



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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January 16, 2020

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Acting Director

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Governor

SHEILA Y. OLIVER
Lt. Governor

Eric M. Bernstein & Associates, LLC
Philip G. George, Esquire

[REDACTED]
[REDACTED]
[REDACTED]

RE: Christos Diktas

[REDACTED]
[REDACTED]

Dear Mr. George:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting on December 11, 2019, the Board of Trustees of the Public Employees' Retirement System (PERS) reviewed the Initial Decision (ID) of the Hon. Ellen S. Bass, ALJ, dated October 29, 2019, together with the evidence submitted by the parties, the exceptions submitted by your office and Deputy Attorney General Jeffrey Padgett, on November 19, 2019 and November 22, 2019, respectively.¹ Thereafter, the Board voted to adopt, but modify the ALJ's factual findings and reject the ALJ's legal conclusion that Mr. Diktas was eligible for PERS service credit pursuant to N.J.S.A. 43:15A-7.2 (Chapter 92), thereby reaffirming its original determination that Mr. Diktas is ineligible for PERS service credit from 2008 to 2013. As such, the Board directed the Secretary to prepare the Findings of Fact and Conclusions of Law as outlined below which were approved by the PERS Board at its meeting on January 15, 2020. These Findings of Fact and Conclusions of Law constitute the Final Administrative Determination in this matter.

¹ DAG Padgett requested and was granted a *nunc pro tunc* extension to file exceptions.

FINDINGS OF FACT

The Board adopted, in part, the ALJ's Findings of Fact, but modified those findings as outlined herein. First, the Board voted to incorporate into the Findings of Fact the Garfield Redevelopment Agency (GRA) resolutions appointing Mr. Diktas as Secretary, Attorney and Executive Director, and finds as fact that Mr. Diktas was appointed to the positions of Attorney/Secretary and Secretary in accordance with "no bid" public contract law as a professional service. Resolution 02-B stated, in pertinent part:

WHEREAS, [N.J.S.A.] 40A:11-5 provides that [the City of Garfield] or any duly established entity thereunder may contract for services without public advertising for bids and without bidding therefore if such services are professional or extraordinary and unspecifiable and [the GRA] has determined that the services of an attorney/secretary are of such nature.

[P-1.]

The Board noted that in 2002, the GRA did not distinguish between the Attorney and Secretary positions at the time they sought to retain Mr. Diktas' professional services. Therefore, the Board finds as fact that Mr. Diktas provided professional services pursuant to a Professional Services Agreement in the position of "Secretary/Attorney." In 2008, when the GRA separated the "Attorney" and "Secretary" positions in the resolutions, the critical language did not change. The language from Resolution 08-E is therefore, incorporated in the Board's findings of fact:

WHEREAS, [N.J.S.A.] 40A:11-5 provides that [the City of Garfield] or any duly established entity thereunder may contract for services without public advertising for bids and without bidding therefore if such services are professional or extraordinary and unspecifiable and [the GRA] has determined that the services of a secretary are of such nature.

[P-7 (emphasis added).]

The Board also finds as fact that Mr. Diktas signed all of the resolutions at issue as "Christos J. Diktas, Secretary." P-7. Unlike the Attorney/Secretary and Secretary resolutions, which cited the

Philip G. George, Esquire
Re: Christos Diktas
January 16, 2020
Page 3

Local Public Contract Law (the "LPCL") (i.e., N.J.S.A. 40A:11-5), Resolution 11-K (appointing Diktas to Executive Director) provided:

Whereas, N.J.S.A. 40A:12A-12 [of the Local Redevelopment and Housing Law] provides that the [GRA] shall contract for services without public advertising for bids and without bidding for the position of an Executive Director;

Whereas, the contract for the Executive Director shall be construed pursuant to N.J.S.A. 40A:12A-12 and City Ordinance 2338.

Therefore the Board finds, based on Resolution 02-B and Resolution 11-K, that the language appointing Mr. Diktas to Executive Director changed over time, showing an acknowledgement of the legal significance of the resolution's language.

The Board also finds, and modifies the factual findings to note that when the Secretary and Attorney positions were separated and adopted in two different resolutions, the Secretary position was still appointed under the LPCL as a no-bid public contract for professional services. Each year from 2008 to 2013, Mr. Diktas was reappointed as Secretary under the same "no bid" public contract language. Therefore, the Board finds that the language of the resolutions unequivocally stated that Mr. Diktas' appointment as Secretary was for professional services.

LEGAL CONCLUSIONS

The Board rejects the ALJ's conclusion that Mr. Diktas met his burden of proving that he is entitled to PERS service credit after January 1, 2008, and instead makes the following legal conclusions.

