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ERNEST TURNER, **Appellant,** **v.** **BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,** **Respondent.**	**SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION** **DOCKET NO: A-003124-23** **ON APPEAL FROM A FINAL ADMINISTRATIVE ACTION OF THE TEACHERS' PENSION AND ANNUITY FUND**

APPELLATE BRIEF ON BEHALF OF APPELLANT, ERNEST TURNER

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I. PRELIMINARY STATEMENT

In the instant matter, Ernest Turner (hereinafter "Appellant") appeals the final administrative decision of Respondent, the Board of Trustees (hereinafter "the Board" or "Respondent") for the Teachers' Pension and Annuity Fund ("TPAF") deeming that he did not effect a bona fide retirement in 2004 and subsequently rendered services for school districts in TPAF eligible positions during his retirement. More specifically, Appellant is challenging Respondent's refusal to grant Appellant a contested case hearing in the Office of Administrative Law ("OAL") given the many factual disputes at issue.

The Board's final administrative decision effectively seeks the reimbursement of approximately $1.3 million which the Board asserts Appellant was paid, in both pension and healthcare benefits, from 2004 to 2022. The basis for that decision was that Appellant worked as an employee of a school district from approximately 2004 to 2006 while receiving ordinary disability retirement ("ODR") benefits during that time period. Moreover, the Board held that Appellant's subsequent engagements as a private contractor providing consulting services for various school districts constituted work in TPAF eligible positions.

Appellant disputed the Board's findings and sought a hearing in the Office of Administrative Law. In particular, Appellant asserted that upon being granted an ODR in 2004, he immediately contacted the Division of Pensions and Benefits

(hereinafter "the Division") as he had been hired to a new position the Northern Highlands School District ("Northern Highlands") while the application was pending. Despite notifying the Division of this issue back in 2004, Appellant was advised by a representative of the Division that he need not make any changes to his retirement. Nonetheless, in its final administrative decision, the Board asserts that Appellant never reached out to the Division to advise it that he was appointed to this new position. Thus, Appellant clearly disputes this fact which is material to the case and it was therefore error for the Board to deny Appellant a hearing.

Furthermore, the limited record that does exist demonstrates that the Board was put on notice not just in 2004 but likewise in 2007 when the Division subjected Appellant to an excess earnings review which he appealed to the Board. Moreover, Appellant had subsequent contacts with the Division regarding outside employment and his disability retirement again in 2012 and 2015. It is entirely unknown why Respondent waited until 2022 to take any action based on these facts, particularly given the excess earnings review that Appellant appealed in 2007 which should have put the Board on direct notice of a possible "bona fide retirement" issue.

Appellant also disputed the notion that his work as a private consultant constituted employment in TPAF eligible positions. At all relevant times since he began rendering such services, Appellant always served as an independent contractor and it was his company that was paid for such services. Further, this

allowed him to provide limited services and collect some additional income while addressing his serious medical conditions that could not otherwise be accomplished had he held a full-time business administrator position.

Given the plethora of factual disputes, a fact-finding hearing in the OAL is necessary and the Board's decision denying such a hearing was entirely improper. Further, a hearing is necessary due to the massive delay on the Division's and/or Board's part despite being put on direct notice of Appellant's employment with Northern Highlands first in 2004 and then in 2007, as the substantial delay has prejudiced Appellant on multiple fronts, as will be more fully detailed below. Moreover, Respondent's decision likewise unjustly and unfairly insinuates bad faith on Appellant's part which is likewise disputed by Appellant. Appellant contacted the Division multiple times in between 2004 and 2022, while he was receiving his disability pension, regarding his contract with Northern Highlands and regarding outside employment issues. He was therefore voluntarily subjecting himself to scrutiny which belies any notion of improper intent or bad faith on Appellant's part. These assertions are likewise materially relevant to potential defenses against the Board's actions, thereby warranting an OAL hearing.

Simply put and for the reasons set forth herein, the Board's refusal to grant Appellant a contested case hearing in the OAL was arbitrary, unreasonable, and capricious and must be overturned.

II. STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

Appellant began his career in public service as a School Business Administrator with the Essex County Educational Services Commission on or about October 1, 1983, and was enrolled in TPAF at that time. (Aa068). Thereafter, he remained employed for various public entities as a school business administrator, continuing his membership in TPAF. Id. In February of 2002, Appellant transferred to the Glen Rock Borough Board of Education as a Business Administrator/ Board Secretary. Id. On or about March 24, 2004, Appellant filed an application for Ordinary Disability retirement benefits to be effective July 1, 2004. Id.

While his disability application was pending, on May 24, 2004, Appellant was appointed to the Northern Highlands Regional High School District as Director of Transportation for the 2004-2005 school year, effective July 1, 2004, at a salary of $104,000.00. (Aa069). This was a TPAF eligible position. Id. Thereafter, on or about August 5, 2004, the Board approved Appellant's application for Ordinary Disability Retirement ("ODR"), based on the finding of the Board's physician that Appellant was totally and permanently disabled from his performance of his job duties. Id. Thus, Appellant was already working at Northern Highlands when he was approved

[1] The facts and procedural history of this matter are intertwined and, therefore, are combined within this brief for clarity.

for retirement. Id. The Board asserts that at the time of Appellant's ODR approval, it was unaware that Appellant had executed an employment contract with Northern Highlands. (Aa077).

After Appellant's ODR was approved, Appellant met with a representative with the Division of Pensions following the approval of his disability retirement application and advised the representative of his engagement with Northern Highlands in 2004. (Aa082 & Aa074-75). He was expressly advised at that time that he did not need to make any changes to his retirement status despite the services he was performing for that district. Id. Nonetheless, in its May 3, 2024 letter denying Appellant a contested case hearing, the Board contended that neither Appellant nor Northern Highlands contacted the division to ascertain whether his employment therewith would have any negative impact on his pension or whether it was in compliance with applicable statutes and regulations. (Aa081).

Appellant was reappointed by Northern Highlands for the 2005-2006 school year, but at a reduced annual salary of $78,500.00. (Aa011). The basis for the reduction was communications between the Northern Highlands Business Administrator and outside counsel, namely, the law firm of Fogarty & Hara. Id. Attorney Stephen R. Fogarty of Fogarty & Hara sent a letter to the Business Administrator of the Northern Highlands Regional High School, dated June 27, 2005, stating, in relevant part, "the TPAF specifically provides for the adjustment of

the individual's pension benefits and not the individual's salary." Id. The letter goes on to state, "… it is a safe assumption that the reduction of that salary purely with the intention of allowing Turner to collect the maximum amount of disability for which he has been approved would be contrary to the treasury regulations." Id. Despite that initial guidance, in a subsequent letter dated July 25, 2005, directed to Appellant, Christina N. Campanella, Esq., of that same firm (Fogarty & Hara) asserted, "It appears… that as long as the sum of your disability payments and current salary does not exceed the current salary attributable to your former positions of Business Administrator of the Glen Rock Board of Education, no further inquiry is necessary." Id.

In October of 2004, Appellant formed Summit Management Solutions, LLC ("SMS") to provide consulting services to various school boards in need of the same. (Aa08 & Aa074). However, SMS did begin providing services to these various districts until July of 2006. (Aa012). SMS continued providing consulting services to various school districts throughout the state over the next two decades. (Aa012-47). These services never involved engaging in what would otherwise be akin to performing services as a full-time school business administrator. (Aa074). Appellant, as principal of SMS, retained far more control over his duties and responsibilities than he would otherwise have in a full-time certificated school business administrator position. Id. He was able to make his own hours of work and

accommodate his medical condition in a way would not have been tolerated or permitted had he continued to serve as a full-time employee of a district as a school business administrator. Id. The various school districts SMS contracted with allowed him to work remote remotely and afforded him a flexible schedule which provided him time to address his medical issues. Id.

Earlier, in 2007, Appellant was the subject of a pension reduction review, ostensibly due to his employment with Northern Highlands for the year 2005-2006. (Aa079). Appellant appealed that review to the Board in that same year. Id. Nonetheless, the Board noted in its final administrative decision in the instant matter, that during his appeal of the pension reduction review, Appellant never informed the Division that he was working in a TPAF eligible position while collecting ODR benefits. Id.

Following an investigation by the Division's Pension Fraud & Abuse Unit (PFAU), the PFAU advised TPAF that Appellant had been holding certificated positions since the effective date of his retirement, prior to Board approval. (Aa05). On April 7, 2022, the Board voted to suspend Appellant's ODR benefits pending the outcome of the investigation by the PFAU. Id. On December 14, 2023, the PFAU concluded its investigation and issued its findings. Id. The PFAU issued the following findings:

> In accordance with N.J.A.C. 17:3-6.2, Turner had thirty (30) days to make any changes to his retirement after [A]

> the effective date of his retirement (July 1, 2004), or [B] the date his retirement was approved by the Board of Trustees (August 5, 2004), whichever is the later date. Thus, his TPAF retirement was not due and payable until September 4, 2004. A bona fide severance of employment requires a complete termination of the employer/employee relationship with no pre-planning or promise of any future full or part time employment.
>
> Turner entered into a contract with the Board of Education of the Northern Highlands Regional High School District effective July 1, 2004, by way of resolution dated May 24, 2004. This employment commenced prior his TPAF retirement application approval by the TPAF Board.
>
> Additionally, the PFAU finds that Turner's continued services in certificated positions are in violation of N.J.S.A. 18A:66-40(b). The PFAU notes that as a disability retiree, the critical need exemption does not apply to Turner.
>
> (Aa049).

On or about January 31, 2024, the TPAF Board adopted the findings detailed in the PFAU's December 14, 2023, memorandum and determined that Appellant failed to separate from service prior to his return to public employment. (Aa071). The Board ultimately determined that Appellant's continued services in his TPAF-eligible and certificated position violated of N.J.S.A. 18A:66-40(b) and N.J.A.C. 17:3-6.2. Id. The Board held that Appellant is required to repay all retirement benefits paid from July 1, 2004 to April 1, 2022. Id. The Board also found that Appellant is required to make the mandatory pension contributions on the salaries

earned while he worked at Northern Highlands from July 1, 2004 through June 30, 2006. Id. The total amount in question, not including the two (2) years of contributions through Northern Highlands, amounts to almost $1.3 million. (Aa049).

On or about February 28, 2024, Appellant appealed the January 31, 2024 decision of the Board. (Aa073-75). Therein, Appellant disputed the findings and conclusions of the Board, asserting that the services he provided while at SMS were consulting services as an independent contractor to provide cost-savings for local school districts and that it was SMS hired in each of these instances, not him personally. (Aa074). He noted that he medically retired in 2004 because his medical conditions impacted his ability to perform all the duties and responsibilities as a full-time business administrator and he never engaged in services for the various entities in what would be akin to performing services as a full-time school business administrator. Id. Appellant further noted that he retained far more control over his duties and responsibilities that he would otherwise have in a full-time position, as he was able to make his own hours of work and accommodate his medical condition in a way that would not have been tolerated or permitted had he continued to serve as a full-time employee. Id. Appellant was also able to work remotely and the consulting services he provided allowed him to work a flexible schedule which provided him time to adequately address his medical issues. Id.

Appellant further noted that because SMS was hired as a private consultant by these various school districts, the services he provided did not require the use of his certificate. Id. Appellant also expressly advised his clients that he was not able to use his business administrator certificate due to his ODR status. Id. Lastly, Appellant noted that he indeed met with the Division in 2004 after his ODR was approved, informed the counselor of his employment with Northern Highlands, and was expressly advised by a counselor that he did not need to make any changes to his retirement status despite the services he was providing to Northern Highlands. Id.

On May 3, 2024, the Board issued its final administrative determination in this matter, finding that there was no issue of material fact in dispute and thus denied Appellant's request for a contested case hearing. (Aa076). To that end, the Board focused on Appellant's two-year engagement with Northern Highlands, for 2004-2005 and 2005-2006, stating, in relevant part:

> The record before the Board clearly shows that Northern Highlands "approved the appointment of Ernest Turner as the Director of Transportation for Region I for the 2004-2005 school year, at an annual salary of $104,000, effective July 1, 2004." Mr. Turner's Ordinary Disability was not approved by the Board until August 5, 2004. Mr. Turner's employment contract required that he "…hold the certification of Supervisor as issued by the New Jersey Department of Education," and further defined the position as a TPAF-eligible position. Accordingly, Mr. Turner never stopped working in a TPAF eligible position, and returned to employment before his retirement was

> approved, in violation of both N.J.S.A. 18A:66-40(b) and N.J.A.C. 17:3-6.2 respectively.
>
> (Aa081).

On or about June 11, 2024, Appellant filed a Notice of Appeal with this Honorable Court. (Aa001-4).

III. STANDARD OF REVIEW

Appellate review of an administrative agency is limited. See, J.D. ex rel. D.D.H. v. New Jersey Div. of Developmental Disabilities, 329 N.J. Super. 516, 521 (App. Div. 2000) (citing Brady v. Board of Rev., 152 N.J. 197, 210 (1997)). An administrative agency's decision may be reversed only if the reviewing court concludes "that the decision of the administrative agency is arbitrary, capricious or unreasonable, or is not supported by substantial credible evidence in the record as a whole." J.D. ex rel. D.D.H., *supra*, 329 N.J. Super. at 521 (citing In Re Taylor, 158 N.J. 664, 657 (1999); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988); Outland v. Board of Trustees, 326 N.J. Super. 395, 399 (App. Div. 1999)). Moreover, an appellate court must "defer to an agency's expertise and superior knowledge of a particular field." Outland, *supra*, 326 N.J. Super. at 399-400 (citing Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). If the agency's finding is "supported by substantial credible evidence in the record as a whole" the appellate court must accept the finding. Outland, *supra*, 326 N.J. Super. at 399-400 (citing Brady, *supra*, 152 N.J. at 210).

In certain cases, however, 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, *supra*, 326 N.J. Super. at 399-400 (citing P.F. v. New Jersey Div. of Developmental Disabilities, 139 N.J. 522, 530 (1995)). As such, appellate review, although limited, is not "simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." Outland, *supra*, 326 N.J. Super. at 399-400 (citing Chou v. Rutgers, 283 N.J. Super. 524, 539 (App. Div. 1995), certif. denied, 145 N.J. 374 (1996)).

Rather, appellate review must include a thorough analysis of the record below to determine whether an agency's decision is not reasonably supported by the evidence or violates the interest of justice. See, e.g., Geller v. Department of the Treasury, 53 N.J. 591 (1969) (reversing the Board's decision not to consider a teacher's 6.4 years of prior service credit because the Board's failure to deduct service credit payments from a teacher who requested same was the Board's error, and ordered the teacher be restored to the pension position she would have achieved had the authorized deductions been made to achieve a just result). The New Jersey Supreme Court has summarized the judicial role in reviewing an administrative agency's decision, in general, as being restricted to three inquiries:

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

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

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

[In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 385-86 (2013) (quoting Mazza v. Board of Trustees, 143 N.J. 22, 25 (1995)).]

Thus, appellate courts must assess each administrative agency's decision within this context to determine whether the decision was arbitrary, capricious, or unreasonable.

IV. LEGAL ARGUMENT

I. RESPONDENT'S DECISION TO DENY APPELLANT'S REQUEST TO TRANSFER THIS CASE TO THE OAL WAS ARBITRARY AND CAPRICIOUS GIVEN THE BREADTH OF FACTUAL ALLEGATIONS RAISED BY RESPONDENT, THE NUMEROUS FACTUAL DISPUTES RAISED BY APPELLANT, AND GIVEN RESPONDENT'S OWN DELAY IN TAKING CORRECTIVE ACTION, DESPITE BEING PUT ON NOTICE, WHICH UNQUESTIONABLY HAS PREJUDICED APPELLANT (Aa076-83).

The Administrative Procedures Act defines a "contested case," generally, as a proceeding in which the legal rights or obligations of the parties "are required by

constitutional right or by statute to be determined by an agency" after the parties have had an "opportunity for an agency hearing." Bouie v. New Jersey Dept. of Community Affairs, 407 N.J. Super. 518, 535 (App. Div. 2009) (quoting N.J.S.A. 52:14B-2(b)). Because this definition "does not create a substantive right to an administrative hearing" then the right to a hearing must be found elsewhere "in another statute or constitutional provision." Bouie, supra, 407 N.J. Super. at 535 (quoting In re Fanelli, 174 N.J. 165, 172 (2002); Christ Hosp. v. Dep't of Health & Senior Servs., 330 N.J. Super. 55, 61 (App. Div. 2000)).

New Jersey courts, however, have consistently held that when there is a dispute as to adjudicative facts, an evidentiary hearing is required to resolve the dispute. Bouie, supra, 407 N.J. Super. at 536 (citing Sloan v. Klagholtz, 342 N.J. Super. 385, 392 (App. Div. 2001) (noting that "if a matter before an agency does not present contested material issues of fact that can be decided only 'after [an] opportunity for an agency hearing,' N.J.S.A. 52:14B-2(b), it is not a contested case subject to transfer to the OAL")). The OAL is the proper forum for such disputes of material facts before administrative agencies because it provides "impartial hearing examiners in 'contested cases.'" High Horizons Dev. Co. v. State, 120 N.J. 40, 46 (1990) (citing N.J.S.A. 52:14B-10(c)). Therefore, administrative agencies, such as the Division of Pensions and/or the Board, must transfer contested cases to the OAL when the disputed facts are considered adjudicatory and material to the outcome of

the dispute. Administrative law judges can then conduct hearings and hear testimony to make an accurate assessment of the operative facts in each case.

Adjudicative facts have been defined as facts pertaining to the parties and their activities, and:

> [U]sually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case.
>
> [High Horizons Dev. Co., supra, 120 N.J. at 49-50 (internal citations omitted).]

Moreover, when determining whether to transfer a case to the OAL for a hearing, the administrative agency must consider whether the contested issues "are ones that ordinarily should be determined without providing the parties an opportunity for a trial." High Horizons Dev. Co., supra, 120 N.J. at 52. Therefore, when certain material facts that will affect the outcome of a case are disputed, the case should be heard in the OAL so that an administrative law judge can make a determination as to the factual discrepancies. In this way, the administrative law judge makes an evidence-based determination regarding the operative facts after assessing the veracity of the parties based on their testimony, demeanor, and being subjected to cross-examination.

An agency's failure to adequately consider all of the evidence in the record unavoidably produces an arbitrary decision. See, e.g., In re Proposed Quest Acad.

Charter Sch. of Montclair Founders Grp., supra, 216 N.J. at 386-87 (stating that "[a] failure to consider all the evidence in a record would inevitably lead to arbitrary decision making"); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (noting that "the proofs as a whole" must be considered); Green v. State Health Benefits Comm'n, 373 N.J. Super. 408, 415 (App. Div. 2004) (finding agency decision that failed to address issues raised in key documents in record arbitrary and capricious); Constantino v. N.J. Merit Sys. Bd., 313 N.J. Super. 212, 218 (App. Div.) (reversing board's decision where findings were unsupported by record, based on "total disregard" of facts), certif. denied, 157 N.J. 544 (1998).

In its final administrative decision in the instant matter, the Respondent stated that "[a]fter careful consideration, the Board affirmed its prior decision, and finding no genuine issue of material fact in dispute, denied your request for an administrative hearing." (Aa076). Yet the Board simply ignored the fact asserted by Appellant that he met with a representative of the Division in 20024 upon being awarded the disability pension based on his new contract with Northern Highlands and was informed by the representative that he need not made any changes to his retirement status, despite knowing that he was rendering services for Northern Highlands. In fact, the Board outright disputes that fact on its own in its final agency decision. To that end, the decision states, "[t]he Board notes that neither Mr. Turner nor Northern Highlands contacted the Division to ascertain whether it would have any negative

impact on his pension and whether it was in compliance with all applicable statutes and regulations." (Aa081). Appellant's assertion regarding his meeting with a representative of the Division directly contradicts this finding. As such, the Board's determination that there is no genuine dispute of material fact is arbitrary, capricious, and unreasonable.

The Board made the above-referenced determination, that neither Appellant nor Northern Highlands contacted the Division regarding the negative impact on his pension, despite Appellant's assertion otherwise and without making any credibility assessment whatsoever. Simply put, a hearing is necessary to establish an underlying record and to determine the credibility of Appellant's assertions.

It is also disingenuous for the Board to assert it was not put on notice of Appellant's employment with Northern Highlands when it subjected him to an excess earnings review in 2007. Not only did it subject Appellant to an excess earnings review, but Appellant even appealed the determination to the Board. This demonstrates indeed that the Board was on notice of Appellant's employment with Northern Highlands while Appellant was receiving his disability pension. Moreover, it demonstrates an absence of malice or questionable intentions on the part of Appellant because he was voluntarily subjecting himself to scrutiny by appealing the Board's decision. By refusing to afford Appellant an administrative fact-finding hearing, the Board is depriving Appellant of his ability to develop a record on the

facts surrounding this 2007 excess earning action. That action should have afforded the Board adequate notice of a potential "bona fide retirement" issue which then raises questions surrounding Respondent's failure to take any action for almost two (2) decades and whether it impacts the final administrative determination or at the very least, the remedy, as will be more fully detailed below.

By its own admission, Appellant again reached out to the Division first on June 13, 2012, and again in October of 2015 to inquire about returning to full time employment and the use of his business administrator certificate, respectively. (Aa006-7). In other words, after Appellant was granted ODR in 2004, he reached out to the Division regarding the interplay between his pension and outside employment first in 2004 after immediately being granted a disability pension, in 2007 to challenge the excess earning review, in 2012 to discuss a potential return to full time employment, and in 2015 to discuss the possible use of his business certificate. He certainly was not "hiding anything" and was availing himself to the scrutiny of the Division and/or the Board pretty regularly during the time he was receiving ODR benefits. This too calls into question the Board's unreasonable delay in raising the bona fide retirement issue. By its own factual summary, Appellant was a "frequent flyer" over the years in terms of reaching out to the Division seeking guidance on how certain actions could negatively impact his pension benefits. These

unique facts warrant exploration as Appellant may have a laches argument, as will likewise be explained below.

Similarly, Appellant disputed the findings of the PFAU which were adopted by the Board, that Appellant's "continued services in certificated positions are in violation of N.J.S.A. 18A:66-40(b)." (Aa049). N.J.S.A. § 18A:66-40(b) states, in relevant part, that "[i]f a disability beneficiary becomes employed again in a position which makes him eligible to be a member of the retirement system, his retirement allowance and the right to any death benefit as a result of his former membership, shall be canceled until he again retires." Appellant contended that the post-retirement contracts he serviced were through SMS and as an independent contractor. (Aa074). It was the company that was paid and Appellant was never an employee of the contracting parties or on their respective payrolls.

Further, Appellant specifically established this company because he was being repeatedly contacted by various school districts seeking advice on cost-savings and rendering temporary and limited services for them as a consultant allowed him the freedom to establish his own hours, to work remotely, and to regularly attend to the medical conditions that gave rise to his ODR application. Id. He was able to make his own hours of work and accommodate his medical condition in a way would not have been tolerated or permitted had he continued to serve as a full-time employee of a district as a school business administrator. Id. Moreover, Appellant

disputed the allegation that his engagements through SMS required the use of his business administrator certificate and stated that he notified each entity that he could not utilize his business administrator certificate in rendering services through SMS. Id. Appellant was also not the only individual rendering services for these districts as other representatives of SMS would also provide services thereto. (Aa010).

Given these facts, Appellant would not have been eligible for membership in TPAF throughout the period of time he has rendered serves through SMS. More importantly, Appellant outright disputed the notion that he performed services throughout the years in TPAF eligible positions and SMS's services that were provided did not require the use of Appellant's business administrator certificate. These are facts that likewise require an administrative fact-finding hearing. At the very least, adjudication of these factual disputes would impact whether or not there is any merit to the Board's assertions regarding Appellant's work with SMS, which we submit there is not, and could likewise then limit the dispute at issue solely to the two (2) years in question where Appellant was employed by Northern Highlands.

II. THE VAROUS FACTUAL DISPUTES ARE DIRECTLY RELEVANT TO THE QUESTION OF WHETHER THE BOARD'S ACTION WAS PROPER AND TO POTENTIAL DEFENSES APPELLANT MIGHT HAVE TO THE UNILATERAL ACTION TAKEN BY THE BOARD, GIVEN THE BOARD'S EXTREME DELAY IN THIS MATTER DESPITE APPELLANT'S FREQUENT CONTACT WITH THE DIVISION. THEREFORE,

RESPONDENT ERRED BY FAILING TO AFFORD APPELLANT A FACT-FINDING HEARING (Aa076-83)

The doctrine of laches is an equitable defense which may be interposed in the absence of the statute of limitations. See Lavin v. Bd. of Educ., 90 N.J. 145, 151 (1982). Laches "precludes relief when there is an unexplainable and inexcusable delay in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 418 (2012). "The time constraints of laches, unlike the periods prescribed by the statute of limitations, are not fixed but are characteristically flexible." Lavin, *supra*, 90 N.J. at 151. The doctrine is described as:

> [N]ot an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.
>
> Id. at 152 (citation omitted).

The length of and reasons for the delay, and changing conditions of either party, are the most important factors. Id. at 152 (citing Pavlicka v. Pavlicka, 84 N.J.

Super. 357, 368-69 (App. Div. 1964)). "The length of the delay alone or in conjunction with the other elements may result in laches." Ibid. (citation omitted). Typically, the application of laches against a public entity is disfavored. Cnty. of Morris v. Fauver, 296 N.J. Super. 26, 41 (App. Div. 1996), rev'd on other grounds, 153 N.J. 80 (1998). However, "[w]hether laches should be applied depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004) (citation omitted). "Lapse of time, in and of itself, will not give rise to laches unless the failure to assert one's rights within a reasonable period of time results in prejudice to the defending party." Winslow, Cohu & Stetson, Inc. v. Skowronek, 136 N.J. Super. 97, 105 (Law Div. 1975).

Being remedial in character, statutes creating pensions should be liberally construed and administered in favor of the persons intended to be benefited thereby. Geller v. Dep't of Treasury, 53 N.J. 591, 597-98 (1969). In the absence of some legislative restriction, administrative agencies have the inherent power to reopen or to modify and to rehear orders that have been entered. Ruvoldt v. Nolan, 63 N.J. 171, 183 (1973). Of course, the power must be exercised reasonably and application seeking its exercise must be made with reasonable diligence. Id., quoting Burl. Cty. Evergreen Pk. Mental Hosp. v. Cooper, 56 N.J. 579, 600 (1970). There is emphasis in the cases on the requirement that such action must be taken within a reasonable

time or with reasonable diligence. Id. But what is a reasonable time depends on the interplay with the time element and a number of other attendant factors, such as the particular occasion for administrative reexamination of the matter, the fraud or illegality in the original action and any contribution thereto or participation therein by the beneficiary of the original action, as well as the extent of any reliance or justified change of position by parties affected by the action. Id.

Even with respect to public entities, equitable considerations are relevant in evaluating the propriety of conduct taken after substantial reliance by those whose interests are affected by subsequent actions. Skulski v. Nolan, 68 N.J. 179, 198 (1975). In Vliet v. Bd. of Trs., 156 N.J. Super. 83 (App. Div. 1978), the appellant, a retired employee for the Township of Chester, continued to work despite his retirement and collection of pension benefits. The appellant noted that he was informed by officials that his pension benefits would not be adversely affected by temporary employment, work that did not require that appellant re-enroll in the Public Employees' Retirement System (PERS). The court affirmed the decision of respondent retirement systems board that appellant was not a temporary employee within the meaning of applicable law. However, the Court also concluded that although the appellant should not benefit from noncompliance with the law, a total reimbursement would be inequitable, given the fact that the appellant would have

been less likely to continue with temporary employment had he actually known he would be giving up his pension payments. Id. at 90.

Even assuming, *arguendo,* that Appellant's retirement was not bona fide, equitable circumstances should still be considered in determining the ultimate remedy. See Vliet, *supra*, and Skulski, *supra*. As such, a primary issue for consideration in these circumstances is not only whether or not the petitioner's retirement was a bona fide retirement, but also, whether equitable principles should apply in the absence of bad faith and in light of an unwitting violation of a Board regulation. In particular, had Appellant been advised correctly in 2004 when he contacted the Division, he could have sought to end his contract with Northern Highlands or otherwise sought to forego disability retirement.

Chiappini v. Bd. of Trs., No. A-3983-09T2, 2011 N.J. Super. Unpub. LEXIS 2062, (App. Div. July 29, 2011), also involved the issue as to whether an individual's retirement was bona fide or not. (Aa084-91). PERS determined that Chiappini's retirement was not bona fide because he did not observe the required thirty (30) day break in service before commencing a PERS-covered part-time temporary teaching position with the Cumberland County College (CCC). The Board also decided that Chiappini did not act in accordance with the standard of conduct of a reasonable person because he failed to consult with the Division of Pensions and Benefits regarding his post-retirement employment:

> "At no time has the PERS Board claimed that Chiappini acted with malice, and the statutes and regulations requiring an individual to cease working in all PERS-covered position[s] for thirty days for a retirement to be effective also do not have an exception for good intentions. N.J.A.C. 17:2-6.1; N.J.A.C. 17:2-6.2; N.J.A.C. 17:2-6.3. Chiappini simply did not act with the standard of conduct of a reasonable person in applying for retirement by starting to work in another PERS-covered position at CCC before his retirement from the JJC became effective. This is evidenced by his total failure to consult with the Division of Pensions and Benefits regarding the effect his employment with CCC would have on his retirement."
>
> Id. at * 10. (Aa087).

The Appellate Division ruled that, although Chiappini did not consult with the Division of Pension and Benefits before accepting employment with CCC, an equitable remedy was still appropriate. Id. at * 22-23. (Aa090). He was not required to reimburse the pension benefits he received for the years in question. Id.

Despite the Board's inherent power to reexamine prior decisions and orders, equity should prevail in circumstances where a significant amount of time has passed between the original action and the Board's reassessment of the same. See Ruvoldt v. Nolan, 63 N.J. 171 (1973). In that matter, the receiver for the pension commission revoked the member's disability pension that had been granted by the commission years earlier. The Court held that it would be essentially unjust to undo the pension grant so many years later after such circumstances of reliance and irremediable change of position as were evidenced by respondent. Id. at 185-186. The court held

that although respondent's original pension application was dealt with perfunctorily and perhaps in not a model manner, it was in conformance with the procedure specified by the statute and did not warrant an inference of fraud or patent irregularity. Id. The Court thus held that eight (8) years after the original administrative action, the course of events could not be rerun and thus, respondent would not have available to him the options he would have had had the original petition been denied. Id.

Here, the Division began looking into Appellant's retirement and his subsequent work with SMS almost two decades after he was approved for ODR. As a result, the Division it is now seeking reimbursement totaling almost $1.3 million. (Aa049). The inordinate delay has prejudiced Appellant on several fronts. For instance, the pension representative he met with in 2004 after being granted ODR may have long since retired from service. The same applies to any other witness who may have had pertinent information about the circumstances surrounding Appellant's meetings with pensions throughout the years, or his appeal of the excess earning action imposed upon him by the Board in 2007, where the Board should have had direct knowledge of his employment with Northern Highlands. Similarly, relevant documentation may have been destroyed and recordings of and/or records of Appellant's communications in 2007 or 2012 may have been destroyed. Thus, the Division and/or the Board's own delay in taking action, despite Appellant's many

contacts therewith, have likely compromised his ability to effectively defend against the actions taken by the Board. The resulting prejudice is therefore relevant to whether the Board has fashioned the proper remedy in this matter.

Furthermore, Appellant is 71 years old. He does not exactly have $1.3 million at his disposal nor the time to aggressively work to pay off such a massive debt. Here, the Board's delay in addressing this matter is particularly prejudicial as the debt they are seeking is substantial and Appellant likely has no ability to ever repay it, at least in its entirety. Also, despite the insinuations contained in the report by the PFAU, Appellant was not trying to "fleece" the Division and/or the Board or "have his cake and eat it too." Appellant contacted the Division first in 2004 upon being granted ODR to immediately address the situation, he appealed the excess earnings review in 2007, and he contacted the Division again in 2012 and 2015 related to his disability pension and outside employment. He was obviously exposing himself to potential scrutiny by the Board, willingly and voluntarily, through these many contacts, which is not consistent with bad faith or malice on the part of Appellant. Nonetheless, the PFAU implies such bad faith on the part of Appellant, despite him routinely reaching out to the Division/ the Board throughout the many years, likely to mitigate its own failure to take action within a reasonable time period.

Appellant also worked with counsel at Northern Highlands to address the situation, by Respondent's own admission, and for the 2005-2006 year of his

contract therewith, his salary was lowered significantly as a result of his receipt of pension benefits. (Aa078-79). While the correct advice at the time might have been to obtain an opinion from the Division, it hardly denotes any bad faith on the part of Appellant and instead, reflects transparency and ultimately, compliance with legal advice by the attorney for Northern Highlands.

While the application of laches and/or equitable estoppel principles against a public entity might be a very high standard, it is not an impossible standard to overcome. There are obviously instances where such doctrines can be applied against public entities. We submit that the instant matter may very well be one of those cases, given the Division's unreasonable delay in taking action despite Appellant immediately advising the Division of his situation, it later being put on notice by virtue of the excess earning action that Appellant appealed, and despite the later communications Appellant had with the Division. A fact-finding hearing is therefore necessary to develop a record, to establish unbiased and disinterested findings of facts, and to allow Appellant to properly formulate the above-described arguments based on such a record. Instead, we have a unilateral edict from Respondent that effectively requires Appellant to "fork over" $1.3 million. Clearly, the Board's refusal to grant a fact-finding hearing under these circumstances is arbitrary, unreasonable, and capricious, and must be overturned.

