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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0522-16T4

SHARPE JAMES,

Petitioner-Appellant,

v.

ALTERNATE BENEFIT PROGRAM,

Respondent-Respondent.

Submitted February 12, 2018 – Decided March 27, 2018

Before Judges Messano, Vernoia and DeAlmeida.

On appeal from the Alternate Benefit Program,
Division of Pensions and Benefits, Department
of Treasury, Docket Nos. 901211 and 960037.

Alan Dexter Bowman, attorney for appellant.

Gurbir S. Grewal, Attorney General, for
respondent (Melissa H. Raksa, Assistant
Attorney General, of counsel; Amy Chung,
Deputy Attorney General, on the brief).

PER CURIAM

Petitioner challenges a determination by the Alternate Benefit Program (ABP) forfeiting one year of service credit as an employee at Essex County College (ECC). Petitioner argues that

the forfeiture was inappropriate because it was based on misconduct, including criminal acts of which he was convicted, not directly related to his position at ECC. Finding no legal support for petitioner's argument, we affirm.

I.

Petitioner Sharpe James was hired as a physical education instructor at ECC in 1968. At that time, he enrolled in ABP, a tax-sheltered, defined-contribution retirement program for higher-education faculty and administrators. Petitioner was eventually promoted to Director of Athletics, Chairperson of the Physical Education and Recreation Department, and Acting Director of the Biological Sciences Department, with the rank of professor.

In 1986, petitioner was elected Mayor of Newark. To fulfill his duties as Mayor, petitioner took an unpaid leave of absence from ECC, having accumulated 18 years of service credit in ABP.¹

In 2006, when his final term as Mayor expired, petitioner exercised his contractual right to return to ECC with the academic rank of professor. ECC's President acknowledged that a position at the college was created for petitioner due to his experience in public office. To this end, ECC created the Urban Issues

¹ In 1999, petitioner was elected to the New Jersey State Senate. This appeal does not concern a claim by petitioner to pension benefits arising from his elected offices.

Institute (UII) to explore urban problems and promote lasting change on urban issues. Effective July 1, 2006, ECC appointed petitioner as Director/Senior Fellow of the UII at an annual salary of \$150,000.² Petitioner also was assigned to teach a course on municipal government, with a component on government ethics. At petitioner's suggestion, ECC hired two of his former staffers, including Cheryl Johnson, his former chief of staff and campaign treasurer, as employees at UII.

In May 2007, petitioner applied for an ABP retirement allowance, effective July 1, 2007. His one year of service as the Director/Senior Fellow at the UII, and his salary in that position, are factors that would increase his retirement benefit.

On July 12, 2007, petitioner was indicted by a federal grand jury on multiple counts of mail fraud, wire fraud, and conspiracy. Four counts of the indictment alleged petitioner violated federal law by engaging in a fraudulent scheme to steer the sale of City-owned properties to Tamika Riley, a woman with whom he was having an extramarital affair. The indictment alleged petitioner and Riley defrauded the federal government through receipt of federal funds intended for construction or renovation of housing on

² Petitioner's immediate successor, who was also in charge of a separate institute that was merged into the UII, started with a salary of \$79,359. Her successor had a starting salary of \$75,808.

distressed properties. A fifth count alleged petitioner engaged in a conspiracy with Riley to defraud the public of his honest services. The indictment also alleged that petitioner committed fraud by using City credit cards to pay for personal expenses.

On August 17, 2007, the Acting Director, Division of Pensions and Benefits, who serves as Plan Administrator for the ABP, notified petitioner that no distributions would be made to him from the ABP while the Acting Director considered forfeiture of his service credit due to the acts alleged in the indictment.

On April 16, 2008, a jury found petitioner guilty of the mail fraud, wire fraud, and conspiracy charges associated with the land sale scheme, and of defrauding the public through the denial of honest services. The criminal acts of which petitioner was convicted took place between July 16, 2002 and October 28, 2005, while petitioner was Mayor of Newark and on leave from ECC. The counts associated with the use of the City's credit cards, which had been severed from the indictment, were voluntarily dismissed.

