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July 9, 2019

Sent via email to: [REDACTED]

DVORAK & ASSOCIATES, LLC
Jeffrey S. Ziegelheim, Esq.
[REDACTED]

RE: Manuel Avila
[REDACTED]

OAL DKT No: TYP 06747-2017

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Ziegelheim:

The Board of Trustees ("Board") of the Police and Firemen's Retirement System of New Jersey ("PFRSNJ") has reviewed the April 15, 2019 Initial Decision¹ of Administrative Law Judge ("ALJ") Thomas Betancourt in this matter; exceptions² filed by Deputy Attorney General ("DAG") Robert Garrison dated April 29, 2019; and your reply to exceptions³ dated May 21, 2019. In addition, the Board noted your email request to postpone the matter in order for you to appear before the Board; however, the Board denied the request for a postponement as the Board was prepared to make a determination based on the above noted records.

At its meeting of June 10, 2019, the PFRSNJ Board voted to reject the ALJ's Initial Decision which recommended that Petitioner Manuel Avila (Mr. Avila) be eligible for service credit for the period

¹ As the 45-day statutory period for issuing a final decision would have expired, the PFRS Board properly requested and received extensions of time for issuing its final decision.

² DAG Garrison timely requested and were subsequently granted extensions of time for filing exceptions.

³ You requested and were subsequently granted an extension of time to file a reply to exceptions.

of time from July 1, 2010, through June 30, 2016, when Mr. Avila was on a leave and not serving in the capacity of police officer.

Findings of Fact and Conclusions of Law as outlined below were presented and approved by the PFRSNJ Board at its July 8, 2019, meeting.

The Board noted that Mr. Avila was employed by the Paterson Police Department starting in 1988. In January 2004, Mr. Avila began to experience mental health problems. Ibid. Three additional incidents occurred in August 2004, November 2004, and January 2005 involving altercations with the police, and Mr. Avila contemplating suicide. A final incident occurred in March 2007, resulting in Mr. Avila's involuntary civil commitment. Thereafter, an internal affairs investigations occurred, that found Mr. Avila unfit for duty. Ibid. Mr. Avila was examined by Dr. William Head for a fitness for duty exam, ultimately resulting in three reports. Ibid. The first report found that Mr. Avila should be put on "desk duty" resulting in him being transferred to the Court and Confinement Division of the Paterson Police Department. Ibid. Mr. Avila was not allowed to carry a weapon at that time. Ibid. In the second report by Dr. Head, he opined that Mr. Avila should leave the police force. Ibid. The final report echoed the same sentiment, finding that Mr. Avila should leave the police force because of psychological issues. Ibid.

Following his conversion to modified duty, Mr. Avila was charged with sexual contact with an inmate in the Paterson lockup in June 2007. Ibid. He was suspended without pay in accordance with the collective bargaining agreement, and after one month, he was continued on suspension but was put into paid status per the collective bargaining agreement. Ibid. Mr. Avila did not report to work during the paid suspension. Ibid. He was then indicted on February 2, 2008. Ibid. In June 2010, he was acquitted after a jury trial. Ibid.

After being acquitted, Mr. Avila was served with a preliminary notice of disciplinary action seeking his removal. Ibid. Hearings were held on February 4, 2014 and April 21, 2015. Ibid. The

preliminary notice of disciplinary action was dismissed pursuant to a settlement agreement in 2016.

Ibid.

Mr. Avila applied for a Special retirement benefit in June 2016. Ibid. He was denied a Special, but granted a Service retirement by the Board. Ibid. The Board found creditable service through June 1, 2010, but not after that date because Mr. Avila had his service weapon removed from him and did not report to duty. Ibid. The Board credited the service between 2007 and 2010 because Mr. Avila would not have been able to file for a retirement benefit until the criminal charges against him were resolved.

In the Initial Decision ("ID"), the Administrative Law Judge ("ALJ") recounted the testimony from Mr. Avila and Pension Fraud Investigator John Sloth, and determined that Mr. Avila was more credible than Investigator Sloth. Investigator Sloth testified regarding his prior experience including twenty-five years as a police officer, and six years with Prudential Insurance in their special investigation unit. Investigator Sloth has been employed by the Pension Fraud and Abuse Unit since 2014 and has been promoted to be the head of the unit. The ALJ found that Mr. Avila wished to return to work and that Investigator Sloth's report provided inaccurate information to the Board that was not supported by the record presented to the ALJ, and therefore should be rejected. Investigator Sloth clearly articulated the basis for his opinions in his report, and his testimony and his reasoning was supported by the evidence that he was able to obtain from the Paterson Police Department.

The ALJ's legal discussion centers on N.J.A.C. 17:1-2.18(c) which governs the award of back pay. The ALJ found that the settlement agreement between the Paterson Police Department and Mr. Avila was not structured in a way that would be in violation of the provisions of N.J.A.C. 17:1-2.18(a) and (c). The ALJ found that the payment to Mr. Avila pursuant to the settlement agreement were for sums he would have been entitled to had he retired without being on administrative leave. Ibid. The ALJ determined that the years between June 30, 2010 and Mr. Avila's retirement were served under administrative leave and that he did not report to duty to earn that income. Ibid.

