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Fasolo v. Bd. of Trustees  
Cite as 6 *N.J.A.R.* 4

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**WILLIAM FASOLO,**  
Petitioner,  
v.  
**BOARD OF TRUSTEES,  
PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM,**  
Respondent.

Decided July 1, 1980

**Initial Decision**

**SYNOPSIS**

Petitioner appealed from the decision of the Board of Trustees of the Public Employee's Retirement System denying the inclusion of his salary as a town sewer attorney and other "vouchered" fees as part of the base upon which his retirement benefits should be calculated.

The administrative law judge found that from the years 1969 to 1975 the petitioner had been paid over \$60,000 in salary payments and over \$75,000 in vouchered fees as the town sewer attorney. Pursuant to *N.J.S.A.* 43:15A-7(r) and *N.J.A.C.* 17:2-4.1 the administrative law judge determined that the petitioner's salary payments should be recognized as creditable for salary payments since these payments were made as the result of a bonafide employer-employee relationship which existed between the town and the petitioner.

Further, the judge found that the salary received was not an adjustment granted primarily in anticipation of petitioner's retirement nor were the salary payments additional remuneration for performing temporary duties beyond the regular work day.

Regarding the vouchered fees, however, the administrative law judge concluded that these could not be included in the definition of compensation since fluctuating fees cannot constitute any part of a base or contractual salary and they do not form the basis for an employer-employee relationship.

Accordingly, the administrative law judge ordered that petitioner's salary as sewer attorney be included in his salary base for the calculation of retirement benefits.

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**Marvin H. Gladstone, Esq.**, for petitioner

**Prudence H. Bisbee**, Deputy Attorney General, for respondent  
(John J. Degnan, Attorney General of New Jersey, attorney)

**CLANCY, ALJ:**

Petitioner has appealed from a determination of the Board of Trustees of the Public Employees' Retirement System which denied his application for the inclusion of certain monies received in the calculation of his retirement benefits.

During the calendar years 1970, 1971, 1972, 1973, and 1974 and the first seven months of 1975, petitioner was a Magistrate in Tenafly, New Jersey. In the calendar year 1970, he also was the Borough Attorney for Demarest, New Jersey. From August 1, 1971 until approximately August 1, 1975, he served as the Demarest Borough Sewer Attorney. Upon retirement, petitioner was granted a "temporary position" which was calculated on the basis of fixed salaries which he had received; excluded from the calculation base were "vouchered fees". Subsequently, pursuant to advice rendered by the Attorney General, the Board of Trustees recomputed petitioner's pension benefits solely on the basis of his Magistrate's salary. Petitioner contends that (a) the "salary" he received for services rendered as Demarest's Sewer Attorney, and (b) other amounts of money he received for "vouchered fees" should be included as part of the base upon which his retirement benefits should be calculated.

The evidence produced in this matter revealed the following income history:

1969

Annual Retainer as Demarest Borough Attorney	\$ 600.00
Vouchered Fees as Demarest Borough Attorney	5868.75
Total Received	\$ 6468.75

1970

Annual Retainer as Demarest Borough Attorney	\$ 600.00
Vouchered Fees as Demarest Borough Attorney	4248.70
Total Received	\$ 4884.70

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## 1971

Salary as Demarest Sewer Attorney (August-December)	\$ 5000.00
Vouchered Fees as Demarest Sewer Attorney	3000.00
Estimated Vouchered Fees as former Demarest Borough Attorney	8550.39
Total Received	\$16550.39

## 1972

Salary as Demarest Sewer Attorney	\$12000.00
Vouchered fees as Demarest Sewer Attorney	4380.75
Estimated Vouchered Fees as former Demarest Borough Attorney	5251.23
Total Received	\$21631.98

## 1973

Salary as Demarest Sewer Attorney (entire year)	\$18000.00
Vouchered Fees as Demarest Sewer Attorney	2833.71
Estimated Vouchered Fees as former Demarest Borough Attorney	3005.00
Total Received	\$23838.71

## 1974

Salary as Demarest Sewer Attorney	\$25000.00
Vouchered Fees as Demarest Sewer Attorney	40165.58
Total Received	\$65165.58

## 1975

Vouchered Fees as Demarest Sewer Attorney	\$ 350.00
Total Received	350.00

Whether money received is creditable for pension purposes is essentially controlled by the provisions of *N.J.S.A.* 17-2-4.1 and *N.J.S.A.* 43:15A-6(r). *N.J.A.C.* 17:2-4.1 provides that a member's base or contractual salary shall be creditable for retirement purposes, while *N.J.S.A.* 43:15A-6(r) reads as follows:

'Compensation' means the base or contractual salary for services as a employee, which is in accordance with the established salary

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policies of the member's employer for all employees in the same position, but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular work day or the regular work year."

Further interpretive guidance is found in the *Att'y Gen. Form Op. 1976-No. 27*, which was drafted specifically for this case. Key portions of that document state the following:

- i. . . . the compensation of a part-time municipal attorney and other similar part-time professional positions is covered by the Act to the extent of a *regular fixed salary (retainer) covering services directly attributable to the functioning of the public office* (as hereinafter more particularly defined).
- ii. Compensation does not include for purposes of the calculation of the pension benefits provided by the Act those payments for professional services normally billed on a fee basis for each item of work performed beyond the accepted responsibilities of the position;
- iii. . . . creditable compensation for purposes of the pension benefits provided by the Act is confined to the *'base or contractual salary'* which is in accordance with established salary policies of the member's employer and *paid to its employees in regular periodic intervals in specific regular amounts*. These installments are usually biweekly or monthly but not infrequently are paid quarterly or annually, as for example the fixed . . . annual salary of legislative members.
- iv. . . . the comparable terms of the statutory language governing eligible credit in the Act require that part-time professional services performed for a local governing body and compensated for by fluctuating fees for each item of available work are not eligible for pensions credit. Those services are generally performed by an independent contractor on a case-by-case basis rather than as part of the basic responsibility of a regularly salaried employee of a governmental entity. On the other hand, those established professional services performed in a statutory office of position and compensated for by a fixed annual retainer (salary) paid at *regular, periodic intervals in specific regular amounts should be regarded the services of an 'employee' for pension credit purposes.*;
- v. *It must be emphasized that what is involved is either the amount of compensation paid without regard to the actual performance*

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*of services simply to 'retain' the professional or to cover those general services normally associated with the holding of the office itself. In this connection, "... whether a compensation arrangement or certain specific items of work are eventually eligible or ineligible for pension credit may involve a factual question as to the presence of a bona-fide employer-employee arrangement between the parties in a given situation to be determined by the Board of Trustees of the Retirement System.*

- vi. The touchstone is the nature of the services rendered—*i.e.* are they nominal, directly related to the office itself and thus arguably rendered as an 'employee' or are they more substantial, usually rendered on a fee basis and thus arguably performed by an 'independent contractor' for his client? Only the actual or reasonably equivalent amount to compensate for the former is includable.; and,
- vii. In conclusion, you are advised that for purposes of pension credit, services performed as a part-time municipal attorney or similar professional services for local governmental subdivisions *compensated for by a fixed annual retainer are to the extent described above generally regarded to be eligible services for coverage by the Act* where the retainer or salary can be demonstrated to be paid under regular salary policies of the governmental entity and as incident to services performed in a governmental office or employment. Those legal or other professional services performed for a fluctuating fee for each item of professional service rendered to the local unit should not be considered to be eligible for pension credit as remuneration for services performed in government office or employment—subject to whether a bonafide employer-employee relationship existed. (Emphasis added.)

(I)

With respect to petitioner's "salary" as Demarest Sewer Attorney, certain pivotal facts compel the conclusion that this amount of money should be a part of the base upon which retirement benefits are calculated:

- (a) the salary amount (to a maximum of \$60,000) was specifically set forth in a detailed written contract executed in 1969
- (b) it is uncontroverted that petitioner performed such services (legal and otherwise) as dealing with the problems of homeowners, contractors and municipal and county authorities, contracts, reviewing specifications, negotiating with banks

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- regarding bond anticipation notes, conducting field inspections, attending meetings and conferences, analyzing cost studies, traveling to Trenton, New Jersey and Washington, D.C. and pursuing various aspects of the "bonding work" in exchange for the salary he received pursuant to the contract and local ordinances;
- (c) local ordinances dated October 18, 1971, June 19, 1972 and March 12, 1973 all state There shall be paid to the Sewer Attorney a salary for legal services rendered for and in connection with the sanitary sewer projects of the Borough of Demarest . . . inclusive of all legal services except litigation, arbitration, and condemnations, for which latter legal services compensation shall be paid upon the presentation of bills properly and duly sworn to as required by law";
  - (d) all payments of "salary" monies were net amounts, deduction having been made for social security, withholding taxes, pension contributions and insurance;
  - (e) the salary monies were paid to petitioner on a regular monthly basis (except in 1974), in specific regular amounts; and,
  - (f) it is uncontroverted that the distribution of the salary monies (\$5000 in 1971, \$12000 in 1972, \$18000 in 1973 and \$25000 in 1974) was proportionate to the work done. Thus, salary was paid for the actual performance of services and not simply to "retain" petitioner or to cover those general services normally associated with the holding of the Sewer Attorney position.

In short, I **FIND** that the facts herein square with the statutory and regulatory requirements as illuminated by the Attorney General's Formal Opinion. I **FIND** that a bona-fide employer-employee relationship existed between the Borough of Demarest and the petitioner, as its Sewer Attorney because (1) the services he rendered were directly related to his position, (2) it has not been demonstrated that the services rendered are of a type usually rendered on a fee basis and/or by an independent contractor, (3) the indicia of such a relationship have been established, and (4) the parties herein envisioned and provided for a dual-natured arrangement which recognized that some services normally provided by independent contractors (such as litigation, arbitration and condemnation) would be billed separately by the petitioner. Furthermore, I **FIND** that the salary received was not an adjustment granted primarily in anticipation of the member's retirement, since the record is devoid of any evidence in this respect.

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Similarly, the salary was not "additional remuneration for performing temporary or extra-curricular duties beyond the regular work day or the regular work year." Since the monies paid were directly related to the performance of the position's regular, attendant duties and responsibilities, I **CONCLUDE**, therefore, that the Petitioner is entitled to have the salary he received as Demarest Sewer Attorney recognized as creditable for pension purposes.

(II)

Regarding the vouchered fees, however, I am persuaded that the Board of Trustees must prevail. Clearly, such fluctuating fees cannot constitute any part of a base or contractual salary because of their inherent nature. In addition, I officially notice that professional services performed for a local governing body and compensated for by "voucher-billings" are generally performed by an independent contractor on a case-by-case basis rather than as part of the basic responsibility of a regularly salaried governmental employee. Thus, in such an instance, the indicia of a true employer-employee relationship are missing. Supportive of this notion is the fact (as in this case) that are, if at all, are deductions taken from vouchered fees for such things as Social Security, withholding taxes, pension contributions and insurance. On the bases of the foregoing and the rationale set forth in the Attorney General's Formal Opinion, I **CONCLUDE** that "vouchered fees" are not included in the definition of "compensation" contained in *N.J.S.A.* 43:15A-6(r).

(III)

While the Board of Trustees has a statutory responsibility to administer the Retirement Fund and is required to define creditable compensation in the interest of safeguarding the financial soundness of the Fund, (*See, Board of Trustees v. La Tronica*, 81 *N.J. Super.* 461, (App. Div., 1963)), nevertheless it cannot be found that the integrity of the Retirement System will be assailed by allowing the petitioner to "receive credit" for his salary as Demarest Sewer Attorney; nor can it be said that there would be permitted in aggrandizement of the specific statutory rights of qualified pensioners into an illegal depletion of the Retirement Fund (*See, Tubridy v. Consolidated Police and Firemen's Pension Fund Commission*, 84 *N.J. Super.* 257, (App. Div. 1964)), especially since all required pension contributions have been made by the employer and the employee in this case.

