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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-000308-23

AUGUST N. SANTORE, JR.	CIVIL ACTION
Plaintiff-Appellant	ON APPEAL FROM
v.	OFFICE OF ADMINISTRATIVE LAW
PUBLIC EMPLOYEE'S RETIREMENT SYSTEM	
Defendants-Respondents	Honorable Thomas R. Betancourt, J.S.C. Sat below

BRIEF AND APPENDIX
For
AUGUST N. SANTORE, JR.

AUGUST N. SANTORE, JR.
APPELLANT
143 Summit Ave.
Berkeley Heights, NJ 07922
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Preliminary Statement

Appellant August N. Santore, Jr. (hereinafter "Santore", "Petitioner" or "Appellant"), appeals the Exception filed by the New Jersey Department of Labor (DOL or respondent) to the determination by Judge Thomas R. Betancourt, ALJ of the Office of Administrative Law (OAL) affirming the determination of the Public Employees Retirement System ("PERS") declaring Santore ineligible for pension benefits retroactive to January 1, 2008 pursuant to N.J.S.A. 43:15A-7.2(a).

Santore asserts that he successfully established before ALJ that no professional services contract existed prior to 2015 and PERS investigators never evaluated nor made any determination regarding whether Santore was an independent contractor. Santore asserts that the finding of the ALJ be reversed in full (complete pension eligibility reinstated) or in part (ineligibility changed from January 1, 2008 to January 1, 2015) as 2015 was the first year of a Professional Services Contract.

Procedural History

Virginia Nesbitt, treasurer of Township of Berkeley Heights sent a notice to PERS on August 13, 2012 (Pa 227). PERS terminated benefits and Berkeley Heights stopped collecting pension payments without any notice to Santore. On November 1, 2013, over a year later, Santore received a letter from PERS indicating retroactive ineligibility back to January 1, 2018. Santore appealed the determination

by letter to PERS dated December 13, 2013 (Pa94-96). On February 28, 2014, pursuant to a request from PERS, Santore remits to director of PERS (James Scott) the IRS 20 question test along with a copy of Santore's 2013 W-2 statement (Pa97-103). The matter stalls for years. On June 17, 2019, Santore again sends 20 Factor IRS Questionnaire to PERS (Pa104-112). This time it is sent to attention to Marc Greenfield (P-3). On July 14, 2020, PERS notifies Santore by letter of investigator Kristin Conover of fraud and abuse unit that Santore was ineligible as of January 1, 2008 (Pa162-165). PERS indicated no further appeal was necessary and matter was scheduled for Board of Trustees hearing on December 9, 2020. (Pa 162-165).

Santore received an improperly dated communication January 7, 2020 (it was January 7, 2021) in response to determinations that occurred at the December 9, 2020 Board of Trustees of PERS from Jeff Ignatowitz, secretary of PERS (Pa158-161). Said letter (R-2) determined again that Santore was ineligible as of January 1, 2008 for PERS. (Pa 158-161) Santore responded by letter of February 21, 2021 (P-4) to Jeff Ignatowitz, secretary of PERS (Pa113-118). P-4 includes with it an attachment published by the State of New Jersey Department of Labor outlining the process of worker misclassification. This print out was downloaded directly from the State of New Jersey website. It specifically states on page 2 of that handout that if an Employer (in this instance the Township) has an Employee (Santore in this

instance) sign an independent contractor agreement does not make someone an Independent Contractor.

Thereafter, the matter is forwarded to OAL for a Hearing. The Hearing occurred on September 28, 2022 before Honorable Judge Thomas R. Betancourt, ALJ. After a significant period of time passes, the transcript is produced and a trial brief was submitted by Santore May 14, 2023 and by counsel for PERS on May 31, 2023. Record was closed on May 31, 2023. The matter was decided June 28, 2023 wherein Judge Betancourt affirmed the PERS determination (Pa81-92). The matter was adopted by PERS on 8/17/23 (Pa92-93). Santore filed for a notice of appeal on 9/29/23. Santore filed a request for Oral Argument on 10/11/23.

Statement of Facts

August N. Santore, Jr. ("Santore") commenced employment with the Township of Berkeley Heights ("Township") as of January 1, 1998 as the Municipal Public Defender. (See Transcript Page 9, Lines 24). Santore was required to participate in the PERS system as a condition of employment. (See Transcript Page 10, Lines 4-7).

At all times from inception of employment in 1998 as the Public Defender until present (May, 2023) the Township did pay and has paid Santore on a W-2 as Salary.(See Transcript Pages 14-16)There were two years of service in 2000 and 2001 where the Township hired Santore as Prosecutor. During that time, Santore

was also paid regular wages on a W-2. (Pa 119-129) All Wages have been paid bi-weekly at all times since 1998 and continuing through present. (Pa 119-129)The Township has never paid Santore on a 1099 with any "contract payments."

Santore's pension was terminated in 2012 without knowledge or notice to Santore. This was triggered by an August 13, 2012 letter from Virginia Nesbitt (Township Treasurer) to Pension and Benefits (Pa 227). (R-10) Santore was notified officially over 1 year later by letter of James Scott, Director Pension Fraud and Abuse dated November 1, 2013 that Santore was determined to be retroactively ineligible in PERS as of January 1, 2008.

The first professional services contract issued by the Township was 2015. This was provided for execution after appointment. Notwithstanding, no contract payments were ever made and all payments continued bi-weekly on a w-2 payment basis. (Pa 119-129) Despite Santore being retroactively ineligible and all credits being eliminated back to December 31, 2007, the State of NJ (PERS) only recently refunded Santore at the end of 2023 without any accounting or explanation overpayments to the account. More importantly, unemployment contributions were also removed bi-weekly and Santore is not eligible for unemployment if he is not determined to be an employee.

Santore appealed the determination by letter to Hank Schwedes dated December 13, 2013 (Pa94-96). (P-1) On February 28, 2014 Santore provides a IRS

20 question test response to Director of Pension Fraud and Abuse, James Scott (Pa97-103). (P-2). The analysis included Santore's 2013 W2 statement from the Township as an Exhibit. The matter stalls out for years. On June 17, 2019, Santore again sends a 20 Factor Questionnaire as required to Marc Greenfield in Pensions and Benefits (Pa104-112). (P-3) On July 14, 2020, State notifies Santore by letter of Kristin Conover, investigator for Pension Fraud and Abuse Unit that Santore was ineligible for PERS as of January 1, 2008 (Pa162-165). Santore was advised that no further appeal was necessary and the matter was scheduled for Board of Trustees hearing on December 9, 2020 (Pa162-165) (R-3).

Thereafter, Santore receives letter improperly dated January 7, 2020 (it was January 7, 2021) in response to determinations that occurred at the December 9, 2020 Board of Trustees of PERS from Jeff Ignatowitz, secretary of PERS (Pa158-161). Said letter (R-2) determined again that Santore was ineligible as of January 1, 2008 for PERS. Santore responded by letter of February 21, 2021 (P-4) to Jeff Ignatowitz, secretary of PERS (Pa113-118). P-4 includes with it an attachment published by the State of New Jersey Department of Labor outlining the process of worker misclassification. This print out was downloaded directly from the State of New Jersey website. (Pa113-118) It specifically states on page 2 of that handout that if an Employer (in this instance the Township) has an Employee (Santore in this

instance) sign an independent contractor agreement it does not make someone an Independent Contractor.

A Hearing occurs September 28, 2022 before Judge Betancourt in the OAL. A series of exhibits were introduced at said trial. Santore paystubs provided in P-5 clearly state on the paystub issued by the Township the following information: **Department-- 82, Employee No.-- SANT0005, Employee Name—Santore Jr., August N., Earnings—Regular.** (Pa119-124) Then the paystub continues to reflect all of the withholding information as it would for any normal, regular employee. More importantly, Santore has an Employee No and they reference him by Employee Name. Exhibit P-5 has representative paystubs from 2013 (the year of the official determination), then 2014, 2016, 2018, 2020, 2021 and the stub for the week before the trial dated September 15, 2022. All the same manner of payment and reference. None of the paystubs in P-5 from 2016-9/15/22 have changed despite the shift to a professional services contract in 2015. No contract payments were made and W2 wages have continued to present. This is the Township and not some unsophisticated small business. They have professional service contracts, and I am sure they pay those individuals on an invoice system unless they regard them as employees. If not, that is their error and not Santore's.

Township has never issued a 1099. Santore W-2's (P-6) from 2006, 2013, 2017, 2018 and 2021 are representative of a continuing and ongoing pattern and

course of conduct that Township has always regarded Santore as an employee and continues to regard Santore as Employee to present. This is bolstered by the information the Township (through its CFO Michael Marceau on 3/17/14) supplied to the Division of Pension and Benefits through a series of Answers by the Township to the IRS 20 Factor Questionnaire surrounding Santore was annexed at trial as P-7 (Pa130-143). The information supplied in response had over 40 replies of "No knowledge" in response to the 20 questions and subparts. Exhibit P-7 includes the payroll register history in response to question 4 (of the 20 Factor Questionnaire) supplied by Township through Mr. Marceau. (Pa130-143)

In Exhibit P-7, question 5c specifically asks whether a personnel file was maintained for the Member. The response by Marceau is **"yes."** Why would there be a personnel file for an Independent Contractor. Exhibit R-4 is a professional services contract dated 4/14/2015 (Pa166-173). There is a provision that made it retroactively effective to 1/1/2015. The document states in it "Scope of Employment" in paragraph 1. Employment not the word contract or services. Paragraph 3 lists compensation as per the Salary Ordinance. Salary is for an employee, payments are made on a services contract. Santore was already appointed for the position in 2015 and then a contract is proposed. Notwithstanding all the pomp and stance, all payments remained on W-2 wages.

The Township published notifications of Public Contract Awards (R-12) are

inconsistent with descriptions of services in accordance with all other contracts for services when it comes to describing services from the Township Public Defender and Prosecutor (Pa312-325). (See Transcript Page 22, Lines 14-25 and Page 23, Lines 1-14 discussing analysis). Generoso Romano, Accountant and Tax expert testified that a W-2 is indicative of an employee relationship. (Transcript Page 43, Line 21-24). Generoso Romano (a tax expert) testified that in thousands of tax returns that he never had an Independent Contractor paid on a W-2. (See page 44, Lines 1-8)

Kristin Conover testified that Santore was ineligible from 2008 forward as Santore was on a public contract award/professional services contract under NJSA 43A:15a-7.2 Subsection A. Conover further testified no part B (Independent Contractor) analysis was performed. (See Transcript Page 53, Lines 1-21). Conover finds ineligibility from 1/1/2008 forward despite the first signed professional services agreement ever in fruition was 4/14/2015 as per Exhibit R-4 provided by PERS (Pa166-173). Township stopped remitting pension contributions after June 30, 2012. (See Conover testimony Transcript Page 60, Lines 4-5). This was about 45 days prior to Virginia Nesbitt's letter two months prior to Nesbitt (See statement 5, Exhibit R-10) (Pa227). The actual notification to Santore was over 1 year later.

Conover is cross-examined regarding whether there is any language in

subsection A of the statute that says municipal resolutions are the governing standard (versus a professional services contract) since there was no contract until April, 2015. The back and forth ends with Judge Betancourt confirming that it does not say resolution in statute. (See Transcripts Page 66, Line 1 through Page 68, Line 12). Conover says her determination was based on the resolutions. (See Transcript Page 66 Line 8-10). Conover says money (ineligible contributions) should have been refunded to Santore once ineligibility was determined. (See Page 69, Lines 12-17) Conover says she would look into it. Finally in December 2023, about 15 months after the trial, some money is returned with no accounting or explanation. Yet, Santore was investigated for Fraud and Abuse.

Conover testifies that she has no idea what happened to Santore's unemployment contributions on his withholdings and would imagine if Santore became unemployed he would get unemployment benefits. (See Transcript Page 69, Line 22 through Page 70, Line 6). Imagine that, so even after her determination of ineligibility, she believes at trial that Santore is entitled to some employee benefits such as unemployment. Unemployment is not available for independent contractors. Conover testifies that the resolutions were the core part of her determination that Santore was ineligible and did not interview anyone as part of her investigation. (See Transcript Page 71 Lines 16-18 and Page 75, Lines 6-22).

The Hearing was concluded. Trial briefs were submitted in May of 2023 by both plaintiff and respondent. On June 28, 2023, Judge Betancourt affirmed the decision of PERS, ruled that Santore was ineligible for PERS participation as of 1/1/2008, and the case was appealed.

Standard of Review

An appellate court will not upset the ultimate determination of an agency unless shown that it was arbitrary, capricious or unreasonable, or that it violated legislative policies expressed or implied in the act governing the agency or where the findings on which the decision is based are not supported by the evidence). Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963). See Prado v. State, 186 N.J. 413, 427 (2006), which applies this standard to the Attorney General's decision denying a state employee's request for representation when the employee is sued. In re Proposed Quest Academy Charter School, 216 N.J. 370, 385-87 (2013), applied the standard to an appeal from the Commissioner of Education's denial of a license to create a charter school. The Court also noted that the standard assumes that there is sufficient credible evidence to support the decision; otherwise, the decision would be arbitrary, capricious or unreasonable. Ibid.

LEGAL ARGUMENTS

I. THE ALJ IMPROPERLY DETERMINED THAT SANTORE WAS INELIGIBLE FOR PENSION BENEFITS PURSUANT TO N.J.S.A. 43:15A-7.2 RETROACTIVE TO JANUARY 1, 2008. (Pa 81- Pa90)

The instant matter centers around the determination made under N.J.S.A. 43:15A-7.2. The pertinent language of 43:15A-7.2 is restated below.

Ineligibility for PERS under professional services contract.

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

b. 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.*

The ALJ incorrectly determined that Santore was ineligible for pension benefits retroactive to 1/1/2008. The ALJ completely ignored the import of the facts developed on the record. Santore has a personnel file. Santore is referred to in their employment and finance records as an Employee. Santore has always been paid on a W-2. Santore never signed a professional services contract until 2015 (which such agreement in paragraph 1 ironically defines scope of **employment (emphasis added).** How can you have a scope of employment when you are not an employee? It is simple, you don't unless you're a public entity and you do whatever you want. The agreement was a rouse to check a box. The proper reference would be listed as terms and conditions of the contract and not scope of employment. The Department of Labor has been rigorously attacking Independent Contractor status for years and setting forth detailed steps and requirements to be able to be considered independent contractors. Yet, in this case, not a solitary component of analysis under §7.2(b) was reviewed despite numerous requests to provide such information.

Specifically, Santore introduced P-4 (Pa113-118) at trial which included with it an attachment published by the State of New Jersey Department of Labor outlining the process of worker misclassification. This print out was downloaded directly from the State of New Jersey website. It specifically states on page 2 of that handout that if an Employer (in this instance the Township) has an Employee

(Santore in this instance) sign an independent contractor agreement it does not make someone an Independent Contractor.

