



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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April 10, 2018

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Acting Director

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Governor

SHEILA Y. OLIVER
Lt. Governor

Sent via Email to [REDACTED]

Thomas P. Vitolo, Esquire
Attorney At Law

RE: Jerald Lee
[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Vitolo:

I am writing in reference to the denial by the Board of Trustees of the Police and Firemen's Retirement System (PFRS) of your client, Jerald Lee's request to file for Ordinary Disability retirement benefits. The PFRS Board initially reviewed and denied his request at its January 8, 2018 meeting. On February 21, 2018, you appealed the Board's denial and requested a hearing in the Office of Administrative Law (OAL). At its meeting on March 12, 2018, the PFRS Board denied your request for a hearing in the OAL. Findings of Fact and Conclusions of Law, as outlined below, were approved by the PFRS Board at its meeting of April 9, 2018.

The PFRS Board has reviewed your submissions and the relevant documentation and finds that the laws governing the PFRS do not permit the Board to grant Mr. Lee's request to file for Ordinary Disability retirement benefits.

FINDINGS OF FACT

Mr. Lee originally established membership in the PFRS on August 1, 2000 when he accepted a position as a Police Officer with the City of Plainfield (Plainfield). His employment continued with Plainfield and pension contributions were remitted on his behalf in his PFRS

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membership until Mr. Lee was charged by Indictment with 2 Counts of Computer Theft, one in the second degree and one in the third degree. The charges stem from an incident on or about April 28, 2012, when without proper authorization, he accessed a *Criminal Justice Information System/New Jersey Motor Vehicle Registration Database* to obtain personal identifying information for a third party. On June 8, 2015, Plainfield filed a *Preliminary Notice of Disciplinary Action* as a result of the criminal charges filed against Mr. Lee. He was suspended without pay on June 8, 2015 until the disposition of the criminal matter.

On June 29, 2017, Mr. Lee filed an *Application for Disability Retirement* requesting an Ordinary disability effective July 1, 2017. Thereafter, Plainfield submitted a *Certification of Service and Salary*, indicating that Mr. Lee was suspended June 8, 2015 due to the pending criminal charges. On September 11, 2017, Mr. Lee pled guilty to an amended Count 2 of the Indictment, Disorderly Conduct-Improper Behavior-Create Hazardous Conduct, a disorderly person's offense, in violation of 2C:33-2A9(2). An *Order for Forfeiture of Public Office* (order) was issued because Mr. Lee entered a guilty plea to one Count of Petty Disorderly Person's Disorderly Conduct and his criminal conduct related to, involved and touched upon his position as a police officer. Thus, it was ordered pursuant to N.J.S.A. 2C:51-2(a)(2) that Mr. Lee "shall forfeit any and all public employment in the State of New Jersey and shall be forever disqualified from holding any office or position of honor, trust or profit in the State of New Jersey or any of its administrative or political subdivisions." On September 12, 2017, a *Final Notice of Disciplinary Action* (FNDA) was issued removing Mr. Lee from his position as a police officer with Plainfield as a result of his plea and forfeiture.

On September 18, 2017, the Division of Pensions and Benefits (Division) notified Mr. Lee that he was ineligible to file for Ordinary disability retirement in accordance with N.J.A.C.17:1-6.4 because he did not leave employment due to a disabling condition; instead his employment was severed with Plainfield as a result of his guilty plea and forfeiture of public office. On September

29, 2017, you appealed the Division's determination. On October 2, 2017, you submitted a formal appeal. On December 1, 2017, Mr. Lee was ordered to only pay various fines which resolved his pending criminal matter.

At its meeting of January 8, 2018, the PFRS Board considered your personal statements and all relevant documentation and denied Mr. Lee's request to file for Ordinary Disability retirement. The Board relied upon N.J.A.C. 17:1-6.4 (b) and further determined that Mr. Lee is unable to comply with N.J.S.A. 43:16A-8(2). On January 18, 2018, you appealed the Board's denial and requested a hearing in the OAL. At its meeting on March 12, 2018, the Board denied your request for a hearing in the OAL. This Final Administrative Determination serves as formal notice that the Board denied your request for a hearing.

CONCLUSIONS OF LAW

The PFRS provides for an Ordinary disability retirement in N.J.S.A. 43:16A-6, which states:

1) Upon the written application by a member in service, by one acting in his behalf or by his employer, any member, under 55 years of age, who has had four or more years of creditable service may be retired on an ordinary disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him and that such incapacity is likely to be permanent and to such an extent that he should be retired.

In addition, N.J.S.A. 43:16A-8 (2) states in pertinent part:

(2) Any beneficiary under the age of 55 years who has been retired on a disability retirement allowance under this act, on his request shall, or upon the request of the retirement system may, be given a medical examination and he shall submit to any examination by a physician or physicians designated by the medical board once a year for at least a period of five years following his retirement in order to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished. If the report of the medical board shall show that such beneficiary is able to perform either his former duty or any other available duty in the department which his employer is willing to assign to him, the beneficiary shall

report for duty; such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service. If the beneficiary fails to submit to any such medical examination or fails to return to duty within 10 days after being ordered so to do, or within such further time as may be allowed by the board of trustees for valid reason, as the case may be, the pension shall be discontinued during such default.

[Emphasis Added]

Also, N.J.A.C.17:1-6.4. which states:

- (a) Each disability retirement applicant must prove that his or her retirement is due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment; the disability must be the reason the member left employment.
- (b) Members who have involuntarily or voluntarily terminated service for any of the reasons listed below will not be permitted to apply for a disability retirement;
 - 1. Removal for cause or total forfeiture of public service;
 - 2. Settlement agreements reached due to pending administrative or criminal charges, unless the underlying charges relate to the disability;
 - 3. Loss of licensure or certification required for the performance of the member's specific job duties;
 - 4. Voluntary separation from service for reasons other than a disability; and
 - 5. Job abolishment or reduction in force.
- (c) The Division will review all disability retirement applications submitted after a member has terminated service to determine whether the member's application is eligible for processing, pursuant to (a) above.

As noted above, Mr. Lee did not leave employment due to a disabling condition. Rather, he left due to his guilty plea and order to forfeit his employment with Plainfield. A FNDA was issued by Plainfield removing Mr. Lee from his position effective September 12, 2017. Because of the order, Mr. Lee is forever barred from returning to his position with Plainfield. Therefore, if

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Mr. Lee's application for disability retirement was approved and his alleged disability diminished to the point that he could return to employment, he is unable to comply with N.J.S.A. 43:16A-8(2).

Consequently, if his application was processed and he was granted an Ordinary disability pension and later it was determined that he was no longer disabled, there is no mechanism for the Board to stop paying the pension because Mr. Lee could never be ordered to return to work, as required by N.J.S.A. 43:16A-8(2). Granting a disability retirement under these circumstances would be in contravention of the statutory scheme, and place the Board in the position of potentially paying a disability pension for which the Board has no ability or mechanism to terminate if the member is no longer totally and permanently disabled.

The Board considered your argument that applying N.J.A.C. 17:1-6.4 violated constitutional rights, specifically, that the regulation was an ex-post facto law. As conceded by you, and as noted in the Board's motion, the regulation was enacted prior to Mr. Lee's application for Ordinary disability retirement. As such, applying a duly enacted regulation to Mr. Lee's application for Ordinary disability retirement does not violate any constitutional rights.

Lastly, the Board rejects your argument that it failed to consider the facts regarding Mr. Lee's excusable neglect claim, disagrees with your assertion that the regulation should not apply to Mr. Lee's situation, and rejects your request to treat Mr. Lee's application as if it had been filed in 2015. The Board considered all of your submissions including information presented that Mr. Lee started the process of his disability application in 2009 and continued through 2015. N.J.A.C. 17:4-6.1 requires all applications for retirement be made on forms required by the System and filed with the Division. You do not dispute that Mr. Lee's application for retirement was not filed until June 29, 2017. While you assert that Mr. Lee had been in the process of filing a disability application, the Division and the Board cannot rely on Mr. Lee's subjective intent to file a disability application. The Board must rely on when the application was filed. It is undisputed that Mr. Lee's

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disability application was not filed until June 29, 2017. At that time, N.J.A.C. 17:1-6.4 was already in effect, and Mr. Lee is required to comply with its terms.

Based upon his age and years of service Mr. Lee is eligible to file for a Deferred retirement. Should he file for a Deferred retirement the Board will determine if it wishes to review the issue of honorable service at that time which includes the question whether he is eligible for a Deferred based upon his removal. See N.J.S.A. 43:16A-11.2.

As noted above, the PFRS Board has reviewed your written submissions and because this matter does not entail any disputed questions of fact, the PFRS Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's enabling statutes and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Police and Firemen's Retirement System.

You have the right, if you wish to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

Sincerely,



Mary Ellen Rathbun, Secretary
Board of Trustees
Police and Firemen's Retirement System

G-5/mer

C: V. McManus (ET); D. Dinkler (ET)
Jerald Lee
DAG Danielle P. Schimmel (via e-mail to: [REDACTED])
DAG Amy Chung (via e-mail to: [REDACTED])