

Superior Court of New Jersey
Appellate Division
Docket No.: A-002951-23

KIM PASCARELLA,

Petitioner-Appellant,

v.

**BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT
SYSTEM,**

Respondent-Respondent.

Civil Action

**On Appeal from the Board of
Trustees of the Public Employees'
Retirement System, Department of
the Treasury, PERS 2-10-360171**

Brief of Petitioner-Appellant Kim Pascarella

On the Brief:

**Donald F. Burke, Esq.
#008011983**

**Donald F. Burke Jr., Esq.
#034812011**

**LAW OFFICE OF DONALD F. BURKE
45 Gale Road**

**Brick, New Jersey 08723
Tel: (732) 966-4922**

Email: donaldburkesq@gmail.com

**Attorneys for Petitioner-Appellant
Kim Pascarella**

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PRELIMINARY STATEMENT

An agency determination that does not follow the law, bases its conclusions on unreliable evidence, fails to explain its reasoning and the facts of record which support its conclusions in a logical, coherent way is an unlawful exercise of agency power and its determination must be vacated. In this case PERS did not follow the law, it based its decision on unreliable evidence in violation of the residuum rule, and it failed to explain its reasoning and the facts which support it in a logical, coherent way.

Petitioner-Appellant Kim Pascarella (Pascarella) retired on March 1, 2019 after some 26 years of public service, first with the Borough of Seaside Heights (Borough) and then with Ocean County. When he sought retirement benefits from Public Employees' Retirement System (PERS) in exchange for the 26 years of contributions he and his employers paid, the PERS Board advised Pascarella on September 13, 2021 that his request was denied.

PERS denied Pascarella pension credit for the 9 years he worked for the Borough on April 22, 2024, adopting in full the Initial Decision of Administrative Law Judge (A.L.J.) Susan M. Scarola, dated November 6, 2023. (Ja1).¹ In her November 6, 2023 decision, A.L.J. Scarola essentially rubber stamped the conclusions of Kristin Conover (Conover), an investigator with the Pension Fraud

¹ Some of the documents in the Joint Appendix are not entirely legible but they are the clearest copies available.

and Abuse Unit of the Division of Pensions. PERS adopted ALJ Scarola's decision in whole and without comment.

A review of the conclusions reached by PERS and the evidence supporting the conclusions demonstrates that PERS 1) did not follow the law, 2) its decision was not supported by substantial evidence and 3) its decision was arbitrary, capricious, or unreasonable. The PERS decision does not follow N.J.S.A. 43:15A-7.2(a) because it restricts Professional Service Contracts to those entered into pursuant to the Local Public Contracts Law (LPCL). The LPCL, N.J.S.A. 40A:11-5, requires a municipality to maintain "on file and available for public inspection" such a contract. Here, PERS found as a fact that "a 'written contract' was not formally signed by the parties" (Ja23) but nevertheless held N.J.S.A. 43:15A-7.2(a) Pascarella was "ineligible for PERS service credit from Seaside Heights after December 31, 2007 under N.J.S.A. 43:15A-7.2(a)." (Ja28). This conclusion based entirely on the reasoning that "the absence of a written contract did not negate that one existed" is logically flawed and fails to follow the law.

The PERS decision was also based on the conclusion that Pascarella was an independent contractor pursuant to the twenty-factor IRS test outlined in IRS Rev. Rul. 87-41 (Ja22) when he worked for the Borough and, therefore, he is barred from receiving pension service credit under N.J.S.A. 43:15A-7.2(a). PERS' conclusion is based on a PERS form Employee/Independent Contractor Checklist

that was signed by Barbara Risley (Risley) in 2014 when Risley did not testify. Nevertheless admitted into evidence as Exhibit R-8. The facts set forth in R-8 were directly contradicted by the sworn testimony former Borough Business Administrator John Camera, Pascarella and Michael P. McDermott, CPA, who testified as an expert witness on the classifications of workers – employee or independent contractor – pursuant to the statutorily applicable IRS regulations. Nevertheless, the PERS rejected testimony of Pascarella, Camera and McDermott and accepted the testimony of PERS Investigator Conover even though she had no personal knowledge of the facts and relied almost exclusively on R-8. (Ja22). At a post-decision deposition Risley testified that she did not hire Pascarella, had no role in determining his duties and responsibilities and did not supervise him (2T20:5-12) and that former Business Administrator Camera was more knowledgeable regarding the factors in Exhibit R-8 than she was. (2T41:7-11).

As set forth below, the PERS decision cannot survive appellate scrutiny, and it constitutes an unlawful exercise of unbridled agency power, and its determinations must be reversed.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law, where it was filed on December 20, 2021 for determination as a contested case. See N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. (Ja4).

The hearing before the Office of Administrative Law was conducted on December 14, 2022 and the record remained open for the receipt of briefs until June 23, 2023. (1T; Ja4).² The Initial Decision of Administrative Law Judge (ALJ) Susan M. Scarola was issued on November 6, 2023. (Ja3-Ja31).

On April 22, 2024, the Board of Trustees of the Public Employees' Retirement System (PERS Board) advised Petitioner-Appellant Kim Pascarella (Pascarella) that he was not entitled to Public Employees' Retirement System (PERS) service credit for his employment by Borough of Seaside Heights from January 1, 2008 to February 1, 2016. (Ja1-Ja2). The PERS Board adopted the Initial Decision of Administrative Law Judge (ALJ) Susan M. Scarola dated November 6, 2023. (Ja1-Ja2).

On March 22, 2024, Pascarella filed a Petition for Pre-Litigation Discovery seeking records from Pascarella's former employer, the Borough of Seaside Heights, and its former Chief Financial Officer Barbara Risley seeking documents and information regarding Pascarella's employment, which was granted and Pascarella obtained records and the deposition of Barbara Risley. (Ja371; Ja169-Ja370; 2T).

² 1T refers to the transcript of the hearing dated December 14, 2022. 2T refers to the transcript of the deposition of Barbara Risley dated July 16, 2024.

On March 31, 2025, the Court granted Pascarella's motion to supplement the record to include the transcript of the deposition of Barbara Risley and related records. (Ja168).

STATEMENT OF FACTS

The issue in this appeal involves the legality of the decision of the PERS Board denying Pascarella PERS service credit from December 31, 2007 to February 1, 2016, more than 9 years of the 26 years served, claiming that Pascarella was not an employee of the Borough of Seaside Heights during those years on the grounds that Pascarella 1) had a professional service contract with the Borough of Seaside Heights pursuant to N.J.S.A. 43:15A-7.2(a) and 2) was an independent contractor as defined by N.J.S.A. 43:15A-7.2 (b). On April 22, 2024, the Board of Trustees of the Public Employees' Retirement System (PERS Board) advised Petitioner-Appellant Kim Pascarella (Pascarella) that he was not entitled to Public Employees' Retirement System (PERS) service credit for his employment by Borough of Seaside Heights from January 1, 2008 to February 1, 2016 precluding him from receiving a pension for the 26 years he and his public employers made pension contributions. (Ja1-Ja2).

The contested matter was tried before Administrative Law Judge (ALJ) Susan M. Scarola on December 14, 2022 who issued a report dated November 6,

2023 concluding that Pascarella was an independent contractor hired pursuant to a professional service agreement and not an employee. (Ja3-Ja31).

On April 22, 2024, PERS adopted the Initial Decision of ALJ Scarola dated November 6, 2023 and advised Pascarella that he was not entitled to PERS service credit for his employment by Borough of Seaside Heights from January 1, 2008 to February 1, 2016. (Ja1-Ja2).

At the trial before ALJ Scarola, Michael P. McDermott, CPA testified as an expert in accounting, his experience in classification of workers and his familiarity with the applicable standards – Internal Revenue Service (IRS) Rule 963, Department of Labor (DOL) classifications and the twenty-factor test. McDermott reviewed the various factors and testified that the Borough of Seaside Heights had the right to control Pascarella's hours, required Pascarella to perform services at its workplace, curtailed Pascarella's outside employment, reviewed Pascarella's performance every year when his employment contract was renewed, paid Pascarella bi-weekly, provided Pascarella with a W-2 annually like other employees and not a 1099 that is provided to independent contractors, and continued to pay him for 5 months when he was out injured. when he was out for when procedures taxes and pension payments were taken from Pascarella's check, he received a W-2 annually, not a 1099. (1T14:2-1T43:17). Weighing the applicable factors, McDermott's opinion was that the petitioner was an employee

and was treated as such by the Borough of Seaside Heights until he left in 2016. (1T24:24-1T25:3).

McDermott also testified as to the analysis by the PERS investigator that resulted in the conclusion that Pascarella was an independent contractor and not an employee. McDermott testified that he was surprised by the investigator's analysis and the failure to use IRS form SS-8, which is available to employers and workers to request a determination of a worker's status as either an employee or an independent contractor for federal tax purposes. (1T42:2-11).

McDermott reviewed the factors noted by the PERS investigator in determining whether the petitioner was an independent contractor or an employee and rebutted them as set forth above and further noted that timekeeping records were kept by the Pascarella; he was provided tools and equipment and that he was employed by the Borough of Seaside for more than twenty years. (1T38:16-1T39:22). McDermott disagreed with the responses Barbara Risley provided on the Employee/Independent Contractor Checklist of criteria used by PERS, Exhibit R-8. (1T26:14-1T27:13).

McDermott reviewed the facts, available records and gave his expert opinion that Pascarella was an employee of the Borough of Seaside Heights and not an independent contractor and that Pascarella and the Borough of Seaside Heights never entered into a professional services agreement. (1T24:24-1T25:3).

John Camera (Camera) also testified. Camera was the Business Administrator for the Borough of Seaside Heights from 1995 through the end of 2014, and he was fully familiar with the employment of Pascarella and his job duties and responsibilities. (1T59:4-12). Camera went through the factors that dictate whether a worker is an independent contractor or an employee and testified that the Borough of Seaside Heights' relationship with Pascarella was one of employee-employer. Camera testified that the Borough of Seaside Heights at all times considered Pascarella to be an employee. Camera testified that the Borough of Seaside Heights wanted to maintain an employee-employer relationship with Pascarella and not an independent contractor relationship as a matter of economic efficiency. (1T60:14-1T61:1). The Borough authorized Camera to negotiate the terms of Pascarella's employment and his salary. (1T61:2-1T61:10).

Camera testified that Pascarella was treated as an employee, offered employee benefits including health insurance, paid for five (5) months sick-leave when he was injured in a snowmobile accident, provided office space in the municipal building, provided secretarial and administrative support by municipal employees, was paid with a bi-weekly check, had pension benefits and taxes taken from his paycheck, received a W-2 IRS form from the Borough at the end of the year like all other Borough employees. (1T64:17-1T65:14; 1T62:2-12). Camera testified that Pascarella never had a professional service contract. (1T77:13-16).

PERS presented the testimony of Kristen Conover (Conover). Conover was employed by PERS as a Pension Benefits Specialist 2. (1T23:7-10). Conover agreed that from 1993 to 2016 the petitioner was employed and was enrolled in the pension system and being paid as an employee of the Borough of Seaside Heights and then as employee of Ocean County as an Assistant Prosecutor. (1T156:20-1T157:2). Conover agreed that Pascarella had a PERS pension number at the Borough and the same pension number at the OCPO; that the transfer of all pension contributions he and the Borough of Seaside Heights made had been approved by PERS. Conover also agreed that that Pascarella was paid by the Borough of Seaside Heights bi-weekly as an employee; that he received a W-2 every year like other employees and, while the Borough of Seaside Heights had issued a Request for Quotations each year to consider its options, the Borough of Seaside Heights and Pascarella never entered into a professional services contract. (1T157:3-1T159:17).

Conover acknowledged that she did not have first-hand knowledge of the facts regarding Pascarella's employment with the Borough of Seaside Heights. Conover testified regarding Employee/Independent Contractor Checklist, Exhibit R-8 that was signed by Barbara Risley.³ (1T138:23-1T139:3).

³ Barbara Risley did not testify at the hearing before ALJ Scarola.

ALJ Scarola and PERS relied heavily on Exhibit R-8 - an out-of-court statement of Barbara Risley that was not subjected to cross examination which was directly contradicted by the sworn testimony of former Business Administrator Camera, Pascarella and McDermott, all of whom were subjected to cross examination.

The testimony of Barbara Risley was taken on July 16, 2024 pursuant to Court Order dated April 26, 2024. (2T; Ja371). Barbara Risley's sworn testimony confirmed that she lacked first-hand knowledge of the facts requested by the checklist. (2T41:7-11). Risley she relied upon Business Administrator John Camera to provide the pertinent facts – facts that were presented by Camera at the hearing of this matter and subject to cross examination. The facts presented by Camera, as to which he had firsthand knowledge, were rejected by ALJ Scarola in reaching her conclusion that Pascarella was an independent contractor and worked pursuant to a professional service agreement.

As set forth below, the conclusions reached by ALJ Scarola were not supported by substantial, admissible evidence in the record and her heavy reliance on the Employee/Independent Contractor Checklist used by PERS accepted into evidence as Exhibit R-8 was misplaced.

LEGAL ARGUMENT

Point I

THE RECORD LACKS SUBSTANTIAL EVIDENCE TO SUPPORT THE PUBLIC EMPLOYEES RETIREMENT SYSTEM'S CONCLUSION THAT PASCARELLA WAS NOT ENTITLED TO PERS SERVICE CREDIT WHEN HE WORKED FOR THE BOROUGH OF SEASIDE HEIGHTS (Ja3-Ja31; 2T)

Pascarella's status as either an employee of the Borough of Seaside Heights or an independent contractor when he worked there from January 1, 2008 to February 1, 2016 determines whether he receives a retirement pension for his twenty-five years and two months of public service.

PERS determined that Pascarella 1) worked "pursuant to a series of Professional Services Contracts awarded under the provisions of the Local Public Contracts Law and N.J.S.A. 19:44A-20.4 et seq, and he is therefore ineligible for PERS service credit from Seaside Heights after December 31, 2007 under N.J.S.A. 43:15A-7.2(a)" and 2) that Pascarella was an independent contractor pursuant to the twenty-factor IRS test outlined in IRS Rev. Rul. 87-41. (Ja22). PERS' conclusion was based on the testimony of Kristin Conover, an investigator in the Pension Fraud and Abuse Unit of PERS whose "analysis of the factors indicates that the petitioner could not be considered an employee" according to PERS. (Ja22).

An exacting appellate review of the record is necessary in this case, one that applies the proper standard of review, requires PERS to follow the law and that its decision be well-based in substantial evidence and supported by a “residuum” of legally competent evidence – at least some evidence that would be admissible in a jury trial to support the agency’s findings.

- 1. The standard of review – an agency decision must follow the law, and its conclusions must be based upon “legally competent evidence” that provides “assurances of reliability” so as to “avoid the fact or appearance of arbitrariness.”**

The standard on appeal from an agency decision is whether “there was a clear showing that[:] (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence.” In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008).

The United States Supreme Court in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) overruled Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which had established the doctrine of deference to administrative determinations. In Loper, the Court held that Chevron was inconsistent with both the constitutional obligation of courts to say what the law is, and with the Administrative Procedure Act (APA) and established the rule that courts “must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.”

In New Jersey, judicial review of agency action flows directly from the state's constitution which superseded the common law remedy of prerogative writs and, in lieu thereof, provided that "hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right." See N.J. Const. art. VI, § 5, ¶ 4.

The New Jersey Administrative Procedures Act establishes the framework for judicial review of agency actions and requires agency actions to "include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director." N.J.S.A. 52:14B-10. "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Ibid.

Exercising independent judgment on appellate review of an agency determinations is the standard in New Jersey. "[I]n reviewing agency actions, an appellate court is 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.'" Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 224 (2009) (quoting In re Carter, 191 N.J. 474, 483 (2007)). "While we must defer to the agency's expertise, we need not surrender to it." N.J. Chapter of Nat'l. Ass'n of Indus. & Off. Parks v. N.J. Dep't of Env't Prot., 241 N.J. Super. 145, 165 (App. Div. 1990). Legal questions are reviewed de novo

an agency's interpretation of a statute, or a regulation is not automatically accepted on appellate review. Bowser v. Bd. of Trs., Police & Firemen's Ret. Sys., 455 N.J. Super. 165, 170-71 (App. Div. 2018).

The requirement that an administrative judgment express a reasoned conclusion is an essential element of N.J.S.A. 52:14B-10 and due process. “[N]o matter how great a deference the court is obliged to accord the administrative determination . . . , it has no capacity to review at all unless . . . the agency has stated its reasons grounded in th[e] record for its action.” In re Issuance of a Permit by Dep't of Env'tl. Prot. to Ciba-Geigy Corp., 120 N.J. 164, 173 (1990) (first alteration in original) (quoting State v. Atley, 157 N.J. Super. 157, 163 (App. Div. 1978)).

A reviewing court must have “confidence that there has been a careful consideration of the facts in issue and appropriate findings addressing the critical issues in dispute.” Bailey v. Bd. of Review, 339 N.J. Super. 29, 33 (App. Div. 2001). “The requirement of findings is far from a technicality and is a matter of substance. It . . . is a fundamental of fair play that an administrative judgment express a reasoned conclusion. A conclusion requires evidence to support it and findings of appropriate definiteness to express it.” N.J. Bell Tel. Co. v. Comm. Workers of Am., 5 N.J. 354, 375 (1950) (internal citation omitted).

An administrative agency ““must set forth basic findings of fact, supported by the evidence and supporting”” its determination ““for the salutary purpose of informing the interested parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations.”” Ciba-Geigy Corp., 120 N.J. at 172 (quoting In re Application of Howard Sav. Inst., 32 N.J. 29, 52 (1960)).

In addition to requiring an administrative agency to explain its conclusions by setting forth the facts it relies upon is the related issue requiring reliable evidence to support an agency’s decision. N.J.A.C. 1:1-15.5 provides that, while hearsay is admissible in the trial of a contested case, “some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.”

Thus, “[h]earsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony” but “a fact finding or a legal determination cannot be based on hearsay alone.” Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (2013) (quoting Weston v. State, 60 N.J. 36, 51 (1972)).

2. PERS did not follow the law as to its finding that Pascarella and the Borough entered into a professional service contract pursuant to N.J.S.A. 43:15A-7.2(a) and its reasoning for reaching this conclusion is faulty.

The PERS decision challenged here, finding that N.J.S.A. 43:15A-7.2(a) bars Pascarella from earning pension service credit while Pascarella worked for the Borough because Pascarella and the Borough had a professional services contract is not supported by substantial evidence in the record. Indeed, PERS acknowledges “a ‘written contract’ was not formally signed by the parties.” (Ja23). The statute provides that “A person who performs professional services for a political subdivision of this State . . . under a professional services contract awarded in accordance with section 5 of P.L.1971, c.198 (C.40A:11-5) . . . on the basis of performance of the contract, shall not be eligible for membership in the Public Employees’ Retirement System.” N.J.S.A. 43:15A-7.2(a). The section incorporates the definition of “professional services” found in N.J.S.A. 40A:11-2 and incorporates the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-5 which requires a professional services contract be “on file and available for public inspection.” N.J.S.A. 40A:11-5. This cannot be accomplished by an unwritten contract.

The conclusion that Pascarella and the Borough had a professional services contract even though there is no written contract ignores the statutory requirement of N.J.S.A. 43:15A-7.2(a) that defines a professional service agreement as one

entered into pursuant to the LCPL. The LCPL requires N.J.S.A. 40A:11-5 that professional service contracts be kept by the municipality “on file and available for public inspection.”

Thus, PERS’ conclusion does not follow the law which requires a written contract “on file and available for public inspection.” Further, PERS reasoning that “the absence of a written contract did not negate that one existed” is fallacious. The absence of a written contract not only leads logically to the conclusion that there is no written contract it leads to the legal conclusion, contrary to that reached by PERS, that the provisions of N.J.S.A. 43:15A-7.2(a) were not met.

Further, ALJ Scarola’s reasoning regarding N.J.S.A. 43:15A-7.2(a) was flawed. ALJ Scarola’s decision states:

As for section (a), the petitioner responded to an RFP or an RFQ from the Borough and offered his professional services for the position of municipal prosecutor. Although a “written contract” was not formally signed by the parties, clearly the Borough was hiring the petitioner to perform professional services. I **FIND** that the petitioner was a professional-service provider within the meaning of section (a).

[(Ja23).]

This reasoning not only fails to follow the law which requires a written contract, it ignores, without explanation, uncontradicted testimony of former Business Administrator Camera who testified that by issuing Requests for Quotations (RFQs), the Borough of Seaside Heights was simply assessing its options and whether to continue with Pascarella as an employee and, even though

Pascarella responded to the RFQs, the Borough opted to continue with the employment relationship it had with Pascarella and the Borough never entered into a written professional services contract with Pascarella. (1T157:3-1T159:17).

The conclusion that “clearly the Borough was hiring the petitioner to perform professional services” as supporting the conclusion “was a professional-service provider within the meaning of section (a)” is logically flawed. While it is undisputed that Pascarella performed “professional services” as the municipal prosecutor, see N.J.S.A. 40A:11-2(6), employees can and do provide professional services to municipalities across New Jersey. The fact that Pascarella provided professional services to the Borough does not mean those services had to be provided pursuant to a professional services agreement and not as an employee. If the reasoning that if a lawyer provides professional services to a public employer was to be accepted, all attorneys who work for public entities, indeed all professionals working for public entities, would be working pursuant to a professional services agreement and, therefore, not entitled to public pension credit. Put another way, if a lawyer responds to a public entity’s request for professional services and is hired as an employee and not as an independent contractor, the lawyer is working pursuant to a professional services agreement, even if there is no written agreement, and the lawyer would be considered and treated as an employee.

In support of her conclusion, ALJ Scarola stated “clearly the Borough was hiring [Pascarella] to perform professional services” (Ja23) which may be true, but this does not support the conclusion that Pascarella was working pursuant to a written professional services agreement that precludes pension credit. If this were the intent of the legislation, the statute would simply say professionals working for a public entity are not entitled to pension credit.

Further, the reasoning that Pascarella performed professional services therefore he must have performed those services pursuant to a professional services agreement and not entitled to service credit under N.J.S.A. 43:15A-7.2(a) would nullify and make superfluous N.J.S.A. 43:15A-7.2(b) which states that “[a] person who performs professional services for a political subdivision of this State . . . shall not be eligible, on the basis of performance of those professional services, for membership in the Public Employees’ Retirement System, if the person meets the definition of independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code.” Contrary to ALJ Scarola’s reasoning, N.J.S.A. 43:15A-7.2(b) contemplates providing a person who performs professional services for a public employer with service credit in PERS as long as the person is not an “independent contractor as set forth in the regulation or policy of the federal Internal Revenue Service for the purpose of the Internal Revenue Code.”

The analysis of the Appellate Division in Ragusa v. Board of Trustees, PERS, No. A-5460-15T3 (App. Div. 2018), <https://njlaw.rutgers.edu/collections/courts/> is directly applicable and persuasive here. In that case, PERS determined that Marian Ragusa (Ragusa), who served as the Municipal Prosecutor in Middle Township, was not entitled to pension service credit for her position as Municipal Prosecutor due to its determination that she was performing professional services for a political subdivision pursuant to a professional services contract. The Appellate Division identified the issue before it as “whether the Board correctly applied N.J.S.A. 43:15A-7.2(a) to the facts” and, more specifically, “whether [Ragusa did] so ‘under a professional services contract awarded in accordance with section 5 of P.L.1971, c.198 (C.40A:11-5)’ and whether she seeks pension credit ‘on the basis of performance of the contract.’ See N.J.S.A. 43:15A-7.2(a).” Id. at 3 (Ja374).

The Appellate Division reviewed N.J.S.A. 40A:11-5, a provision of the Local Public Contracts Law (LPCL) and what a local government must do to award a contract for professional services which includes “(1) award[ing] the contract by a resolution justifying the government’s decision; (2) publiciz[ing] the essential terms of the contract in a newspaper; and (3) maintain[ing] on file for public inspection the resolution awarding the contract and the contract itself.” Id. at 1. The Appellate Division also noted that the LPCL defines a “contract” to mean

“any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement.” N.J.S.A. 40A:11-2(21). Ibid. (Ja375). Accordingly, the Appellate Division found, “The statute requires that there be a professional services contract, and that it be awarded in accordance with section five of the LPCL, N.J.S.A. 40A:11-5” and reversed PERS decision as to Ragusa “[n]either requirement is satisfied by the facts of this case.” Id. at 16. (Ja387). The Court stated:

[A] “professional services contract” does not encompass every employer-employee relationship between a local government and a professional — notwithstanding that the professional agrees to provide his or her services in return for compensation. A “contract” under the LPCL is between a “vendor” and the local government. N.J.S.A. 40A:11-2(21). “Vendor” is not defined. However, throughout the definitional provision, it refers to persons engaged in the provision of goods or services in response to public procurement. See N.J.S.A. 40A:11-2.

[Id. at 6 (Ja387).]

With reasoning that is directly applicable to the instant case, the Appellate Division held that a “professional services contract does not encompass every employer-employee relationship between a local government and a professional—

notwithstanding that the professional agrees to provide his or her services in return for compensation.”

The court ruled in favor of Ms. Ragusa for certain years of her employment when she was not hired pursuant to a professional service contract meeting the requirements of the LCPL as required by N.J.S.A. 43:15A-7.2(a). During those years, she was appointed to the position of municipal prosecutor pursuant to a resolution that “made no reference to public contracting.” Id. at 17 (Ja388).

The Appellate Division held that Ms. Ragusa was entitled to membership in PERS up until a professional service contract entered in conformance with the LPCL was executed in 2013 that referenced her as a vendor but, for the prior years, the court found that “Ragusa accepted what she perceived to be a full-time employment with the Township, which entitled her to pension credits.” Id. at 19 (Ja390).

This reasoning and analysis applies with equal force here. The Borough and Pascarella did not enter into a professional services contract that conformed with the requirements of the LCPL so N.J.S.A. 43:15A-7.2(a) does not bar Pascarella from earning pension service credit for the years he worked for the Borough. A review of each Resolution hiring Pascarella (Ja57 to Ja91) confirms that, like Ragusa, Pascarella was appointed to the job as municipal prosecutor pursuant to resolutions that “made no reference to public contracting.” Id. at 17 (Ja388). As in

Ragusa, the order denying pension credit to Pascarella for the period he worked for the Borough pursuant to N.J.S.A. 43:15A-7.2(a) must be reversed.

The conclusion of ALJ Scarola, accepted by PERS, that Pascarella and the Borough of Seaside Heights entered into a professional services agreement pursuant to the LCPL that bars him from receiving pension credit pursuant to N.J.S.A. 43:15A-7.2(a) lacks any evidence to support it, much less the “substantial evidence” required, and does not follow the law. Accordingly, PERS’ decision on this issue must be set aside and vacated.

3. PERS’ conclusion that Pascarella was an independent contractor who was precluded from pension service credit by N.J.S.A. 43:15A-7.2(b) is not based on “legally competent evidence” that provides “assurances of reliability” so as to “avoid the fact or appearance of arbitrariness.”

The New Jersey Administrative Procedures Act requires agency actions to “include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director.” N.J.S.A. 52:14B-10. Courts review agency decisions to ensure they are not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” M.R. v. N.J. Dep’t of Corr., 478 N.J. Super. 377, 386 (App. Div. 2024) (quoting Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 302 (App. Div. 2022)).

Appellate review requires an analysis as to whether an agency has engaged in reasoned decision making which involves articulating an explanation for its conclusions establishing a rational connection between the facts found and the conclusions reached. If an agency fails to comply with N.J.S.A. 52:14B-10 by setting forth “findings of fact and conclusions of law, separately stated” that are “based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director” adequate reasons, courts cannot properly assess whether the agency acted lawfully and within its authority. Appellate courts must examine the agency’s decision and explanation to make sure the agency followed the law, expressed a rational explanation for its factual findings, and established a rational connection between the facts found and the conclusions reached. If a reviewing court determines that the agency has not adequately explained its decision, the decision is arbitrary and capricious and must be vacated.

The conclusion of PERS that Pascarella was an independent contractor barred by N.J.S.A. 43:15A-7.2(b) from obtaining retirement service credit pursuant to the twenty-factor IRS test outlined in IRS Rev. Rul. 87-41 is essentially a rubber stamp of PERS investigator Conover’s conclusions, without the analysis required by N.J.S.A. 52:14B-10. ALJ Scarola, whose decision was accepted in full, without comment or analysis by PERS, failed to properly evaluate the evidence of record

and set forth a rational explanation for its factual findings and how the facts found supported the conclusions reached. To be more specific, PERS did not explain why it accepted the testimony of PERS investigator Conover, who admittedly lacked first-hand personal knowledge of the facts and based her testimony on out of court statements of others and was not offered as an expert witness, and rejected the contrary under oath, in-court testimony of former Business Administrator Camera and Pascarella and the expert testimony of McDermott.

A review of the PERS decision demonstrates that it based upon unreliable evidence and faulty logic – a classic example of arbitrary, capricious, and unreasonable. The PERS conclusion that Pascarella was an independent contractor when he worked for the Borough and therefore precluded from pension service credit by N.J.S.A. 43:15A-7.2(b) is not based on “legally competent evidence” that provides “assurances of reliability” so as to “avoid the fact or appearance of arbitrariness” as required by N.J.A.C. 1:1-15.5. Rather, PERS’ conclusion that Pascarella was an independent contractor when he worked for the Borough is based on unreliable, out of court statements of Risley through the Employee/Independent Contractor Checklist that was signed by her in 2014 and accepted into evidence as R-8. PERS accepted the facts set forth by Risley in the Employee/Independent Contractor Checklist R-8 even though the facts were directly contradicted by in court sworn testimony of Pascarella and Camera and the

expert testimony of McDermott. PERS did not explain why testimony of PERS investigator Conover, based on the out of court statement of Risley in R-8 was accepted and the testimony of Pascarella and Camera and the expert testimony of McDermott was rejected. In fact, in her decision, accepted by PERS, ALJ Scarola did the opposite, explaining that she accepted all testimony stating, “[e]ach witness testified truthfully as far as he or she used their personal knowledge and assessed the factors to be applied.” (Ja22).

Without explaining why, the decision states, without any further elaboration:

Notwithstanding each witness’s application of the ABC test to their understanding of the position of municipal prosecutor in the Borough, I accept the determination of Conover that the petitioner was an IC under both section (a) and section (b) of the statute. Her analysis of the factors indicates that the petitioner could not be considered an employee.

[(Ja22).]

Conducting the analysis that PERS failed to conduct shows PERS investigator Conover had no firsthand knowledge of employment by the Borough of Pascarella, she never spoke to him or with Business Administrator Camera who did have such knowledge (Ja16), and she did not testify as an expert like McDermott.

The testimony of PERS investigator Conover was a “employee/IC checklist [that had been] sent to and prepared by Risley” on September 24, 2014. (Ja19) “and based on [Risley’s] responses,” PERS investigator Conover applied “the IRS

ABC (twenty-question) test.” (Ja19). PERS investigator Conover’s conclusions regarding the IRS ABC (twenty-question) test, based on the “employee/IC checklist” prepared by Risley. (Ja19 to Ja20). Conover’s conclusions based on the facts set forth in Risley’s R-8 were rebutted by sworn, in court testimony of Former Business Administrator Camera.

A. Behavioral Control

As to 1 – “Does the location [employer] have the right to control the worker?”, the form prepared by Risley stated “yes” but Former Business Administrator Camera, who had firsthand knowledge of the facts, testified, without contradiction, that the Borough had the right to determine the location and times of Pascarella’s performance of the services provided. (Ja12).

As to 2 – “Hiring. Appointed by administrator rather than governing body?” the form prepared by Risley stated “yes” but Former Business Administrator Camera, who had firsthand knowledge of the facts, disagreed, testifying that Camera was authorized by the governing body to interview Pascarella and negotiate his duties and responsibilities and the governing body accepted his recommendation.

As to 3 – “Hired based on submission of RFP?” Former Business Administrator Camera agreed with Risley R-8 that Pascarella was not hired based on submission of RFP.

As to 4 – “Performed personally, is the individual permitted to provide substitute personnel in his or her absence,” Former Business Administrator Camera disagreed with Risley R-8 and explained that that Pascarella was not hired able to provide substitute personnel but when he was unable to perform, the Borough would provide and pay a substitute.

As to 5 and 6, Camera agreed with Risley R-8 that Pascarella was Required to personally attend court sessions and could not hire others to perform the work.

As to 7, “Hours. Does the individual work established and fixed hours structure by or with the approval of the location [employer]?” Risley R-8 said no, and Former Business Administrator Camera testified without contradiction that Pascarella “had no choice in his hours” (Ja16) as the Court set them.

As to 8, conduct performance evaluations, Camera testified that evaluations were implied by the Borough annually continuing Pascarella’s employment. (Ja9).

As to 9, “Instructions. Is the worker given instructions on tasks?” Risley R-8 said no, and Former Business Administrator Camera disagreed testifying that “instructions and directions . . . were given to [Pascarella] . (Ja4).

As to 10, “Integration. Does the worker have to report to certain person at beginning of workday or required to account for attendance?” Camera disagreed with Risley R-8 and testified that Pascarella had to attend Court when in session and he did not decide when court sessions would be scheduled.

As to 11, “Timekeeping records for the worker⁴?” Camera agreed with Risley - 8, but Camera testified that, while Pascarella was required to attend Court when it was in session and he did not decide when court sessions would be scheduled. Thus, the employer had a system of keeping time and was aware of the times Pascarella worked.

As to 12 – “Premises. Is work performed mostly on premises?” Risley and Camera agreed work had to be performed on the Borough’s premises.

As to 13 – “Training. Does location require training?” Camera disagreed with Risley R-8 and testified Pascarella was required to attend training from the from the Ocean County Prosecutor’s Office, the Office of the Attorney General, and the State Police. (Ja15).

As to 14 – “Tools and equipment. Does location provide permanent workspace and facilities?”⁵ The record shows the Borough provided Pascarella with the tools necessary to perform his job, a place at which to perform it including access to court records and business cards.

⁴ Risley R-8 states this question in more detail as “Does the location [employer] maintain time keeping records or a system of keeping time for individual (other than via the submission of payment vouchers)?”

⁵ The full question number 14 on R-8 is “Tools and equipment. Does location provide permanent workspace and facilities (e.g. office space, tools, secretarial support, computer, etc. at the expense of the location)?”

As to 15 – “Sequence. Does location direct order and sequence of duties?” Camer disagreed with Risley R-8 and the record shows Pascarella did not direct the order and sequence of his duties, the Court set this.

As to 16 – “Reports. Is the worker required to prepare regular reports?” Risley n R-8 said no, and Camera testified that he did not know.

B. Financial Control

As to 1 – “Payment. Is payment through a voucher?” Both Risley R-8 and Camera agreed payment was not through vouchers.

As to 2 – “Payment for services on a regular basis?” Both Risley R-8 and Camera agreed - yes.

