



State of New Jersey

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

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July 21, 2022

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

Sent via email to: [REDACTED]

Michael L. Kalmus, Esq.
[REDACTED]

RE: Michael Finello
PERS [REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Kalmus:

I am writing in reference to the denial by the Board of Trustees ("Board") of the Public Employees' Retirement System (PERS) of your client, Michael Finello's, application for Accidental Disability retirement benefits. The Board originally found that Mr. Finello was not eligible to file for Accidental Disability Retirement benefits at its meeting on March 15 2022.¹ On or about May 6, 2022, you filed a timely appeal of the Board's decision. At its meeting of June 15, 2022, the Board considered your appeal and, finding no material facts in dispute, denied your request for an administrative hearing and directed the undersigned to draft this Final Administrative Determination, which the Board reviewed and approved at its meeting of July 20, 2022.

FINDINGS OF FACT

The record establishes that Mr. Finello filed his *Application for Disability Retirement* on February 26, 2020, requesting retirement effective April 1, 2020. The Board noted Mr. Finello filed pursuant to [REDACTED]

[REDACTED]

¹ Due to health and safety concerns for the public regarding COVID-19, the meeting was conducted via teleconference.

Subsequent to the submission of the requisite [REDACTED] documentation, Mr. Finello was

[REDACTED] on July 2, 2021, by [REDACTED] assigned by the fund.

During his [REDACTED] noted that:

When asked to describe the reason for his work stoppage on 3/13/19, Mr. Finello responded, "I was suspended for 135 shifts (one year) for being disobedient. [REDACTED]"

[REDACTED] When asked whether he would still be working if he had not been suspended, Mr. Finello responded, "[REDACTED]"

In response to this disclosure, the Division of Pensions and Benefits (Division) requested documentation from Pompton Lakes Borough related to the suspension. The Borough provided two Preliminary Notices of Disciplinary Actions (PNDA), each dated December 18, 2019, each seeking Mr. Finello's immediate removal. The first PNDA charged Mr. Finello with:

- R&R 3.3.2 - Insubordination;
- R&R 3:4.3 - Relief
- N.J.A.C. 4A:2-2.3(a)(2). Insubordination;
- N.J.A.C. 4A:2.3(a)(6) - Conduct Unbecoming a Public Employee; and
- N.J.A.C. 4A:2.3(a)(12) - Other Sufficient Cause

These charges stemmed from the following incident:

On March 13, 2019, Chief Agosto and Captain Cichon served Dispatcher Finello with a copy of a Preliminary Notice of Disciplinary Action arising from the completed Internal Affairs Investigation No. 2019-1. Dispatcher Finello became argumentative and insubordinate toward the Chief in the presence of Captain Cichon and other members of the Department. Dispatcher Finello's conduct included calling the Chief a "joke" to his face in front of other members of the Department and then leaving his post at the 911 dispatch desk and the building.

The Board noted the aforementioned charges do not appear to relate to a disabling condition.

The second PNDA charged Mr. Finello with:

- R&R 3.4:6 - Reporting for Duty;
- R&R 3.11.3 - Absence without leave;
- R&R 3.4.7 - Physical Fitness for Duty;
- N.J.A.C. 4A:2-2.3(a)(3) - Inability to Perform Duties;

- N.J.A.C. 4A:2-2.3(a)(4) - Chronic or Excessive Absenteeism; and N.J.A.C. 4A:2-2.3(a)(12) - Other Sufficient Cause.

These charges stemmed from the following incident:

Dispatcher Finello was on an extended leave of absence which ended on 6/21/2019. Dispatcher Finello has failed to report for duty and been absent from work without approval for the six (6) full calendar months since the expiration of that leave. Dispatcher Finello is either incapable or unwilling to perform his duties as a police dispatcher.

Pompton Lakes Borough also provided a copy of the Settlement Agreement between the Borough and Mr. Finello, dated February 12, 2020, in which both parties agreed to settle all matters arising from and related to Mr. Finello's employment. The Settlement Agreement included the following:

2. Based on representations and the Borough's understanding regarding Finello's current [REDACTED] it appears that Finello cannot return to work as a police dispatcher due to disability. The parties acknowledge that the Borough has filed Preliminary Notices of Disciplinary Action against Finello dated March 12, 2019, December 12, 2019, and December 18, 2019 (x2), respectively, but that the parties have agreed to finally and fully settle all claims which could have been asserted against Finello by the Borough, including any defenses or counterclaims by Finello, and to fully settle all possible claims upon the terms and conditions set forth in this Settlement Agreement and Release.

...

6. Finello represents that he intends to submit a pension application separate from this Agreement. It is expressly understood that Finello's resignation from his position with the Borough is final and irrevocable regardless of the disposition of his voluntary pension application. The effective date of Finello's resignation shall be the date of the pension system's decision on his pension application. If Finello fails to submit a pension application by February 28 2020, however, his resignation shall be effective on that date.

...

9. In further consideration of this Agreement, Finello agrees that he will not apply for or otherwise seek employment with the Borough or any of its departments, affiliates or subdivisions and agrees that neither the Borough nor any of its departments, affiliates or subdivisions has an obligation, whether arising under the New

Jersey Civil Service Act, N.J.S.A. 1 IA: 1-1, et seq., under contract or policy, or otherwise, to hire or employ him in the future.

Upon review of the documentation, the Division determined that Mr. Finello was not eligible to file for Accidental Disability retirement benefits and closed his application. You filed an appeal with the Board and, at its meeting on March 16, 2022, the Board denied his request to file for Accidental Disability retirement benefits for the reasons listed in the Board's March 30, 2022, letter. Thereafter, the Board considered your appeal at its meeting of June 15, 2022, and, finding no material facts in dispute, directed the undersigned to draft this Final Administrative Determination which was reviewed and approved by the Board at its July 20, 2022, meeting.

CONCLUSIONS OF LAW

The Board made the following conclusions of law.

PERS members who agree to settle disciplinary charges and who are precluded from returning to their position are not eligible to apply for disability retirement benefits. See N.J.A.C. 17:1-6.4 and N.J.S.A. 43:15A-44. 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.

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. N.J.S.A. 43:15A-17.

N.J.S.A. 43:15A-44 requires that a member seeking a disability retirement have a position to return to should the disability diminish sufficiently to allow the member to do so. The statute states, in pertinent part:

If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former 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. If the beneficiary fails to return to duty within 10 days after being ordered so to do, or within such further time as may be allowed by the board of trustees for valid reason, as the case may be, the pension shall be discontinued during such default.

...

[Ibid.] (emphasis added).

See also Cardinale v. Board of Trustees, 458 N.J. Super. 260, 272-73 (App. Div. 2019), applying an equivalent statute. ("Thus, from a practical standpoint, the Board cannot statutorily cease paying any approved disability benefits, once they have begun, for an individual who voluntarily resigns from duty to settle disciplinary charges and agrees never to return.") The inability to return a recovered employee to duty "due solely to an irrevocable resignation" contravenes important public policy. Id. at 263.² See also Rooth v. Bd. of Trs., Pub. Employees' Ret. Sys., App. Div. Dkt. No.: A-2378-20 (decided June 3, 2022)(The inability to return to work based upon a settlement agreement and irrevocable resignation precludes the member from filing a disability application under the prevailing regulatory framework and case law.")

² The court assumed Cardinale was in fact disabled: "we assume the disability existed because it is irrelevant to our holding that his irrevocable resignation made him ineligible for benefits in the first place." Id. at 268

Michael L. Kalmus, Esq.
Re: Michael Finello
July 21, 2022
Page 6

Further, the Board also relied on In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 402 (App. Div. 2018). (“The rehabilitation statutes presume that, unlike other retirees attempting to return to state service, the only obstacle to a disability retiree's reemployment is the disability itself.” Ibid. (emphasis added)). Here, the parties’ agreement that Mr. Finello can never to return to employment implies that a disability is not the reason for his separation from employment. Put simply, if the alleged disability is the sole obstacle precluding Mr. Finello from performing his regular assigned work duties, his employer should have no issue with Mr. Finello’s returning to employment if his alleged disability lessens. Here, the employer only agreed to drop the disciplinary charges on the condition that Mr. Finello never return. “The statutory language expressly conditions reinstatement for disability retirees upon disability rehabilitation. It logically follows then that disability retirees must have left public service because of the disability in the first instance; unlike someone who has been terminated for cause.” Id. at 402.

Thus, if Mr. Finello’s application were processed and he were granted an Accidental Disability pension, but later he became fit to return to work for his former employer, there is no mechanism for the Board to stop paying the disability pension. Providing a disability retirement under such circumstances would be in contravention of the statutory scheme, potentially requiring the Board to pay a disability pension for life to a person who is no longer disabled.

You assert that because Mr. Finello filed for Accidental Disability retirements pursuant to [REDACTED], the requirement that he have a position to return to pursuant to N.J.S.A. 43:15A-44 is irrelevant. The Board disagrees. [REDACTED] provides that certain disabling conditions affecting employees eligible for its coverage will be deemed accidental disabilities. But applications for Accidental Disability under [REDACTED] are otherwise processed under the controlling regulations and statutes applicable to all Accidental Disability retirement applications.

You also assert that although Mr. Finello is precluded from applying for employment with his previous employer, the employer is not precluded from hiring him. The Board disagrees. The

Michael L. Kalmus, Esq.
Re: Michael Finello
July 21, 2022
Page 7

statutory intent behind N.J.S.A. 43:15A-44 is that employers are not free to determine whom they may choose to rehire after the member returns from a disability. The statute states, in pertinent part:

If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former 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. If the beneficiary fails to return to duty within 10 days after being ordered so to do, or within such further time as may be allowed by the board of trustees for valid reason, as the case may be, the pension shall be discontinued during such default.

In the absence of the settlement agreement, Mr. Finello would be required to report for duty and the employer would be required to restore him to active service. However, because of the settlement agreement, the employer would not be required to re-hire Mr. Finello should his disability diminish to the point he could return to work. As the Appellate Division stated in Rooth, “[E]ven assuming Rooth were disabled, as a matter of law, what is determinative is the consequence of her irrevocable resignation.” Slip op. at 11.

For these reasons, the Board determined that Mr. Finello is ineligible to apply for Accidental (or Ordinary) Disability retirement benefits and denied his request to do so.

As noted above, the Board has considered your written submissions 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.

Michael L. Kalmus, Esq.
Re: Michael Finello
July 21, 2022
Page 8

All appeals should be directed to:

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

Sincerely,

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

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

G-8/wt

c: D. Lewis (ET); K. Ozol (ET); A. McCormick (ET); T. Fleischmann (ET)
Michael Finello (sent via regular mail)