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SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
DOCKET NO. A-000041-23

WILLIAM HAUS, Plaintiff, Appellant vs. BOARD OF TRUSTEES FOR THE PUBLIC EMPLOYMENT RETIREMENT SYSTEM, Defendant, Respondents	ATTORNEY OF RECORD Steven D. Cahn, Esq. Cahn & Parra, P.A. 1015 New Durham Road Edison, New Jersey 08817 (732) 650-0444 ON APPEAL FROM THE DECISION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM AUGUST 17, 2023 FINAL ADMINISTRATIVE DETERMINATION State of New Jersey Division of Pensions & Benefits PERS2-923791

APPELLANT'S BRIEF AND APPENDIX
(Pa1 – Pa59)

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February 21, 2024

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PRELIMINARY STATEMENT

This is an appeal of the decision of the Board of Trustees of Public Employees Retirement System (PERS), denying the appellant, William Haus' request to be re-enrolled in (PERS) based upon his employment with the Borough of South Plainfield when he returns to work after a six-month COVID 19 shut down. [Pa38-40,54]

The appellant was initially employed by South Plainfield in 1984 in the Recreation Department on a part-time basis and was enrolled in the Pension System as a Tier 1 pension employee. [Pa1,2,5] He subsequently secured full-time employment with the Middlesex County Department of Aging in the County's Meals for Wheels Program. On or about August 3, 2009, he was enrolled in PERS as a Tier 1 multi-pension employee based on his two pension eligible positions pursuant to *N.J.S.A. 17:2-2(b).* [Pa2]

The appellant continued to be employed by both the County and the Borough of South Plainfield making all appropriate pension contributions up until the unprecedented global health emergency of COVID19. In response to the COVID19 health emergency on January 31, 2020, the United States Secretary of the Department of Health and Human Services declared a public health emergency under *Section 319* of the *Public Health Service Act 42 U.S.C. Ch. 6A §201.* On March 9, 2020, Governor Phil Murphy signed *Executor Order 103* declaring a state of emergency and a public health emergency in New Jersey.

By March of 2020, much of the country, including most municipal governments within the state, were searching for ways to adapt to a rapidly changing environment. Without question, most Americans were unprepared for a total shutdown of the national economy including many of the services provided by local government.

On March 24, 2020, the appellant, along with all other South Plainfield employees in the Recreation Department received an email from Elizabeth J. Bauman Yarus, the Director of Recreation for the Borough of South Plainfield. [Pa3] Her email citing the governor's restrictions states in relevant parts, "*Effective immediately we cannot have part-time staff into the building to do any work.*" [Pa3] The email goes on to provide various options for employees without explaining any of the legal ramifications. Employees were given the option of using any paid time off they might have banked, taking unpaid leave, or being terminated subject to being recalled after the COVID19 emergency had subsided. Ms. Yaros' letter clearly states that at the end of the COVID19 national emergency, "*an employee would be reinstated to their prior positions.*" [Pa3]

When South Plainfield sent this email, no one understood how long this national emergency would last. There were no vaccines or treatments for COVID19 and there was considerable confusion regarding how government entities and

employers should handle the situation. Essentially, the entire country was on a lockdown.

While Middlesex County faced a similar national emergency, they decided to keep the Meals for Wheels Program going since countless seniors depended on this program. The appellant remained employed by the county, but like millions of other Americans, he was suddenly out of work based upon the COVID19 crisis from his position with South Plainfield.

In September of 2020, South Plainfield, with a better understanding of how to manage the COVID19 health emergency, elected to reopen their Recreation Department with various COVID restrictions in place. The appellant returned to his employment with the Borough of South Plainfield on or about September 21, 2020. When Haus returned to his employment, South Plainfield completed the necessary paperwork to re-enroll the appellant in the New Jersey State Pension System. [Pa4,5,6,8]

The Division of Pensions denied the appellants request to re-enroll in the State pension system, claiming that William Haus had a break in service thereby making him ineligible to re-enroll in the State Pension system from his South Plainfield position. [Pa13] After exhausting all administrative attempts to resolve this matter the appellant has filed this appeal pursuant to *Court Rule 2:2-3(a)(2)* [Pa58]

PROCEDURAL HISTORY

As a result of the COVID19 national health emergency, the appellant was temporarily laid off from his position in South Plainfield as of March 24, 2020. [Pa3,11,14] On September 21, 2020, the appellant returned to work with South Plainfield and was re-enrolled as a multiple member in the State Pension System. [Pa4,5,7,8]

The Division of Pensions refused to re-enroll William Haus as a multiple member in the State Pension System which prompted further inquiries from both South Plainfield, and from the appellant. [Pa9,11,12] On February 12, 2022, the New Jersey Division of Pensions contacted the appellant and advised him that he had a break in service and, therefore, would not be re-enrolled as a multiple member. [Pa13]

After the Borough of South Plainfield and the Division of Pensions exchanged various correspondence, the appellant hired legal counsel who wrote to the Division of Pensions on March 22, 2022. [Pa20] On October 13, 2022, the appellant received an official response from the Division of Pensions advising that due to a *break in service* the appellant could not be re-enrolled in the State Pension System. [Pa26]

On November 17, 2022, appellant wrote to Timothy Myhre, Assistant Director of Pension Operations, the Pension Benefits Specialist requesting a further review of the October 13, 2022, decision. [Pa28] On November 23, 2022, Timothy Myhre

respond denying the appellant's request to reconsider the decision from the Division of Pensions. [Pa30]

On December 8, 2022, after efforts to resolve the matter were unsuccessful, the appellant filed a request for administrative appeal of this decision with the Board of Trustees of the Public Employee Retirement System. [Pa31]

The appellant's matter was placed on the agenda of April 19, 2023. [Pa33] Appellant's counsel appeared and made a presentation on behalf of the appellant to the Board of Trustees. Subsequent to the April 19th meeting, appellant's counsel supplemented the record with correspondence from South Plainfield confirming the appellant had been laid off from his position. [Pa37,14]

On May 12, 2023, appellant received correspondence from the Division of Pensions indicating the Board of Trustees had denied his application to be re-enrolled in the State Pension System. [Pa38]

On June 23, 2023, appellant filed an appeal of the decision of the Board of Trustees denying the appellant's request to be re-enrolled in the Public Employee Retirement System. This appeal requested the Board reconsider their decision or in the alternative send this case to the Office of Administrative Law pursuant to the *Administrative Procedures Act N.J.S.A. 52:14B-1* [Pa41]

On August 17, 2023, the appellant received a formal denial of his appeal for re-enrollment in the State Pension System. In addition, the Board refused to send this case to an Administrative Law Judge for a hearing. [Pa54]

On or about September 7, 2023, the appellant filed a timely Notice of Appeal with the New Jersey Superior Court, Appellate Division. [Pa58]

