

**STATE OF NEW JERSEY  
OFFICE OF THE STATE COMPTROLLER**

**INVESTIGATIVE REPORT**

***IMPROPER PARTICIPATION BY  
PROFESSIONAL SERVICE PROVIDERS  
IN THE STATE PENSION SYSTEM***

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## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Background.....	2
	A. N.J.S.A. 43:15A-7.2 Was Designed to Preclude Professional Service Contractors Who Are Not Public Employees from Membership in PERS .....	2
	1. Legislative History .....	2
	2. The Legislation.....	3
	B. State Guidance on Implementing Section 7.2 and Applying the IRS Guidelines .....	4
III.	Methodology .....	7
IV.	Findings.....	8
	A. Summary of Findings.....	8
	B. Professionals with PSCs: Continued PERS Enrollment Post 2008 .....	9
	C. Professionals Without PSCs: Continued PERS Enrollment Post 2008 .....	10
	1. Without Justification, Numerous Local Units Simply Failed to Perform the Required Analysis.....	11
	2. Many Local Units Failed to Conduct the Required Analysis Due to Their Misperception that the Professional at Issue Was Grandfathered in PERS.....	11
	3. Numerous Surveyed Local Units Relied Upon Select Factors Indicative of Employee Status to Justify Continued PERS Enrollment While Ignoring Significant Evidence of Independent Contractor Status .....	13
	4. Local Units Did Not Appropriately Consider Status in a Private Professional Firm.....	15
	D. Numerous Professionals Eventually Removed from PERS Nonetheless Accrued Credits After the Appropriate 2008 Cut-Off Date.....	17
	E. Specific Examples of Improper Participation in PERS and the Effect of “Tacking” .....	18

F.	Potential Financial Impact .....	30
G.	Additional Efforts Are Necessary to Address Inappropriate PERS Enrollments .....	31
V.	Recommendations.....	33

## **I. Introduction**

The Office of the State Comptroller (OSC) has determined that numerous local government entities failed to comply with the 2007 legislative effort to remove inappropriately enrolled professional service providers from the New Jersey state pension system. This failure has resulted in the continued enrollment of numerous ineligible individuals, potentially costing taxpayers millions of dollars per year.

In 2007, state lawmakers enacted N.J.S.A. 43:15A-7.2, which was intended to curtail the participation of professional service providers such as attorneys and engineers in the New Jersey Public Employees' Retirement System (PERS). This statute deemed professional service providers retained by government entities pursuant to a professional services contract or otherwise acting as independent contractors to be ineligible to participate in PERS as of the expiration date of their existing contract or annual appointment. OSC found, however, that an overwhelming majority of surveyed local government entities failed to comply with the statutory mandate to determine whether these professionals are independent contractors or employees. As a result, they have failed to remove ineligible independent contractors from PERS.

Moreover, OSC's investigation found that many of these professionals aggregate their pension credits with multiple questionable PERS enrollments for services provided concurrently to multiple government entities, thereby boosting their ultimate pension payouts. Commonly referred to as "tacking," such multiple enrollments make it even less likely that these professionals qualify as bona fide employees of any one government entity – let alone all of them at the same time.

The continuation and tacking of these dubious enrollments jeopardize the fiscal integrity of PERS and its long-term ability to provide pension benefits to deserving public employees.

## **II. Background**

### **A. N.J.S.A. 43:15A-7.2 Was Designed to Preclude Professional Service Contractors Who Are Not Public Employees from Membership in PERS**

#### **1. Legislative History**

In 2005, the State of New Jersey Benefits Review Task Force (Task Force) was formed and charged with examining laws, regulations and procedures that govern the provision of public employee benefits; analyzing current and future benefit cost data; and making recommendations designed to control such costs and ensure a fair and equitable benefit system. In its final report issued in December 2005, the Task Force recognized that the state's "pension system was meant for career employees," and considered its review to be "driven" by this, among other, "core . . . values." The Task Force found that:

[T]he rules that allow the politically well-connected to game the system for their own benefit must be changed. The pension system exists to serve public employees who dedicate their careers to government and the eligibility rules must ensure that only they can participate. When non-deserving individuals are allowed to essentially freeload off the system, everyone loses. The bottom line is the system must be returned to those for whom it was designed.

The Task Force specifically recommended pension ineligibility for independent contractors "such as municipal attorneys, tax assessors, etc." who are retained pursuant to public contracts. It also recommended the elimination of tacking. The Task Force deemed these two practices to be an "abuse" or "gaming" of the pension system.

In 2006, the Special Session Joint Legislative Committee on Public Employee Benefits Reform was created and charged specifically with utilizing the Task Force report as a starting point for recommending legislative changes to the state pension and health benefits systems. Noting that the Task Force had found the enrollment of independent contractors in PERS to be a "major abuse" of the pension system, this committee ultimately recommended in its report the

exclusion of such professional services contractors from PERS in view of the fact that “only employees of a public entity, be it State or local, are entitled to a pension benefit.”

## **2. The Legislation**

On May 9, 2007, N.J.S.A. 43:15A-7.2 (Section 7.2) was signed into law as part of legislation addressing various public employee benefits. In keeping with the recommendation of the joint legislative committee, Section 7.2 mandated that the following non-employee professional service contractors be removed from PERS:

- Professionals providing services pursuant to a professional services contract (PSC) awarded under New Jersey’s public contract laws (N.J.S.A. 43:15A-7.2(a)); and
- Professionals who otherwise meet the definition of independent contractor as set forth by the Internal Revenue Service (IRS) (N.J.S.A. 43:15A-7.2(b)).

Section 7.2 charged government entities with removing ineligible professionals by the expiration date of their annual contract or, if they were retained through an appointing resolution by the entity’s governing body, the termination date of the yearly appointment.<sup>1</sup>

Additional, separate legislation was passed in 2010 requiring new employees hired by local government entities to work for the public entity a minimum of 32 hours per week, among other requirements, to be eligible for PERS enrollment. Individuals who were enrolled in PERS prior to May 21, 2010 are not, however, subject to the 32-hour work week requirement. Thus, the 2010 legislation is not applicable to the part-time professionals reviewed by OSC as part of this report, as all of these individuals were enrolled in PERS prior to 2010.

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<sup>1</sup>The majority of local government entities in New Jersey operate on a calendar year basis. Thus, those professionals who are independent contractors generally should have been removed from PERS as of January 1, 2008. As for those local governmental entities that operate on a fiscal year basis, those professionals should have been removed from PERS as of June 30, 2008.

## **B. State Guidance on Implementing Section 7.2 and Applying the IRS Guidelines**

In December 2007, to assist local government entities with the implementation of Section 7.2, the state Department of Community Affairs, Division of Local Government Services (LGS) sent a notice providing guidance and direction to New Jersey local government units (the LGS Notice). In addition, the state's Division of Pensions and Benefits (DPB) sent those same local government units a letter dated May 6, 2008 (the DPB Letter) as a supplement to the LGS Notice.

Both the LGS Notice and the DPB Letter direct local pension certifying officers (*i.e.*, the employee of the local government unit responsible for interfacing with DPB and certifying the validity of pension submissions to DPB) to review and document the status of each local professional services provider. As defined by statute and set forth in the LGS Notice and DPB letter, "professional services" means "services rendered or performed by a person authorized by law to practice a recognized profession whose practice is regulated by law." These professionals include, for example, attorneys, engineers and public health officials.

For those professionals not automatically excluded from PERS by virtue of having been retained through a PSC, the DPB Letter states that the "Certifying Officer of each local employer must review their current and future professional employees and use the IRS criteria . . . to determine if the individual meets the requirements of an employee and thus membership in [PERS]." Specifically, both the LGS Notice and the DPB Letter direct that each government unit should take the following steps:

1. analyze the status of its professionals pursuant to IRS criteria to determine if they are more appropriately considered an employee or an independent contractor;
2. document that analysis;

3. maintain that documentation in the professional's personnel file; and
4. remove from the payroll and PERS any professional found to be an independent contractor (emphases added).

LGS and DPB also provided voluntary in-person training on Section 7.2 to local government personnel.

The LGS Notice and the DPB Letter directed local officials to three IRS publications for guidance on applying IRS guidelines to make a determination as to independent contractor or employee status. Those three publications set forth a series of facts and circumstances to be considered in making the employee/independent contractor determination, which fall into three categories: degree of behavioral control, degree of financial control, and the relationship of the parties. Those facts and circumstances are:

#### Behavioral Control

- Instructions (obligation to comply with instructions as to when, where and how to work is indicative of employee status)
- Established policies/procedures (requirement to follow specified policies or procedures is indicative of employee status)
- Tools or equipment (provision of, for example, an office, computer, telephone line, business cards and letterhead is indicative of employee status)
- Providing assistance to the worker (provision by employer of administrative staff to assist with work is indicative of employee status; use of administrative staff hired by worker is indicative of independent contractor status)
- Order or sequence of work (requirement to follow employer-determined order or sequence of work is indicative of employee status)
- Purchase of supplies and services (instruction as to where to purchase or obtain supplies and services is indicative of employee status)
- Training (provision of training is indicative of employee status)

- Government identification (provision of identification, forms or stationery is indicative of employee status)
- Nature of worker's occupation affects the degree of control (highly trained professionals such as lawyers and engineers may require little if any instruction; they can be employees if employer retains other manifestations of control, such as requiring work to be done at government offices, controlling worker's schedule, and determining holidays or vacations and other conditions of employment)
- Evaluation system (provision of a performance evaluation can be indicative of employee status)
- Location of work (requirement to perform work on employer's premises is indicative of employee status; work performed off premises, such as at the worker's office, is indicative of independent contractor status)

#### Financial Control

- Method of payment (payment by the week or month typically indicates employee status, however this is not always the case)
- Offer services to the public (provision of services to the public on a regular basis is indicative of independent contractor status)
- Significant investment (investment in facilities and/or tools used to service other clients, such as the maintenance of an office, is indicative of independent contractor status)
- Corporate form of business (participating in a corporate/business entity such as a private professional practice is indicative of independent contractor status)
- Business expenses (reimbursement for business expenses is indicative of employee status)
- Opportunity for profit or loss (potential for realizing profit or loss (which includes investment in facilities and staff) is indicative of independent contractor status)
- Part-time/full-time status (a part-time or temporary worker may be either an employee or independent contractor; part-time or temporary status is not itself determinative of the issue)

### Relationship of the Parties

- Written contract (a written contract may describe the relationship the parties intended to create)
- Employee benefits (provision of health benefits, paid vacation and/or sick time may indicate that an employer considers the professional to be an employee)
- Permanency of relationship (expectation that work will continue indefinitely is indicative of employee status)
- Integration (if the worker's services are a key aspect of the employer's regular business activities, it is more likely the employer has the right to direct or control the worker)

All three of the IRS publications specifically direct that all facts and circumstances must be analyzed when determining whether a worker is an independent contractor or employee. Moreover, one of the publications (Federal-State Reference Guide, IRS Publication 963) makes clear that it is “unlikely” that a professional service provider is a government employee if that professional is engaged in business through a firm or other corporate structure and offers his or her services to the public.

### **III. Methodology**

OSC commenced this investigation to determine if local government units in New Jersey have complied with the mandates of Section 7.2. We first obtained data concerning a subset of professionals who are providing services to municipalities and school districts (collectively referred to in this report as “local units”). We then cross-referenced the names of those professionals with PERS data and developed a list of 332 PERS-enrolled professionals providing such services.

We determined that these 332 professionals were retained by 228 different local units. We sent survey letters to 58 of the 228 local units seeking information concerning these professionals and any other professionals retained by that local unit who have been participating

in PERS after January 1, 2008.<sup>2</sup> OSC specifically requested from these local units relevant professional service agreements, appointing resolutions and information submitted to PERS by the local unit; any other information or documents relating to the local unit's implementation of Section 7.2; and the statutorily required analysis concerning local professionals' status as either an employee or an independent contractor. OSC also interviewed 12 of these professional service providers and obtained, where appropriate, relevant follow-up information from the local units.

We provided a draft copy of this report to all of the local units we surveyed, any other local units mentioned in the report and all professional service providers referenced in the report. In preparing this final report, we considered all of the responses we received and incorporated them herein where appropriate.

We also provided a draft copy of this report to LGS and DPB for their review and comment. LGS and DPB each advised that they had no recommended changes to the report and endorsed our conclusions.

## **IV. Findings**

### **A. Summary of Findings**

Despite the clear mandate of Section 7.2 and the accompanying guidance provided to local units, an overwhelming majority of the surveyed local units failed to comply with the statutory requirement to remove independent contractors from PERS. For example, 21 of the surveyed local units maintained the PERS enrollment of a total of 34 professionals who were retained via a PSC after the termination date of their PSC, despite the unequivocal statutory prohibition in Section 7.2(a). As to those professionals not retained by a PSC, not one of the

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<sup>2</sup>OSC initially had sent a survey letter to one other local unit, but we ultimately determined that that local unit had not retained a professional within the purview of Section 7.2, making the total number of applicable surveyed units 58.

surveyed units properly performed and documented the analysis required to support the continued enrollment of their professionals who were not removed from PERS. Ten of the 12 professionals interviewed by OSC appear to have at least one inappropriate enrollment in PERS. In total, OSC identified 202 professionals enrolled in PERS after 2008 who are retained through a PSC or are otherwise “unlikely,” as per IRS guidelines, to be properly considered a government employee due to their concurrent private professional practice. Most of the 202 still are enrolled in PERS today, and a significant number of them have “tacked” together multiple dubious enrollments. OSC is forwarding to DPB the names of each of these 202 individuals.

These 202 enrollees are providing services to at least 159 different local units (134 municipalities and 25 school districts). Based on our findings, OSC conservatively estimates that a review of the remaining 515 municipalities and 597 school districts not included in our survey could yield hundreds of additional professionals inappropriately enrolled in PERS. Considering that there are also hundreds of independent local authorities and commissions in New Jersey, a review of those entities could yield many more PERS enrollees who actually are not government employees. The continued PERS enrollment of ineligible professionals, despite the efforts to curb this abuse, has the potential to cost the state millions of dollars in inappropriate future pension benefits.

#### **B. Professionals with PSCs: Continued PERS Enrollment Post 2008**

Despite the clear statutory mandate that professionals providing services pursuant to a PSC are disqualified from PERS enrollment as of their 2008 PSC termination date, OSC found a significant number of those professionals still participating in PERS after that termination date. In fact, many still were enrolled as of the writing of this report. OSC’s analysis revealed that at

least 21 local units maintained the enrollment of such professionals after the statutory removal date, collectively resulting in the continued inappropriate enrollment of 34 professionals.

In correspondence with OSC, 8 of these 21 local units attempted to justify the continued enrollment of these professional service providers, at least in part, on the basis that the individual was enrolled in PERS prior to enactment of Section 7.2 (*i.e.*, was “grandfathered”). For example, the Borough of Kenilworth stated that its borough attorney was permitted to continue his enrollment “since he was previously a member of PERS before January 1, 2007 (original enrollment in 2003).” Similarly, the Borough of Milltown stated that the borough engineer’s enrollment was continued because the borough was “under the impression that since [the borough engineer] was in the PERS pension system prior to January 1, 2008, he should remain in that system.” Section 7.2 contains no such grandfathering exemption and, along with the LGS Notice and the DPB Letter, unequivocally states that professionals with PSCs are prohibited from continued PERS enrollment and must be removed from PERS as of their 2008 PSC termination date.

### **C. Professionals Without PSCs: Continued PERS Enrollment Post 2008**

OSC’s investigation revealed that none of the surveyed local units performed and documented the comprehensive multi-factor analysis required to support the continued enrollment of professionals retained via an appointing resolution. In response to our draft report, a few local units belatedly prepared an analysis, but those analyses generally were incomplete. As explained below, the failure to perform the required analysis has resulted in the continued PERS enrollment of numerous professionals who appear to be independent contractors as opposed to employees.

**1. Without Justification, Numerous Local Units Simply Failed to Perform the Required Analysis**

Nine of the 58 surveyed local units failed to perform any PERS analysis at all for their professionals pursuant to IRS and state guidelines, and provided no justification for their failure to perform the required analysis.

For example, the Borough of Avon-by-the-Sea continued the PERS enrollment of both its borough attorney and municipal prosecutor following enactment of Section 7.2. In response to our survey, the borough did not provide any information or documentation memorializing the required analysis as to the status of these professionals. Ultimately, in response to our draft report, the borough contacted DPB and removed the borough attorney and prosecutor from PERS retroactive to 2008.

**2. Many Local Units Failed to Conduct the Required Analysis Due to Their Misperception that the Professional at Issue Was Grandfathered in PERS**

Ten local units asserted to OSC that they continued the PERS enrollment of the professional in question because he or she was “grandfathered” and/or was a “continuing employee.” As noted previously, Section 7.2 contains no such grandfathering exception.

For example, the City of Wildwood advised OSC that its planning board attorney, municipal prosecutor, public defender and former municipal prosecutor/current staff attorney all were “enrolled in PERS . . . prior to 7/1/07,” and thus stated that they meet the requirements to remain in PERS. Similarly, the Borough of Gibbsboro identified its municipal prosecutor and public defender as professional service providers enrolled in PERS. The borough stated to us, in relevant part, that these individuals have been in those positions since 2004 and 2006 respectively and “while they are appointed on a yearly basis, they are continuing employees.” As discussed above, however, the law provides no such grandfathering exception.

Some of these local units appear to be relying upon inapposite language in a statute that created a separate retirement program – the Defined Contribution Retirement Plan (DCRP). DCRP was established for certain government officials who were themselves elected or were appointed by elected officials and commenced service on or after July 1, 2007. *See* N.J.S.A. 43:15C-2. Those otherwise eligible for DCRP enrollment can remain in PERS if they were enrolled prior to July 1, 2007. In effect, the PERS enrollment of these select DCRP-eligible individuals is “grandfathered.” However, under the law a local unit may enroll a professional in DCRP or “grandfather” their PERS enrollment only after the local unit makes the required determination that the professional is a bona fide employee (as opposed to an independent contractor) pursuant to the multi-factor IRS analysis. As the DPB Letter noted:

The Certifying Officer of each local employer must review their current and future professional employees and use the IRS criteria . . . to determine if the individual meets the requirements of an employee and thus membership in PERS . . . or DCRP.

The local units that relied upon the DCRP grandfathering provision failed to conduct the required comprehensive analysis.

For instance, the Township of Union stated that it enrolled in DCRP two elected officials who took office after 2008, but “[a]ll newly hired or appointed employees were active participants in [PERS] on July 1, 2007, so the Township maintained their PERS membership.” On that basis, Union continued the PERS enrollment of its assistant township attorney, three municipal prosecutors and its municipal public defender. The Borough of Wanaque similarly advised OSC that the PERS enrollment of its planning board attorney and borough attorney were continued based upon the borough’s interpretation of the DCRP statute that “any elected official or professional hired on or after July 1, 2007” could not be enrolled in PERS, but that individuals could remain in PERS if they were hired before July 1, 2007. Both of these local units

determined that these professionals could remain in PERS without engaging in the required detailed analysis. Following OSC's inquiries regarding these issues, Wanaque terminated PERS enrollment for the above-mentioned positions.

**3. Numerous Surveyed Local Units Relied Upon Select Factors Indicative of Employee Status to Justify Continued PERS Enrollment While Ignoring Significant Evidence of Independent Contractor Status**

Local units are required to consider all facts and circumstances in applying the relevant IRS guidelines. Nonetheless, numerous local units looked only to a few select factors indicative of employee status to support their treatment of professionals as employees and completely ignored facts and circumstances strongly pointing to independent contractor status.

For example, three of the surveyed local units asserted that a professional was properly enrolled in PERS simply because he or she is paid a salary and/or receives a Form W-2 from the local unit for tax purposes. The Township of Belleville, for instance, continued the PERS enrollment of its township attorney, assistant township attorney and assistant prosecutor, stating to OSC only that these professionals "are paid through the payroll department and receive a W-2 at year end." The township neither set forth nor analyzed any factors or circumstances other than method of payment. Nor did the township maintain or provide any documentation justifying its ultimate conclusion. Moreover, the township ignored the significant fact that all three of the professionals at issue work at private law firms, making it "unlikely" pursuant to IRS guidelines that they are government employees. Method of payment does not, by itself, justify employee status, especially where there is significant evidence of independent contractor status.

Similarly, numerous local units continued PERS enrollment following an analysis that focused on select "behavioral control" factors without considering other factors that pointed to

independent contractor status. For example, these local units permitted continued PERS enrollment for stated reasons such as:

- The attorney in question is required to attend regularly scheduled council meetings and/or must be available to assist the mayor/council with legal matters when they arise;
- The attorney must be physically present in court during regularly scheduled municipal court hours;
- The professional was required to personally provide the services at issue; and/or
- The professional did not bill by the hour for additional work.

