



State of New Jersey

DEPARTMENT OF THE TREASURY
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August 20, 2018

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Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

Sent via email to [REDACTED]

Bernard Reilly
[REDACTED]

RE: [REDACTED]

Dear Mr. Reilly:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting on July 18, 2018, the Board of Trustees of the Public Employees' Retirement System (PERS) reviewed the Initial Decision ("ID")¹ of the Administrative Law Judge ("ALJ") Lisa James-Beavers dated June 1, 2018 in the above captioned matter, together with the joint stipulation of facts, the items submitted into evidence by the parties, exceptions filed by Deputy Attorney General Jeffrey S. Ignatowitz dated July 9, 2018 and reply to exceptions dated July 10, 2018 filed by you.

Thereafter, the Board voted to adopt the factual findings of the ALJ and the ultimate legal conclusion that you qualified as an employee pursuant to N.J.S.A. 43:15A-7, as well as the 20-factor Internal Revenue Service test but rejected the ALJ's reasoning in reaching her conclusion to comport with the PERS statutes and case law. As a result, you are entitled to PERS salary and service credit for the years 2006 and 2007 in Middletown Township and for the years 2000-2003, 2006 and 2007 in the Borough of Atlantic Highlands².

¹ The Board requested and was granted an extension of time until August 30, 2018 to issue its final administrative determination.

² The Retirement Bureau was instructed to implement the Board's decision and recalculate your retirement benefits based upon this determination.

Findings of Fact and Conclusions of Law as outlined below were presented and approved by the PERS Board at its meeting on August 15, 2018 which constitutes the Final Administrative Determination in this matter.

FINDINGS OF FACT

The Board takes no issue with the ALJ's summary of the testimony and the documentary evidence, and the ALJ's findings of fact and therefore, the Board adopts the facts as they are supported by sufficient credible evidence in the record. See Cavalieri v. Bd. of Trs., Pub. Employees' Ret. Sys., 368 N.J. Super. 527, 533-34 (App. Div. 2004); see also N.J.S.A. 52:14B-10(c).

This matter commenced in 2006³ as the result of a Division of Pensions and Benefits ("Division") audit into your PERS service credit for services performed for the years 2006-2007 in Middletown Township ("Middletown") and for the years 2000-2003, 2006, and 2007 in the Borough of Atlantic Highlands ("Atlantic Highlands"). ID at 2.⁴ You were appointed as Middletown's municipal attorney in both 2006 and 2007 via resolution authorizing your appointment pursuant to the Local Public Contract Law, N.J.S.A. 40A:11-5. Ibid.; J-14. The 2006 and 2007 Middletown contracts appointed only you and not your firm. J-14. You also provided legal services, such as defending Middletown in litigation, and billed separately from your municipal attorney salary for such matters. Ibid. Your work for Middletown totaled approximately 10-15 hours per week. ID at 14.

You were appointed Borough Attorney for Atlantic Highlands from 2000 through 2003 and from 2006 through 2007. ID at 21. Only the 2006 and 2007 contracts were provided for review, although you testified that all of the contracts were substantially similar. (T1:175-76; J-12, 13).

³ The procedural history of this case is detailed at length in the ID. See ID at 2-4. For the sake of brevity it is not repeated herein.

⁴ You were enrolled in the PERS in 1989 as a result of your employment with the New Jersey Turnpike Authority. ID at 5. After leaving that employment, you started a private law firm which concentrated on municipal matters and representing government agencies. Ibid. In 2006, you were named municipal attorney for Middletown. (J-14). You had previous PERS service with Middletown which is not the subject of this case.

The contracts appointed only you and not your firm as the borough attorney, and required your attendance at 24 meetings per year. J-12. In addition to attending the meetings, you were also required to prepare “routine Resolutions and Ordinances,” to discuss legal matters with “the Mayor and Council Members and Borough staff members outside of meetings,” and to “draft[] routine correspondence and legal advice.” Ibid.

CONCLUSIONS OF LAW

Although the Board adopts the ALJ’s ultimate finding that you were an employee of both Middletown and Atlantic Highlands based upon the application of the IRS Test, the Board rejects the ALJ’s legal reasoning because the Board finds that it is fundamentally flawed.

The ALJ begins the analysis by erroneously stating that municipal attorneys were all PERS-eligible prior to 2008, the year in which N.J.S.A. 43:15A-7.2 (“Chapter 92”) became effective. ID at 21, 23. Although it is true that Chapter 92 was intended to remove professional service providers such as attorneys from the PERS, the ALJ’s conclusion that, prior to Chapter 92, all municipal attorneys were eligible for PERS enrollment is simply incorrect.

The ALJ ignores the holding of Angelini v. Board of Trustees, Public Employees’ Retirement System, A-2416-14T3 (App. Div. May 4, 2017), a case she cites later in the ID, which directly contradicts her finding that all municipal attorneys were considered employees prior to Chapter 92. In Angelini, the Appellate Division upheld the Board’s decision to remove from the PERS an attorney who held several different attorney positions for various levels of local government. (Slip op. at 6). In that case, the Board employed the IRS Test, and found that Angelini was not considered an employee of any of the governmental entities for which he worked before 2008. (Id. at 6). The court agreed, noting that it “ha[d] sanctioned use of the IRS twenty-factor test before the 2008 Amendment to the Act.” Ibid. Thus, the ALJ’s reasoning that all government attorneys were PERS-eligible prior to Chapter 92 is rejected because it is incorrect.

