

IN THE MATTER OF
G. PHILIP LEWIS

G. PHILIP LEWIS,

Appellant,

Civil Action

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent,

Interlocutory Appeal from State
of New Jersey, Department of
Treasury, Department of Pensions
and Benefits Final Administrative
Determination

**BRIEF AND APPENDIX IN SUPPORT OF APPELLANT, G. PHILIP LEWIS'
MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL**

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September 11, 2002

VIA HAND DELIVERY BY COURIER SERVICE

James M. Flynn, Clerk of Appellate Division
Superior Court of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625

Re: G. Philip Lewis, Appellant
In the Matter of G. Philip Lewis
Docket No. A-005660-00T3

Dear Mr. Flynn:

Please accept this letter brief in lieu of a more formal submission on behalf of Appellant, G. Philip Lewis (hereinafter "Appellant").

REPLY STATEMENT

It is requested the Court grant G. Philip Lewis, Appellant, Motion for Leave to Appeal from Interlocutory Decision by the Board of Trustees of the Public Employees Retirement System (PERS) dated August 23, 2002 where during the PERS meeting of August 21, 2002, they "reconsidered and reaffirmed" their Final Administrative Determination of May 16, 2001, specifically denying G. Philip Lewis the purchase of additional service credit in the PERS from September 19, 1986 until April 1, 1993 when Appellant was an employee, pursuant to the Job Training Partnership Act (JTPA) at the County of Salem.
(Pa - 1)

Furthermore, it is requested this Court grant the Appellant's Motion to Stay by denying PERS, in conjunction with the Attorney General's Office, from

issuing another Final Administration Determination consistent with PERS May 16, 2001 decision.

Moreover, it is requested the Court retain jurisdiction in this matter because the PERS Board was remanded to take jurisdiction in their August 21, 2002 meeting, but failed to address the salient issues as Ordered by this Court on June 24, 2002. (Pa - 2 to Pa - 11)

PROCEDURAL HISTORY

This matter comes before the Court on G. Philip Lewis' Motion for Leave to file Interlocutory Appeal of the PERS letter dated August 23, 2002 (Pa - 1) and request this Court to subject PERS to the Court Order dated June 24, 2002 (Pa - 2 through Pa - 11). On August 21, 2002, the Board of Trustees for PERS reaffirmed their Final Administrative Determination of May 16, 2001, which was the subject of an original Appeal and subsequent Order by this Court dated June 24, 2002; however, PERS failed to address this Court's June 24, 2002 Order in their August 21, 2002 meeting.

Specifically, On June 24, 2002, this Court said:

Because of the policy implications involved in interpreting this Statute, especially where Veteran's Rights are implicated, we [Appellate Division] believe it is preferable to have the agency with the presumed expertise charged with its administration, interpret the Statute rather than rely on the Attorney General's interpretation of the Statute in a Brief. **The Board itself should explain the rationale for concluding (if it does) that Subsection h carves out an absolute exception that would deprive a JTPA employee, who is also a Veteran, 'in continuous service' of membership in the retirement system the right to purchase service credit.** (Emphasis added) This is especially so in light of PERS initial decision that Appellant was eligible, its subsequent decision that he was completely ineligible, except for his military credits, and the final decision granting some credit, but not all others.

On August 21, 2002, the Appellant with counsel appeared before the Board of Trustees of PERS and at that time the Board failed to address the above-described issue in the August 21, 2002 proceeding.

STATEMENT OF FACTS

G. Philip Lewis, Appellant, filed an Appeal for his being denied retirement benefits having served in various capacities throughout the County of Salem for over twenty-five (25) years.

There were three (3) legal arguments outlined in the Appellant's original Brief filed with the first Appeal. These arguments are addressed in the Appellate Division's decision of June 24, 2002 as more fully described at Pa - 6 and Pa - 7 of the enclosed Appendix.

The Attorney General's Office responded in a Brief as articulated in Pa - 7, Pa - 8 and Pa - 9 of the June 24, 2002 Appellate Division holding.

A Reply Statement was forwarded by the Appellant, G. Philip Lewis, and this matter was decided June 24, 2002 before the Honorable Naomig Eichen, J.A.D. and the Honorable Lorraine C. Parker, J.A.D.

The Appellate Division did not retain jurisdiction and the matter was remanded for further proceedings in conformity with the Appellate Division's Opinion.

It is asserted that the Board of Trustees of PERS did not conduct further proceedings in conformity with the Court's Opinion and, as such, this Appellant requests this Court grant a Stay, deny PERS in conjunction with the Attorney General's Office, from issuing another Final Determination consistent with PERS May 16, 2001 Final Determination. Also, the Appellant respectfully requests this Court retain jurisdiction, and the Court decide on the issue it returned to the Board of Trustees for PERS. The Appellant is asking this Court to decide this matter based upon Findings of Fact and Conclusion of Law as presented to this Court on Appeal by the Appellant and the Respondent, Attorney General's Office, because the Board of Trustees for PERS opted not to decide this matter consistent with this Court's Opinion. The Board of Trustees for PERS completely ignored this Court's Order of June 24, 2002. In fact the Board of Trustees for PERS did not even have this Court's Opinion before them when the Appellant, G. Philip Lewis, appeared on August 21, 2002.

The Appellant had to provide the Board of Trustees for PERS, his copy of the Court's Opinion when he was excused for the Board's closed session.

LEGAL ARGUMENT

I. **THE COURT SHOULD GRANT G. PHILIP LEWIS INTERLOCUTORY
REVIEW IN THE INTEREST OF JUSTICE**

While review of the PERS' decision by the Appellate Division, is the litigant's right, litigant can only appeal an Interlocutory Order, which is not a final disposition of a case if the Appellate Division grants leave for such appeal. The letter described in Pa - 1 is not a Final Determination as discussed in Pa - 1 and the Appellant seeks relief. Where the circumstances are such that the interest of justice will be served only by hearing an Interlocutory Appeal, the Appellate Division should grant such leave and review this case prior to the Board of Trustees of PERS providing a detailed Finding of Facts and Conclusions of Law consistent with an original decision . . . [that] will become part of the Board's Final Administrative Determination; as described in the August 23, 2002 letter forwarded by PERS at Pa - 1.

The Board of Trustees of PERS failed to address the June 24, 2002 Opinion of the Appellate Division when they heard this matter on August 21, 2002. Instead, Kathleen Coates, Secretary to the Board of Trustees for PERS, said, "The Board of Trustees for PERS reconsidered and reaffirmed their Final Administrative Determination of May 16, 2001". Please see Pa - 1. The Board of Trustees for PERS May 16, 2001 is inconsistent with what the Court Ordered on June 24, 2002.

Additionally, Appellant's Attorney specifically stated to the Board of Trustees of PERS that the Appellate Division reversed and remanded this matter as to a single issue. Specifically, counsel for the Appellant was asked to speak and he asked the Board to follow Court Order and carve out a specific exception as to the Veteran's status. The Appellant's attorney said he found no specific exception to Paragraph b of the Statute in question and that he found none in Governor Keane's Veto or the original Statute.

This request as articulated in this Court's June 24, 2002 Opinion was never addressed to the Appellant but a Motion was made by a member of the Board of Trustees for PERS to "reaffirm" their (PERS) Final Administrative Determination of May 16, 2001, specifically denying Mr. Lewis the purchase of additional service credit in the PERS.

II. THE COURT SHOULD GRANT THE APPELLANT'S MOTION REQUESTING A STAY AND DENY PERS, IN CONJUNCTION WITH THE ATTORNEY GENERAL'S OFFICE, FROM ISSUING ANOTHER FINAL ADMINISTRATIVE DETERMINATION, CONSISTENT WITH THE MAY 16, 2001 DECISION

Clearly, in the interest of justice and in full and fair litigation, it requires the Court grant Appellant's Motion for Stay and deny PERS, in conjunction with the Attorney General's Office, from producing another detailed Finding of Facts and issuing another Final Administrative Determination consistent with the May 16, 2001 decision pending this Interlocutory Appeal. This Interlocutory Appeal is one seeking relief of the Appellate Division's June 24, 2002 Opinion and by permitting the Board of Trustees of PERS, in conjunction with the Attorney General's Office, to draft a detailed Finding of Facts and Conclusion of Law consistent with its original decision as described in Secretary Kathleen Coates' letter of August 23, 2002 (Pa - 1), will not serve the ends of justice, in that the Respondent, Attorney General's Office and PERS, should not be given the liberty to recreate argument in a second Final Administrative Determination. The reason for this is the Board of Trustees for PERS failed to address the Opinion of the Appellate Division on June 24, 2002 at Pa - 10. PERS has been trying to revisit their May 16, 2001 Final Determination since this Courts Opinion was handed down on June 24, 2002 and the Appellant does not believe PERS should get "a second bite at the apple" and be given the opportunity to reaffirm their [PERS] decision. This is specifically addressed in an August 13, 2002 letter to the Attorney General's Office. Please see Pa - 12, Appellant's objection to request for Trial de novo.

The Appellant respectfully requests a Stay and the Court deny PERS, in conjunction with the Attorney General's Office, from issuing another Final Administrative Determination because this Interlocutory Appeal is being made. The Board of Trustees for PERS specifically failed to address the issue as Ordered by the Appellate Division, wherein the Appellate Division said at Pa - 10 on June 24, 2002 the following:

[T]he Board itself should explain the rationale for concluding (if it does) that Subsection h carves out an absolute exception that would deprive a JTPA employee, who is also a Veteran "in continuous service", a membership in the retirement system the right to purchase service credit.

The Board of Trustees for PERS never explained to the Appellant that Subsection h carves out an absolute exception depriving the veteran Appellant, "in continuous service" membership in the retirement system.

In the event a Stay is not granted and the Board of Trustees for PERS is permitted to revisit their Final Administrative Determination of May 16, 2001 and given the opportunity "in conjunction with the Attorney General's Office", to draft a detailed Finding of Facts and Conclusion of Law consistent with its original decision, as described in Paragraph 3 of Pa - 1, it will result in confusing the issues and create incomplete and fragmented litigation because the more recent Final Administrative Determination will be inconsistent with what has been Ordered by this Court.

The Board of Trustees for PERS, in conjunction with the Attorney General's Office, should not be permitted to revisit their Opinion of May 16, 2001, produce another Final Administrative Determination "consistent" with the PERS May 16, 2001 because the Board of Trustees of PERS has failed to address this Court's Opinion of June 24, 2002. Again, allowing PERS to proceed will confuse the issues and fragment the litigation.

III. APPELLANT RESPECTFULLY REQUESTS THIS COURT RETAIN JURISDICTION, REVISIT THIS COURT'S ORDER OF JUNE 24, 2002 AND RENDER A DECISION CONSISTENT WITH THOSE ARGUMENTS MADE BY THE APPELLANT AND RESPONDENT AS MORE FULLY DESCRIBED IN THE APPELLATE DIVISION'S COURT ORDER OF JUNE 24, 2002

New Jersey Court Rule 2:10-1 [4] says under the standard of review, for State Administrative Agencies the following: "[t]here is a general proposition all legislative and legislative type actions are presumed reasonable and required to be sustained if not arbitrary or unreasonable to the end that the Agency's statutory grant of authority be liberally construed to effectuate the legislature's purpose".

In this instance, the Board of Trustees for PERS' is acting arbitrary and unreasonable, in that the Agency ignored Court Order. PERS did not even have the Court Order before them when the Appellant made his appearance. PERS never made a determination as to the specific issue ordered by this Court. Their acts of ignoring Court Order and "reconsidering and reaffirming" the May 16, 2001 determination is arbitrary and unreasonable.

New Jersey Court Rule 2:10-1 (2002) at 631 as restated by the Supreme Court, In the Matter of Musick, 143 N.J. 206, 216 (1996), said:

[T]he judicial role in reviewing agency action is limited to three inquiries: (1) whether the action violated the express or implied legislative policies (2) whether there is substantial evidence in the record to support the agencies findings, and (3) whether the agency clearly erred in reaching a conclusion unsupported by relevant factors.

In this case, we are asking this Court to review this Agency's actions, in that the Agency clearly erred in reaching a conclusion unsupported by relevant factors, as articulated by the Court's Opinion of June 24, 2002. See Pa - 2 through Pa - 11.

Furthermore, there is substantial evidence in PERS' August 23, 2002 letter (see Pa - 1, saying PERS has "reconsidered and reaffirmed" their May 16, 2001 Final Administrative Determination, which was the subject of the first Appeal. The PERS determination was reversed and remanded for further

proceedings in conformity with the Courts Opinion, which the Board of Trustees for PERS ignored. There is enough evidence to merit judicial review and this Appellant respectfully requests this Court take jurisdiction in this matter.

CONCLUSION

The Board of Trustees of PERS erred in their meeting of August 21, 2002, in that they reconsidered and reaffirmed their Final Administrative Determination of May 16, 2001. Furthermore, they failed to address the Opinion of this Court decided June 24, 2002 in the PERS August 21, 2002 proceeding.

On June 24, 2002 this Court made determinations based upon Briefs, Responses and Replies to Argument submitted over one (1) year ago. By permitting the Board of Trustees of PERS to ignore Court Order of June 24, 2002, move forward with another Findings of Facts and Conclusions of Law, to be created in conjunction with the Attorney General's Office, will constructively eliminate this Court's Opinion in this matter, which clearly prejudices Appellant, G. Philip Lewis, in his efforts to reach the ends of justice.

It is respectfully requested that this Court retain jurisdiction, Stay any additional Findings of Facts and Conclusions of Law and make a determination as to G. Philip Lewis' eligibility for PERS benefits consistent with the original pleadings filed with this Court and as more fully described in this Court's Opinion dated June 24, 2002.

Respectfully submitted,



JOHN G. DeSIMONE, ESQUIRE

JGD/jld/jcm

Cc: Debra A. Allen, DAG
Suzanne Culliton, DAG
Patrick DeAlmeida, DAG
Kathleen Coates, Secretary, Board of Trustees, PERS - 2 copies
G. Philip Lewis



State of New Jersey

DEPARTMENT OF THE TREASURY
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August 23, 2002

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Re: G. Philip Lewis
PERS # [REDACTED]
A-5660-00T3

Dear Mr. DeSimone:

The Board of Trustees of the Public Employees' Retirement System (PERS) at its meeting of August 21, 2002 reconsidered and reaffirmed their final administrative determination of May 16, 2001 specifically denying Mr. Lewis the purchase of additional service credit in the PERS from September 19, 1986 until April 1, 1993 when Mr. Lewis was an employee, pursuant to the Job Training Partnership Act (JTPA) at the County of Salem.

The Board denied the request for an administrative hearing essentially for the reason(s) set forth in the Board's letter dated May 16, 2001, which specifically relates to the request to purchase JTPA service.

Therefore, the Board has directed the Secretary, in conjunction with the Attorney General's Office, to draft a detailed Finding of Facts and Conclusions of Law consistent with its original decision that will formally outline the Board's decision and become the Board's final administrative determination. Since the Board has denied your request for a hearing and will issue its Finding of Facts and Conclusions of Law. The Board will review and adopt these findings and conclusions and send a copy of the final decision to you. Upon receipt of this final administrative determination, you will have the right to appeal the Board's decision; hence, the 45 days to appeal this decision will not begin until the Board adopts the final administrative determination.

Sincerely,

Kathleen Coates, Secretary
Board of Trustees
Public Employees' Retirement System

Jb/G-6

c: DAG Susanne Culliton
DAG Debra Allen
G. Philip Lewis

Pa - 1

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5660-00T3

IN THE MATTER OF
G. PHILIP LEWIS

G. PHILIP LEWIS,

Appellant,

v.

BOARD OF TRUSTEES, PUBLIC
EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

FILING DATE
APPELLATE DIVISION

JUN 24 2002

Jon Flynn
CLERK

Submitted June 4, 2002 - Decided JUN 24 2002

Before Judges Eichen and Parker.

On appeal from the Board of Trustees, Public
Employees' Retirement System, 1065648.

John G. DeSimone, attorney for appellant.

David Samson, Attorney General, attorney for
respondent (Patrick DeAlmeida, Deputy Attorney
General, of counsel; Debra A. Allen, Deputy
Attorney General, on the brief).

PER CURIAM

Appellant G. Philip Lewis appeals from the final determination of the Board of Trustees (Board) of the Public Employees Retirement System (PERS), dated May 17, 2001, denying his request to purchase service credit. His ineligibility spans the period September 19, 1986, the effective date of N.J.S.A. 43:15A-7h, which disallowed

membership in PERS of "a temporary employee who is employed under the federal Job Training Partnership Act [JTPA], Pub. L. 97-300 (29 U.S.C. § 1501)," until April 7, 1993, the date the Salem County Board of Chosen Freeholders passed a resolution establishing the JTPA as a department of the County (the Resolution). The Resolution also consolidated "the employees serving in the JTPA Office" "into the civil service system," rendering appellant a permanent employee as of that date. We reverse and remand for further proceedings.

These are the relevant facts. Appellant served in the United States Navy from March 14, 1967 to November 30, 1970. Beginning in 1974, he worked in various capacities in Salem County first under the Comprehensive Employment and Training Act Program (CETA), 29 U.S.C. §§ 801 - 999 (2001) and then for the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501 - 1792b (2001).¹

Appellant's first County job was in 1974 as a teacher's aide working for CETA. He remained working for CETA earning promotions and raises until October 1, 1983, when he became the JTPA Administrator. On July 1, 1988, appellant became the Human Resource Coordinator for JTPA. Apparently, throughout this period, appellant was not a civil service employee but was considered a temporary employee of the County. However, on April, 7, 1993, by

¹ The CETA and JTPA were federal programs enacted by Congress during the period in question to provide job training, services and employment opportunities to the economically disadvantaged. The acts authorizing the programs have been repealed.

virtue of the Resolution adopted by the Board of Chosen Freeholders, appellant's status was converted to that of a permanent employee. Appellant remained a permanent employee of the County through June 30, 2000 when he retired. Appellant worked for the County for twenty-six years without interruption in his employment.

Initially, by letter dated December 21, 1998, the Board granted appellant's request to enroll in PERS, indicating that the Board had "also voted to allow Salem County JTPA employees the ability to purchase temporary service under the provisions of N.J.S.A. 43:15A-11 if the temporary service resulted, without interruption, in a permanent appointment with the same employer."² However, in a subsequent letter dated February 16, 2001, PERS reversed its position, advising appellant that he was not eligible to purchase service credit for any of the time he worked for the County, but only for the time he served in the United States Navy, i.e., from March 1967 to November 1970.

On April 3, 2001, appellant's attorney wrote to PERS on behalf of appellant requesting to purchase additional service credit.³ A meeting of the Board followed on April 18, 2001 at which appellant and his counsel were present. Two days later, by letter dated

² N.J.S.A. 43:15A-11 permits "any person employed temporarily by an employer whose temporary employment resulted, without interruption, in permanent employment ... [to] purchase credit for that temporary service."

³ Because that letter is not in the record, we do not know the reasons given for the request to purchase additional credit.

April 20, 2001, the Board approved appellant's request to purchase additional service credit from December 23, 1974 to September 18, 1986, and from April 2, 1993 until his retirement; however, it denied his request "to purchase the JTPA service from September 19, 1986 to April 1, 1993,"⁴ because the Board concluded he was ineligible for membership under N.J.S.A. 43:15A-7h.

On May 17, 2001, PERS issued a "Final Administrative Determination" formally denying appellant's request to purchase additional service credit and denying him a hearing in the Office of Administrative Law. In its final decision, PERS set forth its findings of fact and conclusions of law, relying on N.J.S.A. 43:15A-7h as the basis for its denial of appellant's request.

The letter from PERS reproduced subsection h of the statute as follows:

A temporary employee who is employed under the federal Job Training Partnership Act, Pub. L. 97-300 (29 U.S.C. § 1501) shall not be eligible for membership in the system. Membership for temporary employees employed under the Job Training Partnership Act, Pub. L. 97-300 (29 U.S.C. § 1501) who are in the system on September 19, 1986 me [sic] shall be terminated, and affected employees shall receive a refund of their accumulated deductions as of the date of commencement of employment in a Federal Job Training Partnership Act program. Such refund of contributions shall serve as a waiver of all benefits payable to the employee, to his

⁴ That is the period between the enactment of N.J.S.A. 43:15-7h and the adoption of the Resolution making him a permanent employee. A discrepancy in dates exists as reflected in the letter of April 20, 2001 (April 1, 1993) and the Resolution (April 7, 1993) which we need not resolve.

dependent or dependents, or to any of his beneficiaries under the retirement system.

After quoting the statute, the letter concluded:

N.J.S.A. 43:15A-7(h) provides that a temporary employee who was employed under the Federal Job Training Partnership Act is ineligible for membership in the PERS. The law also provided that employees who were enrolled in the PERS on or before September 19, 1986, would have their membership terminated and all contributions refunded. The refund served as a waiver of any future benefits payable to the employee or beneficiary.

Because this law specifically prohibits PERS membership to JTPA employees after September 18, 1986, the Division is without discretion to permit your request. Mr. Lewis' request to purchase his employment with the County of Salem pursuant to the CETA program was granted. Additionally, the request to purchase the JTPA employment from October 1, 1983, through September 18, 1986 was approved.

In its final decision, PERS did not mention any other subsections of the statute in denying appellant's request.

On appeal, appellant raises the following arguments:

POINT I

WHETHER OR NOT G. PHILIP LEWIS' JOB TRAINING PARTNERSHIP ACT (JTPA) TIME SHOULD NOT BE CONSIDERED UNDER THE PROVISIONS OF N.J.S.A. 43:15-7 ET SEQ.

POINT II

WHETHER OR NOT G. PHILIP LEWIS' EMPLOYMENT STATUS [SHOULD] BE CONSIDERED A PERMANENT EMPLOYEE MAKING HIM ELIGIBLE TO RECEIVE BENEFITS FROM THE STATE OF NEW JERSEY RETIREMENT FUND.

POINT III

THE STATE OF NEW JERSEY, DEPARTMENT OF

TREASURY, DIVISION OF PENSIONS AND BENEFITS
(PERS) ERRED IN THEIR INTERPRETATION OF SENATE
BILL NO. 1471 (2nd OCR) SUBMITTED BY GOVERNOR
THOMAS H. KEENE TO THE SENATE, APRIL 21, 1986.

Under these point headings, appellant urges us to reverse PERS's final decision. He contends he is eligible for membership in PERS as a "veteran" with more than "one years' continuous service" under subsection b of the statute, and maintains that he was a "permanent" employee. He further argues that, under subsection d, as a veteran, he is automatically a member of the retirement system because veterans are not permitted to opt out of the system irrespective of an employee's status under subsection h as "a temporary employee." He also cites two non-pension cases suggesting he is entitled to purchase service credit for this JTPA period because the County somehow deprived him of "the opportunity to become a permanent employee." See Kyer v. City of East Orange, 315 N.J. Super. 524 (App. Div. 1998); Kennedy v. Westinghouse Electric Corp., 29 N.J. Super. 68 (App. Div. 1953).

In his brief, the Attorney General counters that subsection h "carves out an exception" to membership eligibility in PERS for all temporary employees under the JTPA, and appellant was a temporary employee until the County adopted the Resolution on April 7, 1993, changing his status to a civil service employee. Relying on the legislative history of the subsection,⁵ the Attorney General argues

⁵ See Governor's Reconsideration and Recommendation Statement accompanying Senate Bill No. 1471 that resulted in the language of N.J.S.A. 43:15A-7h, which states:

that the exception eliminates any rights appellant may have had under b or d as a veteran. The Attorney General further asserts that subsection b requires a "veteran" to be a permanent employee to obtain retirement benefits, and appellant was not considered a permanent employee until the County passed its resolution, [t]hus, Appellant could not have been enrolled in the PERS." In addressing appellant's "continuous service" argument, the Attorney General also asserts that while his service with the County may have been "continuous," it was not "permanent."

The preamble to N.J.S.A. 43:15A-7 sets forth those persons who are to be included in the retirement system. It states as follows:

There is hereby established the Public Employees' Retirement System of New Jersey in the Division of Pensions and Benefits of the Department of the Treasury. The membership of the retirement system shall include:

Subsection b then provides:

Any person becoming an employee of the State or other employer after January 2, 1955 and every veteran, other than a retired member who returns to service pursuant to subsection b. of section 27 of P.L. 1966, c. 217 (C.43:15A-57.2) and other than those whose appointments are seasonal, becoming an employee of the State or other employer after such date, including a temporary employee with at least

The effect of these amendments will be to exempt all JTPA employees in this State from membership in the PERS. This is a necessary step if we wish to keep JTPA employment at current levels.

[Senate, No. 1471 - L. 1986, c. 109, Governor's Reconsideration and Recommendation Statement.]

one year's continuous service.

[N.J.S.A. 43:15A-7b (emphasis added).]

Subsection d of N.J.S.A. 43:15A-7 provides:

Membership in the retirement system shall be optional for elected officials other than veterans, and for school crossing guards, who having become eligible for benefits under other pension systems are so employed on a part-time basis.... No person in employment, office or position, for which the annual salary or remuneration is fixed at less than \$1,500.00 shall be eligible to become a member of the retirement system.

[N.J.S.A. 43:15A-7d.]

Contrary to the Attorney General's argument, subsection b expressly states that "a temporary employee with at least one year's continuous service" is included in PERS. Hence, its plain language contradicts the Attorney General's assertion that subsection b requires the employee to be "permanent." In addition, we note that N.J.S.A. 43:15A-7b states that "every veteran" "shall [be] includ[ed]" in PERS; yet subsection h states a temporary JTPA employee is ineligible for membership in PERS. Thus, N.J.S.A. 43:15A-7b appears to be in conflict with N.J.S.A. 43:15A-7h, as does N.J.S.A. 43:15A-11.

PERS did not discuss N.J.S.A. 43:15A-7b or 7d or N.J.S.A. 43:15A-11 in its final determination to declare appellant ineligible for membership, addressing only subsection h in denying his request to purchase additional credit for the period in question. We assume these were not raised by appellant at the hearing. Ordinarily, we would consider his arguments in respect of

these subsections to be waived; however, because the appeal implicates a statute bearing upon matters of public interest, Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973), we are reluctant to preclude appellant's arguments without some consideration of them by the agency. While we frequently defer to an agency's expertise when it is interpreting the statutes and regulations it is charged with enforcing, see Div. of Med. Assistance and Health Services, 350 N.J. Super. 175, 185 (App. Div. 2002), we need not show the same deference to the views of the Attorney General.

Because of the policy implications involved in interpreting the statute, especially where veterans' rights are implicated, we believe it is preferable to have the agency with the presumed expertise charged with its administration interpret the statute, rather than rely on the Attorney General's interpretation of the statutes in a brief. The Board itself should explain the rationale for concluding (if it does) that subsection h carves out an absolute exception that would deprive a JTPA employee, who is also a veteran "in continuous service," of membership in the retirement system the right to purchase service credit. This is especially so in light of PERS's initial decision that appellant was eligible, its subsequent decision that he was completely ineligible except for his military credits, and its final decision granting some credit, but not others.

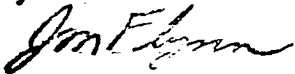
Accordingly, we remand to PERS for it to consider appellant's additional statutory arguments. However, we reject appellant's arguments grounded on unspecified allegations of wrongdoing by the County inasmuch as they are factual in nature and could have been made at the time of the meeting on April 18, 2001, when PERS made its decision. Therefore, they are considered waived. Nieder, supra, 62 N.J. at 234.⁶

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

⁶ Appellant's claims of negligence were not illuminated by any competent evidence below, such as an affidavit from appellant setting forth any facts to the effect he did not understand he was not civil service until the Resolution was passed, or that someone in the County breached a duty to him in not advising him of his status. We assume they were not asserted because they had no basis in fact.

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


CLERK OF THE APPELLATE DIVISION

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August 13, 2002

(Faxed and Regular Mail)

Wendy Jamison, Secretary
Board of Trustees
Public Employees Retirement System
State of New Jersey
Department of Treasury
Division of Pensions and Benefits
P.O. Box 295
Trenton, NJ 08625-0295

Re: Location: 50 West Street, Trenton, New Jersey 08625-0295
G. Philip Lewis v. Board of Trustees, Public Employees Retirement System
Docket No.: A-5660-00T3

Dear Ms. Jamison:

It was a pleasure speaking with you on Monday, August 12, 2002. I appreciate your comments regarding PERS postponement of our August 21, 2002 appearance scheduled before PERS to review the Appellate Division's decision of June 24, 2002. However, in reviewing my notes taken from our telephone conversation on August 12, 2002, and my conversation with Deputy Attorney General, Deborah A. Allen on that same day, my client and I object to PERS scheduling a postponement. My client and I want to attend and hear PERS' position specific to the issue asked by the Appellate Division. There are no new arguments or issues in my client's appeal.

You mentioned that PERS Board Members wanted additional submissions by August 30, 2002 for review as to arguments for a Trial de novo, with the Attorney General's office responding to said submissions by September 10, 2002 for a September 18, 2002 PERS meeting.

The aforementioned concerns me in that it appears the Attorney General's office is seeking a Trial de novo or a new trial or retrial in which the whole case would be

retried as if no trial had been had in the first instance. It appears the Attorney General's office is trying for "a second bite at the apple". By conducting a Trial de novo, based on new submissions presented to PERS, I envision the Attorney General's Office reconstructing the entire case to their advantage, cause another appeal and thereby create further delays in any relief my client may be entitled to receiving.

Furthermore, I took the opportunity to review the Appellate Division's decision of June 24, 2002 and the Appellate Division did not reverse and remand this matter for a Trial de novo. The Appellate Division reversed and remanded this matter for further proceedings by saying the "Board itself should explain the rationale for concluding (if it does) that subsection (h) carves out an absolute exception that would deprive a JTPA employee, who is also a veteran "in continuous service", of membership in the retirement system the right to purchase service credit". We have not consented to a Trial de novo, in fact, we believe the PERS should decide the issue as ordered by the Appellate Division, on June 24, 2002.

The Appellate Division did not direct this matter be listed for a Trial de novo and my client and myself object to providing the Attorney General's office the opportunity to correct any oversights that may have occurred in their original pleadings. This matter went before the Appellate Division, was heard, reversed and remanded with specificity.

Moreover, my client has a family trip scheduled for California and is unavailable on Wednesday, September 18, 2002. As such, we are asking that this matter be re-listed for Wednesday, August 21, 2002 so a determination can be made by the PERS Board as to the specific issue ordered by our Appellate Division.

Many thanks for your time and consideration. I look forward to hearing from you shortly.

Very truly yours,

JOHN G. DeSIMONE, ESQUIRE

JGD:rm

cc: Suzanne Culliton, Esquire

Patrick DeAlmeida, Esquire, Deputy Attorney General of Counsel

Deborah A. Allen, Deputy Attorney General

G. Philip Lewis, Esquire