STATEMENT OF FACTS

The appellant, William Haus, was originally hired by the South Plainfield's Recreation Department in 1984 and was enrolled on November 1, 1984, in the New Jersey State Pension System. (PERS) [Pa5] The appellant secured additional employment with the Middlesex County as a motor vehicle operator and was enrolled as a multiple member in the State Pension System on August 1, 2009. [Pa1,2,5]

He was employed without any issues or break in service up until March of 2020 when the COVID 19 National health Emergency occurred. On March 24, 2020, Mr. Haus along with all other employees in the Recreation Department received an email from Elizabeth J. Bauman Yarus, the Director of Recreation for the Borough of South Plainfield. Her email states in relevant part, *"effective immediately, we cannot have part time staff into the building to do any work."* [Pa3] This email was written in response to the Governors order to shut down non-essential services. [Pa3] Her email then goes on to provide various options for the employees without

explaining any of the legal ramifications. Employees were given the option of using their paid time off, taking unpaid time, or being terminated, which would allow them to collect unemployment. The email indicates that after the COVID19 emergency subsided, *"the employee would be reinstated to their prior positions."* [Pa3]

The appellant continued to work for Middlesex County but advised South Plainfield he would be separated, collect unemployment, and return after the emergency was over. [Pa9] He applied for and received unemployment benefits limited to his eligibility from the loss of his South Plainfield position. The appellant and South Plainfield understood this was a temporary situation and he would return to work when the conditions permitted. [Pa5,9,11,14]

In September of 2020, South Plainfield reopen their recreation department with appropriate Covid protections. The appellant returned to his employment with South Plainfield on September 21, 2020. [Pa4]

When the appellant applied through South Plainfield to be re-enrolled, the Division of Pensions requested confirmation that the appellant was subject to a layoff. [Pa13] South Plainfield sent the Division of Pensions a letter on October 5, 2021. [Pa 14] This letter states in relevant part, "*...he was laid off as our building had to close down due to COVID 19.*" [Pa14] This is consistent with South Plainfield's prior letter of January 20, 2021, which stated, "*...he was let go due to*

COVID 19. He was returned to our location on 9/21/20 and began contributing to the 4th Quarter 2020." [Pa11] This should reasonably have ended this inquiry.

When the Division denied his re-enrollment in PERS, the Appellant wrote to the Division of Pensions on January 20, 2022. [Pa 9] He explained his situation and advised the Division that he was laid off due to COVID 19. He also included the Divisions Fact Sheet which provides members of the pension system with information on pension eligibility. [Pa9,53] This fact sheet defines "break in service." [Pa53]

Despite the efforts of the appellant, he was unable to convince the respondent that he was eligible for re-enrollment in the pension system. [Pa13,17] Appellant then hired legal counsel to pursue the appeal of the denial to allow him to re-enroll in the State Pension system. [Pa20]

LEGAL ARGUMENT

THE BOARD OF TRUSTEES' DECISION TO DENY THE APPELLANT RE-ENROLLMENT IN THE PUBLIC EMPLOYEES RETIREMENT SYSTEM SHOULD BE REVERSED (Pa38,54)

A. STANDARDS OF REVIEW

This is an appeal of a decision by an administrative agency pursuant to *New Jersey Court Rule 2:2-3(a)(2)* which provides direct review by the Superior Court, Appellate Division of State Agency actions. Judicial review of administrative agency actions are generally entitled to substantial deference. While the court is required to

defer to an agency's expertise and superior knowledge of a particular field, this standard is not without its limitations. *Goulding v. N.J. Friendship House* 245 N.J.157,167 (2021)

In determining the scope of judicial review, one must determine whether the administrative agency is interpreting the application of a statute, making factual findings, or interpreting questions of law. Different Appellate review standards apply to these different situations. *AB v. Division of Medical Assistance and Health Services* 407 N.J. Super. 330,339-340 (App. Div. 2009)

In this case, the appellant challenges both the findings of fact as well as the specific interpretations of law made by the Board of Trustees of the Public Employees Retirement System. [Pa38,54] Findings of fact must be supported by the record. If the factual findings of the administrative agency are unsupported by the record, or insufficient to support the factual conclusions, the case should ordinarily be remanded to develop an accurate and proper factual record. *The Matter of Medicinal Marijuana* 465 N.J. Super. 343-355,378-379,384 (App. Div. 2020)

In this case the final administrative determination made concerning the appellant's re-enrollment in the Public Employees Retirement System was based upon incorrect factual findings that were not supported by the record, as well as the Board simply failing to apply *N.J.S.A. 43:15A-25.2* and *N.J.A.C. 17:2-1A.1* to the facts of this case. [Pa54]

While the court should provide due deference to the Board of Trustees' findings of fact, their failure to support these facts by the competent record and the Board's failure to properly apply the relevant statutes and administrative code sections to the appropriate facts of this case requires a reversal. [Pa54]

This Appellate Court, therefore, is not bound by the Board of Trustees' interpretation of the relevant statutes in this case. *DYFS v. TB* 2007 N.J. 294,301-302 (2011); *Gulkowsky v. Equity One, Inc.* 180 N.J. 49,67 (2004) Based on the material factual conclusion unsupported by the record, and the misapplication of relevant statutes this court should reverse and remand the decision of the Board of Trustees of the Public Employees' Pension Board.

B. THE BOARD OF TRUSTEES DENIAL OF THE APPELLANT'S REQUEST FOR A REFERRAL TO THE OFFICE OF ADMINISTRATIVE LAW WAS ARBITRARY AND INCONSISTENT WITH ESTABLISHED LAW (Pa38,39-40; Pa54,57)

This case has disputed questions of fact and issues concerning the legal interpretation of the applicable statutes. This case also involves important rights the appellant had concerning his public employment and his retirement pension through PERS. These contested facts include what action South Plainfield took with respect to the appellant and other employees in the very early days of the COVID 19 Health Emergency. [Pa3]

It is clear that William Haus and South Plainfield both understood and acted as if this was a temporary layoff based on a national emergency. [Pa3, 4, 5,

8,9,11,141516] South Plainfield advised the Division of Pensions that the appellant was laid off. [Pa11,14] After there was a specific request for an "*official layoff notice*" South Plainfield, reported there was no official notice. [Pa14] Somehow, this was transposed into there was "*no actual layoff.*" [Pa 38,39; Pa54,55] This appears to be a critical factual determination made by the respondents without any factual support in the record. [Pa38,39;Pa54,55]

In addition, there is a legal question concerning what law should apply and how the relevant statutes apply to the facts of this case. This is a contested case within the meaning of *N.J.S.A. 52:14B-2* and *N.J.A.C. 1:1-2.1*

Since there were disputed issues of fact, and law this case should have been referred to the Office of Administrative Law for an administrative hearing. *N.J.S.A. 52:14B-1.* The appellant was entitled to an administrative law hearing in order to resolve these issues. *In Re Amico/Tunnel Carwash 371* N.J. Super. 199 (App. Div 2004) *In Re Orange Sun Bank* 172 N.J. super. 275 (App. Div. 1980).

The decision of the Board with respect to the deal of the appellant an administrative law hearing was arbitrary and unreasonable, and the Appellate Division should remand this matter for further proceedings.

C. THE BOARD MADE FACTUAL FINDINGS THAT WERE NOT SUPPORTED BY THE RECORD (Pa38-40;53-56)

The facts of this case are somewhat unique, since they are based on the unusual circumstances and events that unfolded in the very early days of the Covid19

Health Emergency. The Borough of South Plainfield responded to this national emergency by closing all non-essential activities including the recreation department. This was not done at anyone's choice, but rather in reaction to an order of the Governor and the emergent nature of the crisis. [Pa3]

It is unclear what legal authority Ms. Yarus had with respect to employees within the Borough of South Plainfield when she sent out her email on March 24, 2020. She clearly had no role with respect to benefits or pension issues. At the time of her March 24, 2020, email, no-one understood how long this emergency would last. It is equally unclear what if any thought was given to the legal status of employees who were out of work. What was clear is that everyone involved understood this to be a temporary situation. [Pa3,9]

The options provided by Ms. Yarus were limited to essentially using up whatever time employees had on the books, technically remaining employed but unpaid, being terminated and collecting unemployment benefits.[Pa3] These were clearly not the proper procedures, and this was not how the Borough should have handled the situation if they gave any consideration to how this could potentially affect employees' benefits, including their pensions.

All of these options would have resulted in an interruption of pension payments by South Plainfield into the employees' pension account. They all, therefore, would be a disruption or break in service if you view *N.J.S.A. 43:15A-*

25.2 without consideration for the definition of the term, or the specific exceptions the legislature wrote into the statute.

It is unclear how the Board would have resolved this dispute if Haus went on unpaid status or used his limited PTO days. The result would have been the same at some point. Haus would have been out of work, no fault of his own, and no contributions would have been paid on his behalf into the system for that period. He also would have been eligible for unemployment benefits.

On May 12, 2023, the appellant received a letter from Jeff Ignatowitz, Secretary to the Board of Trustees. [Pa38] This letter explained that after the April 19, 2023, meeting the Board voted to deny Mr. Haus' request to be re-enrolled in PERS. [Pa38-40] This letter makes several factual statements that are incorrect. The letter states, *".... South Plainfield clarified there was no actual layoff of its Recreation Department employees."* [Pa38,39] This statement is not accurate and is inconsistent with the evidence in the record. What South Plainfield actually communicated to the Division of Pensions was there was no *"actual layoff notice."* [Pa11,14,15] There is clearly a significant difference between the Division of Pensions claiming South Plainfield confirmed there was no layoff, as opposed to confirming they never provided a formal layoff notice.

The Board's letter of May 12, 2023, goes on to state that, *"Mr. Haus chose to terminate his employment on April 5, 2020, and did not return until September 21,*

2020." [Pa38,39] This is not a correct statement of fact supported by the record. Haus had no choice. The Governor ordered a shutdown of all nonessential services and South Plainfield reacted by telling all Recreation Department employees, including the appellant, they could not continue to work. [Pa3] The initial communication in question here clearly states this is a temporary situation and that the employee would be reinstated when the COVID19 health crisis concludes. [Pa3]

In addition, the appellant certainly had the right to rely on the information the Division of Pensions published which excludes temporary loss of a position from the definition of break in service. [Pa 53] A critical error in the Board's factual findings were the failure to consider the events with any appreciation to the economic conditions in the very early days of the COVID 19 crisis. [Pa38,54]

Despite the appellant's June 23rd letter to the Board, clarifying these facts, and resending the relevant communications, this factual misstatement of the record was repeated, and specifically relied on when the Board of Trustees issued their final administrative determination. [Pa54,55] The final administrative determination, from which the appellant now seeks relief, repeats the same inaccurate statements. *"South Plainfield advised the Division there was no actual layoff of its Recreation Department employees."* [Pa54,55] The final administrative determination goes on again to state that the appellant *"chose"* to terminate his employment so he could

collect unemployment benefits thereby severing the employee relationship. [Pa54,55] These statements are simply not correct and not supported by the record.

There was no formal discovery in this case, so there was little opportunity to determine how the Division, and then the Board made this decision. After the appellant's Notice of Appeal, the appellant was provided a package of information from the Board which included some internal emails that provide insight regarding this question. [Pa18] This exchange of emails illustrates at least a portion of the problem. Lois Quinn, a Pension and Benefits Specialist II, determined that a formal layoff notice was required to qualify as an exception to the break in service definition. [Pa18-19]

Quinn's letter of October 13, 2022, to South Plainfield takes the position that a formal notice was required. [Pa26] Here she writes in part, "*Unfortunately this type of correspondence is not considered a formal layoff notice for a member.*" It appears as if Quinn determined and the Board ultimately adopted the position that a formal layoff notice from an employer, even during the COVID 19 Health Emergency, was legally required to confirm a layoff for purposes of determining pension eligibility. The appellant is unaware of any law or regulation, nor was one ever supplied by the Division of Pensions or the Board of Trustees that supports this conclusion.

A layoff is defined by the *New Jersey Administrative Code* as, *"a separation of a permanent employee from employment for reasons of economy or efficiency or other related reasons and not for disciplinary reasons."* *N.J.A.C. 4A:1-1.3.* A layoff can be permanent or temporary. A termination on the other hand, may or may not involve fault on the part of the employee, however, a termination is a final event that ends the employment relationship. *Black Law Dictionary* (9th Edition 2009)

There should be no real dispute as to what South Plainfield intended to do, and what Haus understood his status was. [Pa3,5,8,9,11,12,14,15] This was without dispute, a separation from employment the parties anticipated was temporary and was not based on any fault of Haus. The borough chose to separate employees during COVID to save the expense of paying employees to stay home, which meets the layoff definition of "*economy or efficiency.*"

The Borough says exactly this in their letter to the Board dated October 5, 2021. [Pa14] The letter states in relevant part *"...he was laid off as our building had to close down due to COVID 19."* The email drafted by South Plainfield can accurately be described as an inaccurate explanation of the various legal options. [Pa14] Under the circumstances Haus should not be penalized. Regardless we have a clear understanding of South Plainfield's intentions, *"the employee would be reinstated to their prior positions."* [Pa14]

The Board ultimately denied Haus' re-enrollment in part due to the fact that they did not consider his temporary separation during COVID19 and a layoff. A review of the various letters from the Division of Pensions and Benefits demonstrates this was due to the fact that a technical layoff notices in compliance with *N.J.A.C. 4A:8-1.6* was not provided. Under the emergency circumstances that required South Plainfield to immediately remove non-essential employees there was not the time, nor the means in which to comply with this statute. There is also a 45-day prior notice provision in this requirement that could not be complied with due to the emergent nature of these events. *N.J.A.C. 4A:8-1.6* The reliance on the technical requirement of *N.J.A.C. 4A:8-1.6* as a determinative factor in this case, considering the facts as they developed in real time, was an error that requires either a reconsideration, or judicial review.

It is clear from a review of the record that the Division of Pensions either misunderstood, or simply got the critical facts wrong in their analysis of this case. The facts in the record do not support the factual conclusions made by the Board in order to support the conclusion that the appellant had a break in service making him ineligible to re-enroll in PERS. [Pa54]

When the appellant appealed the initial decision of the Board, prior to the Board issuing a final administrative determination, the appellant requested an administrative hearing be conducted by the Office of Administrative Law pursuant

to *N.J.S.A. 52:15B-1 et seq.* [Pa 41] Since there were contested facts in this case, the Board of Trustees should have referred this matter to the Office of Administrative Law for a full and fair hearing. This court seeks a reversal and/or remand to the Office of Administrative Law pursuant to *N.J.S.A. 52:14B-1.*

D. THE BOARD MISAPPLIED N.J.S.A. 43:15A-8 TO THE FACTS OF THIS CASE (Pa38,54)

There are two controlling statutes in this case that need to be properly analyzed in order to decide the factual and legal disputes in this case. The proper statute this Board should have considered was *N.J.S.A.43:15A-8.* This statute, restoration of members discontinued from service, states in relevant part, *"If a member of the retirement system has been discontinued from service without personal fault or through leave of absence granted by an employer or permitted by any law of this state not withdrawn the accumulated members contributions from the retirement system, the membership of that member may continue, notwithstanding any provisions of this act if the member returns to service with in a period of ten years from the date of discontinuance of service." N.J.S.A. 43:15-8(a).* This statute does not differentiate between a layoff, or any other separation permitted by any law of the state.

The Board's focus here was on the application of *N.J.S.A. 43:15A-25.2* which eliminated the ability to hold multiple pension status for members who entered the pension system after May 22, 2010. The statute provides an exception for employees

such as Haus who were enrolled in multiple pensions prior to May of 2010. The statute permits an employee to maintain two pensions unless there is a break in service of one or more of the positions paying into the employee's pension account. While the Board correctly indicates there is a specific definition, and exceptions to a break in service, the Board failed to properly analyze these two relevant statutes as applied to the facts of this case. [Pa38,54]

In this case a Governor ordered a State of Emergency which required all nonessential employees to remain out of the workplace. There was very little guidance provided by the Governor's Office and essentially employers like the Borough of South Plainfield were feeling around in the dark, unsure how to handle the situation.

There is no question that a member can be re-enrolled in the pension system if there is no break in service. A break in service has a specific legal definition and certain specific statutory exemptions. *N.J.A.C. 43:15A-7*. The fact that there is some confusion concerning how South Plainfield classified this temporary absence from the workplace should not have any effect on Mr. Haus' eligibility for his pension.

In addition, the Division of Pensions and Benefits distributes a Members' Guide, explaining various legal issues with respect to benefits. [Pa53] There is a section on multiple and dual memberships. The guidebook states that multiple pension members under PERS are only allowed for Tier 1, 2 and 3 employees. The

handbook, specifically citing *N.J.S.A. 43:15A-7* indicates multiple membership is only allowed if an employee was enrolled from both positions of employment prior to May 21, 2010, and there has not been a break in service.

The guidebook goes on to explain how the Division of Pensions and Benefits defines a break in service. While a break in service is any pension reporting period without pay, there are exceptions. These exceptions are, "*With the exception of approved leaves of absence, layoff, abolishment of the position, military, leave, worker's compensation, litigation or suspension.*"

There should be no question that Haus was laid off from his South Plainfield position. This is specifically what South Plainfield reported to the state. [Pa11,14] The exemptions, however, to a break in service also include an abolishment of the position and approved leaves of absence. Without question South Plainfield abolished, at least temporarily, Haus' position with the Recreation Department. All of this was done under emergency circumstances, and with the specific intent this would be a temporary disruption and that Haus would return to his full employment status at the end of the COVID19 crisis.

The statute also indicates that an approved leave of absence does not count as a break in service. This is clearly what South Plainfield was attempting to do when they reacted to the Governor's emergency orders and shut down the Recreation Department. The appellant's situation should correctly be defined as a layoff. If not

a layoff, certainly it was an unpaid leave of absence directed by the employer based upon a national emergency. The Board's decision makes no attempt to legally analyze the appellant's legal status pursuant to the definitions set forth in *N.J.S.A. 43:15A-7.* There is certainly no factual or legal support anywhere in the record that would establish that the appellant's lack of employment for six months during COVID was a break in service as defined by *N.J.S.A. 43:15A-7.*

There is no specific requirement that the temporary separation from employment pursuant described in *N.J.S.A. 43:15-8(a)* be formalized by issuing a Layoff Notice as defined by the Administrative Code. This reliance on the technical compliance by South Plainfield at a time when workers were working remotely has unfairly resulted in Mr. Haus' loss of benefits.

The Board on page two of their decision claims Haus lost his eligibility to maintain multiple members because, *"Mr. Haus chose to separate from his employer rather than lose his PTO or remain employed on an unpaid status while the South Plainfield Recreation Department was closed due to the pandemic."* [Pa3,53,54] This is not a correct factual or legal conclusion. Mr. Haus did not elect to be terminated; he was left with a few viable options. There are no facts in the record that would support the legal conclusion that appellant was actually terminated in March of 2020. The Board's letter also incorrectly states: *"South Plainfield clarified there was no actual layoff of its employees in the Recreation Department."* [Pa54,55]

South Plainfield never said this. Rather they indicated there was no "*formal layoff notice.*" This of course was based on emergent circumstances that were not properly considered by the Board. [Pa14,15]

A review of the May 12, 2023, decision of the Board of Trustees also demonstrates the Board focused on the fact that Mr. Haus was separated in order to collect unemployment benefits. [Pa38,54] The reliance on the fact that he collected unemployment benefits is misplaced and is not relevant to the issues in this appeal.

Rather than properly analyzing the facts of this case, and the controlling law concerning re-enrolling in the pension system when there is a temporary break in service *N.J.S.A. 43:15-8(a), t*he Board focused on the fact the appellant received unemployment. The Board decided that since Haus collected unemployment, he legally had a break in service that prohibited his re-enrollment in the pension system. The issue of unemployment is completely a separate issue and should not have been considered when deciding if Haus temporary separation from the workplace was a break in service that would have caused him to be permanently removed from pension eligibility for his South Plainfield position. There is no law that supports this conclusion. The best illustration of this is a consideration of how the various options provided in the South Plainfield email would have affected his eligibility for unemployment benefits during the COVID19 crisis.

It is important to understand that regardless of the options chosen by the appellant, he would have been eligible for unemployment benefits at some point. For example, if Haus was provided with a technically proper layoff notice, as required by the *New Jersey Administrative Code*, meeting the requirements of a layoff, he also would have been eligible for unemployment benefits. *N.J.S.A. 43:21-19*. In addition, under the unique circumstances of COVID19 emergency, if appellant had chosen to be on unpaid leave status due to the COVID19 closure, he would also have been eligible for unemployment benefits. If he chose to use his sick and or vacation days, when they ran out, he would have been eligible for unemployment. *N.J.S.A. 43:21-19* (This also assumes he had sufficient days on the books to use during this period)

The Federal Government extended unemployment benefits during COVID19, and the state made it easier for individuals to apply. The Board's decision to penalize the appellant due to the fact he received unemployment seems to miss the point. The issue of Mr. Haus collecting unemployment benefits should have no relevancy to the issue of continuation of multiple pensions pursuant to *N.J.S.A. 43:15-8(a)*.

