

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4191-12T3

TOWN OF WEST NEW YORK,

Plaintiff-Appellant,

v.

JANET PASSANTE,

Defendant-Respondent.

Submitted August 19, 2014 – Decided February 27, 2015

Before Judges Nugent and Carroll.

On appeal from Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No.
C-133-11.

Gilberto M. Garcia, attorney for appellant.

Gary M. Lachman, attorney for respondent.

The opinion of the court was delivered by

NUGENT, J.A.D.

Upon defendant Janet Passante's retirement after thirty-five years as a Town of West New York, New Jersey employee, she and the Town of West New York (the Town) agreed on the amount of compensation the Town would pay her, in periodic payments, for accumulated sick leave, compensatory time, and vacation. After making more than one-third of the agreed-upon installment

payments, the Town attempted to rescind the agreement and filed an eight-count complaint seeking to have the Chancery Division nullify the agreement or, alternatively, reform it. The Town contended that its governing body was required to ratify the agreement by adopting an ordinance rather than a resolution, and because the agreement had been ratified by resolution, it was invalid. On cross-motions for summary judgment, the trial court denied the Town's motion, granted Passante's cross-motion, and entered judgment against the Town in favor of Passante for the balance of payments due plus post-judgment interest. The Town appealed from the judgment. For the reasons that follow, we affirm.

The material facts are undisputed. The Town employed Passante from 1975 until April 30, 2010, when she retired. She had worked in the Public Safety Department through October 2006. From November 2006 until she retired, she served as the Mayor's Chief of Staff and also worked in the Public Affairs Department. Passante had no employment contract nor was she a member of a union. Her salary was established through annual municipal salary ordinances. From 1975 through 1995, at the Mayor's request, Passante prepared lists of all accrued vacation and compensatory time for each Public Safety Department employee, including herself.

When Passante considered retiring, she presented the municipal attorney with a request for payment of her accrued sick leave, compensation time, and accrued vacation. Based on his review of materials he had received from both Passante and the Municipal Administrator, his discussions with municipal officials, and his consideration of "the past practices concerning accrual of unused time," the solicitor prepared an agreement, which the Town's Administrator and Passante signed. The agreement required the Town to pay Passante \$306,324.30 in monthly installments over three years. On May 10, 2010, the Town's Board of Commissioners adopted a resolution ratifying and approving the agreement.

The May 2010 resolution acknowledged, among other things, that various employees had earned substantial vested benefits and salary compensation rights that the Town was obligated to pay; that it was in the Town's best interest to pay such obligations over time rather than in lump sums; and that the Town, "by prior resolution the Board of Commissioners authorized the Municipal Administrator, with the advice of and consultation with the Town Attorney to negotiate separate agreements with any Town Employee for the payment of earned compensatory rights post-cessation of employment, for a minimum payment period of

[two years] and maximum payment period of ten years [post-cessation] of employment [.]"

The resolution further acknowledged that Passante had earned "compensation that must be paid out by the Town regardless of any termination agreement" and confirmed that an agreement had been negotiated with Passante "to the benefit of the Town by minimizing the immediate fiscal burdens upon the Town if an immediate payment of such earned compensation would have otherwise have had to be made [.]"

Lastly, the resolution provided in pertinent part:

2. The Agreement Concerning Payment . . . of Past Employment Benefits between Janet Passante and [the Town] dated April 30, 2010, on file with the office of the Municipal Clerk is hereby ratified and approved.

3. This Agreement is in the nature of a contract, and is binding upon the Town and subject to yearly appropriation of funds.

According to the Town's records of the meeting at which the resolution was adopted, the current Mayor explained that the payments were for benefits that had accrued during the administrations of two of the Town's previous mayors.

Passante retired in 2010 and the Town began making the agreed-upon periodic payments. After paying Passante \$112,219.87, the Town adopted a resolution on August 17, 2011, rescinding its agreement with Passante. The resolution

contained these recitations: on June 15, 2011, the governing body authorized the Town's attorney to "determine whether payments made to certain officials and employees who have left the employment of the Town are valid and based on either contracts or past policy"; on July 18, 2011, the Town's attorney "assigned [the] investigation to Special Counsel"; and "the sum total of this investigation reveal[ed] that there was no past policy for the payment of compensatory time, accumulated vacation time or accrued sick time within the municipality[.]" The resolution not only rescinded the previous agreement between the Town and Passante as well as a similar agreement between the Town and another former employee, but also authorized Special Counsel "to take such steps as he deems necessary and appropriate under the law to return to the Town payments previously made and to cancel all future payments under the alleged and improper contracts[.]"

Pursuant to that authority, Special Counsel filed an eight-count complaint in September 2011 seeking to have the court void its contract with Passante on the grounds of mutual mistake (First Count), fraud (Second Count), violation of statute (Third Count), violation of the constitutional prohibition against municipalities gifting money to individuals (Fourth Count), violation of public policy (Fifth Count), estoppel (Sixth

Count), unjust enrichment (Seventh Count), and misrepresentation (Eighth Count). Passante filed an answer denying the complaint's accusations and a counterclaim seeking a judgment for the balance of payments the Town owed her under the original agreement. The Town answered the counterclaim and the parties undertook discovery, after which the Town filed a motion, and Passante a cross-motion, for summary judgment. The trial court denied the Town's motion and granted Passante's cross-motion.

In its opinion, the trial court explained that the Town's contention was this:

[B]ecause the "Agreement" was ratified by Resolution rather than by Ordinance it is void and unenforceable. Plaintiff argues that because the then existing employment policy Ordinance did not permit the type of payment authorized under the Agreement, the Agreement had to be introduced and adopted by Ordinance rather than by Resolution.

The trial court perceived Passante's argument to be that "the May 10, 2010 Resolution was sufficient municipal action to authorize the deferred payment of accrued compensation."¹

The court rejected the Town's argument that its contract with Passante had to be ratified by an ordinance rather than by a resolution. Relying on our decision in McCurrie v. Town of

¹ Passante also contended the Town's argument was barred by the Doctrine of Collateral Estoppel. The trial court rejected that argument and Passante has not renewed it on appeal.

Kearny, 344 N.J. Super. 470 (App. Div. 2001), rev'd on other grounds, 174 N.J. 523 (2002), the court determined that the agreement between the Town and Passante was contractual, and that both parties benefited by Passante retiring early. The court concluded: "I believe the record demonstrates that Ms. Passante is not being compensated for the performance of personal services."

Following the grant of summary judgment to Passante, the court entered a final judgment against the Town for the balance of the payout due Passante under her agreement with the Town. The Town appealed.

Our review of the trial court's disposition of the parties' summary judgment motions is de novo and we apply the same standard as the trial court applied under Rule 4:46-2. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In doing so, we view the evidence in the

light most favorable to the non-moving party, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), and review the legal conclusions of the trial court de novo, without any special deference. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In applying the summary judgment standard to a municipal resolution, we bear in mind that "municipal actions enjoy a presumption of validity." Bryant v. City of Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998) (citing Fanelli v. City of Trenton, 135 N.J. 582 (1994); Ballantyne House Assocs. v. City of Newark, 269 N.J. Super. 322, 337 (App. Div. 1993)). "Thus, a challenge to the validity of . . . municipal . . . action must overcome the presumption of validity – a heavy burden." Ibid.

Turning to the Town's arguments on appeal, we note the Town does not allege, as it did in its 2011 resolution authorizing special counsel to take action, that "the sum total of this investigation reveal[ed] that there was no past policy for the payment of compensatory time, accumulated vacation time or accrued sick time within the municipality[.]" In fact, the Town concedes on appeal that it "no longer disputes Janet Passante's entitlement to receive her compensation for 300 unused sick days[.]"

We further note the Town no longer contends on appeal, as it alleged in its complaint, that its agreement with Passante is void due to mutual mistake, fraud, the making of an unconstitutional gift, disparate treatment contrary to public policy, misrepresentation, or unjust enrichment. Rather, the Town argues that in view of statutory restrictions on paying for unused vacation and compensatory time, the resolution ratifying the agreement with Passante was legislative, not contractual, and therefore required ratification by ordinance rather than by resolution. The Town frames the issue this way:

The issue in this case is whether [the trial court's] interpretation of the Agreement between the Town . . . and Janet Passante, as contractual and not legislative in nature, is the correct interpretation and, as such, a resolution was sufficient action by the Governing Body to adopt the agreement.

Generally, "[a] municipality may exercise its delegated powers through either an ordinance or a resolution." Inganamort v. Borough of Fort Lee, 72 N.J. 412, 417 (1977). Nevertheless, there is a distinction between an ordinance and a resolution:

An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. Thus, it may be stated broadly that all acts

that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desires to legislate must be put in the form of ordinances.

[Id. at 418 (quoting [Eugene] McQuillin, Municipal Corporations (3[d] ed. 1973) § 14.02 at 43-45 (footnotes omitted)).]

Of course, "[i]t has long been settled that when the law requires a proceeding to be instituted by an ordinance it cannot be effected by resolution merely; the latter, wanting the solemnities of the former, is not regarded as a legal equivalent." Chasis v. Tumulty, 8 N.J. 147, 153-54 (1951) (citing State ex rel. Paterson v. Barnet, 46 N.J.L. 62 (Sup. Ct. 1884)). But "where a statute fails to indicate whether the power should be exercised by ordinance or resolution it may be done by either means." Frasier v. Twp. of Teaneck, 1 N.J. 503, 507 (1949).² For that reason, "in the absence of statutory language to the contrary, a local government may enter into a contract by the passage of a resolution." McCurrie, supra, 344 N.J. Super. at 480 (citations omitted).

Here, the issue is whether the Town's ratification of its agreement with Passante was legislative in nature and required by law to be effectuated by an ordinance, or whether it was a

² Superseded by statute on other grounds as stated in Finn v. Norwood, 227 N.J. Super. 69, 75 n. 1 (App. Div. 1988).

non-legislative act that could be effectuated by either an ordinance or a resolution. We agree with the trial court that the resolution ratifying the agreement between the Town and Passante constituted valid municipal action.

The governing body of a municipality is statutorily required to "by ordinance fix and determine the salaries, wages or compensation to be paid to the . . . employees of the municipality" which "may . . . be increased, decreased or altered by ordinance." N.J.S.A. 40A:9-165; see also McCurrie, supra, 344 N.J. Super. at 478. The word salary "is commonly defined as meaning an agreed compensation for services[,]" is considered in case law as synonymous with "wages," and "both words are defined generally as meaning a sum of money periodically paid for services rendered." McCurrie, supra, 344 N.J. Super. at 478 (internal quotation marks and citation omitted).

For the same reason we determined in McCurrie that a municipal employee was not paid a salary in return for resigning from office, we conclude that Passante was not paid a salary for retiring instead of working longer and utilizing her accrued leave while still employed. Passante, like the employee in McCurrie, "had a right to continue in the job, but gave up that

right under the terms of the agreement." Id. at 480. As we explained in McCurrie:

The agreement was contractual, not legislative in nature, and as such a resolution is sufficient. The purpose of the salary ordinance provision, N.J.S.A. 40A:9-165, is to empower the governing body to fix salaries. Lettieri v. Governing Body of Bayonne, 168 N.J. Super. 423, 426 (Law Div. 1979). There is no support for a conclusion that the statute was intended to cover payments made by a local government to employees other than for the performance of services in their official capacities.

[Id. at 480-81.]

The contract between the Town and Passante did not require Passante to perform services in return for the money the Town contracted to pay to her. Obviously, the Town did not intend Passante to continue to perform services as an employee after her retirement. Moreover, the Town entered into the agreement with Passante "for a temporary purpose" and ratification did not involve a "matter[] upon which the municipal corporation desire[d] to legislate." Id. at 479-80 (citing Inqanamort, supra, 72 N.J. at 417-18).

Overlooking the distinction between the nature of ordinances and resolutions, the Town argues that specific statutes required it to ratify the agreement with Passante by ordinance. That argument is flawed for several reasons. First,

as the Town concedes, Passante was entitled to be paid for her accumulated unused sick time.

Second, and more importantly, the Town overlooks the fact that Passante accumulated her compensatory time and unused vacation not under the governing body extant when she retired, but rather under two previous administrations. Consequently, the relevant salary ordinances were those in effect when she accrued those entitlements; not the salary ordinance in effect when she retired.

For example, the Town contends that its agreement to pay Passante for unused compensatory time was an agreement to pay her additional salary and therefore was required by N.J.S.A. 40A:9-165 to be effectuated by an ordinance rather than by the resolution adopted by the governing body when she retired. By then, however, Passante was owed her compensatory time for past services. See Colasanti v. Pension Comm'n of Emps. Ret. Sys., 149 N.J. Super. 215, 219 (App. Div. 1977) ("Plaintiff here was owed time for past services performed. The [eighty-nine] compensatory days were earned by plaintiff long before he made his request for retirement, and the city was obligated to pay him for these days.") Here, the Town offered no evidence that the compensatory time Passante earned in any given year exceeded that permitted by the then-existing salary ordinance. On the

other hand, Passante produced undisputed evidence that she complied with the directives of former mayors and maintained accurate business records of compensatory time due not only her, but other employees as well. In the absence of any proofs that the compensatory time earned by Passante in any given year violated a then-existing salary ordinance, in view of the motion evidence that the Town's decision to pay her for earned compensatory time was made following an investigation based on records maintained by the Town, and in light of the presumption of validity accorded municipal action, we cannot conclude that the trial court erred by denying the Town's summary judgment motion and granting summary judgment to Passante.

Similarly, the Town argues with respect to Passante's accrued vacation time:

The Town . . . is a [c]ivil [s]ervice jurisdiction subject to N.J.S.A. [11A:1, et seq.] Civil [s]ervice jurisdiction municipal employees are subject to statutory limits on compensation for unused vacation. N.J.S.A. [11A:6-3] provides that any vacation not taken in a given year shall accumulate and be used during the succeeding year only. Janet Passante cannot . . . be compensated for any of her unused 172 vacation days because the statute does not permit it.

Although the Town's argument implicitly raises an issue about the legality of its agreement with Passante to accumulate unused vacation, the Town never developed that issue before the

trial court. To begin with, the Town did not establish when it became a "Civil Service Jurisdiction." See N.J.S.A. 11A:9-2 to -7 (setting forth the procedure to be followed when a political subdivision adopts the provisions of the Civil Service Act). Moreover, employees in "unclassified service shall not be subject to the provisions of [the Civil Service Act] unless otherwise specified" N.J.S.A. 11A:3-5. That statute includes as employees in unclassified service one secretary and one confidential assistant to each mayor, N.J.S.A. 11A:3-5(b), and one secretary, clerk or executive director to each department, board and commission authorized by law to make the appointment, N.J.S.A. 11A:3-5(i). The Town has not established that Passante was an employee in the classified service. See N.J.S.A. 11A:3-1 (providing that the "Civil Service Commission shall assign and reassign titles among the career service, senior executive service and unclassified service").

More significantly, however, the Town did not raise the issue before the trial court. During oral argument on the cross-motions for summary judgment, the Town argued that civil service jurisdictions have "their own statute as to what kind of compensation they're going to pay for vacation and accrued sick days." The Town further argued that "[o]ur ordinances say you cannot bank more than one year of vacation." When the court

responded, "that's a different argument" – different from the argument that the Town should have ratified its agreement with Passante by an ordinance – "you're saying . . . she was never entitled to that money in the first instance." The Town replied:

well, no, she was entitled to compensation. But if you're going to go beyond the statute and if you're going to go beyond the existing ordinance and you're going to give somebody compensation that [is] already provided for in the ordinance and the statute, you should have created an ordinance. Not by way of resolution.

In other words, the Town did not attack the payments to Passante on the basis that they violated the Civil Service Act or salary ordinances in effect during prior administrations when she deferred taking the vacation time to which she was entitled. Rather, the Town argued that its governing body should have authorized those payments by adopting an ordinance upon her retirement rather than a resolution; an argument we have rejected for the reasons explained previously.

Because the Town did not raise the issue that its contract with Passante was void because she was not entitled to accrue vacation days during the years she actually accrued them, we decline to address it on the inadequate record before us. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.


CLERK OF THE APPELLATE DIVISION