

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEWIS VELKEN,

Petitioner,

vs.

Case No. 19-2746

DEPARTMENT OF MANAGEMENT SERVICES,
DIVISION OF RETIREMENT,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on November 19 and 20, 2019, by video teleconferencing in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: H. B. Stivers, Esquire
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For Respondent: Thomas E. Wright, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner Lewis Velken failed to meet the Deferred Retirement Option Program ("DROP") termination requirements set forth in chapter 121, Florida Statutes; and, if so, whether he is liable for repayment of the distribution from DROP in the amount of \$691,307.41.

PRELIMINARY STATEMENT

By letter dated March 6, 2019, Respondent Department of Management Services, Division of Retirement ("Division" or "Respondent"), advised Petitioner Lewis Velken ("Velken" or "Petitioner") that the Division intended to void his participation in DROP. The letter further instructed Petitioner that he must repay all retirement benefits received, including the health insurance subsidy, for a total of \$691,307.41. The letter relied upon section 121.021(39)(b) and Florida Administrative Code Rule 60S-4.012(2)(a)2, as authority.

On March 28, 2019, Petitioner timely requested an administrative hearing contesting the Division's determination.

On May 22, 2019, the Division transmitted Petitioner's request to the Division of Administrative Hearings ("DOAH") and assigned the undersigned Administrative Law Judge to the case. The case proceeded to hearing as scheduled on November 19 and 20, 2019.

At hearing, Petitioner testified on his own behalf and offered the testimony of six witnesses: Stephanie Leon, Marlen Martell, Elbert Wrains, Dr. Joyce Morgan, Scott McArthur, and Kathy Gould. Petitioner's Exhibits 1 through 43 were received into evidence. Respondent presented the testimony of seven witnesses: Lewis Velken, Stephanie Leon, Marlen Martell, Elbert

Wrains, Dr. Joyce Morgan, Scott McArthur, and Kathy Gould. Respondent's Exhibits 1 through 30 were received into evidence.

The proceeding was recorded and transcribed. On December 10, 2019, Volumes I, II, III, and IV of the Transcript were filed at DOAH. On January 9, 2020, the undersigned granted a deadline extension to January 17, 2020, for the parties' proposed recommended orders. The parties timely filed proposed recommended orders, which have been considered by the undersigned in the preparation of the Recommended Order.

References to the Florida Statutes will be to the 2018 version, unless otherwise noted.

FINDINGS OF FACT

1. The Division is, and was, at all times material to this case, the state agency charged with the responsibility of administering the Florida Retirement System ("FRS").

2. Petitioner Velken was employed by Miami-Dade County Sheriff's Office ("Sheriff's Office") from June 27, 1988, through January 31, 2018. For the last 12 years of his employment with the Sheriff's Office, Petitioner served in the position of lieutenant.

3. On June 5, 2013, Velken filled out and signed the DP-ELE Form, entitled Florida Retirement System Pension Plan Notice of Election to Participate in the Deferred Retirement Option Program (DROP) and Resignation of Employment, indicating that he wanted to enter DROP. The form reads, in pertinent part:

I elect to participate in the DROP in accordance with s. 121.091(13), Florida Statutes (F.S.), as indicated below, and resign my employment on the date I terminate from the DROP. I understand that the earliest date my participation in DROP can

begin is the first date I reach normal retirement date as determined by law and that my DROP participation cannot exceed a maximum of 60 months from the date I reach my normal retirement date, although I may elect to participate for less than 60 months. Participation in DROP does not guarantee my employment for the DROP period.

I understand that I must terminate all employment with FRS employers to receive a monthly retirement benefit and my DROP benefit under Chapter 121, F.S. Termination requirements for elected officers are different as specified in s. 121.091(13)(b)[4.], F.S. I cannot add service change options, change my type of retirement or elect the Investment Plan after my DROP begin date. I have read and understand the DROP Accrual and Distribution information provided with this form.

4. Also, on June 5, 2013, Velken filled out and signed a DP-11 Form, entitled Florida Retirement System Pension Plan Application for Service Retirement and the Deferred Retirement Option Program (DROP). That form states, in pertinent part:

I understand that I must terminate all employment with FRS employers to receive a monthly retirement benefit and my DROP benefit under Chapter 121, F.S. If I fail to terminate employment in accordance with s. 121.021(39)(b), F.S., on my DROP termination date, my retirement will be null and void and my FRS membership shall be established retroactively to the date I began DROP.

5. Effective July 1, 2013, Velken entered DROP, and, for the last approximately four and one-half years of his employment with the Sheriff's Office, he participated in DROP.

6. During the latter part of Velken's employment with the Sheriff's Office, he took a position with the Los Angeles County Public Defender's Office as an investigator while also being employed with the Sheriff's Office. In

December 2017, Velken left the Public Defender's Office and, eventually, reunited with the Sheriff's Office.

