



State of New Jersey

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January 20, 2022

Sent via email to: [REDACTED]

CASTELLANI LAW FIRM
David R. Castellani, Esq.

[REDACTED]

RE: Michael Mosca
PERS [REDACTED]
OAL DKT. NO. TYP 01261-17 S

Dear Mr. Castellani:

At its meeting on December 8, 2021, the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered the Initial Decision (ID) of the Honorable Jeff S. Masin, ALJ, all exhibits, exceptions filed by Deputy Attorney General (DAG) Jeffrey Padgett, dated November 23, 2021 and your personal appearance on behalf of your client, Michael Mosca. After careful consideration, the Board voted to adopt in part, reject in part, and modify the ALJ's factual findings, and to reject the finding that Mr. Mosca is eligible for PERS enrollment for his service as City of Ventnor municipal prosecutor, thereby reaffirming its original decision denying his enrollment. The Board directed the Secretary to draft findings of fact and conclusions of law consistent with its decision for presentation at its meeting of January 19, 2022.¹

a. FINDINGS OF FACT

This matter involves the application of N.J.S.A. 43:15A-7.2(a) ("Chapter 92" of the Public Laws of 2007) to the case of a municipal prosecutor. That statute provides:

- (a) A person who performs professional services for a political subdivision of this State or a board of education, or any

¹ Due to health and safety concerns for the public regarding COVID-19, December 8, 2021, meeting was conducted via teleconference.

agency, authority or instrumentality thereof, under a professional services contract awarded in accordance with section 5 of P.L.1971, c.198 (C.40A:11-5), N.J.S.18A:18A-5 or section 5 of P.L.1982, c.189 (C.18A:64A-25.5), on the basis of performance of the contract, shall not be eligible for membership in the Public Employees' Retirement System. A person who is a member of the retirement system as of the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) shall not accrue service credit on the basis of that performance following the expiration of an agreement or contract in effect on the effective date. Nothing contained in this subsection shall be construed as affecting the provisions of any agreement or contract in effect on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.), whether or not the agreement or contract specifically provides by its terms for membership in the retirement system. No renewal, extension, modification, or other agreement or action to continue any professional services contract in effect on the effective date of P.L.2007, c.92 (C.43:15C-1 et al.) beyond its current term shall have the effect of continuing the membership of a person in the retirement system or continuing the accrual of service credit on the basis of performance of the contract.

Mr. Mosca was appointed annually to the Ventnor municipal prosecutor position pursuant to Local Public Contract Law ("LPCL") N.J.S.A. 40A:11-1 et seq. under a series of "no bid" contracts which made him ineligible to earn PERS service credit in that capacity. ID at 2-3. But Mr. Mosca contended that, notwithstanding the language in the appointing resolutions and public notices published consistently, year after year, from 2008 through 2015, he was nonetheless in fact a regular employee of Ventnor serving in the position of municipal prosecutor. ID at 2. Mr. Mosca asserts that the resolutions were passed and published in the newspaper due to an error repeated annually over an extended period of time. Ibid.

Both the Board and Mr. Mosca moved for summary decision in this matter, ID at 2. In its moving papers the Board argued that the resolutions and public notices demonstrate that Mr. Mosca was appointed annually to the Ventnor municipal prosecutor position pursuant to Local Public Contract Law ("LPCL") N.J.S.A. 40A:11-1 et seq. under a series of "no bid" contracts which

make him ineligible to earn PERS service credit in that capacity. ID at 2-3. Moreover, the certifications, drafted years after the alleged errors took place, are not sufficient to establish the fact that an error had occurred each year over an extended period of time without ever being noticed, let alone corrected, and fail to explain why the formal process to award an annual service contract was followed, if, in fact Mosca was to be retained as an employee. Ibid.

Based solely on certifications submitted by Mr. Mosca, without the benefit of live testimony and cross-examination, the ALJ accepted Mr. Mosca's argument that the public process instituted by Ventnor after the passage of Chapter 92, executed faithfully year after year and published in the local press was an error by the town's staff. The ALJ found that the lack of written contracts reflecting the annual appointments corroborated Mosca's argument that he was in fact an employee. The ALJ denied the Board's motion for summary decision and granted Mosca's, holding that the certifications submitted, together with the lack of contracts subsequent to Mosca's annual appointments, establish that there was no contract between Mosca and Ventnor and that Mosca was in fact an employee eligible for PERS membership.

In its review of the ALJ's findings of fact, the Board added to the factual findings the language in Ventnor's resolutions appointing Mr. Mosca as municipal prosecutor pursuant to LPCL. The Board also found that Mr. Mosca was appointed to the positions of attorney/secretary and secretary in accordance with "no bid" public contract law as a professional service.

The Board also modifies the ALJ's factual finding to include the specific language of Resolution No. 154, passed by Ventnor on December 18, 2008 (the "2008 Resolution"), titled "Reappointment of Michael Mosca, Esq. as Prosecutor for [Ventnor]" for 2009. R-2. The resolution stated:

WHEREAS, the Ventnor City Board of Commissioners is desirous of reappointment Michael Mosca, Esq. to serve as Municipal Prosecutor for a one year term beginning January 1, 2009: and

WHEREAS, the Local Public Contracts Law (N.J.S.A. 40A:5-11 et seq.) requires that the Resolution authorizing the award of contracts for “Professional Services” without competitive bids must be publicly advertised.

...
The Contract is awarded without competitive bidding as a “Professional Service” under the provisions of the Local Public Contracts Law because the law permits the waiving of competitive bids under N.J.S.A. 40A:5-11.

[ibid.]

The Board finds this language particularly important because the resolution is a public notice regarding the award of a contract worth \$31,000.00 to Mr. Mosca for appointment as municipal prosecutor. The public notices were also published each year in the Atlantic City Press as a “professional service pursuant to N.J.S.A. 40A:11-5(1)(a).” R-2.

The Board therefore finds as fact that after the 2008 Resolution, Ventnor passed six essentially identical resolutions reappointing Mr. Mosca as Ventnor’s municipal prosecutor for every year between 2009 and 2015, and public notices advising of these professional services contract awards were published in each year. R-3 (Resolution No. 179 of 2009); R-4 (Resolution No. 160 of 2010); R-5 (Resolution No. 187 of 2011); R-6 (Resolution No. 10 of 2013); R-7 (Resolution No. 193 of 2013); R-8 (Resolution No. 174 of 2014). Finally, the Board notes that the LPCL requires the publication of these awards in a local newspaper. N.J.S.A. 40A:11-5. There is no requirement that a general hire would require publication, nor would an employee normally be required to be rehired every year.

The Board also modified the findings of fact to note that Mosca maintained his own private law practice, while purportedly an employee of Ventnor, with regular business hours of 9:00 a.m. to 5:00 p.m. R-11.

Finally, the Board rejects entirely the ALJ’s reliance upon the certifications of former Ventnor mayors, finding their contents as “undisputed facts.” ID 10-12; 17. It is clear these documents were prepared years after the resolutions were passed, and it is difficult to determine

how the Board would refute their contents considering they relate that to the “understanding” that Mr. Mosca was an employee, despite yearly appointing him as municipal prosecutor under the LPCL.

CONCLUSIONS OF LAW

The Board rejects the ALJ’s conclusion that Mr. Mosca’s service as Ventnor’s municipal prosecutor qualifies him for PERS service credit after the effective date of Chapter 92, January 1, 2008. Rather, the Board finds that the resolutions and public notices unequivocally appointed Mr. Mosca under the provisions of the LPCL. As such, his service in that position is not creditable under Chapter 92.

The ALJ found that Mr. Mosca “was not a vendor, did not provide professional services pursuant to a professional services contract pursuant to the LPCL, and was instead always an employee of Ventnor,” and therefore, “he was and remains eligible for enrollment in PERS for his services to Ventnor.” ID at 9. The Board rejects that legal conclusion.

Our courts have held in other Chapter 92 cases that a municipal resolution itself can constitute a binding agreement for professional services. Lanza v. Bd. of Trs., Pub. Employees’ Ret. Sys., 2019 N.J. Super. Unpub. LEXIS 497, at *19 (App. Div. Mar. 5, 2019) (affirming Board’s determination that that appellant was not eligible for PERS service credit after effective date of Chapter 92); Diktas v. Bd. of Trs., 2021 N.J. Super. Unpub. LEXIS 1042, at *8 (App. Div. June 1, 2021) (affirming Board’s denial of service credit under N.J.S.A. 43:15A-7(a) and finding “ample evidence” in support, based on the plain language of the resolutions appointing the attorney pursuant to LPCL).

Moreover, “[W]hile the contracts of a municipal corporation are ordinarily executed and signed on its behalf by one or more of its duly authorized officers, it is also well established by the great weight of authority that a contract, binding upon a municipality, may be brought into existence by a vote of the municipal council.” Buckley v. Jersey City, 105 N.J. Eq. 470, 478-79

(Ch. Div. 1930), aff'd, 107 N.J. Eq. 137 (E. & A. 1930); see McCurrie v. Town of Kearney, 344 N.J. Super. 470, 480 (App. Div. 2001) (holding that, “in the absence of statutory language to the contrary, a local government may enter into a contract by the passage of a resolution”), rev'd on other grounds, 174 N.J. 523 (2002).

Under the LPCL, a contract is a legally enforceable agreement between a “vendor who agrees to provide or perform goods or services and a contracting unit that agrees to compensate a vendor.” N.J.S.A. 40A:11-2(21). Further, a contract does not need to be in writing to be enforceable. See Leodori v. Cigna Corp., 175 N.J. 293, 304-05 (2003). The absence of a written agreement between the parties does not abrogate the plain language of the Resolutions. Moreover, the absence of a written contract does not amount to a genuine issue of material fact.

Here, the existence of the award(s) of the public contract(s) over many years was clearly noted in the Atlantic City Press publications and the Resolutions, even if they were not separately drafted and acknowledged. The Board therefore finds that Mr. Mosca was a professional service provider appointed under the LPCL and therefore his service is not eligible for PERS credit under Chapter 92.

The Board also noted, under the rules for summary decision in the Office of Administrative Law, the ALJ improperly granted summary decision in favor of Mosca, but denied the Board’s motion “in the face of conflicting evidence . . .”. ID at 18. In such an event, if the evidence as to the nature of Mr. Mosca’s work relations to the municipality was in material conflict, summary decision should have been denied for both parties, and the evidence fully developed in an adversarial process.

The Board noted that the ALJ gave significant weight to the certifications of Mosca, Kreisler, and Bagnell. ID at 10-12. However, the Board also noted that these individuals did not testify at a hearing, and their untested certifications are insufficient to support the ALJ’s finding that Ventnor’s governing body’s repeated awards of professional service contracts, published in

the newspaper each year pursuant to the LPCL, was simply an error. The Board rejects the ALJ's reliance on the certifications, because the certifications do not create a genuine dispute of material fact. The certifications, drafted years after the contracts were awarded simply cannot negate the plain language of the Resolutions appointing Mr. Mosca to a professional services agreement pursuant to the LPCL.

Moreover, the ALJ credited Mr. Mosca's certified statement (supported by others) that "my name was accidentally lumped in with others when the resolutions were put together, and the Council passed the resolutions in error." ID 10-12. The ALJ found the statements unrefuted, but this post hoc and self-serving statement is also factually inaccurate. The resolutions were passed each year and specifically cite to Mosca's annual reappointment, and titled appropriately, specifically naming Mosca as the individual awarded the professional services contract. R-1 thru R-8. The resolutions also were published in the Atlantic City Press, advising the public that a "no-bid" professional services contract was awarded to Mr. Mosca in accordance with N.J.S.A. 40:11A-5. R-1 -R-8. The resolutions were clearly not general "lump" appointments, but specifically enacted and awarded to Mr. Mosca each year. The Board rejects the ALJ's finding that that the resolutions were erroneously passed year after year, without a credible explanation as to how or why such an alleged error occurred (or why it was never corrected). The Board finds that the record before the OAL entitled the Board to summary decision.

For these reasons, the Board rejects in part, adopts in part, and modifies the ALJ's factual findings as set forth above. The Board rejects the ALJ's legal conclusion that Mr. Mosca's position as Ventnor's municipal prosecutor was eligible for PERS service credit. This correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.


David Castellani, Esq.
Re: Michael Mosca
January 20, 2022
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You have the right to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,



William Tedder, Acting Secretary
Board of Trustees
Public Employees' Retirement System

G-7

C: J. Sloth (ET); K. Conover (ET)
OAL, Attn: Library (ET)
DAG Jeffrey Padgett (ET)
Michael Mosca