NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2416-14T3

MICHAEL ANGELINI,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Respondent.

Argued November 1, 2016 – Decided May 4, 2017

Before Judges Messano, Espinosa and Suter.

On appeal from the Board of Trustees, Public Employees' Retirement System, Department of Treasury, PERS No. 2-579190.

Ellis I. Medoway argued the cause for appellant (Archer & Greiner, P.C., attorneys; Mr. Medoway and Benjamin D. Morgan, on the briefs).

Jeffrey S. Ignatowitz, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Christopher Tattory, Deputy Attorney General, on the brief).

PER CURIAM

For nearly thirty years, appellant Michael Angelini, an attorney in private practice, provided legal services to numerous public entities who enrolled Angelini in the Public Employees' Retirement System (PERS) and deducted contributions to PERS from his compensation. In 2008, Angelini applied for early retirement benefits and, after conducting an extensive review, the Division of Pensions and Benefits (the Division) denied his request, concluding Angelini was not an employee of the public entities.

Angelini appealed the decision, and the Division transferred the matter to the Office of Administrative Law as a contested case. The administrative law judge (ALJ) issued an interlocutory order, placing the burden upon Angelini to establish his eligibility. Thereafter, the ALJ conducted hearings that spanned ten, non-consecutive days from September 2013 to February 2014.

In his October 8, 2014 initial decision, the ALJ concluded Angelini was not a public employee for the majority of the years at issue. However, as to certain years and certain public entities, and for other equitable reasons, the ALJ determined Angelini had met his burden of proof and ordered the Division to make appropriate "adjustments and calculations." Angelini and the Division filed exceptions with the PERS Board of Trustees (the Board).

The Board issued its final agency decision on December 15, 2014, adopting the ALJ's findings and concluding Angelini was not a public employee. However, the Board rejected the ALJ's determination that Angelini was a public employee of some of the entities for some of the time and the ALJ's conclusion that Angelini was entitled to equitable relief. This appeal followed.

I.

The appropriate standard we employ on review is well-known. "'[J]udicial review of an administrative agency action is limited' because respect is due to the 'expertise and superior knowledge' of an agency in its specialized field." Francois v. Bd. of Trs., 415 N.J. Super. 335, 347 (App. Div. 2010) (alteration in original) (quoting Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 198 N.J. 215, 223 (2009)). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)).

"[I]f substantial evidence supports the agency's decision, a court may not substitute its own judgment for the agency's even though the court might have reached a different result." In re Carter, 191 N.J. 474, 483 (2007) (citation and internal quotation

marks omitted). In considering that evidence, "[a]s a general rule, the reviewing court should give 'due regard to the opportunity of the one who heard the witnesses to judge of their credibility.'" Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). As the Court has said, "it is not for us or the agency head to disturb that credibility determination, made after due consideration of the witnesses' testimony and demeanor during the hearing." H.K. v. State, 184 N.J. 367, 384 (2005). When the Board's findings are contrary to those of the ALJ,

> [w]e must determine whether the findings could reasonably have been reached on sufficient credible evidence in the record, considering the proofs as a whole, with due regard to the opportunity of the ALJ to judge the witnesses' credibility and with due regard also to the agency's expertise where such expertise is a pertinent factor.
>
> [Hiering v. Bd. of Trs., 197 N.J. Super. 14, 19 (App. Div. 1984) (citation omitted).]

See also N.J.S.A. 52:14B-10(c) (stating the "agency head may not reject or modify any findings of fact [by the ALJ] as to issues of credibility of lay witness testimony unless . . . the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.").

We are not bound, however, by the agency's interpretation of a statute or its decision on purely legal issues, which we review

de novo. Russo, supra, 206 N.J. at 27. Nevertheless, we "generally defer to the interpretations of a state agency of the statutes and implementing regulations it administers, unless the interpretation is 'plainly unreasonable.'" Francois, supra, 415 N.J. Super. at 347 (quoting In Re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 260 (2010)).