As to 3 – “Expenses. Reimbursement for travel or business expenses?” Risley R-8 said no, and Camera did not know.

As to 4 – “State and federal taxes deducted and paid?” Both Camera and Risley R-8 agreed - yes.

As to 5 – “Fringe benefits that are provided to other employees at locations?” Camera disagreed with Risley who said no fringes benefits were provided to Pascarella. The uncontested testimony was that Pascarella was offered health benefits like other employees but declined because he received them through his wife’s employment and, when he was out of work because of injuries,

he was paid as an employee on sick leave. Further, Pascarella contributed to the PERS pension plan for the years he worked for the Borough.⁶

As to 6 – “Compensation established by ordinance or resolution of governing body?” Both Camera and Risley R-8 agreed, yes. As to the conclusions of PERS investigator Conover regarding the IRS ABC (twenty-question) test that she extrapolated from Risley’s “employee/IC checklist” set forth on pages Ja19 to Ja20, McDermott gave expert testimony contradicting the conclusions reached by PERS investigator Conover.

C. Relationship to the Parties

As to 1 – “General Public/Other Employees. Is the worker also employed or associated with another entity that provides services to the location by contract, retainer or agreement?” Both Camera and Risley R-8 agreed – no.

As to 2 – “Continuing Relationship. Relationship ongoing,”⁷ Risley said no, and Camera pointed out that Pascarella as continued in his position every year.

As to 3 – “Union contract and location?” Both Camera and Risley R-8 agreed – no.

⁶ Salary continuation benefits like sick leave are not provided to independent contractors, something Risley agreed with.

⁷ The full question section C, number 2 on R-8 is “Continuing Relationship. Are the parties in a continuing relationship that is ongoing (a specific conclusion date or term indicates there was may be a continuing employment relationship)?”

As to 4 – “Offer services to the public at large?”⁸ Both Camera and Risley R-8 agreed – yes but the testimony was undisputed that Pascarella’s services to the public were limited because he could not practice criminal law.

As to 5 – “Does the individual perform essentially the same services for other public employers?” Both Camera and Risley R-8 agreed – no.

As to 6 – “Termination. Can the individual be terminated at the will of the location [employer]?” Both Camera and Risley R-8 agreed – yes.

As to 7 – “Discharge – Can the individual terminate the relationship at will?” Both Camera and Risley R-8 agreed – yes.

If Camera’s sworn, in court testimony is considered, the factors on the PERS form overwhelmingly show an employer-employee relationship and not an independent contractor relationship. The Risley form R-8 states, without providing any guidance as what differentiates an employee from an independent contractor, asks this question and Risley checked the box for “independent contractor.” This determination, however, is complex and requires more a sophisticated analysis that was provided through the expert testimony of McDermott but rejected by ALJ Scarola and PERS in favor of PERS investigator Conover’s conclusions based on R-8.

⁸ The full question section C, number 2 on R-8 is “Does the individual offer his services to the public at large (rather than exclusively to the location).”

As to the reliability of Risley's out of court statement set forth in R-8, Risley herself admitted at her deposition taken on July 16, 2024 pursuant to Court Order dated that she did not hire Pascarella, had no role in determining his duties and responsibilities and did not supervise him (2T20:5-12) and that former Business Administrator Camera was more knowledgeable regarding the factors in Exhibit R-8 than she was. (2T41:7-11).

PERS relied heavily on Exhibit R-8 that was signed by Risley, even though Barbara Risley did not testify and rejected the sworn testimony of former Business Administrator Camera who, as set forth above, testified as to Exhibit R-8 that was signed by Risley and why he disagreed based upon his first-hand knowledge of the facts. Accepting Risley's out of court statements as set forth in R-8 over Camera's contrary sworn, in-court testimony was error for the following reasons:

- Camera was the Business Administrator for the Borough of Seaside Heights from 1995 through the end of 2014;
- Mr. Camera was familiar with the employment of Pascarella;
- Mr. Camera testified that the Borough of Seaside Heights relationship with Pascarella was one of employee-employer;
- Mr. Camera testified that the Borough of Seaside Heights considered Mr. Pascarella as an employee as a matter of economic efficiency;
- The Borough of Seaside Heights authorized Mr. Camera to negotiate Mr. Pascarella's salary;
- Mr. Camera testified that Mr. Pascarella was treated as an employee because Mr. Pascarella was:
 - offered employee benefits including health insurance,
 - paid for five (5) months sick-leave to Pascarella,
 - provided office space in the municipal building,

- provided secretarial and administrative support by municipal employees,
- paid Pascarella with a bi-weekly check,
- had pension benefits and taxes taken from his paycheck,
- issued a W-2 IRS form from the Borough at the end of the year like all other Borough employees, and
- never had a professional service contract.

The Employee/Independent Contractor Checklist, Exhibit R-8, is demonstrably unreliable as demonstrated by the testimony of Barbara Risley taken on July 16, 2024 pursuant to Court Order dated April 26, 2024, stating:

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19 Q. Who was primarily answering the
20 questions?

21 I mean, you said you weren't familiar
22 with Mr. Pascarella's employment with the Borough,
23 correct?

24 **A. Well, I was familiar that he was**
25 **employed by the Borough of Seaside Heights but**
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1 **exactly what he did and what, you know, hours he**
2 **worked and like those types of things I had no idea.**

3 Q. So were you able to answer any of the
4 questions on the checklist, or did you rely on
5 John Camera?

6 **A. Oh, I think some of them I might have**
7 **been able to, but we went over the entire checklist**
8 **together.**

9 Q. Okay, and is it your testimony that
10 you answered it together, or you did what you could
11 and then gave it to him?

12 **A. No, we did it together.**

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5 Q. All right. Did you hire
6 Kim Pascarella?

7 **A. No.**

8 Q. Did you have any role in determining
9 his duties and responsibilities?

10 **A. No.**

11 Q. Did you supervise him?

12 **A. No.**

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20 Q. Mr. Camera testified that

21 Mr. Pascarella was hired as an employee and not as
22 an independent contractor, that Mr. Pascarella was
23 issued a W-2 as an employee, was offered fringe
24 benefits, and each year after issuing requests for
25 proposal for the position held by Mr. Pascarella,

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1 Seaside Heights decided to continue Mr. Pascarella
2 as an employee rather than hiring either
3 Mr. Pascarella or someone else as an independent
4 contractor.

5 Do you agree with Mr. Camera's
6 testimony?

7 **A. I guess so.**

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23 Q. Do you have any reason to dispute
24 that the testimony Mr. Camera, that Mr. Pascarella
25 was treated as an employee in every way, including
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1 providing sick leave for five months while
2 Mr. Pascarella recuperated --

3 **A. I don't recall that.**

4 Q. Do you have any reason to dispute
5 that, or are you just saying you don't remember?

6 **A. I don't remember.**

7 Q. Well, can we agree that sick leave,
8 especially for that duration, is something that
9 would not be given -- that is something that would
10 be afforded an employee, not an independent
11 contractor, fair to say?

12 **A. Yes. I mean, mayor and council**

13 **did -- what mayor and council did I had no control**

14 **over what they did.**

15 Q. Okay, but my question was, that is
16 something that is characteristic of an employment
17 relationship, not an independent contractor
18 relationship, correct?

19 **A. Yes.**

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7 Q. Okay. Would you agree that
8 Mr. Camera was more knowledgeable regarding the
9 factors in this questionnaire than you?

10 **A. I would, yes. That is why I didn't**
11 **complete it by myself.**

[2T13:19-14:12; 2T20:5-12; 2T25:20-26:7; 2T26:23-2T27:19;
2T41:7-11 (emphasis added).]

The sworn testimony of Barbara Risley and the records obtained from the Borough of Seaside Heights demonstrate that the residuum rule was violated in this matter. Investigator Conover agreed that she had no firsthand knowledge of the employment relationship between Pascarella and Seaside Heights. Yet, ALJ Scarola accepted her testimony which was based upon Risley's Employee/Independent Contractor Checklist, Exhibit R-8 and rejected the contrary sworn testimony of Business Administrator Camera, Pascarella and the expert testimony of McDermott.

The issue here is not one of credibility but on the lack of "legally competent evidence" to support the conclusion that Pascarella was an independent contractor which was based on the Risley's out of Court statements in R-8. PERS provided no analysis as to the basis for rejecting Camera's testimony and accepting Risley's R-

8. PERS reliance on Risley's out of Court statements in R-8, especially when Risley herself acknowledged under oath her limited knowledge and Camera's superior knowledge eliminates any "assurances of reliability" so as to "avoid the fact or appearance of arbitrariness" as required by N.J.A.C. 1:1-15.5.

Here, the conclusion of PERS that Pascarella was an independent contractor barred by N.J.S.A. 43:15A-7.2(b) from obtaining retirement service credit pursuant to the twenty-factor IRS test outlined in IRS Rev. Rul. 87-41 is based upon the same unreliable evidence and faulty logic. PERS relied on the out of court, statements of Risley as set forth in the Employee/Independent Contractor Checklist, Exhibit R-8, that she signed and ignored, without any explanation, the contrary sworn testimony of persons with first-hand knowledge, Business Administrator Camera and Pascarella and the expert testimony of McDermott who applied the facts to the IRS standards and concluded Pascarella was an employee and not an independent contractor.

As to McDermott's expert testimony, he testified that he was surprised by the investigator's analysis, as the IRS has form SS-8, which the Borough could have utilized to ask the IRS for its classification. McDermott pointed out that PERS Investigator Conover had no firsthand personal knowledge of the employment relationship between Pascarella and the Borough of Seaside Heights extrapolated from Risley's Employee/Independent Contractor Checklist, Exhibit

R-8, and applied those Risley’s responses to the IRS ABC (twenty-question) test.

The following chart sets forth the basis for Conover’s conclusions juxtaposed with the basis for McDermott’s findings:

IRS ABC 20 Question Test (N.J.S.A. 43:15A-7.2(B) Standard)	Conover Extrapolated Risley’s Check List Findings From Disavowed	McDermott’s Expert Opinion Based On Sworn, In Court Testimony Of Former Business Administrator Camera And Pascarella
<p>1. Level of instruction. If the company directs when, where, and how work is done, this control indicates a possible employment relationship.</p>	<p>Conover – I C (Independent Contractor) Based on Risley R-8 answer to A-9.</p>	<p>McDermott – Employee. Based on Camera testimony that “instructions and directions . . . were given to [Pascarella]. (Ja4).</p>
<p>2. Amount of training. Requesting workers to undergo company-provided training suggests an employment relationship since the company is directing the methods by which work is accomplished.</p>	<p>Conover – I C (Independent Contractor) Based on Risley R-8 answer to A-13.</p>	<p>McDermott – Employee. Based on Camera disagreed with Risley R-8 and testified Pascarella was required to attend training from the from the Ocean County Prosecutor’s Office, the Office of the Attorney General, and the State Police. (Ja15).</p>
<p>3. Degree of business integration. Workers whose services are integrated into business operations or significantly affect business success are likely to be considered employees.</p>	<p>Conover – I C (Independent Contractor but not strong) Based on Risley R-8 answer to A-13.</p>	<p>McDermott – Employee. Camera testified that Pascarella had to attend Court when in session and that Pascarella did not decide when court sessions would be scheduled.</p>

<p>4. Extent of personal services. Companies that insist on a particular person performing the work assert a degree of control that suggests an employment relationship. In contrast, independent contractors typically are free to assign work to anyone.</p>	<p>Conover – Employee but not strong Based on Risley R-8 answer to A-4.</p>	<p>McDermott – Employee Based on Camera’s testimony that “Pascarella was not permitted to provide substitute personnel in his or her absence and when he was unable to perform, the Borough would provide and pay a substitute.</p>
<p>5. Control of assistants. If a company hires, supervises, and pays a worker’s assistants, this control indicates a possible employment relationship. If the worker retains control over hiring, supervising, and paying helpers, this arrangement suggests an independent contractor relationship.</p>	<p>Conover – I C (Independent Contractor) Based on Risley R-8 answer to A-4.</p>	<p>McDermott – Employee Camera pointed out that that Pascarella’s co-workers in conducting assignments for the Borough were Borough employees and not Pascarella’s employees.</p>
<p>6. Continuity of relationship. A continuous relationship between a company and a worker indicates a possible employment relationship. However, an independent contractor arrangement can involve an ongoing relationship</p>	<p>Conover – I C (Independent Contractor) - Based on fact that Pascarella “applied annually.”</p>	<p>McDermott – Employee Based on Camera’s testimony that the Borough continued its employment relationship with Pascarella each year even though and did not hire an independent contractor pursuant to a RFQ.</p>

for multiple, sequential projects.		
7. Flexibility of schedule. People whose hours or days of work are dictated by a company are apt to qualify as its employees.	Conover – I C (Independent Contractor) Based on Risley R-8 answer to A-7.	McDermott – Employee Based on Camera’s uncontradicted testimony that Pascarella “had no choice in his hours” (Ja 16) as the Court set them.
8. Demands for full-time work. Full-time work gives a company control over most of a person’s time, which supports a finding of an employment relationship	Conover – I C (Independent Contractor) Not Addressed	McDermott – not addressed Not disputed, however, that Pascarella was not a full time employee of the Borough.
9. Need for on-site services. Requiring someone to work on company premises—particularly if the work can be performed elsewhere—indicates a possible employment relationship.	Conover – I C (Independent Contractor) (not strong)	McDermott – Employee Based on Camera’s testimony that the Borough determined the location (in Court) and times (when court was in session) of Pascarella’s performance of the services provided. (Ja12).
10. Sequence of work. If a company requires work to be performed in specific order or sequence, this control suggests an employment relationship.	Conover – I C (Independent Contractor) Based on Risley R-8 answer to A-15.	McDermott – Employee Based on Camera’s testimony that Pascarella did not direct the order and sequence of his duties, that the Court set this.
11. Requirements for reports. If a worker	Conover – I C (Independent	McDermott – not addressed

<p>regularly must provide written or oral reports on the status of a project, this arrangement indicates a possible employment relationship.</p>	<p>Contractor) Based on Risley R-8 answer to A-16.</p>	<p>Camera testified that he did not know whether Pascarella submitted oral or written reports.</p>
<p>12. Method of payment. Hourly, weekly, or monthly pay schedules are characteristic of employment relationships, unless the payments simply are a convenient way of distributing a lump-sum fee. Payment on commission or project completion is more characteristic of independent contractor relationships.</p>	<p>Conover – Employee (not strong)</p>	<p>McDermott – Employee Both Risley R-8 at B.1. and Camera agreed payment was not through vouchers. On the contrary, Pascarella was paid by the Borough through a bi-weekly paycheck as to which the Borough issued Pascarella a IRS W-2 like other employees and not an IRS 1099 like when independent contractors are issued.</p>
<p>13. Payment of business or travel expenses. Independent contractors typically bear the cost of travel or business expenses, and most contractors set their fees high enough to cover these costs. Direct reimbursement of travel and other business costs by a company suggests an employment relationship.</p>	<p>Conover – Neutral—no explanation</p>	<p>McDermott – not addressed Camera testified that he did not know if Pascarella was reimbursed for travel or business expenses or if there even were any.</p>
<p>14. Provision of tools</p>	<p>Conover – I C</p>	<p>McDermott – Employee</p>

<p>and materials. Workers who perform most of their work using company-provided equipment, tools, and materials are more likely to be considered employees. Work largely done using independently obtained supplies or tools supports an independent contractor finding.</p>	<p>(Independent Contractor) Based on Risley R-8 answer to A-14.</p>	<p>The Borough provided Pascarella with the tools necessary to perform his job, a place at which to perform it including access to court records and business cards.</p>
<p>15. Investment in facilities. Independent contractors typically invest in and maintain their own work facilities. In contrast, most employees rely on their employer to provide work facilities</p>	<p>Conover – Employee</p>	<p>McDermott – Employee Pascarella did not invest in the work facility to accomplish his work for the Borough, the Borough</p>
<p>16. Realization of profit or loss. Workers who receive predetermined earnings and have little chance to realize significant profit or loss through their work generally are employees.</p>	<p>Conover – I C (Independent Contractor) not strong Unexplained and any such conclusion is not based in evidence in the record</p>	<p>McDermott – Employee Pascarella received a salary, and he did not profit or loss based on his work.</p>
<p>17. Work for multiple companies. People who simultaneously provide services for several unrelated companies are likely to qualify as independent contractors.</p>	<p>Conover – I C (Independent Contractor) Based on Risley R-8 answer to A-4.</p>	<p>McDermott – Unspecified The record shows, however, that Pascarella’s services to the public were limited because he could not practice criminal law,</p>

		but he was allowed to engage in the practice of law when not working for the Borough.
<p>18. Availability to public. If a worker regularly makes services available to the general public, this supports an independent contractor determination.</p>	<p>Conover – IC Unexplained NOTE: Both Camera and Risley R-8 in answer to A-5 that Pascarella did not “perform essentially the same services for other public employers.”</p>	<p>McDermott – Employee Both Camera and Risley R-8 in answer to A-5 that Pascarella did not “perform essentially the same services for other public employers.”</p>
<p>19. Control over discharge. A company’s unilateral right to discharge a worker suggests an employment relationship. In contrast, a company’s ability to terminate independent contractor relationships generally depends on contract terms.</p>	<p>Conover – Employee R-8 at C.7.</p>	<p>McDermott – Employee NOTE: Both Camera and Risley R-8 agreed that the Borough had the right to unilaterally discharge Pascarella.</p>
<p>20. Right of termination. Most employees unilaterally can terminate their work for a company without liability. Independent contractors cannot terminate services without liability, except as allowed under their contracts.</p>	<p>Conover – Employee R-8 at C.7.</p>	<p>McDermott – Employee NOTE: Both Camera and Risley R-8 agreed that the Pascarella had the right to unilaterally terminate his employment with the Borough.</p>

While PERS investigator Conover concluded that certain factors indicated Pascarella was an independent contractor, as demonstrated above, Conover's conclusions were not supported by substantial evidence in the record, were based on the Risley out of court statements in R-8, which Risley herself acknowledged were unreliable, and Conover's testimony was contradicted by the testimony of McDermott who expressed his expert opinion based on facts presented at trial.

