NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3997-13T2

WILLIAM ZAGORSKI,

Petitioner-Appellant,

v.

PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent-Respondent.

Argued March 25, 2015 – Decided October 19, 2015

Before Judges Alvarez and Maven.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of Treasury, Docket No. 2-10-214829.

Sanford R. Oxfeld argued the cause for appellant (Oxfeld Cohen, P.C., attorneys; Mr. Oxfeld, of counsel and on the briefs; Samuel Wenocur, on the brief).

Robert E. Kelly, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Kelly, on the brief).

PER CURIAM

In this appeal, we consider the remedy sought by the Division of Pensions and Benefits (Division) from appellant

William Zagorski for violating the Public Employees Retirement System (PERS) statute, N.J.S.A. 43:15A-57.2, due to his employer's failure to enroll him in the PERS pension system. William Zagorski, presently age seventy-five, appeals from a final determination of the PERS Board of Trustees (the Board), which directed him to repay pension benefits in the amount of $85,411.41 along with an additional $5002.27 for missed PERS contributions. On appeal, Zagorski argues that the Board erred by failing to apply equitable principles to reduce the total repayment obligation. We agree and remand this matter for consideration of the equities.

I.

We briefly summarize the procedural history and the facts developed at a hearing before an Administrative Law Judge (ALJ). Neither party disputes these findings, which were accepted by the Board.

In February 2012, the Division notified Zagorski that he was in violation of the pension statute, N.J.S.A. 43:15A-7.1, and, therefore, his retirement was not bona fide. The Division required that Zagorski: 1) reimburse all of the retirement benefits he had received from August 1, 2006, through February 1, 2012, totaling $85,411.41; 2) pay $5002.27, which represents one-half of the pension deductions he would have paid had he

been properly enrolled in PERS by his employer, Mercer County Community College (MCCC) in 1996; and 3) enroll in PERS as an active contributing member.[1]

Zagorski appealed to the Board, which upheld the Division's determination. Zagorski timely appealed, and the Board forwarded the matter to the Office of Administrative Law (OAL), where it was filed as a contested case. The parties appeared for a plenary hearing before the ALJ on April 19, 2013.

Zagorski began his employment as an assistant producer/director for Rutgers University's television production program in March 1972. He contributed to PERS while employed as a full-time faculty member. In August 1987, Zagorski left Rutgers to work at Union County Community College (UCCC) as a part-time adjunct instructor, where he continued to contribute to PERS. Beginning in May 1996, Zagorski also began working part-time at MCCC as an overnight classical radio announcer, a non-faculty position. Zagorski worked concurrently at both UCCC and MCCC from May 1996 until he retired from UCCC on May 31, 1999. Thereafter, he continued working only at MCCC.

On July 20, 2006, Zagorski applied for a normal service pension from PERS based upon his employment at Rutgers and UCCC.

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[1] N.J.A.C. 17:2-6.1(a) provides that "[m]embers enrolled in multiple PERS positions must retire from employment in all covered positions before a retirement shall become effective."

The Division approved his application, effective August 1, 2006, and credited him with twenty-six years and seven months in the pension system.

Michael R. Czyzyk, the Supervisor of External Audit for the Division, testified that the Division reviewed Zagorski's post-retirement earnings as a part of its routine annual audits. In response to the Division's request for additional information, MCCC provided Zagorski's employment records,[2] as well as information that other MCCC part-time radio announcers were enrolled in PERS, though Zagorski was not. In February 2012, Czyzyk wrote Zagorski to inform him that the Division determined that his employment at MCCC was PERS-eligible, and that he had violated the re-enrollment provisions of the pension statute, N.J.S.A. 43:15A-57.2, by failing to re-enroll in the PERS system. In addition, his retirement was not bona fide because he continued employment in a PERS-eligible position while collecting retirement benefits and his wages exceeded the $15,000 allowable annual post-retirement threshold.

[2] MCCC provided Zagorski's earnings from 1996 through 2012. In the years up to and including 2007, Zagorski earned less than $15,000, except for 2003, when he earned $15,311. In 2008, 2009, and 2010, he earned $17,410, $22,805, and $25,049, respectively. In 2011, he earned $10,397. There was incomplete information for 2012.