A contract for professional services is paid by check to a company or firm and employees are paid by a paycheck process. The 2015 appointment which such agreement was retroactive to 1/1/2015 from April, 2015 (execution date) does not automatically convert Santore from an employee to an Independent Contractor. It is not a baptism. Imagine, what if everyone just had their employees sign a service contract and no more payroll tax or employee benefit system. In my experience the Department of Labor would have an investigation launched instantaneously.

Santore was supplied 20 Factor tests on multiple occasions which Santore completed. What was the purpose in wasting his time with a document that Conover admitted she never took into consideration. The reality is that PERS has been lulled into a mechanical termination of Pension Benefits and vesting in any manner they see fit. They see this as shooting fish in a barrel. The manner in which this process takes place is incredible. The Court needs to look no further than the documentation supplied by the Township from their CFO in response to the States inquiry regarding the analysis. The information supplied by the Township (through its CFO Michael Marceau on 3/17/14) to the Division of Pension and Benefits through a series of Answers by the Township to the IRS 20 Factor Questionnaire surrounding Santore was annexed at trial as P-7 (Pa130-143).

The information supplied in response had over 40 replies of "No knowledge" in response to the 20 questions and subparts. Exhibit P-7 includes the payroll register history in response to question 4 (of the 20 Factor Questionnaire) supplied by Township through Mr. Marceau. In Exhibit P-7, question 5c specifically asks whether a personnel file was maintained for the Member. The response by Marceau is **"yes."** Why would there be a personnel file for an Independent Contractor? So, why was the analysis done if it was never taken into consideration. See Conover testimony. (T71, lines 16-25 and T72, lines 1-15). So, no one in PERS or the Township actually knew anything about Santore's job and its roles and yet somehow PERS and the ALJ concluded that Santore was an Independent Contractor.

In Lanza v. Bd. Of Trs., 2019 NJ Super. Unpub. LEXIS, 497, the ALJ developed the record and the Board of Trustees completed a full investigation and made a full determination of whether or not Lanza was an independent contractor. Despite the request of information from Santore relative to the 20 question factor test on multiple occasions, no information was introduced at trial. The failure to complete the analysis completely subverted Santore's rights. The ALJ ignored this deficiency and ruled essentially exclusively on the resolution. Municipal Employees are routinely hired by resolution and the mere introduction of a resolution is not a distinguishing factor.

The framework for analyzing whether someone is an employee or an independent contractor is long settled in the State of NJ. This matter is governed by the statutory "ABC test." Carpet Remnant Warehouse. Inc. v. N.J. Dep't of Labor. 125 NJ, 567, 572 (1991). That test provides:

> A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract for service and in fact;
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business. Ibid. (quoting N.J.S.A. 43:21-19(i)(6)(A)).

"Part A of the test requires a showing that the provider of services 'has been and will continue to be free from control or direction over the performance of such services.'" Ibid. (quoting N.J.S.A. 43:21-19(i)(6)(A)). To prevail, the challenger "must establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance." Ibid. This standard echoes the common-law test, "which classifies as an independent contractor one who renders services but retains control over the manner in which those services are performed, agreeing only to accomplish results." Ibid

Berkeley Hts. cannot satisfy the "A" prong of N.J.S.A. 43:21-19(i)(6)(A)(B)(C) as Santore has to show up and work under the Court's direction. The Court tells Santore when and where the services need to be rendered and is not free from control. The Town through the Court dictates where and when Santore needs to provide the service. Once a singular prong is unable to be satisfied, then the inquiry can technically stop as the test is conjunctive.

Notwithstanding, Berkeley Heights clearly cannot satisfy independence under prong "B" either. The NJ Supreme Court in **Carpet Remnant Warehouse** in addressing the B prong of the test stated "[i]n our view, that phrase refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business." (Id at 592). Santore attended in person at the Court's location where it conducted its primary business (court sessions) each and every time up until COVID restrictions were put in place to limit the spread and in-person contact. The sessions continued occurring on the Zoom platform thereafter and the mere conversion to an online forum does not make it an independent place of business for Santore. The services were rendered at the time and place as stated by the Court acting on behalf of the Township. Therefore, if the Township of Berkeley Heights cannot determine that I am an Independent Contractor then I am an employee. There is no other conclusion irrespective of sweeping ambitions of the legislature in this instance.

II. N.J.S.A . 43:15A-7.2(A) CONFLICTS WITH NEW JERSEY STATE LAWS GOVERNING DETERMINATION OF EMPLOYEE STATUS (PARTICULARLY N.J.S.A. 43:21-19(i)(6)(A)(B)(C)) AND ARE IMPROPERLY SUPERSEDED BY N.J.S.A. 43:15A-7.2(A). (ISSUE NOT RAISED BELOW)

In NJ, the analysis under N.J.S.A. 43:21-19(i)(6)(A)(B)(C) determines whether a person is an Independent Contractor or an employee. Santore introduced a printout during trial as P-4 which was obtained from the State of New Jersey governmental website indicating that an agreement (in this instance a professional services contract) alone cannot supplant the determination and review of the substance of facts determining whether someone is an employee or independent contractor. (Pa113-118). As such, N.J.S.A . 43:15A-7.2(A) directly eliminates the ABC test. In the alternative, the best case is the statute was intended to be conjunctive and determinations are required to be made under 7.2(a) and 7.2(b). In this instance, either the Statute is improper or being misinterpreted. PERS never made an independent contractor determination or analysis despite taking 10 years to get the matter to trial.

Further, in a unanimous decision, the New Jersey Supreme Court held that the same test should be used to determine the nature of an employment relationship under both the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law, and that the standard adopted by the New Jersey Department of Labor, the "ABC" test, would be used to make employment status

determinations under both laws. *Hargrove v. Sleepy's, LLC*, 220 N.J. 289 (2015). The "ABC" test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed, including:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business. *Id*. at 305. The New Jersey Supreme Court noted that the inability to meet any one of these three criteria results in a finding that the individual is an employee. Id.

The mere fact that determining that Santore was not eligible as he was not an employee is the conclusion the pension unit wishes to reach, does not make it so. All Santore ever did was accept a job and then he was enrolled into a pension program at his employer's direction as they promised when they induced him into a low paying position. He then performed the service in an exemplary manner for decades and continues to do so. He was paid on a salary on a W-2 and not a 1099. A copy of the pay stubs and W-2's were introduced at trial and were ignored by both

PERS during their investigation and the Court during the trial. (See Pa 119-129)

There is nothing in the Pension legislation that eliminates all professionals being considered employees and exempt from payroll tax under all NJ Law. Otherwise, all law firms could hire attorneys under a professional services agreement and could bypass core components of employment taxation, unemployment benefits, 401K contributions, vacation and, not to mention, the now mandatory earned sick leave. These benefits are costly in the private sector as well. But, the cost of the benefits is not how you analyze whether someone is an employee or an independent contractor.

The NJ DOL printout specifically warns of the perils of Employee misclassification including significant Employer penalties and ramifications. This is a required document to be posted by an Employer warning Employees in the workplace. It is a simple conclusion that Santore is NOT an independent contractor. The State cannot have it both ways—collecting money to bolster unemployment and state labor accounts and simultaneously eradicate pension payments. It is a plainly irreconcilable position.

The constant reference to annual appointments or contracts is a red herring. It is irrelevant. Employees enter employment contracts every single day of the year around the country. It is customary in many positions. The change in methodology as to calling his position a professional services contract once again

did not come about until 2015. (See Pa166-173) Notwithstanding, Santore had no choice but to sign it if he wanted to keep his position which he relied on for supplemental income as a part-time employee. Even with all the changes, Berkeley Heights still pays Santore on a W-2 as an employee. Santore still has unemployment contributions and all other customary employee-based taxes removed from his compensation. Santore was always and is still paid a salary. Independent contractors and professional service agreements are paid on 1099's with contract payments based on invoice or other agreement. No such structure has ever existed prior, or subsequent to, Santore's removal from the pension.

CONCLUSION

The ALJ improperly analyzed the law and the facts presented and the decision made is not consistent with the evidence introduced at trial. Santore is an employee under the ABC test. No finding could have been otherwise made as PERS introduced no evidence to the contrary. Deciding that Santore was ineligible for pension benefits was plain error. In addition, the best possible interpretation of §7.2(a) would lead to a conclusion that the "so-called" professional services agreement was only first introduced in 2015. Therefore, stretching the interpretations and ignoring the actual Independent Contractor analysis, would only allow the ALJ to conclude ineligibility as of 1/1/2015. Either way, the ALJ erred

and must be reversed in part or in their entirety and Santore's pension eligibility restored accordingly.

/s/August N. Santore, Jr.
August N. Santore, Jr.

State of New Jersey

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TAESHA L. WAY
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April 12, 2024

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Re: August Santore v. Board of Trustees, Public Employees' Retirement System
Docket No. A-000308-23T2

On Appeal from a Final Administrative Determination of the Board of Trustees, Public Employees' Retirement System

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

Dear Mr. Orlando:

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

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TABLE OF APPENDIX

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant, August Santore, appeals the August 17, 2023 final agency decision of the Board of Trustees, Public Employees' Retirement System ("Board") denying PERS service credit for services performed as the public defender for the Township of Berkeley Heights starting December 31, 2007, pursuant to N.J.S.A. 43:15A-7.2(a).[2] (Pa93).

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

[2] Santore's brief misidentifies both the decision on appeal (referring to the Final Administrative Determination as an "Exception") and the Respondent (referring to

A. Legislative History of Chapter 92

In 2005, concerned that the State's public pension systems were rife with abuse and upon the verge of a fiscal crisis in the funding of these benefits, 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).[3] The New Jersey Benefits Review Task Force issued a final report and recommendations in December 2005. Ibid. The Task Force described the problem relevant here as follows:

> the rules that allow the politically well-connected to game the system for their own benefit must be changed. The pension system exists to serve public employees who dedicate their careers to government and the eligibility rule must ensure that only they can participate. When non-deserving individuals are allowed to essentially freeload off the system, everyone loses. The bottom line is the system must be returned to those for whom it was designed.
>
> [Id. at 4.]

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

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

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the Board as the Department of Labor). (Pb2). "Pa" refers to Santore's appendix; "Pb" refers to his brief. Santore's appendix starts numbering at Pa81.

[3] Report can be found at http:www.state.nj.us/benefitsreview/final_report.pdf.

> a) Professional services vendors, such as municipal attorneys, tax assessors, etc., who are retained under public contracts approved by an appointing agency should not be eligible for a pension. In our opinion, these employees simply do not meet the original purpose of the public retirement plan and should not be eligible to participate in any pension plan.
>
> In addition to preserving the integrity of the pension funds for those who had dedicated their lives to public service, this change will also serve as a disincentive to "tacking."
>
> [Id. at 18.]

A Special Session Joint Legislative Committee on Public Employee Benefits Reform was convened, considered the Task Force Report Recommendations, held hearings and issued its Final Report on December 1, 2006. See 2006 Special Session Joint Legislative Committee, Public Employee Benefits Reform Final Report, (Dec. 1, 2006).[4] "Recommendation 10" of the Joint Legislative Committee again urged that all professional services contractors be excluded from PERS membership. The Committee stated:

> [B]oth the Internal Revenue Service and the New Jersey Department of Labor have rules that govern the distinction between an employee and an independent contractor. The purpose of this recommendation is to ensure that all public employers adhere to these rules.
>
> [Id. at 83.]

[4] Report can be found at http:www.htdspace.njstatelib.org/xmlui/bitstream/handle/10929/25028/p4182006zb.pdf?sequence=1&isAllowed=y.

In the years that followed, the Legislature enacted a series of sweeping reforms designed to curb abuses and restore fiscal integrity to the retirement systems. Specifically, Chapter 92 was enacted in May 2007 to effectuate several recommendations in the Joint Legislative Committee Report. Section 20 of Chapter 92, codified at N.J.S.A. 43:15A-7.2, responded to Recommendation 10 by clarifying that individuals performing professional services under a professional services contract awarded under N.J.S.A. 40A:11-5, 18A:18A-5 or 18A:64A-25.5 (governing local government contracts and school contracts) following the expiration of the term of any existing contract would not be eligible for future PERS service credit. N.J.S.A. 43:15A-7.2(a).

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) ("Comptroller Report").[5] The Comptroller Report found that, in violation of Chapter 92, a significant number of professional services providers remained enrolled in PERS after January 1, 2008, even though many were engaged through professional services contracts awarded under the Local Public Contracts Law (the "LPCL"), N.J.S.A. 40A:11-1 thru -60, or were not "employees"

[5] Report can be found at http:www.comptroller/news/docs/pensions_report.pdf.

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. Id. at 10-13. The examples cited in the Comptroller Report included municipal attorneys, municipal prosecutors and municipal public defenders. Ibid. Subsequent to the Comptroller Report, the Division of Pension and Benefits began auditing a number of municipalities to determine compliance with Chapter 92.

B. Santore's Professional Relationship with Berkeley Heights

In 1998, Santore was enrolled into PERS as the municipal public defender for Berkeley Heights. (Pa82). He was reappointed annually through 2019 via municipal resolution. (Pa87). Specifically, from 2007 through 2019, Santore continued to be reappointed as public defender, for one-year terms, pursuant to annual resolutions passed by the Berkeley Heights township council. (Pa144-156). Each resolution stated that "the Local Public Contracts Law (N.J.S.A. 40A:11-1, et seq.) requires that the resolution authorizing the award of a contract for professional services without competitive bids must be publicly advertised." Ibid. The resolutions further stated that:

> WHEREAS, this contract is awarded without competitive bidding as a "professional service" under the provisions of said Local Public Contracts Law because said services are rendered or performed by persons authorized by law to practice a recognized profession, which practice is regulated by law, and which practice requires the knowledge of an advanced type in a field of learning acquired by a prolonged, formal course of specified education and instruction and because it is impossible at this time to know the exact dimensions of the services to be performed, and accordingly, written specifications, and additionally, because the said services of such a qualitative nature as will not permit the receipt of competitive bids due to the subjective difference in the work product of such persons and the fact that the ethical requirements of such profession will not permit such bidding;
>
> [Ibid.]

According to the language of the resolutions, public notice of each resolution was published in the newspaper. Ibid.

On August 13, 2012, Virginia Nesbitt, the assistant treasurer for Berkeley Heights, wrote to the Division stating that four individuals needed "to be removed from the Pension System as of January 1st 2008. After careful review of Chapter 92 Law and the individual[']s employment status[,] they should not have been considered employees for [Berkeley Heights]." (Pa227). Berkeley Heights stopped remitting pension contributions for Santore after June 30, 2012. (Pa86). One of the four individuals identified in Nesbitt's letter was "August Santore Public Defender." Ibid.

Starting in 2015, Berkeley Heights began issuing annual Request for Proposals for the position of public defender. (Pa200-226).[6] As a result of the RFPs, Berkeley Heights and Santore began entering into annual written contracts for the position of public defender, designating Santore as a "Professional Consultant." (Pa166-199).[7]

On July 14, 2020, Kristin Conover, an investigator with the Pension Fraud and Abuse Unit ("PFAU"), issued a determination finding that Santore was ineligible for PERS service credit from 2008 onwards under N.J.S.A. 43:15A-7.2(a). (Pa162-165). Santore was ineligible under subsection (a) because he was annually appointed pursuant to the "no bid" provisions of the LPCL, which permit a professional service provider to be awarded a professional service contract without submitted RFP's. Ibid.

On January 7, 2020 the Board affirmed Conover's determination as to N.J.S.A. 43:15A-7.2(a). (Pa158-161). The Board found that Santore was awarded professional service contracts pursuant to resolution from 2008 onwards, making him a professional service provider ineligible for PERS credit. Ibid. Santore appealed to the Office of Administrative Law, and this matter was assigned to

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[6] The record includes RFPs for only 2015 and 2016. (Pa200-226).

[7] The record only includes copies of these contracts covering 2015 through 2018. (Pa166-199).

Administrative Law Judge ("ALJ") Thomas R. Betancourt for a contested hearing held on September 28, 2022. (Pa82). Santore testified on his own behalf along with Generoso Romano, his accountant, and Conover tested on behalf of the Board. (Pa84; Pa91).

On June 28, 2023, the ALJ issued his Initial Decision. (Pa81-90). The ALJ affirmed the Board's January 7, 2020 determination, and found that Santore was ineligible for PERS service credit from 2008 onwards pursuant to N.J.S.A. 43:15A-7.2(a). (Pa89). Specifically, the ALJ found that there was "no question [Santore] was awarded professional services contracts pursuant to the Local Public Contracts Law (N.J.S.A 40A:11-5) and is therefore ineligible for enrollment in PERS after the effective date of N.J.S.A. 43:15A-7.2, January 1, 2008." Ibid. The ALJ also found that "the lack of a written professional services contract between 2008 and 2015 does not negate the fact that he was working under such a contract during this period. The continued passing of resolutions can bind the municipality." Ibid.

On August 17, 2023, the Board issued its final administrative determination, affirming the Initial Decision in its entirety, again finding that Santore is ineligible for PERS service credit following the effective date of N.J.S.A. 43:15A-7.2. (Pa93).

This appeal followed.

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT SANTORE IS INELIGIBLE FOR PERS SERVICE CREDIT AS MUNICIPAL PUBLIC DEFENDER FOR BERKLEY HEIGHTS PURSUANT TO N.J.S.A. 43:15A-7.2(a).

"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) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)).

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) (citing R & R Mktg., LLC v. Brown-Forman Corp., 158 N.J. 170, 175

(1999)). "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).

Santore 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. Pen. & 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 . . . .").

Relevant here is N.J.S.A. 43:15A-7.2(a), which 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, under a professional services contract awarded in accordance with section 5 of P.L.1971, c.198 (C.40A:11-5), . . . on the basis of performance of the contract, shall not be eligible for membership in the Public Employees' Retirement System.
>
> . . . .
>
> As used in this subsection, the term "professional services" shall have the meaning set forth in section 2 of P.L.1971, c.198 (C.40A:11-2).
>
> [Ibid. (emphasis added).]

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

> services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as

> distinguished from general academic instruction or apprenticeship and training. . . . .
>
> [Ibid.]

Thus, in plain terms, Chapter 92 restricts from PERS eligibility those employed under professional services contracts awarded under the LPCL. N.J.S.A. 43:15A-7.2(a). "The purpose of the [LPCL] is to 'secure for the public the benefits of unfettered competition'" by competitive bidding. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994) (quoting Terminal Constr. Corp. v. Atl. Cnty. Sewerage Auth., 67 N.J. 403, 410 (1975)). With certain limited exceptions, the LPCL requires that publicly advertised contracts in excess of the bid threshold are awarded to the lowest bidder through a public bidding process. N.J.S.A. 40A:11-4(a); N.J.S.A. 40A:11-6.1.

N.J.S.A. 40A:11-5, however, exempts professional services contracts from the LPCL's statutory "lowest bidder" requirement by allowing what is commonly referred to as a "no-bid" contract. The statute states that any contract exceeding the bid threshold "may be negotiated and awarded by the governing body without public advertising for bids and bidding" and "shall be awarded by resolution of the governing body if" the subject matter of the contract is for "Professional Services." Ibid. The municipality "shall" award the contract via

resolution, print the resolution in an official newspaper, and have the contract available for inspection. Ibid.

Here, the Board reasonably adopted the ALJ's determination that the plain language of the resolutions lawfully enacted between 2007-2018 conclusively established that Santore was working under a professional services agreement—accordingly he was ineligible for PERS credit for that time pursuant to of N.J.S.A. 43:15A-7.2(a). (Pa89). The resolutions specifically state "this contract is awarded without competitive bidding as a 'professional service' under the provisions of said Local Public Contracts Law . . . ." (Pa144-156). These resolutions committed to writing demonstrated Berkeley Heights' desire to seek a professional service provider for legal services, and it awarded Santore professional service contracts under the "no bid" rules of the LPCL under N.J.S.A. 43:11A-5. Ibid. Accordingly, Santore cannot satisfy his burden of proving the Board's determination is unreasonable, when his position is in direct contradiction of the plain language of the resolutions, published in the newspaper, and lawfully enacted in accordance with N.J.S.A. 40A:11-5.

Critically, Santore's work as a legal service provider was open to the general public, which is undoubtedly the exact type of position the Legislature intended to exclude from PERS in enacting the Chapter 92 reforms. In fact, the Comptroller report specifically highlights the position of municipal public defender as being one

in which individuals were incorrectly being given pension service credit. This position is supported by Berkeley Heights, as Nesbitt's letter to the Division indicated that Santore was improperly enrolled in PERS following the passage of Chapter 92. (Pa227).

Now Santore asks this court to disregard over ten years of resolutions, and the actions of Berkeley Heights itself, to find him eligible for PERS credit, claiming only that he was an employee, not an independent contractor. (Pb20-21). In fact, rather than address his eligibility under N.J.S.A. 43:15A-7.2(a) (subsection (a)), Santore ignores the PFAU's determination, the Board's determination, and the Initial Decision, and instead argues just that he should not be classified as an independent contractor under N.J.S.A. 43:15A-7.2(b) (subsection (b)). (Pb10-16). To be clear, neither subsection (a) nor (b) creates eligibility criteria, but rather, precludes certain individuals from PERS service credit.

Subsection (b) does preclude from PERS membership after December 31, 2007, any person who qualifies as an independent contractor. This preclusion applies regardless of whether the person was appointed to perform services under the LPCL. However, here, the Board found Santore's was ineligible for continued enrollment in PERS from 2008 onward based on subsection (a) alone. (Pa162-165). Neither the ALJ's determination nor the Board's final agency decision made a finding on the substance of subsection (b).

In fact, at no point did the Board or PFAU perform any analysis under subsection (b), N.J.S.A 43:15A-7.2(b)—as acknowledged by Santore in his brief. (Pb8). That is because subsection (b) is irrelevant to the issuance of a professional services contract under subsection (a). Subsection (b) of Chapter 92 simply restates what has always been the case—independent contractors are not eligible for PERS (or any retirement system) credit because they are not employees. Whether or not Santore is an independent contractor or not has no bearing on the Board's determination because it did not find him to be an independent contractor for purposes of subsection (b). (Pa162-165).

All of Santore's legal arguments on appeal addresses subsection (b) (Pb12-20). Again, any claims related to subsection (b) are not germane to any issues in this appeal and should not be considered by this court because the sole reason for the Board's denial of Santore's request for continued membership in PERS was based on subsection (a). (Pa162-165). Attempting to prove he was not ineligible under (b), in no way proves his eligibility under (a). The W-2's Santore relies upon for his position, are only pertinent to a determination of whether Santore is an independent contractor, not whether his work was done under a professional services agreement. (Pb12). Similarly, the "ABC test" Santore cites, is simply another method for analyzing employment status and

not relevant to the actual issue on appeal, namely whether the Board erred finding Santore ineligible for PERS under subsection (a). (Pb15-16).

Doubling down on his confusion, Santore cites the unpublished decision Lanza v. Board of Trustees, Public Employees' Retirement System, No. A-2685-16, (App. Div. Mar. 5, 2019), slip op. at 19 (affirming the Board's determination that appellant was not eligible for PERS service credit after effective date of Chapter 92 based on a finding that municipal resolutions created a binding contract for professional services) (Pb14).[8] Santore argues that in Lanza the ALJ "developed the record and the Board of Trustees completed a full investigation and made a full determination of whether or not Lanza was an independent contractor." Ibid. What Santore misses is, unlike his own case, the Board found ineligibility under both subsections (a) and (b) in Lanza. (Ra1). Both the ALJ and this court affirmed the Board's determination under both subsections. Ibid. In fact, Lanza actually supports the Board's determination in this matter because this court affirmed that municipal resolutions "demonstrating that Lanza's appointment as municipal prosecutor met the definition of a 'professional services contract,' under the LPCL as prescribed by

[8] Santore fails to attach this unpublished decision and provide contrary opinions as required under Rule 1:36-3. The Board has provided a copy in its appendix. (Ra1-20).

N.J.S.A. 43:15A-7.2(a)." (Ra6). This directly supports the ALJ's finding that, while no formal written contract existed until 2015, Santore was indeed working pursuant to a contract for a professional services, awarded by yearly resolutions.

CONCLUSION

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

Respectfully submitted,

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