STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 4, 2013)

TOWN OF SCITUATE	:	
	:	
V.	:	**C.A. No. PC-2011-6345**
	:	
EMPLOYEES' RETIREMENT SYSTEM OF RHODE ISLAND, and RHODE ISLAND STATE EMPLOYEES' RETIREMENT BOARD	:	

DECISION

TAFT-CARTER, J. In this administrative appeal, Appellant Town of Scituate (Town) challenges a decision by the Retirement Board of the Employees' Retirement System of the State of Rhode Island (Retirement Board) authorizing intervening Defendant Richard Iverson to purchase retirement credits for his previous service on the Scituate Town Council from the Employees' Retirement System of the State of Rhode Island (ERSRI).[1] The Town also seeks declaratory relief under the Uniform Declaratory Judgments Act, G.L. 1956 §§ 9-30-1, et seq. Jurisdiction is pursuant to §§ 9-30-1 and 42-35-15.

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Facts and Travel

Intervenor[2] Richard Iverson (Mr. Iverson) was first elected to the Scituate Town Council (Town Council) in November 1982. See Letter from Richard Iverson to Teresa Rusbino, Mar.

[1] In its Complaint and Amended Complaint, the Town improperly named the Retirement Board of the Employees' Retirement System of the State of Rhode Island and the Employees' Retirement System of the State of Rhode Island as the Rhode Island State Employees' Retirement Board and the Employees' Retirement System of Rhode Island, respectively. In its original Complaint, the Town named Gina M. Raimondo, in her capacity as the General Treasurer of the State of Rhode Island, as a defendant. In its Amended Complaint, however, the Town did not name Ms. Raimondo as a defendant.

[2] The Court granted Mr. Iverson's motion to intervene on January 18, 2012.

12, 2009, Rec. Ex. 1. From 1983 through 1992, he served on the Town Council for five consecutive two-year terms. See id. During his tenure on the Town Council, Mr. Iverson did not exercise his option to become a member of the Municipal Employees Retirement System (MERS). MERS is the mandatory, contributory deferred benefit pension plan established under G.L. 1956 §§ 45-21-1, et seq. The intention of the legislature in creating MERS was to establish an actuarially financed retirement system for municipal employees. See Sec. 45-21-1. MERS participants are required to contribute a statutorily-set percentage of their annual salary. Mr. Iverson was not a participant in MERS until 1994. (Hr'g Tr. 5, Mar. 19, 2009, Rec. Ex. 2.) Neither he nor the Town made contributions on his behalf while he served on the Town Council. See id.

In 1994, Mr. Iverson was appointed Director of the Town of Scituate Department of Public Works. Id. When Mr. Iverson began his Directorship in January 1994, he applied for membership in MERS. See Membership Application, Rec. Ex. 2H. His contributions to the system began on or about January 21, 1994. See id. Around that time, the Town's Deputy Treasurer informed Mr. Iverson that he was entitled to receive retirement credits for the ten years he had previously served on the Town Council. (Hr'g Tr. 5, 18, Mar. 19, 2009, Rec. Ex. 2.) Prompted by that conversation, Mr. Iverson sent a request for the credits to ERSRI. Id. at 72-73.

In a letter dated June 13, 1995, ERSRI informed Mr. Iverson that he could purchase retirement credits for his ten years of service on the Town Council for a cost of $1049.93. (Letter from ERSRI to Richard Iverson, June 13, 1995, Rec. Ex. 2A.) To effectuate the purchase, Mr. Iverson was required to submit payment to ERSRI on or before July 13, 1995. Id. After July 13, 1995, the "[i]nterest charges [would] have to be recomputed." Id. A letter dated June 13, 1995 was also mailed to the Finance Director of the Town of Scituate informing him

that the Town's contribution towards Mr. Iverson's retirement credits for the ten year period he served on the Town Council was $1220.72. (Letter from ERSRI to Finance Director, June 13, 1995, Rec. Ex. 2C.) Neither Mr. Iverson nor the Town made payment to ERSRI. (Hr'g Tr. 8-9, 21, 23, Mar. 19, 2009, Rec. Ex. 2.).

Sometime later in 1995, Mr. Iverson telephoned the Retirement Board, again inquiring about the purchase of credits. Id. at 6. During that telephone call, he was informed that he could purchase credit for five years of service on the Town Council, not ten years. Id. ERSRI issued a second "Statement for Purchase of Service," dated December 11, 1995, to Mr. Iverson, indicating that he could purchase five years of retirement credits for $326.36. (Statement for Purchase of Service, Dec. 11, 1995, Rec. Ex. 2B.) Similar to the previous letter, the Statement indicated that payment was due on or before January 11, 1996. Id. Failure to make the requested payment by that date would result in the accrual of additional interest. Id. Again, Mr. Iverson did not tender payment. (Hr'g Tr. 9, 22, Mar. 19, 2009, Rec. Ex. 2.)

Mr. Iverson took no further action to purchase the retirement credits until he began planning for his retirement from his position as Director of the Department of Public Works in May 2008. Id. at 9. At a meeting with a benefits analyst from ERSRI, Mr. Iverson was informed that he could purchase retirement credits for only five out of the ten years he had served on the Town Council. Id. To effectuate the purchase, on March 7, 2008, Mr. Iverson executed a form affidavit, provided by ERSRI, swearing that his failure to contribute to MERS during the ten years he served on the Town Council "was due to the inadvertence and mistake on behalf of the Town of Scituate and [him]self." (Employee Affidavit at ¶ 4, Rec. Ex. 2E.) On the same day, then-Treasurer for the Town of Scituate, Theodore Przybyla (Mr. Przybyla), executed a similar affidavit swearing that "the failure of Richard Iverson to be a contributing member of MERS

[from 1983 to 1992] was due to the inadvertence, mistake and excusable neglect on behalf of the Town of Scituate and/or the employee, Richard Iverson[.]" (Employer Affidavit at ¶ 5, Rec. Ex. 2F.) Mr. Przybyla further swore that the Town "acknowledges that the Town and [Mr. Iverson] shall be responsible for all costs and fees associated with the purchase . . . ." Id. at ¶ 6.

In correspondence dated March 19, 2008, ERSRI sent Mr. Iverson a "Purchase of Service Agreement Letter" indicating his ability to purchase retirement credits for the full ten years of his previous service on the Town Council for a cost of $1926.27. See Purchase of Service Agreement Letter, Mar. 19, 2008, Rec. Ex. 2D; Letter from Richard Iverson to Teresa Rusbino, Mar. 12, 2009, Rec. Ex. 1. The letter indicated that payment was due no later than April 19, 2008. Id. ERSRI sent the Town an invoice dated the same day, March 19, 2008, for the Town's share of the cost of the full actuarial value of Mr. Iverson's retirement credits, totaling $183,225.42. (Invoice, Mar. 19, 2008, Rec. Ex. 2J.)

Immediately thereafter, by letter dated March 24, 2008, the Town informed ERSRI that in light of "recently uncovered documentation," it wished to withdraw the affidavit that Mr. Przybyla had executed. (Letter from Theodore Przybyla to Gayle Mambro-Martin, Mar. 24, 2008, Rec. Ex. 2K.) In late April 2008, Mr. Iverson telephoned Frank Karpinski (Mr. Karpinski), the Executive Director of ERSRI, to inquire about the status of his purchase. See Letter from Richard Iverson to Teresa Rusbino, Mar. 12, 2009, Rec. Ex. 1. During that telephone conversation, Mr. Karpinski informed Mr. Iverson that the payment was not due on April 15, 2008, because ERSRI was awaiting the receipt of additional information it had requested from the Town. See id.; Hr'g Tr. 11, Mar. 19, 2009, Rec. Ex. 2.

On May 1, 2008, Town Council President, Robert Budway (Mr. Budway), executed an employer affidavit. (Budway Affidavit, May 1, 2008, Rec. Ex. 2G.) In his affidavit, Mr.

Budway swore that "[b]ased on information presented to me, the failure of Richard Iverson to be a contributing member of MERS [from 1983 through 1992] was due to inadvertence, mistake and excusable neglect on behalf of the Town of Scituate and/or the employee, Richard Iverson." Id. at ¶ 5. As in the previous affidavit, Mr. Budway swore that the Town "acknowledges that the Town and the . . . employee shall be responsible for costs and fees associated with the purchase . . . ." Id. at ¶ 6.

Concerned that the Town's retracting and resubmitting its affidavit may indicate that the Town had doubts about whether or not Mr. Iverson's failure to contribute was inadvertent, Mr. Karpinski wrote to Mr. Budway on May 12, 2008, requesting further information. See Letter from Frank Karpinski to Robert Budway, May 12, 2008, Rec. Ex. 2O; Hr'g Tr. 51, Mar. 19, 2009, Rec. Ex. 2. Specifically, Mr. Karpinski informed Mr. Budway that in order to make a final determination of Mr. Iverson's request to purchase credits, ERSRI wished to "review the years in question and whether or not other members of the town council were contributing members or otherwise knew of the option to become a member." Id. Not receiving any response to his request, Mr. Karpinski wrote to Mr. Budway again on August 28, 2008. See Letter from Frank Karpinski to Robert Budway, Aug. 28, 2008, Rec. Ex. 2P; Hr'g Tr. 51, Mar. 19, 2009, Rec. Ex. 2. Town Solicitor, David D'Agostino (Mr. D'Agostino), responded to Mr. Karpinski's inquiries on behalf of the Town. (Letter from David D'Agostino to Frank Karpinski, Sept. 5, 2008, Rec. Ex. 2Q.) On September 5, 2008, Mr. D'Agostino wrote,

> [I]t was confirmed through available Town records, that five (5) out of the seven (7) officials serving on the Council with Mr. Iverson participated in the retirement system and that Mr. Iverson and one (1) other individual did not. We have found no other information explaining Mr. Iverson's failure to participate or the Town's failure to withhold pension contributions.