In July 2008, petitioner was sentenced to 27 months of imprisonment followed by three years of supervised release. He was also fined \$100,000.³

³ On September 16, 2010, the Third Circuit reversed petitioner's conviction on the honest services count, and remanded the matter for resentencing. The court affirmed petitioner's

On July 9, 2010, the Acting Director considered petitioner's retirement application. After reviewing various documents, including a stipulation of facts and the federal indictment, the Acting Director determined that the criminal acts of which petitioner was convicted were "grave and continuing," arose from his public office and the performance of his official duties as Mayor, constituted a betrayal of the public trust, and related to his position at ECC because he was a role model for students and the public as a professor. Because the misconduct started while petitioner was on leave from ECC, the Acting Director decided to forfeit service credit for petitioner's one year as the Director/Senior Fellow at the UII, and that forfeiture was not appropriate for his years of service at ECC prior to assuming public office.

Petitioner appealed that determination, contending that forfeiture was unwarranted because his criminal acts were not directly related to his position at ECC. The matter was transferred to the Office of Administrative Law (OAL) as a contested case.

A discovery issue arose at the OAL. In May 2013, ABP served interrogatories and a document request on petitioner. He did not

convictions and sentence on the remaining counts. United States v. Riley, 621 F.3d 312 (3d Cir. 2010).

respond to those discovery demands. In addition, in July 2015, ABP served requests for admissions on petitioner regarding the dismissed credit card fraud counts of the indictment and a matter pending before the Election Law Enforcement Commission (ELEC). The ELEC matter concerned petitioner's use of funds from his election campaign account to pay for his federal criminal defense. Petitioner did not respond to the requests for admission. Because of petitioner's failure to respond, the admissions are deemed true. N.J.A.C. 1:1-10.4(c).

At the first day of the OAL hearing, the Administrative Law Judge (ALJ) invited petitioner to seek leave to withdraw the deemed admissions. Petitioner thereafter requested that the deemed admissions be withdrawn, arguing that they concerned irrelevant subjects. The ALJ granted the request, excluding the admissions and any testimony regarding the credit card fraud counts or the ELEC matter.

Following the hearing, an ALJ issued an Initial Decision recommending the Acting Director not forfeit any portion of petitioner's service at ECC because "[w]hatever dishonest acts [petitioner] may have performed in his capacity as Mayor or State Senator were separate and apart from his duties at [ECC]." The ALJ further noted that petitioner's crimes "did not involve greed

or personal enrichment and did not result in financial loss to the citizens of Newark."

On August 12, 2016, the Acting Director rejected the ALJ's Initial Decision. She determined that the ALJ abused his discretion by permitting petitioner to withdraw his deemed admissions, given that the requests for admission were served five months prior to trial and no objection was raised until the first day of trial. The Acting Director also rejected the ALJ's exclusion of evidence associated with the credit card fraud counts and the ELEC matter. She found both matters to be relevant in light of the broad scope of inquiry permitted in the discretionary forfeiture context.

After considering "all of [petitioner's] actions while in public service," the Acting Director concluded that petitioner's criminal acts and other misconduct amounted to a "significant violation of federal laws and a direct repudiation of [petitioner's] official duties, which resulted in a breach of the public's trust in public college professors and elected officials." The Acting Director concluded that petitioner was hired by ECC for his experience in public office and that it was "inconceivable" that ECC would have created a position for petitioner at UII and given him a \$150,000 annual salary had he disclosed to the college his criminal misconduct as Mayor.

She also concluded that petitioner's criminal acts began while he was on leave from the ECC, but other misconduct took place after he returned to the college. In support of that conclusion, the Acting Director found that petitioner and Johnson used the UII office as "a de facto 'base of operations' to coordinate the defense to the criminal charges" petitioner anticipated he would face from his time in public office. According to the Acting Director, the evidence showed petitioner and Johnson used the UII address to receive mail from petitioner's criminal defense attorneys, and used UII telephones to call ELEC on weekdays with respect to the pending ELEC matter.

Based on these conclusions, and a balancing of other factors favorable to petitioner, including the good works he accomplished in public office, and his unblemished tenure at ECC prior to being elected Mayor, the Acting Director determined that forfeiture of service credit for the one year that petitioner was employed at ECC after he returned from his leave of absence was appropriate.

This appeal followed.

II.

Our scope of review of an administrative agency's final determination is limited. In re Herrmann, 192 N.J. 19, 27 (2007). The "final determination of an administrative agency . . . is

entitled to substantial deference." In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016).

An appellate court will not reverse an agency's final decision unless the decision is "arbitrary, capricious, or unreasonable," the determination "violate[s] express or implied legislative policies," the agency's action offends the United States Constitution or the State Constitution, or "the findings on which [the decision] was based were not supported by substantial, credible evidence in the record."

[Ibid. (alterations in original) (quoting Univ. Cottage Club of Princeton N.J. Corp. v. Dep't of Env't'l Prot., 191 N.J. 38, 48 (2007)).]

On the other hand, the court is "'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Dep't of Children & Families v. T.B., 207 N.J. 294, 302 (2011) (alterations in original) (quoting Mayflower Sec. Co. v. Bureau of Secs., 64 N.J. 85, 93 (1973)). Since "an agency's determination on summary decision is a legal determination, [appellate] review is de novo." L.A. v. Bd. of Educ., 221 N.J. 192, 204 (2015).

Pension forfeiture is governed by statute. The receipt of a public pension or retirement benefit is conditioned on the rendering of honorable service. N.J.S.A. 43:1-3(a). The Acting Director has the authority to order the forfeiture of all or part of the earned service credit or pension or retirement benefits of

any member of ABP "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). The statute identifies eleven factors that must be considered in evaluating a member's misconduct to determine whether it renders the member's service dishonorable, and whether full or partial pension forfeiture is appropriate:

- (1) the member's length of service;
- (2) the basis for retirement;
- (3) the extent to which the member's pension has vested;
- (4) the duties of the particular member;
- (5) the member's public employment history and record covered under the retirement system;
- (6) any other public employment or service;
- (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 guilt or culpability, including the member's motives and reasons, personal gain or similar considerations;
- (10) the availability and adequacy of other penal sanctions; and

(11) other personal circumstances relating to the member which bear upon the justness of forfeiture.

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

This statute codifies the factors set forth by our Supreme Court in Uricoli v. Board of Trustees, Police and Firemen's Retirement System, 91 N.J. 62, 77 (1982), for determining whether a full or partial forfeiture of a pension benefit is warranted. The "pension forfeiture policy is penal in nature and has as its objectives the same considerations underlying all such schemes: punishment of the individual and deterrence, both as to the offending individual and other employees." Eyers v. Bd. of Trs., Pub. Emps.' Ret. Sys., 91 N.J. 51, 56 (1982).

Having reviewed the Acting Director's written decision, we conclude that she considered each of the statutory factors, carefully weighed the relevant facts, and made a soundly reasoned determination to forfeit the last year of petitioner's service at ECC. Petitioner committed criminal acts in his position as Mayor, and, at a time when those acts were not yet publicly known, accepted a position at ECC created for him to serve as an educator and mentor for college students interested in municipal government and public service. The salary set for the newly created position was significant, a reflection of the value ECC placed on petitioner's public service. We cannot find fault with the Acting

Director's determination that petitioner would not have been named Director/Senior Fellow of the UII had his criminal conduct as Mayor been known to the college at the time of his appointment.

In addition, it was reasonable for the Acting Director to conclude that petitioner's misconduct as Mayor brought dishonor on his position at ECC, where he served as a teacher and role model to college students. The Acting Director reasonably concluded that service in those roles by someone who used his public office to engage in a criminal conspiracy was not honorable.

Contrary to petitioner's arguments, it was appropriate for the Acting Director to consider evidence related to the credit card fraud counts of the indictment in her forfeiture analysis. While it is true that those counts ultimately were dismissed, this fact alone does not preclude their consideration under N.J.S.A. 43:1-3. Honorable service under that statute "is sufficiently generic to encompass a broad range of misconduct bearing on the forfeiture decision, including, but not limited to criminal conviction. . . . [T]he balancing test anticipates a situation in which non-criminal misconduct can factor into a pension-forfeiture decision." Corvelli v. Bd. of Trs., Police and Firemen's Ret. Sys., 130 N.J. 539, 552 (1992). We note, however, that even absent such evidence, the record adequately supports the Acting Director's determination that petitioner did not render

honorable service during his final year at ECC, in light of his criminal acts as Mayor, and the impact of those acts on his positions of Director/Senior Fellow at UII and professor.

