



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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January 15, 2019

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Lt. Governor

Sent via email to: [REDACTED]

GAYLORDPOPP
Samuel M. Gaylord, Esquire

Re: Brian Attardi
[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Gaylord:

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, Brian Attardi's request to file for Accidental Disability retirement benefits. The PFRS Board initially reviewed and denied his request to file an Accidental Disability retirement at its April 10, 2017 meeting. On May 25, 2017, you appealed the Board's denial and requested a hearing in the Office of Administrative Law ("OAL"). At its meeting on July 10, 2017 the Board postponed action and requested that you provide any factual issues that were in dispute. Because no additional information was received, at its meeting on December 10, 2018, the Board determined that no material facts are in dispute and denied your request for an administrative hearing, and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law, which were presented and approved by the PFRS Board at its January 14, 2019 meeting.

The PFRS Board has reviewed your letter appeal and the relevant documentation and finds that the laws governing the PFRS do not permit the Board to grant Mr. Attardi's request to file for Accidental Disability retirement.

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FINDINGS OF FACT

Mr. Attardi was enrolled in the Public Employees' Retirement System (PERS) on November 1, 2004. He remained in the PERS until he accepted a position with the New Jersey, Department of Corrections (NJDOC) and was enrolled in the PFRS. At that time Mr. Attardi inter-fund transferred his PERS service into his newly established PFRS membership account. He remained with the Department of Corrections until 2014 when he transferred to Garden State Rec. & Youth Correction Center. The record indicates that pay period 26 of 2015 was the last date that pension contributions were remitted on his behalf.

On April 15, 2016, Mr. Attardi was served a *Preliminary Notice of Disciplinary Action* (PNDA) seeking his removal and charging him with violating: N.J.A.C. 4A:2-2.3, General Causes (a) 6. Conduct unbecoming a public employee; (a) 12. Other sufficient causes, HRB 84-17 as amended, (C) Personal Conduct-3. Physical or mental abuse of an inmate, patient, client resident, or employee, 11. Conduct unbecoming an employee, E. General-1. Violation of a rule, regulation, policy, procedure, order or administrative decision, HRB 84-17 as amended, C. Personal Conduct-8. Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report investigation or other proceeding.

The charges stemmed from an incident occurring on or about November 6, 2015, wherein physical force was used against an inmate. An investigation revealed the following: "Officer Brian Attardi was one of three officers who did physically abuse the inmate in the Garden State Youth Correctional Facility Staff Barbershop; specifically, by holding him down in the barber chair, punching and slapping him, and cutting his hair off." As indicated on the PNDA, this constitutes conduct unbecoming, physical abuse of an inmate and a violation of law enforcement rules, policies and procedures. In addition, during a supplemental interview with the NJDOC Internal Affairs Units, Mr. Attardi admitted to providing false information during the initial interview.

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Subsequently, he was placed on long term unpaid suspension beginning on April 23, 2016, pending a disciplinary hearing. On December 2, 2016, the Division of Pensions and Benefits (Division) received his *Application for Disability Retirement* requesting Accidental Disability retirement effective of January 1, 2017, based upon an incident occurring on December 27, 2015. On December 7, 2016, the Division received the *Employer Certification for Disability Retirement*.

A Final Notice of Disciplinary Action (FNDA) (31-C) was issued on January 17, 2017 sustaining the charges in the PNDA and removing Mr. Attardi from his position effective January 24, 2017. The record indicates that Mr. Attardi waived his Departmental Appeal Hearing but reserved his right to appeal the matter to the OAL and the Civil Service Commission.

On January 23, 2017 the Division notified Mr. Attardi via letter that his application for Accidental Disability was closed and he was not permitted to apply for Accidental Disability retirement. The Division relied upon N.J.A.C. 17:1-6.4 (b)1 which states members who have involuntarily or voluntarily terminated service for removal for cause will not be permitted to apply for disability retirement. The letter also informed him of his appeal rights.

On February 28, 2017, you notified the Division that you were retained to represent Mr. Attardi's appeal of the Division's administrative decision denying his request to file for Accidental Disability retirement. Prior to the Board meeting an email was sent to the Garden State Youth Correctional Facility asking whether Mr. Attardi would be able to return to employment and therefore comply with N.J.S.A. 43:16A-8(2), in the event that his application for disability retirement was approved and his alleged disability diminished to the point that he could return to employment. His employer responded that Mr. Attardi was removed from the NJDOC and the only factor that could change this would be a modified decision from the Civil Service Commission upon appeal. The PFRS Board initially reviewed and denied his request to file for an Accidental

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Disability retirement at its April 10, 2017 meeting. On May 25, 2017, you appealed the Board's denial and requested a hearing in the OAL. At its meeting on July 10, 2017 the Board postponed action and requested that you provide any factual issues that were in dispute. This information was not provided, therefore, on December 10, 2018, the Board determined that no material facts are in dispute and denied your request for an administrative hearing and directed the Board Secretary in conjunction with the Attorney General's Office to prepare Findings of Fact and Conclusions of Law which constitutes the Board's Final Administrative Determination.

