

In the Matter of S.P., Township of West Orange

CSC Docket No. 2012-1029

Civil Service Commission, decided April 17, 2013)

S.P., a former Fire Captain with the Township of West Orange (West Orange), represented by Patrick P. Toscano, Jr., Esq., requests that the Civil Service Commission (Commission) reinstate him to his position after a determination by the Police and Firemen's Retirement System (PFRS) that he is no longer disabled.

The record reflects the following: The appellant commenced his employment as a Fire Fighter with West Orange on July 28, 1980. On March 3, 2001 he was promoted to Fire Captain. In September 2004, the appellant was granted an ordinary disability retirement. After an independent medical examination, the appellant was cleared for duty by the PFRS on September 10, 2010. However, West Orange has not reinstated the appellant to his position. It sent the appellant a letter dated September 22, 2011, indicating that he would not be reinstated for the following reasons: Failure to arrive promptly for a scheduled psychological examination; Failure to participate in the scheduled psychological examination; Failure to arrive promptly to a scheduled physical/medical examination; Failure to submit a completed application; Failure to submit necessary original documentation during the application process; and Failure to act professionally during the re-employment process.

The appellant argues that he is entitled to reinstatement. The appellant explains that he was late to the psychological examination due to traffic and the need to speak with his physician. He claims that he apprised the examiner as to why he was late and that this issue should not stop his reinstatement. Additionally, the appellant states that due to his lateness, the doctor refused to examine him. The appellant also maintains that he was on time for and received his physical/medical examination. Further, the appellant asserts that he submitted his application by the agreed upon date. The appellant contends that the only information not provided was his college transcripts, which were not in his possession at the time. Finally, the appellant claims that he did everything properly to be reinstated and even retained an attorney to ensure that the process was completed correctly.

In response, West Orange, represented by Kenneth A. Rosenberg, Esq., argues that the appellant should not be reinstated because it properly disqualified him for reinstatement pursuant to *N.J.A.C. 4A:4-6.2*. In this regard, it claims that although PFRS found the appellant no longer disabled and ordered his reinstatement, the appellant's reappointment was still governed by Civil Service laws and rules regarding selection and appointments. It also contends that the

appellant does not possess the requisite job requirements to be a Fire Captain, he failed to pass the examination procedures to be reemployed as a Fire Captain, and he made false statements of material fact and/or was attempting to deceive it during the reemployment process. West Orange maintains that the appellant would be required to complete a training/re-training program and to be certified in certain areas before he could commence performing any firefighting duties. Additionally, it asserts that it made a conditional offer of employment to the appellant conditioned upon his successful completion of certain conditions. The appellant signed this offer and was aware of the conditions. The conditions included participating in an interview, submitting to medical and psychological examinations, completing fire fighter training courses, passing a background check, and obtaining certain licenses and certifications. In this regard, West Orange argues that the appellant's actions during the reemployment process justify his removal. Further, it reiterates that the appellant's actions in not submitting to a psychological examination and not properly completing his employment application are further cause to deny his reemployment. In support of this contention, it submits a copy of the application and a letter from the physician concerning the psychological examination. Moreover, West Orange asserts that the appellant indicated disturbing information concerning drug use during the period he had been employed as a Fire Fighter in his present application and failed to fully explain such drug use. Furthermore, the appellant's application contained numerous unanswered or improperly answered questions which clearly indicate the appellant was making false statements or attempting to deceive it.

CONCLUSION

N.J.S.A. 43:16A-8 states:

(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 5 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 [emphasis added].

Plainly, the Legislature intended that persons on disability retirement who are no longer disabled, *i.e.*, no longer entitled to disability retirement, and who are under the age of 55, be returned to either their prior positions or any available duty which their employers are willing to assign. In other words, the employee should be returned to his or her position as if the employee's service was never interrupted and the disability retirement never occurred.

In order to effectuate this legislative mandate, the Commission promulgated *N.J.A.C. 4A:4-7.12*, which states:

(a) A permanent employee who has been placed on disability retirement may be reinstated following a determination from the Division of Pensions that the retiree is no longer disabled.

(b) The employee's reinstatement shall have priority over appointment from any eligible list, except a special reemployment list.

By adopting this regulation, the Commission codified its longstanding practice of implementing the provisions of *N.J.S.A. 43:16A-8*. Again, the "reinstatement" of the formerly disabled retiree is merely returning this individual to his or her prior position, or other available duties as determined by the employer, as if the disability retirement never occurred. *See N.J.S.A. 43:16A-8*.

In *In the Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993), the court considered the application of *N.J.S.A. 43:16A-8* in a Civil Service municipality. In *Allen*, the court explains the "unique situation" which occurs when a police officer returns to his position after being determined to be no longer disabled:

If the retired employee regains the ability to perform his or her duties, the Legislature mandated that he or she be returned to the former position. The Legislature clearly recognized that individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service. [262 *N.J. Super.* at 444].

Further, *In the Matter of Robert W. Terebetski*, 338 *N.J. Super.* 564 (App. Div. 2001), the court found that:

Pursuant to the plain language of *N.J.S.A. 43:16A-8*, once a person is determined no longer disabled, the appointing authority is required to

return the officer to active duty or, in the language of the regulation, to “reinstate” the officer to the same or near as the same position as he or she previously occupied. The purpose of this legislation is to return the previously disabled employee to work as if the officer had never been disabled and the officer’s service had never been interrupted. *Id.* at 570.

In the instant matter, West Orange has refused to reinstate the appellant, arguing that the appellant does not possess the requisite job requirements to be a Fire Captain, he failed to pass the examination procedures to be reemployed, and he made false statements of material fact and/or was attempting to deceive it during the reemployment process. It claims that although PFRS found the appellant no longer disabled and ordered his reinstatement, the appellant’s reappointment was still governed by Civil Service laws and rules regarding selection and appointments. The Commission does not agree. The appellant’s reinstatement is **not** subject to the selection and appointment process and regulations. As indicated above, the purpose of *N.J.S.A. 43:16A-8* “is to return the previously disabled employee to work as if the officer had never been disabled and the officer’s service had never been interrupted.” The reinstatement of the employee is **not contingent** upon a medical or psychological examination, completion of an application, or updated background check. *See In the Matter of Town of Kearny v. Charles J. Rowan, Jr.*, Docket No. A-1371-99T3 (App. Div., March 22, 2001) (The Court upheld the finding that “there is no . . . law or rule requiring an employee who is returning from a disability retirement to undergo physical or psychological examinations, or any other preemployment screening, as a pre-condition to his or her reinstatement”). *See also, In the Matter of Toney Cooper* (MSB, decided January 16, 2008). Therefore, the requirements set forth by West Orange were not proper and the appellant was not required to meet such requirements before being reinstated. Accordingly, since PFRS has found that the appellant is no longer disabled, he should be immediately reinstated by West Orange according to the provisions of *N.J.S.A. 43:16A-8* and *N.J.A.C. 4A:4-7.12*.

At the time of retirement, the appellant was at the rank of Fire Captain. A review of official records shows that the first appointments in West Orange’s Fire Department after PFRS’ September 10, 2010 decision were two Fire Captains with appointment effective dates of June 2, 2011. The appellant is entitled to be reinstated to his position with that effective date. Further, the appellant is entitled to seniority and benefits for the period from June 2, 2011 to the date of his actual reinstatement. However, the Commission notes that while the appellant is entitled to immediate reinstatement to the position of Fire Captain with retroactive seniority effective June 2, 2011, West Orange is *not required* to displace any of the Fire Captains appointed after June 2, 2011. Further, the Commission notes that

the appellant is not entitled to back pay or counsel fees in the instant matter. In this regard, *N.J.A.C. 4A:2-1.5(b)* provides:

Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. *See N.J.A.C. 4A:2-2.10*. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the Civil Service Commission or where the Commission finds sufficient cause based on the particular case. A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.

The instant matter is not a disciplinary appeal. Thus, back pay or counsel fees may only be awarded if the Commission finds sufficient cause in this particular matter. In this regard, the Commission notes that except in disciplinary matters, the Commission does not routinely grant awards of back pay for periods in which the individual has not worked. *See In the Matter of Marveinia Kitchen and the Department of Law and Public Safety*, Docket No. A-6402-91T1 (App. Div. Feb. 7, 1994). Additionally, in the present matter, there is no evidence in the record that West Orange delayed effecting the appellant's reinstatement for invidious reasons. Rather, although misplaced regarding any effect on the appellant's reinstatement, West Orange appears to have potentially legitimate concerns regarding the appellant's fitness for duty and continued employment. Further, there is no evidence that its misapplication of the operating statutes and regulations was done purposefully. Therefore, under the particular circumstances of this matter, the record does not establish a sufficient basis for the award of back pay or counsel fees.

Finally, upon the appellant's reinstatement, West Orange may require him to undergo all necessary training and require that he obtain all requisite licenses and certifications needed for the Fire Captain position. Further, the Commission notes that if West Orange has a genuine concern about the appellant's ability to perform his duties or any other concerns including past issues, formal charges must be filed and served upon him, and he must be provided the opportunity for a hearing. *See N.J.S.A. 11A:2-13 and N.J.A.C. 4A:2-2.1, et seq.*

ORDER

Therefore, it is ordered that the appellant be reinstated to the position of Fire Captain for the Township of West Orange and awarded seniority and benefits from June 2, 2011. The Commission orders no further remedies such as back pay or counsel fees.

It is further ordered that the appellant's overall seniority calculation shall include any prior permanent service and be aggregated with any future permanent service. The appellant's prior permanent service must be included in implementing seniority based programs such as salary step placement, layoffs and vacation leave entitlement.

In the event that the Township of West Orange has not made a good faith effort to comply with this order within 30 days of issuance of this decision, the Commission orders that a fine be assessed against the appointing authority in the amount of \$100 per day, beginning on the 31st day from the issuance of this decision, and continuing for each day of continued violation, up to a maximum of \$10,000.

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 17TH DAY OF APRIL, 2013

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries	Henry Maurer
and	Director
Correspondence	Division of Appeals and Regulatory Affairs
	Written Record Appeals Unit
	Civil Service Commission
	P.O. Box 312
	Trenton, New Jersey 08625-0312

c: Patrick P. Toscano, Jr., Esq.
Stephen Phillips
Kenneth A. Rosenberg, Esq.
John K. Sayers, Business Administrator
Kenneth Connolly
Joseph Gambino