Czyzyk explained that pension eligibility is defined by statute and regulations. N.J.S.A. 43:15A-7(d)(1); N.J.A.C. 17:2-2.1. In 1996, when Zagorski began employment at MCCC, the statute provided that an employee was pension or PERS-eligible if his or her position paid more than $1500 per year, was subject to Social Security, and was not specifically listed as ineligible. N.J.S.A. 43:15A-7(d)(1).[3] In 2010, the Legislature amended the enrollment requirement to create new pension eligibility tiers. L. 2010, c.1, effective May 21, 2010. Czyzyk explained that under the new rules, an employee's eligibility for enrollment in the pension system is based upon the number of hours worked in a pension eligible position. N.J.S.A. 43:15A-7(d)(4), requires an employee to work a minimum of thirty-two hours per week to be eligible for PERS.

Once eligible an employee's enrollment in the pension system is mandatory. The employer has the obligation and responsibility for enrolling its employees in the pension system. Czyzyk confirmed that MCCC was solely responsible for enrolling Zagorski into PERS, but failed to do so.[4]

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[3] The income threshold increased to $7500, effective November 1, 2008. N.J.S.A. 43:15A-7(d)(3).

[4] Prior to the hearing, the parties stipulated that "MCCC took no steps to enroll Mr. Zagorski in PERS with respect to his employment at that institution until sometime in 2012."

Czyzyk did not believe that Zagorski acted with any malice or intent to defraud the pension fund. Nevertheless, he explained that the Division interprets a violation of the statute as imposing "per se liability," regardless of anyone's intentions or mistakes. Therefore, regardless of the circumstances, because Zagorski did not have a bona fide retirement, the Division required him to repay the pension benefits he received from 2006 through 2012 ($85,411.41), and one-half of the contributions that he would have made during his employment at MCCC ($5002.27). Due to its failure to timely enroll Zagorski, MCCC was required to pay the other half of the contributions under the statute's "late employer liability" provision.[5]

Zagorski testified that he took the MCCC position as a retirement job. When he started in 1996, he earned $8.20 hourly and worked eighteen hours per week. At the time of the hearing, he earned $19 per hour and worked eighteen to twenty-two hours a week. He had no reason to believe he should be in the PERS system because, unlike the paystubs he received at his previous jobs, his MCCC paystubs did not reflect any pension contribution

[5] N.J.S.A. 43:15A-7.1(b) requires an employer who fails to timely enroll an employee in PERS to pay one-half of the employee's cost for delinquent enrollment.

deductions. In addition, he was never told by any administrator that he was supposed to be enrolled in PERS, and he was not aware that other part-time announcers at MCCC were enrolled in PERS. He argued that it would be "utterly impossible" to repay the demanded $90,000 in pension earnings and back contributions.

In a comprehensive sixteen-page written decision, the ALJ agreed with the Division that Zagorski's retirement "was not bona fide because he did not retire from all PERS-covered positions at the time his retirement became effective." In making this determination, the ALJ found that under the statutory scheme in effect in 1996, Zagorski should have been enrolled in PERS, because his position was PERS-eligible. The ALJ noted that "an employee cannot enroll himself in PERS. Only an employer can do so." However, MCCC inexcusably failed to enroll him.

Despite that conclusion, the ALJ also found that it would be inequitable to compel Zagorski to repay the entire amount of the retirement benefits he received. The ALJ reasoned that "[u]nder the circumstances of this case, it is simply unconscionable to lay the entire liability at the feet of the petitioner for the failure of the 'system' to detect, for sixteen years, that he was in a PERS-eligible position but was not enrolled." The ALJ further found that "considerations of

equity and fairness in this matter dictate that [Zagorski] cannot be liable for repayment of substantial retirement benefits that were erroneously paid through no fault of [Zagorski's]." In arriving at his decision, the ALJ reasoned that

> [T]he present matter is clearly not a case of manipulation of the system by a knowledgeable individual, but, rather, one in which an unexplainable failure by the employer to properly classify [Zagorski] for over sixteen years has led to severe economic consequences to a retiree with relatively limited economic resources. Consequently, a remedy must be crafted that reflects the equity and fairness envisioned by the case law that has addressed a retiree who innocently erred in receiving excess retirement benefits and then is faced with a substantial repayment obligation. The failure by MCCC to enroll [Zagorski] into PERS for the ten years he worked prior to his retirement application is, at minimum, an implicit assurance by the college that his employment was not pension eligible. Given the totality of the circumstances surrounding this rather unique situation, [Zagorski] should not be required to return any salary earned at MCCC because to do so would be overly punitive due to the fact that he did not engage in any non-compliance while in retirement. [Zagorski] did not change his position, title, or employment status in any way during retirement. . . . [Zagorski] here held the same position pre- and post-retirement. Unfortunately for him, due to some confusion at MCCC, [Zagorski] was never enrolled in PERS, despite the fact that it should have been plainly obvious to any administrator that he should have been enrolled.

In fashioning an appropriate remedy, the ALJ recognized the extended period of time for which the Division sought to recoup payments, stating:

> Given that petitioner had received income from MCCC for sixteen years prior to being notified that he was in a PERS-eligible position, it would be inequitable to require him to repay either the pension benefits paid to him or the substantial salary he has received from MCCC over sixteen years (which would be an unjust enrichment to the college). The proper remedy is to restore petitioner and the Board to the positions they would have been in if the mistake had not occurred.

The ALJ recommended that "the current standards for PERS enrollment of a local employee should be retroactively applied to the date [Zagorski's] employment commenced with MCCC, such that his employment at MCCC would never qualify as PERS eligible because he always worked less than thirty-two hours per week."

In its final decision, the Board adopted the ALJ's conclusion that Zagorski's retirement was not bona fide, but rejected the ALJ's recommended equitable remedy that absolved Zagorski of full liability for repayment of the retirement benefits. It explained that the ALJ reached two contradictory conclusions when it simultaneously concluded that Zagorski's retirement was not bona fide, but that he did not have to re-enroll in PERS and pay deductions for missed PERS contributions. "[T]he ALJ is effectively providing Mr. Zagorski with the

benefits of a bona fide retirement, despite already concluding that his retirement was not bona fide."

This appeal followed, in which Zagorski does not contest the ALJ's or the Board's finding that his retirement was not bona fide. Instead, he contends that the Board erred in imposing a remedy that required him to refund all pension benefits received from August 1, 2006 through June 1, 2012.

II.

Our scope of review of an administrative agency's final determination is limited. An administrative board has the authority "to adopt, reject or modify the recommended report and decision of the ALJ, and an appellate court is only entitled to review those findings and recommendations in its overview of the record for the purpose of determining whether or not the Board's findings are supported by substantial credible evidence." N.J. Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 189 N.J. Super. 491, 507 (App. Div. 1983) (internal citation omitted) (citing In re Suspension of License of Silberman, 169 N.J. Super. 243, 255-56, (App. Div. 1979), aff'd, 84 N.J. 303 (1980)).

The reviewing court "should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the

decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008). Nevertheless, an appellate court is "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).

"An important goal of pensions for public employees 'is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed.'" Francois v. Board of Trustees, 415 N.J. Super. 335, 349 (2010) (quoting Geller v. N.J. Dep't of Treasury, Div. of Pensions & Annuity Fund, 53 N.J. 591, 597 (1969)). In that regard, courts must construe pension statutes with a dual purpose to balance the interests of the employee and the employer. We must ensure that the pension statutes are administered liberally in favor of the persons intended to be benefited. Ibid. In addition, we must construe the pension statutes "so as to preserve the fiscal integrity of the pension funds." See DiMaria v. Bd. of Trs. of Pub. Emps.' Ret. Sys., 225 N.J. Super. 341, 354 (App. Div.), certif. denied, 113 N.J. 638 (1988).

Without question, Zagorski's retirement was not bona fide because he continued to work in a PERS-eligible position. Indeed, Zagorski does not contest that finding. However, we part company with the Board's determination that Zagorski was pension eligible and thus required to re-enroll in PERS and refund $89,113.68. For that reason, we do not affirm.

Our courts have applied considerations of equity and fairness to the administration of the pension fund. See Ruvoldt v. Nolan, 63 N.J. 171, 183-84 (1973); see also, Hemsey v. Bd. of Trs., Police & Firemen's Ret. Sys., 393 N.J. Super. 524, 536 (App. Div. 2007) (applying equitable estoppel to reverse the Board's decision that required Hemsey to reimbursement benefits and to re-enroll in the pension system), rev'd on other grounds, 198 N.J. 215 (2009); see also Vliet v. Board of Trustees, 156 N.J. Super. 83, 90 (App. Div. 1978) (holding that requiring the retiree to make a "total reimbursement would be inequitable").

When these principles are applied to the unique circumstances of this case, we conclude that Zagorski's admittedly innocent non-compliance with the pension statute should not require him to re-enroll in the PERS system or repay the full amount of the benefits he received. N.J.S.A. 43:15A-57.2 is controlling here. The statute mandates that when a former member who is receiving a retirement allowance becomes

employed again in a PERS-covered position, "his retirement allowance . . . shall be canceled until he again retires." N.J.S.A. 43:15A-57.2(a). The employee is thus required to re-enroll in the pension system again until any future re-retirement. However, this mandate does not apply if the former member's new employer is "an employer . . . in a position or positions for which the aggregate compensation does not exceed $15,000 per year. . . ." N.J.S.A. 43:15A-57.2(b)(1). Moreover, the revised, current statute, N.J.S.A. 43:15a-7(d)(4), does not require re-enrollment unless an employee's work hours exceeded thirty-two hours per week.

With the exception of 2003, 2008, 2009, and 2010, Zagorski did not earn more than $15,000, and in all of his years, he never worked thirty—two hours a week. For the majority of his years at MCCC, Zagorski would not have qualified as a participant in PERS. Zagorski argues that this court should adopt the remedy prescribed by the ALJ, which would result in no repayment because he would not qualify as PERS-eligible.[6] We agree and find that the Board's strict interpretation and

[6] The ALJ recommended retroactive application of the current standard for PERS enrollment requirements to Zagorski's position effective May 1, 1996, the date he commenced employment with MCCC. See N.J.S.A. 43:15A-7(d)(4) (requiring a minimum of thirty-two hours per week for local employees to be eligible for PERS as of May 21, 2010).

application of the statute results in a sanction that is inequitable.

When reviewing sanctions imposed by an agency, we have the power to consider "tests of illegality, arbitrariness or abuse of discretion" and "to impose a lesser or different penalty in appropriate cases." Mayflower Sec., supra, 64 N.J. at 93. After considering the applicable law in light of the facts of this case, we hold that equitable considerations require a diminution in the amount of benefits that must be refunded to avoid, in the words of the ALJ, "severe economic consequences to a retiree with relatively limited economic resources."

In this regard, we agree with the ALJ's recommendation that Zagorski's past employment be scrutinized under current standards as it pertains to the "missed" pension payments. Zagorski could never have been eligible to participate in PERS because he did not meet the work-hour threshold. Therefore we hold that there are no past contribution payments to be paid and reverse the portion of the order requiring the payment of $5002.27.

Next, we consider the Board's demand for full reimbursement of $85,411.41 in pension benefits received. In dealing with the public, government "may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over

[a private litigant]." F.M.C. Stores Co. v. Borough of Morris Plains., 100 N.J. 418, 427 (1985) (permitting the plaintiff-taxpayer to file its Tax Court claim after the statutory deadline). Government agencies must "turn square corners," id. at 426, and must observe certain standards and norms that are beyond reproach. See CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 585, (App. Div. 2010) (citing F.M.C., supra, 100 N.J. at 426); see also New Concepts for Living, Inc. v. City of Hackensack, 376 N.J. Super. 394, 401 (App. Div. 2005) (relying on "turn square corners" doctrine to permit plaintiff to appeal loss of its tax-exempt status, even if the statute of limitations period had expired).

In this case, equity dictates that the Division should not be permitted to benefit from their delay in discovering MCCC's errors. See, e.g., Ruvoldt, supra, 63 N.J. at 183 (concluding that principles of equity and fairness rendered it "clearly unjust" to apply "a substantive rule of disentitlement of pension against Ruvoldt" eight years after the fact).

Here, Zagorski bears no fault in the quandary in which he finds himself. He worked part-time at MCCC for almost sixteen years without MCCC enrolling him in the pension system. During that time, the Division inexplicably failed to investigate his employment in 2003, 2008, 2009, and 2010, during which his post-

retirement income exceeded the $15,000 threshold. The Division's neglect to recognize that his position may have been pension-eligible during their annual audits significantly contributed to this unfortunate situation. Given the acts of omissions of both MCCC and the Division, it would be unconscionable to hold Zagorski liable for the sixteen-year failure to detect that he was in a PERS-eligible position but not enrolled in PERS by his employer. Based on these circumstances, we find the Board's demand for full reimbursement to be unreasonable and excessive. Therefore, reversal of the Board's determination holding Zagorski liable for the full repayment of the retirement benefits he received is warranted.

Notwithstanding our determination, because there are years where Zagorski exceeded the statutory threshold, we can conceive an equitable reimbursement remedy that takes into account both the Board's interest in preserving the fiscal integrity of the pension system and Zagorski's unwitting violation of the pension statute. Accordingly, we remand for the Board to reconsider the financial sanctions in this matter and to establish the reimbursement of pension benefits based on the years Zagorski's wages exceeded $15,000, the statutory threshold. We anticipate this equitable remedy will mitigate the economic hardship on Zagorski.

Affirmed in part. Reversed in part and remanded.

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

CLERK OF THE APPELLATE DIVISION