In summary, the notion that there is no genuine dispute of material fact lacks merit. To that end, Respondent claims Appellant did not have notice of the latter's employment with Northern Highlands. This is simply not correct as Appellant immediately notified the Division after his ODR was granted and was advised that no changes had to be made and the Division was likewise put on notice through the excess earnings action that Appellant appealed in 2007. Appellant's subsequent contacts with the Division in 2012 and 2015 should have likewise triggered an inquiry by the Division. There are also genuine disputes of material fact regarding the Board's assertions that Appellant was employed in TPAF positions or in "certificated positions" while working on behalf of the various school districts serviced by SMS as Appellant was always working as an independent contractor and it was the company that was paid for consulting services. A fact-finding hearing is necessary to develop a record on these factual disputes.

Additionally, a hearing is necessary because laches and/or equitable estoppel may apply given the Division's and/or the Board's inexcusable delay in taking action. Again, the Division was immediately notified by Appellant of his employment with Northern Highlands and in 2007 instituted an excess earnings action against him which Appellant appealed. It is entirely unknown why the Division did not take any action at that time, despite being on notice of Appellant's employment with Northern Highlands, and the ultimate basis for the delay is directly

relevant to a potential laches and/or equitable defense that Appellant may have. A fact-finding hearing should likewise be afforded to Appellant for these reasons. By refusing to grant Appellant such a hearing, Respondent is depriving him of the ability to meaningfully respond to the unilateral action by the Board or offer any substantive defense. Quite simply, a hearing is necessary so Appellant can testify and respond to the allegations leveled by the Board, explain his actions, and provide "his side of the story." Accordingly, the final administrative determination of Respondent must be reversed and Appellant should be afforded a fact-finding hearing.

V. CONCLUSION

For these reasons, Respondent's denial of Appellant's request for a contested case hearing in the OAL was arbitrary, unreasonable, and capricious, and should be reversed given the many factual disputes at issue that are material to a proper outcome in the instant matter, as the development of an actual record is crucial to Appellant's ability to meaningfully defend against the Board's action as described herein.

Respectfully Submitted,

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ERNEST TURNER, Petitioner-Appellant, v. BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND, Respondent-Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3124-23T3 Civil Action ON APPEAL FROM A FINAL AGENCY DECISION OF THE BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND

Amended Brief of Respondent Board of Trustees of the Teachers' Pension and Annuity Fund

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant, Ernest Turner, appeals the Board's May 3, 2024 determination that his July 1, 2004 Ordinary Disability retirement was non-bona fide and its requirement that he reimburse the Teachers' Pension and Annuity Fund ("TPAF") for all retirement benefits received from July 1, 2004 through April 1, 2022 and re-enroll in the TPAF and pay mandatory contributions for the period he returned to employment with Northern Highlands. (Pa1).[2]

On October 1, 1983, Turner enrolled in the TPAF as a result of this employment with Essex County Educational Services Commission. (Pa77). After transferring employers and continuing membership in TPAF, Turner eventually transferred to Glen Rock Borough Board of Education as a Business Administrator/Board Secretary in February 2002. Ibid.

On or about March 24, 2004, Turner filed an application for ordinary disability retirement benefits to become effective July 1, 2004. Ibid. On May 24, 2004, the Northern Highlands Regional High School District Board of Education appointed Turner as "'Director of Transportation for Region I for the 2004-2005 school year, at an annual salary of $104,000, effective July 1, 2004,'"

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

[2] "Pb" refers to Turner's brief; "Pa" refers to Turner's appendix; "Ra" refers to the Board's appendix.

which, as noted, would have been the same day his disability retirement benefits would be effective under the application he had submitted two months prior. (Pa77; Pa11; Ra3).

Turner's contract with Northern Highlands required that Turner hold the certification of Supervisor as issued by the New Jersey Board of Education and defined the position as a TPAF-eligible position. (Pa77; Pa11; Ra3). The required certificate for the Director of Transportation position with Northern Highlands was the same certificate that enabled him to hold the position in Glen Rock for which he filed for disability benefits. (Pa77; Pa11). The employment contract also provided for compulsory deductions for various taxes and "'for the Teachers' Pension [and] Annuity Fund.'" (Pa79; Pa11; Ra3).

At its meeting of August 5, 2004, the Board approved Turner's disability application effective July 1, 2004. (Pa77; Ra1). At the time of its approval, the Board was not aware of Turner's employment contract with Northern Highlands. Ibid. The Board's approval letter explained that:

> You have a right to withdraw, cancel, or change your retirement application provided you notify the Division of Pensions and Benefits within 30 days of the date of the Board's approval or your retirement date, whichever is later; otherwise, the retirement will stand as approved and cannot be changed for any reason.
>
> If you continue to receive a salary beyond the effective date of retirement, no retirement benefits shall be paid for the period where you received salary. . . .

[(Pa77-78) (emphasis in original).]

The approval letter included language explaining that disability retirees are subject to an Excess Earning Review:

> Your retirement allowance as a disability [retiree] is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position.
>
> [(Pa78).]

On June 27, 2005, Turner was reappointed by Northern Highlands for the 2005-2006 school year in a TPAF-eligible position with an annual salary of $78,500. (Pa78; Pa11; Ra7; Ra11). Northern Highlands and Turner were both advised that reducing his salary for the sole purpose of maintaining OD benefits was contrary to Treasury regulations. (Ra16-19). However, Northern Highlands reduced Turner's salary by $25,500 so that he could maintain his OD benefits (Ra13-14). and Turner accepted (Ra7). The employment contract for 2005-2006, just like the contract for 2004-2005, provided for compulsory deductions for various taxes as well as "for the Teachers' Pension [and] Annuity Fund." (Pa79; Pa11; Ra3). Turner resigned from Northern Highlands effective June 30, 2006. (Pa79; Pa11; Ra15).

Beginning in 2006, Turner, individually and through Summit Management Solutions, LLC ("SMS") provided services as an independent

contractor to over seventy State-administered retirement system participating locations. (Pa10). Turner is the President of SMS, which is a "'A Professional Organization providing consulting services in the areas of fiscal management for pubic governmental entities.'" Ibid. SMS began contracting with Boards of Education in 2006. (Pa12). There were at least sixty-nine instances where the contracts between the Boards of Education and SMS required Turner to hold the same certificate he used for his position in Glen Rock, from which he was receiving disability benefits. (Pa52-59).

In 2007, Turner was the subject of a pension reduction review, which he appealed to the Board. (Ra20-34). In the Division's March 20, 2007 letter to Turner, the Division advised that he had been overpaid by $1,463.37. (Ra20-22). In the enclosed calculation, the Division found that in the calendar year 2005, Turner earned $32,067.93 in pension benefits and $86,999.94 in private and public earnings, which totals $119,067.87. (Ra22). The Division determined that the current salary of Turner's former position would be $117,604.50. Ibid. After subtracting the salary of the former position from the total of the pension benefits received and the public/private earnings, the Division determined that Turner had been overpaid by $1,463.37. Ibid.

Based on the documents attached to his July 9, 2007 letter to the Division, Turner was on notice that "Reenrollment in the TPAF is required whenever a TPAF retiree is appointed to a teaching or professional staff position requiring

certification that pays more than $500[.]" (Ra29). During the excess earnings review, Turner never informed the Division the salary he was earning was from a TPAF-eligible and certificated position. (Pa79; Pa6-7). Northern Highlands also did not notify the Division that Turner was employed in a TPAF-eligible position. (Pa79; Pa6-7).

On April 7, 2022, the Board suspended Turner's monthly disability retirement benefits pending the completion of the Pension Fraud and Abuse Unit ("PFAU") investigation into Turner's post retirement public employment. (Pa79). On January 11, 2024, the Board adopted the PFAU's findings of fact and found that Turner violated both N.J.S.A. 18A:66-40(b) and N.J.A.C. 17:3-6.2. (Pa68-72).

On February 28, 2024, Turner appealed the Board's determination and requested a hearing in the Office of Administrative Law. (Pa73-75). Turner alleged that he met with a representative from the Division in 2004 who advised him to not make any changes to his retirement and that the Division was on notice since 2007 of his employment with Northern Highlands. (Pa74-75). On May 3, 2024, the Board considered and denied Turner's appeal, finding that his July 1, 2004 OD retirement was not bona fide. (Pa76). Specifically, the Board determined that Turner returned to a TPAF-eligible position prior to the date his OD application was approved by the Board in violation of N.J.S.A. 18A:66-40(b) and N.J.A.C. 17:3-6.2. (Pa81). As a result, the Board ordered Turner to

(1) re-enroll in the TPAF and pay mandatory contributions for the period he returned to employment with Northern Highlands and (2) reimburse the TPAF for all retirement benefits received from July 1, 2004 through April 1, 2022. (Pa82).

This appeal followed.

ARGUMENTS

POINT I

THE BOARD'S DETERMINATION THAT TURNER'S JULY 1, 2004 RETIREMENT WAS NON-BONA FIDE IS REASONABLE AND SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE

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

This court is "obliged to accept" factual findings that "are supported by sufficient credible evidence." Brady v. Bd. of Review, 152 N.J. 197, 210 (1997) (quotation omitted). "[T]he test is not whether [this] court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs." Ibid. (quotation omitted). As the person challenging the Board's decision, Turner bears the burden of proving that the decision is unreasonable and unsupported by sufficient credible evidence. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002).

Additionally, by enacting N.J.S.A. 52:14B-9 and N.J.S.A. 52:14B-10, the Legislature has outlined the process for administrative appeals. "The Administrative Procedure Act . . . does not create a substantive right to an administrative hearing; it merely provides for a procedure to be followed in the event an administrative hearing is otherwise required by statutory law or constitutional mandate." Toys "R" Us v. Twp. of Mount. Olive, 300 N.J. Super. 585, 590 (App. Div. 1997). With N.J.S.A. 52:14F-7(a), the Legislature gave agencies the "exclusive authority to determine whether an administrative matter is a 'contested case' within the intent of the APA." Sloan ex rel. Sloan v. Klagholtz, 342 N.J. Super. 392 (App. Div. 2001) (quoting N.J.S.A. 52:14B-2(b)). If a matter does not present a genuine issue of material fact, then "it is not a contested case subject to transfer to the OAL." Ibid.

The Board's determination that Turner's July 1, 2004 OD retirement was non-bona fide and its denial of his request for a hearing are supported by the evidence and the law. The Board's final administrative determination should be affirmed.

A. The Board reasonably determined that Turner's retirement was non-bona fide pursuant to N.J.S.A. 18A:66-40(b).

The pension statutory and regulatory framework outlines the requirements to effectuate a proper retirement. "A member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or 30 days after the date of the retirement, whichever is later." N.J.A.C. 17:2-6.2. A pension-fund member may "withdraw, cancel, or change an application for retirement at any time before the member's retirement allowance becomes due and payable. N.J.A.C. 17:3-6.3(a). Additionally, if a disability retiree

> becomes employed again in a position which makes him eligible to be a member of the retirement system, his retirement allowance and the right to any death benefit as a result of his former membership, shall be canceled until he again retires.
>
> [N.J.S.A. 18A:66-40(b) (emphasis added).]

Here, Turner's disability retirement from Glen Rock was approved by the Board on August 5, 2004. Thus, Turner's disability retirement became finalized, i.e., due and payable, on September 4, 2004. Before his retirement was even

finalized, Turner was appointed the Director of Transportation by Northern Highlands for the 2004-2005 year. The Director of Transportation position was a certificated and TPAF-eligible position. Because Turner returned to a TPAF-eligible position prior to his disability retirement becoming due and payable pursuant to N.J.A.C. 17:2-6.2, Turner's retirement was non-bona fide, as he should have remained enrolled in TPAF. Consequently, he was not eligible to receive disability retirement benefits.

Furthermore, because Turner's purported retirement was a disability retirement and he was reemployed in a TPAF-eligible position, Turner was also in violation of N.J.S.A. 18A:66-40(b). His TPAF employment, no matter when it occurred, required the cancellation of Turner's disability retirement until he retired again on April 1, 2022. N.J.S.A. 18A:66-40(b). Accordingly, the Board correctly determined that Turner must return all of his retirement benefits, and is required to re-enroll and pay the mandatory pension contributions for the period he returned to eligible TPAF employment (July 1, 2004 through June 30, 2006).

Turner's argument that the Board's decision to deny his request for an administrative hearing was arbitrary and capricious because Board failed to consider Turner's allegation that he met with a Division representative in 2004, is without merit. (Pb16-17). In Turner's view, that fact is legally relevant to the issues on appeal because he argues that it creates a genuine issue of material

fact that contradicts the Board's determination that he did not contact the Division prior to beginning employment with Northern Highlands. (Pb16-17). The Board noted that neither Turner nor Northern Highlands contacted the Division to determine how his employment with Northern Highlands would affect his retirement. (Pa81). In the Pension Fraud and Abuse Unit's December 14, 2023 investigation report, a timeline of events is meticulously laid out. (Pa7-9). There is no mention of any meeting between a Division representative and Turner in 2004. Ibid. In fact, Turner's first outreach to a Division representative was on June 13, 2012. (Pa8). Thus, based on the investigation report and the Division's internal records, the Board reasonably determined that there was no merit to Turner's claim that he met with the Division representative in 2004, who told him to not make any changes to his retirement.

Furthermore, even if Turner's claims that he met with a Division representative who told him not to make any changes to his retirement status in 2004 were true, that still would not create a genuine issue of material fact to warrant an administrative hearing. TPAF disability retirees are not barred from all post-retirement employment. N.J.S.A. 18A:66-40(a). Rather, TPAF disability retirees are only expressly barred from working in a TPAF-eligible position. N.J.S.A. 18A:66-40(b). Pursuant to N.J.S.A. 18A:66-40(a) and N.J.A.C. 17:3-6.14(a), a TPAF disability retiree may be engaged in employment that does not require reenrollment in the TPAF as long as the salary earned when

combined with the pension benefit is less than the salary attributed to the position from which the member retired.[3] N.J.S.A. 18A:66-40(a) and N.J.A.C. 17:3-6.14(a). If a TPAF disability retiree's salary plus disability benefit is higher than the salary attributed to the position from which the member retired, then the member will be subject to an overpayment. N.J.A.C. 17:3-6.14(c)(1).

Based on these statutory and regulatory permissions to engage in non-TPAF-eligible public employment, Turner's meeting with a Division representative in 2004 would not have created a genuine issue of material fact. The Division can only advise a member based on the information provided by the member. If the TPAF disability retiree does not disclose that the position he is seeking employment in is a TPAF-eligible position or a position related to the general area of employment he retired from, then the Division's alleged advice to not change retirement status would have been correct. Turner does not allege that he told the Division representative that he was seeking employment in a TPAF-eligible position or a position that was related to the general area of

[3] A disability retiree "must establish incapacity to perform duties in the general area of his ordinary employment rather than merely showing inability to perform the specific job for which he was hired." Skulski v. Nolan, 68 N.J. 179, 205-06 (1975). See also Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 130-31 (App. Div. 2008). Therefore, while N.J.S.A. 18A:66-40(a) generally permits non-TPAF eligible post-retirement employment, the nature of the non-TPAF employment could be subject to consideration and evaluation for any indication the member was no longer totally and permanently disabled.

employment he retired from; he only alleges that he told the Division representative that he was seeking employment at Northern Highlands. Thus, The Board reasonably determined that Turner's argument that he told the Division he was seeking employment with Northern Highlands does not create a genuine issue of material fact to warrant an administrative hearing.

For similar reasons, the court should reject Turner's argument that Board's denial of his request for an administrative hearing was arbitrary and capricious because the Division was put on notice during the 2007 excess earning review that Turner was employed at Northern Highlands is without merit. (Pb17-18). As noted above, TPAF disability retirees are not prohibited from employment in non-TPAF-eligible positions as long as the salary, when combined with their pension benefit is less than the current salary of their former position. The 2007 excess earnings review does show that the Division was on notice that Turner was employed with Northern Highland. However, as non-TPAF-eligible employment is permitted, the fact of Turner's employment alone would not have triggered any alarm bells. Based on the Division's March 20, 2007 letter with the calculations, the Division was only focused on what Turner's salary at Northern Highlands was, not whether it was a TPAF-eligible position or whether it was in the general area of employment he was receiving disability benefits for. None of the statutes or regulations concerning the excess earnings review require the Division to check for what type of employment the

member is employed in as part of the review. Thus, the Division would have no way of knowing whether Turner's employment was TPAF-eligible unless either Turner or Northern Highlands reported that fact to the Division.

Moreover, in the documents Turner provided to the Division on July 9, 2007, Turner was put on notice that returning to a TPAF-eligible position that requires a certification would cancel his retirement and re-enroll him in the TPAF. (Ra27-32). It is not credible that, as a former school business administrator, he would not have known that he signed a contract with Northern Highlands for a TPAF-eligible and certificated position. Accordingly, the Board reasonably determined that the Division was not put on notice during the 2007 excess earnings review that Turner was employed in a TPAF-eligible position.

POINT II

THE BOARD REASONABLY DETERMINED THAT EQUITABLE PRINCIPLES ARE NOT APPLICABLE.

To avoid the consequences of his actions, Turner argues that the Board should be estopped from requiring him to repay the funds he improperly received because it failed to timely act. The undisputed record contradicts that claim. More importantly, the outcome he seeks is would subvert the Board's statutory charge to ensure "the proper operation of the retirement system." N.J.S.A. 43:16A-13(1).

The Legislature authorized the Board to correct errors in the retirement system if an individual receives a retirement benefit he or she is not legally entitled to receive. N.J.S.A. 43:16A-18. An individual who is "eligible for benefits" is entitled to a liberal interpretation of the pension statute, but "eligibility [itself] is not to be liberally permitted." Krayniak v. Bd. of Trs., Pub. Emps.' Ret. Sys., 412 N.J. Super. 232, 237 (App. Div. 2010). Allowing ineligible members to receive retirement benefits "place[s] a greater strain on the financial integrity of the fund in question and its future availability for those persons who are truly eligible for such benefits." Smith v. State, 390 N.J. Super. 209, 215 (App. Div. 2007). The consequences of those laws here are clear. Because Turner was not eligible for the funds he received, must repay them. Equitable considerations have no place in his case.

As a threshold matter, "[g]enerally, equitable principles are rarely applied against governmental entitles." Seago v. Bd. of Trs., Tchrs. Pension & Annuity Fund, 257 N.J. 381, 394-95 (2024) (citing Middletown Twp. Policemen's Benevolent Ass'n Loc. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000). In determining whether to apply equitable principles in general, the court should consider the following: "'whether the government failed to "turn square corners"; whether the pension member 'acted in good faith and reasonably'; the harm a member will suffer; the harm to the pension scheme; and any other relevant factors in the interest of fairness." Seago, 257 N.J. at 396-97 (citing

Sellers v. Bd. of Trs., Police & Firemen's Ret. Sys., 399 N.J. Super. 51, 62-63 (App. Div. 2008). Equitable principles should only be used as a remedy "rarely and sparingly" and when it "does no harm to the pension overall pension scheme." Sellers, 399 N.J. Super. at 62.

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). 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, 162 N.J. at 36, "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. Miller v. Miller, 97 N.J. 154, 163 (1984).

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 doctrine of laches is an equitable remedy that "precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417 (2012) (citing Cnty. Of Morris, 153 N.J. at 105. "'Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned.'" Fox, 210 N.J. at 418 (citing Knorr v. Smeal, 178 N.J. 169, 181 (2003) (emphasis added).

Here, neither equitable estoppel, laches, nor general equitable principles apply. The Legislature expressly forbids TPAF disability retirees from returning to TPAF-eligible positions. N.J.S.A. 18A:66-40(b). And if they do return to a TPAF-eligible position, the Legislature has mandated that their retirement "shall be cancelled." Ibid. Equitable principles do not apply here as the Board is fulfilling its statutory duty under N.J.S.A. 18A:66-40(b) by requiring repayment of the disability retiree benefits.

And in any case, Turner cannot reasonably deny his own role in creating the delays. The Division did not become of aware of Turner's case until 2022, because, in part, Turner failed to report that he had returned to a TPAF-eligible position. The employment contract between Northern Highlands and Turner

indicated that Turner would be required to hold the Certificate of Supervisor and deductions to the TPAF would be made. (Pa11; Ra3-10). Turner, a former business administrator who would have no doubt been familiar with employment contracts, did not advise the Division of his TPAF-eligible position.

In fact, correspondence in 2005 indicates that Turner and Northern Highlands were actively seeking advice on how to evade the regulations to ensure that Turner could collect the maximum disability retiree benefits and earn a salary. (Ra16-19). Northern Highlands was advised that reducing Turner's salary with the intention of allowing him to collect that maximum amount of disability retiree benefits would be contrary to the treasury regulations; however, they reduced Turner's salary anyway for the 2005-2006 school year. (Ra16-17; Ra14; Pa11). Turner was also warned that the reduction would contravene the regulations, but chose to accept the lower salary anyway. (Ra18-19; Ra7; Pa11). Turner, was in fact, trying to "'have his cake and eat it too.'" (Pb27).

Based on these actions, Turner's claims that had he "been advised correctly in 2004 when he contacted the Division, he could have sought to end his contract with Northern Highlands or otherwise sought to forego his disability retirement" are unconvincing. (Pb24). Turner's conduct in 2005 indicates that he was willing to act contrary to the disability retiree earnings regulations for his own personal benefit. It is not reasonable to believe that proper advice in

2004 would have changed Turner's conduct, nor is it enough to create a genuine issue of material fact to warrant an administrative hearing.

Moreover, Turner's arguments that the Division was on notice of his employment based on his meeting with the Division representative in 2004 is, again, without merit. As noted above, Turner has not alleged that he told the Division that he was seeking employment in a TPAF-eligible position, only that he was seeking employment with Northern Highlands. Turner's claims were not enough to put the Division on notice, and therefore, any delay cannot be attributable to the Division.

Further, even if the 2004 meeting with the Division representative did occur and Turner did not advise the representative that he was seeking employment in a TPAF-eligible position, then the alleged advice that he could accept employment and collect OD retirement benefits would not be a misrepresentation. Regardless, Turner has not alleged enough information or produced any supporting documentation to show that any meeting occurred in 2004. The Board reasonably determined that his self-serving statements about a 2004 meeting with a Division representative were not sufficient to warrant a hearing to determine whether equitable estoppel applied. Similarly, the 2007, and subsequent, excess earnings reviews did not place the Division on notice that Turner was employed in a TPAF-eligible position. As such, the Division did not cause any unreasonable delay.

Finally, contrary to his claims, there was no prejudice to Turner. (Pb26). If OD retiree benefits has not been granted or if the Division immediately discovered that Turner returned to a TPAF-eligible position, Turner has not established how his conduct would have changed. Had OD been denied or the Division found out about his TPAF-eligible employment, Turner would have more likely than not continued employment with Northern Highlands because the salary was higher than his OD benefit. He would have also probably founded and run SMS, in the same way, as it provided him flexibility to accommodate his medical conditions. (Pb19). In fact, Turner noted that SMS allowed him to "collect some additional income while addressing his serious medical conditions that could not otherwise be accomplished had he held a full-time business administrator position." (Pb3).

The Division's alleged inaction did not prevent Turner from doing what he intended to. Instead, he benefited from almost twenty years of pension payments he was not eligible for. Accordingly, due to Turner failing to inform the Division of his return to TPAF-eligible employment and his bad faith actions, the Board reasonably determined that equitable considerations did not apply.

CONCLUSION

For these reasons, the Board's decision should be affirmed.

Respectfully submitted,

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June 30, 2025

VIA ECOURTS

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Ernest Turner v. Board of Trustees of the Teachers' Pension and Annuity Fund
Docket No.: A-003124-23

On Appeal from a Final Agency Decision of the Board of Trustees of the Teachers' Pension and Annuity Fund

Letter Brief of Appellant, Ernest Turner, in further support of his Appeal

Dear Mr. Orlando:

As you are aware, this office represents the Appellant, Ernest Turner ("Appellant" or "Turner") in regard to the above-referenced matter. Please accept this letter brief, in lieu of a more formal submission, in reply to Respondent's Appellate Brief in said matter.

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LEGAL ARGUMENT

I. RESPONDENT'S DECISION IN THIS MATTER WAS ARBITRARY, UNREASONABLE, AND CAPRICIOUS AND MUST BE REVERSED BECAUSE IT FAILED TO CONSIDER MATERIAL DISPUTES OF FACT AND OTHER FACTUAL ASSERTIONS BY APPELLANT THAT WARRANT A FACT-FINDING HEARING TO ALLOW APPELLANT TO ASSERT DEFENSES TO RESPONDENT'S ACTION (Aa076-083)

Respondent's own submission in this matter demonstrates the factual disputes at issue that warrant a reversal of the Board's decision to deny Appellant a hearing in the Office of Administrative Law (OAL).

First, in its brief, Respondent references the charge made by the Board in its final administrative decision, asserting that, "neither Mr. Turner nor Northern

Highlands contacted the Division to ascertain whether it would have any negative impact on his pension and whether it was in compliance with all applicable statutes and regulations." (Respondent Brief at p. 10); (Aa081). This is an assertion directly disputed by Appellant.

To that end, Appellant stated, in its submission to Respondent seeking an administrative hearing, that "he met with a representative from the Division of Pensions following the approval of his disability retirement application and advised the representative of his engagement with Northern Highlands in 2004" and "[h]e was expressly advised at that time that he did not need to make any changes to his retirement status despite the services he was performing for that district." (Aa074). Despite this contention raised by Appellant in his submission seeking a contested case hearing, Respondent claims the direct opposite in its final administrative determination, namely, that Appellant failed to contact the division to ascertain whether it would have any negative impact on his pension and/or whether it ran afoul of any statutes or regulations. However, this is precisely what Appellant contends he did. He asserts that he advised the Division of his employment with Northern Highlands immediately following approval of his disability retirement and was advised he did not have to make any changes, despite working for Northern Highlands at that particular time. Respondent unilaterally determined that this never occurred without affording Appellant a fact-finding hearing. We submit that this was

reversible error and demonstrates that Respondent's final administrative decision was arbitrary, unreasonable, and capricious.