None of these local units performed the required comprehensive analysis. None of them even considered all of the control-related factors.

Requiring township attorneys to appear at regularly scheduled council meetings and be available to assist the mayor/council does not, on its own, render the attorney an employee. That type of relationship is no different from any attorney at a private law firm who serves as legal counsel to a board of a private company. Such attorneys typically must appear at regularly scheduled board meetings and be available to assist on legal matters. Servicing a client in that manner, however, does not transform a private attorney into an employee of that client. Similarly, requiring a municipal prosecutor or public defender to appear in court during regularly scheduled court sessions does not constitute control over how that attorney practices their profession. To the contrary, it reveals only that the attorney is actually showing up for court appearances, which would be a requirement for a private attorney-contractor just as it would for a public attorney-employee.

None of these local units looked to any of the factors that indicated independent contractor status in these instances. For example, almost all of the professionals retained by these local units concurrently were engaged in a private professional practice, were offering their

services to the public and were representing other clients. In accordance with IRS guidance, strong evidence of employee status would have to be present to overcome these factors pointing to an independent contractor designation.

#### **4. Local Units Did Not Appropriately Consider Status in a Private Professional Firm**

Our review found that local units making PERS determinations repeatedly failed to engage in the proper analysis in instances in which the local service provider also is an active member, partner or associate in a private professional firm. In fact, the vast majority of the local units we surveyed failed even to recognize this significant factor that points to independent contractor status.

For example, the Township of North Bergen identified seven of its professionals who continued to be enrolled in PERS after January 2008, including three municipal prosecutors, three public defenders and the police physician. All of these individuals are associated with private professional firms. The township removed the police physician from PERS in 2011 after receiving OSC's survey. As to the other six professionals, the township advised OSC that it had reviewed their PERS eligibility in 2008 with its labor counsel and had determined that they pass the "IRS test as employees" because they are paid with municipal payroll checks and the "Township designates where and when they appear for court sessions and specifies their duties." The township's analysis, however, fails to take these individuals' private professional practice into consideration, let alone give it the weight mandated by the IRS. Nor does it comprehensively address other pertinent factors, such as the municipality's control over how these professionals perform their work. Indeed, under North Bergen's analysis all municipal prosecutors and public defenders would be considered employees, which is inconsistent with the DPB and LGS guidance.

Similarly, the City of New Brunswick identified to OSC six of its professional service providers who continued to be enrolled in PERS after January 1, 2008. Those six individuals included an assistant city attorney, three municipal prosecutors, a municipal public defender and the rent control/planning board attorney. Each of these six individuals is associated with or is a partner in a private firm. The city did not document any contemporaneous analysis as to the employee/independent contractor status of these professionals in accordance with the LGS and DPB guidance.

In response to OSC's draft report, New Brunswick set forth several factors that are indicative of employee status for some of these professionals. However, much of the documentation provided by New Brunswick further supports an independent contractor classification. For example, pursuant to the annual contract entered into between the rent control/planning board attorney and the city, this attorney is required to identify and pay for his own substitute when a scheduling conflict prevents him from fulfilling his responsibilities – rarely, if ever, the responsibility of a typical employee. Similarly, the assistant city attorney, the public defender and the rent control/planning board attorney also are required to provide secretarial assistance for themselves at their own expense. Bona fide employees typically are not required to retain a secretary at their own expense. Moreover, the attorney who supervises the city attorneys in question is himself an independent contractor, thus placing the city in the awkward position of contending these attorneys are city employees even though they are supervised by an independent contractor.

Some local units that failed to engage in the analysis required by Section 7.2 had obtained advice as to the application of Section 7.2 from the same attorney whose PERS eligibility was at issue. That is, OSC's review revealed that several local units were provided legal advice by their

municipal attorney that he or she was entitled to remain in PERS. For example, Hainesport Township and the City of Garfield both obtained legal opinions from their municipal attorney provided on the letterhead of the attorney's private law firm. Both attorneys advised that they could remain in PERS with regard to their positions. Simply put, government agencies should not be obtaining legal advice from interested parties. OSC recommends that local units seek advice on the application of Section 7.2 from DPB or from an attorney with no personal interest in the opinion to be rendered.

**D. Numerous Professionals Eventually Removed from PERS Nonetheless Accrued Credits After the Appropriate 2008 Cut-Off Date**

OSC found that at various points between April 2008 and 2011, 12 of the 58 surveyed local units removed at least one of their professionals from PERS (for a combined total of 16 professionals) after determining they were ineligible pursuant to Section 7.2. These removals each occurred after the appropriate removal date as set forth by Section 7.2. Moreover, these local units failed to carry out the removals retroactive to the 2008 cut-off date. These professionals therefore accrued pension credits for a time period for which they inappropriately were enrolled in the pension system. In fact, remaining in PERS for a period of time after January 1, 2008 permitted 2 of the 16 professionals to "vest" in the pension system and therefore become eligible to receive payments upon retirement. Such vesting occurs only after attaining ten years of PERS credits.

For example, the Borough of Magnolia stated to OSC that initially it continued PERS enrollment for its then-borough attorney after 2008 because he repeatedly advised the borough that he was permitted to remain in PERS and because DPB did not respond to the borough's inquiry about this issue. The borough's then-chief financial officer (CFO) advised OSC that she subsequently attended a League of Municipalities seminar on pensions, during which an LGS

official cautioned that “none of you in this room should have an attorney enrolled in PERS.” The CFO told OSC that she then advised the borough that the borough attorney should not be enrolled in PERS, and that she would resign if the attorney was not removed from PERS. The borough subsequently removed the attorney from PERS in 2010, but failed to make the removal retroactive to 2008.

Similarly, 18 of the 58 surveyed local units indicated that certain professionals who maintained their PERS enrollment after January 2008 subsequently were removed from PERS (for a combined total of 28 professionals) for various other reasons such as retirement, resignation or termination. However, as above, for the time period of 2008 until the retirement/termination, the professional continued to accrue PERS credits. None of these local units provided the required analysis to justify PERS enrollment for these professionals in the post 2008 time period.

We have referred the names of all of these enrollees to DPB.

**E. Specific Examples of Improper Participation in PERS and the Effect of “Tacking”**

OSC’s investigation thus revealed that none of the surveyed local units properly performed and documented the comprehensive analysis required to support the continued enrollment of their professionals who were not removed from the pension system. OSC found that a majority of the professionals we reviewed (202 out of 332) are apparently engaged in a private professional practice, offer their services to the public, and work for other clients, and therefore are unlikely to be appropriately considered an “employee” of a local unit. Further, OSC found that 43 of the 202 have continued to “tack” together multiple PERS enrollments. Considering that the provision of services to multiple entities is itself indicative of independent

contractor status, it is particularly unlikely that such “tackers” qualify as employees of any one public entity, let alone all of them at the same time.

Below are details pertaining to five examples from the group of professional service providers that OSC interviewed. Other suspect enrollees may have a larger number of inappropriate PERS enrollments and/or higher potential pension benefits. These examples are set forth merely to illustrate the failure of these local units to consider all relevant facts and circumstances in making PERS eligibility determinations, as well as the substantial financial impact of this failure.

The information OSC obtained from these five professionals corroborates OSC’s findings that Section 7.2 has been rendered ineffective and that the 202 noted individuals are ineligible for PERS as they were retained through a PSC or are “unlikely,” pursuant to IRS guidelines, to be properly deemed government employees. All five of these attorneys work in private firms, offer their legal services to the general public and represent other clients (public and private). All five have significant additional indicia of independent contractor status and comparatively nominal indicia of employee status. Further, four of the five tack together multiple PERS enrollments. An in-depth review of their particular circumstances and the relevant IRS factors leads us to conclude that despite their PERS enrollment these private practitioners are not pension-eligible government employees.

#### Attorney 1

Attorney 1 serves as the borough attorney/director of the legal department for the Borough of Fairview with an annual compensation of \$191,654, and also is legal counsel for the Guttenberg Board of Education with annual compensation of \$50,000. He is enrolled in PERS

for both of these part-time positions, for a combined annual compensation of \$241,654. He has accrued more than 22 years of PERS credits.

Attorney 1 also is engaged in the private practice of law as a solo practitioner. OSC interviewed Attorney 1 at his private law office. He stated that he devotes approximately 50 percent of his time to his private law practice, billing approximately 20 hours per week in providing services to other private and public clients (for which he is not in PERS). Attorney 1 further stated that he dedicates approximately 20 to 30 hours per week to his work for Fairview, and 10 to 15 hours per week to Guttenberg.

Regarding Fairview, Attorney 1 revealed the following, which are evidence of independent contractor status under the IRS guidelines:

- he does not have his own office at the borough or an on-site computer;
- he does not have letterhead or business cards;
- he does not receive a performance evaluation;
- he does not have assigned administrative/clerical assistance (although he periodically receives administrative assistance from several individuals in various borough departments); and
- he does some of his work for Fairview at his private law office where he is assisted by his secretary, who is an employee of his law firm.

Attorney 1's statements also set forth the following indications of employee status:

- he received a personnel handbook from the borough;
- he reports to the mayor, borough administrator and borough council;
- the borough offered him health benefits, although he advised OSC that he declined them;
- he supervises the zoning board attorney, rent level attorney, municipal prosecutor and municipal public defender, although he does not conduct formal performance evaluations of these professionals; and
- he is paid through Fairview's payroll and receives a Form W-2 at year end.

In response to OSC's draft report, Attorney 1 further asserted that he shares an office with Fairview's Assistant Borough Administrator (ABA) and that he provides verbal performance evaluations to the ABA regarding the attorneys he supervises. However, the ABA advised OSC

that Attorney 1 actually has not provided any such verbal evaluations to him and that he does not share an office with Attorney 1. Specifically, the ABA explained that Attorney 1 does not have a desk in the ABA's office, but simply utilizes his conference table and office three or four times a month for meetings. He also stated that Attorney 1 does not have an e-mail address at Fairview or a computer identification login.

Moreover, municipal resolutions provided to us by Fairview demonstrate that Attorney 1 is appointed to his borough position on an annual basis in a manner characteristic of an independent contractor. Specifically, Fairview adopted resolutions in 2008, 2009 and 2010 stating that the contract for the services of a borough attorney was being awarded under the "fair and open" contracting process, that the solicitation of qualifications was publicly advertised and that the proposals were publicly opened. The resolutions also generally state that Fairview determined that the proposal of Attorney 1 best serves the needs of the borough and authorized the mayor and the borough to execute a contract with Attorney 1 "whose office is located at [address of Attorney 1's private firm]." Consistent with these resolutions, Fairview and Attorney 1 executed an "Employee's Contract Agreement" each year. Despite this heading on the document, the resolutions and the corresponding public contract advertisements make clear that these contracts were awarded under New Jersey's public contract laws and therefore are PSCs. As such, pursuant to Section 7.2, Attorney 1 should have been automatically removed from PERS on that basis as of January 2008.

With regard to his position with Guttenberg, the following are indicative of Attorney 1's independent contractor status:

- he does not have an office or on-site computer;
- he does not have letterhead or business cards;
- he does not supervise anyone;
- he does not receive administrative/clerical assistance;

- he does not receive reimbursement for expenses such as travel, photocopying and postage;
- he performs some of his work for Guttenberg at his private law office where he is assisted by his secretary; and
- he does not receive a performance evaluation.

Satisfying a few factors that are indications of employee status, Attorney 1 stated that he reports to the Superintendent of the Guttenberg School District, receives health benefits, is paid through the school district payroll and receives a Form W-2 at year end. In response to OSC's draft report, Attorney 1 further stated that he also is assigned work by the board of education and the business administrator, and is required to report all of his work to the board and the superintendent. Additionally, Attorney 1 and Guttenberg executed each year an "Employee's Contract Agreement" that states that Guttenberg "employs" Attorney 1.

The minimal evidence of employee status in this instance is not enough to overcome the likelihood, pursuant to IRS guidance, that Attorney 1 is acting as an independent contractor. The mere use of the verb "employ" in Attorney 1's annual contract with Guttenberg is not dispositive of the PERS eligibility analysis. Such contracts must be considered in their entirety and the parties may not avoid state pension law simply by using a particular word in a document.

If Attorney 1 were to retire tomorrow, his annual pension benefit would be approximately \$97,196. Removing Attorney 1's PERS credits as of the 2008 cut-off date would reduce his estimated annual pension benefit to \$67,776, a difference of \$29,420 annually.

#### Attorney 2

Attorney 2 currently is enrolled in PERS as municipal public defender for six separate municipalities (Borough of Audubon, Borough of Barrington, Borough of Gibbsboro, Gloucester City, Haddon Township and Borough of Somerdale) with combined annual compensation of

\$43,064. He has accrued more than 13 years of PERS credits. He also is concurrently engaged in the private practice of law as a solo practitioner.

According to Attorney 2's statements, the following are evidence of his independent contractor status:

- none of the municipalities provide him with his own office (Gloucester City and Audubon provide him with a desk used by him and others in a lobby area; Haddon provides him with a desk for his sole use in the hallway; and Gibbsboro provides him with office space also used by others);
- none of the municipalities provide him with a computer, stationary or similar supplies (he stated that he is supplied with legal pads and post-it notes);
- none of the municipalities provide him with health benefits, or vacation or sick days;
- he does not supervise anyone;
- he does not receive a performance evaluation from any of the municipalities; and
- he is not provided with clerical assistance from any of the municipalities (he stated that various members of the court staff assist him when needed).

Attorney 2 also satisfies some factors that point to employee status. Specifically, he is paid through each local unit's municipal payroll and receives a year-end Form W-2 from each. In response to OSC's draft report, Attorney 2 further asserted that each of these municipalities instruct him as to when, where and how to perform his work. With the exception of being subject to the requirements of the municipal court schedule, however, Attorney 2 provided no explanation or documents evidencing specific control or instruction over his work by these municipalities.

Two of the six municipalities at issue responded to OSC's draft report. Specifically, Haddon Township advised that in light of OSC's findings the township undertook its own analysis and subsequently sent a letter to DPB stating that the township believes Attorney 2 "is ineligible for inclusion in PERS." The Borough of Somerdale contended that a former LGS official had previously told Somerdale that public defenders are per se employees for pension eligibility purposes and that it would therefore be unnecessary to conduct the IRS test. In

response to our ensuing inquiries, that former LGS official informed us that he had not made such a statement and noted that such a statement would be contrary to LGS' written guidance and the verbal guidance provided by LGS and DPB at the training sessions. Both the written guidance and the presentation slides memorializing the verbal training corroborate the LGS official's assertion.

The fact that Attorney 2 is engaged in the private practice of law renders it unlikely that he is an employee at any of these six local units, let alone all. He makes his legal services available to the public, represents other clients and advertises his services by way of a website that states he is an "experienced defense attorney in all types of traffic cases." The minimal indications of employee status in these circumstances are insufficient to overcome the conclusion that Attorney 2 is an independent contractor.

If Attorney 2 were to retire tomorrow, his annual pension benefit would be approximately \$10,309. Retracting his PERS credits received after the 2008 cut-off date would reduce his pension benefit to zero, as it would preclude him from vesting and thereby render him ineligible for pension benefits.

### Attorney 3

Attorney 3 serves as the chief municipal prosecutor and township attorney for Pennsauken Township; the municipal attorney for the Borough of Barrington, the Borough of Brooklawn, the Borough of Merchantville and Oaklyn Borough; and municipal prosecutor for the Borough of Gibbsboro. Attorney 3 previously was enrolled in PERS for all of these part-time positions. The local units ultimately removed him as municipal attorney (although not all of the removals were given retroactive effect as required), and thus he currently remains in PERS only for his positions as municipal prosecutor in Pennsauken and Gibbsboro, with a combined

annual compensation of \$37,156. Attorney 3 stated to us that he advised each of the local units where he served as municipal attorney to remove him from PERS because it was his opinion that borough/township attorneys no longer could be enrolled in PERS pursuant to Section 7.2. He has accrued more than 21 years of PERS credits.

Attorney 3 also is engaged in the private practice of law. Through his private law practice, Attorney 3 makes his services available to the public and provides those services to other private and public clients. Attorney 3 informed OSC that he devotes 90 percent of his time to his private law practice.

OSC interviewed Attorney 3 at his private law office. With regard to his positions as municipal prosecutor, Attorney 3 stated the following, which are evidence of independent contractor status:

- he does not have an assigned office;
- he is not provided with an on-site computer;
- he is not provided with letterhead or business cards;
- he does not receive health benefits from Gibbsboro (but he receives them from Pennsauken); and
- he does not receive any sick or vacation time.

Attorney 3 is paid through each local unit's municipal payroll and taxes are deducted from his pay, which is an indication of employee status. The Borough of Gibbsboro sent OSC a response to our draft report in which the borough further noted that Attorney 3 "is required to appear personally at each municipal court session which is generally once a month." Gibbsboro also stated that it provides Attorney 3 with "[a]ll the equipment needed to perform his services, recording services, courtroom, clerks, etc." However, requiring a prosecutor to prosecute in a functional courtroom and only while court is in session is not a significant manifestation of employer control. Far more substantial and specific assertions of "control" would be needed to provide a foundation for an employee designation in these circumstances.

In view of the relevant IRS guidance as well as the above-mentioned circumstances, it does not appear that Attorney 3 is appropriately considered a government employee for either of his current PERS enrollments. Although his current annual compensation for these positions is \$37,156, if Attorney 3 were to retire tomorrow his annual pension benefit would be approximately \$55,181, as his benefits would be based upon the average of his three highest yearly earnings including the years he was enrolled for seven public positions. Removing these credits he received after 2008 would reduce his pension benefit to \$43,496, a difference of \$11,685 annually.

#### Attorney 4

Attorney 4 serves as the borough attorney in the Borough of Elmwood Park with annual compensation of approximately \$53,840, and in the Borough of Leonia with annual compensation of approximately \$75,000. He also serves as the municipal prosecutor in the Township of Saddle Brook with annual compensation of \$6,516. He currently is enrolled in PERS for all three of these part-time positions with combined annual compensation of approximately \$135,356. In total, Attorney 4 has accrued more than 20 years of PERS credit. Attorney 4 also is engaged in the private practice of law with two other partners.

OSC interviewed Attorney 4 at his private law firm. According to Attorney 4's statements regarding his three public-sector positions, the following are evidence of independent contractor status:

- he does not have his own office;
- he does not have his own computer or internet access;
- he does not have letterhead or business cards;
- he does not receive health benefits, vacation days or sick time (he was offered health benefits from Elmwood Park, but declined);
- he receives minimal direction on his legal work;
- he is provided with only nominal clerical assistance, such as copying and mailing;

- he performs some of his work for the local units at his private law office, where he is assisted by his secretary (an employee of his law firm); and
- he is not required to personally perform all services for Elmwood Park and Leonia; he has on occasion sent an associate from his law firm to perform those services when he has had a scheduling conflict.

With regard to factors indicative of employee status, Attorney 4 stated that he reports to the mayor and borough council in Elmwood Park and Leonia. He also stated that he received a personnel policy from Elmwood Park.

Through his private law practice, Attorney 4 makes his services available to the public and provides services to other private and public clients. In fact, he provides legal services to 12 other local units, serving as borough attorney for the boroughs of Paramus and Oradell, planning board attorney for the Borough of Little Ferry, zoning board attorney for the Township of River Vale, labor counsel for the Borough of Harrington Park and the Township of South Hackensack, and municipal prosecutor for the Township of Rochelle Park. He currently is not enrolled in PERS for any of these positions. Attorney 4 was removed from PERS by Little Ferry in September 2010 after Little Ferry determined, with assistance from DPB, that he was ineligible. He was removed by River Vale in October 2010, although River Vale's removal was not made retroactive as it should have been. *See above, Section IV.D.*

Seeking a determination from the IRS as to Attorney 4's employee/independent contractor status, in January 2010 Elmwood Park filed with the IRS a form entitled "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding." Although the IRS responded to Elmwood Park that Attorney 4 should be considered an employee, OSC found information provided by Elmwood Park to the IRS to be substantially incomplete and in several material instances incorrect. For example, in response to a question as to Attorney 4's daily routine, such as schedule and hours, Elmwood Park simply

responded, “Attends meetings and performs other work.” However, Attorney 4 is not at Elmwood Park five days a week. He informed us that he “stops by” there only periodically. Further, the form asks, “Is the worker required to provide the services personally?” Elmwood Park responded, “Yes.” This answer is not correct as Attorney 4 advised OSC that he periodically sends an associate from his law firm to cover for him at Elmwood Park, a factor that is indicative of independent contractor status. Along those same lines, the form also asks, “If substitutes or helpers are needed, who hires them?” and “Who pays the substitutes or helpers?” Elmwood Park responded “N/A” to both questions. These answers also are inaccurate. Attorney 4 stated to us that his associates who are paid by his law firm periodically perform his work for Elmwood Park, and that his private secretary, who also is paid by his law firm, similarly assists him with some of his work for the borough.

If Attorney 4 were to retire tomorrow, his annual pension benefit would be approximately \$49,835. Removing Attorney 4’s PERS credits as of his 2008 cut-off date would reduce his annual pension benefits to approximately \$16,692, a difference of \$33,143 annually.

#### Attorney 5

During the time period covered by our review, Attorney 5 served as the township attorney for the Township of Little Falls and was enrolled in PERS for that position with most recent annual compensation of \$27,244. He accrued nine years and nine months of PERS credits. Attorney 5 also engages in the private practice of law with one other partner. Attorney 5 stated to OSC that he previously contacted DPB to inquire as to his status as an employee or independent contractor, but did not receive a response.

OSC interviewed Attorney 5 at his private law firm. According to his statements regarding his position as township attorney, the following are evidence of Attorney 5's independent contractor status:

- he did not have his own office or an on-site computer;
- he did not use township letterhead;
- he did not receive health benefits;
- he did not receive sick or vacation time;
- he did not receive a formal performance evaluation;
- he never received any employee handbook;
- he was not provided with any training;
- the township did not reimburse him for any business expenses incurred as township attorney;
- he was not provided with assigned administrative/clerical assistance;
- he performed some of his work at his private law office where he was assisted by his secretary; and
- he was not required to perform all services personally (for example, if he had a scheduling conflict, he sent his partner to cover for him).

In addition to Attorney 5's annual compensation as township attorney, Attorney 5's law firm received a \$12,500 per month retainer from Little Falls for additional legal work beyond his duties as township attorney, and he also billed Little Falls an additional \$150 per hour for litigation services he performed on the township's behalf.

With regard to facts and circumstances pointing to employee status, Attorney 5 was paid through the township's payroll and received a year-end Form W-2. These are, however, insufficient to overcome the substantial evidence of independent contractor status in these circumstances. Moreover, Attorney 5 also was PERS-ineligible because he was retained during at least some of the relevant time period pursuant to a PSC awarded following a public procurement process.

Attorney 5 applied for retirement benefits in May 2012 and his application currently is pending at DPB. His estimated annual pension benefit is \$4,829. Removing Attorney 5's PERS

credits as of his 2008 cut-off date would reduce his estimated annual pension benefit to \$2,458, a difference of \$2,371 annually.

\* \* \*

Despite the significant evidence of independent contractor status in these examples, the local units at issue classified these individuals as employees for PERS purposes without engaging in the statutorily required analysis. The above examples further demonstrate that the tacking of these part-time positions can result in significant annual pension benefits for the individuals in question.

#### **F. Potential Financial Impact**

In total, OSC is referring to DPB the names of 202 PERS enrollees who are retained through a PSC and/or have significant indicia of independent contractor status, making it likely that at least one of their PERS enrollments is inappropriate. These 202 enrollees have accrued pension credits that could result in the state paying them a total of approximately \$1.9 million per year in state-funded pension benefits. Removing these professionals as of the 2008 cut-off date would significantly reduce the future annual pension payouts for these individuals. First, it would preclude, based upon their years of service, many of them from vesting, rendering them ineligible for any pension benefits. *See, e.g.*, Section IV.E (discussion of Attorney 2). Second, it would reduce the annual eligible compensation and length of service credits accrued by the vested individuals, thereby reducing their ultimate pension payouts. Using ten of our interviewees as an example of potential savings, the estimated cost of the annual pension benefits for these ten individuals is \$411,852. If their improper PERS credits were removed as of January 1, 2008, the estimated cost would be \$260,379, a 37% savings of approximately \$151,473 annually.

OSC conservatively estimates that a review of the remaining 515 municipalities and 597 school districts not included in our survey could yield hundreds of other inappropriately enrolled professionals in PERS, and millions of dollars in pension savings each year.

The failure of local units to conduct the statutorily mandated analysis and remove ineligible professionals from PERS has financial ramifications even beyond the pension payments themselves. Specifically, PERS enrollees who also are enrolled in the State Health Benefits Plan (SHBP) are entitled to state-funded lifetime health benefits upon accruing 25 years of PERS credits. Forty-two of the professionals being referred to DPB currently are enrolled in SHBP. Ten of them already have accrued 25 or more years of pension credits and six have accrued between 20 and 25 years of credits. Using current SHBP expense rates, OSC conservatively estimates that the potential future cost to the public of retiree health benefits for these 16 professionals with suspect enrollments who have accrued 20 or more years of PERS credits is \$307,111 annually. Significant additional potential costs are associated with other suspect enrollees who may ultimately become eligible for lifetime health benefits.

#### **G. Additional Efforts Are Necessary to Address Inappropriate PERS Enrollments**

In April 2011, legislation was enacted that institutes additional safeguards relating to PERS enrollment requirements. That legislation requires that each local pension certifying officer and his or her immediate supervisor certify the eligibility of all current enrollees on an annual basis as well as the eligibility of all new enrollees. The legislation further requires the certifying persons to acknowledge that anyone knowingly providing false information in an effort to defraud the pension system may be found guilty of a crime of the fourth degree. DPB has advised OSC that it is developing more specific procedures and guidance concerning this certification requirement.

While this certification requirement represents progress in the effort to ensure the integrity of the state pension system, the findings of this report render it far from clear that this requirement will itself be sufficient to remedy the full extent of inappropriate PERS enrollments. That is, in view of the pervasive nature of the problems we have identified and the substantial number of local units that missed the mark so badly in carrying out the 2007 statutory mandate, additional measures appear necessary.

Contributing to these challenges is the limited resources at DPB's disposal in overseeing compliance with Section 7.2. DPB advised OSC that DPB staff review a questionable PERS enrollment only when DPB receives a specific tip or the media reports on a specific enrollee whose PERS participation appears questionable. In fact, DPB has been using IRS guidance as far back as 1993 to make a determination as to whether an enrollee is an employee or independent contractor, but only on this reactive basis. DPB advised OSC that it currently has only one primary investigator reviewing and investigating these cases. This investigator is able to dedicate only half of his time to these efforts. DPB informed OSC that two other staff members assist with reviewing these issues as time permits; these cases, however, constitute only a small portion of their job responsibilities. The number of questionable PERS enrollees we have identified, along with the other findings of this report, suggest that the time has come to allocate additional resources to this effort, at least on a temporary basis.

Recent successful efforts in New York to address similar instances of pension abuse support that conclusion. Unlike the New Jersey State Comptroller, the New York State Comptroller is the administrator of the New York state pension system, which includes New York's State and Local Employees' Retirement System (ERS). The New York State Comptroller recently established a Pension Integrity Bureau, which currently is staffed with ten

employees. Three of those employees are tasked solely with reviewing, on a proactive basis, whether particular professional service providers are independent contractors or employees pursuant to applicable guidelines. With the help of these employees, New York state has entered into settlement agreements with more than 30 pension enrollees found to have received improper service credits. In some instances the settlements included significant fines as well as pension benefit recoveries. Numerous other individuals voluntarily have surrendered pension membership or service time that should not have been credited. Other individuals are in various stages of administrative or judicial review regarding whether pension credits had been improperly reported.