Id.

Approximately two months later, Mr. Iverson received a letter from Mr. Karpinski dated November 3, 2008, informing him that his request to purchase retirement credits for his prior service on the Town Council was denied. (Letter from Frank Karpinski to Richard Iverson, Nov. 3, 2008, Rec. Ex. 2L.) Mr. Karpinski recounted that in 1995, ERSRI had initially billed Mr. Iverson and the Town for the purchase of credits for the full ten years that he had served on the Town Council but that "due to a change in the law,"[3] ERSRI subsequently rebilled Mr. Iverson and the Town for only five years. Id. Mr. Karpinski explained that after Mr. Iverson had made his subsequent purchase request in 2008, ERSRI "determined that [his] request did not fit within the meaning of a purchase, but instead would fall under inadvertence, mistake, and excusable neglect." Id. In the letter, Mr. Karpinski gave a brief overview of ERSRI's process for providing retirement credits in situations where mistake or error has occurred:

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[3] In his letter, Mr. Karpinski does not identify which law changed. The Court notes, however, that in 1994, the Legislature amended § 45-21-16 to read as follows:

> (2) . . . no member is eligible for pension benefits under this chapter unless:
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> (I) On or prior to June 30, 2012 the member has been a contributing member of [MERS] for at least ten (10) years;
>
> . . . .
>
> (iv) Notwithstanding any other provision of law, no more than five (5) years of service credit may be purchased by a member of the System. The five (5)-year limit does not apply to any purchases made prior to the effective date of this provision. A member who has purchased more than five (5) years of service credit maximum, before January 1, 1995, shall be permitted to apply the purchases towards the member's service retirement. However, no further purchase will be permitted.

Sec. 45-21-16, as amended by P.L. 1994 ch. 139, § 2.

> In 2001, ERSRI implemented a course of action aimed at providing service credit when inadvertence, mistake and excusable neglect on the part of both the member and the employer can be determined. Once ERSRI receives certain requested information which includes affidavits signed by both the employee and employer, it is analyzed in conjunction with other information such as the status of retirement contributions of similarly situated members during the same time as the member inquiring . . . .

Id. Mr. Karpinski indicated that ERSRI had applied this procedure to Mr. Iverson's request. He wrote that after reviewing the records for other Scituate Town Council members who had served with Mr. Iverson,[4]

> ERSRI has determined that while prior to 1994 you may not have been aware of your option to become a member of MERS while serving on the Council from 1983-1994 [sic], it is our position that you were made aware at that time as evidenced by the fact that you inquired to make the purchase of those years.

Id. at 2-3. Mr. Karpinski informed Mr. Iverson that since he had the option to purchase credits in 1995 but failed to do so, ERSRI had concluded that "in 2008 no other inadvertence, mistake and excusable neglect exists, and consequently, we find no error to correct." Id. at 3. In his letter, Mr. Karpinski did not cite any statutory or regulatory authority for ERSRI's procedure. See id.

Shortly after receiving Mr. Karpinski's letter informing him that his purchase had been disallowed, Mr. Iverson exercised his right under R.I. Admin. Code 29-1-4:4-3.00 to request a hearing. (Letter from Richard Iverson to Frank Karpinski, Nov. 29, 2008, Rec. Ex. 2M.) In

[4] In the letter, Mr. Karpinski indicated that ERSRI's research had revealed that two former members of the Scituate Town Council had purchased credits for previous service dating back to 1971 and 1978. (Letter from Frank Karpinski to Richard Iverson, Nov. 3, 2008, Rec. Ex. 2L.) He also informed Mr. Iverson that there were seven "other contributing members of MERS during [Mr. Iverson's] tenure" on the Town Council. Id. According to Mr. Karpinski, this information suggested that Mr. Iverson and other Town officials "had direct knowledge of the ability to participate in MERS." Id.

accordance with R.I. Admin. Code 29-1-4:4-6.00, a hearing was held on the matter on March 19, 2008 before Hearing Officer Teresa Rusbino (Hearing Officer). See Hr'g Tr. Mar., 19, 2009, Rec. Ex. 2. The Hearing Officer heard testimony from Mr. Iverson and Mr. Karpinski. Michael Robinson, Esq. represented ERSRI at the hearing. Id. at 1. Mr. Iverson appeared pro se. Id. There was no representative of the Town present at the hearing. See id.

At the hearing, Mr. Iverson testified generally concerning the facts and sequence of events. Id. at 4-15. He also testified that in 1995, he believed, based on the language in the June 13 and December 11, 1995 letters, that there was no deadline for the purchase and that his failure to purchase the credits would only result in increased interest costs. See id. at 6, 25-26. Based on his conversations with various representatives from both the Town and ERSRI, he concluded that he was entitled to purchase credits for the full ten years he served on the Town Council. Id. at 10, 18, 24-25, 40. In his opinion, it was worth accruing the additional interest in the hopes that when he was ready to retire in 2008, ERSRI would allow him to purchase credits for the full ten years. Id. at 25.

Mr. Karpinski also testified at the hearing. Mr. Karpinski served as Finance Director of ERSRI from 1994 to 2001. Id. at 42. Since 2001, he has served as Executive Director of ERSRI. Id. Mr. Karpinski explained the reason that ERSRI billed the Town for $1220.72 in June 1995 and later invoiced the Town for $183,225.43. Id. at 45-49. According to Mr. Karpinski, the 1995 calculation was based on simple interest, while the 2008 calculation represented the full actuarial value or cost to the Town had the Town contributed its share of Mr. Iverson's retirement benefit from 1983 to 1992.[5] Id. at 45-47. He testified that "[c]onsistent

[5] On cross-examination, Mr. Karpinski stated that if the Town could not pay the $183,225.43 invoice as a lump sum, the amount would be spread out over the next several years by increasing the Town's municipal contribution rate to MERS. (Hr'g Tr. 60-64, Mar. 19, 2009, Rec. Ex. 2.)

with the statutes, there are only a handful of purchases that are done which are considered full actuarial costs." Id. at 48. Mr. Karpinski further explained that elected municipal officials are eligible for membership in MERS pursuant to statute. Id. at 47. The eligible officials are required to exercise the option to become a member of MERS within sixty days of assuming office. Id. He stated that in those situations where an official fails to comply with the sixty-day deadline because of an unawareness of eligibility, ERSRI extends the deadline to allow the official to correct the mistake and purchase retirement credits for previous service at full actuarial value. Id. at 48-49. Again, the witness did not point to any statutory or regulatory authority for ERSRI's practice.

There are many difficulties in assessing what is inadvertent. Specifically, Mr. Karpinski stated that due to membership size, it is difficult to verify information for every member. Id. at 59. He pointed out that, over time, documents are lost or thrown out and the memories of those who were in a position to know whether or not a mistake occurred twenty years ago have since faded. Id. Mr. Karpinski indicated that it is often the case that an individual who currently has the authority to execute an affidavit on behalf of a municipality either was not employed when a former official first took office or has no recollection if a mistake occurred. Id. at 58.

ERSRI argued at the hearing that "[t]here is no statutory mechanism . . . to permit [the] sort of stale or correction of error type of purchase" that Mr. Iverson was attempting to make. Id. at 76. It was suggested that the Hearing Officer apply the doctrine of laches to bar Mr. Iverson's purchase based on the prejudice to ERSRI because of his fourteen-year delay in effectuating the

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Mr. Karpinski explained that each municipality which participates in MERS contributes to the System at a certain percentage rate. Id. at 63. If the Town could not pay the cost of its share of Mr. Iverson's retirement credits in one payment, ERSRI would, in effect, finance the payment by raising the Town's percentage rate for the next fifteen years or so. Id.

purchase. Id. at 77. Attempting to assess whether a mistake occurring more than a decade ago was inadvertent is a difficult task for ERSRI. Id. at 75.

On June 14, 2010, the Hearing Officer issued a written decision in which she overruled ERSRI's November 3, 2008 denial of Mr. Iverson's request and recommended that Mr. Iverson be allowed to purchase retirement credits for his ten years on the Town Council. See Decision of Hearing Officer, June 14, 2001, Rec. Ex. 3. Specifically, she found that Mr. Iverson had failed to exercise his option to become a member of MERS within the sixty-day deadline provided in § 45-21-8(a). Id. at 6. She also noted that although § 45-21-9 authorizes some purchases of credit for prior service, it did not apply to Mr. Iverson's purchase. Id. While acknowledging the difficulty created for ERSRI in attempting to assess whether a mistake occurred fifteen years ago, the Hearing Officer noted that Mr. Iverson initially inquired about the purchase in 1994 and 1995, and ERSRI had not required him or the Town to demonstrate mistake, inadvertence, or excusable neglect. Id. at 6-7. The Hearing Officer therefore concluded that ERSRI's doctrine of laches argument

> [F]ails . . . because [ERSRI] did not impose this requirement [to show mistake, inadvertence or excusable neglect] on [Mr. Iverson] or on the Town of Scituate until 2008 . . . . Moreover, after the required affidavits were submitted by [Mr. Iverson] and by the [T]own, [ERSRI] again forwarded correspondence to [Mr. Iverson], dated March 19, 2008, granting his request to purchase the entire ten (10) years of prior time service and enclosing a purchase agreement for his review and signature[.]

Id. at 7. The Hearing Officer ultimately concluded that the March 19, 2008 Purchase of Service Agreement Letter conditionally obligated ERSRI to permit Mr. Iverson's purchase of service credits, reasoning that

> The issue is not . . . whether [ERSRI] erred in failing to re-extend [Mr. Iverson] an option to purchase service credit

> for his [T]own [C]ouncil service. [ERSRI] did re-extend him this option in 2008, based upon the affidavits submitted by both [Mr. Iverson] and the Town of Scituate . . . . Upon receipt of the required affidavits and payment . . . [ERSRI] must fulfill its obligation and permit the purchase of service credit for the ten (10) years that [Mr. Iverson] served on the Scituate Town Council, in accordance with the terms of its Purchase of Service Agreement Letter, dated March 19, 2008[.]

Id. at 8. The Hearing Officer did not cite any statutory or regulatory provision authorizing the purchase.

Pursuant to R.I. Admin. Code 29-1-4:4-10.00, the Retirement Board considered the Hearing Officer's decision at a hearing on September 8, 2010. See Transcript of Sept. 8, 2010 Hearing, Rec. Ex. 3. The Retirement Board heard oral arguments from Mr. Iverson and Mr. Robinson, attorney for ERSRI. Mr. Robinson argued that the "plain and unambiguous language" of § 45-21-8(a) requires a municipal, elected official to exercise his or her option to participate in MERS within sixty days of assuming office, or else that official is not entitled to participate. Id. at 6. He asserted that § 45-21-8(a) "does not permit any exceptions" but explained that "[n]evertheless, [ERSRI] as a matter of practice over the years, has occasionally allowed such purchases if the employer and employee . . . execute an affidavit articulating an inadvertence, mistake and/or excusable neglect that they believed led to them not . . . contributing."[6] Id. at 8.

[6] Mr. Robinson suggested that ERSRI may have borrowed the "mistake, inadvertence and excusable neglect" language from the Rhode Island Superior Court Rules of Practice or Procedure. In reference to that language, he explained to the Retirement Board:

> [I]t appears to me that that standard . . . was derived . . . from language in the Superior Court Rules that allows someone . . . to have a default vacated and to be able to litigate the case on the merits in the event of a mistake, inadvertence, or excusable neglect.

Mr. Robinson reiterated that this practice is difficult for ERSRI to administer because the loss of documentation and fading memories of witnesses makes it difficult to assess whether a municipal official's failure to contribute was indeed unintentional. Id. at 13-14. He requested that the Retirement Board overturn the Hearing Officer's decision because it "does not comply with Rhode Island Law," and is "erroneous as a matter of statutory construction." Id. at 15.

The Retirement Board also heard from Mr. Karpinski, who agreed with Mr. Robinson that under § 45-21-8(a) elected officials are required to exercise their option to become members of MERS within a sixty-day window but asserted that many elected officials were unaware of this sixty-day membership deadline. Id. at 21-22. He explained that to allow those officials—and only those officials—whose failure to become members within the sixty-day window was due to inadvertence to receive credits for their previous service, ERSRI developed the process that it followed in Mr. Iverson's case. Id. at 22-24. Mr. Karpinski acknowledged that allowing a former municipal official to retroactively purchase retirement credits at full actuarial value "creates a huge unfunded liability," mostly borne by the municipal-employer. Id. at 24-25.

There was no representative from the Town present at the September 8, 2010 hearing. After hearing from Mr. Iverson, Mr. Karpinski, and Mr. Robinson, the Retirement Board voted to uphold the Hearing Officer's decision authorizing Mr. Iverson's purchase of ten years' worth of retirement credits. Id. at 34-36.

Shortly thereafter, Town Solicitor, Mr. D'Agostino, sent a letter dated October 6, 2010 to Mr. Robinson requesting that the Town be given an opportunity to appear before the Retirement

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> I would suggest . . . that that language does not appear in the [MERS] statute and I don't believe it is authorized by the statute. Nevertheless, that is something that has been done over time by the system.

Id. at 8-9.

Board at its November 2010 meeting. (Letter from David D'Agostino to Michael Robinson, Oct. 6, 2010, Rec. Ex. 7.) Mr. D'Agostino wrote that in light of the Town's obligation to pay the $183,225.43 invoice, ERSRI's previous failure to give the Town notice and an opportunity to be heard in this matter deprived the Town of its right to due process. See id. at 1-2. At its October 13, 2010 meeting, the Retirement Board voted to reopen the matter to give the Town an opportunity to address the Board at its upcoming November meeting. See Tr. 3, Nov. 10, 2010, Rec. Ex. 8. At the November 10, 2010 meeting, Mr. D'Agostino explained that Mr. Iverson's failure to comply with the sixty-day membership deadline in § 45-21-8(a) precluded his purchase of any retirement credits for his previous service on the Town Council. See id. at 15-17; Letter from David D'Agostino to Michael Robinson, Oct. 6, 2010, Rec. Ex. 7. The reason why the Town failed to contribute on behalf of Mr. Iverson was immaterial because there was no authority for the purchase. See id. Mr. D'Agostino suggested that since the statute barred Mr. Iverson's purchase, the $183,225.43 invoice for the Town's share of that purchase was not legally valid.[7] See Tr. 16, Nov. 10, 2010, Rec. Ex. 8.

At the November 10, 2010 meeting, the Retirement Board voted to rescind its previous vote on September 8, 2010, upholding the Hearing Officer's decision and further voted to remand the matter to the Hearing Officer, with the suggestion that the Hearing Officer consider

[7] Mr. D'Agostino also explained to the Retirement Board that there were essentially two reasons why the Town withdrew Mr. Przybyla's affidavit: first, Mr. D'Agostino believed that Mr. Przybyla did not have the authority to execute the affidavit without prior permission from the Town Council. (Tr. 47, Nov. 10, 2008, Rec. Ex. 8.) Second, a concern had surfaced that the Town may have lacked sufficient information to support Mr. Pryzbyla's sworn statement that Mr. Iverson's failure to contribute was due to mistake or inadvertence. Id. According to Mr. D'Agostino, the Town Council held an executive session on April 24, 2008, at which it voted to authorize Council President Mr. Budway to execute a new affidavit. Id. at 44.

reopening the matter to allow the Town to participate.[8] See id. at 56-58, 73-74; Minutes of Nov. 10, 2010 Retirement Board Meeting at 3, Rec. Ex. 9. After affording the Town, Mr. Iverson, and ERSRI an opportunity to submit legal memoranda on the issue of standing, the Hearing Officer issued a written decision in which she concluded that the Town lacked standing to participate in Mr. Iverson's case. (Hearing Officer Decision, Aug. 31, 2011, Rec. Ex. 17.) She therefore denied the request to reopen the hearing. See id. at 5.

The Retirement Board then voted at its October 12, 2011 meeting to reverse the Hearing Officer's decision on standing. See Tr. 26-28, Oct. 12, 2011, Rec. Ex. 20. At that meeting, the Retirement Board heard further argument from Mr. D'Agostino on the Town's behalf, as well as further argument from Mr. Robinson and Mr. Karpinski. After considering the various arguments, the Retirement Board voted to uphold the Hearing Officer's June 14, 2010 decision allowing Mr. Iverson to purchase the retirement credits. Id. at 53-55. In a letter dated October 28, 2011, Mr. Karpinski informed Mr. Iverson and Mr. D'Agostino of the Retirement Board's decision.[9] (Notice of Board Decision, Oct. 28, 2011, Rec. Ex. 21.)

On November 3, 2011, the Town timely filed a complaint with this Court appealing the Retirement Board's decision and requesting that this Court declare the March 19, 2008 invoice null and void. On January 18, 2012, the Court granted Mr. Iverson's motion to intervene.

[8] Although the Retirement Board sent him notice of the November 10, 2010 meeting, Mr. Iverson was not in attendance. See Minutes of Nov. 10, 2010 Retirement Board Meeting at 2, Rec. Ex. 9.

[9] In the letter, Mr. Karpinski informed the Town that it must either make a payment of $183,225.43 or "acknowledge in writing its acceptance of the related unfunded liability be included and reflected as an increase in the Town's employer contribution rate." See Notice of Decision, Oct. 28, 2011, Rec. Ex. 21.

