JEFFREY D. CHENEY, ESQ. [307862019]

DASTI & STAIGER
310 Lacey Road | P.O. Box 779
Forked River, NJ 08731
O: 609-549-8990 F: 609-549-5043

Attorneys for Defendant, Barnegat Township

ANTHONY KING, Plaintiff, v. BARNEGAT TOWNSHIP, JOHN DOES 1-5, JANE DOES 1-5, and ABC CORPORATION 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION CASE NO. A-003881-22 **On Appeal from the Orders entered on July 25, 2023 and August 14, 2023** SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION OCEAN COUNTY DOCKET NO.: OCN-C-12-23 Sat Below: Hon. Mark A. Troncone, P.J.Ch.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT BARNEGAT TOWNSHIP

DASTI & STAIGER, P.C.
Attorneys for Defendant-Appellant
Barnegat Township

Of Counsel and on the Brief:
Christopher J. Dasti, Esq. (13802010)

On the Brief:
Jeffrey D. Cheney, Esq. (307862019)

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PRELIMINARY STATEMENT

The instant matter involves a scenario that has seen increasing public scrutiny in recent years: Plaintiff/Respondent Anthony King ("Plaintiff") was a police officer for Defendant/Appellant Township of Barnegat (the "Township") whose troubled tenure concluded by entering into a voluntary Separation Agreement and Release ("Agreement") that resolved pending disciplinary and disability issues.

Pursuant to the terms of the Agreement, Plaintiff voluntarily retired and the Township agreed to not stand in the way of Plaintiff applying to the State of New Jersey, Department of the Treasury, Division of Pension and Benefits' ("NJDPB" or the "Division") Police and Firemans' Retirement System ("PFRS" or "Pension Board") for disability retirement including, but not limited to involuntary ordinary disability ("IOD") retirement.

The terms of the Agreement are clear that the Parties shall have no other obligation to one another. Indeed, the Parties acknowledged the autonomy of the NJDPB in adjudicating IOD retirement claims, and that the Agreement was not contingent on the NJDPB accepting Plaintiff's application.

Eventually, PFRS denied Plaintiff's application for IOD retirement because it believed that Plaintiff was not entitled to it.

Thereafter, Plaintiff filed the instant matter alleging the Township "breached the contract" of the Agreement and seeks an order to compel the Township to revise the terms of the Agreement.

The Chancery Division ignored precedent of this Court reinforced in multiple published and unpublished opinions, and severed the provision of the Agreement which prohibited Plaintiff's return to service. As a result, the Chancery Division removed the bargained-for-exchange that the Township and the Plaintiff entered into in executing the Agreement.

The Chancery Division's decision is both legally and factually incorrect, and against well-established case law. Therefore, the decision of the Chancery Division must be reversed and Plaintiff's Complaint dismissed with prejudice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1][2]

Plaintiff was employed as a police officer with Barnegat Township and eventually entered into the November 5, 2021 Separation Agreement and Release as a result of pending disciplinary charges. See DA012-DA022.

Under the Agreement, the Parties agreed that Plaintiff was medically disabled. See DA015 at ¶ 3. To that effect, the Township agreed to file for an IOD application for Plaintiff effective September 1, 2020 and that Plaintiff would be placed on medical leave effective February 20, 2020 pending the determination of the IOD retirement by PFRS. Ibid.

The Township further agreed to "take all necessary steps to effectuate the [IOD] application, including, but not limited to, providing all medical information and taking all Governing Body action necessary." See DA016 at ¶ 6.

[1] The Statement of Facts and Procedural History are included together for judicial economy.

[2] The transcript for the July 7, 2023 Motion Hearing (1T) is the only transcript in this matter.

In exchange, Plaintiff agreed to submit an irrevocable letter of resignation to the Chief of Police stating he was resigning for medical reasons concurrent with the execution of the Agreement. See DA017 at ¶ 10; See also DA022 at Attachment A. The letter of resignation would be valid, binding, and irrevocable once submitted to the Chief of Police but held in escrow until Plaintiff's IOD application was decided upon and he had exhausted all rights of appeal regarding his IOD application. See DA017-DA018 at ¶¶ 10-12.

In consideration of Plaintiff's resignation, the Township agreed to dismiss any filed or contemplated disciplinary charges and that, besides Plaintiff's fitness for duty, his resignation was otherwise made in good standing and with no allegation of misconduct or delinquency pending other than that arising out of and related to his medical disability. See DA017-DA018 at ¶¶ 12-13.

The Parties further acknowledged that the autonomy of the NJDPB regarding pension applications and that neither they nor their attorneys could make determinations regarding pension applications. See DA016 at ¶ 7.

Importantly, if Plaintiff's IOD application were granted, and his medical condition improved so as to allow a return to employment, he would be reinstated to his position and then resign within thirty days of

reinstatement, without any compensation due to him (the "return to work" provision). See DA018-DA019 at ¶ 17.

The Agreement further contained several standard clauses. For example, disputes concerning the Agreement would be forumed in the Superior Court of New Jersey and the laws of the State of New Jersey would apply to any such disputes. See DA018 at ¶ 15. Additionally, the Agreement could not be abandoned, supplemented, amended, or modified without the written authorization of both Parties. See DA018 at ¶ 16.

Finally, the Agreement's severance clause provided that "if any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed severable[.]" See DA018 at ¶ 18.

The Parties further acknowledged that the autonomy of the NJDPB regarding pension applications and that neither they nor their attorneys could make determinations regarding pension applications. See DA016 at ¶ 7.

In furtherance of the Township's duties and obligations under the Separation Agreement and Release, the Township adopted two

resolutions which authorized the Township Administrator to execute the Agreement with Plaintiff and authorizing the Township to process the IOD application on behalf of Plaintiff. See DA012, DA087.

The Parties, through counsel, extensively negotiated the terms of the Agreement and discussed the ramifications of such terms over a six month period from May 2020 to until the signing of the Agreement in November 2020. See DA096-103

On May 14, 2020, Plaintiff, through counsel, wrote to the Township specifically requesting that the Township "dismiss misconduct charges as related to [Plaintiff's] disability and move to benevolently file for [IOD] rather than terminate [Plaintiff][.]" See DA096.

On May 20, 2022, the Township, through counsel, advised Plaintiff, through counsel, that the Township agreed to proceed with an IOD application, however, the Township would not agree to proceed with its disciplinary charges against Plaintiff if the Division of Pensions did not deem Plaintiff disabled and retired, rather, any agreement with Plaintiff would require cessation of employment upon a decision by the Division of Pensions, regardless of whether Plaintiff appealed such decision. See DA100.

On June 4, 2020 Plaintiff, through counsel, agreed that Plaintiff's IOD could fail under N.J.A.C. 17:1-6.4 and thus proposed that the underlying misconduct charges specifically be "withdrawn and dismissed [under the Agreement] because they are related to or were caused by the disability" to increase the likelihood of a favorable IOD application. See DA103-106.

Plaintiff's June 4, 2020 letter additionally recognized that if Plaintiff's IOD application failed, the underlying misconduct charges would render Plaintiff ineligible for the Deferred Benefits provided by N.J.S.A. 43:16A-11.2. Ibid.

On May 26, 2021, the NJDPB administratively denied Plaintiff's IOD application pursuant to N.J.S.A. 43:16A-8(2) because his irrevocable resignation would leave him with no position to return to if, at any point in the future, his disability diminished to the point that he could return to employment. See DA108.

On June 17, 2021, Plaintiff formally appealed the NJDPB's May 26, 2021 determination to the Board of Trustees of the Police and Firemen's Retirement System of New Jersey ("PFRS" or "Pension Board"). See DA114.

Thereafter, on August 10, 2021 the PFRS affirmed the denial on the grounds that the terms of the Agreement rendered Plaintiff ineligible

for IOD retirement pursuant to N.J.S.A. 43:16A-8(2). See DA116-DA117.

Specifically, the PFRS noted that the return to work provision and all other provisions providing that Plaintiff's resignation is "final" and "irrevocable" rendered him ineligible for IOD retirement. Ibid.

On August 30, 2021, Plaintiff requested an appeal of the PRFS's denial of IOD application which it granted on October 4, 2021. See DA121-DA122.

On October 22, 2021, Plaintiff's counsel authored an email correspondence to the Township requesting "a redraft" of certain provisions of the Separation Agreement. See DA124.

On November 5, 2021, the Township advised Plaintiff that it would not amend the Separation Agreement. See DA126.

On January 27, 2022, Plaintiff notified the Township that he would file suit seeking amendment and/or severance of the Separation Agreement if the Township did not agree to amend same. See DA128-DA129.

The Township replied to Plaintiff on February 11, 2022, reiterating that the Parties mutually bargained for and agreed that Plaintiff's resignation was irrespective of the outcome of his IOD application. See DA131-DA133.

On April 21, 2022, the Office of Administrative Law ordered, upon Plaintiff's request, that his matter be placed on the inactive list. See DA216-DA217.

Plaintiff filed his initial Complaint in the Law Division on April 20, 2022 under the Docket Number OCN-L-839-22.

Thereafter, Plaintiff filed a First Amended Complaint in the Law Division on April 29, 2022.

On January 24, 2023, the matter was transferred to the Chancery Division by way of consent order and docketed as OCN-C-12-23. See DA213-DA214.

On January 28, 2023, Plaintiff filed an Amended Complaint under Docket Number OCN-C-12-23. See Amended Complaint, OCN-C-23, filed January 28, 2028.

On January 30, 2023, the Township filed an Answer and Counterclaim to Plaintiff's Amended Complaint. See Answer and Counterclaim, filed January 30, 2023.

On April 18, 2023, the Parties agreed to immediately conclude discovery by way of Consent Order. See DA145-DA146.

On May 10, 2023, the Township filed a motion for summary judgment. See DA049-DA156, DA219-226. Plaintiff thereafter filed

opposition and cross-motion for summary judgment on June 9, 2023. See DA161-DA215.

Following oral argument, the Chancery Division entered an Opinion and Order on July 25, 2023 denying the Township's motion for summary judgment and partially granting Plaintiff's motion for summary judgment as to breach of contract and specific performance but denying Plaintiff's motion as to damages. See DA227-DA229.

Following a case management conference, the Court entered a second Order on August 14, 2023 clarifying its July 25, 2023 Order and that all issues were otherwise resolved as Plaintiff withdrew his claim on damages. See DA230-DA231.

The Chancery Division's July 25, 2023 and August 14, 2023 Orders thus severed the return to work provision and all terms of the Agreement providing that Plaintiff's resignation was irrevocable, identified by the NJDPB as blocking compliance with N.J.S.A. 43:16a-(8)(2), or that Plaintiff's position would be considered temporary if he returned to work. See DA229.

For clarity, the impacted provisions of the Agreement are set forth as follows, with the severed terms and/or provisions *italicized* (collectively the "severed terms"):

10. Concurrent with the execution this Agreement, King shall submit to Chief of Police Keith Germain a *valid and binding* letter of resignation pending retirement from his employment with the Township. This letter will state that King is resigning from his employment with the Township for medical reasons. A copy of this resignation letter is attached hereto as Exhibit A. This letter of resignation shall be *valid, binding and irrevocable at the time it is submitted to the Chief*. King's resignation shall be a resignation in good standing. King's use of the term "resignation" in this document will neither argument nor reduce any benefit King would normally receive under the CNA. See DA191 at ¶ 10.

11. *Notwithstanding the binding and irrevocable nature of* King's letter of resignation, the letter will be held in escrow while and until King's involuntary disability pension application is decided upon by the New Jersey Division of Pensions and Benefits and King has exhausted all rights of appeal flowing from the disability application. See DA191 at ¶ 11.

12. It is expressly understood that King's resignation from his position is herein acknowledged by the Township as one made in good standing. *This resignation is final and irrevocable regardless of the disposition of the involuntary disability pension application and upon King exhausting all rights of appeal, if any.* See DA191-DA192 at ¶ 12.

17. King and the Township acknowledge and agree that if King is granted an Ordinary Disability by PFRS, and in the unlikely event his medical condition improves thereafter to allow a return to employment, that King will be reinstated to his position *and then will resign his position within thirty (30) days of his reinstatement, without any compensation due to him from the Township during this thirty (30) day period.* See DA192-DA193 at ¶ 17.

On August 18, 2023, the Township filed the instant appeal. See DA235-239.

That same day, pursuant to R. 2:9-5, the Township filed a motion for a stay of the Chancery Division's decision pending the instant appeal. See DA232-234.

On September 8, 2023, following formal briefing and oral argument, the Chancery Division denied the Township's motion for a stay without prejudice. See DA240.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW.
(Issue Not Raised Below).

The Chancery Division disposed of the instant contract dispute via summary judgment. The principles of contract interpretation are well-established in New Jersey and is thus a legal matter ordinarily suitable for resolution on summary judgment. Celanese Ltd. v. Essex County Improvement Authority, 404 N.J. Super. 514, 528 (App. Div. 2009).

The standard for a summary judgment motion is well-settled in New Jersey: pursuant to R. 4:46-2(c) "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact."

The court reviewing the motion for summary judgment must determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America,

142 N.J. 520, 523 (1995). The standard for summary judgment requires the trial court to conduct a "searching review" of the record to ascertain whether there is a genuine issue of material fact. Brill, supra, 142 N.J. at 541.

A party may defeat a motion for summary judgment by representing that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raises sufficient credibility issues to "permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 523. Summary judgment must be granted when the evidence is "so one-sided that one party must prevail as a matter of law." Housel for Housel v. Theodoridis, 314 N.J. Super. 597, 603-04 (App. Div. 1998) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)). Therefore, "summary judgment cannot be defeated if the non-moving party does not 'offer any concrete evidence from which a reasonable juror could return a verdict in his favor[.]'" Theodoridis, supra, 314 N.J. Super. at 604 (quoting Anderson, supra, 477 U.S. at 256).

For the reasons that follow, the Chancery Division's decision to grant Plaintiff's motion for summary judgment was contrary to well-established law; therefore, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

POINT II

PLAINTIFF FAILED TO DEMONSTRATE THAT THE TOWNSHIP BREACHED ITS DUTIES UNDER THE AGREEMENT; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED AND PLAINTIFF'S COMPLAINT DISMISSED WITH PREJUDICE.
(DA201 at ¶¶ 1-2; DA202 at ¶¶ 1-2).

The Chancery Division erred in determining that the Township breached its duties under the Agreement by refusing to sever provisions of the Agreement that the NJDPB and Pension Board deemed unenforceable.

A. THE BREACH OF CONTRACT STANDARD.

To establish a prima facie claim for breach of contract, a plaintiff must prove four elements: first, that "the parties entered into a contract containing certain terms"; second, that "plaintiff did what the contract required them to do"; third, that "defendant did not do what the contract required them to do, " defined as a "breach of the contract"; and fourth, that "defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff." Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016) (quoting Model Jury Charge (Civil), § 4.10A "The Contract Claim-Generally" (May 1998); see also Coyle v. Englander's,

199 N.J. Super. 212, 223 (App. Div. 1985) (identifying essential elements for breach of contract claim as "a valid contract, defective performance by the defendant, and resulting damages").

Each element must be proven by a preponderance of the evidence. See Liberty Mutual Ins. Co. v. Land, 186 N.J. 163, 169 (2006) (citing State v. Seven Thousand Dollars, 136 N.J. 223, 238 (1994). Under the preponderance standard "a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Liberty Mutual Ins. Co., supra, 186 N.J. at 169 (2006).

B. OVERVIEW OF THE PARTIES' MUTUAL PROMISES.

In construing a contract, "the plain language of the contract is the cornerstone of the interpretive inquiry; 'when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)).

Under the Agreement, Plaintiff agreed: (i) that he is medically disabled; (ii) to submit a binding and irrevocable letter of resignation to the Township; (iii) to fully participate in the ordinary disability

retirement process; (iv) to irrevocably resign regardless of the disposition of his disability retirement application; (v) that if his disability retirement application were granted, and Plaintiff ever returned to employment, he would resign within 30 days without any compensation; and (vi) he understood the terms of the Agreement and had the opportunity to consult an attorney before signing it. See DA16-DA18 at ¶¶ 6,10, 14 and 17.

In exchange, the Township agreed: (i) that Plaintiff is medically disabled; (ii) to place Plaintiff on medical leave, pending the determination of his disability retirement application; (iii) to file an IOD application on behalf of Plaintiff; (iv) to take all necessary steps to effectuate Plaintiff's application; (v) to provide accurate and truthful information in response to any inquiry from the NJDPB regarding Plaintiff and/or the Agreement; (vi) to dismiss any disciplinary charges filed or contemplated alleging that Plaintiff is unfit for duty; and (vii) that Plaintiff's resignation was made in good standing and with no allegation of misconduct or delinquency pending other than that arising out of and related to his medical disability. See DA15-DA18 at ¶¶ 3,6,8 and 12-13.

Finally, the Parties mutually agreed: (i) that the NJDPB is an autonomous agency; (ii) that only the NJDPB, and no one else, including

the Parties and their attorneys, can make determinations regarding disability retirement applications; and (iii) that if any provisions of the Agreement were deemed illegal, unenforceable, or ineffective in a legal forum, such provisions would be deemed severable and all other provisions would remain valid and binding. See DA16 at ¶¶ 7 and 18.

Applying the principles set forth in Barila, supra, the record before the Chancery Division demonstrated that the Parties entered into the Agreement freely and voluntarily, upon the advice of counsel, extensive negotiation of the terms within and the ramifications thereof. See e.g. DA18 at ¶ 14, DA69-DA79. Notably, provisions concerning Plaintiff's ordinary disability application were at the forefront of those negotiations. Thus, it was readily apparent that the Parties appreciated the risk of Plaintiff's disability retirement application being denied, and they specifically memorialized as much in the Agreement.

C. THE TOWNSHIP'S DUTY TO EFFECTUATE PLAINTIFF'S IOD APPLICATION DID NOT INCLUDE SEVERANCE OF THE RETURN TO WORK PROVISIONS.

The Chancery Division's determination that the Township breached the Agreement derived from Paragraph 6 thereof, in which the Township agreed to take all necessary steps to effectuate Plaintiff's ordinary disability retirement application.

The "basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 321 (2019). Consequently, New Jersey courts have long recognized that the judiciary "should not torture the language of [a contract] to create ambiguity." Stiefel v. Bayly, Martin & Fay, Inc., 242 N.J. Super. 643, 651 (App. Div. 1990).

Likewise, a court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument. See Schenck v. HJI Assoc., 295 N.J. Super. 445, 450 (App. Div. 1996), certif. denied, 149 N.J. 35 (1997); Tomaiuoli v. U.S. Fid. & Guar. Co., 75 N.J. Super. 192, 201 (App. Div. 1962).

The Agreement does not define "effectuate" thus, consistent with Kernahan, supra, the term's plain and ordinary meaning applies. Merriam-Webster Dictionary defines "effectuate" as "to cause or bring about (something)". *Effectuate*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/effectuate (last visited October 14, 2023).

Yet, the Chancery Division's decision inexplicably departs from the plain and ordinary meaning of "effectuate" without any

rationalization or even setting forth the alternative definition that it sought to apply.

Notably, Plaintiff never alleged that the Township failed to submit his IOD application or provide accurate information to the NJDPB and Pension, nor could he, as is clearly demonstrated by both entities' denials of his application.

Accordingly, the Township satisfied its obligations under the Agreement by taking all steps necessary to bring about Plaintiff's application before the NJDPB and Pension Board.

D. THE CHANCERY DIVISION'S DECISION DEPARTS FROM WELL-ESTABLISHED CASELAW CONCERNING DISABILITY APPLICATIONS.

During briefing and oral argument, the Parties extensively argued over the applicability of several Appellate Division decisions concerning the impact of settlement agreement provisions on disability eligibility. See e.g. DA69-DA79. Yet, the Chancery Division's opinion fails to reference, let alone distinguish, these decisions, let alone why such decisions do not apply.

The Chancery Division determined the Township breached the Agreement despite the record demonstrating the Parties were both aware of and appreciated the impact two published Appellate Division

decisions which undercut the chances of Plaintiff's IOD application being granted. See e.g. DA69-DA79.

First, In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386 (App. Div. 2018) which upheld the Division's regulation that precludes an individual from receiving disability retirement if they separated from service due to non-disability reasons. Id. at 394.

Second, Cardinale v. Board of Trustees, 458 N.J. Super. 260 (App. Div. 2019), which affirmed the PFRS' refusal to process the plaintiff former police officer's ordinary disability benefits application for an alleged PTSD-addiction disability because he voluntarily and irrevocably resigned from his position under a settlement agreement to resolve disciplinary, which "automatically render[ed] the individual ineligible for ordinary disability benefits." Cardinale, supra, 458 N.J. Super. at 263, 267 (emphasis added).

In the short time since Cardinale, supra, and In re Adoption of N.J.A.C. 17:1-6.4, supra, the Appellate Division has repeatedly reaffirmed both cases and their underlying rationale: "although a person eligible for benefits is entitled to a liberal interpretation of a pension statute, 'eligibility itself is not to be liberally permitted.'" In re Adoption of N.J.A.C. 17:1-6.4, supra, 454 N.J. Super. at 399 (quoting Smith v. Dep't of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209,

213 (App. Div. 2007)); see also Cardinale, supra, 458 N.J. Super. at 272 (quoting Smith, supra, 390 N.J. Super. at 213).

For example, the Appellate Division has cited In re Adoption of N.J.A.C. 17:1-6.4, supra, twice in published decisions – and a further fifteen times in unpublished decisions – for the specific purpose of affirming denials of applications for ordinary or accidental disability retirement. See e.g. Thorpe v. Bd. of Trustees, Pub. Employees' Ret. Sys., A-0689-20, 2023 WL 2395067, at *1 (N.J. Super. Ct. App. Div. Mar. 8, 2023)[3]; Rooth v. Bd. of Trustees, Pub. Employees' Ret. Sys., 472 N.J. Super. 357, 364-68 (App. Div. 2022).

In Rooth, supra, a case decided less than six weeks after Plaintiff filed his initial Complaint in early 2022, the Appellate Division specifically held that "the inability to return to work based upon a settlement agreement and irrevocable resignation" precludes the filing of a disability application. Id. at 360-61. This preclusion extends to agreements not to seek future employment. Ibid.

Although most of the opinions citing Cardinale, supra, and In re Adoption of N.J.A.C. 17:1-6.4, supra, are unpublished, the amount of those unpublished decisions and the uniformity of their holdings

[3] See DA116.

demonstrates their roles as the definitive caselaw regarding the interplay of separation agreements and disability retirement eligibility.

In a remarkably similar unpublished case, the Appellate Division specifically held that when a former public employee executes a settlement agreement providing that the employee can apply for disability benefits, the fact that benefits are denied by the Pension Board leaves the employee no recourse against the municipality. See Carr v. Borough of Glen Ridge, A-1124-20, 2022 WL 38864 (N.J. Super. Ct. App. Div. January 5, 2022).[4]

The well-established caselaw is thus clear that Plaintiff's complaint is without merit as it is not the responsibility of the Court, nor the Township to amend the Agreement so as to give Plaintiff another chance. There is no basis to require a return to work or for a court to revise the Settlement Agreement that was entered into by both parties freely and voluntarily. See Cardinale, supra, Rooth, supra, Thorpe, supra and Carr, supra.

Inexplicably, the Chancery Division failed to even cite any of the controlling case law in its opinion, let alone differentiate why the precedent is not binding on the Chancery Division and inapplicable in

[4] See DA125.

this case. The Chancery Division's decision is thus not supported by the record nor the law.

Accordingly, the Township did not breach the Agreement, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

POINT III

PLAINTIFF FAILED TO DEMONSTRATE ENTITLEMENT TO SPECIFIC PERFORMANCE; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED AND PLAINTIFF'S COMPLAINT DISMISSED WITH PREJUDICE.
(DA201 at ¶¶ 1-2; DA202 at ¶¶ 1-3).

The Chancery Division similarly erred in determining that Plaintiff was entitled to specific performance under the Agreement because Plaintiff failed to satisfy his evidentiary burden.

As an initial matter, Plaintiff's specific performance claim must fail if the Township did not breach the Agreement because specific performance, together with restitution and compensatory damages is among those "judicial remedies upon breach of contract". Totaro, Duffy, Cannova & Co. v. Lane. Middleton & Co., 191 N.J. 1, 12 (2007).

A party seeking specific performance must establish that: (1) the contract at issue is valid and enforceable; (2) the terms of the contract

are clear, such that the court can determine with reasonable certainty "the duties of each party and the conditions under which performance is due;" (3) an order compelling performance would not be "harsh or oppressive" to the defendant; and (4) a denial of specific performance would leave the plaintiff without an adequate remedy. Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598-600 (App. Div. 2005).

The Chancery Division's opinion fails to justify its determination and lacks several aspects of the analysis required by Marioni, supra. As discussed supra, the Chancery Division applied, but failed to set forth, an alternative definition of "effectuate" that defied its plain and ordinary meaning. Additionally, the Chancery Division's opinion failed to explain how compelling severance would not be harsh or oppressive to the Township or leave Plaintiff without an adequate remedy as required by Marioni, supra.

Critically, the Chancery Division's opinion also fails to account for the substantial benefit Plaintiff still received under the Agreement – the opportunity resign in good standing as a result of the Township agreeing to dismiss any disciplinary charges filed or contemplated alleging that Plaintiff was unfit for duty.

Unfortunately, Marioni, supra, is just the tip of the iceberg in demonstrating both that Plaintiff was not entitled to specific performance and the inadequacy of the Chancery Division's opinion.

First, in Houseman v. Dare, 405 N.J. Super. 538 (App. Div. 2009), the Appellate Division opined:

> "the remedy of specific performance can be invoked to address a breach of an enforceable agreement when money damages are not adequate to protect the expectation interest of the injured party and an order requiring performance of the contract will not result in inequity to the offending party, reward the recipient for unfair dealing or conflict with public policy."
>
> Id. at 543-44.

Despite Plaintiff's Complaint including a request for money damages, the Chancery Division's opinion departs from Houseman, supra, by failing to address: (1) if and how money damages fail to protect Plaintiff's expectation interest and (2) if and how will not result in inequity to the Township, reward the Plaintiff for unfair dealing or conflict with public policy.

Second, in Carr, supra, the Appellate Division's three justifications for affirming the trial court's decision to deny the plaintiff's specific performance claim to reform the settlement agreement are each applicable to the instant matter:

> "First, because the intent of the parties was plain and the language of the agreement was clear and unambiguous, the court must enforce the agreement as written. Barila, supra, 241 N.J. at 616 … Second, plaintiff did not demonstrate "fraud or any compelling circumstance" that would justify reforming the Settlement Agreement. Pascarella, supra, 190 N.J. Super. at 124-25 … Third, plaintiff concedes that both parties knew about the issues that may arise in his pension application… both knew that the Pension Board retained the authority under the Pension Law."
>
> Carr, supra 2022 WL 38864 at *3-4.

Further, in Carr, supra Appellate Division noted that the plaintiff's assertion that "he was unaware that the Settlement Agreement did not comply with pension law until after the agreement was executed … does not constitute "fraud or any compelling circumstance" that would justify reforming the Settlement Agreement." Ibid.

Here, Plaintiff's argument is even weaker, the record demonstrates that the Parties acknowledged the potential denial of his IOD application, and Plaintiff's counsel represented the unsuccessful plaintiff-appellant in Cardinale, supra. Nor did Plaintiff's demonstrate "fraud or any compelling circumstance" that would justify reforming a settlement agreement. See Carr, supra at 2022 WL 38864 at * 4 (citing Pascarella v. Bruck, 190 N.J. Super 118, 124-25 (App. Div. 1983)).

Accordingly, Plaintiff failed to demonstrate that specific performance was warranted; therefore, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

POINT IV

THE NEW JERSEY DIVISION OF PENSIONS IS NOT A LEGAL FORUM FOR PURPOSES OF TRIGGERING THE SEVERANCE PROVISION OF THE AGREEMENT; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED AND PLAINTIFF'S COMPLAINT DISMISSED WITH PREJUDICE.
(DA201 at ¶¶ 1-2; DA202 at ¶¶ 1-3).

The Chancery Division correctly recognized the existence of two distinct legal forums: "the NJDPB is the legal forum for rulings on the validity of Plaintiff's [IOD application] and that the Superior Court is the forum for rulings regarding the Agreement itself." See DA198.

However, the Chancery Division erred in determining that the NJDPB's determinations as to Plaintiff's IOD application triggered the severance provision of the Agreement. In doing so, the Chancery Division ignored the plain language of the Agreement and inexplicably blurred the scope and roles of the NJDPB and Superior Court of New Jersey as legal forums.

A. BOTH THE AGREEMENT AND THE POLICE AND FIREMEN'S RETIREMENT SYSTEM ACT, N.J.S.A. 43:16A-1 ET SEQ. DEMONSTRATE THE NJDPB AND PFRS LACK JURISDICTION OVER SETTLEMENTS AGREEMENTS AND THE VALIDITY OF PROVISIONS THEREIN.

Pursuant to the Agreement, the Parties agreed that the Agreement shall be construed in accordance with the laws of the State of New Jersey, the Superior Court of New Jersey is the legal forum for the Agreement and the NJDPB is the legal forum for Plaintiff's IOD Application. See DA016-DA019 at ¶¶ 7, 15 and 18.

Further, the Agreement's severance provision provides that if any provisions of the Agreement were deemed illegal, unenforceable, or ineffective in a legal forum, such provisions would be deemed severable and all other provisions would remain valid and binding. Ibid.

The intent of the Parties was thus plain and the language of the Agreement was similarly clear and ambiguous: the Superior Court of New Jersey is the only forum having the jurisdiction to declare a provision of the Agreement illegal, unenforceable or ineffective. The Agreement must be interpreted and enforced accordingly. Barila, supra, 241 N.J. at 616.

Likewise, a review of NJDPB and Pension Board's enabling statute, the Police and Firemen's Retirement System Act, N.J.S.A.

43:16A-1 to -68, confirms they both lack jurisdiction to declare a contractual provision illegal, unenforceable or ineffective.

Administrative agencies possess wide discretion and authority to select the means and procedures by which to meet their statutory objectives. Texter v. Dep't of Human Servs., 88 N.J. 376, 383 (1982).

