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JAMES GLUCK, **Appellant,** **v.** **BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM,** **Respondent.**	**SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION** **DOCKET NO: A-003773-22** **ON APPEAL FROM A FINAL ADMINISTRATIVE ACTION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM**

AMENDED APPELLATE BRIEF ON BEHALF OF APPELLANT, JAMES GLUCK

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I. PRELIMINARY STATEMENT

In the instant matter, James Gluck (hereinafter "Appellant") appeals the final administrative decision of Respondent, the Board of Trustees (hereinafter "the Board") for the Public Employees Retirement System ("PERS") retroactively deeming him ineligible for PERS membership from February 1, 2002 through February 29, 2008 and from December 1, 2009 through the present. During that period, Appellant served as counsel for the Beachwood Township Sewerage Authority ("BSA").

First, the Board contends that from 2002 until 2008, Petitioner was an independent contractor and not a "genuine" employee of the BSA where he had worked since 1999. Furthermore, the Board determined that during the second period of time, namely 2009 to 2016, Petitioner was essentially performing services for the Beachwood Sewerage Authority under a Professional Services Agreement ("PSA"), as he had been during the years of 1999 to 2008. Thus, the Board determined that pursuant to N.J.S.A. 43:15A-7.2, a statute that effectively precludes membership in PERS for individuals employed by a public entity under a PSA, that Petitioner was not eligible for membership in PERS from 2009 to 2016.

Petitioner disputes this determination and posits that he should be credited for the years in question for a multitude of reasons and based on the relevant law. First, Petitioner was a "genuine" employee of the BSA from 2002 until 2008 and from

2009 until 2016. As fully detailed below and based on the underlying record, hiring and retaining Petitioner as an employee was the obvious intention of the BSA throughout the entirety of their relationship. Second, as of December of 2009, Petitioner was no longer employed pursuant to a Professional Services Agreement and was instead a W-2 salaried employee pursuant to resolution of the Commissioners of the BSA. As such, the notion that he was employed pursuant to a PSA during this latter time period is simply incorrect. Third, the guidance provided by the IRS through their 20-factor test and other publications demonstrates that he did not act in the capacity of an independent contractor for either period of time for which he was employed by the BSA and an analysis of such factors weigh in Petitioner's favor.

Lastly, the Board must be equitably estopped from denying Petitioner credit for the years in question as he was required to contribute to PERS as part of his employment with the BSA. As explained further below, the actions of the Division and the Board must not be countenanced, as they unequivocally affirmed his membership during the years in question and Petitioner has otherwise relied upon his membership in PERS and the various representations made by the Division to the absolute detriment of his future retirement stability. More specifically, as a result of the Division and the Board's failure to take any action for approximately fifteen (15) years after Petitioner initially enrolled with PERS via his job with the BSA,

they have deprived Petitioner of future retirement opportunities and have significantly damaged his future retirement prospects. Such inequitable conduct must not be tolerated and the Board must be equitably estopped from disqualifying Petitioner's membership with PERS.

II. STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

On or about May 18, 1999, Appellant entered into a Professional Services Agreement (hereinafter "PSA") with the Beachwood Sewerage Authority (hereinafter "BSA") to serve as Counsel for the BSA and to render legal services commensurate therewith for a defined period of time. (Aa38-41). The PSA began on May 18, 1999 and ran until January 31, 2000. Section Two (2) of said agreement states the following:

> "Appointee shall furnish all equipment and materials and shall perform the services as provided in this Agreement and as awarded to it for a partial consideration of Three Thousand AND 00/100 ($3,000.00) DOLLARS per year commencing on February 1, 1999. Said sum shall be payable to Appointee as a *salaried employee of the Authority* on a monthly basis for legal services rendered in the position of Attorney for the (BSA) for the fiscal year 1999 in strict accordance with the contract as the word "contract" is hereinafter defined and in accordance with all other terms and provisions."
>
> (Aa38).

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

Since entering into the initial employment agreement, Appellant continued to serve as Counsel for the BSA, being first retained on a yearly basis under a PSA and later being expressly hired as in-house counsel, as more fully detailed below. (See Aa38-91, consisting of Appellant's PSA's with the BSA) Given the fact that Appellant was hired as a salaried employee of the BSA, and the BSA is a governmental entity as defined under N.J.S.A. 43:15A-7, *et. seq.*, immediately after entering into the initial agreement in 1999, the BSA had an affirmative duty to enroll Appellant in PERS as a term and condition of his employment. (1T:77:10-22).[2] (Aa31-37).[3] The BSA's failure to enroll Appellant in PERS would have been a violation of the aforementioned statute. See N.J.S.A. 43:15A-7.1.

In or around 2007, Chapter 92, P.L. of 2007 was enacted, otherwise known as N.J.S.A. 43:15A-7.2 (hereinafter "Chapter 92"). Chapter 92 provided:

> a. A person who performs professional services for a political subdivision of this State or a board of education, or of 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. A person who is a member of the retirement system as of the effective date

[2] The transcript from the hearing held on July 25, 2022, is referenced throughout this submission as "1T."
[3] Appellant had already enrolled in PERS by virtue of an earlier appointment as a public defender for the Borough of Beachwood, and thus his in enrollment in PERS for his employ with the BSA consisted of his prior credit being transferred to the service and salary being reported by the BSA.

> 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. Nothing contained in this subsection shall be construed as affecting the provisions of any agreement or contract in effect on the effective date of P.L.2007, c. 92 (C.43:15C-1 et al.), whether or not the agreement or contract specifically provides by its terms for membership in the retirement system. No renewal, extension, modification, or other agreement or action to continue any professional services contract in effect on the effective date of P.L.2007, c. 92 (C.43:15C-1 et al.) beyond its current term shall have the effect of continuing the membership of a person in the retirement system or continuing the accrual of service credit on the basis of performance of the contract.
>
> N.J.S.A. 43:15A-7.29(a).

On or about May 6, 2008, the BSA received a notice from Deputy Director of Finance at the Division, John D. Megariotis, concerning pension eligibility for employees that perform services under professional services contracts. (Aa92-96). Therein, Mr. Megariotis stated that, "a full-time, in-house counsel, however, may be eligible to continue in PERS if the counsel was a member of PERS prior to July 1, 2007, the employment is not tied to a professional services contract, and the individual does not meet the independent contractor test." Id. The Deputy Director further advised that all questions concerning professional services contracts and independent contractors should be forwarded to the Division of Pension and Benefits in writing for clarification. Id.

On or about May 22, 2008, based on the May 6, 2008 correspondence from the Division and the representations contained therein that a "full-time, in house-counsel… may be eligible to continue in PERS" if he or she was a member of PERS prior to July 1, 2007, the BSA Commissioners directed that an email inquiry be sent to the Division requesting clarification of the number of hours needed to be worked by an employee to be considered "full time" employment. (Aa97). The Division responded by stating that the employer is responsible for making that determination – not the Division. Id.

On or about December 15, 2009, the Commissioners voted unanimously to adopt resolution 12-50-09 hiring Appellant as an in-house Attorney to be compensated as a salaried W-2 employee. (Aa98). It should be noted, however, that Appellant received a W-2 from the BSA for the entirety of his tenure therewith, to include the period of 2002 to 2008. (Aa157-175). Nonetheless, following the adoption of the resolution, the BSA re-enrolled Appellant in PERS. (1T:80:7 to 82:4). Appellant remained employed as in-house counsel for the BSA as a W-2 employee from December 15, 2009, until June 21, 2022. (1T:76:16-21).

On or about November 7, 2014, the Division notified Appellant that based upon information it had received from the BSA, his position was ineligible for continued membership in PERS as of January 1, 2008. (Aa110-111). The Division stated that under Chapter 92, a person employed under a PSA or one who does not

meet the definition of a "bona fide employee" is prohibited from earning pension credits in PERS with respect to that service. (Aa110). Additionally, the Division noted that "bona fide employees" enrolled in PERS who were performing professional services pursuant to a contract entered into prior to January 1, 2008, were permitted to continue to accrue pension credits for the remainder of that contract year. Id. However, they contended that an individual was not eligible to earn any further retirement credits for the performance of those services after that contract expired. Id. As such, the division concluded retroactively that Appellant was ineligible to earn pension credits in PERS with the BSA after December 31, 2007. Id.

The Division also noted in the above-referenced correspondence that its determination as to Appellant's status at the time was made without a review of the circumstances of his professional services relationship prior to January 1, 2008, which was the date that Chapter 92 went into effect. (Aa111). The Division further stated that it was reserving the right to review the circumstances of Appellant's pre-January 1, 2008, employment and based upon the same, the Division may disallow additional service and salary if it is determined that the Appellant's relationship with the BSA was that of an independent contractor under the IRS test. Id.

Remarkably, on or about April 27, 2015, the Division contacted Appellant and advised that he is eligible to purchase pension credits for service he performed for

the years of 1988 and 1989. (Aa99-101). Appellant acted on the representation of the division and on or about May 11, 2015, the Division confirmed that it had accepted Appellant's payment for the aforementioned pension credits. (Aa101).

On September 22, 2015, Susan Grant, Acting Director of Fraud and Abuse for the Division, forwarded a notice to Appellant advising him, pursuant to the Division's review of certain information provided by both the BSA and Appellant himself, that it has determined that Appellant was an independent contractor and not an employee for his *entire* tenure at the BSA. (Aa102-106). This period spanned from 1999 to the present time. Id. In reaching this conclusion, the Division claimed that it relied upon a variety of alleged facts, to include: (1) public notifications from 2007 and 2008 published in the Ocean County Observer and the Asbury Park Press, respectively, indicated that the BSA contract was awarded to Appellant's law firm, Gluck & Allen, L.L.C., not Appellant individually; (2) despite being removed from payroll at the BSA on February 28, 2008, and despite EPIC's notation that he resigned on February 29, 2008, Appellant remained the legal counsel under the PSA subsequent thereto; (3) for the period of February 1, 2009 to January 31, 2010, Appellant was paid as an independent contractor through a 1099 form after his reappointment as BSA counsel; and (4) a December 15, 2009 resolution passed by the BSA provided that Appellant was to be individually hired as in-house counsel

the for BSA in the capacity of a salaried employee, while the PSA between BSA and Gluck & Allen, L.L.C., was thereupon terminated. (Aa102-103).

As a result of those factors stated above, Grant contended that Appellant was properly removed from PERS in February of 2008 (at the expiration of that PSA) under Chapter 92 and the December 15, 2009 resolution passed by the BSA providing for Appellant's salaried employment therewith, was formulated by the BSA "to circumvent Chapter 92, P.L. 2007." (Aa103). Grant also alleged that a review of minutes from 2010, 2011, and 2012, note that several BSA resolutions were "provided" by the law firm of Gluck & Allen, L.L.C., despite the law firm being terminated in 2009. Id. Based upon the aforementioned information, the Division determined that Appellant must be retroactively expelled from PERS, from 1999 through 2008 and from 2009 to 2016. (Aa105-106).

On or about October 17, 2015, within the applicable time frame, Appellant formally put the Division on notice of his intent to appeal its ruling concerning his expulsion from PERS and requested a hearing before the PERS Board of Trustees. (Aa107-109). Thereafter, on July 31, 2016, the Division forwarded a determination letter stating that it deemed Appellant's service from February 1, 2002, to the present as an independent contractor rather than an employee and should be removed from PERS from February 1, 2002, to February 29, 2008, and from December of 2009 to 2016. (Aa112-117).

Following its August 2016 PERS Board meeting, the Board transmitted correspondence to Appellant stating he was ineligible for PERS enrollment with the BSA from February 1, 2002, to February 29, 2008 under N.J.S.A. 43:15A-7.2(b) as it considered Appellant an independent contractor rather than an employee. (Aa118-124). The Board further stated that Appellant was terminated through December 1, 2009 through the present "as (Appellant) was retained pursuant to a professional services contract under Local Public Contracts Law and thus, not eligible for PERS enrollment pursuant to N.J.S.A. 43:15A-7.2(a). (Aa123).

On or about March 1, 2018, the Appellate Division decided the case of Petit-Clair v. Bd. of Trs., No. A-2048-16T2, 2018 N.J. Super. Unpub. LEXIS 478 (App. Div. Mar. 1, 2018). (Aa184-219). That opinion impacted the instant matter, as the Court determined that Independent Contractor Checklist relied upon by the Division to disqualify Petit-Clair from eligibility (and relied upon by the Division/ PERS to disqualify Appellant in this matter) did "not accurately distill IRS regulation or policy" and that "reliance solely on the Checklist deviates from the statutory command that IRS regulations or policy govern the employee-independent contractor determination." (Aa208). The Court further pointed out that Checklist was inadequate because "[t]he threshold level of control necessary to find employee status is generally lower when applied to professional services than when applied to nonprofessional services." (Aa197-198), citing Weber v. Commissioner, 60 F.3d

1104, 1111 (4th Cir. 1995). The Court thus then remanded the matter back to the agency.