The ALJ also cites to a number of cases in which municipal attorneys were found to be employees, as support that all government attorneys were PERS-eligible. ID at 21-23. The Board disagrees. The ALJ's reliance on Mastro v. Board of Trustees, Public Employees' Retirement System, 266 N.J. Super. 445 (App. Div. 1993), which cites to Fasolo v. Board of Trustees, Public Employees' Retirement System, 181 N.J. Super. 434 (App. Div. 1981), for this proposition, see ID at 22, is mistaken.

First, the central issue in Mastro was whether the Board's failure to reject an initial decision within 45 days of its issuance meant the decision was deemed adopted, or whether the Board was free to reject the decision. 266 N.J. Super. at 448. The Mastro and Fasolo courts next resolved the question of whether the parties' respective earnings were PERS-eligible based exclusively on the method of compensation. However, the Mastro court explicitly recognized the "dangers of manipulation of the pension system by professionals performing part-time services for government agencies" as well as the "Board's understandable desire" to protect the pension system by guarding against such manipulation. 266 N.J. Super. at 456. The court then noted that it had previously approved the Board's consideration of "factors other than simply the method of compensation in determining whether payments to a professional are the salary of an employee or the compensation of an independent contractor." Ibid. (emphases supplied) (citing DiMaria v. Bd. of Trs., Pub. Employees' Ret. Sys., 225 N.J. Super. 341 (App. Div. 1988)). Thus, contrary to the ALJ's reasoning, the fact that an attorney is employed by a governmental entity is not, by itself, dispositive of the question of PERS eligibility.

The ALJ next cited to Loigman v. Township of Middletown, 409 N.J. Super. 1 (App. Div. 2009), a case involving your Middletown contract. ID at 22. In that case, Loigman challenged a Middletown ordinance which carved out your salary as municipal attorney, but also authorized payment for additional services, such as litigation. Loigman, 409 N.J. Super. at 5. The court held that "it is permissible for an attorney. . . to be paid a salary for [the municipal attorney] position, and

also to be paid for additional services.” Id. at 5. The ALJ’s statement that the Appellate Division “validated” your appointment as an “employee” mischaracterizes the holding in that case, as the only issue involved whether separate ordinances were required for the municipal attorney duties and the additional duties as required by Middletown. Id. at 6. (citing Middletown Code §4-32A). The Loigman court in no way decided that you were an “employee” under the PERS statutes.

The ALJ also incorrectly reasons that the Board should not have applied the IRS Test, but rather Publication 963, because the case law was clear that government attorneys were, again, automatically PERS-eligible based on their appointment. ID at 23. The Board rejects this statement of the law as it is incorrect. Contrary to the ALJ’s reasoning, the Appellate Division has consistently approved of “the PERS Board’s use in individual contested cases of the twenty factors, which was originally set forth by the Internal Revenue Service in IRS Rev. Rul. 87-41, 1987-1 C.B. 296, 298-99, to determine whether a public sector employer had sufficient ‘control’ over a person . . . so that the person was an employee whose service and salary was creditable in PERS.” Francois v. Bd. of Trs., Pub. Employees’ Ret. Sys., 415 N.J. Super. 335, 350-51 (App. Div. 2010); see also Hemsey v. Bd. of Trs., Police & Firemen’s Ret. Sys., 393 N.J. Super. 524, 542 (App. Div. 2007), overruled in part on other grounds, 198 N.J. 275 (2009); Stevens v. Bd. of Trs., Pub. Employees’ Ret. Sys., 309 N.J. Super. 300, 304 (App. Div. 1998); Stevens v. Bd. of Trs., Pub. Employees’ Ret. Sys., 294 N.J. Super. 643, 653, n.1 (App. Div. 1996).

The ALJ next found that Petit-Clair v. Board of Trustees, Public Employees’ Retirement System, A-2048-16 (App. Div. Mar. 1, 2018), which dealt with PERS eligibility under Chapter 92, required the use of Publication 963, rather than the IRS Test. ID at 23. Both the Board and you agree that Chapter 92 is inapplicable to this case, and therefore the court’s analysis in Petit-Clair is not applicable here. Again, the Board rejects this legal reasoning.

Finally, the Board rejects the ALJ’s legal conclusion that this matter was improperly remanded to the Office of Administrative Law (OAL) for additional fact-finding, in violation of the

Administrative Procedure Act. ID at 32. As outlined in the ID, at the first hearing the ALJ did not allow the Board to cross-examine you as to any issue other than whether you were able to substitute personnel in your absence at either location, and therefore did not apply the IRS Test to your situation in order to determine your PERS eligibility. ID at 2. The Board has the authority to remand “issues or arguments not previously raised or incompletely considered” without issuing a final administrative decision. N.J.A.C. 1:1-18.7(a). Thus, the ALJ’s conclusion that the Board should have issued a final decision rather than remand to the OAL is incorrect and therefore, the Board rejects this conclusion.

CONCLUSION

For these reasons, the Board adopts the ALJ’s conclusion that you qualify as an employee under N.J.S.A. 43:15A-7, but rejects the ALJ’s legal analysis.

You have the right, if you wish 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.

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Public Employees’ Retirement System

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C: D. Dinkler (ET)
DAG Robert Kelly (ET); DAG Amy Chung (ET)