7. Prior to ending his DROP participation, Velken completed a DP_TERM Form, entitled Drop Termination Notification Form, on January 16, 2018, confirming he would terminate his employment early on January 31, 2018. The form included the following statement above his notarized signature:

Termination Requirement: In order to satisfy your employment termination requirement, you must terminate all employment relationships with all participating FRS employers for the first 6 calendar months after your DROP termination date. Termination requirement means you cannot remain employed or become employed with any FRS covered employer in a position covered or non-covered by retirement for the first 6 calendar months following your DROP termination date. This includes but is not limited to: part-time work, temporary work, other personal services (OPS), substitute teaching, adjunct professor or non-Division approved contractual services.

8. Velken's brother was married to Stephanie Leon's ("Leon") sister, and they have known each other since Leon was approximately 11 years old.

9. After leaving the FRS, on or about February 5, 2018, Velken started working for Leon's property management and maintenance company, Stephanie Leon P.A., as an independent contractor. Stephanie Leon P.A. does not have any other employees. While working for Stephanie Leon P.A., Velken's law enforcement expertise was utilized to make properties safer and to help the agents remain safe. Velken also performed administrative duties such as reviewing contracts and proofreading, as well as generating business for Stephanie Leon P.A.

10. Leon also has another company named Realty Empire, Incorporated ("Realty Empire"), which is a brokerage company. Velken, at the time of the hearing, had not been affiliated with Realty Empire.

11. Leon has a broker's license and real estate license in Florida.

12. While working for Leon, Velken looked into getting a real estate license. He also was still considering law enforcement opportunities. He was actively attempting to get an investigator position with the California Department of Insurance.

13. Leon and Velken neither had a contract nor finalized Velken's salary amount, because they did not know how much business Velken would be able to generate for the company. However, Velken was living off his FRS pension, and he understood he was going to be compensated when Leon was compensated.

14. On April 16, 2018, Velken's friend called him to let him know that North Bay Village ("Village") was looking for a police chief and that he had recommended Velken for the position. Velken told his friend he was not interested in the position but was convinced by his friend to meet with Marlen Martell ("Martell"), the Village manager, because she was under pressure to hire a police chief expeditiously, since the individual who was going to serve in the position decided not to accept the position at the last minute.

15. Velken met with Martell that same afternoon.

16. When the two met, Martell summarized the challenges the Village police department had and asked Velken about ideas to resolve the issues. The meeting ended with Martell letting Velken know that she had several others to meet with regarding the position and that she would get back with him.

17. Later that same day, Martell called Velken and offered him the chief of police position. As the Village manager, Martell had the authority to contract for services on behalf of the Village. She also had the sole authority to hire the police chief. They agreed to meet the next day to discuss the position further.

18. The following day, Velken discovered that the Village was an FRS employer. So, Velken let Martell know that he would not be able to take the

position because he had just recently retired and exited DROP from an FRS agency.

19. Martell responded by suggesting that Velken meet with the new human resources coordinator, Ana DeLeon ("DeLeon"), about the retirement issue.

20. On April 17, 2018, Velken met with DeLeon who called the FRS hotline. DeLeon briefed the representative on Velken's retirement status and explained that he ended his DROP in January 2018 and that the Village was offering him a position. DeLeon inquired how the Village could bring Velken on board to work and him continue to receive his benefits. The FRS representative instructed Velken that he could not be placed on the payroll of an FRS agency, unless he had been unemployed for six months, because, once in DROP, a participant cannot receive an FRS salary and pension check at the same time. Additionally, the representative advised that there is no option around the six-month or one-year reemployment restrictions. Velken was told he could not go back to work without violating the termination requirement.

21. After the teleconference meeting with the FRS representative, Velken informed Martell again that he could not come to work for the Village according to FRS requirements. Martell then suggested that Velken become a "contracted employee" to accept the police chief position, which would not interfere with his retirement because he would not be a Village employee in the FRS system.

22. Martell then took Velken upstairs to the Village attorney, Norman Powell ("Powell"), to discuss a possible contracted employee arrangement. Powell informed them that he did not see any problems with a contracted employee arrangement for police chief. Powell indicated he would research and get back with them to inform them if he found anything contrary.

23. Soon thereafter, Martell let Velken know that Powell had approved the contractual employee arrangement to move forward with Velken becoming a contracted police chief for the Village.

24. Velken then approached Leon about the opportunity of expanding her business to include a temporary staffing service and making the service available to the Village to help increase her bottom line.

25. Leon researched temporary staffing service businesses and what was legally required to become one. She checked to see what insurance was needed and checked with the Department of Business and Professional Regulation, where she found out she did not need a license for a temporary staffing agency. When Leon did not find anything that prevented her from having a temporary staffing service, she expanded Stephanie Leon P.A. to include temporary staffing services.

26. Leon never contacted the Division while she was expanding her business or about Velken serving as an independent contractor for Stephanie Leon P.A.

27. On April 25, 2018, Leon modified the purpose of Stephanie Leon P.A., so that the new venture, temporary staffing services, would be included under executive services. She amended her Articles of Incorporation with the Division of Corporations for her property management company, Stephanie Leon P.A., and modified the purpose to say "engage in real estate sales, management, executive services, and/or any and all lawful business."