Following Petit-Clair, the Division remanded the matter back to the Division for reevaluation in accordance with the Appellate Division's decision in that case. (Aa125-150). On April 10, 2019, the Division again considered the matter at the agency level, performed a twenty-factor analysis ("20-factor test") and once again found that Appellant was ineligible for PERS from February 1, 2002 through the present pursuant to N.J.S.A. 43:15A-7.2(b). (Aa135). Thereafter, on July 8, 2019, the Board notified Appellant that it was adopting the Division's April 10, 2019, decision. (Aa151-156). Thereafter, Appellant's administrative appeal in the OAL continued and a hearing was ultimately held before the Honorable Dean Buono, A.L.J. ("ALJ Buono" or "the ALJ"), on July 25, 2022.

At the July 25th hearing, the Board presented the testimony of Kristin Conover, a Pension Benefits Specialist 2 for the New Jersey Division of Pensions and Benefits and the self-described "unofficial supervisor" of Chapter 92 investigations. Appellant presented the testimony of James Gluck, the Appellant in this matter. Appellant also presented the expert testimony of Certified Public Accountant, Scot Pannepacker of Lear & Pannepacker, LLP.

On April 6, 2023, ALJ Buono issued his initial decision affirming the determination made by the Board. (Aa25). In that regard, the ALJ held that Appellant

did not meet his burden of proof in establishing his status as an bona fide employee of the BSA and instead found that Gluck's relationship therewith was that of an independent contractor. (Aa23). As such, the ALJ concluded that Appellant was not eligible for membership or for credit in PERS for the years in question. (Aa25).

Subsequently and after receipt of exceptions submitted by the parties, on June 26, 2023, the Board affirmed ALJ Buono's Initial Decision but made slight modifications. (Aa5-6). In particular, the Board modified the ALJ's finding with respect to Factor 16 of the Independent Contractor Test (Realization of Profit or Loss), finding that factor supported a characterization of Appellant as an employee rather than an independent contractor. Id. Furthermore, the Board did not adopt the ALJ's "editorializing comments" made in his Initial Decision. Id. In that regard, the ALJ stated:

> It is a disgrace that individuals such as Gluck devote a portion of their lives to public service and get the rug ripped out from underneath them. Also, the fact that Gluck lost all those years of investment in a viable retirement fund is shameful and a discredit to the system. Nevertheless, I am constricted by the law and after considering that most of the 20-Factor test militated towards an independent contractor status, I CONCLUDE that Gluck was an independent contractor performing professional services pursuant to a professional services contract, and that contract was authorized by the Local Public Contracts Law, N.J.S.A. 40A:11-5.
>
> (Aa25).

Thereafter, on August 9, 2023, a Notice of Appeal of the Board's final decision was filed with this Honorable Court. (Aa1-4).

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

POINT ONE

I. THE BOARD'S FINAL DECISION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AS THE UNDERLYING RECORD DEMONSTRATES THAT APPELLANT WAS AN EMPLOYEE OF THE BSA FOR THE RELEVANT TIME PERIODS (Aa5-30).

Legislation creating the Public Employees' Retirement System (PERS), N.J.S.A. 43:15A-1 et seq., contains a definition of those eligible for membership. The key to eligibility is the existence of an employer-employee relationship:

> b. Any person becoming an employee of the State or other employer after January 2, 1955 and every veteran, other than a retired member who returns to service pursuant to subsection b. of section 27 of P.L.1966, c.217 (C.43:15A57.2) and other than those whose appointments

> that are seasonal, becoming an employee of the State or other employer after such date, including a temporary employee with at least one year's continuous service. The membership of the retirement system shall not include those persons appointed to serve as described in paragraphs (2) and (3) of subsection a. of section 2 of P.L.2007, c.92 (C.43:15C-2), except a person who was a member of the retirement system prior to the effective date [July 1, 2007] of sections 1 through 19 of P.L.2007, c.92 (C.43:15C-1 through C.43:15C15, C.43:3C-9, C. 43:15A-7, C.43:15A-75 and C.43:15A-135) and continuously thereafter; . . .
>
> [N.J.S.A. 43:15A-7(b)].

Without the existence of an employee relationship, one is not eligible for PERS membership and anyone who is solely an independent contractor cannot qualify for PERS membership. Thus, Appellant's qualification to be a member of PERS for the years of service at issue is predicated upon a determination that he was an employee of the BSA for the time periods in question. To that end, in order to perform the necessary analysis, it is imperative to understand how the position of a "municipal public entity attorney" has been historically viewed under the laws of this State.

It is undisputed that Appellant served as attorney for the BSA during the years in question. Such a position is indeed well recognized as a position of public employment. In Reilly v. Ozzard, 33 N.J. 529, 540 (1960), the court acknowledged that:

> Government needs professional services of many types, legal, medical, engineering, and if the need is sufficient to induce the creation of a post for their rendition, the incumbent is not an independent contractor merely because the services are professional in nature. Surely the Attorney General and the county prosecutor are not independent contractors. They hold office. State ex rel. Clawson v. Thompson, 20 N.J.L. 689 (Sup. Ct. 1846).
>
> The definition of an office depends upon the context. See 2 Antieau, Municipal Corporation Law (1955), § 13.00, at p. 209. For present purposes, it may be sufficiently defined as a post created or authorized by constitution or statute for the continuous exercise of a portion of governmental power or authority. See Thorp v. Board of Trustees of Schools for Industrial Educ., 6 N.J. 498, 507, vacated as moot, 342 U.S. 803 (1951). That the post of township attorney partakes in some degree of political power or governmental authority seems clear. The role of the lawyer is threaded throughout government. It includes advice, the preparation of indispensable instruments, and the prosecution of the civil and criminal business of the public. The need is so apparent that the Legislature either directed or authorized the creation of a legal post in local government. And in so doing it has consistently characterized the post as an "office."
>
> [Reilly, *supra*. at 541-43].

This recognition of the position as a "public office" is also reflected in Attorney General Formal Opinion No. 27-1976, (AG27-1976) wherein the Attorney General, in considering what compensation is creditable for pension purposes for part-time municipal attorneys and other similar part-time professional positions, noted a distinction between creditable regular salary covering services "directly attributable to the functioning of the public office" and other, non-creditable,

payments "for professional services normally billed on a fee basis for each item of work performed in addition to the accepted statutory responsibilities of the government office." Formal Opinions of the Attorney General of New Jersey 1974-1977, AG27-1976, page 223. This recognition of the nature of the position as an "office" importantly also reflects the crucial acknowledgement that even a part-time public office holder may in some instances function as an employee, while in other instances as an independent contractor.

Case law since 1976 has confirmed the possibility of the existence of both an employee and/or an independent contractor status for a municipal attorney. See, for e.g., Mastro v. Retirement System, 266 N.J. Super. 445 (App. Div. 1993).

Courts have previously approved the use of the IRS's twenty (20) factor test under Revenue Ruling 87-41 as a guide "to determine whether a public sector employer had sufficient 'control' over a person so that the person was an employee whose service and salary was creditable in PERS[.]" See Francois v. Bd. of Trs., Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 350-51 (2010). The twenty (20) factors under the IRS test that merit consideration are as follows:

1. INSTRUCTIONS. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

2. TRAINING. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or

persons for whom the services are performed want the services performed in a particular method or manner.

3. INTEGRATION. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control.

4. SERVICES RENDERED PERSONALLY. If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.

5. HIRING, SUPERVISING, AND PAYING ASSISTANTS. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

6. CONTINUING RELATIONSHIP. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

7. SET HOURS OF WORK. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control

8. FULL TIME REQUIRED. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.

9. DOING WORK ON EMPLOYER'S PREMISES. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.

10. ORDER OR SEQUENCE SET. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.

11. ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

12. PAYMENT BY HOUR, WEEK, MONTH. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates that the worker is an independent contractor.

13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

14. FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

15. SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer- employee relationship.

16. REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee.

17. WORKING FOR MORE THAN ONE FIRM AT A TIME. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

19. RIGHT TO DISCHARGE. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer.

20. RIGHT TO TERMINATE. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

Rev. Rul. 87-41, 1987-1 C.B. 296.

Commentators have recognized that the IRS's reliance on the twenty factors is not restricted to the specific fact patterns in the ruling. See James J. Jurinski, Eligibility for Relief from Federal Employment Taxes under § 530 of the Internal Revenue Code, 149 A.L.R. Fed 627 (1998) (stating the IRS "normally makes its determination [regarding employee classification] with reference to 20 factors detailed in Rev. Proc. 87-41"); Myron Hulen et al., Independent Contractors: Compliance and Classification Issues, 11 Am. J. Tax Pol'y 13, 27 (1994) (stating that the IRS "developed a 20-factor test in making the control determination" and noting "[t]he test is not objective, that is, no specific number of factors need to be satisfied for a finding that the worker is an employee").

For employment tax purposes, an employee is defined by IRC 3121(d)(2) as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." See IRC 3121(d)(2)**.** As previously stated, the factors fall into three main categories: (1) whether the entity has the right to control the behavior of the worker; (2) whether the entity has financial control over the worker; (3) the relationship of the parties, including how they see their relationship. IRS Publication 963, Chapter 4, page 4-1.

CHAPTER 92

The State Legislature enacted Chapter 92, codified as N.J.S.A. 43:15A-7.2, which introduced changes to the public pension system. Under N.J.S.A. 43:15A-7.2(a), a person who is a member of the retirement system as of Chapter 92's effective date (January 1, 2008) shall not accrue service credit on the basis of (the performance of professional services under a PSA for a political subdivision of the State) following the expiration of an agreement or contract in effect on the effective date. See N.J.S.A. 43:15A-7.2(a). The statute further states that, "[n]othing contained in this subsection shall be construed as affecting the provisions of any agreement or contract in effect on the effective date (of Chapter 92), whether or not the agreement or contract specifically provides by its terms for membership in the retirement system. Id. Thus, effective January 1, 2008, any person serving as a

municipal attorney *pursuant to a PSA* is not eligible for PERS membership based on performance of the contract. N.J.S.A. 43:15A-7.2(a) (emphasis added).

Prior to the enactment of Chapter 92 and as referenced *supra*, in or around 1976, Attorney General William F. Hyland issued an opinion concerning the pension eligibility of William A. Fasolo, Esq., the "sewer attorney" for the Borough of Demarest, New Jersey, and concluded:

> "Those established professional services performed in a statutory office or position and compensated for a fixed annual retainer (salary) paid at regular, period intervals in specific, regular amounts should be regarded as the services of an 'employee' for pension credit purposes."
>
> See Attorney General Opinion 27-1976.

Fasolo's pension eligibility ultimately became the subject of litigation with the pension board after the latter determined that there had not been a bona fide employer-employee relationship with respect to Fasolo's sewer attorney contract with Demarest and that the $60,000.00 salary he was paid by the Borough was excluded from the definition of "compensation" as defined by N.J.S.A. 43:15A-6(r). See Fasolo v. Board of Trustees, Division of Pensions, 181 N.J. Super. 435, 436, 440 (App. Div. 1981). N.J.S.A. 43:15A-6(r) defines "compensation" as "the base or contractual salary, for services as an employee, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted

primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular workday or the regular work year."

In Fasolo, *supra*, the Appellate Division reversed the Board's decision. In doing so, the Court held:

> In fact, we cannot perceive why the $60,000 should not be deemed contractual salary within N.J.S.A. 43:15A-6(r). Initially, we note that in the various ordinances adopted by Demarest authorizing the payments to Fasolo the municipality always referred to the compensation as salary. It is not denied that the usual deductions for taxes and Social Security were taken from the payments. Further, the payments were regularly made. It is true, of course, that Fasolo and Demarest could have established their relationship as that of employer and independent contractor. Yet it is undoubtedly true that in many situations a person desiring work to be done could hire an employee to do it or could contract out work. See In re Local 195 v. State, 176 N.J. Super. 85 (App. Div. 1980). Here the $60,000 payment was established in advance of the work being done, just as it would for any employee. Fasolo did not make a charge after the work was completed on the basis of the reasonable value of the services… While it is true that the $ 60,000 was far larger than the ordinary municipal retainers, it is difficult to see how this distinction should change the treatment of the basic salary. Certainly in principle Fasolo was to perform certain services for a fixed compensation.
>
> Fasolo, *supra*, 181 N.J. Super. at 443-444.

The Court then concluded:

> We recognize, of course, that Fasolo's services to Demarest as sewer attorney were unique in the sense that

> no other person was performing similar work for that municipality. But probably the same may be said for his services in Tenafly as a municipal judge. We believe that most municipalities in New Jersey have only one judge. We also do not doubt that Fasolo as an employee was probably not subject to the same intensity of control that the municipality exercised over other employees. Yet a municipal judge clearly is subject to little municipal control, though PERS agrees that for purposes of N.J.S.A. 43:15A-6(r) his salary is compensation. Thus we conclude that Fasolo's salary as sewer attorney must be deemed compensation within N.J.S.A. 43:15A-6(r).
>
> Id. at 444.

More recently, in Cohen v. Bd. of Trs. of the Pub. Empls. Ret. Sys., No. A-1219-16T4, 2019 N.J. Super. Unpub. LEXIS 175 (App. Div. Jan. 24, 2019), albeit an unpublished decision, the Appellate Division relied on Fasolo in reversing the Board's decision to invalidate that petitioner's service as municipal attorney in Fort Lee, New Jersey. (Aa220-226). The Board rendered a final decision deeming the petitioner ineligible for membership in PERS for the years 2001 to 2007. The Appellate Division affirmed the Board's ruling for the years 2004 to 2007 but reversed and ordered that his credits be reinstated for the years 2001 to 2003. The Court held that petitioner's relationship with Fort Lee was different during the years 2001 through 2003 than it was after that time because in those earlier years, Fort Lee appointed him alone as municipal labor counsel whereas from 2004 onward, the town executed contracts specifically appointing petitioner *and* his law firm as labor

counsel. (Aa223-225). (emphasis added). The Court deemed this an "important factual distinction." (Aa225).

To that end, the Court noted that: (1) Fort Lee enrolled petitioner in PERS in 2001, when it appointed him labor counsel pursuant to the first of three, one-year contracts; (2) each contract's preamble stated the agreement is between Fort Lee and petitioner; (3) each contract detailed the specific services petitioner would provide for an annual retainer, and included an additional hourly rate for litigation activities; (4) the contracts, and each that followed, required petitioner to maintain malpractice insurance, which he did through his firm; and (5) petitioner executed these agreements, and each that followed, on a signature line under his firm's name and following the word "by." Id. at 10. Thus, the Court held:

> Having considered the entire record, and applying principles we enunciated in Fasolo, 181 N.J. Super. at 443-44, we conclude that Cohen was an employee of Fort Lee from 2001 through 2003 when he alone served as labor attorney on a part-time basis. We remand the matter to the Board to direct the Division to adjust Cohen's retirement account and pension to include his compensation for these years.
>
> (Aa225).

In the instant matter, the record demonstrates that for the entirety of the BSA's relationship with Appellant, the parties intended it to be that of an employer and employee. The PSA's entered into between the parties prior to 2008 demonstrate such an intention, and the actions of the BSA, to include the investigative steps and

adjustments that were made following the passage of Chapter 92, likewise demonstrate that intention for the time period that followed, namely, 2009 to 2016.

Here, the ALJ found that application of the 20-factor test weighs in favor of deeming Appellant an independent contractor for the two (2) time periods in question. That said, the ALJ, and the Board for that matter, does agree that certain factors weigh in favor of deeming Appellant and employee. For example, the Board conceded that an assessment of Factors 10 (Order of sequence set); 11 (Oral or written reports); 19 (Right to discharge); and 20 (Right to terminate), demonstrate "employee" status for both time periods at issue, namely, 2002 to 2008 and 2009 to 2016. (Aa125-150 & Aa151-156). Despite those concessions by the Board, the ALJ found that Factor 19, weighed in favor of independent contractor status. (Aa22). Moreover, the Board conceded that Factors 6 (Continuing relationship); and 12 (Payment by hour, week, month) demonstrate an employee status with respect to Appellant for the latter period of 2009 to 2016. (Aa125-150 & Aa151-156). Furthermore, despite findings by the ALJ to the contrary, in its final decision, the Board determined that Factor 16 (Realization of profit or loss) weighed in favor of deeming Appellant an employee. (Aa5-6). These factors, as applied to the time periods in question, should not be in dispute.

There are, however, numerous indicators of an employer-employee relationship in the underlying record for both time periods in question that apply to

other relevant factors at issue, such as Factors 1 (Instructions), 3 (Integration), and 8 (Full-time required). For instance, Appellant's undisputed testimony demonstrated that his job duties and responsibilities for the two (2) relevant time periods effectively remained the same. (1T:76:16 to 77:1). He would be assigned tasks from other BSA employees at the direction of the BSA chairman and commissioners or otherwise by the chairman and commissioners directly. (1T:84:12-25). Appellant had an "open line of communication" with the BSA and was expected to respond if there was a crisis or if an incident needed to be addressed. Id. In fact, the BSA expected him to be on-call 24-hours per day. (Aa139). Thus, only the BSA would assign tasks for Appellant to complete and a deadline would be set by the commissioners. (1T:85:1 to 86:19).

ALJ Buono failed to afford any weight to these facts in assessing the aforementioned factors. For instance, with respect to Factor 1, the ALJ decided that it weighed in favor of independent contractor status because Appellant received instructions on work assignments via email or by contacting him on his cell or office phone. (Aa14-15) He likewise focused on the fact that the BSA would not direct how nor where he completed the request. Id. The ALJ, however, failed to take into account that deadlines would be assigned by the BSA and that Appellant, as a licensed attorney, would not have required as much instruction on how such work was supposed to be completed. (1T:85:1 to 86:19).

The ALJ likewise insufficiently assessed Factor 3. In regard to the former, ALJ Buono found that Appellant "was not restricted from delegating his duties" and "on many occasions, attorneys from his firm were required to cover for him if needed." (Aa15-16). The underlying record, however, only demonstrates that Appellant would require a substitute when he was conflicted out of a matter or was incapacitated due to illness. Moreover, his agreements with the BSA expressly provided for substitution in such instances. Simply put, there is no support in the record for the assertion that Appellant "was not restricted from delegating his duties."

We further submit that Factor 6 (Continuing Relationship) weighs in favor of Appellant being deemed an employee for the entirety of his relationship with the BSA. As noted, the Board agreed with this contention at least with respect to the period of 2009-2016. (Aa125-150 & Aa151-156). ALJ Buono ruled that Factor 6 weighed in favor of independent contractor status, finding that Appellant "was appointed based on a yearly term by vote and resolution by the township committee at its reorganization meeting" and because of that "there was no continuing relationship since (Appellant's) position required a yearly appointment." (Aa16-17). This finding is contrary to the record. First, Appellant was only appointed on a yearly basis during the first time period at issue, from 2002 to 2008. Thus, the ALJ's findings ostensibly only applies to that period. Secondly, the fact that Appellant was

continuously appointed during each year of that time period, by definition, demonstrates a continuing relationship and thus, Factor 6 should be weighed in favor of Appellant for 2002 to 2008, and, as conceded by the Board, for 2009 to 2016.

There is likewise support for deeming Appellant an employee with respect Factor 12 (Payment by hour, week, month) for the entirety of the relationship. To that end, Appellant received a W-2 from the BSA for each and every year that he worked for the BSA and was paid as a salaried employee. (1T:83:19 to 84:11); (See also Aa157-175 and Aa140, Factor 12 – Payment by hour, week, month: "*Contracts from 1999-2009 allowed Gluck to collect an annual salary, paid monthly, while billing for services which would be billed against the monthly salary draw, the balance being paid on 1099*."). Moreover, for each year he worked for the BSA Appellant likewise had the option of enrolling in the BSA's health benefits plan. (1T:83:19 to 84:11); (See Aa38-91). These facts weigh in favor of employee status with respect to Appellant for his entire tenure at the BSA. As set forth in Revenue Ruling 87-41, under Factor 12, "payment made by the job or on a straight commission generally indicates that the worker is an independent contractor." The evidence demonstrates that Appellant was paid in regular intervals and not "per job" throughout the relevant time periods in question.

Contrary to the decision of ALJ Buono, Factor 2 (Training) should also be weighed in favor of deeming Appellant an "employee" based on the evidence. First,

Appellant was required to remain current on local government law, and did so by attending continuing legal education classes, the League of Municipalities conference on an annual basis, and mandatory training by the New Jersey Joint Utility Authority Insurance fund. (1T:86:20 to 87:12). Second, the BSA expected him to know and understand various training provided to employees at the BSA because he was responsible for preparing the Employee Manual. (See Aa136, Factor 2 - Training). Notably, and as observed by the Court in Petit-Clair, "attorneys… can be employees" and "in such cases, the entity may not train the individuals or tell them how to practice their professions." (Aa202). Despite this guidance, the record demonstrates that the BSA expected Appellant to be familiar with training materials given that he produced them and likewise expected him to maintain constant familiarly with local government law.

In considering this factor (Factor 2), ALJ Buono simply stated that Appellant "did not require training from the township" and "most if not all of his training was completed through" CLE courses required of all practicing attorneys. (Aa15). Thus, he failed to give due regard to his testimony regarding his responsibility to attend the League of Municipalities conference on annual basis, partake in training by the New Jersey Joint Utility Authority Insurance fund, or Appellant's obvious responsibility to be familiar with BSA training given his unique obligation to prepare

the employee handbook. In sum, an objective assessment of Factor 2 demonstrates that Appellant was an employee of the BSA for his entire tenure therewith.

The ALJ's decision, as adopted by the Board, is likewise without merit with respect to Factors 4 (Services rendered personally), 14 (Furnishing of tools and materials), and 15 (Significant investment). Appellant was the only member of his firm that took direction from the BSA. (1T:87:13 to 89:10). Moreover, the PSAs during the period of 2002 to 2008 specifically required Appellant, as "appointee," to perform the services provided by the agreements. (Aa38-91). After the passage of Chapter 92, the BSA appointed Appellant individually as an employee. (Aa98). Appellant also never shared any income he derived from the BSA with individuals from his firm. (1T:89:11 to 90:14). Appellant further testified that he performed the work assigned by the BSA and he would only be assisted by another attorney when he had a personal conflict of interest or was otherwise ill, such as when he fell ill in 2017 for approximately six (6) months. (1T:87:13 to 89:10).

Factor 4 was weighed against Appellant because "[t]he method used to accomplish the work (Appellant) was required to do was of no import, only the results. (Aa16). Here, the ALJ failed consider IRS Publication 963, which provides that, "[t]he nature of the worker's occupation affects the degree of direction and control necessary to determine worker status" and that "[h]ighly-trained professionals such as doctors, accountants, lawyers, engineers, or computer

specialists may require very little, if any, instruction on how to perform their specific services." IRS Publication 963 at 4-3. The publication goes on to state that, "[a]ttorneys, doctors and other professionals can, however, be employees" and "[i]n such cases, the entity may not train the individuals or tell them how to practice their professions, but may retain other kinds of control, such as requiring work to be done at government offices, controlling scheduling, holidays, vacations, and other conditions of employment." Id. Based off this guidance, it is not particularly relevant that the "method used to accomplish the work (Appellant) was required to do was of no import." (Aa16). Yet the ALJ relied heavily on this fact in finding against Appellant in regard to Factor 4.

The ALJ also weighed Factor 4 against Appellant on the basis that someone would, on very limited occasions, substitute for Appellant at the BSA. Id. (See also, Aa137, Factor 4). Conover testified that if Appellant was an employee, then the BSA would be responsible for securing substitution in the event of Appellant's absence. (1T:50:13 to 52:16). Yet, the record shows that the BSA took responsibility for securing substitution in the event of Appellant's absence. As Conover conceded, the PSAs entered into between Appellant and the BSA called for a specifically named individual from his firm to appear in Appellant's absence. (1T:53:2 to 54:3). The notion that the BSA was not "taking responsibility" for securing a substitute is inane and contrary to the evidence. The ALJ's heavy reliance on the fact that individuals

would on limited occasions fill in for Appellant completely disregards the ethical obligations of attorneys to recuse themselves when a conflict of interest arises. For these reasons, the ALJ's and Board's determination on Factor 4 is meritless and it should be weighted in favor a deeming Appellant an employee.

Regarding Factors 14 (Furnishing of Tools and Materials) and 15 (Significant investment) Conover admitted that despite the many years Appellant worked for the BSA, she was only able to find two (2) letters written on Appellant's firm letterhead from 2009 forward and admitted she failed to include any letters that were sent out by Appellant that were not on his letterhead in her report. (1T:55:3-20). Conversely, Appellant testified to regularly preparing letters sent out on BSA letterhead during the relevant time periods. (1T:89:11 to 90:14). The BSA also absorbed all fees associated with distributing resolutions or other documents Appellant prepared. (1T:87:13 to 89:10). Though he was not supplied with postage and other officer supplies, the BSA provided him with a conference room and a computer. (See Aa141 – Factor 14). ALJ Buono ignored this fact, stating only that Appellant "was not provided with an office and only had access to some supplies, if needed." (Aa20).

It must also be noted that Appellant's position with the BSA is contemplated by statute. Specifically, N.J.S.A. § 40:14A-5 provides, in relevant part, that, "[e]very sewerage authority may also, without regard to the provisions of Title 11 of the

Revised Statutes, appoint and employ a secretary ***and such professional and technical advisers and experts and such other officers, agents and employees as it may require***, ***and shall determine their qualifications, terms of office, duties and compensation***. See N.J.S.A. § 40:14A-5(e) (emphasis added). One of the points raised in Petit-Clair, *supra*, was that IRS policy suggests that governmental entities "consult state statutes to determine whether a professional position is statutorily created" and if so, what level of control over the worker does the statute provide the governmental entity." (See Aa208, citing Publication 963 at 4-3, 4-8). The Court further noted that, "it is not self-evident that appointment by a governing body tends to demonstrate independent contractor status." Id.

