



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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May 16, 2019

Alfred Petit-Clair, Jr.,
Attorney-At-Law

[Redacted address information]

RE: PERS [Redacted]
Appellate Division Remand
Dkt. No.: A-2048-16T2

Dear Mr. Petit-Clair:

FINAL ADMINISTRATIVE DETERMINATION

I am writing in reference to the decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) regarding the Appellate Division's remand in Alfred Petit-Clair, Jr. vs Board of Trustees, Public Employees' Retirement System, A-2048-16T2 (App. Div. March 1, 2018). In the Board's December 12, 2018, decision, the Board applied the Appellate Division's directives in applying the Internal Revenue Service Guidelines (Guidelines) and found that your service with Perth Amboy did not qualify you as a bona fide employee, but rather an independent contractor, and therefore ineligible for PERS service credit after the effective date of Chapter 92, January 1, 2008. None of your PERS service previous to that date has been challenged.

You appealed the Board's decision and at its meeting on March 20, 2019, the Board determined that there are no material facts in dispute which would require an administrative hearing and directed the Board Secretary, in conjunction with the Attorney General's Office, to

prepare Findings of Fact and Conclusions of Law, which were presented and approved by the PERS Board at its May 15, 2019 meeting.

The Board has considered all of your personal statements, reviewed your written submissions and the relevant documentation, and finds that you are not eligible for PERS enrollment after the effective date of Chapter 92.

FINDINGS OF FACT¹

The record establishes that you were enrolled in the PERS in 1990 as a result of your appointment as the Zoning Board of Adjustment (ZBA) Attorney, and you were reappointed yearly by the ZBA through a series of consecutive one-year terms. In 2007, the Legislature enacted a series of sweeping pension reforms including the removal of professional service providers, such as attorneys, from the PERS. Specifically, N.J.S.A. 43:15A-7.2 was enacted, which precluded PERS eligibility for professional service providers retained pursuant to professional services agreements in accordance with Local Public Contracts Law. Also excluded from PERS eligibility are those individuals qualifying as independent contractors pursuant to IRS guidelines.

In July 2012, the State of New Jersey Comptroller's Office issued a report entitled Improper Participation by Professional Services Providers in the State Pension System.² The Comptroller found that local public employers had improperly included professional service providers in the PERS, and recommended that local public employers review the pension status of its professional service providers. The report also suggested the use of a Checklist which would assist local employers in determining an individual's PERS status.

Based upon the Comptroller's recommendation, Perth Amboy reviewed your PERS status in 2012, and determined that because you were an independent contractor rather than a bona

¹ For the sake of brevity, the Board only briefly summarizes and incorporates by reference the procedural history and prior factual findings as found by the ALJ, adopted by the Board, and upheld by the Appellate Division. The Board has also previously adopted by reference the Appendix attached to the Fraud and Abuse Unit's letter of July 12, 2018.

² https://www.nj.gov/comptroller/news/docs/pensions_report.pdf (last accessed May 10, 2019).

bona fide employee, you were ineligible for continued participation in the PERS.³ As a result, the Division commenced a review of your PERS enrollment, and considered the circumstances surrounding the professional services you provided to the ZBA. After applying the IRS factors outlined in a checklist included with the Comptroller's report, the Division determined that you were ineligible for PERS service credit after January 1, 2008 because you qualified as an independent contractor rather than a bona fide employee. You appealed the Division's decision to the PERS Board.

At its meeting of January 15, 2014, the Board determined that you were an independent contractor and therefore ineligible for continued PERS enrollment after January 1, 2008. You appealed the Board's decision and requested a hearing in the Office of Administrative Law, and the Board transferred the matter as a contested case. After a plenary hearing, the ALJ affirmed the Board's finding that you qualified as an independent contractor rather than a bona fide employee, and recommended that the Board remove you from the PERS effective January 1, 2008. The Board adopted the ALJ's findings of fact and conclusions of law at its meeting of December 15, 2016.

You appealed the Board's adoption of the ALJ's Initial Decision to the Appellate Division. In its March 1, 2018, decision, the court remanded the matter to the "Board to apply IRS regulations or policy to determine [your] status..." In its decision, the court found that the Board properly adopted the ALJ's factual findings⁴ as they were "adequately supported by substantial evidence in the record. Slip op. at 7. The court also found that the ALJ properly required that you shoulder the burden of proof to establish employee status, and rejected your contention that the "ABC Test" should be utilized in determining your status.

³ PERS service credit earned and credited to your PERS account prior to the enactment of Chapter 92 was left untouched.

⁴ The Division and Board utilized, inter alia, those factual findings in its decision herein.

CONCLUSIONS OF LAW

The Board first considered the Appellate Division's decision at its meeting of June 20, 2018. At that time, the Board referred the matter to the Division's Pension Fraud and Abuse Unit to prepare an analysis as directed by the court. On or about July 12, 2018, the Division determined that in light of the court's decision and an analysis pursuant thereto, you did not qualify as a bona fide employee and determined that you were not eligible for PERS enrollment under Chapter 92.

At its meeting of December 12, 2018, the Board adopted the Division's determination, substantially for the same reasons as outlined in the Division's July 12, 2018 letter. As set forth in its letter, the Board made the following findings pursuant to IRS Rev. Rul. 87-41:

- 1) **INSTRUCTIONS** – The ALJ found that it was undisputed that the City does not have the right to “control, supervise or direct” your work as to the result, but also as to how the tasks are to be performed. The Board therefore found that this factor weighs in favor of independent contractor status.
- 2) **TRAINING** – The ALJ found that there was no evidence that you have been required to attend training related to your position or training typically required of employees, such as sexual harassment or ethics training. The Board therefore found that this factor weighs in favor of independent contractor status.
- 3) **INTEGRATION** – The ALJ found that there was no evidence that you reported to any individual as a supervisor, and that your communication with the Zoning Officer prior to ZBA meetings was insufficient to establish that you reported to the Zoning Officer. Additionally, the ALJ noted that your name being listed on the agenda was insufficient to establish a record of attendance or timekeeping. The Board therefore found that this factor weighs in favor of independent contractor status.
- 4) **SERVICES RENDERED PERSONALLY** – The ALJ found that you were authorized to substitute personnel in the event you were unable to attend a ZBA meeting or otherwise perform the duties of ZBA Attorney as required. The Board therefore finds this factor weighs in favor of independent contractor status.
- 5) **HIRING, SUPERVISING, AND PAYING ASSISTANTS** – The ALJ found no evidence that you were precluded from hiring and paying for other individuals to assist you with your ZBA duties. The Board therefore found that this factor weighs in favor of independent contractor status.
- 6) **CONTINUING RELATIONSHIP** – The ALJ found that, although you were reappointed by the ZBA annually, the term of your services is only for one year, and therefore your tenure is for a set period of time rather than a continuing relationship, and weighs towards independent

contractor status. The Board therefore found that this factor weighs in favor of independent contractor status; however, in light of the fact that you were reappointed annually over 25 years, this factor was given little weight.

7) SET HOURS OF WORK – The ALJ found that ZBA meetings, when necessary to process applications, are scheduled for the second Thursday each month. The Board therefore found that this factor weighs in favor of employee status; however, in light of the fact that meetings are regularly cancelled or of short duration, this factor was given little weight.

8) FULL TIME REQUIRED – The ALJ found that your service was part-time in nature, and that you maintain a full-time private law office. These facts were not in dispute. The Board therefore finds that this factor weighs in favor of independent contractor status.

9) DOING WORK ON EMPLOYER'S PREMISES – The ALJ found that you perform the majority of your duties on the City's premises. The Board therefore finds that this factor weighs in favor of employee status; however, that this is not a strong indicator of such status, given the unique circumstances of your case.

10) ORDER OR SEQUENCE SET – The ALJ found that there is no evidence that you were directed in the Order or Sequence of tasks assigned as ZBA Attorney. The Board therefore finds that this factor weighs in favor of independent contractor status; however, that this is not a strong indicator of such status, given the unique circumstances of your case.

11) ORAL OR WRITTEN REPORTS – The ALJ found that you were not responsible to prepare written reports. The Board therefore finds that this factor weighs in favor of independent contractor status.

12) PAYMENT BY HOUR, WEEK, OR MONTH – The ALJ found that you were paid via regular intervals, similar to Perth Amboy employees. The ALJ also found that payments were set up in this fashion in order to provide you with PERS benefits. The Board therefore finds that this factor weighs in favor of employee status; however, that this is not a strong indicator of such status, given the unique circumstances of your case.

13) PAYMENT OF BUSINESS AND/OR TRAVEL EXPENSES – The ALJ found that you are not required to travel and you offered no evidence of any business expenses related to your position. The Board therefore finds that this factor weighs in favor of independent contractor status.

14) FURNISHING OF TOOLS AND MATERIALS – The ALJ found that you were not provided with office supplies, computer, secretarial support or any other supplies or equipment. You were not provided with an office or permanent workspace. The Board therefore finds that this factor weighs in favor of independent contractor status.

15) SIGNIFICANT INVESTMENT – As stated in #14, the ALJ found that you were not provided with office supplies, computer, secretarial support or any other supplies or equipment. Although you performed some of your ZBA duties at your law office, the evidence weighs in favor of employee status; however, that this is not a strong indicator of such status, given the unique circumstances of your case.

16) REALIZATION OF PROFIT OR LOSS – This factor was not referenced in the Checklist and therefore the ALJ did not make factual findings with respect to whether you may realize a profit or loss. The Board noted that you are paid the same salary at regular intervals, even for meetings that are cancelled or last only a few minutes. The Board therefore finds that this factor weighs in favor of employee status; however, that this is not a strong indicator of such status, given the unique circumstances of your case.

17) WORKING FOR MORE THAN ONE FIRM AT A TIME – The ALJ found that you are not precluded from practicing law in your private law office, or from working for another Zoning Board while in the service of the ZBA, although she gave this factor little weight. The Board finds that this factor weighs in favor of independent contractor status; however, the Board notes this is not a strong indicator of such status, given the unique circumstances of your case.

18) MAKING SERVICES AVAILABLE TO THE GENERAL PUBLIC –The ALJ found that you offer and provide legal services to the community at large through your private law office. The Board therefore finds that this factor weighs in favor of independent contractor status.

19) RIGHT TO DISCHARGE – The ALJ found that you were appointed by the ZBA and that there was no evidence that the City could simply terminate you at will. The Board therefore finds that this factor weighs in favor of independent contractor status.

20) RIGHT TO TERMINATE – The ALJ found that it was undisputed that you could terminate your employment at will. The Board therefore finds that this factor weighs in favor of employee status.

Pursuant to the remand decision, the Board also considered the Division's findings with respect to IRS Publication 963, in relation to your provision of professional services to the ZBA. Publication 963 essentially streamlined the 20 Factor Test into three separate categories; Behavioral Control, Financial Control; and Relationship of the Parties. These headings were utilized in the original Checklist used by Perth Amboy, the ALJ and the Board. Publication 963 addresses the breakdown of the three sections of the common law test and offers points to consider in evaluating these criteria. Many of these factors overlap with those in the 20 Factor Test, while there are others that are not found in the 20 factor test, such as being issued Government Identification. Publication 963 requires the consideration of multiple factors to consider in determining if an individual who provides professional services to a local public entity is a bona fide employee or an independent contractor. Publication 963 states, in part:

If there is some question as to whether a worker is a public official and employee, a critical factor to consider is whether there is a provision of the state constitution or a statute establishing the

position. State statutes should be reviewed to determine whether they establish enough control for the individual to be classified as an employee under the common-law test.

The Division noted that N.J.S.A. 40:55D-71 allows the ZBA to “employ, or contract for” an attorney. The Division found the statute does not establish enough control to classify the ZBA Attorney as an employee, particularly when considered in light of the strong independent contractor indication on the 20 Factor Test. Finally, the Division considered that you are given an identification badge in order to access Perth Amboy’s premises. However, the Division noted that the provision of a badge is commonly provided to both employees and independent contractors in a position such as yours, and is not indicative of any particular status. The Board agreed with the Division’s analysis and adopted the Division’s determinations on these issues.

In your appeal, you assert that two factors indicate that you are a bona fide employee. First, you assert that you were paid through regular payroll and therefore must be considered an employee. The Board disagrees. Rather than establishing that you were an employee, you were paid via regular City payroll because you were incorrectly characterized as an employee and the City would then be required to pay you through regular payroll with the regular deductions required for employees.

Next, you assert that because you were given a City identification badge, you must be classified as a bona fide employee rather than an independent contractor. While the Board considered this factor, it is not dispositive of the issues herein. As stated above, the Division noted that the provision of a badge is commonly provided to both employees and independent contractors in a position such as yours, and is not indicative of any particular status. This is particularly clear here, where the facts as found by the ALJ, and affirmed in the appellate decision, overwhelmingly support a conclusion that you were, in fact, retained as an independent contractor to provide legal services to the ZBA, just as any attorney would be retained by a client.

Alfred Petit-Clair, Jr.
May 16, 2019
Page 8

Based on the above, the Board found that you were not eligible for PERS enrollment after the enactment of Chapter 92, January 1, 2008. Your PERS service credit earned prior to that date remains in your PERS account.

You have the right, if you wish to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Public Employees' Retirement System

G-10/MER

C: K. Conover (ET); J. Sloth (ET); DAG R. Garrison (ET) DAG R. Kelly (ET)