We describe the applicable legal framework before proceeding to the findings reached by the ALJ on the extensive record before him. The Public Employees' Retirement System Act, N.J.S.A. 43:15A-1 to -161 (the Act), provides PERS membership and retirement benefits for public employees. N.J.S.A. 43:15A-7. Although the Act does not define the term "public employee," it defines "compensation," upon which benefits are calculated, as salary for "services as an employee." N.J.S.A. 43:15A-6(r)(1) (emphasis added). As Judge Skillman recognized nearly a quarter century ago,

> The eligibility for membership in PERS of persons performing part-time professional services and the calculations of their benefits present difficult problems with which the Board and the courts have struggled for a number of years. The essential problem is that a person performing part-time professional services may be either an employee who receives "compensation" and who therefore is eligible for membership in the pension system or an independent contractor who is not eligible for membership in the pension system. The situation is further complicated by the

> fact that a professional may provide some services to a governmental entity which are compensated by "salary, for services as an employee" within the intent of N.J.S.A. 43:15A-6(r) and other services compensated on a fee basis for which the professional is deemed to be an "independent contractor."
>
> [Mastro v. Bd. of Trs., Pub. Emps.' Ret. Sys., 266 N.J. Super. 445, 453 (App. Div. 1993).]

Effective January 1, 2008, the Legislature significantly amended the Act. Any person performing professional services for public entities pursuant to a professional services contract is no longer eligible for membership in PERS based on performance of the contract. N.J.S.A. 43:15A-7.2(a). Additionally, any person providing professional services as an independent contractor, "as set forth in regulation or policy of the . . . Internal Revenue Service [IRS]," is ineligible based on performance of those services. N.J.S.A. 43:15A-7.2(b). See also N.J.A.C. 17:2-2.3(a)(14) and (15) (codifying these ineligibility standards).

We have approved the Board's use of the IRS twenty "'control' factors," set forth initially in Rev. Rul. 87-41, 1987-1 C.B. 296, 298-99, to determine whether an applicant was an employee, and thus eligible for benefits. Francois, supra, 415 N.J. Super. at 350-51. Indeed, this court sanctioned use of the IRS twenty-factor test before the 2008 amendment to the Act. Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 393 N.J. Super. 524, 542

(App. Div. 2007) (approving pension board's use of twenty-factor test in contested case without promulgating a regulation), overruled in part on other grounds, 198 N.J. 215 (2009); see also Stevens v. Bd. of Trs., Pub. Emps.' Ret. Sys., 309 N.J. Super. 300, 304 (App. Div. 1998) (recognizing appropriate use of the IRS test in contested case).

The IRS twenty-factor test requires consideration of the following: instructions; training; integration; services rendered personally; hiring, supervising, and paying assistants; continuing relationship; set hours of work; full-time required; doing work on employer's premises; order or sequence set; oral or written reports; payment by hour, week, month; payment of business and/or traveling expenses; furnishing of tools and materials; significant investment; realization of profit or loss; working for more than one firm at a time; making service available to general public; right to discharge; and right to terminate. Rev. Rul. 87-41, supra, 1987-1 C.B. at 298-99.

II.

Although the ALJ determined Angelini bore the burden of persuasion regarding eligibility, he nonetheless required the Division to present its case first. Michael Czyzyk, a certified public accountant employed by the Division and a supervisor of its External Audit Unit, was the Division's main witness. Appellant

first enrolled in PERS in 1981. Between that time and 2008, when he submitted his early retirement application, appellant provided legal services to twelve different public entities. Czyzyk's investigation was limited to eight of those entities: Clayton Borough (Clayton), West Deptford Township (West Deptford), Gloucester County Board of Social Services (BSS), Mantua Township (Mantua), Borough of Paulsboro (Paulsboro), Gloucester County Improvement Authority (GCIA), South Jersey Port Corporation (SJPC) and South Jersey Transportation Authority (SJTA).[1] Four other public entities, East Greenwich Township (East Greenwich), Monroe Township (Monroe), Gloucester County (Gloucester) and Oaklyn Borough (Oaklyn), did not retain records of Angelini's engagement pursuant to record retention policies, and no documents were available for review.

Over the years, these public entities enrolled Angelini in PERS and deposited monies on his behalf. Periodically, the Division would forward benefit statements to appellant. In February 2008, Angelini applied for early retirement, and the Division confirmed he had twenty-seven years and nine months of service, but it did not begin processing payments. In December

[1] Angelini began providing legal services to the GCIA in 2007. Although GCIA enrolled him in PERS, testimony at the hearing revealed the authority never considered him an employee. Angelini withdrew his claim for credit from GCIA during the proceedings.

2009, the Office of the Inspector General (OIG), which had been conducting an investigation of Angelini's enrollment in PERS, concluded he was not an employee of any of the public entities. OIG issued its report and referred the matter to the Division.[2]

Czyzyk sent questionnaires to the eight public entities, reviewed the answers utilizing the IRS twenty-factor test and examined public documents. In September 2011, Czyzyk sent Angelini a "violation letter" that apparently detailed his findings with respect to each public entity.[3] At its July 2012 meeting, the Board determined Angelini was not eligible for credit as a result of legal services provided to the eight public entities and advised Angelini later that month of its decision.

The ALJ reviewed more than one hundred pieces of documentary evidence, including municipal resolutions, contracts, minutes of meetings, court records, correspondence and billing records, including those of appellant's law firm.[4] The ALJ carefully

---

[2] The report is not in the record, however, there are repeated references to it in the testimony and in other documents in the record.

[3] The letter is not in the record.

[4] Because of the privileged information contained in the firm's billing records, the ALJ ordered their admission under seal. The same restriction remains in place for purposes of this appeal.

considered the testimony of six witnesses called by the Division and Angelini, as well as Angelini's own testimony.

The ALJ explained that the evidence required consideration of four different scenarios. Where the public documents and other evidence indicated Angelini was appointed as "an individual attorney" and compensated in a manner similar to other employees, applying the IRS twenty-factor test would "be useful in assessing . . . the relationship." In a second scenario, the public entity appointed or contracted not with Angelini, but rather with "a multi-person law firm." In that situation, the firm was an "independent contractor" and "it would not be legally appropriate to raise persons who work for an independent contractor to employee status with the party for whom the contractor performs."

In the third scenario, the public entity appointed Angelini and his law firm. In this "more complicated" situation, the entity might "limit work done for a salary, or a retainer in lieu of salary to the individual named, and then provide that additional work performed outside the scope of the salaried employee role . . . could be performed by the named individual and/or by members of his . . . firm." In such a "hybrid . . . Fasolo-type"[5] situation, "if the individual attorney was otherwise treated in a

[5] Fasolo v. Bd. of Trs., 181 N.J. Super. 434 (App. Div. 1981).

manner indicative of employee status, pension eligibility would lie." The ALJ stated the IRS twenty-factor test would be "relevant."

Finally, the ALJ considered a fourth set of circumstances, where the public entity indicated the legal work could be "performed by [Angelini] or by any attorney associated with [his] firm." The ALJ reasoned that in such a situation it was reasonable to conclude the entity "engaged the firm, and not the individual." Likening this to the second scenario, the ALJ concluded the twenty-factor test was irrelevant because "by the very structure of the legal arrangement, no one could qualify as an employee."

Against this analytic framework, the ALJ considered the evidence with respect to each of the seven public entities. He determined that Angelini failed to establish pension eligibility for the services he provided to Clayton, Mantua, Paulsboro and SJPC, essentially because the documents demonstrated the entities contracted with Angelini's law firm. The ALJ determined that, at least as to some of the years, West Deptford, BSS and SJTA contracted directly with Angelini and not his firm.

The ALJ considered the IRS twenty-factor test and IRS Publication 963, the "Federal-State Reference Guide," which provides guidance in determining whether a worker is an employee or independent contractor, fully recognizing that as an attorney,

Angelini would "not be subject to quite the same level of control as other public employees may be." He concluded that Angelini was an employee of BSS for the years 1988 and 1989, and an employee of SJTA for the year 1991. He also found Angelini was the sole "appointee" of West Deptford for the years 1986 and 1989-1991, but the situation changed in 1999, when the town appointed his law firm. Noting the lack of any documentary evidence for the years in between was not attributable to Angelini, the ALJ concluded it was "fair and equitable" to credit him for the years 1992 through 1998.

As noted, both sides filed exceptions. The Board adopted the ALJ's findings and accepted his conclusions as to Clayton, Mantua, Paulsboro and SJPC. However, the Board noted that application of the twenty-factor test to Angelini's service for the other three entities weighed heavily in favor of concluding he was an independent contractor and not an employee. The Board rejected the ALJ's application of equitable principles, noting Angelini asserted equitable estoppel and laches with respect to all the service time, but the ALJ rejected the argument for good reason.

The Board concluded Angelini was not an employee of any of the seven public entities during the years in question.[6]

III.

Angelini argues the Board erred by placing the burden of proof upon him to demonstrate eligibility for benefits. As noted, the ALJ entered an interlocutory order requiring Angelini to prove he was eligible for early retirement benefits. See N.J.S.A. 43:15A-41(b) (permitting a "member" of PERS to "elect 'early retirement'" prior to reaching age sixty "after having established 25 years of creditable service") (emphasis added).[7] The ALJ cited Skulski v. Nolan, 68 N.J. 179, 201 (1975), and Stevens, supra, 309

[6] In its July 2012 letter to Angelini, the Board noted that Czyzyk had not investigated Angelini's relationship with East Greenwich, Monroe, Gloucester and Oaklyn. Without deciding whether Angelini was a public employee of those entities, the Board concluded he was ineligible for service credit because he last provided legal services to those entities in 1990. See N.J.S.A. 43:15A-7(e) ("Membership of any person in the retirement system shall cease if he shall discontinue his service for more than two consecutive years."). As a result, even though Angelini testified about his relationship with these entities, the ALJ made no findings with respect to whether he was or was not an employee. The Board did not address the issue in its final decision.

Angelini argues the Board conceded he was a bona fide employee of these four entities. Our review of the Board's correspondence and statements made by the Deputy Attorney General representing the Board at the hearings before the ALJ convince us the Board effectively conceded the point.

[7] In 2008, the Legislature raised the minimum age to sixty-two for individuals who joined PERS after 2008. L. 2008, c. 89.

N.J. Super. at 304, to support his conclusion that the burden of proof only shifts to the Board when it revokes a benefit previously granted.

Angelini asserts the ALJ construed those decisions too broadly. He notes Skulski and Stevens involved the termination or revocation of pension payments, but neither case supports the converse proposition, i.e., that an applicant bears the burden of proof as to eligibility. Appellant claims there is no precedent to support the ALJ's decision. We disagree.

We acknowledge, "pension statutes are 'remedial in character' and 'should be liberally construed and administered in favor of the persons intended to be benefited thereby.'" Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist. Monmouth Cty., 199 N.J. 14, 34 (2009) (quoting Geller v. N.J. Dep't of Treasury, Div. of Pensions & Annuity Fund, 53 N.J. 591, 597-98 (1969)). "However, '[i]n spite of liberal construction, an employee has only such rights and benefits as are based upon and within the scope of the provisions of the statute.'" Francois, supra, 415 N.J. Super. at 349 (alteration in original) (quoting Casale v. Pension Comm'n of the Emps.' Ret. Sys. of Newark, 78 N.J. Super. 38, 40 (Law Div. 1963)).

In other words, "an employee is entitled to the liberality spoken of in Geller when eligible for benefits, but eligibility

is not to be liberally permitted." Smith v. State, Dep't of Treasury, Div. of Pensions & Benefits, 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. (alteration in original) (quoting Chaleff v. Bd. of Trs., Teachers' Pension & Annuity Fund, 188 N.J. Super. 194, 197 (App. Div.), certif. denied, 94 N.J. 573 (1983)). See also DiMaria v. Bd. of Trs. of Pub. Emps.' Ret. Sys., 225 N.J. Super. 341, 354 (App. Div.) ("[P]ensions statutes are to be construed so as to preserve the fiscal integrity of the pension funds."), certif. denied, 113 N.J. 638 (1988). "An inappropriate allowance of benefits tends 'to place a greater strain on the financial integrity of the fund in question and its future availability for those persons who are truly eligible for such benefits.'" Francois, supra, 415 N.J. Super. at 350 (quoting Smith, supra, 390 N.J. Super. at 215).

In other circumstances and pursuant to other remedial legislative schemes, we have placed the initial burden upon the applicant to prove eligibility for benefits. See, e.g., Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008) ("The applicant for ordinary disability

retirement benefits has the burden to prove that he or she has a disabling condition . . . ."), certif. denied, 199 N.J. 540 (2009); Bonilla v. Bd. of Review, 337 N.J. Super. 612, 615 (App. Div. 2001) ("It is well-settled that the claimant normally has the burden of establishing entitlement to unemployment compensation."); Perez v. Monmouth Cable Vision, 278 N.J. Super. 275, 282 (App. Div. 1994) (petitioner seeking workers' compensation benefits must establish compensability of the claim), certif. denied, 140 N.J. 277 (1995).

In sum, we agree with the ALJ that an applicant seeking PERS pension benefits bears the burden of demonstrating he or she is eligible under the Act. In this case, Angelini was required to demonstrate he was a "public employee" during those periods for which he sought pension credit.

IV.

A.

Angelini posits several reasons why we should reverse the Board's decision as arbitrary, capricious and unreasonable. He contends the Board relied solely on language in "selective appointing documents." Angelini argues this reliance was incompatible with prior precedent recognizing the "hybrid" status of attorneys providing legal services to public entities. We are unpersuaded by these arguments.

In Loigman v. Township Committee of Middletown, 409 N.J. Super. 1, 9 (App. Div. 2009), we discussed the "hybrid method" of payment, whereby "an attorney is paid a fixed annual salary for regular recurring work (such as attendance at meetings, rendering routine legal advice, preparing routine ordinances and resolutions, and the like), and is then paid at an hourly rate for additional nonrecurring services." Undoubtedly, an attorney providing services to public entities may be an independent contractor or an employee. See Hiering, supra, 197 N.J. Super. at 19 ("The conversion from prior vouchered independent contractor provisions for legal services to salaried employee positions is clearly within the discretion of" the public entity.). We recognize the cases Angelini cites, but we disagree that the Board's reasoning was incompatible with those decisions, or that those cases limit the Board's consideration of the total circumstance in deciding Angelini's status.

In Loigman, supra, 409 N.J. Super. at 10, we recognized every municipality must appoint a designated legal officer pursuant to N.J.S.A. 40A:9-139, and the compensation for professional services rendered by an attorney to the municipality may be approved by resolution and not by ordinance. However, we never held the method of payment defined the attorney's employment status.

In Mastro, supra, 266 N.J. Super. at 448-49, we considered whether an attorney who retired from public service and began collecting PERS benefits could thereafter represent a public entity as an independent contractor and continue to receive those benefits. At issue was whether the employee had actually retired, and deciding in favor of the attorney, we concluded "the ALJ's initial decision constituted a reasonably debatable view of the retirement rights of a person performing part-time professional services for governmental agencies." Id. at 453 (emphasis added).

Lastly, Fasolo, supra, demonstrates that in some situations, services provided by an attorney may be both compensation under the Act, and non-salaried payment excluded from credit. In Fasolo, two towns paid a municipal attorney a salary on retainer, but he also submitted vouchers for other legal services. 181 N.J. Super. at 436-39. He challenged the Board's ruling that vouchered fees above the retainer, and his salary as "sewer attorney" for one of the towns, were not compensation under the Act. Id. at 439-40. We affirmed the Board's decision regarding the attorney's vouchered services, finding they were not compensation because he was not an employee. Id. at 440-41. We also held compensation he received as sewer attorney was "contractual salary," noting the municipality referred to him as an "employee," it made the usual

deductions from his payments, and he performed "certain services for a fixed compensation." Id. at 443-44.

Contrary to Angelini's argument, each of these cases turned on particular facts, and they do not support a broad conclusion that "hybrid" payment necessarily equates to employee status for purposes of the Act. Although some of the public entities in this case referred to Angelini as an employee, and he was paid through payroll with normal deductions, the evidence also supported the conclusion that Angelini was not an employee at all, but rather an independent contractor. In many instances, the governing documents clearly indicated the public entity hired Angelini's firm, not Angelini. In many instances, Angelini did not perform a substantial amount of the legal work, but rather other lawyers in his firm provided the service. The ALJ's, and in turn the Board's, application of the IRS twenty-factor test led to the reasonable conclusion that Angelini and his firm were independent contractors. Given the limited scope of our review, we find no basis to overturn the Board's decision.

B.

Angelini also argues the Board created a new test for eligibility without engaging in "rulemaking," and application of the IRS twenty-factor test was inappropriate. We again disagree,

finding little merit to the arguments. R. 2:11-3(e)(1)(D), (E). We add only the following.

The ALJ's analysis of four possible scenarios suggested by the record evidence, which we discussed above, was not "a new test for eligibility." Rather, it was a well-reasoned attempt to use a coherent framework and resolve the "difficult problem[] with which the Board and the courts have struggled for a number of years." Mastro, supra, 266 N.J. Super. at 453. The analysis did not discard prior precedent nor alter in any manner the prerequisite that only public "employees" are entitled to PERS benefits.

We also reject Angelini's argument that use of the IRS twenty-factor test was not appropriate because the test emphasized "control" in determining status, and he was necessarily subject to less control as an attorney. See Stomel v. City of Camden, 192 N.J. 137, 156 (2007) (recognizing municipal attorney's status as an employee for purposes of his CEPA claim, despite his need to exercise "independent professional judgment"). The ALJ specifically recognized the limitations of the twenty-factor test when applied to an attorney. Moreover, the Board considered more than the twenty-factor test in reaching its decision, concluding in many instances Angelini did not actually perform the work. His reliance, therefore, on Stomel is misplaced.

Angelini claims the twenty-factor test was never designed to exclude a person from PERS benefits. While that might be true, the test certainly was intended to provide guidance in determining whether a person is or is not an employee. In Francois, supra, 415 N.J. Super. at 350-51, we specifically recognized and sanctioned the Board's use of the twenty-factor test. Moreover, our decision in Stevens, supra, 309 N.J. Super. at 304, approved the Board's use of the IRS twenty-factor test well before passage of N.J.S.A. 43:15A-7.2, which specifically adopted the test. In Stevens, we rejected any claim that the Board circumvented rulemaking procedures by utilizing the twenty-factor test. Ibid. Angelini's argument that the Board's consideration of the twenty-factor test was an improper ex post facto application of the new law is similarly without merit.

C.

Lastly, Angelini contends equitable principles of estoppel and laches should foreclose forfeiture of his years of public service credits. We again disagree.

Estoppel is an equitable principle based on the concept that a person may,

> by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith relied upon such conduct. . . . The repudiation of one's act done or position

> assumed is not permissible where that course would work injustice to another who, having the right to do so, has relied thereon.
>
> [Fraternal Order of Police v. Bd. of Trs. of the Police & Firemen's Ret. Sys., 340 N.J. Super. 473, 484-85 (App. Div. 2001) (quoting Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503-04 (1955)).]

"The doctrine of equitable estoppel is 'rarely invoked against a governmental entity.'" Welsh v. Bd. of Trs., Police and Firemens' Ret. Sys., 443 N.J. Super. 367, 376 (App. Div. 2016) (quoting Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000)). In the rare instances where it has been applied in pension cases, the appellants "demonstrated detrimental reliance on express assurances of employment qualification or pension credit either by their employers or the pension boards." Id. at 379 (emphasis added).

"Laches is an equitable doctrine, operating as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417-18 (2012) (quoting Cty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)). "The factors to be considered when determining whether to apply laches include: length of the delay; reasons for the delay; and 'changing conditions of either or both parties during

the delay.'" Fauver, supra, 153 N.J. at 105 (quoting Lavin v. Hackensack Bd. of Educ., 90 N.J. 145, 152 (1982)).

Estoppel does not apply here because the misinformation supplied by the public employers regarding Angelini's status was the sole reason the Division enrolled him in PERS. The Division cannot be obligated to investigate every person enrolled in PERS and determine before they submit a retirement application whether they are public employees eligible for pension benefits under the Act. Angelini could have ascertained whether the services he provided, and the manner in which he provided them, actually qualified him for membership in PERS. Although he corresponded with the Division over the years, he never asked for confirmation of his eligibility.

It is true the Division delayed making its determination about Angelini's eligibility for benefits. However, laches only applies when the party knowingly fails to assert its rights. Here, the Inspector General's report first triggered concerns about Angelini's status as an employee.

Appellant's reliance on Ruvoldt v. Nolan, 63 N.J. 171 (1973), is misplaced. There, after paying benefits for eight years, the Division suspended payments. Id. at 176. The Court noted the delay detrimentally affected the pensioner's ability to make alternative plans and earn additional service credit. Id. at 185.

Here, any delay occurred after Angelini submitted his retirement application. While we do not countenance the Division's delay in reaching its final decision, we cannot conclude the equities weigh in favor of Angelini so as to compel reversal.

Affirmed. Because we cannot discern whether the time Angelini served in East Greenwich, Monroe, Gloucester and Oaklyn may have potential future impact on pension benefits, we remand to the Board only to make necessary adjustments and credit Angelini with that time.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION