

No. _____

**In The
Supreme Court of the United States**

—◆—

MARIO ALBERTO RECINOS,

Petitioner,

v.

BOARD OF TRUSTEES, POLICE AND
FIREMAN'S RETIREMENT SYSTEM,

Respondent.

—◆—

**On Petition For Writ Of Certiorari
To The Superior Court Of New Jersey,
Appellate Division**

—◆—

PETITION FOR WRIT OF CERTIORARI

—◆—

JOHN VINCENT SAYKANIC, ESQ.
NJ Bar ID No.: 045801984
1135 Clifton Avenue
Clifton, New Jersey 07013
Tel: (973) 779-1124
Fax: (973) 614-0386
E-Mail: JohnVincentEsq@aol.com
*Attorney for Petitioner
Mario Alberto Recinos*

QUESTIONS PRESENTED

The questions presented are:

- 1) Should certiorari be granted as an important question of federal law that should be settled by this Court exists as the petitioner Mario Alberto Recinos' due process rights were violated by the State of New Jersey, Department of the Treasury, Division of Pension and Benefits, as he was not required to re-enroll in the Police and Fireman's Retirement System (PFRS) nor required to pay back retirement benefits he has received (and payments into the pension system) and the PFRS Board's decision is arbitrary, capricious, unreasonable and incorrect and at the very least, petitioner should have been granted an evidentiary hearing?
- 2) Should certiorari be granted as an important federal question exists as petitioner's due process rights were violated since the decisions of the New Jersey state courts were arbitrary, capricious and unreasonable (with petitioner denied an evidentiary hearing)?
- 3) Should certiorari be granted as an important federal question exists as petitioner's due process rights were violated since the PFRS Board erred in finding as a factor that the petitioner did not contact the Division?
- 4) Should certiorari be granted as an important federal question exists as petitioner's due process rights were violated as the petitioner has the requisite breaks in service which were greater than 30 and 180 days as to any law enforcement position?

QUESTIONS PRESENTED – Continued

- 5) Should certiorari be granted as an important federal question exists as petitioner's due process rights were violated as the item of full police powers is not a question of pensionability and should not prevent the petitioner from receiving his pension while serving as Undersheriff?
- 6) Should certiorari be granted as an important federal question exists as petitioner's due process rights were violated since the position of Undersheriff is not listed on any documents issued by the Pension Board regarding pensionable positions?
- 7) Should certiorari be granted as an important federal question exists as the Board erred by finding that the expert report of Mr. Meyers was not entitled to any weight (without an evidentiary hearing)?
- 8) Should certiorari be granted as an important question exists as petitioner's due process rights were violated as the retirement plan provided by the State of New Jersey to police officers and fire fighters who are vested in the plan creates rights that are protected by the United States and New Jersey Constitutions?
- 9) Should certiorari be granted as an important question exists as petitioner's due process rights were violated as the positions of the Director of the Bureau of Narcotics and Undersheriff are not PFRS-eligible positions because the titles do not appear on the Division's website as an eligible title nor are they permanent positions under the Rules

QUESTIONS PRESENTED – Continued

of Civil Service which prohibit re-enrollment of petitioner into the PFRS?

- 10) Should certiorari be granted as an important question exists as petitioner's due process rights were violated as the ever-changing theories presented by the Division and the Board made it impossible for the petitioner to defend and present his case?
- 11) Should certiorari be granted as an important question exists as petitioner's due process rights were violated as the Board denied petitioner's request for an evidentiary hearing (particularly in light of the confusion in the record surrounding petitioners positions)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	x
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	4
POINT I	
THE PETITION FOR CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT EXISTS AS PETITIONER MARIO ALBERTO RECINOS' DUE PROCESS RIGHTS WERE VIOLATED BY THE STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF PENSION AND BENEFITS, AS HE WAS NOT REQUIRED TO RE-ENROLL IN THE POLICE AND FIREMAN'S RETIREMENT SYSTEM (PFRS) NOR REQUIRED TO PAY BACK RETIREMENT BENEFITS HE HAS RECEIVED (AND PAYMENTS INTO THE PENSION SYSTEM) AND THE PFRS BOARD'S DECISION IS ARBITRARY, CAPRICIOUS, UNREASONABLE AND INCORRECT; AT THE VERY LEAST, DUE PROCESS DEMANDS THAT PETITIONER SHOULD HAVE BEEN GRANTED AN EVIDENTIARY HEARING.....	4

TABLE OF CONTENTS – Continued

	Page
POINT II	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED SINCE THE DECISIONS OF THE NEW JERSEY STATE COURTS WERE ARBITRARY, CAPRICIOUS, UNREA- SONABLE AND INCORRECT; AT THE VERY LEAST, DUE PROCESS DEMANDS PETI- TIONER RECEIVE AN EVIDENTIARY HEAR- ING	15
POINT III	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED SINCE THE PFRS BOARD ERRED IN FINDING AS A FACTOR THAT MR. RECINOS DID NOT CONTACT THE DI- VISION	18
POINT IV	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED AS PETITIONER HAD THE REQUISITE BREAKS IN SERVICE WHICH WERE GREATER THAN 30 AND 180 DAYS	22

TABLE OF CONTENTS – Continued

	Page
POINT V	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED AS THE ITEM OF FULL POLICE POWERS IS NOT A QUESTION OF PENSIONABILITY AND SHOULD NOT PREVENT MR. RECINOS FROM RECEIVING HIS PENSION	24
POINT VI	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED SINCE THE POSITION OF UNDERSHERIFF IS NOT LISTED ON ANY DOCUMENTS ISSUED BY THE PENSION BOARD	26
POINT VII	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED AS THE BOARD ERRED BY FINDING THAT THE EXPERT REPORT OF MR. MEYERS “IS ENTITLED TO NO WEIGHT”; AT THE VERY LEAST, THERE MUST BE AN EVIDENTIARY HEARING CONSIDERING MR. MEYERS’ REPORT AND CONCLUSIONS	29

TABLE OF CONTENTS – Continued

	Page
POINT VIII	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED AS THE RETIREMENT PLAN PROVIDED BY THE STATE OF NEW JERSEY TO POLICE OFFICERS AND FIRE FIGHTERS WHO ARE VESTED IN THE PLAN CREATES RIGHTS THAT ARE PROTECTED UNDER THE UNITED STATES (AND NEW JERSEY) CONSTITUTIONS	31
POINT IX	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED AS THE POSITIONS OF THE DIRECTOR OF THE BUREAU OF NAR- COTICS AND UNDERSHERIFF ARE NOT PFRS-ELIGIBLE POSITIONS BECAUSE THE TITLES DO NOT APPEAR ON THE DIVI- SION’S WEBSITE AS AN ELIGIBLE TITLE; NOR ARE THEY PERMANENT POSITIONS BUT ARE INSTEAD AT-WILL UNCLASSI- FIED POSITIONS UNDER THE RULES OF CIVIL SERVICE WHICH PROHIBIT RE- ENROLLMENT OF MR. RECINOS INTO THE PFRS.....	33

TABLE OF CONTENTS – Continued

	Page
POINT X	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE EVER-CHANGING ILLEGITIMATE THEORIES PRESENTED BY THE DIVISION AND THE BOARD MADE IT IMPOSSIBLE FOR PETITIONER TO DEFEND AND PRESENT HIS CASE IN A PROPER MANNER; AT THE VERY LEAST, AN EVIDENTIARY HEARING SHOULD HAVE BEEN HELD	35
POINT XI	
CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE BOARD ERRED IN DENYING THE REQUEST FOR AN EVIDENTIARY ADMINISTRATIVE HEARING (PARTICULARLY IN LIGHT OF THE CONFUSION IN THE RECORD SURROUNDING MR. RECINOS' POSITIONS).....	43
CONCLUSION.....	44

TABLE OF CONTENTS – Continued

	Page
APPENDIX:	
Opinion of New Jersey Superior Court, Appellate Division (Docket No. A-5590-15T3; decided July 19, 2018).....	a1-a17
Final Administrative Determination dated July 12, 2016, From Mr. Schwedes to Mr. Buglione (RECINOS 0069-0086; SOI No. 3).....	a18-a46
Order of New Jersey Supreme Court Denying Petition For Certification (filed January 18, 2019)	a47
Letter (Opinion) of Mr. Schwedes to Mr. Buglione (denying request for evidentiary hearing) dated June 14, 2016 (RECINOS 0109; SOI No. 7)	a48-a49
Board letter opinion of Mr. Schwedes dated March 16, 2016 (RECINOS 0250-0254; SOI No. 18).....	a50
REVISED Division letter opinion from Kristen Bell, Investigator, Pension Fraud and Abuse Unit to Albert C. Buglione, Esq. dated October 20, 2015 (RECINOS 0236-0239; SOI No. 16)...	a62-a70
Division letter opinion of Mark Casey, Investigator, Pension Fraud and Abuse Unit to Mario Recinos dated August 10, 2015 (RECINOS 0232-0235; SOI No. 15)	a71-a79

TABLE OF AUTHORITIES

	Page
CASES CITED	
<i>Bd. of Regents of State Colleges v. Roth</i> , 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)	5
<i>Gloucester County Improvement Authority v. New Jersey Dept. of Environmental Protection</i> , 391 N.J. Super. 244 (App. Div. 2007).....	43
<i>Hemsey v. Board of Trustees, Police & Firemen’s Retirement System</i> , 198 N.J. 215 (2009)	8, 9
<i>In re Carter</i> , 191 N.J. 474 (2007)	6
<i>In re License of Fanelli</i> , 174 N.J. 165 (2002)	43
<i>In the Matter of Dennis</i> , 385 N.J. Super. 360 (App. Div. 2006)	34
<i>Kantner v. Police and Firemen’s Retirement System</i> , 2015 WL 4390249; unpublished Appellate Division Opinion decided July 20, 2015).....	6, 8, 9
<i>Ky. Dep’t of Corr. v. Thompson</i> , 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)	5
<i>Knox v. Public Employees’ Retirement System</i> , 2012 WL 570058 (App. Div., decided February 23, 2012)	15, 16, 17, 23
<i>Kossup v. Bd. of Trs., Police & Firemen’s Ret. Sys.</i> , 372 N.J. Super. 468 (App. Div. 2004)	23
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)	5
<i>Masse v. Public Employees’ Retirement System</i> , 87 N.J. 252 (1981).....	32

TABLE OF AUTHORITIES – Continued

	Page
<i>Ruvoldt v. Nolan</i> , 63 N.J. 171 (1973).....	16, 17
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1, 7 S.Ct. 1505, 52 L.Ed.2d 92 (1977)	5, 31

CONSTITUTIONAL PROVISIONS CITED

U.S. Const. Amend. XIV	2, 4
------------------------------	------

STATUTES CITED

28 U.S.C. § 1257	2
<i>N.J.A.C.</i> 17:1-17.14	22, 42
<i>N.J.A.C.</i> 17:4-2.1(c)	6, 8
<i>N.J.A.C.</i> 17:4-2.1(d)(1)	8
<i>N.J.A.C.</i> 17:4-2.6(d).....	34
<i>N.J.A.C.</i> 17:4-6.8(a)1	37
<i>N.J.S.A.</i> 40A:9-119.2	7, 37, 40, 41
<i>N.J.S.A.</i> 43:15C-2	29
<i>N.J.S.A.</i> 43:16A-1(2)(a)	27
<i>N.J.S.A.</i> 43:16A-1(3).....	34
<i>N.J.S.A.</i> 43:16A-3.1	6, 36, 37, 38, 40
<i>N.J.S.A.</i> 43:16A-3.5	28, 39
<i>N.J.S.A.</i> 43:16A-15.1	34
<i>N.J.S.A.</i> 43:16A-15.3	<i>passim</i>

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Alberto Recinos respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of New Jersey denying his Petition for Certification.

**OPINIONS BELOW**

The opinion of the Superior Court of New Jersey, Appellate Division (filed July 19, 2018) is reproduced here. (a1).

The Final Administrative Determination of the Board of Trustees (dated July 12, 2016) is reproduced here. (a18).

The order of the New Jersey Supreme Court denying certification (filed January 18, 2019) is reproduced here. (a47).

The letter opinion of the Board of Trustees (dated March 16, 2016) is reproduced here. (a50).

The REVISED letter opinion of Kristin Bell (October 20, 2015) is reproduced here. (a62).

The letter opinion (dated August 10, 2015) is reproduced here. (a71).



JURISDICTION

The decision of the New Jersey Supreme Court was rendered on January 18, 2019. 28 U.S.C. § 1257.



CONSTITUTIONAL PROVISIONS

The relevant part of the Fourteenth Amendment (Section 1) is: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”



STATEMENT OF THE CASE

Mr. Recinos began employment as a Corrections Officer with the Passaic County Sheriff’s Department (PCSD) on September 4, 1982. He was subsequently enrolled in the Police and Fireman’s Retirement System of New Jersey (PFRS) effective February 1, 1983, and continued in the position of a Corrections Officer, receiving promotions to Sergeant and Lieutenant, during a distinguished career. On June 1, 2011, Mr. Recinos honorably retired as a vested member in the PFRS.

Mr. Recinos began receiving his monthly retirement allowance of \$8,177.64 on July 1, 2011. On July 25, 2011, he was hired by Passaic County as a Keyboarding Clerk 1. Mr. Recinos held this position for approximately 4 months. On December 1, 2011, he was appointed to the position of the Director of Bureau of Narcotics (Director). On February 3, 2014, Mr.

Recinos was appointed Undersheriff for Passaic County.

By letter dated August 10, 2015, the Division of Pensions and Benefits (Division) required cancellation of Mr. Recinos' retirement benefits, ordered re-enrollment in the PFRS, with repayment of pension benefits totaling \$359,816.16. Mr. Recinos was also liable for \$30,901.81 in back pension contributions. (a71). Mr. Recinos appealed and on March 14, 2016, the Board again voted to require cancellation of his retirement and required re-enrollment in the PFRS, based on his appointment as Director (a50). By letter dated June 14, 2016, the Board rejected Mr. Recinos' request for an evidentiary hearing in the Office of Administrative Law (OAL). (a48).

Following an appeal, the Board accepted "that the required break in service under the regulations in effect at that time was observed." (a31). However, the Board ruled that Mr. Recinos had to re-enroll in PFRS and repay \$359,816.16, with contributions of \$30,901.81. (a42-43). On July 19, 2018, the Appellate Division affirmed. (a1-17). On January 18, 2019, the New Jersey Supreme Court denied certification. (a47).



**REASONS FOR GRANTING THE WRIT
POINT I**

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT EXISTS AS PETITIONER MARIO ALBERTO RECINOS' DUE PROCESS RIGHTS WERE VIOLATED BY THE STATE OF NEW JERSEY, DEPARTMENT OF THE TREASURY, DIVISION OF PENSION AND BENEFITS, AS HE WAS NOT REQUIRED TO RE-ENROLL IN THE POLICE AND FIREMAN'S RETIREMENT SYSTEM (PFRS) NOR REQUIRED TO PAY BACK RETIREMENT BENEFITS HE HAS RECEIVED (AND PAYMENTS INTO THE PENSION SYSTEM) AND THE PFRS BOARD'S DECISION IS ARBITRARY, CAPRICIOUS, UNREASONABLE AND INCORRECT; AT THE VERY LEAST, DUE PROCESS DEMANDS THAT PETITIONER SHOULD HAVE BEEN GRANTED AN EVIDENTIARY HEARING¹

The Fourteenth Amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." To prevail on a procedural due process claim, a litigant must show (1) that the state deprived him of a protected interest in life, liberty, or property and (2) the deprivation occurred

¹ As the Appellate Division "affirm[ed] substantially for the reasons expressed by the Board in its . . . final decision" (a17), the focus of this petition is the Board's decision.

without due process of law. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement of those benefits.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Courts must look to state law to determine whether a particular claim of right is sufficient to constitute a Due Process Clause property interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). As explained in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977), government interference with government contracts is subject to greater scrutiny than when the interference concerns a contract between private parties. A state cannot refuse to meet its contractual obligations to private creditors simply because it would prefer to spend the money for the greater good of the community.

Turning to New Jersey state law, as explained in *In re Herrmann*, 192 N.J. 19, 27-28 (2007), “an administrative agency’s final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.” However, an appellate court is “in no way bound by the agency’s interpretation of a statute or its determination of a strictly legal issue.”

In re Carter, 191 N.J. 474 (2007). See *Kantner v. Police and Firemen's Retirement System*, 2015 WL 4390249; decided July 20, 2015.

N.J.S.A. 43:16A-3.1 sets forth four requirements an employee must establish to be eligible to continue or to re-enroll as a PFRS member: (1) current service with a law enforcement unit or firefighting unit; (2) in an appointive capacity; (3) with administrative or supervisory duties over police officers or firefighters; and (4) service as a member of that or any law enforcement unit less than six months prior to any appointment. Although the pension regulations do not define the phrase “administrative or supervisory duties over policemen or firemen” as it is used in *N.J.S.A.* 43:16A-3.1, they describe administrative or supervisory duties for the purpose of meeting the statutory definitions of “police officer” and “firefighter.” See *N.J.A.C.* 17:4-2.1(c).

The Board first relied upon *N.J.S.A.* 43:16A-15.3 which provides, in relevant part:

- a. Except as provided in subsection b. of this section, if a former member of the retirement system who has been granted a retirement allowance for any cause other than disability, *becomes employed again in a position which makes him eligible to be a member of the retirement system*, his retirement allowance and the right to any death benefit as a result of his former membership, *shall be canceled until he again retires*. (emphasis supplied).

Under this statute, a member of PFRS who retires and later accepts employment *in a PFRS-covered position* will lose his or her pension benefits and must re-enroll in PFRS. In finding the position of Director is PFRS-covered, the Board relied solely on the “requirements for the holder of this position [which are] delineated in *N.J.S.A. 40A:9-119.2*.” (a34):

N.J.S.A. 40A:9-119.2 defines the requirements for the position of Director of the Bureau of Narcotics:

The sheriff of any county may appoint any person who, at the time of his appointment, has: a. served for 10 years or more as a law enforcement official, three years of which shall have been in a supervisory position that included responsibilities for narcotic investigation or control activities; and b. has been certified by the Police Training Commission as having completed a police training course at an approved police training school, pursuant to PL 1961, c. 56 (C. 52:17B-66 et seq.), as director of the bureau of narcotics, to serve for a term of one year without having to take a civil service examination. The director of the bureau of narcotics shall have full police officer status, as is granted to other sheriff’s officers.

Having full police powers does not make the unclassified position pensionable. This statute only recites the requisite *qualifications* – not title. Thus, the Board incorrectly found the Director position to be PFRS eligible. (a8-9).

In *Hemsey v. Board of Trustees, PFRS*, 198 N.J. 215 (2009), the Court held that a retired fire chief/police officer's work as an emergency communication consultant/director of communications did not require him to re-enroll in PFRS and repay the retirement benefits. The Court found the pension regulations do describe administrative or supervisory duties for the purpose of meeting the statutory definitions of "police officer" and "firefighter," citing *N.J.A.C. 17:4-2.1(c)*. "Administrative" duties include "preparing or recommending budgets[,] contracting for goods or services, processing employment actions, managing information systems, and the provision of administrative support." Further, the regulations provide that "supervisory" duties include "conducting performance evaluations, disciplining, adjusting the grievances, rewarding, and assigning and directing the work of non-supervisory police officers or firefighters or effectively recommending such actions." *N.J.A.C. 17:4-2.1(d)(1)*. In *Kantner, supra*, a retired chief of county investigators with the Camden County Prosecutor's Office, was not PFRS-eligible due to his position as Assistant Vice President for Public Safety and Emergency Management (AVPPSEM) at Rowan University. After the PFRS Board affirmed that Kantner was ineligible to receive PFRS benefits while serving as AVPPSEM, the Appellate Division reversed and concluded that Kantner did not have to re-enroll in PFRS and to cease receiving PFRS benefits contrary to the ALJ decision. (*Kantner Op.* at 7-8).

In *Recinos*, as in *Hemsey* and *Kantner*, it was a violation of due process for the Board to cancel Mr. Recinos' PFRS retirement benefits (and order repayment of benefits received). The Certifications of eight law enforcement officers assigned to the Bureau of Narcotics reveal that Mr. Recinos never acted in a "supervisory" or "administrative" capacity. Detectives Shaleeta Howard, Johnnie Ramos, Michael J. Patti; Carlos Aymat; Eric Fajardo, Americo Escobar; Stephen Lantigua; and Ruben Rios all attest:

During the time parameter that Mr. Recinos was in the position of Director of the Bureau of Narcotics, he never assigned me to take an official action or any law enforcement action.

It was my understanding that he was to act as a liaison between the supervisors and the Sheriff. Furthermore, I never saw him engaged in any law enforcement activities, assist in any investigations, or arrests.

In the Certification of retired PCSD Officer Charles Meyers² dated August 25, 2016, he attests, in pertinent part:

1. When Mr. Recinos was initially going to be rehired by the Passaic County Sheriff's Department, I did call the pension board and conferenced Mr. Recinos' stats with an employee of the Division. At that time, I specifically asked whether or not Mr. Recinos could

² Meyers served as Warden of the Passaic County Jail, Undersheriff, acting Sheriff, and PCSD Business Administrator.

accept the position of clerk typist. I was advised that he could in fact be hired as a clerk typist, at that time.

2. When Mr. Recinos was being considered for the position of the Bureau of Narcotics, he and I had a discussion on whether or not it was a position that he could take. As such, I personally checked with both Civil Service and the Pension Bureau to see whether or not Mr. Recinos could be hired in that position. The response that I received from the Pension Board (orally) was that he could in fact be hired for that position without any penalty or issue. This protocol was required by Fact sheet #29, which placed the burden on the employer to determine pension eligibility.

* * *

4. I make this certification in furtherance of my understanding and knowledge of the instant matter and to assert to this Honorable Board that all proper procedures were followed when Mr. Recinos was hired in his various capacities with the Passaic County Sheriff's Department – post his Law Enforcement career.

5. Based upon my observations while Mr. Recinos served in the capacity of Director o[f] the Bureau of Narcotics, I can assert that he never performed any Law Enforcement duties, nor did he give any directive/orders to sworn Law Enforcement personnel. (emphasis supplied).

Mr. Recinos attests in his certification dated September 18, 2015:

3.A. During the period of time I was employed by the Passaic County Sheriff's Department [P.C.S.D.] which qualified me for my afore-referenced pension, I always served in the official title/capacity as: Corrections Officer.

* * *

3.B. Thereafter, I had a break in service in excess of thirty (30) days. At that time (2011) the required break in service was thirty (30) days as opposed to a six (6) month break in service (required today) based upon the prevailing legislation – at that time.

* * *

3.D. On December 16, 2011, I was assigned to be the Director of the Bureau of Narcotics (by the Sheriff) – which is a law enforcement based position and involves the oversight of law enforcement functions. A copy of my employers Personnel Action Form for this position is annexed hereto as Exhibit 5. Here, I had a break in service – in excess of six (6) months between my retirement and this law enforcement position. Please see Exhibit 2 and 5 annexed hereto. Also note that position is separate, distinct and different from the position that I retired from – which was a corrections officer.

(I.E.: Break in Law Enforcement from 6/1/2011 to 12/16/2011 – is greater than six (6) months) . . .

4. The position that I currently hold is that of Undersheriff. In this capacity, I am assigned to the Bureau of Law Enforcement, and supervise and oversee law enforcement functions which includes, but is limited to Sheriff's Officers. In this new capacity, I have *never* supervised any corrections officer – nor have I been involved with the handling of corrections matters. However, most of my responsibilities deal with Administration, Human Resources and Personnel – in the Law Enforcement Division, and I have nothing to do with the operations of the Corrections Division.

* * *

6. That letter opinion specifically states that I am conducting job functions and duties which are similar to those that I previously performed in my capacity as a Corrections Officer, which is not correct. Since my return to the P.C.S.D. – I have never been involved with the Corrections Division. The positions of Corrections Officer and Police/Sheriff's Officer are completely different. Please see Exhibits 1 and 6, annexed hereto – which are the Civil Service definitions/descriptions for each position.

* * *

11. Another important factor to note is that I have *not applied for nor sought entry into another pension system* – such as P.E.R.S. Specifically, when I accepted my new position as Keyboard/clerk typist with the PCSD on 7-25-2011 (sic) (see Exhibits 3 [116a-119a] and 7 [135a-137a]) I chose *not* to enroll in any new pension system – because I believed that I was not eligible to enter a new pension plan. Please see Chapter 92, P.L. 2007, Chapter 103, P.L. 2007, Chapter 89, P.L. 2008, Chapter 1, P.L. 2010, and Chapter 78, P.L. 2011. Assuming (*arguendo*) that I was eligible for a P.E.R.S. Pension – I *do not* want it and waive the same.

* * *

13. I must also note that the positions of: Director of Bur. of Narcotics and Undersheriff- are not pension eligible. Please see New Jersey Pension Fact Sheet – annexed hereto as Exhibit 8 [139a], as such, I should not be viewed as being in violation of Your Honors' [sic] rules and regulations.
14. In addition, I am enclosing a letter from my former Union President, Joseph DeFranco, who served as the Superior Officers President of Local PBA 197 – from 2002 until 2013. My union exclusively serves Corrections Officers. This letter attests to my membership in the Corrections Union and is annexed hereto as Exhibit 9. The PCSD is serviced by two

separate Unions which represent Corrections Officers and Sheriff's Officers – respectively.

15. The foregoing is very important, since it establishes that I served as a Corrections Officer – before accepting a Police position – six months after my break in service. The PCSD Union dedicated to Police Officers/Sheriff's Offices – is PBS Local 286 – which I *do not* belong to.

Passaic County Executive Undersheriff Joseph Dennis certified (on September 21, 2015), in pertinent part, that:

6. “Mr. Recinos had a break in service greater than thirty (30) days when he was hired by the P.C.S.D. as a clerk typist – which was the law in 2011, as opposed to a six (6) month separation – which is the law now. His clerical position did not involve any law enforcement responsibilities. In addition, his break in service between his retirement as a corrections officer and appointment to the position of Director of Bureau of narcotics [sic] was greater than six (6) months. As such, I can state without hesitation that Mr. Recinos and this agency did not violate any of the Pension Board's rules or regulations.

7. Based upon these factors, we would respectfully request that the decision of this Board revoke the August 10, 2015 Order and hold Mr. Recinos as a Pension Member in Good Standing.

The Board incorrectly claimed: “The Director [of the Bureau of Narcotics] will also have supervisory duties over sheriff’s officers who themselves are sworn police officers.” (a30). There is no job description for the position as it is unclassified and Mr. Recinos did not have supervisory duties over sheriff’s officers. His role as Director was only to act as a liaison carrying out information of day-to-day operations between the Sheriff’s administration and Bureau of Narcotics.

POINT II

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED SINCE THE DECISIONS OF THE NEW JERSEY STATE COURTS WERE ARBITRARY, CAPRICIOUS, UNREASONABLE AND INCORRECT; AT THE VERY LEAST, DUE PROCESS DEMANDS PETITIONER RECEIVE AN EVIDENTIARY HEARING

In *Knox v. Public Employees’ Retirement System*, 2012 WL 570058, the Superior Court of New Jersey, Appellate Division reversed a decision by the Division that required *Knox* to reimburse PERS for all of the retirement benefits he received from PERS between July 1, 2003 and November 14, 2006, which totaled \$258,191. Treasury concluded that because *Knox* waited fourteen days after retirement, rather than the required thirty, before beginning employment covered by the PERS pension system, he was obliged to forfeit all of the pension benefits he received after he retired

as an assistant prosecutor. (*Knox* Op. at 1). In reversing, the Appellate Division stated:

As *Knox* correctly argues, this court and our Supreme Court have repeatedly recognized that as a matter of sound public policy, statutes creating pensions should be liberally construed in favor of those they are intended to benefit. Pensions for public employees serve a public purpose. A primary objective in establishing them is to induce able persons to enter and remain in public employment, and to render faithful and efficient service while so employed. . . . They are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service. Being remedial in character, statutes creating pensions should be liberally construed and administered in favor of the persons intended to be benefited thereby. *Knox* Op. at 7.

Knox noted the New Jersey Supreme Court held “considerations of equity and fairness must temper the application of deadlines in the administration of the pension fund.” (Op. at 7).

In *Ruvoldt v. Nolan*, 63 N.J. 171 (1973), eight years after an assistant prosecutor retired on a disability pension, the Hudson County Employees Pension Commission set aside the disability pension granted to the retiree Ruvoldt. *Id.* at 173-174. Despite evidence that Ruvoldt was medically able to continue his work, the Court declined to reach the merits of the controversy,

instead concluding that principles of equity and fairness rendered it “clearly unjust” to apply “a substantive rule of disentitlement of pension against Ruvoldt” eight years after the fact. *Id.* at 183. Particularly relevant to *Recinos*:

The [*Ruvoldt*] Court emphasized that the retiree’s reliance on the pension board decision, and the absence of “fraud or illegality” should play a role in determining whether the refund of pension benefits should be required, and that any review of pension eligibility “must be made with reasonable diligence.” *Ibid.* The Court observed . . . “the question of overall fairness and justice in the attendant circumstances cannot be overlooked” even in the fact of “diversion of public funds for statutorily unwarranted pensions.” *Id.* at 184-185.

As in *Knox* and *Ruvoldt*, in *Recinos* due process and fundamental fairness mandate that Mr. Recinos not be forced to re-enroll into the PFRS. The *Knox* Court stated:

Knox served honorably through thirty years of public service, and his honest mistake in starting a new position sixteen days too soon should not result in the catastrophic result that Treasury demands of him . . . We also conclude that Treasury’s decision to wait four years and four months before telling Knox that his retirement was not bona fide has exceeded the standards of reasonableness we expect of a public agency. In light of the absence of bad faith, and Knox’s legitimate reliance on the advice of the UCPO,

the unwitting violation that occurred should not deprive a career public servant of his earned pension benefits. Treasury's decision to the contrary was arbitrary and capricious. *Knox* Op. at 8-9; (emphasis supplied).

Mr. Recinos also served honorably through more than thirty years, and should not be subjected to these catastrophic results. As in *Knox*, that the Board waited over four years "has exceeded the standards of reasonableness we expect of a public agency." Mr. Recinos took affirmative steps prior to taking the position as Director and was advised by a former Union Representative and former Acting Sheriff he would not have to re-enroll.

POINT III

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED SINCE THE PFRS BOARD ERRED IN FINDING AS A FACTOR THAT MR. RECINOS DID NOT CONTACT THE DIVISION

In its "CONCLUSIONS OF LAW" the Board writes:

. . . neither Mr. Recinos nor Passaic County contacted the Division to inquire about post-retirement employment as required by the March 14, 2011, letter approving Mr. Recinos' retirement. . . . (a44).

Mr. Recinos was not required "to contact the Division" – pursuant to Fact Sheet #29, he was only

required to notify his employer, which he did. Fact Sheet #29 states:

However, if there is any doubt, you should have the *prospective employer* contact the Division of Pensions and Benefits for verification prior to your accepting any public employment after retirement (Emphasis in the original).

Mr. Recinos' employer's representative did contact the Pension Board (see Meyers' certification). Mr. Recinos also relied upon an inquiry by his former Union Representative, Mr. William Nativio (New Jersey State P.B.A. (Local 286)), who was advised by the P.B.A.'s pension consultant that Mr. Recinos would be entitled to accept all positions of employment at issue herein with no PFRS deductions. As stated in Mr. Nativio's letter:

That title was known as Director of Bureau of Narcotics. The information requested by me was to identify whether this title was a PFRS pensionable title.

I was advised by the NJSPBA Pension consultant at that time that this title was not listed as a PFRS position and that the individual Mr. Recinos would not be subject to PFRS deductions.

Mr. Recinos' justifiable reliance is further reflected in the e-mails of Meyers seeking confirmation that the position of Director is not covered under PFRS. The Board cites the e-mails:

Charles S. Meyers . . . emailed Aurus Malloy at the Civil Service Commission on December 12, 2011, requesting to know which of two Director of Bureau of Narcotics titles available on the Civil Service Commission's website . . . should be used for Mr. Recinos . . . Mr. Malloy responded later that day stating that 07726 is an unclassified position for which Civil Service does not have a job title, but any "Director" title would "more or less indicate the responsibilities of the Director position." (a23).

The Board states: "Neither Mr. Recinos nor Passaic County contacted the Division after these communications and after being provided with a statutory statement that the position has 'full police officer status.'" (a33). However, the mere fact the position has "full police officer status" does not make the position PFRS pensionable. (*Point V, infra*).

Mr. Recinos did have inquiries conducted with the Pension Board to make certain that he would be able to accept the post-retirement positions of PCSD employment jeopardizing his pension.

The Board cites Fact Sheet #29 (codified by *N.J.S.A.* 43:16A-15.3) which "requires that if you return to employment covered by the PFRS, you must suspend your retirement and re-enroll in the PFRS. . . ." (a27). The Board fails to cite the PFRS enrollment application which states that the title must be a *permanent, fulltime position and only eligible titles may join*

– again, the titles of Director of the Bureau of Narcotics and Undersheriff are not on the approved site.

Mr. Recinos did rely upon Fact Sheet #29 which decreed that in the year 2011, any employee who retired from any agency and sought re-employment only needed 30 days of separation between retirement and re-employment. Fact Sheet #29 also places the burden of determining whether or not a retired employee could return to employment on the employer. The Board writes:

The issue is whether Mr. Recinos has to enroll in the PFRS as a result of taking these positions, a question within the authority of the PFRS and the Division. At no point did Mr. Recinos or Passaic County contact the Division when Mr. Recinos returned to post-retirement public employment, as required by the March 14, 2011 letter approving Mr. Recinos' retirement. (a31).

This is a red herring and the relevant statutes overrule the letter. Mr. Recinos contacted his employer – the reasonable thing to do.

POINT IV**CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS PETITIONER HAD THE REQUISITE BREAKS IN SERVICE WHICH WERE GREATER THAN 30 AND 180 DAYS**

Mr. Recinos fully complied with "separation." The Division/Board's position on the "separation/break issue" is not clear:

Therefore, even if he had declined PFRS participation, he was ineligible to collect any pension benefit under IRS rules as set forth in the regulations until he has a bona fide retirement from Passaic County pursuant to *N.J.A.C. 17:1-17.14* (180 day break in service with no pre-arrangement to return). (a38).

The Board concluded:

Therefore, because Mr. Recinos had no break between his employment with Passaic County when he moved from Director of Bureau of Narcotics to Undersheriff, on the basis of the applicable statutes (sic) and regulations, Mr. Recinos' retirement must be cancelled until such time as he has a bona fide separation. . . . (a42).

This is simply wrong. The break in service for Mr. Recinos was prior to being hired as the clerk; so he had the proper 30 day separation. The Board wrote:

On appeal, you argue that Mr. Recinos' retirement was bona fide according to *N.J.A.C.* 17:4-6.2 because he waited more than 30 days from his retirement date before accepting a non-PFRS position with the County. The return to employment in the keyboarding clerk position is not at issue. Mr. Recinos' June 1, 2011 retirement was bona fide in accordance with *N.J.A.C.* 17:4-6.2. However, even an individual with a bona fide retirement must re-enroll in PFRS *if they return to PFRS-eligible employment* in accordance with *N.J.S.A.* 43:16A-15.3 and *N.J.S.A.* 43:16A-1(2)a. The Board concludes that the position of Director of the Bureau of Narcotics is a PFRS position based on the statutory definition and requirements for the position contained in *N.J.S.A.* 40A:9-119.2. Therefore, Mr. Recinos must re-enroll pursuant to *N.J.S.A.* 43:16A-1(2)a, and *N.J.S.A.* 43:16A-15.3. (a42-43).

The Board is wrong as Mr. Recinos never returned to any PFRS-eligible employment. In *Kossup v. Board of Trustees, Police and Firemen's Retirement System*, 372 N.J. Super. 468, 473-478 (App. Div. 2004), the Court held that an individual must have a six month break in service; Mr. Recinos has complied.

Most significantly, this Court in *Knox* held that *Knox's* "honest mistake" in not complying with the thirty-day break in service rule should not deprive him of his earned pension benefits. *Knox* at 8-9.

POINT V

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE ITEM OF FULL POLICE POWERS IS NOT A QUESTION OF PENSIONABILITY AND SHOULD NOT PREVENT MR. RECINOS FROM RECEIVING HIS PENSION

The Board incorrectly mischaracterized the law:

As noted above, Mr. Recinos accepted the positions of Director of the Bureau of Narcotics, a law enforcement position that required police training and granted *law enforcement powers* pursuant to *N.J.S.A. 40A:9-119.2*. Acceptance of the Undersheriff position is a continuation in PFRS-covered employment, as permitted by *N.J.S.A. 43:16A-3.5*. He continues in such employment through the present. (a29) (emphasis supplied).

The Board wrote:

Your argument focuses on whether Mr. Recinos must return to employment under *N.J.S.A. 43:16A-3.1*. Again, the Board's decision is not based on that statute; the Board's decision is based on the requirements of *N.J.S.A. 43:16A-15.3* and that the Director of Bureau of Narcotics positions [sic] is a PFRS position by the statutory requirements and definition in *N.J.S.A. 40A:9-119.2*. (a31).

The Board stated: “Accordingly, the statutory requirements for the position of Director of the Bureau of Narcotics clearly meet the requirements for enrollment in the PFRS: police powers. . . .” (a36). The Board concluded: “In accordance with *N.J.S.A.* 43:16A-3.5, upon his appointment as Undersheriff, Mr. Recinos was permitted to continue participation in his PFRS account due to the law enforcement power granted and exercised by him under *N.J.S.A.* 40A:9-119.2” (a37).

Whether Mr. Recinos’ current position may have law enforcement powers is irrelevant, since the item of full police powers is not a question of pensionability. Class I and Class II Police Officers in New Jersey (part-time police positions) do, in fact, have law enforcement authority and powers, yet they are not pensionable positions. Only full-time and permanent positions are pensionable. Eight certifications of law enforcement officers assigned to the Bureau of Narcotics while Mr. Recinos was Director attest that Mr. Recinos “never acted in a law enforcement capacity while he served in the position of Director of the Bureau of Narcotics.”

POINT VI

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED SINCE THE POSITION OF UNDER- SHERIFF IS NOT LISTED ON ANY DOCU- MENTS ISSUED BY THE PENSION BOARD

The Board conceded “Undersheriff”/“Director of the Bureau of Narcotics” are not on the PFRS list; per the PFRS application, Mr. Recinos could not apply for a pension with these positions:

The Board notes that this title is not included on the list of PFRS eligible titles available through the Division’s website; the titles of Sheriff’s Captain, Sheriff’s Chief, Sheriff’s Investigator, Sheriff’s Lieutenant, Sheriff’s Officer, Sheriff’s Officer, Bilingual, and Sheriff’s Sergeant, which appear to be all other sheriff’s officer titles, are included on the list. (a22-23).

Neither the “Director of the Bureau of Narcotics” nor “Undersheriff” are pensionable. The “[PFRS] Eligible Titles As Of December 2014” does not list the titles of Director nor Undersheriff.

The Board also wrongly found:

that the Director of the Bureau of Narcotics is a position eligible for PFRS enrollment by its statutory definition . . . [since] . . . “the Legislature . . . 119.2.” (a23-24).

Having “police officer status” does not make the position pensionable; (reflected by the title of Director of the Bureau of Narcotics and title of Undersheriff not on the PFRS’s website). As to the Board’s finding that “Mr. Recinos’ appointment as Undersheriff continued his active PFRS enrollment,” (a25) this is erroneous and Mr. Recinos is being forced into the PFRS via a position not listed on the PFRS’s own website.³

Having full police power does not make the unclassified position pensionable and the Board’s citation to the definition of “Policeman” (*N.J.S.A. 43:16A-1(2)(a)*) is irrelevant (a35) since both the Director and Undersheriff positions are unclassified and not permanent positions. The New Jersey Civil Service Commission “Unclassified Service” includes job titles permitted or required by State law or local ordinance to be unclassified and these laws or ordinances govern these job titles. An individual who has an unclassified appointment serves for a fixed term or employment at the pleasure of the employer and may not accrue seniority or permanency. See Civil Service Website: http://www.state.nj.us/csc/about/divisions/slo/itp_unclassified.html.

The Board erroneously concluded:

Accordingly, the statutory requirements for the position of Director of the Bureau of

³ The Board’s citation to *N.J.S.A. 43:16A-15.3*: “Such person shall be re-enrolled in the retirement system. . . .” (a33) is erroneous. Mr. Recinos could not complete the application and does not qualify for re-enrollment.

Narcotics clearly meet the requirements for enrollment in the PFRS: police powers, supervisory police powers, full-time employment, certification of training by the Police Training Commission, and full police officer status as is granted to other Sheriff's officers. (a36).

These are only qualifications and do not make the position of Director pensionable under the PFRS. The Board discussed Mr. Recinos' optional enrollment as Undersheriff:

Subsequently, he accepted the position of Undersheriff for Passaic County on February 3, 2014, and continues to serve in that capacity through the present. (a36).

This was optional enrollment by Mr. Recinos to what he understood (and had been told) was a non-PFRS pensionable position. *N.J.S.A.* 43:16A-3.5 states: "Any member of the Police and Firemen's Retirement System of New Jersey who has been or shall be selected to the position of . . . undersheriff may, by written notification to the Director of the Division of Pensions and the county treasurer, elect to continue to be a member of the retirement system while serving as . . . undersheriff" (a36-37). The Board then stated: "In accordance with *N.J.S.A.* 43:16A-3.5, upon his appointment as Undersheriff, Mr. Recinos was permitted to continue participation in his PFRS account due to the law enforcement power granted and exercised by him under *N.J.S.A.* 40A:9-119.2." (a37). However, there is nothing in the record that Mr. Recinos wanted to continue in the PFRS account; in fact, every indication is

otherwise. The Board wrote: “If he were not granted law enforcement powers, he would be required to enroll in the PERS, now the DCRP, for elected and appointed officials pursuant to *N.J.S.A. 43:15C-2*.” (a37). However, this is not the requirement for enrolling. In Mr. Recinos’ certification he references his employer’s Personnel Action Form for the position of Director. This “Request for Personnel Changes” specifically states, as to “Brief Explanation for Changes”: “ADVANCEMENT TO *UNCLASSIFIED TITLE* OF 9 DIRECTOR OF BUREAU OF NARCOTICS SALARY CHANGE AS PER NON-UNION GUIDE” (emphasis supplied). Further proof of Mr. Recinos’ justified reliance is that both the positions of Director and Undersheriff are *not* listed in PFRS eligible titles.

POINT VII

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER’S DUE PROCESS RIGHTS WERE VIOLATED AS THE BOARD ERRED BY FINDING THAT THE EXPERT REPORT OF MR. MEYERS “IS ENTITLED TO NO WEIGHT”; AT THE VERY LEAST, THERE MUST BE AN EVIDENTIARY HEARING CONSIDERING MR. MEYERS’ REPORT AND CONCLUSIONS

Mr. Recinos presented the expert opinion of Charles Meyers of the Vyanka Group, LLC. Mr. Meyers submitted an expert opinion that Mr. Recinos did not violate any of the rules and regulations relative to his

return to service with the PCSD. More importantly, Mr. Meyers opined that Mr. Recinos' present employment is not pensionable under the PFRS.

Bizarrely, the Board rejected the expert opinion of Mr. Meyers. If anything, the Board should have heard testimony from Mr. Meyers prior to dismissing his opinions. The Board, however, rejected Mr. Recinos' request for a hearing as properly requested by his attorney (a36), then arbitrarily and capriciously rejected the opinion of Mr. Meyers (in both its "FINDINGS OF FACT" and "CONCLUSIONS OF LAW." (a25-26). Equally unpersuasive is the statement: "However, the question of PFRS enrollment is not within the Civil Service Commission's purview; it is an issue for the Division and the PFRS Board, . . . the PFRS Board determines that the position of Director of Bureau of Narcotics is a PFRS position." (a44). The statutes in question are paramount and support his position.

Mr. Recinos should not be severely penalized for any errors made by his employer. That Mr. Recinos did, in fact, contact his employer as to his position as Director and relied upon his employer's representations should be fully explored at a hearing.

POINT VIII

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE RETIREMENT PLAN PROVIDED BY THE STATE OF NEW JERSEY TO POLICE OFFICERS AND FIRE FIGHTERS WHO ARE VESTED IN THE PLAN CREATES RIGHTS THAT ARE PROTECTED UNDER THE UNITED STATES (AND NEW JERSEY) CONSTITUTIONS

Mr. Recinos is a distinguished Public Servant/ Corrections Officer who honorably retired from the Passaic County Sheriff's Department and is a vested member in the PFRS. This plan was established to provide and ensure retirement benefits. The Plan participants are employed by New Jersey's Municipalities and Counties, and also by the State of New Jersey itself. Every participant pays 8.5% of every paycheck into the plan. Based on the explicit terms of the statute, employers are required to contribute to the plan the amounts calculated by the plan's actuary to fully secure the participants' retirement benefits.

The PFRS evinces a clear intent to create a contract and to generate reliance by participants by encouraging them to apply for public employment and to remain in their positions and to continue to provide services. A statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State. *United States Trust*

Company v. New Jersey, 431 U.S. 1, 17 n. 14 (1977). A pension is an element in encouraging qualified individuals to enter and remain in public service. *Masse v. Public Employees' Retirement System*, 87 N.J. 252, 261 (1981).

Mr. Recinos was a faithful pension member, and completed his required service. Therefore, a contract has been made between Mr. Recinos and the State of New Jersey for him to receive the pension. The decision advanced by the Board on August 10, 2015 states that Mr. Recinos violated the Board's rules and regulations when he accepted a new and different position with his previous employer. The Board's position is simply wrong.

POINT IX

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE POSITIONS OF THE DIRECTOR OF THE BUREAU OF NARCOTICS AND UNDERSHERIFF ARE NOT PFRS-ELIGIBLE POSITIONS BECAUSE THE TITLES DO NOT APPEAR ON THE DIVISION'S WEBSITE AS AN ELIGIBLE TITLE; NOR ARE THEY PERMANENT POSITIONS BUT ARE INSTEAD AT-WILL UNCLASSIFIED POSITIONS UNDER THE RULES OF CIVIL SERVICE WHICH PROHIBIT RE-ENROLLMENT OF MR. RECINOS INTO THE PFRS

The Board incorrectly rejected this contention:

The Board notes that the office holder may hold a recognized title, e.g., Captain or Lieutenant, but, despite the fact that the title is not included on the PFRS eligible position list on the Division's website, *N.J.S.A. 40A: 9-119.2*, which governs the position clearly indicates the office holder must meet the requirements for PFRS enrollment: The Director of the Bureau of Narcotics must be a law enforcement officer with police training as certified by the Police Training Commission, possessing full police powers, and has served at least 10 years of police duty, three of which must be in a supervisory position. The Director will also have supervisory duties over sheriff's officers who themselves are sworn police officers. Further, the statute grants the

Director full police officer status. The Board determined that this position is eligible for PFRS enrollment, and Mr. Recinos must therefore be re-enrolled effective December 1, 2011. (a29-30).

In *In the Matter of Dennis*, 385 N.J. Super. 360 (App. Div. 2006), the Court held that a police officer paid under the Comprehensive Employment Training Act (CETA) was not required to be enrolled in the PFRS retirement system after 12 months of employment. In an “order granting partial summary decision,” rendered on October 31, 2003, the ALJ ruled in Dennis’ favor, holding that pursuant to *N.J.A.C. 17:4-2.6(d)* Dennis should have been enrolled in PFRS on the thirteenth month of his CETA employment, May 1, 1979. The ALJ determined that, pursuant to *N.J.S.A. 43:16A-15.1*, the City was required to contribute half of the purchase rate for service credit from May 1, 1979 to June 30, 1981, plus half of Dennis’ share. *Id.* at 373.

Dennis is highly relevant as it affirmed the longstanding law that “only permanent employees were eligible for enrollment in PFRS.” *Id.* at 376. The Board in *Dennis* rejected the ALJ recommendation that petitioner Dennis should have been enrolled in the PFRS on the thirteenth month of his temporary employment. *Id.* at 376-377. *Dennis* supports Mr. Recinos’ position as Mr. Recinos was never a permanent employee. The same policy reasons for not considering CETA workers permanent PFRS employees applies in Recinos. *Dennis* also interpreted *N.J.S.A. 43:16A-1(3)* and held that a full-time police officer

becomes a member of the retirement system as a condition of his employment. This clearly delineates the fact that Mr. Recinos cannot be re-enrolled in the pension system since his positions as Director and Under-sheriff are not permanent positions.

POINT X

CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE EVER-CHANGING ILLEGITIMATE THEORIES PRESENTED BY THE DIVISION AND THE BOARD MADE IT IMPOSSIBLE FOR PETITIONER TO DEFEND AND PRESENT HIS CASE IN A PROPER MANNER; AT THE VERY LEAST, AN EVIDENTIARY HEARING SHOULD HAVE BEEN HELD

The ever-changing illegitimate theories presented by the Division and the Board by way of four letter opinions has made any meaningful defense of Mr. Recinos impossible. Indeed, it is evident that the Division, and then the Board, had the goal of eliminating Mr. Recinos' pension payments (past and present) and tried to figure out a theory to support this goal. Equally troubling (and adding to the difficulty of presenting a complete appeal) is the fact that there were numerous discussions at various Board meetings – none of which proceedings were transcribed.

**THE FIRST DECISION: AUGUST 10, 2015
DIVISION LETTER OF INVESTIGATOR CASEY**

The first inkling that Mr. Recinos had of any pension problem was when he received the Division letter dated August 10, 2015 (a71). This letter clearly states that the ground for the Division's action is based on *N.J.S.A. 43:16A-15.3* and *N.J.S.A. 43:16A-3.1* (the "administrative or supervisory duties" bar) which, as stated by Casey: "is the operative statute that defines service for appointed positions for PFRS members who take a position such as you have with Passaic County." (a72).

The rationale for the Division's action is clearly stated in the following passage of this first decision:

The positions of Director of Bureau of Narcotics and Undersheriff have clear *administrative and supervisory responsibilities* over the subordinate officers at the Passaic County Sheriff's Department. Since the position of Undersheriff directly followed your position of Director of Bureau of Narcotics, you are required to continue your second PFRS membership in this position.

There are *several notable duties* listed in the Job Description that require the Director Bureau of Narcotics and Undersheriff *to directly oversee the sheriff's officers*. (a72) (emphasis supplied).

The Division's argument relates solely to its characterization of Mr. Recinos' position as one with "administrative or supervisory duties" as proscribed by

N.J.S.A. 43:16A-3.1. Factually this is incorrect, as attested to by the eight Detectives and Mr. Meyers that Mr. Recinos did not supervise them but merely acted as a liaison.

In this first decision by the Division, no mention is made of the “separation/break issue.”

**THE SECOND DECISION: OCTOBER 20, 2015
REVISED DIVISION LETTER OF
INVESTIGATOR BELL**

After Mr. Recinos’ erstwhile attorney filed a responding letter brief dated September 18, 2015, Kristin Bell, Investigator, Pensions Fraud and Abuse Unit, filed an October 20, 2015 “revised” opinion (a62-70). This revised opinion again cites *N.J.S.A.* 43:16A-15.3 but does not cite *N.J.S.A.* 43:16A-3.1. This opinion cites for the first time *N.J.A.C.* 17:4-6.8(a)1. This second opinion also cites *N.J.S.A.* 40A:9-119.2 [Director of bureau of narcotics] and concludes:

The positions of Director of Bureau of Narcotics and Undersheriff have clear administrative and supervisory responsibilities over the subordinate officers at the Passaic County Sheriff’s Department. Since the position of Undersheriff directly followed Mr. Recino’s [sic] position of Director of Bureau of Narcotics, he is required to continue your [sic] second PFRS membership in this position. (a65) (emphasis supplied).

This second Division decision again relates solely to its characterization of Mr. Recinos' position as one with "administrative or supervisory duties" as proscribed by *N.J.S.A.* 43:16A-3.1 (however, no mention is made of this statute). Again, factually this is incorrect, as attested to by the eight Detectives and Mr. Meyers that Mr. Recinos did not supervise them but merely acted as a liaison.

There is again no mention made of the "separation/break issue" (a lack of the 30 days/180 days waiting period).

THE THIRD DECISION: MARCH 16, 2016 BOARD LETTER OF SECRETARY SCHWEDES

Mr. Recinos filed a letter brief dated January 26, 2016 with exhibits which included an Expert Report of Mr. Charles Meyers 32 (December 3, 2015). The Board issued a decision dated March 16, 2016 (a50). This third decision (and first Board decision) makes no mention of *N.J.S.A.* 43:16A-3.1 ("administrative or supervisory duties"). This Board decision concedes that there is no "separation" issue: "The Board notes that his June 1, 2011 retirement date was bona fide because he observed a 30-day break in service after his retirement date." (a51).

**AS TO THE POSITION OF DIRECTOR
OF BUREAU OF NARCOTICS IN THE
THIRD DECISION**

The Board concluded: “The Director will also has (sic) supervisory duties over sheriff’s officers who themselves are sworn police officers. The Board determines that the Director of the Bureau of Narcotics is a position eligible for PFRS enrollment.” (a52).

**AS TO THE POSITION OF UNDERSHERIFF
IN THE THIRD DECISION**

The Board cites for the first time N.J.S.A. 43:16A-3.5 (Member who becomes sheriff or undersheriff; election to remain member). (a53). Mr. Recinos submits that this statute should not require him to re-enroll in the PFRS.

This decision rejects the argument “that Mr. Recinos relied on the assurances of Charles Meyers . . . that accepting the positions of Director of Narcotics and Undersheriff would not jeopardize his PFRS retirement benefits. The Board notes, however, it is not bound by advice offered by an employer.” (a53-54). The decision also rejects the contention “that relevant fact sheets – #29, *Employment After Retirement*, and #86, *Post Retirement Employment Restrictions*, published by the Division are incorrect and do not support the Division’s determination that Mr. Recinos must re-enroll in PFRS.” (a54). In addressing the Fact Sheet #29 argument the Board simply cites N.J.S.A. 43:16a-15.3 which, while requiring re-enrollment in the event

of a “return to employment covered by the PFRS” (a54) does not provide that Mr. Recinos’ position is so covered. The Board conceded that the 180-day separation requirement found in Fact Sheet #86 was not applicable to Mr. Recinos as it was enacted after Mr. Recinos accepted employment “as Director of Narcotics and Undersheriff in 2011 and early 2012” (since “Fact Sheet #86 is primarily concerned with the impact of regulations promulgated by the Division in March, 2012. . . . Fact Sheet #89, published in August 2015.” (a54).

**THE FOURTH AND FINAL DECISION:
JULY 12, 2016 OPINION OF BOARD
LETTER OF SECRETARY SCHWEDES**

In the fourth and final decision of the Board (which is the opinion being reviewed by the Court), Secretary Schwedes writes:

Your argument focuses on whether Mr. Recinos must return to employment under *N.J.S.A.* 43:16A-3.1. Again, the Board’s decision is not based on that statute; the Board’s decision is based on the requirements of *N.J.S.A.* 43:16A-15.3 and that the Director of Bureau of Narcotics positions is a PFRS position by the statutory requirements and definition in *N.J.S.A.* 40A:9-119.2. (a31).

In this final decision of the Board, Secretary Schwedes rebuffs Mr. Recinos’ correct efforts at arguing the inapplicability of *N.J.S.A.* 43:16A-3.1 (the “administrative or supervisory” bar) and twists the

Board's rationale to being based on *N.J.S.A.* 43:16A-15.3 and *N.J.S.A.* 40A:9-119.2.

Your (sic) also focus on whether the Director of Bureau of Narcotics position *supervises police* and the fact that Mr. Recinos did not accept that position until more than six months after his retirement. Your argument focuses on whether Mr. Recinos must return to employment under *N.J.S.A.* 43:16A-3.1. Again, the Board's decision is not based on that statute; the Board's decision is based on the requirements of *N.J.S.A.* 43:16A-15.3 and that the Director of Bureau of Narcotics positions (sic) is a PFRS position by the *statutory requirements and definition in N.J.S.A. 40A:9-119.2.* (a31) (emphasis supplied).

Any reading of *N.J.S.A.* 40A:9-119.2 does not require Mr. Recinos to re-enroll in the PFRS.

The Board in this final decision concedes that "the required break in service under the regulations in effect at that time was observed, and there is no factual dispute on this point." (a31). At the non-transcribed meetings/hearings below the "separation/break issue" was raised, resulting in Mr. Recinos addressing this issue in his three briefs: 1) in his September 18, 2015 brief: *POINT TWO* – "Mr. Recinos had breaks in service which were greater than thirty days and six months"; 2) in his January 26, 2016 brief: "In support of our legal position that a break in service for a minimum of thirty (30) days was required . . . "; and 3) in his May 4, 2016 brief: "Point I – MR. RECINOS DID

COMPLY WITHIN THE BREAK IN SERVICE PROTOCOL.” The manner in which the Division and Board were simply looking for a way to rescind Mr. Recinos’ pension evokes the Queen’s pronouncement of “Sentence first-verdict afterwards” in Lewis Carroll’s “Alice’s Adventures in Wonderland.”

The separation/break issue is again addressed in the final Board decision:

Importantly, Mr. Recinos was appointed Undersheriff of Passaic County without any break in service from his position as Director of Bureau of Narcotics, both positions with the same employer, Passaic County. Therefore, even if he had declined PFRS participation, he was ineligible to collect any pension benefit under IRS rules as set forth in the regulations until he has a bona fide retirement from Passaic County pursuant to *N.J.A.C. 17:1-17.14* (180 day break in service with no pre-arrangement to return). (a37-38).

The Board concludes:

Therefore, because Mr. Recinos had no break between his employment with Passaic County when he moved from Director of Bureau of Narcotics to Undersheriff, on the basis of the applicable statutes (sic) and regulations, Mr. Recinos’ retirement must be cancelled until such time as he has a bona fide separation from service with Passaic County and applies to retire again. (a42).

POINT XI**CERTIORARI SHOULD BE GRANTED AS AN IMPORTANT FEDERAL QUESTION EXISTS AS PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS THE BOARD ERRED IN DENYING THE REQUEST FOR AN EVIDENTIARY ADMINISTRATIVE HEARING (PARTICULARLY IN LIGHT OF THE CONFUSION IN THE RECORD SURROUNDING MR. RECINOS' POSITIONS)**

The Board rejected Mr. Recinos' request for an administrative hearing (a48-49) and then summarily rejected his proffers (including the expert opinion of Mr. Meyers). In support of this erroneous decision, the Board wrote:

Your arguments for a hearing focus on Mr. Recinos observing the required break in service between his June 1, 2011 retirement and his return to employment as a Keyboarding Clerk. The Board agrees that the required break in service under the regulations in effect at that time was observed, and there is no factual dispute on this point. (a31).

In *In re License of Fanelli*, 174 N.J. 165 (2002), the new Jersey Supreme Court held that a physician appearing before the Board of Medical Examiners was entitled to a plenary hearing on the appropriate sanctions. In *Gloucester County Improvement Authority v. New Jersey Dept. of Environmental Protection*, 391 N.J. Super. 244 (App. Div. 2007), the Appellate Division held that where the Gloucester County Improvement

Authority, that owned and operated a landfill, appealed from a decision of the Department of Environmental Protection (DEP) denying the authority's request for a hearing with regard to the DEP's issuance of a notice of violation ordering the immediate cessation of the operation of a materials recovery facility, the authority was entitled to an administrative hearing.

Petitioner Recinos is entitled to an evidentiary hearing, particularly in light of the confusion in this record.



CONCLUSION

For the foregoing reasons this Court should grant the petition for a writ of certiorari in this important case.

Respectfully submitted,

JOHN VINCENT SAYKANIC, ESQ.

NJ State Bar ID No.: 045801984

Attorney for Petitioner

Mario Alberto Recinos

Dated: April 18, 2019