Based on the foregoing, Appellant's position is contemplated by statute, namely, N.J.S.A. § 40:14A-5. Similarly, the statue provides for a significant level of control over his position by the BSA inasmuch as it requires them to determine qualifications, terms of office, duties, and compensation. We therefore submit that the BSA was authorized by statute to appoint Appellant as an employee and said statute provides a significant level of control over his position by the BSA.

Simply put and based on the foregoing, the evidence sufficiently demonstrates, based on an assessment of the 20-factors in Revenue Ruling 87-41, that there was an employer-employee relationship between Appellant and the BSA for the two (2) time periods in question. Appellant took instruction directly from the

BSA with respect to the work he performed, he was paid as an employee during the relevant time periods receiving W-2's each year, he was retained individually and on annual basis from 2002 to 2008 and specifically appointed as an employee at the end of 2009, and he was expected to be at the BSA's "beck and call" during his time working there. These facts and the various other important facts outlined above all favor an employee status in terms of Appellant's relationship with the BSA.

Conversely, the Board and the Division, through the testimony of Conover, rely on the fact that Appellant would often perform work at his office while ignoring that he was provided a conference room and a computer at the BSA. They rely on the fact that individuals would substitute for Appellant on very few occasions while ignoring the fact that the BSA authorized the substitutions and similarly ignoring that the rules of professional responsibility will at times require recusal. The Board and Division rely on the fact that there were no log entries demonstrating that Appellant attended training while ignoring the fact that the BSA expected him to remain up to date on local government law and familiar with the various training procedures through his preparation of the employee manual. Because the ALJ ignored many of these facts, the final decision in this matter is not based upon sufficient credible evidence. All told, ALJ's decision and the Board's adoption of same, ruling that Appellant was not an employee and not eligible for membership in PERS, must be reversed for the two (2) time periods in question. Such an outcome

is particularly egregious in light of the plethora of facts that weigh in favor of employee status and the length of time the Division/ Board allowed to pass before it took any action in this matter. For these reasons, the Board's final decision was arbitrary, unreasonable, and capricious and should not stand.

POINT TWO

II. THE BOARD'S DECISION FOR THE PERIOD OF 2002 TO 2008 WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE, AND MUST BE REVERSED (Aa5-30).

Appellant submits that the decision of the ALJ and the Board disqualifying him from PERS membership from 2002 to 2008, while working under a PSA, should be reversed based on the totality of the circumstances outlined in the preceding section. That said, there are additional reasons why the adverse decision for this time period is without merit, arbitrary, and capricious.

The BSA and Appellant entered into annual written agreements or PSAs during the period of 1999 to 2008. (Aa38-91). For each of these agreements that were executed by Appellant and the BSA, "James J. Gluck, Esq.", individually, is expressly listed as the party to the contract and Appellant individually executed each agreement. Appellant's law firm is not listed as Counsel in any of the annual written employment agreements for this specific time period. Instead, each agreement specifically appoints Appellant as BSA attorney. Each of these agreements likewise appoints Appellant "as a salaried employee of the (BSA)." (See Aa38-91, ¶2 of each

agreement). Each PSA likewise provides for compensation to be paid as a monthly salary. Id. Each agreement gives Appellant the ability to enroll in the BSA's health benefits plan. Id. Similarly, each agreement during this period calls for his enrolment in PERS. Id. These materials demonstrate that it was the BSA's intention to enter into these agreements with Appellant, individually, not with Appellant's firm, and to appoint him as a salaried employee.

Appellant should therefore be deemed eligible for PERS membership for the 2002 to 2008 period in accordance with Fasolo and Cohen, both cited *supra*. As noted above, the Appellate Division reversed a Board decision excluding the petitioner in Cohen from PERS eligibility from 2001 to 2003. The Court, in reliance on the principles outlined in Fasolo, deemed the petitioner an employee for 2001 to 2003 because the agreement for each of these years was specifically between the Borough of Fort Lee and that petitioner, each contract detailed the services petitioner would provide for an annual retainer which included an additional hourly rate for litigation activities, and the petitioner executed these agreements on a signature line under his firm's name and following the word "by." (Aa223). The Court thus concluded that that petitioner alone served as labor attorney for Fort Lee during the relevant time period and deemed the petitioner an employee for these years and deemed such years creditable. (Aa225). They did so in reliance on Fasolo, 181 N.J. Super at 443-444, which outlined these relevant factors. More notably, the Court in

Cohen affirmed the Board's decision for the years 2004 to 2007 disqualifying the petitioner because during those years, Fort Lee appointed Cohen and his law firm as labor counsel. (Aa223).

In the instant matter, it is undisputed that for each and every PSA entered into between Appellant and the BSA at issue in this matter, Appellant is appointed individually as a salaried employee and signed these agreements individually – not on behalf of his law firm. He was paid as an employee, as demonstrated by the PSAs and by the fact he was issued W-2s during this particular period. The principles outlined in Fasolo, *supra*, and the Appellate Division's ruling in Cohen aptly support Appellant's contention that he was an employee of the BSA from 2002 to 2008 and was therefore eligible for PERS membership during that time period.

It is also significant that the Board found that Appellant qualified for membership in PERS from 1999 to 2001. (Aa151-156). Appellant was subject to a PSA with the BSA for these specific years, just like he was up until 2008. (Aa38-51). However, according to Conover, the reason Appellant was not disqualified from membership from 1999 to 2001 was because the corresponding agreements during that time did not allow for substitution in Appellant's absence. (1T:21:11-23). Quite simply, the notion that this single distinction between the 1999 to 2001 PSAs and the 2002 to 2008 PSAs is so significant that it warrants disqualification for the latter time period is entirely arbitrary.

More specifically, each agreement from 1999 to 2008 is virtually identical. (Aa38-91). The fact that the BSA and the Appellant had the foresight beginning in 2002 to address instances where Appellant might be precluded from appearing, either due to a professional conflict of interest or due physical incapacity, should not be used as a "cudgel" to now disqualify Appellant from PERS eligibility for 2002 to 2008. As previously noted, there are certainly instances where attorneys are professionally required to recuse themselves from certain matters and that fact should not be held against them. The substitution provision merely recognizes this reality and does not change the fact that the PSAs in question are otherwise identical in that they all appoint Appellant, individually as a salaried employee of the BSA, and were all executed by Appellant in his individual capacity.

The mere fact that a municipal entity permits a substitute for its municipal attorney when a conflict arises should not be deemed dispositive as to the issue of whether one is an employee or independent contractor, particularly where the municipal entity retains control over who is permitted to serve as a substitute and does not simply allow the municipal attorney to have unfettered control over who is selected as a substitute. Instead, permitting this type of substitution simply recognizes the realities of life, the realities of the office, and the realities of the profession.

Appellant submits that the inclusion of the substitution clause actually demonstrates the BSA's assertion of control over the relationship by having the substitute expressly named in the agreements and ensuring they would have coverage where Appellant was conflicted or incapacitated, as he was in 2017 for several months due to personal illness. This lone distinction between the 1999 to 2001 PSAs and the 2002 to 2008 PSAs is certainly not significant enough to suddenly "tip the scale" in terms of whether Appellant was an employee for the latter time period. The ALJ's ruling to the contrary is entirely arbitrary and must be reversed.

POINT THREE

III. THE BOARD'S DECISION FOR THE PERIOD OF 2009 TO 2016 WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE AND MUST BE REVERSED (Aa5-30).

Appellant submits that the ALJ's decision, as adopted by the Board, to deny him PERS eligibility for the period from 2009 onward is likewise in error, not only for the reasons previously outlined, but based on the following grounds as well. Following the enactment of N.J.S.A. 43:15A-7.2, in December of 2009, the BSA passed a resolution naming Appellant, individually, as a salaried W-2 employee, and he had worked for the BSA in that capacity up until 2022. (Aa98). The Board ruled that Appellant was disqualified during this time period because, according to their

initial determination, he was "retained pursuant to a (PSA).. and therefore, is not eligible for PERS enrollment." (Aa151). However, it is clear that starting in December of 2009, Appellant was no longer employed under a PSA. Chapter 92 precludes membership in PERS for individuals performing services pursuant to a PSA. To that end, N.J.S.A. 43:15A-7.2 explicitly excludes from PERS eligibility "a person who performs professional services of a political subdivision of this State… under a professional services contract." N.J.S.A. 43:15A-7.2(a).

Here, the only PSA's in evidence are those that preceded the December 2009 resolution explicitly naming Appellant as an employee of the BSA. Because N.J.S.A. 43:15A-7.2(a) precludes PERS membership explicitly for individuals performing professional services pursuant to a PSA, the section of the statute simply has no application to the second time period, from 2009 to 2016. As such, the only mechanism for disqualifying Appellant for this time period would be via N.J.S.A. 43:15A-7.2(b), which precludes membership for individuals performing professional services as an independent contractor.

For the reasons previously outlined above, Appellant should not be disqualified from PERS based on N.J.S.A. 43:15A-7.2(b) for the period of 2009 to 2016 because it is substantially clear that he was a W-2 employee of the BSA. To reiterate, Appellant was paid as an employee during this period and in regular intervals. He had taxes and other deductions withheld from his periodic salary

payments and his duties and responsibilities at the BSA remained the same as they did previously. (1T:81:7 to 82:6); (1T:76:16 to 77:1). The evidence sufficiently demonstrates that Appellant served as an employee of the BSA from 2009 onward.

Additional facts in the underlying record likewise support the contention that Appellant was an employee of the BSA for this latter time period. For instance, following the passage of Chapter 92, on May 6, 2008, the Division sent correspondence to the certifying officers of each town regarding the impact on professionals appointed pursuant to a PSA. (Aa92-96). Within that letter, the Division advised that "a full-time in-house counsel, however, may be eligible to continue in the PERS if the counsel was a member of the PERS prior to July 1, 2007, the employment is not tied to a professional services contract, and the individual does not meet the independent contractor test." (Aa93).

In response to the May 6, 2008 correspondence, the BSA's certifying officer, Milly Tangen, sought guidance from the Division regarding the above-referenced representation about a full-time in-house counsel's ability to remain in PERS. In particular, on May 22, 2008, Tangen sent an email to the Division stating:

> "Dear Sir, in your Certifying Officers Letter dated May 6, 2008, you wrote: 'A full-time in-house counsel, however may be eligible to continue in PERS if the counsel was a member of PERS prior to July 1, 2007.' Our Chairman asked me to inquire what is the number of hours per week that is considered 'full-time'? Thank you, M. Tangen."
>
> (Aa97).

One week later the Division responded stating, "The Division of Pensions and Benefits does not determine what constitutes full-time. The determination is made by the employer. Thank you for contacting the Division of Pensions." Id. Based on the foregoing response, the BSA took the steps they did to formally appoint Appellant as in-house counsel on what they deemed to be a full-time basis. The notion that these steps were taken solely to circumvent and evade the proscriptions of Chapter 92 is entirely without merit. First, the May 6, 2008, letter from the Division directly advised the BSA that an in-house counsel previously employed pursuant to a PSA may be eligible for PERS if they were a member prior to July 1, 2007, their employment is no longer tied to a PSA, and they do not meet the independent contractor test. (Aa93). The Division's May 6, 2008 correspondence, together with its response to the BSA's May 22, 2008 inquiry as to what constitutes "full-time," indicating that it was for the BSA to decide, effectively ratified the actions subsequently taken by the BSA in order to retain Appellant as their employee. There was nothing underhanded about the BSA's actions and the steps it took to retain Appellant as an employee following the passage of Chapter 92. Rather, it was relying on the guidance provided by the Division.

In the ALJ's decision, he simply fails to address the distinction between the two time periods, namely, 2002 to 2008 and 2009 to 2016. Rather, the ALJ concludes, at the end of his decision, the following:

> I CONCLUDE that Gluck was an independent contractor performing professional services pursuant to a professional services contract, and that contract was authorized by the Local Public Contracts Law, N.J.S.A. 40A:11-5. Accordingly, I FURTHER CONCLUDE that Gluck was not eligible for membership or for credit in the PERS for those years.
>
> (Aa25).

Contrary to the ALJ's decision, as demonstrated by the record, Appellant was not employed pursuant to a PSA for the time period of 2009 to 2016. While we would reach a different conclusion than that of the Pension Fraud and Abuse Unit, they even recognized that Appellant was not employed pursuant to a PSA during this time period, opining that, "[i]t is clear that Resolution 12-50-09 (appointing Appellant as an employee/ in-house counsel) was created to circumvent Chapter 92." (Aa103) Simply put and for the reasons outlined herein, the ALJ's decision denying Appellant eligibility for the years 2009 to 2016 must be reversed.

POINT FOUR

IV. THE DOCTRINES OF EQUITABLE ESTOPPEL AND LACHES REQUIRE REVERSAL OF THE BOARD'S DECISION (Aa5-30).

Laches arises from "'the neglect for an unreasonable and unexplained length of time . . . to do what in law should have been done.'" Lavin v. Bd. of Educ. of Hackensack, 90 N.J. 145, 151, 447 A.2d 516 (1982) (quoting Atlantic City v. Civil Serv. Comm'n, 3 N.J. Super. 57, 60, 65 A.2d 535 (App. Div. 1949)). The doctrine

bars relief when the delaying party had ample opportunity to bring a claim, and the party invoking the doctrine was acting in good faith in believing that the delaying party had given up on its claim. Knorr v. Smeal, 178 N.J. 169, 181, 836 A.2d 794 (2003); Lavin, *supra*, 90 N.J. at 152.

When determining whether the doctrine of laches should be invoked, the court considers: (1) "the length of the delay," (2) "the reasons for the delay," and (3) how the circumstances of the parties have changed over the course of the delay. Knorr, *supra*, 178 N.J. at 181. The period of time during which laches can be raised as an equitable defense is flexible, not fixed. Lavin, *supra*, 90 N.J. at 151.

The related concept of equitable estoppel involves similar considerations. In order to establish an equitable estoppel claim, "the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action." Miller v. Miller, 97 N.J. 154, 163 (1984). Additionally, the party asserting estoppel must rely on the conduct, "and the relying party must act so as to change his or her position to his or her detriment." Boritz v. N.J Mfrs. Ins. Co., 406 N.J. Super. 640, 647 (App. Div. 2009) (quoting Miller, *supra*, 97 N.J. at 163).

It is well-settled that the equitable estoppel doctrine 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) (quoting Wood v. Borough of

Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999)). However, it may be invoked against a governmental entity "where interests of justice, morality and common fairness clearly dictate that course." Gruber v. Mayor of Raritan, 39 N.J. 1, 13 (1962); see also Twp. of Neptune v. N.J. Dep't of Envtl. Prot., 425 N.J. Super. 422, 438 (App. Div. 2012) (rejecting an appellant's equitable estoppel claim against the State, even though the appellant was likewise a governmental entity). Furthermore, it is not essential that the act relied upon was fraudulent or intentionally misleading. Miller v. Bd. of Trs., Teachers' Pension & Annuity Fund, 179 N.J. Super. 473, 477 (App. Div.), certif. denied, 88 N.J. 502 (1981).

While "[e]quitable estoppel is rarely invoked against a governmental entity[,]. . . equitable estoppel will be applied in the appropriate circumstances unless the application would prejudice essential governmental functions." Twp. of Middletown v. Simon, 193 N.J. 228, 250 (2008) (quoting Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000)). This is because the "government must turn square corners in its dealings with others and comport itself with compunction and integrity." Sellers v. Bd. of Trs. of the Police & Firemen's Ret. Sys., 399 N.J. Super. 51, 59 (App. Div. 2008) (internal citations omitted). The Court has held that "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." Ibid. (quoting Skulski v. Nolan, 68 N.J. 179, 198 (1975)).

The Appellate Division has ruled that an individual's reliance on their ability to participate in the pension system is reasonable where the Division has invited said individual to buy back time. See Holl v. Bd. of Trs., 2014 WL 3055915 (App. Div. July 8, 2014) ("The Division of Pensions invited petitioner to buy back time in the Prosecutor's Part. Obviously, this would cause petitioner to assume his participation was undisputed."). (Aa233). In Holl, albeit an unpublished decision, the Division collected funds from the appellant which he used to purchase additional service credits. The Court held, "[t]o deny him benefits at this stage would be a 'manifest injustice.'" (Aa233). See also Oberhand v. Dir. of Tax., 193 N.J. 558, 571-73 (2008). We would concede that Holl is somewhat distinguishable given that the appellant in that matter had been approved for retirement and it involved a question of whether he was eligible for PERS Prosecutor's Part, not PERS entirely. Nonetheless, it is clear that the Court found the invitation to purchase service credit significant.

In the instant matter, Appellant's reliance on his participation in the pension system has been reasonable, under the circumstances, and patently detrimental. Going back to 1999, Appellant was compelled to contribute to PERS as part of his employment with the BSA. As enrollment was part and parcel to Appellant accepting employment, he did not have a choice in the matter. The agreements he

entered into with the BSA provided for same. Thus, Appellant did not have an option as it pertained to participation and was in fact obligated to contribute to PERS since 1999. To then state, in 2015, that he was not eligible for almost the entirety of that period, is unconscionable.

Further, on or about April 27, 2015, the Division forwarded correspondence to Appellant advising him that he was eligible to purchase thirty-eight (38) months of pension credits for service that the Division deemed to be creditable. (Aa99-101). Specifically, the correspondence states: "Dear Member: The Division of Pensions and Benefits is pleased to advise you that you are eligible to purchase 38 MONTHS of FORMER MEMBERSHIP service as follows" and it then lays out the service for which Appellant was eligible to purchase. Id. Appellant subsequently remitted a check to the Division in the amount of $1,644.43 (one-thousand six-hundred forty-four dollars and forty-three cents) to buy back the time proposed by the Division. The Division accepted the payment and confirmed same in writing on May 11, 2015. (Aa101).

It must be pointed out that the Division sent Appellant correspondence on November 7, 2014 stating that it determined he should not be enrolled in PERS as of January 1, 2008. (Aa110-111). Notably, this was the first time Appellant was directly notified by anyone that his pension might be in jeopardy. Within that November 7, 2014 correspondence, Susan Grant, the author of the letter, states,

"[t]he Division may review the circumstances of your engagement prior to January 1, 2008 and may disallow additional service and salary if it determines the relationship was that of an independent contractor under the IRS test." Id.

Thus, Appellant did not hear from the Division again until that April 27, 2015 correspondence wherein the Division states that it was "pleased to advise you that you are eligible to purchase 38 MONTHS of FORMER MEMBERSHIP." (Aa99-101). Given that almost six (6) months had passed in between the November 7, 2014 correspondence and the April 27, 2015 correspondence, it was reasonable for Appellant to conclude that the Division had completed its review of his service prior to 2008 and had elected not to take any further adverse action. Appellant thus relied upon the April 27, 2015 correspondence as he subsequently remitted a check in the amount quoted by the Division. Simply put, the Division should not have been sending Appellant offers to purchase creditable time if they were going to subsequently deem him ineligible for the years prior to 2008. The Division should have likewise not accepted his payment if it intended on taking any further adverse action. Such conduct by the Division is entirely improper and, in fact, demonstrates complete negligence on its part as a governmental entity. Accordingly, consistent with Holl, *supra*, it was reasonable for Appellant to assume his membership for the years 2002 to 2008 was "undisputed" Based on the Division's November 7, 2014 letter and the April 27, 2015 letter soliciting him to purchase prior service credit.

Therefore, at the very least, the Board should be estopped from disqualifying Appellant for that initial time period.

For similar reasons, it was reasonable for Appellant and the BSA to rely on the Division's May 29, 2008 response to Certifying Officer Tangen's request for guidance on what constitutes a "full-time in-house counsel" for purposes of remaining eligible for PERS membership. (Aa97). The Division's response was that it was up to the BSA and the BSA acted accordingly, by terminating its PSA with Appellant and appointing him as a salaried employee by way of BSA resolution. (Aa98). At the very least, this communication should have triggered an earlier inquiry by the Division into the circumstances surrounding the basis for Tangen's question. Instead, the Division waits *another six and half years* before taking any action in this matter. During that time, Appellant, to his detriment, continued remitting pension contributions based on the presumption that he and the BSA had taken appropriate steps in response to the passage of Chapter 92. For the Division to turn around six and half years after that email communication and only *then* begin attacking Appellant's PERS eligibility is not only negligent but contemptible, particularly for an agency that that has a fiduciary duty to all of its active members, to include Appellant during the years in question. For these reasons, the Board must be estopped from denying Appellant membership in PERS for the subsequent period of 2009 to 2016.

Lastly and as demonstrated by the testimony of expert witness Scot Pannepacker, CPA/ABV/CFF, Appellant has suffered real and tangible losses as a direct result of the highly delinquent and deleterious actions of the Board in this matter. To that end, Appellant was restricted in his ability to fund other retirement investment vehicles due to his participation in a state pension plan for the years in question, thereby demonstrating the egregious nature of the Board's action after Appellant had been a contributing PERS member for at least fifteen (15) years.

Pannepacker reviewed several documents in conjunction with the rendering of his report in this matter. These documents include various correspondence from the Division, the PSAs between the BSA and Appellant, and various tax forms such as W-2 and 1099-MISC forms. (1T:111:10-24); (Aa176-183). Pannepacker further relied on the Internal Revenue Code, Treasury Regulations, and selected IRS form instructions and publications to analyze the matter. (1T:111:10-24); (Aa176-183). The primary sources he relied upon were IRS Publication 560, Retirement Plans for Small Businesses, and Publication 590-A, Contributions to Individual Retirement Arrangements. (1T:111:10-24); (Aa176-183).

The W-2 forms of Appellant that were inspected by Pannepacker reflected contributions to an IRC 414(h) and Appellant's participation in a qualified retirement plan. IRC 414(h) concerns contributions to a plan established by a governmental entity. Pannepacker indicated that both the designation of Form W-2

wages and the employee participation in a qualified retirement plan have a direct impact on one's ability to contribute to individual retirement accounts and other qualified retirement plans. (1T:111:25 to 114:3); (1T:114:12 to 116:17); (Aa176-183).

In particular, Pannepacker noted that Appellant made contributions to an IRC 414(h) for the periods of May of 1999 to January of 2008 and from December of 2009 to 2016. Citing the relevant IRS authority, Pannepacker indicated that there were three (3) reasons this retirement savings opportunity is not available to Appellant as a remedy for the potential loss of PERS eligibility:

> 1. As a form W-2 employee, Appellant's reported compensation from the BSA would not qualify as self-employed income for purposes of contributions;
>
> 2. Based on the existence of IRC 414(h) contributions, Appellant could not establish a second qualified retirement plan on the same income; and
>
> 3. Contributions for a tax year are due by the filing date of the applicable tax return, which has obviously passed for all prior years.
>
> (Aa178).

Based on these three (3) factors, Pannepacker asserted that Appellant is unable to make self-employed retirement contributions for the time period of 1999 to 2016. (Aa178-179). Thus, according to Pannepacker, Appellant cannot make any additional qualified retirement plan contributions for the years 1999 to 2016 nor does

the IRS provide any remedy to make up missed prior year contributions. (See 1T:119:5-21). (Aa178-179). Moreover, the tax deductibility of any contributions would also have been limited by virtue of his participation in PERS, because, for a married couple, the existence of one Form W-2 with retirement plan checked can limit both spouses' eligibility for tax deductible IRA contributions, even if the contribution amount is nominal. Conversely, when an individual or married couple is not covered by an IRS 414(h) retirement plan, then a full IRA contribution is allowed, only subject to sufficient qualifying income. (1T:117:5 to 119:1); (Aa178-179).

Appellant relied on his participation in PERS to his detriment. As noted by Pannepacker, because Appellant actively made contributions to PERS from 1999 to 2016, his ability to invest in alternative retirement plans for that entire time period was severely hindered. Due to the passage of contribution due dates, he is likewise not able remedy the issue. Had the Division and/or PERS had any mechanism in place that would have "flagged" Appellant's eligibility at an earlier point in time, perhaps his loss would be negligible or otherwise mitigated. Because the Division and the Board "sat on their hands" for fifteen (15) years without doing anything whatsoever, Appellant has now lost all of that retirement investment time. Neither the ALJ nor the Board (by way of adopting the ALJ's decision) addressed this aspect of the case, at least in a specific fashion.

It is similarly unfathomable that the Division is permitted to simply wait fifteen (15) years, during which time it is accepting pension contributions from Appellant, only to turn around at the fifteen (15) year mark and begin taking the adverse action it has taken in this matter. There is certainly no comparable statute of limitations period in terms of any civil action in this state and equity demands that there must be some limits imposed upon the Board's actions in this case. Equity is also clearly on the side of the Appellant in this matter. As a result of the delinquent actions by the Division and the Board, Appellant has forever lost a decade and half of investment opportunity toward his retirement.

Despite our disagreement with the decision of ALJ Buono, even he recognized the injustice perpetrated upon Appellant in this matter. In his decision, ALJ Buono stated the following:

> "It is a disgrace that individuals such as Gluck devote a portion of their lives to public service and get the rug ripped out from underneath them. Also, the fact that Gluck lost all those years of investment in a viable retirement fund is shameful and a discredit to the system."
>
> (Aa25).

Here, the Board's actions must not be tolerated, particularly based on the facts and circumstances outlined earlier in submission demonstrating that Appellant maintained an employee/ employer relationship with the BSA for the entire time he worked for that entity. For that same reason, the application of equitable estoppel

will not "prejudice" the "essential function" of the Division or the Board. See Twp. of Middletown, 193 N.J. at 250. It is likewise beyond dispute that by waiting as long as it had to take any action, the Division and the Board can hardly be described as comporting itself with "compunction and integrity." See Sellers, 399 N.J. Super. at 59. As such, it is appropriate to apply equitable estoppel against the Board in this matter, due to the unique circumstances at issue.