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 that any person retired on a disability retirement allowance 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 him, the beneficiary **shall report for duty**; such a beneficiary shall not suffer any loss of benefits while he awaits 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. (emphases added).]

Further, N.J.A.C. 17:1-6.4 states as follows:

(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.

Based upon the factual record, prior to the filing of his application for disability retirement, Mr. Attardi was facing administrative charges stemming from a work incident on or about November 6, 2015, wherein he used physical force against an inmate. An FNDA was issued on January 17, 2017 sustaining the charges in the amended April 15, 2016 PNDA and as a result he was removed for cause effective January 24, 2017. He did not appeal his removal from his position, in fact, he waived his departmental hearing.

In addition, when specifically asked if Mr. Attardi would be able to return to employment under the provisions of N.J.S.A. 43:16A-8(2), his employer stated that Mr. Attardi was removed from the NJDOC and the only factor that could change this would be a modified decision from the Civil Service Commission upon appeal. However, he failed to appeal his dismissal and at that point he was out of time to file an appeal.

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Therefore, as Mr. Attardi was removed as part of a disciplinary action he is unable to comply with N.J.S.A. 43:16A-8(2) and N.J.A.C. 17:1-6.4. Thus, if his application was processed and he was granted an Accidental 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 he 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 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.

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. 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, CPFPP, 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.¹

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

¹ Termination for work-related misconduct or delinquency, for example, results in ineligibility for deferred retirement. N.J.S.A. 43:16A-11.2.

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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.]

The even more recent Appellate Division decision in Nowicki v. Board of Trustees, Police & Firemen's Retirement System, 2018 N.J. Super. Unpub. LEXIS 1806 (App. Div. July 27, 2018), petition for certif. filed (Aug. 24, 2018), and Marques v. Board of Trustees, Police and Firemen's Retirement System, 2018 N.J. Super. Unpub. LEXIS 2727 (Dec. 13, 2018) confirm that Mr. Attardi is not eligible to file for Accidental Disability retirement.

In Nowicki, a corrections officer entered into an agreement to settle disciplinary charges and agreed to “not seek further employment with [his former employer].” 2018 N.J. Super. Unpub. LEXIS 1806 at *3. The court affirmed the Board's decision to reject Nowicki's request to file for a disability pension “because [Nowicki] resigned without the ability to be reemployed [so] he could not satisfy N.J.S.A. 43:16A-8.” Id. at *9. The court held that N.J.S.A. 43:16A-8 “mandates that the employer reinstate a member returned from disability.” Ibid. Nowicki, like Ms. Creamer, did not have the “ability to enter into a settlement that modifie[s] the statute's requirement in N.J.S.A. 43:16A-8.” Ibid.

Similarly, in Marques, the Appellate Division affirmed the Board's determination that Marques, who had been terminated by his employer, was ineligible to apply for Accidental Disability retirement benefits. The court noted that Marques's assertion that he was eligible to apply for Accidental Disability retirement, “conflict[s] with N.J.S.A. 43:16A-8, which states that the retired member ‘shall report for duty’ if ‘able to perform either his former duty or any other available duty’ because “he was terminated. Marques, 2018 N.J. Super. Unpub. LEXIS 2727 at *4 (quoting In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. at 400-01). .

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Here, it is undisputed that Mr. Attardi is not eligible for reinstatement and he cannot “report for duty” with the NJDOC and cannot comply with N.J.S.A. 43:16A-8(2). Mr. Attardi’s situation is similar to that of Nowicki and Marques. As the court noted in Marques, the Board’s interpretation of N.J.S.A. 43:16A-8 is “neither novel nor new.” Marques, 2018 N.J. Super. Unpub. LEXIS 2727 at *4 (quoting In re Adoption of N.J.A.C. 17:1-6.4, 17:1-7.5 & 17:1-7.10, 454 N.J. Super. at 394-95.) Because Mr. Attardi cannot return to his former employer, he is not eligible to apply for Accidental Disability retirement.

The Board noted that Mr. Attardi may be eligible to file for Deferred retirement. Mr. Attardi was cautioned that if he files an application for Deferred retirement the Board would review the issue of honorable service.

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 was able to reach its findings of 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,



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

G-6/MER

C: DAG Schimmel (ET); DAG Amy Chung (ET); Brian Attardi