



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

July 21, 2022

Sent via email to: [REDACTED]

Judy Thorpe
[REDACTED]

Re: PERS [REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Ms. Thorpe:

At its meeting on April 20, 2022,¹ the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) considered your personal statements and all documentation in the record concerning your appeal of the Board's July 21, 2021, determination that you are not eligible for Deferred retirement benefits because you were separated from service by removal for cause on charges of misconduct or delinquency directly related to your employment. You appealed the Board's decision via email on or about August 2, 2021, and requested additional time to secure legal representation. At the Board meeting of October 20, 2021, you again requested, and the Board agreed, that consideration of your appeal be postponed to allow you additional time to secure counsel and documents related to your appeal. After several additional extensions, the Board heard your appeal, presented by your then-counsel, Samuel J. Halpern, Esq., at its meeting of April 20, 2022.

After careful consideration, the Board affirmed its prior determination that you are not eligible for Deferred retirement benefits. Finding no genuine issue of material fact in dispute, the Board denied your request for an administrative hearing and directed the undersigned to draft a

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

Final Administrative Determination. Findings of Fact and Conclusions of Law were presented to and approved by the Board at its May 18, 2022, meeting.

On or about June 5, 2022, you emailed the undersigned and requested an additional reconsideration by the Board. At its June 15, 2022 meeting, the Board reconsidered the matter, but its decision remained unchanged: because you were removed for cause on charges of misconduct or delinquency directly related to your employment, you are not eligible for Deferred retirement benefits. The Board therefore re-affirmed both its decision to deny your application for Deferred retirement benefits and your request for an administrative hearing. The Board directed the undersigned to draft this Final Administrative Determination, which was presented to and approved by the Board at its July 20, 2022, meeting.

FINDINGS OF FACT

The record before the Board establishes that you were enrolled in the PERS on June 9, 1984, as a result of your employment with Marlboro Psychiatric Hospital as an Hourly Human Services Assistant. Thereafter, you transferred to the Arthur Brisbane Child Treatment Center as a Head Nurse. You remained with this employer until April 18, 2005, when you transferred to the Juvenile Justice Commission (Mercer) as a Supervisor of Nursing Services. While you were employed in this position, a Preliminary Notice of Disciplinary Action was filed, charging you with Insubordination and Other Sufficient Cause, and Violation of Sick Leave Procedures for State Service. The Notice alleged that you were instructed to report for a [REDACTED]. However, upon reporting for the [REDACTED], you refused to sign the [REDACTED] [REDACTED] and therefore did not [REDACTED] despite knowing that your continued employment was contingent on the results of [REDACTED]. In the months that followed, your noncompliance continued – you never consented to the required [REDACTED]. Eventually, you proffered [REDACTED] that was [REDACTED] [REDACTED] but the Juvenile Justice Commission did not accept it in lieu of the required [REDACTED].

A Final Notice of Disciplinary Action was issued on August 20, 2008, terminating your employment effective August 15, 2008. You filed a grievance and Arbitrator Joyce M. Klein conducted a hearing on December 10, 2009. The Arbitrator noted that you alleged you were confused by the consent form, and had requested additional time to consult with your attorney before signing it. Although, as you stated, your attorney advised you to sign the consent form, you never did. Thereafter, you were offered the opportunity to reschedule the [REDACTED], and your employer postponed the disciplinary hearing in order to allow you to do so. Ultimately, in an Opinion and Award dated February 12, 2010, the Arbitrator found that you had been given ample opportunity to comply with your employer's directive and had failed to do so. Therefore, the Arbitrator found, the employer had just cause to terminate your employment. No appeal was taken from the Arbitrator's decision, although you did pursue a claim of legal malpractice against the attorney who presented your case to the Arbitrator.

When you were separated from service in 2008, you were approximately 47 years of age and your PERS account reflected a total of 23 years and 5 months of service credit. Based on your age and years of service, the only benefit for which you were eligible to apply was a Deferred retirement. You filed your application for Deferred retirement on April 11, 2021, requesting a retirement effective May 1, 2021. But the statute governing Deferred retirement in PERS, N.J.S.A. 43:15A-38, limits eligibility for that benefit to employees who, "after having completed 10 years of service, [are] separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for cause on charges of misconduct or delinquency." *Ibid.* Case law establishes that the "misconduct or delinquency" must be related to the member's employment. *In re Hess*, 422 N.J. Super. 27 (App. Div. 2011).

As detailed above, the Board considered your Deferred retirement application at its meeting of July 20, 2021. Because you were separated from service before retirement age "by removal for cause on charges of misconduct or delinquency" related to your employment, the

Board denied your application for Deferred retirement benefits in accord with N.J.S.A. 43:15A-38 and In re Hess. You filed a timely appeal, and several postponements were granted before the Board reconsidered and denied the appeal on April 20, 2022. The Board also denied your request for a fact-finding hearing, noting that no genuine issue of material fact was in dispute. The Board directed the undersigned to draft findings of fact and conclusions of law that it approved at its meeting of May 18, 2022.

On or about June 5, 2022, you requested additional reconsideration of the Board's decision. At its June 15, 2022 meeting, the Board voted to reconsider the matter, but after reconsideration, its decision remained unchanged. The Board directed the undersigned to draft this Final Administrative Determination, which was presented to and approved by the Board at its July 20, 2022, meeting.

LEGAL CONCLUSIONS

The Board made the following legal conclusions.

PERS members with 10 or more years of service are eligible to file for Deferred retirement benefits upon reaching service retirement age:²

Should a member of the Public Employees' Retirement System, after having completed 10 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for cause on charges of misconduct or delinquency, such person may elect to receive:

- (a) The payments provided for in section 41b of this act,³ if he so qualifies under said section, or;
- (b) A deferred retirement allowance, beginning at the retirement age...

[N.J.S.A. 43:15A-38 (Emphasis added)].

² As a former Tier 1 member of PERS, your service retirement age is 60.

³ N.J.S.A. 43:15A-41

Based on the plain language of the statute, the Board determined that your removal for cause on grounds of misconduct or delinquency directly related to your employment rendered you ineligible for Deferred retirement benefits. See In re Hess, 422 N.J. Super. 27 (App. Div. 2011) (holding that ineligibility for Deferred retirement occurs only when a member is terminated for misconduct or delinquency related to the employment). Accordingly, the Board denied your application.

Your previous counsel had argued to the Board that your failure to consent to the [REDACTED] [REDACTED] required by your employer did not “rise to the level” of misconduct or delinquency as required under the statute. The Board disagrees. While the statute’s reference to “misconduct,” standing alone, might be construed as a high bar, the addition of the words “or delinquency,” in the Board’s view, indicates that the statute is intended to apply to a broad range of employee behavior. Consistent failure, over months, to comply to the employer’s satisfaction with a job requirement, as occurred in this case, falls within this broad range of behavior. The Board therefore finds that your failure to sign the consent form and attend the required [REDACTED] constitutes misconduct or delinquency as contemplated under the statute. Moreover, you had the opportunity to appeal your termination when you were separated from service. Having failed to avail yourself of that option, your termination on charges of misconduct or delinquency became final. It is not within the Board’s purview or competence to re-litigate your termination fourteen years after the event.

Consequently, the Board denied your application for Deferred retirement because you were separated from service on charges of misconduct or delinquency directly related to your employment, and so you are not eligible for a Deferred retirement under the provisions of N.J.S.A. 43:15A-38. See also In re Hess, 422 N.J. Super. 27 (App. Div. 2011).

You are eligible to withdraw your accumulated pension contributions remitted during active membership. You may request an *Application for Withdrawal* by writing to Robin Willever,

Judy Thorpe
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Supervisor, Loan/Withdrawal Section at the Division, at the address above. **Nonetheless, you are cautioned against filing the withdrawal application if you intend to appeal the Board's determination or to continue your current appeal in the Appellate Division regarding your application for disability retirement. Withdrawal terminates all rights and privileges of membership.**

As noted above, the Board has considered your personal statements, 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 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

Sincerely,



Jeff S. Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-3/JSI
C: J. Ehrmann (ET); R. Willever (ET)