



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. BOX 295

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June 17, 2021

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

Sent via email to [REDACTED]

WEISSMAN & MINTZ LLC
Justin Schwam, Esq.

[REDACTED]

RE: Denise Cole
PERS [REDACTED]

Dear Mr. Schwam:

FINAL ADMINISTRATIVE DETERMINATION

I am writing in reference to the decision of the Board of Trustees ("Board") of the Public Employees' Retirement System (PERS) denying your request on behalf of your client, Denise Cole, to allow her to file for Accidental Disability retirement benefits. The Board originally denied the request at its meeting of January 20, 2021.¹ You appealed the Board's decision, via letter dated March 22, 2021. At its meeting of April 21, 2021, the Board considered your appeal, denied Ms. Cole's request to reconsider and denied her request for an administrative hearing as no disputed issues of material facts were in dispute. You contacted the undersigned thereafter, and advised that you had requested to appear at the meeting, but you were not informed that the matter would appear on a subsequent Board agenda. To rectify that oversight, the matter was placed on the Board's May 19, 2021 agenda. At that meeting, both you and Ms. Cole were permitted to present arguments to the Board with respect to her appeal. Thereafter, the Board denied your request for reconsideration, and directed the Board Secretary to draft findings of fact

¹ You advised that you did not receive the Board's original determination. The Board accepted your appeal as timely.

and conclusions of law for its review at its June 16, 2021, meeting. After careful consideration, the Board approved this Final Administrative Determination.

FINDINGS OF FACT

The Board made the following findings of fact.

The record establishes that Ms. Cole filed her *Application for Disability Retirement* on September 5, 2018, requesting an Accidental Disability retirement effective October 1, 2018, on the basis of [REDACTED]. The *Employer Certification for Disability Retirement* completed on December 24, 2018 by the Office of the Public Defender, Ms. Cole's former employer, indicated that her service terminated on December 5, 2007.

The record further reveals that on September 28, 2007, a Preliminary Notice of Disciplinary Action (PNDA) was issued to Ms. Cole for an incident occurring on October 5, 2006, during which she acted inappropriately in response to a co-worker giving her a telephone message. Ms. Cole was charged with:

- N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee; and
- N.J.A.C. 4A:2-2.3(a)11– Creating a hostile work environment; Disruption of the workplace; Impeding the effective delivery of services; and Violation of the Workplace Violence Policy.

The aforementioned PNDA referred to two prior suspensions for inappropriate behavior that led to charges of conduct unbecoming a public employee.

On December 7, 2007 (later amended on February 11, 2008), a PNDA was issued Ms. Cole charging her with:

- N.J.A.C. 4A:2-2.3(a)2 – Insubordination;
- N.J.A.C. 4A:2-2.3(a)6 – Conduct Unbecoming;
- N.J.A.C. 4A:2-2.3(a)7 – Neglect of Duty; and
- N.J.A.C. 4A:2-2.3(a)11 Breach of Confidentiality; Disruption of the workplace; Impeding the effective delivery of services; Improper disclosure of confidential information; Providing false and/or misleading information in an official investigation and Violation of the Public Trust.

Ms. Cole was suspended as of December 5, 2007 and her removal was sought. The specification outlined in this PNDA included the following:

Since June 30, 2005, you have had a one-day suspension, a five-day suspension, and two pending major disciplinary actions - a 20-day suspension and a 30-day suspension, both issued on September 28, 2007. All of the disciplinary actions include charges related to your inappropriate conduct and one of the pending major disciplinary actions is based on your improper disclosure of confidential patient material outside of the Division of Mental Health Advocacy to your union.

Ms. Cole requested a hearing which convened on March 24 and April 4, 2008. By way of a Final Notice of Major Disciplinary Action (CWA) dated April 22, 2008, the four charges against her were sustained, and she was removed effective December 5, 2007.

Twelve years later, by way of a Settlement Agreement (Agreement) dated April 22, 2020, the Office of the Public Defender agreed to rescind the action for removal, "given the employee's wish to resign in lieu of removal." The resignation was recorded as a "General Resignation." As part of the Agreement, Ms. Cole agreed "that she shall at no point in the future seek employment with the Office of the Public Defender."

In the Division's letter dated September 21, 2020, Ms. Cole was deemed ineligible to file for Accidental Disability retirement in accord with N.J.A.C. 17:1-6.4(b) and N.J.S.A. 43:15A-44, the latter of which requires that a member seeking a disability retirement must have a position to return to should the alleged disability diminish to the point that the member could return to employment.

In your letter dated October 20, 2020, you argue that because Ms. Cole is over the age of 60, if her application "was considered and approved on its merits, Ms. Cole's potential ability to comply with N.J.S.A. 43:15A-44(a) is irrelevant because the statute categorically excludes her from the class of disability beneficiaries to which it applies. Accordingly, that statute does not provide a valid basis to deny her Application and the Division's denial should be reversed." You also argue that because Ms. Cole was allowed to resign in lieu of the dismissal for charges directly

related to her employment, that she did not leave her position due to reasons other than a disability.

At its meeting of May 19, 2021, the Board found that Ms. Cole was not eligible to apply for Accidental Disability retirement benefits as she clearly terminated employment due to disciplinary charges. She did not file a disability application for 14 years after the incident. Moreover, the Settlement Agreement provided that she agreed to never seek employment with her previous employer. If she had resigned due to a disability, there would be no reason to include such a provision in the agreement. The Board, finding no disputed issue of material fact, denied her request for an administrative hearing, and directed the Board Secretary to draft this final administrative determination,

LEGAL CONCLUSION

The Board made the following legal conclusions.

The Board found that Ms. Cole is ineligible to apply for disability benefits and denied her request to do so. In making its determination, the Board relied on N.J.A.C. 17:1-6.4 and N.J.A.C. 17:2-6.15.

N.J.A.C. 17:1-6.4 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.

[Emphasis added.]

The Board noted that a disability retiree aged 60 or older cannot be subject to re-examination. The Board also noted the timing of the Agreement (four months after the Nappe decision at which point Ms. Cole was 60 years of age) could be construed as an attempt to insulate Ms. Cole from the re-examination requirement set forth in N.J.S.A. 43:15A-44. Nevertheless, Ms. Cole's exclusion from the group of disability retirees to which the aforementioned statute applies in regard to re-examination is not dispositive of her eligibility to file for a Disability retirement. Rather, the Board found that the regulation clearly renders her ineligible to file for disability retirement benefits.

In your October 20, 2020, letter, you also assert "[w]hat is clear is that the Agreement contemplated Ms. Cole's disability and her application for disability retirement benefits. OPD was aware of Ms. Cole's pending accidental disability application as evidenced by Paragraphs 1 and 3 of the Agreement." The Board disagrees. The Board notes that neither the intent of parties to an Agreement, nor such Agreement's terms bind the Board, when the Board is not a party to the Agreement. The Board has the sole responsibility for determining eligibility for disability retirement in accordance with its governing statutes and regulations. Employers and employees may not arrogate this determination to themselves in order to provide a benefit to the employee.

Lastly, the Board noted and relied on N.J.A.C. 17:2-6.15, which states in pertinent part:

(a) Following the filing of a disability retirement application, a vested member, who has not withdrawn contributions from the PERS, and has discontinued service for more than two consecutive years, and who was otherwise eligible for a disability retirement at the time service was discontinued, shall be approved to receive disability retirement benefits by the Board, if:

1. The applicant demonstrates to the satisfaction of the Board that the applicant was physically or mentally incapacitated for the performance of

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duty at the time service was discontinued and continues to be so incapacitated, with the same disability or disabilities, at the time of filing; and

2. The applicant factually demonstrates to the satisfaction of the Board that service was discontinued because of the disability or disabilities.

...

[Emphasis added.]

The record before the Board clearly indicates that Ms. Cole did not separate from employment due to an alleged disability, and it so finds. Rather, it was her extensive disciplinary history that led to charges which resulted in her removal. Because Ms. Cole did not leave employment due to a disability, the Board determined that she is ineligible to apply for Accidental (or Ordinary) Disability retirement benefits.

As noted above, the Board has considered your written submission and all documentation in the record. Because this matter does not entail any disputed questions of fact, the Board was able to reach its findings of fact and conclusions of law 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 Public Employees' Retirement System.


You also have the right 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.

All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

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Sincerely,

A handwritten signature in black ink, appearing to read "Jeff S. Ignatowicz". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Jeff Ignatowicz, Secretary
Board of Trustees
Public Employees' Retirement System

G-9/JSI

c: D. Lewis (ET)

Denise Cole (Sent via email to: [REDACTED])