



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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January 16, 2019

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Lt. Governor

Sent via email to: [REDACTED]

ALTERMAN & ASSOCIATES, LLC
[REDACTED]

RE: Mary Creamer
[REDACTED]

OAL DKT NO. TYP 02688-2018

Dear Mr. Murray:

At its meeting on December 10, 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) Tama B. Hughes, dated November 5, 2018, in the above captioned matter, together with the joint stipulation of facts, the items submitted into evidence by the parties, exceptions filed by Deputy Attorney General (DAG) Christopher Meyer and your reply to exceptions.² Thereafter, the Board voted to adopt the factual findings of the ALJ but reject the legal analysis and conclusions of law that that Ms. Creamer is eligible to file for Ordinary disability retirement.

Findings of Fact and Conclusions of Law as outlined below were presented and approved by the PFRS Board at its meeting on January 14, 2019, 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 At the December 10, 2018, meeting the Board indicated that the reply to exceptions were filed untimely. However, a subsequent review of the timeline reveals that the reply to exceptions were filed timely. On December 10, 2018, the Board did consider the oral presentation and arguments presented by Tim Prol, Esq., from your law firm, which included all of the arguments made in your written reply to exceptions.

FINDINGS OF FACT

The Board adopts the findings of fact as set forth in the Initial Decision and incorporates the same by reference. Briefly summarized, on November 17, 2016, Ms. Creamer's employer, Middle Township, filed a Preliminary Notice of Disciplinary Action (PNDA) against her charging her with Inability to perform duties and other sufficient cause for which they were seeking her removal. On March 20, 2017, Middle Township and Ms. Creamer entered into a settlement agreement dismissing the PNDA and agreeing that Ms. Creamer would resign from her position in good standing. The agreement precluded Ms. Creamer from future employment with the Middle Township Police Department as a Police Officer. On May 22, 2017, Ms. Creamer filed her application for Ordinary disability retirement

The PFRS Board denied Ms. Creamer's request to file for Ordinary disability retirement. The Board acknowledges that her claimed disability is the reason for her termination and therefore she meets the requirements of N.J.A.C. 17:1-6.4. However, the Board denied the request because the Separation Agreement negotiated between the parties offends the law since Ms. Creamer cannot comply with N.J.S.A. 43:16A-8(2), because it expressly precluded her from returning to work with Middle Township if she were retired on an Ordinary disability but eventually recovered. Therefore, the Board denied her eligibility to file and did not consider the merits of the claim that she was permanently and totally disabled.

CONCLUSIONS OF LAW

This case presents a sole question: whether Ms. Creamer can comply with the return-to-work provision of N.J.S.A. 43:16A-8(2) where the terms of her Separation Agreement preclude all future employment with her former employer.

N.J.S.A. 43:16A-8(2) states that any person retired on a disability retirement allowance may:

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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).]

N.J.S.A. 43:16A-8(2) requires Ms. Creamer be able to return to work with her former employer in the event she is no longer disabled. She cannot do so based on her agreement with her employer and is therefore ineligible to apply for Ordinary disability retirement.

Consequently, if her application was processed and she was granted a disability pension and later it was determined that she was no longer disabled, there is no mechanism for the Board to stop paying the pension because Ms. Creamer 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.

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 Ms. Creamer's application were processed and she were approved

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for Ordinary disability, there is no mechanism for the Board to stop paying the pension if she were no longer disabled, because she would never be able to return to work, as required by N.J.S.A. 43:16A-8(2). Permitting an Ordinary disability application to proceed under these circumstances would thwart the statutory scheme. The Board therefore found Ms. Creamer ineligible to apply for Ordinary disability.

The ALJ rejected this rationale. relying on the Board's adoption of an initial decision, McNally v. Board of Trustees, Police & Firemen's Retirement System, 2018 N.J. AGEN LEXIS 324 (Apr. 9, 2018), Initial Decision at 8-11. The ALJ's reliance on McNally is misplaced and rejected by the Board. The ALJ's Initial Decision actually recognizes that in adopting McNally

The Board noted that "[t]he ALJ suggested that under N.J.S.A. 43:16A-8(2), the Board can stop a disability retirement benefit 10 days after the Board determines that a disability retiree is able to return to work," but the Board found that "[t]his suggestion is inconsistent with . . . N.J.S.A. 43:16A-8(2)" because "[t]he Board pays the disability retirement until the retiree is returned to employment." *Id.* at *1-2 (citing Klumb v. Bd. of Educ. of the Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14 (2009)).

[Initial Decision at 10.]

Further, the Board's adoption of McNally was premised on "the unique circumstances" of that case where the Medical Review Board had already reviewed the application and made a determination regarding McNally's disability. McNally, 2018 N.J. AGEN LEXIS 324, at *1. In addition to differing circumstances of the application, the Board notes that McNally was adopted by the Board before 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), 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). Processing Ms. Creamer's Ordinary disability application would be contrary to law.

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.

Here, it is undisputed that Ms. Creamer is not eligible for reinstatement, re-hire, future employment, or any employment relationship with Middle Township, her employer at the time her Ordinary disability application was filed. Therefore, she cannot “report for duty” to Middle Township and cannot comply with N.J.S.A. 43:16A-8(2). There is no material difference between Nowicki’s and Ms. Creamer’s ability to comply with the return-to-work provision of N.J.S.A. 43:16A-8(2).

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 to 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.’ See 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, 400-01.” Marques, 2018 N.J. Super. Unpub. LEXIS 2727 at *4.

Ms. Creamer’s situation is similar to that of Nowicki, Marques and Semenza v. Board of Trustees, Police & Firemen’s Retirement System, TYP 1844-2015 (Final Decision Nov. 15, 2016), where the Board denied a disability retirement application by a former police officer who agreed

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to never return to their previous employer(s). Id. at 7. As in Nowicki and Semenza, the terms of the Separation Agreement make it impossible for Ms. Creamer to satisfy N.J.S.A. 43:16A-8(2). 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 Ms. Creamer cannot return to her former employer, she is not eligible to apply for Ordinary disability retirement.

CONCLUSION

Based upon the above, the Board adopts the ALJ's findings of fact but rejects the ALJ's legal reasoning and conclusion that Ms. Creamer is eligible to apply for Ordinary 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 Amy Chung (ET), DAG Chris Meyer (ET)
Mary Creamer