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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2797-20**

CYNTHIA E. COVIE,

Petitioner-Appellant,

v.

**BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,**

Respondent-Respondent.

Argued October 17, 2022 – Decided December 13, 2022

Before Judges Mawla, Smith, and Marczyk.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of the Treasury, PERS No. xx6370.

Angelo J. Genova argued the cause for appellant (Genova Burns LLC, attorneys; Angelo J. Genova and Lauren W. Gershuny, of counsel and on the briefs).

Robert E. Kelly, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Robert E. Kelly, on the brief).

PER CURIAM

Petitioner Cynthia E. Covie appeals from the final decision of the Board of Trustees (Board) of the Public Employees' Retirement System (PERS) denying her request for a ten-year extension of her PERS account. We affirm.

I.

Petitioner appeals from the May 19, 2021 final decision of the Board that she is not eligible to continue her expired PERS account should she return to eligible employment within ten years of her last PERS contribution, because her discontinuance of service was not due to a layoff or reduction in force. Petitioner was enrolled in PERS on or about May 1, 1991. She began her most recent position, with the Board of Public Utilities (BPU), on February 16, 2015. She left that position, involuntarily, on February 16, 2018, due to a change in political administration. Her last pension contribution from that position to her PERS account was on March 31, 2018. On December 3, 2019, the Division of Pensions and Benefits (Division) advised petitioner in writing her account would expire two years after March 31, 2018, the date of her last pension contribution, pursuant to N.J.S.A. 43:15A-7(e). In response, on January 27, 2020, petitioner requested continuation of her PERS membership pursuant to N.J.S.A. 43:15A-8(a). Petitioner argued that the nature of her separation from employment

qualified for an extension under the plain language of the statute because she was involuntarily separated from employment without personal fault. The BPU confirmed to the Division that her employment had ended due to a "change of administration in 2018."

The Division rejected petitioner's request for an extension via letter on February 10 and March 9, 2020, taking the position that N.J.S.A. 43:15A-8(a) does not provide for continuation of membership for employees appointed to "unclassified" or "at-will" positions. In its March 9, 2020 letter to petitioner, the Division stated that the "[ten]-year extension on a member[']s account under [PERS] is applicable for members who were laid off or whose positions were abolished." The letter also stated, "[s]ince your position was an [u]nclassified appointment, your termination did not allow you to have an extension beyond two years from the date of your last pension deduction." Petitioner appealed the Division's initial decision to the Board, which reviewed her claim at its meeting on October 21, 2020. Petitioner personally addressed the Board at the meeting.

The Board, making findings, adopted the Division's initial decision. The Board noted under certain circumstances that an individual may be eligible to continue their original PERS membership if they become reemployed in a PERS-eligible position within ten years from her separation from service.

N.J.S.A. 43:15A-8(a). The Board found petitioner did not meet the statutory eligibility criteria. Consequently, her membership in the PERS ended two years after the end of active service. In reaching this conclusion, the Board found petitioner's employment was not "discontinued" as contemplated in the statute, but rather terminated because petitioner was a political employee who left her position as a result of a change in political administration. It therefore denied petitioner's request to extend the expiration of her PERS account beyond the two-year limitation established in N.J.S.A. 43:15A-7(e).

The Board concluded petitioner, as an unclassified "at-will" employee who held a political appointment which ended with a change in administration, did not fall within the exceptions for extending the two-year expiration period for PERS membership. Petitioner sought reconsideration and after considering petitioner's additional submissions and argument by her counsel, the Board determined that there were no disputed facts and denied the appeal without an administrative hearing. The Board issued its final decision on May 19, 2021.

On appeal, petitioner argues: the Board's denial of the ten-year extension to her PERS account is contrary to the plain language of N.J.S.A. 43:15A-8(a) because she was terminated without fault; the Board should be equitably estopped from denying the ten-year extension of her PERS account because it

previously granted extensions to unclassified employees; and the Board was required to toll expiration of her account due to the COVID-19 pandemic.

II.

Our review of an administrative agency's final decision is limited. In re Carter, 191 N.J. 474, 482 (2007). We afford "a strong presumption of reasonableness" to the "agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980)). Absent arbitrary, unreasonable, or capricious action, or a lack of support in the record, the agency's final decision will be sustained. In re Herrmann, 192 N.J. 19, 27-28 (2007).

"It is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (alteration in original) (quoting In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997)). However, we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007) (quoting In re Taylor, 158 N.J.

644, 658 (1999)). We continue to "apply de novo review to an agency's interpretation of a statute or case law." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (citing Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)).

When considering pension related claims, we have concluded "eligibility is not to be liberally permitted." Smith v. State, Dep't of Treasury, Div. of Pensions & