



# State of New Jersey

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DIVISION OF PENSIONS AND BENEFITS  
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December 13, 2017

Sent via email to: [REDACTED]

Crivelli & Barbati, LLC  
Michael P. DeRose, Esquire  
[REDACTED]

RE: Justine Branham  
[REDACTED]

Dear Mr. DeRose:

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Board of Trustees of the Police and Firemen's Retirement System ("PFRS Board") reviewed the Initial Decision ("ID") of the Administrative Law Judge ("ALJ") Barry E. Moscovitz dated September 25, 2017,<sup>1</sup> in the above captioned matter, together with the joint stipulation of facts, the items submitted into evidence by the parties, exceptions filed by Deputy Attorney General Christina Levecchia dated October 4, 2017<sup>2</sup> and reply to exceptions filed by you dated October 18, 2017.

At its meeting of November 13, 2017, the PFRS Board voted to adopt the ALJ's findings of fact, with modification and reject the legal conclusion that Ms. Branham is entitled to Accidental disability retirement benefits, based on Nichols v. Board of Trustees, Public Employees' Retirement System, No. A-5615-10T4 (App. Div. July 3, 2012), certif. granted, 212 N.J. 455 (2012). The ALJ determined that Ms. Branham is entitled to Accidental disability retirement benefits based on a finding that Ms. Branham was on-duty at the time of the December 10, 2013 incident, and that the incident

<sup>1</sup> The PFRS Board requested and was granted an extension of time for the Board to issue its final decision.

<sup>2</sup> DAG Levecchia requested and was granted an extension of time to file exceptions.

occurred during and as a result of Ms. Branham's regular or assigned duties. The PFRS Board rejected this determination and has issued the following Findings of Fact and Conclusions of Law which constitute the Final Administrative Determination in this matter.

### **FINDINGS OF FACT**

At its meeting on October 15, 2015, the PFRS granted Ms. Branham an Ordinary disability retirement based upon the determination that she is totally and permanently disabled from her job duties as a police officer with Newark City. However, the Board denied Accidental disability retirement benefits because the event did not occur during and as a result of Ms. Branham's regular or assigned duties. It is an undisputed fact that she "slipped and fell on ice when she walked up the steps to work" on December 10, 2013. The Board rejects the ALJ's finding of fact that "when Branham left her home between 7:20 a.m. and 7:30 am, she was already on duty, awaiting assignment." The record reflects that Ms. Branham's shift was from 8:00 a.m. to 4:00 p.m. and that she should report for work by 7:45 a.m. While Ms. Branham might be available for assignment as needed on her drive to work, that fact does not alter her normal shift start time nor does it place her on duty during her commute every day. The Board adopts the remainder of the ALJ's factual findings.

### **LEGAL CONCLUSION**

The Board rejects the ALJ's conclusion that Ms. Branham was engaging in her regular or assigned duties when she was injured because that conclusion is not based on the credible evidence in the record and is not in accordance with N.J.S.A. 43:16A-7. The Board finds instead that Ms. Branham is not eligible for Accidental disability retirement benefits.

The undisputed fact is that Ms. Branham "slipped and fell on ice when she walked up the steps to work" on December 10, 2013. While she had already driven through the precinct gate, parked her car, and walked from her car to the steps, where she slipped and fell, the fall did not

occur during and as a result of her regular or assigned duties. N.J.S.A. 43:16A-7 states in pertinent part:

(1) upon the written application by a member in service, by one acting in his behalf or by his employer any member may be retired on an accidental disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that the member is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and..

(Emphasis added)

The phrase “during and as a result of the performance of [your] regular or assigned duties” was addressed by the New Jersey Supreme Court in Kasper v. Board of Trustees, Teachers' Pension & Annuity Fund, 164 N.J. 564 (2000). In Kasper, the Court defined “regularly assigned duties” to include “all activities engaged in by the employee in connection with his or her work, on the employer's premises, from the formal beginning to the formal end of the workday.” Id. at 585-86.

The Kasper Court left open when precisely an employee's commute ends and regular or assigned duties begin. Importantly, it cited with approval an agency decision, Estate of Matza v. Board of Trustees, Teachers' Pension & Annuity Fund, 96 N.J.A.R.2d (TYP) 224 (1996), in which a teacher “slipped and fell on ice while walking across [the] school parking lot towards school” and was determined to still be commuting and not yet in the performance of her duties. 164 N.J. at 581-82; see also id. at 587-88 (noting that amendment to pension statute “was meant to restore the integrity of the premises rule” and “to reinvigorate the going and coming rule”).

While Kasper, “was engaged in conduct that was, in every sense, preliminary but necessary to her early workday media distribution,” Ms. Branham, by contrast, was not engaged in conduct preliminary but necessary to her work as a police officer; she was outside walking up

stairs to the precinct. Kasper, supra, 164 N.J. at 588. In Politza v. Board of Trustees, Police & Firemen's Retirement System, No. A-2057-12T1 (App. Div. Feb. 5, 2014), certif. denied, 217 N.J. 589 (2014), the court held that a police officer who had lunch at a pizzeria and fell on his way to his patrol car was not performing any assigned duty “causally connected . . . to the work [his] employer has commissioned,” even though the officer was in uniform, listening to his radio, and constantly observing his surroundings for any suspicious activity. Id. at \*9 (citing Kasper, supra, 164 N.J. at 588); see also Esposito v. Bd. of Trs., Pub. Employees' Ret. Sys., No. A-1778-12T4, at \*\*7-8 (App. Div. May 21, 2015) (police officer who tripped in parking lot “was not performing any function connected to his work assignment” and his “injury was not causally connected to his work”).

The Appellate Division has reiterated the Kasper Court's holding that an employee cannot qualify for Accidental disability if he is “merely ‘coming or going’ to work.” Esposito v. Bd. of Trs., Pub. Employees' Ret. Sys., No. A-1778-12, at \*6 (App. Div. May 21, 2015). In Esposito, a corrections officer parked his vehicle in the employee parking lot controlled by his employer and tripped in a pothole while walking to the prison to start his shift. Id. at \*\*1-2. In affirming the denial of Accidental disability, the court found that the “disabling incident in the parking lot did not occur on the premises of the prison.” Id. at \*7. Although the parking lot was used by the employees and controlled by the employer, the court stated that the officer “was not performing any function connected to his work assignment. Thus, the injury was not causally connected to his work.” Id. at \*\*7-8.

In Nichols v. Board of Trustees, Pub. Employees' Retirement System, No. A-5615-10T4 (App. Div. July 3, 2012), certif. granted, 212 N.J. 455 (2012), an employee arrived at work early to accommodate her own preference, even though she had been required to arrive early for specific duties on prior occasions, when she slipped and fell on the steps of the building she

worked in. Slip op at \*1, \*2, \*7. In upholding the Board's denial of Accidental disability retirement benefits, the Appellate Division explained:

Here, although Nichols had been required to arrive early or stay late to complete work on prior occasions, on the date she suffered her fall she had not arrived early in response to such a request or as a result of a designated assignment. She voluntarily arrived prior to the start of her assigned workday to accommodate her personal preference, which cannot be considered "as a result of the performance of [her] regular or assigned duties[.]"

[Id. at \*7].

Here, the 2013 incident did not occur during and as a result of Ms. Branham's regular or assigned duties; Ms. Branham was still commuting when she slipped and fell in the parking lot because she had not yet begun her formal workday. As in Nichols, the accident occurred prior to the start of her work day, before she reached the building of the precinct, and before she had begun any of her duties. She testified that no duty had been assigned to her at the time she fell. Like in Politza, simply because Ms. Branham was in her uniform and could be given an assignment does not mean that she was performing a function connected to her work at the time of her injury. Ms. Branham was simply walking up the stairs to enter the building of the precinct.

In Re Carlson, 174 N.J. Super. 603 (App. Div. 1980) and Pollara v. Board of Trustees, 183 N.J. Super. 505 (App. Div. 1982) are not applicable to the current matter. In both cases, the employee was inside the building when they were injured and they were both **required** to be at their place of employment early and they both were injured during that time. Here, Ms. Branham had not yet entered the building when she was injured, was not on duty, and was not completing any assignments when she fell. Further, her fall was prior to her 7:45 a.m. reporting time. She was simply completing her commute into work in order to start her day.

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Michael P. DeRose, Esquire  
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For the foregoing reasons, the Board modifies the ALJ's findings of fact and rejects the legal conclusion that the December 10, 2013 incident occurred during and as a result of Ms. Branham's regular or assigned duties and that she is entitled to Accidental disability retirement.

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,

A handwritten signature in black ink that reads "Mary Ellen Rathbun". The signature is written in a cursive style and is enclosed within a thin vertical rectangular border.

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

G-11/mer

C: DAG Christina Levecchia (ET); DAG Danielle Schimmel (ET)  
Justine Branham