



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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October 19, 2017

FORD M. SCUDDER
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

Sent via email to: [REDACTED]

Craig S. Gumpel, Esq.
[REDACTED]

RE: Scott Rogow (Deceased)
[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Gumpel:

I am writing in reference to the denial by the Board of Trustees of the Police and Firemen's Retirement System (PFRS) of your client, Lynn Rogow, surviving widow of the late Scott Rogow. You are requesting to amend the retired survivor death benefits Ms. Rogow is receiving by virtue of the Accidental disability retirement benefits Scott Rogow received in his lifetime to an Accidental death in the line of duty benefit as provided under N.J.S.A. 43:16A-10. The PFRS Board initially reviewed and denied her request at its May 8, 2017 meeting¹. At its meeting on September 11, 2017, the PFRS Board reviewed your letter dated June 27, 2017² requesting reconsideration and/or in the alternative that the Board issue a Final Administrative Determination.

The Board noted your statements and the arguments set forth in your letter; however, the Board denied your request for reconsideration and stands by its determination of May 8, 2017 which denied Ms. Rogow's request to change her eligibility to receive an Accidental death benefit.

¹ At that time Ms. Rogow was represented by Susan E. Champion, Esq.

² By letter dated May 30, 2017, you noted the substitution of counsel.

Thereafter, the Board voted to issue a Final Administrative Determination in accordance with your request as there are no issues of fact in dispute.

The Board finds that the statutes and relevant case laws governing the PFRS do not permit the Board to grant Ms. Rogow's request. Findings of Fact and Conclusions of Law, as outlined below, were approved by the PFRS Board at its meeting of October 16, 2017.

FINDINGS OF FACT

Scott Rogow became employed with Paterson City as a Firefighter and was enrolled in the PFRS effective July 1, 1995. On October 28, 2010, the Division of Pensions and Benefits (Division) received Mr. Rogow's *Application for Disability Retirement* wherein he requested Accidental Disability effective November 1, 2010, based on [REDACTED] an incident on July 6, 2009. Subsequently, you notified the Division via letter that you represented Mr. Rogow and forwarded documents to support his claim for disability. The certifying officer for the City of Paterson completed an *Employer Certification for Disability Retirement* on November 20, 2010 indicating that Mr. Rogow filed for Accidental Disability as a result of an accident³ that occurred during the performance of his duties on July 6, 2009.

At its meeting of May 2, 2011 the PFRS Board considered and approved Mr. Rogow's application for Accidental Disability retirement benefits effective November 1, 2010 pursuant to N.J.S.A. 43:16A-7 and relevant case law. A statement of retirement allowance was issued to Mr. Rogow by mail dated June 27, 2011. This statement confirmed his retirement allowance and provided a summary of his insurance and survivor benefits. Mr. Rogow received a monthly Accidental disability

³ The documents supporting Scott Rogow's disability claim indicate that while descending into a basement at a working fire to shut off utilities, he slipped on debris (plastic bags) and fell down a flight of stairs. [REDACTED]

allowance in the amount of \$5,238.88 from June 1, 2011⁴ through August 31, 2012 totaling \$83,822.08.

On September 4, 2012, the Division received notice that Mr. Rogow passed away on August 28, 2012. As a result, Mr. Rogow's monthly retirement benefit was suspended. Thereafter, Lynn Rogow received a summary of death benefits which confirmed upon Mr. Rogow's death a survivor's benefit would be paid to her in the amount of \$3,884.06 a month and would continue for life or until she remarries. Additionally, Mr. Rogow's two dependent children (age fourteen) were quoted to receive \$971.02 per month each. On October 17, 2012, the Division processed the PFRS death benefits which included:(1) Group Life insurance in the amount of \$326,261.64; (2) Ms. Rogow's initial monthly payment of \$3,884.06; (3) [REDACTED]

