WILLIAM J. WELCH,
Petitioner,

v.

BUREAU OF REGULATORY AFFAIRS,
Respondent.

Initial Decision: August 31, 1989
Final Agency Decision: October 16, 1989
Approved for Publication by the Commissioner of Community
Affairs, Anthony M. Villane, Jr.: October 16, 1989

SYNOPSIS

Petitioner appealed an order to pay a penalty pursuant to
N.J.A.C. 5:23-4.12(c)1 for failure to comply with the licensing require-
ment for code enforcement officials who are not employees of a
municipality. The matter was transmitted to the Office of Adminis-
trative Law for a hearing.

The administrative law judge assigned to the case concluded that
petitioner was not a municipal employee and had, therefore, violated
the regulation setting out the requirements for independent code en-
forcement officials. Respondent's request for summary decision was
granted.

Upon review, this initial decision was adopted by the Com-
missioner of Community Affairs. The purpose of the regulation is to
distinguish between code enforcement personnel who are municipal
employees, and therefore are not subject to licensing requirements for
private enforcing agencies, and code enforcement personnel who are
functioning as private enforcing agencies who contract to work for
municipalities. Petitioner in this case is not an employee of the munic-
ipality because there was no FICA withholding. The Commissioner
noted that municipalities may choose to have code officials who are
independent contractors rather than employees. In that case, the ap-
propriate procedures must be followed. Contractors must be licensed,
comply with reporting requirements and carry a specified amount of
liability insurance.

Paul A. Massaro, Esq., petitioner
Ellen Casey, Deputy Attorney General, for respondent (Peter N.
Perretti, Jr., Attorney General of New Jersey, attorney)
SULLIVAN, ALJ:

On March 9, 1989, Dennis Warford signed a notice of violation and order to pay a $250 penalty directed to William J. Welch upon alleged violations of N.J.A.C. 5:23-4.12(c)1. Through counsel, Welch appealed the notice. On April 24, 1989, the Department of Community Affairs referred the matter to the Office of Administrative Law for determination as a contested case, pursuant to the Administrative Procedure Act.

Following an exchange of discovery motions, both parties filed various cross-motions for summary decision.

Because of the number of motions filed, I granted oral argument, which took place on August 16, 1989. The parties were invited to review whether or not any public body or official other than the Commissioner of the Department of Community Affairs had rulemaking authority under the Uniform Construction Code.

The appellant submitted a comprehensive letter on August 22, 1989, which set forth a wide variety of state and federal authorities with whom the commissioner had rulemaking and other relationships. However, the list did not indicate a sharing with any municipal bodies.

Welch’s most fundamental argument was that the Code was being applied to him ex post facto, since he had (as the Department concedes) been engaged in work for remuneration by the Township of Montclair starting at a date in 1984 earlier than the effective date of the regulation cited above. Since the Department seeks no penalties from Welch because of his service prior to the effective date, I know of no decisonal law which would support Welch’s claim that the regulation was applied to him ex post facto. Hence, I CONCLUDE there was no ex post facto application of the regulation to Mr. Welch. (The Department challenges Welch’s capacity to argue against the constitutional validity of the regulation. In broad terms, I understand this to be so only in the event of a facial attack on the constitutionality of the regulation. Constitutional attacks on the regulation as applied are, in my view, appropriate but on the substantive ruling above, the question is moot.)

Welch’s further argument for summary decision proceeds upon the claim that any imputation of validity to N.J.A.C. 5:23-4.12(c)1, must be analyzed in light of the broad powers given to the Township of Montclair under N.J.S.A. 40:69A-95, which sets forth the duties of a municipal manager under the council-manager form of government used, I take it, in the Township of Montclair. Welch further argues
that the phrasing of the Code, specifically *N.J.S.A. 52:27D-126a*, and stresses that the appointing authority of any municipality "shall appoint the construction official and any necessary subcode officials to administer and enforce the Code."

Notwithstanding this, Welch's argument does not deal with the question of whether or not the obvious identification of the Township of Montclair as the appointing authority gives it a free hand respecting the terms under which a subcode official is to work. The qualifier of the Township's powers is set forth in the broad regulatory powers of the Commissioner in *N.J.S.A. 52:27D-124* which reads in part:

> The commissioner shall have all the powers necessary or convenient to effectuate the purposes of this act, including, but not limited to, the following powers in addition to all others granted by this act:
> a. To adopt, amend and repeal, after consultation with the code advisory board, rules: (1) relating to the administration and enforcement of this act and (2) the qualifications or licensing, or both, of all persons employed by enforcing agencies of the State to enforce this act or the code . . . .

The pertinent question is the degree to which the Township of Montclair's power shall be construed. Welch cites Article IV, Section 7, Paragraph 11 of the New Jersey Constitution urging liberal construction of any law concerning municipal governments. However, the same paragraphs also limit their activities to those "not inconsistent with or prohibited by this constitution or by law." The reference to inconsistencies with law forces the conclusion that any lawfully enacted statute would satisfy the demand for liberal construction of the above-cited provision. Furthermore, Welch's argument respecting New Jersey Constitution Article IV, Section 6, Paragraph 9, which purports to limit the Legislature's ability to pass laws appointing local officials, fails because in the terms of the text of that provision, the regulation before me is not a "private, special or local law" but rather a general enactment which touches upon every area touched upon by the Code itself.

