



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Roberto Lopez, Jr.,
City of Camden

CSC Docket No. 2015-3244

Interim Relief

ISSUED: **NOV 3 0 2016** (DASV)

Roberto Lopez, Jr., a former Fire Fighter, Bilingual in Spanish and English, with the City of Camden, represented by Matthew R. Dempsy, Esq., requests interim relief regarding his separation from employment.

By way of background, the appellant was appointed as a Fire Fighter, Bilingual in Spanish and English, with the City of Camden effective February 3, 1997. He served in that position until June 30, 2011. Agency records indicate that he resigned in good standing.

On appeal to the Civil Service Commission (Commission),¹ the appellant challenges his "de facto/constructive termination" and requests interim relief on the basis that he was not provided with any written notice of his termination or a hearing. The appellant explains that on September 4, 2009, he sustained injuries as a result of an accident at work while riding on a fire truck. He thereafter applied for accidental disability retirement. However, at its meeting on April 9, 2012, the Board of Trustees of the Police and Firemen's Retirement System (PFRS) denied the appellant's application, determining that he was not totally and permanently disabled from performing the duties of a Fire Fighter. He was only eligible for deferred retirement. The appellant appealed the determination, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. On January 17, 2014, the Administrative Law Judge (ALJ) issued his initial decision, also finding that the appellant was not disabled from his duties and not eligible for

¹ The appellant's appeal was faxed on June 15, 2015 and postmarked June 16, 2015.

accidental or regular disability retirement. Thereafter, at its February 10, 2014 meeting, the Board of Trustees adopted the ALJ's initial decision. The appellant subsequently sought reinstatement. In that regard, in a letter dated June 30, 2014 to the City of Camden Business Administrator, the appellant requested reemployment and attached an Application for Reemployment form. The appellant stated that he was "employed as a Fire Fighter from 1997 until June 2011 when [he] attempted to apply for a Disability Pension" but was denied. It is noted that, in the Application for Reemployment form signed by the appellant on June 30, 2014, he indicated that his "Date of Resignation" was June 30, 2011. However, the appellant on appeal argues that, despite never having resigned or formally removed from his position, by letter dated July 23, 2014, the Business Administrator "flatly" denied reinstating him and did not provide a reason.² The appellant attempted to resolve the matter with the City, but he asserts that the "City merely took him off of active duty while he pursued his pension application" and "shows no intention of ever restoring him." The appellant contends that he was terminated without due process and a hearing.

Regarding the factors for interim relief, the appellant contends that it is "next to impossible" for him to address whether there is a clear likelihood of success on the merits of his case, since the appointing authority has provided no basis for its refusal to reinstate him. As such, he has been denied any meaningful opportunity to challenge his separation. Moreover, the appellant claims that "this unilateral denial of income threatens" his ability to support himself and his dependents in the long term and may reduce him to poverty if the matter continues indefinitely. Furthermore, the appellant maintains that there would be no substantial injury to other parties if he is granted his interim relief request. Rather, it is in the public interest for employers to abide by constitutional due process guidelines. Therefore, the appellant requests that he be immediately reinstated to his permanent position of Fire Fighter, as well as be awarded costs and attorney fees.

In response, the appointing authority, represented by Meredith A. Accoo, Assistant City Attorney, maintains that the appellant admittedly resigned in good standing effective June 30, 2011. It emphasizes that it did not institute disciplinary action "in order to effectuate" the appellant's "voluntary separation from employment." The appellant remained in his resigned status in order to pursue disability pension benefits. In that regard, the appointing authority indicates that the appellant submitted an Application for Disability Retirement on April 1, 2011 in which he notified the appointing authority that his retirement would be effective June 1, 2011. In the application, the appellant also declared that he was incapacitated and that he understood that changing or cancelling his retirement date did not guarantee continued employment. Moreover, the appointing authority highlights that in the appellant's Application for Reemployment form, he indicated

² The Business Administrator responded that he was in receipt of the appellant's June 30, 2014 letter and was unable to fulfill the appellant's request for reemployment.

that he resigned on June 30, 2011 and that he had not been dismissed from another position since his resignation.

Further, the appointing authority contends that, although the appellant requests interim relief, there is no pending disciplinary action or decision from which he could request relief. It reiterates that it did not remove the appellant from employment. Thus, his request for interim relief is procedurally deficient. Additionally, the appointing authority states that the appellant's appeal is untimely since he did not appeal his resignation within 20 days or request a hearing. Nonetheless, it maintains that the appellant has not met the standard for interim relief. The appointing authority submits that the appellant has not shown a clear likelihood of success on the merits of his case because he voluntarily resigned and he has not shown that immediate or irreparable harm would occur. In that regard, it asserts that the appellant waited over four years to seek a reversal of his resignation, and thus, such inaction demonstrates a lack of urgency. The appellant has also not presented that he is restricted from working anywhere else to earn an income. In addition, the appointing authority indicates that there was medical documentation in 2010 that the appellant had a physical limitation to serve as a Fire Fighter. The appellant also testified to the same at the OAL. As such, the public and the appointing authority could face danger and liability if the appellant's interim relief request is granted. Finally, the appointing authority contends that the appellant should not place fault or demand relief from the appointing authority when the Board of Trustees of PFRS did not grant him pension benefits.

CONCLUSION

N.J.A.C. 4A:2-1.2(a) states that upon the filing of an appeal, a party to the appeal may petition the Commission for a stay or other relief pending final decision of the matter. Additionally, *N.J.A.C.* 4A:2-2.5(e) provides that appeals concerning violations of *N.J.A.C.* 4A:2-2.5 (opportunity for hearing before the appointing authority) may be presented to the Commission through a petition for interim relief. Moreover, *N.J.A.C.* 4A:2-1.1(b) indicates that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. In addition, *N.J.A.C.* 4A:2-2.13(d) provides in relevant part that a Fire Fighter shall have 20 days from the date of receipt of the Final Notice of Disciplinary Action (FNDA) to appeal the removal. If the appellant does not receive the FNDA as required, he or she shall file an appeal of removal within a reasonable time. The Fire Fighter shall file the appeal simultaneously with the OAL and the Commission.

Initially, the appellant's request is procedurally deficient, as there is no pending appeal in which interim relief may be granted. See *N.J.A.C.* 4A:2-1.2(a). Additionally, although the appellant alleges that he was terminated, a remedy may

only be granted if the request is timely filed. In this case, there is no dispute that the appellant was separated from employment in June 2011 and did not seek relief from the Commission until June 2015. Similarly, the appellant's appeal of a resignation or removal from employment is untimely. See *N.J.A.C.* 4A:2-1.1(b), *N.J.A.C.* 4A:2-2.13(d), and *N.J.S.A.* 11A:2-15. Even affording the appellant the greatest latitude, at the latest, the appellant knew that he would not be reinstated in July 2014, when the Business Administrator advised him that his request for reemployment could not be fulfilled. However, he did not file an appeal with the Commission until almost one year later. The appellant's efforts to secure an accidental disability retirement and reinstatement with the appointing authority do not provide good cause to relax the regulatory time frames, since clearly the appellant knew he was not at work beginning in June 2011 and filing an appeal four years later is not within a reasonable time. Further, even if the appellant is considered removed from employment rather than resigned, then his separation would be a disciplinary action covered by *N.J.S.A.* 11A:2-13 and subsection a.(1) of *N.J.S.A.* 11A:2-6. In that regard, *N.J.S.A.* 11A:2-15 provides that any appeal from adverse actions specified in *N.J.S.A.* 11A:2-13 shall be made in writing to the Commission no later than 20 days from receipt of the final written determination of the appointing authority or within a reasonable time if no determination is received. Again, allowing the latest date of July 2014 for the appellant to realize that his separation was permanent, an appeal one year later is not within a reasonable time. Therefore, since the appellant's appeal is untimely for filing a request for interim relief and appealing a resignation and removal, his appeal is dismissed as untimely.

Nonetheless, even assuming that the appellant timely filed his appeal, a review of the record reveals that he accepted a resignation of his Fire Fighter position. The appellant's actions and the documentation he submits support such a determination. The appellant did not seek a hearing regarding his "de facto/constructive termination" at the time of his separation and his filing of an Application for Reemployment, which noted a "Date of Resignation" as June 30, 2011, demonstrates his understanding that he had resigned his position. Furthermore, the record does not indicate that the appellant requested or was approved for a leave of absence during his attempt to secure an accidental disability retirement. Under these circumstances, the appellant is properly considered to have resigned his position effective June 30, 2011.

It is noted that *N.J.A.C.* 4A:2-6.1(b) and (c) provide that a resignation shall be considered accepted by the appointing authority upon receipt of the notice of resignation and a request to rescind the resignation prior to its effective date may be consented to by the appointing authority. In the present case, the appointing authority clearly accepted the appellant's separation as a resignation and does not wish to rescind it. *N.J.A.C.* 4A:2-6.1(c) grants an appointing authority the discretion to consider such requests to rescind, but there is no obligation to accept.

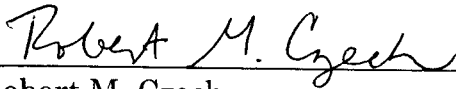
Regarding reemployment, *N.J.A.C.* 4A:4-7.10(b) provides that upon the recommendation of the appointing authority that such reemployment is in the best interest of the service, the Chair/CEO of the Commission shall place the employee's name on a reemployment list. *See also N.J.S.A.* 11A:4-9d. The determination as to whether to place the appellant's name on a regular reemployment list rests within the discretion of the appointing authority. That discretion is not reviewable. *See Richard Marinelli v. Department of Personnel*, Docket No. A-1415-97T2 (App. Div. Mar. 9, 2000). Based on the forgoing, the Commission does not have jurisdiction to review the appellant's reemployment issues. Accordingly, since the appointing authority declined the appellant's request for reemployment, no further action can be taken in that regard.

ORDER

Therefore, it is ordered that this appeal be dismissed as untimely.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF NOVEMBER, 2016



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