A review of the PERS decision here shows that it does not "express a reasoned conclusion" which is an essential element of N.J.S.A. 52:14B-10 and due process. PERS did not evaluate the facts presented with the 20 relevant factors of the IRS ABC test. McDermott provided his expert opinion of the relevant factors based on his education based on the facts presented at the hearing, addressing each relevant factor, applying his expertise and experience and concluded Pascarella was an employee not an independent contractor and the Borough treated him as such. PERS relied in whole on AJL Scarola's decision which did not provide a "careful consideration of the facts in issue and appropriate findings addressing the critical issues in dispute." Bailey v. Bd. of Review, 339 N.J. Super. 29, 33 (App. Div. 2001). N.J. Bell Tel. Co. v. Comm. Workers of Am., 5 N.J. 354, 375 (1950).

The decision does not adequately set forth basic findings of fact as to the relevant factors and explain why those findings were supported by the evidence in a way that is grounded in the evidence and not arbitrary, capricious or

unreasonable. The absence in the PERS decision of a reasoned analysis setting forth factual findings as to the 20 relevant factors of the IRS ABC test and explaining why certain testimony and evidence was found credible and contrary testimony and evidence was not, leads to the conclusion that PERS rubber stamped the conclusions of its investigator which is the very definition of arbitrary, capricious and unreasonable. Accordingly, the PERS decision must be set aside.

4. **Neither PERS nor the Borough took any action to notify Pascarella he was an independent contractor and not an employee and instead continued to treat Pascarella as an employee and PERS continued to accept pension payments made by him and his public employers on his behalf until he retired on March 1, 2019 after some 26 years of public service.**

The Employee/Independent Contractor Checklist, Exhibit R-8 completed by Barbara Risley on behalf of the Borough on September 24, 2014. The form directs the Borough to “notify the Division of Pensions immediately and take all appropriate action to remove ineligible individuals from PERS or DCRP membership.” (Ja142) (emphasis in original). The Borough and PERS took no action to notify Pascarella that he was considered an independent contractor and not an employee who was eligible for pension service credit. Instead, the Borough and PERS continued to treat Pascarella as an employee, including making and accepting his pension contributions, issuing IRS W-2 forms that are issued to employees, deducting payroll taxes rather than issuing IRS 1099 forms that are provided to independent contractors, PERS accepted all of the contributions he and

the Borough made towards his retirement pension and applied them to his employment with Ocean County that he began in 2016.

PERS notified Pascarella on August 11, 2017, that not only that he would not get receive service credit pension that he worked for and he and his public employers paid into paid into since 1993 and that he would not receive service credit for 9 years he worked for the Borough, but that “his continued membership in PERS would have expired in 2009” and, therefore, he was “no longer be eligible for service credit under a Tier 1” and service credit he was employed by the Ocean County Prosecutor’s Office from 2016 to 2019 would only be applied towards a “Tier 5 PERS account.”

Accepting payments for a future benefit and then refusing to provide that benefit when it came due is perhaps the most egregious violation that the law must address and remedy for “if there is a right, there must be a remedy” is a well-known legal principle, often expressed in Latin as “ubi jus ibi remedium.” This principle emphasizes the importance of access to justice and the availability of remedies for those who have been wronged. When an insurance company accepts premiums for a future benefit and then refusing to provide that benefit when comes due, the law provides a remedy pursuant to the doctrine of insurance bad faith where the insurance company owes a fiduciary duty to act in good faith. In commercial transactions a vendor or contractor who accepts money in exchange

for future performance, who reneges is subject to liability under the Consumer Fraud Act for treble damages and attorney's fees.

Government should likewise be held accountable when it refuses to provide a benefit after accepting money in exchange for a promise of a future benefit. In this regard, N.J.S.A. 43:3C-9.5 provides that, "upon the attainment of five years of service credit in the retirement system" a person "shall have a non-forfeitable right to receive benefits as provided under the laws governing the retirement system or fund." In Berg v. Christie, 225 N.J. 245, 253 (2016), the Supreme Court recognized that this statute granted "[q]ualifying members of the State's public pension systems or funds . . . a non-forfeitable right to receive benefits as provided under the laws governing the retirement system or fund" and that "the 'benefits program, for any employee for whom the right has attached, cannot be reduced.'" Ibid. This statute "underscored the view that a public employee's pension—a benefit accrued through many years of faithful public service—represented earned compensation, not a gratuity that would be revoked or reduced without cause." Ibid. (citations omitted).

The egregiousness of PERS' misconduct is evident in the testimony of Barabara Risley:

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8 Q. After you submitted Risley 6, also
9 R-8, the employee independent contractor checklist,
10 to the Division of Pension and Benefits in 2014, are

11 you aware of any action taken by the Division of
12 Pension and Benefits to remove Mr. Pascarella from
13 PERS membership and stop accepting his pension
14 contributions?

15 **A. Not that I'm aware of.**

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19 Q. Do you see under that it says,
20 employing locations must notify the Division of
21 Pension and Benefits immediately of any improperly
22 enrolled individuals and take all appropriate action
23 to remove eligible individuals from PERS or DCRP
24 membership; do you see that?

25 **A. Mm-hmm.**

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1 Q. You never took any such action to
2 remove Kim Pascarella from PERS, correct?

3 **A. Not that I recall.**

4 Q. And do you see under that where it
5 says, to remove an ineligible individual, stop
6 reporting pension contributions for the individual
7 on the quarterly report of contributions.

8 You never did that, correct?

9 **A. I would have to see the quarterly
10 report, what was -- if there was anything stated on
11 there.**

12 Q. Sitting here today, do you recall
13 ever doing that?

14 **A. No.**

15 Q. Then it says, immediately notify the
16 Division of Pension and Benefits, Pension Fraud
17 Abuse Unit in writing or by sending an e-mail. When
18 writing, please identify your employing location and
19 contact name and phone number, the name of the
20 independent contractor, professional service
21 provider, the position held and the original date of
22 hire or employment.

23 You never did that, correct?

24 **A. No.**

[(2T62:8-15; 2T94:19-95:24).]

PERS has accepted pension contributions made by Pascarella and his public employers in exchange for a promise of future payments. PERS takes the position that Pascarella’s “continued membership in PERS would have expired in 2009” even though it continued to accept contributions made in exchange for a promise of future payments in the form of a pension. If an insurance company or a commercial entity did this, the law would hold them to account. This case is no different. PERS must be held accountable to Pascarella and provide him with the retirement benefits it promised in exchange for the pension contributions it accepted.

PERS’ attempt to renege on its promise to provide Pascarella the future benefits it promised in exchange for years of contributions he and his public employers contributed towards, which at all times were accepted by PERS, should be rejected. PERS should be required by this Court to honor its promise to provide Pascarella future pension payments in accordance with its actions and promise.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Kim Pascarella respectfully requests that the court vacate the decision of PERS adopting the ALJ's decision affirming PERS' denial of Pascarella eligibility for PERS service credit from January 1, 2008 to February 1, 2016.

Respectfully submitted,

Law Office of Donald F. Burke
Attorneys for Petitioner-Appellant
Kim Pascarella

By: s/ Donald F. Burke
Donald F. Burke, Esq.

Dated: June 25, 2025

KIM PASCARELLA,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
	:	DOCKET NO. A-002951-23T4
Petitioner-Appellant,	:	
	:	<u>Civil Action</u>
v.	:	
	:	ON APPEAL FROM A FINAL
BOARD OF TRUSTEES,	:	AGENCY DECISION OF THE
PUBLIC EMPLOYEES’	:	BOARD OF TRUSTEES,
RETIREMENT SYSTEM,	:	PUBLIC EMPLOYEES’
	:	RETIREMENT SYSTEM
Respondent-Respondent.	:	

Brief and Appendix of Respondent Board of Trustees,
Public Employees’ Retirement System
Date Submitted: October 30, 2025

	MATTHEW J. PLATKIN
	ATTORNEY GENERAL OF NEW
	JERSEY
	R.J. Hughes Justice Complex
	P.O. Box 106
	Trenton, New Jersey 08625
	Attorney for Respondent Board of
	Trustees, Public Employees’ Retirement
	System
	(609) 376-2251
	Jeffrey.Padgett@law.njoag.gov
Sookie Bae-Park	
Assistant Attorney General	
Of Counsel	
Jeffrey D. Padgett	
ID: 235962017	
Deputy Attorney General	
On the Brief	

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Appellant, Kim Pascarella, appeals the April 22, 2024 final agency decision of the Board of Trustees, Public Employees' Retirement System denying PERS service credit pursuant to N.J.S.A. 43:15A-7.2(a) (“subsection (a)”) and (b) (“subsection (b)”) from January 1, 2008, to February 1, 2016, for the period he worked as municipal prosecutor for the Borough of Seaside Heights. (Pa1-2).²

A. Legislative History of Chapter 92

In 2005, concerned that the State's public pension systems were rife with abuse and upon the verge of a fiscal crisis, the Legislature undertook a comprehensive study and review of these problems. The Report of the Benefits Review Task Force to Acting Governor Richard J. Cody at 3 (December 1, 2005). The New Jersey Benefits Review Task Force issued a final report and recommendations in December 2005. Ibid. The Task Force described the problem relevant here as follows:

[t]he rules that allow the politically well-connected to game the system for their own benefit must be changed. The pension system exists to serve public employees who dedicate their careers to government and the

¹ Because the procedural history and fact are closely related, these sections are combined for efficiency and the court's convenience.

² “Pa” refers to Petitioner's Appendix; “Pb” refers to his brief; “Ra” refers to Respondent's Appendix .

eligibility rule must ensure that only they can participate. When non-deserving individuals are allowed to essentially freeload off the system, everyone loses. The bottom line is the system must be returned to those for whom it was designed.

[Id. at 4.]

The Task Force made specific recommendations to eliminate these practices stating:

Since the principal purpose of any public retirement plan is to provide adequate retirement benefits, such coverage should only be extended to “true” public employees.

Professional services vendors, such as municipal attorneys, tax assessors, etc., who are retained under public contracts approved by an appointing agency should not be eligible for a pension. In our opinion, these employees simply do not meet the original purpose of the public retirement plan and should not be eligible to participate in any pension plan.

In addition to preserving the integrity of the pension funds for those who had dedicated their lives to public service, this change will also serve as a disincentive to “tacking.”

[Id. at 18 (emphasis added).]

A Special Session Joint Legislative Committee on Public Employee Benefits Reform was convened, considered the Task Force Report Recommendations, held hearings and issued its Final Report on December 1, 2006. 2006 Special Session Joint Legislative Committee Public Employee

Benefits Reform Final Report, (Dec. 1, 2006). Recommendation No. 10 of the Joint Legislative Committee again urged that all professional services contractors be excluded from PERS membership. The Committee stated:

[B]oth the Internal Revenue Service and the New Jersey Department of Labor have rules that govern the distinction between an employee and an independent contractor. The purpose of this recommendation is to ensure that all public employers adhere to these rules.

[Id. at 83.]

In the years that followed, the Legislature enacted a series of sweeping reforms designed to curb abuses and restore fiscal integrity to the retirement systems. Chapter 92 was enacted in May 2007 to effectuate several recommendations in the Joint Legislative Committee Report. L. 2005 c. 92, § 20 (codified at N.J.S.A. 43:15A-7.2) responded to Recommendation No. 10 by clarifying that individuals who perform professional services under the laws governing local government contracts and school contracts governing—specifically N.J.S.A. 40A:11-5, 18A:18A-5 or 18A:64A-25.5—would not be eligible for future PERS service credit following the expiration of the term of any existing contract. N.J.S.A. 43:15A-7.2(a).

In July 2012, the Office of the State Comptroller (“OSC”) conducted an extensive audit of PERS local employer locations and found that, in violation of Chapter 92, a significant number of professional services providers remained

enrolled in PERS after January 1, 2008, even though many were engaged through professional services contracts awarded under the Local Public Contracts Law (the “LPCL”), N.J.S.A. 40A:11-1 thru -60, or were not “employees” but rather independent contractors. Improper Participation by Professional Service Providers in the State Pension System at 9 (July 17, 2012). The OSC Report found that many employers failed to review these situations or took no action after Chapter 92’s enactment, and as a result, many professional services providers, including attorneys who provided legal services to local governments under publicly bid contracts, remained in PERS after January 1, 2008, though ineligible for credit based on this service. Id. at 10-13. The examples cited in the OSC Report included municipal attorneys, municipal prosecutors and municipal public defenders. Ibid. Subsequent to the OSC Report, the Pension Fraud and Abuse Unit (“PFAU”) began auditing a number of municipalities to determine compliance with Chapter 92.

B. Pascarella’s Professional Relationship with Seaside Heights

On January 1, 1993, Pascarella enrolled in PERS as a municipal prosecutor for Seaside Heights. (Pa50.) He was initially appointed pursuant to Resolution No. 93-15 passed by the mayor and borough council. (Pa57.) Seaside Heights subsequently reappointed him by resolution every year, each resolution containing similar language. (Pa58-91.) The appointment process,

duties, and terms for municipal prosecutors are established by Chapter 70 of the Seaside Heights Municipal code. (Pa111.) From 2006 onwards, before appointing Pascarella, Seaside Heights would first publicly advertise and solicit proposals/qualifications for service providers to bid on a contract (request for proposal, “RFP”, or request for qualifications, “RFQ”) for “various professional appointments,” with public notice published in a newspaper. (Pa113-118;(Pa132-141.) The position of “prosecutor” (among other legal services) was specifically requested in each RFQ and notice. (Pa113-118; Pa132-141.) Pascarella would respond to the RFQ with his qualification packet. (Pa119-131.) In his 2013 and 2014 responses, Pascarella’s response was on firm letterhead and provided that his firm complies with affirmative action and the ADA, he also stated that “Joseph D. Coronato, Jr. has become associate with my office as of counsel, who will assist in the prosecuting duties.” (Pa119-120); (Pa125-126). Pascarella retired from PERS effective March 1, 2019. (Pa4).

C. Pension Fraud and Abuse Unit’s Investigation

On August 11, 2017, Kristin Conover, an investigator with the PFAU, issued an initial determination informing Pascarella that he was ineligible for PERS service credit from 2008 onwards for his work as municipal prosecutor for Seaside Heights under both N.J.S.A. 43:15A-7.2(a) and (b). (Pa44-48.) Pascarella’s matter was not placed on the Board for review, instead, the case

was returned for additional investigation and a determination by the PFAU using the Twenty-Factor balancing test established in IRS Rev. Rul. 87-41 (“Twenty-Factor test”), as affirmed by Petit-Clair v. Bd. of Trs., No. A-4561-18T1 at 111 (App. Div. July 27, 2020) (Ra55).³

On February 4, 2021, Conover found that Pascarella was ineligible for PERS service credit from 2008 onwards under both N.J.S.A. 43:15A-7.2(a) and (b). (Pa49-56.) She found Pascarella ineligible under subsection (a) because he was appointed pursuant to a resolution after a request for qualifications by Seaside Heights. (Pa96-98.) Conover then she applied the Twenty-Factor test and concluded that Pascarella’s relationship with Seaside Heights was that of an independent contractor, not an employee and thus, she also found him ineligible under subsection (b). (Pa98-100.)

During her investigation she reviewed documentation which included: Pascarella’s full personnel file, the RFQs/RFPs issued by Seaside Heights and accompanying resolutions. (Pa97-98.) Conover also reviewed Seaside Height’s

³ Originally, the Board and PFAU relied exclusively on an employee/independent contractor checklist to make subsection (b) determinations—this Court found that while the checklist could be used for fact finding, the ultimate decision needed to be “expressly moored to IRS authority.” (Ra56.) The Board’s use twenty-factor test was found to satisfy this mandate. (Ra64.) The twenty-factor test is used to determine if an employee-emplyoer relationship exists by focusing on the right of the employer to control and direct the employee. This control (or lack thereof) is grouped into twenty general categories or “factors.” IRS Rev. Rul. 87-41.

answers to the employee/independent contractor checklist, which was sent to municipalities across the State, and completed by a location's certifying officer. (Pa142-144.) Pascarella provided his own answers to the "20 factor questionnaire, which Conover reviewed. (Pa147-159.) She virtually interviewed Christopher Vaz, Seaside Heights Borough Administrator. (Pa98.) Included in "Appendix A" to her determination, Conover listed each factor in the Twenty-Factor test, the PFAU's finding on that factor, and the factual basis for that finding (interview with Vaz, documentation gained during the investigation, responses by Pascarella, or checklist completed by Seaside's certifying officer Barbara Risley). (Pa102-110.)

As to Factor #1 – instructions. Conover found that Pascarella was not instructed or controlled by Seaside Heights as to how to perform his duties of prosecutor, outside of a schedule established by the court, and thus he met the definition of independent contractor. (Pa103.) This finding was supported by Barbara's Risleys certified checklist, and by Pascarella's own response—who stated there was no performance evaluation. Id.

As to Factor #2 – training, Conover found that none of Pascarella's training was done through Seaside Heights, but rather the New Jersey Attorney General's Office, the New Jersey State Police and Count Prosecutors office. (Pa103.) Further, no record of any training was kept in his personnel file. Ibid.