From October, 2012 until July, 2017, Ms. Rogow received a monthly survivor widow and children's benefit totaling \$5,826.10 per month. By letter dated September 6, 2016, nearly five years after Ms. Rogow commenced receipt of her benefits, her former attorney Susan E. Champion, Esq., requested that she be permitted to change Scott Rogow's pension status from "Accidental Disability to line of duty death"⁵. In conjunction with that submission she provided medical records and a copy of the *Order Approving Settlement* in the Workers' Compensation action. By letter dated October 5, 2016, the Division as administrator for the PFRS Board requested additional information⁶ before the Board would consider this appeal. On November 9, 2016 the Division received a response from Ms. Champion. The information provided to the Division reveals that Mr. Rogow's death was as a result

[REDACTED] While the Board did not address the merits

⁴ Linda Curry, Certifying Officer for the City of Paterson notified the Division via email on May 4, 2011 that Mr. Rogow stayed on payroll until April 30, 2011. As a result, Mr. Rogow's retirement benefit became payable June 1, 2011 (for the month of May 2011).

⁵ Referring to N.J.S.A. 43:16A-10 – Accidental Death Benefit.

⁶ Additional medical documentation was requested to support the appeal.

of the Accidental death benefits because he was not an active member at the time of his death, the incident of July 6, 2009 did not directly result in his death.

On December 3, 2016, the Division's Claims Bureau noticed Ms. Rogow via letter that the benefits for [REDACTED] were scheduled to be terminated once they reach age eighteen or upon their expected graduation date. The Principal of Emerson Junior-Senior High School wrote the Division to affirm the expected graduation date for the minor Rogow children as June 22, 2017. Therefore, the additional benefits Lynn Rogow received for the benefit of her two minor children [REDACTED] [REDACTED] were terminated effective July 1, 2017. The records indicate the total amount paid by the PFRS for the benefit of the Rogow children was \$114, 580.36.

On January 24, 2017, Cheryl Chianese, Chief of Operations sent Susan Champion, Esq. a letter wherein she administratively denied Lynn Rogow's request to change Scott Rogow's benefits from Accidental Disability to an Accidental Death in the Line of Duty. She relied on the fact that Mr. Rogow collected his Accidental Disability benefits for a period of eighteen months which is well over his due and payable date. The Division was relying upon N.J.A.C. 17:2-6.3(a)⁷ which states that a member shall have the right to withdraw, cancel or change an application for retirement at any time before the member's retirement allowance becomes due and payable. Additionally, Lynn Rogow received Accidental Disability Death benefits for over four years. The letter also noticed Ms. Champion that the appeal would be forwarded to the PFRS Board to be added to the agenda. Thereafter, Ms. Champion submitted an additional submission to the PFRS Board with regard to the administrative denial.

On February 1, 2017, counsel was notified that at its meeting on March 13, 2017 the PFRS Board would consider Lynn Rogow's request to amend the Accidental disability survivor benefits she is currently receiving to an Accidental death in the line of duty benefit. On February 21, 2017 Ms.

⁷ The regulation cited by the Division governs the Public Employees' Retirement System. N.J.A.C. 17:4-6.3(a), which governs the PFRS, is identical.

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Champion responded to the Division's denial and indicated that the application before the Board is a request that the retirement benefit for the late Scott Rogow be "reclassified to death benefits provided under an Accidental death."

At the PFRS meeting on March 13, 2017, the PFRS Board considered the statements of Ms. Champion and Ms. Rogow along with the relevant documents. During the Board's discussion, it went into Executive Session to receive legal advice from the Deputy Attorney General. Ultimately, the Board made a motion to table the matter in order to seek Attorney General written advice. However, the motion failed to carry. As a result, no action was taken by the Board on March 13, 2017. Accordingly, Ms. Champion was notified that the matter would be rescheduled. By email dated April 20, 2017, counsel was notified that the PFRS Board would consider Lynn Rogow's request at its meeting on Monday, May 8, 2017.

At its meeting of May 8, 2017, the Board considered and denied Ms. Rogow's request, in accordance with N.J.S.A. 43:16A-10 which requires that the death of the PFRS member must occur while in active service. In consideration of the request, the Board reviewed a comparison of benefits chart that was prepared by Division staff. The summary of the benefits paid and proposal of outcomes

were done to assist the Board in its determination. The information is as follows:

11/1/2010 Retirement date retained on payroll through 4/30/2011 & since members cannot receive salary & a monthly retirement benefit, Scott's benefit would have paid as effective 5/1/2011 for a start on 6/1/2011.

Member (Scott)	.6666* X \$94,299.96 = \$5,238.88
supp chk dated 6/3/11 for 6/1/11	1 @ \$5,238.88
7/1/11 through 9/1/12	15 @ \$5,238.88
	<u>\$83,822.08</u>

Widow (Lynne)	.50 X \$93,217.61 = \$3,884.06
supp chk dated 10/31/12	1 @ \$3,884.06
11/1/12 through 7/1/17	58 @ \$3,884.06
	<u>\$229,158.54</u>

Dependent children [redacted] Birthdate [redacted] aging out on [redacted]
 $.25 \times \$93,217.61 = \$1,942.03 / 2 = \$971.02$

Dependent child #1 [redacted]	
supp chk dated 10/31/12	1 @ [redacted]
11/1/12 through 7/1/17	58 @ [redacted]
	<u>\$57,290.18</u>

Dependent child #2 [redacted]	
supp chk dated 10/31/12	1 @ [redacted]
11/1/12 through 7/1/17	58 @ [redacted]
	<u>\$57,290.18</u>

Total benefits paid out under Accidental Disability \$427,560.98

Accidental Death Benefits from date of death 8/28/12 through 7/1/17.
 NO DEPENDENT BENEFIT PAYABLE

Widow (Lynne)	.70 X \$93,217.61 = \$5,437.69
10/1/12 through 7/1/17	58 @ \$5,437.69
	<u>\$315,386.02</u>

Note member received the 9/1/17 standard check.

Accidental Disability Benefit is \$112,174.96 higher than the Accidental Death Benefit.

By email dated May 30, 2017, you notified the PFRS Board of the substitution of counsel wherein you would represent Ms. Rogow's matter and requested reconsideration of the denial of her request to amend the retired survivor death benefits to Accidental death in the line of duty. At its

meeting of September 11, 2017, you confirmed that you were seeking to have the benefits changed from an Accidental disability survivor benefit to an Accidental death benefit, effective September 6, 2016, the date that Ms. Rogow first sought this change in the benefit. During an executive session, the Board received written, attorney-client privileged advice provided by the Deputy Attorney General. The Board had previously found that because Mr. Rogow was retired and was receiving Accidental Disability benefits he is not eligible for Accidental death benefits. The Board denied reconsideration of this decision and voted to issue a Final Administrative Determination in accordance with your request as there are no material issues of fact in dispute. This Final Administrative Determination serves as formal notice of the Board's denial.

CONCLUSIONS OF LAW

At its meeting on May 2, 2011, Mr. Rogow was approved for Accidental Disability retirement benefits as an active member based upon the Board's finding that he was totally and permanent disabled as a direct result of a traumatic event. His retirement benefit was effective November 1, 2010. Mr. Rogow received 16 monthly retirement payments through September 1, 2012.

Mr. Rogow passed away on August 28, 2012. Upon his death, his beneficiary, Ms. Rogow received \$326,261.64 in group life insurance (N.J.S.A. 43:16A-7(3)). Also, she began receiving a monthly benefit of \$3,884.06 and [REDACTED] pursuant to N.J.S.A. 43:16A-12.1(a).

On September 6, 2016, approximately six years after Mr. Rogow's effective date of Accidental Disability retirement, and almost four years subsequent to his death, counsel requested that Ms. Rogow be permitted to change Mr. Rogow's pension status from Accidental disability to line of duty death. No explanation for the delay has been provided to the Board.

Following a review of the documentation, the Board denied your request. As an active member Mr. Rogow applied for and was granted an Accidental disability retirement. At that point his status was no longer an active participant, but Mr. Rogow was a retiree of PFRS. As a matter of law,

the Board denied your request in accordance with N.J.S.A. 43:16-A-10 which requires that the death of the PFRS member must occur while the member is in active service. Because Mr. Rogow was retired and receiving Accidental disability benefits he is not eligible for Accidental death benefits. Specifically, N.J.S.A. 43:16-A-10 states:

- (1) Upon the death of a member in active service as a result of:
 - (a) An accident met in the actual performance of duty at some definite time and place, or
 - (b) Service in the reserve component of the Armed Forces of the United States or the National Guard in a federal active duty status, and such death was not the result of the member's willful negligence, an accidental death benefit shall be payable if a report of the accident is filed in the office of the retirement system within 60 days next following the accident, but the board of trustees may waive such time limit, for a reasonable period, if in the judgment of the board the circumstances warrant such action. No such application shall be valid or acted upon unless it is filed in the office of the retirement system within five years of the date of such death.

...

[Emphasis added.]

The term "active service" is not specifically defined, but N.J.S.A. 43:16A-1 defines "service" as "service as a policeman or fireman paid for by an employer." Further, for the purposes of an accidental death benefit, N.J.S.A. 43:16A-9(5)(a) provides that a member is in "active service":

for no more than 93 days while on an official leave of absence without pay for reasons other than illness,

for not more than one year if the member is on an official leave of absence

- (a) for maternity,
- (b) for a residency requirement for an advanced degree, or
- (c) for full-time studies at an institution of higher education,
and

- (1) is disabled from a condition arising out of his employment, is not working, and is receiving or eligible to receive periodic benefits under Workers' Compensation law, "and has not

retired or terminated his membership" or

- (2) for not more than two years while on an official unpaid leave of absence if due to personal illness other than to which (1) applies.

[ibid. (Emphasis added.)]

A review of the history of N.J.S.A. 43:16A-10 indicates that prior to 1967, an Accidental death benefit was awarded "[u]pon the accidental death of a member before retirement." L. 1964, c. 241, § 7 (emphasis added). Thus, a death benefit was payable so long as no retirement application was filed, even if the member had left service and was not contributing to the system. In 1967, the language of N.J.S.A. 43:16A-10 was amended to provide the benefit "...[u]pon the death of a member in active service." L. 1967, c. 250 (Chapter 250), § 10 (emphasis added). Chapter 250's definition of the term "retirement" further indicates that the Legislature's intent to narrow the eligibility for an accidental death benefit. It defined "Retirement" as "withdrawal from active service with a retirement allowance granted under [the PFRS statutes]."⁸ N.J.S.A. 43:16A-1. Chapter 250 included in N.J.S.A. 43:16A-9 the definition of "active member", explained above, that for the first time was applicable to the Accidental Death Benefit statute, N.J.S.A. 43:16A-10. L. 1967, c. 250, § 9. Chapter 250 added the language described above.

By the plain language of N.J.S.A. 43:16A-10, the Legislature intended that an accidental death benefit only be available to those members who are in "active service" at the time of death and had not yet retired. As the Board is responsible for the general administration and proper operation of PFRS and to make effective the provisions of the PFRS statutes, the Board cannot grant a benefit that is not authorized by the Legislature. N.J.S.A. 43:16A-13; L. 1944, c. 255.

As noted above, the PFRS Board has reviewed your written submissions and because this matter does not entail any disputed questions of fact, the PFRS Board is able to reach its findings of

⁸ "Retirement" is currently defined as "the termination of a member's active service with a retirement allowance granted and paid under the provisions of this act." N.J.S.A. 43:16A-1(16).

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fact and conclusions of law in this matter 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 Police and Firemen's Retirement System.

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 black rectangular border.

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

G-9/MER

C: C. Chianese (ET); DAG Danielle Schimmel (ET)
Lynn Rogow