Accordingly, and in the alternative, the Board should be equitably estopped from disqualifying Appellant's membership in PERS for the two time periods at issue.

V. CONCLUSION

For these reasons, the ALJ's decision, as adopted by the Board, must be reversed in its entirety.

Respectfully Submitted,

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JAMES GLUCK, Petitioner-Appellant, v. BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent-Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003773-22T2 Civil Action ON APPEAL FROM A FINAL AGENCY DECISION OF THE BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Brief and Appendix of Respondent Board of Trustees of the Public Employees' Retirement System
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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Appellant, James Gluck, appeals the June 26, 2023 final agency decision of the Board of Trustees, Public Employees' Retirement System denying PERS service credit for services performed for the Borough of Beachwood, as counsel to the Beachwood Sewerage Authority ("BSA") from February 1, 2002 through February 29 2008 and from December 1, 2009 through the present, because he was not an employee of Beachwood, but rather, an independent contractor.[2] (Pa5-6).

A. Gluck's Professional Relationship with Beachwood

1. Resolutions and Public Notices

On January 1, 1998, Gluck was enrolled in PERS as a public defender for Beachwood. (Pa31-32). Effective June 1, 1999, Gluck was appointed as "legal counsel" for the BSA under Resolution 05-19-99. (Ra1). The Resolution, provides:

> WHEREAS, the Local Public Contract Law, 40A:ll-l et seq, requires that a Resolution authorizing the award of contracts for "Professional Services" without

[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 Gluck's appendix; "Pb" refers to his brief. Gluck's appendix starts numbering at Pa81. "Ra" refers to the Board's appendix.

> competitive bids must be publicly advertised and available for public inspection.
>
> [Ra1 (emphasis added).]

The Resolution further provides that:

> This contract is awarded without competitive bids as a "Professional Service" under the provisions of the Local Public Contract Law because the legal counsel is highly experienced in goverenment [sic] operations and sewerage authorities and in the opinion of the Authority, can best provide the appropriate professional service for the Authority.
>
> [Ra1 (emphasis added).]

The contract was awarded to "James J. Gluck, Attorney at Law, 245 Atlantic City Blvd., Suite E, Beachwood, New Jersey 08722." (Ra1). From 2000 through 2005, the BSA appointed Gluck in this manner[3]. (Ra1-7).

Beginning in 2006, Resolution 02-04-06 appointed "James Gluck of the firm Gluck, Allen & Gertner, L.L.C., 217 Washington Street, Toms River, NJ 08753." (Ra8-13). This method of appointment continued until 2008. (Ra8-13; Pa9). Pension contributions were remitted from 1999 until he resigned effective February 29, 2008. (Pa128). On December 15, 2009, under Resolution No. 12-50-09, Gluck returned and was "hired as an employee of the [BSA] for

[3] When a resolution was passed, in accordance with the LPLC, a "notice of contracts awarded" was published in the local paper—including other professional services contracts award by the BSA—such as insurance or engineering. (Ra14-16).

the position of General Counsel." (Pa98). Pension contributions resumed, but no more resolutions were passed. Ibid. On the resolution hiring him as general counsel, his firm's stamp appears: "Gluck & Allen, L.L.C., Attorneys at Law" with the firm address. Ibid.

2. Professional Service Agreements

Contemporaneous with the passing of resolutions, the BSA entered into professional service agreements with Gluck. (Pa38-85). The first contract, dated May 18, 1999, was between the BSA and "James J. Gluck, Esq., of the firm of James J. Gluck, P.A., 245 Atlantic City Boulevard, Beachwood, New Jersey." (Pa38). The same professional service agreement was entered in 2000 and 2001 (in 2001 the firm name changed to "Gluck & Allen, L.L.C."). (Pa42; Pa6).

The contract terms provided for $3,000 per year, "payable to [Gluck] as a salaried employee of the Authority on a monthly basis." (Pa38; Pa42; Pa46). Additionally, compensation was to be billed at an hourly rate "for all services which shall be billed against the monthly salary draw" and each additional hour over the monthly salary. Ibid. The contracts provided Gluck would be enrolled in PERS and the BSA would pay for health benefits. (Pa40; Pa45; Pa48).

From 2002 through 2005, Gluck and the BSA entered into professional service agreements with the same terms, but with a new addition. (Pa52-88).

The contract permitted that a member of Gluck's firm, Robert W. Allen, Esq. "shall be permitted to act under the terms and conditions of this contract as an alternate." (Pa55; Pa58; Pa61; Pa66). In 2006 and 2007, the firm name changed again to "Gluck, Allen, & Gertner, L.L.C." and provided that Sean Gertner, Esq., and Jerome Gertner, Esq., in addition to Allen, "shall be permitted to act under the terms and conditions of this contract as an alternate." (Pa88). Otherwise the terms of the professional service agreements remained consistent. (Pa52-88).

In 2008, the contract provided for $3,000 to be paid as a "retainer on a monthly basis for legal services rendered . . ." (Ra30). The same hourly rate billing system remained in place. Ibid. In 2009, there was no provision for a retainer or a salary, just an hourly rate billing system. (Ra38). Thereafter, no further professional services agreements were executed. (Pa129-130).

3. The Pension Fraud and Abuse Unit's Investigation

In 2005, concerned that the State's public pension systems were rife with abuse and upon the verge of a fiscal funding crisis, the Legislature undertook a comprehensive study and review of these problems. N.J. Benefits Review Task Force, Report of the Benefits Review Task Force to Acting Governor Richard J. Cody at 3 (December 1, 2005) (Ra121-188). 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.

In July 2012, the Office of the State Comptroller conducted an extensive audit of PERS local employer locations. See A. Boxer, State of New Jersey Office of the State Comptroller, Improper Participation by Professional Service Providers in the State Pension System (2012) (Ra189-228) ("Comptroller Report"). The Comptroller Report found that a significant number of professional services providers remained enrolled in PERS after January 1, 2008, in violation of Chapter 92, 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. Ibid. The Comptroller Report also 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. (Ra201-204). After the Comptroller Report issued, the Division of Pension and Benefits began auditing a number of municipalities to determine compliance with Chapter 92.

On November 7, 2014, Susan Grant, the acting director of the Pension Fraud and Abuse Unit ("PFAU"), wrote to Gluck and informed him that he was ineligible for enrollment in PERS after December 31, 2007, the effective date of Chapter 92. (Pa110-111). On September 22, 2015, after further review into the entirety of Gluck's relationship with the BSA, Grant issued a determination letter finding that Gluck's entire service with the BSA (1999 onward) was ineligible for PERS service credit because he should have been classified as an independent contractor, not an employee. (Pa102-104).

On July 31, 2016, Grant reevaluated Gluck's service and determined that he was ineligible for service credit from February 1, 2002 onward, because that was the year in which members of Gluck's firm could assume his duties under the terms of the professional service agreement. (Pa112-117). In rendering her determination, Grant considered the employee-independent contractor checklist and twenty-factor questionnaire completed by Beachwood. (Ra51-60). She reviewed the Gluck & Allen website where Gluck openly advertised that he had other clients, including public entities. (Ra117-120). On August 17, 2016, the Board accepted Grant's July 31, 2016 determination, because Gluck had served as an independent contractor, not an employee, throughout his entire relationship with the BSA. (Pa118-124). Gluck appealed, and the matter was transferred to the Office of Administrative as a contested case, where it was later

remanded for further evaluation under the twenty-factor balancing test from IRS Rev. Rul. 87-41 ("twenty-factor test") . (Pa8).

On April 10, 2019, Kristin Conover, successor to Grant as acting director of the PFAU, reissued a determination applying the twenty-factor test to determine that Gluck had served the BSA as an independent contractor, not an employee. (Pa125-150). In addition to previous findings, Conover noted that from December 2009 to July 2018, members of Gluck's firm substituted for Gluck at BSA meetings eleven times. (Pa146). Further, when performing work for the BSA, 121 resolutions were stamped as prepared by Gluck & Allen, the Rules and Regulations of the BSA were authored by the firm of Gluck & Allen, letters from the BSA were written on Gluck & Allen letterhead and signed by "James Gluck, For the Firm." (Ra45-50; Ra110-112)

On July 8, 2019, the Board accepted Conover's determination and applied the twenty-factor test to Gluck's relationship with the BSA and determined many factors demonstrated Gluck's status as an independent contractor: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (13) payment of business and/or travel expenses; (14) furnishing of tools and materials; (15) significant investment; (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. (Pa151-156). Gluck again appealed and the matter was sent to the Office of Administrative Law, where it was assigned to Administrative Law Judge Dean J. Buono. (Pa9).

B. Administrative Hearing and Determination

On July 25, 2022, a hearing was held in the OAL. Conover testified for the Board, and Gluck, along with his accountant, Scot Pannepacker also testified. (Pa9-12). On April 6, 2023, the ALJ issued his Initial Decision. (Pa7-29). The ALJ found Gluck was ineligible for PERS service for his professional services to the BSA. (Pa25). The ALJ engaged in a 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 Gluck was an independent contractor rather than an employee, and, as such, his removal from PERS was warranted." (Pa23).

The ALJ began each factor analysis with the relevant provision from the IRS Revenue Ruling, and then made factual findings:

Factor #1 – instructions:

> A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

[(Pa14); Rev. Rul. 87-41.]

The ALJ found this weighed in favor of independent contractor status. (Pa14). Gluck attended meetings scheduled by the BSA, the resolutions created by Gluck were done at either his home or his firm. (Pa15). The township did not direct and where he was to perform the work for the BSA. Ibid.

Factor #2 – training:

> Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.
>
> [(Pa15); Rev. Rul. 87-41.]

The ALJ found this weighed in favor of independent contractor status. (Pa15). The ALJ found that Gluck did not receive any sort of training from the BSA. (Pa15). Gluck did not receive any training, even though the employee handbook mandates training for employees. (Ra61). He attended Continuing Legal Education classes, but that is required for all practicing lawyers in New Jersey and the maintenance of his private law firm. (Pa15).

Factor #3 – integration:

> The IRS ruling explains integration of the worker's services is subject to direction and control. When the success or continuation of a business depends to an

> appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.
>
> [(Pa15); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of independent contractor status. (Pa18). The ALJ found that Gluck was not restricted from delegating his duties and, in fact, had attorneys from his firm cover for him. (Pa16).

> Factor #4 – services rendered personally:
>
> If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.
>
> [(Pa16); Rev. Rul. 87-41.]

The ALJ found that Gluck was contractually permitted to substitute other attorneys from his firm to perform duties for the BSA and did so. (Pa16).

> Factor #5 – hiring supervising, and paying assistants:
>
> If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.
>
> [(Pa16); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of independent contractor status. (Pa18). The ALJ found that Gluck would have members of Gluck & Allen perform duties, including research, and those individuals were not compensated directly by the BSA but through the firm. (Pa16).

Factor #6 – continuing relationship:

> A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.
>
> [(Pa16-17); Rev. Rul. 87-41.]

The ALJ found this weighed in favor of independent contractor status. (Pa17). The ALJ found that Gluck was reappointed annually via resolution. (Pa17).

Factor #7 – set hours of work:

> The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.
>
> [(Pa17); Rev. Rul. 87-41.]

The ALJ found this weighed in favor of independent contractor status. (Pa17). The ALJ found that outside of the BSA meetings, Gluck did not have any set hours of work and no timekeeping. (Pa20).

Factor #8 – full time required:

> If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and implicitly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses.
>
> [(Pa17); Rev. Rul. 87-41.]

The ALJ found this weighed in favor of independent contractor status. (Pa17). The ALJ found that Gluck testified he was a part-time attorney with the BSA, he was free to conduct other business, and the BSA accounted for "7%-10% of his work income." (Pa17-18).

> Factor #9 – doing work on employer's premises:
>
> If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.
>
> [(Pa18); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of independent contractor status. (Pa18). The ALJ found that Gluck controlled when and where he performed legal work for the BSA, as he testified that the majority of work was completed in his home or law office, with law office staff. (Pa18).

Factor #10 – order or sequence set:

> If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person, or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.
>
> [(Pa18-19); Rev. Rul. 87-41.]

The ALJ found this weighed in favor of employee status. (Pa19). The ALJ determined that the township clerk scheduled all meetings and agenda; the BSA would assign tasks to Gluck and would indicate which tasks were of high priority. Ibid.

Factor #11 – oral or written reports:

> A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.
>
> [(Pa19); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of employee status, because Gluck provided oral reports at the BSA monthly meetings, even though they were not required. (Pa19).

Factor #12 – payment by hour week or month:

> Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on straight commission generally indicates that the worker is an independent contractor.
>
> [(Pa19); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of independent contractor status. (Pa19). Gluck was not entitled to sick, vacation, or personal days, and was not paid health benefits. Ibid.

