

Officer position, Freehold brought forth and sustained disciplinary charges of inability to perform duties and being medically unfit for duty and removed him from his position effective April 21, 2017. Specifically, the Final Notice of Disciplinary Action indicates that along with being medically unfit for duty due to him no longer having the dexterity to shoot a gun that Dentrux was also found to be psychologically unfit for duty after a psychological examination. He appealed that removal to the Commission and the matter was transmitted to the OAL for a hearing as a contested case.

At OAL, on March 6, 2018, the ALJ issued an order of consolidation and predominant interest regarding these matters. In that order, the ALJ stated that the matters would be consolidated and that the PFRS had the predominant interest. In this regard, the ALJ properly noted that the PFRS has sole jurisdiction under its regulations to determine whether Dentrux is totally and permanently disabled for the purposes of his accidental disability retirement. He further indicated that the final determination by PFRS regarding Dentrux's ability to work necessarily will affect the outcome of the disciplinary charges against him.

Based on that order, the PFRS and the Commission issued a joint order affirming the ALJ's determination that the PFRS had the predominant interest. That order stated, in pertinent part, that:

[I]t is clear that the PFRS has subject matter jurisdiction under its law and rules to determine whether Dentrux is totally and permanently disabled for the purposes of his retirement pursuant to *N.J.S.A. 43:16A-7*. While the Commission has the ability when necessary to interpret statutes and regulations outside of Title 11A of the New Jersey Statutes and Title 4A of the New Jersey Administrative Code, it will not do so where the issue can be determined by the agency governed by and charged with making final determinations based on those statutes and regulations. In this regard, PFRS has significant expertise in determining the physical ability of public employees to perform their jobs. In fact, that is its main function when an employee seeks any type of disability retirement. While the Commission also has significant experience in such matters when they arise in the context of whether an employee is unable to perform duties, it is clearly preferable to have the agency that is properly seen as the expert in such matters make the determination as to disability. *Finally, should the PFRS find that Dentrux is totally and permanently disabled from performing as a Police Officer, his removal from employment would be considered moot since his reinstatement to employment in the first case would have been unnecessary. The disciplinary charges of unfitness proffered by Freehold would only proceed if PFRS should find him fit to perform Police Officer duties.* In this regard, the disciplinary charges

of unfitness contain allegations separate and distinct from the medical issues considered by the PFRS relating to Dentrux's disability, namely that Dentrux was also psychologically unfit to perform his duties. That issue will solely be decided, if necessary, by the Commission (emphasis added).

Subsequently, on May 14, 2018, the PFRS again reconsidered its determination that Dentrux was unfit to serve as a Police Officer. At that meeting, it found, as indicated in a May 21, 2018 letter from the Secretary for the Board of Trustees, PFRS, to Dentrux's attorney, that Dentrux was "totally and permanently disabled from the performance of his duties as a police officer." It further indicated that Dentrux was entitled to "continue to collect Accidental Disability retirement benefits without interruption." Based on that determination, the PFRS indicated that Dentrux's appeal of his retirement was moot and requested that his appeal be returned to it from OAL.

Thereafter, inexplicably, the ALJ ignored the explicit language of the joint order highlighted above and issued the subject initial decision. In that decision, along with certain statements that do not comport with the facts of the matter¹, unclear or incorrect legal conclusions², as well as unsolicited dicta³, the ALJ granted Dentrux's appeal and reversed his removal.

Upon its *de novo* review, the Commission rejects the initial decision in total. As indicated in the joint order, since the PFRS has found that Dentrux is, in fact, entitled to an accidental disability retirement, it was wholly unnecessary for the ALJ to make any substantive determination as to the sufficiency of Freehold's removal of Dentrux from employment. That action is, as a result of the PFRS determination, deemed to have never occurred. Accordingly, the Commission rejects the initial decision and dismisses Dentrux's appeal as moot.

¹ For example, the ALJ incorrectly states that PFRS' determination "is based on a finding that Dentrux can perform as a fire department employee, and therefore should be able to perform as a police officer."

² For example, the ALJ reversed the charges against Dentrux based on his conclusion that Freehold could not impose major discipline due to a physical limitation that occurred as a result of Dentrux's duties. While the ALJ did not even need to address this issue based on the fact that the appeal is moot, his conclusion in that regard is incorrect. It is perfectly permissible for an appointing authority to seek the disciplinary removal of an employee who is physically unfit to perform the essential functions of the position, regardless upon how that limitation occurred.

³ For example, the ALJ states that the "issue of the terminated health benefits has been addressed by the interlocutory review of the prior salary order. I question the Commission's reversal of my attempt to restore those benefits"

ORDER

The Commission dismisses the appeal of Richard Dentrux as moot.

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 5TH DAY OF SEPTEMBER, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 08573-17

AGENCY DKT. NO.

2017-3845

**IN THE MATTER OF RICHARD DENTROUX,
TOWNSHIP OF FREEHOLD.**

Louis M. Barbone, Esq., for appellant Richard Dentrux (Jacobs & Barbone, P.A., attorneys)

Brian J. Chabarek, Esq., for respondent Township of Freehold (Davison, Eastman, Munoz, Lederman & Paone, P.A., attorneys)

Record Closed: July 16, 2018

Decided: August 3, 2018

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Police officer Richard Dentrux (Dentrux or appellant), retired on an accidental disability pension, appeals from the May 22, 2017, decision of the Township of Freehold (Township or Freehold) to remove him from his position as a police officer at the Township on charges of violation of N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties— medically unfit for duty. The Township removed Dentrux effective April 21, 2017.

JURISDICTION/RIPENESS

This tribunal's jurisdiction is in question. The Board of Trustees of the Police and Firemen's Retirement System (Pension Board) determined on or about February 10, 2017, that Dentrux was no longer totally and permanently disabled, and therefore no longer eligible for accidental disability retirement benefits. The Pension Board notified the Township to place Dentrux on the active rolls of police officer, and the Township required a fitness-for-duty examination. Dentrux took an appeal from the Pension Board's determination. There is uncertainty whether the Pension Board ever notified the Township of the appeal, though the Township did become aware of the appeal of the pension matter. This tribunal questions the Pension Board's failure to advise the Township of the pension matter or direct the Township to cease all actions against Dentrux until the Pension Board's determination became final. The Board does have regulations to restore a retired disabled pension recipient to active duty; however, beyond allowing that action, this tribunal found no regulations or case law addressing the procedures.

Generally, when the State takes an action against an individual or entity, and a timely appeal is filed, no enforcement of that determination is taken pending a final decision on the appeal. This is not always the case in pension matters, see Mount v. Board of Trustees of the Public Employees' Retirement System, 133 N.J. Super. 72 (App. Div. 1975). In the Mount case the retiree was indicted after regular pension benefits were awarded. There the court approved a termination of benefits; however, it noted the inappropriateness of proceeding to a hearing with the pension board because of the pending criminal indictment and anticipated trial. These types of factors were not presented here. Dentrux was retired on accidental disability, and the Pension Board found him no longer disabled. However, the determination of the Pension Board is based on a finding that Dentrux can perform as a fire department employee, and therefore should be able to perform as a police officer. Accordingly, this tribunal is concerned that on Dent roux's filing of an appeal of the Board's determination, the Township had no

authority to proceed, and both the Pension Board and the Township's actions would be ultra vires until the final determination on the disability reclassification.

If that be the case, then this removal preceding is premature due to lack of either jurisdiction or ripeness. I find little subsequent regulatory or case-law support for the Pension Board's action and defer to the Civil Service Commission and/or the Appellate Division for guidance in this area.

FACTUAL DISCUSSION

Dentroux received a telephone notice from the Township that on February 10, 2017, the Board of Trustees of the Police and Firemen's Retirement System determined that Dentroux was no longer qualified as totally and permanently disabled; at the time, Dentroux had not received any notice from the Pension Board. The Township requested that Dentroux appear for a fitness-for-duty examination. Dentroux complied with the request, and the medical evaluations confirmed that Dentroux was not fit for duty, as he was still unable to discharge a weapon due to his physical limitations. The Township then proceeded to institute a disciplinary action against Dentroux for removal based upon his inability to perform his duties. The hearing officer below found that the Township had no alternative than to seek Dentroux's removal. The Township provided no evidence that it attempted to accommodate Dentroux, or considered the incident as qualifying for an involuntary retirement. The Township provided no evidence that Dentroux rejected an involuntary retirement or a resignation in good standing.

The parties have no dispute that Dentroux is incapable of performing the duties of a police officer because he does not have the dexterity to discharge a firearm accurately. (See J-1.)

The testimony at the hearing included that of Peter Valesi, the Township administrator; Ernest Schriefer, the police chief; Dr. Sabine T. Paul-Yee, M.D., an internist; Dr. Vasco Gulevski, M.D., a neurologist; and Dr. White, a clinical psychologist.

FACTUAL FINDINGS

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, J-1, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Appellant first received notice of the proposed action of the Pension Board from the Township.
2. Appellant timely appealed the Pension Board's determination to reclassify him as no longer eligible for an accidental disability retirement benefit.
3. The Pension Board resolved appellant's petition in that action by restoring his accidental disability pension benefits.
4. Appellant is incapable of performing the duties of a police officer due to his medical condition.
5. There are courses of action other than a disciplinary action for removal that could have been taken by the Township.
6. The Township did not offer appellant the opportunity to resign in good standing, nor provide an alternative job for appellant.
7. The Township proceeded to move forward with this disciplinary action for removal based upon the Pension Board initial determination to restore appellant to active duty.
8. The Township proceeded to move forward even after it has notice of appellant's appeal of the Pension Board's determination.

9. The Township proceeded to move forward with this disciplinary proceeding even after the Pension Board determined to restore appellant to full accidental disability pension benefits.
10. The Township allowed appellant's family health coverage to lapse during the pendency of this disciplinary hearing.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory, and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:220; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the Township bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Therefore, I must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted).

Dentroux and the Township medical experts agree that he is unable to perform his duties as a police officer.

The Township seeks the major discipline of removal under N.J.A.C. 4A:2-2.2, and N.J.A.C. 4A:2-2.3(a)(3). The definition of "discipline" does not appear in the disciplinary provisions of N.J.A.C. 4A. In such absence, one must look to the common definition of discipline. Black's Law Dictionary 562 (10th ed. 2014) defines "discipline" as, "Punishment intended to correct or instruct; esp., a sanction or penalty imposed after an official finding of misconduct." The American Heritage Dictionary of the English Language (3rd ed. 1992) defines "discipline" as, "4. Punishment intended to correct or train." Such a definition does not apply to the present circumstances. Dentroux cannot correct his physical limitation. The Township has not demonstrated conduct on the part of Dentroux that would warrant discipline.

This tribunal does not dispute the Pension Board's ability to review the grant of accidental disability retirement benefits when the circumstances are appropriate. See Mount, 133 N.J. Super. 72. However, in both Ruvoldt v. Nolan, 63 N.J. 171 (1973), and Evers v. State, Board of Trustees, Public Employees' Retirement System, 91 N.J. 51 (1981), the Court found that alleged or actual criminal activity on the part of a pension board member who is receiving a pension may not deprive the member from continuing receipt of that pension. Mount acknowledged Ruvoldt regarding the ability of a pension board to modify a pension. A dissent in Evers could not logically justify the majority

opinion. Here, no evidence of appellant's wrongdoing is presented. The discipline is related to the physical condition of the appellant.

Notably, respondent does not put forth a plethora of cases in support of its position, nor has this tribunal found cases directly on point. There is the ability to compel an involuntary retirement; however, this tribunal understands that such action is inconsistent with the Pension Board's previous determination.

Appellant cites Arose v. Township of Little Egg Harbor Police Department, 96 N.J.A.R.2d (CSV) 490, and Newark v. Bellezza, 159 N.J. Super. 123, 128 (App. Div. 1978). These cases support the conclusion that appellant's inability to perform the duties of his job should not be addressed in a disciplinary matter; rather, appellant's disability compels a resignation in good standing. As there is still an issue of jurisdiction and ripeness, this tribunal has not directed the resignation in good standing.

There is no question that Dentrux cannot perform his duties as a police officer. This tribunal rejects the Township's action to impose major discipline for a physical limitation that was the result of an incident that occurred during the performance of his duties. I **CONCLUDE** that the preponderance of the competent and credible evidence has established that appellant has not violated N.J.A.C. 4A:2-2.3(a)(3).

I **FURTHER CONCLUDE** that the filing of the pension appeal deprives the jurisdiction of this tribunal or makes consideration of this disciplinary action not yet ripe for adjudication.

For the reasons set forth above and on the absence of competent proofs, I **CONCLUDE** that respondent has not met its burden on this major disciplinary charge and that the disciplinary charge against appellant must fail.

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action is hereby **DISMISSED**, without prejudice to reinstatement of same

upon the final decision of the Pension Board on the issue of accidental disability retirement benefits. Appellant's appeal is **GRANTED**.

This tribunal has already issued a salary order, which order the Commissioner has modified; no additional salary order will be forthcoming. The retirement benefits paid by the Pension Board continue appellant as a retired employee, and no additional compensation will be due to Dentrux. The issue of the terminated health benefit has been addressed by the interlocutory review of the prior salary order. I question the Commissioner's reversal of my attempt to restore those benefits to prevent Freehold's exposure to unknown medical costs which it may ultimately be responsible.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 3, 2018

DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

8/3/18

Mailed to Parties:

8/3/18

lam

APPENDIX

LIST OF WITNESSES

For Appellant:

None

For Respondent:

Peter Valesi, Township Administrator

Ernest Schriefer, Township Police Chief

Dr. Sabine T. Paul-Yee, M.D., internist

Dr. Vasco Gulevski, M.D., neurologist

Dr. Mark White, Ph.D., clinical psychologist (orthopedic & neurological)

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-1 Joint stipulation of facts

For Appellant:

None

For Respondent:

R-1 Cover letter of PFRS approval, dated May 3, 2011

R-2 PFRS approval of accidental disability retirement benefits, dated May 2, 2011

R-3 Dr. Jeffrey F. Lakin, M.D., examination, dated December 6, 2016

R-4 PNDA, dated April 21, 2017

R-5 Job Description

- R-6 Curriculum vitae of Dr. Vasko K. Gulevski, M.D.
- R-7 April 19, 2017, report of Dr. Gulevski
- R-8 Curriculum vitae of Dr. Mark White Ph.D.
- R-9 April 27, 2017, report of Dr. White
- R-10 Curriculum vitae of Dr. Sabine T. Paul Yee, M.D.
- R-11 May 3, 2017, report of Dr. Yee
- R-12 FNDA, dated May 22, 2017
- R-13 Termination of Medical Coverage COBRA availability, dated April 21, 2017
- R-14 Records, Central Jersey Neurology Associates, P.A. (multiple dates)
- R-15 Records, Family Practice at CentraState, dated March 6, 2017