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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2048-16T2

ALFRED PETIT-CLAIR, JR.,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Respondent.

Argued January 8, 2018 – Decided March 1, 2018

Before Judges Sabatino, Ostrer and Whipple.

On appeal from the Board of Trustees of the
Public Employees' Retirement System,
Department of Treasury, Docket No. 2-882337.

Alfred Petit-Clair, Jr., appellant, argued the
cause pro se.

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

PER CURIAM

Alfred Petit-Clair, Jr. appeals from a final agency decision
of the Board of Trustees (the Board) of the Public Employees'

Retirement System (PERS) denying him pension service credit retroactive to January 1, 2008, for his service as attorney to the Zoning Board of Adjustment (ZBA) of the City of Perth Amboy (the City). The Board's decision was based on N.J.S.A. 43:15A-7.2(b), enacted in 2007,¹ which prospectively denies pension service credit to a person who performs professional services for a political subdivision as an independent contractor and not an employee, according to Internal Revenue Service (IRS) regulations or policy. Having considered the parties' arguments in light of the record and applicable principles of law, we remand the Board's decision for further findings of fact and conclusions of law.

I.

Petitioner, a New Jersey attorney, has maintained his own law practice since 1972, and has served as the ZBA attorney since 1990. Petitioner originally obtained his job through the mayor at the time, but the ZBA, in compliance with the Municipal Land Use Law, N.J.S.A. 40:55D-71(b), formally appointed petitioner and did so for successive one-year terms throughout his service. The

¹ See L. 2007, c. 92, § 20. The Board and Administrative Law Judge (ALJ) use "Chapter 92" to refer generally to section 7.2's limitation on a professional service provider's pension eligibility. We will do so as well.

City enrolled petitioner in PERS as a permanent part-time employee, and provided him health insurance coverage.

Petitioner had served briefly as the ZBA attorney in 1986, but quit because he did not want to forgo clients to comply with conflicts rules. In 1990, petitioner was willing to tolerate those restrictions (and relinquish fifteen percent of his caseload), because the ZBA position included health insurance, which petitioner needed after a divorce. Petitioner said the mayor assured him he would also be eligible for health insurance in retirement. Four years later, the City formally adopted a resolution pursuant to N.J.S.A. 40A:10-23, opting to provide health insurance coverage to all its retired employees provided they served the City for twenty-five years, or fifteen years and were sixty-two.

In 2009, the City adopted an ordinance withdrawing retiree health insurance coverage for retired part-time employees. The ordinance was one of numerous austerity measures the City adopted to cope with a fiscal crisis. Petitioner was unaware of the resolution until 2011, when he proposed to retire and was informed that he was ineligible for retiree health insurance. Petitioner opted to continue working, assured by the mayor (a different one) that it would be worked out. But, it was not.

The City also concluded petitioner was ineligible for pension credits. In 2012, based on an outside counsel's investigation, which was prompted by a State Comptroller's report on statewide non-compliance with Chapter 92,² the City's administrator informed petitioner that the City considered him an independent contractor and not an employee. Consequently, the City intended to remove him from PERS effective January 1, 2008. Petitioner retained his service credits for the period ending December 31, 2007, and would receive a pension based thereon. The administrator also informed petitioner that the City would remove him from the City's health insurance plan, because it was only open to employees. Furthermore, as the City's outside counsel noted, the 2009 ordinance made him ineligible to receive retiree health coverage.

Petitioner contested the City's pension decision before the Board. After it rendered an unfavorable decision, he obtained a contested hearing before the ALJ, who reached the same conclusion. The Board then adopted the ALJ's decision as its own in the final order that is the subject of this appeal.³

² A. Boxer, State of New Jersey Office of the State Comptroller, Improper Participation by Professional Service Providers in the State Pension System (2012) (Comptroller Report).

³ Petitioner waged a multi-front legal battle to preserve his benefits. In a lawsuit against the City in Superior Court, he

II.

In the contested hearing before the Office of Administrative Law (OAL), petitioner and the Board presented evidence relevant to factual questions set forth in an Employee/Independent Contractor Checklist (Checklist), which the Division of Pensions and Benefits issued, as an attachment to its Fact Sheet #84. See N.J. Div. of Pensions and Benefits, Fact Sheet #84, Professional Services Contracts, Independent Contractors, and Pension Enrollment (2013) (Fact Sheet #84).⁴ The Checklist was designed to help a public employer distinguish between employees and independent contractors.⁵ It consists of twenty-nine questions,

unsuccessfully sought to enjoin the termination of his health insurance coverage and future denial of retiree health benefits. That decision is the subject of a separate appeal. Petitioner also filed unsuccessful federal litigation against the City. See Petit-Clair v. New Jersey, Civ. No. 2:14-07082 (WJM), 2016 U.S. Dist. LEXIS 51738 (D.N.J. Apr. 18, 2016); Petit-Clair v. New Jersey, Civ. No. 2:14-07082 (WJM), 2016 U.S. Dist. LEXIS 51736 (D.N.J. Apr. 18, 2016); Petit-Clair v. New Jersey, Civ. No. 2:14-07082 (WJM), 2015 U.S. Dist. LEXIS 101624 (D.N.J. Aug. 4, 2015).

⁴ We note that the fact sheet has been updated. See N.J. Div. of Pensions and Benefits, Fact Sheet #84, Professional Services Contracts, Independent Contractors, and Pension Enrollment (2015).

⁵ The State Comptroller recommended the adoption of a checklist to assist local government officials. Comptroller Report at 34. Although the Division did not promulgate the checklist through formal rulemaking, petitioner has not challenged it on that basis, and we do not address the issue. See Metromedia Inc. v. Dir. Div. of Taxation, 97 N.J. 313, 331-32 (1984). As we discuss in further

allocated to three categories: Behavioral Control, Financial Control, and Relationship to the Parties. The first category pertains to "whether the location has a right to direct and control how the work is performed." The second pertains to "whether the location controls the financial aspects of the individual's services, the method of payment and whether services are offered to the public." The last category includes "factors [that] illustrate how the entity and individual perceive their relationship" including whether "there [is] a continuing, ongoing relationship understood between the parties as one of employer and employee."⁶

detail below, we conclude the Board erred in relying on the Checklist because it does not fully incorporate IRS "regulations or policy," which the Legislature declared must determine a person's status as employee or independent contractor. See N.J.S.A. 43:15A-7.2(b).

⁶ In its initial decision, the Board relied in part on the Checklist answers that Jill Goldy, the City's chief financial officer, provided with help from the City's interim business administrator, Gregory Fehrenbach. The Board stated that the Division developed the Checklist "to certify the PERS eligibility of employees and exclude . . . ineligible professional service providers and independent contractors." The Board also considered petitioner's responses to a questionnaire that the Board stated "identifies the 20 factors used by the IRS to aid in the determination of employee status." However, the questionnaire consisted of questions that overlapped, but varied from those identified as the "twenty factor test." Compare Rev. Rul. 87-41, 1987-1 C.B. 296, 1987-23 I.R.B. 7 (Rev. Rul. 87-41); Stevens v. Bd. of Trs. of Pub. Employees' Ret. Sys., 294 N.J. Super. 643, 653 n.1 (App. Div. 1996) (quoting

Goldy, Fehrenbach, and former assistant zoning officer Jaime Rios testified for the Board. Petit-Clair was the sole witness on his own behalf. The hearing testimony and the ALJ's subsequent decision focused on the Checklist. Regarding behavioral control, the ALJ found the following factors weighed slightly in favor of petitioner's employee status: he was not hired based on a request for proposals (RFP) (A-3)⁷; he was required to attend meetings the ZBA arranged (A-5), at hours the ZBA set (A-7); and he performed most of his work at the City Council Chambers where the ZBA met, as opposed to in his law office (A-12).

However, the ALJ concluded these facts did not outweigh the numerous factors establishing that the City did not have behavioral control over petitioner and that he was an independent contractor. The City did not have "the right to control, supervise or direct [petitioner]" in how he performed his tasks and the results obtained (A-1), nor did it instruct or direct him as to the tasks to perform (A-9), nor did it direct the order or sequence in which

topics of twenty-factor test). A side-by-side comparison of the Board's so-called "IRS 20-Factor Questionnaire" and the twenty factors in the IRS's revenue ruling is provided at the end of this opinion. The Board also identified three IRS publications, two of which we discuss below.

⁷ We refer to the related question number in the Checklist, the text of which is set forth in full in an appendix to this opinion.

he performed his duties, other than requiring him to abide by the ZBA's meeting agendas (A-15). Also, petitioner was appointed annually by the ZBA, not an administrator, and there was no written job description (A-2). Petitioner was permitted to send substitute personnel in his absence (A-4), and was not precluded from hiring others at his expense to help him perform his duties (A-6), notwithstanding he did neither.

Additionally, the ZBA did not conduct performance evaluations (although the City did not uniformly perform evaluations of its workforce) (A-8), nor did the ZBA require petitioner to prepare regular reports (A-16). He was not required to report to any particular person or account for his attendance (A-10), nor did the ZBA keep track of his time (A-11). With the exception of one land use seminar in the beginning of his service, petitioner was not required to receive training, particularly training in "sexual harassment [and] ethics" (A-13), and the ZBA did not provide him with a permanent workspace or support staff, notwithstanding he was able to work in the City Council Chambers, use the ZBA's letterhead, and was provided a land use treatise (A-14).

The ALJ found that financial control factors "militate[d] toward employee status," but, on the whole, they were entitled to "less weight" because the City and petitioner intentionally

fashioned their financial relationship with the goal to qualify him for pension and health benefits. The ALJ made the following findings favoring employee status: the governing body established petitioner's compensation by ordinance or resolution (B-6); and, rather than require vouchers for payment (B-1), the City included petitioner on the payroll and paid him semi-monthly along with other employees (B-2), deducted state and federal taxes from his paycheck, and submitted employer-side taxes (B-4). The ALJ determined the following demonstrated independent contractor status: the ZBA did not reimburse petitioner for travel or business expenses (B-3); and, although the ZBA provided him health benefits, it did not provide paid vacation or sick leave (although that was true of all part-time employees) (B-5).

The ALJ found that the "Relationship to the Parties" factors favored independent contractor status, notwithstanding the following pro-employee factors: petitioner was not employed or associated with another entity that provided services to the City by contract, retainer, or other agreement (C-1); petitioner did not offer his services to another board of adjustment (although he was free to do so) (C-5); and petitioner could quit at any time (C-7). Favoring independent contractor status, the ALJ found that petitioner was not in a continuing, ongoing relationship with the

City, since he was appointed to single one-year-terms (C-2); he was not covered by a union contract (C-3); he offered legal services to the public at his private law firm (C-4); and the ZBA could not fire him at will (C-6). After weighing and balancing her findings as to the various Checklist questions, the ALJ concluded that petitioner was an independent contractor.

Upon receiving petitioner's exceptions and opposition, the Board adopted the ALJ's decision and affirmed its initial finding that petitioner was not entitled to pension service credits because he was an independent contractor.

III.

On appeal, petitioner contends the ALJ erred in utilizing the Checklist, and in assigning to petitioner the burden to establish he was an eligible employee.⁸ Petitioner argues the so-called "ABC Test" should have determined his status. But, assuming for argument's sake that the Checklist applied, petitioner contends the Board's decision was arbitrary and capricious, and against the weight of the evidence.

We reject petitioner's contentions. First, the Board properly allocated to petitioner the burden to establish he was

⁸ Although petitioner directs his contentions to the ALJ, we review the decision of the Board, which adopted the ALJ's reasoning.

an employee eligible for a pension. "[W]hile a person 'eligible for benefits' is entitled to a liberal interpretation of the pension statute, 'eligibility [itself] is not to be liberally permitted.'" Francois v. Bd. of Trs., 415 N.J. Super. 335, 350 (App. Div. 2010) (quoting Krayniak v. Bd. of Trs., 412 N.J. Super. 232, 242 (App. Div. 2010)). With respect to other retirement benefits, our courts have placed the burden on the applicant to demonstrate eligibility. See Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008) (imposing burden on applicant to prove eligibility for disability retirement benefits); Bueno v. Bd. of Trs., Teachers' Pension & Annuity Fund, 404 N.J. Super. 119, 126 (App. Div. 2008).

The same principle should apply here, particularly given petitioner's greater access than the Board's to proofs about the nature of his own position. See J.E. ex rel. G.E. v. State, 131 N.J. 552, 569-70 (1993) (recognizing that the burdens of persuasion and production are generally imposed "on the party best able to satisfy [them]," noting the importance of "access to relevant information"); Romano v. Kimmelman, 96 N.J. 66, 89 (1984) (citing "the access of the parties to proof" as a factor in allocating burden).

We also discern no error in the Board's factual findings, which were adequately supported by substantial evidence in the record. See Hemsey v. Bd. of Trs., Police and Firemen's Ret. Sys., 198 N.J. 215, 223-24 (2009) ("[A]n 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." (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007))). We reject petitioner's contention that the Board's reliance on Jill Goldy's testimony was arbitrary and capricious because she admittedly lacked direct contact with the ZBA or petitioner. She testified based on information she received from other City officials, her familiarity with the City's financial management and processes, and her general understanding of zoning boards of adjustment.

Furthermore, we reject petitioner's contention that the Board was obliged to apply the ABC Test. "ABC" refers to the three subparagraphs – (a), (b), and (c) – in N.J.S.A. 43:21-19(i)(6), which defines "employment" for purposes of the Unemployment Compensation Law. See Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 580-87 (1991) (applying the ABC test to determine employment and eligibility for unemployment compensation). The same standard applies to determining whether

a person is an employee for purposes of the Wage Payment Law. Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301 (2015). However, Chapter 92 expressly directs the Board elsewhere to determine whether a person is an employee. The Board shall apply "the definition of independent contractor as set forth in regulation or policy of the federal [IRS] for the purposes of the Internal Revenue Code [(IRC)]." N.J.S.A. 43:15A-7.2(b).

Nonetheless, we are constrained to remand because we are not satisfied that the ALJ and the Board applied a standard consistent with Chapter 92's command. We are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973); see also Hemsey, 198 N.J. at 224. We may reverse an agency's decision if it "violate[s] express or implied legislative policies" In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016) (quoting Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env'l Prot., 191 N.J. 38, 48 (2007)).

As just noted, N.J.S.A. 43:15A-7.2(b) incorporates by reference IRS "regulation or policy," without further citation. See also N.J.A.C. 17:2-2.3(a)(15) (repeating statutory language). To understand what that means, we must look first to IRS regulations. Three virtually identical regulations define who is

an employee for purposes of the Federal Insurance Contributions Act, 26 C.F.R. § 31.3121(d)-1; the Federal Unemployment Tax Act, 26 C.F.R. § 31.3306(i)-1; and for purposes of collecting income tax at the source, 26 C.F.R. § 31.3401(c)-1. Consistent with the IRC,⁹ the federal regulations adopt a common law control test.

Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

[26 C.F.R. § 31.3121(d)-1(c)(2); 26 C.F.R. § 31.3306(i)-1(b); 26 C.F.R. § 31.3401(c)-1(b).]

The regulations identify other relevant factors, such as the right to discharge, and the provision of tools:

The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a

⁹ See 26 U.S.C. § 3121(d)(2) (defining an employees as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee").

place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

[26 C.F.R. § 31.3121(d)-1(c)(2); 26 C.F.R. § 31.3306(i)-1(b); 26 C.F.R. § 31.3401(c)-1(b).]

The determination is fact-sensitive in "doubtful cases." 26 C.F.R. § 31.3401(c)-1(d). The parties' self-description of their relationship is "immaterial." 26 C.F.R. § 31.3401(c)-1(e).

The IRS regulations expressly discuss attorneys and other professionals. The section on collecting income tax at the source states, "Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees." 26 C.F.R. § 31.3401(c)-1(c).¹⁰ On the other hand, "[t]he threshold level of control necessary to find employee status is generally lower when applied to professional services than when applied to nonprofessional services." Weber v. Commissioner, 60 F.3d 1104, 1111 (4th Cir. 1995).

¹⁰ Notably, the qualifier "generally" is absent from the other regulations' discussion of lawyers and other professionals. 26 C.F.R. § 3121(d)-1(c)(2); 26 C.F.R. § 31.3306(i)-1(b).

The Legislature also directs the Board to consider IRS policy, clearly referring to something distinct from regulations. As for the source of such "policy," the statute provides no guidance, nor does the legislative history.¹¹ But, we conclude with some confidence that we may look to revenue rulings as expressions of IRS policy, inasmuch as they represent the IRS's generally applicable interpretations of law. See Davis v. United States, 495 U.S. 472, 484 (1990) (stating that Court will give weight to revenue rulings as agency's legal interpretations, although they lack "the force and effect of regulations"); Foil v. Comm'r, 920 F.2d 1196, 1201 (5th Cir. 1990) (stating that revenue rulings "express[] the studied view of the agency whose duty it is to carry out the statute"); 26 C.F.R. § 601.601(d)(2)(i)(a) (stating "[a] 'Revenue Ruling' is an official interpretation by the Service"); 26 C.F.R. § 601.601.(d)(2)(b)(v)(d) (stating "Revenue

¹¹ The incorporation of IRS regulation or policy was substituted by the Assembly. See S. 17 § 20(b) (Jan. 29, 2007) (first reprint). The original bill disqualified any professional serving as a part-time officer or employee of a political subdivision who was "concurrently the sole proprietor, owner, partner, associate, officer or employee of a business entity," or owned over one percent of a corporation, that was "primarily engaged on a full-time basis in providing professional services of substantially the same type or nature" to other public or private entities. See S. 17 § 20(b) (Jan. 22, 2007) (bill introduction). Under that unenacted test, petitioner would have unquestionably been disqualified.

Rulings . . . are published to provide precedents to be used in the disposition of other cases"). The IRS cautions the public against applying revenue rulings to facts that are inapposite to those the ruling addresses. 26 C.F.R. § 601.601(d)(2)(b)(v)(e).

We note that long before passage of Chapter 92, our courts looked to the particular revenue ruling that established the "twenty-factor test" to determine whether a person was an employee for purposes of pension eligibility. See Stevens, 294 N.J. Super. at 653 n.1 (quoting topics of twenty-factor test set forth in Rev. Rul. 87-41). That revenue ruling addressed the employment status of scientifically skilled workers – but not professionals such as lawyers or physicians – assigned to perform tasks at companies by a third party. Those twenty factors are set forth at length at the end of our opinion. In summary, they pertain to the following:

- (1) instructions;
- (2) training;
- (3) integration;
- (4) services rendered personally;
- (5) hiring, supervising, and paying assistants;
- (6) continuing relationship;
- (7) set hours of work;
- (8) full time required;
- (9) doing work on employer's premises;
- (10) order or sequence set;
- (11) oral or written reports;
- (12) payment by hour, week, month;
- (13) payment of business and/or traveling expenses;
- (14) furnishing of tools and materials;
- (15) significant investment;
- (16) realization of profit or loss;
- (17) working for more than one firm at a time;
- (18) making service available to general public;
- (19) right to discharge;
- (20) right to terminate.

[Rev. Rul. 87-41.]

Notably, other revenue rulings have expressly addressed the employment status of an attorney. Compare Rev. Rul. 68-323, 1968-1 C.B. 432 (stating that where a corporation paid an attorney a fixed annual retainer to defend lawsuits against the company in the course of his separate practice, the attorney was an independent contractor), with Rev. Rul. 68-324, 1968-1 C.B. 433 (stating that an attorney who was furnished a place to work by a firm, required to work certain hours, paid an annual salary, and assigned research tasks, was an employee, notwithstanding that he handled other cases assigned by the firm for which he received fees).

The Board may also look to IRS tax guides as a source of IRS "policy." Although they do not have the force of law, they are "aimed at explaining existing tax law to taxpayers" United States v. Josephberg, 562 F.3d 478, 498 (2d Cir. 2009) (quoting Taylor v. United States, 57 Fed. Cl. 264, 266 (2003)). Two significant publications address the employee-independent contractor determination. See Dep't of the Treasury Internal Revenue Service, Publication 15-A, Employer's Supplemental Tax Guide (Publication 15-A); Dep't of the Treasury Internal Revenue

Service, Publication 963, Federal-State Reference Guide
(Publication 963).

The latter is particularly relevant because it focuses guidance on individuals working for governmental entities. With regard to the behavioral control of professionals, the publication states:

The nature of the worker's occupation affects the degree of direction and control necessary to determine worker status. Highly-trained professionals such as doctors, accountants, lawyers, engineers, or computer specialists may require very little, if any, instruction on how to perform their specific services.

Attorneys, doctors and other professionals can, however, be employees. In such cases, the entity may not train the individuals or tell them how to practice their professions, but may retain other kinds of control, such as requiring work to be done at government offices, controlling scheduling, holidays, vacations, and other conditions of employment.

[Id. at 4-3.]

The publication suggests, with reference to employees like police officers, firefighters, and other public safety or public health workers, that statutes or regulations may mandate training and procedures, or other aspects of control that would support a finding of employment. The publication returns to that topic in reference to professionals:

Again, the government entity should consult state statutes to determine whether a professional position is statutorily created. On the other hand, professionals can be engaged in an independent trade, business, or profession in which they offer their services to the public, including work for government entities. In this case, they may be independent contractors and not employees. In analyzing the status of professional workers, evidence of control or autonomy with respect to the financial details is especially important, as is evidence concerning the relationship of the parties

[Id. at 4-3 to 4-4.]

The publication also states that facts and circumstances relevant to the employee-independent contractor determination fall into three categories: "1) Whether the entity has the right to control the behavior of the worker; 2) Whether the entity has financial control over the worker; and 3) The relationship of the parties, including how they see their relationship." Id. at 4-2. The IRS suggests that employee status is indicated when "[a]n employee is generally subject to the government entity's instructions about when, where and how to work." Id. at 4-3. Identifying oneself as a government worker, by "[w]earing a uniform, displaying government identification, or using forms and stationery that indicate one is representing a government are highly indicative of employee status." Ibid. The nature of the occupation, which is discussed as quoted above, is also relevant.

As for evaluation systems, the IRS notes that their presence does not necessarily indicate employee status, since they are used "by virtually all government entities to monitor the quality of work performed." Id. at 4-4.

With regard to financial control, the IRS suggests that a key distinction between employees and independent contractors, is that the latter have "a genuine possibility of profit or loss."

Facts showing possibility of profit or loss include: significant investment in equipment, tools or facilities; unreimbursed expenses, including the requirement to provide materials or hiring helpers; working by the day or by the job rather than on a continuous basis; having fixed costs that must be paid regardless of whether the individual works; and payment based on contract price, regardless of what it costs to accomplish the job.

[Id. at 4-4.]

Work on a flat-fee basis reflects independent contractor status, while time-based payments are generally reflective of employee status (although the IRS recognizes that independent contractor attorneys "usually bill by the hour"). Ibid. Whether a person also offers services to the public, and how they do so, may favor independent contractor status. Ibid. Also supporting that status is the maintenance of a separate business entity.

Ibid. The IRS observes that part-time status does not necessarily tilt one way or the other. Id. at 4-5.

As for the relationship of the parties, the IRS reiterates that the parties' own contractual designations are not determinative. Id. at 4-5. The IRS recognizes that a government entity's inability to discharge the worker at will may not reflect independent contractor status, since many employees may share that protection. Id. at 4-6. Likewise, the worker's ability to terminate his or her own work at will is not as salient an indicator of employment status as it once was. Ibid. "On the other hand, a government entity's ability to refuse payment for unsatisfactory work continues to be characteristic of an independent contractor relationship." Ibid. While an expectation of an indefinite relationship may tend to support employee status, "a long-term relationship may also exist between a government entity and an independent contractor" such as when "contracts . . . [are] renewed regularly due to superior service, competitive costs, or lack of alternative service providers." Ibid.

IRS policy may also be reflected in private letter rulings, although the IRC expressly states they are not precedential. See 26 U.S.C. 6110(k)(3); Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1372 (D.C. Cir. 1995) (stating that, in a private

letter ruling, the IRS applies tax laws "to a specific factual problem presented by a particular taxpayer; only that taxpayer may then rely on the ruling"). Nonetheless, "such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." Hanover Bank v. Comm'r, 369 U.S. 672, 686 (1962).

In one private letter ruling, the IRS found private pool attorneys who handled cases for a public defender's office were independent contractors because, although the attorneys represented indigent clients assigned by the public defender, the public defender had no control over how and when the attorneys completed their work, the attorneys were required to furnish their own offices and bear the related expenses, and were paid an annual fixed rate regardless of the number of clients they were assigned. I.R.S. Priv. Ltr. Rul. 89-16-054 (Jan. 24, 1989). By contrast, a law student who worked as a part-time law clerk for a solo practitioner was considered an employee, notwithstanding that the student decided when and where to perform his legal assignments, such as drafting documents, and performing research and writing. I.R.S. Priv. Ltr. Rul. 96-39-001 (Jan. 20, 1996). Some factors the IRS viewed as favoring employee status in that case were: the law student was not engaged in his own independent enterprise in

which he assumed a risk of loss; his work was integral to the solo practitioner's practice; the firm supplied him with a computer, office space and law books; and although the law student did not require detailed supervision, the firm retained the right to control the work to assure a satisfactory product. Ibid.

IV.

Without reference to IRS regulations, or the various sources of IRS policy we have identified, the ALJ, and the Board by adoption, determined that petitioner was an independent contractor based on the Checklist findings. However, in light of Chapter 92's clear mandate, reliance on the Checklist is appropriate only if it is an accurate distillation of IRS regulations or policy. We are not satisfied that it is.

While it references the three general categories found in Publication 963, the Checklist weighs various factors that are not directly traceable to that publication nor, apparently, to other IRS regulations or sources of policy. Furthermore, it omits considerations that IRS policy documents identify.

According to the Checklist, who appointed the individual in question – a governing body or an administrator – and how he or she was appointed – by RFP or not – are significant questions. Yet, we find no indication in IRS regulations or policy sources

that these are significant factors. It is not self-evident that appointment by a governing body tends to demonstrate independent contractor status, as the Checklist presumes. Indeed, the MLUL expressly authorizes a zoning board of adjustment to "employ, or contract for, and fix the compensation of legal counsel" N.J.S.A. 40:55D-71(b). Thus, the statute contemplates legal counsel as employees or contractors. IRS policy suggests that governmental entities "consult state statutes to determine whether a professional position is statutorily created" and if so, what level of control over the worker does the statute provide the governmental entity. Publication 963 at 4-3, 4-8.

The Checklist also omits reference to government identification – such as "displaying government identification, or using government forms and stationery" – which the IRS considers "highly indicative of employee status." Id. at 4-3. Notably, the record indicates petitioner received a City employee identification card, and used government stationery.

We find no basis in IRS policy for the conclusion that employee status is suggested if a governing body's ordinance or resolution sets compensation levels. As just noted, a zoning board may fix compensation of legal counsel, whether it employs

them or contracts for their services. N.J.S.A. 40:55D-71(b).¹² Rather, it is the method of payment that is particularly relevant. See Publication 963 at 4-4 ("The method of payment must be considered.").

Furthermore, the Checklist does not adequately capture what IRS policy deems particularly significant: whether the individual bears a risk of loss or the potential of profit; and whether the individual has made an investment in his or her own office or facilities. These are factors fifteen and sixteen in the twenty-factor test, see Rev. Rul. 87-41, and are mentioned in Publication 963, at 4-4.¹³ The Checklist also does not ask whether the individual maintains a separate corporate form. See Publication 963, at 4-4 to 4-5 (discussing "Corporate Form of Business"). All of those factors indicate independent contractor status.

In sum, although the Checklist may be a helpful tool to gather many facts relevant to the employee-independent contractor determination, it does not accurately distill IRS regulation or policy. Therefore, reliance solely on the Checklist deviates from the statutory command that IRS regulations or policy govern the

¹² We note petitioner's testimony that the City governing body, not the ZBA, set his salary.

¹³ Notably, Fact Sheet #84 addresses the profit or loss factor.

employee-independent contractor determination. See N.J.S.A. 43:15A-7.2(b).

Based on this conclusion, we are constrained to remand. We may not substitute an alternative rationale, based on IRS regulations or policy, for the Board's decision, which it based on the Checklist. "The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based." In re Petition of Elizabethtown Water Co., 107 N.J. 440, 460 (1987) (quoting Sec. and Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943)). To do otherwise would impinge upon the agency's exercise of its delegated authority and expertise. "[A] judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress [or the Legislature] has exclusively entrusted to an administrative agency." Chenery, 318 U.S. at 88.

We therefore remand to the Board to apply IRS regulations or policy to determine petitioner's status, and to provide a decision that is expressly moored to IRS authority. We leave it to the Board to decide whether any additional evidence is needed, inasmuch as the OAL hearing was confined to the Checklist questions.

Remanded. We do not retain jurisdiction.



APPENDIX

REV. RULING 20 FACTORS

DIVISION OF PENSIONS 20 FACTORS

<p>1. <i>Instructions.</i> A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.</p>	<p>1. How did you know what services or tasks to perform? How was your work assigned? By whom? Did you determine when, where and how the work is to be done? If not, who made the decisions? Specifically: State the name, address and phone number of any contracting/employing agency officer providing supervision or control related to the professional services provided by you. Also, provide the name and address of each person who directed the manner of the performance of your professional services. Describe how you received your work assignments, how new tasks/complaints were assigned and by whom these were assigned.</p>
<p>2. <i>Training.</i> Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.</p>	<p>2. Provide proof of qualifications or requirements for the position. How did you meet those qualifications? Were you appointed by a governing body or someone else in authority? Provide proof of such appointment. How were you trained? Specifically: Identify any specific training and instructions provided to you by the municipality and the dates of participation. Describe the training.</p>
<p>3. <i>Integration.</i> Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.</p>	<p>3. What role did your service play in the overall functioning of the contracting/employing agency? How were you retained for the service?</p>
<p>4. <i>Services Rendered Personally.</i> If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.</p>	<p>4. Send proof of any all persons in your employ along with their job duties. Provide proof of appointment of any of your employees by the contracting/employing agency, if applicable. Explain the method and send proof of payment by the contracting/employing agency (if available) of any and all persons in the your employ, such as pay stubs, direct payment reimbursements and/or W2s, etc. Were you required to personally perform the services for which you were retained/employed? Did you? Describe, by date, all absences from work during the period of appointment(s) providing reason for any absence. To whom were absences</p>

	<p>reported? For each absence, who substituted in your place?</p> <p>Describe how work was covered when you were absent. Who was responsible to designate someone to substitute for you if you were absent and unable to perform services? If coverage was obtained, how was that person paid?</p> <p>Did any secretarial or administrative assistance employed at your business/practice assist you on matters you worked on for the contracting/employing agency? If yes, identify the date and describe the assistance provided.</p>
<p><i>5.Hiring, Supervising, and Paying Assistants.</i> If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.</p>	<p>5. Provide proof of withholding of income tax or other payments (e.g., Social Security) for you and any persons who are employed by you in any capacity.</p> <p>Were you provided with fringe benefits: sick time, vacation time, medical insurance? Provide proof of any benefits (e.g., health insurance, pension or other retirement plan) provided to you and any other person employed by you in any capacity.</p> <p>Did the contracting/employing agency maintain a personnel file relative to your position?</p> <p>Were you provided with an Employee Handbook?</p>
<p><i>6.Continuing Relationship.</i> A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.</p>	<p>6. How long had you received compensation of any kind from this employer, regardless of whether it is claimed to be as an employee or independent contractor? On what date will this relationship terminate?</p>
<p><i>7.Set Hours of Work.</i> The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.</p>	<p>7. What type of personnel did you interact with when performing services? Were you expected to be available to other personnel during the regular workday or work year?</p>
<p><i>8.Full Time Required.</i> If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.</p>	<p>8. How much time did you devote to the effective performance of this position? What hours were you required to be available to any personnel of the public employer? Were you required to attend meetings arranged by the public employer? Specifically:</p> <p>What was your daily routine and hours?</p> <p>Were you required to attend staff meetings?</p>
<p><i>9.Doing Work on Employer's Premises.</i> If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as</p>	<p>9. Were you required to be on the public employer's premises to perform your duties either as an express requirement or practical means of performing the duties? Where else did you perform your duties? Specifically:</p> <p>State the location where professional services performed.</p>

<p>at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The 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. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.</p>	<p>Were services performed at any other location other than the contracting/employing agency? If so, state the location, describe the tasks performed and the amount of time spent on these tasks.</p>
<p>10. <i>Order or Sequence Set.</i> If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.</p>	<p>10. How were your various tasks assigned? How were they prioritized? Did you need any authorization from the governing body or management to perform any tasks you were providing? If so, please indicate who in the organization authorized such tasks.</p>
<p>11. <i>Oral or Written Reports.</i> A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.</p>	<p>11. How did the public employer keep track of your productivity and/or work accomplishments? Did you ever submit any type of report, either as tasks were completed, goals were met, or as part of a report that was compiled on a regular basis (e.g., weekly, monthly, per marketing period, semiannually or annually)? Were you required to make status presentations to the organization's management or governing body? Specifically: Describe the process or procedure used by the contracting/employing agency for recording time and attendance. Specifically identify whether any timekeeping forms or other documents were required, and if so to whom were the documents submitted. Were formal or informal performance evaluations conducted? And if so, were they memorialized. Please provide copies of performance evaluations.</p>
<p>12. <i>Payment by Hour, Week, Month.</i> Payment 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. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.</p>	<p>12. What was your compensation for performing this service? How was it determined? What was the frequency and method of payment for services? Provide proof payment as issued by the public employer and W2s or 1099s issued from whatever source with regard to the services you were providing.</p>

<p>13. <i>Payment of Business and/or Traveling Expenses.</i> If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.</p>	<p>13. Who paid for your business and/or travel expenses? What type of expenses were incurred? How were they paid? If you paid these expense, were they reimbursed and by whom? Who paid for your mandatory Continuing Education courses? (If applicable) Who paid for your NJ annual licensing fee? (If applicable)</p>
<p>14. <i>Furnishing of Tools and Materials.</i> The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.</p>	<p>14. What equipment and supplies were you required to provide to carry out this service? Were you reimbursed by the public employer for any of these supplies or equipment? Did the contracting/employing agency provide you with:</p> <ul style="list-style-type: none"> • A private office <ul style="list-style-type: none"> • Personal secretary • Telephone (If so, state number) • Computer • E-mail • Office supplies (Including legal pads) • Vehicle • Copier • Fax • Postage • Access to legal or other research databases <ul style="list-style-type: none"> • Lawyers diary or other calendar system
<p>15. <i>Significant Investment.</i> If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities, such as home offices.</p>	<p>15. Provide proof of rental, depreciation or other tax deduction, maintenance costs, or other payment for facilities in which the services are performed.</p>
<p>16. <i>Realization of Profit or Loss.</i> A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker</p>	<p>16. Provide proof of any investments or liabilities incurred for the specific purpose of performing these services. Are they reimbursable?</p>

<p>is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.</p>	
<p>17. <i>Working for More Than One Firm at a Time.</i> If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.</p>	<p>17. How many public employers did you work for while at this location? For how many other businesses or other organizations of any type did you perform any duties? What types of duties? Provide proof of payment, W2s or 1099s and copy of state and Federal Income Tax returns for all organizations in which you provided service.</p>
<p>18. <i>Making Service Available to General Public.</i> The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.</p>	<p>18. Did you advertise your services to the general public on a regular basis? Did you offer services to the public between January 1, 2008 and the present while also serving the contracting/ employing agency? If so, do you currently do so? From January 1, 2008 to the present, did you maintain an office for private practice while serving with the contracting/ employing agency? If so, do you currently maintain an office? State the name, address, phone number and fax number of the office or offices referenced above. How many hours per week do you work at you office(s)?</p>
<p>19. <i>Right to Discharge.</i> The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.</p>	<p>19. Could you be fired and/or services terminated? Under what circumstances and what procedure?</p>
<p>20. <i>Right to Terminate.</i> If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.</p>	<p>20. What would ensue if you had quit performing the services prior to a set date or meeting a specific goal.</p>
	<p>In addition to providing responses to the questions above, please state any facts you believe support the assertion that the</p>

	contracting/employing agency exercised behavioral and financial control over the performance of the services provided by you and that an employee/employer relationship exists or existed.
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EE-0909-0113

STATE OF NEW JERSEY — DEPARTMENT OF THE TREASURY
 DIVISION OF PENSIONS AND BENEFITS
 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

External Audit Unit
 PO BOX 295
 Trenton, NJ 08625-0295

EMPLOYEE/INDEPENDENT CONTRACTOR CHECKLIST

Use this form and checklist as a guide to determine the employer-employee relationship and properly classify Independent Contractors and other individuals providing "professional services."

1. Employing Location: _____ 2. PERS Location #: _____
3. Name of Individual: _____
4. Social Security #: _____ 5. PERS Membership #: _____
 (if applicable)
6. Position Held: _____
7. Hours Worked per Week: _____ 8. First Appointment Date: _____
 mm / dd / yyyy
9. Appointment Dates Since Jan. 1, 2008: From _____ to _____
 mm / dd / yyyy mm / dd / yyyy

10. Is the individual working under a Professional Services Contract pursuant to the New Jersey statutes N.J.S.A. 40A:11-5, 18A:18A-5, or 18A:64A-25.5 (no bid contracts)? No Yes (If "Yes", this individual is not eligible for PERS or DCRP enrollment through this position.)

INSTRUCTIONS: Complete the Employee/Independent Contractor questions by answering "Yes" or "No" as indicated. Some facts may support an Employee relationship while other facts indicate Independent Contractor status. The final determination rests on the weight given to the factors as a whole, with the degree of importance of any particular factor dependent on the occupation and circumstances. In all cases, the Division of Pensions and Benefits may review the facts to determine if the individual is an Employee or an Independent Contractor and additional supporting documentation may be required from the location. Individuals who are found to have been improperly enrolled, will be issued a return of pension contributions and any pension service based upon an ineligible position will be canceled by Division of Pensions and Benefits. For more information see Fact Sheet #84, *Professional Services Contracts, Independent Contractors, and Pension Enrollment*.

EMPLOYEE/INDEPENDENT CONTRACTOR QUESTIONS	EMPLOYEE	INDEPENDENT CONTRACTOR
A. BEHAVIORAL CONTROL		
<i>This test determines whether the location has a right to direct and control how the work is performed. The question is whether the location has the right to control the manner in which services are performed.</i>		
1. 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 to be performed?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
2. Hiring. Was the individual appointed by an administrator (rather than appointed by the governing body) and is there a written job description?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3. Was the individual hired based on the submission of a Request for Proposal?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
4. Performed Personally. Is the individual permitted to provide substitute personnel in his or her absence?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
5. Is the individual required to personally attend Court sessions or meetings arranged by the location?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
6. Is the individual authorized to hire others at his own expense or that of a third party, to assist the individual in performing work for the location?	<input type="checkbox"/> No	<input type="checkbox"/> Yes

Continued on next page.

EMPLOYEE/INDEPENDENT CONTRACTOR QUESTIONS <i>(Continued)</i>	EMPLOYEE	INDEPENDENT CONTRACTOR
7. Hours. Does the individual work established and fixed hours structured by or with approval of the location?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
8. Does the location conduct performance evaluations for the individual?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
9. Instructions. Is the individual given instructions and directions on tasks to perform?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
10. Integration. Does the individual report to a certain person at the beginning of the work day or other regular basis or otherwise is, required to account for attendance?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
11. Does the location maintain timekeeping records or a system of keeping time for the individual (other than via the submission of payment vouchers)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
12. Premises. Is the individual's work mostly performed on the location's premises?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
13. Training. Does the location require the individual to be trained related to their position (e.g. sexual harassment, ethics, etc) ?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
14. Tools and Equipment. 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)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
15. Sequence. Does the location direct the order and sequence of the duties to be performed by the individual?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
16. Reports. Is the individual required to prepare regular reports?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
B. FINANCIAL CONTROL		
<i>This test considers whether the location controls the financial aspects of the individual's services, the method of payment and whether services are offered to the public.</i>		
1. Payment. Does the location pay for the performance of services through submission of a voucher?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
2. Is payment for services made on a regular interval, such as weekly or bi-weekly payroll?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3. Expenses. Does the location reimburse for travel or business expenses?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
4. Are state and federal employee taxes and employee benefit deductions taken from the individual's paycheck and are employer taxes paid?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
5. Does the individual receive fringe benefits that are provided to other employees of the location (such as vacation, health benefits, administrative leave, sick leave)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
6. Has the compensation for the work been established by ordinance or resolution of the governing body establishing salaries for persons in similar positions?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Continued on next page.

EMPLOYEE/INDEPENDENT CONTRACTOR QUESTIONS <i>(Continued)</i>	EMPLOYEE	INDEPENDENT CONTRACTOR
C. RELATIONSHIP TO THE PARTIES <i>These factors illustrate how the entity and individual perceive their relationship. Is there a continuing, ongoing relationship understood between the parties as one of employer and employee?</i>		
1. General Public/Other Employers. Is the individual also employed or associated with another entity that provides services to the location by contract, retainer, or other agreement?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
2. Continuing Relationship. Are the parties in a continuing relationship that is ongoing (a specific conclusion date or term indicates there may not be a continuing employment relationship)?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
3. Is the individual covered by a contract negotiated between a union and location?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
4. Does the individual offer his services to the public at large (rather than exclusively to the location)?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
5. Does the individual perform essentially the same services for other public employers?	<input type="checkbox"/> No	<input type="checkbox"/> Yes
6. Termination. Can the individual be terminated at the will of the location?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
7. Discharge. Can the individual terminate the relationship at will?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Review the questions and responses and indicate a determination of the individual's classification below.

EMPLOYING LOCATION'S DETERMINATION

I have reviewed the factors and have determined that this individual best meets the classification of an:

Check One: EMPLOYEE INDEPENDENT CONTRACTOR

Name of Certifying Officer: _____ Phone: _____

Certifying Officer Signature: _____ Date: _____

Submit this completed and signed form to the External Audit Unit,
Division of Pensions and Benefits, PO Box 295, Trenton, NJ 08625-0295.

- Employing locations must notify the Division of Pensions and Benefits immediately of any improperly enrolled individuals and take all appropriate action to remove ineligible individuals from PERS or DCRP membership.

To remove an ineligible individual:

- Stop reporting pension contributions for the individual on the quarterly *Report of Contributions*; and
- Immediately notify the Division of Pensions and Benefits, External Audit Unit in writing or by sending e-mail to pensions.nj@treas.state.nj.us with "External Audit" in the e-mail subject line. When writing, please identify your employing location, a contact name and phone number, the name of the independent contractor or professional service provider, the position held, and the original date of hire or appointment.
- The Division of Pensions and Benefits will also review the responses and classification of any individual regarding his/her eligibility for enrollment in the retirement system. Additional supporting documentation may be required.
- See Fact Sheet #84, *Professional Services Contracts, Independent Contractors, and Pension Enrollment*, for more information.