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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4684-14T3

TIMOTHY CLARKE,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES, POLICE AND
FIREMEN'S RETIREMENT SYSTEM,

Respondents-Respondents.

Submitted March 7, 2017 – Decided March 28, 2017

Before Judges Reisner and Koblitz.

On appeal from the Board of Trustees, Police
and Firemen's Retirement System, Docket No.
3-65585.

Colleen A. McCarthy, attorney for appellant.

Christopher S. Porrino, Attorney General,
attorney for respondent (Melissa H. Raksa,
Assistant Attorney General, of counsel; Jeff
S. Ignatowitz, Deputy Attorney General, on the
brief).

PER CURIAM

Timothy Clarke appeals from the May 5, 2015 final decision
of the Board of Trustees (Board) of the Police and Firemen's

Retirement System (PFRS), which forfeited petitioner's PFRS service and salary from March 2007 through September 2010. Clarke contends that the partial forfeiture of his pension was contrary to law, the Board made insufficient findings, and he was unable to file for benefits while incarcerated. We affirm substantially for the reasons stated in Administrative Law Judge (ALJ) Jeffrey A. Gerson's written findings, which were adopted by the Board.

Clarke worked as a firefighter with the Elizabeth Fire Department (EFD) for about twenty years, beginning in August 1991. On March 25, 2007, Clarke was arrested and charged with fourth-degree criminal trespass, N.J.S.A. 2C:18-3(c), and the disorderly persons offense of lewdness, N.J.S.A. 2C:14-4(a). Clarke's arrest resulted from a police call reporting a nude male peering into a private home in the middle of the night. Upon arriving at the scene, officers saw Clarke running across his neighbor's yard, towards his home. When questioned by police, Clarke admitted to peering into his neighbor's window. Clarke was accepted into a pretrial intervention program (PTI).

In July 2007, Clarke was arrested again, this time for exposing himself to the same neighbor by masturbating in his open garage and doing push-ups in his backyard while nude. Clarke was convicted of the disorderly persons offense of lewdness.

Because of this arrest and conviction, Clarke was terminated from PTI and then pled guilty to the earlier trespassing and lewdness charges. He was sentenced to three years of probation and was ordered to undergo psychiatric treatment and abstain from contacting the neighbor involved in the incidents.

After an EFD disciplinary action resulting from Clarke's arrests and convictions, in June 2008 Clarke and the EFD reached a settlement agreement that allowed Clarke to return to full firefighter duty, so long as he complied with various employment conditions including enrollment in an employee assistance program. Clarke also agreed to accept an unpaid suspension from February 16, 2008 through June 23, 2008.

In September 2010, Clarke was indicted for second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(a), fourth-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b), and third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(1), in connection with possessing and disseminating internet child pornography. The charges involved 219 computer files depicting children in various sexual acts. Clarke pled guilty to all charges.

Clarke was sentenced to five years in prison, and was subject to Megan's Law. The EFD terminated Clarke from duty, effective September 23, 2010. Clarke applied for service retirement after

his release from prison. The Board voted to forfeit all of Clarke's PFRS salary and service as dishonorable service. In its decision, the Board addressed the eleven factors established under N.J.S.A. 43:1-3(c) to determine what portion of pension forfeiture was appropriate. The Board determined that Clarke's conduct had a "high degree of moral turpitude," and was indirectly related to Clarke's public employment. Because Clarke's conduct "violated the public trust," the Board found that total forfeiture of Clarke's salary and service was warranted.

Clarke appealed the Board decision, specifically targeting the Board's findings related to factors seven, eight and nine.

Those factors are:

(7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated; (8) the relationship between the misconduct and the member's public duties; (9) the quality of moral turpitude or the degree of guilty or culpability, including the member's motives and reasons, personal gain and similar considerations

[N.J.S.A. 43:1-3(c).]

After a hearing, ALJ Gerson issued written findings of fact and conclusions of law, affirming the Board's findings related to factor seven, which addresses the nature of the misconduct or crime. The ALJ disagreed with the Board's findings related to

factor eight, which addresses the relationship between the misconduct and Clarke's position. ALJ Gerson wrote:

None of [Clarke's] offenses were related to his job and clearly none of them occurred while he was on the job. . . . The logic of the Board contending that there was an indirect relationship between the offenses and [Clarke's] job performance is at best a stretch of logic

While the ALJ did not dispute the Board's determination that Clarke's misconduct had a high degree of moral turpitude, factor nine, he disagreed that such a finding necessarily warrants complete forfeiture of Clarke's benefits. Relying on T.J.M. v. Board of Trustees, 218 N.J. Super. 274 (App. Div. 1987), ALJ Gerson ordered that Clarke receive the portion of his pension from his hire date to the date of his first arrest.

On May 5, 2015, the Board adopted ALJ Gerson's findings and voted to forfeit the portion of Clarke's PFRS service and salary from March 1, 2007 through September 30, 2010, making Clarke qualified for deferred retirement effective September 2021.

We serve a "limited role" in reviewing administrative agency decisions. In re Stallworth, 208 N.J. 182, 194 (2011) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). We will not overturn an agency decision unless the decision is "arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record as a whole." Ibid. (quoting Henry,

supra, 81 N.J. at 579-80). We may not overturn an agency decision merely because we would have come to a different conclusion. Ibid.

"However, we are 'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 302 (2011) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). Clarke contends that, because the ALJ found that Clarke's criminal behavior was not related to his public service, he should not forfeit any portion of his pension. We disagree.

A public employee must provide "honorable service" to receive his pension or retirement benefits. N.J.S.A. 43:1-3(a); see also Corvelli v. Bd. of Trs., 130 N.J. 539, 550 (1992) ("All public pension statutes . . . carry an implicit condition precedent of honorable service . . . and forfeiture can be ordered for failure of that condition."). Moreover, the Board is authorized to order forfeiture, in whole or in part, "for misconduct occurring during the member's public service which renders the member's service or part thereof dishonorable" N.J.S.A. 43:1-3(b). To require forfeiture of that portion of a member's pension that accrued prior to the criminal activity, the Board must find that the misconduct was related to his or her service. Masse v. Bd. of Trs., 87 N.J. 252, 263 (1981).

The Board must consider an eleven-factor balancing test in determining whether forfeiture is appropriate. N.J.S.A. 43:1-3(c). The Board may attribute more weight to factors seven, eight, and nine, when applicable. See Corvelli, supra, 130 N.J. at 552-53. Depending on the case-specific circumstances, the Board may determine that partial forfeiture is appropriate. N.J.S.A. 43:1-3(d). In such cases, the Board "shall order that benefits be calculated as if the accrual of pension rights terminated as of the date the misconduct first occurred" N.J.S.A. 43:1-3(d).

Partial forfeiture of Clarke's pension benefits is not prohibited by statute or case law, so long as the forfeiture covers only the pension credit accrued after the time of Clarke's wrongful conduct. In T.J.M., we reversed the full forfeiture of a police officer's retirement benefits despite his guilty plea to the sexual assault of his daughter. T.J.M., supra, 218 N.J. Super. at 283. We reversed because petitioner's crime was "uniquely personal and completely unrelated to his office." Id. at 280. When remanding the case back to the Board, we stated that the defendant's unrelated misconduct could warrant "partial forfeiture . . . but in no event should it be greater than admeasurement as of the time of the wrongful conduct." Id. at 283. ALJ Gerson and the Board

appropriately limited the forfeiture to the time following Clarke's first arrest, which occurred on March 25, 2007.

Clarke also contends that the Board's failure to provide an explanation of its findings and analysis of the eleven enumerated factors under N.J.S.A. 43:1-3(c) warrants reversal of its final decision. Unquestionably, an administrative agency must provide an adequate explanation of its decision. See In re Issuance of Permit by Dep't of Env'tl. Prot., 120 N.J. 164, 173 (1990) (quoting State v. Atley, 157 N.J. Super. 157, 163 (1978)) (We have "no capacity to review at all unless there is some kind of reasonable factual record . . . and the agency has stated its reasons grounded in that record for its action.").

After an ALJ has submitted his or her findings of fact and conclusions of law to the Board, it has forty-five days to "adopt, reject or modify the recommended report and decision." N.J.S.A. 52:14B-10. Should the Board modify or reject any of the ALJ's findings it must then "state clearly the reasons for doing so," otherwise the entire decision is deemed adopted. Ibid. Because the Board adopted ALJ Gerson's thorough findings of fact and conclusions of law in their entirety, it did not need to amplify upon those findings to permit our review of its decision.

Clarke contends finally that his inability to file a paper application for his PFRS pension benefits unjustly denied his

daughter the right to receive his benefits while he was incarcerated. See N.J.S.A. 43:1-2. Clarke did not raise this issue before the agency. We therefore decline to review the issue because it does not go "to the jurisdiction of the trial court or concern[s] matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (citations omitted). We add only the following comment. Had Clarke applied earlier for his pension, the same decision would have been rendered, but earlier. Given the Board's decision, Clarke is not eligible to receive his reduced pension until September 2021. Thus, whether he applied before he was incarcerated, while he was incarcerated or after his release is irrelevant to his receipt of benefits.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION