

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Richard Mariano | : | |
| | : | |
| v. | : | No. 1428 C.D. 2010 |
| | : | |
| City of Philadelphia Board | : | Argued: May 10, 2011 |
| of Pensions and Retirement, | : | |
| | : | |
| Appeal of: City of Philadelphia | : | |
| Board of Pensions and | : | |
| Retirement and City of | : | |
| Philadelphia | : | |

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: August 31, 2011

The City of Philadelphia (City) and the City’s Board of Pensions and Retirement (Board) appeal the order of the Court of Common Pleas of Philadelphia County (trial court) granting the appeal of Richard Mariano, and reversing the Board’s decision to retain Mariano’s pension contributions totaling \$65,435.88.¹ We affirm.

¹ It should be noted that the appellate brief filed by the City and the Board in this Court does not contain a Statement of Jurisdiction or the Order or Other Determination in Question as required by Pa.R.A.P. 2111(a)(1), (2), 2114, and 2115. As a result, the appellate brief could be suppressed, and the instant appeal could be quashed or dismissed, pursuant to the provisions of

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Mariano was initially employed with the City as an employee of the City Council on January 6, 1992. He was elected a City District Councilman in November of 1995. During his employment, Mariano was a member of Pension Plan “L” and contributed a total of \$65,435.88 to the City’s retirement system. On March 17, 2006, Mariano was convicted in federal court of a number of felony counts of mail fraud, wire fraud, money laundering, bribery, filing a false tax return and conspiracy to commit honest services fraud.² He resigned his employment with the City on May 2, 2006. Ultimately, Mariano was sentenced to serve 78 months in prison, and assessed an \$1800.00 fine.

The City retained counsel from the Saul Ewing firm to represent Mariano during the investigation of the criminal charges and prior to his indictment.³ The City claimed that it paid the Saul Ewing firm \$82,064.96 in legal

Pa.R.A.P. 2101. Nevertheless, this Court may proceed to dispose of this appeal on the merits as the foregoing enumerated defects in the appellate brief do not preclude effective appellate review. Hatter v. Landsberg, 563 A.2d 146 (Pa. Super. 1989), petition for allowance of appeal denied, 525 Pa. 626, 578 A.2d 414 (1990).

² More specifically, Mariano was convicted of 18 criminal counts comprised of: (1) one count of Conspiracy to Commit Honest Services Fraud, 18 U.S.C. § 371; (2) five counts of Mail Fraud – Deprivation of Right to Honest Services of Public Official and Aiding and Abetting, 18 U.S.C. §§ 1343, 1346; (3) six counts of Wire Fraud – Deprivation of Right to Honest Services and Aiding and Abetting, 18 U.S.C. §§ 1343, 1346; (4) two counts of Money Laundering and Aiding and Abetting, 18 U.S.C. § 1956(a)(1)(B)(i); (5) three counts of Bribery, 18 U.S.C. § 666(a)(2) & (b); and (6) one count of False Tax Return, 26 U.S.C. § 7206(1).

³ See Section 20-702 of the Philadelphia Code, Phila. Code § 20-702 (“The City Solicitor shall defend and the City of Philadelphia shall indemnify and hold harmless the officers and employees of the City, whether currently employed by the City or not, against and from any and all personal liabilities, actions, causes of action, and any and all claims made against them whatever for acts performed within the scope of their employment.”). See also Section 4.4-400(b) of the Philadelphia Home Rule Charter, 351 Pa. Code § 4.4-400(b) (“(b) *Litigation*. The [Law] Department shall ... represent the City and every officer, department, board or commission in all litigation....”).

fees for this representation on behalf of Mariano. See Reproduced Record (RR) at 0285-0318.

On March 24, 2006, the City's acting Director of Finance formally asserted a claim with the Board's Executive Director, pursuant to the City's Public Employee's Retirement Code (Code)⁴, against any return of contributions to

⁴ Section 22-1302 of the Code provides, in pertinent part:

(1) Notwithstanding any other provision of this Title, no employee ... shall be entitled to receive any retirement or other benefit or payment of any kind except a return of contribution paid into the Retirement System, without interest, if such employee:

(a) pleads or is finally found guilty, or pleads no defense, in any court, to any of the following:

* * *

(.2) Acceptance of a bribe for the performance, or affecting the performance or for the non- performance of the employee's official duties...;

(.3) Engaging in graft or corruption incident to or in connection with the employee's office or employment constituting a violation of the laws of ... the United States;

(.4) Theft, embezzlement, willful misapplication, or other illegal taking of funds or property of the City, or those of any official agency of the City, or agency, engaged in performing any governmental function for the City....

Phila. Code § 22-1302(1)(a)(.2), (.3), (.4). See also Section 22-903(1) of the Code, Phila. Code § 22-903(1) ("*Refund of total contributions.* A member who separates from service for any cause other than death, disability or retirement shall at the written request of the member be repaid the total contributions made by such member into the Retirement System, without interest. Upon the refund of such contributions, all rights of the member ... under this Title shall terminate.").

However, Section 22-1303(1) of the Code provides:

(1) *Exempted from levy, sale, etc.; City offset.* Except as otherwise provided in this Section ..., the right of a person to ... the return of contributions ... , and the moneys in the funds of the Retirement System, are hereby exempt from levy and sale, garnishment, attachment, execution, sequestration or any other

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Mariano. See RR at 0104.⁵ On December 1, 2006, the Board’s Pension Program Administrator requested an opinion from the City Solicitor’s Office regarding Mariano’s pension rights. Id. at 0124. On February 1, 2007, the City’s Law Department advised the Board to retain Mariano’s pension contributions to the extent required to pay the claim asserted by the City. See id. at 0141-0146. On March 22, 2007, the Board voted 8-0 to retain Mariano’s pension contributions to offset the fees paid to Saul Ewing. See id. at 0158-0164.

As a result, on March 27, 2007, the Board sent Mariano a letter indicating that it had approved the disqualification of his pension and the retention of his pension contributions, and informed him of his right to appeal this determination within 30 days. RR at 0167. Mariano appealed this determination to the Board on April 26, 2007. Id. at 0176.

process whatsoever, except that the City shall have the authority to assert or offset any claim of the City against such person and the rights or benefits arising from membership under this Title.

Phila. Code § 22-1303(1).

⁵ Section 22-1201(1) of the Code provides that “[t]he general administration and management of the Retirement System is vested in the Board.” Phila. Code § 22-1201(1). In addition, Section 22-1202(1) of the Code provides, in pertinent part:

(1) *In general.* [T]he entitlement of any member ... to benefits accrued or rights accorded under this Title shall be determined after notice and opportunity to be heard. Any member or other claimant shall have a right to appeal to the Board any decision or determination affecting such person’s claimed benefits or rights. Findings and decisions of the Board on any actions taken by the Board or any of its employees shall be final and there shall be no further appeal other than to court as provided by law.

Phila. Code § 22-1202(1).

A hearing was conducted before a Board hearing panel on April 3, 2008. See RR at 0215-0232. On August 19, 2008, the Board notified Mariano that it had voted to withhold his contributions at its regular meeting on August 14, 2008. Id. at 0262-0264. On September 18, 2008, Mariano appealed the Board's decision to the trial court.

A hearing was conducted before the trial court on August 19, 2009. See RR at 0025-0056. On June 15, 2010, the trial court entered an opinion and order disposing of the appeal in which it determined, inter alia, that: (1) Section 22-1303 of the Code is not preempted by the relevant provisions of the Public Employee Pension Forfeiture Act (Act)⁶; (2) the City was entitled to recoup the

⁶ Act of July 8, 1978, P.L. 752, as amended, 43 P.S. §§ 1311-1315. In particular, Section 3 of the Act provides, in pertinent part:

(a) Notwithstanding any other provision of law, no public official or public employee ... shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted ... [of] any crime related to public office or public employment.

