



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of S.L., City of
Wildwood

Request for Interim Relief

CSC Docket No. 2021-655

ISSUED: AUGUST 6, 2021 (ABR)

S.L., a former Police Officer with the City of Wildwood, represented by Thomas Cushane, Esq., requests reinstatement to her former position, and an award of back pay and counsel fees.

By way of background, the petitioner experienced a series of medical issues likely triggered by her 2017-2018 pregnancy. The petitioner sought a diagnosis and treatment, but her condition continued to worsen after her pregnancy. She was eventually informed of a diagnosis indicating that her condition was likely to be permanent. Thereafter, on December 18, 2019, the petitioner filed for ordinary disability pension benefits through the Division of Pensions and Benefits with an anticipated retirement date of January 1, 2020. According to a certification provided by the petitioner, she was advised by the Chief of Police that any accrued leave time she had remaining in her leave-time bank after January 1, 2020 would be paid out to her directly. The petitioner also indicated in her certification that in January 2020, “while at the police headquarters returning all of my department issued equipment,” she met with the Chief of Police. However, after additional treatment, the petitioner’s condition unexpectedly improved. On August 6, 2020, the petitioner’s physician cleared her for full duty as a Police Officer “effective immediately with no restrictions.” In September 2020, the petitioner, through counsel, notified the appointing authority of her improvement and her desire to return to work. After communications with counsel for the appointing authority, the petitioner was advised that the appointing authority would not allow her to return to duty.

On appeal, the petitioner argues that the appointing authority’s failure to issue a Preliminary or Final Notice of Disciplinary action is contrary to *N.J.S.A. 11A:2-14*

and *N.J.S.A.* 40A:14-147. The petitioner argues that the appointing authority must be compelled to reinstate her based on that failure and pursuant to applicable law and to award her back pay and counsel fees. The petitioner also requests that the instant request be transferred to the Office of Administrative Law (OAL) for a hearing as a contested case.

In response, the appointing authority, represented by Colleen S. Heckman, Esq., maintains that it had no legal obligation to reinstate the petitioner after she submitted a doctor's note clearing her to return to work in August 2020 and it argues that she does not meet the criteria for interim relief. In this regard, it avers that her request has not demonstrated a likelihood of success on the merits, as she voluntarily retired from her position without first being approved for an ordinary disability pension; she does not meet the criteria of *N.J.A.C.* 4A:4-7.12 and *N.J.S.A.* 43:16A-8(2) because she has not submitted documentation from the Division of Pensions and Disabilities or the Police and Firemen's Retirement System (PFRS) Medical Board setting forth that she is no longer disabled and able to perform her former duty; there is no factual or legal basis to conclude that the petitioner was removed without proper disciplinary procedures; and she has not otherwise met a condition mandating her reinstatement. Additionally, because the only harm she can show is loss of pay, the petitioner is unable to establish immediate and irreparable harm, as other mechanisms, such as back pay, can provide relief. Further, her reinstatement would cause substantial injury to the appointing authority, as it already prepared and approved its budget without accounting for her employment. Moreover, it contends that the public interest would not be served by requiring a public entity to reinstate the petitioner in contravention of statutory law, including *N.J.S.A.* 43:16A-8(2) and *N.J.A.C.* 4A:4-7.21.

In reply, the petitioner argues that because the appointing authority's response is not supported by affidavit or certification, in accordance with *N.J.A.C.* 1:1-12.6, her assertions of fact, which are supported by certifications, are uncontroverted and must be accepted as true. In addition, she maintains that the appointing authority has overlooked the purpose and intent of the statutory scheme governing the State pension system. In this regard, she notes that *N.J.A.C.* 4A:4-3.7(b) provides that "reinstatement of a permanent employee following disability retirement shall have priority over appointment from any eligible list, except a special reemployment list." Further, she proffers that the Appellate Division has held that the grant of disability retirement is conditioned on the continuation of an incapacity and that if an employee regains the ability to perform their duties, the Legislature requires that employee to be returned to their former position. The petitioner avers that the appointing authority's arguments are tantamount to a statement that she must continue to pursue a disability retirement in bad faith in order to carry out the appointing authority's incorrect interpretation of the legislative scheme. The petitioner also contends that the principle of equitable estoppel should be applied in this case as the Police Chief and labor counsel promise her that if her

condition improved and she was deemed fit for duty by both her physicians and was able to pass a functional capacity examination, she would be returned to full duty. In this regard, she maintains that she reasonably relied on these representations and redoubled her efforts to make a full recovery. The petitioner provides emails between her counsel and the appointing authority's labor counsel in support of this contention. Accordingly, she asserts that she must be returned to full duty.

In response, the appointing authority argues that the petitioner's doctor's note is not sufficient to require her reinstatement. It submits that she must instead adhere to statutory procedures and provide a proper determination by the PFRS Medical Board for reinstatement pursuant to *N.J.S.A.* 43:16A-82) and *N.J.A.C.* 4A:4-7.12, or seek re-employment. It emphasizes that it did not remove her from her position, but rather, as she acknowledges, she left its employment and cashed out her accrued, unused paid time off by her own choice as of January 1, 2020. It contends that any claim of equitable estoppel is inapplicable, as it cannot be premised on the alleged representations of the appointing authority's Chief of Police or former labor counsel, as neither individual had the authority to bind the appointing authority. Rather, it submits that only the Commissioners of the City of Wildwood have the authority to bind it. Further, it maintains that the petitioner's equitable estoppel claim is undercut by the fact that her ineligibility for a disability retirement is not due to the representations of the Chief of Police or former labor counsel. Instead, it is the product of her full recovery. With regard to irreparable harm, it observes that if the petitioner has truly recovered, nothing is precluding her from obtaining employment and mitigating the damages she claims will occur if she is not immediately reinstated. It submits that reinstating her will harm the appointing authority as the City of Wildwood's budget was set without accounting for an improper immediate reinstatement of the petitioner. It further avers that her reinstatement would be contrary to public policy as it would be in circumvention of procedures established under New Jersey law. Moreover, it argues that it is not required to furnish a certification or sworn affidavit at this juncture because the Commission has not yet designated the matter a contested case so as to trigger *N.J.A.C.* 1:1-1.1(a), *et seq.* Similarly, the appointing authority argues that the statutes providing for back pay and attorney's fees have no applicability here, as it did not suspend or dismiss the S.L. Accordingly, it asserts that the instant request for interim relief should be denied.

CONCLUSION

Initially, the petitioner requests a hearing in this matter. Requests for interim relief are treated as reviews of the written record. *See N.J.S.A.* 11A:2-6b. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists which can only be resolved through a hearing. *See N.J.A.C.* 4A:2-1.1(d). No material issue of disputed fact has been presented which would require a hearing. *See Belleville v. Department of Civil*

Service, 155 *N.J. Super.* 517 (App. Div. 1978). Further, because the matter is not before the Office of Administrative Law, *N.J.A.C.* 1:1-12.6 does not apply and it is not necessary for the parties to furnish affidavits to support their assertions of fact.

N.J.A.C. 4A:2-6.1(a) provides that any permanent employee in the career service may resign in good standing by giving the appointing authority at least 14 days written or verbal notice, unless the appointing authority consents to a shorter notice. *N.J.A.C.* 4A:2-6.1(d) states that where it is alleged that a resignation was the result of duress or coercion, an appeal may be made to the Civil Service Commission under *N.J.A.C.* 4A:2-1.1. *N.J.A.C.* 4A:4-3.1(a) provides, in part, that the Chairperson or designee may establish a police, sheriff's officer, or fire reemployment eligible list, which shall include former permanent uniformed members of a police department, sheriff's office, or fire department who have resigned in good standing and whose reemployment is certified by the appointing authority as being in the best interest of the service. *N.J.A.C.* 4A:4-7.10(a) states that a permanent employee who has resigned in good standing, received a general resignation, retired or voluntarily demoted, may request consideration for reemployment by indicating availability to his or her appointing authority. Pursuant to *N.J.A.C.* 4A:4-7.10(b):

Upon recommendation of the appointing authority that such reemployment is in the best interest of the service, the Chairperson or designee shall place the employee's name on a reemployment list. A regular reemployment list shall be subject to certification to all appointing authorities in a jurisdiction.

N.J.A.C. 4A:4-7.10(c) indicates, in relevant part, that police, sheriff's officer, and fire reemployment lists shall have unlimited durations. *N.J.A.C.* 4A:4-7.12(a) provides that a permanent employee who has been placed on disability retirement may be reinstated following a determination that the retiree is no longer disabled. *N.J.A.C.* 4A:4-7.12(b) states that the employee's reinstatement shall have priority over appointment from any eligible list, except a special reemployment list.

N.J.S.A. 43:16A-6(1) provides that:

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.

N.J.S.A. 43:16A-8(2) provides, in pertinent part, that:

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.

The question to be determined is if the circumstances surrounding her petition for ordinary disability retirement benefits equated to her resignation in good standing. Although *N.J.A.C.* 4A:2-6.1. does not expressly address “retirement,” this rule provides the appropriate framework for voluntary separation from employment. See *In the Matter of James Hartnett* (CSC, decided July 21, 2021); *In the Matter of Geraldine Bryant* (MSB, decided January 30, 2008).

In this matter, on December 18, 2019, S.L. applied to the Division of Pensions and Benefits for ordinary disability retirement with an anticipated retirement date of January 1, 2020. In January 2020, she returned all of her department issued equipment to the appointing authority. Both the petitioner and appointing authority indicated that she was paid out all unused paid time off that she was entitled to upon retirement and the appointing authority’s assertion that her benefits ceased as of February 1, 2020 was un rebutted. As part of her argument that she relied to her detriment on asserted representations by various employees of the appointing authority, the petitioner provided emails in which the appointing authority’s labor counsel indicated that the petitioner was not approved for a leave of absence, never requested a leave of absence, but that if she had evidence to the contrary, to submit it for review. Despite being provided this opportunity, there is no evidence in the record that the appointing authority granted the petitioner a leave of absence.

The term retirement is not defined in Civil Service regulations and the Commission does not have jurisdiction over retirements. However, the petitioner’s December 18, 2019 application for ordinary disability retirement effective January 1, 2020, in conjunction with the payout of her accrued leave time and cessation of benefits effective February 1, 2020, her return of all department issued equipment, lack of evidence that the appointing authority granted her a leave of absence, and her apparent non-contact with the appointing authority for seven months regarding the progress of her rehabilitation clearly evinces that she resigned. It is not necessary

that an individual use “resign” as there is no requirement under Civil Service law or rules that requires an employee to specifically use the word “resign” to request to resign. Clearly, the petitioner’s actions indicated that she was no longer going to work for Wildwood, which is a resignation. Further, the fact that Wildwood referred to the petitioner’s request as a retirement and not a resignation in an internal document, does not indicate that the petitioner did not resign from her employment from Wildwood. In essence, the petitioner was “retiring” for the purposes of her pension and she was “resigning” from her Civil Service position. Furthermore, as the petitioner was not disciplined, there was no need for disciplinary proceedings.

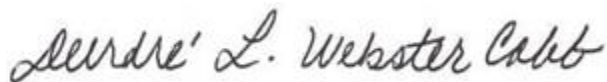
Additionally, the Division of Pensions and Benefits did not process the petitioner’s application prior to her recovery and she maintains that she would no longer qualify ordinary disability retirement under the PFRS. As such, she was never “placed on disability retirement” and is considered to have resigned from her position as a Police Officer with the City of Wildwood in good standing, effective January 1, 2020. Therefore, she cannot be reinstated pursuant to *N.J.A.C. 4A:4-7.12(a)*. Since her separation is considered a resignation in good standing, the petitioner may request that the appointing authority add her to a Police Officer list in accordance with *N.J.A.C. 4A:4-7.10*.

ORDER

Therefore, it is ordered that the petitioner’s request for interim relief be denied.

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 4TH DAY OF AUGUST, 2021



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