Overall, he met the definition of independent contractor. Ibid. As to Factor # 3– integration, Conover found he met the definition of independent contractor but was not a strong indicator of status because while every municipality in New Jersey was required to have a prosecutor—it could be either a firm or an individual, and it is not required that they be an employee. (Pa103.)

As to Factor #4 – services rendered personally, Conover found that it weighed in favor of Pascarella’s classification as an employee, but was not a strong indicator of status because he was able to substitute members of his firm to fill his duties, but they were appointed as assistant municipal prosecutors by Seaside Heights. (Pa104.) Factor #5 – hiring, firing, supervising, and paying assistants, Conover found Pascarella meets the definition of independent contractor because had no secretarial support at Seaside Heights other than for discovery. (Pa104.) Further, the support staff for discovery are police department employees and their supervisor is the chief of police. Id.

Factor #6 – continuing relationship, she found Pascarella meets the definition of independent contractor because he was only appointed for one-year terms which required re-appointment annually, which Pascarella acknowledged in his response to the Twenty-Factor questionnaire. (Pa104.) Factor #7 – set hours of work, Pascarella meets the definition of independent contractor because there was no formal system to track his hours, and no established hours in which

the work must be done, outside of the court's schedule which is true of all prosecutors. (Pa105.) As to Factor #8 – full time required, Conover found that he met the definition of independent contractor because municipal prosecutor was not a full-time position. Id.

As to Factor #9 – doing work on employer's premises, Pascarella meets the definition of independent contractor because while a conference room was available for Pascarella's use, his work outside of court could be performed anywhere. (Pa106.) Factor #10 – order or sequence set, again, Pascarella meets the definition of independent contractor because he was free to perform preparation and all other duties in whatever order he saw fit. Id. He was only bound by the municipal court schedule. Id. As all prosecutors must follow the court schedule, this is not determinative in Conover's analysis. Id. Factor #11 – oral or written reports, Pascarella meets the definition of independent contractor because in Conover's interview with Vaz, he indicated that Pascarella was not required to, and did not, give any oral or written reports to the Borough. (Pa107.) Factor #12 – payment by hour, week or month, Conover found that Pascarella's bi-weekly payment of a set annual salary is consistent with Seaside Heights' misclassification. Id.

Factor #13 – payment of business and/or travel expenses, no reimbursements were made by Seaside Heights but it is unclear if he incurred

any costs, accordingly Conover found the neutral did not indicate status in either direction. (Pa107.) Factor #14 – furnishing of tools and materials, Pascarella meets the definition of independent contractor because, as Vaz stated in his interview, and confirmed in the employee/independent contractor checklist, Pascarella was not provided a personal private office, personal secretary, telephone, computer, E-mail, office supplies, vehicle, copier, fax, postage, legal research database, lawyer’s diary or calendar system. (Pa108.) Under Factor #15 – significant investment, Pascarella met the definition of employee because he had no investment in Seaside Heights. (Pa108.) Factor #16 – realization of profit or loss, Conover found that this factor slightly favors Pascarella’s classification as independent contractor because Vaz indicated that if Pascarella was sued it would only be covered by the Joint Insurance Fund if it was blatantly frivolous, otherwise his private malpractice insurance would get involved. (Pa109.)

Under Factor #17 – working for more than one firm at a time, the information provided by Vaz shows Pascarella performed work for other entities, specifically for other entities as prosecutor, thus Pascarella meets the definition of independent contractor. (Pa109.) Similarly, Factor #18 – making services available to the general public, Pascarella’s legal services were open to the public and other governmental entities. (Pa110.) Under Factor #19 – right

to discharge and Factor #20 – right to terminate, Conover found that Pascarella could resign or be terminated at any time with both favored status as an employee. (Pa110.)

On August 18, 2021, the Board considered Pascarella’s statements and the documentary evidence and denied PERS eligibility under both subsection (a) and (b) (Pa49-57.) The Board’s memorialized its reasoning in a determination dated September 13, 2021. Id.

It found Pascarella ineligible under subsection (a) because he was appointed pursuant to a resolution after a request for qualifications by Seaside Heights. (Pa51-52.) As for subsection (b), the Board applied the Twenty-Factor test to Pascarella’s relationship with Seaside Heights and determined significant factors weighed in favor of Pascarella’s status as an independent contractor: (1) instructions; (2) training; (3) integration; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer’s premises; (10) order or sequence set; (11) oral or written reports; (13) payment of business and/or travel expenses; (14) furnishing of tool and materials; (16) realization of profit or loss; (17) working for more than one firm at a time; and (18) marking services available to the general public. Id. Pascarella appealed, and this matter was sent to the

Office of Administrative Law for a hearing, where it was assigned to Administrative Law Susan M. Scarola. (Pa56); (Pa3).

B. Administrative Hearing and Determination

On December 14, 2022, a hearing was held in the OAL. (Pa4.) Conover testified for the Board, going factor-by-factor through the twenty-factor test and explaining how the evidence gathered during the investigation supported each finding. (Pa17-21.) Pascarella testified on his own behalf, along with Michael McDermott, a certified public accountant, and John Camera, the business administrator for Seaside from 1995 thru 2014. (Pa4-16.)

On November 6, 2023, the ALJ issued her Initial Decision. (Pa3-31.) The ALJ found Pascarella was ineligible for PERS service for his professional services to Seaside under both subsection (a) and (b). (Pa24-28.) For subsection (a), the ALJ found that while there was no formal written contract between the parties, Seaside was “clearly” retaining Pascarella for “professional services.” (Pa23.) The ALJ found that “the substance of the agreement between a municipality and its professional service provider, rather than the form of the agreement, controls.” (Pa26-27.)

The ALJ considered Conover’s factor-by-factor analysis of the twenty-factor test and concluded that “[a]n analysis of all of the above findings, the majority of which lean towards an independent contractor, thus leads to the

conclusion that Pascarella was an independent contractor rather than an employee, and, as such, his removal from PERS was warranted.” (Pa23.)

Pascarella submitted no exceptions, and on April 22, 2024, the Board issued its final administrative determination—affirming the ID without modification. (Pa1-2.) This appeal followed.

On February 24, 2025, Pascarella filed a motion to supplement the record with deposition testimony Barbara Risley, taken in an unrelated proceeding, which did not involve the Board. (Pa166.) The Board opposed because the deposition was taken in pre-litigation discovery for a potential civil law suit, the exact claims of which are unknown, and the Board is not a party. On March 27, 2025, Pascarella’s motion to supplement the record was granted. (Pa168.)

ARGUMENTS

POINT I

THE BOARD REASONABLY DETERMINED THAT PASCRELLA IS INELIGIBLE FOR PERS SERVICE CREDIT PURSUANT TO N.J.S.A. 43:15A-7.2(A). (RESPONDING TO APPELLANT’S POINT 1 AND 2.)

“Courts have but a limited role to play in exercising judicial review over the actions of other government agencies.” Carpet Remnant Warehouse, Inc. v. N.J. Dep’t of Labor, 125 N.J. 567, 595 (1991); Gerba v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 83 N.J. 174, 189 (1980). An administrative agency’s determination

is presumptively correct, and on review of the facts, a court will not substitute its own judgment for the agency's where the agency's findings are supported by sufficient credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Thus, if a court "is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result." Campbell v. New Jersey Racing Comm'n, 169 N.J. 579, 587 (2001) (internal citations omitted).

Deference is particularly appropriate when the Board has adopted the findings of the ALJ because the ALJ has the opportunity to hear "live testimony" and "judge the witnesses' credibility." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). Moreover, if lay witness testimony "can support more than one factual finding, it is the ALJ's credibility findings that control." Cavalieri v. Bd. of Trs., Pub. Emps. Ret. Sys., 368 N.J. Super. 527, 537 (App. Div. 2004).

On questions of law, the appellate courts "afford 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) (internal citations omitted). "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) (quoting In re Election Law Enf’t Comm’n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010) (additional citations omitted)). Thus, a party who challenges the validity of the Board’s administrative decision bears “a heavy burden of . . . demonstrating that the decision was arbitrary, unreasonable or capricious.” In re Tax Credit Application of Penrose Props. Inc., 346 N.J. Super. 479, 486 (App. Div. 2002); accord Russo v. Bd. of Trs., Police & Firemen’s Ret. Sys., 206 N.J. 14, 27 (2011).

Pascarella cannot shoulder that burden. While pension statutes should be construed liberally “in favor of the persons intended to be benefitted thereby,” Bumbaco v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 325 N.J. Super. 90, 94 (App. Div. 2000), “eligibility is not to be liberally permitted.” Smith v. Dep’t of Treasury, 390 N.J. Super. 209, 213 (App. Div. 2007). “Instead, in determining a person’s eligibility to a pension, the applicable guidelines must be carefully interpreted so as not to obscure or override considerations of . . . a potential adverse impact on the financial integrity of the [f]und.” Ibid. (quoting Chaleff v. Tchrs. Pension & Annuity Fund Trs., 188 N.J. Super. 194, 197 (App. Div. 1983) (alterations in original)). Further, the Board has both the authority and the obligation to correct errors in PERS benefits, regardless of when they arise.

N.J.S.A. 43:15A-54; Cavalieri v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 368 N.J. Super. 527, 539 (App. Div. 2004) (“The statute requires the retirement system to correct the error . . .”).

Under N.J.S.A. 43:15A-7.2(a):

A person who performs professional services for a political subdivision of this State or a board of education, or any agency, authority or instrumentality thereof, under a professional services contract awarded in accordance with section 5 of P.L.1971, c.198 (C.40A:11-5), N.J.S. 18A:18A-5 or section 5 of P.L.1982, c.189 (C.18A:64A-25.5), on the basis of performance of the contract, shall not be eligible for membership in the Public Employees’ Retirement System.

...

As used in this subsection, the term “professional services” shall have the meaning set forth in section 2 of P.L.1971, c.198 (C.40A:11-2).

[Ibid. (emphasis added).]

N.J.S.A. 40A:11-2(6) defines “professional services” as:

Services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.

[Ibid.]

Thus, Chapter 92 restricts from PERS eligibility employment under professional services contracts that are awarded pursuant to the LPCL. N.J.S.A. 43:15A-7.2(a). The purchase of goods and services by New Jersey municipalities is governed by the LPCL. N.J.S.A. 40A:11-1 to -60; N.J.A.C. 5:34-1.1 to -10.19. “The purpose of the [LPCL] is to secure for the public the benefits of unfettered competition by competitive bidding.” Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994) (quotation omitted). Generally, with certain limited exceptions, the LPCL requires that publicly advertised contracts in excess of the bid threshold are awarded to the lowest bidder through a public bidding process. N.J.S.A. 40A:11-4(a) & -6.1.

N.J.S.A. 40A:11-5 exempts professional services contracts from the LPCL’s statutory “lowest bidder” requirement by allowing what is commonly referred to as a “no-bid” contract. The statute states that any contract exceeding the bid threshold “may be negotiated and awarded by the governing body without public advertising for bids and bidding” and “shall be awarded by resolution of the governing body if “the subject matter of the contract is for ‘Professional Services.’” Ibid. (emphases added). The municipality “shall” award the contract via resolution, print the resolution in an official newspaper, and have the contract available for inspection. Ibid. The LPCL states that a

“contract[,], the amount of which exceeds the bid threshold, may be negotiated and awarded by the governing body without public advertising for bids” and awarded by resolution of the governing body if the contract is for “professional services.” N.J.S.A. 40A:11-5(1)(a)(i).

Here, the resolutions passed by Seaside Heights following the yearly issuance of RFQs renders Pascarella ineligible under N.J.S.A. 43:15A-7.2(a). While performing a professional service does not per se render an individual ineligible for PERS credit under subsection(a), Pascarella’s work as a legal service provider open to the general public is undoubtedly the exact type of position the Legislature intended to exclude from PERS in enacting the Chapter 92 reforms based on the 2006 Special Session Joint Legislative Committee Public Employee Benefits Reform Final Report, (Dec. 1, 2006). Recommendation No. 10 of the Joint Legislative Committee urged that all professional services contractors be excluded from PERS membership, lawyers being paramount among them. Id. This intent is reinforced by the OSC report which specifically highlights the position of prosecutor as being one in which individuals were incorrectly receiving pension service credit.

Pascarella argues that while he responded to the RFQs, Seaside was just “assessing its options,” and chose to hire him as an employee—never entering into a written professional services agreement. (Pb16.) In support of his

argument, he relies on the unpublished decision in Ragusa v. Board of Trustees, Public Employees' Retirement System, Docket No. A-5460-15T3 (App. Div. Sep. 7, 2018) (Pb24).⁴

In Ragusa, this court reversed the Board's denial of PERS membership to an attorney where the appellant refused to sign an employment contract and the municipality's resolutions "simply appointed Ragusa to the municipal prosecutor's position at the specified salary" and not "in accordance with [the LPCL] N.J.S.A 40A:11-5." Id. at *2. Because the Board was unable to provide proof of a meeting of the minds between Ragusa and the municipality on the terms of the appellant's contract, and because the appellant had been appointed under the LCPL, the panel found that she had not wrongfully and repeatedly accepted employment as an independent contractor, nor had she attempted to obtain PERS credit for this work. Id. at *18-19.

⁴ Pascarella fails to provide the contrary opinions required under R. 1:36-3. See Diktas v. Bd. of Trs., No. A-2449-19 at 8 (App. Div. June 1, 2021)(affirming Board's denial of service credit under N.J.S.A. 43:15A-7(a) and finding "ample evidence" in support, based on the plain language of the resolutions appointing the attorney pursuant to LPCL) (Ra1-13); Lanza v. Bd. of Trs., Pub. Emps.' Ret. Sys., No. A-2685-16T2 at 19 (App. Div. Mar. 5, 2019) (affirming Board's determination that appellant was not eligible for PERS service credit after effective date of Chapter 92, finding that municipal resolutions created a binding contract for professional services) (Ra35-54); Platt v. Bd. of Trs., Pub. Emps.' Ret. Sys., No. A-0516-15T4 at 7 (App. Div. June 19, 2017) (affirming Board's denial of PERS service credit after 2008 pursuant to N.J.S.A. 43:15A-7.2(a)) (Ra14-34).

Ragusa is factually distinguishable. There is no evidence here that Seaside Heights actually offered a formal employment contract to Pascarella, and Pascarella refused to sign. Nor does Pascarella argue that there was no meeting of the minds, instead he suggests that the lack of a formal written contract is legally dispositive of whether he was an employee or a independent contractor. (Pb16.) He offers no legal authority to support that view, and in any case he is incorrect.

First, Pascarella argues that because no written contract was available for inspection pursuant to N.J.S.A. 40A:11-5, the court should presume he was not hired pursuant to the LPCL. (Pb17.) This flawed logic is endemic in Pascarella's brief; if Seaside was correctly following the LPCL and the Chapter 92 reforms, it would have ceased his pension contributions at the end of 2007. The Board's position is that Seaside Heights was improperly treating Pascarella was pension eligible, and failing to keep a written contract on file is merely more evidence of that impropriety.

Second, a contract does not need to be in writing to be enforceable. Leodori v. Cigna Corp., 175 N.J. 293, 304-05 (2003). The absence of a formal contract does not defeat the parties' own conduct because the repeated use of resolutions demonstrates continued agreement for his position of prosecutor for Seaside Heights. N.J.S.A. 40A:11-14 of the LPCL directs that contracts for

goods and services “shall be in writing,” but is silent as to the form that writing must take. In the contrary unpublished cases Pascarella did not provide as required by court rule, an appellate found that a municipal resolution itself can constitute a binding agreement for professional services within the meaning of the LPCL. See Supra, at 22 fn. 3.

“[W]hile the contracts of a municipal corporation are ordinarily executed and signed on its behalf by one or more of its duly authorized officers, it is also well established by the great weight of authority that a contract, binding upon a municipality, may be brought into existence by a vote of the municipal council.” Buckley v. Jersey City, 105 N.J. Eq. 470, 478-79 (Ch. Div. 1930), aff’d, 107 N.J. Eq. 137 (E. & A. 1930); see McCurrie v. Town of Kearney, 344 N.J. Super. 470, 480 (App. Div. 2001), rev’d on other grounds, 174 N.J. 523 (2002) (holding that, “in the absence of statutory language to the contrary, a local government may enter into a contract by the passage of a resolution”). Resolutions passed publicly, committed to writing, following a public notice requesting proposals, should be found here (as they were in Lanza and Diktas) to constitute written contracts—even if they were not specifically referencing public contracts, the context of the RFQ issuance leads to a reasonable factual conclusion, the resolutions were the written contract stemming from the RFQs. (Pb22.)

POINT II

THE BOARD REASONABLY DETERMINED THAT PASCARELLA IS INEGLIBLE FOR PERS SERVICE CREDIT PURSUANT TO N.J.S.A. 43:15A-7.2(B). (RESPONDING TO APPELLANT'S POINTS 3 AND 4.)

Enacted in 2007, N.J.S.A. 43:15A-7.2(b) precludes any person who qualifies as an independent contractor from PERS membership after December 31, 2007. The statute states, in pertinent part:

A person who performs professional services for a political subdivision of this State or a board of education, or any agency, authority or instrumentality thereof, shall not be eligible, on the basis of performance of those professional services, for membership in the Public Employees' Retirement System, if the person meets the definition of independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code. Such a person who is a member of the retirement system on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall not accrue service credit on the basis of that performance following the expiration of an agreement or contract in effect on the effective date.

[Ibid. (emphasis added).]

It is fundamental that in interpreting a statute, a court will first look to its plain terms. Nobrega v. Edison Glen Assoc., 167 N.J. 520, 536 (2001). "If the language is plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms." Sasco 1997

NI, LLC v. Zudkewich, 166 N.J. 579, 586 (2001) (quoting State, Dep't of Law & Pub. Safety v. Bingham, 119 N.J. 646, 651 (1990)). The overriding objective is to “effectuate the legislative intent in light of the language used and the objects sought to be achieved.” McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (quoting State v. Hoffman, 149 N.J. 564 (1997)).

The Board’s use of the twenty-factor test has been most recently acknowledged in Petit-Clair v. Bd. of Trs., No. A-4561-18T1 at *11 (App. Div. July 27, 2020) (Ra55-67). This court has long recognized its application. Hemsey v. Bd. of Trs., Police & Firemen’s Ret. Sys., 393 N.J. Super. 524, 542, 544 (App. Div. 2007) (permitting twenty-factor test in classifying member as employee or independent contractor), rev’d, in part, on other grounds, 198 N.J. 215 (2009); accord Francois v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 415 N.J. Super. 335, 351 (App. Div. 2010) (approving Board’s use of twenty-factor test “to determine whether a public sector employer had sufficient ‘control’ over a person to so that the person was an employee whose service and salary was creditable in PERS”); Stevens v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 309 N.J. Super. 300, 303 (App. Div. 1998) (endorsing twenty-factor test);

Here, the Twenty-Factor test supports the Board’s conclusion that Pascarella was an independent contractor rather than an employee from 2008 onwards. In essence, the Twenty-Factor test simply quantifies what is apparent

in the record—Pascarella provided legal services to Seaside Heights as a contracted attorney, not personally as an employee of Seaside Heights. Accordingly, Pascarella was improperly classified as an employee.

Factor #1 – instructions: on balance this weighs in favor of Pascarella’s status as an independent contractor. The record indicates that Seaside Heights assigned cases to Pascarella to prosecute, but Pascarella had full discretion over when, how, and where he prepared for his cases and performed related tasks. His calendar was also established by the local municipal court, not Seaside Heights. Factor #2 – training: weighs in favor of independent contractor status because Pascarella did not receive any sort of training from Seaside Heights, which kept no record of his training in his personnel file (i.e. no training for workplace violence, sexual harassment, cybersecurity). While he attended trainings related to his position, those training did not occur through Seaside Heights—they occurred through sources like Continuing Legal Education classes and mandatory training conduct by the Attorney General, requirements of all municipal prosecutors regardless of employment status. Factor #3 – integration: based on the entire record, he meets the definition of independent contractor, but it is not a strong indicator of status. Under the Municipal Code, the position of prosecutor can be filled by an independent contractor or employee.

Factor #4 – services rendered personally: Pascarella meets the definition of employee, but it is not a strong indicator of status. He was permitted to substitute other attorneys from his firm to perform duties as municipal prosecutor, but they had been appointed by Seaside Heights as assistant municipal prosecutors. Factor #5 – hiring, supervising, and paying assistants: Pascarella meets the definition of independent contractor because he was not provided any secretarial support by Seaside Heights. The only support staff he was provided at all was for discovery matters, and this person served under the chief of police.

Factor #6 – continuing relationship: Pascarella meets the definition of independent contractor because he was reappointed annually via resolution. Pascarella acknowledges as much his response to the Twenty-Factor questionnaire. Factor #7 – set hours of work: Pascarella meets the definition of independent contractor. All prosecutors, regardless of classification, are directed by the municipal court's schedule. Preparatory work was entirely in Pascarella's discretion. No timekeeping system was in place for Pascarella. Factor #8 – full time required: his municipal prosecutor position was part-time. Pascarella had no set hours outside of his court schedule, and had other clients concurrently with Seaside Heights, accordingly he meets the definition of independent contractor.

Factor #9 – doing work on employer’s premises: Pascarella meets the definition of independent contractor, but it is not a strong indicator of his status. While Pascarella testified all preparatory work was performed at the borough office, he was not required to perform work at any specific location. Factor #10 – order or sequence set: Pascarella meets the definition of independent contractor. Regardless of classification, prosecutors are bound by the court schedule. He was free to perform all other duties as he saw fit.

Factor #11 – oral or written reports: Pascarella meets the definition of independent contractor because was not required to give any oral or written reports to Seaside Heights according to both Conover’s interview with Vaz and the employee/independent contractor checklist. Factor #12 – payment by hour week or month: Pascarella meets the definition of employee because he was paid in a bi-weekly paycheck recorded as W-2 income. However, this does not heavily indicate employee status, but rather, is simply consistent with his misclassification. Factor #13 – payment of business and/or travel expenses: is a neutral factor. Pascarella was not reimbursed for expenses, but it is unknown whether Pascarella incurred any expenses for travel.

Factor #14: furnishing of tools and materials: Pascarella meets the definition of independent contractor. Vaz and the employee/independent contractor checklist indicate that Seaside Heights did not provide a personal

private office, personal secretary, telephone, computer, E-mail, office supplies, vehicle, copier, fax, postage, legal research database, lawyer's diary or calendar system. Factor #15 – significant investment: Pascarella meets the definition of employee as he had no investments in Seaside Heights. Factor #16 – realization of profit or loss: Pascarella meets the definition of independent contractor because Vaz stated that Pascarella could be sued and it may have to be covered by his private malpractice carrier, and not the Joint Insurance Fund. This is not a strong indicator of status.

Factor #17 – working for more than one firm at a time: Pascarella clearly meets the definition of independent contractor. It is undisputed on the record that Pascarella performed services for public entities other than Seaside Heights, including work as prosecutor. This is particularly important in the context of legal services, as typically private attorneys who offer services to the public will not be deemed employees of public entities. See IRS Rev. Rul. 87-4.

Factor #18 – making services available to the general public: significantly, this weighs heavily in favor of classifying Pascarella as an independent contractor. It is undisputed that Pascarella offered his services as an attorney to the general public and maintained client relationships with other entities. Factor #19 – right to discharge: weighs in favor of Pascarella being considered an employee because his services could be terminated at any time. Finally, factor

#20 – right to terminate: again, this factor weighs in favor of finding that Pascarella was an employee, but not significantly. The fact that Pascarella could resign at any time is not central to the ultimate determination that he performed work as an independent contractor.

As the ALJ clearly found, no substantive changes were made to Pascarella’s relationship with Seaside Heights from before 2008 to after 2008, following the Chapter 92 reforms. Pascarella was not working as a bona-fide employee, but rather, better classified as an independent contractor when considering “the occupation and the factual context in which the services are performed.” 1987 IRB LEXIS 254, *10-11 (I.R.S. January 1, 1987). Pascarella’s relationship with Seaside Heights was that of an independent legal service provider, like the vast majority of other lawyers in New Jersey who offer their services to the public, not as an attorney-employee.

Pascarella now challenges the Board’s determination under subsection (b) by arguing a singular piece of evidence—the employee/independent contractor checklist that was admitted into the record below—is unreliable. (Pb33). Pascarella argues that it is unreliable because Barbara Risley’s stated in her July 16, 2024 deposition (in which the Board was not a party and had no notice) that she “had no role in determining [Pascarella’s] duties and responsibility and did not supervise him.” (Pb33).

As an initial matter, it is well settled that the Appellate Division “do[es] not consider issues not raised below at an administrative hearing.” In re Stream Encroachment Permit, Permit No. 0200-04-002.1 FHA, 402 N.J. Super. 587, 602 (App. Div. 2008) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

Regardless, his derivative argument that the ALJ’s determination violated the “residuum rule” by relying ths allegedly inaccurate evidence also fails. (Pb36). In administrative proceedings, parties are not bound by the formalities of the Rules of Evidence. N.J.A.C. 1:1-15.1.4. Thus, “[h]earsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony.” Weston v. State, 60 N.J. 36, 51 (1972). However, “a fact finding or a legal determination cannot be based upon hearsay alone [T]here must be a residuum of legal and competent evidence in the record” for a court to uphold an administrative decision. Ibid. The residuum rule, however, “does not require that each fact be based on a residuum of legally competent evidence but rather focuses on the ultimate finding or findings of material fact. The competent evidence standard applied to ultimate facts requires affirmance if the finding could reasonably be made.” Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359-60 (2013).

Clearly, the ultimate finding of fact (that Pascarella should have been classified as an independent contractor) is reasonably made on the documentary evidence contained in the record. Even assuming an infirmity with the checklist, the determinations of the PFAU, the Board, and the ALJ as to each factor were not based solely on the checklist from Risley—multiple pieces of evidence supported each factor in the Board’s determination. Specifically, there was the checklist, an interview with an employee of Seaside Heights (Christopher Vaz), Pascarella’s personnel file, and additional documents. (Pa105-110). This includes Pascarella’s own response to the twenty-factor test that he submitted to the Board (Pa145-159), and was explicitly considered by the Board, Conover, and the ALJ. (Pa102-110). All of this evidence was admitted into evidence and properly considered in the ALJ’s determination. (Pa22).

Pascarella then faults the Board for its alleged failure to explain why it accepted the testimony of Conover—who he claims did not have firsthand knowledge of the case. (Pb23-25). Again, Pascarella’s argument shows a fundamental misunderstanding of what constitutes competent evidence. Conover was simply an investigator communicating the documentary evidence gained to the ALJ and rendering a decision—she was not testifying as the sole basis of the Board’s determination, nor could she, because she did not work for Seaside Heights and has no relationship with Pascarella.

Even more confusingly, Pascarella states that the testimony of McDermott was “rejected” without any citation as to where this rejection occurred. (Pa26). As Pascarella notes, the ALJ accepted McDermott’s testimony and it is contained in the record—in fact the ALJ found that every witness “testified truthfully.” (Pa22). Simply because the ALJ’s ultimate conclusion was unfavorable to Pascarella, does not mean testimony was rejected or found not to be credible.

Ultimately, Pascarella essentially asks this court to weigh the twenty-factor test differently than the ALJ and the Board. (Pb38-43). In Petit-Clair v. Bd. of Trs., No. A-4561-18T1 at 13 (App. Div. July 27, 2020), the panel found the Board, in weighing the twenty-factor test, reached a decision that “deserves our deference.” (Ra67). That decision recognized that “[a]lthough reasonable minds may differ in a close classification case, the Legislature has delegated the responsibility for making this determination to the Board.” (Ra65). This court explicitly, and correctly, rejected Petit-Clair’s request to substitute the court’s judgment for the Board’s. (Ra66). As these matters involve weighing facts to determine pension eligibility, there was ample support in the record for the Board’s determination and that rulings is entitled to substantial deference.

Finally, Pascarella argues that “[t]he Borough and PERS took no action to notify Pascarella that he was considered an independent contractor and not an

employee who was eligible for pension service credit.” (Pb45.) As a threshold matter, the Board equally relies on accurate reporting and pension contributions from a municipality—Seaside Heights—who is not a party to this administrative determination, and any legal recourse Pascarella may seek against Seaside Heights is not before the court.

Next, to the extent Pascarella alleges an equitable estoppel argument because the Division “accepted” his pension contributions; 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); (Pb25.) This doctrine is “applied in only very compelling circumstances[,]” Davin, L.L.C., v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000), and 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 equitable estoppel should be applied rests squarely with the party asserting the equitable claim. Ibid.

Equitable estoppel should not be applied so as to thwart or compromise the will of the Legislature. Cnty. 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) (finding that a pension member could not claim equitable remedy unavailable under statutory law). “When positive statutory law exists, an equity court cannot supersede or abrogate it.” In re Quinlan, 137 N.J. Super. 227, 236 (Ch. Div. 1975).

The Board is vested with “the general responsibility for the proper operation of the retirement system.” N.J.S.A. 43:16A-13(1). Allowing ineligible members to receive retirement benefits “place[s] a greater strain on the financial integrity of the fund in question and its future availability for those persons who are truly eligible for such benefits.” Smith v. Dep’t of Treasury, 390 N.J. Super. 209, 215 (App. Div. 2007).

Here, Pascarella’s eligibility under Chapter 92 is a prerequisite to any claim of equitable relief. Berg, 225 N.J. at 280. Further, Pascarella utterly fails to allege any actions on the part of the Board or Division that could conceivably give rise to a claim of equitable estoppel, much less provide uncontroverted proof of misrepresentation or concealment. Apart from processing his pension contributions as normal, the Division had absolutely no involvement in Pascarella’s employment prior to its review of his employment status under Chapter 92. As opposed to misrepresentation or concealment, the Division

promptly and accurately informed Pascarella that he was not entitled to enrollment in PERS once his employment status was reviewed.

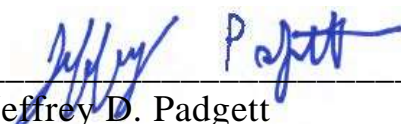
CONCLUSION

For the reasons above, the Board's final administrative determination should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By:



Jeffrey D. Padgett
Deputy Attorney General

Dated: October 30, 2025

Superior Court of New Jersey
Appellate Division
Docket No.: A-002951-23

KIM PASCARELLA,

Petitioner-Appellant,

v.

**BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT
SYSTEM,**

Respondent-Respondent.

Civil Action

**On Appeal from the Board of
Trustees of the Public Employees'
Retirement System, Department of
the Treasury, PERS 2-10-360171**

Reply Brief of Petitioner of Appellant Kim Pascarella

On the Brief:

**Donald F. Burke, Esq.
#008011983**

**Donald F. Burke Jr., Esq.
#034812011**

**LAW OFFICE OF DONALD F. BURKE
45 Gale Road**

**Brick, New Jersey 08723
Tel: (732) 966-4922**

Email: donaldburkesq@gmail.com

**Attorneys for Petitioner-Appellant
Kim Pascarella**

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PRELIMINARY STATEMENT

Respondent Board of Trustees of the Public Employees' Retirement System's (PERS) brief offers no credible basis in law or equity to sustain the Board's arbitrary and retroactive reclassification of Kim Pascarella (Pascarella) as an "independent contractor" rather than an employee after more than two decades of accepting pension contributions made by him and on his behalf as an employee. PERS's brief fails to address the significance of the undisputed fact that PERS accepted 26 years of pension contributions from Pascarella and his employers yet on September 13, 2021 it denied Pascarella's request for a pension. From 1993 until 2019, when Pascarella left public employment, PERS never informed him that he was classified as an independent contractor and not eligible for a pension. Instead, every record—payroll, tax filings, PERS membership, transfer of contributions and personal benefit statements—identified Pascarella as an employee and a contributing member of the PERS system for 26 years.

Thus, this case is not merely about statutory interpretation under N.J.S.A. 43:15A-7.2. It is about fair dealing, course of conduct, agency accountability, and the fundamental equitable principles that prevent government from benefiting from an employee's service and pension contributions, only to later deny the employee the corresponding promised benefit – a retirement pension. Pascarella's 26-year retirement plan has been shattered.

PERS denial began with a PERS investigator's conclusion, that "based upon information obtained" Pascarella "was ineligible to continue participation in the PERS with the location after December 31, 2007" and that Pascarella's "retirement system membership account will be adjusted to exclude any salary and service credit to him after that date." (Ja95). PERS conceded and ALJ Scarola agreed however, that "[n]o written professional-services contract" between Pascarella and Seaside Heights was in Pascarella's file (Ja18). Notwithstanding the complete lack of evidence of a statutorily required written contract, ALJ Scarola found that it was enough for Pascarella to have responded to an RFP or an RFQ from the Borough, even though the uncontradicted testimony is that Seaside Heights issued an RFP or an RFQ to decide whether to continue with Pascarella as an employee. N.J.S.A. 40A:11-5, specifically incorporated into N.J.S.A. 43:15A-7.2(a), requires a municipality retaining a professional under a professional services agreement to file in the office of the municipal clerk for public inspection the "written contract" and as well as a resolution awarding each contract specifying "the nature, duration, service and amount of the contract," something absent here. By disregarding this statutory requirement, PERS committed legal error.

With regard to PERS's conclusion that Pascarella was an independent contractor and not an employee under N.J.S.A. 43:15A-7.2(b), which incorporates

the Internal Revenue Service's Twenty-Factor Test, ALJ Scarola (Ja27) concluded that Pascarella:

- was free to do the work as he sees fit;
- has no direction from the Borough;
- is not evaluated;
- receives annual appointments;
- has no fringe benefits; and
- performs all the services as would be encompassed in a professional service contract.

ALJ Scarola did not tie these findings to the Internal Revenue Service's 20-Factor Test, violating N.J.S.A. 52:14B-10 that requires, "findings of fact and conclusions of law, separately stated." Moreover, these findings were based on the conclusions of the PERS investigator who admitted that she lacked personal knowledge and who relied on hearsay evidence including Exhibit R8 which was prepared by Barbara Risley (Risley). The facts set forth in Exhibit R8 were directly contradicted by live, sworn testimony presented by Pascarella, his supervisor at Seaside Heights, Business Administrator John Camera, and Michael P. McDermott, CPA. McDermott testified as an expert witness on application of the IRS Twenty-Factor test and concluded that Pascarella was an employee not an independent contractor. At a post-hearing, court ordered deposition made part of this record, Barbara Risley disavowed knowledge necessary to answer the questions asked in Exhibit R8 and agreed that Camera had such knowledge. (2T35:4-8).

STATEMENT OF FACTS

The facts are essentially undisputed; it is the inferences and legal conclusions drawn from those facts that control the outcome of this appeal. The legal issues are 1) whether Pascarella had a professional service contract with the Borough of Seaside Heights pursuant to N.J.S.A. 43:15A-7.2(a) and, relatedly, 2) whether Pascarella was an independent contractor as defined by N.J.S.A. 43:15A-7.2(b).

