



State of New Jersey

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September 11, 2018

Sent via email to: [REDACTED]

Craig S. Gumpel, Esquire
[REDACTED]

RE: Marco Seminario
[REDACTED]

Dear Mr. Gumpel:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting on August 13, 2018, the Board of Trustees of the Police and Firemen's Retirement System (PFRS) reviewed the Initial Decision (ID)¹ of the Administrative Law Judge (ALJ) Solomon A. Metzger, dated June 21, 2018, in the above captioned matter, together with the joint stipulation of facts, the items submitted into evidence by the parties, exceptions filed by both Deputy Attorney General (DAG) Robert E. Kelly² and you³ and reply to exceptions filed by DAG Kelly and you. Thereafter, the Board voted to adopt the factual findings of the ALJ and his legal reasoning and conclusion regarding the justness of the partial forfeiture but rejects the ALJ's legal reasoning and the ultimate legal conclusion that Mr. Seminario is eligible to file for accidental disability retirement.

Findings of Fact and Conclusions of Law as outlined below were presented and approved by the PFRS Board at its meeting on September 10, 2018, which constitutes the Final Administrative Determination in this matter.

¹ An extension of time was requested and was granted in order for the PFRS Board to issue a final decision.

² An extension of time was requested and granted to file exceptions.

³ An extension of time was requested and granted to file exceptions.

FINDINGS OF FACT

The Board adopts the findings of fact as set forth in the Initial Decision. Briefly summarized, Mr. Seminario applied for accidental disability in 2014, during the pendency of his unsuccessful judicial appeal of the Civil Service Commission's (CSC) final administrative decision upholding his termination effective May 9, 2013. He was dismissed after pleading guilty to Driving While Intoxicated and also for conduct unbecoming a law enforcement officer. He was administratively charged with (1) attempting to flee the scene of an accident, (2) using his position to avert arrest, and (3) threatening retaliation against the arresting officer. His termination was upheld through appeals to the Office of Administrative Law, Civil Service Commission, and the Superior Court of New Jersey, Appellate Division.

The Board reviewed the charges in the context of N.J.S.A. 43:1-3 and after balancing the eleven factors, imposed a partial forfeiture of three years of service and salary credit, one year for each administrative charge. As a result, Mr. Seminario, who had 20 years, 4 months of creditable service before the forfeiture, could only be eligible for a disability retirement or a deferred retirement at age 55, because he no longer had the service credit to be eligible for a service retirement.

Mr. Seminario's application for accidental disability retirement was based on work-related injuries that preceded his 2012 drunk-driving accident. At its meeting of February 8, 2016, the Board declined to consider the application, finding Mr. Seminario ineligible for accidental disability because he had been terminated and could not return to employment with Hudson. The Board denied his request to file for accidental disability, reasoning that he left employment due to his termination, not a disabling condition, and could never return to employment as required by statute should the disabling condition be found to have vanished or become materially diminished.

CONCLUSIONS OF LAW

PFRS members are eligible for accidental disability in accordance with N.J.S.A. 43:16A-

7. In addition, N.J.S.A. 43:16A-8 provides, in pertinent part:

(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 five 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. If the beneficiary fails to submit to any such medical examination or 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.]

As noted above, Mr. Seminario did not leave employment due to a disabling condition. Rather, he left due to his guilty plea and subsequent termination by his employer. Due to his termination, he cannot be restored to active service should any claimed disability materially diminish as required by N.J.S.A. 43:16A-8.

Consequently, if his application was processed and he was granted a disability pension and later it was determined that he was no longer disabled, there is no mechanism for the Board to stop paying the pension because Mr. Seminario could never be ordered to return to work, as required by N.J.S.A. 43:16A-8(2). Granting a disability retirement under these circumstances would be in contravention of the statutory scheme, and place the Board in the position of

Craig S. Gumpel, Esquire
RE: Marco Seminario
Page 4
September 11, 2018

potentially paying a disability pension for which the Board has no ability or mechanism to terminate if the member is no longer totally and permanently disabled.

Both the New Jersey Supreme Court and the Appellate Division have held that N.J.S.A. 43:16A-8(2) mandates that an employer reinstate a member who has returned from disability retirement with seniority and credit for prior service. Klumb v. Bd. of Educ. of Manalapan-Englishtown Regional High Sch. Dist., 199 N.J. 14, 32-35 (2009); In re Allen, 262 N.J. Super. 438, 444 (App. Div. 1993). Here, if Mr. Seminario's application were processed and he were approved for accidental disability, there is no mechanism for the Board to stop paying the pension if he were no longer disabled, because he would never be able to return to work, as required by N.J.S.A. 43:16A-8(2). Permitting an accidental disability application to proceed under these circumstances would thwart the statutory scheme. The Board therefore found Mr. Seminario ineligible to apply for accidental disability.

