

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001093-02T2

G. PHILIP LEWIS,

Appellant,

v.

Civil Action

BOARD OF TRUSTEES, PUBLIC
EMPLOYEES RETIREMENT SYSTEM,

Respondent.

On Appeal from
State of New Jersey Department
of Treasury, Department of
Pensions and Benefits Final
Administration Determination

REPLY BRIEF ON BEHALF OF APPELLANT, G. PHILIP LEWIS

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REPLY STATEMENT

The Appellant, G. Philip Lewis, is a veteran who was continuously and uninterruptably employed by the County of Salem from December 1, 1974 through June 30, 2000, thereby making him eligible to receive all pension benefits for the twenty-five and one-half (25½) years of service and continuous employment.

As to the Respondent's preliminary statement, the Respondent alleges, "the law also provides for termination of PERS membership and refund of contributions for all [emphasis added] temporary employees of JTPA who are enrolled in the PERS on or before September 19, 1986," is incorrect. (Rb1). Nowhere does *N.J.S.A. 43:15A-7(a)-(j)* (2001) use the word all [emphasis added] terminating PERS membership. (Pa33, 34)

In the Respondent's preliminary statement, there is an assumption JTPA is the employer of the Appellant, G. Philip Lewis. (Rb1). The Appellant was employed by the County of Salem, located in the State of New Jersey.

REPLY TO PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

The Respondent says, "the positions held by Mr. Lewis prior to April 7, 1993 were deemed temporary by Salem County", and the Respondent cites the Appellant's Appendix

at page 16. The Appellant's Appendix at 16 (Pa16) is the copy of the Board of Trustee's Public Employees' Retirement System (PERS) Final Administration Determination who believes the Appellant was a temporary employee. There is a presumption by PERS the Appellant was temporary.

The Appellant, G. Philip Lewis, was continuously employed for twenty-five (25) years by Salem County. Listed on every paycheck the Appellant received and every W-2 statement ever issued to the Appellant, his employer was the County of Salem. During the Appellant's employment, the departments in which he was employed were funded from three different sources. Those funds were then routed to the County of Salem for payment to the Appellant.

Do not be swayed by the Respondent's continuous use of the word temporary found throughout Rb3 and Rb4 of the Respondent's brief, leading someone to believe his employment was not continuous.

The Appellant argues that, pursuant to *N.J.S.A.* 43:15A-7(b), if he is classified as a temporary employee with at least one year's continuous service (which he had 25½ years of continuous employment), he is thereby eligible for the benefits of membership in the PERS. (Pb11, Pb12).

The Respondent said that in April 18, 2001 the Appellant made a purchase request that was presented to the

PERS Board voting "to approve [the] purchase of additional service time from December 23, 1974 to September 18, 1986, using a purchase request date of October 14, 1998...", however, the only time the Board could not approve for purchase with the Appellant's JTPA service time from September 1986 through April 1, 1993. (Rb6).

The Respondent said, "the basis for the Board's denial was *N.J.S.A. 43:15A-7(h)* specifically disallows for **any** [emphasis added] persons employed under the JTPA and, consequently, JTPA service time was not credible and could not be purchased," is a misinterpretation of statute. Nowhere in *N.J.S.A. 43:15A-7(h)* are the words saying the statute "specifically disallows membership in the PERS for **any** [emphasis added] person employed under the JTPA. (Pa20, Pa21).

The Respondent brings to the court's attention that this court on June 24, 2002 said, "[T]his court reversed and remanded the matter so that the PERS Board could address the Appellants **additional arguments regarding his status as a veteran and status as a temporary employee with continuous service for at least one year,**" wherein the PERS Board allegedly reconsidered the matter as per the Court's directive. This is not the case as the PERS Board did seek additional argument. The PERS Board voted to reaffirm its

prior determination to deny the Appellant's purchase request as seen in the PERS Board May 17, 2001 Final Administrative Determination. (Pa11-Pa13). This Court instructed that "the Board itself should explain the rational 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 a service credit". This order was never followed until the filing of the Attorney General's Respondent Brief for the Board of Trustees, Public Employees' Retirement System. This court at Pa9 said specifically, "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 PERS Board, although charged with making the determination ordered above, did not provide an administrative interpretation but, once again, the PERS Board relied on the Attorney General's brief and Appendix of the Respondent for PERS to interpret the statute.

REPLY TO RESPONDENT'S ARGUMENTS

The PERS Board acts in denying Appellant G. Philip Lewis' pension benefits is arbitrary and capricious in that

their acts are unreasonable, without consideration of facts or law. Blacks Law Dictionary (1990) at 105. Their acts are unsupported claiming substantial credible evidence calling for it to be reversed. Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); Atkinson v. Parsekian, Supra, 37 N.J. at 149.

In the Respondent's brief, they say "it is the party who challenges the validity of the decision who bears the burden of showing it [PERS Board] was arbitrary, unreasonable or capricious," Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980) and the brief of Appellant G. Philip Lewis is replete with argument after argument showing the PERS Board has been arbitrary, unreasonable and capricious. For example, throughout the Respondent's entire brief, the Respondent moves forward and back, claiming that N.J.S.A. 43:15A-7(h) applies to **all** [emphasis added] JTPA employees and then some portions of the Respondent's brief the Respondent argues the denial of benefits applies to **temporary** [emphasis added] JTPA employees. The Respondent plugs in the words "temporary", "any" and "all" to suit their argument. Specifically, at Rb1, line 7 the Respondent says, "subsection (h) bars **temporary** [emphasis added] employees employed under the JTPA from membership in the PERS." Then at Rb1, line 9 and 10, the Respondent says,

"the law also provides for a termination of PERS membership and refund of contributions for **all** [emphasis added] temporary employees of the JTPA who were enrolled in the PERS on or before September 19, 1986. The Respondent also said, that "N.J.S.A. 43:15A-7(h) specifically disallows membership in the PERS for **any** [emphasis added] person employed under the JTPA and consequently, JTPA service time was not creditable and could not be purchased." (Rb6 at lines 9, 10).

At Rb8, lines 7-9, of the Respondent's brief they say, "N.J.S.A. 43:15A-7(h) specifically prohibits JTPA employees from membership in the PERS from September 19, 1986 forward", is a presumption of the law applying the Respondent's interpretation that all persons are denied membership but the Respondent fails to address the word "temporary" as more fully described in the Appellant's brief. (Ab12-Ab19).

The Respondent argues that N.J.S.A. 43:15A-7(h) "establishes that **all** [emphasis added] JTPA employees are ineligible for membership in the PERS . . . [and] the law specifically states that the PERS membership for **any** [emphasis added] JTPA employee be terminated effective September 19, 1986," is nowhere found in N.J.S.A. 43:15A-7(h) as argued in the Respondent's brief (Rb10). Also,

please see Ab19-Ab21 for a complete copy of the N.J.S.A. 43:15A-7(a)-(j).

The Respondent's brief at page 11 quotes the then Governor Kean's Reconsideration and Recommendation Statement, which accompanied Senate Bill No. 1471. (Rb11, 12). The then Governor's Reconsideration and Recommendation Statement is in plain language as to what he was reconsidering and recommending, and as to what should be adopted by the legislature, but the legislature did not adopt the then Governor's recommendations. It may have been the then Governor's recommendation for reconsideration to "apply to all JTPA employees, regardless of whether they are currently enrolled in the PERS", however, legislature did not adopt his recommendations for reconsideration. Please see Pa19-Pa21 for complete text of N.J.S.A. 43:15A-7 (2001). The then Governor's Reconsideration and Recommendation may have been what the Governor's intent may have been and that was to apply to all JTPA employees, however, the Governor's intent was not adopted by our legislature. If our legislature were bound to accept our then Governor's power to institute the Governor's intent (to effect all JTPA employees), then the State of New Jersey would be considered a totalitarian regime.

The Respondent said, "the intent of Governor Kean's suggested amendments, which were subsequently adopted by the Legislature, to bar all JTPA employees from membership in the PERS is unequivocal", is wholly incorrect (Rb12), for the following reasons.

First, the suggested amendments were recommendations sent to the legislature that were **not adopted** as more clearly seen in that the then Governor's use of the word **all** [emphasis added] and the legislature's use of the word **temporary** [emphasis added], as found in *N.J.S.A. 43:15A-7* (2001), which shows the suggested recommendations by the then Governor were not adopted by the legislature.

Secondly, the veto as described in Rb11-12 was not part of *N.J.S.A. 43:15A-7* (2001) (Pa19-Pa21).

Furthermore, in the Respondent's brief at Rb13, lines 1-3 (Rb13), the Respondent alleges, "the Legislature amended the bill to "broaden its scope" by applying **all** [emphasis added] the provisions to ""all JTPA employees, regardless of whether they are currently enrolled in the PERS""", citing Pa29-Pa30. However, the Legislature did not amend the bill to apply to all JTPA employees, but instead the term "temporary" was used in *N.J.S.A. 43:15A-7(h)* (Pa19-Pa21), not the word "all" as argued by the Respondent. (Rb13).

The Respondent argues that, "the Board did not have the discretion to permit the purchase of this period of service due to the clear language of *N.J.S.A.* 43:15A-7(h) and its definite and unambiguous legislative commentary that barred JTPA employees from the PERS", is incorrect in that *N.J.S.A.* 43:15A-7(h) and the then Governor's commentary should be viewed together. They are not the same document and the documents contain different words and have different applications. The statute must be taken under consideration separate to the then Governor's recommendations for reconsideration. The State of New Jersey legislature did not adopt the then Governor's Reconsideration and Recommendation Statement as argued by the Respondent.

In the Respondent's brief, they say "the threshold for membership eligibility in the PERS, and the focal point of *N.J.S.A.* 43:15A-7(b), is employment status and not veteran status." (Rb15) and this quote applies to this Appellant G. Philip Lewis in that *N.J.S.A.* 43:15A-7(b) says:

Any person becoming an employee of the State or **other employer** [emphasis added] 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. 43:16A-57.2) and other than those whose appointments are seasonal . . . including a temporary employee with at least one year's

continuous service. . . shall be included in the membership of the retirement system.

If, the Respondent argues that it is an employment status, not a veteran status, then in addition to the Appellant being a veteran he was an employee of an **"other employer after January 2, 1955"** [emphasis added] it makes the Appellant eligible to receive retirement benefits. The Appellant was continuously employed for 25½ years by the County of Salem, who was funded by the JTPA and CETA programs. The Respondent addressed the legislative history as to State employment, but not "other employers".

The Respondent acknowledges the Appellant was employed under the JTPA through March 1993 and further states that as of April 7, 1993, Appellant became a permanent employee of Salem County via resolution passed by the Board of Chosen Freeholders (Rb4), however, no proof has been provided that the Appellant was not paid by JTPA funds between April 7, 1993 through June 30, 2000. Furthermore, the Respondent acknowledges that the Appellant was paid with JTPA funds, until April 7, 1993 (Rb4) and then later in the Respondent's brief at Rb16, the Respondent argues that "JTPA was no longer considered an "employer" under N.J.S.A. 43:15A-7(b)", and that "N.J.S.A. 43:15A-7(h) is directly on point in this matter, as an absolute exception

to *N.J.S.A. 43:15A-7(b)*" (Rb16). The Respondent's argument clearly shows an arbitrary selection of one portion of a statute over another, interpreting one section of subparagraphs to the statute in favor of another to advance the Respondent's argument. These acts are clearly arbitrary, capricious and unreasonable, especially since the Respondent has acknowledged employment of the Appellant through JTPA funded programs through April 7, 1993, but then the Respondent selects a portion of the statute arguing that it is an absolute exception thereby not making the employee eligible for retirement through the JTPA funded program, as of 1986. This arbitrary application of the statute to suit the Respondent's needs is unreasonable and the challenge by the Appellant is credible.

At page 17 of the Respondent's brief the Appellant does contend that his status as a veteran requires his membership in the PERS in accordance with *N.J.S.A. 43:15A-7(b)* (Rb17). Additionally, the Appellant claims he is eligible for PERS membership as a veteran pursuant to *N.J.S.A. 43:15A-7(d)*, which is in support of *N.J.S.A. 43:15A-7(b)* in that the Appellant is a veteran and, although the Respondent contends that *N.J.S.A. 43:15A-7(d)* says "a veteran must be employed by a State employer in order to gain entry into PERS" (Rb17), but what the

Respondent has failed to address is that pursuant to *N.J.S.A.* 43:15A-7(b) found at Ab11, the statute considers any person employed by the State "or other employer" ... and "every veteran"... is eligible for membership. (Ab11). Specifically, *N.J.S.A.* 43:15A-7(b) says:

Any person becoming an employee of the State or **other employer** [emphasis added] after January 2, 1955 and **every veteran**, [emphasis added] . . . including a temporary employee with at least one year's continuous service, is eligible for the benefits of membership.

The Appellant's position that *N.J.S.A.* 43:15A-7(d) does not trump *N.J.S.A.* 43:15A-7(b) in that the Appellant was employed by an "other employer" after January 5, 1955 and is a "veteran" and arguably a "temporary employee with at least one year's continuous service", therefore, making the Appellant eligible for the benefits of membership.

As to Point II of the Respondent's brief wherein the Respondent argues that *N.J.S.A.* 43:15A-7(h) trumps *N.J.S.A.* 43:15A-7(b) because the canons of statutory construction require that more specific provisions take precedence over more general provisions", is a presumption that *N.J.S.A.* 43:15A-7(h) is more specific and, although argued eloquently by the Respondent, this analysis fails. The Respondent argues that *N.J.S.A.* 43:15A-7(b) is a "general provision pertaining to the membership of the PERS", and

that *N.J.S.A. 43:15A-7(b)* was broadened to include temporary employees of the State¹ with at least "one year's continuous service", however, Respondent's analysis is flawed in that they fail to take under consideration *N.J.S.A. 43:15A-7(c)* and *N.J.S.A. 43:15A-7(d)* wherein our legislature ensure veteran status and eligibility, which is described with more specificity throughout *N.J.S.A. 43:15A-7(b), (c), (d)*. (Pb19-Pb21).

Throughout the Respondent's brief, they argue the statute applies to "all" JTPA funded employees, however, when convenient to plug the word "temporary" to a citation of federal case law, it makes the Respondent's analysis to advance their argument unreasonable.

The Appellant was a Vietnam veteran who was hired on December 23, 1974 by the County of Salem. He worked for that same employer for 25½ years, in positions funded by various grant sources. A question that remains is whether or not any grant funded employees and/or were denied membership.

If *N.J.S.A. 43:15A-7 (2001)* were to apply to all JTPA funded employees, as argued by the Respondent, then an analysis of the New Jersey State Department of Labor, Human

¹ Respondent did not include the complete quote of *N.J.S.A. 43:15A-7(b)* in their citation. The Respondent should have said, "any person becoming employed by the State or other employer", which is important to consider in this instance.

Services, Education and Higher Education must be reviewed in addition to almost every County, County College, Vocational School, and Board of Social Services throughout the State of New Jersey.

The Respondent contends the "Appellant" [is] a member who gained entry into PERS in 1985 by virtue of his temporary positions with JTPA, but then lost this membership at the time of *N.J.S.A. 43:15A-7(h)* when enacted, is ludicrous in that the word "temporary" is not to include someone with 25½ years of continuous service, in that *N.J.S.A. 43:15A-7(b)* says that eligibility is extended to those for "becoming an employee of the State or other employer after such date, including a temporary employee with at least one year's continuous service", therefore making the Appellant eligible for the benefits.

The application of Harvard Law School professor Arthur Sutherland wherein the Respondent cited the treatise provisions assumes that *N.J.S.A. 43:15A-7(h)* is more specific act than *N.J.S.A. 43:15A-7(b)*². If the Appellant argues to reverse the application of "general" and "specific" acts, conduct an analysis by making *N.J.S.A. 43:15A-7(b)* the specific act, and then *N.J.S.A. 43:15A-7(h)*

² In the Respondent's analysis portions of the statute have not been taken under consideration, such as *N.J.S.A. 43:15©, (d)*.

the general act, then the Appellant would arguably receive benefits.

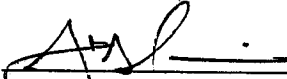
CONCLUSION

To paraphrase parts of this court's position of June 24, 2002 found at Pa9, the Appellant's Reply shows the PERS Board decision in May 2001 and then again in August 2002 is self-serving in that it is arbitrary, capricious and unreasonable to the extent that the PERS Board failed to show any presumed expertise in administering a member's eligibility.

Respectfully submitted,

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Dated: May 8, 2003



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