Factor #13 – payment of business and/or travel expenses:

> If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses generally retains the right to regulate and direct the worker's business activities.
>
> [(Pa20); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of independent contractor status. (Pa20). Gluck testified that he was not reimbursed for any sort of travel or

business expenses. Ibid. The BSA did not compensate Gluck for any fees or costs associated with being an attorney. Ibid.

Factor #14: furnishing of tools and materials:

> The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship."
>
> [(Pa23); Rev. Rul. 87-41.]

The ALJ found this factor weighed in favor of independent contractor status because he was not furnished with the necessary tools and materials to perform all of his duties. (Pa23). Gluck was not provided with an office, and only had access to some supplies, if needed. Ibid.

Factor #15 – significant investment:

> If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.
>
> [(Pa23); Rev. Rul. 87-41.]

The ALJ found that Gluck meets the definition of independent contractor because he invested in his own office space with his firm, and the township did not provide Gluck with staff, equipment or maintenance. (Pa23-24).

Factor #16 – realization of profit or loss:

> A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.
>
> [(Pa24); Rev. Rul. 87-41.]

The ALJ found no evidence that Gluck was able to sustain a profit or loss and determined he met the definition of independent contractor. (Pa24).

Factor #17 – working for more than one firm at a time:

> If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.
>
> [(Pa24); Rev. Rul. 87-41.]

The ALJ determined that Gluck performed services for public entities other than the BSA. (Pa24). Gluck testified only approximately 7% to 10% of his total time was spent performing work for the BSA as opposed to other clients. (Pa24).

Factor #18 – making services available to the general public:

> The fact that a worker makes his other services available to the general public on a regular and consistent basis indicates an independent contractor relationship.
>
> [(Pa25); Rev. Rul. 87-41.]

The ALJ noted that Gluck offered his professional services to the public which indicated independent contractor status. (Pa25). On the Gluck & Allen website, Gluck openly advertised that he had other clients, including public entities. (Ra117). Gluck testified he worked for other entities and clients. (Pa25).

Factor #19 – right to discharge:

> The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.
>
> [(Pa25); Rev. Rul. 87-41.]

The ALJ found there was no continuing relationship because appointment was only for a year at a time and required reappointment. (Pa25).

Finally, factor #20 – right to terminate:

> If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.
>
> [(Pa25); Rev. Rul. 87-41.]

Again, this factor weighed in favor of finding that Gluck was an employee because Gluck could be terminated at any time. (Pa25).

In sum, while the ALJ felt affronted by having to conclude Gluck should not receive PERS credit for his professional service to the BSA, calling it a "disgrace," he was "constricted by the law" and concluded that the twenty-factor test compelled a finding that Gluck was an independent contractor. (Pa25). In particular, the ALJ found it important that Gluck "maintained an independent, private practice of law." (Pa24).

On June 26, 2023, the Board issued its final administrative determination, noting the exceptions filed, and adopted the Initial Decision with modifications. (Pa5). The Board rejected the ALJ's editorialization about Gluck not receiving service credit, which did not impact his analysis under the twenty-factor test. Ibid. The Board also noted that factor #16 "realization of profit or loss," weighed in favor of a finding Gluck to be an employee, but does not change the

overall analysis when considering all twenty factors. Ibid. This appeal followed.

ARGUMENT

POINT I

THE BOARD REASONABLY DETERMINED THAT GLUCK IS INELIGIBLE FOR PERS SERVICE CREDIT FOR HIS PROFESSIONAL SERVICES TO THE BEACHWOOD SEWERAGE AUHORITY BECAUSE HE WAS AN INDEPENDENT CONTRACTOR.

"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).

This court also "afford[s] 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 Pennrose 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).

Gluck 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. See 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 . . . .").

Eligibility for PERS enrollment is governed by N.J.S.A. 43:15A-7(b), which by its very terms requires the existence of an employee-employer relationship:

> Any person becoming an employee of the State or other employer after January 2, 1955 . . . and other than those whose appointments are seasonal, becoming an employee of the State or other employer after such date, including a temporary employee with at least one year's continuous service. The membership of the retirement system shall not include those persons appointed to serve as described in paragraphs (2) and (3) of subsection a. of section 2 of P.L.2007, c.92 (C.43:15C-2), except a person who was a member of the retirement system prior to the effective date [July 1, 2007] of sections 1 through 19 of P.L.2007, c.92 (C.43:15C-1 through C.43:15C-15, C.43:3C-9, C.43:15A-7, C.43:15A-75 and C.43:15A-135) and continuously thereafter; . . . .

[N.J.S.A. 43:15A-7(b) (emphasis added).]

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)). Further, "[a]n administrative agency may not under guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964). A court must reject a statutory interpretation that is contrary to the statutory language. GE Solid State, Inc. v. Dir., Div. of Tax'n, 132 N.J. 298, 306-07 (1993).

While the plain language of Chapter 92 disallows service credit after January 1, 2007 for professional service providers, being an employee has been prerequisite to enrollment in PERS since the system's inception. N.J.S.A. 43:15A-7; N.J.S.A. 43:15A-6(r)(1). In order to determine whether an individual performed contracted services as an independent contractor or an employee, the Board uses the twenty-factor test established in IRS Rev. Rul. 87-41. The weight of each factor will vary "depending on the occupation and the factual context in which the services are performed." 1987 IRB LEXIS 254, *10-11 (I.R.S. January 1, 1987). Further, IRS Rev. Rul. 87-41 provides that "individuals, such as physicians, lawyers, dentists . . . who follow an independent. . . profession, in which they offer their services to the public, generally, are not employees." Ibid.

The Board's use of the twenty-factor test has been most recently acknowledged in Petit-Clair v. Bd. of Trs., 2020 N.J. Super. Unpub. LEXIS 1504, at *11 (App. Div. July 27, 2020)(Ra113).[4] 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), overruled in part on other grounds, 198 N.J. 215 (2009); Stevens v. Bd. of Trs., Pub. Emps.' Ret. Sys., 309 N.J. Super. 300, 303 (App. Div. 1998) (endorsing twenty-factor test); 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").

Here, application of the twenty-factor test classifies Gluck as an independent contractor rather than an employee from 2002 onward. In essence, the twenty-factor test focuses what is apparent in the record—the legal services were coming from Gluck through his firm, not from Gluck personally as an employee of the BSA.

[4] Gluck includes the first Petit-Clair decision, but not the second, in his appendix.

Factor #1 – instructions: on balance this weighs in favor of Gluck's status as an independent contractor. The record reflects that the BSA chairperson assigned legal tasks to Gluck, but Gluck had full discretion over when, how, and where the tasks would be performed. Factor #2 – training: weighs heavily in favor of independent contractor status because Gluck did not receive any sort of training from the BSA, even though the employee handbook mandates such training for employees. Factor #3 – integration: based on the entire record, he meets the definition of independent contractor because Gluck held himself out to the public as a member of the firm of Gluck & Allen, not an employee of the BSA. When performing work for the BSA, 121 resolutions were stamped as prepared by Gluck & Allen, the Rules and Regulations of the BSA were authored by the firm of Gluck & Allen, letters from the BSA were written on Gluck & Allen letterhead and signed by "James Gluck, For the Firm." (Ra111-112).

Factor #4 – services rendered personally: Gluck clearly meets the definition of independent contractor because he was contractually permitted to substitute other attorneys from his firm to perform duties for the BSA. Beginning in 2002, members of Gluck & Allen would substitute for Gluck at BSA meetings. From December 2009 to July 2018, members of Gluck's firm attended BSA meetings 11 times. Factor #5 – hiring supervising, and paying assistants: based on the entire record, Gluck meets the definition of independent

contractor. Gluck would have members of Gluck & Allen perform duties, those individuals were not compensated directly by the BSA but through the firm. Gluck had no authority to hire or supervise any employee of the BSA.

Factor #6 – continuing relationship: from May 1999 through November 2009 Gluck meets the definition of independent contractor because he was reappointed annually via resolution. For the period of December 2009 through June 2022, he meets the definition of employee because it seemed there was no break in service. However, it should be noted that the nature of his relationship with the BSA did not otherwise change. Factor #7 – set hours of work: Gluck clearly meets the definition of independent contractor. Other than appearing at BSA meetings, Gluck had no set hours or any sort of structure as to when he must perform work assigned to him by the chairman. No timekeeping system was in place for Gluck. Factor #8 – full time required: as Gluck had no set hours, and worked for multiple other public entities concurrently with the BSA, he meets the definition of independent contractor.

Factor #9 – doing work on employer's premises: Gluck meets the definition of independent contractor. As Gluck stated in his testimony, apart from attending BSA meetings, he performed his work for the BSA from his office or his house. Gluck was not required to be on the BSA's premises to perform his duties; this was confirmed by the BSA's answers to the twenty-

factor questionnaire. Factor #10 – order or sequence set: Gluck meets the definition of employee because the BSA board would assign tasks to Gluck and would indicate which tasks were of high priority. However, this is not a strong indicator of overall status because it aligns with typical legal services to a public entity.

Factor #11 – oral or written reports: Gluck meets the definition of employee because he provided oral reports at the BSA monthly meetings. Factor #12 – payment by hour week or month: Gluck meets the definition independent contractor from 2002 to 2009 because he was paid an annual salary then billed for additional time for which he received a 1099. From 2009 on he was only paid monthly and received a W-2, so that period supports a finding of employee. As it is the Board's contention that Gluck was misclassified after 2009, it does not heavily indicate employee status, but rather, is simply consistent with his misclassification. Factor #13 – payment of business and/or travel expenses: Gluck meets the definition of independent contractor. Gluck was not reimbursed for any sort of travel or business expenses.

Factor #14: furnishing of tools and materials: Gluck meets the definition of independent contractor. Gluck performed his duties from his office or home. He was not provided any general office supplies or postage. He testified that he would have members of his firm perform research for him. Factor #15 –

significant investment: Gluck meets the definition of independent contractor. He invested in his own office space with his firm, and did not use any supplies from the BSA. Factor #16 – realization of profit or loss: Gluck meets the definition of independent contractor because, again, he performs the majority of his duties from his law office or home.

Factor #17 – working for more than one firm at a time: Gluck clearly meets the definition of independent contractor. It is undisputed on the record that Gluck performed services for public entities other than the BSA. In fact, Gluck testified only approximately 7% to 10% of his total time was spent performing work for the BSA as opposed to other clients. Accordingly, Gluck spent the vast majority of his time working for clients other than the BSA.

Factor #18 – making services available to the general public: significantly, this weighs heavily in favor of classifying Gluck as an independent contractor. On the Gluck & Allen website, Gluck openly advertised that he had other clients, including public entities. Gluck testified he worked for other entities and clients. Factor #19 – right to discharge: weighs in favor of Gluck being considered an employee because Gluck's services could be terminated at any time. However, this is not a significant factor in the overall balancing because it is not uncommon in the nature of legal services to be able to dismiss a law firm at any time. Finally, factor #20 – right to terminate: again, this factor

weighs in favor of finding that Gluck was an employee, but not significantly. The fact that Gluck could resign at any time is not central to the ultimate determination that he performed work as an independent contractor.

As the ALJ found, no substantive changes were made to Gluck's relationship with the BSA from before 2009 to after 2009, when he was allegedly hired as in-house counsel. Gluck was not working as a bona-fide employee, but rather, is 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). Gluck's relationship with the BSA was that of a law firm retained to perform legal work as needed, billed against a retainer (sometimes classified as a salary). Common sense requires a finding that Gluck was performing work through Gluck & Allen, like the vast majority of other lawyers in New Jersey who offer their services to the public, not as an attorney-employee. This is supported by Gluck's own testimony and answers on cross-examination.

Gluck essentially asks this court to weigh the twenty-factor test differently than the ALJ and the Board. (Pb27). Gluck states that attorneys can be employees. (Pb31). The Board agrees. To support this position, Gluck cites the 2018 Petit-Clair decision, remanding the matter to the Board, but fails to cite

the ultimate outcome of Petit-Clair; where this court found that he was not an employee, but an independent contractor. (Pb31; Pa220-226).

In Petit-Clair v. Bd. of Trs., No. A-4561-18T1 (App. Div. July 27, 2020), this court found the Board, in weighing the twenty-factor test, reached a decision that "deserves our deference." (Ra116). It 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." (Ra115). This court explicitly, and correctly, rejected Petit-Clair's request to substitute the court's judgment for the Board's. (Ra47-48). As these matters involve weighing facts to determine pension eligibility, the Board's determination is entitled to substantial deference. Gluck points out that factors 6, 12, and 16 weigh in favor of Gluck's status as an employee. (Pb27). The Board agrees. However, this was the exact situation in Petit-Clair, and the Board's weighing of the factors is entitled to deference. Piatt, 443 N.J. Super. at 99; (Ra115-116).

Further, Gluck's disagreement with the Board's determination does not withstand scrutiny. Gluck argues factor 2 (training) weighs in his favor because he was "required to remain current on local government law, and did so by attending continuing legal education classes" and other conferences. (Pb30-21). Gluck fails to explain how an attorney's obligation to perform competent legal

services by remaining up-to-date in their area of expertise is analogous to an employee's obligation to attend mandatory discrimination, sexual harassment, or other training required by an employer. (Pb31). Similarly, Gluck's responsibility "for typing the Employee Manual," (Pa136; Pb31), does not equate to receiving such mandatory employee training.

Gluck also suggests that factor 3 (integration) was "insufficiently assessed because his professional services agreements with the BSA permitted delegation to specific people." (Pb29). Gluck fails to understand this delegation is the very reason why the factor weighs in favor of independent contractor status. A typical attorney-employee could not substitute a member of his private firm to assume his duties for his employer when the attorney-employee is ill. It would be up to the employer to decide how to cover for the employee's absence. Gluck's situation evinces a typical law firm-client relationship, where the law firm can staff assignments or meetings with other attorneys in accordance with the retainer agreement.

Further, there is no legal or factual support to distinguish between the period before 2009 and after 2009. (Pb37). In fact, even the resolution attempting to hire Gluck as "general counsel" was prepared by the firm of Gluck & Allen, as indicated by the "Gluck & Allen, L.L.C." stamp. (Ra13). These

stamps appeared well after the 2009 hiring that Gluck argues created a different work relationship with the BSA. (Ra45-50).

Gluck cites Fasolo v. Board of Trustees, Division of Pensions, 181 N.J. Super. 435, 436, 440 (App. Div. 1981), to claim that PERS is attempting to apply Chapter 92 retroactively because this court has upheld prior municipal retainer agreements. Fasolo involves a different legal issue and is thus distinguishable. In Fasolo, this court overturned the Board's determination that $60,000 in additional salary was not creditable compensation for the purpose of an employee-attorney's pension calculations pursuant to N.J.S.A. 43:15A-6(r). Fasolo, 181 N.J. Super. at 436. The Board made no finding that Fasolo was an independent contractor nor that Fasolo was not entitled to years of pension credit. Rather, the sole issue was whether the extra compensation (outside of otherwise valid employment) was within the scope of his employment. Id. at 445-46.

Gluck relies on an unpublished case to claim that just because a municipal attorney is a member of a law firm, he is not a de facto independent contractor. Cohen v. Bd. of Trs., Pub. Emps. Ret. Sys., No. A-1219-16T4, 2019 N.J. Super. Unpub. LEXIS 175 (App. Div. Jan. 24, 2019) (Pb25). In Cohen, a municipal attorney was considered an employee from 2001 to 2004 under the twenty-factor test but was an independent contractor from 2004 to 2007 when contracts were

executed between the municipality and his law firm. Id. at 18. Cohen simply stands for the proposition that an individual must be evaluated under the twenty-factor test when determining eligibility, and that a contract for professional services—when those services flow through a law firm—reflects the attorney is an independent contractor. Id. at 17-18.

The Board's determination that Gluck was an independent contractor is supported by substantial, credible evidence. It should be affirmed.

POINT II

THE DOCTRINE OF EQUITABLE ESTOPPEL IS NOT APPLICABLE BECAUSE GLUCK DOES NOT HAVE ENTITLEMENT UNDER THE LAW.

The Board is vested with "the general responsibility for the proper operation of the retirement system." N.J.S.A. 43:16A-13(1). To this end, the Legislature authorized the Board to correct errors in the retirement system if an individual receives a retirement benefit he or she is not legally entitled to receive. N.J.S.A. 43:16A-18. An individual who is "eligible for benefits" is entitled to a liberal interpretation of the pension statute, but "eligibility [itself] is not to be liberally permitted." Krayniak v. Bd. of Trs., Pub. Emps.' Ret. Sys., 412 N.J. Super. 232, 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 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 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).

Here, Gluck's eligibility for a PERS membership is a prerequisite to any claim for equitable relief. Berg, 225 N.J. at 280. What's more, Gluck alleges no actions on the part of the Board or Division that could conceivably give rise to a claim of misrepresentation or concealment. The record, on the whole, reflects that the Division promptly and accurately informed Gluck that he was not entitled to enrollment in PERS once his employment status was reviewed.

In an effort to suggest the Division knew of his work status, Gluck relies on correspondence from the Division in 2008, where the Division states it does not determine whether employees are full-time, but rather, relies on the employer to make that determination. (Pb51; Pa97). It is unclear how this correspondence would have informed the Division that Gluck was an independent contractor improperly identified as an employee. There was nothing the BSA asked which would "trigger" an inquiry into the BSA's appointment of Gluck. The Division is only aware of the information it is provided, and nothing in the communication sent to the Division explains the nature of Gluck's and the BSA's work relationship.

Nor was the Division's correspondence to Gluck about purchasing his prior service credit a determination that he was eligible for a retirement benefit. Any member who appears eligible for purchase is informed of their right to do so. Apart from processing his pension contributions and this minimal

correspondence, the Division had absolutely no involvement in assessing Gluck's employment status prior to its review under Chapter 92 in 2014.

The argument that Gluck contributed to the PERS system and was denied the benefit of other retirement vehicles adds nothing to the calculus of equity. (Pb52). This is true of all determinations which find an individual ineligible for a retirement benefit. While Gluck is understandably disappointed that he did not invest that money in another manner, there is no remedy to be gained from PERS, which is statutorily obligated to make these determinations. If Gluck has claims against any entity, it is the BSA who improperly enrolled him in PERS to begin with—not the Board which made a determination consistent with the law once it uncovered the improper enrollment.

CONCLUSION

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

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

By: _____
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Dated: August 29, 2024

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November 25, 2024

VIA ECOURTS

Joseph H. Orlando, Clerk
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James Gluck v. Board of Trustees of the Public Employees' Retirement System
Docket No.: A-003773-22T2

On Appeal from a Final Agency Decision of the Board of Trustees of the Public Employees' Retirement System

Letter Brief of Appellant, James Gluck, in further support of his Appeal (Amended)

Dear Mr. Orlando:

As you are aware, this office represents the Appellant, James Gluck ("Appellant" or "Gluck") 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 AS IT RELIES TOO HEAVILY ON VERY LIMITED INSTANCES OF SUBSTITUTIONS AND THE STAMP ON SOME OF THE RESOLUTIONS APPELLANT PREPARED WHILE FAILING TO ACKNOWLEDGE THAT APPELLANT'S ROLE AS AN ATTORNEY NATURALLY REQUIRED LESS OVERSIGHT BY THE BSA (Aa005-030)

First, Respondent attempts to discount the relevance of Fasolo v. Board of Trustees, 181 N.J. Super. 434 (App. Div. 1981) by contending that it is distinguishable, namely, because the Board made no finding that Fasolo was an independent contractor. That assertion is misleading, however, because in Fasolo, PERS rejected a hearing officer's decision finding that there indeed

had been a bona fide employer-employee relationship between Fasolo and the employer with respect to the sewer attorney contract and the $60,000.00 fee associated therewith. Fasolo v. Bd. of Trs., 181 N.J. Super. 434, 440 (App. Div. 1981). Thus, the Board in Fasolo, at least implicitly, found that he was an independent-contractor in regard to his sewer attorney contract. As such, the reasoning by the Court in Fasolo in reversing the Board's finding is at least relevant to some of the factors in question in the instant matter.

To that end, the Court recognized that Fasolo "was probably not subject to the same intensity of control that the municipality exercised over other employees… [y]et a municipal judge clearly is subject to little municipal control, though PERS agrees that for purposes of N.J.S.A. 43:15A-6(r) his salary is compensation." Id. at 444. Here, Respondent places an inordinate amount of weight upon the fact that Gluck, as an attorney, was not subject to the same intensive oversight that other municipal employees may be subjected to in their employment. This aspect influenced the ALJ's and Respondent's decisions as to Factor 1 (Instructions), Factor 2 (Training), Factor 7 (Set hours of work), and Factor 9 (Doing work on employer's premises). Respondent thus weaponized the fact that Gluck is an attorney and therefore did not require the same amount of supervision or control over his tasks and training as other municipal employees, and used it to attack his eligibility with PERS.

Rather, Appellant submits it is Factor 10 (order or sequence set) that is more significant in this case. Respondent acknowledges that Factor 10 weighs in favor of employee status. The ALJ also made such a finding, indicating that Gluck was required to perform services in the order or sequence set by the Beachwood Sewerage Authority ("BSA"). (Aa18-19). Despite not having intensive control over the particular training he was required to undertake and affording him some freedom in regard to how he accomplished the work he was to perform, the BSA still exercised significant control over when the work was to be performed by and as to which tasks were to be given priority. (Aa19). Thus, while Gluck might have had some freedom in regard to how he performed the work, that was simply due to his status/ training as an attorney and the BSA had ultimate control over what work he was to perform and when he was to perform it by.

Respondent also relies heavily in its analysis of Factor 3 (Integration) on various resolutions stamped "Gluck & Allen." Yet it affords no weight to the fact that each agreement in question appointed Gluck, individually, not his firm, as BSA attorney and as a salaried employee. (See Aa38-91, ¶2 of each agreement). While there indeed were substitutes for Gluck at BSA meetings when conflicts arose, Gluck was still responsible for drafting and completing these resolutions as the BSA's individually appointed attorney. The fact that

Gluck might have used his firm's paper to complete various resolutions should not be dispositive based on these other relevant facts.

Respondent's analysis with respect to Factor 6 (Continuing relationship), for the period of 2002-2008, is equally unavailing. As articulated by the ALJ, "A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals." (Aa16-7). Gluck was appointed on an annual basis year after year from 1999 to 2008. It is entirely perplexing that this undisputed fact is somehow not sufficient to satisfy a "continuing relationship" for the time period of 2002-2008. That is exactly what he and the BSA had for that period. The ALJ's and Respondent's decisions on that front are entirely arbitrary.

Regarding Factors 4 (Services rendered personally) and 14 (Furnishing of tools and materials), Respondent relies heavily on the fact that on very limited occasions, members of Gluck's firm substituted for him at BSA meetings. To that end, Appellant testified that he performed the work assigned by the BSA and he would only be assisted by another attorney when he had a personal conflict of interest or was otherwise ill, such as when he fell ill in 2017 for approximately six (6) months. (1T:87:13 to 89:10). First, this was

permitted pursuant to his agreement with the BSA. Respondent contends that a "typical attorney-employee could not substitute a member of his private firm to assume his duties for his employer when the attorney-employee is ill." (Respondent brief at 31). Such a statement is entirely conclusory. The BSA exercised authority over this aspect of its relationship with Gluck by contractually authorizing him to find a substitute in recognition of the fact that attorneys at times have personal conflicts. Aside from these very minimal substitutions over the years, there is nothing in the record that undermines Gluck's testimony that he, individually, performed each and every task assigned to him by the BSA. As such, the findings of the ALJ and Respondent in regard to these factors, particularly Factor 4, are arbitrary and capricious.

Respondent further "side-steps" the relevance of Cohen v. Bd. of Trs. of the Pub. Emples. Ret. Sys., No. A-1219-16T4, 2019 N.J. Super. Unpub. LEXIS 175 (App. Div. Jan. 24, 2019), asserting that it merely stands for the concept that a contract for professional services, when those services flow through a law firm, reflects the attorney is an independent contractor. (See Respondent Brief at p. 33). However, it is the factual similarities between Cohen, for the years the Court deemed Cohen eligible for credit (2001-2003) and the instant matter that are most notable. In particular, for the years after 2003, Cohen's firm was explicitly appointed as counsel for Fort Lee whereas

from 2001 to 2003, Cohen was appointed individually. Cohen, 2019 N.J. Super. Unpub. LEXIS 175, at * 9-10 & 16-17. In this matter, Appellant was individually appointed as the BSA's attorney for the years he operated under the PSA's and subsequently when named as in-house counsel. The Court in Cohen considered this an "important factual distinction" and thus, we submit that it was error for the ALJ and Respondent to ignore such a distinction.

Finally, the notion that the Division "promptly and accurately informed Gluck that he was not entitled to enrollment in PERS" is absurd. (See Respondent Brief, at p. 35). Respondent was enrolled in PERS in or around 1999 and Respondent does not dispute that Gluck did not receive any notice of ineligibility until November of 2014. Thus, the idea that Gluck was "promptly" notified of ineligibility by the Division is almost comical.

It is likewise not in dispute that the BSA contacted the Division after the enactment of Chapter 92 to inquire as to what constituted "full-time" to remain eligible in PERS and the representative of the Division stated that the Division "does not determine what constitutes full-time" and instead, that "determination is made by the employer." (Aa097). This was obviously misleading given that the BSA acted on that guidance, appointed Gluck to a position it deemed full-time, only to have Respondent, years later, deem

Gluck ineligible, in part, because it did not deem him "full-time." (See Factor 8). We submit that this further supports Appellants estoppel argument.

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 as the 20-factor analysis weighs in favor of deeming Appellant an employee for both periods in question. Alternatively, Respondent must be equitably estopped from denying Appellant membership in PERS for said time periods.

Respectfully submitted,

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CLIENT