The Board also never articulated that there was no merit to Appellant's assertion that he met with a division counselor after being approved for his disability pension in its final administrative decision, as contended by Respondent. (Respondent Brief at p. 10). Instead, it simply unilaterally held that Appellant never contacted the Division to ascertain the impact of his Northern Highlands employment on his pension, directly disputing the assertion made by Appellant in his submission to the Board. As such, there is unequivocally a factual dispute on that issue.

Appellant further submits that this factual dispute is, indeed, a material one. For instance, the Board deemed it important and relevant enough to state in its final administrative determination that "neither Mr. Turner nor Northern Highlands contacted the Division to ascertain whether it would have any negative impact on his pension and whether it was in compliance with all applicable statutes and regulations." (Aa081). The Board's inclusion of this allegation in its final administrative decision should speak volumes as it implies that Appellant did not take any steps to investigate the ramifications of accepting the job at Northern Highlands given his subsequent approval of disability retirement. Yet Appellant alleges this is precisely what he did. Such action on the part of Appellant, if

established through factual findings of an independent fact finder, dispel any notion of impropriety or bad faith on Appellant's part, demonstrates transparency and actual notice to the Division of the underlying circumstances, and would weigh heavily in favor of Appellant's equitable arguments. It would demonstrate immediate notice on the part of the Division of Turner's employment with Northern Highlands while receiving disability retirement benefits. It would also further Appellant's laches argument given the Division waited almost twenty years before acting to suspend his benefits, resulting in a demand for reimbursement of over $1.2 million. (Aa062-67).

Respondent further argues that "Turner's meeting with a Division representative in 2004 would not have created a genuine issue of material fact" and that "[t]he Division can only advise a member based on the information provided by the member." (Respondent Brief at p. 11). Further, Respondent asserts that "[i]f the TPAF disability retiree does not disclose that the position he is seeking employment in is a TPAF-eligible position or a position related to the general area of employment he retired from, then the Division's alleged advice to not change retirement status would have been correct." Id. Respondent then states that Appellant does not allege that he advised a Division representative that he was seeking employment in a TPAF-eligible position or "a position that was related to the general area of employment he retired from," and instead only alleges that he told the division that

"he was seeking employment at Northern Highlands." (Respondent Brief at p. 11-12). Appellant disputes these contentions entirely. Appellant had already been hired at Northern Highlands when he was approved for disability retirement. He never contended that he met with a Division counselor to advise them that he was "seeking" employment at Northern Highlands, but rather, he advised them that he was actively working for Northern Highlands. (Aa074). That employment at Northern Highlands consisted of being appointed as Director of Transportation Services for Region 1 for the 2004- 2005 school year. (Ra02). Therefore, the Division would have surely been put on notice that he was employed in a TPAF eligible position or, at the very least, in a "position that was related to the general area of employment he retired from." Respondent's arguments in this regard further demonstrate the need for a contested case hearing, as Respondent is not only misrepresenting what Appellant contends he advised the Division counselor, but Respondent is also making unfounded assertions about what Appellant said or did not say to the Division counselor.

By summarily disposing of this matter in its final administrative decision, Respondent is depriving Appellant of his ability to adequately raise the equitable arguments set forth in his appeal. A hearing before a fact finder is therefore necessary to determine whether equitable estoppel and/ or laches apply.

Respondent further submits that the excess earnings review the Division and Respondent imposed on Appellant did not provide adequate notice of his employment in a TPAF eligible position. We submit that this argument is entirely specious and lacks merit. In its initial letter to Appellant in 2007, the Division expressly states that "[t]he Division reviewed your post-retirement earnings history through the New Jersey Division of Wage and Hour and has determined that you have exceeded your earnings limitation as a disability retirement." (Ra20). Moreover, this specifically pertained to his "benefits for calendar 2005," while he was employed by Northern Highlands. Id. For Respondent to now contend that such earnings would not have "triggered any alarm bells" is disingenuous given Respondent's concession that the Division was "only focused on what Turner's salary at Northern Highlands was." (Respondent Brief at p. 12). Respondent is therefore admitting that it was aware that Appellant was earning income from Northern Highlands in 2005 and this should have certainly "triggered alarm bells" given his recent disability retirement at that time.

The fact that Appellant appealed the 2007 excess earnings review demonstrates that he was not attempting to conceal his employment with Northern Highlands while receiving disability retirement benefits. Not only does this demonstrate an absence of "unclean hands" on Appellant's part, it further corroborates his assertion that he met with a pension counselor while working for

Northern Highlands, once he learned that his disability retirement was granted. In other words, if Appellant was trying to avoid shining a light on the fact that he was working at Northern Highlands in a TPAF eligible position as alleged by the Board, while receiving pension benefits, then he would not have challenged the excess earnings penalty imposed by the Division and Board. The fact that "alarm bells" were ostensibly "triggered" almost two decades after his retirement is inexcusable, given the monumental reimbursement now being sought by Respondent. The Board's denial of a hearing in this regard not only deprives Appellant of establishing and asserting equitable defenses, it likewise allows Respondent and/or the Division from having to account for the significant delay in this case. Such a result must not be permitted.

Appellant's assertions also require a hearing to determine whether equitable estoppel should be applied. Equitable estoppel may be invoked against a government entity "where interests of justice, morality and common fairness clearly dictate that course." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000), quoting Gruber v. Mayor and Twp. Comm. of Twp. of Raritan, 39 N.J. 1, 13 (1962). The Supreme Court has defined the doctrine of equitable estoppel as follows:

> The essential principle of the policy of estoppel here invoked is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in

> good faith has relied upon such conduct. An estoppel . . . may arise by silence or omission where one is under a duty to speak or act. It has to do with the inducement of conduct to action or nonaction. One's act or acceptance may close his mouth to allege or prove the truth. The doing or forbearing to do an act induced by the conduct of another may work an estoppel to avoid wrong or injury ensuing from reasonable reliance upon such conduct. The repudiation of one's act done or position assumed is not permissible where that course would work injustice to another who, having the right to do so, has relied thereon.
>
> Id., quoting Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503-04, (1955) (citations omitted).

Equitable estoppel is "rarely invoked against a governmental entity." Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999) (citations omitted)). However, equitable estoppel will be applied in the appropriate circumstances unless the application would "prejudice essential governmental functions." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124, 162 N.J. at 367, quoting Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954).

Equitable considerations "are relevant in assessing governmental conduct" and impose a duty on the court to invoke estoppel when the occasion arises. Id., citing Skulski v. Nolan, 68 N.J. 179, 198 (1975). In Skulski, the Court concluded that "it [was] appropriate for [the Court] to weigh equitable considerations, particularly the reliance factor" in determining whether the termination of pensions

previously granted by the Hudson County Pension Commission was appropriate. Skulski, supra, 68 N.J. at 198-99. The Court found particularly relevant circumstances where pensioners "relied upon the pension award in declining to secure subsequent full-time employment either within or without the county, thereby foreclosing the opportunity to secure alternate pension benefits." Middletown Twp. Policemen's Benevolent Ass'n Local No. 124, 162 N.J. at 367, quoting Skulski, supra, 68 N.J. at 199.

As noted, *supra*, and as set forth in Appellant's initial brief, one of the central factual disputes involves Appellant's meeting with a pension counselor after learning he was awarded his disability pension. He contends he brought the issue at hand directly to a pension counselor and was advised that he did not have to change anything. Under those circumstances, it was certainly reasonable for him to rely on such advice. Moreover, the fact that he challenged the excess earnings review concerning the interplay between his salary at Northern Highlands and his receipt of disability pensions benefits supports the contention that Appellant had, in fact, relied upon the advice of the pension counselor as he was willing to expose himself and his 2005 salary to scrutiny by the Division and the Board. These facts clearly warrant an administrative hearing so that Appellant can at least have an opportunity to defend against Respondent's action by raising equitable defenses.

II. CONCLUSION

For these reasons and for the reasons originally set forth in Appellant's initial submission, which Appellant incorporates herein, Respondent's decision in this matter must be reversed and Appellant must be afforded a fact-finding hearing. We thank the Court for its consideration in this matter.

Respectfully submitted,

CRIVELLI, BARBATI & DeROSE, LLC

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