Like many of the examples cited in this report, many of the professionals removed from ERS had been providing concurrent services to multiple local government entities. One example is an attorney who was providing legal services to five separate school districts. He ultimately was found to be an independent contractor and was removed from ERS based upon factors such as the school districts did not supervise and control how his work was performed; the attorney had inconsistent work days/hours; the school districts did not provide work space or legal reference materials; the attorney performed school district work at his private law office; and the attorney concurrently provided services to multiple school districts while at the same time offering his services to the public. As part of a settlement agreement, that attorney was required to pay the state more than \$240,000, including \$180,000 in pension benefit repayments.

## **V. Recommendations**

1. OSC is forwarding to DPB the names of the 202 professional service providers referenced in this report. OSC recommends that DPB review the pension credits accrued by these individuals and remove any pension credits accrued in violation of Section 7.2.

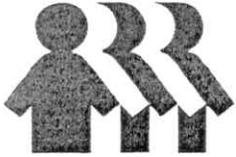
2. In light of the many incorrect explanations and justifications set forth by local units as to PERS eligibility issues, OSC recommends that DPB develop a comprehensive checklist to be used by local units to certify the PERS eligibility of professional service providers. OSC recommends that the certification form expressly incorporate the IRS presumption that a professional who engages in a private professional practice offering his or her services to other clients is “unlikely to be a government employee.” The certification form developed by the Office of the New York State Comptroller may be used as a model, and is attached as Appendix A. OSC recommends that the checklist be sent to all local units with a specific deadline for response.

3. As to any current PERS enrollee who is a professional service provider and who is determined to be ineligible for PERS enrollment pursuant to Section 7.2, OSC recommends a retroactive review of the provider’s earlier pension credits to ensure that all improperly obtained credits have been addressed.

4. In view of the potential to achieve significant long-term savings, OSC recommends that consideration be given to allocating additional state resources to address questionable PERS enrollments.

5. When a municipality seeks advice concerning the application of Section 7.2, OSC recommends that such advice be obtained from DPB or an impartial attorney who does not have a personal interest in the outcome of the opinion.

# APPENDIX A



Office of the New York State Comptroller  
 New York State and Local Retirement System  
 Employees' Retirement System  
 Police and Fire Retirement System  
 110 State Street, Albany, New York 12244-0001

# Certification for Individuals Engaged in Certain Professions

**RS 2414**  
 (Rev. 10/11)

You must complete this form for all Attorneys, Physicians, Engineers, Architects, Accountants or Auditors engaged **on or after April 1, 2008**. For individuals who are determined to be elected officials, public officers or employees, return this form certified by the Chief Fiscal Officer to the Retirement System within 30 days, along with supporting documentation.

_____	_____	_____
Individual's Name	Employer	Registration Number
_____	_____	_____
Individual's Title	Employer Location Code	Date of Appointment

If the individual is an **Elected Official**, check here  and sign and date on the reverse side of this form and return to the Retirement System. You do not need to complete the Employee/Independent Contractor questions below.

If the individual is a **Public Officer**, check here  provide the documents noted immediately below and sign and date on the reverse side of this form and return to the Retirement System. You do not need to complete the Employee/Independent Contractor questions.

1. The resolution of the governing board creating the position
2. The resolution of the governing board appointing the individual to the position
3. A copy of the oath of office (if multiple oaths, provide a representative sample)
4. Information documenting any residency requirements (if required) or the enactment of local legislation waiving or changing the residency requirement

For **all other individuals**, complete the Employee/Independent Contractor questions below.

Circle YES or NO for each question. If most of the selections appear in the Employee column, the individual may be an employee. If most of the circles appear in the Independent Contractor column, the individual may appropriately be classified as an independent contractor. Where the selections are split between both columns, weight should be given to the amount of control the employer has over the individual's work in making a determination.		
<b>If the answer to a question is not known, please indicate in the answer space that it is "not known".</b>	<b>Employee</b>	<b>Independent Contractor</b>
1. Does the employer have the right to control, supervise or direct the individual performing the services, not only as to result but as to how assigned tasks are to be performed?	YES	NO
2. Does the individual report to a certain person or department at the beginning of or during each work day?	YES	NO
3. Are the individual's decisions subject to review by the employer?	YES	NO
4. Does the employer set the hours to be worked?	YES	NO
5. Does the individual work at established and fixed hours?	YES	NO
6. Does the employer maintain time records for the individual by means of either a timekeeping system/or submission of a sample record of activities?	YES	NO
7. Has the employer established a formal job description for the position? <b>If yes, please provide job description.</b>	YES	NO

8. Has the employer's governing board formally created the position with the approval of the local civil service commission where necessary? <b>If yes, please provide documentation.</b>	YES	NO
9. Does the employer prepare performance evaluations for the individual? <b>If yes, please provide a representative evaluation.</b>	YES	NO
10. Does the employer have the right to require the individual to be trained related to their employment (e.g., sexual harassment prevention)?	YES	NO
11. Does the employer provide the individual with permanent workspace and facilities (e.g., office, furniture, utilities)?	YES	NO
12. Does the employer provide the individual with equipment and support services (e.g., computer, telephone, supplies, clerical assistance, etc.)?	YES	NO
13. Is the individual covered by a contract negotiated between a union and the employer?	YES	NO
14. Does the individual have a contract with the employer? <b>If yes, please provide contract.</b>	NO	YES
15. Does the employer pay the individual for the performance of services through the submission of a voucher?	NO	YES
16. Are tax withholding and employee benefit deductions made from the individual's paychecks?	YES	NO
17. Does the individual receive any fringe benefits (e.g., health insurance, sick or vacation time)?	YES	NO
18. Is the individual authorized to hire others, at the expense of the individual or a third party, to assist the individual in performing work for the employer? <b>If yes, please provide explanation.</b>	NO	YES
19. Is the individual currently performing substantially the same services for other public employers?	NO	YES
20. Is the individual also employed or associated with another entity that provides services to the employer by contract, retainer or other agreement?	NO	YES
21. Does the individual provide professional services to the public?	NO	YES

If the individual is an **Employee**, check here ; provide the information noted below and sign and date the bottom of this form and return to the Retirement System.

- ✓ Documentation of the employment of the individual and decision to provide Retirement System benefits (e.g., minutes of the employer's governing board, contracts, agreements, engagement letters, memos, etc.).

If the individual is an **Independent Contractor**, check here  and maintain this document for your records.

I, the Chief Fiscal Officer of this participating employer, have reviewed and completed the Certification for Individuals Engaged in Certain Professions and certify that I have determined that the individual is designated as indicated above:

Please print name: \_\_\_\_\_ Title: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_ Phone No.: \_\_\_\_\_

If you have any questions, please contact us at 518-474-7736.

This certification form and all supporting documentation **for each individual** determined to be an elected official, public officer or employee should be mailed to:

New York State and Local Retirement System  
Pension Integrity Bureau Maildrop 7-3  
110 State Street, Albany NY 12244-0001