The same is true for the Acting Director's consideration of the use of ECC time and resources by petitioner to coordinate his federal criminal defense, and to contact ELEC with respect to the propriety of his use of campaign funds for his defense. These acts of misconduct, which are directly related to petitioner's final position at ECC, are relevant to whether he honorably served in the role of Director/Senior Fellow at UII. It is plain that it is dishonest for an employee to use public resources, including the time of a co-worker, to prepare a defense to expected criminal charges, and to arrange for the personal use of campaign funds.⁴

Nor are we convinced by petitioner's argument that the Acting Director's forfeiture decision is erroneous because petitioner's criminal convictions did not directly involve or touch his employment at ECC. Petitioner misapprehends the law. The mandatory forfeiture statute, N.J.S.A. 43:1-3.1(a), not applicable here, requires a public employee who is convicted of a crime that "involves or touches [his or her] office, position or employment"

⁴ Respondent represents to this court that ELEC ultimately determined that petitioner had misused campaign funds for his criminal defense.

to "forfeit all of the pension or retirement benefit earned as a member of . . . [the] retirement system in which he [or she] participated at the time of the commission of the offense and which covered the office, position or employment involved in the offense." A crime or offense that "'involves or touches such office, position or employment' means that the crime or offense was related directly to the person's performance in, or circumstances flowing from, the specific public office or employment held by the person." Ibid.

The Acting Director did not rely on N.J.S.A. 43:1-3.1(a) to determine that forfeiture of one year of petitioner's service credit at ECC was warranted. She instead relied on the discretionary provisions of N.J.S.A. 43:1-3, which allow forfeiture in a broader set of circumstances. Under N.J.S.A. 43:1-3(b), misconduct need not "involve[] or touch[] upon" the employee's public office to trigger forfeiture, but must only "occur[] during the member's public service." This important distinction is recognized by the courts. See Corvelli, 130 N.J. at 548 (noting that pension benefits may be forfeited under a discretionary analysis for "a crime involving moral turpitude which is unrelated to . . . public office."); T.J.M. v. Bd. of Trs., Police and Firemen's Ret. Sys., 218 N.J. Super. 274, 280, 283 (App. Div. 1987)(police officer's sexual assault on daughter,

although a crime "uniquely personal and completely unrelated to his office," may be considered as factor in discretionary forfeiture analysis under Uricoli).

We also reject petitioner's contention that he did not benefit personally from his criminal conspiracy with Riley. As the Third Circuit noted,

[b]y providing a means for Riley to gain income from the City's assets, James was otherwise relieved from expending his own. Thus, a reasonable jury could have concluded that James did receive a cognizable benefit even though he did not accept directly any of the proceeds from Riley's sale of the properties.

[Riley, 621 F.3d at 332.]

In addition, there can be no doubt that, as the federal judge who sentenced petitioner noted, the true casualty of petitioner's wrongful behavior was the public trust, given that the people of Newark are entitled to decisions by public officials made in the public's best interest, unclouded by extramarital affairs and emotional entanglements.


Petitioner did not include in his merits brief arguments directly addressing the Acting Director's determination with respect to the unanswered requests for admission. Nor did petitioner include the requests for admission in his appendix, making it impossible for this court to determine what facts were

deemed admitted. Consequently, we decline to address the point. See R. 2:6-2(a)(6). We note, however, that to the extent that the ALJ concluded that the admissions should not be deemed admitted because they concerned facts that did not directly relate to petitioner's position as Mayor, that determination was erroneous. As discussed above, all misconduct, whether or not directly related to petitioner's position as Mayor, is relevant to the discretionary forfeiture analysis.

We have considered petitioner's argument that he made positive contributions during his service in elective office, but we cannot conclude it was unreasonable for the Acting Director to determine that petitioner's last year of employment at ECC constituted dishonorable service requiring forfeiture of the contested service credit.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION