SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JILL MAYER Petitioner/Appellant, v. BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIRMENT SYSTEM Agency/Respondent.	Docket No.: A-002902-22 On Appeal from the April 20, 2023 Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System PERS Docket No. 2-10-363879

BRIEF ON BEHALF OF PETITIONER/APPELLANT JILL MAYER

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PRELIMINARY STATEMENT

Petitioner-Appellant, Jill Mayer ("Ms. Mayer") has dedicated most of her professional life to public service. Within the New Jersey Division of Criminal Justice ("DCJ"), she developed a stellar reputation in service to the citizens of this State. Upon reaching the milestone of twenty-five (25) years of service, she planned to retire. However, in further service to the State, she agreed to serve as the Acting County Prosecutor for Camden County for two years during a period of unprecedented disruption as she navigated the office through COVID.

On August 11, 2021, Ms. Mayer submitted her retirement. On December 8, 2021, the Board of Trustees ("Board") of the Division of Pensions and Benefits ("DOP") approved Ms. Mayer's retirement with an effective date of December 1, 2021. This is the benchmark date upon which the analysis must rest. There can be no dispute that: (1) on December 1, 2021, Ms. Mayer terminated her employment relationship with the State of New Jersey; (2) on that date, she had no *pre-arranged agreement* for future reemployment; and (3) she has satisfied the 180-day separation of service requirement. Importantly, neither the Board, nor the DOP, has ever found, argued, or asserted, that Ms. Mayer had a *pre-arranged agreement* for future reemployment.

Ms. Mayer's pension benefits became "due and payable" on January 7, 2022, thirty (30) days after the December 8th Board approval. To date, nothing

has happened that would change the December 1st effective retirement date or the January 7, 2022, "due and payable" date of Ms. Mayer's retirement benefits.

Between August 11, 2021, and December 8, 2021, Ms. Mayer was approached to see if she was interested in the possibility of becoming a Superior Court Judge. Honored to be considered, she began the multi-step process ("the Process") required to become a Superior Court Judge, not knowing when or if this endeavor would result in a nomination and confirmation. As any Judge within the State of New Jersey is aware, this Process can terminate at any step.

Because Ms. Mayer was being considered for the possibility of becoming a Superior Court Judge, she contacted pension benefits specialists within the DOP to ensure she could proceed without jeopardizing her pension by waiving participation in the judicial retirement system ("JRS") in the event this process resulted in a nomination and confirmation. Despite the numerous email exchanges between Ms. Mayer and the pension specialists, the specialists never advised Ms. Mayer that merely taking steps within the Process to be considered for a position as a Judge would *forever* preclude Ms. Mayer from: (a) accepting a position as a Superior Court Judge while waiving her judicial pension; (b) receiving her Judicial salary; and (c) receiving the PERS Prosecutors' Part pension benefits to which she was entitled. This is not surprising because participating in the Process, or "pre-planning," as the DOP mischaracterizes it,

is not the standard for determining eligibility. The standard is whether Ms. Mayer terminated her position with the DCJ with a *pre-arranged agreement* for future reemployment *at the time of her termination [Emphasis added]*.

The Board's actions conflate "pre-planning" with a "pre-arranged agreement" – as if the two terms have the same meaning. To the contrary, pre-planning is not a term found in the governing regulation. Thus, the Board's reliance on this term constitutes legal error and, the Board's decisions are legally flawed. The correct benchmark is whether there was a "pre-arranged agreement for reemployment at the termination of employment." Any argument by the State asserting that Ms. Mayer "pre-planned" her reemployment or her pension payments were not "due and payable" are red herrings that must be disregarded.

The two important issues for this Court to analyze are whether Ms. Mayer had a "bona fide severance from employment" and whether, at the time of her December 1st retirement, she "terminated her employment with a pre-arranged agreement for reemployment." The answer to the first question is yes. The answer to the second is no. At the completion of its de novo review, this Court should reverse the decision of the Board and issue an Order that allows Ms. Mayer to accept the position of Superior Court Judge, waive participation in the JRS, and receive her judicial salary and the pension benefits to which she is entitled. In the alternative, this Court to remand to the Board to Order the same.

CONCISE PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Jill Mayer served with distinction within the New Jersey Division of Criminal Justice from October 1995 through November 2021. For the last two years, she served as the Acting Prosecutor for Camden County. (Pa 0012).[2]

On August 11, 2021, Ms. Mayer submitted her retirement application through the portal maintained by the DOP. Id. In connection with her application, she selected Option A and a retirement date of December 1, 2021. Id. The Division of Criminal Justice filed its Certification of Service and Final Salary on September 5, 2021. (Pa 0012 and Pa 0113).

On October 25, 2021, Ms. Mayer responded to a Judicial Questionnaire received from the Office of the Governor. (Pa 0058) This is one step in a multi-step process toward potentially becoming a Judge of the Superior Court and in no way guarantees future success in being nominated, confirmed, or sworn in as a Judge. As part of the Process, Ms. Mayer was interviewed by the Governor's office on November 18, 2021. Id. As an additional part of the Process, Ms. Mayer submitted a Senate Judiciary Committee Questionnaire on December 19, 2021. (Pa 0059).

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[1] Ms. Mayer has combined the two sections (Statement of Facts and Statement of Procedural History) for the sake of convenience to the Court to best describe the record of events in this matter.

[2] References to the Appendix of the Ms. Mayer shall be in the form (Pa ___).

On December 8, 2021, Ms. Mayer was notified that her retirement was approved by the Board. (Pa 0072). The retirement was effective December 1, 2021, and was approved in accordance with Ms. Mayer's selection of Option A. Id. Thus, December 1, 2021, is the benchmark date for analysis of this matter.

The retirement notice letter advised Ms. Mayer that, if she ever considered working after her retirement, it was her responsibility to inform her prospective employer that she was receiving retirement benefits and to understand the impact any potential employment could have on those benefits. Id.

Ms. Mayer subsequently submitted a change to her pension distribution option on December 30, 2021. (Pa 0028). On that date, she switched from Option A to Option B. This switch was timely in accordance with her retirement approval letter dated December 8, 2021, which expressly provided that changes are permissible for a period of thirty (30) days. (Pa 0072). In January of 2022, Ms. Mayer discovered that the DOP did not make the option change to the requested pension election. (Pa 0061). She thereafter made several calls to the DOP to have the error corrected. Ms. Mayer further noticed that when she logged on to Member Benefits Online System, ("MBOS"), the designated election continued to reflect Option A instead of Option B, and the pension checks she began receiving reflected the disbursement amount listed in Option A. (Pa 0061). Between January 2022, and April of 2022, Ms. Mayer continued to correspond with the DOP regarding the

incorrect pension payment amount. She submitted a copy of the face sheet in support of the confirmation she received from the DOP when she initially switched from Option A to B. Id. The Board of Pensions sent a letter to Ms. Mayer on April 20, 2022, indicating that the Pension Board of Trustees voted to approve the change, apparently upon receiving the face sheet. (Pa 0082). While the change to Ms. Mayer's retirement check could not be made until thirty days after the change was approved by the Board, the change was explicitly stated as being retroactive to the original effective date of her retirement. Id. As noted above, the original effective date was December 1, 2021. (Pa 0072). Significantly, this approval letter was silent as to any potential impact on Ms. Mayer's "bona fide severance of employment date." (Pa 0082).

After the retirement was approved, and in accordance with the instructions provided in the Board's December 8, 2021, letter, on December 28, 2021, Ms. Mayer contacted Lisa Fisk regarding the impact of a potential judicial nomination. (Pa 0074). Ms. Fisk is employed within the Administrative Office of the Courts and was recommended to Ms. Mayer by several Judges who described her as "the pension guru" regarding the implications of accepting a potential judicial appointment while receiving a Prosecutors' Part pension. Id. In outlining the facts surrounding her inquiry to Ms. Fisk, Ms. Mayer was clear that she previously worked for the State Division of Criminal Justice and that if

she ever became a Judge, she would waive participation in the JRS. Id. Significantly, as of December 28, 2021, Ms. Mayer was in "process for consideration for a judicial appointment" and clearly no agreement to become a judge had been reached, nor could any such agreement ever be reached given the multiple steps involved in the judicial nomination, vetting, and approval process. In fact, she had not even been nominated. (Pa 0080). Ms. Fisk responded the same day and confirmed that Ms. Mayer could waive enrollment in the Judicial Retirement System ("JRS") if she is collecting from another pension fund. (Pa 0076). In response to Ms. Mayer's question about the break in service requirement, Ms. Fisk copied Brittany Zulla, JRS Liaison in Pensions and Benefits, at the Department of Treasury. Id. Ms. Fisk described Ms. Zulla, a Pensions Benefit Specialist, as "the real guru with all things pension related" and as the individual who can "provide any important information regarding break in service requirements." Id.

Ms. Zulla emailed Ms. Mayer on December 28, 2021. (Pa 0078). Significantly, Ms. Zulla advised that Ms. Mayer must have a "bona fide severance of employment" for thirty days after her retirement date or board approval date, whichever is later. Id. In Ms. Mayer's case, the 30-day period began on December 8, 2021, which was the date of the Board's approval of her retirement. (Pa 0072). Thirty days from December 8, 2021, was January 7,

2022. Neither Ms. Fisk, nor Ms. Zulla, stated that Ms. Mayer would be prohibited from collecting her pension for participating in the Process.

On January 3, 2022, Governor Murphy nominated Ms. Mayer to be a Judge of the Superior Court. (Pa 0082). Pursuant to Article VI, Section VI of the New Jersey Constitution, the Governor's nomination came with a requirement for advice and consent of the Senate. N.J. CONST. art VI, § 6.

On the morning of January 10, 2022, one hour before a scheduled Senate confirmation vote, Ms. Mayer received a voicemail from Ms. Zulla which stated the following:

> "Hi Jill, this is Brittany Zulla from Pensions giving you a call, urn I just want you to hold off on accepting any position in order to jeopardize your PERS pension Prosecutors' Part Retirement, um I did send this to external audit to review and they do believe that there might be an issue because since you are retiring from the state system and you know you would be going into another state system, another job with the judiciary, you actually need 180 bona-fide severance so just hold off on any acceptance and I'm just waiting for upper management to review so it will take some time alright?"

(Pa 0061). Later that day, on January 10, 2022, the New Jersey Senate confirmed Ms. Mayer's nomination to the New Jersey State Judiciary. Id. However, based on the advice provided by Ms. Zulla, Ms. Mayer did not take the judicial oath or accept the position with the New Jersey State Judiciary. Ms. Mayer did ask to speak to Ms. Zulla's supervisor. Id.

On January 19, 2022, Ms. Mayer spoke to Ms. Zulla regarding the change from 30 days to 180 days. Id. Ms. Zulla subsequently sent an email to Ms. Mayer summarizing the phone conversation that they had. (Pa 0084). In this email, Ms. Zulla stated that "if [Ms. Mayer accepts] the JRS position, [she] would not meet the 180-day bona fide severance requirements." Id. This email is significant for two reasons. First, it is silent regarding any potential concern regarding a "pre-arranged agreement for reemployment." Id. More importantly, it discusses the potential impact on Ms. Mayer's pension benefits, "if you accept the JRS position." Id. Thus, it confirms the understanding of Ms. Zulla, a Pension Benefits Specialist for the Department of the Treasury, that the Senate approval which occurred nine days earlier, on January 10, 2022, did not constitute an agreement nor was it a "pre-arranged agreement for reemployment." On the same day, Ms. Zulla and her supervisor, Sunanda Rana, called Ms. Mayer to confirm that a 180-day break in service was required and if she accepted the position as a Judge, **at that time**, she would not have the necessary break in service. (Pa 0015)(Emphasis added). Notably, again, neither Ms. Zulla nor Ms. Rana advised that participating in the Process or that the Senate vote on January 10, 2022, forever precluded Ms. Mayer from achieving a bona fide180-day break in service. Following this conversation, Ms. Mayer heeded the advice of the Division of Pensions and Benefits and did not accept

the position as a Superior Court Judge at that time. Instead, she waited the required 180 days.

On June 8, 2022, Ms. Mayer contacted Ms. Zulla via email. (Pa 0087). In the email, Ms. Mayer stated that she had refrained from getting sworn in as a Judge to complete her 180 days of separation of service. Id. Ms. Mayer's calculation of 180 days was calculated from December 8, 2021, which Ms. Zulla noted in her December 28, 2021, email was the date of her notice of approved retirement effective December 1, 2021. (Pa 0078). To ensure that her calculation of the 180-day separation period was satisfied as of June 6, 2022, Ms. Mayer asked for confirmation that the Division of Pensions concurs with that start date. (Pa 0087). Ms. Mayer also reminded Ms. Zulla that she would be waiving enrollment in the JRS and health and benefits program because she was receiving her pension and health care benefits through her Prosecutors' Part retirement. Id. Thus, it was crystal clear that Ms. Mayer would not be re-enrolling into a pension or healthcare plan. Ms. Zulla responded the same day. (Pa 0089). She advised that she would get back to Ms. Mayer. She did not express any concern over an alleged "pre-arranged agreement for reemployment." Id.

Because Ms. Zulla had not gotten back to her after the June 8, 2022, email exchange, Ms. Mayer sent a follow up email to Ms. Zulla on June 13, 2022. (Pa

0063). Ms. Mayer was notified that Ms. Zulla was out of the office and that she should contact Mr. Rafael Soto-Irizarry. Id. Ms. Mayer subsequently sent an email to Mr. Soto-Irizarry seeking to confirm that she had satisfied the 180-day separation period. (Pa 0091). Mr. Soto-Irizarry responded on the same day and advised that he would look into the matter. (Pa 0093). Ms. Mayer continued to follow up with Mr. Soto-Irizarry but received no further response. (Pa 0064). On one occasion, she asked to speak with Mr. Soto-Irizarry' s supervisor and Mr. Soto-Iriszrry advised her that he could not provide her with that information. Id.

On August 18, 2022, over two months later, Ms. Mayer received a letter from the DOP. In sum, the letter stated the following:

1. The controlling regulation regarding this matter was N.J.A.C. 17-1-17.14(a)(2);

2. That Ms. Mayer must meet the requirements of a "bona-fide severance of employment" under that regulation;

3. That for purposes of this analysis the State of New Jersey is the former employer;

4. That the State of New Jersey would be Ms. Mayer's future employer if she were to accept a position as a Superior Court Judge;

5. That Ms. Mayer must have 180 days from the date of her retirement with no pre-arrangement agreement, *such as pre-planning or promise of any future full or part time employment*, with the State of New Jersey;

6. That return to employment with the State of New Jersey at any time in the future, would be non-bona-fide because there would not have been

> a complete termination of employment of the employer/employee relationship due to *"**preplanning** that occurred prior to [her] December 1, 2021, retirement and during the 180 days after [her] retirement*;"
>
> 7. That Ms. Mayer should be aware that any appeal of the administrative decision and the Board of Trustees' review of this matter must be consistent with the specific legal standards of the statute and regulations of the retirement system.

(Pa 0095-0096)(Emphasis added). Ms. Mayer appealed the August 18, 2022, determination of the DOP. (Pa 0058-0112). After hearing oral argument telephonically, the DOP affirmed its decision on January 13, 2023. (Pa 0021-0027).

On February 27, 2023, Ms. Mayer appealed the January 13, 2023, affirmance of the Board decision. (Pa 0031-0057). She contested the decision that she could not accept employment as a Superior Court Judge and continue to collect her Prosecutors' Part pension at any time even though she was waiving participation in the JRS. (Pa 0031). The DOP issued its Final Administrative Decision ("Final Decision") on April 20, 2023, after oral argument before the Board. (Pa 0011-0020).

In its Final Decision, the Board held that Ms. Mayer was ineligible to collect her PERS Prosecutors' Part pension and accept a Judgeship with the State

of New Jersey. (Pa 0011).[3] Ms. Mayer *does not* dispute the following Findings of Fact:

(1) The controlling regulation is N.J.A.C. 17:1-17.14. (Pa 0017).

(2) Immediately prior to her retirement, Ms. Mayer was employed by the State of New Jersey, Department of Law & Public Safety, Division of Criminal Justice ("Division"). (Pa 0012).

(3) Ms. Mayer served as the Acting Prosecutor for the County of Camden in the final two years of her employment. Id.

(4) Ms. Mayer filed her retirement application on August 11, 2021, through the MBOS. Id.

(5) Ms. Mayer requested a Special Retirement under Option A with an effective retirement date of December 1, 2021. Id.

(6) As of December 1, 2021, Ms. Mayer had twenty-six (26) years and ten (10) months of service credit in the PERS Prosecutors' Part. Id.

(7) The Division filed its Certification of Service and Final Salary on Ms. Mayer's behalf on September 5, 2021. Id.

(8) The Board approved Ms. Mayer's retirement at its meeting on December 8, 2021. Id. The effective date of retirement was December 1, 2021. (Pa 0072).

(9) Prior to December 1, 2021, Ms. Mayer filled out a questionnaire and sat for an interview as part of the process to be considered as a potential Superior Court Judge. (Pa 0012).

(10) Ms. Mayer was nominated by Governor Murphy on January 3, 2022, and was confirmed by Senate on January 10, 2022. (Pa 0012).

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[3] The Board also determined that there was no genuine issue of material fact in dispute and that it could make its Final Decision without the need for an evidentiary hearing. (Pa 0011).

(11) Ms. Mayer requested that her retirement option be changed from Option A to Option B on or about December 30, 2021. (Pa 0015). The Board ultimately approved the option change at its meeting of April 20, 2022. Id.[4]

(12) In response to Ms. Mayer's inquiry regarding the potential impact to her pension if she was nominated and accepted a position as a Superior Court Judge, Ms. Mayer was advised on December 28, 2021, by Brittany Zulla, a Pension Benefits Specialist with the Judicial Retirement System, that she would need a thirty (30) day break in service in order to effectuate a bona fide retirement. (Pa 0015).

(13) Ms. Zulla's advice was incorrect. Id.

(14) Ms. Zulla sent Ms. Mayer an email on January 19, 2022, that she was required to observe a 180 day break in service in order to effectuate her retirement prior to returning to public employment. Id.

(15) Ms. Mayer spoke with Sunanda Rana on or about January 19, 2022. Mr. Rana is an Auditor with the Division's External Audit Unit. Id. Ms. Rana advised that Ms. Mayer needed a bona fide separation from employment for a period of 180 days. Id. Most importantly, Ms. Rana advised Ms. Mayer that "if she accepted the Judgeship **at that time**, she would not have a 180-day break in service and would not be eligible to receive her PERS Prosecutors' Part pension benefits." Id. (Emphasis added).[5]

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[4] Ms. Mayer disagrees that because thirty (30) days must pass before the pension becomes "due and payable," that Ms. Mayer's retirement would not become effective until May 20, 2022. (Pa 0015) The Board's letter dated April 20, 2022, expressly stated that "the change in benefit will be retroactive to the original effective date of [Ms. Mayer's] retirement." (Pa 0082). In fact, Ms. Mayer had begun receiving pension payments in January 2022.

[5] Thus, as of January 19, 2022, nine (9) days after the Senate confirmation hearing on January 10, 2022, the DOP had not opined that the Senate confirmation constituted a pre-arranged agreement for reemployment.

(16) The Board did not determine that Ms. Mayer had a pre-arranged agreement.

Ms. Mayer does dispute the following Conclusions of Law contained in the Final Decision dated April 20, 2023:

(1) "The process of appointment was completed days after her original due-and payable date, and months before 180 days had passed since her retirement date." (Pa 0018).

(2) Because the Board approved Ms. Mayer's Option change at its April 20, 2022, meeting, her retirement would not become due and payable until May 20, 2022. (Pa 0018-0019).

(3) Ms. Mayer is not permitted to begin working as a Judge of the Superior Court and simultaneously collect her Prosecutors' Part pension benefit. (Pa 0019).

(4) The records establish that Ms. Mayer had **pre-planned** her return to public employment by engaging in the judicial nomination process during the months of October, November and December 2021 and immediately prior to her retirement in violation of N.J.A.C. 17:1-17.14. Id. (Emphasis Added)

(5) If Ms. Mayer were to **accept** this judicial nomination, her retirement would be deemed non-bona-fide and she would not be able to collect a Prosecutors' Part pension benefit and a judicial salary simultaneously. Id. (Emphasis added).

Ms. Mayer thereafter commenced her timely appeal. There are consequential issues of state-wide importance for the Court to resolve in this appeal. Since the Court's decision will impact other similarly situated judicial candidates and directly affect the judicial crisis the State is currently

experiencing, Ms. Mayer filed a motion seeking an acceleration of the appeal. Ms. Mayer argued that there is a strong public interest in resolving this matter and a prompt final disposition is important. Ms. Mayer's motion was denied. (Pa 0030).

LEGAL STANDARD AND APPLICABLE REGULATION

"[Q]uestions of law are the province of the judicial branch," Russo v. Bd. of Trustees, Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)(citing Steven L. Lefelt et al., 37 *New Jersey Practice: Administrative Law Practice* § 7.19 at 387 (2d ed. 2000)). Therefore, reviewing courts are "in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue." Russo, 206 N.J. at 27 (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). This is especially true when an agency's "interpretation is inaccurate or contrary to legislative objectives." Russo, 206 N.J. at 27 (quoting G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs., 157 N.J. 161, 170 (1999)); *see also,* Lefelt et al., *supra,* § 7.19 at 387 ("A court will not permit an agency's legal determination to stand if the court believes it to be error."). Courts apply a *de novo* review to all matters of law. Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002). That is the applicable standard in this case in connection with the Board's interpretation of N.J.A.C. § 17:1-17.14 which provides that "[t]ermination of employment with *a pre-arranged agreement* for reemployment." does not constitute

a complete termination of the employee's relationship with the employer. N.J.A.C. 17:1-17.14(a)(2)(v)(Emphasis added).

As for questions of fact, the New Jersey Supreme Court has held that the standard for judicial review of agency action is limited. As such, "[a]n appellate court may reverse an agency decision if it is arbitrary, capricious, or unreasonable." In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 385 (2013)(citation omitted). Thus, a Court "can intervene [when] an agency action is clearly inconsistent with its statutory mission or with other State policy." Brady v. Bd. of Review, 152 N.J. 197, 210 (1997)(quoting George Harms Constr. v. Turnpike Auth., 137 N.J. 8, 27 (1994)). While the test has often been expressed in the negative as deferential, the Supreme Court has described the judicial role in reviewing agency action as involving three inquiries:

> (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 clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Mazza v. Bd. Of Trs., 143 N.J. 22, 25 (1995)(citation omitted).

New Jersey Courts have therefore understood that a review of the evidence in the record available to the agency is required under the arbitrary, capricious

or unreasonable standard. See Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 414-415 (App. Div. 2004) ("Failure to address critical issues, or to analyze the evidence in light of those issues, renders the agency's decision arbitrary and capricious and is grounds for reversal."). Additionally, New Jersey Courts have held that a decision "based on a complete misperception of the facts submitted in a record [will] render the agency's conclusion unreasonable." In re Proposed Quest Academy Charter School, 216 N.J. at 387 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588–89 (1988) (stating that appellate court should intervene where agency's "finding is clearly a mistaken one.")).

The sole regulation relevant to this case is N.J.A.C. 17:1-17.14 which provides in part:

> (a) Definitions. For purposes of this section, the following words and terms shall have the following meanings:
>
> 1. "Defined benefit plans" means the following: Public Employees' Retirement System, …, Judicial Retirement System….
>
> 2. "Bona fide severance from employment" means a complete termination of the employee's employment relationship with the employer for a period of at least 180 days. The following does not constitute a complete termination of the employee's relationship with the employer:
>
> (v) Termination of employment with a pre-arranged agreement for reemployment.

Id.

LEGAL ARGUMENT

I. The Board's Determination That Ms. Mayer Cannot Accept The Position Of Superior Court Judge And Collect Her Prosecutors' Part Pension Benefits Was In Error (Pa 0031-0057 and Pa 0058-0112)

Ms. Mayer has complied with the regulation governing return to employment after retirement and should be permitted to receive her judicial salary while receiving her PERS Prosecutors' Part pension benefits. Pension benefits are earned rights, not mere gratuities. Charles C. Widdis v. PERS, 238 N.J. Super. 70, 77 (App. Div. 1990). Laws designed to restrict pension allowances should be interpreted favorably to the public employee who should not be deprived of the pension except upon an express or implied legislative mandate which leaves no doubt of the purpose. Application of Smith, 57 N.J. 368, 374 (1971)(citations omitted). Moreover, New Jersey Courts have held that "considerations of equity and fairness must temper the application of deadlines in the administration of the pension fund." Knox v. Pub. Employees' Ret. Sys., No. A-1444-10T3, 2012 N.J. Super. Unpub. LEXIS 381, at *19 (App. Div. Feb. 23, 2012).[6] (Pa 0115)(citation omitted). Therefore, "pension statutes are 'remedial in character' and 'should be liberally construed and administered in favor of the persons intended to be benefited thereby.'" Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist.,

[6] I hereby certify that I am unaware of any contrary unpublished opinions.

Monmouth Cty., 199 N.J. 14, 34 (2009)(citations omitted).[7] Because Ms. Mayer has complied with the governing regulation, it should therefore be liberally construed in her favor. Moreover, the Board's decision was based upon its legal interpretation of the meaning of "pre-arranged agreement for reemployment" as stated in N.J.A.C. 17:1-17.14(a)(2)(v). This was a legal decision. See Saccone v. Bd. Of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014)(holding that "[s]tatutory interpretation involves the examination of legal issues and is, therefore, a question of law subject to de novo review.")(citations omitted). Therefore, the Board's erroneous decision that Ms. Mayer could not collect her PERS Prosecutors' Part pension benefits while receiving a judicial salary is a conclusion of law that must be reviewed de novo. After its de novo review, this Court should reverse the decision of the Board and issue an Order declaring that Ms. Mayer is permitted to accept the position of Superior Court Judge and collect her judicial

[7] Ms. Mayer recognizes that the pension statutes should also "be construed so as to preserve the fiscal integrity of the pension funds." DiMaria v. Bd. of Trs., Pub. Emps.' Ret. Sys., 225 N.J. Super. 341, 354 (App. Div. 1988), certif. denied, 113 N.J. 638 (1988)(citations omitted). However, as detailed below, Ms. Mayer's compliance with the governing regulation and corresponding receipt of the pension benefits to which she is entitled cannot be construed as negatively impacting the fiscal integrity of pension funds, nor is there any evidence that it would.

salary and collect the earned pension benefits to which she is entitled. In the alternative, this Court should remand to the Board to Order the same.

II. Ms. Mayer Did Not Terminate Her Employment Relationship With The State Of New Jersey On December 1, 2021, With A Pre-arranged Agreement For Reemployment (Pa 0031-0057 and Pa 0058-0112)

A. The Governing IRS Code Sections Only Prevent Pre-Arranged Agreements, And A Facts And Circumstances Analysis Confirms There Was No Pre-Arranged Agreement To Become A Judge (Pa 0031-0057 and a P0058-0112)

The Board claims that its decision is based upon a requirement that qualified governmental defined benefit plans must comply with Internal Revenue Service Code ("IRC") Sections 401(a) and 414(d) to preserve the qualified status of the plan and to protect the retirees from an excise tax penalty on their retirement benefits. (Pa 0013 and Pa. 0022). However, the Board neglects to cite specific references or any caselaw or guidance on the Internal Revenue Code provisions at issue. Since the issuance of a private letter ruling[8] in 2010, the IRS has cautioned that situations in which an employer pre-arranges, *at the time of retirement*, to later rehire the retiree, would not qualify as a bona fide retirement. (Pa 0033 and Pa 0037-0043). Under those circumstances, the retirement benefits would be impermissible and would

[8] An IRS private letter ruling applies only to the specific taxpayer who requested it, and may not be used or cited by others as precedent. Internal Revenue Code Section 6110(k)(3). Nonetheless, the private letter ruling here is widely used as guidance on the subject matter of the letter.

potentially jeopardize the qualified status of the retirement plan. The converse is equally true and determinative here. In other words, the original retirement would be deemed bona fide if the rehire was not **pre-arranged and agreed upon between the employer and employee at the time of retirement**.

Recently issued IRS FAQs regarding "Rehires Following Bona Fide Retirement" make it clear that the determination of whether an individual's retirement separation of service is bona fide for retirement plan purposes is based on a facts and circumstances analysis. (Pa 0045-0051). The facts and circumstances analysis focuses on the date that crediting service ends and break in service begins. In other words, it is an inquiry based on a historical snapshot in time. See Treas. Reg. Section 1.410(a)-7(b)(2). As the IRS has stated:

> The term "separation of service" is not defined by either the Code or regulations. However, its meaning has been explained in revenue rulings and caselaw. The basic rule is that, to receive a distribution from a 401(k) plan on account of separation from service, the participant must have experienced a bona fide termination of employment in which the employer/employee relationship is completely severed.

http://www.irs.gov/pub/irs-wd/00-0245.pdf The Board is obligated to apply a facts and circumstances analysis to Ms. Mayer's pension eligibility. Based upon its facts and circumstances analysis, the facts reveal that Ms. Mayer filed her retirement application on August 11, 2021, effective December 1, 2021. The facts further reveal that at no time as of the August 11, 2021, application date, or as of the retirement

effective date of December 1, 2021, did Ms. Mayer reach a pre-arranged agreement for rehire by the State. On December 1, 2021, Ms. Mayer ceased service to the State of New Jersey. As of that date, Ms. Mayer had no agreement with the State for continued service as a Superior Court Judge.

The extensive vetting process that a person must go through to become a Superior Court Judge precludes a candidate from reaching any such agreement to serve until the New Jersey Senate confirms the nomination and the individual is sworn in as a Judge. Accordingly, Ms. Mayer had a bona fide separation of service because she properly terminated her employment with the State without a pre-arranged agreement at the time of retirement and has established continued pension eligibility. In a time of judicial crisis, the Board incorrectly applied the facts and the law in denying Ms. Mayer the opportunity to serve as a New Jersey Superior Court Judge, while collecting her PERS pension after over twenty-six years of prosecutorial service. Moreover, the Board has never concluded that Ms. Mayer had a pre-arranged agreement, thus their determination that her separation of service is non bona fide is unfounded.

B. The Facts Are Clear That Ms. Mayer Had No Pre-Arranged Agreement To Return To Employment As A Judge At The Time Of Her Retirement On December 1, 2021 (Pa 0031-0057 and Pa 0058-0112)

On August 11, 2021, Ms. Mayer submitted her retirement application through the portal maintained by the DOP. (Pa 0012). In connection with her

application, she selected Option A and a retirement date of December 1, 2021. Id. On December 8, 2021, Ms. Mayer was notified that her retirement was approved by the Board. (Pa 0072). The retirement was effective December 1, 2021, and was approved in accordance with Ms. Mayer's selection of Option A. Id. Since November 30, 2021, Ms. Mayer has not worked in a PERS pension benefits eligible position. On January 3, 2022, Governor Murphy nominated Ms. Mayer to be a Judge of the Superior Court. (Pa 0080). As detailed below, Ms. Mayer does not concede that her nomination constitutes a pre-arranged agreement for reemployment. For example, if the January 10, 2022, Senate vote on her nomination was not in favor of Ms. Mayer, she did not have a right to sue the Senate to enforce an agreement. However, for purposes of this argument, even if the Senate vote did constitute an agreement, there can be no doubt that there was no pre-arranged agreement for reemployment prior to her termination of employment on her effective retirement date of December 1, 2021.

In its August 18, 2022, decision, the Board improperly concludes that Ms. Mayer is precluded from receiving her earned Prosecutors' Part pension benefits while working as a Superior Court Judge and earning a judicial salary because her participation in the Process to become a Judge constitutes "*pre-planning*."

(Pa 0029)(Emphasis added). This is not the appropriate statutory standard and constitutes legal error requiring de novo review and reversal.[9]

In its Case Information Statement, PERS also states that Ms. Mayer's pre-planning and nomination to become a Judge before her pension became due and payable rendered her retirement non-bona fide. The "due and payable" date is also not the appropriate standard upon which to review these facts.

The governing regulation in this matter, as acknowledged by the DOP, is N.J.A.C. 17:1-17.14 which governs retiree reemployment and provides in part:

> (a) Definitions. For purposes of this section, the following words and terms shall have the following meanings:
>
> 1. "Defined benefit plans" means the following: Public Employees' Retirement System, …, Judicial Retirement System….
>
> 2. "Bona fide severance from employment" means a complete termination of the employee's employment relationship with the employer for a period of at least 180 days. The following does not constitute a complete termination of the employee's relationship with the employer:
>
> **v.** Termination of employment **with a pre-arranged agreement for reemployment**.

[9] Ironically, the Board concludes its August 18, 2022, denial letter by stating that if Ms. Mayer appeals the Boards decision, future review by the Board "must be consistent with specific legal standards of the statute and regulations of the retirement system." However, the Board is ignoring the legal standard entirely in its conclusions. (Pa 0029)

Id. (Emphasis added).

Words matter. The regulation does not discuss "pre-planning." The regulation is also silent as to any potential impact of when a pension becomes "due and payable." Therefore, any "pre-planning" or "due and payable" arguments are red herrings and must be disregarded.

Elsewhere within the regulations, "[s]everance from employment" means the date the participant terminates employment with an employer with no obligation or expectation for future services to be performed for an employer by the participant." N.J.A.C. § 17:6-2.1. Based upon the factual timeline summarized above, which the Board accepted, there can be no doubt that on December 1, 2021, when Ms. Mayer terminated her employment, she had no pre-arranged agreement for reemployment. (Pa 0012 and Pa 0072). Additionally, when Ms. Mayer's pension became due and payable on January 7, 2022, there had been no action on her nomination by the Senate Judiciary Committee. Consequently, this Court should reverse the decision of the Board and issue an Order declaring that Ms. Mayer is permitted to accept the position of Superior Court Judge and collect her judicial salary and collect the pension benefits to which she is entitled. In the alternative, this Court should remand to the Board to Order the same.

III. Ms. Mayer Has Never Had An Agreement For Reemployment (Pa 0031-0057 and Pa 0058-0112)

The governing regulation in this matter requires a "bona fide severance from employment" for a period of 180 days and further provides that there can be no such "bona fide severance from employment" if there has been termination of employment with a pre-arranged agreement for reemployment. N.J.A.C. 17:1-17.14(a)(v). Here, Ms. Mayer has never had a pre-arranged agreement for reemployment and certainly did not *terminate* her employment with a pre-arranged agreement for reemployment. Notably, the Division of Pensions did not find that Mayer had a pre-arranged agreement in any of their issued decisions. In fact, the DOP ignored the very standard which they were required to follow in analyzing the issue presented to them.

"The objective of all statutory interpretation is to discern and effectuate the intent of the Legislature." Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)(citing Allen v. V & A Bros., Inc., 208 N.J. 114, 127 (2011)). "To achieve that objective, [Courts] begin by looking at the statute's plain language, ascribing to the words used 'their ordinary meaning and significance.'" Id. (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

The governing regulation in this matter uses clear language. The exception to the 180-day requirement applies in cases of a "termination of employment with a pre-arranged *agreement* for reemployment." N.J.A.C. 17:1-17.14(a)(v)(Emphasis

added). Interpretation of statutes and regulations must "begin[] with the language of the statute, and the words chosen by the Legislature should be accorded their ordinary and accustomed meaning." State v. Hudson, 209 N.J. 513, 529 (2012) (citation omitted). Because the regulation does not define the meaning of a "pre-arranged agreement for reemployment," reference to the ordinary and accustomed meaning of clear language within the regulation is appropriate. "Pre-arranged" is defined by Webster's Dictionary as, "to arrange something in advance." Additionally, according to Dictionary.law.com, the legal definition of "agreement" is "another name for a contract including all the elements of a legal contract: offer, acceptance, and consideration (payment or performance) based on specific terms."

Unlike other positions of employment with the State of New Jersey, such as being hired as a Deputy Attorney General, the appointment of a judge is unique. Because of the nature of the appointment process, it is a legal and practical impossibility to have a pre-arranged agreement to become a judge. The State of New Jersey's process to nominate and confirm a Superior Court Judge is rooted in basic principles of constitutional law and separation of powers. e.g., if the Governor wanted to enter into a pre-arrangement agreement with Ms. Mayer to be a judge, he could not have unilaterally achieved that result because the position also requires agreement by her hometown Senator, an agreement of the Senate Judiciary Committee, and agreement of the majority of the full Senate.

Further, when an employee submits a retirement application through the MBOS system, the employee must check a box certifying that the employee has made "no pre-arrangement to return to public employment in any capacity." (Pa 0012). When Ms. Mayer submitted her retirement application, she checked the box acknowledging and agreeing to that term and condition of retirement because in fact it was true. Ms. Mayer did not have any pre-arranged contractual agreement in advance with anyone to return to her former employer, the Division of Criminal Justice, or the Office of the Attorney General, or even the Superior Court of New Jersey. Nothing about any part of the complex and lengthy process of endeavoring to become a Superior Court Judge was a guarantee. At any time, Ms. Mayer could have fallen short on the questionnaires or interviews conducted by the State or County Judicial and Prosecutorial Appointment Committees, or not have received a nomination by the Governor, or not have received approval of the Senate Judiciary Committee, or not have received Senatorial courtesy from her hometown Senator, or not have received the full Senate confirmation. There simply was not and could not have been a pre-arranged agreement.

There is also substantial evidence in the record to confirm that this was also the view of the Board. On the morning of January 10, 2022, one hour before a scheduled Senate confirmation vote, Ms. Mayer received a voicemail from Ms. Zulla which stated the following:

> "Hi Jill, this is Brittany Zulla from Pensions giving you a call, urn I just want you to hold off on accepting any position in order to jeopardize your PERS pension Prosecutors' Part Retirement, um I did send this to external audit to review and they do believe that there might be an issue because since you are retiring from the state system and you know you would be going into another state system, another job with the judiciary, you actually need 180 bona-fide severance **so just hold off on any acceptance** and I'm just waiting for upper management to review so it will take some time alright?"

(Pa 0061)(Emphasis added). Ms. Zulla did not indicate any concern that the Senate vote would consummate a pre-arranged agreement. She merely advised to "hold off on any acceptance."

Thereafter, on January 19, 2022, Ms. Zulla sent an email to Ms. Mayer summarizing a phone conversation that the two recently had. (Pa 0084-0085). Ms. Zulla advised Ms. Mayer not to accept the Judgeship. Id. This email is significant for two reasons. First, it is silent regarding any potential concern regarding a "pre-arranged agreement for reemployment." Id. More importantly, it discusses the potential impact on Ms. Mayer's pension benefits "if you accept the JRS position." Id. Thus, it confirms the understanding of Ms. Zulla, a Pension Benefits Specialist for the Department of the Treasury, that the Senate approval, which occurred nine days earlier, on January 10, 2022, did not consummate a "pre-arranged agreement for reemployment."

On the same day, Ms. Zulla and her supervisor, Sunanda Rana, called Ms. Mayer to advise that a 180-day break in service was required. (Pa 0015). The

advice given was to avoid accepting the position - which Ms. Mayer has complied with. They did not advise that the Senate vote on January 10, 2022, forever precluded Ms. Mayer from achieving a 180-day break in service, nor did they advise that engaging in the Process would violate the terms of a bona fide severance. See In re Johnson, 215 N.J. 366, 386 (2013)("When an agency misrepresents the effect of a determination under circumstances calculated to induce reliance by reasonable persons to their detriment, the agency may be estopped to prevent a manifest injustice.").

Based upon the facts and circumstances presented here, there is simply no agreement for reemployment. Even if the Court is inclined to view the confirmation of Ms. Mayer's nomination by the Senate on January 10, 2022, as an offer for reemployment, the offer has never been accepted by Ms. Mayer because she has never been sworn in as a Superior Court Judge.

Without a finding that Ms. Mayer terminated her employment with a pre-arranged agreement for reemployment, the only regulatory obligation which Ms. Mayer must satisfy is to await a period of 180 days from the termination of her employment to establish a "bona fide severance from employment." As demonstrated below, Ms. Mayer has more than satisfied that obligation as she is now over 650 days past her retirement date. Therefore, Ms. Mayer respectfully asks this Court to reverse the decision of the Board and issue an Order declaring that Ms.

Mayer is permitted to accept the position of Superior Court Judge and collect her judicial salary and collect the pension benefits she is entitled to. In the alternative, this Court should remand to the Board to Order the same.

IV. Ms. Mayer Has A Bona Fide Severance From Employment Because She Has Been Completely Separated From Her Employment Relationship For Over 180 Days (Pa 0031-0057 and Pa 0058-0112)

A. Ms. Mayer's Retirement Date Was December 1, 2021 (Pa 0072)

Pursuant to N.J.A.C. § 17:2-6.2, "[a] member's retirement allowance shall not become **due and payable** until 30 days after the date the Board approved the application for retirement or 30 days after the date of the retirement, whichever is later." Id. (Emphasis added). The Board notified Ms. Mayer on December 8, 2021, that her retirement application was approved at its regular meeting on December 8, 2021 ("the Notice"). (Pa 0072). The Notice further advised that the retirement was effective December 1, 2021, and was approved in accordance with Ms. Mayer's selection of Option A. Id. Finally, the Notice stated that Ms. Mayer had thirty (30) days from: (a) the effective date of her retirement (December 1, 2021); or (b) the date her retirement was approved by the Board (December 8, 2021) to make any changes and that her first check would not be received until after this thirty day period. Id. Most importantly, whatever date triggered the thirty day period, the Notice stated that any benefit payment would be retroactive to the original date of her retirement – December 1, 2021. Id.

In Ms. Mayer's case, the Board approved her retirement on December 8, 2021, and the thirty day period expired on January 7, 2022. This date, three (3) days prior to the Senate confirmation, was Ms. Mayer's "due and payable" date. While not conceding that her Senate confirmation constitutes a pre-arranged agreement for reemployment, even if it was, and even if the due and payable date was somehow determinative on this issue, which it is not, Ms. Mayer's due and payable date preceded the Senate confirmation date of January 10, 2022. Thus, any "due and payable" argument is a red herring and must be disregarded.

B. Ms. Mayer's Change To Option B Did Not Change The Effective Date Of Her Retirement (Pa 0031-0057 and Pa 0058-0112)

Ms. Mayer submitted a change to her pension distribution option on December 30, 2021. (Pa 0015). She switched from Option A to Option B. Id. This switch was timely in accordance with her retirement approval letter dated December 8, 2021, which expressly provided that changes are permissible for a period of thirty (30) days. (Pa 0072). In January of 2022, Ms. Mayer discovered that the DOP did not make the option change to the requested pension election. (Pa 0061). She thereafter made several calls to the DOP to have the error corrected. Id. Ms. Mayer further noticed that when she logged on to Member Benefits Online System, ("MBOS"), the designated election continued to reflect Option A instead of Option B. Between January 2022, and April of 2022, Ms. Mayer continued to correspond with the DOP regarding the incorrect pension payment. Id. She

submitted a copy of the face sheet in support of the confirmation she received from the DOP when she switched from Option A to B. Id. The Board of Pensions sent a letter to Mayer on April 20, 2022, indicating that the Pension Board of Trustees voted to approve the change, apparently upon receiving the face sheet. (Pa 0082). While the change in Ms. Mayer's retirement check could not be made until thirty days after the change was approved by the Board, the change was retroactive to the original effective date of her retirement and Ms. Mayer had been receiving her pension disbursements since January 2022. As noted above, the original effective date was December 1, 2021. (Pa 0072; Pa 0082). Most significantly, this approval letter dated April 20, 2022, is silent as to any potential impact on Ms. Mayer's "bona fide severance of employment date." (Pa 0082).

The Board incorrectly concludes in its Final Decision that "Ms. Mayer's retirement would not become effective until May 20, 2023" (Pa 0015). Its purported basis for doing so is language, without citation, in the retirement application on MBOS which states a "bona fide" retirement must also be "due and payable." Id. However, pursuant to N.J.A.C. § 17:2-6.2, "[a] member's retirement allowance shall not become **due and payable** until 30 days after the date the Board approved the application for retirement or 30 days after the date of the retirement, whichever is later." Id. (Emphasis added). The regulation cited is silent as to the effect of a change in the selected Option for the benefits. The net result is

that Ms. Mayer's retirement was effective on December 1, 2021, and her benefits were "due and payable" on January 7, 2022, which was thirty days after the Board notified Ms. Mayer that her retirement had been approved retroactive to December 1, 2021.[10] There is no support for any argument that those dates ever changed. The Board's Notice letter dated December 8, 2021, is silent as to any potential impact as a result of a change in option. Instead, the Notice states that Ms. Mayer's retirement was effective December 1, 2021. (Pa 0072). Likewise, the Board's April 20, 2022, letter advising that the change in Option had been approved explicitly says the change in benefits was retroactive to the original date of Ms. Mayer's retirement. (Pa 0082). The April 20, 2022, letter merely says that the change in Ms. Mayer's retirement check cannot take place for thirty days and says absolutely nothing about a change in either the effective date or the "Due and Payable" date of Ms. Mayer's retirement. Id. Thus, the Board's conclusion is: (a) a legal error; (b) inconsistent with the substantial evidence in the record; and (c) a conclusion that could not reasonably have been made on a showing of the relevant factors. See Mazza v. Bd. Of Trs., 143 N.J. 22, 25 (1995).

[10] As noted above in Section IV(A), January 7, 2022, was three (3) days in advance of the January 10, 2022, Senate confirmation hearing.

C. Regardless Of Which Date Triggered The 180 Day Separation Period, Ms. Mayer Has Satisfied It (**Pa 0031-0057 and Pa 0058-0112**)).

Ms. Mayer has yet to take the oath of office and therefore, as stated above, never had a "pre-arranged agreement for reemployment." Therefore, the only relevant inquiry for this Court is whether she has satisfied the 180 day separation period. As noted in the chart below, regardless of the triggering date utilized, the answer is yes.

Triggering Date	180 Day Separation Date
December 1, 2021	May 31, 2022
December 8, 2021	June 6, 2022
January 7, 2022	July 6, 2022
May 20, 2022	November 16, 2022

For Ms. Mayer, any agreement to become a Superior Court Judge will not be finalized until she is administered her oath of office. To date, this has not occurred. Consequently, she never had a "pre-arranged agreement for reemployment" and has satisfied the 180 day separation period required by the governing regulation. Contrary to the Board's conclusion, she has had a "bona fide severance from employment."

The Courts of New Jersey have held that "considerations of equity and fairness must temper the application of deadlines in the administration of the pension

fund." Knox v. Pub. Employees' Ret. Sys., No. A-1444-10T3, 2012 N.J. Super. Unpub. LEXIS 381, at *19 (App. Div. Feb. 23, 2012). (Pa 0115). As noted, upon retirement, Ms. Mayer sought the advice of the Division of Pensions as set forth in her retirement approval letter from the Board, and detrimentally relied upon the advice given to her by the Pension Specialists. A review of the above-stated facts reveals that she has completely satisfied the governing regulatory requirements. Her retirement was effective on December 1, 2021. At that time, she had no agreement with anyone regarding future reemployment. She was not even nominated by Governor Murphy until January 3, 2022. She has earned the right to take the oath of office to become a Judge of the Superior Court and collect her judicial salary while simultaneously receiving the benefits to which she is entitled as other sitting Judges are doing. The Final Administrative Determination of the Board is legally incorrect. Ms. Mayer respectfully asks this Court to reverse the decision of the Board and issue an Order declaring that Ms. Mayer is permitted to accept the position of Superior Court Judge and collect her judicial salary and collect the pension benefits to which she is entitled. In the alternative, this Court should remand to the Board to Order the same.

CONCLUSION

After over 26 years in public service, Ms. Mayer submitted her retirement application on August 11, 2021, and her retirement was approved by the Board effective December 1, 2021. As of December 1, 2021, while Ms. Mayer had submitted questionnaires and been interviewed for a position as a Superior Court Judge, as any Judge in the State of New Jersey knows, these steps were taken because there was a possibility that she could become a Judge someday. As of the date of this brief, while Ms. Mayer has since been nominated and confirmed by the Senate, she has not accepted the position and has yet to take the oath of office and be sworn-in. Based upon this timeline, there can be no doubt that Ms. Mayer never "terminated her employment with a pre-arranged agreement for reemployment." She has also satisfied the 180-day separation period required by the governing regulation given that she has been separated from service for over 650 days. Since there has been complete compliance with the statutory requirements, and because Ms. Mayer relied to her detriment upon the advice of the Pension Benefits Specialist with whom she consulted, this Court should reverse the Final Decision of the Board and issue an Order declaring that Ms. Mayer is permitted to accept the position of Superior Court Judge, collect her

judicial salary and collect the pension benefits to which she is entitled. In the alternative, this Court should remand to the Board to Order the same.

Respectfully submitted,

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Date: September 15, 2023

JILL MAYER, Petitioner-Appellant, v. BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent-Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2902-22T4 Civil Action ON APPEAL FROM A FINAL AGENCY DECISION OF THE BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM

BRIEF OF RESPONDENT BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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PRELIMINARY STATEMENT

Appellant Jill Mayer filed for retirement from the State of New Jersey's Department of Law & Public Safety, Division of Criminal Justice ("DCJ"), in the summer of 2021 with an effective date of December 1, 2021. Around that time, she applied for employment be a Judge of the Superior Court. She actively engaged in the interview and review process through the fall of 2021, with the admitted intention of collecting a State pension and a judicial salary at the same time. Mayer's December 1 retirement was approved on December 8, 2021. The Governor filed a notice of intent on December 13, 2021, which publicly notified the Senate of his intent to nominate her to the Superior Court.

During December 2021, Mayer worked actively with Judiciary and the Division of Pensions and Benefits to manage the process of retiring from DCJ and beginning her new State employment with the Judiciary with the objective of establishing an arrangement that would allow her to to simultaneously collect both retirement benefits from the Public Employees Retirement System ("PERS") and a judicial salary. Mayer now appeals an unfavorable determination by the PERS Board, affirming the Division, that she is not eligible for PERS retirement benefits if she begins service in the judicial appointment to which the Senate consented on January 10, 2022, because doing so would establish that she did not completely sever her employment relationship with the

State at the time of her retirement from one of its agencies.

The record establishes that Mayer attempted to retire from State service with DCJ while fully intending, if appointed, to promptly commence judicial service rather than fully end her State service. In other words, her separation from DCJ on December 1, 2021 was intended to be only a temporary break in her State service. Under regulations adopted by the Division to protect the tax classification of the retirement system by conforming it to the requirements of the Internal Revenue Code, Mayer's pre-planned return to State employment therefore would invalidate her retirement.

Pointing to references in the regulations and the Code that preclude retirement when there is a "pre-arranged agreement" with the employer to return to work, Mayer argues that she was permitted to take extensive steps towards taking a new State job while in the process of retiring from another State job, as long as there was no express agreement in place on the date of her effective retirement, even though she intended to take the judicial oath very soon afterwards. She argues that pre-planning a return to State employment is different under the pension regulations from making a disqualifying "agreement" to do so.

Mayer is mistaken. The requirement of a complete break from State service as a condition of retirement implies that the retirement applicant must

separate from State service with the intention of ending their career as a State employee. Mayer had no such intention on December 1, 2021, during the following 180 days, or at any time thereafter. Even now, Mayer seeks to resume her State employment by accepting an offer she actively (and successfully) pursued leading up to, and immediately after, her retirement date.

Mayer did not sever the employment relationship with the State when she began actively arranging for her intended next State job prior to retiring, and immediately upon retiring, from DCJ. Her acceptance of the job she was pursuing before and after she retired, an offer for which was finalized well within the 180-day period established to ensure that a retirement is bona fide, therefore would render that retirement invalid. The Board's reasonable determination to that effect should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

1. Establishment of the PERS as a qualified plan and promulgation of regulations

Section (a) of N.J.S.A. 43:3C-18 established the PERS as a qualified governmental defined benefit plan "pursuant to sections 401(a) and 414(d) of the federal Internal Revenue Code of 1986 ([26 U.S.C. § 401(a), 26 U.S.C. § 414(d)]), as amended, or such other provision of the federal Internal Revenue Code, as applicable, regulations of the U.S. Treasury Department, and other guidance of the federal Internal Revenue Service." Ibid.

Section (b) of the statute vested in the Director of the Division authority to modify the provisions of the PERS plan "when a modification is required to maintain the qualified status of the retirement plans under the Internal Revenue Code of 1986, applicable regulations of the U.S. Treasury Department or other guidance of the federal Internal Revenue Service." N.J.S.A. 43:3C-18(b). Such modifications may be made by promulgating a regulation without the usual notice-and-comment requirements of the Administrative Procedures Act, N.J.S.A. 52:14B-1 thru -31. Ibid.

Under the authority of N.J.S.A. 43C-18, the Division promulgated

[1] Because the procedural history and facts are closely related, they are combined for efficiency and the court's convenience.

N.J.A.C. 17:1-17.14 to ensure that an employee who receives a retirement benefit intended to retire and effected a "bona fide severance from employment," which the regulation defines as "a complete termination of the employee's employment relationship with the employer for a period of at least 180 days." N.J.A.C. 17:1-17.14. The regulation is explicit that there is no "complete termination of the employee's relationship with the employer" if the employee "terminat[es] the employment with a pre-arranged agreement for reemployment." Ibid. (emphasis added). It directs that "Federal Internal Revenue Service factors shall be used as guidance in determining whether an employment relationship exists." Ibid.

Section I of the regulation notes that, as a requirement for maintaining qualified plan status under federal law, a member in service can only receive payments from a defined benefit plan if there is a bona fide severance from employment. Ibid.[2] Accordingly, applicants for retirement and their employers must certify, as Mayer did, (Pa29), that they are making a bona fide severance from employment and have not entered into a prearranged agreement "to be reemployed by the employer as an employee, a contract employee, a leased

[2] The only exception to that rule requires that two conditions be met: the member must have "attained normal retirement age" under the plan; and the plan must provide for in-service distributions to those retirees. Ibid. Neither is true here.

employee, or an independent contractor." Ibid.

The Division, which is entrusted with maintaining the qualified status of the plan, may investigate a member's reemployment and, if it determines that there was not a bona fide severance from employment, take appropriate action, including "revok[ing] the retirement of the member and requir[ing] the repayment of benefits in order to protect the qualified status of the defined benefit plans." Ibid.

Here, the Division looked at the facts and circumstances surrounding Mayer's proposed return to employment when she made an inquiry to the Division. The Division determined (and the Board subsequently found) that if she were to accept the judicial appointment for which she had been confirmed during the requisite 180-day period and return to State employment, it would render her retirement from State service non bona fide. (Pa12).[3]

2. Mayer's applications for retirement from the Department of Law and Public Safety and for employment with the State Judiciary

Until her retirement, Mayer was an Assistant Attorney General in DCJ. (Pa12; Pa113). During the final two years of this State employment, she served as the Acting Prosecutor of Camden County, but remained a DCJ employee.

[3] "Pa" refers to Mayer's appendix; "Pb" refers to her brief. "Ra" refers to the Board's appendix.

(Pa12). Mayer filed on August 11, 2021, seeking a Special Retirement effective December 1, 2021, at which point she would have twenty-six years and ten months of service credit in the PERS Prosecutors Part.[4] Ibid.

The DCJ filed a *Certification of Service and Final Salary* on her behalf on September 5, 2021. Ibid. The PERS Board approved Mayer's December 1 retirement at its meeting of December 8, 2021, under pension option A. (Pa72).[5] On December 20, 2021, Mayer requested an option change to pension option B. (Pa95). The option change was approved by the Board at its meeting of April 20, 2022, to become effective thirty days later. (Pa82).

While her retirement application was pending in 2021, Mayer actively sought to be appointed a Judge of the Superior Court of New Jersey. To that end, from October 2021 through December 2021, Mayer participated in an intensive review process. (Pb28). The process required her to submit a questionnaire to the Governor's Office, complete a background check, a review

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[4] PERS members with at least 25 years of service in the Prosecutors Part receive "a total retirement allowance of 65% of final compensation, plus 1% of final compensation multiplied by the number of years of creditable service over 25 but not over 30." N.J.S.A. 43:15A-159.

[5] A member receives a retirement benefit in one of nine ways, or "options." The choice of options may be changed at any time before the pension becomes due and payable. Option A provides the surviving beneficiary with the same benefit paid to the member, while Option B provides the member a higher benefit but pays the surviving beneficiary 75% of the benefit paid to the member. N.J.A.C. 17:2-6.1(d).

by the Governor's Judicial Advisory Panel, and a review by the Judicial and Prosecutorial Advisory Committee of the New Jersey State Bar Association prior to the Governor's nominating her to the Superior Court. Ibid. Following her nomination, she then needed to complete the advice and consent process, which included an additional questionnaire, courtesy from her home county Senators, testimony before the Senate Judiciary Committee, and confirmation by the full Senate. Ibid.[6] Mayer submitted her detailed responses to the Governor's Judicial Questionnaire on October 25, 2021, and was interviewed by the Office of the Governor on November 18, 2021. (Pa58). On December 13, 2021 — only three business days after the PERS Board approved Mayer's retirement — the Governor publicly advised the Senate of his intention to nominate Mayer to the bench. (Ra1).[7] Six days later, Mayer submitted a Judiciary Questionnaire to the Senate. (Pa59).

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[6] The process is described in Governor Corzine's Executive Order #36, establishing the Judicial Advisory Panel. State of New Jersey - Executive Orders (nj.gov) EO 36 Corzine 2006 (last visited January 5, 2024); see also Judicial and Prosecutorial Appointments Committee - NJSBA (last visited January 5, 2024).

[7] Mayer sent an email to Judiciary staff on December 28, 2021 correctly stating that the Governor had filed the Notice of Intent ("NOI") to nominate her on December 13, 2021. (Pa59, 74). The NOI is required to be provided to the Senate at least seven days before the actual nomination is filed. N.J. Const. art. VI, § 6, 1. However, when Mayer provided the December 28, 2021 email to the Board, she indicated that the NOI actually was filed on January 3, 2022. (Pa59,

On December 28, 2021, while emailing with the Judiciary's human resources staff regarding the new-employee onboarding process, (Pa74), Mayer was referred to the Division to discuss the break-in-service requirements relative to her anticipated reemployment by the State. (Pa15; Pa76). On the same day, Brittany Zulla, a Pension Benefits Specialist, responded in an email stating that Mayer would be required to observe a thirty-day break in service to effectuate a bona fide retirement. (Pa15; Pa78).[8]

On January 3, 2022, Governor Murphy nominated Mayer to the Superior Court. (Pa12). Mayer testified before the Senate Judiciary Committee on January 7, 2022 and was confirmed by the full Senate on January 10, 2022. Ibid.

Zulla later realized that her advice to Mayer had been incorrect because the thirty-day break in service did not apply to Mayer. Specifically, a thirty-day separation from service is required to effectuate a bona fide retirement from PERS and a complete separation from service between different public employers, *e.g.*, between a County and the State. (Pa102); N.J.S.A. 43:15A-57.2(a), N.J.A.C. 17:2-6.2, N.J.A.C. 17:2-7.2. But a longer 180-day separation from service is required to effectuate a bona fide separation from service with

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74). The NOI was, in fact, filed on December 13, 2021, whereas the nomination was filed on January 3, 2022. (Ra1; Pa80).

[8] As discussed in the next paragraph, this information was incorrect.

the same employer (the State). In Mayer's case, it was undisputed that while she had served as the Acting Camden County Prosecutor, Mayer was nonetheless an employee of DCJ, a State employer, and would remain a State employee in her new position as a Superior Court judge. Entering into an arrangement to return to service with the same employer (the State) within the 180-day period, as Mayer sought to do, would invalidate her PERS retirement if she in fact returned to State employment. (Pa15; Pa28-29).

When she realized her error, Zulla left Mayer a telephone message on January 10. (Pa61). She noted the 180-day requirement and cautioned Mayer not to take the judicial oath before the potential effects on her pension could be clarified. Ibid. Zulla followed up the January 10 telephone message with an email on January 19, 2022, advising Mayer that she was required to observe a 180-day break in service prior to returning to State employment. (Pa15, Pa84).

On or about January 19, 2022, Mayer spoke with Sunanda Rana of the Division's External Audit Unit.[9] Ibid. Rana explained that a PERS retiree must have a bona fide severance of employment prior to returning to public employment in New Jersey. Ibid. She further explained that, under Internal

[9] Acting Director Megariotis's August 18, 2022 letter misidentified Rana as Sharon Fenstermacher, to whom Rana reports. (Pa28). The Board's April 25, 2023 FAD correctly indicated that Rana, not Fenstermacher, spoke with Mayer. (Pa15).

Revenue Service ("IRS") and PERS rules, a bona fide separation from employment requires that the retiree completely terminate the employer/employee relationship for a period of 180 days prior to returning to the same employer (here, the State of New Jersey). Ibid.; N.J.A.C. 17:1-17.14(a)(2). Rana also directed Mayer to the Division's Fact Sheet #86, entitled "Employment after Retirement Restrictions." Ibid.; (Pa99). That Fact Sheet notes, in Example 1, that when a "State employee retires and returns to work as a full- or part-time employee or independent contractor at any State agency, including a State university, within 90 or 180 days of the retirement date[,]" a "bona fide severance of employment has not occurred."[10] (Pa99). Rana informed Mayer that if she resumed State employment by becoming a judge in January 2022, she would not have a 180-day break in service and would be ineligible for PERS retirement benefits. Ibid. When asked to inform the Division of her decision to accept or decline her new position, Mayer indicated that she would consult with a lawyer and her financial consultant. (Pa28). Mayer never so informed the Division; rather, on June 8, 2022, Mayer emailed

[10] Retirees of the Police and Firemen's Retirement System are considered under N.J.A.C. 17:4-6.19 to have completely separated from their former employment after 90 days, as opposed to the 180 days required under N.J.A.C. 17:1-17.14(a)(2) for retirees of PERS, JRS, the Teachers' Pension and Annuity Fund, and the State Police Retirement System. These limits do not apply to retirees who were subjected to mandatory retirement or to retired judges recalled under N.J.S.A. 43:6A-13N.J.S.A. 52:14F-4, or N.J.S.A. 34:15-49. (Pa103).

Zulla to determine when she could take the judicial oath without jeopardizing her pension in light of the fact that over six months had passed since her retirement date. (Pa87).

3. The Division's initial determination that Mayer's employment as a judge of the State Superior Court would void her pension, and the Board's adoption of that determination

In a letter dated August 18, 2022, Acting Director John Megariotis confirmed that that the regulation required Mayer to observe a 180-day break from State employment to make her retirement bona fide. (Pa16; Pa28-29). He further explained that, because Mayer's appointment had been pre-planned "prior to [her] December 1, 2021 retirement and during the 180 days after [her] retirement," assuming the judgeship at any time based on the nomination confirmed on January 10, 2022 would render her retirement non-bona-fide. (Pa16; Pa28-29). If Mayer took the bench based on her January 10, 2022 confirmation, she would be required to reimburse the PERS for all pension benefits received up until that point, and her retirement would be canceled pending her re-retirement from State service. (Pa16; Pa28-29).

Mayer appealed to the Board on or about September 30, 2022. (Pa58). The Board heard and denied the appeal on December 7, 2022, affirming the Acting Director's determination. (Pa21). Mayer sought reconsideration of the Board's decision on or about February 27, 2023. (Pa11).

Mayer denied that she had prearranged a judicial appointment and claimed that she had merely engaged in the process of seeking one. (Pa18; Pa32). She was not guaranteed, nor could she ever be guaranteed in advance, a nomination by the Governor or approval by the Senate. (Pa18; Pa32). Mayer argued that pre-planning a return to employment should be permitted when there was no final agreement in place before the retirement date. (Pa18; Pa32). The Board disagreed, noting that Mayer had taken substantial steps toward acquiring another position within the new State during the months leading up to her retirement date and in the five weeks that followed. (Pa18). She was confirmed as a Superior Court judge days after her original due-and-payable date,[11] and only forty-one days after she left DCJ. Ibid. In addition, the Board found that because Mayer had opted to change her retirement option her retirement benefit did not become due and payable until May 20, 2022, several months after her Senate confirmation. Ibid. Thus, the Senate confirmed Mayer before her PERS retirement was finalized, i.e., due and payable. Ibid.

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[11] "A member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or 30 days after the date of the retirement, whichever is later." N.J.A.C. 17:2-6.2. A pension-fund member has "the right to withdraw, cancel, or change an application for retirement at any time before the member's retirement allowance becomes due and payable by sending a written request signed by the member. N.J.A.C. 17:3-6.3(a)." Minsavage for Minsavage v. Bd. of Trs., Teachers' Pension and Annuity Fund, 240 N.J. 103, 105 (2019).

Based on those undisputed facts, the Board found that Mayer could not accept employment based on the January 2022 confirmation and simultaneously collect both a retirement benefit and a judicial salary from the State. (Pa19). It could not reasonably be disputed that Mayer had pre-planned her return to public employment by actively seeking a judicial nomination for months immediately prior to her December 2021 retirement. Ibid. The Board affirmed the Acting Director's finding that this level of pre-planning violated N.J.A.C. 17:1-17.14, and Mayer's planned return to State service would therefore invalidate the retirement. (Pa16). Therefore, the Board determined, based on both the Internal Revenue Code and the Pensions regulations, that were Mayer to accept this judicial appointment her retirement would not be bona fide; she would not be able to collect a pension benefit and a judicial salary simultaneously, and she would be required to return all benefits received during the invalid retirement. Ibid. The Board added that the extension of Mayer's due-and-payable date as a result of her change of option provided another basis for invalidating the retirement if Mayer assumed the bench based on the January 10, 2022 confirmation. (Pa18).

Accordingly, the Board denied Mayer's appeal on March 15, 2023 and directed the Secretary to draft a Final Administrative Determination. (Pa12).

The Board approved the Final Administrative Determination at its April 2023 meeting, as memorialized in the Board's letter of April 15, 2023. Ibid.

Mayer appealed the Board's Final Administrative Determination to this court on May 26, 2023. (Pa8). Her motion to accelerate the proceeding was denied.

ARGUMENT

POINT I

THE BOARD REASONABLY DETERMINED THAT MAYER'S ACCEPTANCE OF HER JUDICIAL APPOINTMENT WOULD RENDER HER PERS RETIREMENT NON-BONA-FIDE.

The Board's reasonable application of a regulation promulgated by the Division to protect the tax-advantaged status of the pension system is entitled to this court's deference. "On judicial review of an administrative agency determination, courts have but a limited role to perform." Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 189 (1980) (citations omitted). An agency's factual determinations are presumptively correct; on review of the facts, a court will not substitute its own judgment where the agency's findings are supported by sufficient credible evidence. Rooth v. Bd. of Trs., Pub. Emps.' Ret. Sys., 472 N.J. Super. 357, 365 (App. Div. 2022). Thus, the dispositive question for this court is not whether the reviewing court would have reached a different decision, but rather whether it was arbitrary, unreasonable or capricious for the agency to reach the decision it did.

In making that determination, appellate courts give "substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing," Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007), particularly when the agency's interpretation involves a

permissible construction of an ambiguous provision, Kasper v. Bd. of Trs., Teachers' Pension & Annuity Fund, 164 N.J. 564, 58-82 (2000), or the exercise of expertise, In re Alleged Improper Practice, 194 N.J. 314, 332 (2008); A.Z. v. Higher Educ. Student Assistance Auth., 427 N.J. Super. 389, 394 (App. Div. 2012). "Such deference has been specifically extended to state agencies that administer pension statutes," because "a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." Piatt v. Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015) (citation omitted). Deference to an agency decision is "particularly appropriate where interpretation of the [a]gency's own regulation is in issue." I.L. v. N.J. Dep't Hum. Servs., Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 364 (App. Div. 2006).

1. The Board and the Division reasonably interpreted the Division's own regulation to bar pre-planning a return to state service. (Addressing Petitioner's Point I)

The Legislature entrusted the Director with the important task of protecting the qualified status of the plans for the benefit of all PERS members. Maintaining that status is a critical responsibility of the Board and the Division because that status gives all PERS members the significant tax advantage of deferring tax on the income used to fund their pensions (i.e., pre-tax contributions). To make sure the Division has the ability to carry out that task,

the Legislature gave it particularly broad authority to protect the pension system with the direct promulgation of regulations. N.J.S.A. 43:3C-18 (b).

Pursuant to that authority, the Division has enacted regulations designed to comply with federal law ensuring the protected status of the pension plan by preventing the payment of benefits to a PERS member who attempts to retire while planning an imminent return to state service, as required by N.J.S.A. 43:3C-18(c). Those regulations explicitly require that a retiring member certify that she is making a bona fide severance from employment and has no prearranged agreement "to be reemployed by the employer as an employee, a contract employee, a leased employee, or an independent contractor." N.J.A.C. 17:1-17.14(d).

Similarly, the regulations empower the Division, at its discretion, to determine whether a separation from service of the necessary duration has occurred. N.J.A.C. 17:1-17.14(e). Discretion is vested in the Division, under the authority of the pension Boards, to interpret the facts and circumstances in a given case to determine whether a retirement is bona fide and, if not, whether it should be revoked. Ibid. This appeal therefore turns on the reasonable interpretation of those regulations – specifically whether pre-planning a return to state service before and shortly after retirement constitutes a pre-arranged agreement for reemployment under the facts and circumstances here presented.

Because the Board's interpretation of the Division's own regulation "is not plainly unreasonable," it "is entitled to 'substantial deference.'" Smith v. State, Dep't of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209, 216-17 (App. Div. 2007) (citation omitted). This is particularly true here, where the regulation in question is designed to avoid placing the tax-advantaged nature of the pension plan at risk. The plain text of the regulation provides that a "[b]ona fide severance from employment" means a complete termination of the employee's employment relationship with the employer for a period of at least 180 days. N.J.A.C. 17:1-17.14(a)(2) (emphasis added). Simply put, a bona fide separation from service entails more than simply terminating the performance of one job — it means that the employee no longer has a relationship with the employer in any capacity, whether as a regular employee, a part-time employee, a seasonal employee, a contractual employee, an independent contractor, a leased employee, or even a volunteer. N.J.A.C. 17:1-17.14(a), (d). Expressly carved out from the definition of "bona fide severance from employment" is "a [t]ermination of employment with a pre-arranged agreement for reemployment." N.J.A.C. 17:1-17.14(a)(2)(v). Consistent with that definition, the Division requires certification that no such pre-arranged agreement exists and empowers the Director to investigate a bona fide severance by asking the member to reconfirm that there is not pre-arranged agreement. N.J.A.C. 17:1-17.14(d), (e),

(f).

The Division's determination that pre-planning a return to work can also invalidate a retirement, even where there is no finalized agreement, is reasonable and should be affirmed. There may be situations in which "pre-planning" does not, under all the relevant facts and circumstances, lead the Division to determine that a retirement is not bona fide. However, when discussions between an employee and the employer about possible re-employment options advance to planning an intended resumption of employment, the validity of the retirement comes into question.

The Division's interpretation is consistent with federal authorities on what constitutes the necessary bona fide separation from service prior to making a pension distribution. And the Division is expressly empowered to consider "Federal Internal Revenue Service factors" as "guidance in determining whether an employment relationship exists." N.J.A.C. 17:1-17.14(a). Both the IRS and courts interpreting pension requirements have agreed that, as the Board concluded, there is no bona fide separation when the employee and employer have a pre-arranged, shared understanding that the employee will go back to work.

At the outset, IRS regulations state that, in general, "(a)n employee separates from service with the employer if the employee dies, retires, or

otherwise has a termination of employment with the employer." 26 C.F.R. § 1.409A-1(h)(1)(i). Each of the qualifying acts in that definition carries an expectation that the employee will not return to work. As the Seventh Circuit has observed, relying on a dictionary definition, to retire is "to withdraw from one's position or occupation: to conclude one's working or professional career." Meredith v. Allsteel, Inc., 11 F.3d 1354, 1358 (7th Cir. 1993). Similarly, federal regulations explain that "[w]hether a termination of employment has occurred is determined based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date." 26 CFR § 1.409A-1(h)(1)(ii) (emphasis added). Consistent with this guidance, the Board reasonably concluded that a shared understanding that an employee would continue to provide services to the State following her retirement would not satisfy the IRS's rules on break-of-service.

Notably, in determining whether a bona fide termination of the employment relationship has occurred, the IRS looks only for a reasonable certainty that the employee will resume service for the employer, and does not ask for absolute certainty. As the IRS explained in a private letter ruling, "if both the employer and employee know at the time of 'retirement' that the employee will, with reasonable certainty, continue to perform services for the

employer, a termination of employment has not occurred upon 'retirement' and the employee has not legitimately retired." (Ra2, Private Letter Ruling 201147038). The same private ruling letter acknowledges that a purported retirement "with the explicit understanding between the employee and the employer that they are not separating from service with the employer" violates the Internal Revenue Code and will "result in disqualification of the Plan." Ibid.

Whether the retiree intends to permanently leave employment at the date of retirement and conclude their career is a key point in determining whether a retirement is bona fide. In Barrus v. United States, 23 AFTR 2d (RIA) 990, *17 (DC NC 1969), for example, a District Court found that an employee who retired mainly due to health concerns, took a lump-sum distribution as a retirement benefit, and returned to employment with his former employer only five months later had nonetheless effectuated a bona fide severance from service. In reaching that conclusion, the court relied on the fact that the employee had no intention of returning to work as of the date he retired because of his health concerns, and returned only because of an unexpected improvement in his health. Id. at *14, 17.

Thus, to effectuate a bona fide severance of service, an employee must retire with the intention not to return and with reasonable certainty that they will not soon resume service for their employer. The Division's analysis of the facts

and circumstances of an individual matter must therefore include a review of any evidence of pre-planning between the employer and the employee, as well as any arrangement made during the 180-day period for the employee's return to employment.

2. Mayer's extended interactive planning for reemployment before her retirement date and before she had separated from service for 180 days would disqualify her from retirement benefits if she commences the arranged reemployment. (Addressing Petitioner's Points II and III).

The Board reasonably determined that Mayer's extensive interactive preparation to be appointed to the bench, before and shortly after her retirement date, showed that she intended to resume State service in the near future and, by the time of her retirement, had the reasonable certainty that she would do so. Thus, she did not completely sever the employment relationship as required by Federal and State regulations that protect the qualified status of the pension plan.

For months before her December 1, 2021 retirement date, Mayer actively engaged with the Governor's Office and the Legislature in "the multi-step process . . . required to become a Superior Court Judge." (Pa2). In so doing, she manifested and acted upon a clear intent to continue her State government service after her DCJ retirement. Mayer does not offer evidence that she retired with an intention to engage in private practice, pursue interests outside the field of law, or do anything other than commence employment in the Judiciary. Instead, she argues that she did not have a perfected agreement to continue her

State service on her effective retirement date (Pb22), and did not commence judicial service within 180 days of her effective retirement date of December 1, 2021. (Pb32). She argues that these facts alone entitle her to begin her State service with the Judiciary and simultaneously collect State retirement benefits. (Pb26).

Even now, two years after the Governor filed a notice of intent to nominate her, and almost two years since her confirmation, Mayer contends that she *still* does not have a finalized agreement, despite the fact that she retains control over when she would begin her Judicial service. (Pb31). In her view, there is no actual agreement with the Judiciary that she will indeed serve, only an offer pending her acceptance. Ibid. But the "unaccepted" offer is an offer to assume the judicial seat that she applied for, the Governor nominated her to, and the Senate confirmed her to, which has been held open for her for two years.

A determination that nothing short of a finalized, mutual agreement between employer and employee, perfected on or before the retirement date, can invalidate a retirement, would eviscerate the Board's efforts to ensure compliance with IRS and state regulatory requirements. A member wishing to receive retirement benefits while resuming a career in State service could, consistently with Mayer's stated position, negotiate a return to employment in exquisite detail, delaying only the formal acceptance of a formally-offered

position until the relevant "compliance date." Under Mayer's argument, any plans to return to service, as Mayer undeniably had (even allowing for the possibility that her plans would fall through), is irrelevant to the determination whether a bona fide severance had occurred. Furthermore, Mayer's argument rests in part on the concept that a pre-arranged agreement is analyzed under contract terms, but the IRS rules and the pension regulations employ a facts-and-circumstances test (not a determination as to whether the employer and employee have entered into a formal, binding contract). See 26 CFR § 1.409A-1(h)(1)(ii); N.J.A.C. 17:1-17.14(a)(2) ("Federal Internal Revenue Service factors shall be used as guidance"), (e)(2) (the Division may look at "the circumstances of the reemployment").

Mayer's months-long active participation in the ongoing and demanding application process for appointment to the Superior Court is relevant; it demonstrates that well before her retirement date she fully intended to accept the new State employment she was seeking with the active support of the Office of the Governor. Thus, it was not arbitrary, unreasonable or capricious for the Division to conclude that Mayer did not have a bona fide intention of actually ending her State career when she separated from DCJ. To the contrary, Mayer was working assiduously to obtain a judicial position well before December 1, 2021, her original requested retirement date. Indeed, the process culminated

with her confirmation by the Senate early in the 180-day period following her retirement, and before her ultimate May 2022 due-and-payable date. Her decision to delay taking the oath until 180 days had passed from her retirement does not change the substance of her pre-planned arrangement and what she intended at the dispositive point in time, but only the timing of its implementation.

Her extensive pre-planning established that Mayer fully intended, and reasonably anticipated, that she would continue her State service. Although a degree of "pre-planning" may, when all the facts and circumstances are considered, be consistent with a bona fide severance of service, such is not the case here.

3. Mayer's employment based on her confirmation on January 10, 2022 would violate the 180-day rule. (Addressing Petitioner's Point IV)

N.J.A.C. 17:1-17.14(2)(2)(ii) provides that "Employment or reemployment in a position that is not covered by the Defined Benefit Plan" within 180 days is likewise incompatible with a bona fide separation from service. As discussed above, the facts and circumstances of a given case may indicate that an earlier return is consistent with an intent at the time of retirement to fully separate from service. Barrus, for example, held that an employee who retired from a North Carolina corporation due to health concerns could return to his employment before 180 days had passed without adverse consequences to

his retirement benefit because of "a substantial change in conditions [related to his health] and when the original termination and separation was absolute and in good faith." Barrus, 23 A.F.T.R.2d (RIA) 990 at *18.

Here, having been advised of the 180-day requirement by the Division, Mayer did not begin judicial service during that period. But she did have a fully-developed agreement with the State allowing her to return at any time from January 10 forward, almost five months before the 180 days ran. The agreement itself continued the employer-employee relationship by establishing Mayer's and the employer's intention for her to continue as a State employee.

And Mayer cannot argue that the offer of State employment in the Judiciary came as a surprise to her, such that she, like Barrus, could bypass the 180-day rule on the basis that she in fact separated from State service with the intention of ending her State career and now wished to return on the basis of an unexpected change in circumstances. No such change of circumstances occurred here, where Mayer always intended to resume her State service shortly after retiring. Because she did not absolutely sever the employment relationship with the State for 180 days after her retirement, Mayer's retirement would be invalidated if she resumes her State employment by beginning employment based on her confirmation during that 180-day period.

4. Mayer made an arrangement to return to employment before her retirement was finalized (due-and-payable). (Addressing Petitioner's Point IV).

Further, Mayer's retirement was not final until it was "due and payable." A retirement becomes due and payable thirty days after (1) retirement or (2) the date of Board approval, whichever is later, because retirees have thirty days to make changes to their pension options, such as withdrawal or cancellation of the application, designation of beneficiaries, or changes to their option selection. See N.J.A.C. 17:3-6.3(b). Mayer did, in fact, make a change to her option selection and thus her retirement was not finalized until May 20, 2022, thirty days after the Board approved her change of retirement option. Ibid. The Board determined that Mayer's arranging for new State employment while she still had the ability to make changes to her retirement was an additional basis for invalidating her retirement if Mayer actually assumed judicial office.

Even without taking into account the changing due-and-payable dates, Mayer still (1) did not leave State service with the intention of permanently separating therefrom, (2) did not refrain from pre-planning her return to State service for months before her retirement date, and (3) did not refrain from entering into an arrangement to resume State employment during the 180 days following her actual retirement date. Thus, Mayer is ineligible to collect State retirement benefits during active State employment as a judge based on her

January 10, 2022 confirmation even if the due-and-payable date is excluded from the analysis.

POINT II

CONSIDERATIONS OF EQUITY DO NOT CHANGE THE ANALYSIS.

In passing, Mayer references estoppel. (Pb31). For completeness, the Board will briefly address the issue. The fact that incorrect information was initially provided to Mayer around the time she was attempting to begin collecting a State pension while also taking on new employment with the State does not, as Mayer suggests, support an equitable departure from the Board's and Division's regular application of the separation-from-service rule.

Mayer relies on an unpublished case, Knox v. Public Employees' Retirement System, Dkt. No. A-1444-10T3, (App. Div. February 23, 2012), for the proposition that "considerations of equity and fairness must temper the application of deadlines in the administration of the pension fund." (Pb19; Pb36-37). Apart from being non-binding on this court, R. 1:36-3, Knox is inapposite because the material facts of that case are distinguishable.

Harold Knox, a retired assistant prosecutor, returned to employment before his retirement was due and payable, taking a part-time "seasonal" position with the prosecutor's office paying $20,000 per year. (Pa116). He did this on very specific, but incorrect, advice from his employer that doing so

would not violate then-current return-to-employment rules, which did not prevent the reemployment of retirees as seasonal employees. (Pa116-17). But the employer's classification of Knox's position as "seasonal" was erroneous, and the Division demanded that Knox reimburse PERS for the three years of pension payments he had received while so employed. (Pa116). The Appellate Division upheld an ALJ's determination that rather than repay $258,191 in received benefits, equity required that Knox, who had diligently investigated his options before retirement and had, consistent with guidance in the precursor to Fact Sheet #86, relied on his employer's advice in accepting the offending position, should instead disgorge $54,160, the amount he had earned in salary. (Pa119-21).

In contrast, though the Division's advice to Mayer was initially incorrect, Mayer never began judicial service. She therefore did not incur the detriment of having to disgorge benefits improperly paid. And nothing that Mayer could have done consistent with the information she was initially receiving from the Division would have made her eligible at that time to collect a State pension while employed as a State judge.

"It is a well settled and fundamental principle that ignorance of the law excuses no [one]." In re Wittreich, 5 N.J. 79, 87 (1950). Here, Mayer had access to Fact Sheet #86, as well as the statutes and regulations governing retirement

and post-retirement employment. Further, the doctrine of equitable estoppel applies when "conduct, either express or implied, . . . reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law." McDade v. Siazon, 208 N.J. 463, 480 (2011) (quotation omitted). The doctrine is "applied in only very compelling circumstances." Davin, L.L.C., v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000). It is well-settled that equitable estoppel is "rarely invoked against a governmental entity," Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000), "particularly when estoppel would interfere with essential government functions." O'Malley v. Dep't of Energy, 109 N.J. 309, 316 (1987). The burden of proving that the doctrine should be applied rests solely with the party asserting the equitable claim. Ibid.

Equitable estoppel should not be applied so as to thwart or compromise the Legislature's will. Cty. of Morris v. Fauver, 153 N.J. 80, 104 (1998) (citation omitted). In all matters, equity follows the law. Berg v. Christie, 225 N.J. 245, 280 (2016) (pension member could not claim equitable remedy unavailable under statutory law). Nor can equity be invoked to expand an agency's legal authority, as granting a pension to a person who has not effected a bona-fide retirement arguably would do. See Meyers v. State Health Benefits Comm'n, ___ N.J. ___, slip op. at *7 (2023) (noting that "a governmental entity

cannot be estopped from refusing to take an action that it was never authorized to take under the law").

Even if equitable estoppel were considered here, it would not provide Mayer the result she seeks. Although incorrect information was initially provided indicating that Mayer would need a bona fide severance of employment for only 30 days, Mayer's reliance on that information, even if deemed reasonable, did not lead to a change in her actual position to her detriment. See In re Johnson, 215 N.J. 366, 386 (2013) ("When an agency misrepresents the effect of a determination under circumstances calculated to induce reliance by reasonable persons to their detriment, the agency may be estopped to prevent a manifest injustice."). Ibid. (citation omitted, emphasis added).

In the absence of the incorrect information she received from Zulla, Mayer would still have been ineligible to collect simultaneously both a PERS retirement benefit and a judicial salary based on her January 10, 2022 confirmation. The inconvenience and frustration Mayer experienced in connection with the incorrect information is regrettable, but does not rise to the level of "manifest injustice" that, as Mayer notes, can serve, under appropriate circumstances not found here, as the basis for a holding of equitable estoppel against a government agency. (Pa31, citing In re Johnson, 215 at 386).

CONCLUSION

For these reasons, the Board's determination that Mayer's employment based on her January 2022 judicial confirmation would invalidate her PERS retirement was not arbitrary, capricious or unreasonable, and should be affirmed.

Respectfully submitted,

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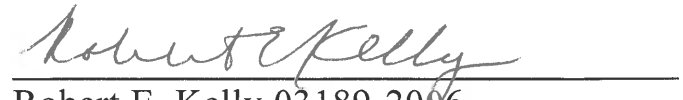
By: 

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Dated: January 12, 2024

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
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TRENTON
08625
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PHILIP D. MURPHY
GOVERNOR

December 13, 2021

Honorable Linda Metzger
Secretary of the Senate

Madam:

Please be advised that I have this day given public notice as required by the provisions of Paragraph 1, of Section VI, of Article VI, of the State Constitution, that I will submit to the Senate the following nomination for appointment of **Jill S. Mayer**, of **Cherry Hill**, as a **Judge of the Superior Court**, for the term prescribed by law.

Sincerely,

Philip D. Murphy
Governor

Notice of Intention

2010 PLR LEXIS 3036

US Internal Revenue Service

April 20, 2010

PLR 201147038

Reporter
2010 PLR LEXIS 3036 *; PLR 201147038

Private Letter Ruling 201147038

Subject Matter

Pension Plans; Single-Employer Plans - Funding-Based Limits; Minimum Participation; Trust Beneficiary's Tax; Inclusion in Gross Income of Deferred Compensation

Summary

Taxpayer proposed a rehabilitation plan under I.R.C. § 432 after its Plan's actuary certified that the Plan was in critical status. As part of the default schedule, eligible participants who retired during this 60-day period before the subsidized service pension benefit was eliminated could then return to employment and have their benefits suspended while working. The IRS concluded that employees who retired one day to qualify for a benefit under the Plan, with the explicit understanding between the employee and employer that they were not separating from service with the employer, were not legitimately retired. Because these employees would not actually separate from service and cease performing services for the employer when they retired these "retirements" would not constitute a legitimate basis to allow participants to qualify for early retirement benefits. Such "retirements" would violate I.R.C. § 401(a) and result in disqualification of the Plan. However, under I.R.C. § 401(a)(36), employees who attained age 62 upon benefit commencement would qualify for and receive an early retirement benefit under the Plan while they continued in employment.

Applicable Sections

Section 401 -- Pension Plans

Section 436 -- Single-Employer Plans - Funding-Based Limits

Section 410 -- Minimum Participation

Section 402 -- Trust Beneficiary's Tax

Section 409A -- Inclusion in Gross Income of Deferred Compensation

[*1]

Significant Index No.

UI List: 401.11-00

Refer Reply To: SE:T:EP:RA:A2

Core Terms

retire, benefits, early retirement, regulations, employees, pension plan, severance, default, qualify, perform a service, period of service, provide a service, subsidized, Taxpayer, termination of employment, employer and employee, rehabilitation plan, pension benefits, service pension

Text

Significant Index No. 401.11-00

Date: April 20, 2010

Refer Reply To: SE:T:EP:RA:A2

Re: * * *

LEGEND:

Plan = * * *

Taxpayer = * * *

Dear * * *

This letter is in response to your ruling request, dated October 15, 20* * *, regarding the Taxpayer's request for a ruling regarding the payment of subsidized early retirement

benefits in conjunction with the default schedule required by section 432(e)(1)(B)(ii) of the Internal Revenue Code (the "Code").

The issue raised relates to the rehabilitation plan required as a result of the Plan's actuary certifying the Plan to be in critical status effective October 1, 2009. Section 432 of the Code **[*2]** requires that the rehabilitation plan include a default schedule, which must assume that there are no increases in contributions under the plan other than those necessary to emerge from critical status after future benefit accruals and other benefits have been reduced by as much as the law allows.

The Taxpayer proposes to present to the collective bargaining parties a default schedule that will eliminate all subsidized early retirement benefits, including unreduced service pensions. The default schedule will eliminate the ability of participants with 20 or more years of service to retire with an unreduced pension benefit. As a result, participants who have sufficient service to retire without a reduction in benefits will no longer be able to do so once the default schedule is in place. The Taxpayer anticipates that participants who are eligible to retire and receive an unreduced service pension, over 300 participants, will elect to retire rather than wait until age 65 to receive their full pension benefit.

The Taxpayer also proposes to give participants notice 60 days prior to the date that the subsidized service pension benefit is eliminated and that as part of this default schedule, **[*3]** eligible participants who retire during this 60-day window may then return to employment and have their benefits suspended while working.

The subsidized service pension benefit in question is an early retirement pension benefit and the plan's normal retirement age is 65. Prior to elimination of the benefit, the Taxpayer proposes to allow employees to "retire" on one day in order to qualify for the subsidized service pension benefit, and return to work the very next day or perhaps after a week has passed. In either case, neither the employee nor the employer will plan on these "retirees" actually terminating employment and no longer performing services for the employer when they "retire" and qualify for their early retirement pension benefit.

Based on the aforementioned facts you requested a ruling as to whether allowing participants who are eligible for subsidized early retirement benefits to "retire" on one day in order to qualify for the early retirement subsidy, and then immediately return to work with payment of their early retirement pension benefit suspended, would result in disqualification of the Plan under section 401(a) of the Code.

Section 401(a)(36) of the Code provides that, **[*4]** for plan years beginning after December 31, 2006, a pension plan does not fail to qualify under section 401(a) solely because the plan provides that a distribution may be made to an employee who has attained age 62 and who has not separated from employment at the time of distribution.

Section 409A of the Code provides when deferred compensation under nonqualified compensation plans is included in gross income. Section 409A(a)(2)(A) provides, in pertinent part, that compensation deferred under a nonqualified deferred compensation plan may not be distributed earlier than separation from service as determined by the Secretary.

Section 432(e) of the Code requires that a rehabilitation plan must be adopted for a multiemployer plan that is in critical status.

Section 432(e)(1)(B)(i) of the Code indicates that the plan sponsor must provide to the bargaining parties 1 or more schedules showing revised benefit structures, revised contribution structures, or both, which, if adopted, may reasonably be expected to enable the multiemployer plan to emerge from critical status in accordance with the rehabilitation plan.

Flush language following section 432(e)(1)(B)(ii) of the Code provides that the schedule **[*5]** or schedules described in subparagraph (B)(i) shall reflect reductions in future benefit accruals and adjustable benefits (as defined in 432(e)(8)(A)(iv)(II)), and increases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status. One schedule shall be designated as the default schedule and such schedule shall assume that there are no increases in contributions under the plan other than the increase necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under section 411(d)(6)) have been reduced to the maximum extent permitted by law.

Section 432(e)(8)(A)(iv)(II) of the Code provides that an adjustable benefit includes any early retirement benefit or retirement-type subsidiary (within the meaning of section 411(d)(6)(B)(i)) and any benefit payment option (other than the qualified joint-and survivor annuity).

Section 1.401-1(a)(2) of the Income Tax Regulations ("Regulations") provides that a qualified pension plan (i.e., a qualified defined benefit plan or money purchase pension plan) is a definite written program and arrangement **[*6]** that is communicated to employees and that is established and maintained by an employer to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits.

Section 1.401-1(b)(1)(i) of the Regulations provides that a qualified pension plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits for employees over a period of years, usually for life, after retirement.

Section 1.401(a)-1(b)(1)(i) of the Regulations provides that in order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age (subject to paragraph (b)(2) of this section). A plan does not fail to satisfy the requirements of this paragraph (b)(1)(i) merely because the plan provides, in accordance with section 401(a)(36), that a distribution may be made from the plan to an employee who has attained age 62 and **[*7]** who is not separated from employment at the time of such distribution.

Section 1.401(a)-1(b)(1)(ii) of the Regulations provides that section 1.401-1(b)(1)(i), a pre-ERISA regulation, provides rules applicable to the requirement of § 1.401(a)-1(b)(i), and that regulation is applicable except as otherwise provided.

Section 1.409A-1(h)(1)(i) of the Regulations provides that in general an employee separates from service with the employer if the employee dies, retires, or otherwise has a termination of employment with the employer.

Section 1.409A-1(h)(1)(ii) of the Regulations provides that whether a termination of employment has occurred is based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date or that the level of bona fide services the employee would perform after such date (whether as an employee or as an independent contractor) would permanently decrease to no more than 20 percent of the average level of bona fide services performed) whether as an employee or an independent contractor) over the immediately preceding 36-month period (or the full period of services to the **[*8]** employer if the employee has been providing services to the employer less than 36 months).

Section 1.409A-1(h)(1)(ii) of the Regulations also provides that facts and circumstances to be considered in making this determination include, but are not limited to, whether the employee continues to be treated as an employee for other purposes (such as continuation of salary and participation in employee benefit programs), whether similarly situated service providers have been treated consistently, and whether the employee is permitted, and realistically available, to perform services for other service recipients in the same line of business.

Section 1.409A-1(h)(1)(ii) of the Regulations provides the following example: An employee may demonstrate that the employer and employee reasonably anticipated that the employee would cease providing services, but that, after the original cessation of services, business circumstances such as termination of the employee's replacement caused the employee to return to employment. Although the employee's return to employment caused the employee to be presumed to have continued in employment because the employee is

providing services at a rate equal to the rate **[*9]** at which the employee was providing services before the termination of employment, the facts and circumstance in this case would demonstrate that at the time the employee originally ceased to provide services, the employee and the service recipient reasonably anticipate that the employee would not provide services in the future.

Section 1.410(a)-7(b)(2) of the Regulations defines "severance of service date" as the earlier of the date on which an employee quits, retires, is discharged or dies, or the first anniversary of the first date of absence or for any other reason. The severance of service date is used to provide an endpoint for crediting service and to apply the statutory "break in service" rules to an elapsed time method of crediting service under 1.410(a)-7.

Section 1.410(a)-7(b)(6) of the Regulations defines "period of service" in pertinent part, generally as a period of service commencing on the employee's employment commencement date and ending on the severance from service date.

Revenue Ruling 79-336, 1979-2 C.B. 187, provides that, for purposes of the special forward averaging treatment of lump sum distributions under § 402(d), an employee will be considered separated from **[*10]** service within the meaning of § 402(e)(4)(D) (formerly 402(e)(4)(A)) of the Code only upon the employee's death, retirement, resignation, or discharge, and not when the employee continues on the same job for a different employer as a result of the liquidation, merger, or consolidation, etc. of the former employer.

Meredith v. Allsteel, Inc., 11 F.3d 1354 (7th Cir. 1993), in deciding on what date an employee actually retired, concluded by applying common law rules of contract interpretation, that the word retire is to be given its ordinary meaning. The court opined: "In common parlance, retire means to leave employment after a period of service. See Webster's Ninth New Collegiate Dictionary 1007 (1986) (retire is "to withdraw from one's position or occupation: to conclude one's working or professional career")."

Ahng v. Allsteel, Inc. 96 F.3d 1033 (7th Cir. 1996) in reviewing Meredith v. Allsteel, Inc., 11 F.3d 1354 (7th Cir. 1993) (with regard to its earlier decision on the question of whether the anti-cutback rule of the Retirement Equality Act of 1984, Pub. L. No 98-397, 98 Stat. 1426 (1984), which amended ERISA § 204(g), should be interpreted to prohibit pension plan amendments or **[*11]** terminations that reduce or eliminate an employee's ability to participate in early retirement benefits) let stand the definition of the word retire provided in Meredith.

Taken together, sections 1.409A-1(h)(1)(i) and 1.409A-1(h)(1)(ii) provide that when an employee legitimately retires, he separates from service with the employer. Accordingly if both the employer and employee know at the time of "retirement" that the employee will, with reasonably certainty, continue to perform services for the employer, a termination of

employment has not occurred upon "retirement" and the employee has not legitimately retired.

Section 1.410(a)-7(b)(2) defines the "severance of service date" as the earlier of the date on which an employee quits, retires, is discharged or dies, or the first anniversary of the first date of absence or for any other reason. Section 1.410(a)-7(b)(6) defines "period of service" as generally ending on an employee's severance of service date. Taken together, sections 1.410(a)-7(b)(2) and 1.410(a)-7(b)(6) provide that an employee retires on a severance of service date, when his period of service ends.

In Meredith v. Allsteel Inc., the seventh circuit court of appeals defined **[*12]** the word retire to have its ordinary meaning. Specifically the court provided that in common parlance, retire means to leave employment after a period of service mentioning that Webster's Ninth New Collegiate Dictionary 1007 (1986) defined retire as: "to withdraw from one's position or occupation: to conclude one's working or professional career. In Ahng v. Allsteel, Inc., while reviewing the Meredith case, the same court retained this definition of the word retire. Accordingly an employee would not legitimately retire if he did not actually leave employment upon retirement.

Although section 409A and its regulations address a nonqualified plan arrangement the definitions regarding termination and separation from service are consistent with the definition of "severance of service date" found in 1.410(a)-7(b)(2) and both are consistent with the conclusion of Revenue Ruling 79-336. These regulations and Revenue Ruling serve to clarify that an employee legitimately retires when he stops performing service for the employer and there is not the explicit understanding between the employer and employee that upon retirement the employee will immediately return to service with the employer. That **[*13]** an employee severs his employment with the employer when he retires is directly expressed in the definition of the word retire found in Meredith v. Allsteel Inc.

On November 10, 2004, a notice of proposed rulemaking (REG-114726-04) under section 401 was published in the Federal Register (69 DE 65108) (the "proposed regulations"). The proposed regulations provided rules permitting distributions to be made from pension plan under a phased retirement program and set forth requirements of bona fide phased retirement program. The preamble to the proposed regulations provides that the proposed regulations: "specifically do not endorse a prearranged termination and rehire as constituting a full retirement."

In accordance with §§ 1.401(a)-1(b)(1)(i) and 1.401-1(b)(1)(i), because a qualified pension plan is generally not permitted to pay benefits before retirement, an employee who "retires" with the explicit understanding between the employer and employee that upon

retirement the employee will immediately return to service with the employer has not legitimately retired and may not qualify for an early retirement benefit under the Plan.

We have concluded that employees who "retire" on one day in **[*14]** order to qualify for a benefit under the Plan, with the explicit understanding between the employee and employer that they are not separating from service with the employer, are not legitimately retired. Accordingly because these employees would not actually separate from service and cease performing services for the employer when they "retire" these "retirements" would not constitute a legitimate basis to allow participants to qualify for early retirement benefits (which are then immediately suspended.) Such "retirements" will violate section 401(a) of the Code and result in disqualification of the Plan under section 401(a) of the Code.

However, in accordance with section 401(a)(36) of the Code, employees who have attained age 62 upon benefit commencement may qualify for and receive an early retirement benefit under the Plan while they continue in employment.

Please note that this ruling does not express any other opinion regarding the suitability of the proposed default schedule or the associated rehabilitation plan.

This ruling letter is directed solely to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

If **[*15]** you have any questions regarding this ruling letter, please contact * * *

Sincerely yours,

David M. Ziegler, Manager

Employee Plans Actuarial Group 2

Load Date: 2011-11-29

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JILL MAYER Petitioner/Appellant, v. BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIRMENT SYSTEM Agency/Respondent.	Docket No.: A-002902-22 On Appeal from the April 20, 2023 Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System PERS Docket No. 2-10-363879

REPLY BRIEF ON BEHALF OF PETITIONER/APPELLANT JILL MAYER

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CASES

REGULATIONS

PRELIMINARY STATEMENT

The two important issues for this Court to analyze are whether Petitioner-Appellant, Jill Mayer ("Ms. Mayer") had a "bona fide severance from employment" and whether, at the time of her December 1st retirement, she "terminated her employment with a pre-arranged agreement for reemployment." The answer to the first question is yes. The answer to the second is no.

There is no dispute as to what regulation governs in this matter and there are no disputed facts regarding the timeline of events. This appeal stems from the erroneous legal conclusions by the Board: (1) that Ms. Mayer engaged in "pre-planning" which it alleges is the equivalent of having a "pre-arranged agreement" for a position as a Judge; and (2) that the Senate confirmation vote on January 10, 2022 forever precluded Ms. Mayer from satisfying the 180 Day separation period required under the regulation. As for item one, as every Judge in this State is aware, because of the nature of the process ("Process") of how one becomes a Judge, there was no "pre-arranged agreement." As for item two, the Board's determination that the Senate confirmation vote consummated an agreement is without legal support.

At the completion of its de novo review, this Court should reverse the determination of the Board and issue an Order that allows Ms. Mayer to accept the position of Superior Court Judge, waive participation in the Judicial

Retirement System ("JRS"), and receive her judicial salary and the pension benefits to which she is entitled or remand to the Board to Order the same.

LEGAL ARGUMENT

I. The Board's Determination Was Both Legal Error And Was Not Reasonable Based Upon The Governing Regulation

A. A Legal Issue Requires De Novo Review

The Board incorrectly interprets the governing regulation by conflating "pre-arranged agreement" with "pre-planning." (Db17). It also ignores basic contract principles, without legal foundation, arguing that the Senate vote on January 10, 2022, resulted in a fully-developed agreement which permanently precluded Ms. Mayer from satisfying the 180 day separation requirement. (Db26). These incorrect determinations stem from a deliberate misreading of the governing regulation. The questions to be decided by this Court are questions of law and the province of the judicial branch. Russo v. Bd. of Trustees, Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)(citation omitted).

The Board cites Richardson v. Bd. of Trs., 192 N.J. 189, 196 (2007) for the proposition that "[g]enerally, courts afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." (citations omitted). (Db16). However, the Board omits the next sentence holding that an appellate court is "in no way bound by the agency's interpretation

of a statute or its determination of a strictly legal issue." Richardson, 192 N.J. at 196 (citation omitted). As set forth in James R. Ientile, Inc. v. Zoning Bd. of Adjustment of Tp. of Colts Neck, 271 N.J. Super. 326 (App. Div. 1994):

> The application to the Board did not call for the exercise of any expert discretionary judgment. It was solely one for interpretation of an ordinance. Such interpretation is a judicial function and the conclusions of the Board of Adjustment and the trial court are not, in consequence, entitled to any special deference.

Id. at 329 (citation omitted). While the Board is charged with maintaining the qualified status of pension plans, it has no expertise in evaluating the multi-step Process involved in becoming a Superior Court Judge. (Db6). See In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Auth. Labor Relations Instruction, 194 N.J. 314, 332 (2008), certif. denied, 555 U.S. 1069 (2008)(it is only "in situations where agency expertise is essential towards understanding the proper context of a dispute [that] a deferential standard of review is appropriate.")(citation omitted). Here, any alleged Board expertise is irrelevant to a conclusion that “pre-planning” is not the equivalent of a “pre-arranged agreement” or what is the significance of a Senate confirmation vote.