## (IV)

Finally, petitioner contends that the Board of Trustees and the Division of Pensions are estopped from denying that all of his earnings (including vouchered fees) constitute "compensation". He highlighted many contacts he had with Division of Pensions personnel between 1969 and 1975 concerning his pension situation. In 1974 the Director of the Division of Pensions assured him that his Sewer Attorney salary was creditable for pension purposes and indicated that all municipal earnings, including vouchered fees, should be reported to the Division. After this was done, petitioner was required to contribute almost \$13,000.00 to the Retirement System to make his account current. This amount included what may have been due for Vouchered fees. In any event, in January of 1976, the Board of Trustees granted him a "temporary pension" which was calculated on the basis of *fixed salaries* which he had received, but excluded a consideration of vouchered fees. Then, later on, pursuant to the advice of the Attorney General, the Board of Trustees recomputed the benefits solely on the basis of his Tenafly magistrate's salary which is not disputed herein.

Generally, equitable estoppel principles are not applicable against governmental agencies. *Summer Cottagers' Ass'n v. Cape May*, 19 N.J. 493 (1955). However, some situations may arise which warrant the doctrine's application. *Skulski v. Nolan*, 68 N.J. 179 (1975). In the case at hand, no specific representation was ever made to petitioner to the effect that his vouchered fees would be recognized for pension credit purposes. Accordingly, it cannot be found that he *justifiably relied* on any such advice. Furthermore, petitioner has not demonstrated any detriment suffered with respect to the vouchered fee category. No pension contributions were ever deducted from his vouchered fees, and no determination was ever made by the Board of Trustees or the Division of Pensions which would have *reasonably led him to believe* that said fees were recognizable for pension purposes.

On the other hand, with respect to his Sewer Attorney salary, pension contributions were deducted therefrom, he was specifically assured by the Director of the Division of Pensions and others that the salary was creditable for pension purposes, and the Board of Trustees initially approved the salary as part of the base upon which benefits were calculated. In short, a course of conduct was embarked upon by the parties in which "equitable considerations are relevant in evaluating the propriety of conduct taken after substantial reliance by those whose interests are affected by subsequent actions" (See *Skulski v. Nolan*, supra). On balance, it would seem that the Board

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of Trustees should be estopped from denying that petitioner's Sewer Attorney's salary is recognizable for pension credit purposes. (See also, *Carlsen v. Masters, Mates and Pilots Pension Plan Trust*, 80 *N.J.* 344 (1979).

Accordingly, on the strength of the foregoing, I **ORDER** that the Board of Trustees of the Public Employees' Retirement System recognize the creditability of petitioner's Sewer Attorney salary, and recompute his pension benefits on the basis of the applicable fixed salaries which he received. I also **ORDER** that any contributions received by the Division of Pensions or the Retirement System to cover "vouchered fees" be refunded to the petitioner.

**After reviewing this Initial Decision,  
The Board of Trustees of the Public Employees' Retirement System  
on August 18, 1980 issued the following Final Decision:**

The Board of Trustees of the Public Employees' Retirement System at its meeting on August 13, 1980: by unanimous vote accepted the recommendation of Administrative Law Judge Theodore Clancy with the regard to Part II of his opinion wherein he concludes that "vouchered fees" are not included in the definition of "compensation" contained in *N.J.S.A.* 43:15A-6(r).

The Board, however, rejected his conclusion regarding the creditability for pension purposes of the remuneration which the petitioner received for services as the Demarest Sewer Attorney and his finding that a bona fide employer-employee relationship existed, rather the Board found that the services rendered were of the type usually rendered by an independent contractor and accordingly the Board is constrained by *Att'y Gen. Form Op.* 1976-No. 27.