There is no legal support for the position that an employee's temporary disruption in service must be considered a break in service for pension purposes if the employee receives unemployment. An employee is eligible for unemployment

benefits if they are laid off, or terminated unless it fits one of the exceptions set forth in the unemployment statute. *N.J.S.A. 43:21-19 et.seq.*

These issues require the Appellate Division to reverse and remand the decision of the Board and either order the appellant to be enrolled back into the pension system or remand the matter to an Administrative Law judge for further proceedings.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that this court reverse the decision of the Board of Trustees and order, either the appellant to be re-enrolled in the Public Employees Retirement System or order the matter to be forwarded to the Office of Administrative of Law for further proceedings.

Respectfully,

STEVEN D. CAHN, ESQ.

Dated: February 21, 2024

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Re: William Haus v. Board of Trustees, Public Employees' Retirement System
Docket No. A-000041-23T1

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

Letter Brief of Respondent, Board of Trustees, Public Employees' Retirement System on the Merits of the Appeal

Dear Mr. Orlando:

Please accept this letter brief on behalf of the Respondent, the Board of Trustees, Public Employees' Retirement System (the Board), on the merits of the appeal.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Appellant William Haus appeals from the Board's August 17, 2023 denial of his request to maintain multi-member status in the Public Employees' Retirement System (PERS). (Pa54-57).[2]

Haus was enrolled in the PERS effective November 1, 1984, as a result of his employment with the Borough of South Plainfield as a Recreation Attendant. (Pa54-55). On August 1, 2009, Haus was enrolled in PERS as a multiple-member due to his employment with Middlesex County as a Motor vehicle

[1] Since the procedural history and facts are interrelated, they are presented together for efficiency and the court's convenience.

[2] "Pb" refers to Haus's brief, and "Pa" refers to his appendix.

Operator. (Pa55).

In 2010, the Legislature enacted L. 2010, c. 1, § 28, codified as N.J.S.A. 43:15A-25.2. The statute, in relevant part, eliminated multiple member status for members enrolled in PERS after May 21, 2010, such that a member would only be eligible for membership based upon one office, position or employment held concurrently. N.J.S.A. 43:15A-25.2(a). The statute allowed a member already holding multiple member status prior to May 22, 2010, to remain "while the member continues to hold without a break in service more than one of those offices, positions, or employments." N.J.S.A. 43:15A-25.2(c).

In a March 24, 2020 email to staff, South Plainfield informed Haus that part-time employees were no longer permitted in the building due to the Covid-19 pandemic. (Pa3). Within this email, South Plainfield provided Haus with the following list of options regarding his employment:

> -You can use PTO days as you see fit[.]
> -You can take unpaid time[.]
> -We can terminate your status so you may be eligible to collect unemployment. (Depending on your personal situation this may or may not be the case)[.] If you chose this option, will be happy to reinstate you after this situation resolves and we are back to our regular operating status.
>
> [Ibid.]

Haus separated from his South Plainfield employment in April 2020.

(Pa16). On September 21, 2020, he began employment with South Plainfield for a second time. (Pa4). A multiple enrollment form was submitted to the Division of Pensions and Benefits (the Division) on October 5, 2020. (Pa4). On August 30, 2021, the Division informed South Plainfield that it can no longer submit pension contributions for Haus pursuant to N.J.S.A. 43:15A-7, because multiple membership is prohibited following a break-in-service in any concurrently held PERS position. (Pa17).

On January 20, 2022, Haus informed the Division that he had been laid off from his South Plainfield position in March 2020 and he claimed that should not have been considered a break in service. (Pa9-10). On February 17, 2022, the Division wrote Haus, requesting a copy of his official layoff notice. (Pa13). On June 22, 2022, however, South Plainfield informed the Division that there was no "actual" layoff notice, and instead referred to the March 24, 2020 email wherein South Plainfield informed Haus of various options regarding his employment. (Pa15). Then, on September 29, 2022, South Plainfield confirmed that Haus's employment "was terminated in April 2020," and that he was "reinstated" in September 2020. (Pa16).

On October 13, 2022, the Division wrote South Plainfield explaining that the March 24, 2020 email did not constitute an official layoff notice, stating: "When someone is officially laid-off from their position, the member receives

an informative letter from their employer addressed to them explaining the reasons for the particular layoff. This is required by [the Division] for confirmation." (Pa26). Accordingly, the Division advised that Haus's break-in-service prohibited his re-enrollment as a multiple member. Ibid.

On December 8, 2022, Haus appealed the Division's decision to the Board. (Pa31-32). At its April 19, 2023 meeting, the Board denied Haus's request to maintain multiple-member status in PERS. (Pa38-40). On June 23, 2023, Haus appealed that decision and requested a hearing before an administrative law judge. (Pa41-47). At its July 19, 2023 meeting, the Board denied Haus's appeal and his request for an administrative hearing. (Pa54).

In its Final Administrative Determination dated August 17, 2023 (Pa54-57), the Board noted that prior to May 22, 2010, PERS members were permitted to aggregate salary credit for multiple positions for retirement calculation purposes. (Pa55). However, the legislature enacted N.J.S.A. 43:15A-25.2, which eliminated the creation of multiple status for members enrolled in the PERS on or after May 22, 2010, and curtailed the creation of new multiple locations for members hired prior to that date. Ibid. Under N.J.S.A. 43:15A-25.2, members were permitted to retain their previously held multiple-position(s) provided that the member maintain those positions continuously without a break in service. Ibid. The Board, however, found that Haus's

separation from employment with South Plainfield constituted a break-in-service that made him ineligible to maintain multiple membership status. (Pa56-57). While the Board noted there are exceptions to the no break-in-service requirement, such as layoffs, Haus did not qualify for any of these exceptions. Ibid. Lastly, the Board found there were no disputed questions of fact that would necessitate an administrative hearing. (Pa57).

This appeal of the Board's decision followed. (Pa58-59).

ARGUMENT

THE BOARD'S DETERMINATION THAT HAUS IS NOT ELIGIBLE TO MAINTAIN MULTIPLE MEMBER STATUS IS REASONABLE AND SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Judicial "review of administrative agency action is limited." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Ibid. (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). This court will "afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007) (citing R & R Mktg., LLC v. Brown-Forman Corp., 158 N.J. 170, 175 (1999) (additional citations omitted)).

"Such deference has been specifically extended to state agencies that administer pension statutes." Piatt v. Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015). "This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." Ibid. (quoting In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010) (additional citations omitted)). "A reviewing court 'may not substitute its own

judgment for the agency's, even though the court might have reached a different result.'" In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007) (additional citations omitted).

Here, the Board's decision that Haus is not eligible to maintain multiple member status was reasonable because it is supported by the plain language of N.J.S.A. 43:15A-25.2, which states in pertinent part:

> a. Notwithstanding the provisions of any law to the contrary, after the effective date [May 21, 2010] of P.L.2010, c.1, a person who is or becomes a member of the Public Employees' Retirement System and becomes employed in more than one office, position, or employment covered by the retirement system or commences service in a covered office, position, or employment with more than one employer shall be eligible for membership in the retirement system based upon only one of the offices, positions, or employments held concurrently. In the case of a person who holds more than one office, position, or employment covered by the retirement system, the retirement system shall designate the position providing the higher or highest compensation for the person with such concurrent positions as the basis for eligibility for membership and the compensation base for contributions and pension calculations.
>
> . . . .
>
> c. The provisions of subsections a. and b. of this section shall not apply to a person who, on the effective date [May 21, 2010] of P.L.2010, c.1, is a member of the retirement system and holds more than one office, position, or employment covered by the retirement system with one or more employers, while the member

> continues to hold without a break in service more than one of those offices, positions, or employments. Any additional office, position, or employment acquired by the member shall not be deemed creditable service for the purposes of the retirement system and no designation for that member shall be made until only one of the offices, positions, or employments held on the effective date remains.
>
> [Ibid. (emphasis added).]

According to that plain language, it is thus clear that an office, position, or employment is not eligible for multiple member status in the event of a break-in-service from any such position. Ibid. A "break in service" is defined as "any pension reporting period without pay, a monthly or biweekly pay period, as appropriate to the employer's reporting method, with the exception of approved leaves of absence, lay-off, abolishment of position, military leave, Workers' Compensation, litigation, or suspension." N.J.A.C. 17:2-1A.1. Haus's separation from employment with South Plainfield does not fit within any of the listed exceptions. The Board thus reasonably found that Haus is ineligible to maintain multiple member status with respect to his position with South Plainfield which terminated in April 2020. (Pa56-57).

On appeal, Haus argues that he was laid-off from his South Plainfield employment position, and thus meets one of the exceptions listed in N.J.A.C. 17:2-1A.1. (Pb10-11). He highlights that both he and South Plainfield

understood that his separation from employment in April 2020 was a "temporary layoff," and that South Plainfield advised the Division that Haus was laid off. Ibid. He further claims the Board erred in stating "South Plainfield clarified there was no actual layoff" because South Plainfield only communicated that there was "no actual layoff notice." (Pb13). In any case, he claims there is no legal basis for the Board's reliance on the fact that there was no layoff notice. (Pb15).

Haus's arguments fail to recognize that layoffs involve a formal process with several procedural requirements as per the Administrative Code. For example, a layoff notice must be provided to an affected employee at least forty-five days prior to the layoff action. N.J.A.C. 4A:8-1.6(a). That notice must contain both "[t]he effective date of the layoff action" and "[t]he reason for the layoff." N.J.A.C. 4A:8-1.6(b). Further, layoffs must be reviewed and approved by the Civil Service Commission. N.J.A.C. 4A:8-1.4. Layoffs also come with specific "layoff rights" and appeal rights. N.J.A.C. 4A:8-2.1; N.J.A.C. 4A:8-2.6. The Board's decision here that there was no layoff is reasonable on the record presented. It is based on the fact that the documents that are legally required to be produced during a layoff, do not exist. (Pa55).

Further, there is no evidence on this record to suggest the layoff procedure, as required by the Administrative Code, was followed here. South

Plainfield admitted that there was no "'actual' layoff notice," but only an email provided to all members of the one department about the closure of the building. (Pa15). With the absence of any evidence that the layoff procedure was followed, and the admission by South Plainfield that no layoff notice was issued, there is thus no issue of material fact that would warrant an administrative hearing, as Haus argues on appeal (Pb10-11), because the undisputed facts on the record support the Board's finding that there was no layoff.

Haus also argues on appeal that the Board's denial of his request "for a referral to the Office of Administrative Law was arbitrary and inconsistent with established law." (Pb10-11). He claims that there are "contested facts," such as "what action South Plainfield took with respect to the appellant and other employees in the very early days of the COVID 19 Health Emergency." (Pb10). He also says that he is entitled to a hearing because the Board erred in making a "critical factual determination" that there was no layoff and also because there is "a legal question concerning what law should apply . . . to the facts of this case." (Pb10-11). Haus has unnecessarily complicated the analysis here.

Haus seems to suggest that, instead of verifying whether a layoff occurred by the presence of legally required documents, the Board should have based its decision on South Plainfield's characterization of the action. (Pb10). In the absence of the procedural requirement of notice pursuant to N.J.A.C. 4A:8-1.6,

what South Plainfield and/or Haus thought was happening is irrelevant. The Board did not "transpose[]" the report that there was no "official layoff notice" to "no actual layoff," as Haus argues on appeal. (Pb11). Rather, the admission that no official layoff notice was issued, combined with the options other than termination provided by South Plainfield to affected employees by email, supports the Board's finding that no layoff occurred here. (Pa54-57). In any case, no "[s]tate agency can bind PERS regarding its authority or the pension laws." Francois v. Bd. of Trs., Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 352 (App. Div. 2010). Thus, the Board is not bound by any belated determination made by South Plainfield as to whether Haus's separation from employment in 2020 constituted a layoff under N.J.A.C. 17:2-1A.1, a PERS regulation, or a simple termination.

Haus also erroneously states that he "had no choice" but to terminate his employment. (Pb13-14). However, that claim is belied by the record. South Plainfield's March 24, 2020 email shows that he was given three options in the face of the restrictions on building access, two of which did not involve termination. (Pa3). He could have used "PTO days," or taken "unpaid time" (Pa3), and such an "approved leave[] of absence" would not have qualified as a break in service under N.J.A.C. 17:2-1A.1. Instead, he voluntarily chose the third option--termination--and was terminated shortly thereafter in April 2020.

(Pa16). Thus, based on the undisputed facts on this record, Haus chose to be terminated instead of taking PTO or unpaid leave. There was no layoff.

Haus also suggests that the Board "penalize[d] Haus due to the fact he received unemployment." (Pb23). However, the Board's decision was not predicated on the fact that Haus received unemployment. (Pa54). Rather, the Board's decision is based on the overall situation, where Haus chose to terminate his employment and receive unemployment, while being offered other options, and that this scenario was not indicative of a layoff. (Pa56-57).

It must also be noted that on appeal Haus repeatedly mischaracterizes the Board's decision as a denial of his request to be "re-enrolled" in PERS. (Pb8; Pb24). However, the Board's decision actually involves the question of whether Haus is eligible to maintain multiple member status, i.e., getting pension credit on multiple positions, after a break in service from one of his two positions. (Pa56-57). Haus fails to mention the fact that he is still enrolled in PERS through his highest-paid employment with Middlesex County as a Motor Vehicle Operator, a position he has held since 2009. (Pa2; Pa55).

Haus also argues that the Board "misapplied N.J.S.A. 43:15A-8 to the facts of this case." (Pb18). That statute, a general statute regarding restoration of members discontinued from service, has no application in this case where Haus's membership in PERS continued through his other position. Ibid.. Again,

Haus fails to appreciate that the Board's decision involves his ability to maintain multiple membership status (Pa56), not whether he is eligible for the ten-year exception to keep his membership account from expiring under N.J.S.A. 43:15A-8(a). His membership account is still active through his employment with Middlesex County, so N.J.S.A. 43:15A-8 is wholly irrelevant here.

Further, the Board here properly relied on N.J.S.A. 43:15A-25.2 because it addresses the specific subject of how discontinuation from service impacts multiple membership status, as opposed to general membership status. (Pa55-56). "[W]hen there is a conflict between a general and a specific act on the same subject, the latter shall prevail." Last Chance Dev. P'ship v. Kean, 232 N.J. Super. 115, 133 (App. Div. 1989) (quoting W. Kingsley v. Wes Outdoor Advert. Co., 55 N.J. 336, 339 (1970)).

Finally, Haus's argument that the Board failed to consider the effects of the COVID-19 pandemic should be rejected. (Pb14; Pb17). N.J.S.A. 43:15A-25.2 is clear on its face that a member is no longer eligible for multiple member status once there is a break in service from one of the offices, positions or employments. There is no basis to override the plain language of the statute. Haus did not, and cannot, point to any legislative amendment or Executive Order that provides an exception due to the COVID-19 pandemic. Nor has Haus cited

to any controlling authority where our courts have applied equitable principles in an analogous situation.

Therefore, on this record, the Board was reasonable in applying the clear language of N.J.S.A. 43:15A-25.2 and N.J.A.C. 17:2-1A.1 to find Haus ineligible to maintain multiple membership status because of his break in service.

CONCLUSION

For these reasons, the Board's reasonable denial of Haus's request to maintain multiple member status should be affirmed.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
DOCKET NO. A-000041-23

WILLIAM HAUS, Plaintiff, Appellant vs. BOARD OF TRUSTEES FOR THE PUBLIC EMPLOYMENT RETIREMENT SYSTEM, Defendant, Respondents	ATTORNEY OF RECORD Steven D. Cahn, Esq. Cahn & Parra, P.A. 1015 New Durham Road Edison, New Jersey 08817 (732) 650-0444 ON APPEAL FROM THE DECISION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM AUGUST 17, 2023 FINAL ADMINISTRATIVE DETERMINATION State of New Jersey Division of Pensions & Benefits PERS2-923791

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This is an appeal of the decision of the Board of Trustees of Public Employees Retirement System (PERS) concerning the denial of William Haus' request to be re-enrolled as a multi-pension member in PERS after he returned to work for the Borough of South Plainfield at the conclusion of a six-month COVID 19 shut down. [Pa38-40,54]

On September 7, 2023, the appellant filed a timely Notice of Appeal with the New Jersey Superior Court, Appellate Division. [Pa58] The appellant filed a brief and appendix on February 21, 2024. The respondents filed an opposition to the appellants brief on May 22, 2024.

The respondent's brief contains factual assertions that are not supported by an objective review of the record. Appellant also disagrees with the legal arguments of the respondents regarding the relevant issues on this appeal. It is important to note, the respondent's brief seems to concede that South Plainfield did not follow the proper Civil Service procedural requirements with respect to the temporary separation of the appellant from his position. Despite this acknowledgment they take the position the appellant should be penalized and lose his pension rights. This position fails to consider critical facts, and the emergent events of March 2020.

We are requesting that this court rule that as a direct result of a national emergency, the temporary closure of a municipal office is not a break in service as defined by the legislature. *N.J.S.A. 43:15A-25.2 (c); N.J.A.C. 17:2-1A.1*

While Appellant's initial brief and appendix set forth a clear record and demonstrated the decision of the Board of Trustees of Public Employees Retirement System (PERS) was in error, Appellant will briefly respond to some of the issues raised by the Respondents.

LEGAL ARGUMENT

THE BOARD OF TRUSTEES' DECISION TO DENY THE APPELLANT RE-ENROLLMENT IN THE PUBLIC EMPLOYEES RETIREMENT SYSTEM SHOULD BE REVERSED (Pa38,54)

A. STANDARDS OF REVIEW

Respondents initially argue that this Court should not reverse the decision of the Board of Trustees because appellate courts have limited powers to review administrative actions. *New Jersey Court Rule 2:2-3(a)(2)* The courts are not powerless in their review of administrative agency actions. When there is a clear error, or a misapplication of a set of facts to the proper statute, the court is not bound by the agency's interpretation. It is the role of the courts to ultimately interpret and apply a statute. *D.D. v. New Jersey Division of Disabilities* 351 N.J. Super. 308, 317 (App. Div. 2002) *Goulding v. N.J. Friendship House* 245 N.J.157,167 (2021)

In determining the proper scope for appellate review, the court must initially determine whether the administrative agency is interpreting the application of a statute or making factual findings. In this case, there is a combination of disputed factual findings and the application of more than one statue and administrative code section to these facts.

The Final administrative determination made by the Board of Trustees concerning the Appellant's re-enrollment in the Public Employees Retirement System failed to review or consider various applicable statutes, but perhaps more importantly, did not develop a complete factual record. The central issue in this case was the classification of the appellant's temporary separation from his employment. [Pa54-57] The Board misinterpreted the facts and incorrectly applied the law when they concluded the appellant had a statutorily impermissible break in service making him ineligible to remain enrolled as a multi-pension employee.

This court is not bound by the Board of Trustees' interpretation of the facts or relevant statutes in this case. This determination requires judicial review. *DYFS v. TB* 2007 N.J. 294,301-302 (2011); *Gulkowsky v. Equity One, Inc.* 180 N.J. 49,67 (2004)

B. THE BOARD OF TRUSTEES DENIAL OF THE APPELLANT'S REQUEST FOR A REFERRAL TO THE OFFICE OF ADMINISTRATIVE LAW WAS ARBITRARY AND INCONSISTENT WITH ESTABLISHED LAW (Pa38,39-40; Pa54,57)

This case presented disputed issues of fact and law, requiring a referral to the Office of Administrative Law for an administrative hearing. *N.J.S.A. 52:14B-1.* The Board of Trustees' refusal to do so requires a reversal.

Without developing a clear and undisputed factual record the Board determined the appellant had a break in service and was therefore disqualified to re-enroll as a tier one pension employee in South Plainfield. A break in service is defined as "*any pension reporting period without pay.*" *N.J.A.C. 17:2-1A.1* There are clear exceptions to this definition designed to protect an employee temporarily out of work. The decision of the Board required the conclusion there was no layoff in the recreation department in South Plainfield in March of 2020. [Pa54-57] This goes against the weight of the evidence.

The best evidence in the case are the statements of the parties at the time the events occurred. South Plainfield made it clear in both words and actions that this was a temporary situation driven solely by the COVID19 emergency. They advised the State this was a layoff and in fact returned the appellant to his exact same position six months later. [Pa5,7,8,9,11,14,15]

The decision of the Board was based entirely on the lack of a Civil Service compliant layoff notice. [Pa54-57] The Board did not analyze the facts or the party's

intentions. The Board adopted the position there was a requirement for an official layoff notice to confirm there was a layoff. [Respondents' brief P10-11] This may be the practice of the individuals who made the decision at the Division of Pensions. [Pa18] There is no *Administrative Code* requirement or regulation of any kind that supports this legal conclusion. There is no law, and none was cited, that supports the position that without compliance with Civil Service procedures the appellant should be penalized and the time he was forced out of work be classified as a break in service.

There was no opportunity to develop a complete record. For example, how were South Plainfield employees in other departments notified of their temporary loss of employment? How were public employees in other municipalities classified? Was there any relaxation of Civil Service rules during COVID19? Were there other tier one employees who went back to their respective pensions and were not considered to have had a break in service by the Division of Pensions or the Board of Trustees? How were employees classified in non-Civil Service townships?

The Board concluded without any facts in the record that the appellant should have either gone on unpaid leave or used his PTO days. There was no record of whether the appellant could afford to go on unpaid status indefinitely, or if he even had PTO time on the books. These are important facts were overlooked by the Board in their decision. An Administrative Law hearing would have provided the

opportunity to complete and clarify the record. What would have occurred if the appellant used, for example 60 days of PTO and then went on unemployment? What would his status have been after any available PTO was exhausted? Would the Board have concluded that after an employee exhausted PTO they were terminated, or the there was a layoff? Regardless of what choice the appellant made in March of 2020 at some point he would have been out of work and in a *pension reporting period without pay.* These are all unresolved relevant questions.

What would the appellant's status have been if he went on unpaid leave but applied for and received unemployment during the expanded unemployment rules during COVID19? The Board's decision erred by specifically penalizing the appellant because he received unemployment during the COVID19 shut down. [Pa54,55] Under the circumstances presented, whichever choice the appellant made he would have been out of work for six months and would have received unemployment for at least part of that time. There was no record of, or appreciation of these facts in the Board's decision.

There is no question that the appellant was a Civil Service employee. The Board concluded that the borough did not comply with the *Administrative Code* Sections applicable to a layoff and therefore there was a break in service. [Pa54] What if South Plainfield was not a Civil Service jurisdiction? Would the email notification be sufficient to satisfy the Board? The very purpose of the *Civil Service*

Act is to provide stability and fairness in public employment. *N.J.S.A. 11A:1-1 et. seq*. The Board's decision to cling to the technical requirements of the Civil Service procedures undermines their very purpose. The Board made the incorrect factual and legal conclusions that the appellant was terminated. [Pa54-57]

The termination of a permanent or tenured Civil Service employee also has specific administrative requirements. *N.J.A.C 4A:2-2.2 (a) (1)* South Plainfield did not comply with the administrative requirements for termination. A permanent Civil Service employee cannot be separated without the employer's compliance with the *Administrative Code. N.J.S.A. 11A:9-9, N.J.A.C. 4A:2-2.2 (a)(1)* Mr. Haus was a career permanent employee who could only be terminated for cause. *N.J.A.C. 4A:1-1.3* He essentially was a tenured employee entitled to Civil Service protection. There was no consideration of these portions of the *Administrative Code* when the Board determined he was terminated and not laid off.

It is not clear how the Board can justify the decision the appellant was terminated and not subject to a layoff simply based on the failure of South Plainfield to provide a proper layoff notice when they equally failed to provide such notice of termination? This issue was not addressed. The conclusions of the Board are sufficiently in dispute that an administrative hearing should have been ordered.

Additionally, there is no break in service if an employe is on an authorized period of leave, or their position is abolished. *N.J.A.C 17:2-1A.1* This was

unquestionably what occurred in the chaotic environment of the early days of the COVID19 emergency. If the appellant was not legally laid-off and he was not legally terminated, then without question he must have been on a period of authorized leave. The Board failed to analyze whether the appellant's separation was authorized leave as a result of the temporary closure or abolishment of his recreation department position and whether that would satisfy an exception to the break in service rule. [Pa54-57]

As set forth in Part D of the appellant's initial brief, there is a legal question concerning what law should apply and how the relevant statutes and code sections apply to the facts of this case. This is a contested case within the meaning of *N.J.S.A. 52:14B-2* and *N.J.A.C. 1:1-2.1* The appellant was entitled to an administrative law hearing in order to resolve these issues. *In Re Amico/Tunnel Carwash 371* N.J. Super. 199 (App. Div 2004) *In Re Orange Sun Bank* 172 N.J. super. 275 (App. Div. 1980).

Despite the arguments of the respondent's, the decision of the Board to deny appellant an administrative law hearing was arbitrary and unreasonable, and the Appellate Division should remand this matter for further proceedings.

C. THE BOARD MADE FACTUAL FINDINGS THAT WERE NOT SUPPORTED BY THE RECORD (Pa38-40;53-56)

The facts of this case must be analyzed with an understanding of the events that took place in the very early days of the Covid19 Health Emergency. The entire country and most of the world shut down in March of 2020. These events occurred

quickly without any notice and with little guidance. The Borough of South Plainfield responded to this national emergency by closing all non-essential activities including the recreation department. This was not done at anyone's choice, but rather in real time reaction to the emergent events as they unfolded. [Pa3]

When the Governor ordered a shutdown, South Plainfield responded by telling all Recreation Department employees they could not continue to work. [Pa3] Those employees still working were working remotely. While no one knew where the COVID19 health emergency might lead, everyone involved understood this to be a temporary situation. [Pa3,9] The Board denied Haus' re-enrollment because they made the factual and legal conclusion that this temporary separation was not a layoff. The Board decided this was a break in service pursuant to *N.J.S.A. 43:15A-25.2 (c); N.J.A.C. 17:2-1A.1.* For the reasons set forth in the appellants initial papers as well as the arguments above this was a factually deficient and a legally incorrect conclusion.

While the applicant appeals from the Board's refusal to refer this matter to the Office of Administrative Law; this court should rule as a matter of law that the temporary closure of a municipal office as a result of the COVID19 National Emergency did not result in not a break in service for the appellant as defined by the legislature. *N.J.S.A. 43:15A-25.2 (c); N.J.A.C. 17:2-1A.1.* The appellant, therefore, respectfully request the Appellate Division to exercise its authority and reverse the

decision of the Board of Trustees and enter an order that the Division of Pensions re-enroll the appellant in the State Pension System as a multi-member pension holder.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that this court reverse the decision of the Board of Trustees and order, either the appellant to be re-enrolled in the Public Employees Retirement System or order the matter to be forwarded to the Office of Administrative of Law for further proceedings.

Respectfully,

STEVEN D. CAHN, ESQ.

Dated: June 4, 2024