A review of the Code leads to the conclusion that it is a statewide program to be administered through appointments made at the local level. Nevertheless, I am persuaded that the overall purpose of the Code was to centralize the management of construction activities and I do not see how the Department is in any way constrained in issuing regulations consistent with the Code. The Township, whose interest Welch asserts, has not seen fit to intervene in this matter and so far has thoroughly treated this matter as a dispute between Welch and
the Department. To this end, the resolution of the conflicting claims of home rule (even were they cognizable from Welch) and the Code have yet to show a conflict. Therefore, under the rulemaking power of the Commissioner, I CONCLUDE that \textit{N.J.A.C. 5:23-4.12(c)} is valid as against claims which might have been made by the Township had it made them.

The last reason Welch asserts for resistance to the penalty is \textit{N.J.A.C. 5:23-4.3(f)}, which is set out below:

Personnel hired or transferred on a full or part-time basis, for purposes of the administration of the act and the regulations, may be hired or transferred by resolution of the government body, or \textit{by such other procedure as is provided by law in the municipality for such purposes.} (emphasis added)

Given the law's general reluctance to imply repealers in legislative material, it is appropriate to conform the above-quoted regulation with \textit{N.J.A.C. 5:23-4.12(c)} upon which the notice of violation was predicated. Assuming for the sake of discussion that Welch was "hired" and not acting as a consultant, \textit{N.J.A.C. 5:23-4.3(f)} allows the municipality to hire by resolution or "such other procedure as is provided by law in the municipality for such purposes." This authorization to the municipality and its employee lies outside the requirement of \textit{N.J.A.C. 5:23-4.12(c)} that the municipality hire by resolution.

On the strength of the texts before me, the two provisions are irreconcilable on the issue of access to employment.

On the other hand, \textit{N.J.A.C. 5:23-4.3(f)} deals exclusively with hiring and transferring while \textit{N.J.A.C. 5:23-4.12(c)} deals with ongoing relationships such as the withholding of federal and state income tax. While \textit{N.J.A.C. 5:23-4.3(f)} is generally supportive of Welch's position in terms of access to the work, it fails him totally as a defense to the Department's position respecting the terms on which he held it over a period of time. Therefore, the ongoing alleged violation with respect to continued tenure by Welch is not cured by the possible ambiguities of the regulatory scheme respecting his original access to his position.

Community Affairs argues for summary dismissal upon grounds that the salary, wages and compensation paid Welch were inconsistent with that demanded by \textit{N.J.A.C. 5:23-4.12(c)}. The Department asserts that there are no ordinances in effect to recognize Welch as an employee retained by ordinance and, indeed, the Department has submitted photocopies of Welch's bills which were submitted on his
stationery of "Building Code Consultant." No FICA materials were maintained.

Welch has never replied to respondent's brief on these issues nor has he sought to controvert the proofs that were put before me. I do note that Welch's invoice for services "for building subcode work" of June 10, 1986 (found in Appendix B to respondent's brief and appendix of July 24, 1989) is under his own letterhead. The document shows hours worked between the period of May 19, 1986 and June 9, 1986, but nothing in the file accuses Welch of not working, simply of not meeting the forms demanded in the regulation of bona fide employment.

I FIND from the evidence that Mr. Welch used his own stationery, was never employed by ordinance and never the object of FICA withholding. Upon merits of respondent's brief of July 24, 1989 decision for the Department is GRANTED.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF COMMUNITY AFFAIRS, ANTHONY M. VILLANE, JR., who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE COMMISSIONER OF COMMUNITY AFFAIRS, ANTHONY M. VILLANE, JR.:

Having reviewed the Initial Decision in this matter, together with any exceptions and replies submitted, I hereby adopt the Initial Decision as the Commissioner's Final Decision. In so doing, I wish particularly to note it is undisputed in the record that the payments received by the petitioner from the municipality were not made subject to FICA withholding.

The clear purpose of N.J.A.C. 5:23-4.12(c) is to distinguish between code enforcement personnel who are bona fide municipal employees, and hence not subject to the licensing requirements for private third-party enforcing agencies, and code enforcement personnel who are not deemed to be bona fide employees and are therefore deemed to be functioning as private enforcing agencies and required to be licensed accordingly. It is important that this distinction be clearly made because private inspection agencies are required to meet numerous reporting requirements not imposed on municipal employees and are subject, by statute, to Department regulation of their fees. Additionally, private inspection agencies must carry liability insurance in the amount of at least $1,000,000 per person and per occurrence
and are required to pay authorization and reauthorization fees, the latter including an amount equal to five percent of gross revenue for the previous 12 month period. "Contractors" who are not bona fide municipal employees cannot be allowed to circumvent these requirements, thereby competing unfairly with the licensed private enforcing agencies that must be in compliance with them.

_N.J.A.C. 5:23-4.12(c)2_ unequivocally establishes as a test the receipt of payment only in the form of wages or salary subject to FICA and income tax withholding. In a case such as this petitioner's, in which it is undisputed that no FICA withholding occurred, the test has not been met and licensing as a private enforcing agency is required.

If it is the common desire of a licensed code enforcement official and a municipality to have the official serve as an independent contractor rather than as an employee, this is permissible under the Department's rules. However, the appropriate procedures, namely licensing as a private enforcing agency, must be followed. One cannot have the benefits of independent contractor status without the responsibilities that it entails.

I also note that the commencement of petitioner's service with Montclair prior to the effective date of the amendment to _N.J.A.C. 5:23-4.12_ (November 19, 1984) did not relieve him of the obligation to be in compliance with the amended rule once it was adopted. I therefore reject any contention that he had a vested right to continue unaltered his previous relationship with Montclair.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.