(b) The benefits shall be forfeited ... upon initial conviction and no payment or partial payment shall be made during the pendency of an appeal.... Such conviction ... shall be deemed to be a breach of a public officer's or public employee's contract with his employer.

* * *

(d) The appropriate retirement board may retain a member's contributions and interest thereon for the purpose of paying any fine imposed upon the member of the fund, or for the repayment of any funds misappropriated by such member from the ... political subdivision.

43 P.S. § 1313(a), (b), (d). In turn, Section 2 of the Act defines "political subdivision", in pertinent part, as "[a]ny county, city, ... [or] home rule ... municipality, and any ... boards, ... departments, instrumentalities, or entities thereof designated to act in behalf of a political

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attorney fees that it paid to Saul Ewing in Mariano's criminal defense; and (3) that the Board was not the proper forum in which the City could seek to recoup the attorney fees that it paid to Saul Ewing in Mariano's criminal defense. As a result, the trial court entered the instant order granting Mariano's appeal, and reversing the Board's decision to retain Mariano's pension contributions totaling \$65,435.88.⁷ The City and the Board then filed this appeal from the trial court's order.⁸

subdivision either by statute or appropriation." 43 P.S. § 1312.

⁷ In the opinion filed in support of its order, the trial court stated the following, in pertinent part:

Clearly the City properly retained counsel during a pre-indictment investigation. Once it became clear that Mariano would be indicted, the retained law firm withdrew this representation. There is no dispute that Mariano was later indicted and convicted. There is further no dispute that as a result of this conviction, he forfeited his pension. The only issue before this Court is whether the City can now make a claim against this pension for the legal fees and cost incurred in this pre-indictment investigation. This Court finds [Mariano]'s argument that a contract did not exist between the law firm and Mariano disingenuous. The City has every right and in fact an obligation to seek reimbursement from Mariano for the legal fees and cost it expended in this pre-indictment investigation. However, this Court finds that this proceeding is not the proper forum for the City to seek collection of the legal bill.... In this situation, the City simply submitted a legal bill from Saul Ewing in the amount of approximately \$82,000.00 and directed the Pension Board to retain Mariano's pension contribution to reimburse the City this expense. This is not proper. [T]he City clearly denied Mariano any opportunity to review and/or contest the legal bill from Saul Ewing. The City had every right to file a civil action against Mariano. If the City obtained a judgment against Mariano, then it would have every right to offset the judgment with the pension contribution. This is not what took place however. The City's actions here circumvented Mariano's right to contest the legal bill. By

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The sole claim raised by the City and the Board in this appeal⁹ is that the trial court erred in determining that the Board was not the proper forum to consider the amount to be offset from Mariano's pension contributions based upon the attorney fees incurred by the City in connection with his criminal defense. More specifically, although the City and the Board concede that the Board did consider and dispose of Mariano's contest of the City's claim for the return of the attorney fees, the City and the Board assert that Mariano acquiesced that the Board was the proper forum to dispose of this claim and that the Board was, in fact, the proper forum to dispose of this claim. We do not agree.

As this Court has previously noted:

As a creature of statute, the Pension Board can exercise only those duties given to it by the legislature. *Marinucci v. State Employees' Retirement System*, 863 A.2d 43, 47 (Pa. Cmwlth. 2004) (an employee has only those retirement rights created by statute and none beyond it); *see also Costanza v. Department of*

"contest" the court does not mean the City's right to reimbursement but whether the amount billed was accurate, consistent with the contract for legal services, properly attributed to Mariano and not another Saul Ewing client, and a myriad of other defenses he might assert....

Trial Court Opinion at 4-5.

⁸ This Court's scope of review, where the trial court does not take additional evidence, is limited to determining whether constitutional rights were violated, an error of law was committed, or whether necessary findings of fact were supported by substantial evidence. *Martorano v. Philadelphia Board of Pensions and Retirement*, 940 A.2d 598 (Pa. Cmwlth.), petition for allowance of appeal denied, 598 Pa. 770, 956 A.2d 437 (2008).