II

Standard of Review

The Rhode Island Administrative Procedures Act, G.L. §§ 42-35-1, et seq. governs this Court's review on appeal from a decision of the Retirement Board. See Rossi v. Employees' Retirement Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). Pursuant to § 42-35-15, "[a]ny person . . . who has exhausted all administrative remedies available to him or her within [an] agency, and who is aggrieved by a final order in a contested case is entitled to judicial review" by this Court. Sec. 42-35-15. This Court "may affirm the decision of the agency or remand the case for further proceedings." Sec. 42-35-15(g). This Court may reverse or modify an agency's decision if:

> [S]ubstantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Sec. § 42-35-15(g). This Court's review of an agency decision is, in essence, "an extension of the administrative process." R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 484 (R.I. 1994).

ERSRI employs a two-tiered system for review of grievances. A hearing officer, who performs the first level of review, takes evidence and hears live testimony. See R.I. Admin. Code 29-1-4:4-6.00. The Retirement Board then considers the hearing officer's written decision, along with further briefs and oral arguments. See R.I. Admin. Code 29-1-4:4-10.00. The

Retirement Board must accord deference to "the hearing officer's findings and conclusions unless clearly wrong." Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 209-210 (R.I. 1993). In turn, when this Court reviews the agency's decision, it "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Sec. 42-35-15(g). This Court will defer to an agency's factual determinations so long as they are supported by legally competent evidence of record. Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007).

In contrast to its review of findings of facts, this Court reviews agency determinations of law de novo. Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). An agency's determinations of questions of law are not binding on this Court. Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977). Nonetheless, if "'the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference so long as that construction is not clearly erroneous or unauthorized.'" Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 345 (R.I. 2004) (quoting In re Lallo, 768 A.2d 921, 926 (R.I. 2001) (internal quotation omitted)). This Court does not afford such deference, however, when the statute is unambiguous and not susceptible to multiple reasonable meanings. Unitrust Corp. v State Dep't of Labor & Training, 922 A.2d 93, 99 (R.I. 2007).

A request for declaratory relief pursuant to the Uniform Declaratory Judgments Act, G.L. §§ 9-30-1, et seq. invokes this Court's original, rather than appellate, jurisdiction. Bradford Assocs. v. R.I. Div. of Purchases, 772 A.2d 485, 489 (R.I. 2001) (citations omitted). Section 9-30-1, in pertinent part, provides that this Court,

> [S]hall have the power to declare rights, status, and other legal relations whether or not further relief is or could be

> claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Sec. 9-30-1. This Court's grant or denial of declaratory relief is purely discretionary. Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket School Comm., 694 A.2d 727, 729 (R.I. 1997). In particular, this Court has "broad discretion to deny declaratory relief where it would not have the effect of terminating a controversy or relieving an uncertainty that gave rise to the proceeding." Fireman's Fund Ins. Co. v. E.W. Burman, Inc., 120 R.I. 841, 846, 391 A.2d 99, 101 (1978); § 9-30-6.

III

Analysis

On appeal, the Town argues that the Retirement Board's October 12, 2011 decision upholding the Hearing Officer's June 14, 2010 decision to authorize Mr. Iverson's purchase of ten years of retirement credits for his past service on the Town Council was affected by error of law and/or in excess of the Retirement Board's statutory authority. The Town further argues that the doctrine of laches bars Mr. Iverson's purchase of the retirement credits. The Town additionally requests that this Court declare the March 19, 2008 invoice for $183,225.43 null, void, and unenforceable.

In response, ERSRI, the Retirement Board, and intervening Defendant Mr. Iverson generally assert that the Retirement Board acted within the scope of its authority in permitting Mr. Iverson's purchase. Mr. Iverson alternatively argues that this Court should apply the doctrine of judicial estoppel to prohibit the Town from opposing his purchase through this appeal.

A

Retirement Board's Authority

The Town maintains that the Retirement Board's decision was in violation of the plain and ordinary meaning of § 45-21-8(a). In response, ERSRI and the Retirement Board argue that nothing in § 45-21-8(a) prohibits Mr. Iverson's purchase of retirement credits for his past service on the Town Council. It is further argued that in the event that there is a prohibition, then the Retirement Board has an implied power to authorize such purchases.

At the outset, Mr. Iverson concedes that he has no express statutory right to purchase the credits and that ERSRI cannot be compelled to allow the purchase of credits. Nonetheless, he argues that ERSRI may, of its own accord, permit him to purchase the credits since there is nothing in chapter 21 of title 45 specifically forbidding it. Pointing to the Retirement Board's longstanding practice of permitting retroactive purchases to correct members' mistakes and the Legislature's failure to take any action prohibiting the practice, Mr. Iverson argues that such purchases are consistent with the Legislature's intent.

1

Section 45-21-8(a) of the Rhode Island General Laws

Section 8 of chapter 21 of title 45 of the Rhode Island General Laws provides for membership in the retirement system. In pertinent part, § 45-21-8[10] provides:

[10] Subsection (a) of § 45-21-8 has remained substantially unaltered in all respects relevant to the instant matter since 1991. In 2011, the Legislature enacted § 45-21-8.1 which reads, in pertinent part:

> [N]o city or town council member . . . or other local elected officials, other than elected officials who are compensated for devoting thirty-five (35) or more hours per week to their elected position, elected for the first time after June 30, 2012, shall be allowed membership into the municipal

> Membership in the retirement system . . . consists of the following:
>
> (a) Any employee of a participating municipality as defined in this chapter, who becomes an employee on and after the effective date of participation, shall . . . become a member of the retirement system . . . . Any employee who is elected to an office in the service of a municipality after the effective date and prior to July 1, 2012, has the option of becoming a member of the system, which option must be exercised within sixty (60) days following the date the employee assumes the duties of his or her office, otherwise that person is not entitled to participate under the provisions of this section[.]

Sec. 45-21-8(a) (emphasis added). The Town asserts that because the second clause of § 45-21-8(a) provides a sixty-day window within which an elected official of a municipality may become a member of MERS, any elected official who fails to become a member within the sixty-day window is thereafter barred from purchasing credits for the years that he or she served in an elected capacity. The Town therefore concludes that, since it is undisputed that Mr. Iverson failed to exercise his option to become a member of MERS within the sixty-day period for any of the five terms he served on the Town Council, the plain language of § 45-21-8(a) bars Mr. Iverson from purchasing credits for those ten years.

ERSRI and the Retirement Board do not dispute that § 45-21-8(a) applies to Mr. Iverson and that Mr. Iverson failed to apply for membership in MERS within the sixty-day period specified in § 45-21-8(a). Rather, they state that § 45-21-8(a) does not contain language that bars an elected municipal official from purchasing retirement credits for past service. Specifically,

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> employees' retirement system, as a result of that elective service.

Sec. 45-21-8.1. Accordingly, the Legislature also amended § 45-21-8(a) by inserting the qualifying phrase, "and prior to July 1, 2012," to indicate that council members elected on or after that date would not be eligible for membership. See Sec. 45-21-8(a).

ERSRI and the Retirement Board maintain that § 45-21-8(a) governs an individual's eligibility to become a member of MERS and is silent as to the service for which a member may purchase credits.

This Court reviews agency determinations of law de novo. Arnold, 822 A.2d at 167. The Court will afford deference to an agency's reasonable construction of an ambiguous statute. See Labor Ready Northeast, 849 A.2d at 345. If, however, "'the language of a statute is clear and unambiguous, [the court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" School Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 641 (R.I. 2009) (quoting State v. LaRoche, 925 A.2d 885, 887 (R.I. 2007) (internal quotation omitted)). Specifically, an unambiguous statute "may not be construed or extended." Pizza Hut of Am., Inc. v. Pastore, 519 A.2d 592, 593 (R.I. 1987) (citing Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 57 (R.I. 1980) (citations omitted)). When faced with a statute whose terms are clear, a court may not engage in statutory interpretation either to render it inapposite or to make it applicable to a particular matter. Id. at 594 (quoting Little v. Conflict of Interest Comm'n, 121 R.I. 232, 237, 397 A.2d 884, 887 (1979)).

Chapter 21 of title 45 of the R.I. General Laws establishes and provides for the administration of MERS. Membership in MERS is governed by § 45-21-8. See Sec. 45-21-8. Subsection (a) of that general law addresses membership of both municipal employees and elected officials who were hired or elected after the "effective date of participation." Id. The

"effective date of participation," as defined in § 45-21-2(6), is the date on which the provisions of chapter 21 of title 45 became applicable to a particular municipality.[11] Sec. 45-21-2(6).

The membership provision in MERS treats elected officials differently from all other municipal employees. See Sec. 45-21-8(a); Cahir v. Reynolds, 92 R.I. 501, 505, 170 A.2d 612, 614 (1961) ("It is not without significance that every . . . municipal employee retirement act which we have reviewed provides generally for compulsory membership, except as to . . . officers who are elected or appointed[.]"). The first clause of subsection (a) of § 45-21-8 relates to employees and mandates that employees of municipalities "shall" become members of MERS. The second clause of § 45-21-8(a) relates to elected officials of municipalities and provides that those individuals have the "option of becoming a member." Sec. 45-21-8(a). An elected official is required to exercise the membership option within sixty days of commencing the duties of his or her office; otherwise that person is unable to participate. Sec. 45-21-8(a).