Importantly, PERS does not contest and acknowledges that:

1. Pascarella enrolled in PERS as an employee of Seaside Heights performing the duties of municipal prosecutor for Seaside Heights from January 1, 1993 until February 1, 2016 when he became employed by the Ocean County Prosecutor's Office.
2. Pascarella is entitled to pension service credit for his employment with the Borough of Seaside Heights as a Municipal Prosecutor from January 1, 1993 to January 1, 2008.
3. Pascarella and Seaside Heights made pension contributions and PERS accepted the contributions as though Pascarella an employee of Seaside Heights for the entire time Pascarella worked for Seaside Heights from January 1, 1993 until February 1, 2016 when he became employed by the Ocean County Prosecutor's Office.
4. In 2016, PERS allowed Pasquarella to transfer all of the pension contributions/credits he earned from January 1, 1993 to January 1, 2008 and those credits continued to accrue during his employment with the Ocean County.
5. It was not after Pascarella sought a retirement pension that PERS informed Pascarella that he was being stripped of PERS service credit when he worked for Seaside Heights from 2008 to 2016 under both N.J.S.A. 43:15A-7.2(a) and (b) and, further, that PERS would not credit him for the pension contributions

Pascarella and Ocean County made while he was employed by the Ocean County Prosecutor's Office from February 1, 2016 to February 28, 2019 because his PERS "would have expired" on January 1, 2028. (Ja95-Ja101).

6. Conover acknowledged that she did not have first-hand knowledge of the facts regarding Pascarella's employment with the Borough of Seaside Heights.

7. Conover testified regarding Employee/Independent Contractor Checklist, Exhibit R-8 that was signed by Barbara Risley. (1T138:23-1T139:3).

With regard to Pascarella's employment with the Borough of Seaside Heights as a Municipal Prosecutor from January 1, 1993 to January 1, 2008, the following facts presented at the trial before ALJ Scarola are unrefuted by PERS:

1. The Borough of Seaside Heights had the right to control Pascarella's hours – he worked when municipal court was in session.

2. The Borough of Seaside Heights required Pascarella to perform services at its workplace – in municipal court.

3. The Borough of Seaside Heights curtailed Pascarella's outside employment – Pascarella was prohibited from representing criminal defendants.

4. The Borough of Seaside Heights reviewed Pascarella's performance every year when his employment contract was renewed.

5. The Borough of Seaside Heights paid Pascarella bi-weekly.

6. The Borough of Seaside Heights provided Pascarella with a W-2 like other employees and not a 1099 that is provided to independent contractors.

7. The Borough of Seaside Heights continued to pay Pascarella for 5 months when he was out injured, a benefit an independent contractor would not be afforded.

8. The Borough of Seaside Heights deducted pension payments from Pascarella's check. (1T14:2-1T43:17).

9. The Borough of Seaside Heights had Pascarella maintain records of his time.

10. The Borough of Seaside Heights provided Pascarella tools and equipment – an office, computer office supplies including office space in the municipal building, secretarial and administrative support by municipal employees, (1T64:17-1T65:14; 1T62:2-12).

11. The Borough of Seaside Heights wanted to maintain an employee-employer relationship with Pascarella and not an independent contractor relationship as a matter of economic efficiency. (1T60:14-1T61:1).

12. The Borough authorized Camera to negotiate the terms of Pascarella's employment and his salary. (1T61:2-1T61:10).

13. From 1993 to 2016 the petitioner was employed and was enrolled in the pension system and being paid as an employee of the Borough of Seaside Heights. (1T156:20-1T157:2).

14. Pascarella had a PERS pension number at the Borough and had the same pension number at the OCPO.

15. While the Borough of Seaside Heights had issued a Request for Quotations each year to consider its options, the Borough of Seaside Heights continued with Pascarella as an employee and never entered into a written professional services contract with Pascarella. awarded under the provisions of the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-5 and N.J.S.A. 19:44A-20.4 et seq. (1T77:13-16) (1T157:3-1T159:17).

16. ALJ Scarola and PERS relied heavily on Exhibit R-8 – an out-of-court statement of Barbara Risley that was not subjected to cross examination which was directly contradicted by the sworn testimony of former Business Administrator Camera and Pascarella both of whom had personal knowledge and were subjected to cross examination.

17. The testimony of Barbara Risley was taken on July 16, 2024 pursuant to Court Order dated April 26, 2024. (2T; Ja371) and she confirmed that she lacked first-hand knowledge of the facts requested by the checklist. (2T41:7-11).

18. Risley testified at deposition on July 16, 2024 that in preparing Exhibit R-8, she relied upon Business Administrator John Camera to provide the pertinent facts who had knowledge of Pascarella's employment that she lacked.

The above unrefuted and undisputed facts of record inform and dictate the legal conclusions to be reached and show that PERS' decision to disqualify Pascarella is arbitrary, capricious, or unreasonable because it is not supported by substantial credible evidence in the record as a whole and does not follow the law.

LEGAL ARGUMENT

Point I

PERS' Decision Did Not Follow The Law, Its Conclusions Were Not Based Upon "Legally Competent Evidence" That Provides "Assurances Of Reliability" So As To "Avoid The Fact Or Appearance Of Arbitrariness" And The Conclusions Lack "Substantial Evidence" To Support Them.

The legal conclusion that Pascarella is disqualified from receiving retirement credits by N.J.S.A. 43:15A-7.2(a) cannot be sustained as a matter of law because the process of awarding a professional services contract pursuant to the Local Public Contracts Law N.J.S.A. 40A:11-1 et seq. (LPCL), as required by N.J.S.A. 43:15A-7.2(a), was not followed as there is no written contract between Pascarella and Seaside Heights on file with the Municipal Clerk for public inspection as mandated by the LPCL.

As to whether Pascarella was an independent contractor or an employee pursuant to the Twenty-Factor balancing test established in IRS Rev. Rul. 87-41 (IRS Twenty-Factor test), the ALJ reached the conclusion that Pascarella was an independent contractor only by accepting testimony of the PERS investigator

based on hearsay – Exhibit R8 prepared by Barbara Risley. The facts set forth in Exhibit R8 were directly contradicted by live, sworn testimony presented by Pascarella, his supervisor at Seaside Heights, Business Administrator John Camera, and Michael P. McDermott, CPA, who testified as an expert witness on application of the IRS Twenty-Factor test. In a post-hearing court ordered deposition made part of this record by Court Order, Barbara Risley disavowed knowledge necessary to answer the questions asked in Exhibit R8 and agreed that Business Administrator Camera had such knowledge. This is not a matter of credibility because ALJ Scarola found testimony of Pascarella, Camera, and McDermott was truthful stating, “[e]ach witness testified truthfully as far as he or she used their personal knowledge and assessed the factors to be applied. I accept each party’s understanding of how the position of municipal prosecutor was performed.” (Ja22).

1. Standard of review.

PERS spends almost three pages of its brief setting forth a standard of review that seeks to have this Court simply rubber stamp PERS’ conclusions without an exacting analysis necessary for judicial review. The standard of review on appeal, however, requires an exacting review of the record to make sure the agency’s conclusions are based on legally competent evidence that provides assurances of reliability so as to avoid the fact or appearance of arbitrariness. This

is an important control over agency which would otherwise be an unbridled exercise of agency power. An exacting review of the record is most important in cases like this where the agency is a *de facto* litigant and reviewing its own conduct and analysis. PERS' repeated reference in its brief to potential adverse impact on the financial integrity of the pension fund must not be a factor in the analysis. For one thing, PERS reported assets totaling \$38,732,313,227 at the close of fiscal year 2024.

[https://www.nj.gov/treasury/pensions/documents/financial/annrpt2024/2024-](https://www.nj.gov/treasury/pensions/documents/financial/annrpt2024/2024-ACFR-NJDPB.pdf)

ACFR-NJDPB.pdf, page 28 and, as PERS acknowledges, "pension statutes should be construed liberally 'in favor of the persons intended to be benefitted thereby.'" (Db19) (citation omitted).

PERS cites Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007) as requiring "substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." (Db18). PERS omitted, however, the following from Richardson, which is perhaps the most important part of the case regarding appellate review and directly applicable here:

An appellate court, however, is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." In re Taylor, 158 N.J. 644, 658 (1999) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

[Richardson, 192 N.J. at 196.]

Further, PERS fails to acknowledge the requirements imposed by the Administrative Procedure Act (APA) on contested matters. N.J.S.A. 52:14B-1 to -31. The APA requires findings of fact to be based “exclusively on the evidence and on matters officially noticed,” N.J.S.A. 52:14B-9(f), and while hearsay evidence is admissible, “some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.” N.J.A.C. 1:1-15.5(b). This provision, known as the “residuum rule,” means hearsay may be “employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony.” DeBartolomeis v. Bd. of Rev., 341 N.J. Super. 80, 85 (2001) (quoting Weston v. State, 60 N.J. 36, 51 (1972)).

Indeed, “[appellate] review of an agency’s decision is not simply a *pro forma* exercise in which [the Court] rubber stamp findings that are not reasonably supported by the evidence; ‘it calls for careful and principled consideration of the agency record.’” Chou v. Rutgers, State Univ., 283 N.J. Super. 524, 539 (App. Div. 1995), certif. denied, 145 N.J. 374 (1996). In certain cases, the interest of justice “authorizes a reviewing court to abandon its traditional deference to agency decisions when an agency’s decision is manifestly mistaken.” Outland v. Bd. of Trs. of Teachers’ Pension & Annuity Fund, 326 N.J. Super. 395, 400 (App. Div. 1999) (citing P.F. v. New Jersey Div. of Developmental Disabilities, 139 N.J. 522,

530 (1995)). Exacting judicial review of agency action is important because it acts as a critical check on the power of the executive branch's administrative agencies, ensures that the agency follows the law and the Constitution, protects the rights and liberties of individuals from potential government overreach, and guarantees that decisions are based on a fair and reasonable process and not the result of conflicting interests.

The Supreme Court in In re Stallworth, 208 N.J. 182, 194 (2011), succinctly set forth the standard of appellate review as whether “the agency’s decision to be ‘arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.’” This is determined by deciding “(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.” Ibid.

As set forth below, an exacting review of the record here shows that PERS decision is arbitrary, capricious, or unreasonable, and not supported by substantial credible evidence in the record as a whole and must, therefore, be reversed.

2. The conclusion that Pascarella worked “pursuant to a series of Professional Services Contracts awarded under the provisions of the Local Public Contracts Law and N.J.S.A. 19:44A-20.4 et seq, and he is therefore ineligible for PERS service credit from Seaside Heights after December 31, 2007 under N.J.S.A. 43:15A-7.2(a)” (Ja3-Ja31; 2T) lacks substantial credible evidence in the record and does not follow the law.

PERS determined that Pascarella worked pursuant to a series of Professional Services Contracts awarded under the provisions of the Local Public Contracts Law and N.J.S.A. 19:44A-20.4, et seq, and he is therefore ineligible for PERS service credit from Seaside Heights after December 31, 2007 under N.J.S.A. 43:15A-7.2(a). In its brief, PERS asks this Court to afford deference to this finding and assume it is “presumptively correct” (Ja18) based on the standard of review of agency actions without analyzing whether there is substantial credible evidence to support the conclusion as required by In re Stallworth. Administrative power, however, must be exercised within constitutional boundaries and the rule of law must be upheld. Judicial review is the only control to make sure administrative decisions are not unbridled administrative power. Assuming PERS is “presumptively correct” would be to abdicate the responsibility for judicial review.

An exacting appellate review of the record here shows that PERS failed to follow the law. The PERS decision does not follow N.J.S.A. 43:15A-7.2(a) because it restricts Professional Service Contracts to those entered into pursuant to the Local Public Contracts Law (LPCL). The LPCL, N.J.S.A. 40A:11-5, requires a municipality to maintain “on file and available for public inspection” such a

contract. Here, PERS found as a fact that “a ‘written contract’ was not formally signed by the parties” (Ja23) but nevertheless held N.J.S.A. 43:15A-7.2(a) Pascarella was “ineligible for PERS service credit from Seaside Heights after December 31, 2007 under N.J.S.A. 43:15A-7.2(a).” (Ja28). This conclusion, based entirely on the reasoning that “the absence of a written contract did not negate that one existed” (Ja18), fails to follow the law and is logically flawed.

In its brief, PERS makes an outrageous and completely unsupported claim that the Borough of Seaside Heights was “improperly treating Pascarella” by “failing to keep a written contract on file” and this is “more evidence of that impropriety.” (Db22). This accusation – that the Borough of Seaside Heights was acting improperly by failing to keep a written professional service contract on file, as opposed to hiring Pascarella as an employee and not pursuant to a Professional service agreement entered into in conformance with the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-5, flies in the face of the presumption of governmental regularity – that government officials and agencies act lawfully, honestly, and in good faith. It also disregards the fact that from 1993 to 2016, there was never a written contract compliant with the LPCL and the ascribed illegal and improper motive of Seaside Heights would only have arisen on May 9, 2007 when N.J.S.A. 43:15A-7.2(a) was enacted, as part of Public Law 2007, c. 92 (L. 2007, c.

92). Thus, this illegal and improper motive ascribed by PERS as motivating the Borough of Seaside Heights must be soundly rejected.

PERS contends that the resolutions appointing Pascarella as municipal prosecutor in 1993, 1995, 1998, 2006, 2008, 2015, and 2016 identified the need for legal services, the services to be provided, and the time frame (Ja18) but they are not professional service agreements, they are quite clearly municipal resolutions appointing a municipal prosecutor. Again, PERS' argument that whenever a resolution appoints a municipal prosecutor, the municipal prosecutor is not entitled to pension credit even if he or she is an employee, sweeps too broadly and conflicts with the principle observed throughout New Jersey that employees, including lawyers, can be and are hired to provide municipal services and, as employees, they are entitled to pension service credit. Ragusa v. Board of Trustees, Public Employees' Retirement System, Docket No. A-5460-15T3 (App. Div. Sep. 7, 2018) (Pb24) makes this clear.

In Ragusa, the Court found that the "municipality's resolutions "simply appointed Ragusa to the municipal prosecutor's position at the specified salary" and not "in accordance with [the LPCL] N.J.S.A 40A:11-5." Here, except for the 1993 and 1995 resolutions, the resolutions appointing Pascarella (from 1998 to 2016) state the appointment is "in accordance with the provisions of N.J.S.A. 2B:12-7. (Ja59, Ja61, Ja63 Ja65, Ja67, Ja69, Ja71 Ja73, Ja75, Ja77, Ja79, Ja81,

Ja83, Ja85, Ja87, Ja89, Ja91, Ja93). N.J.S.A. 2B:12-27 allows a municipality to “employ an attorney-at-law as a prosecutor” “who may represent the State, county or municipality in any matter within the jurisdiction of the municipal court in accordance with the provisions of P.L.1999, c. 349 (C.2B:25-1 et al.)”

As in Ragusa, the resolutions here are insufficient to establish compliance with the LPCL, N.J.S.A. 40A:11-5 and simply authorize Pascarella to act in the capacity of municipal prosecutor for Seaside Heights pursuant to N.J.S.A. 2B:12-27.

3. Unpublished appellate division cases Platt, Lanza and Diktas do not assist PERS under the facts of this case.

Respondent’s contention that the “resolutions passed by Seaside Heights” appointing Pascarella as Municipal Prosecutor “renders Pascarella ineligible under N.J.S.A. 43:15A-7.2(a)” (Db22) must also be rejected. The yearly Resolutions passed by Seaside Heights do nothing more than meet the statutory requirement of N.J.S.A. 2B:25-4 which requires each municipal court to have at least one municipal prosecutor appointed by the governing body of the municipality whether employed as an employee or pursuant to a Professional Service Agreement entered pursuant to the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-5.

Here there is no Professional Service Agreement retaining Pascarella that was entered in conformance with the LPCL. This is undeniable because N.J.S.A. 40A:11-5 provides that a Professional Services contract “which exceeds the bid

threshold” may be awarded by a governing body without public advertising for bids and bidding therefor and shall be awarded by resolution of the governing body on the condition that state supporting reasons for its action in the resolution awarding each contract and shall publish a notice “stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the clerk of the county or municipality.” There is no resolution of the governing body stating the reasons for awarding a professional service contract to Pascarella or any published notice “stating the nature, duration, service and amount of the contract” and “the resolution and contract” are not “on file and available for public inspection in the office of the clerk of the county or municipality.” Ibid. Indeed, PERS cannot point to a contract “available for public inspection in the office of the clerk of the county or municipality” as required by N.J.S.A. 40A:11-5 because none exists.

Addressing respondent’s contention that Pascarella’s citation to Ragusa v. Board of Trustees, Public Employees’ Retirement System, Docket No. A-5460-15T3 (App. Div. Sep. 7, 2018) required citation to Diktas v. Bd. of Trs., No. A-2449-19 (App. Div. June 1, 2021) (slip op. at 8) (Ra1-13); Lanza v. Bd. of Trs., Pub. Empls.’ Ret. Sys., No. A-2685-16T2 (App. Div. Mar. 5, 2019) (slip op. at 19) (Ra35-54) and Platt v. Bd. of Trs., Pub. Empls.’ Ret. Sys., No. A-0516-15T4 (App.

Div. June 19, 2017) (slip op. at 7) (Ra14-34) as “contrary opinions required under R. 1:36-3,” Diktas, Lanza and Platt are not contrary opinions.

Rule 1:36-3 provides, “No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.” Ragusa was cited for the proposition, clearly stated by the Appellate Division that a “professional services contract does not encompass every employer-employee relationship between a local government and a professional—notwithstanding that the professional agrees to provide his or her services in return for compensation.” Ibid. The Appellate Division ruled in favor of Ms. Ragusa for certain years of her employment when she was not employed pursuant to a professional service contract that met the requirements of the LCPL set forth in N.J.S.A. 43:15A-7.2(a). During the years she was not employed pursuant to a professional service contract, she was appointed to the position of municipal prosecutor pursuant to a resolution that “made no reference to public contracting.” Ibid.

To the contrary, Diktas was appointed by resolutions stating “that Diktas was being appointed as Secretary and Attorney through the no-bid process authorized by the Local Public Contracts Law (“LPCL”), N.J.S.A. 40A:11-5(a), because such roles were “professional or extraordinary” in nature. The resolutions “specified [Diktas’s] law firm’s address on each resolution, rather than his personal

address, which would be more typical of an employee” and “on at least one occasion, other attorneys from Diktas’s law office covered the Board meeting and served as Secretary in his absence.” (Ra010). None of these facts are present here.

The Resolutions appointing Pascarella have no such language. (Ja59-Ja94). The Resolutions appointing Pascarella as Municipal Prosecutor did not state Pascarella was being hired through “the no-bid process authorized by the Local Public Contracts Law (“LPCL”), N.J.S.A. 40A:11-5(a).” Further, the Borough of Seaside Heights directly appointed a backup Municipal Prosecutor to serve in Pascarella’s absence and the resolutions appointing Pascarella as Municipal Prosecutor were enacted each year as required by N.J.S.A. 2B:25-4, not to hire him. Diktas was not a municipal prosecutor, and no statutes require annual resolutions appointing a person to the position of Secretary to the Board of Commissioners of a municipal redevelopment agency. Further, Diktas “completed and supplied to PERS a twenty-factor questionnaire” and this was used to help determine his “employee/independent contractor” status under N.J.S.A. 43:15A-7.2(b). Notwithstanding these facts, “[t]he ALJ issued an Initial Decision on October 29, 2019, concluding that Diktas had met his burden of establishing his service as a Board Secretary for the GRA was a form of employment and had not been performed under a professional services contract” and “recommended his reinstatement to PERS.” PERS adopted certain factual findings of the ALJ but

rejected the ALJ's legal that Diktas was eligible for PERS service credits during the 2008-2014 period." (Ra006-Ra007). PERS found that

[The ALJ's] legal conclusion is 'at odds with the GRA's enabling legislation,' N.J.S.A. 40A:12A-11(b), which requires the Executive Director of a redevelopment agency – not its attorney – to also serve as its Secretary. Diktas admitted the Executive Director position with GRA is not eligible for pension service credit. Consequently, the PERS Board found "it follows that, under N.J.S.A. 40A:12A-11(b), the Secretary position is also not pensionable as it is statutorily required that the [E]xecutive [D]irector serve as the [S]ecretary."

[(Ra007).]

PERS Board of Trustees (the "PERS Board") concluded in May 2015 that Diktas "was ineligible for continued membership in PERS based on his service with the GRA." (Ra010). The Appellate Division affirmed that determination, "substantially for the sound reasons set forth in the PERS Board's final agency decision." (Ra10).

In Lanza v. Bd. of Trs., Pub. Emps.' Ret. Sys., No. A-2685-16T2 (App. Div. Mar. 5, 2019) (Ra35-Ra54), Lanza was municipal prosecutor for the Borough of South Plainfield, the Borough of Dunellen and the City of South Amboy. Lanza's appointments by the City of South Amboy and the Borough of Dunellen were not part of the appeal. (Ra037). The key fact driving the Appellate Division's analysis upholding the denial of pension credit to Lanza was that "Lanza was appointed annually via a formal resolution" generally stating the "contract is awarded pursuant to a fair and open process in accordance with [N.J.S.A.] 19:44A- 20.4"

and “[a] copy of this resolution shall be published in The Observer as required by law within ten days of its passage.” (Ra040). This demonstrates that Lanza was hired pursuant to a Professional Service Agreement in a process adhering to the requirements of the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-5, something completely lacking in Pascarella’s case. PERS can point to no resolutions stating the “contract is awarded pursuant to a fair and open process in accordance with [N.J.S.A.] 19:44A- 20.4 “ or publishing the resolution appointing Pascarella in the newspaper. The resolutions appointing Pascarella do not reference N.J.S.A. 19:44A-20.4 at all; the resolutions state that Pascarella was being appointed as municipal prosecutor because a resolution appointing a municipal prosecutor is required by N.J.S.A. 2B:25-4 whether the municipal prosecutor is an employee or an independent contractor hired pursuant to a Professional services agreement. In fact, Business Administrator Camera testified without contradiction that the Borough of Seaside Heights hired Pascarella as an employee and not pursuant to a professional services contract. (Ja11).

In Platt v. Bd. of Trs., Pub. Emps.’ Ret. Sys., No. A-0516-15T4 (App. Div. June 19, 2017) (Ra013-Ra034), the Appellate Division identified the issues as “whether N.J.S.A. 43:15A-7.2, proscribes [Platt’s] participation in PERS” stating “[t]his question requires statutory interpretation, which ultimately is a judicial responsibility” and, therefore, “[w]e accord no deference to the Board’s

interpretive conclusions.” (Ra023). Here, as in Platt, the Court owes no deference to the Board’s interpretive conclusions.

Importantly, PERS concluded that Platt was an employee of the Township of Berlin and, based on that employment she remained eligible to participate in PERS but that “Platt was engaged under a professional services contract in the remaining four municipalities.” (Ra015).

The Appellate Division reviewed the facts as to each of the other municipalities Winslow Township, the Borough of Hi-Nella, the Borough of Chesilhurst and the Borough of Berlin, and the Township of Berlin as follows:

Township of Winslow: The record showed, “documents regarding service in Winslow include contracts, requests for proposal (RFP), proof of publication, the Township Committee’s resolutions specifically referencing the LPCL and compliance with N.J.S.A. 19:44A-20.5.” (Ra031).

Borough of Hi-Nella: municipal resolutions confirming Platt’s appointment, public notices reappointing Platt under a “professional services contract,” and correspondence she sent accepting reappointment. All of these reinforced Platt was providing professional legal services under a professional services contract appointment, public notices reappointing Platt under a “professional services contract.” (Ra033).

Borough of Berlin: Berlin Borough, provisions of the annual contracts appointing Platt as municipal prosecutor referenced the LPCL and stated the provision of attorney services were professional services. Correspondence from the Borough Solicitor to Platt identified the agreement as a professional services contract under the LPCL and stated it complied with an open and public process. (Ra032).

Borough of Chesilhurst: appointee was “Donna Sigel Platt, P.C.” undercutting any suggestion Platt individually was a municipal employee. (Ra034).

The ALJ found the “Platt was appointed to provide professional services and was engaged under a professional services contract as defined in the LPCL. Therefore, the appointment could not result in PERS participation, as of January 1, 2008, pursuant to N.J.S.A. 43:15A-7.2(a).” (Ra016). PERS concurred with the ALJ, and the Appellate Division agreed, stating:

The record sufficiently shows Platt accepted these appointments, awarded without bidding, and entered into contracts to perform “professional services,” under the authority of the LPCL, N.J.S.A. 40A:11-5. A professional providing services pursuant to a professional service contract is no longer eligible for participation in PERS. N.J.S.A. 43:15A-7.2(a). We conclude the Board did not err in rendering its determination.

The Appellate Division in Platt stated “the lack of a writing mentioned in N.J.S.A. 40A:11-5(1)(a)(i) does not defeat the professional engagement from qualifying as a professional services contract as used in Chapter 92” (Ra033), which appears to ignore the requirement of N.J.S.A. 40A:11-5(1)(a)(i) that to enter into a Professional Service Agreement, a governing body must publish a “notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the clerk of the county or municipality.” Other evidence showed Platt had entered into a Professional Service Agreement including “municipal resolutions

confirming Platt’s appointment, public notices reappointing Platt under a ‘professional services contract,’ and correspondence [that Platt] sent accepting reappointment.” (Ra033-Ra034). The Appellate Division found that “[a]ll of these reinforced Platt was providing professional legal services under a professional services contract.” (Ra034).

Accordingly, the statement in Platt that “the lack of a writing mentioned in N.J.S.A. 40A:11-5(1)(a)(i) does not defeat the professional engagement from qualifying as a professional services contract as used in Chapter 92” is *obiter dictum* – not essential to the resolution of the case – and thus does not set binding precedent. Also, the statement conflicts directly with the holding in Ragusa that a “professional services contract does not encompass every employer-employee relationship between a local government and a professional— notwithstanding that the professional agrees to provide his or her services in return for compensation,” Ragusa, and that, for certain years of her employment when she was not employed pursuant to a professional service contract that met the requirements of the LCPL set forth in N.J.S.A. 43:15A-7.2(a), Ragusa was entitled to pension service credit. Ibid.

Any interpretation of N.J.S.A. 40A:11-5(1)(a)(i) that ignores the statutory requirement that to enter into a Professional Services Agreement, a municipality must publish a “notice stating the nature, duration, service and amount of the

contract, and that the resolution and contract are on file and available for public inspection in the office of the clerk of the county or municipality” does not follow the law and is “plainly unreasonable.” East Bay Drywall v. Department of Labor and Workforce Development, 251 N.J. 477, 493 (2022) (citations and internal quotation marks omitted). Accordingly, applying the In re Stallworth, 208 N.J. at 194, standard of review, the PERS decision here is arbitrary, capricious, or unreasonable and not supported by substantial credible evidence in the record as a whole and must, therefore, be reversed.

4. The conclusion that Pascarella worked as an independent contractor and not as an employee (Ja3-Ja31; 2T) lacks substantial credible evidence in the record and does not follow the law.

Appellate review of agency action requires an analysis as to whether an agency has engaged in reasoned decision making which involves articulating an explanation for its conclusions establishing a rational connection between the facts found and the conclusions reached. If an agency fails to comply with N.J.S.A. 52:14B-10 by setting forth “findings of fact and conclusions of law, separately stated” that are “based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director” adequate reasons, courts cannot properly assess whether the agency acted lawfully and within its authority. If a reviewing court determines that the

agency has not adequately explained its decision, the decision is arbitrary and capricious and must be vacated.

On the issue of whether Pascarella is an independent contractor not entitled to pension credit or an employee who is, N.J.S.A. 2A:15A-7.2(b) requires application of the IRS Rev. Rul. 87-41 Twenty-Factor test. The checklist prepared and relied upon by ALJ Scarola prepared by Barbara Risley and entered into evidence as R8 also did not directly apply the IRS Rev. Rul. 87-41 Twenty-Factor test.

With regard to the conclusion that Pascarella was an independent contractor and not an employee pursuant to the IRS Rev. Rul. 87-41 Twenty-Factor test, ALJ Scarola made the following findings of fact pursuant to N.J.S.A. 52:14B-10:

- Pascarella was free to do the work as he sees fit,
- Pascarella has no direction from the Borough,
- Pascarella is not evaluated,
- Pascarella receives annual appointments,
- Pascarella has no fringe benefits, and
- Pascarella performs all the services as would be encompassed in a professional service contract.

[(Ja27).]

These determinations of the ALJ are not tethered to the Internal Revenue Service's (IRS) 20-Factor Test making the conclusion that the facts demonstrate an independent contractor relationship, pursuant to the Internal Revenue Service's

(IRS) Twenty-Factor Test, arbitrary, capricious and unreasonable. Further, even if they were somehow linked to the applicable Internal Revenue Service's (IRS) Twenty-Factor Test, the record lacks substantial credible evidence to support these conclusions for the following reasons:

- Finding: Pascarella was free to do the work as he sees fit.

Borough Administrator John Camera testified without contradiction that “instructions and directions . . . were given to [Pascarella]” (Ja14) and McDermot testified that this factor favored an employment relationship, not an independent contractor relationship.

- Finding: Pascarella has no direction from the Borough.

Again, Borough Administrator John Camera testified without contradiction that “instructions and directions . . . were given to [Pascarella]” (Ja14) and McDermot testified that this factor favored an employment relationship, not an independent contractor relationship.

- Finding: Pascarella is not evaluated.

Camera testified without contradiction that annual evaluations of Pascarella were conducted by the Borough continuing Pascarella's employment. (Ja9). Camera was authorized by the governing body to interview and evaluate Pascarella and negotiate his duties and responsibilities and the governing body accepted his recommendation. (1T61:2-1T61:10).

- Finding: Pascarella receives annual appointments.

This is true but does not weigh toward an independent contractor status because all municipal prosecutors are appointed to the position annually. In fact, the record establishes that the 2016 resolution for Mr. Pascarella's replacement is pursuant to N.J.S.A. 2B:12-27 yet the individual appointed in 2016 "executed a Professional Services Agreement with the Borough" and was not enrolled in the PERS. (Ja51). This proves the point that Seaside Heights knew how to enter into a professional services agreement for the municipal prosecutor position and the annual resolutions making the appointment did not make Pascarella an independent contractor. As with Pascarella's replacement, the professional services agreement does that.

- Finding: Pascarella has no fringe benefits.

Camera testified without contradiction that Pascarella was offered fringe benefits provided to other employees. A strong, un rebutted example was that Pascarella was provided with paid medical leave that lasted months while he was recuperating from an accident, a benefit that only employees are afforded and not independent contractors.

- Finding: Pascarella performs all the services as would be encompassed in a professional service contract.

This is true but, like the annual appointment, this does not weigh towards an independent contractor status and against an employee – employer status.

Employees can and do perform professional services throughout New Jersey. Further, unlike an independent contractor, Pascarella was not allowed to select another attorney to perform his work for Seaside Heights. On the contrary, all services were required to be performed by Pascarella or the alternate municipal prosecutor who was directly selected by the governing body.

ALJ Scarola never addressed each of the twenty factors of the IRS Rev. Rul. 87-41 Twenty-Factor Test and how the facts supported the conclusion that Pascarella was an independent contractor and not an employee. Thus the conclusions are arbitrary, capricious and unreasonable and must be reversed.

In its opposition brief, PERS does not address the lack of compliance with N.J.S.A. 52:14B-10 requiring an agency to set forth “findings of fact and conclusions of law, separately stated” that are “based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director” and provided adequate reasoning. Instead, PERS seeks to fill this hole in the record by performing the analysis in its opposition brief, something ALJ Scarola and PERS failed to do. This should not be permitted.

If the Court disagrees and allows a post decision analysis of the evidence at trial and the IRS Rev. Rul. 87-41 Twenty-Factors, a review of the record show the findings of PERS investigator Conover were extrapolated from Risley’s disavowed

check list and are unreliable. The chart presented in Pascarella's brief at page 38 which shows that the facts set forth in Exhibit R8, which were disavowed by its author Barbara Risley, was used by Conover for 11 items, item 1, 2, 3, 4, 5, 7, 10, 11, 14 17, 19 and 20 and all of these facts were directly contradicted by Seaside Business Administrator John Camera, except for 17 "work for multiple companies." Camera did not directly contradict this but the record shows Pascarella's services to the public were limited because he could not practice criminal law.

In her review, accepted by ALJ Scarola and PERS, PERS investigator Conover found 13 of the IRS Rev. Rul. 87-41 Twenty-Factors indicated an Independent Contractor status and 11 of the factors – 1, 2, 3, 4, 5, 7, 10, 11, 14, 19 and 20 – were based on the disavowed and unreliable Exhibit R8. More importantly, these facts were directly contradicted by the in court, testimony of Business Administrator John Conover who had direct, first-hand knowledge. Michael P. McDermott, CPA testified as an expert in accounting and based on his experience in classification of workers and his familiarity with the applicable standards – Internal Revenue Service (IRS) Rule 963, Department of Labor (DOL) classifications and the twenty-factor test, he testified that Pascarella was an employee when he worked for Seaside Heights.

In its brief, PERS asks this Court to defer to the findings of the ALJ because “the ALJ has the opportunity to hear ‘live testimony’ and ‘judge the witnesses’ credibility” (Db18) (citation omitted) but the ALJ found all witnesses credible stating “[e]ach witness testified truthfully as far as he or she used their personal knowledge and assessed the factors to be applied.” (Ja22, Db35). Because ALJ Scarola found “[e]ach witness testified truthfully as far as he or she used their personal knowledge” the issue is not one of credibility, the issue is the nature and extent of each witnesses “personal knowledge” and whether “each ultimate finding of fact” found by ALJ Scarola and PERS is based on “legally competent evidence” that provide “assurances of reliability” and “avoid the fact or appearance of arbitrariness.” N.J.A.C. 1:1-15.5(b).

Thus, the conclusions of the PERS investigator, accepted by the ALJ and PERS, on the issues, 1) did Pascarella have a professional service contract with the Borough of Seaside Heights pursuant to N.J.S.A. 43:15A-7.2(a) and 2) was Pascarella an independent contractor as defined by N.J.S.A. 43:15A-7.2 (b) which would disqualify him from receiving bought and paid for pension credit violate N.J.A.C. 1:1-15.5(b), are arbitrary, capricious, or unreasonable, and are not supported by substantial credible evidence in the record as a whole and must, therefore, be reversed.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Kim Pascarella respectfully requests that the Court vacate the decision of PERS adopting the ALJ's decision affirming PERS' denial of Pascarella's eligibility for PERS service credit from January 1, 2008 to February 1, 2016.

Respectfully submitted,

Law Office of Donald F. Burke
Attorneys for Petitioner-Appellant
Kim Pascarella

By: s/ Donald F. Burke
Donald F. Burke, Esq.

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