Superior Court of New Jersey
Appellate Division

Docket No: A-003898-22

DONNA PLATT,

Petitioner/Appellant,

v.

PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Defendant/Respondent.

CIVIL ACTION

On Appeal from a Final Determination of the Board of Trustees of the Public Employees Retirement System, a State Agency, entered on OAL Docket No. A-003898-22 and Agency Docket No. TYP-01013-21

AMENDED BRIEF OF PETITIONER/APPELLANT, DONNA PLATT, IN SUPPORT OF PETITIONER'S APPEAL

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PRELIMINARY STATEMENT

This case involves an appeal by Donna Platt, Petitioner, of a final determination of the Board of Trustees ("Board" or "Respondent") of the Public Employees' Retirement System ("PERS") dated July 21, 2023, affirming the Administrative Law Judge Decision of June 13, 2023, denying the Petitioner's intra-fund transfer of her PERS benefit from Berlin Township to the Township of Winslow. The Board had previously affirmed the determination that the Petitioner was eligible for continuing membership in PERS as municipal prosecutor for Berlin Township. This case centers around the applicability of Chapter 92 P.L. 2007 (N.J.S.A. 43:15A-7.2b) ("Chapter 92b") to a vested member in PERS who has not yet retired or received benefits.

As the transcripts and evidence at the administrative proceedings make evident, Petitioner established that as a municipal prosecutor, she was eligible for an intra-fund transfer of her PERS benefit from Berlin Township to the Township of Winslow for the time periods at issue. The record below demonstrates that the Petitioner was an employee with the Township of Winslow in which she served as municipal prosecutor and met substantially all of the factors in the "IRS 20 Factor Test" to establish that she was a bona fide employee from 2015 to the present. The Respondent's determination was based upon fact finding that was arbitrary and capricious and not based upon substantial credible evidence in the record.

PROCEDURAL HISTORY

Petitioner appealed a preliminary determination of the Board dated January 18, 2017, denying the Petitioner's intra-fund transfer of her PERS service from Berlin Township to Winslow Township. On November 26, 2018, the Board returned the matter to the Division of Pensions and Benefits ("Division") for further review under the "IRS 20 Factor Test" to determine whether the Petitioner was qualified as a bona fide employee of Winslow Township. On October 19, 2020, the Board determined that the Petitioner was ineligible for an intra-fund transfer because she did not fit the definition of employee for Winslow Township.

The matter was referred to the Office of Administrative Law ("OAL") as a contested case on January 29, 2021, Kathleen M. Calemmo, A.L.J., and a hearing was held February 16, 2023. (T)[1] On June 13, 2023, Judge Calemmo issued an initial decision (Pa2) making a determination that the Petitioner was ineligible for the intra-fund transfer from Berlin Township to Winslow Township. On July 21, 2023, the Board adopted the recommendation of Judge Calemmo and the initial decision. This was the Final Agency determination (Pa1) in this case which led to the filing of this appeal by the Petitioner. (Pa1).[2]

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[1] T refers to the transcript of the hearing from February 16, 2023.

[2] Pursuant to R. 2:6-1(a)(1), a copy of the Certification of Transcript Completion and Delivery has been included in the Appendix. (Pa26) along with the Notice of Appeal (Pa27).

STATEMENT OF FACTS

The Petitioner first became enrolled in PERS on January 1, 1993. (T10-18) The Petitioner is employed by Winslow and other municipalities, including Berlin Township, as a municipal prosecutor. (Pa31) She has been the municipal prosecutor of Winslow continuously from 2003 to the present except for one year in 2008. (T9-20) She was originally enrolled in the pension system in Winslow when she began working there in 2003 until Winslow removed her from the pension system as a result of the Board's direction in 2008. (T10-15) While engaged in the private practice of law, Petitioner always believed she was an employee in Winslow and the pension was a fringe benefit of her job since compensation was less as a municipal prosecutor in Winslow than that as an attorney in her private practice. (T11-3) Petitioner's duties and role as an employed municipal prosecutor are the same in Winslow Township as in Berlin Township where she remains enrolled in the PERS pension system. (T11-27) Petitioner also confirmed that her duties in Winslow from 2003 to 2008, when she was enrolled in the pension system, and from 2015 to the present, which is at issue in this case, are exactly the same. (T12-1) The Petitioner also confirmed that she was not subject to a Request for Proposal ("RFP") process during the period of 2015 to the present. (T12-6)

On or about June 23, 2015, Nancy A. Esposito, the Certifying Pension Officer for Winslow, and Stephen J. Dringus, Jr., the Supervisor of the Pension Certifying

Officer, issued a Report of Transfer form for the Petitioner seeking an intra-fund transfer of her PERS service from Berlin Township to Winslow. (Pa37) According to Kristen Conover, the investigator for the Division ("Conover"), the Certifying Pension Officer (Ms. Esposito) and the Supervisor of the Pension Certifying Officer (Mr. Dringus) are the individuals who are statutorily responsible for making the determination as to whether an individual is an employee of that agency.[3] (T121-24) Conover further confirmed the primary individuals in which the Board collects its information from are the Certifying Officer and the Supervising Certifying Officer. (T183-22)

In their Report of Transfer (Pa37), both Ms. Esposito and Mr. Dringus determined the Petitioner was an employee of Winslow. This was confirmed by Conover. (T184-10). As further evidence of the Petitioner's employee status with Winslow, a Request for Personnel Action was issued on January 1, 2015. (Pa38) This form determined the Petitioner was a permanent employee as the Winslow municipal prosecutor and was certified and approved by every required Winslow Official. On January 6, 2015, the Winslow Municipal Clerk issued a letter to the State Attorney General's Office confirming the Petitioner was "hired as an employee of Winslow to the position of Municipal Court Prosecutor." (Pa39) Winslow also

[3] The Board did not call Nancy Esposito as a witness which can be taken as a negative inference against it under the Rules of Evidence. (NJ Model Civil Jury Charges 1.18)

confirmed Petitioner's position as an employed municipal prosecutor in Winslow's appointing Resolutions from 2016 through 2019 along with other employees of the Township. (Pa39) Significantly, Winslow adopted a Salary Ordinance for employees of Winslow, which included the Petitioner in 2018 as well as other years. (Pa44)

The Board required Ms. Esposito to answer a 20 Factor Questionnaire, which was signed and dated September 13, 2018. (Pa46) The overwhelming majority of the answers to the questions on the Board's own 20 Factor Questionnaire indicated the Petitioner was an employee. This was confirmed by Conover. (T184-10) Conover conceded that the 20 Factor Questionnaire answered by Ms. Esposito is an important fact-finding document. (T124-5) During the course of the OAL Hearing, there was an extensive review of this document by Conover. (T124-13 to T138-16) Conover broke down the 20 Factor Questionnaire into factors which are indicative of employee status, factors which are indicative of independent contractor status and factors which are neutral. Conover testified that the overwhelming majority of answers indicated employee status.

Also considered by the Board was the "Employee/Independent Contractor Checklist" completed by Ms. Esposito. (Pa55) In this document, she confirmed that after the analysis of the State's own Employee/Independent Contractor Checklist, the Petitioner was in fact an employee. Out of the 27 categories on the State's own

form, the Petitioner was reported as an employee in 19 of them and as an independent contractor in only 8. This was also confirmed by Conover. (T138-23) Ms. Esposito and the Petitioner both submitted additional documentation to PERS, further clarifying that even some of the questions where the Petitioner was found as an independent contractor, actually were indicative of her being an employee. (Pa55) The following month, the Supervising Pension Certifying Officer Mr. Dringus, confirmed in an email that beginning in 2015, the Petitioner was an employee. (Pa58)

IRS 20 FACTOR TEST

This test is referenced in Chapter 92b and the analysis in Local Finance Notice 2007-28 issued on December 29, 2007, by the New Jersey Department of Community Affairs, Division of Local Government Services and can be specifically found at IRS Revenue Ruling 87-41, 1987-1(C)(B) 296.

FACTOR 1 – INSTRUCTIONS

1. Virtually all of Petitioner's prosecutorial services were required to be performed and were actually performed in the courtroom of the municipal building in Winslow. (T12-18 to T26-9).

2. During the Pandemic, there were no in-person appearances, and the Court Administrator still controlled the Court sessions and the dockets by use of the Plea by Mail and the Municipal Case Resolutions Systems. (T15-4 and T16-4).

3. At all times, the Court supplied the Petitioner with all records, discovery, driver abstracts, and the Plea by Mail forms. (T17-6)

4. During the Pandemic, the Petitioner was not allowed to work in the Municipal Building. (T18-4)

5. Other Court employees were also required to work outside the Municipal Building during the Pandemic. (T18-16)

6. The Petitioner did most of her municipal prosecutor work during the Pandemic at her law office. (T18-17)

7. The Petitioner must complete the entire docket and finish the Court sessions and she has no discretion on when she can leave. (T20-23)

8. The Court Administrator determines which type of cases are on the docket. (T21-10)

9. The Court Administrator maintains all Municipal Court files at the Municipal Building. (T22-12).

10. The Winslow Police Records Department handles all the local discovery in Municipal Court cases. The Winslow Police Records Department gathers the discovery information and sends it out to the attorneys or the pro-se defendants. (T23-18)

11. Winslow Township uses letterhead as its discovery form with the Petitioner's name at the bottom. (Pa61)

12. In the Conover report, she found with respect to this factor, that despite the unique duties of a municipal prosecutor, Petitioner meets the definition of independent contractor. Despite no information to contradict the extensive control over the Petitioner by Winslow during Court sessions, Conover still found Petitioner was not an employee because Winslow did not exercise control outside of Court sessions. (T100-3)

13. Conover reported that non-court officials said they do not control the order and sequence of the way in which Petitioner conducts her work outside of Court sessions, yet agreed they absolutely control the order and sequence of the work when she is in Court sessions. (T142-18)

14. The only piece of information which Conover relied upon that Winslow does not control Petitioner's work was that they call her on her cell phone when Court is not in session. (T144-1)

15. Conover admitted that she did not interview any courtroom personnel to verify any of the information she used in making her report. (T144-8)

16. Conover testified that she only discussed the Petitioner's case with Mr. Gallagher, the Township Administrator, Mr. Dringus and Ms. Esposito; the last two who are designated by statute to provide the information to the Board. (T144-13)

17. Yet, despite Conover's reliance on those designated by statute to provide the information, Conover completely ignored both Mr. Dringus and Ms.

Esposito's determination by Winslow that Petitioner was an employee of Winslow for the period at issue. (T145-3)

18. Conover also conceded that she did not speak to the Petitioner herself. In fact, she admitted the Petitioner would be in the best position to know what her duties were and whether or not she did prep work at the municipality or at her law office. (T145-19)

19. Conover also conceded the Court personnel were in a better position to know the Petitioner's duties and responsibilities as the Municipal Court Prosecutor in answering the 20 Factor Test than the three people to whom she spoke. (T147-2)

20. Conover also admitted that she did not confirm whether the people she spoke to actually got their information from any Court personnel or Petitioner. (T147-7)

21. In making her report, Conover also conceded that she did not speak with the Municipal Court Judge, the Municipal Court Administrator or anyone else in determining who controls or supervises the Petitioner in her work, which includes the Court sessions most fundamentally. (T148-13)

22. Conover had to concede that it was Winslow and not the Petitioner who determines the docket for each Court session. (T149-7)

23. Conover also had to concede that Petitioner cannot refuse to prosecute certain cases and not finish out the docket. (T149-15)

24. Conover made a great deal of reference to the one-year that Petitioner was not appointed as a municipal prosecutor in the last 20 years. (T150-7)

25. However, she had to concede that by statute, municipal prosecutors are rehired every year (T150-7) and the Petitioner was hired 19 out of the past 20 years except 2008. (T50-20)

26. While Conover would not concede that being hired 19 out of the last 20 years was the ultimate performance evaluation, she had no idea whether any other employees were subject to performance evaluations. (T150-7)

27. Conover also conceded that she did not know whether the Municipal Court Judge, who is an employee of Winslow and in the pension system, was subject to a performance evaluation. (T152-13)

28. Conover also had to concede that like the Petitioner in this case, the Judge who is an employee of Winslow and in the pension system, does take calls outside Court sessions at home or at his private law practice.

FACTOR 2 – TRAINING

1. The Petitioner testified as to extensive training she is given by the Township, including a bi-annual Municipal Building security meeting, annual updates of Winslow Ordinances, and being supplied by Winslow with books and other manuals for DWI law, Title 2C (Criminal Laws) and Title 39 (Motor Vehicle Laws).

2. She was also trained by Winslow in the Municipal Court Case Resolution System that was established during the Pandemic and attended a training session on how to handle the cases the Court Administrator places on the System. She also testified she is required by the Camden County Prosecutor's Office to attend two meetings each year with the Assistant County Prosecutor who is the liaison to Municipal Courts in Camden County. In addition, she is governed by Part 7 of the New Jersey Rules of Court and Directives from the Camden County Prosecutor's Office and Attorney General's Office. (T26-14)

3. Conover admitted that she did not know about the Petitioner being involved in security training and that would be indicative of employee status. (T153-16)

4. Conover also had to concede that she was not aware that Petitioner trains the Animal Control Officers and Zoning Officers about Municipal Court offenses. (T155-22)

FACTOR 3 – INTEGRATION

1. While Conover reported the Petitioner meets the definition of independent contractor, she notes that given the unique circumstances of the position of municipal prosecutor, this is not a strong indicator of such status.

2. The Petitioner testified there is extensive integration between her and Winslow in terms of the Municipal Court process. In addition to all the integration

with the actual Court sessions, she has extensive involvement in discussing cases with Winslow Police Officers, Animal Control Officers and Zoning Officers that are on the docket. She also has extensive interaction with the Liaison Officers who address pro-se defendants and she has regular meetings with police officers with respect to cases which are on the docket. (T28-6)

3. Conover conceded the Petitioner is required to report to someone at the beginning of each workday, which is indicative of employee status. (T156-13)

4. She also confirmed that Winslow controls all of her job duties and responsibilities during the Court sessions. (T157-16)

5. She testified, "There is a great deal of control as to how Court sessions are performed and yes, they are very controlled methods." (T157-18)

FACTOR 4 – SERVICES RENDERED PERSONALLY

1. Petitioner testified that all her services are rendered personally as she is the one providing the services. (T29-18)

2. Since 2015, her Law Firm has not been appointed through an RFP process nor does her Law Firm hold any other positions in the Township. (T29-13)

3. Petitioner gets paid through the Township's payroll system in her personal name and she receives bi-monthly employee payroll checks like the other employees in the Township. (T29-19)

4. Petitioner has been receiving annual W-2's, which other employees

receive from Winslow, since 2015. (Pa62) (T30-9)

5. Conover reported the Petitioner meets the definition of an independent contractor based upon information received that the Petitioner is responsible to find her own replacement and there is a swap of prosecutorial services with another municipal prosecutor. In addition, sometimes there is an evening prosecutor who fills in for her, and such a prosecutor is hired through the RFP process. (Pa95)

6. In correcting the record, Petitioner testified that it is the Court Administrator, with recommendations from the Petitioner, who selects a substitute prosecutor when the Petitioner is on vacation or sick. (T32-15)

7. While sometimes the evening session prosecutor does substitute for the Petitioner, it is not based upon the substitute prosecutor's RFP appointment which is limited to him being the Township's special DWI prosecutor. (T33-9)

8. Petitioner testified in detail about the sequence of the work and how it is completely controlled by the employer, Winslow Township and its officials and not her. (T33-22)

9. Conover also confirmed that during Court sessions, Petitioner renders the services personally under this Factor. (T158-9)

10. Conover confirmed that the times when a substitute prosecutor was necessary were the exception to the rule. (T159-7)

11. When Conover was confronted with the fact that Petitioner does not

choose her own substitute prosecutor, she admitted that leaned toward employee status. (T159-10)

12. With respect to Conover's conflation of the special DWI prosecutor substituting for the Petitioner in regular Court sessions and not in DWI Court sessions, she was not aware of whether that was part of his DWI services which were procured by an RFP. (T160-16)

13. Mr. Dringus confirmed that it is the municipal court who has the responsibility to find the Petitioner's replacement and not the Petitioner herself. (T193-11)

14. Mr. Dringus also had no knowledge or other information that anyone else in the Petitioner's Law Firm would assist her in performing any municipal prosecutor services. (T193-16)[4]

15. The only evidence the Board seems to rely upon goes back to the special DWI prosecutor who substitutes for the Petitioner occasionally, but not within his duties as the special DWI prosecutor. (Pa95)

FACTOR 5 – HIRING, SUPERVISING AND PAYING ASSISTANTS

1. According to Conover's report, the Petitioner was not authorized to hire others at her own expense or a third party to assist her in performing her duties. (Pa95)

[4] The Board's own witness confirms the Petitioner's position.