⁹ In their appellate brief, the City and the Board also extensively argue that the trial court correctly determined that Mariano was obligated to reimburse the City for the Saul Ewing legal fees, and that Section 22-1303 of the Code was not preempted by the Act. See Brief of Appellant at 17-32.

Environmental Resources, [606 A.2d 645, 646 (Pa. Cmwlth. 1992)] (“Any power exercised by an administrative agency must be conferred by statute....”). Although a retirement system must be liberally administered in favor of its members, “a liberal administration of the retirement system does not permit the board to circumvent the express language of the Code....” *Dowler v. Public School Employes’ Retirement Board*, [620 A.2d 639, 644 (Pa. Cmwlth. 1993)]. Accordingly, the Board has no authority to grant equitable relief in contravention of the statutory mandates of the Retirement Code. *Rowan v. Pennsylvania State Employes’ Retirement Board*, 685 A.2d 238, 240 (Pa. Cmwlth. 1996)....

Martorano, 940 A.2d at 601. See also Pequea Township v. Herr, 716 A.2d 678, 686 (Pa. Cmwlth. 1998) (“Any power exercised by an administrative agency must be expressly conferred by statute or given by necessary implication. The [Environmental Hearing Board (board)] has the power and duty to hold hearings on the [Department of Environmental Protection]’s orders, permits, licenses or decisions. However, the board is not statutorily authorized to exercise judicial powers in equity.”) (citations omitted).

As noted above, Section 22-1201(1) of the Code provides that “[t]he general administration and management of the Retirement System is vested in the Board.” Phila. Code § 22-1201(1). In addition, Section 22-1202(1) provides that “[t]he entitlement of any member ... to benefits accrued or rights accorded under this Title shall be determined after notice and opportunity to be heard. Any member or other claimant shall have a right to appeal to the Board any decision or determination affecting such person’s claimed benefits or rights....” Phila. Code § 22-1202(1).

Thus, although Section 22-1303(1) of the Code provides that the City may “[o]ffset any claim of the City against such person and the rights or benefits

arising from membership under this Title...”,¹⁰ neither Section 22-1201(1) nor Section 22-1202(1) of the Code confer upon the Board the authority to dispose of the City’s request for equitable relief¹¹ in which it is seeking the reimbursement of the attorney fees. Martorano; Pequea Township; Rowan.

¹⁰ Phila. Code § 22-1303(1).

¹¹ In this case, the City and the Board assert that Mariano is required to reimburse the City the attorney fees expended in his defense, citing County of Allegheny v. Grier, 179 Pa. 639, 36 A. 353 (1897). In County of Allegheny, a county initiated an action in assumpsit to recover \$1,290.32 that was paid to a county controller in excess of his salary. With respect to an action in assumpsit, the Pennsylvania Superior Court has noted:

This is an action at law, and restitution as a form of relief, under the facts of this case, is potentially available under two theories. The first is an action in assumpsit, on a theory of quasi-contract, with relief in the nature of *restitution* measured by the amount of *unjust enrichment* to the defendant....

It is hornbook law that restitution as a form of relief in assumpsit is in the nature of disgorging the amount of *unjust enrichment*, if any, to the defendant....

Diesel v. Caputo, 366 A.2d 1259, 1264 (Pa. Super. 1976) (emphasis in original).

This form of relief in assumpsit is equitable in nature. See Department of Environmental Resources v. Winn, 597 A.2d 281, 284 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 529 Pa. 654, 602 A.2d 863 (1992) (“Pursuant to Section 405 of the Fiscal Code, 72 P.S. § 405, the Board of Claims exercises both law and equity jurisdiction. Miller v. Department of Environmental Resources, [578 A.2d 550 (Pa. Cmwlth. 1990)]. The Board of Claims’ equity jurisdiction extends to all cases instituted in the form of contract actions; specifically, *quasi* contract claims and claims in *quantum meruit*, *Id.*, the *sine qua non* of both being unjust enrichment.”) (emphasis in original). See also Filippi v. City of Erie, 968 A.2d 239, 242 (Pa. Cmwlth. 2009) (“Count one of the amended complaint states that the City owes Filippi a duty of restitution [for attorney fees that he expended in his own criminal defense] under the equitable principle of ‘unjust enrichment’. Unjust enrichment is shown by ‘benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.’ The application of this doctrine depends on the particular factual circumstances of the case at issue. In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.”) (citations omitted).

Moreover, Mariano's purported acquiescence in the Board's authority to grant such relief does not confer such power upon the Board in the absence of some legislative mandate. See Pequea Township, 716 A.2d at 686 ("Any power exercised by an administrative agency must be expressly conferred by statute or given by necessary implication...."); Costanza, 606 A.2d at 646 ("Any power exercised by an administrative agency must be conferred by statute...."). As a result, the trial court did not err in determining that the Board was not the proper forum to consider and dispose of the City's claim for attorney fees in this case.¹²

¹² As a corollary to this allegation of error, the City and the Board contend that the trial court also erred in requiring the Board to return Mariano's contributions. In support of this assertion, the City and the Board rely upon Francis v. Carleto, 418 Pa. 417, 211 A.2d 503 (1965). However, the City's and the Board's reliance upon Francis for this proposition is misplaced. In Francis, the Supreme Court determined that mandamus could not compel the return of retirement contributions to officials, where the City may have a valid offset claim under a prior version of Section 22-1303(1), for losses sustained as a result of the officials' misappropriation of funds. Rather, in that case, the Supreme Court directed the officials to pursue "the adequate and appropriate remedy in assumpsit" in order to compel the City to return the funds. See Francis, 418 Pa. at 429, 211 A.2d at 509 ("In this case, plaintiffs seek to circumvent a confrontation with the City and to avoid assertion against them of the City's claims arising out of their alleged misconduct in office. In light of the pertinent statutory provisions, and the relevant legal rules and equitable principles, it would be singularly inappropriate for plaintiffs to be given the aid of a remedy of mandamus. Instead, plaintiffs will be left to the adequate and appropriate remedy in assumpsit and any consequences which may flow therefrom.").

Likewise, in the instant case, the City sought to avoid "the adequate and appropriate remedy in assumpsit", to disgorge Mariano of the amount of unjust enrichment that he purportedly received, by asserting its claim directly to the Board rather than seeking such equitable relief in the proper forum. See, e.g., City of Philadelphia v. Clayton, 987 A.2d 1255, 1259 (Pa. Cmwlth. 2009) ("Subsequently, the City paid Appellant \$343,540.61 to satisfy the workers' compensation award. Thus, after payment of the workers' compensation award, Appellant possessed both workers' compensation and disability pension benefits for the same period of disability. As a result, in May, 2007, the Pension Board sent Appellant a letter seeking total reimbursement of the disability pension benefits he received in addition to the workers' compensation benefits. Appellant, however, refused to reimburse the Pension Board. The Pension Board filed a breach of contract and unjust enrichment action.... The trial court held a bench trial and, in September, 2008, entered judgment in favor of the Pension Board in the

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Accordingly, the trial court's order is affirmed.

JAMES R. KELLEY, Senior Judge

Judge Cohn Jubelirer did not participate in the decision in this case.

amount of \$298,922.04 with a further assessment of \$77/day from January 20, 2007 until the date of payment....”). Because the Board was without the statutory authority to award such equitable relief, the trial court properly reversed the Board's decision denying the return of Mariano's contributions to which he was entitled under the relevant provisions of Sections 22-903(1) and 22-1302(1) of the Code. Phila. Code §§ 22-903(1), 22-1302(1).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Mariano :
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 v. : No. 1428 C.D. 2010
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 City of Philadelphia Board :
 of Pensions and Retirement, :
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 Appeal of: City of Philadelphia :
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ORDER

AND NOW, this 31st day of August, 2011, the order of the Court of Common Pleas of Philadelphia County, dated June 15, 2010 at September Term, 2008 No. 02804, is AFFIRMED.

JAMES R. KELLEY, Senior Judge