In general, "[c]ompliance with the statutory requirements for establishing a pension right is a prerequisite to the right to receive such pension." 60A Am. Jur. 2d Pensions § 1245 (2013). An elected official's option under § 45-21-8(a) to become a member of MERS is a statutory offer that the official must affirmatively accept within the time specified. See Nat'l Educ. Assoc.-R.I. by Scigulinsky v. Ret. Bd. of R.I., 890 F. Supp. 1143, 1156 (D.R.I. 1995) (statute giving unions the option to participate in state retirement system was a "statutory offer" requiring affirmative acceptance and contribution before union members could receive benefits); see also Richard A. Lord, 1 Williston on Contracts § 5:16 (4th ed.) (an option contract grants the optionee the right to accept the offer "within the time and in the manner specified[.]"). The option to participate in

[11] Although the record does not indicate the exact date of participation for the Town of Scituate, the Hearing Officer found that the Town had participated in MERS throughout the entirety of Mr. Iverson's tenure on the Town Council. See Decision of Hearing Officer at 6, Rec. Ex. 3.

MERS under § 45-21-8(a) lapses if the elected official fails to accept the offer within the sixty-day time period specified therein. See Bolier v. N.Y. State Employees' Ret. Sys., 167 A.D.2d 815 (N.Y. App. Div. 1990) (employee whose membership in state retirement system was optional and whose membership application was not filed by the cutoff date was not eligible for higher tier benefits); 1 Williston on Contracts § 5:5 (4th ed.) (if no acceptance is made within the time specified, "the power of acceptance necessarily expires.").

In the instant case, Mr. Iverson failed to exercise his option to become a member of MERS within the sixty-day statutory deadline set forth in § 45-21-8(a). In addition, he failed to make contributions to MERS at any point during that time. Under the plain language of § 45-21-8(a), Mr. Iverson is not eligible to receive retirement credits for his years of service on the Town Council.[12] Accordingly, the Court finds that the Retirement Board's decision to authorize the purchase of retirement credits was in violation of the plain and ordinary meaning of § 45-21-8(a) and therefore, affected by error.

2

Implied Authority

ERSRI and the Retirement Board concede that there are several statutory provisions in chapter 21 of title 45 that expressly authorize members of MERS to purchase or receive retirement credits for specific instances of previous service. None of these provisions, however, authorizes the purchase of retirement credits by Mr. Iverson. It is suggested that the Retirement

[12] Mr. Iverson suggests that the language of § 45-21-8(a) is ambiguous when juxtaposed with § 45-21-2(7) because § 45-21-2(7) specifies, in part, that the "retirement board shall decide who are employees within the meaning of this chapter." Sec. 45-21-2(7). As discussed, this Court finds nothing ambiguous in the language of § 45-21-8(a). That section makes a clear distinction between "employees" and elected officials and requires only the latter to opt-in to MERS. Additionally, the statutory definition of "employee" by itself does not create a legal right. See Jackman v. Montgomery, 320 N.E.2d 770, 775 (Ind. Ct. App. 1972); Black Clawson Co., Inc. v. Int'l Assoc. of Machinists, 212 F. Supp. 818, 821 (D.C.N.Y. 1962).

Board possesses such implicit or incidental powers as may be necessary to effectuate its express powers. ERSRI and the Retirement Board assert that the Retirement Board therefore has the implied power to cure error. They argue that since the Hearing Officer allegedly found that Mr. Iverson's failure to become a contributing member of MERS during his time on the Town Council was the result of an error,[13] the Retirement Board had the implied power to cure Mr. Iverson's error by authorizing his purchase of credits for his previous service on the Town Council.

This argument is flawed on several fronts. First, "administrative agencies are purely creatures of legislation without inherent or common-law powers . . . ." 3 Sutherland Statutory Construction § 65:2 (7th ed. 2012). As such, courts generally require that agencies' "claims of authority . . . be based on clear statutory language." Charles H. Koch, Jr. 4 Public Administrative Law and Practice, § 11:33 (3rd ed. 2012); see also Berkshire Cablevision of R.I., Inc. v. Burke, 488 A.2d 676, 679 (R.I. 1985) (agencies "must have specific statutory authority for the regulations they promulgate."). Therefore, "the general rule applied to statutes granting powers to [administrative agencies] is that only those powers are granted which are conferred either expressly or by necessary implication." 3 Sutherland Statutory Construction § 65:2 (7th ed. 2012). While "agencies generally have such implied powers, and only such, as are necessarily . . . incident to [] the powers and duties expressly granted and imposed on them[,]"

[13] Although ERSRI and the Retirement Board assert in their memorandum that "the Hearing Officer found as a matter of fact that Mr. Iverson's failure to participate in MERS when an elected official was [] a result of an error," the Hearing Officer's "Findings of Fact" in her June 14, 2010 written decision do not contain any such statement. See Decision of Hearing Officer at 2-5, Rec. Ex. 5. Indeed, in her decision, the Hearing Officer emphasized that ERSRI had not required Mr. Iverson to show mistake, inadvertence or excusable neglect when he made his initial purchase request in 1995. Id. at 6.

those implied powers "are not to be extended beyond fair and reasonable inferences[.]" 73 C.J.S. Public Administrative Law § 109 (2012).

Although an agency's reasonable construction of an ambiguous statute is entitled to deference, an agency may not alter or amend a statute to extend its power beyond the scope of its enabling legislation. F. Ronci Co., Inc. v. Narragansett Bay Water Quality Mgmt. Dist. Comm'n, 561 A.2d 874, 881 (1989); Little, 121 R.I. at 236, 397 A.2d at 886. In general, interpretations with the potential to expand an agency's jurisdiction and authority are subject to increased judicial scrutiny. Charles H. Koch, Jr. 4 Administrative Law and Practice, § 11:33 (3rd ed. 2012).

The Court does not agree with the Retirement Board's assertion that there exists an implied power to cure an error of a participant. At the Retirement Board's November 20, 2010 meeting, Mr. Karpinski explained that although no provision exists to authorize Mr. Iverson's purchase, ERSRI had established a practice allowing elected municipal officials who mistakenly failed to apply for membership within the established sixty-day deadline to purchase credits. See Tr. 36, 55, Nov. 10, 2010, Rec. Ex. 8; Tr. 46, 52, Oct. 12, 2011, Rec. Ex. 20. ERSRI does not, however, indicate the specific authority to conclude that it possesses an implied power to allow an individual to purchase credits after the statutory deadline has expired. See 73 C.J.S. Public Administrative Law § 109 (2012) (agencies have only such implied powers as are necessarily incident to the powers and duties expressly granted and imposed). The Court notes that § 45-21-32 entrusts the management and administration of MERS to the Retirement Board, which has the power to "make reasonable rules and regulations for carrying out the provisions of this

chapter."[14] Sec. 45-21-32 (emphasis added). That section also declares that the purpose of MERS is to "provid[e] retirement allowances for employees of participating municipalities of the state of Rhode Island under the provisions of this chapter . . . ." Id. (emphasis added). Nevertheless, it is not readily apparent to this Court how an implied power to bestow retirement benefits not provided for in chapter 21 is reasonable and necessary to effectuate the Retirement Board's express power to carry out the provisions of that chapter. Cf. Berkshire Cable, 488 A.2d at 679 (finding that agency had authority to regulate television monopoly where enabling statute provided that agency shall regulate every cable television operator in Rhode Island "so far as necessary" to prevent it from having "a detrimental consequence to the public interest[.]").

A review of the case law relied upon by ERSRI and the Retirement Board further evidences that the Retirement Board is not impliedly authorized to permit Mr. Iverson's purchase. They cite, inter alia,[15] Perrotti v. Solomon, 657 A.2d 1045 (R.I. 1995) and In re

[14] It appears that ERSRI's practice of allowing former municipal officials to purchase credits for previous service is an informally adopted policy rather than a formally promulgated rule or regulation. In general, agency interpretations that are not formally adopted are entitled to less deference than those formally issued pursuant to an agency's delegated authority. See Charles H. Koch, Jr. 4 Administrative Law and Practice § 11:33 (3rd ed. 2012); Town of Burrillville v. Pascoag Apartment Assocs., L.L.C., 950 A.2d 435, 446 n.13 (R.I. 2008).

[15] ERSRI and the Retirement Board also cite Lyman v. Employees' Retirement Sys., 693 A.2d 1030 (R.I. 1997) for the proposition that the Retirement Board has the power to authorize purchases of retirement credits not otherwise statutorily authorized. In Lyman, a public school teacher participating in the state retirement system sought to purchase service credits for time she had previously spent working as a student-employee at Rhode Island College. 693 A.2d at 1030. The Retirement Board denied her request based on its long-standing position that anyone on a student payroll was not an "employee" within the meaning of the statute. See id. In a brief opinion on an order to show cause, the Supreme Court held that the Retirement Board's reasonable interpretation of § 36-8-1(2) to exclude student-employees from the statutory definition of employee was entitled to deference since the Board's interpretation was consistent with § 36-8-1(2)'s express exclusion of employees "whose duties are of a casual nature." See id. At no point in the opinion did the Court mention the authority for Ms. Lyman's purchase or the Retirement Board's power to authorize the purchase. Furthermore, although it is not mentioned in the Supreme Court's opinion in Lyman, this Court notes that teachers, who are members of the state and not the municipal retirement system, are statutorily authorized to purchase credits for

Denisewich, 643 A.2d 1194 (R.I. 1994) for the proposition that agencies have an implied power to correct mistakes. In Perrotti, our Supreme Court held that the Retirement Board was not only empowered, but also obligated, to reconsider a previous award of pension benefits to an individual who was subsequently convicted of an employment-related federal offense where the relevant statute made receipt of benefits conditional on "honorable service." 657 A.2d at 1048-49. Likewise, in In re Denisewich, the Court held that the law enforcement officers' bill of rights hearing committee[16] had inherent authority and an obligation to hold a rehearing on charges against a police officer in light of newly available evidence. 643 A.2d at 1197-98. In so holding, the Court noted that the hearing committee "is granted broad powers to investigate allegations of police misconduct, hold hearings, and issue decisions . . . ." Id. at 1197. The Court further reasoned that it is generally recognized that "administrative tribunals endowed with quasi-judicial powers embody the inherent power to reconsider their judicial acts." Id. (citations omitted). In both Perrotti and In re Denisewich, an agency made an initial decision that it was unquestionably statutorily authorized to make and then later reconvened to reconsider its decision based on new information.

In contrast, the Retirement Board in this case seeks to allow a purchase not authorized by statute because Mr. Iverson may have made a mistake more than a decade ago. This procedure cannot in any way be characterized as a reconsideration of a previously authorized quasi-judicial

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several different categories of previous service under the provisions of chapter 16 of title 16. For example, teachers are specifically authorized to receive or purchase retirement credits for certain services rendered as a state employee, a municipal employee, a federal employee, a teacher at a private or charter school, and/or for appropriate work experience. See §§ 16-16-8, 16-16-6, 16-16-6.1, 16-16-6.2, 16-16-7.2. Thus, this Court cannot reasonably read Lyman as acknowledging that the Retirement Board has an implied power to authorize purchases of retirement credits not otherwise statutorily authorized.

[16] The Hearing Committee is not an agency within the meaning of the Administrative Procedures Act. See In re Denisewich, 643 A.2d at 1197.

act based on new information. See In re Denisewich, 643 A.2d at 1197. Accordingly, neither Perrotti nor In re Denisewich demonstrates that the Retirement Board has an implied power to allow Mr. Iverson's purchase. Nor does either case indicate that the Retirement Board is impliedly authorized to saddle municipalities with what Mr. Karpinski admits are huge, unfunded liabilities because it finds that an employee made a mistake.[17] See Tr. 24, Sept. 8, 2010, Rec. Ex. 4. Instead, both cases make clear that the broad extra-statutory power that the Retirement Board seeks to exercise in this instance is far removed from the kinds of powers that our Supreme Court has previously found agencies impliedly authorized to exercise. Compare Perrotti, 657 A.2d 1045, and In re Denisewich, 643 A.2d 1194, with Kritz v. Cianci, 474 A.2d 1248, 1250 (R.I. 1984) (Retirement Board "had no other authority to reconsider their grant of [] pension . . . where there was no newly discovered evidence questioning the propriety of their earlier decision."), and Betz v. Paolino, 605 A.2d 837 (R.I. 1992) (municipal retirement board's administrative powers did not include power to amend municipal retirement act to provide additional benefits).

Moreover, the fact that the Legislature has specifically provided by statute for purchases of credits for different types of previous service, but omitted the previous service at issue in this case, further demonstrates that the Retirement Board is without authority to allow Mr. Iverson's purchase. According to the interpretative maxim of expressio unius est exclusio alterius, "an express enumeration of items in a statute indicates a legislative intent to exclude all items not listed." Terrano v. State Dept. of Corrections, 573 A.2d 1181, 1184 (R.I. 1990) (internal

[17] At the Retirement Board's November 10, 2010 meeting, Mr. Karpinski indicated that if a municipality was unwilling to cooperate, ERSRI would not proceed with an employee's purchase. See Tr. 55-56, Nov. 10, 2010, Rec. Ex. 8. At the Retirement Board's September 8, 2010 meeting, however, he indicated that a municipality's unwillingness to pay was not a sufficient basis for ERSRI to disallow an employee's purchase. See Tr. 28, Sept. 8, 2010, Rec. Ex. 4.

quotation omitted); see also 2A Sutherland Statutory Construction § 47:23 (7th ed. 2012) ("where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions."). While this principle is not an absolute legal rule, it is a useful interpretative aid based on "logic" and "the learning of common experience." 2A Sutherland Statutory Construction § 47:24 (7th ed. 2012); see also 3 Sutherland Statutory Construction § 65:2 (7th ed. 2012) ("[T]he various aids for interpretation, such as . . . expressio unius . . . are relevant to . . . determine the scope of administrative powers granted to an agency.").

As ERSRI and the Retirement Board acknowledge in their memorandum, members of MERS may purchase retirement credits for previous service as a teacher or state employee pursuant to § 45-21-12.1, for prior employment with a non-participating municipality pursuant to § 45-21-56, for armed service pursuant to § 45-21-53, for a leave of absence pursuant to § 45-21-14.2, and for layoffs of up to one year pursuant to § 45-21-58. Additionally, in § 45-21-9, entitled "Prior service credit of members joining by election," the Legislature has provided that municipal employees in service prior to a municipality's effective date of participation may receive or purchase credits for their prior service. In particular, subsection (b) of that provision, in pertinent part, reads:

> Any member who becomes an employee after the effective date of participation by a municipality into the system, has the privilege of purchasing credit for prior service with the city or town of which the employee is now employed. This privilege does not become effective until a member has had at least one year of service following his or her latest reentry into membership with the system . . . . Upon granting prior service under the provisions of this section, the board shall bill the applicable city or town for its share of the total liability for the prior service. Effective July 1, 2012, any purchase requested under this paragraph shall be made by a member at full actuarial cost.

Sec. 45-21-9(b).

The Hearing Officer specifically concluded in her June 14, 2010 written report that § 45-21-9(b) cannot authorize Mr. Iverson's purchase of credit for his time on the Town Council because "prior service" is defined in § 45-21-2(15) as "service as a member rendered before the effective date of participation[.]" (Decision of Hearing Officer at 6, Rec. Ex. 3.) The Hearing Officer found, and none of the parties dispute, that "[a]t all times during which [Mr. Iverson] served on the Scituate Town Council[,] the Town of Scituate was a participating municipality in the Employees' Retirement System." Id. Since the entirety of Mr. Iverson's service on the Town Council was after the Town of Scituate's effective date of participation, it is not considered "prior service" as that term is used in § 45-21-9.[18] Mr. Karpinski, at the Retirement Board's November 10, 2010 meeting, also acknowledged that while there is statutory authority for several other types of purchases, there is no express authority for Mr. Iverson's purchase. (Tr. 55, Nov. 10, 2010, Rec. Ex. 8.) He explained to the Retirement Board that

> [P]ursuant to the statute, there are a number of purchases that people can buy [sic]. There are [ERSRI] forms that talk about that. . . . And, again, there is not a law that

[18] Mr. Robinson directed the Hearing Officer's attention to § 45-21-9 at the March 19, 2009 Hearing. Mr. Robinson did not refer to any particular subsection of that provision, but explained:

> The only other potential source of statutory authority [for purchases of credit for prior service] is 45-21-9, which applies by its terms to a municipality that becomes a member of the retirement system and someone who straddles that line. They engaged in prior service before the municipality became a member of MERS and may stay on the payroll after the . . . municipality becomes a participating member.

(Hr'g Tr. 76, Mar. 19, 2009, Rec. Ex. 2.)

> permits this purchase. Hence, we have this process, but we kind of use the same mechanism.

Id. at 54-55. In other words, like the purchases authorized by § 45-21-9(b), Mr. Iverson's purchase was to be done at full actuarial cost. See Hr'g Tr. 47-48, Mar. 19, 2009, Rec. Ex. 2. It appears that ERSRI has created specific forms and a detailed process to permit unauthorized purchases that mirror purchases expressly authorized by statute.

Nonetheless, the fact that Mr. Iverson's purchase was mirrored on others expressly allowed by statute does not imply that ERSRI has the power to authorize Mr. Iverson's purchase. To the contrary, the existence of these various provisions supports the conclusion that the Legislature found it suitable to expressly limit the purchases of credits to those ordered by statute.[19] See Vanni v. Vanni, 535 A.2d 1268 (R.I. 1988) (applying expressio unius to decline to

[19] When §§ 45-21-8 and 45-21-9 are read in tandem, they reveal a fairly comprehensive scheme for membership in MERS, in which certain categories of employees have compulsory enrollment while others must either opt-in or opt-out within specified time periods. See Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011) ("individual sections must be considered in context of the entire statutory scheme.") (quotation omitted). As discussed, § 45-21-8(a) provides for mandatory enrollment for non-elected municipal employees hired after the municipality's effective date of participation. Sec. 45-21-8(a). Additionally, § 45-21-8(b) specifies that municipal employees and elected officials who were in service prior to the municipality's effective date of participation and who were not members of any other pension or retirement systems supported by a participating municipality were required to opt-out of MERS within sixty days of the municipality's effective date of participation. Sec. 45-21-(b). Nonetheless, under section 45-21-9(a), "[a]ny employee who elects not to join [MERS], as provided in § 45-21-8(b), may thereafter be admitted to membership, but no employee shall receive credit for prior service unless the employee applies for membership within one year from the effective date of participation of the municipality." Id. Similarly, under § 45-21-8(c), those employees in service prior to the effective date of participation who were members of another municipally supported retirement plan could opt-in by "waiv[ing] and renounc[ing] all accrued rights and benefits of any other pension or retirement system." Sec. 45-21-8(c). While there is no deadline for opting-in by renunciation, see sec. 45-21-8(c), section 45-21-9(a) provides that "[n]o employee of a participating municipality whose membership in the retirement system is contingent on his or her own election to join under § 45-21-8(c), shall receive prior service credits unless the employee makes application for membership within one year from the effective date of participation of the municipality by which the employee is employed." Sec. 45-21-9(a).

find third exception in statute where Legislature had expressly provided two exceptions). Therefore, this Court finds that the Retirement Board's decision to allow Mr. Iverson to purchase retirement credits for previous service on the Town Council was an impermissible extension of its authority beyond the scope of the enabling act. See F. Ronci, 561 A.2d at 881 (even though agency's interpretation was entitled to deference, agency lacked authority to levy civil fines where "[agency] . . . clearly attempted to extend its power beyond the scope of the enabling legislation.").

3

Acquiescence

Mr. Iverson additionally argues that the Legislature's failure to take action to curtail ERSRI's practice of allowing municipal officials who failed to become members of MERS to purchase credits for previous service should be interpreted as legislative approval. In support of his argument, Mr. Iverson asserts that since at least 1994, ERSRI and the Retirement Board have had a longstanding practice of permitting elected municipal officials who failed to become members within § 45-21-8(a)'s sixty-day deadline to purchase retirement benefits upon making a finding of mistake, inadvertence, or excusable neglect. He points out that ERSRI has employer and employee form affidavits specifically for this purpose. According to Mr. Iverson, § 45-12-

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In contrast, for municipal officials elected after the effective date of participation, the Legislature has not provided for compulsory enrollment nor provided a grace period within which they may change their minds and still receive credit. It would seem that where the Legislature has enacted a fairly comprehensive scheme in which it has provided for mandatory enrollment for certain categories of municipal employees or essentially allowed a one year grace period for other categories, its failure to extend such leniencies to elected officials is deliberate. See State v. Grullon, 783 A.2d 928, 931 (R.I. 2008) (holding that where Legislature had enacted "comprehensive legislative scheme" and explicitly provided two procedures for recovery, litigant could not use alternate procedure). Thus, ERSRI's practice of effectively allowing some elected officials to circumvent the deadline in § 45-21-8(a) by retroactively purchasing credits seems inconsistent with the statutory scheme contained in §§ 45-21-8 and 45-21-9.

8(a)'s sixty-day, opt-in period for elected officials is an obscure technical requirement of which many municipal officials were unaware. He claims that if not for ERSRI's policy of ignoring it in instances of mistake, the deadline would inequitably have precluded many elected officials from receiving retirement credits for their service.

While it is true that "a longstanding, practical and plausible interpretation given a statute of doubtful meaning by those responsible for its implementation without any interference by the Legislature" can constitute proof of legislative approval, Trice v. City of Cranston, 110 R.I. 724, 730, 297 A.2d 649, 652 (1972), it is equally true that legislative "inaction frequently betokens unawareness, preoccupation, or paralysis" rather than approval. Zuber v. Allen, 396 U.S. 168, 185-86 n.21 (1969). Indeed, the United States Supreme Court has repeatedly cautioned against relying on legislative inaction and warned that legislative silence lacks persuasive significance, particularly when there is no evidence that the legislature is aware of the agency's position. See, e.g., Brown v. Gardiner, 513 U.S. 115, 121 (1994) (quoting United States v. Calamaro, 354 U.S. 351, 359 (1957)); Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)); Zuber, 396 U.S. at 185 n.21 ("Where . . . there is no indication that a subsequent [legislature] has addressed itself to the particular problem, [it is] unpersua[sive] that silence is tantamount to acquiescence, let alone . . . approval[.]"). A review of relevant Rhode Island cases reveals that the Rhode Island Supreme Court has often required something more than mere legislative inertia, usually some indicia of legislative awareness. See Trice, 110 R.I. at 730, 297 A.2d at 652 ("[I]n light of what has transpired over the years in the city hall in Cranston and the state house in Providence, we uphold the action of the council[.]"); Chernov Enters. Inc. v. Scuncio, 107 R.I. 439, 443, 268 A.2d 424, 427 (1970) ("[c]ertainly what has been occurring . . .

could not have escaped the attention of the legislature over these many years[.]"); Henry v. John W. Eshelman and Sons, 99 R.I. 518, 209 A.2d 46 (1965) (acquiescence by legislature "after its attention has been called to repeated litigious criticism of its underlying policy, is persuasive proof of at least implied legislative approval[.]"). No matter how long an agency practice has continued without legislative interruption, a court will not read legislative inaction as approval where the agency's position is inconsistent with the controlling statute. See Brown, 513 U.S. at 122 ("A regulation's age is no antidote to clear inconsistency with a statute[.]"); Zuber, 396 U.S. at 185 n.21 ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible.").

In the instant case, the Retirement Board has not offered a long-standing, plausible interpretation of its enabling statute. Cf. Trice, 110 R.I. at 730, 297 A.2d at 652. Rather, the Retirement Board has followed an informal and erroneous policy of allowing statutorily unauthorized purchases based on an implied power which is inconsistent with the statutory scheme governing MERS. See Brown, 513 U.S. at 122. Even if the practice were consistent with the statutory scheme, neither Mr. Iverson nor ERSRI has presented any evidence tending to suggest that the Legislature is aware of ERSRI's practice. See Zuber, 396 U.S. at 185 n.21. In particular, there is no evidence as to how many individuals have been permitted to make such purchases.[20] It is not clear if ERSRI's use of this policy has been so pervasive or widespread that

[20] Although ERSRI offered Mr. Iverson the opportunity to purchase credits for five years of service as early as 1995, it appears that it did not implement its specific practice of allowing credit in instances where mistake or excusable neglect could be verified until 2001. At the Retirement Board's November 10, 2010 meeting, Mr. Karpinski testified as follows:

> Since 2001 . . . what we began to hear were cities and towns, town managers, town council[s] saying I didn't know I could be a member. . . . In fact, I received a letter from a bunch of councilmen, council persons in

it unavoidably would have come to the Legislature's attention. Cf. Chernov Enterprises, 107 R.I. at 443, 268 A.2d at 427 n.5 (noting that the effects of agency's practice were obvious to anyone who took a cursory look at the local press or drove along a public highway). ERSRI's practice of allowing these retroactive purchases is not a formally adopted rule. Thus, the practice has never undergone the kind of public notice and comment that at least would have garnered some public awareness. Finally, the Court does not agree with Mr. Iverson's suggestion that the sixty-day provision is an obscure technical requirement whose brushing aside for the sake of equity the Legislature would tacitly condone. As is evidenced by the $183,225.43 invoice that the Town received in this case, as well as the uncontradicted testimony of Mr. Karpinski, an elected official's failure to become a contributing member in a timely fashion can create large, unfunded liabilities for the municipal-employers if ERSRI allows the former employee, years later, to purchase credits at full actuarial value. See Tr. 24-25, Sept. 8, 2010, Rec. Ex. 3. Since there are no reliable indicia that ERSRI's practice was ever brought to the Legislature's attention, and since this Court finds ERSRI's practice inconsistent with the statutory scheme, it cannot

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> Middletown who said I should be part of it, and we did this exact same process.

(Tr. 33, Nov. 10, 2008, Rec. Ex. 8.) Mr. Karpinski's November 3, 2008 denial letter to Mr. Iverson likewise indicates that ERSRI implemented this practice in 2001. See Letter from Frank Karpinski to Richard Iverson, Nov. 3, 2008, Rec. Ex. 2L. Thus, when Mr. Iverson attempted to purchase the retirement credits in 2008, ERSRI's practice had been in place for approximately seven years.

None of the parties have given an estimate of the number of municipal council members who have benefited from ERSRI's practice. The Court notes that in addition to Mr. Karpinski's suggestion that ERSRI may have allowed "a bunch of . . . council persons in Middletown" to purchase credits for previous service, he also indicated that two members of the Scituate Town Council had acted to purchase credits retroactively. See id.; Tr. 33, Nov. 10, 2008, Rec. Ex. 8. Mr. Karpinski's testimony evidences that council members from municipalities other than Middletown and Scituate may have benefited from ERSRI's practice but the exact numbers are not clear. See Tr. 33, Nov. 10, 2008, Rec. Ex. 8.

conclude that the Legislature's inaction is proof of implied approval.[21] See Zuber, 396 U.S. at 185 n.21.

B

Judicial Estoppel

Mr. Iverson alternatively argues that the Town should be judicially estopped from opposing his purchase of retirement credits in this administrative appeal because it took an inconsistent position in a prior legal proceeding. Mr. Iverson makes this argument by relying on Mr. Budway's May 1, 2008 employer affidavit, submitted to ERSRI in support of his purchase. He argues that the Town took a position that is directly contrary to the one it now takes before this Court. Therefore, this Court should prohibit the Town from opposing his purchase in this appeal in order to preserve the integrity of the judicial process.

As recognized by the Rhode Island Supreme Court, the doctrine of judicial estoppel forbids a party from "assum[ing] successive positions, in the course of a suit or series of suits, in reference to the same facts or state of facts which are inconsistent with each other or mutually contradictory." McAuslan v. Union Trust Co., 46 R.I. 176, 125 A. 296, 301 (1924); see also 31 C.J.S. Estoppel and Waiver § 186 (2012) (judicial estoppel "precludes a party from gaining an advantage by taking one position" in a legal proceeding "and then seeking a second advantage by taking an incompatible position."). "[T]he underlying purpose[s] of the doctrine [are] 'to protect the integrity of the judicial process[,]'" Gaumond v. Trinity Repertory Co., 909 A.2d 512, 519 (R.I. 2006) (quoting New Hampshire v. Maine, 532 U.S. 742, 750 (2001)), and to "promot[e] truthfulness and fair dealing in court proceedings." D & H Therapy Assocs. v. Murray, 821 A.2d

[21] Since the Court concludes that the Retirement Board lacks authority to permit Mr. Iverson's purchase of credits for previous service, it need not consider the Town's argument that the doctrine of laches would prohibit the purchase.

691, 693 (R.I. 2003) (citations omitted). Accordingly, parties will not be allowed "to play fast-and-loose with the court by intentional self-contradiction as a means of obtaining an unfair advantage." 31 C.J.S. Estoppel and Waiver § 186 (2012). Since the doctrine of judicial estoppel "'is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.'" Gaumond, 909 A.2d at 519 (quoting New Hampshire, 532 U.S. at 749-50)). Its application is "[o]rdinarily . . . an extraordinary form of relief, that 'will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief.'" Shorrock v. Scott, 944 A.2d 861, 864 (R.I. 2008) (quoting Gaumond, 909 A.2d at 519 (internal quotation omitted)).

Although "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," there are several factors that most courts look to in determining whether to apply the doctrine in a particular case. New Hampshire, 532 A.2d at 749 (internal quotation and citation omitted). "First, a party's later position must be 'clearly inconsistent' with its earlier position." Id. (citing United States v. Hook, 195 F.3d 299, 306 (7th Cir. 1999)) (additional citations omitted). Second, the party "must have been successful in maintaining the first position and must have received some benefit . . . ." 28 Am. Jur. 2d Estoppel and Waiver § 68 (2011) (citing Bogan v. Hodgkins, 166 F.3d 509 (2d Cir. 1999)). Finally, the most important consideration "in determining whether to apply the doctrine of judicial estoppel is whether the party seeking to assert an inconsistent position would derive an unfair advantage . . . if not estopped." Gaumond, 909 A.2d at 519 (quotation omitted). Where these factors are met, judicial estoppel may apply to prohibit a party in a civil proceeding from asserting a position that is inconsistent with his or her prior sworn statement to an administrative agency. See generally Judicial Estoppel in Civil Action Arising from

Representation or Conduct in Prior Administrative Proceeding, 99 A.L.R. 5th 65 (2002) (citing among others DeRosa v. National Envelope Corp., 595 F.3d 99 (2d Cir. 2010)).

Although the May 1, 2008 affidavit would constitute a sworn statement made to an administrative agency, a review of the record does not show that Mr. Budway made any statements in that affidavit that are "clearly inconsistent" with the position the Town now takes in this appeal. See New Hampshire, 532 U.S. at 749. In the affidavit, Mr. Budway swore, "[b]ased on information presented to me, the failure of Richard Iverson to be a contributing member of MERS [from 1983 to 1992] was due to inadvertence, mistake and excusable neglect on behalf of the Town of Scituate and/or the employee, Richard Iverson." (Budway Affidavit at ¶ 5, Rec. Ex. 2G.) In this appeal, the Town asserts that the reasons why Mr. Iverson failed to contribute to MERS are irrelevant because the plain language of § 45-21-8(a) prohibits municipal officials from making retroactive purchases of credit, irrespective of whether their failure to contribute was inadvertent or intentional.[22] Essentially, the Town argues that even if the statement in Mr. Budway's affidavit is true, Mr. Iverson nevertheless cannot purchase credit for his previous service. The Town has consistently maintained its position that § 45-21-8(a) prohibits Mr. Iverson's purchase since Town Solicitor, Mr. D'Agostino, wrote to Mr. Robinson on October 6, 2010, requesting an opportunity to be heard in this matter. See Letter from David

[22] Specifically, in its memorandum in support of its appeal, the Town argues:

> This case does not turn on consideration of competing sets of facts; while there are differing (or, more accurately, inconclusive) facts concerning why Mr. Iverson failed to participate in [MERS] at any number of opportunities, none bear on the ultimate issue, which is whether he did participate within the statutorily-required time frame.

(Appellant's Mem. 11) (emphasis in original).

D'Agostino to Michael Robinson, Oct. 6, 2010, Rec. Ex. 7. The Town thereafter asserted the same position throughout the Retirement Board's proceedings. See Tr. 15-16, Nov. 10, 2010, Rec. Ex. 8; Letter from David D'Agostino to Frank Karpinski and Michael Robinson, Sept. 30, 2011, Rec. Ex. 18; Tr. 32, 43, Oct. 12, 2011, Rec. Ex. 20. Furthermore, even if the Town's position in this appeal was in any way inconsistent with the statements in Mr. Budway's affidavit, judicial estoppel has generally been held to preclude only inconsistent assertions of facts, not legal positions. See, e.g., Okland Oil Co. v. Conoco, Inc., 144 F.3d 1308, 1325 (10th Cir. 1998); Seneca Nation of Indians v. State of N.Y., 26 F. Supp. 2d 555, 565 (W.D.N.Y. 1998) (citation omitted); Holzer v. Motorola Lighting, Inc., 693 N.E.2d 446, 977-78 (Ill. App. Ct. 1998); Ottema v. State ex. rel. Wyo. Worker's Comp. Div., 968 P.2d 41, 46 (Wyo. 1998).

Finally, and perhaps most significantly, it is not clear what advantage, if any, the Town derived from submitting the affidavit to ERSRI. To the contrary, the submission of the affidavit would appear to have been to the Town's detriment since, in the affidavit, the Town acknowledges its liability for the costs and fees associated with Mr. Iverson's purchase. See Budway Affidavit at ¶ 5, Rec. Ex. 2G. Therefore, this is clearly not a case in which a party playing "fast-and loose" with a court has gained an advantage by taking one position and now deliberately seeks a second unfair advantage by taking a different position. See D & H Therapy Assocs., 821 A.2d at 693; 31 C.J.S. Estoppel and Waiver § 186 (2012). Exercising its discretion, this Court finds that it is not appropriate to apply the doctrine of judicial estoppel to prohibit the Town from opposing Mr. Iverson's purchase in this appeal. See Gaumond, 909 A.2d at 519 (judicial estoppel is an equitable doctrine invoked by a court at its discretion).

C

Declaratory Relief

The Town requests that if the Court overturns the Retirement Board's decision, the Court also declare the March 19, 2008 invoice for $183,225.43 null, void, and unenforceable. In light of this Court's finding that the Retirement Board was without authority to allow Mr. Iverson to purchase the retirement credits for his service on the Town Council, the requested declaratory relief is unnecessary.[23] See 26 C.J.S. Declaratory Judgments § 13 (2012) (declaratory judgment only proper when useful and necessary); see also Berberian v. Travisono, 114 R.I. 269, 273, 332 A.2d 121, 123 (1975) (Court should consider availability of other adequate remedy before granting declaratory judgment). The Court therefore exercises its discretion to decline to entertain the Town's request for declaratory relief. Fireman's Fund Ins., 120 R.I. at 846, 391 A.2d at 101.

IV

Conclusion

After reviewing the entire record, this Court finds that the Town's substantial rights have been prejudiced because the Retirement Board's decision was in excess of its statutory authority and in violation of statutory provisions. Accordingly, the decision of the Retirement Board allowing Mr. Iverson to purchase retirement credits for his previous service on the Town Council is reversed. Counsel shall prepare an appropriate order for entry.

[23] Additionally, ERSRI and the Retirement Board, in their memorandum, agree that this Court's resolution of the Town's administrative appeal will also resolve any issues relating to the enforceability of the invoice. See Providence Teachers Union v. Napolitano, 690 A.2d 855, 856 (R.I. 1997) (no present, actual controversy where both parties were in agreement).

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Town of Scituate v. Employees' Retirement System of Rhode Island, et al.
CASE NO:	PC-2011-6345
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 4, 2013
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
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