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October 2, 2002

Sent Via FedEx Overnight Priority Mail

James M. Flynn, Clerk
Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

Re: In the Matter of G. Philip Lewis
Docket No.: AM-63-0215
Docket No.: M-431-02

Dear Mr. Flynn:

Enclosed please find the original and five copies of the Reply Brief on behalf of Appellant, G. Philip Lewis and Proof of Mailing, in the above captioned matter.

Would you kindly file the Reply Brief and Proof of Mailing and return a conformed copy in the self-addressed stamped envelope provided herein for your convenience.

If you have any questions, please feel free to contact the undersigned.

Respectfully submitted,



JOHN G. DeSIMONE, ESQUIRE

JGD/jld/jcm

Enclosures

cc: David Denbe, SDAG
Kathleen Coates, CEBS, Secretary, Board of Trustees of PERS
Debra A. Allen, DAG
G. Philip Lewis, w/enclosure

IN THE MATTER OF
G. PHILIP LEWIS

G. PHILIP LEWIS,

Appellant,

CIVIL ACTION

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Reply to Respondent's Certification
in Opposition to Appellant's
Interlocutory Appeal

Respondent,

PROOF OF SERVICE

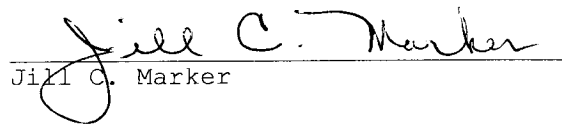
The original of the within Reply to Respondent's Certification in Opposition to Appellant's Interlocutory Appeal and Proof of Service were sent FedEx Overnight Priority Mail to James M. Flynn, Clerk of Appellate Division, Superior Court of New Jersey, Richard J. Hughes Justice Complex, 25 West Market Street, (P.O. Box 006) Trenton, New Jersey 08625, for filing with the above named Court.

On **Wednesday, October 2, 2002**, I, the undersigned sent by FedEx Overnight Priority Mail to **DEBRA A. ALLEN, DAG** and **DAVID DENBE, SDAG** both at the Office of Attorney General, State of New Jersey, Department of Treasury, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625 and **KATHLEEN COATES, SECRETARY**, Board of Trustees, Public Employees' Retirement System, 50 West State Street, Trenton, New Jersey 08625, the following:

**Reply to Respondent's Certification in Opposition to Appellant's
Interlocutory Appeal and Proof of Service**

I certify that the foregoing statements made by me are true, I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: October 2, 2002


Jill C. Marker

IN THE MATTER OF
G. PHILIP LEWIS

G. PHILIP LEWIS,

Appellant,

Civil Action

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,
Respondent,

Reply to Respondent's Certification
In Opposition to Appellant's
Interlocutory Appeal

REPLY BRIEF ON BEHALF OF APPELLANT, G. PHILIP LEWIS

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October 2, 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.: AM-63-0215
Docket No.: M-431-02

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

In reply to Paragraph 9 of the Respondent's Certification, they say the "Appellant's Motion for Leave should be deemed moot", is correct in that the definition of moot is: "A subject for argument; unsettled; undecided. A moot point is "one not settled by judicial decisions", Black's Law Dictionary, 6th Edition, (1990) at 1008. One of the points of argument in the Appellant's Interlocutory Appeal is that the matter is not settled and that this matter should be settled by judicial decision. This matter is ripe for judicial determination.

REPLY TO PROCEDURAL HISTORY AND
COUNTERSTATEMENT OF FACTS

As to paragraph 6 of Respondent's Certification wherein the Respondent says, "The PERS Board reconsidered the matter as per this Court's directive", is not correct in that the Board of Trustees for PERS did not even have this Court's opinion before them when Appellant, G. Philip Lewis, appeared on August 21, 2002. Additionally, Exhibit "A" of the Respondent's Certification speaks for itself in that the PERS Final Determination does not address this Court's Order of June 24, 2002. Please see Exhibit "A" of the Respondent's Certification, copy of the PERS Board Final Determination, dated September 19, 2002.

As to Respondent saying, "the Appellant did not present any argument to support his contention that he should be allowed to purchase JTPA Service by virtue of his Veteran status or as a temporary employee with at least one year's continuous service", again, is wholly incorrect.

To paraphrase the Appellant, he addressed his status to the PERS Board as a temporary employee in that he said to the Board of Trustees for PERS:

"After reviewing the Statutes I find no definition of temporary in subparagraph (h) although the Statutes refer to temporary JTPA employees. My review of the other parts of this Statute show the Statute saying temporary employees at the time I was hired - it was with one year of service - must be put into the system. There is the part of the Statute that says Veterans *shall* [Emphasis Added] and it's not an option except for, I believe, elected officials and crossing guards - Veterans shall be enrolled in the system. So, on the strength of those two pieces and the fact that I had twenty-five and one-half years (25-1/2) years of continuous service with the same employer, my position would be that: I should have been put into the system when I first started with the County in 1974 as a Veteran and, alternatively, I should have been put in 1975 as a temporary employee with one year of service or more."

Furthermore, the Respondent's Certification at paragraph 6 is incorrect and the Appellant is asking this Court to consider the Appellant's Attorney's paraphrased statement. He said:

"The Appellate Division reversed and remanded as to a single issue - they asked the Board to carve out a specific exception as to the Veteran status. We found no specific exception to paragraph (b). We found none in Governor Kean's veto or in the original Statute. We believe there was never an intent to affect Veterans as to their entitlement to these benefits. The plain language of the Statute clearly reads that he should be entitled to it forgetting the subparagraph (h) and specifically focusing on subparagraph (b) because of his Veteran status. The Briefs we submitted to the Appellate Division and the arguments we presented before the Board are replete with our position, forgetting all the temporary issues and everything else that were already addressed by the Appellate Division in the reversal and the remand. Again, if we focus simply on what they had asked for the Board to decide upon, it is our position that because of his Veteran status, he is entitled to it (benefits) by Statute."

REPLY TO RESPONDENT'S ARGUMENT

This matter is not "moot" as described in the Respondent's Certification. As defined by Black's Law Dictionary, 6th Edition (1990) at 1008, "moot" means: "A subject for argument; unsettled; undecided." A moot point is one not settled by judicial decision and this matter cries out for a judicial decision not an administrative agency's decision.

As described in the Appellant's moving papers and now further emphasized in this Reply, judicial determination is needed in this case. In The Matter of Irene Musick, Department of Corrections, 143 N.J. 206; 670 A. 2d 11; 1996 N.J. Lexis 7, at page 8 of 10 it says:

The Courts have only a limited role to play in reviewing the actions of other branches of government. In light of the executive function of administrative agencies, judicial capacity to revue administrative actions is severely limited. Gloucester County Welfare Bd. V. New Jersey Civil Serv., Comm'n., 93 N.J. 384, 390, 461 A. 2d 575 (1993). Courts can intervene only in

those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other State policy. Although sometimes phrased in terms of a search for arbitrary or unreasonable action, the judicial role is generally restricted to three (3) inquiries: (1) whether [*** 24] the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency bases its action; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. Campbell v. Department of Civil Serv., 39 N.J. 556, 562, 189 A. 2d 712 (1963)." [*217]

In this present case, the Appellant is asking the Court to consider all three prongs in the Appellant's request for Judicial consideration in that "the agency actions violated express or implied legislative policies" because the agency (Board of Trustees for PERS) did not follow the law. First, the agency did not take under consideration the Court's opinion of June 24, 2002. Please see Appendix of the Appellant's Notice of Motion for Interlocutory Appeal, for the June 24, 2002 opinion.

Furthermore, in footnote number 1 at page 2 of Exhibit "A" of the Respondent's Certification, they say:

The Board consistently attempts to read statutes liberally and in light most favorable to the member. Consistent with its goal and in an attempt to permit the maximum amount of PERS membership credit eligible for purchase to the member of the hearing, the Board permitted the JTPA time that was credible, at the time of Mr. Lewis' employment. Thus, the period between October 1, 1983 and September 18, 1986 was permitted, as Mr. Lewis was eligible for pension credit during these nearly three years.

The Board's attempt at reading a Statute liberally and in light most favorable to the member [G. Philip Lewis] was not done for the Appellant in that the PERS Board has limited their scope of review and application to only N.J.S.A. 43:15A-7 (h) and by not considering N.J.S.A. 43:15A-7 (b) they are ignoring legislative policy. The Board of Trustees for PERS failed to apply a liberal interpretation most favorable to the member interpreting the Statute in that at page 3 of Exhibit "A" of the Respondent's Certification, where the Board of Trustees of PERS says, "The Board, relying on long standing interpretation of the Division of Pensions and Benefits, interprets subsection

(h) as an absolute exception to the mandatory enrollment provided in subsection (b) is completely without a liberal reading of Statute as expressed in Footnote 2 of Exhibit "A" submitted by the Board of Trustees for PERS in their Responsive Certification. G. Philip Lewis' Veteran status should be the absolute exception as to his entitlement of the benefits."

As to paragraph 2 of the three prong measure used in Musick, Id. at 3, when determining whether or not this Court should review the administrative actions of the Board of Trustees for PERS, the record for the Board of Trustees for PERS contained substantial evidence to support the findings on which an agency should base its action, however, the Board of Trustees for PERS ignores that evidence and chooses to not acknowledge that evidence in making decisions. For example, the Board of Trustees for PERS ignored this Court's Order of June 24, 2002 by boldly stating that the Appellant has not provided support for his argument as to his Veteran status when the Appellant's first appeal and presentation before the Board on August 21, 2002 was replete with argument as to his Veteran status. The Board of Trustees for PERS was ordered by this Court to carve out the exception of a Veteran with one year of continuous service, not the Appellate. Please see Exhibit "A" at page 3 of the Respondent's Certification as to the PERS Board not addressing Court Order and Appendix of the Appellant's Interlocutory Appeal enclosing a copy of the Court Order.

Additionally, even if you were to assume *arguendo* and accept the Board of Trustees for PERS comment at page 3 in Exhibit "A" of the Respondent's Certification wherein they say "eligibility for enrollment in the system is a condition precedent before a Veteran may be entitled to any benefits under the system", paves the way for the following reply. What the Board of Trustees for PERS is saying is that Mr. Lewis may not be a member of the PERS solely by his Veteran status; but he must first be eligible for enrollment pursuant to the Statute, which fails in that the Appellant's benefit eligibility is still protected by N.J.A.C. 17:2-2.4. So, if argument fails as to the Appellant's

Veteran status the law protecting him as to his time of service eligibility is an incorrect analysis.

What the Board of Trustees for PERS fails to address is that in the Appellate Division's June 24, 2002 Opinion, they consider the Appellant a Veteran "in continuous service" which by definition entitles the Appellant to the benefits. Also, how can the Board of Trustees for PERS say that after almost twelve (12) years of "continuous service" the Appellant does not satisfy a condition precedent? *N.J.A.C.*, 17:2-2.4 supports this position and this was presented before the Appellate Division in the original Appeal, which covers his eligibility that was in effect two years and five days before the Appellant was originally hired by the County of Salem.

Clearly, the Board of Trustees for PERS has ignored the substantial evidence to support findings that due to the Appellant's Veteran status he should not be eligible for the benefits of PERS.

As to prong number three of the Musick test the Appellant when requesting this Court intervene, is asking the Court to consider Musick, Id. At 3, where it says, "in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors, as held in Campbell v. Department of Civil Serv., 39 N.J. 556, 562, 189 A. 2d 712 (1963)" in that the Board of Trustees for PERS failed by not reasonably showing relevant factors in that the PERS Board makes the following reference to **include all** [Emphasis Added] JTPA employees, specifically at page three, paragraph four, of Exhibit "A", wherein the Board of Trustees for PERS says that subsection (h) carves out an absolute exception for **all** [Emphasis Added] JTPA employees. This assessment by the PERS Board is horribly flawed, in that subsection (h) of the Statute does not use the word "all", as inserted by the Board of Trustees for PERS when applying the legislative policies to the facts. The agency clearly erred in reaching a conclusion that could not reasonably have been made on the showing of the relevant factors, in that there is absolutely nothing in

N.J.S.A. 43:15A-7 (h) that 'carves out an absolute exception for **all** [Emphasis Added] JTPA employees' as quoted by the Board of Trustees for PERS.

The provisions of N.J.S.A. 43: 15 A. - 7 (h) specifically say:

A temporary employee who is employed under the Federal Job Training Partnership Act, PUB. L. 97-300 (29 U.S.C. Section 1501) shall not be eligible for membership in the system. Membership for temporary employees employed under the Federal Job Training Partnership Act, PUB. L. 97-300 (29 U.S.C. Section 1501) who was in the system on September 19, 1986 shall be terminated, and affected employees shall receive a refund of their accumulated deductions as to 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 employees, to his dependent or dependents, or to any of his beneficiaries under the retirement system.

Subsection (h) does not say anywhere in that subsection of this Statute that a determination of benefits applies to **all** [Emphasis Added] JTPA employees. The only category of employee subsection (h) addresses is "temporary employee", which this Court held on June 24, 2002, that the Appellant was a Veteran "in continuous service" by specifically 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", a membership in the retirement system of the right to purchase service credit.

Please see Pa 10 of the Appellant's Brief and Appendix in Support of Appellant, G. Philip Lewis' Motion for Leave to File Interlocutory Appeal.

This Court recognized that the Appellant, G. Philip Lewis, was "in continuous service" thereby eliminating the argument as to whether or not he was of temporary status when ordering the Board of Trustees of PERS to carve out an absolute exception that would deprive a JTPA employee who is a Veteran membership in the retirement system.

Moreover, in the Respondent's Certification, they say at paragraph six (6) of Exhibit "A", "the undersigned presented legislative history that includes a conditional veto by then Governor Kean of Senate Bill No. 1471,

terminating PERS membership for **all** [Emphasis Added] JTPA employees who were in the PERS at the time".

The Appellant did present a conditional veto by the then Governor Kean of Senate Bill No. 1471, however, the Respondent is incorrect in their Certification in assuming that the conditional veto terminated PERS membership for **all** [Emphasis Added] JTPA employees who were in PERS at that time. Again, nowhere in subsection (h) and this conditional veto does it say all JTPA employees who were in PERS at the time would have their membership terminated.

The Respondent in their Certification failed to address the three points presented before this Court by the Appellant in G. Philip Lewis' Motion for Leave to File an Interlocutory Appeal. Specifically, the Board of Trustees for PERS in presenting a Response did not address their letter dated August 23, 2002, from the Board of Trustees of PERS reaffirming their final administrative determination on May 16, 2001. This letter was the reason for the Interlocutory Appeal. In the Board of Trustees for PERS Response they ignored argument presented before this Court as to the Appellate Division's opinion decided June 24, 2002, and they (PERS Board) ignored argument and response to Rule 2:10-1 [4] by showing the Board of Trustees for PERS did not act arbitrary or unreasonable in their decision.

CONCLUSION

It is respectfully requested that this Court retain jurisdiction, make a determination as to G. Philip Lewis' eligibility for PERS consistent with the original filings filed with this Court and the arguments presented by counsel in this Interlocutory Appeal and as more fully described in this Court's Order of June 24, 2002.

Respectfully submitted,



JOHN G. DeSIMONE, ESQUIRE

JGD:jld/jcm