However, it is axiomatic that an administrative agency possesses only those powers expressly delegated to it by the Legislature or fairly implied from the legislative conferral of authority. Bd. of Educ. of Upper Freehold Reg'l Sch. Dist. v. State Health Benefits Comm'n, 314 N.J. Super. 486, 492 (App. Div. 1998) (quoting Chopper Express, Inc. v. Department of Insurance, 293 N.J. Super. 536, 542 (App. Div. 1996)). Without an adequate basis in statute, no administrative agency possesses inherent subject matter power. Ibid.

"The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citing Chasin v. Montclair State Univ., 159 N.J. 418, 426-27 (1999). When determining legislative intent from a statute's language, "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the [L]egislature or unless another of different meaning is expressly indicated, be given their

generally accepted meaning, according to the approved usage of the language." State v. Hupka, 203 N.J. 222, 232 (2010) (quoting N.J.S.A. 1:1-1).

The Legislature vested the PFRS Board of Trustees with "the general responsibility for the proper operation of the retirement system" and further directed the PFRS Board to "establish rules and regulations for the administration of the [pension] funds" and "for the transaction of the board's and committees' business." N.J.S.A. 43:16A-13(a)(1),(7).

Further, the primary obligation of the PFRS Board of Trustees is directing policies and investments to achieve and maintain the full funding and continuation of the retirement system for the exclusive benefit of its members. N.J.S.A. 43:16A-13(a)(1). In essence, the PFRS Board serves as fiduciaries and thus have a duty to protect the interests of all members and beneficiaries of the Retirement System and its "financial integrity." See Mount v. Trustees of the Public Employees' Retirement System, 133 N.J. Super. 72, 86 (App. Div. 1975).

Unequivocally, the Legislature did not delegate to the NJDPB or PFRS general subject matter authority concerning the validity and interpretation of settlement agreements between an employee and employer so as to constitute a legal forum for the purposes of triggering a severance provision. Nor does the NJDPB's or PFRS's delegated

authority, concerning administration of the retirement system, imply an authority to do so.

Accordingly, the NJDPB and PFRS are not a legal forum for purposes of triggering the severance provision of the Agreement; therefore, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

B. ASSUMING ARGUENDO, THE NJDPB IS A LEGAL FORUM FOR PURPOSES OF THE AGREEMENT, THE SEVERANCE PROVISION WAS NOT TRIGGERED.

Assuming arguendo, the NJDPB is a legal forum for purposes of the triggering the severance provision of the Agreement, the Chancery Division erred by severing the return to work provision because the NJDPB never declared said provision illegal, unenforceable, or ineffective.

Under the Agreement, the Parties agreed that "if any of the provisions, terms, clauses or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses or waivers or release of claims or rights shall be deemed severable[.]" See DA019 at ¶ 18.

Applying the same contract interpretation principals of Barila, supra, and Schenck, supra, up until the Chancery Division's decision, no legal forum had opined that Plaintiff's 30-day unpaid reinstatement violated or was preempted by state or federal law or was otherwise unenforceable or ineffective under common law or as a matter of public policy.

Rather, the Division's regulations require that an applicant for disability retirement benefits must show that he or she retired "due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment." N.J.A.C. 17:1-6.4(a). A member cannot apply if their employment ended pursuant to a "settlement agreement reached due to pending administrative or criminal charges, unless the underlying charges relate to the disability." N.J.A.C. 17:1-6.4(b)(2). Likewise, a member who "voluntarily separated from service for reasons other than a disability" cannot apply. N.J.A.C. 17:1-6.4(b)(4).

Thus, both the Division and Pension Board determinations pertained to Plaintiff's eligibility for IOD, not the validity of the actual Agreement or provisions therein.

Yet, as argued supra, the Chancery Division deviated from that distinction by adopting Plaintiff's argument that the Township violated its duty under the Agreement to effectuate Plaintiff's IOD application when it refused to modify the Agreement following the determinations of the Division and Pension Board.

In doing so, the Chancery Division held that the Township's bringing about of Plaintiff's IOD application before the NJDPB and Pension Board was insufficient but neither explained the definition of "effectuate" that it applied nor rationalized its departure from the plain and ordinary meaning of "effectuate".

Thus, the Chancery Division ran afoul of basic contract interpretation principles by extending the scope of the circumstances triggering the severance provision so as to include administrative determinations on Plaintiff's IOD eligibility.

Accordingly, the Chancery Division errantly decided that the NJDPB's denial of Plaintiff's IOD application triggered the severance provision of the Agreement; therefore, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

POINT V

SEVERANCE OF THE IRREVOCABILITY PROVISION WOULD DEFEAT THE CENTRAL PURPOSE OF THE AGREEMENT; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED AND PLAINTIFF'S COMPLAINT DISMISSED WITH PREJUDICE.
(DA201 at ¶¶ 1-2; DA202 at ¶¶ 1-3).

Assuming arguendo, the NJDPB is a legal forum for purposes of the triggering the severance provision of the Agreement, the Chancery Division erred by severing the irrevocability provision because it would defeat the central purpose of the contract.

Freedom of contract is a basic tenet of our law enabling parties who bargain at arms-length to generally contract as they wish because they are "conclusively presumed to understand and assent to its legal effect." Marcinczyk v. State of New Jersey Police Training Comm'n, 203 N.J. 586, 592-93 (2010)

If "a contract contains an illegal provision, if such provision is severable the courts will enforce the remainder of the contract after excising the illegal portion." Roman v. Bergen Logistics, LLC, 456 N.J. Super. 157, 170 (App. Div. 2018) (quoting Naseef v. Cord, Inc., 90 N.J. Super. 135, 143 (App. Div. 1966)). However, "[i]f striking the illegal

portion defeats the primary purpose of the contract, [this Court] must deem the entire contract unenforceable." Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 33 (1992).

Here, the central purpose of the Agreement was the amicable resolution of disciplinary charges that the Township filed against Plaintiff. Each party received specific considerations in furtherance of this purpose for agreeing to forego a disciplinary hearing and potential termination: The Township received Plaintiff's valid, binding and irrevocable resignation and Plaintiff received the opportunity to separate in good standing without the cloud of disciplinary charges hanging over his head. See DA017-DA018 at ¶¶ 10 and 12-13.

In contrast, the Parties never bargained as to a specific outcome for Plaintiff's disability retirement claim, instead, the Parties' bargained for exchange merely allowed Plaintiff to roll the dice by attempting to file an IOD application. Crucially, Plaintiff received the opportunity to separate in good standing regardless of the outcome of his IOD application.

Further, the fundamental aspect of Plaintiff's binding and irrevocable resignation was on display at oral argument, where the Township reiterated that it desired to proceed with termination if the

Court severed or otherwise amended the provision at issue. See 1T8:8-1T9:2; 1T23:24-1T25:17.

A contract "should not be interpreted to render one of its terms meaningless." Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011). Permitting a party to "repudiate the unfavorable parts of a contract and claim the benefit of the residue" constitutes unjust enrichment, binding the parties "to a contract which they did not contemplate." County of Morris v. Fauver, 153 N.J. 80, 97 (1998).

Yet, the Chancery Division's severing of the return to work provisions precisely defies Porreca, supra and Fauver, supra, by allowing Plaintiff to retain the benefit of separating in good standing, while rendering his resignation neither valid, binding, nor irrevocable.

In doing so, the Chancery Division, without any reference or explanation in its decision, rendered the Township's fundamental consideration meaningless and bound the Township to an agreement that it did not contemplate.

Historically, courts have been unwilling to invalidate an entire contract if doing so would be unfair because the parties have partially performed their bargain and are no longer in a position to revert to their former status. See e.g. Jones v. Gabrielan, 52 N.J. Super. 563, 573 (App. Div. 1958).

The instant matter uniquely obviates these concerns because the Agreement requires that Plaintiff's resignation letter be held in escrow. Nor do the NJDPB's regulations prevent Plaintiff from filing a new IOD application at a later date. Thus, the Parties can easily be restored to their former positions, the Township can proceed with termination proceedings, or, alternatively, negotiate a new settlement agreement.

Accordingly, the Chancery Division's decision to grant severance defeated the essential purpose of the Agreement; therefore, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

POINT VI

PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES PRIOR TO SUING THE TOWNSHIP; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED AND PLAINTIFF'S COMPLAINT DISMISSED WITH PREJUDICE.
(DA201 at ¶¶ 1-2).

The Chancery Division's opinion fails to consider whether Plaintiff exhausted his administrative remedies prior to commencing the instant litigation, despite the Township raising the issue in briefing and at oral argument.

The only difference between the instant matter and In re Adoption of N.J.A.C. 17:1-6.4, supra, Cardinale, supra, and their progeny cases is that Plaintiff has chosen to sue his employer instead of the Pension Board and otherwise place his administrative appeal on hold upon receipt of an unfavorable, but not unexpected decision concerning his IOD application.

The Pension Board transferred the matter to the Office of Administrative Law ("OAL") pursuant to Plaintiff's appeal of the Pension Board's ruling. Instead of perfecting his appeal and having the matter be heard substantively, Plaintiff instead had the OAL matter placed on the "inactive list" and thereafter filed the instant matter in Superior Court.

Although Plaintiff has the right to appeal the Pension Board's denial to the Office of Administrative Law, that is the appropriate forum if Plaintiff believes that the Pension Board improperly denied his IOD application. It is a "firmly embedded judicial principle" that Plaintiff has an obligation to exhaust "administrative remedies before resorting to the courts." Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 559 (1979).

Although the principal of administrative exhaustion is "neither jurisdictional nor absolute," Swede v. City of Clifton, 22 N.J. 303, 315

(1956), a court seeking to review a matter otherwise amendable to administrative review must consider "whether the exhaustion of remedies will serve the interests of justice." Abbot v. Burke, 100 N.J. 269, 297 (1985), rev'd on other grounds, 119 N.J. 287 (1990).

Further, the doctrine of exhaustion of administrative remedies will otherwise not apply when (1) the administrative remedies would be futile; (2) when irreparable harm would result; (3) when jurisdiction of the agency is doubtful, or (4) when an overriding public interest calls for a prompt judicial decision. New Jersey Civil Serv. Ass'n v. State, 88 N.J. 605, 613 (1982).

The Chancery Division's opinion granted severance of the Agreement despite neither it nor Plaintiff referencing how or why his decision to sue his employer while his appeal of the Pension Board's decision was ongoing was a permissible circumvention of the doctrine of exhaustion of administrative remedies.

Instead, the Chancery Division capitulated to Plaintiff's attempts to bully the Township into renegotiating the Agreement and simultaneously litigate the Pension Board's denial before both the Superior Court and the Office of Administrative Law.

Accordingly, the Chancery Division's decision to grant severance must be reversed as Plaintiff failed to exhaust his administrative remedies prior to commencing the instant litigation.

CONCLUSION

For all the reasons set forth herein, the Chancery Division departed from well-established caselaw in deciding that the Township breached the Agreement or granting severance of certain provisions of the Agreement.

Accordingly, the Township did not breach the Agreement, the Chancery Division's decision must be reversed and Plaintiff's complaint dismissed with prejudice.

Respectfully submitted,

DASTI & STAIGER, P.C.

Attorneys for Defendant/Appellant
Township of Barnegat

Dated: October 23, 2023

s/Christopher J. Dasti, Esq.
CHRISTOPHER J. DASTI, ESQ.
Of Counsel & On the Brief

s/Jeffrey D. Cheney, Esq.
JEFFREY D. CHENEY, ESQ.
On the Brief

Law Office of Steven J. Kossup, PC
18 Church Street
Suite 114
Newton, New Jersey 07860
Phone: (973) 940-1167 Fax: (973) 940-1169
E-mail: sjk@kossup.com
Attorney ID: 017471993

By: Steven J. Kossup, Esq., for Respondent/Plaintiff Anthony King

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	)Superior Court of New Jersey
Anthony King	)APPELLATE DIVISION
Plaintiff/Respondent	)Docket No.: A-003881-22
v.	)
	)
Barnegat Township	)Trial Court Docket:
Appellant/Defendant	) OCN-C-12-23
	)
	)Sat Below:
	) Hon. Mark Troncone, JSC

RESPONDENT'S BRIEF AND APPENDIX

Steven J. Kossup, Esq.
on the Brief and Appendix for
Respondent Anthony King

Date:December 7, 2023

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PRELIMINARY STATEMENT

The contract dispute before this Court can be reduced to an equation – in a "Separation Agreement" (Da13-Da22), the parties agreed as follows:

If "A", then "B"

Presently, the "A" has occurred, and the Court appropriately ordered that "B" must follow as contemplated by the Separation Agreement itself. "A" occurred when an outside third party, the New Jersey Division of Pensions and Benefits, determined certain language in the parties' mutual Separation Agreement to be illegal, ineffective, and unenforceable. This required "B" to take place (severing of certain words in the Agreement as required by the Agreement. Appellant refused and breached its contractual obligation to sever the terms ("B") under the severance clause in that document. The Court's July 25, 2023 (Da 202-203, Da195-200,) correctly ordered that severance, but now Appellant appeals the matter.

Appellant has written much on the subject to justify its refusal to meet its obligation under the Agreement. The matter, as stated above, is not complicated, the Court's determination was sound, and Appellant's appeal should be denied.

STANDARD OF REVIEW

Appellant seeks review of the Trial Court's determination on summary judgment. "On appeal, we review a summary judgment decision de novo, applying the same legal standard as the trial court in determining whether the

grant or denial of summary judgment was correct. Hinton v. Meyers, 416 N.J. Super. 141, 146, 3 A.3d 601 (App.Div.2010); Antheunisse v. Tiffany & Co., Inc., 229 N.J. Super. 399, 402, 551 A.2d 1006 (App.Div.1988), certif. denied, 115 N.J. 59, 556 A.2d 1206 (1989). Of course, summary judgment is appropriate where "there is no genuine issue as to any material fact challenged and . . . the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Heyert v. Taddese, 431 N.J. Super. 388, 411.

This "De novo review applies when appellate courts review determinations about the enforceability of contracts, including arbitration agreements." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316, 199 A.3d 766 (2019) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186, 71 A.3d 849 (2013))." Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 23.

The Trial Court's decision was correct, and Appellant's appeal lacks merit. "A court's role is to consider what is "written in the context of the circumstances" at the time of drafting and to apply "a rational meaning in keeping with the expressed general purpose." Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302, 96 A.2d 652 (1953); *accord* Dontzin v. Myer, 301 N.J. Super. 501, 507, 694 A.2d 264 (App.Div.1997). Sachau v. Sachau, 206 N.J. 1, 5-6.

Further, the Appellant's arguments often contradict the terms, intent, underlying purpose and plain language of the contract. "It is well-settled that "[c]ourts enforce Contracts 'based on the intent of the parties, the express terms of the Contract, surrounding circumstances and the underlying purpose of the Contract.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118, 85 A.3d 947 (2014) (quoting Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506, 767 A.2d 979 (App. Div. 2001)). Matter of County of Atlantic, 230 N.J. 237, 254.

Wherefore, for the reasons outlined herein, the Trial Court's Orders of July 25, 2023 and August 14, 2023 must be upheld and Appellant's appeal denied.

PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS[1]

Respondent Anthony King was a Barnegat Township Police Officer. On November 5, 2021, Appellant Barnegat Township (*Hereinafter Appellant*) and Respondent Anthony King (*Respondent*) mutually entered into Separation Agreement and Release (hereinafter "the Agreement") (Da13-Da22) after several months of negotiations. Both parties acknowledged that Respondent was medically disabled for further service as a police officer (Da15, Par.3)

[1] The Statement of Facts and Procedural History are included together for judicial economy.

and, as noted in the Separation Agreement, Respondent's separation from service occurred in the following manner:

1. The Appellant filed the involuntary disability application (Hereinafter IOD) on behalf of Respondent (Da15, Par.3). The application was filed pursuant to N.J.A.C 17:4-6.10 and N.J.S.A. 43:16A-6 (*for Ordinary Disability Benefits/General Disability*). Appellant further agreed to thereafter take any action necessary to effectuate Respondent's Involuntary Disability Pension (Da16, Par.6) (Da12 – Resolution adopting Separation Agreement).

2. The Parties agreed that the New Jersey Division of Pensions and Benefits [Hereinafter NJDPB] was the only entity that could make a determination on the Involuntary Disability Application itself (Da16, Par.7). The parties therefore agreed in the Separation Agreement (Da16, Par.7) that the NJDPB was a legal forum, and Appellant's admission of that fact is included in the Trial Court's Order at (Da198) as well as in Appellant's brief at (Db28).

3. Under the Separation Agreement the parties agreed that any portion of the Agreement deemed illegal, unenforceable, or ineffective by a legal forum would be stricken from the agreement under a severance clause found at (Da19, Par.18).

4. The parties further agreed that any disputes under the Agreement itself would be resolved in the Superior Court of New Jersey (Da18, Par. 15).

On May 26, 2021, the NJDPB stopped processing the IOD because of certain language in the Agreement (Da 81). Thereafter, on August 10, 2021, the NJDPB determined that certain terms in the Separation Agreement were, in effect, illegal, ineffective, or unenforceable under N.J.S.A. 43:16A-8 and refused to process the disability application as matter of pension law (Da24-

Da25). The issue whether Respondent was permanently and totally disabled noted in under N.J.A.C 17:4-6.10 (6) and N.J.S.A. 43:16A-6 was not reached. The NJDPB letter further advised that Respondent had 45 days to request an appeal of this decision; if no appeal was taken from that legal ruling, the decision would be a final determination. Respondent necessarily filed an appeal to the Office of Administrative Law (OAL) on August 30, 2021 (Da91) and Respondent also requested Appellant's compliance under Par. 18 of the Agreement and its terms prior to filing suit on October 22, 2021 and January 27, 2022 (Da94 – Da103), but Appellant, in breach of the agreement itself, refused to sever the subject terms under the Agreement or otherwise resolve the situation (Da85) (Da96). Respondent then filed to enforce his rights under the Agreement before the Superior Court in accord with Par.15 (Da18) to have the offending terms stricken from the Separation Agreement so the case could proceed.

Respondent, at the OAL, moved to the administrative appeal placed on the inactive list per N.J.A.C 1:1-9.7, pending resolution of the issue in the Superior Court (Da184-Da185), as the Respondent's case would fail at the OAL as the OAL had no jurisdiction to enforce the Separation Agreement.

On April 20, 2022, Respondent filed suit in the Superior Court, Law Division under Docket OCN-L-839-22 - Respondent filed an amended

complaint on April 29, 2022 prior to any responsive pleading. Appellant, on May 9, 2022, demanded dismissal of Respondent's Superior Court Complaint (Da 105-106).

Appellant, in lieu of filing an answer in the Law Division claim, filed a motion for summary judgment on June 7, 2022 (Pa1-Pa2). Respondent cross moved for summary judgment on July 8, 2022, seeking a determination that Appellant breached the Separation Agreement in failing to strike the offending terms as required by Par. 18 of the Separation Agreement, specific performance under the Separation Agreement and damages. On August 5, 2022, the Court heard oral argument on the two motions for summary judgment and on August 31, 2022 denied both parties' motions for summary judgment without prejudice (Pa3-Pa4). Appellant filed an answer to the Law Division complaint on September 19, 2022, and the parties thereafter engaged in discovery.

On December 20, 2022, Respondent filed a motion to amend his complaint and transfer the matter to Chancery Division with Appellant's consent. On January 24, 2023, the Superior Court Law Division entered an Order (with consent) transferring the matter to Chancery Division and on January 26, 2023, the Court entered an Order permitting Respondent to file his amended complaint in Chancery Division (Da182).

On January 28, 2023, Respondent filed his amended complaint in Chancery Division under Docket OCN-C-00012-23 (Da 1-27). Appellant filed an answer to Respondent's amended Chancery Division complaint on January 30, 2023 (Da28-Da38).

The parties again, by consent (Da114-115), brought the matter before the Superior Court through summary proceedings: Appellant filed a motion for summary judgment on May 10, 2023 (Da45-Da129) and Respondent filed a cross motion for summary judgment on June 9, 2023 (Da130-Da186). Appellant filed a reply to Respondent's cross-motion on June 30, 2023.

The Trial Court heard oral argument on July 7, 2023 (1T) and entered its Order and opinion on July 25, 2023, denying Appellant's motion, but partially granting Respondent's cross-motion for summary judgment (Da195-Da203)[1]. Respondent *withdrew* the claim for monetary damages at a case management conference held on August 7, 2023, and on August 14, 2023 the Court entered its subsequent Order clarifying the July 25, 2023 Order (Da 204-Da205) as final. Appellant filed the within appeal on August 18, 2023.

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[1] The "partial" designation in the July 25, 2023 Order (Da202-Da203) concerned the fact that Respondent's issue of damages in the complaint had not yet been addressed by the Court under the July 25, 2023 Order – (these were not denied by the Court as Appellant notes at Db10).

Subsequently, on September 8, 2023, Appellant moved to stay the proceedings, denied by the Court at Da214.

The NJDPB reviewed the Trial Court Orders in this matter (Da195-Da205) and on October 18, 2023 remanded Respondent's appeal from the OAL to the Board level for an immediate vote on the merits of the Involuntary Disability as contemplated by the Separation Agreement (Pa5-Pa6). The appeal to the OAL is now moot and the NJDPB retains jurisdiction. However, pursuant to N.J.A.C. 17:1-6.2, the NJDPB is presently holding its vote on the merits of the IOD in abeyance pending the outcome of this appeal (Pa6). On November 16, 2023, Respondent filed a motion to supplement the record on appeal to include the NJDPB October 18, 2023 determination, as it was germane to the issues on appeal. On December 5, 2023 the Appellate Court granted Respondent's motion (Pa7).

LEGAL ARGUMENT

POINT ONE
APPELLANT BREACHED THEIR DUTIES UNDER THE SUBJECT AGREEMENT AND THE COURT MADE APPROPRIATE FINDINGS AND CONCLUSIONS IN ITS ORDER OF JULY 25, 2023

(Raised below at Da198, Da202)

The Court Order of July 25, 2023 notes that the intent of the parties is shown in the language of the Agreement itself: the parties mutually drafted an Agreement they intended would be accepted by the NJDPB and would allow a

vote on the merits of Respondent's disability application (Da16, Par.7). To that end, the parties acknowledged that the NJDPB has the legal authority to determine the application and is therefore a legal forum, both as in fact, as contemplated under the Agreement at Par. 7, and as admitted by the Appellant before the Trial Court (Da198) and in their submission at Db28. The NJDPB letters (Da81, Da24-Da25) concerned the NJDPB's legal determination that in this Separation Agreement was unlawful and this called for severance under Par. 18 of the Agreement – this declaration evidenced a potential condition contemplated by the parties at the time of drafting wherein a legal forum may declare aspects of the Separation Agreement to be a problem - once such declaration is made, then

> "such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties." (Da19)

The language of the Separation Agreement shows that the parties included a vehicle for resolution - any offending terms that triggered Paragraph 18 were to be stricken, with no limitation as to what terms are stricken. Appellant stated at Point II, Section B (Db16) that provisions concerning the disability application were at the forefront of negotiations and the parties appreciated the risk of some language in the Separation Agreement

causing a problem, so they specifically memorialized as much in the agreement. This admission includes the severance clause and obligations to effectuate the process of disability determination by the NJDPB. Appellant, however, in its breach, blocked that process and still refuses to sever the terms deemed "declared illegal, unenforceable, or ineffective" despite Appellant's admission that the NJDPB is a legal forum as contemplated in Par. 18 of the Separation Agreement (Da19).

The Court determined that Appellant breached this agreement (Da202). Paragraph 18 requires necessary action that should have immediately been taken pursuant to the mutual covenants under Paragraph 6 (Da16). The Court's July 25, 2023 Order enforced those terms and should be left undisturbed.

POINT TWO

APPELLANT'S CONTENTION AT POINT II C (DB 18-20) CONCERNING THE TERM "EFFECTUATE" BYPASSES THE TERMS OF THE AGREEMENT, IS WITHOUT MERIT, AND ADMITS TO APPELLANT'S BREACH

(Raised below at 1T 14:10-25, 1T 15:18- 1T 16:24, Da200)

Appellant was required under the Separation Agreement to file the Involuntary Ordinary Disability application, but on appeal focuses on the term "effectuate", isolating the term from the whole of the Agreement. The term "effectuate' is used in the Separation Agreement without limitation and speaks

to a full measure of effort to bring the Involuntary Disability Application to a vote on the disability merits of the case.

Presently, the NJDPB determined that the terms in the Separation Agreement blocked processing as certain sections were illegal and unenforceable (Da24-Da25). Appellant's refusal to strike the terms is in breach of Par. 6 of the Agreement, as the IOD cannot be "effectuated" without the offending terms being stricken (as required by Par. 18 and as recognized by the Trial Court at Da200). Appellant was required to comply with all terms of the Agreement. They did not, and this is a breach of the agreement as noted in the Trial Court's order at (Da202).

Since "the polestar of construction is to discover the intention of the parties as revealed by the language used by them" then Appellant's argument fails as interpretation of the Separation Agreement is in Respondent's favor (EQR-LPC Urban Renewal North Pier, LLC V. City of New Jersey City, 452 N.J. Super. 309, 319 (App. Div. 2016) (quoting Karl's Sales and Service Inc. v Gimbel Bros., Inc. 249, N.J. Super. 487, 493 (App. Div. 2016) certification denied 127 N.J. 548 (1991), 249 N.J. Super at 487, 492.)

There is also no basis in the record below for Appellant's contention that the Chancery Division derived the whole of its determination from a breach of Par. 6 of the Agreement, nor deviated from the plain and ordinary language of

the term "effectuate' to reach the determination on breach of the Agreement[2]. Rather, as indicated by the substance at oral argument, the intent of the parties was the Court's focus and the need to strike the offending language under Par. 18 of the Agreement (Da19) in order to make the Agreement effective. As noted in the Trial Court's opinion, Par. 6 of the parties' Separation Agreement cannot exist without Par. 18 (Da200):

> "Here, the Court finds no genuine issue of material fact exists. The Separation Agreement clearly states that any provision "declared illegal, unenforceable, or ineffective in a legal forum . . . shall be deemed severable." Def. Motion., Certification of Christopher J. Dasti, Esq., "Exhibit A," ¶ 18. The parties both acknowledge that the NJDPB is a legal forum and that said legal forum declared the provisions declaring Appellant's resignation irrevocable to be unenforceable in conjunction with the 2021 Agreement's provision that Appellant would "take all necessary steps to effectuate [Respondent's] involuntary ordinary disability retirement application" and the requirements of N.J.S.A. 43:16A-8(2). The provisions undoubtedly cannot coexist. Accordingly, severance of the subject provisions is necessary and summary judgment on that issue is appropriate. (Da199-Da200)

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[2] Par. 6 of the Agreement states: "King agrees to fully participate in the involuntary ordinary disability retirement process including appearing for any evaluations ordered by the PFRS Board of Trustees and/or Division of Pensions and Benefits. The Township will take all necessary steps to effectuate the involuntary disability retirement application, including, but not limited to, providing all medical information and taking all Governing Body action necessary. The Township Governing Body will immediately provide to King, through counsel, a copy of the Involuntary for his review concerning accuracy and for amendment if necessary." (Da 158)

Further, at oral argument the Court continued to focus on the intent of the parties:

> "THE COURT: Right. So -- so, that -- so, that the intent of the parties, I believe, was both parties acknowledge that he has a disability. Okay? Now -- and I understand that there were -- there were disciplinary actions pending or about to occur, but -- but both parties recognize that the disciplinary actions -- it's just -- it's in the agreement were -- were related to his underlying disability or his claimed disability and you allowed him to go then through this process. The parties thought it was in the best interest of both parties to allow him to go through this disability process, but he can't do that because he signed this letter so that -- you know, it made the whole point of the agreement between you and the employee unachievable. You know, because he was "cooked" because he signed this -- this resignation letter and (indiscernible) which kind of defeated the whole purpose of the agreement; right?" (1T 16:4-21) [*Note – the Court was repeating Mr. Dasti's earlier vernacular use of the term "cooked" leveled against Respondent at 1T 15:18-21*].

The Court properly focused on the parties' intent in making its determination.

> "Motivations or mental reservations cannot affect a written agreement. If they were permitted to do so, a written agreement would be worthless and the source of much litigation. The avoidance of such uncertainty is the precise reason for the Statute of Frauds and the companion parole evidence rule. The parties are bound by the intentions they express in their writing so long as that writing is complete and unambiguous on its face -- as this Contract is. 17 [***14] *Am.Jur.*2d 355, *Contracts* § 19; 1 *Williston, supra*, § 94 at 338. Zapanta v. Isoldi, 212 N.J. Super. 678, 687. "As a general rule, courts should enforce Contracts as the parties intended. Henchy v. City

> of Absecon, 148 F. Supp. 2d 435, 439 (D.N.J.2001); Barr v. Barr, 418 N.J. Super. 18, 32, 11 A.3d 875 (App.Div.2011). Similarly, it is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. Tessmar v. Grosner, 23 N.J. 193, 201, 128 A.2d 467 (1957).

Appellant's reference to the term 'effectuate" notes language in the agreement that directs and admits "the Township will take all necessary steps to effectuate the Involuntary Ordinary Disability Retirement Application, including, but not limited to, providing all medical information and taking all governing body action necessary.' (Da16, Par 6). This authority also appears in Appellant's formal resolution at Da12. It is evident, as recognized by the Court, that Appellant's refusal to sever the terms created a situation in which the Involuntary Disability noted at Da 15, Par. 3 of the agreement could never reach a determination on the merits as noted above (1T 16:4-21) (Da200).

Appellant claims error that the Trial Court applied an alternate definition of the term "effectuate" but provides no reference in the record below where the Trial Court did so (Db25 and Db34). The Trial Court in fact discussed the term "effectuate" in connection with reforming the Separation Agreement to remove the offending language so that the intent of the parties in signing the agreement could be accomplished (1T 14:10-25). Further, the Trial Court's analysis in its Opinion of the Court notes that Par. 6 and Par. 18 of the Separation Agreement (Da 16, Da19) could not co-exist without severance of

the offending terms noted as a bar to proceeding (Da200). Severance was required for Appellant to meet its own obligations under Par. 6 of the Agreement. Appellant refused to sever the terms and therefore did not meet its obligations under the Separation Agreement; consequently, the Trial Court's Order found Appellant in breach of contract (Db202).

POINT THREE
RESPONDENT MEETS ANY BURDENS UNDER THE FOUR PRONGS IN GLOBE MOTOR CO. V. IGDALEV, 225 N.J. 469, 482 (2016)

(Raised below at 1T 3:8-14, 1T 7:3-19, 1T 9:5-13, 1T 14: 5-23, Da195-202)

Contrary to Appellant's Point II (Db15), Respondent also meets the four prongs in Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016) as outlined in the Appellant's brief (at Db15).

1. Firstly, the parties entered into a Separation Agreement containing certain terms, and

2. Secondly, Respondent took all required action under the Agreement

3. Thirdly, Appellant did not perform as required and breached the terms of the Separation Agreement as found by the Trial Court and noted in the July 25, 2023 Order (Da202)

4. Fourthly, Appellant's breach in failure to do what this Separation Agreement required of Appellant deprived Respondent of his expectations under the Separation Agreement - presently, that Appellant would have amicably agreed to strike the terms declared to be illegal, unenforceable, or ineffective by the NJDPB and enable the Involuntary Disability Application to

> proceed to a vote before the NJDPB on the merits of Respondent's condition. The parties agreed that this condition was severe, disabling, and it was expected that the disability application would be granted although the NJDPB was to make that determination – instead, Appellant's breach damaged Respondent and blocked his ability to reach the mutually intended vote on the merits of the disability application.

POINT THREE, Sub Point One

Appellant, a legal entity, cannot enforce terms of an agreement that the entity now knows is illegal, unenforceable, or void against public policy both as a matter of law and in accord with Paragraph 7 of the Agreement.

Appellant's Point Two at (Db11) further posits that the Agreement is not subject to severance of its terms as no portion has been "declared illegal, unenforceable, or ineffective in a legal forum". That argument is contrary to most of Appellant's case where Appellant, in accusation, contends that Respondent actually knew the agreement was illegal all along. However, this agreement is to be construed as a jointly reached agreement as noted in Par. 20 of the Agreement (Da 20). Appellant's accusatory construction is impermissible against Respondent pursuant to the terms of the Separation Agreement. The parties, in drafting, believed those portions of the Separation Agreement were lawful and the document is to be construed as a joint product so that interpretation of any term cannot be leveled against either party (Da20). Further, a public entity cannot enter into an illegal contract as noted in the Pb46 at Point Twelve.

Nevertheless, this objectionable accusation acts as Appellant's admission that the terms are recognized, at least now, as illegal, unenforceable, or ineffective in a legal forum and should have been stricken with Appellant's consent.

POINT THREE, Sub Point Two:
The Separation Agreement invoked the Involuntary (Ordinary) Disability Application (IOD) process which, by N.J.A.C. 17:4-6.10, supports the Court's determination that the intent of the parties was that Respondent's case should reach a vote on the merits of the Respondent's disability.

The Involuntary Disability Regulation (found at N.J.A.C. 17:4-6.10) notes Respondent's Ordinary Disability (found at N.J.S.A. 43:16A-6) was projected to reach a vote on the merits of the related "permanent and total disability" required for those benefits. The Separation Agreement notes that the NJDPB is the only entity that could make such a determination on this legal status. The Regulation provides for submission of the application by the Employer (Appellant) and that a vote would be taken by the Board of Trustees on the question of permanent and total disability[3].

In the within matter, the parties agreed that Respondent was disabled, and that it was unlikely he would return (Da15, Par. 3, Da18, Par.17). Under

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[3] "In the event the Board finds that the member is not totally and permanently incapacitated for the performance of duty, the employer's application shall be disallowed and the employer shall be informed that the member should be returned to duty." N.J.A.C. 17:4-6.10

the agreement, Respondent is kept on medical leave, even until this day (Da15, Par. 3). Once the NJDPB determined that terms related to irrevocable retirement offended the law in this area (Da24-Da25), an impasse was created in reaching the question of disability. Appellant, in refusal to strike the terms, breached the agreement and repudiated its duty to under Par. 18 of the Separation Agreement so that NJDPB could reach the intended finding that the Respondent *was, or was not*, "totally and permanently disabled" for further services as an officer.

The intent in filing the Involuntary Ordinary Disability under the Involuntary Regulation (N.J.A.C 17:4-6.10) aims at the idea that the NJDPB could reach a determination on whether Respondent was permanently and totally disabled. Otherwise, Respondent could have filed for disability without the Appellant pursuant to N.J.S.A. 43:16A-6 – in that section there is no language which suggests that the Appellant "**shall be informed that the member should be returned to duty"** as found in N.J.A.C. 17:4-6.10. The hypothetical application under N.J.S.A.43:16A-6 may have been granted or denied. However, the parties as employer/employee mutually proceeded under this IOD section; Respondent did not know, in advance, that the Appellant would later breach these terms and block that process. The Trial Court's ruling to strike the terms and reach the subject determination under law is a sound

decision in accord with the facts of this case and the intent of the parties at the time of contract.

POINT THREE, Sub Point Three:
Appellant is not prejudiced by striking the subject terms of the Contract as noted in the Trial Court's Order (Da202-Da203).

The NJDPB is ready to hear the disability at this time having received the Order – the case has been remanded from the OAL/Administrative appeal (now moot) and is pending vote on the merits once this appeal is concluded (Pa5-Pa6). If disability were denied, Respondent is obligated to exhaust his appeals before being returned to duty. He would remain on leave of absence under the agreement. The Regulation notes only that the Appellant Employer **shall be informed that the member should be returned to duty** (N.J.A.C. 17:4-6.10). The provision is only a mandate of "notice." The Employer Appellant retains the ability to block his return in that instance because Respondent has already admitted to the severity of his disability (Da15, Par.3) and medical proofs/other documentation (*i.e. charges for errant behavior related to the disabling condition*) noted in the Agreement supports Appellant in that situation.

The legal process differs when a disability is awarded. The fact is that Respondent's mental health is such that he is not going to improve to return from duty. The Parties agreed this was "highly unlikely" (Da18, Par.17). The

section concerning his "return to duty" in Par. 17 of the Separation Agreement considers Respondent's "return to duty from permanent and total disability" as noted in NJSA 43:16A-8. The Irrevocable features the parties drafted concerning that "highly unlikely" possibility, to take effect, requires:

> (a) that the NJDPB must first reach a vote on the merits of permanent and total disability, and
>
> (b) Respondent, aged 51 at this time, must recover from his psychiatric condition before age 55 (N.J.S.A. 43:16A-8). After 55 he is ineligible to return to duty under that section.

Appellant in its breach blocked the intent of the parties in section (a). Section b, Respondent's return to duty, is unlikely, but that language was deemed ineffective and illegal by the NJDPB. It has been stricken. It is highly unlikely that Respondent would seek a return to the job at that age due to failing health. It is even more "highly unlikely" that the NJDPB doctor (psychiatric) would, before Respondent reaches 55, compel his return to examination and find his mental (medical) condition has reversed itself such that he is fit for duty. However, NJDPB found these terms to illegal, ineffective, or unenforceable (Da24-Da25). They were properly stricken by the Trial Court. Wherefore the Appellant's appeal must be denied, and the Trial Court's ruling left undisturbed.

POINT FOUR
THE SEPARATION AGREEMENT WAS PROPERLY CONSTRUED AS A JOINT PRODUCT OF THE PARTIES AND SHOULD NOT, AS APPELLANT REPEATEDLY CONTENDS, BE CONSTRUED AGAINST EITHER PARTY

(raised below at 1T 10:2-17)

Appellant argued at Db36 that Respondent should have known that the Agreement would be rejected by the NJDPB when he signed it. Initially, the Agreement is to be construed as a joint product of the parties and should not be construed against either party (Da 20, Par. 20). Therefore, in good faith and dealing, both parties acknowledged that a severance of certain terms might be required (Par.18), and the Agreement provided for that correction if that was needed. The scope of the Severance clause is not limited under the agreement.

Counsel for Appellant now claims that the parties knew the Agreement would never be honored, signed it anyway, and the Respondent was "cooked" once he signed a letter of resignation under the agreement (1T 15:20 to 1T 16:3). Appellant therefore is arguing against the facts of the case and its own agreement with Respondent. Therefore, the Court correctly observed,

> "THE COURT: -- Mr. Dasti, then why go through this whole exercise if everybody knew what the law was, and you know, everybody knew that because of this letter, you know, his application to -- for disability would have been futile, why enter into the agreement? I mean, why would anybody do that?" (1T 17:6-11)

The Court's inquiry was based upon well-established law:

> A court's role is to consider what is "written in the context of the circumstances" at the time of drafting and to apply "a rational meaning in keeping with the expressed general purpose." Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302, 96 A.2d 652 (1953); *accord* Dontzin v. Myer, 301 N.J. Super. 501, 507, 694 A.2d 264 (App.Div.1997). Sachau v. Sachau, 206 N.J. 1, 5-6.

Wherefore, Appellant's position at Point II (C) is without merit and without basis in the record below.

POINT FIVE
APPELLANT'S POINT I(D) FAILS TO IDENTIFY HOW THE TRIAL COURT DEPARTED FROM CASELAW

(Raised below at 1T 10:9 to 1T11:1, 1T 15:8-24)

Appellant's net conclusion that the Trial Court departed from well-established caselaw concerning Disability Pension Cases is without support in its brief or in the record and constitutes error (Db20-Db24)]. The Trial Court considered the very same arguments made at Db21-24 and was not swayed by Appellant's incorrect analysis of the caselaw (argument on Carr at 1T 10:9 to 1T11:1, argument on Cardinale at 1T 15:8-24).

Here, Appellant has not identified any genuine issue of material fact or issue of material fact overlooked by the Trial Court that warrants reversal. The Trial Court found:

> "Here, the Court finds no genuine issue of material fact exists. The Separation Agreement clearly states that any

> provision "declared illegal, unenforceable, or ineffective in a legal forum . . . shall be deemed severable." (Da199).

There is no requirement under the Court rules [R. 1:6-2(f)] that the Trial Court mark, catalog, and reply to every case cited in a brief. Appellant's argument seeks shift the focus from Appellant's obligation under Par. 18 to an unfounded accusation of the Trial Court's failure to analyze each of the various cases Appellant argued at the Trial Court level.

There is no error – the Court's ruling is based on the language of the contract, and "A contract is subject to the ordinary principles of contract law." Thompson v. City of Atlantic City, 190 N.J. 359, 374, 921 A.2d 427 (2007).

Again, the question before the Court was whether the terms declared to be illegal, unenforceable, or ineffective by the NJDPB should be stricken under the terms of the Separation Agreement – this is a question of contractual interpretation. Appellant reiterates his Trial Court argument concerning analysis of cases where employees were declared ineligible for their pensions or could have been fired for cause for criminal behavior – these are not controlling on this contract question, nor do these cases involve involuntary disability applications and severance clauses.

The facts sub judice are quite different than the matters raised in holdings from Cardinale, Carr, Rooth, and In RE Adoption of N.J.A.C 17:1-

6.4[4] (at Point II (D) Pg 20). These cases are not "remarkably similar" as Appellant suggests at Page 23 of his brief and do not support or advance Respondent's position.

Appellant's arguments on Cardinale and Carr were raised on the record at the oral augment and are not applicable (1T10:9-19,1T15:15-23). Further, Appellant's reference in its brief to Rooth and In Re 17:1-6.4 are also not applicable for the reasons stated below. Appellant's appeal is without merit. The Appellant's analysis of these cases is short on facts, self-serving, and misleading.

Analysis of those cases follows:

A. Cardinale v. Bd. of Trustees, 458 N.J. Super. 260, 266, 204 A.3d 312, 316 (App. Div. 2019)

The Appellant gives the Cardinale decision short attention and leaves out details that distinguish the case from the case *sub judice* (Db21-Db22). Initially, Cardinale was declared ineligible because the PFRS Board was of the opinion that, in

> **" [T]he Board may properly decline to process an application on the grounds that the cessation of employment arose solely out of disciplinary charges**

[4] Cardinale v. Board of Trustees, PFRS, 458 N.J. Super. 260 (App Div. 2019), Carr v. Borough of Glen Ridge, A-1124-20, EL 38864 (N.J. Super. Ct. App. Div. January 5, 2022) In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, Rooth v. Bd. of Trustees, Public Employees' Retirement System, 472 N.J. Super. 357

> **and was not based on an issue of disability.** Cardinale v. Bd. of Trustees, 458 N.J. Super. 260, 266, 204 A.3d 312, 316 (App. Div. 2019)

Cardinale was decided March 1, 2019 – the within Separation Agreement was submitted on November 5, 2020 (Da12-Da22). Contrary to Cardinale, Respondent is still employed and on a leave of absence (Da 15, Par. 3). Next, his medical leave and disciplinary charges concern his disability. The parties, in drafting the within Agreement, considered Cardinale and sought to align the Agreement with those margins. The parties also provided a vehicle in Paragraph 18 to address any possible determination by NJDPB regarding the language of the Agreement.

Further, the facts of Cardinale *are not applicable* and the case sub judice are different:

a. In the present action both parties agreed to a reinstatement provision (noted as 30 days) in the admittedly "unlikely" event that Respondent were found fit to return to duty (Da 18-Da19, Par. 17).

b. This was designed so that the Respondent, in the unlikely event that the NJDPB would want to reinstate a mentally disabled 51-year-old officer (before he turned age 55 (N.J.S.A. 43:16A-8).

c. This provision allows the Appellant to return Respondent to his employment under the law, a concern noted in Cardinale.

d. The parties jointly believed that this provision would pass muster with the NJDPB but the corrective

language of Par. 18 (Da 19) was jointly included in the event another legal forum determined otherwise.

e. The parties had mutually recognized NJDPB as a legal forum in the Separation Agreement itself, and as Appellant admitted on the record (Noted in the Court's Order at (Da199-Da200).

a. Unlike Cardinale, the parties agreed that Respondent was medically disabled, and any charges were directly related to the medical disability as allowed by N.J.A.C. 17:1-6.4. The parties further agreed it is unlikely Respondent will improve (Da18-Da19, Par. 17 and Da 15, Par. 3) and as a result, Appellant agreed to file the IOD application pursuant to N.J.A.C. 17:4-6.10 and N.J.S.A. 43:16A-6.

f. Contrary to Respondent, Cardinale had problems with cocaine and allegation of PTSD – and Cardinale could have been fired *for cause,* (not for his medical inability to perform) and that fact triggered the eligibility provisions of N.J.A.C. 17:1-6.4 from which he could not return to duty per N.J.S.A. 43:16A-8(2) if he were granted disability [per N.J.S.A 43:16A-6 Ordinary Disability or N.J.S.A. 43:16A-7 Accidental Disability]. Appellant, too, was aware of these provisions at the time of drafting[5].

g. Unlike Cardinale, Respondent and Appellant both considered the involuntary application and related needs before the NJDPB, included the severance provisions, and both worked to make an agreement

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[5] In Cardinale the Court observed: "Pertinent to our standard of review, it is undisputed that Cardinale signed the Separation Agreement to resolve the disciplinary action. The Agreement does not mention Cardinale's alleged PTSD-addiction disability, which has since vanished or materially diminished. Rather, the Police Department dropped the disciplinary charges in exchange for Cardinale irrevocably resigning, and for no other reason." (*Ibid,* at 267)

that would be acceptable to the NJDPB in that legal forum.

h. Cardinale's facts further deviate from Respondent's case: the Employer in Cardinale took a "hands off' position that does not appear in the benevolent and otherwise supportive goal-oriented language that the parties in the present action reached in the Separation Agreement sub judice. Appellant here agreed to file the IOD application (unlike in Cardinale) and even now holds Respondent on a leave of absence (Da15, Par.3) in furtherance of other obligations found in the Separation Agreement *sub judice.*

Further, Cardinale held that an officer subject to termination for cause for use of CDS was retiring out of disciplinary charges and NOT from an issue of disability. If Cardinale's condition improved, the concern was he couldn't be returned to his job because he had no job to which he could return. That fact is not present here, but the parties were trying to work within Cardinale and included the 30-day return to work provision (Da18, Par. 17).