A. THE RESOLUTIONS CONCLUSIVELY ESTABLISH THAT DIKTAS PERFORMED WORK UNDER A PROFESSIONAL SERVICES AGREEMENT AND IS THEREFORE NOT ELIGIBLE FOR PERS SERVICE CREDIT UNDER CHAPTER 92

The ALJ concluded that "fairness to the parties, and fidelity to the language and intent of Ch. 92, dictate that [her] decision be based on the work actually performed by Mr. Diktas, and not on the language used in the resolutions that appointed him." ID at 10. The legal conclusion ignores well-established legal precedent and must be rejected. The Board therefore makes the

following Conclusions of Law and incorporates the same into its final agency decision. First, municipal resolutions can constitute a binding agreement for professional services. See 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 adoption of initial decision by Bass, ALJ that appellant was not eligible for PERS service credit after effective date of Chapter 92). "[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).

Therefore, the Board finds clear legal support for its decision that the language used in the resolutions is significant when determining the role and duties the individual performed. Moreover, it was Mr. Diktas who signed the resolutions approving their language and giving them legal effect, who now argues against reliance on that language. The ALJ distinguished Lanza by stating that "even if the resolution appointing Mr. Diktas constituted a contract, it was not a contract for professional services, as demanded by the statutory language. Resolutions passed publicly, committed to writing, and signed by Mr. Diktas as the secretary, should be found here (as they were in Lanza) to constitute written contracts." ID at 10.

The Board found that the ALJ's distinction does not logically follow and therefore rejects the ALJ's distinction, as there is no basis for concluding that the resolutions did not constitute a contract for professional services. The plain language of the resolutions states that the GRA "may contract for services without public advertising for bids and without bidding therefore if such services are professional or extraordinary and unspecifiable and [the GRA] has determined that

the services of a secretary are of such nature.” R-7 (emphases added). It is incongruent to find that resolutions can form a contract, but also find the same contract is not for professional services, when the language of resolutions (serving as the contract) refer to the Secretary position as one of professional services. The distinction serves no purpose but to diminish the importance of validly entered public resolutions. Therefore, the Board concludes that the GRA’s resolutions from 2008 to 2013 constituted contracts for professional services between Mr. Diktas and the GRA based on the holding in Lanza.

B. MR. DIKTAS’ POSITION AS SECRETARY IS BARRED BY STATUTE

The ALJ’s finding that the position of GRA secretary is pensionable is at odds with the GRA’s enabling legislation. The ALJ summarily determined that:

Finally, the Board urges that Diktas improperly served as the Board Secretary, as the legislation that allowed for creation of the Agency demands that the Executive Director serve in this role. See: N.J.S.A. 40A:12A-11(b). It asserts that Diktas should be barred from receiving pension credit for a position unauthorized by statute. I disagree. If the Agency is delegating duties to its staff improperly, this is a matter for a different day and a different forum.

[ID at 11.]

The ALJ failed to cite or analyze the GRA’s enabling legislation. Therefore, the Board’s final agency decision incorporates the language of N.J.S.A. 40A:12A-11(b), which provides that the GRA “shall employ an executive director, who shall be its secretary.” Ibid.

Given Mr. Diktas’ admission that the Executive Director position is not eligible for PERS service credit, it follows that, under N.J.S.A. 40A:12A-11(b), the Secretary position is also not pensionable as it is statutorily required that the executive director serve as the secretary. As Mr. Diktas helped establish the GRA, he should not receive the benefit of PERS membership for creating a duplicative/unauthorized position. Mr. Diktas cannot create a pensionable position by ignoring legislative mandate when there is no statutory support that the position of Secretary is pension eligible. The ALJ’s statement that an improper delegation of duties by the GRA “is a

Philip G. George, Esquire
Re: Christos Diktas
January 16, 2020
Page 6

matter for a different day and a different forum," ID at 11, ignores the fact that the Board has the statutory responsibility to determine eligibility for PERS service credit, which is not supported by the facts of this case.

For these reasons, the Board modifies the ALJ's findings of fact as set forth above and rejects the ALJ's conclusion of law that Mr. Diktas was eligible for PERS service credit pursuant to N.J.S.A. 43:15A-7.2, thereby reaffirming its original determination that Mr. Diktas is ineligible for PERS membership credit from 2008 to 2013. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

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. All appeals should be directed to:

Superior Court of New Jersey

Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,



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

G-9/MER

C: K. Conover (ET); J. Sloth (ET)
DAG Padgett (ET)
OAL, Attn: Library (ET)
Christos Diktas