The ALJ rejected this rationale, stating that Board's reading of the statutory scheme and halting the disability process at the outset because a member could not return to employment subverts the legislative intent. Initial Decision at 3. He suggests that "a more natural reading of N.J.S.A. 43:16A-8 is that a member receiving disability benefits who is otherwise capable of resuming work but cannot owing to prior misconduct, simply loses the disability benefit." Initial Decision at 3. The Board rejects this rationale and conclusions as contrary to the statutory scheme and the case law on the operation of N.J.S.A. 43:16A-8.

In n re Allen, 262 N.J. Super. at 444, the Appellate Division recognized that "[i]f a retired [disabled] employee regains the ability to perform his or her duties, the Legislature mandated that he or she be returned to the former position." N.J.S.A 43:16A-8 is the Legislature's recognition that "individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service" and their separation from service is not the same as "the voluntary separation of other civil servants." In re Allen, 262 N.J. Super. at 444.

The Appellate Division further affirmed this rationale in In re Terebitski, 338 N.J. Super. 564, 570-71 (App. Div. 2001) explaining that 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.” Id. at 570. It is noted that the Appellate Division denied Terebitski’s claim for back pay from the date the employer was ordered to reinstate him. Id. at 571. Of note is that N.J.S.A. 43:16A-8 explains that the member “shall not suffer any loss of benefits while he awaits his restoration to active service.”

Further, the recent decision in In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. 386, (App. Div. May 2018) supports the Board’s analysis. In that case, the Appellate Division rejected a challenge to a 2016 regulation that formalized the practice, at issue here, of refusing to consider disability retirement applications of members who left employment for a reason other than disability. The court found that:

...rehabilitation statutes entitle a disability retiree whose disability has abated to return to active service. For example, if a medical report shows that a TPAF disability retirement beneficiary "is able to perform either his [or her] former duty or other comparable duty which his [or her] former employer is willing to assign," he or she must "report for duty." *N.J.S.A. 18A:66-40(a)*. Rehabilitation provisions have been present in the TPAF, PERS, PFRS, CPFPF, and POPF statutory schemes for decades. Pursuant to *Klumb*, 199 N.J. at 32, and *In re Allen*, 262 N.J. Super. 438, 444, (App. Div. 1993), disability retirees must be returned to the same status and position held at the time of retirement, if available, after proving rehabilitation. Returning to active service presumes that, at the time the beneficiary left public service, he or she actually had a duty. *E.g., N.J.S.A. 18A:66-40 (TPAF)*. And so, a beneficiary who previously left public service for some reason other than a disability — like termination for cause — would have no employment or work duty from which to return.

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. Once the disability abates, the disability retirement beneficiary may be entitled to reinstatement. *See Allen*, 262 N.J. Super. at 444, (interpreting the rehabilitation statutes, and observing that, "[t]he 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 . . . [and t]heir separation from employment is *unlike* the voluntary separation of other civil servants" (emphasis added)). 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.

[In Re Adoption, 454 N.J. Super at 401-02 (emphasis added).]

If the Board were to entertain disability-retirement applications by parties to career-ending discipline, it would encourage abuse of the pension system. Employers should not be allowed to transfer the costs of disciplinary terminations to the pension system. The pension statutes were not intended by the Legislature to provide a fallback benefit for members forced out of work due to misconduct or delinquency.⁴

In In re Adoption, the court held that although there is no "explicit text" in the statute which precludes such a member from filing for disability retirement benefits, "it is obvious to us" that "it is common sense that disability retirees leave their jobs due to a purported disability." 454 N.J. Super at 399. In re Adoption affirmed the Division's long-standing interpretation of the disability retirement statutes as providing benefits only to members *who separate from service due to a disability*.

In general, the primary practical effect of our holding — as to the separation of service rule — maintains the longstanding principle that eligibility for disability retirement benefits requires members to make a prima facie showing that they cannot work due to a disability. To that end, voluntary or involuntary termination of employment, for non-disability reasons, generally deems a member ineligible for disability benefits. Such a holding comports with the existing overall framework of the enabling, eligibility, and rehabilitation statutes, and policies applicable to the various State public retirement systems. To hold otherwise would require us to re-write the text of multiple statutes, which has never been the role of the judiciary.

[Id. at 394.]

⁴ Termination for work-related misconduct or delinquency, for example, results in ineligibility for deferred retirement. N.J.S.A. 43:16A-11.2.

Mr. Seminario's application was filed before the June 20, 2016 effective date of the regulation affirmed in In re Adoption and the Board did not apply that regulation to Mr. Seminario. However, In re Adoption makes clear that the Board properly analyzed and applied the statutory scheme.

CONCLUSION

Based upon the above, the Board adopts the ALJ's findings of fact and his legal reasoning and conclusion regarding the justness of the partial forfeiture but rejects his legal reasoning and conclusion regarding Mr. Seminario's eligibility to apply for accidental disability and reaffirms its determination that Mr. Seminario is ineligible to file for 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,



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

G-7/mer

C: DAG Robert Kelly (ET); DAG Amy Chung (ET)
Marco Seminario