The Board attempts to convince this Court that its determination regarding Ms. Mayer was based upon a reasonable interpretation of the governing regulation. (Db16). This argument should be rejected since the Board’s determination was based on legal conclusions and not factual determinations.

The issue on appeal here is whether the Board improperly interpreted the clear wording of the governing regulation where there are no relevant factual disputes regarding the timeline of events. In this matter, The Board's determination is not entitled to any deference. This Court should conduct a de novo review.

B. Even Under The Deferential Arbitrary And Capricious Standard, The Determination Was Not Reasonable

Even if the substantial deference standard applies, the Board's determination regarding Ms. Mayer was not reasonable and cannot be sustained. "An agency's determination on the merits '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.'" Rooth v. Bd. of Trs., Pub. Employees' Ret. Sys., 472 N.J. Super. 357, 364-65 (App. Div. 2022)(citations omitted)(emphasis added). To determine whether the agency action is arbitrary capricious or unreasonable, the judicial role involves three inquiries:

> (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 clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Mazza v. Bd. Of Trs., 143 N.J. 22, 25 (1995)(citation omitted). A decision "based on a complete misperception of the facts submitted in a record [will] render the agency's conclusion unreasonable." In re Proposed Quest Academy Charter School, 216 N.J. 370, 387 (2013).

The only relevant inquiry is whether Ms. Mayer had a "bona fide severance from employment" and whether, at the time of her December 1st retirement, she terminated her employment "with a pre-arranged agreement for reemployment." While the Board asserts that it is entitled to deference because of its specialized knowledge in this area, (Db17), the representations made by its representatives belie that assertion.

When Ms. Mayer brought the issue of a potential judicial nomination to Lisa Fisk in the Administrative Office of the Courts, she was referred to Brittany Zulla who was a JRS liaison within the DOP. (Pa 0074; Pa 0076). Ms. Zulla was identified as a Pensions Benefit Specialist and "the real guru with all things pension related" who could "provide any important information regarding break in service requirements." (Pa 0076). Ms. Zulla emailed Ms. Mayer on December 28, 2021. (Pa 0078).[1] In their initial communications, neither Ms. Fisk, nor Ms. Zulla, stated that Ms. Mayer would be prohibited from collecting her pension because of participating in preliminary steps in the Process.

On January 10, 2022, three days after Ms. Mayer appeared before the Senate Judiciary Committee, three days after she satisfied the thirty (30) Day

[1] Ms. Zulla advised that Ms. Mayer must have a "bona fide severance of employment" for thirty days after her retirement date or board approval date, whichever is later. (Pa 0078). The 30-day period began on December 8, 2021. (Pa 0072). Thirty days from December 8, 2021, was January 7, 2022.

waiting period, as advised by Ms. Zulla, and one hour before a scheduled Senate confirmation vote, Ms. Zulla left a voicemail which stated the following:

> "Hi Jill, this is Brittany Zulla from Pensions giving you a call, urn I just want you to **hold off on accepting** any position in order to jeopardize your PERS pension Prosecutors' Part Retirement, um I did send this to external audit to review and they do believe that there might be an issue because since you are retiring from the state system and you know you would be going into another state system, another job with the judiciary, you actually need 180 bona-fide severance **so just hold off on any acceptance** and I'm just waiting for upper management to review so it will take some time alright?"

(Pa 0061)(emphasis added). Ms. Zulla did not indicate any concern that the Senate vote would finalize a pre-arranged agreement and merely advised to "hold off" on any acceptance.

On January 19, 2022, Ms. Zulla sent an email to Ms. Mayer summarizing a phone conversation that they had. (Pa 0084). Ms. Zulla stated that "**if [Ms. Mayer accepts]** the JRS position, [she] would not meet the 180-day bona fide severance requirements." Id. (emphasis added). On the same day, Ms. Zulla and her supervisor, Sunanda Rana, called Ms. Mayer to confirm that a 180-day break in service was required and **if she accepted the position** as a Judge, **at that time**, she would not have the necessary break in service. (Pa 0015)(emphasis added). The January 19th email and phone call are significant for two reasons. First, they are silent regarding any potential concern regarding a "pre-arranged agreement for reemployment" and they do not express any

concerns about her having participated in the Process. Id. More importantly, they alert Ms. Mayer about a potential issue if she accepts the position. They confirm the understanding of a Pension Benefits Specialists within the DOP that the Senate confirmation vote, which occurred nine days earlier, on January 10, 2022, did not finalize an agreement or that there was already a "pre-arranged agreement for reemployment." Following this conversation, Ms. Mayer heeded the advice, did not accept the position, and waited the required 180 days.

This timeline of events is critical. The directions given by DOP Pension Benefit Specialists, and the Board's ultimate about-face eight months later in concluding that Ms. Mayer's participation in the Process constituted "pre-planning," which is allegedly the equivalent of a "pre-arranged agreement," are inconsistent, not reasonable, and not entitled to deference by this Court. Likewise, the DOP's erroneous conclusion that the Senate confirmation vote on January 10, 2022, forever precluded Ms. Mayer from achieving a bona fide severance from employment is also not reasonable and not entitled to deference.

II. Ms. Mayer Did Not Have A Pre-Arranged Agreement On The Date Of Her Retirement

The Board argues that because it is entrusted with the task of protecting the qualified status of pension plans, its determination that pre-planning a return to work can invalidate a retirement even when there is no finalized agreement is

reasonable. (Db17; Db20). Citing no cases supporting this legal conclusion, the Board attempts to support its position through the use of phrases such as "shared understanding" and "reasonably anticipated" and "explicit understanding" (Db20-22). This argument must be rejected.

The DOP promulgated the applicable regulation, N.J.A.C. 17:1-17.14. (Db4-5). Thus, it was the choice of the DOP to utilize the key words "pre-arranged agreement for reemployment" in the governing regulation. The phrase "pre-planning" does not appear in the regulation. "[T]he goal of [regulatory] interpretation is to ascertain and effectuate the [Division's] intent." Cashin v. Bello, 223 N.J. 328, 335 (2015)(citation omitted). The "'best indicator' of that intent, [is the] [regulation's] plain language." Finkelman v. Nat'l Football League, 236 N.J. 280, 289 (2019) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). If the DOP intended to include the vague, overly broad, and undefineable standard of "pre-planning" in the list of what does not constitute a complete termination of the employer/employee relationship in N.J.A.C. 17:1-17.14, then it would have said so.

The New Jersey Supreme Court in O'Connell v. State, 171 N.J. 484 (2002) best summarized the applicable principal of looking at the plain language of a statute or regulation. The O'Connell Court stated:

> "'In the interpretation of a statute our overriding goal has consistently been to determine the Legislature's intent.'" As a general rule, that process begins with an examination of the plain language of the statute. Where a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning.

Id. at 488 (internal citations omitted). In this matter, the DOP chose to utilize the key words "pre-arranged agreement for reemployment" and chose not to include the phrase "pre-planning" in the regulation. The regulation must be enforced as written. The Board's interpretation applying words which do not appear in the regulation was legal error which must be reversed. Even under the more liberal "arbitrary and capricious" standard, the Board's determination was not reasonable and must be reversed

III. Ms. Mayer Satisfied The 180 Day Separation Of Service Rule

The Board argues that Ms. Mayer did not satisfy the 180 Day Separation of Service Rule because: (1) at the time of her retirement (December 1, 2021), she had reasonable certainty that she would return to State service (Db23); (2) the possibility of becoming a Superior Court Judge could fall through is irrelevant (Db 25); (3) Ms. Mayer did not offer any evidence that she retired with the intention to enter private practice or pursue other interests outside of the law (Db 23); and (4) the Senate confirmation vote resulted in a fully

developed agreement with the State which continued her employer-employee relationship as a State employee. (Db 27). These arguments must be rejected.

As for points one and two, there is no dispute that Ms. Mayer's retirement was approved with an effective date of December 1, 2021. (Pa 0072). The Board's approval of Ms. Mayer's change from Option A to Option B ("Option change") did not change the December 1, 2021 effective date. See Section IV infra. (Pa 0072; Pa 0082). As of December 1, 2021, Governor Murphy's office had not filed its Notice of Intent which occurred on December 13, 2021. (Ra1) Likewise, Ms. Mayer had not yet been nominated which occurred on January 3, 2022. (Pa 0080). Finally, she had not yet appeared before the Senate Judiciary Committee which occurred on January 7, 2022, (Db9) nor had her nomination been voted on by the full Senate which occurred on January 10, 2022. (Db9; Pa 0061). This Process can terminate at any step. Therefore, based upon the nature of the Process, it was a legal and practical impossibility for Ms. Mayer to have had a pre-arranged agreement to become a judge on December 1, 2021.

As for point three, the Board cites no authority for its position that it was Ms. Mayer's burden to present evidence she intended to enter private practice or pursue other interests outside of the law. Regardless of who bears the burden, the only evidence of intent was provided by Ms. Mayer. When an employee submits a retirement application through the MBOS system, the employee must

check a box certifying that the employee has made "no pre-arrangement to return to public employment in any capacity." (Pa 0012-0013). When Ms. Mayer submitted her retirement application, she checked the box acknowledging and agreeing to that term and condition of retirement because in fact it was true.

Finally, with respect to point four, the Board offers no support for its stated position that the Senate confirmation vote resulted in a fully developed agreement with the State which continued her employer-employee relationship as a State employee. The extensive vetting Process precludes a judicial candidate from reaching any such agreement to serve until the New Jersey Senate confirms the nomination **and the individual is sworn in as a Judge.** If Ms. Mayer proceeded to become a Superior Court Judge, the counter-party to her employer-employee relationship would have been the New Jersey Judiciary, not the New Jersey Senate. The Senate did not, and could not, bind Ms. Mayer to a position as a Superior Court Judge by its confirmation vote.[2]

To summarize, Ms. Mayer satisfied the 180 Day Separation of Service Rule. The Board's determination to the contrary is legal error which must be reversed under this Court's de novo review. Even under the "arbitrary and

[2] For example, Ms. Mayer could have decided not to take the oath and accept another job offer. Neither the State Judiciary nor the State Senate would have an enforceable contract upon which to take legal action to force Ms. Mayer to take the oath.

capricious" standard, based upon the representations of the DOP's Pension Benefit Specialists, the Board's determination was not reasonable.

IV. The Option Change Did Not Change The Due and Payable Date

The Board incorrectly concludes that the "due and payable" date was deferred to May 2022 as a result of the Option change. On December 8, 2021, Ms. Mayer was notified that her retirement was approved by the Board. (Pa 0072). The retirement was effective December 1, 2021, and was approved in accordance with Ms. Mayer's selection of Option A. Id. Ms. Mayer began receiving pension disbursements, consistent with Option A, in January 2022. The Option change was approved on April 20, 2022. (Pa 0082). While the change to the amount in the retirement checks due to the Option change could not be made until thirty days after the change was approved, the change was explicitly retroactive to December 1, 2021, the original effective date of her retirement. Id. May 20, 2022 was the anticipated date of the adjustment of the disbursement checks. It was not the original "due and payable" date as evidenced by the fact that Ms. Mayer began receiving checks in January 2022.

V. Equitable Considerations Are Appropriate In This Matter

The Board argues that equitable considerations are inapplicable in this matter. In doing so, it attempts to distinguish the Knox case cited by Ms. Mayer in her initial brief. (Pb19; Pb37). While not binding on this Court, the analysis

and holding in Knox that "considerations of equity and fairness must temper the application of deadlines in the administration of the pension fund" is illustrative. Knox v. Pub. Employees' Ret. Sys., No. A-1444-10T3, 2012 N.J. Super. Unpub. LEXIS 381, at *19 (App. Div. Feb. 23, 2012). (Pa 0115).

The Board also argues there was no detrimental harm caused by the advice of the DOP Pension Board Specialists. This is not true. The timeline is critical. Ms. Zulla emailed Ms. Mayer on December 28, 2021. (Pa 0078). Ms. Zulla advised that Ms. Mayer must have a "bona fide severance of employment" for thirty days after her retirement date or board approval date, whichever is later. Id. For Ms. Mayer's case, the 30-day period began on December 8, 2021, and ended on January 7, 2022. (Pa 0072). Ms. Mayer's Senate confirmation vote was on January 10, 2022. (Pa 0061). It was not until one hour before the Senate vote, that Ms. Zulla left Ms. Mayer a voicemail. (Pa 0061). More significantly, the voicemail merely advised Ms. Mayer to "hold off on accepting any position" as opposed to advising her to have her name withdrawn from the Senate vote. A voicemail one hour prior to the vote was clearly inadequate notice. Ms. Mayer was detrimentally harmed by the admitted incorrect advice she received.

The Board also argues that equitable principles are inapplicable because ignorance of the law is not an excuse. (Db30). In doing so, the Board cites Fact Sheet #86 in support for the proposition that the law should have been obvious

to Ms. Mayer. Because Fact Sheet #86 does not clearly support the position asserted by the Board, this argument should be rejected. Fact Sheet #86 identifies scenarios wherein the employee **returns to work** within the 180 Day time period. (Pa 0098-Pa 0104). It is silent and therefore provides no notice regarding the potential impact of the steps taken toward the possibility of becoming a Judge. This is because filling out questionnaires, meeting with representatives of the Governor's Office, appearing before the Senate Judiciary Committee, or a Senate confirmation vote do not constitute a return to work. Ms. Mayer, after initially receiving admittedly incorrect information, then receiving updated information that a 180 day separation was required, complied with the corrected advice and the scenarios identified in Fact Sheet # 86.

Finally, the Board argues that equitable estoppel should not thwart the DOP's will. (Db31). Simply put, the Board's argument here is that what it declares to be the law, is the law, and the law cannot be expanded through equitable considerations. This circular reasoning should be rejected.

The net result is that, while not necessary because the Board's determination is incorrect, this Court can apply equitable principles.

CONCLUSION

Ms. Mayer submitted questionnaires and interviewed for a position as a Superior Court Judge because there was a possibility that she could become a

Judge someday. There was never a pre-arranged agreement to make her a Judge. In fact, the Governor had not even filed a Notice of Intent yet on the date of her retirement. Moreover, while the Senate voted to confirm her nomination, Ms. Mayer has not accepted the position and has yet to take the oath of office and be sworn-in. When Ms. Mayer terminated her employment on December 1, 2021, there was no "pre-arranged agreement for reemployment." She has also satisfied the 180-day separation period required by the governing regulation. There has been complete compliance with the governing regulatory requirements. This Court should reverse the Final Determination of the Board and issue an Order declaring that Ms. Mayer is permitted to accept the position of Superior Court Judge, collect her judicial salary and collect the pension benefits which she has earned or remand to the Board to Order the same.

Respectfully submitted,

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