2. Conover also noted that while the Petitioner meets the definition of independent contractor, given the unique circumstances, this is not a strong indicator of such status. (Pa95)

3. Petitioner testified in detail about all of the municipal officials who supervise and assist her in her prosecutorial duties both during and outside of Court sessions. (T33-22 to T35-22)

4. All of these officials are Township employees hired and paid by the Township. (T36-11 to T37-9).

5. Petitioner also testified in great detail about all of the assistance from Township municipal court and police personnel post-Pandemic. (T37-10 to T39-10)

6. Petitioner also testified that despite her reluctance to come back to in-person court, she was required to by the Township and Court Administrator. (T39-11 to T40-19)

FACTOR 6 – CONTINUING RELATIONSHIP

1. Petitioner testified she has been the municipal prosecutor for the past 20 years except for 2008. (T9-20)

2. Conover notes in her report that the parties are in a continuing relationship. (Pa95)

3. Due to statutory requirements, a municipal prosecutor must be reappointed each year. Conover indicated in her report that she felt Petitioner met

the definition of independent contractor due to the 2009 to 2014 RFP process. (Pa95)

4. However, in Conover's report she conceded there was no RFP process from 2015 to the present and testified the Petitioner was taken out of PERS at the direction of the Division in 2009. (T164-9)

FACTOR 7 – SET HOURS OF WORK

1. Petitioner testified extensively that she has set Municipal Court hours where the Township requires her to prosecute from 8:30am to 12:30pm and 1:30pm to 4:30pm on the first and third Wednesdays of the month and from 8:30am to 12:00pm on the second and fourth Wednesdays of the month at the Winslow Township Municipal Building or, during the Pandemic, off premises. (T41-10)

2. Conover noted in her report that the Petitioner is required to work established and fixed hours with the approval of the location. (Pa95)

3. Conover also noted there were no time-keeping records because Petitioner did not submit vouchers but rather is a salaried employee which also confirms employee status. (Pa95)

4. Conover felt Petitioner does not meet the definition of independent contractor but yet again stated this is another Factor that is not a strong indicator of such status.

5. The only information indicative of the Board's view of independent contractor status, was the Township would contact the Petitioner by cell phone or on

her Law Firm's phone when Municipal Court was not in session and the issue about the special DWI prosecutor substituting for her the few times, she was either sick or on vacation. (Pa95)

6. Conover had to concede that despite there not being any time-keeping records for the Petitioner because she was a salaried employee, she did not evaluate any other employees at the Township and believed that other salaried employees, like the Court Administrator and Municipal Court Judge, also do not have time-keeping records. Essentially, there was absolutely no evaluation of anyone else in the Township, including the Petitioner. (T166-9)

FACTOR 8 – FULL-TIME REQUIRED

1. Petitioner is not a full-time employee, but Winslow Township only offers the municipal prosecutor position as a part-time employee position due to its small size. Petitioner did testify that during the Pandemic she worked beyond the Court sessions and worked additional hours each week for the same salary. (T42-1)

FACTOR 9 – DOING WORK ON EMPLOYER'S PREMISES

1. Petitioner and the Board agree that the Petitioner is required to do all of her work during Municipal Court sessions at the municipal building which would be indicative of employee status. (Pa12)

2. This Factor has changed worldwide due to the Pandemic as the Petitioner testified Court sessions were held remotely and many of her duties are

required to be done outside of the municipal building. (T41-10)

3. The only fact upon which Conover based her opinion that the Petitioner was an independent contractor, was that sometimes she is reached by cell phone or through her Law Firm phone by the municipal court.

4. When confronted with how the Pandemic has changed the impact of employees doing work on premises worldwide, Conover did concede that it does impact and affect this Factor. (T169-22 and T170-6)

5. During the OAL Hearing, Conover, who is a state employee and presumably in the pension system, testified remotely. (T170-20)

6. Conover also noted that her report was done in 2019 prior to the Pandemic and she did not update her report. (T168-21)

FACTOR 10 – ORDER OR SEQUENCE SET

1. In her report, Conover notes the employer sets the order and sequence of duties to be performed and the Judge sets the sequence. (Pa95)

2. Conover also recognized that the court calendar is set and prioritized by the administrative officers of the court or the Municipal Court Judge but believed the Petitioner met the definition of independent contractor since the Township did not know how she performed her services outside of the Court sessions. (Pa95)

3. This was another Factor that Conover notes was not a strong indicator of independent contractor status. (Pa95)

4. Petitioner testified extensively that she has no control over the cases she is required to prosecute nor the times she is required to prosecute those cases. (T13-19 and T26-3)

5. Petitioner also testified she is required to prepare Plea by Mail forms for cases she is provided, and the form is supplied to her by the Court Administrator for which she has no authority to change. (T15-9)

6. In addition, Petitioner testified extensively that she is required to provide plea offers on the Municipal Case Resolution system within five (5) days. (T17-8) She also testified she is sequenced by the Township Zoning Officers, Code Enforcement Officers and Animal Control Officers on ordinance violation cases and how each of these Township officials want the cases to proceed. (T21-10)

7. Once again, Conover testified she had no information, nor did she update her report about the Pandemic and the Plea by Mail and Municipal Case Resolution Systems are completely controlled by the Court Administrator and Municipal Court Judge. (T171-22)

FACTOR 11 – ORAL OR WRITTEN REPORTS

1. Conover notes the Petitioner is required to prepare regular reports which would be indicative of employee status. (Pa95)

2. However, since she was not subject to performance evaluations, it was Conover's belief the Petitioner met the definition of independent contractor.

3. Petitioner testified extensively that while not having to provide any written reports, she is required to provide oral reports to the liaison officers concerning the Municipal Court Resolution cases and the Plea by Mail cases. (T42-21)

4. Petitioner also testified that she reports to the Township Zoning Officers, Code Enforcement Officers, and Animal Control Officers as to the disposition of the cases which are under their control. (T42-24)

5. Conover conceded that if Petitioner was required to provide oral reports to the Township Zoning Officers, Code Enforcement Officers and Animal Control Officers, all three would be indicative of employee status. (T172-3)

FACTOR 12 – PAYMENT BY HOUR, WEEK OR MONTH

1. In her report, Conover notes Petitioner is paid through the bi-monthly payroll system, is not paid through the submission of vouchers and all state and federal employee taxes are taken from the Petitioner's paycheck which are indictive of employee status. (Pa95)

2. Conover also notes the Petitioner is paid through the salary ordinance. (Pa95)

3. Conover determined the Petitioner met the definition of independent contractor because the Township provided her with 1099s from the period 2010 through 2014 which are not at issue in this case. (Pa95)

4. Conover also found this is yet another Factor that is not indicative of independent contractor status.

5. Petitioner testified extensively that the Township sets her annual salary, she does not submit invoices for payment by vouchers, she is paid bi-monthly through the Township payroll system, and she is paid a net salary with all taxes taken out and issued a W-2 form at the end of each year. (T43-22)

6. All of this was conceded to by Conover at the OAL Hearing as well. (T175-15)

7. Conover also did not do an evaluation of this Factor as to Petitioner from 2003 to 2008 when she was in the PERS system.

8. Conover admitted that the Petitioner does not have any other jobs for Winslow besides being the municipal prosecutor (T176-6) and her Law Firm was not contracted for any other services with Winslow Township. (T176-18)

9. Petitioner also testified she was paid as a municipal employee while she was in the PERS system between 2003 and 2008. (T44-4)

10. Petitioner also testified about her appointments as municipal prosecutor by way of Resolution since 2015. (T44-20 and Pa 13)[5]

11. Petitioner testified there was no RFP process, and she did not enter into a Professional Services Agreement with the Township from 2015 to the present.

[5] List of positions on the Resolution are all Winslow Township employees. (Pa39)

(T45-15)

12. Petitioner also testified she was paid through the salary ordinance from 2015 to the present. (T46-11 and Pa13)

13. Petitioner also testified that as municipal prosecutor, it limits her ability to work in her private law practice and specifically bars her from doing any defense work within in the County of Camden. (T47-1)

FACTOR 13 – PAYMENT OF BUSINESS AND/OR TRAVEL EXPENSES

1. Conover was of the belief that since there were no business or travel expenses reimbursed by the Township, this was indicative of independent contractor status. Yet, once again she notes that this is not a strong indicator of such status.

2. Petitioner testified the Township does in fact reimburse her for business expenses, specifically State Police discovery. (T47-16)

3. Petitioner is also required by the Township to purchase an App called, "We Transfer", which transfers municipal court discovery to defense attorneys. She testified the Township reimburses her the $120.00 per year for having to purchase that App. (T48-2)

4. Conover conceded that when she indicated Petitioner was not reimbursed for any business or travel expenses, she did not know if she had any reimbursable expenses in the first place. (T177-10)

5. Conover also conceded that if Petitioner was reimbursed for the "We

Transfer" App it would be indicative of her being an employee. (T177-14)

6. Likewise, Mr. Dringus also conceded that he did not know if the Petitioner had any business or travel expenses to be reimbursed in the first place. (T201-8)

FACTOR 14 – FURNISHING OF TOOLS AND MATERIALS

1. In her report, Conover noted that the Township does provide Petitioner with workplace facilities, tools, and a support computer at the expense of the location. (Pa14)

2. Specifically, it was noted, the Township provides office supplies, copier, fax machine and postage. (Pa14)

3. Conover believed the Petitioner met the definition of independent contractor solely on the basis that the Township Administrator indicated she is not provided with a permanent office or workstation, a phone or Township email. (Pa95)

4. Conversely, Petitioner testified that when she prosecutes, everything is supplied by the Township. The Township purchases all the materials and all the equipment and hires all the employees to work with her. (T48-18)

5. Petitioner testified there is a telephone in the conference room where she has worked for the past 20 years, which allows her to communicate with the State Police barracks, State Troopers, and anyone else she would need to talk to. (T48-24)

6. Petitioner testified the Township supplies the plea agreement forms, a HEPA Filter in the conference room, the plexiglass guard on the conference room table and the signs for her Township workspace. (T49-3)

7. Petitioner noted that the Township supplies the television and video boards used during trials as well as all informational materials such as the Family Violence Prevention Program and others that are given to defendants. (T49-12)

8. Petitioner also testified the Township provides the services of "My Friend's House" which is a drug rehabilitation program for defendants with drug addictions. (T49-22)

9. Petitioner testified the Township provides a fax machine, copier, driver abstracts and criminal histories for her use as well. (T50-3)

10. Petitioner is also given a key fob for access to secured rooms and doors in the Township as well as supplying the complaint and summons forms for all municipal court files and all other supplies necessary for her to perform her services as municipal prosecutor. (T50-8)

FACTOR 15 – SIGNIFICANT INVESTMENT

1. The Board conceded that Petitioner meets the definition of an employee and there was no limitation on the strength of this Factor as there were with most of the independent contractor findings. (Pa14)

FACTOR 16 – REALIZATION OF PROFIT OR LOSS

1. The Board conceded that Petitioner meets the definition of an employee and there was no limitation on the strength of this Factor as there were with most of the independent contractor findings. (Pa14)

FACTOR 17 – WORKING FOR MORE THAN ONE FIRM AT A TIME

1. The Board indicates the Petitioner meets the definition of independent contractor. While the Petitioner does work as a municipal prosecutor in other municipalities, she is prohibited from doing any defense work in the County of Camden as set forth above.

FACTOR 18 – MAKING SERVICES AVAILABLE TO THE GENERAL PUBLIC

1. Conover found that the Petitioner meets the definition of independent contractor. (Pa95)

2. Petitioner testified that while she does have a private law practice, the services that she provides as municipal prosecutor to Winslow Township are not offered to the public. Rather, she only prosecutes individuals who commit a violation within the jurisdiction of the municipal court in Winslow Township.

3. Conover conceded that the Division and the Board have found that Petitioner is an employee for pension purposes in Berlin Township for many years. (T178-18 and T179-1)

FACTOR 19 – RIGHT TO DISCHARGE

1. The Board conceded that Petitioner meets the definition of an employee and there was no limitation on the strength of this Factor as there were with most of the independent contractor findings. (Pa15)

FACTOR 20 – RIGHT TO TERMINATE

1. The Board conceded that Petitioner meets the definition of an employee and there was no limitation on the strength of this Factor as there were with most of the independent contractor findings. (Pa15)

The Board's entire decision rests on the Conover Report which is the only report submitted in this case. (T110-23). Despite the Pandemic and the change in many workplace issues, Conover did not update her report. (T112-20) Conover had no specific training on the "IRS 20 Factor Test" as it pertains to a municipal prosecutor in the State of New Jersey. (T113-14)

Conover and a co-worker only did one set of interviews on January 15, 2019, for her report. (T113-19) Conover admitted that the notes from those interviews were destroyed. (T114-17) Conover conceded that she did not actually interview the Petitioner in performing her investigation. (T114-19) Conover also admitted that she did not interview any of the Municipal Court personnel in Winslow Township in the performance of her investigation. (T115-4) Conover conceded that she did not interview anyone in the Police Records Department in performing her investigation.

(T115-16) Conover admitted that she did not interview the Municipal Court Judge in performing her investigation. (T115-19) Conover testified that she did not interview any bailiffs that work in the Municipal Court in the performance of her investigation. (T115-21) Conover testified that she did not interview any of the liaison officers in the Municipal Court in the performance of her investigation. (T115-24) Conover does not know what a liaison officer is. (T116-2)

Conover testified that she did not do a comparative 20 Factor analysis between the period of 2003 to 2008 when Petitioner was enrolled in PERS versus the period from 2015 to the present, which is at issue in this case. (T116-8)

Conover testified that she does not have firsthand knowledge of Petitioner's municipal court prosecutorial services to Winslow Township. (T116-22) Conover also conceded that Petitioner would be in a better position to know her municipal court services than she or any other investigators in this case. (T117-3)

Conover conceded the Petitioner was <u>not</u> appointed under the No Bid Professional Services Language of the Local Public Contracts Law between 2015 to the present. (T120-17) Conover also conceded that the position of municipal prosecutor was not subject to the RFP process from 2015 to the present. (T120-22) Conover also conceded that the Petitioner did not operate under a Professional Services Agreement from 2015 to the present. (T121-1) Conover

conceded that Petitioner was paid a salary set by the salary ordinance and through the Township's employee payroll system and received W-2s at the end of each year from 2015 to the present. (T121-5)

Stephen J. Dringus, Jr., the Township CFO and Supervisor of the Certifying Pension Officer was called by the Board as a witness on its behalf at the time of the OAL hearing. (T185-15) As early as May 20, 2010, Mr. Dringus wrote a letter to PERS where he determined Petitioner was an employee. (Pa116) Mr. Dringus, as the Supervisor of the Pension Certifying Officer, determined the Petitioner was an employee of the Township entitled to be enrolled in PERS in 2015 (Pa116) and again in 2018 (Pa116).

Mr. Dringus testified it was the Municipal Court and not the Petitioner who finds a replacement the few times she has called out sick or taken a vacation. (T193-11) Mr. Dringus did not have any knowledge of anyone else in Petitioner's Law Firm assisting her in performing her municipal prosecutorial duties. (T193-16) Mr. Dringus testified that Petitioner's hours of work and length of Court sessions are determined by the Administrative Offices of the Courts and the Municipal Court and not the Petitioner. (T193-22)

Mr. Dringus testified that he did not know if the Township contacts Petitioner outside of Court sessions on a regular basis. (T194-3) Mr. Dringus also testified Petitioner does all municipal prosecuting on the premises except during the

Pandemic. (T194-7) Mr. Dringus testified that since the Court has gone back to in person appearances, Petitioner is required to appear in person. (T194-14) Mr. Dringus acknowledged that it is the Municipal Court Judge and the Court Administrator that set the order and sequence of the Petitioner's work and duties. (T195-9)

Mr. Dringus testified the Petitioner is given a conference room next to the Municipal Court to utilize as the prosecutor's office and she can use the copier and general office equipment when she is on the premises. (T195-24) Mr. Dringus did not know how the Court would contact Petitioner when Court is not in session. (T196-18) Mr. Dringus was unaware of the difference in duties and responsibilities between the special DWI prosecutor and the Petitioner. (T197-19)

Despite earlier testimony that all employees are required to submit timecards or timesheets, Mr. Dringus confirmed that both the Municipal Court Judge and the Township Business Administrator, who are salaried employees like Petitioner, do not have to do so. (T198-10) Despite earlier testimony, Mr. Dringus clarified that as far as people submitting timesheets, he was only aware of 3 out of 80 employees in the entire Township who did so. (T199-2)

Mr. Dringus acknowledged that Petitioner was not required to be part of the RFP process from 2015 to the present. (T199-22) Mr. Dringus does not know if the Petitioner incurs any business or travel expenses as the municipal prosecutor to begin

with. (T201-8) Despite earlier testimony about training, Mr. Dringus was not aware that the Petitioner had to undergo scheduled municipal court security training. (T201-21)

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

When error in a fact finding of a judge or an administrative agency is alleged, the scope of appellate review is limited. The Court will only decide whether the findings made could reasonably have been reached on sufficient or substantial credible evidence present in the record, considering the proofs as a whole. The Court gives due regard to the ability of the fact finder to judge credibility and, where an agency's expertise is a factor, to that expertise. In re: Taylor, 158 N.J. 644 (1999); State v. Locurto, 157 N.J. 463, 470-71 (1999) and Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

Notwithstanding the above, however, interpretation of statutes is a judicial and not an administrative function and the Court is in no way bound by the agency's interpretation. Mayflower Securities Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

In the case sub judice, a significant portion of the Respondent's decision was based upon the determination that there was no change in the Petitioner's duties as municipal prosecutor in Winslow Township prior to 2015 based upon this Court's decision in Platt v. Board of Trustees, Public Employees Retirement System, 2017

WL 2628051. (Pa153) However, in that case neither the Board, OAL nor this Court evaluated the Petitioner's employment status under Chapter 92b but rather Chapter 92a where her appointments were based upon Professional Services Contracts. This Court did not reach the eligibility for Winslow Township under the "IRS 20 Factor Test" pursuant to Chapter 92b in that case. As such, this Court should disregard the Respondent's legal interpretation of the impact of the prior case in terms of eligibly of the Petitioner under the "IRS 20 Factor Test" for Winslow Township.

II. PETITIONER WAS A BONA FIDE EMPLOYEE OF THE TOWNSHIP OF WINSLOW AND IS ENTITLED TO THE INTRA-FUND TRANSFER OF HER PERS BENEFIT FROM BERLIN TOWNSHIP TO THE TOWNSHIP OF WINSLOW. (Pa19)

Chapter 92 provides as follows:

"**43:15A-7.2 Ineligibility for PERS under professional services contract.**

a. A person who performs professional services for a political subdivision of this State or a board of education, or any agency, authority or instrumentality thereof, under a professional services contract awarded in accordance with section 5 of P.L.1971, c.198 (C.40A:11-5), N.J.S.18A:18A-5 or section 5 of P.L.1982, c.189 (C.18A:64A-25.5), on the basis of performance of the contract, shall not be eligible for membership in the Public Employees' Retirement System. A person who is a member of the retirement system as of the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall not accrue service credit on the basis of that performance following the expiration of an agreement or contract in effect on the effective date. Nothing contained in this subsection shall be construed as affecting the provisions of any agreement or contract in effect on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.), whether or not the agreement or contract specifically provides by its terms for membership in the retirement system. No renewal, extension, modification, or other agreement or action to continue any professional services contract in effect on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) beyond

its current term shall have the effect of continuing the membership of a person in the retirement system or continuing the accrual of service credit on the basis of performance of the contract.

b. A person who performs professional services for a political subdivision of this State or a board of education, or any agency, authority or instrumentality thereof, shall not be eligible, on the basis of performance of those professional services, for membership in the Public Employees' Retirement System, if the person meets the definition of independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code. Such a person who is a member of the retirement system on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall not accrue service credit on the basis of that performance following the expiration of an agreement or contract in effect on the effective date.

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

Chapter 92 essentially provides two tests of eligibility and is not an outright exclusion of the position of municipal prosecutor from PERS. In this case, the Respondent determined that Petitioner was ineligible for the intra-agency fund transfer solely under Chapter 92b. As a result, the Respondent's entire determination is limited to an analysis under Chapter 92b.

There have been some recent decisions by the Appellate Division that supports the Petitioner's position in this case. In Petit-Clair v. Board of Trustees,

Public Employee Retirement System, Docket No. A-4561-18T1, Publication Number 2020WL4280273 (Pa119), the Appellate Division once again endorsed the "IRS 20 Factor Test" in determining whether an individual is an employee or an independent contractor for pension purposes. The Appellate Division noted, "The factors should be applied in a fact-sensitive manner, inasmuch as the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed." Id., at 3.

In a case very similar to the matter at bar, the Office of Administrative Law found that a municipal prosecutor was an employee under Chapter 92b. In John J. Cassese v. Board of Trustees, Public Employee Retirement System, OAL Docket No. TYP05141-14, decided on July 21, 2015 (Pa123), Judge Strauss found that Mr. Cassese was an employee as the municipal prosecutor for the City of Perth Amboy. This decision was upheld by the Board. (Pa145) In that case, the Administrative Law Judge noted that if the legislature wanted to simply ban municipal prosecutors from the pension system they could have done so. However, Chapter 92b requires a fact-sensitive analysis of the "IRS 20 Factor Test".

Similar to the Petitioner in this case, Mr. Cassese also maintained a private practice of law. However, Perth Amboy in answering the Employee/Independent Contractor Checklist determined Mr. Cassese was as independent contractor. Here, Winslow Township found Petitioner is an employee. Despite both Perth Amboy's

and the Board's initial finding that Mr. Cassese was an independent contractor, the Administrative Law Judge and Board ultimately found that upon analysis of all the factors and the totality of the circumstances, Mr. Cassese was an employee and not an independent contractor and should never have been removed from PERS in the first place. Judge Strauss noted that in light of the special duties of a municipal prosecutor, some of the factors were inapplicable to the analysis and while a few minor factors led toward independent contractor, the weight of the other factors, when considered as a whole, and in the appropriate context, supported the conclusion that Mr. Cassese was not an independent contractor and rather an employee within the meaning of N.J.S.A. 43:15A-7.2(b).

Overwhelming evidence adduced at the OAL Hearing by both Petitioner, and the witnesses called by the Respondent, demonstrates Petitioner was an employee of Winslow as its municipal prosecutor from 2015 to the present. Under the "IRS 20 Factor Test", even Respondent concedes that four of the Factors are indicative of employee status and eight of the other sixteen Factors or half are not strong indicators of independent contractor status. Since 2010, Winslow has consistently determined Petitioner was an employee entitled to be enrolled in PERS except when they were directed by the Board to remove Petitioner from PERS in 2009. Except for perhaps one or two of the 20 Factors, Petitioner's testimony, supported by Winslow and largely uncontradicted at the time of the OAL Hearing, strongly favors

employee status. The Respondent's investigator had to concede that most, if not all, of the sixteen Factors they found were indicative of independent contractor status were not based upon proper information. Rather, they were based upon mistaken beliefs or upon erroneous conclusions from the records.

The report of Conover was fundamentally flawed. She admitted she did not have any first-hand knowledge of the Petitioner's work or the workings of the Municipal Court. The investigation report itself contained little to no investigation (a couple of hours of interviews on one day in 2019) and failed to obtain information from Petitioner herself or information from anyone in the Winslow Municipal Court system. Perhaps the greatest flaw is that while acknowledging the Pension Certifying Officer and Supervisor of the Pension Certifying Officer are those individuals imbued by statute to determine employee status, Conover and Respondent completely ignored multiple determinations from those Officials that Petitioner was an employee from 2015 to the present. That either shows great bias on the part of the Respondent or an unwillingness to face the clear evidence which was in front of them.

The fact of the matter is that Conover's so-called investigation report contained very little investigation whatsoever. Throughout her report and despite the facts clearly falling on the side of "employee status," Conover always defaulted to independent contractor status so Petitioner would not be enrolled in PERS. The

ALJ and the Respondent turned a blind eye towards the mountain of evidence which unequivocally establishes that under the "IRS 20 Factor Test", the Petitioner was an employee of Winslow from 2015 to the present. Given the principle that pension laws are to be construed most favorably in the employee's interest, it is clear that Petitioner's intra-agency fund transfer of service credits from Berlin Township to Winslow should be granted.

IRS 20 FACTOR TEST

FACTOR 1 – INSTRUCTIONS

This Factor concerns the amount of control the employer has over the individual. The more control, the more indicative it is of employee status. The Petitioner testified credibly and extensively about the overwhelming amount of control exerted by the Winslow Municipal Court Judge, Administrator, and others in performing her duties as municipal prosecutor. The control over the Municipal Court docket and the types of cases are solely governed by the Municipal Court Judge and Administrator and the Petitioner simply has no say in the process. Winslow's Police Records Department handles all local discovery requests and even uses its own letterhead with Petitioner's name on it when issued to defense counsel.

By contrast, the Respondent did absolutely no investigation whatsoever of municipal court personnel and despite the overwhelming evidence to the contrary, still found the Petitioner was an independent contractor while stating this Factor is

not a strong indicator of such. Curiously, the Respondent is concerned about the so-called lack of control by Winslow officials over Petitioner when she is not in Court session. This finding is preposterous as the overwhelming amount of municipal prosecutor functions are done while Court is in session. The fact that Petitioner took a call or two on her cell phone or at her law office pales in comparison to the overwhelming amount of control exerted by Winslow over the Petitioner. Here again, Respondent ignored the determinations of both Mr. Dringus and Ms. Esposito that for this Factor, Petitioner was considered an employee by the Township. Regardless of Respondent's position, the Pandemic has changed all this so whether she takes a call in the municipal building or outside of it, is no longer a viable basis to deny employee status and never really was.

FACTOR 2 – TRAINING

The more training an individual must undergo, the more indicative they are of being an employee. Petitioner testified extensively as to training given by Winslow, including the bi-annual municipal building security meeting, annual updates of Winslow ordinances and training sessions which Petitioner undergoes with the Camden County Prosecutor's office, Zoning Officers, Enforcement Officers, and Animal Control Officers. She also undergoes extensive training in the Municipal Case Resolution system since the Pandemic as well as the Plea by Mail process. Conover conceded during the OAL Hearing that she was unaware of the extensive

training Petitioner must undergo and had she known, it would be indicative of employee status.

FACTOR 3 – INTEGRATION

This is a control factor. The more an individual is integrated into the employer's business, the more they are an employee. Petitioner testified extensively about the interaction between her and Winslow's municipal court process. Petitioner gave uncontradicted testimony of her extensive involvement in discussing matters with Winslow police officers, Zoning Officers, Animal Control Officers and other enforcement officials. She also has extensive interaction with the police liaison officers and must report to the Township Administrator at the beginning of each Court session. On this last point, Conover conceded this is indicative of employee status.

Conover also testified that, "There is a great deal of control as to how Court sessions are performed and yes, they are very controlled methods." Conover also reported this Factor is not a strong indicator of independent contractor status. The only basis for her determination is that Petitioner was retained under a Professional Services Agreement between 2009 – 2014. However, Conover conceded that Petitioner was not subject to an RFP process or a Professional Services Agreement for the period of 2015 to the present, which is the only period at issue in this case. Critical to this analysis is that Conover conceded that Petitioner was not appointed

under the no bid professional services language of the Local Public Contracts Law from 2015 to the present.

FACTOR 4 – SERVICES RENDERED PERSONALLY

If an individual renders the services personally, then it is more indicative of employee status. There was uncontradicted testimony that Petitioner renders all of her services personally and her law firm is not a vendor or contractor with Winslow. The only information upon which the Respondent relies is there are other prosecutors who substitute for the Petitioner when she is either sick or on vacation. However, it was conceded that the Court Administrator selects the substitute prosecutor and the special DWI prosecutor who sometimes substitutes for Petitioner, does so personally and not through his special DWI prosecutor appointment. Even Mr. Dringus, who is a witness called by the Respondent, confirmed that it is the Court Administrator who has the responsibility to find Petitioner's replacement and not the Petitioner.

FACTOR 5 – HIRING, SUPERVISING AND PAYING ASSISTANTS

This is yet another Factor that Respondent says is not a strong indicator of independent contractor status. Despite noting that Petitioner is not authorized to hire others at her own expense or a third party to assist her in performing her duties, she still reported the Petitioner was an independent contractor under this Factor. The Petitioner provided extensive testimony about the multiple layers of assistance and support that she gets from the municipal court system from other Township

employees who work in the Municipal Court. Once again, Respondent references some "swapping system" between Petitioner and substitute prosecutors which was completely debunked at the time of the OAL Hearing.

FACTOR 6 – CONTINUING RELATIONSHIP

Under this Factor, the longer the relationship, the more consistent it is with employee status. It is uncontradicted that Petitioner has been the municipal prosecutor for 19 of the past 20 years for Winslow except for 2008. Under Title 2B of the state statutes, municipal prosecutors are required to be appointed on an annual basis. From 2015 to the present, Petitioner was appointed by Resolution and not through the RFP process and was not required to enter into a Professional Services Agreement which would have been indicative of independent contractor status. Despite this, Respondent simply goes back to a period that is not at issue in this case and refuses to acknowledge that Petitioner's appointments in 19 out of the last 20 years is indicative of a continuing relationship sufficient to support employee status.

FACTOR 7 – SET HOURS OF WORK

Under this Factor, Respondent testified to the lack of time-keeping records as indicative of independent contractor status. However, Conover was forced to concede at the OAL Hearing that Petitioner was a salaried employee who did not have to keep her hours of work like the Court Administrator, the Municipal Court Judge and the Township Administrative who are also salaried employees and do not

punch a clock and are enrolled in the PERS system. Petitioner also testified she did not submit invoices or vouchers as an outside professional would. Finally, the flaw in the investigation report was manifested here where Conover did absolutely no evaluation of anyone else in the Township on this Factor.

FACTOR 8 – FULL TIME REQUIRED

Petitioner is not a full-time employee, but due to its lack of size, Winslow only offers the municipal prosecutor position as a part-time employee position. Under the IRS revenue rulings cited above, an individual can be declared an employee even if it is a part-time position.

FACTOR 9 – DOING WORK ON EMPLOYER'S PREMISES

The more work done on the employer's premises, the more indicative it is of employee status. Both Petitioner and Respondent agree that she is required to do all her work during municipal Court sessions at the municipal building. At the OAL Hearing, Conover refused to acknowledge that the Pandemic has changed this Factor worldwide. Many individuals counted as employees and enrolled in various pension systems throughout the State of New Jersey, worked and continue to work off premises. In an ironic twist, Conover herself, who is a state employee and presumably enrolled in the pension system, testified from her home during the OAL Hearing. Since the Respondent did not update its report to analyze this once in a

century Pandemic impact on the "IRS 20 Factor Test", any position taken by Respondent on this issue must be rejected out-of-hand.

FACTOR 10 – ORDER OR SEQUENCE SET

The more a worker performs services in the order or sequence set by the employer, the more indicative it is that the individual is an employee. Once again, Petitioner testified extensively and without contradiction that the order and sequence of duties are set by the Municipal Court officials in Winslow and not by her. This is both before the Pandemic and during the Pandemic when the remote Court sessions were scheduled and set by Winslow court personnel. In her report, Conover noted it is Winslow and particularly the Municipal Court Judge who sets the order and sequence of how the cases are processed in municipal court. Also noted, the court calendar is set and prioritized by the Court Administrator. This is yet another Factor which Respondent says is not a strong indicator of independent contractor status.

Despite the overwhelming evidence to the contrary, the bias of the Respondent and its investigator are clearly evident in their analysis. Here, Respondent claims Petitioner is an independent contractor because the Township does not set the order or sequence of the services when she is not in Court session. This whole notion is ludicrous. Obviously, the employer does not set any employees' order or sequence of services when they are not working for them. This

streak of bias by the Respondent and Conover is replete throughout her report and the Board's decision.

FACTOR 11 – ORAL OR WRITTEN REPORTS

A requirement that the individual submit oral or written reports to the employer also indicates a degree of control which is indicative of employee status. While Conover notes in her report that Petitioner is required to prepare regular reports, that is exactly the opposite of her conclusion. In a biased way, Conover and Respondent depart from the reporting requirement under this Factor and concluded Petitioner is an independent contractor because she does not undergo "performance evaluations". Whether or not Petitioner undergoes performance evaluations has absolutely nothing to do with this Factor. Petitioner testified extensively that she is required to provide oral reports to liaison officers concerning the cases in the Municipal Case Resolution System and the Plea by Mail cases. She also testified she reports to the Township Zoning Officers, Code Enforcement Officers, and Animal Control Officers as to the disposition of their cases. Conover conceded that had she known this, it would be indicative of employee status.

FACTOR 12 – PAYMENT BY HOUR, WEEK OR MONTH

An individual who is paid through the payroll system and not through a voucher system is more likely an employee. It was conceded through the OAL Hearing and reporting by Respondent that Petitioner is paid through the bi-monthly

payroll system of the Township, is not paid through the submission of vouchers, all state and federal employee taxes are taken from Petitioner's paycheck, and she receives a W-2 at the end of each year. It was also established by both parties that Petitioner is paid through a salary ordinance which pertains to municipal employees only. This is the exact way Petitioner was paid from 2003-2008 when she was enrolled in the PERS system. Yet, despite all this information, Conover once again refers to the 2009-2014 period, which is not at issue in this case.

FACTOR 13 – PAYMENT OF BUSINESS AND/OR TRAVEL EXPENSES

Under this Factor, an employer who reimburses an individual for business or travel expenses is more indicative of employee status. During her investigation, Conover wrongfully concluded that since there were no business or travel expenses reimbursed by the Township, it was indicative of independent contractor status. Yet, once again, she noted that this is not a strong indicator of such status. However, Petitioner testified the Township does, in fact, reimburse her for business expenses, specifically State Police discovery and the "We Transfer" App for municipal court state police discovery to defense attorneys. Even Respondent's own witness, Mr. Dringus did not know if Petitioner had any business or travel expenses to be reimbursed in the first place. Conover conceded that had she known Petitioner was reimbursed for these business expenses, it would have been indicative of employee status.

FACTOR 14 – FURNISHING OF TOOLS AND MATERIALS

Under this Factor, an employer that furnishes the tools and materials for individuals is indicative of employee status. Petitioner testified extensively that she is provided with everything down to pen and paper by the Township. She is supplied with the use of the Township computer, copier, fax machine, telephone, and video boards for use while she is prosecuting. The Township provides her with all case files, the plea agreement forms, a HEPA filter in her conference room and a plexiglass guard on her conference room table as well as signs on her door at her Township workspace. The Township also provides the Petitioner with driver abstracts and criminal histories for her use as well as the Treatises on DWI law, Title 2C law and Title 39 law. In fact, Petitioner is given a key fob for her access to secure rooms and other facilities in the municipal building. Essentially, each tool of the trade the Petitioner needs to prosecute is supplied by the Township. This is one of the Factors which the Board notes is not a strong indicator of independent contractor status. Although her workstation is not permanent, she has used the same workstation for the past 20 years in the same room next to the same courtroom designated for the prosecutor.

FACTOR 15 – SIGNIFICANT INVESTMENT

Respondent concedes Petitioner meets the definition of employee under this Factor.

FACTOR 16 – REALIZATION OF PROFIT OR LOSS

Respondent concedes Petitioner meets the definition of employee under this Factor.

FACTOR 17 – WORKING FOR MORE THAN ONE FIRM AT A TIME

While the Petitioner works for other municipalities, she is the Municipal Court prosecutor in Berlin Township which has essentially the same duties and responsibilities as those in Winslow where she is enrolled in PERS.

FACTOR 18 – MAKING SERVICES AVAILABLE TO THE GENERAL PUBLIC

Under this Factor, an individual that makes their services available to the public on a regular basis generally indicates independent contractor status. What the Respondent fails to understand is that Petitioner does not provide municipal prosecutorial services to the public at large. She only provides such services to municipalities in which she is appointed as municipal prosecutor, including Berlin Township where she has been enrolled in the PERS system for a long time. This was also acknowledged by Conover at the OAL hearing.

FACTOR 19 – RIGHT TO DISCHARGE

Respondent concedes Petitioner meets the definition of employee under this Factor.

FACTOR 20 – RIGHT TO TERMINATE

Respondent concedes Petitioner meets the definition of employee under this Factor.

As set forth above, Respondent conceded that Petitioner meets four of the 20 Factors for employee status. Out of the other sixteen Factors, while in their view, Petitioner is an independent contractor, Respondent concedes that half of those Factors are not a strong indicator of independent contractor status. The lack of any real investigation conducted by Respondent, the uncontradicted testimony of Petitioner and the actual statutory officials delegated with the responsibility of making this determination, all lean heavily in favor of Petitioner being an employee. While Petitioner does concede that one or two of the Factors would be indicative of independent contractor status, the overwhelming evidence established at the time of the OAL Hearing, largely uncontracted by Respondent, establishes that at least 18 of the 20 Factors in the Test established Petitioner as an employee of Winslow Township for the period of 2015 to the present.

III. THE ALJ'S DECISION AFFIRMED BY THE BOARD WAS ARBITRARY AND CAPRICIOUS AND NOT BASED UPON SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD. (Pa19)

Judge Calemmo found the following:

"Winslow does not control, supervise or direct Platt's work efforts. Winslow does direct Platt's hours insofar as they are tied to the Court calendar. Platt reports to the Court Administrator at the start of her day. However, I distinguish this from punching a time clock, signing in or otherwise alerting a supervisor that you have

timely arrived at work station which I believe is the intent of this inquiry. Indeed, Winslow maintains no time keeping records for Platt."

This finding by the Court is factually erroneous as the overwhelming evidence as set forth above demonstrates that there was an enormous amount of control by Winslow Township over the Petitioner's work schedule as the municipal prosecutor. Indeed, the ALJ did confirm that amount of control in her decision.

The issue here surrounds the "IRS 20 Factor Test" applied to Petitioner's duties and role as municipal prosecutor. Most, if not all of the municipal prosecutor's work in this case, as in similar cases cited above, involve their functions, duties and activities during the court sessions and related to court sessions. It was confirmed that no salaried employee in Winslow Township either punches a clock and as a result there cannot be and should not be any time keeping records for the Petitioner. While the ALJ acknowledged Petitioner reported to the Court Administrator at the start of her day distinguishes this from punching a clock, this is a distinction without a difference. This very minor point which is factually erroneous is against the great weight of evidence showing all the control which the Township of Winslow exerts over the Petitioner in her duties as municipal prosecutor.

The ALJ also made the following erroneous factual determination:

"Platt is a seasoned prosecutor, who offered credible testimony as to her role in Winslow and her duties as a municipal prosecutor. However, Platt's knowledge of her duties compared to the information provided by the Winslow representatives showed that Winslow does not control, direct, or supervise Platt's work activities.

The Winslow representatives did not possess the level of detail in Platt's duties which would have been indicative of control."

The emphasis on control should be on the Petitioner's ability to independently direct her own work efforts versus the level of qualitative detail which any employee much less a municipal prosecutor would know over a Township representative that is not within the municipal court system. The irony here is that those very same Winslow representatives who the ALJ claims have less knowledge of Petitioner's duties, are the very same ones who classified the Petitioner as an employee rather than an independent contractor. This factual determination by the ALJ cannot withstand appellate scrutiny.

The ALJ based her findings on extremely minor and insignificant points instead of the totality of all the evidence of all the factors to reach her conclusion that Platt was not an employee. The ALJ noted that Platt was required to take some required municipal training but not all, that she was not subject to performance evaluations and that at least one witness for the Township was not familiar with her expense reimbursements. (Pa16) Petitioner testified extensively about reimbursements that she received directly from Winslow Township including State Police discovery and the "We Transfer" App. In fact, the Respondent's investigator conceded that had she known Petitioner was reimbursed for these business expenses it would be indicative of employee status.

The ALJ also confused the issue of the Petitioner's longevity with the requirement that municipal prosecutors get reappointed annually pursuant to N.J.S.A. 2B:25-4. This is a serious legal disconnect between the "IRS 20 Factor Test" which looks at the longevity of a prosecutor which in this case is 20 years versus a statutory annual reappointment requirement which has no bearing on the issue. Clearly, if the legislature wanted to preclude municipal prosecutors from enrollment in PERS they could have said so. Chapter 92 does not specifically exclude municipal prosecutors from enrollment in PERS or from intra-agency PERS transfers.

CONCLUSION

Based upon the substantial credible evidence in the record, the ALJ could not have reasonably reached any of the factual determinations it did in deeming Petitioner ineligible for the intra-agency transfer. For the most part, the ALJ's decision ventures into interpretation of various statutes and the interplay between them which are not entitled to any deference by this Court. Therefore, it is respectfully requested that the ALJ's decision be reversed, and the Petitioner be deemed eligible for the intra-fund transfer.

Respectfully submitted,
THE PLATT LAW GROUP, P.C.
By: /s/ Stuart A. Platt
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Attorney for Plaintiff/Appellant,

DONNA PLATT, Petitioner-Appellant, v. BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, Respondent-Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3898-22T4 Civil Action ON APPEAL FROM A FINAL AGENCY DECISION OF THE BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Brief and Appendix of Respondent Board of Trustees,
Public Employees' Retirement System
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OTHER AUTHORITIES

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant, Donna Platt, appeals the final agency decision of the Board of Trustees, Public Employees' Retirement System denying an intra-fund transfer of her Public Employees' Retirement System (PERS) service credit for services performed as a Municipal Prosecutor from Berlin Township to the Township of Winslow. (Pb1).[2] The services Platt performed as a Municipal Prosecutor for Winslow are not eligible under the Legislature's significant "Chapter 92" pension benefit reforms of 2007, which removed professional service providers who were previously enrolled in the PERS. (Pa1; Pa20).

A. Legislative History of Chapter 92

In 2005, concerned that the State's public pension systems were rife with abuse and upon the verge of a fiscal crisis in the funding of these benefits, the Legislature undertook a comprehensive study and review of these problems. The Report of the Benefits Review Task Force to Acting Governor Richard J. Cody at 3 (December 1, 2005). The New Jersey Benefits Review Task Force issued a final report and recommendations in December 2005. Ibid. The Task

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

[2] "1T" refers to the February 16, 2023 hearing transcript; "Pb" refers to Platt's brief; "Pa" refers to Platt's appendix; "Ra" refers to the Board's appendix.

Force described the problem relevant here as follows:

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

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

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

A Special Session Joint Legislative Committee on Public Employee Benefits Reform was convened, considered the Task Force Report Recommendations, held hearings and issued its Final Report on December 1, 2006. 2006 Special Session Joint Legislative Committee Public Employee Benefits Reform Final Report, (Dec. 1, 2006). Recommendation No. 10 of the Joint Legislative Committee again urged that all professional services contractors be excluded from PERS membership. The Committee stated:

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

In the years that followed, the Legislature enacted a series of sweeping reforms designed to curb abuses and restore fiscal integrity to the retirement systems. Specifically, Chapter 92 was enacted in May 2007 to effectuate several recommendations in the Joint Legislative Committee Report. N.J.S.A. 43:15A-7.2(a). Section 20 of Chapter 92, codified at N.J.S.A. 43:15A-7.2, responded to Recommendation No. 10 by clarifying that individuals performing professional services under a professional services contract awarded under N.J.S.A. 40A:11-5, 18A:18A-5 or 18A:64A-25.5 (governing local government contracts and

school contracts) following the expiration of the term of any existing contract would not be eligible for future PERS service credit. N.J.S.A. 43:15A-7.2(a).

Following the enactment of Chapter 92, the Division of Pensions and Benefits (the "Division") and the Division of Local Government Services issued more specific guidance to local governments concerning the proper enrollment of individuals performing professional services, many of whom were not full-time employees and were engaged by multiple entities. In July 2012, the Office of the State Comptroller ("OSC") conducted an extensive audit of PERS local employer locations and found that, in violation of Chapter 92, a significant number of professional services providers remained enrolled in PERS after January 1, 2008, even though many were engaged through professional services contracts awarded under the Local Public Contracts Law (the "LPCL"), N.J.S.A. 40A:11-1 thru -60, or were not "employees" but rather independent contractors. Improper Participation by Professional Service Providers in the State Pension System at 9 (July 17, 2012). The OSC Report found that many employers failed to review these situations or took no action after Chapter 92's enactment, and as a result, many professional services providers, including attorneys who provided legal services to local governments under publicly bid contracts, remained in PERS after January 1, 2008, though ineligible for credit based on this service.

Id. at 10-13. The examples cited in the OSC Report included municipal attorneys, municipal prosecutors and municipal public defenders. Ibid. Subsequent to the OSC Report, the Division began auditing a number of municipalities to determine compliance with Chapter 92, including this case. (Ra1-3).

B. Platt's Professional Relationship with Winslow

In 1993, Platt enrolled into PERS. (1T10:19-20). From 2003 to the present, with the exception of 2008, Platt served as Municipal Prosecutor for Winslow. (1T9:22-10:2). From 2009 through 2014, Winslow solicited Platt's services through the Request for Proposals process under the LPCL. (1T11:10-11:12). Her job duties and responsibilities as Municipal Prosecutor for Winslow remained the same since the beginning of her service in 2003. (1T12:1-9). Platt has also been the Municipal Prosecutor for Township of Berlin (2008-present), Borough of Berlin (2008-2010), Stratford Borough (2010-2012), Voorhees Township (2018-present), and Waterford Township (2023). (1T10:2-7). From 2003 until 2007, Platt was enrolled in PERS for her municipal prosecutor positions in Winslow, Borough of Hi-Nella, Borough of Chiselhurst, Borough of Berlin, and Township of Berlin. (1T10:15-22; Pa154-55). Her duties and

responsibilities in the municipalities where she served as a Municipal Prosecutor were essentially the same. (T11:17-21).

In 2010, the Pension Fraud and Abuse Unit (PFAU) began an investigation into Platt's eligibility for PERS. (Pa155; Ra1-3). The PFAU concluded Platt was an employee of the Township of Berlin and remained eligible for PERS based on that employment, but she was ineligible for PERS participation and service credit for the other four municipalities, including Winslow, because she was engaged under a professional services contract with them. (Pa155). In 2015, the Board affirmed the PFAU's decision and determined that because Platt was hired under a professional services contract in Winslow from 2009 through 2014, she was ineligible for PERS participation and service credit. (Pa157; Ra18-19).

Platt appealed and, in 2017, the Appellate Division held that Platt was hired through a professional services contract in Winslow, and was therefore ineligible to participate in PERS at Winslow from 2009 through 2014. (Pa171-72).[3] In its decision, the court stated:

> We reject the suggestion the municipality [Winslow] believed Platt was its employee; we do not agree that the title to an earlier contract, labeled "Employment

[3] The court also determined that Platt was hired through a professional services contract in Hi-Nella, Chesilhurst, and Township of Berlin, and was also ineligible to participate in PERS at those locations. (Pa172-74).

> Agreement" is controlling; nor is payment of the annual contract salary through payroll dispositive. We look past the form employed and examine the substance of the arrangement. Chapter 92 makes clear labeling the engagement an employment contract will not save an ineligible individual from the preclusive effect of the statute.
>
> [Ibid.]

While this case was pending in this court, in February 2015, Winslow adopted an ordinance "designating the salaries, wages, retainers, benefits and other conditions of employment" for Municipal Prosecutor. (Ra5-17). Later in 2015, Platt submitted an application for an intra-fund transfer to transfer her PERS service credit from the Township of Berlin to Winslow. (Pa37).

At its January 18, 2017 meeting, the Board denied Platt's request for an intra-fund transfer from the Township of Berlin to Winslow. (Ra18-19). The denial was based on a determination by Susan Grant, the then-acting director of the PFAU, that there were no material changes in Platt's duties and the attempt to allow Platt to convert her status from independent contractor to employee via an ordinance violated the very purpose of Chapter 92. Ibid. Platt appealed the Board's denial and the matter was transferred to the Office of Administrative Law, then subsequently returned to the Board for further administrative review

under N.J.S.A. 43A:15A-7.2(b), which required application of the IRS twenty-factor test. (Ra20-22).

On July 3, 2019, Kristin Conover, successor to Grant as acting director of the PFAU, reissued a determination applying the twenty-factor balancing test from IRS Revenue Ruling 87-41 ("twenty-factor test") to determine that Platt served Winslow as an independent contractor, not an employee. (Pa95-115). Conover found that Platt was ineligible for PERS enrollment through Winslow from 2015 onward pursuant to N.J.S.A. 43:15A-7.2(b) because she met the definition of independent contractor under the twenty-factor test. (1T95:21-96:1; Pa105-07). Conover has been specifically trained on the IRS twenty-factor test by supervisors who were retired from the IRS. (1T113:8-13).

During her investigation, Conover obtained information from many different sources. (Pa95-107). First, she considered the procedural history of the case and the factors that led Platt to request an intra-fund transfer. (Pa95-97). Then, she sought information and documentation directly from Winslow in the form of an "Employee/Independent Contractor Checklist" completed by Nancy Esposito, certifying officer for Winslow (Pa55-57) and a "20 Point Questionnaire" also completed by Esposito (Pa46-54). (1T96:2-97:7; Pa98). Although Esposito signed both forms, filling out the forms was a collaborative

effort between Esposito, Stephen Dringus, Chief Financial Officer and Supervising Certifying Officer, and Joseph Gallagher, Township Administrator. (1T188:18-24). Conover also conducted an interview on January 15, 2019, with Esposito, Dringus, and Gallagher. (1T86:6-22; Pa98-100). Conover interviewed the Certifying Officer and the Supervising Certifying Officer because they are the "statutorily designated individuals at any location to provide information regarding pension issues, including eligibility and enrollment." (1T85:2-6). Conover did not interview Platt, as subjects of PFAU investigations are not often interviewed in the course of the investigation. (1T114:19-21). Conover did, however, send Platt two written requests on July 13, 2019, and August 16, 2018, to complete a "20 Factor Questionnaire" but Platt never answered them. (1T114:21-23; Pa105).

Looking at the relationship between Winslow and Platt through the years, Conover found that between 2009 to 2014, Platt was hired through the RFP process. (Pa101-02). For each of these years, Winslow solicited bids by issuing an RFP and Platt responded. (Pa101-02; 1T90:10-15). Then in 2015, following the Board's affirmance of the PFAU's determination that Platt was ineligible for PERS for her service at Winslow because she was hired under a professional services contract, Winslow passed an ordinance designating Municipal

Prosecutor as an employee position. (1T92:23-94:6; Ra4-17). On January 6, 2015, Winslow sent a letter to the Attorney General's Office indicating that Platt had been hired as an employee of Winslow in the position of Municipal Prosecutor. (1T94:7-95:16; Pa39).

On October 19, 2020, the Board determined, on a totality of the circumstances, that the factors weighed in favor of Platt's status as an independent contractor. (Ra23-29). Platt appealed and this matter was again transferred to the Office of Administrative Law for a hearing and determination by an administrative law judge (ALJ). (Ra30-32).

At the February 16, 2023 hearing, Platt testified on her own behalf. (1T8:21-75:3). Conover and Dringus testified on behalf of the Board. (1T83:3-184:20; 1T187:2-202:19). On June 13, 2023, the ALJ issued a decision affirming the Board's denial of Platt's request to transfer her PERS service credit from the Township of Berlin to Winslow. (Pa20). The ALJ concluded that Platt failed to meet her burden of proving she was eligible for pension credit under N.J.S.A. 43:15A-7.2(b) because the ALJ found that Platt was an independent contractor. (Pa19). The ALJ noted that some of the factors, such as financial control, are easy to manipulate. Ibid. The ALJ explained that, according to the IRS rules, the most important consideration in the twenty-factor

test is to determine whether the employer "controls" the worker, meaning the employer controls not only what shall be done but how it shall be done. Ibid. The IRS Revenue Ruling 87-41 specifically noted that certain professions, such as lawyers, are generally not employees. (Rev. Rul. 87-41, 1987-1 C.B. 296, at *10; Pa19-20).

In weighing the twenty-factors, the ALJ highlighted some facts which, taken in the totality of circumstances, tipped the scales in favor of finding Platt's status as an independent contractor--specifically, Factor #1 – Instruction; Factor #2 – Training; Factor #3 – Integration; Factor #10 – Order of Sequence Set; Factor #11 – Oral or Written Reports; Factor #17 – Working at More Than One firm at a Time; and Factor #18 – Making Services Available to General Public. (Pa20). Based on these factors, the ALJ found that Winslow did not control, supervise or direct Platt's work effort. (Pa15).

As for the individual factors, for Factor #1 – Instruction, the ALJ found that Winslow required that Platt prosecute on Wednesdays during the court sessions. (1T13:19-14:5). The court administrator set the docket, which Platt had no control over. (1T14:5-20). Every Wednesday, Platt would go to the court administrator in the morning to ask about that day's docket and she left when court was adjourned. (1T20:11-22). She was not required to clock in or

out when she arrives or leaves, nor was she required to keep a timesheet. (1T62:13-63:4). While Platt reported to the court administrator every Wednesday, the ALJ determined this was not equivalent of "punching in" or "signing in" as Winslow did not keep any timekeeping records. (Pa15).

In addition, the Municipal Judge and Municipal Court Administrator set the sequence of the court proceedings in the way that any municipal judge and municipal court administrator would. (1T105:12-21). Additionally, any work outside of court, such as preparatory work, was not directed or controlled by Winslow or the court and the Municipal Judge did not supervise Platt in that work. (1T105:17-21). If Winslow needed to contact Platt outside of court hours, they contacted her via telephone or email at her private law office. (1T62:6-12). The ALJ did not give much weight to Platt's testimony that she was supervised by the Judge as she performed the same duties as Municipal Prosecutor in other municipalities. (Pa16). Further, the ALJ noted that while "Platt must obviously be present when court is in session, . . . no one in Winslow otherwise control[led] her comings and goings." (Pa20). Outside of being required to be present for court proceedings, Winslow did not exert any other control over Platt. (1T100:3-7).

With respect to the COVD-19 pandemic, there was a time where Winslow municipal court sessions were fully remote, so Platt performed her Municipal Prosecutor duties from her private law office.[4] (1T18:4-25). While court proceedings were remote, the Winslow court administrator would email Platt a complaint and a Plea by Mail form, which Platt would need to email to the defendant or defense counsel. (1T15:14-16:3). Platt was also required to check the Municipal Case Resolution System through the New Jersey Court's website. (1T16:4-8). Winslow's Municipal Court sessions are now fully back to in-person proceedings. (1T38:6-9). However, Platt still checks the Municipal Case Resolution System every day and estimated that she performs an extra one to two hours a week of work beyond court appearances. (1T42:23-42:10).

In her report, Conover noted inconsistent answers from Winslow as to Factor #1 – Instruction. (Pa109). On the Checklist, Winslow answered "yes" for the question "Does the location have the right to control, supervise or direct the individual performing the services, not only as to result but as to how assigned tasks are performed?" (Pa55). However, in the January 2019

[4] Conover prepared her report prior to the pandemic. (1T105:3-11). However, when considering the impact of the pandemic, Conover explained that an individual's situation needs to be considered in relation to how the other employees are treated to determine the level of control over the individual. (1T170:8-19).

interview, Winslow stated that the Municipal Prosecutor was not supervised, directed, or controlled by anyone at the Township. (Pa109). Further, Dringus was not aware of anyone from Winslow, outside of the municipal court, directing or supervising Platt. (1T190:24-191:2).

As to Factor #2 – Training, the ALJ found that Platt was not required by Winslow to receive training in diversity, harassment, and ethics in the workplace, that other Winslow employees were required to do. (Pa16). Twice a year, Platt was required to attend security meetings with the township administrator, the police chief, the liaison officers, the judge, the court administrator, the bailiff, and the security officers. (1T26:14-26). Conover explained that even if Platt was required to attend meetings on court security, that would not lean towards employee status because she was not required to perform other trainings, such as Human Resource trainings, that other employees were required to do. (1T180:23-181:8; 1T56:8-12).

Winslow also gave conflicting answers for this factor. (Pa109). In the Checklist, for the question "Does the location require the individual to be trained related to their position (e.g. sexual harassment, ethics, etc.)"? Winslow answered "yes." (Pa56). However, in the Questionnaire, Winslow stated "We do not provide training." (Pa47).

For Factor #3 – Integration, Conover explained that the IRS noted that if the worker's services are integral, the employer will exert significant control over the individual. (1T101:14-16). Through her investigation, Conover did not see that level of control exerted over Platt. (1T101:16-17). Conover found Platt met the definition for independent contractor for this factor, but noted due to the unique fact that every municipality requires municipal prosecutors, her finding of independent contractor was not a strong indicator of such status for this factor. (1T101:17-22; Pa105; Pa109).

As to Factor #4 – Services Rendered Personally, Platt said that she and Winslow worked together to find a substitute when she could not attend court. (1T32:20-22). Typically, the substitute was the other Winslow Municipal Prosecutor. (1T32:22-33:8). Winslow paid the other prosecutor when he substituted for Platt. (1T74:10-16).

Conover received conflicting information from Winslow about finding substitutes. (1T101:23-102:18; Pa110). In the Questionnaire, Winslow answered that "court office selects replacement – paid rate and paid by purchase order." (1T102:4-8; Pa48). Then, in the January 2019 Interview, Winslow

indicated that Platt was responsible for finding a replacement and was to swap compensation with the replacement. (1T102:9-14; Pa110).[5]

For the next one, Factor #5 – Hiring, Supervising, and Paying Assistants, Winslow answered in the Questionnaire that Platt had "no known assistants." (1T102:25-103:17; Pa48; Pa105; Pa110). Such an answer indicated that Winslow did not know if Platt had assistants or not, meaning that they were not exerting control. (1T129:1-3). Notably, Winslow did not answer that Platt cannot have any assistants. (1T128:1-2). However, according to Platt, any assistants she used were provided by Winslow, such as the liaison officers, the bailiff, and the court administrator. (1T36:11-15).

For Factor #6 – Continuing Relationship, the ALJ noted that because the municipal prosecutor position required yearly re-appointment, Platt did not have an on-going employment relationship with Winslow. (Pa17). Along with the yearly re-appointments, Platt's designated status with Winslow changed many times from employee to independent contractor back to employee. (1T101:10-13).

For Factor #7 – Set Hours of Work and Factor #8 – Full Time Required, the ALJ found that while Platt had set hours on Wednesday, she did not work

[5] Here, Conover noted that the other Municipal Prosecutor hired by Winslow was hired through the RFP process. (1T158:6-8).

full time. (Pa16). Winslow noted that municipal court sessions were on Wednesdays from 8:30 a.m. to 1:00 p.m., two weeks a month, and then Wednesdays from 8:30 a.m. to 5:00 p.m., the other two weeks of the month. (Pa49; Pa111). Winslow also noted that they contacted Platt via her personal email or cell phone when court was not in session. (Pa49; Pa111).

With respect to timekeeping, Platt did not fill out a timesheet. (1T62:25-63:4). Conover explained that the fact that Platt did not fill out a timesheet was not alone indicative of employee status because many salaried employees were required to complete timesheets. (T165:22-166:8). Conover further explained that the issue of timekeeping had to be compared to the other salaried employees, meaning that if all other salaried workers did not have submit timesheets, then the issue of timesheets would be neutral. (1T166:3-5). But if the other salaried workers had to submit a timesheet, but Platt did not, then it would lean towards her being an independent contractor. (T66:5-8). Dringus explained that payroll issued a timesheet to every department with all the employees listed. (1T197:23-198:2).

Conover again noted inconsistent answers for Factor #8. (Pa111). In the Checklist, for the question "hours worked per week," Winslow responded "varies." (Pa55). In the Questionnaire, for the questions "What hours did he/she

ordinarily work for the public entity? How many hours were required?," Winslow answered "Wednesday 8:30 am until court is over [and] 2 weeks a month court ends at 1:00 PM[,] the other two weeks a month it ends at 5:30 PM." (Pa49). For the questions "What hours was the member required to be available to any personnel of the public entity? Was he/she required to attend meetings arranged by the public entity? If so, how often?." Winslow answered "no additional hours – court schedule." (Pa50).

For Factor #9 – Doing Work on Employer's Premises and Factor #10 – Order of Sequence Set, see the facts listed under Factor #1.

For Factor #11 – Oral or Written Reports, the ALJ found that the reports Platt made to the police, zoning officers, code enforcement officials, and animal control officers were specific to the cases she was working. (Pa15). Conover explained that when considering this factor, the Division looks at if the individual is providing regular information about the way in which their work is being conducted. (1T181:15-18). It does not matter to whom this information is being reported. (1T181:15-16). Here, Platt trained officers by discussing their investigation reports and how to improve them, discussing the case law, and relaying developments in the case law or new directives. (1T28:6-23). She also met regularly with the animal control officers, zoning officer, and the code

enforcement officers to "get their input, instructions, advice, and recommendations on what the Township want[ed]." (1T29:4-12). Further, the Municipal Judge monitored her plea agreements and DWI dispositions to ensure they were legally sufficient. (1T33:20-35:17).

The ALJ noted that Winslow gave conflicting answers on the Questionnaire and Checklist about whether Platt had to prepare regular reports. (Pa16). In the Checklist, for the question "Is the individual required to prepare regular reports?." Winslow answered "yes." (Pa56). In the Questionnaire, Winslow responded "N/A" to questions regarding whether she submitted regular written or oral reports and whether the public entity tracked the member's productivity or work accomplishments. (Pa51). The ALJ found that Winslow's answers in the Questionnaire and Checklist, combined with Dringus's testimony indicated a lack of knowledge about Platt's duties which demonstrated that Winslow did not control, direct, or supervise Platt's work. (Pa15). The ALJ reasoned that the "Winslow representatives did not possess the level of detail in Platt's duties which would have been indicative of control." Ibid.

Along with not providing reports on her work, the ALJ found that Platt also was not subject to performance evaluations. (Pa16). The ALJ found

Winslow did not evaluate her work or give her instructions on how to perform her work. (Pa16).

As to Factor #12 - Payment by Hour, Week, Month, the ALJ reasonably noted that financial control could be easily manipulated by the parties, such as readily making payment with a W-2 with all the usual deductions. (Pa19). Conover explained that while Platt was paid a salary, the IRS explained that "payment by the hour, week, or month generally points an employer/employee relationship, provided that the method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of the job." (1T106:15-21; Pa106; Pa113). Conover further explained that if Platt were to be labeled as an employee incorrectly, she would be paid via payroll, but that would not be dispositive of employee status. (1T106:24-107:2).

For Factor #13 – Payment of Business and/or Training Traveling Expenses, the ALJ again noted conflicting testimony between Platt and Winslow. (Pa16-17). Winslow indicated that there were no reimbursed expenses, but also did not indicate whether there were any expenses to be reimbursed. (1T107:8-12; Pa52; Pa56). Specifically, Dringus was not aware of any reimbursed travel or business expenses and explained that reimbursements would be processed through his office. (1T195:17-19; 1T200:21-201:3). Platt stated that because

Winslow required that she process state police discovery, she used an application called "We Transfer" to provide discovery to defendants. (1T47:16-48:7). Contrary to Winslow's answers, Platt said she sends Winslow an invoice for the application and Winslow reimbursed her $120 annually. (1T48:2-11). Winslow did not reimburse her for any other expenses. (1T48:12-15).

As to Factor #14 – Furnishing of Tools and Materials, the ALJ found that Winslow only provided incidental office supplies. (Pa16). Winslow provided Platt with ancillary items such as office supplies, use of a copier and fax machine, and postage. (1T107:17-18). In the January 2019 interview, Winslow officials stated that they did not provide bigger items such as a permanent workspace, office, a secretary, phone or Township email. (1T107:20-21; Pa113). However, in the Checklist, Winslow officials marked "yes" for the question "Does the location provide the individual with permanent workspace and facilities (e.g. office space, tools, secretarial support, computer, etc.) at the expense of the location?" (Pa56; Pa113). Additionally, the conference room where Platt worked did not have her name on the door, rather it just said "Municipal Prosecutor." (1T65:8-12).

For Factor #17 – Working at More Than One firm at a Time and Factor #18 – Making Services Available to General Public, the ALJ found that Platt

provided municipal prosecutorial services for other municipalities and offered her legal services to the public. (Pa16; Pa20). Platt was concurrently the Municipal Prosecutor at Winslow, Chesilhurst, Hi-Nella, Borough of Berlin, and Township of Berlin, along with having her own private practice. (1T108:5-13; Pa106; Pa114). Platt also offered her services as an attorney to the general public through her private law firm, Donna Sigel Platt, P.C. (1T108:14-18; Pa106; Pa115).

The ALJ found that in all the other municipalities except the Township of Berlin, Platt performed her services based on a professional services agreement as an independent contractor. (Pa17). Prior to 2015, Platt also performed municipal prosecutorial services for Winslow under a professional services agreement and, by her own admission, the nature of her services did not change between the years before 2015 and the years after 2015. Ibid.

Ultimately, the ALJ concluded that "Platt is an independent contractor who performs professional services for a political subdivision," and as a result, is ineligible for an intra-fund under N.J.S.A. 43:15A-7.2(b). (Pa20).

At its meeting of July 19, 2023, the Board adopted the initial decision affirming the Board's denial of Platt's application to transfer her PERS membership from Berlin to Winslow pursuant to N.J.S.A. 43:15A-7.2(b). (Pa1).

ARGUMENT

THE BOARD REASONABLY DETERMINED THAT PLATT IS INELIGIBLE FOR PERS SERVICE CREDIT AS MUNICIPAL PROSECUTOR FOR WINSLOW UNDER N.J.S.A. 43:15A-7.2(b).

Courts "have but a limited role to play in exercising judicial review over the actions of other government agencies." Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 595 (1991); Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 189 (1980). An administrative agency's determination is presumptively correct, and on review of the facts, a court will not substitute its own judgment for the agency's where the agency's findings are supported by sufficient credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Thus, if a court "is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result." Campbell v. New Jersey Racing Comm'n, 169 N.J. 579, 587 (2001) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988)).

This court also "afford[s] substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196

(2007) (citing R & R Mktg., LLC v. Brown-Forman Corp., 158 N.J. 170, 175 (1999)). "Such deference has been specifically extended to state agencies that administer pension statutes," because "a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." Piatt v. Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015) (quoting In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010) (additional citations omitted)). Thus, a party who challenges the validity of the Board's administrative decision bears "a heavy burden of . . . demonstrating that the decision was arbitrary, unreasonable or capricious." In re Tax Credit Application of Pennrose Props. Inc., 346 N.J. Super. 479, 486 (App. Div. 2002); accord Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011).

Platt cannot shoulder that burden. Chapter 92 should be strictly applied to effectuate the Legislature's intent. N.J.S.A. 43:15A-7.2(b). While pension statutes should be construed liberally "in favor of the persons intended to be benefitted thereby," Bumbaco v. Bd. of Trs., Pub. Emps.' Ret. Sys., 325 N.J. Super. 90, 94 (App. Div. 2000), "eligibility is not to be liberally permitted." Smith v. Dep't of Treasury, 390 N.J. Super. 209, 213 (App. Div. 2007).

"Instead, in determining a person's eligibility to a pension, the applicable guidelines must be carefully interpreted so as not to 'obscure or override considerations of . . . a potential adverse impact on the financial integrity of the [f]und.'" Ibid. (quoting Chaleff v. Tchrs. Pen. & Annuity Fund Trs., 188 N.J. Super. 194, 197 (App. Div. 1983) (alterations in original)). Further, the Board has both the authority and the obligation to correct errors in PERS benefits, regardless of when they arise. See N.J.S.A. 43:15A-54; Cavalieri v. Bd. of Trs., Pub. Emps.' Ret. Sys., 368 N.J. Super. 527, 539 (App. Div. 2004) ("The statute requires the retirement system to correct the error . . . .").

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

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

> C.43:15A-75 and C.43:15A-135) and continuously thereafter; . . . .
>
> [Ibid. (emphasis added).]

Enacted in 2007, N.J.S.A. 43:15A-7.2(b) precludes any person who qualifies as an independent contractor from PERS membership after December 31, 2007. The statute states, in pertinent part:

> A person who performs professional services for a political subdivision of this State or a board of education, or any agency, authority or instrumentality thereof, shall not be eligible, on the basis of performance of those professional services, for membership in the Public Employees' Retirement System, if the person meets the definition of independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code. Such a person who is a member of the retirement system on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall not accrue service credit on the basis of that performance following the expiration of an agreement or contract in effect on the effective date.
>
> [Ibid. (emphasis added)]

It is fundamental that in interpreting a statute, a court will first look to its plain terms. Nobrega v. Edison Glen Assoc., 167 N.J. 520, 536 (2001). "If the language is plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms." Sasco 1997 NI, LLC v. Zudkewich, 166 N.J. 579, 586 (2001) (quoting State, Dep't of Law

& Pub. Safety v. Bingham, 119 N.J. 646, 651 (1990)). The overriding objective is to "effectuate the legislative intent in light of the language used and the objects sought to be achieved." McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (quoting State v. Hoffman, 149 N.J. 564 (1997)). Further, "[a]n administrative agency may not under guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows." Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964). A court must reject a statutory interpretation that is contrary to the statutory language. GE Solid State, Inc. v. Dir., Div. of Tax'n, 132 N.J. 298, 306-07 (1993).

Here, not only does the plain language of Chapter 92 disallow service credit after January 1, 2007, for professional service providers, but being an employee has been a prerequisite to enrollment in PERS since the system's inception. See N.J.S.A. 43:15A-7 (State employee eligibility); N.J.S.A. 43:15A-6(r)(1) (defining "compensation" for employee). Independent contractors are specifically ineligible to accrue service credit in PERS based on such service. N.J.S.A. 43:15A-7.2(b).

In order to determine whether an individual performed contracted services as an independent contractor or an employee, the Board uses the twenty-factor

test established in IRS Revenue Ruling 87-41. The weight of each factor varies "depending on the occupation and the factual context in which the services are performed." Rev. Rul. 87-41, 1987-1 C.B. 296, at *10-11. Further, IRS Revenue Ruling 87-41 states that "individuals, such as physicians, lawyers, dentists . . . who follow an independent . . . profession, in which they offer their services to the public, generally, are not employees." Ibid.

The use of the twenty-factor test has been historically approved by this court. Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 393 N.J. Super. 524, 542, 544 (App. Div. 2007) (permitting twenty-factor test in classifying member as employee or independent contractor), overruled in part on other grounds, 198 N.J. 215 (2009); Stevens v. Bd. of Trs., Pub. Emps.' Ret. Sys., 309 N.J. Super. 300, 303 (App. Div. 1998) (endorsing twenty-factor test); see also Francois v. Bd. of Trs., Pub. Emps.' Ret. Sys., 415 N.J. Super. 335, 351 (App. Div. 2010) (approving Board's use of twenty-factor test "to determine whether a public sector employer had sufficient 'control' over a person to so that the person was an employee whose service and salary was creditable in PERS . . . .").

Here, the ALJ and Board reasonably determined that under the twenty-factor test, Platt was an independent contractor for Winslow. (Pa1; Pa19-20).

In essence, the twenty-factor test simply quantified what is apparent in the record – Winslow did not exert control beyond the level of control required for all municipal prosecutors (employees and contractors), and Winslow had an attorney-client relationship rather than an employer-employee relationship.

Platt's argument, in essence, asks this court to weigh the twenty-factor test differently than the Board and the ALJ. (Pb32-36; Pb47-50). As noted above, the Board's decision under the twenty-factor test is entitled to "substantial deference" and should only be reversed if it is arbitrary or capricious. Richardson, 192 N.J. at 196.

With respect to Factor #1 – Instructions, the ALJ reasonably and correctly found that Winslow did not control, supervise, or direct Platt work efforts. (Pa15). Aside from requiring Platt to appear in court on specific days, Winslow did not give her any instructions or directions in how to perform her duties. There is no evidence in the record that Winslow instructed Platt on how she should prosecute cases, whether she should try to settle certain cases, or what kind of dispositions she should seek. Contrary to Platt's assertions that Winslow exerted a significant amount of control over her by controlling the docket and types of cases assigned (Pb36-37), Winslow required the bare minimum that would be required of any municipal prosecutor – be present and prosecute the

assigned cases. The ALJ did not give weight to Platt's testimony that her work is supervised by the Judge – because she worked as a prosecutor in other municipalities, with other judges, performing the same duties that she does for Winslow – but was not considered an employee in those municipalities. (Pa16).

With respect to Factor #2 – Training, the record supports the finding that Platt was not required to take the mandatory trainings which bona fide Winslow employees were required to do. As Conover explained, it is important to compare an individual's situation with other similarly situated employees, in order to determine a baseline, to analyze how much control an employer is exerting over the individual. (1T180:23-181:8). The security trainings and the trainings with the Camden County Prosecutor's Office and the Attorney General's Office that Platt participated in were unique to her position as Municipal Prosecutor and were not required for other Winslow employees. Here, by not requiring Platt to do any other trainings outside of typical prosecutor trainings, Winslow was not directing Platt's methodology or performance to show an employer-employee relationship.

With respect to Factor #3 – Integration, the IRS explained that "[w]hen the success or continuation of a business depends to an appreciable degree on the performance of certain services, the worker . . . must necessarily be subject

to a certain amount of control . . . ." Rev. Rul. 87-41, 1987-1 C.B. 296, *12. The ALJ reasonably found that Winslow did not exert a significant level of control over Platt. (Pa20). As noted for Factor #1, Winslow did not exert direction and control over how Platt was to perform her duties as Municipal Prosecutor. (Pa15). Despite Platt's claims that she was very involved with the municipal court process, polices officers, and other enforcement officials (Pb38), she failed to demonstrate the manner in which Winslow controls her work effort.

With respect to Factor #4 – Services Personally Rendered and Factor #5 – Hiring, Supervising, and Paying Assistants, Winslow's conflicting answers on the Questionnaire and in the January 2019 interview with Conover demonstrated a distinct lack of knowledge and control of Platt. (Pa110). Contrary to Platt's assertion one appeal that Winslow selected her substitute (Pb39), the record contains conflicting information about who selected the replacement and how the replacement was paid. (Pa110). In the Questionnaire, Winslow answered that the court selects the replacement. (Pa48; Pa110). In the January 2019 Interview, Winslow indicated that Platt was responsible for finding a replacement and was to swap compensation with the replacement. (Pa110). However, Platt testified that when she required a substitute, she and Winslow

worked together to find a substitute. (1T32:20-22).

Similarly, there was questionable information from Winslow regarding assistants. Winslow responded in the Questionnaire that there were "no known assistants." (1T102:25-103:17; Pa48; Pa105; Pa110). This response reveals Winslow's lack of knowledge about any assistants Platt may have, if any. It also did not clarify whether or not Winslow allowed Platt to provide her own assistants – Winslow simply answered that they did not know.

With respect to Factor #6 – Continuing Relationship, the ALJ reasonably found that the municipal prosecutor position was a one-year appointment which was inconsistent with an ongoing relationship. (Pa17). Although Platt had been the Municipal Prosecutor for Winslow for nineteen of the past twenty years, she was always required to be annually appointed pursuant to N.J.S.A. 2B:25-4(b). (1T103:23).

With respect to Factor #7 – Set Hours of Work, while Platt was required to prosecute cases based on the court schedule, the ALJ reasonably noted that she was often contacted outside of court hours via email or cell phone when needed. (Pa16). Notably, Platt's requirement to work set hours every Wednesday was not a strong indication of employee status because she was required to work during Municipal Court sessions, which is the basic

requirement for a municipal prosecutor. (Pa15; Pa20).

Regarding Platt's contention here that as a salaried employee, she did not have to submit timesheets (Pb40), Conover explained that this was not alone indicative of employee status as many salaried employees were required to complete timesheets. (1T165:22-166:8). Dringus even testified that payroll sent timesheets to department heads with a list of all the employees. (1T197:23-198:2).

Further, since the pandemic, Platt was required to check the Municipal Case Disposition System daily. (1T16:4-8). She estimated that she spent an extra hour or two outside of court performing her Municipal Court duties. (1T42:23-42:10). However, nothing in the record suggests that these hours she works beyond the set court schedule were not set, directed, or monitored by Winslow.

With respect to Factor #8 – Full Time Required, the ALJ reasonably noted that Platt's required attendance one day per week did not meet the definition of full time. (Pa16). Platt argues that under the IRS revenue rulings, "an individual can be declared an employee even if it is a part-time position," but she does not provide any citation to support her position. (Pb41). Nevertheless, the fact that Platt worked part-time for Winslow, while also maintaining her own private law

practice and serving as Municipal Prosecutor for several other municipalities supports a finding that this factor was more indicative of status as an independent contractor. (Pa17).

With respect to Factor #9 – Doing Work on Employer's Premises, according to the IRS, "[t]he importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises." Rev. Rul. 87-41, 1987-1 C.B. 296, at *14. Due to the unique situation that municipal prosecutors must prosecute cases and be present for court proceedings, the requirement that Platt be on premises to perform these court duties diminished the importance of this factor. If every municipal prosecutor in every municipality must be on premises to prosecute cases, then Winslow's requirement for Platt to be on premises to prosecute cannot be dispositive of employee status. Additionally, Platt was not required to work on premises with respect to any pre- or post- court duties. (1T104:23-105:2).

While Platt contends that the pandemic has changed the nature of this factor worldwide (Pb41), the record shows that Winslow's Municipal Court sessions are now fully back to in-person proceedings. (1T38:6-9). As such, the nature of Platt's remote work is not as relevant anymore, and was not relevant

for the years pre-pandemic. Even if it were, Platt performed her duties as Municipal Prosecutor remotely from her private law office instead of her home, which further indicated independent contractor status. (1T18:17-25). Since the pandemic, Platt also performed one to two hours of work per week checking the Municipal Case Resolution system from her private law office that was not controlled by Winslow. (1T16:4-8; 1T41:15-42:12). The records show that she was permitted to do so whenever and however she determined. Ibid. This, again, supported the finding of independent contractor status.

With respect to Factor #10 – Order or Sequence Set, the Municipal Judge, and court administrator set the schedule and docket for court proceedings. (1T14:5-20). As with Factor #1, the Municipal Prosecutor position is unique in that the court always set the order and sequence of cases. (Pa20). Again, regardless of whether a municipal prosecutor is an employee or independent contractor, municipalities control the docket and when court was in session. Ibid. But, neither Winslow nor the Municipal Judge evaluated Platt's work or otherwise gave her instructions or directions in terms of how to perform that work. (Pa16).

With respect to Factor #11 – Oral and Written Reports, the ALJ reasonably found that Platt was not subject to any performance evaluations. (Pa16).

Further, the oral reports Platt provided to the chief of police, zoning officer, code enforcement official, and animal control officers were specific to the cases she was assigned to. (Pa14; 1T29:4-12). As Conover explained, for this factor to indicate employee status, the individual should be providing regular information about the way in which their work was being conducted. (1T181:15-18). Platt's meetings with the various officers did not satisfy this requirement because she was not reporting the way in which her work was being conducted. Rather, she was meeting with them as part of the regular process required to reach a case disposition. (Pa15). Nothing about her meetings with the various officers indicated that Winslow was exerting control by requiring Platt to be accountable for how she performed her work.

With respect to Factor #12 – Payment by Hour, Week, Month, the ALJ reasonably noted that financial control could easily be manipulated by the parties by paying a salary and issuing W-2s. (Pa19). Here, nothing about Platt's relationship with Winslow changed in 2015 when it designated her as an employee via ordinance except for how she was paid. In 2015, Platt was paid a salary and was issued W-2s. (Pa62-87). As the IRS notes, "[p]ayment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a

lump sum agreed upon as the cost of a job." Rev. Rul. 87-41, 1987-1 C.B. 296, at *15.

Looking at the substance of the arrangement between Platt and Winslow, it appears that she was paid a salary and issued a W-2 in order to maintain an employee status, not because she actually was an employee. It further appears that Platt was paid a salary as a way to pay her the value of a lump sum agreed upon as the cost of doing the job. Moreover, this court had already noted in Platt's prior appellate case that payment of salary through payroll was not dispositive of employee status. (Pa171-72).

With respect to Factor #13 – Payment of Business and/or Travelling Expense and Factor #14 – Furnishing of Tools and Materials, the ALJ reasonably noted the inconsistencies between Dringus's testimony that he was not aware of any reimbursements and Platt's testimony that she was reimbursed for a computer application. (Pa16). Despite Platt's contention that she was reimbursed for her business expenses (Pb44), she did not provide any proof to substantiate her claim.

The ALJ also reasonably noted that Platt was only provided with incidental office supplies, like a conference room with desk, phone, and copier. (Pa16). Winslow did not provide Platt with a permanent office or work station,

a secretary or assistant, a dedicated phone line, or a unique Winslow email. (Pa16). The door to the conference room had a sign that said "Municipal Prosecutor," but did not state Platt's name. (1T65:8-12). There was no evidence that Winslow provided any tools or materials for use at Platt's private law firm where she performed most of her work when outside of court.

With respect to Factor #17 – Working for More Than One Firm at a Time and Factor #18 – Making Services Available to the General Public, the ALJ reasonably found that Platt offered her services as a Municipal Prosecutor to other municipalities in Camden County and offered her services as an attorney to the public at her private law firm. (Pa20). Platt's contention that she did not offer her services as a Municipal Prosecutor to the public is misguided. (Pb46). Platt is confusing offering services as a professional to the public with offering the services of a specific job title to the public. IRS Revenue. Ruling 87-41 concerns offering professional services to the public, which Platt does as she offers her services as an attorney to the public. Rev. Rul. 87-41, 1987-1 C.B. 296, at *18.

With respect to Factor #15 – Significant Investment, Factor #16 – Realization of Profit or Loss, Factor #19 – Right to Discharge, and Factor #20 – Right to Terminate, the record supports the finding that Platt met the definition

for employee.

Looking at the totality of the circumstances, it is clear that Winslow and Platt did not have an employer-employee relationship. The ALJ and Board reasonably found that all these factors favoring classification of independent contractor status significantly outweighed the other factors that supported employee status because they demonstrated a distinct lack of control and knowledge about Platt's duties. (Pa1; Pa15-17; Pa19-20).

Moreover, as Platt's testimony unambiguously stated, no substantive changes were made to her job duties or responsibilities from before 2015 to after 2015, when Winslow passed an ordinance granting employee privileges to the Municipal Prosecutor position. (Pa20; 1T12:1-9). Platt still performed the same duties in the same matter as she did from 2009 to 2014, when she was hired through a professional services contract. In fact, Platt performed the same job duties and responsibilities as the other Winslow Municipal Prosecutor who was indisputably an independent contractor. This court has already made clear that labeling the engagement as an employer-employee relationship "will not save an ineligible individual from the preclusive effect of [Chapter 92.]" (Pa171-72). Accordingly, because nothing about Platt's relationship with Winslow changed in 2015, being called an employee did not actually make her an employee.

Platt's argument that Conover's investigation and results were based on mistaken beliefs or erroneous information is misguided. (Pb35). Conover relied on the information provided by the statutorily designated individuals. (1T85:2-6); N.J.S.A. 43:3C-15. The answers from the Questionnaire, the Checklist, and the January 2019 interview revealed several inconsistencies (Factors #1, 2, 4, 8, 9 11, and 14) and a general lack of knowledge by Winslow about Platt's duties and responsibilities. (Pa15). Notably, the same three people from Winslow--Esposito, Dringus, and Gallagher--all answered the Questionnaire and Checklist and participated in the January 2019 interview. This lack of knowledge was particularly illuminating because it showed that Winslow did not know enough about Platt's duties and responsibilities to exert any control over her. Thus, the ALJ reasonably relied on this to find that Platt was an independent contractor for Winslow pursuant to N.J.S.A. 43:15A-7.2(b). (Pa15-17).

Furthermore, Platt's contention that Conover failed to obtain information from her or from the Winslow Municipal Court is without merit. (Pb35). Conover testified that she reached out to Platt twice to fill out the Questionnaire, but Platt failed to respond. (1T114:19-23). Conover focused the investigation on the certifying officer and supervising certifying officer, who are statutorily required to know this information and report it to the Division. (1T85:2-6);

N.J.S.A. 43:3C-15. Conover properly based her conclusions and decision on the information received from the certifying officer and the supervising certifying officer. Platt's testimony, while it provided greater detail about her specific duties and responsibilities, did not change the results of the twenty-factor test. The ALJ and Board reasonably found that Platt was an independent contractor for Winslow based on the twenty-factor test. (Pa1; Pa20).

Finally, Platt's reliance on Cassese v. Board of Trustees, Public Employee Retirement System, OAL Docket No. TYP05141-14, initial decision (July 21, 2015) (Pa123), is misplaced. (Pb33). Cassese is an OAL initial decision that is not binding on the Board and limited to the specific facts of that case. Further, Platt failed to certify pursuant to Rule 1:36-3, that she is unaware of any other contrary unpublished opinions. Cf. Gluck v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2023 N.J. AGEN LEXIS 153 (Apr. 6, 2023) (affirming the Board's denial of PERS service credit for work as a municipal attorney and finding petitioner was more properly classified as independent contractor, rather than employee under the IRS twenty factor test) (Ra33-46); Pascarella v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2023 N.J. AGEN LEXIS 843 (Nov. 6, 2023) (affirming the Board's denial of PERS service credit for work as a municipal prosecutor from 2007 through 2016 and finding petitioner was better classified as an independent

contractor, rather than an employee under the IRS twenty factor test) (Ra47-70); Coronato v. Bd. of Trs., Pub. Emps.' Ret. Sys., 2023 N.J. AGEN LEXIS 939 (Dec. 21, 2023) (affirming the Board's denial of PERS service credit for work as an assistant municipal prosecutor after 2008 and finding petitioner was better classified as an independent contractor, rather than an employee under the IRS twenty factor test) (Ra71-89); Shain v. Bd. of Trs., Pub. Emps.' Ret. Sys., OAL Docket No. TYP04701-21, Initial Decision (Feb. 16, 2024) (affirming the Board's denial of PERS service credit and finding under the IRS twenty factor test petitioner could not be classified as an employee, as his relationship with the municipality essentially remained the same after Chapter 92 with the exception of recasting the director of law position as an employee requiring a W-2 so he could maintain his membership in PERS) (Ra90-107).

Platt also erroneously argues that Petit-Clair v. Bd. of Trs., No. A-4561-18T1 (App. Div. July 27, 2020) (Pa119-22), supports her position. (Pb32-33). In Petit-Clair, this court affirmed that an attorney for the Perth Amboy Zoning Board was an independent contractor. (Pa119). Like Platt, Petit-Clair asked this court to substitute its judgment for the Board's in weighing the twenty factors, but this court rejected that request. (Pa122). Instead, this court found the Board was not arbitrary, capricious, or unreasonable in weighing the twenty

factors to determine that Petit-Clair was an independent contractor. (Pa122). In particular, this court found reasonable the Board's findings that needing to secure an annual appointment, failure to provide a computer, office supplies or secretary, while providing ancillary items like zoning treatises, City letterhead, and access to the coffee room were all indications of independent contractor status. (Pa122). Similarly, in Platt's case, she required annual reappointment, was not provided with a permanent workstation, and she was provided with ancillary items like a conference room, the Township letterhead, and access to the copier. Accordingly, the Petit-Clair decision supports the Board's finding of ineligibility under Chapter 92 subsection (b).

CONCLUSION

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

Respectfully submitted,

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Superior Court of New Jersey
Appellate Division

Docket No: A-003898-22T4

DONNA PLATT,

Petitioner

v.

BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

CIVIL ACTION

On Appeal from a Final Determination of the Board of Trustees of the Public Employees Retirement System, a State Agency
Agency Docket No. TYP-01013-21

AMENDED REPLY BRIEF OF PETITIONER, DONNA PLATT, IN SUPPORT OF PETITIONER'S APPEAL

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STATUTE

PRELIMINARY STATEMENT

The overwhelming and largely uncontradicted testimony of Petitioner adduced at the time of the OAL Hearing demonstrates she was eligible for the intra-fund transfer as an employee in Winslow under Chapter 92(b). Respondent's Brief further demonstrates Petitioner was a bona fide employee of Winslow from 2015 to the present and the ALJ's decision was clearly arbitrary and capricious and lacked fair support in the record. Saccone v. Bd. of Trs. of the Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs. of the Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Neither Chapter 92(b) nor its legislative history prohibit prosecutors, even ones who are part-time, from being eligible for a pension under PERS. (Rb2). If the legislature wanted to prohibit part-time municipal prosecutors from its sweeping pension reform, it could have said so, but it chose not to. In fact, the Petitioner herself is eligible and enrolled in PERS as a part-time municipal prosecutor in the Township of Berlin.

The ALJ's decision lacks any support in the record as the totality of the IRS 20 Factor Test weighs heavily in favor of the Petitioner being an employee. The ALJ was arbitrary in emphasizing incidental findings such as the Petitioner's use of her own cell phone, erroneously finding Petitioner and not the Township provided substitutes and its reliance upon a flawed and biased report on the part of Respondent's investigator.

The Respondent's so-called investigation ignored both the Township certifying pension officer and supervisor's determination that Petitioner was an employee, failed to interview anyone in the Winslow court system and consisted of a three-hour interview where all the notes were destroyed. Respondent turned a blind eye to the facts and the truth and instead issued an investigation report that was fatally flawed. (Pa95)

Respondent also fails to realize that any court, including a municipal court, is an independent branch of the government. That disconnect by Respondent and the ALJ surely results in arbitrary and capricious findings. The notion that the Respondent could argue the Township and Petitioner had an attorney-client relationship rather than an employer-employee relationship shows a complete lack of understanding of how the municipal court system works. (Rb29). In a pre-civil war case, which was cited by Respondent, New Jersey courts have long held the following:

> "Government needs professional services of many types, legal, medical, engineering, and if the need is sufficient to induce the creation of a post for their rendition, the incumbent is not an independent contractor merely because the services are professional in nature. Surely the Attorney General and the county prosecutor are not independent contractors. They hold office." State ex rel. Clawson v. Thompson, 20 N.J.L. 689 (Supp. Ct. 1846) (Ra42).

A. PETITIONER WAS A BONA FIDE EMPLOYEE OF WINSLOW TOWNSHIP UNDER THE IRS 20 FACTOR TEST

Factor 1 – Instructions

Respondent argues that Winslow did not give Petitioner any instruction or direction on how to perform her duties. (Rb29-30). This argument completely ignores the separation of powers between the executive or administrative branch of government and the independent municipal court of Winslow. It also fails to comprehend the notion of prosecutorial independence and discretion. It almost goes without saying that no municipality can ever tell a municipal prosecutor how to prosecute cases. That would be illegal on the part of the municipality and unethical of the prosecutor. Does the Respondent really believe that members of the Township governing body or the township administrator should tell the prosecutor which cases to prosecute and which cases to dismiss? This notion by the Respondent is incredulous.

The Respondent also points out that the ALJ did not give weight to the Petitioner's testimony that her work is supervised by the Judge in Winslow because she worked as a prosecutor in other municipalities and was not considered an employee in those municipalities. (Rb30). The Court should only be concerned about the amount of control that Winslow had over the Petitioner. Also, Petitioner is considered an employee in Berlin Township where she is also supervised by a Judge. Both that finding by the ALJ and the reliance on it by the Respondent are clearly erroneous.

Furthermore, Ms. Conover erroneously found that the Municipal Court Judge did not supervise Petitioner in her work. (Rb12, 1T105:17-21). The Respondent cannot have it both ways. The ALJ clearly made a finding that Petitioner was supervised by the Judge in Winslow which is in complete contradiction to Ms. Conover. (Pa16). The inconsistency between the Respondent's argument, Ms. Conover's conclusion and the ALJ's finding are the definition of capricious.

Respondent admits a number of instruction factors which show control over the Petitioner in her work including the requirement that she prosecute on Wednesdays during court sessions, the court administrator sets the docket, the requirement that Petitioner check-in with the court administrator each morning and not being able to leave until Court is adjourned, and the Judge and court administrator set the sequence of court proceedings. (Rb11-12). Despite these acknowledgments, the Respondent clings onto the notion that since Petitioner was contacted outside of court hours via her cell phone that Winslow did not control Petitioner. These minor points which the Respondent tries to bootstrap into a lack of control cannot withstand the mountain of evidence adduced at the time of the OAL Hearing. (Pb6-10).

Furthermore, the pandemic changed the nature of this factor worldwide and forever in the workplace. Where someone does the work has less importance than all the other facets. The part-time Judge also took calls at home or in his private law

office and his pension enrollment has never been questioned in any reported case. Petitioner should be treated no different than the municipal court judge for pension purposes.

Factor 2 - Training

The Respondent claims that when it comes to training, "it is important to compare an individual's situation with other similarly situated employees in order to determine a baseline, to analyze how much control an employer is exerting over the individual." (Rb30). However, in the very next sentence, the Respondent admits that, "the security trainings and trainings with the Camden County Prosecutor's office and Attorney General's office that Platt participated in were unique to her position as Municipal Prosecutor and were not required for other Winslow employees." Respondent's argument is inconsistent. They want the Court to compare similarly situated employees to the Petitioner, yet acknowledge that her position is unique in the Township. Moreover, the Respondent admits that Petitioner's position is unique when analyzing Factor 9 - Doing Work on the Employer's Premises (Rb34) and Factor 10 - Order or Sequence of the Work (Rb35). Moreover, neither the Respondent nor its investigator ever performed an evaluation of similarly situated employees such as other court personnel.

Factor 3 – Integration

While this is a control factor, it is acknowledged by Respondent that it is a limited indicator due to the unique nature of the position of municipal prosecutor. Here again, Respondent noted Petitioner's uncontradicted testimony of her significant involvement in the municipal court process, and with police officers and other enforcement officials. (Rb31). Conover's flawed investigation, which failed to interview court personnel, must give way to the Petitioner's uncontradicted testimony.

Factor 4 – Services Rendered Personally

As explained in the Petitioner's initial Brief, the ALJ and the Respondent got it wrong when they mistakenly conflated the issue of substitute prosecutors when Petitioner was either sick or on vacation. (Pb39). Respondent's own witness, Mr. Dringus, confirmed that it was the Court who had the responsibility to find Petitioner's replacement and not her. (T193-11). Mr. Dringus also confirmed that he had no knowledge or other information that anyone else in the Petitioner's law firm would assist her in performing any prosecutor services. (T193-16).

Respondent claims in Factor 1 that all cell phone calls and emails outside of Court went to the Petitioner personally. That acknowledgement by the Respondent demonstrates that all services rendered by the Petitioner both inside and outside of the municipal building were done by her personally.

Factor 5 – Hiring, Supervising And Paying Assistants

Respondent misleads the Court by turning Winslow's answer that Petitioner had "no known assistants" to mean that Winslow did not know if she had assistants or not. (T102-25 to T103-17). Simply put, no means no. As acknowledged by Respondent in its own Brief, the Petitioner confirmed that any assistants used were provided by Winslow such as liaison officers, the bailiff and the court administrator. (Rb16).

Factor 6 – Continuing Relationship

Respondent's entire argument that Petitioner had to be reappointed every year is a red herring. Pursuant to N.J.S.A. 2B:25-4(b), municipal prosecutors are required to be appointed on an annual basis. Unfortunately, when Chapter 92 was enacted, this statutory conflict was not resolved. It is urged that this Court should look at the length of the relationship, in this case 19 out of the past 20 years, rather than the annual reappointment, which is statutory form over substance.

Factor 7 – Set Hours of Work

Respondent acknowledges the most fundamental aspect of Petitioner's job, which is that she was required to work set hours every Wednesday for municipal court sessions. (Rb32). This is the key to this factor and shows fundamental control by the Township. Respondent also acknowledges that the Petitioner was required to "check the municipal case disposition system daily." (Rb33). Even during the pandemic, the Township exerted control over the Petitioner.

Respondent also argues Petitioner did not have to submit timesheets as it claims many salaried employees were required to do. A salaried employee does not have to submit timesheets and the notion that Petitioner would be required to do so, makes no sense. Furthermore, Respondent's finding here is simply not true. Ms. Conover conceded during the OAL Hearing that she did not evaluate any other employees of the Township and believed that other salaried employees, like the court administrator and Judge, did not have timekeeping records. There was absolutely no evaluation of anyone else in the Township or the municipal court. (T166-9 and Pb17).

Factor 9 – Doing Work On Employer's Premises

While downplaying this factor, Respondent concedes it weighs in favor of the Petitioner's status as an employee. "Due to the unique situation that municipal prosecutors must prosecute cases and be present for court proceedings, the requirement that Platt be on premises to perform these court duties diminish the importance of this factor." (Rb34). One has to wonder where else the Respondent thinks the Township should hold court? Respondent tries to diminish the importance of this factor yet in the same vain, claims that it is indicative of an independent contractor status. Respondent cannot argue on the one hand that Petitioner was required to do work in the municipal building, yet on the other hand claim it is not important.

Furthermore, the issue of where someone works has been greatly impacted by the Pandemic. Respondent makes the ridiculous assertion that since Petitioner performed her duties remotely from her law office instead of her home, this indicates independent contractor status. What difference does it make where someone performed their duties during the Pandemic? Whether Petitioner zoomed into a municipal court session from her private law office, her home or her car is irrelevant on this issue. And, if the Respondent is true to its position, if you compare the Petitioner's remote services with other employee's remote services during the Pandemic (other than police officers), they all maintained employee status.

Factor 10 – Order Or Sequence Set

Respondent admits the prosecutor's position is unique in that the Court sets the order and sequence of the cases. (Rb35). This serves as another concession of employee status.

Respondent's claim that the Township did not know how the Petitioner performed her duties is without merit. As in the case with all of these factors, the Respondent's investigator simply failed to interview court personnel and individuals in the Township who would have had the most knowledge about how all of these factors applied to the Petitioner.

Factor 11 – Oral or Written Reports

Respondent relies upon the notion of lack of performance evaluations to show independent contractor status. Performance evaluations are neither oral nor written reports under the IRS 20 Factor Test. Oral or written reports go from the employee to the employer. Performance evaluations go in the exact opposite direction. The lack of performance evaluations is completely irrelevant to this issue.

Respondent fails to contradict the plethora of uncontradicted testimony by the Petitioner of the multiple reports she makes each week to the chief of police, zoning officer, code enforcement official, animal control officers and others. (Pa14). Respondent tries to refute this by creating an element which does not exist in this factor, namely that Petitioner did not satisfy this requirement because, "she was not reporting the way in which her work was being conducted. Rather, she was meeting with them as a part of the regular process required to reach a case disposition". (Rb36). This element was completely made up by Conover and the Respondent and it appears nowhere in the IRS 20 Factor Test.

Moreover, this does show control since this is part of the disposition of cases on the docket which is exclusively controlled by Winslow. Reporting to municipal officials in the way in which cases are disposed of demonstrates employee status. To the extent Respondent claims Mr. Dringus did not know this is because he is not in the court system, and they did not interview the appropriate Township officials for this or any of the other factors.

Factor 12 – Payment by Hour, Week or Month

There is no doubt Petitioner met all of the elements of this factor which show employee status. Respondent's attempt to mitigate or diminish this factor is problematic. Either this factor counts, or it does not. Several things are certain. The way Petitioner was paid from 2015 to the present is the exact same way she was paid from 2003 to 2008 when she was enrolled in PERS. The key here is there were no Requests for Proposals nor was the Petitioner subject to a Professional Services Agreement. Those would be indicative of employee status which the Respondent ignores.

Factor 13 – Payment of Business and/or Travel Expenses

Petitioner provided specific details as to reimbursed expenses by the Township including the "We Transfer App" and municipal court discovery to defense attorneys. (T48-2). Respondent relied upon Mr. Dringus, who conceded that he did not know if the Petitioner had any business or travel expenses to be reimbursed in the first place. (T201-8). As with the other factors, Petitioner should not be punished because the Respondent failed to investigate the bona fides of the her job duties.

Factor 14 – Furnishing Of Tools And Materials

Respondent argues that the door to the Petitioner's conference room had a sign that said "Municipal Prosecutor" but did not state Platt's name. (Rb37). This

is going from the sublime to the ridiculous. The Petitioner provided uncontradicted testimony that she has been using the same office supplied by the Township with the same work station for almost 20 years. The Township provides a phone, letterhead, a laptop computer and other supplies for her use. (Pa23).

The Respondent concedes that Factor 15 – Significant Investment, Factor 16 – Realization of Profit or Loss, Factor 19 – Right of Discharge and Factor 20 – Right to Terminate, support the finding that Petitioner met the definition of employee.

The Respondent's case rests upon minor issues such as name plates on doors, where someone did work during the Pandemic and the misunderstanding of how a substitute prosecutor filled in for Petitioner. The Respondent also conveniently ignores that both the pension certifying officer and her supervisor always determined Petitioner was an employee. This was confirmed in the Report of Transfer (Pa37), Request for Personnel Action (Pa38), 20 Factor Questionnaire (Pa46), Employee/Independent Contractor Checklist (Pa55) and Mr. Dringus' email (Pa58). While the Respondent points to minor inconsistencies, which were either dispelled by the Petitioner's own testimony or because the investigation performed by Ms. Conover's was fundamentally flawed, they must fall to the mountain of uncontradicted testimony and evidence adduced at the OAL Hearing.

Furthermore, the Respondent's reliance upon the 2009 to 2014 period is also misguided. The reality is that Respondent never did the IRS 20 Factor analysis for

that period of time. Furthermore, Ms. Conover failed to interview the Petitioner herself, who she readily admits would be in the best position to know the details of her work. Contrary to the Respondent's assertion, Petitioner did, in fact, respond to a request for information by virtue of her letter dated February 10, 2016. (Pa58). Petitioner confirmed to the Respondent that she had reviewed the Employee/Independent Contractor Checklist and added additional clarification including reimbursement for out-of-pocket expenses. Ms. Conover's three-hour investigation with the destroyed notes should not withstand the uncontradicted testimony and information provided by the Township and the Petitioner in confirming that she was a bona fide employee.

B. THE CASES RELIED UPON BY THE RESPONDENT IN ITS BRIEF SUPPORTS THE PETITIONER'S POSITION.

Respondent cites a number of cases in its Brief (Ra33-Ra107) which actually support the Petitioner's position.[1] In the OAL decision of James Gluck v. Bd. of Trs. Pub. Emps.' Ret, Sys., 2023 N.J. AGEN LEXIS 153 (Ap. 6, 2023), the ALJ found that Gluck's position as a sewage authority attorney was not eligible under Chapter 92. First, the position at issue was not that of a municipal prosecutor and so provides a distinction with a difference.

[1] The undersigned apologizes to the Court for overlooking these cases in its Brief.

The ALJ's evaluation of the 20 Factor Test is instructive here. The Court found that all of Gluck's work was done at his home or his law firm, which is in contrast with the Petitioner who did the majority of her work in the municipal building during court sessions. The ALJ found that Gluck was not restricted from delegating his duties and other attorneys from his firm filled in for him. This never happened with the Petitioner. With respect to hiring, supervising and paying assistants, unlike the Petitioner here, Gluck and his law firm staff would provide services for the sewage authority. Unlike Gluck who did not have set hours or a work schedule, Petitioner does have set hours and a work schedule in Winslow. With respect to payment of business and travel expenses and furnishing tools and materials, unlike Gluck who was not provided with any office and did not get reimbursed for any expenses, the Petitioner has been provided with the same office and supplies for almost 20 years and received reimbursement of expenses.

In Kim Pascarella v. Bd. of Trs. Pub. Emps.' Ret. Sys., 2023 N.J. AGEN LEXIS 843 (Nov. 6, 2023) (Ra47), the critical factor that distinguishes this case is that the Borough's certifying pension officer certified that the assistant prosecutor for Seaside was not an employee. (Ra68). Unlike the case at bar, the assistant prosecutor was subject to the RFP process and automatically disqualified under Chapter 92(a).

In Joseph Coronato v. Bd. of Trs. Pub. Emps.' Ret. Sys., 2023 AGEN LEXIS 939 (Dec. 21, 2023) (Ra71), Petitioner also sought eligibility for his position as the assistant Seaside Heights municipal prosecutor. The Petitioner was disqualified under Chapter 92(a) because that position was subject to the RFP process. (Ra81). Unlike the Petitioner in this case, Coronato received no instructions from the municipality, was provided with no training, had no office in the municipality, no order or sequence to follow and the municipality provided him with no tools of the trade. [2]

CONCLUSION

For the above reasons, and those set forth in the Petitioner's initial Brief, the Respondent's decision should be overturned and the Petitioner's intra-fund transfer from Berlin Township to the Township of Winslow should be permitted.

Respectfully submitted,

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By: _____
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Dated: March 22, 2024

[2] The Respondent also cites the case of Joel Shain v. Bd. of Trs. Pub. Emps.' Ret. Sys, OAL Docket No. TYP04701-21, Initial Decision (Feb. 16, 2024) (Ra90). This case involved a municipal solicitor and Director of the Department of Law under the Faulkner Act form of government and is irrelevant to the case at bar.