28. Leon decided to place Velken at the Village as her first attempt at temporary staffing.

29. Since Leon did not know anything about police work, she authorized Velken to negotiate the terms and conditions of the agreement with the Village. However, Leon had the final approval on each portion of the negotiated agreement.

30. Stephanie Leon P.A. through Velken and the Village through Martell reached a verbal agreement for Velken to perform temporary police chief

services. Martell hired Stephanie Leon P.A. for approximately \$130,000.00 annually.

31. The verbal agreement provided that termination of the agreement could be by Stephanie Leon P.A., or Leon could authorize Velken to do so, or Martell could terminate the agreement for the Village, without any financial penalty. There was not a set term for the verbal agreement between Stephanie Leon P.A. and the Village.

32. The agreement began in April and was not reduced to writing. In her capacity, Martell had the authority to make verbal agreements for the Village for services with Stephanie Leon P.A.

33. Velken did not contact FRS again to review the agreement between Stephanie Leon P.A. and the Village, because the Village attorney, Powell, had approved the legality of his employment relationship as an independent contractor. Velken followed his advice.

34. Martell retained Velken as the chief of police by "going through an agency, as we did with other employees in the Village, to be able to hire him at that time, without jeopardizing any of his existing benefits."

35. Velken was not the first contracted non-FRS employee hired by the Village. The Village had hired numerous other contracted employees outside the FRS system to provide services. Some of the high-ranking Village positions, such as public works director, director of the Planning Department, and Village engineer, had been contracted non-FRS employees. The Village had also typically provided offices and assistants to the contracted employees, even though the Village used staffing agencies to fill many of the contracted employee positions.

36. Martell notified the Village's finance department and DeLeon that Velken would be providing services through an agency.

37. On or about April 17, 2018, Velken was drug tested by Quest Diagnostics Incorporated as part of pre-employment for his services to the Village. The results of his tests were negative.

38. DeLeon had Velken fill out some paperwork when he started. However, Velken did not fill out the standard Village employee FRS paperwork because he was not an employee of the Village. Since Velken was not an employee of the Village, he was not on the Village's payroll, and the Village did not provide Velken any benefits such as workers' compensation insurance, health insurance, deferred compensation, retirement contributions, and vacation or sick leave. Also, the Village did not provide Velken a W-2 or W-4 tax form.

39. On or about April 20, 2018, as the new Village police chief, Velken signed above the employee signature line on the Oath of Office for Elected and Appointed Village Officials ("Oath") template form, affirming to "support and obey the Constitution of the United States and of the State of Florida, and that I will, in all respects, observe the provisions of the Charter and Ordinances of the Village." The Oath also stated Velken was "a legal resident of the State of Florida and being employed [with the Village]."

40. The Village had joined the FRS to cover their police officers in 2004.

41. By doing so, the Village signed a federal-state agreement to cover their police officers and, also, had an agreement with the Social Security Administration to cover services.

42. Village Resolution 2018-023 formally affirmed and documented the appointment of Velken as the police chief and was used to introduce Velken to the Village commission.

43. Velken began services as Village chief of police while still working at Stephanie Leon P.A. as an independent contractor.

44. The Village provided Velken an executive assistant, Ana Gonzalez ("Gonzalez"), who assigned him equipment. Velken was given a cell phone, handcuffs, holster, whistle, badge, uniform, shoulder mike, laptop, building fob, office keys, building keys, gym card, vehicle, rifle, shotgun, and taser.

45. The majority of Velken's work as police chief was at an administrative level. He did not carry a gun and never patrolled or conducted enforcement

activities; so, he did not use most of the equipment provided. Additionally, he supplied some of his own equipment.

46. Velken typically wore his own purchased street clothes or a shirt and tie as police chief, and only wore the issued uniform about twice.

47. Velken did use the Village cell phone for city-related calls to avoid public records issues if he used his own cell phone.

48. Velken's work hours were determined by him. Velken was never instructed when to be at work, how to perform the job, what job to do, or where to perform services. He worked independently. Additionally, neither Stephanie Leon P.A. nor Velken were provided any training for the position.

49. Velken once received a Village parking reimbursement check for \$12.00, which he never cashed.

50. Martell briefed Velken as to issues she had with the police department, such as overtime budget, accreditation, and preparation of a hurricane plan. Martell informed Velken that those were challenges she hoped could be resolved. However, she did not tell him how to resolve those issues.

51. While working at the Village, Velken maintained his office at Stephanie Leon P.A. and another at his home. He continued to provide services to Stephanie Leon P.A. and, also, continued seeking employment with the California Insurance Commissioner. Velken even flew to California and participated in an in-person panel interview while assigned to the Village to work. Velken did not get the Village's approval to be absent while in California. He just told them he would be gone for a few days.

52. Neither Stephanie Leon P.A. nor Velken ever submitted regular reports to Martell regarding his services performed for the Village.

53. On July 10, 2018, Martell resigned as Village manager.

54. That same month, Velken was appointed and sworn in as interim Village manager. Velken's services for the Village changed to interim Village manager, and he started the services of his new position. However, the

original temporary staffing verbal agreement with Stephanie Leon P.A. continued unchanged with the Village for Velken's management services. Also, Velken continued to provide services to Stephanie Leon P.A. while working with the Village.

55. Village Resolution 2018-47 formally documented the appointment of Velken as interim Village manager and is how Powell introduced Velken to the Village commission in his new capacity.

56. Neither Velken nor the Village controlled Velken's pay while he was chief of police or interim manager. Leon generally prepared monthly invoices for services to the Village and submitted them to the Village for payment. The invoices listed "labor wages for Lewis Velken." The Village paid Stephanie Leon P.A. for Velken's services based on the invoices.

57. After Stephanie Leon P.A. received payment from the Village, Leon determined Velken's salary and paid him. The Village never paid Velken any compensation.

58. The Village benefited from not providing benefits for the agreement with Stephanie Leon P.A., because it did not have to pay the costs for the benefits. By utilizing a temporary staffing service, the Village saved money.

59. Leon solely determined how much Velken was paid after receiving the Village payments. Velken never received the total amount of money the Village paid Stephanie Leon P.A.

60. When Velken served as both police chief and Village manager, the verbal agreement between Stephanie Leon P.A. and the Village for Velken's temporary contracted services remained the same. As when Velken provided services as police chief, Velken still did not have structured or required hours as interim manager. In fact, Velken independently decided what services to perform and how to perform the services; he received a Village office, maintained an office at Stephanie Leon P.A., and was not trained. However, Village Resolution 2018-47 did provide that Velken was supposed to follow the charter.

61. Stephanie Leon P.A. paid Velken \$48,579.00 in 2018. Leon kept the remaining approximate \$89,000.00 of the Village payments from the invoices.

62. Stephanie Leon P.A. did not withhold any taxes or Social Security from the checks it paid Velken. Additionally, the company did not provide Velken any benefits.

63. Velken's pay was reported to the Internal Revenue Service by Stephanie Leon P.A. by a 1099 tax form.

64. On June 29, 2018, Velken signed a State of Florida Statement of Financial Interests for the fiscal year ending December 31, 2017, reporting his previous primary source of income from "Miami-Dade Police Department" (Sheriff's Office) and the Public Defender's Office in California. The name of the agency listed on the financial statement was "North Bay Village Police Department," and the name of office blank was filled out as "Police Chief."

65. On January 9, 2019, Village Commissioner Julianna Strout ("Commissioner Strout") questioned Elbert Wrains ("Wrains"), Village finance director, by email as to who Leon was and requested that Wrains please clarify the labor wages related to Leon.

66. That same day, Wrains responded: "Mr. Velken was hired through the firm of Stephanie Leon P.A. Staffing Services by Marlen Martell. This is for contract wages vs a paid salary. Mr Velken does not receive any wages directly from North Bay Village. He is paid by Stephanie Leon P.A."

67. On January 30, 2019, Wrains further explained by email to Commissioner Strout about the multiple Leon invoices. The email stated, in pertinent part:

I am resending the invoices,
I do not believe that we have a contract with
Stephanie Leon P.A.
The Interim Village Manager is a contract
employee and there is no contact with FRS for his
cost to the Village.
He works for a firm and we contract for his
services. We have several contract employees

including our building official, all our building inspectors, The Village attorney, one of my accountants, Johnny our computer tech, several public works employees, Amy in the Village Clerks office, Jim Larue, Gary Ratay of Kimley Horn, Marie Bennett in public works. We do not report any of their costs to FRS because they are not employees.

If you have any questions please feel free to call me and ask. I would rather try and get you the right answer than speculation.

68. Leon authorized Velken to end the Stephanie Leon P.A. agreement with the Village because of bad publicity. On or about February 11, 2019, the verbal agreement ended the same day Velken informed Powell.

69. On February 22, 2019, Gonzalez followed the Acting Chief of Police Brian Collins's instructions and removed Velken from the Florida Department of Law Enforcement ("FDLE") Automated Training Management System. Gonzalez checked the box "[v]oluntary separation not involving misconduct" when filling out the form. The Village submitted an Affidavit of Separation to FDLE on behalf of Velken. The FDLE Profile Sheet was improperly checked, indicating Velken was an employee of the Village, before being forwarded to FDLE.

70. After Stephanie Leon P.A. ended the agreement with the Village, Leon continued the temporary employee staffing part of the company by attempting to place Velken in loss prevention positions with other businesses.

71. Velken stopped working for Stephanie Leon P.A. in May 2019.

DIVISION INVESTIGATION

72. Two anonymous complaints were reported to the Division regarding Stephanie Leon P.A. and Velken's services at the Village.

73. On or about January 14, 2019, William McArthur ("McArthur"), retirement analyst I for the Division, received one of the anonymous complaints regarding the employment relationship of Velken and the Village.

74. Afterwards, McArthur was assigned to look into the matter and to get any documentation from the Village regarding Velken's employment to determine what was going on. The Village provided McArthur documentation, including payment ledgers and some copies of resolutions.

75. McArthur reviewed the Village ledgers and found entries to Stephanie Leon P.A., listing "labor wages for Lewis Velken." The ledgers also showed where the city reimbursed Stephanie Leon P.A. for wages. McArthur then searched the Division of Corporations and discovered Leon's Realty Empire company. Neither McArthur nor his supervisors looked into Stephanie Leon P.A. McArthur believed that Realty Empire and Stephanie Leon P.A. were one in the same business.

76. McArthur concluded his review without contacting Leon or Velken. He was never provided the terms of the work arrangement. Also, he failed to follow up with the Village and find out why the Village was paying Stephanie Leon P.A. when the payment ledgers indicate the payments were for Velken's services.

77. Dr. Joyce Morgan ("Dr. Morgan"), bureau chief for the Bureau of Enrollment and Contributions for the Division, was also provided the Velken issue to evaluate. However, Dr. Morgan was not provided many details regarding the nature of the employment relationship between the Village, Velken, and Stephanie Leon P.A. Usually, when determining a DROP participant's status, Dr. Morgan is provided an employment relationship questionnaire to fully evaluate the circumstances of the DROP participant and to decide the employment relationship. However, Dr. Morgan was not provided the questionnaire while evaluating Velken.

78. Dr. Morgan was informed of little else than that Velken was serving as Village police chief. Dr. Morgan utilized the documents provided for review and concluded that Velken was a compulsory employee in an established position under the IRC § 3401 and, therefore, an FRS employee.

79. After Velken was designated an employee, the Division concluded that Velken committed a reemployment violation by working at the Village. As a result of the violation, the Division rendered Velken's retirement null and void, added the time he had been working for the Village to his years of service, and determined he had to repay retirement received because it was like he never retired.

80. McArthur was instructed to call Velken and tell him of the Division's decision. McArthur called Velken to explain that the Division was suspending his pension because Velken had violated terms of the DROP agreement.

81. On March 6, 2019, the Division issued an agency action letter voiding Velken's FRS DROP retirement and retroactively establishing service credit to July 1, 2013. The letter also requested the repayment of \$691,307.41.

HEARING

82. At hearing, Dr. Morgan credibly explained that when she was assigned to review Velken to determine the employment relationship with the Village, "there was very little to review. There was nothing that showed that he was not an employee. Everything supported being an employee."

83. Dr. Morgan testified that she reviewed all documents provided, including his Oath, global profile sheet that indicated his employer was the Village, resolutions affirming appointment, and payment registry. She also testified that her review of Velken's employment relationship did not include any information about benefits, payroll, the agreement between Stephanie Leon P.A. and the Village, or an ERQ-1 employment questionnaire form.

84. Dr. Morgan also admitted, at hearing, that she did not do an independent contractor review because no one asked for one or submitted any staffing documents.

85. Dr. Morgan summarized the process of her review and explained that she was looking to see what position Velken was filling. Once she determined he was a police chief, then she knew he was in an employee position under federal law. She further explained that IRC § 3401(c) classifies public

officials, and Velken fell into that category because of his regularly established position as police chief, which allowed him to administer or enforce the public laws. Dr. Morgan testified that her determination was made because Velken was a compulsory employee in a regularly established position and, as such, also a mandatory FRS employee because he was a public official.

CONCLUSIONS OF LAW

86. DOAH has jurisdiction of the parties and subject matter of this proceeding. §§120.569 and 120.57, Fla. Stat. (2019).

87. This proceeding is de novo. §120.57(1)(k), Fla. Stat.

88. The burden of proof in an administrative proceeding is on the party asserting the affirmative of the issue. *Young v. State, Dep't of Cmty. Aff.*, 567 So. 2d 2 (Fla. 3d DCA 1990); *Balino v. Dep't of HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977). The Division, as the party asserting that Petitioner violated the terms of the DROP agreement, has the burden of proof in this proceeding.

89. Section 120.57(1)(j), Florida Statutes, requires that evidence be considered by the preponderance of the evidence standard. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain outcome. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000). Accordingly, as the party seeking termination of Petitioner's DROP retirement, Respondent must demonstrate that Petitioner violated the termination requirements.

90. The Division is the state agency responsible for administering the FRS. See §§ 121.025 and 121.031, Fla. Stat.

91. The Legislature set limitations on individuals who participate in DROP. After termination of employment and before a participant can return to employment with an FRS employer, there is a six months' waiting period.

Termination is defined in section 121.021(39)(b)2. and states, in pertinent part:

(b) "Termination" for a member electing to participate in the Deferred Retirement Option Program occurs when the program participant ceases all employment relationships with participating employers in accordance with s. 121.091(13), however:

* * *

2. For termination dates occurring on or after July 1, 2010, if the member becomes employed by any such employer within the next 6 calendar months, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence constitutes a continuation of the employment relationship.

92. Section 121.091(13)(c)5.d. provides that failure to meet the definition of termination results in the DROP election becoming null and void, as follows:

At the conclusion of the member's participation in DROP, the Division shall distribute the member's total accumulated DROP benefits, subject to the following:

* * *

d. A DROP participant who fails to terminate all employment relationships as provided in s. 121.021(39) shall be deemed as not retired, and the DROP election is null and void. Florida Retirement System membership shall be reestablished retroactively to the date of the commencement of DROP, and each employer with whom the member continues employment must pay to the Florida Retirement System Trust Fund the difference between the DROP contributions paid in paragraph (i) and the contributions required for the applicable Florida Retirement System class of membership during the period the member

participated in DROP, plus 6.5 percent interest compounded annually.

93. Rule 60S-11.004 further details that a member who fails to meet the termination requirement voids or cancels their retirement and DROP. The rule mandates that the participant must repay all retirement benefits received, including accumulated DROP benefits.

94. In this case, there is no dispute that Velken was aware of the termination requirements.

95. However, there are exceptions to the termination requirements. Respondent provides the exceptions to DROP participants in its FRS Employer Handbook ("Handbook"). Specifically, Chapter 13 of the Handbook is entitled "Reemployment After Retirement" and explains the limitations on a retiree's reemployment with an FRS agency and exceptions that allow a participant to return to work.

96. The Handbook also explains what private employers a retiree can work for and provides, in pertinent part:

No restrictions apply to post-retirement employment in the private sector. When an employee retires from the consolidated FRS, the employee may work for any private employer without affecting retirement benefits.

97. The Handbook also sets forth the same reemployment restriction as in the DROP retirement forms and states, in pertinent part:

If a DROP participant is reemployed after the DROP termination date by a participating employer before meeting the definition of termination, as provided in section 121.091(39), the DROP participant will also void the retirement (including any period of DROP participation), forfeit any DROP accumulation, and reestablish active membership retroactive to the date of DROP commencement. The former DROP participant will be considered to have never retired.

98. The Handbook even has a section entitled "Exceptions to the Reemployment Restriction in Subsection C." This subsection notifies a retiree that, in pertinent part:

Independent contractors are self-employed individuals who are not eligible for membership in the FRS. They are not subject to reemployment limitations because they are not employees of the agency.

99. Respondent also publishes a guide entitled Ready.Set.Retire, which provides retirees with the reemployment restrictions. In pertinent part, this guide advises retirees that:

You may work for the following employers without affecting your retirement benefit

- A Private Employer
- A Florida public employer not covered by the FRS
- Public employer in another state or covered by another state's retirement[.]

100. The Ready.Set.Retire guide also specifically states that "independent contractors are not employees and are therefore not subject to termination and reemployment limitations."

101. The crux of the dispute in this case is Velken's employment relationship while working for the Village. The Division contends Velken was an FRS employee at the Village. However, Petitioner maintains that he worked for the Village in the exception category as an independent contractor. Before a determination can be made as to whether Petitioner violated the terms of the DROP agreement, Velken's employment relationship must be determined.

102. Respondent's position is that Velken is an FRS employee. Respondent rests on the partial information received by the Division during the investigation of the anonymous complaints. First, Respondent relies on

section 121.021(10), which classifies the Village as an employer and provides, in pertinent part:

"Employer" means any agency, branch, department, institution, university, institution of higher education, or board of the state, or any county agency, branch, department, board, district school board, municipality, metropolitan planning organization, or special district of the state which participates in the system for the benefit of certain of its employees, or a charter school or charter technical career center that participates as provided in s. 121.051(2)(d). Employers are not agents of the department, the state board, or the Division of Retirement, and the department, the state board, and the division is not responsible for erroneous information provided by representatives of employers.

103. Respondent also utilizes Dr. Morgan's evaluation of Velken under IRC § 3401(c) to conclude that, as a police chief, Velken was a compulsory employee of the Village in a regularly established position. Respondent relies on section 121.021(11) to support its position, which provides, in pertinent part:

(11) "Officer or employee" means any person receiving salary payments for work performed in a regularly established position and, if employed by a municipality, a metropolitan planning organization, or a special district, employed in a covered group. The term does not apply to state employees covered by a leasing agreement under s. 110.191, other public employees covered by a leasing agreement, or a coemployer relationship.

104. Section 121.021(52) defines regularly established position and provides, in relevant part:

"Regularly established position" means:

* * *

(b) With respect to a local agency employer (district school board, county agency, Florida College System institution, municipality, metropolitan planning organization, charter school, charter technical career center, or special district), other than a water management district operating pursuant to chapter 373, a regularly established position that will be in existence for a period beyond 6 consecutive months, except as provided by rule.

105. The undersigned is not persuaded by Respondent's position that Velken is a compulsory member and FRS employee because he is in a "regularly established position," solely because he served as police chief or interim city manager. Likewise, the Oath, resolutions, and Statement of Financial Interests are not determinative of Velken's employment relationship. In this cause, the greater weight of the evidence contravenes Respondent's position and does not meet sections 121.021(11) or 121.021(52).