Citing In re Town of Harrison Fraternal Order of Police, Lodge No. 116, 440 N.J. Super 268 (App. Div. 2015), and Sellers v. Board of Trustees, Police and Firemen's Retirement System, 399 N.J. Super. 1 (App. Div. 2008), the ALJ found that the Board has exclusive authority to make a final determination as to "creditable compensation." The ALJ also noted that the Board has the equitable power to provide a remedy when justice so demands provided the power is used rarely and sparingly, and does no harm to the overall pension scheme. Ibid. The ALJ grounded his decision in his view that the Board had incorrect information when it rendered its decision to find that service credit from July 1, 2010 onward was not creditable compensation.

The Board rejected the ALJ's legal conclusions. The Board's original denial correctly determined that after June 1, 2010, Mr. Avila ceased to provide creditable service to the Paterson Police Department. He no longer had a service weapon because of the psychological evaluation conducted by Dr. Head. While he was receiving a paycheck, it was due to the provisions of the collective bargaining agreement, which put him on paid administrative leave, and not because he worked and earned service credit for those years. It was only after the resolution of the criminal complaint against Mr. Avila that the Board would have been able to process his retirement application, therefore resulting in the Board stopping his pension service credit in June 2010.

Under N.J.S.A. 43:16A-1 (26) (a), compensation is defined as follows:

"Compensation" shall mean the base salary, for services as a member as defined in this act, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary duties beyond the regular workday.

[Ibid.]

"Service" shall mean service as a policeman or fireman paid for by an employer." N.J.S.A. 43:16A-1(26)

(7). Further creditable service is:

Only service as a policeman or fireman paid for by an employer, **which was rendered by a member** since that member's enrollment, or since that member's last enrollment in case of a break in service, plus service, if any,

covered by a prior service liability, shall be considered as creditable service for the purposes of this act.

[N.J.S.A. 43:16A-4 (emphasis added).]

N.J.A.C. 17:1-2.18(a), which governs the award of back pay for a PFRSNJ member, states:

When a member appeals the suspension or termination of the member's employment and through an award or settlement becomes entitled to full pay for all or a portion of that employment for the period of such suspension or termination, the member shall receive service credit for the period covered by the award or settlement The member must receive full back pay, including normal salary increases before mitigation and the contributions will be computed on the base salaries that the employee would have earned for the reinstated suspended or terminated period.

[ibid.]

Further, the Board is authorized to review a back pay award or settlement that would substantially increase a member's creditable service and entitle a member to retirement benefits he otherwise would not be entitled to receive. N.J.A.C. 17:1-2.18(c).

The Board has the exclusive authority to make a final administrative determination as to what is considered "creditable compensation." Harrison, 440 N.J. Super. at 270. Further, the Board has equitable powers "to provide a remedy when justice so demands provided the power is used rarely and sparingly, and does no harm to the overall pension scheme." Sellers, 399 N.J. Super. at 52.

The Board determined that Mr. Avila did not creditably serve from June 1, 2010 onward, following the resolution of his pending criminal charges. The Board based this determination on the documentation supplied to the Board, which showed that the Paterson Police Department intended to file for an involuntary disability retirement on behalf of Mr. Avila. The contemplation was that Mr. Avila would work in the Courts and Confinement Division until the Paterson Police Department or until Mr. Avila applied for retirement. However, the criminal indictment delayed this filing, and regardless would have delayed his claims processing. Because Avila did not provide honorable service, and could not have applied for a pension until June 1, 2010, the Board determined that Avila's pension service credit applied prior to that date, but once

the criminal charges were resolved, reasonably determined that Avila no longer provided honorable service that would count toward his pension.

The Board determined that Mr. Avila should not get PFRS service credit for the entire time he was on paid leave. From July 19, 2007 onward, Mr. Avila received a full salary without performing any work for the Paterson Police Department. The failure of Mr. Avila and the Paterson Police Department to act cannot operate to grant him an additional six years in the PFRS that he is not entitled to receive. Mr. Avila cannot be awarded additional years of service credit when he did nothing to earn that credit. Cf. Jackson v. Bd. of Trs., Police & Firemen's Ret. Sys., No. A-4084-15T2 (App. Div. Oct. 6, 2017) (holding that accrued sick leave does not count as creditable compensation toward special retirement benefit). For these reasons, the Board determined that Mr. Avila's pension service ended as of June 1, 2010.

CONCLUSION

For the foregoing reasons, the Board rejected the ALJ's conclusions of law and affirmed its original decision that Mr. Avila stopped rendering pensionable service credit as of June 1, 2010. 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,



Lisa Pointer
Board Secretary
Police and Firemen's Retirement System of New Jersey

G-8/jb

c: Manuel Avila
DAG Amy Chung (ET)
OAL Library (ET)