> "Thus, from a practical standpoint, the Board cannot statutorily cease paying any approved disability benefits, once they have begun, for an individual who voluntarily resigns from duty to settle disciplinary charges and **agrees never to return.** Allowing ongoing benefits under these circumstances unquestionably places a strain on the financial integrity of the fund and its future availability for those persons who are truly eligible for such benefits. Doing so would drain, weaken, and over burden the disability retirement system available to PFRS members. **Entertaining an ordinary disability retirement application – as the Board recognized – for members who irrevocably resign from service to settle disciplinary charges flowing from illegal use of drugs**

> **would violate public policy, contravene the rehabilitation statute, and encourage abuse of the disability retirement system."** Cardinale v. Bd. of Trustees, 458 N.J. Super. 260, 272–73, 204 A.3d 312, 320 (App. Div. 2019)

So, as was explained to the Trial Court below, the parties *sub judice* both believed the 30 day return to work provision at Par. 17 would be acceptable to the NJDPB. This was a practice in effect among local entities at the time of the drafting of the Separation Agreement (as noted herein in Point Five, Part B – discussing Carr). The severance provisions at Par. 18 were put in place should the effort prove to be wrong. The severance terms are included without limitation as to provisions or whether the subject terms "benefitted" either side, and interpretation of these terms or what should be stricken is directed by the plain language of the Separation Agreement and cannot interpreted against either party (Da 20, Par. 20).

Therefore, Appellant's argument as to Cardinale isn't applicable - the question before the Court was a question of contract interpretation - whether the terms declared to be illegal, unenforceable, or ineffective by the NJDPB should be stricken under the terms of the Separation Agreement.

B. Carr v. Borough of Glen Ridge, A-1124-20, EL 38864 (N.J. Super. Ct. App. Div. January 5, 2022)

The holding in Carr v. Borough of Glen Ridge is also not applicable and Appellant's reliance on the unpublished case is misplaced (Db13). Initially, the

2022 decision itself postdates the November 5, 2020 Separation Agreement in the case *sub judice*.

Carr does provide evidence that the 30-Day provision references the *then-accepted* practice among local counsel in handing these cases as noted above, but there is no written published authority, regulation, statute for use or prohibition of this provision, nor was Carr published at the time this Agreement *sub judice* was written.

By inclusion, the parties, too, acknowledged their belief that use of the 30-day provision was probably a viable term that would be effective to return person back to duty and off the pension payroll under N.J.S.A. 43:16A-8 – a concern noted in Cardinale. (see Cardinale analysis above at Pb24-Pb28).

Carr is further distinguished from the present action on its facts:

a. Carr sought a revision of their Agreement based on fraud and sought to reopen the settlement to insert a "Restoration Provision." To the contrary, Respondent seeks to enforce a provision to strike terms as required by Par. 18 of the agreement (Da19).

b. Carr concerns addition of terms not previously in the contact after a monetary settlement was finalized. Carr did not contain the clear mandate to strike any offending term as found in the within Agreement (Da19, Par. 18).

c. Respondent here does not seek such an amendment or inclusion of any term as did Carr, but instead seeks to strike the terms under language of the agreement itself as it is written. Further, the obligation to correct the

Agreement is ripe in light of the NJDPB's determination as to offensive terms at (Da24-Da25).

d. Carr had filed a complaint against the Employer for adverse employment actions in violation of the New Jersey Law against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Civil Rights Act, and the New Jersey Family Leave Act. In the present case, no such lawsuits were filed pre-contract by the parties.

e. Carr accepted settlement funds and his claims had been dismissed with prejudice. As such, revising a key material provision in Carr's agreement would send the parties back to the drawing board. In the present case, there was not a monetary settlement to resolve any lawsuit. Instead, there exists, to this day, a series of continuing duties noted in the Agreement that did not appear in Carr.

f. In Carr the employer offered a 30-day provision as noted here. Carr rejected the option. Instead, he settled his case for $645,000.00 under a general release absolutely and forever. The thirty-day provision never reached the NJDPB in Carr.

g. In Carr there was no expressed intent to move Carr towards involuntary disability, nor any agreement that he was medically disabled; the employer acquiesced that they wouldn't stand in his way.

h. Respondent does not present a fraud argument as found in Carr; rather the parties reached the final agreement in October 2020 (ratified November 2020) believing that it would work and included the Par. 18 safeguard to ensure the agreement was effective.

Contrary to Defendant's position at Db13, the jointly reached Agreement between the parties bypasses Carr and intends that the parties would continue

to work together to keep the Separation Agreement viable as the matter progressed so that they may have the involuntary disability merits reach the NJDPB Board.

Appellant further misinterprets the Carr holding in his argument that Respondent, having entered into a Separation Agreement, is left with no legal recourse against the Appellant. That is also not accurate. The Agreement itself identifies the Superior Court as venue for any dispute under the Agreement (Da18, Par. 15). Wherefore, for the reasons stated herein, Carr is not applicable to this case and Appellant's appeal must be dismissed in toto.

C. Rooth v. Bd. of Trustees, Public Employees' Retirement System, 472 N.J. Super. 357, 363

Appellant's analysis under Rooth (Decided June 3, 2022) is likewise not applicable to the within action (Db23). Rooth also postdates the Separation Agreement and again, unlike Respondent, Rooth was removed from her employment due to reasons of a criminal nature unrelated to her alleged disability:

> "Rooth was subsequently charged with several moving violations: driving while intoxicated, reckless driving, driving while intoxicated in a school zone, driving while intoxicated in a school crosswalk area, and driving while intoxicated with a minor child present, as well as administrative charges. There is no proof that the disciplinary charges concerned an alleged disability that caused her to have the accident." Rooth v. Bd. of Trs.,

Pub. Emps.' Ret. Sys., 472 N.J. Super. 357, 361 (App. Div. 2022

Respondent's case does not involve such termination for cause but does involve an irrevocable resignation provision held in escrow until the IOD application is complete and all appeals exhausted (Da17, Par.11). That provision would be moot unless he returned to work from a disability pension (N.J.A.C 17:4-6.10, N.J.S.A. 43:16A-6), an admittedly unlikely situation (Da18, Par. 17). Respondent is presently *still* on a leave of absence with the Employer and has not been terminated contrary to Rooth. The facts of this case are distinguished and Rooth does not apply and does not affect the Trial Court's order (Da195-Da200, Da202-Da203).

D. Thorpe v. Bd. of Trs., 2023 N.J. Super. Unpub. LEXIS 332, *1

Appellant's reference to Thorpe also supports Respondent, not Appellant - once again, as in the above noted cases, Thorpe was removed for reasons not related to disability.[6]

[6] "By way of background, it is well established "that eligibility for disability retirement benefits requires members to make a prima facie showing that **they cannot work due to a disability**. To that end, voluntary or involuntary termination of employment, **for non-disability reasons, generally deems a member ineligible for disability benefits.**" In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 394 (App. Div. 2018).

Appellant's reference to these cases is contrary to Respondent's situation as outlined in the Agreement. Respondent was not removed for cause (he remains on a medical leave) he is retiring due to an agreed upon medical disability, and Respondent's charges related to the disability were dismissed (and there was no criminal charge, or other such charge, implicated).

Respondent's case differs from all the cases cited by Appellant; the above cases concern charges "for cause" unrelated to the disability and the individuals had no job to return to in the event their condition improved.

Appellant presented the argument on the above cases to the Trial Court, and the Trial Court heard Respondent's opposition, reviewed the papers, and considered arguments of counsel as noted in the Order (Da202). The Trial Court issued a sound ruling and the Appellant's appeal should be dismissed.

POINT SIX
APPELLANT'S ARGUMENT (DB33) THAT ALL SEPARATION AGREEMENTS UNDER N.J.A.C 17:1-6.4 AUTOMATICALLY BAR ELIGIBILITY FOR DISABILITY BENEFITS IS COMPLETELY WRONG

(*Raised below at 1T 5:4-7, 1T 7:3-16, 1T 17:20-25)*

Appellant is wrong in the assertion that Separation Agreements are an automatic bar to pension proceedings. N.J.A.C. 17:1-6.4 specifically notes that Separation Agreements on charges reached where the underlying charges relate to the disability are permissible. In this case, as Appellant is aware, the

Agreement states that disciplinary charges noted in the Agreement directly related to an admitted medical disability (Da15, Par. 3, Da18, Par.13). No other charge was present or operative:

> "According to the Division, the separation from service rule "is intended to prevent members from applying for a disability retirement benefit when their service has voluntarily or involuntarily terminated for reasons unrelated to a disability." Ibid. In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, 398.

Appellant's reference to In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, is not applicable and does not affect the Court's ruling on the contractual terms of the Settlement Agreement.

Appellant next argues is that the NJDPB wouldn't accept the Agreement even if the terms were stricken, and the Respondent knew or should have known that the NJDPB would never accept the agreement – that argument is unavailable on these facts herein. Now, with the terms stricken by the Trial Court, NJDPB is ready to vote on the IOD following the resolution of the within appeal (Pa5-Pa6).

Wherefore, Appellant is wrong - separation agreements are not all rejected by the NJDPB; the regulation permits Separation Agreements under the circumstances presented here (N.J.A.C 17:1-6.4 (b)(2)]) and as shown in the

NJDPB intent to vote on the merits of the disability following the Trial Court's ruling (Pa5-Pa6, Da 202-203).

POINT SEVEN
THE TRIAL COURT'S ORDER OF JULY 25, 2023 PROPERLY ENFORCED THE PARTIES AGREEMENT AS WRITTEN

(Raised below at 1T16:13-16, 1T17:6-21, 1T18:12 to 1T20:21, 1T 22:6-25, 1T19:12-23, 1T 22:6-25, and Da199-Da200)

Initially, since the Trial Court found that Appellant breached the Separation Agreement (Da202, then the issue of specific performance thereafter follows, as required by Totaro: "Performance makes the non-breaching party whole by requiring the breaching party to fulfill his or her obligation under the agreement. *See id.* at 444, 453 A.2d 160. Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1, 13

Appellant's argument at Db 24 that the Trial Court failed to review the within matter for specific performance under Marioni fails, as the Appellant argued Marioni in his moving papers below[7]. The Trial Court heard argument on the Marioni factors during oral argument and these factors were also noted in the parties' moving papers that were reviewed by the Trial Court in making its determination as noted below:

1) **The Separation Agreement at issue is valid and enforceable**: the validity of the Separation Agreement is not in dispute and was not raised below. Both parties

[7] Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588

agreed that the Separation Agreement was binding on each party and required each party to take certain actions thereunder.

2) **The terms of the Separation Agreement are clear, such that the court can determine with reasonable certainty the duties of each party and the conditions under which performance is due**: Both parties argued the plain language of the Separation Agreement in their moving papers below. This is not in dispute. was also addressed at 1T 22:6-25, and Da199.

3) **An order compelling performance would not be "harsh or oppressive" to the Appellant**; discussed at (1T19:12-23 discussing that it was in the interest of the Appellant to enter into the Agreement, (also1T 22:6-25), discussing both parties receiving a benefit by the disability filing)

4) **A denial of specific performance would leave Respondent without an adequate remedy** (addressed at 1T16:13-16, discussing best interest of both parties to file IOD, also at 1T17:6-21 discussing the futility of entering into the Agreement if the Agreement would not reach the level of an IOD vote, and 1T18:12 to 1T20:21 and Da200)

The Trial Court considered these factors and the July 25, 2023 and August 14, 2023 Orders should not be disturbed. Wherefore, Appellant's case should be dismissed.

POINT EIGHT
APPELLANT'S ANALYSIS UNDER *HOUSEMAN V. DARE*, 405 N.J. SUPER 538 (APP. DIV 2009) IS NOT APPLICABLE
(Not raised below)

Respondent, contrary to Houseman, only sought specific administrative

performance under Par. 18 of the Agreement. Respondent *withdrew* his claim for damages and the Court entered an Order on same (Da204). Money damages are inadequate to remedy Respondent's rights under the Separation Agreement. These were not "denied" as Appellant incorrectly suggested in his statement of facts (Db10).

There is no inequity here; in fact, there is no objective harm to Appellant once the offending language was stricken. Respondent will be removed from employment. The provisions to strike terms could have worked either way, the parties bargained for that agreement, and the Court ruled accordingly (1T 12:10 to 1T13:9).

POINT NINE
APPELLANT ADMITTED THAT THE NJDPB IS A LEGAL FORUM THAT WOULD TRIGGER PAR. 18 OF THE SEPARATION AGREEMENT CONTRARY TO HIS ASSERTION AT POINT IV.

(Raised below at Da198,1T 11:11-16)

Appellant argues, on one hand, that the NJDPB *is* a legal forum [Db29, Point IV(a)] then conversely argues, on the other hand, that the NJDPB is *not* a legal forum (Db 29-31 and Db 32-34, Db 35-41). The Trial Court recognized that both parties acknowledge the NJDPB is a legal forum (Da198) (Da16, Par. 7) and then properly determined that the terms of the NJDPB letter of August 10, 2021 (Da24-Da25) triggered the severance clause in the Separation

Agreement at Par. 18 noting the plain language of the agreement as noted in the Trial Court's July 2023 Order (Da199).

It is therefore established and admitted that the NJDPB is a legal forum. Initially, the New Jersey Administrative Code, Chapter 17 and N.J.S.A Chapter 43 provide the Board of Trustees, PFRS the legal authority to determine pension matters. Further, the Board is granted the authority to make findings of fact and conclusions of law, thus making it the legal forum for pension issues:

> "If the granted appeal involves solely a question of law, the Board may retain the matter and issue a final administrative determination which shall include detailed findings of fact and conclusions of law based upon the documents, submissions and legal arguments of the parties. The Board's final determination may be appealed to the Superior Court, Appellate Division." (N.J.A.C. 17:4-1.7).

The ability to determine what language in the Separation Agreement is illegal, unenforceable or ineffective therefore lies statutorily with the NJDPB. The Superior Court has no jurisdiction over pension matters, which is why the parties included Par. 7 and Par. 15 as to venue and decision-making authority (Da 158, Da 160). Appellant's interpretation (Db29), the language of the Separation Agreement merely states that the terms had to be declared illegal or unenforceable in a legal forum.

> "The Legislature vested the PFRS Board of Trustees with exclusive authority and "responsibility for the proper operation of the retirement system." N.J.S.A. 43:16A-13(a)(1)." In re I/M/O Town of Harrison and Fraternal Order of Police, Lodge No. 116, 440 N.J. Super. 268, 271
>
> "If resolution of a question before the PFRS Board of Trustees "involves a question of facts," the Board has the legal authority to refer the matter to the Office of Administrative Law for an evidentiary hearing before an Administrative Law Judge. N.J.A.C. 17:4-1.7(d). If the appeal before the PFRS Board of Trustees concerns only a legal determination, as is the case in most of the appeals we decide here, "the Board may retain the matter and issue a final administrative determination which shall include detailed findings of fact and conclusions of law based upon the documents, submissions and legal arguments of the parties." N.J.A.C. 17:4-1.7(e). Once the PFRS Board of Trustees reaches a final determination, the affected PFRS member has the right to appeal to the Superior Court, Appellate Division. Ibid." In re I/M/O Town of Harrison and Fraternal Order of Police, Lodge No. 116, 440 N.J. Super. 268, 294-295.

Appellant's recitation of cases at Db29 to Db31 does no harm to the Trial Court's ruling of July 25, 2023; instead, Appellant's argument at Db30-31 confirms that the Court correctly interpreted the matter. Appellant's closing position [Db32, first full paragraph] is contradictory to the admissions made in the balance of that point.

Appellant's Point IV (B) now suggests that the NJDPB never said the provision was illegal unenforceable or ineffective, which is completely contradictory to the NJDPB letters (Da 81 and Da 24-Da25) and contradictory

to their earlier admission that the language of the separation agreement itself was known to be illegal, unenforceable, or ineffective in a legal forum when the agreement was entered (Db28).

Further, Appellant's argument at Point IV(B) is contrary to the record on appeal. First, the Separation Agreement is clear that the determination of what was illegal, unenforceable or ineffective was to be made by a legal forum. Secondly, the Trial Court Order of July 25, 2023 (Par. 3) referred to the NJDPB letter of August 10, 2021 for defining the offending terms (Da202).

The authority of the NJDPB to determine what was illegal, unenforceable, or ineffective was admitted by Appellant at Db 29 and in the Separation Agreement itself at Par 7 (Da16).

The NJ Legislature has unambiguously vested the NJDBP Police and Firemen's Retirement System Board of Trustees with the general responsibility for the proper operation of the retirement system.

Pursuant to N.J.S.A 52:18A-95.1:

> "any reference in a law, rule, regulation, judicial or administrative proceeding, or otherwise to the Division of Pensions shall mean and refer to the Division of Pensions and Benefits and pursuant to N.J.S.A 52:18A-96 the subject Board is under the Department of the Treasury.

Further, pursuant to N.J.S.A 43:7-18.1:

> "[T]he Division of Pensions and Benefits in the Department of the Treasury shall have the general

> responsibility for the proper operation of the pension fund and shall have such powers and shall exercise such functions and duties, as may be necessary and appropriate for the proper operation of the fund, subject to the provisions *of* P.L.1955, c.70 (C.52:18A-95 et seq.). .... The Division may make all necessary rules and regulations. Such rules and regulations shall be consistent with those adopted by the other pension funds within the Division of Pensions and Benefits in order to permit the most economical and uniform administration of all such retirement systems."

Pursuant to N.J.S.A 52:9HH-2.1:

> "[T]he Division has been directed by the Legislature to review any proposed legislation which constitutes pensions or health benefits legislation. The legislation shall not be considered nor voted on until this is completed."

Pursuant to N.J.A.C. 17:4-1.7:

> "The following is... noted in every written notice setting forth the Board's determination in a matter where such determination is contrary to the claim made by the claimant or the claimant's legal representative:
>
> "If the member disagrees with the determination of the Board, the member may appeal by submitting a written statement to the Board within 45 days after the date of written notice of the determination. The statement shall set forth in detail the reasons for the member's disagreement with the Board's determination and shall include any relevant documentation supporting the claim. If no such written statement is received within the 45-day period, the determination by the Board shall be final."

Under N.J.A.C 17:4-1.7(e), the NJDPB's final determination may be appealed to the Superior Court, Appellate Division.

Further, pursuant to R. 2:2-3 (a)(2), once a State Agency decision is final, the Appellate Division then has the authority to review the final decisions or actions of any state administrative agency or officer. This relief from a final determination is not available to Respondent yet, because there is no final determination by the NJDPB on the IOD application.

Further still, the Separation Agreement does not call for a "final determination' or exhaustion of administrative appeals (Argued at Db 38, Point VI) before Paragraph 15 of the Separation Agreement (Da18) can be enforced – this paragraph directs the parties to go to the Superior Court of New Jersey in the event of a dispute under the Separation Agreement. Respondent's actions herein are responsive the terms of the Contract. The Court's July 25, 2023 Order did not award benefits. Instead, it enforced the Agreement itself under the plain language of that document.

POINT TEN
CONTRARY TO APPELLANT'S ARGUMENT AT DB34, THERE HAS BEEN NO DETERMINATION ON THE MERITS OF THE INVOLUNTARY ORDINARY DISABILITY APPLICATION

(Raised below at 1T 5:16 to 1T 6:20)

Contrary to Appellant's argument at Db 34, the NJDBP has not voted on Respondent's IOD (Pa5-Pa6).

Further, as recognized by the Trial Court and confirmed by the NJDPB at Pa5-Pa6, the Disability case has cannot even be heard by the NJDPB:

> "THE COURT: -- Mr. Dasti, then why go through this whole exercise if everybody knew what the law was, and you know, everybody knew that because of this letter, you know, his application to -- for disability would have been futile, why enter into the agreement? I mean, why would anybody do that?" (1T 17:6-11)
>
> "THE COURT: But he couldn't -- but he make his case. He couldn't make his case because that -- that -- that agreement or that letter that he signed made it all futile. He couldn't make his case. The Division would never accept his application." (1T 17:16-21)

Appellant's argument is without merit and the Trial Court Order should be upheld.

POINT ELEVEN
RESPONDENT WAS NOT REQUIRED TO EXHAUST ALL ADMINISTRATIVE REMEDIES

(raised below at 1T 17:25 -1T 18:5, also 1T 18:22-25, also 1T 25:23 to 1T 25:7)

Appellant's Point VI is without merit and contrary to the provisions of Par. 11 of the Separation Agreement.[8] Further, the arguments at Appellant's Point VI speak to a denial and appeal of the Involuntary; there has been no denial and therefore no subsequent appeal of the Disability itself as noted in the record below.

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[8] "Notwithstanding the binding and irrevocable nature of King's letter of resignation, the letter will be held in escrow while and until King's involuntary disability pension application is decided upon by the New Jersey Division of Pensions and Benefits and King has exhausted all rights of appeal flowing from the disability application." (Da17)

Initially, there is no requirement in the Separation Agreement that Respondent must exhaust all administrative remedies prior to the complaint for specific enforcement – in fact, the Separation Agreement speaks to the Superior Court as the venue for this dispute. This dispute concerns the terms of the Separation Agreement, not the outcome of the NJDPB case, a separate matter in a separate venue under a separate proceeding. Next, as Appellant admitted in Point IV, the OAL has no authority to enforce any aspect of the Separation Agreement noted here (i.e. to strike terms). Thirdly, Respondent appealed the May 26, 2021 and August 10, 2021 ***eligibility*** denial based on the terms of the parties Separation Agreement to the Office of Administrative Law (Da81, Da24-Da25) which is now moot (Pa5-Pa6); contrary to Appellant's argument at Db39, there was no denial of the Disability Application itself, as the merits of the IOD never reached the Board of Trustees, PFRS. The Trial Court made no determination on the pension laws either – it only enforced the terms of the Separation Agreement in light of Appellant's continued breach as recognized in multiple points on the record at oral argument (1T 6:16-22, 1T17:6-21, 1T18:12 to 1T20: 21, 1T 22:7-25).

Even if the Appellate Court sought fit to revisit the Appellant's "exhaustion of administrative remedies argument," Appellant does not meet the standard for such requirement. Initially, it will leave the Respondent

without a remedy in violation of the Marioni factors. "Admittedly, the exhaustion requirement will be waived where "the interest of justice so requires." Ward v. Keenan, supra, 3 N.J. at 308; Waldor v. Untermann, 10 N.J. Super. 188 (App. Div. 1950). This has been held to mean that exhaustion of remedies will not be required where administrative review will be futile, where there is a need for prompt decision in the public interest, where the issues do not involve administrative expertise or discretion and only a question of law is involved and where irreparable harm will otherwise result from denial of immediate judicial relief. See generally, Pressler, Current New Jersey Court Rules, Comment R. 4:69-5, at 748-49 (1975)." Brunetti v. New Milford, 68 N.J. 576, 589. Here, exhaustion of the administrative appeal on the eligibility issue would have been futile, as the offending language of the Separation Agreement would have prevented eligibility in the administrative forum. Appellant was required under Par. 18 to sever any unenforceable, illegal, or ineffective terms – the NJDPB made this determination (Da81) (Da24-Da25). If Appellant had complied, then Respondent's case would have resolved to his favor long ago. Now, the only bar from the NJDPB reaching a vote on the IOD application is the within appeal (Pa-Pa6).

There was no requirement to exhaust administrative remedies when the parties identified, in the Agreement at Par. 15, that the Superior Court was the

venue to resolve Agreement disputes. Accordingly, Appellant's argument on Respondent's requirement to exhaust all administrative remedies is not applicable, the Court's July 25, 2023 Order is sound, and the Appellant's appeal should be dismissed.

POINT TWELVE
APPELLANT SEEKS TO ENFORCE TERMS THAT VIOLATE PUBLIC POLICY

(Raised below at 1T 25:8-13)

Appellant argues that the Order of July 25, 2023 should be reversed and the subject terms deemed by the NJDPB to violate law and contravene public policy under the law should be enforced – they should not – they should be stricken, and the Court properly did so –

> [I]t is an established rule that a Contract valid where made will not be enforced in this State if it contravenes the public policy thereof, or is inconsistent with that policy as declared by the Legislature. Lobek v. Gross, 2 N.J. 100, 102, 65 A.2d 744 (1949); Minzesheimer v. Doolittle, 60 N.J. Eq. 394, 397, 45 A. 611 (E. & A. 1899); Flagg v. Baldwin, 38 N.J. Eq. 219, 244 (E. & A. 1884); Thompson v. Taylor, 65 N.J.L. 107, 109, 46 A. 567 (Sup.Ct.1900). from HIMC Inv. Co. v. Siciliano, 103 N.J. Super. 27, 35, 246 A.2d 502, 506 (Law. Div. 1968)

"Public policy" is often "broadly" defined as the "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." *Black's Law Dictionary* at 1351 (9th ed. 2009). In this case, the irrevocable resignation was thought to be

cured by the "30-day' provision noted above, but was, post-Separation Agreement, deemed in contravention of law and public policy. The construction of the Agreement is a product of both sides, so to that extent the Appellant entity is deemed complicit in any public policy question even though the error occurred in good faith. There is no restrictive language in the agreement that leaves only Respondent exposed and Appellant protected here. The obligation to correct this error is a mutually reached product of the Separation Agreement where, in this instance, the obligation falls to the Appellant and survives the denial at the NJDPB level.

Appellant's argument now *further* demands that the Appellant not only be relieved of its obligations under the Separation Agreement, and by extension, that Appellant, a public entity, should benefit from a jointly reached agreement that violates public policy. Consequently, Appellant's argument fails because "a Separation Agreement to do an act forbidden by law is void and cannot be enforced in a court of justice. Tiffany v. Boatman's Sav. Inst., 85 U.S. 375, 376, 21 L. Ed. 868 (1873) Separation Agreements in violation of statutes are void whether the consideration to be performed or act to be done be a violation. Harris v. Runnels, 53 U.S. 79, 80, 13 L. Ed. 901 (1851).

The act and consideration here are mutual obligations that both parties should make the corrections – Appellant refused, and the Court appropriately enforced the agreement.

POINT THIRTEEN
APPELLANT MISPRESENTS THE RECORD BELOW
(Not raised below)

Appellant represents that only certain language be stricken by the Court, but Par. 18 of the Agreement (Da19) places no limitation on what should be stricken, nor does it support the Appellant's argument.

Next, Appellant egregiously misrepresented the nature of the Agreement - Appellant's arguments at Db36 are contrary to the actual Agreement and the parties' intent in drafting the Agreement. Respondent was not allowed to "roll the dice by attempting to file an Involuntary Disability Application" (Db36). Appellant filed the involuntary disability application (Da15, Par.3) pursuant to N.J.A.C 17:4-6.10 and as required by the Separation Agreement. The involuntary disability process can only be filed by the Appellant and therefore Appellant's "roll the dice" argument was neither contemplated by the Separation Agreement nor was it the intent of the parties, nor is it factual.

Appellant's argument on appeal relies on continued misrepresentations. The Trial Court was not swayed by Appellant's arguments that the resignation letter was a material issue to the creation of the Separation Agreement (argued

extensively: 1T 17:6-21, 1T 20:13 to 1T26:25) and the Trial Court's Order should be upheld.

CONCLUSION

Wherefore, for the reasons stated herein, the Chancery Division's Orders of July 25, 2023 and August 14, 2023 are sound and must remain undisturbed. Consequently, Appellant's must be dismissed in toto.

Law Office of Steven J. Kossup, PC

By: _____
Steven J. Kossup, Esq. for
Respondent Anthony King

Dated: December 7, 2023

JEFFREY D. CHENEY, ESQ. [307862019]

DASTI & STAIGER
310 Lacey Road | P.O. Box 779
Forked River, NJ 08731
O: 609-549-8990 F: 609-549-5043

Attorneys for Defendant, Barnegat Township

ANTHONY KING, Plaintiff, v. BARNEGAT TOWNSHIP, JOHN DOES 1-5, JANE DOES 1-5, and ABC CORPORATION 1-5, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION CASE NO. A-003881-22 **On Appeal from the Orders entered on July 25, 2023 and August 14, 2023** SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION OCEAN COUNTY DOCKET NO.: OCN-C-12-23 Sat Below: Hon. Mark A. Troncone, P.J.Ch.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT BARNEGAT TOWNSHIP

DASTI & STAIGER, P.C.
Attorneys for Defendant-Appellant
Barnegat Township

Of Counsel and on the Brief:
Christopher J. Dasti, Esq. (13802010)

On the Brief:
Jeffrey D. Cheney, Esq. (307862019)

Submitted on: December 18, 2023

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PRELIMINARY STATEMENT

In the instant matter, Plaintiff seeks to once again, as he did below, completely ignore the established binding legal precedent that has been decided and reinforced numerous times by the Appellate Division. Simply, Plaintiff voluntarily executed a Settlement Agreement (the "Agreement") which dismissed pending disciplinary charges in order to give Plaintiff the opportunity to file for Involuntary Ordinary Disability ("IOD") Retirement. Plaintiff acknowledged by way of executing the Agreement that it was not definitive that he would receive the IOD retirement, that he was essentially taking a chance.

The State of New Jersey, Department of the Treasury, Division of Pension and Benefits' ("NJDPB" or the "Division") Police and Firemans' Retirement System ("PFRS" or "Pension Board") denied his application based on eligibility, and Plaintiff by way of this litigation, Plaintiff seeks to renegotiate the material terms of the Agreement.

The Chancery Division had no authority to rewrite the material terms of the Agreement – to wit that Plaintiff would irrevocably resign from the Township Police Department if his retirement application was denied.

Therefore, the Chancery Division clearly erred in its decision and the Order must be reversed and the Complaint dismissed with prejudice.

Parenthetically, Plaintiff's Point Thirteen in his Appellate Brief seeks to allege that the Township misrepresents the record below. Nothing can be further from the truth, and the page that Plaintiff devotes to this attempted character attack is misguided. To be clear, the Agreement speaks for itself and without a doubt indicates that Plaintiff was taking a chance filing an application for the IOD disability retirement. Nothing is misrepresented on behalf of the Township, and Plaintiff's attempt to assert same is unbecoming and without merit.

For all the reasons set forth in the Township's initial brief and this reply brief, the Order must be reversed and the Complaint dismissed with prejudice.

LEGAL ARGUMENT[1]

POINT I

THE TOWNSHIP DID NOT BREACH ITS DUTIES UNDER THE AGREEMENT; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED.
(DA201 at ¶¶ 1-2; DA202 at ¶¶ 1-2).

Plaintiff urges the Court to affirm the Chancery's Division determination that the Township breached the Agreement, however, Plaintiff has failed to even establish a prima facie claim for breach of contract. Specifically, Plaintiff has not proven by a preponderance of the evidence that the Township breached the contract or that said breach caused a loss to him. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016); see also Liberty Mutual Ins. Co. v. Land, 186 N.J. 163, 169 (2006).

The Parties largely agree on the applicable principles of contract interpretation. Namely, that the Agreement is a settlement agreement for which enforcement thereof is the same as a contract. Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008). As a result, in construing

[1] For the sake of judicial economy, the Township replies to the thirteen points within Plaintiff's Opposition Brief with two points, and appropriate subpoints.

the Agreement, "the plain language of the contract is the cornerstone of the interpretive inquiry; 'when the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 616 (2020) (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)).

However, Plaintiff fails to justify the Chancery Division's arbitrary construction of the Agreement which materially altered the terms therein and reduced the benefit received by the Township.

A. THE AGREEMENT'S RETURN TO WORK TERMS WERE NOT DETERMINED ILLEGAL, INEFFECTIVE OR UNENFORCEABLE.

The Chancery Division failed to distinguish the Parties' rights and obligations under Agreement from those under those under the PFRS pension statutes, N.J.S.A. 43:16A-1. Further, Plaintiff once again misconstrues the Township's argument as to the NJDPB's capacity as a legal forum under the Agreement and in doing so consumes several pages justifying the NJDPB's legal authority to determine pension matters. See PB37-41.

Pension eligibility is not liberally permitted, Smith v. Dep't of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209, 213 (App. Div. 2007), nor is an employee entitled to any rights and benefits beyond

those based upon and within the scope of the provisions of the pension statutes. Francois v. Bd. of Trs., Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 349 (App. Div. 2010).

A PFRS member "irrevocably resigning from work is not within the scope of the provisions of N.J.S.A. 43:16A-8(2)" and "is not of a class intended to be benefited by the statute." Cardinale v. Board of Trustees, 458 N.J. Super. 260, 272 (App. Div. 2019).

Pursuant to the Agreement, the Parties agreed it would be construed in accordance with the laws of the State of New Jersey, the Superior Court of New Jersey is the legal forum for the Agreement and the NJDPB is the legal forum for Plaintiff's IOD Application. See DA016-DA019 at ¶¶ 7, 15 and 18.

Therefore, the Agreement and Plaintiff's IOD Application must be treated as separate and distinct. The Agreement is a settlement agreement resolving Plaintiff's employment, whereas Plaintiff's IOD Application concerns eligibility for disability retirement allowance. As a result, the Agreement's return to work terms were not declared illegal, ineffective or unenforceable. Rather, the PFRS determined Plaintiff's decision to agree to such terms in exchange for settling pending disciplinary charges rendered him ineligible for disability benefits.

The word "forum" and its legal implications further highlights the need for dichotomy between the Agreement and Plaintiff's IOD Application. A "forum" is a "court or other judicial body; a place of jurisdiction." See Black's Law Dictionary (11th ed. 2019). The New Jersey Supreme Court has defined jurisdiction as having three essential components: (1) cognizance of the class of cases to which the case to be adjudicated belongs; (2) presence of the proper parties, and (3) the point to be decided must be, in substance and effect, within the issue. Petersen v. Falzarano, 6 N.J. 447, 453 (1951). However, a "court cannot hear a case as to which it lacks subject matter jurisdiction even though all parties thereto desire an adjudication on the merits." Peper v. Princeton Univ. Bd. of Trustees., 77 N.J. 55, 65-66 (1978). Thus, the appropriate forum for a matter is one which has jurisdiction over said matter.

The Legislature delegated the NJDPB and PFRS with "the general responsibility for the proper operation of the retirement system," N.J.S.A. 43:16A-13(a)(1), which neither explicitly nor implicitly conferred authority to interpret settlement agreements and determine provisions therein "illegal, unenforceable, or ineffective" so as to trigger the Agreement's severance clause.

Accordingly, the NJDPB and PFRS are not a legal forum for purposes of triggering the severance provision of the Agreement;

therefore, the Chancery Division's decision must be reversed and Plaintiff's Complaint dismissed with prejudice.

B. THE TOWNSHIP'S DUTY TO EFFECTUATE PLAINTIFF'S IOD APPLICATION DID NOT INCLUDE SEVERANCE OF THE RETURN TO WORK PROVISIONS.

Plaintiff does not dispute that the Agreement fails to define "effectuate" but instead succinctly demonstrates the arbitrary nature of the Chancery Division's application of the term by arguing, without supporting citation, the Agreement uses the term "without limitation and speaks to a full measure of effort to bring [his IOD Application] to a vote on the disability merits of the case." See PB10-PB11.

The Chancery Division's decision reflects it accepted this interpretation by declaring that the provisions concerning Plaintiff's irrevocable resignation (Paragraphs 10-12, 17) and the Township's duty to effectuate Plaintiff's IOD application (Paragraph 6) "undoubtedly cannot coexist". See DA199-200.

The Appellate Division was faced with a similar settlement agreement and "turn square corners" argument in Cardinale v. Board of Trustees, 458 N.J. Super. 260 (App. Div. 2019) and specifically rejected the argument that a petitioner was entitled to a vote on the disability merits: "the settlement reflected Cardinale's decision to proceed with his

application. **But the settlement agreement does not represent – nor could it have – that the Board would process the application** … the outcome of the application would not affect the enforceability of the settlement." Id. at 274 (emphasis added).

Thus, the Chancery Division should have given the term its plain and ordinary meaning, Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 321 (2019), which is "to cause or bring about (something)". *Effectuate*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/effectuate (last visited December 15, 2023).

If the Chancery Division had afforded "effectuate" its plain and ordinary meaning, the Township would have been entitled to summary judgment as Plaintiff did not allege that the Township failed to submit his IOD application or provide accurate information to the NJDPB and Pension Board. Instead, the Chancery Division both tortured the language of the Agreement, Stiefel v. Bayly, Martin & Fay, Inc., 242 N.J. Super. 643, 651 (App. Div. 1990), and impermissibly rewrote the Agreement, Tomaiuoli v. U.S. Fid. & Guar. Co., 75 N.J. Super. 192, 201 (App. Div. 1962), by arbitrarily substituting "effectuate" in a manner that neither defined nor explained.

Accordingly, the Township satisfied its obligations under the Agreement by taking all steps necessary to bring about Plaintiff's application before the NJDPB and Pension Board.

C. THE CHANCERY DIVISION RENDERED MEANINGLESS PLAINTIFF'S "BINDING" AND "IRREVOCABLE" RESIGNATION.

Plaintiff, without medical documentation, let alone authority to speak on behalf of the NJDPB's medical experts, asserts as facts a variety of speculations regarding Plaintiff's health as demonstrating that the Township is not prejudiced by severance of the Agreement's return to work provisions. See PB19-PB20. Such an argument fundamentally misconstrues the purpose of the Agreement and trivializes the Parties' consideration received thereunder.

The central purpose of the Agreement was not whether Plaintiff was disabled, rather, it was the amicable resolution of disciplinary charges filed against Plaintiff. As a result, no less than four paragraphs reiterated that Plaintiff's resignation was "final" "binding" and "irrevocable" upon submitting his letter of resignation concurrent with his October 20, 2020 execution of the Agreement. See DA191-DA193 at ¶¶ 10,11,14,17.

The language and ramification of each of these provisions is specific, clear, unequivocal and reflective of New Jersey's public policy

favoring settlement agreements, Brundage, supra, 195 N.J. at 601. Plaintiff agreed to never return to his employment with the Township in exchange for the Township dismissing any filed or contemplated disciplinary charges. See Cardinale, supra, 458 N.J. Super. at 274 ("[Plaintiff] could have fought the disciplinary action and run the risk of the Police Department terminating him for cause… but knowingly chose not to do that.")

The Chancery Division thus violated longstanding contractual principles by permitting Plaintiff to retain the benefit of separating in good standing, while rendering his resignation neither binding, nor irrevocable. See Porreca v. City of Millville, 419 N.J. Super. 212, 233 (App. Div. 2011) (A contract "should not be interpreted to render one of its terms meaningless."); see also County of Morris v. Fauver, 153 N.J. 80, 97 (1998) (Allowing a party to "repudiate the unfavorable parts of a contract and claim the benefit of the residue" constitutes unjust enrichment.)

In essence, the Chancery Division defeated the central purpose of the Agreement and bound the Township to an agreement that it did not contemplate. Fauver, supra, 153 N.J. at 97. The Chancery Division should have instead deemed the Agreement unenforceable. See Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 33 (1992).

Accordingly, the Chancery Division's decision to grant severance defeated the essential purpose of the Agreement; therefore, the Chancery Division's decision must be reversed and Plaintiff's Complaint dismissed with prejudice.

D. THE CHANCERY DIVISION DEPARTED FROM WELL-ESTABLISHED CASELAW.

Plaintiff portrays the Township's references to several pension cases as "short on facts, self-serving, and misleading." See PB22-PB32. However, Plaintiff's attempts to distinguish the instant matter are largely premised on the Township agreeing to dismiss any disciplinary charges filed or contemplated alleging that Plaintiff is unfit for duty other than those arising out of and related to his medical disability in exchange for Plaintiff's irrevocable resignation. See DA15-DA18 at ¶¶ 12-13.

Thus, Rooth v. Bd. of Trustees, Pub. Employees' Ret. Sys., 472 N.J. Super. 357 (App. Div. 2022), Cardinale, supra, and In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386 (App. Div. 2018) are applicable to the instant matter because the Township only agreed that Plaintiff was medically disabled and to dismiss non-related disciplinary charges in exchange for the precise terms severed by the Chancery Division. Notably, it is false that Plaintiff could not be fired for cause as the Township reiterated that its desire to terminate Plaintiff if the

Court severed or otherwise amended the provision at issue. See 1T8:8-1T9:2; 1T23:24-1T25:17. In essence, Plaintiff is only now able to distinguish these cases because of a bargained-for consideration that no longer exists.

Further, regarding Cardinale, supra, it is irrelevant whether the Agreement contains "goal-oriented language" as it could not guarantee whether NJDPB would process the application, Cardinale, supra, 458 N.J. Super. at 274, and Parties recognized the NJDPB's authority as to Plaintiff's IOD application since said authority is conferred by statute, not contract. See N.J.S.A. 43:7-18.1. Similarly, the inclusion of "unlikely" is immaterial as a point of contrast as the term is inherently subjective and vague by nature. To illustrate, the logical follow-up to something being unlikely, is precisely how unlikely it is.

Next, Carr v. Borough of Glen Ridge, A-1124-20, 2022 WL 38864 (N.J. Super. Ct. App. Div. January 5, 2022) (DA125) demonstrates changes to a restoration provision are not "simple amendment[s]" and instead "constitute a substantive change to the applicability of the [Agreement]" which would "unravel the [Agreement] and send the parties back to the drawing board" and thus "lead to an 'absurd result.'" Id. at *3 (quoting Barila, supra, 241 N.J. at 616).

Plaintiff's claim has the same motivations and causal effect of the plaintiff in Carr, supra, but has simply opted for a severance claim instead of the unsuccessful specific performance and reformation claim. Thus, Carr, supra, demonstrates the Pension Board's determination an agreement irrevocable resignation renders an applicant ineligible does not trigger a municipal employer's contractual duty to "do all things lawful, reasonable, and necessary" and address "substantive impediments" arising in the IOD application process. Ibid.

Accordingly, the Township did not breach the Agreement, the Chancery Division's decision must be reversed and Plaintiff's Complaint dismissed with prejudice.

POINT II

PLAINTIFF FAILED TO DEMONSTRATE ENTITLEMENT TO SPECIFIC PERFORMANCE; THEREFORE, THE DECISION OF THE CHANCERY DIVISION MUST BE REVERSED.
(DA201 at ¶¶ 1-2; DA202 at ¶¶ 1-3).

Plaintiff wildly misrepresents the Court's consideration of the specific performance factors under Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598-600 (App. Div. 2005). The portions of the transcript cited by Plaintiff (1T19:12-23 and 1T22:6-25) do not show any consideration whether compelling performance would be harsh or

oppressive to the Township. Rather, the Township specifically noted that it had intended to terminate Plaintiff for untruthfulness, but agreed to settle in exchange for him agreeing to never returning to work. See (1T19:23-1T20:25). Further, as argued supra, the Chancery Division applied, but failed to set forth, an alternative definition of "effectuate" that defied its plain and ordinary meaning.

Likewise, the interests of the Parties in filing an IOD application and futility of the Agreement are neither dispositive nor relevant regarding whether Plaintiff had an adequate remedy. The Township urged the Court that Plaintiff has an adequate remedy – the IOD appeals process. See 1T21:19-1T22:3. The Court disregarded that argument in favor of interpreting the Parties as anticipating a determination on the merits. See 1T22:4-1T22:19. However, Cardinale, supra, specifically disavowed that parties from expecting or guaranteeing such a determination, let alone memorialize as much.

The Chancery Division was thus presented with significant evidence that granting Plaintiff's specific performance claim deficient under Marioni, supra, and such relief was unwarranted pursuant to Houseman v. Dare, 405 N.J. Super. 538 (App. Div. 2009), as it would result in inequity towards the Township and conflict with public policy

Accordingly, the Chancery Division's decision to grant severance defeated the essential purpose of the Agreement; therefore, the Chancery Division's decision must be reversed and Plaintiff's Complaint dismissed with prejudice.

CONCLUSION

For all the reasons set forth herein, the Chancery Division departed from well-established caselaw in deciding that the Township breached the Agreement or granting severance of certain provisions of the Agreement.

Accordingly, the Township did not breach the Agreement, the Chancery Division's decision must be reversed and Plaintiff's Complaint dismissed with prejudice.

Respectfully submitted,

DASTI & STAIGER, P.C.

Attorneys for Defendant/Appellant
Township of Barnegat

Dated: December 18, 2023

s/Christopher J. Dasti, Esq.
CHRISTOPHER J. DASTI, ESQ.
Of Counsel & On the Brief

s/Jeffrey D. Cheney, Esq.
JEFFREY D. CHENEY, ESQ.
On the Brief