106. In paragraph 103 of Respondent's Proposed Recommended Order, Respondent also contends that Velken's circumstances do not comply with the independent contractor guidelines, and, therefore, Velken must be considered an FRS employee while at the Village.

107. "The standard for determining whether one is an independent contractor is the degree of control exercised by the employer or owner over the agent. ... More particularly, it is the [extent] of control, and not actual control, which determines the relationship between the parties." *Nazworth v. Swire Fla., Inc.*, 486 So. 2d 637, 638 (Fla. 1st DCA 1986).

108. The Legislature defined independent contractor in section 121.021(50) as:

An individual who is not subject to the control and direction of the employer for whom work is being performed, with respect not only to what shall be done but to how it shall be done. If the employer has the right to exert such control, an employee-employer relationship exists, and, for purposes of

this chapter, the person is an employee and not an independent contractor. The Division shall adopt rules providing criteria for determining whether an individual is an employee or an independent contractor.

109. Additionally, the Division's administrative rule provides the framework to evaluate who is in control of the work performed and how the work is done to make a determination whether an individual is an independent contractor. Independent contractor factors are comprehensively outlined in rule 60S-6.001(33) and, in pertinent part, state:

(33) INDEPENDENT CONTRACTOR--Means an individual who is not subject to the control and direction of the employer for whom work is being performed, with respect not only to what shall be done but also to how it shall be done. If the employer has the right to exert such control, an employee-employer relationship exists and the person is an employee and not an independent contractor. The Division has adopted the following factors as guidelines to aid in determining whether an individual is an employee or an independent contractor. The weight given each factor is not always the same and varies depending on the particular situation.

(a) INSTRUCTIONS: An employee must comply with instructions from his or her employer about when, where, and how to work. The instructions may be oral or may be in the form of manuals or written procedures that show how the desired result is to be accomplished. Even if no actual instructions are given, the control factor is present if the employer has the right to give instructions.

(b) TRAINING: An employee is trained to perform services in a particular manner. This is relevant when the skills and experience which would be used as an independent contractor were gained as a result of previous employment. Independent contractors ordinarily use their own methods and

receive no training from the purchasers of their services.

(c) INTEGRATION: An employee's services are integrated into the business operations because the services are critical and essential to the success or continuation of an agency's progress/operation. This shows that the employee is subject to direction and control.

(d) SERVICES RENDERED PERSONALLY: An employee renders services personally. This shows that the employer is interested in the methods as well as the results. Lack of employer control may be indicated when a person has the right to hire a substitute without the employer's knowledge or approval.

(e) HIRING ASSISTANTS: An employee works for an employer who hires, supervises, and pays assistants. An independent contractor hires, supervises, and pays assistants under a contract that requires him or her to provide materials and labor and to be responsible only for the result.

(f) CONTINUING RELATIONSHIP: An employee has a continuing relationship with an employer. A continuing relationship may exist where work is performed at frequently recurring, although irregular intervals.

(g) SET HOURS OF WORK: An employee usually has set hours of work established by an employer. An independent contractor is the master of his or her own time and works on his or her own schedule.

(h) FULL-TIME OR PART-TIME WORK: An employee may work either full-time or part-time for an employer. Full-time does not necessarily mean an 8-hour day or a 5 or 6-day week. Its meanings may vary with the intent of the parties, the nature of the occupation and customs in the locality. These conditions should be considered in defining "full-

time." An independent contractor can work when and for whom he or she chooses.

(i) **WORK DONE ON PREMISES:** An employee works on the premises of an employer, or works on a route or at a location designated by an employer. The performance of work on the employer's premises is not controlling in itself; however, it does imply that the employer has control over the employee. Work performed off the employer's premises does indicate some freedom from control; however, it does not in itself mean the worker is not an employee.

(j) **ORDER OR SEQUENCE OF SERVICES:** An employee generally performs services in the order or sequence set by an employer. This shows that the employee is subject to direction and control of the employer.

(k) **REPORTS:** An employee submits oral or written reports to an employer. This shows that the employee must account to the employer for his or her actions.

(l) **PAYMENTS:** An employee is usually paid by the hour, week, or month. An independent contractor is paid periodically (usually a percent of the total payment) by the job or on a straight commission.

(m) **EXPENSES:** An employee's business and/or travel expenses are paid by an employer. This shows that the employer is in a position to control expenses and therefore the employee is subject to regulations and control.

(n) **TOOLS AND MATERIALS:** An employee is furnished significant tools, materials, and other equipment by an employer. An independent contractor usually provides his or her own tools, materials, etc.

(o) **INVESTMENT:** An employee is usually furnished the necessary facilities. An independent

contractor has a significant investment in the facilities he or she uses in performing services for someone else.

(p) PROFIT OR LOSS: An employee performs the services for an agreed upon wage and is not in a position to realize a profit or suffer a loss as a result of his or her services. An independent contractor can make a profit or suffer loss. Profit or loss implies the use of capital by the individual in an independent business of his or her own.

(q) WORKS FOR MORE THAN ONE PERSON OR FIRM: An employee usually works for one organization. However, a person may work for a number of people or organizations and still be an employee of one or all of them. An independent contractor provides his or her services to two or more unrelated persons or firms at the same time.

(r) OFFERS SERVICES TO GENERAL PUBLIC: An independent contractor makes his or her services available to the general public. This can be done in a number of ways: Having his/her own office and assistants, hanging out a "shingle", holding business licenses, having listings in business directories and telephone directories, and advertising in newspapers, trade journals, etc.

(s) RIGHT TO TERMINATE EMPLOYMENT: An employee can be fired by an employer. An independent contractor cannot be fired so long as he or she produces a result that meets the specifications of the contract. An independent contractor can be terminated but usually he or she will be entitled to damages for expenses incurred, lost profit, etc.

(t) RIGHT TO QUIT: An employee can quit his or her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.

110. Applying the independent contractor factors from rule 60S-6.001(33) to this case establishes that the Village was not in control as an employer, and Velken is an independent contractor, contracted through a third-party agency. Specifically, the evidence shows the Village did not provide instructions to Stephanie Leon P.A. or Velken as to when, where, or how to provide the contracted services. The Village did not provide training to Stephanie Leon P.A. or Velken. Additionally, Stephanie Leon P.A. and Velken were permitted to hire assistants if they felt it was needed. Any such hires would have been at Stephanie Leon P.A.'s expense, not the Village. Also, neither Stephanie Leon P.A. nor Velken had set work hours. Velken was free to perform the services when he wanted based on his own schedule. Even so, both Stephanie Leon P.A. and Velken also performed services outside of the contract with the Village. The evidence shows that all of Velken's time was not devoted to the Village. The record further demonstrates that Velken was provided an office like other Village contract employees. However, there was no requirement that the office be utilized. Velken also maintained an office at Stephanie Leon P.A. and at his home. To this end, Velken continued to work for Stephanie Leon P.A. while working for the Village. Also, Velken did not have to obtain permission to perform services outside the Village premises or seek permission to not be at the location. The record confirms neither Stephanie Leon P.A. nor Velken had a set sequence to perform services. Instead, the services could be completed however and whenever. Likewise, no reporting requirements existed as part of the services provided by Velken. Furthermore, Velken was paid by Stephanie Leon P.A., and only received a percentage of the total payment. Stephanie Leon P.A. received the payments invoiced to the Village. The evidence establishes that Velken's percentage was approximately 32 percent of the monies Stephanie Leon P.A. received from the Village. Also, no taxes or Social Security was taken out of Velken's checks, and he received a 1099 tax form from Leon. Similarly, neither Leon nor Velken received any benefits

from the Village or were paid business or travel expenses from the Village. However, Velken did receive one short-term parking expense of \$12.00 for parking when meeting with the Village manager, which he did not cash. Even though the Village supplied standard police equipment to Velken, rarely, if ever, did he use it because his role as police chief was an administrative position. He only wore his uniform at the most twice and dressed daily in street clothes or a shirt and tie, which he purchased, putting himself out to the public as a regular citizen, not police chief. Velken did use the Village cell phone to avoid public records issues that might have occurred had he used his personal cell phone. Stephanie Leon P.A. and Velken worked for more than one organization while working for the Village because Stephanie Leon P.A.'s business never stopped operating, and Velken was working there simultaneously. Besides, Leon had just started the temporary staffing business with Velken being her first placement. She continued to attempt to place Velken after the Village contract ended. While Velken was contracted with the Village, he continued to make his services available to others as demonstrated by his active pursuit of employment in California. Moreover, the agreement between the Village and Stephanie Leon P.A. provided that each party could terminate the agreement.

111. In sum, the credible evidence above demonstrates that Velken had greater control than the Village over the way he carried out his work. The evidence shows that he was not subject to the control and direction of the Village and meets the following independent contractor factors in rule 60S-6.001(33)(a), (b), (e), (g), (h), (i), (k), (l), (m), (n), (q), (r), and (s). Therefore, under the Division's rule, Velken is an independent contractor of the Village contracted through a third party, Stephanie Leon P.A.

112. In light of the foregoing, the Division has not met its burden because the record does not establish Velken was an FRS employee with the Village. Instead, the greater weight of the evidence demonstrates Velken was an independent contractor pursuant to section 121.021(50) and rule 60S-

6.001(33). The Division allows one to work as an independent contractor because it does not violate the six-month restrictions, as outlined in the Division's Handbook and Ready.Set.Retire. Accordingly, Velken, as an independent contractor working for a private employer, did not violate the terms of the DROP agreement and should maintain his pension.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Management Services, Division of Retirement, enter a final order dismissing its request for reimbursement of past FRS benefits, reinstating Petitioner's monthly retirement benefits, and paying any and all past due amounts to Petitioner, with interest.

DONE AND ENTERED this 28th day of February, 2020, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.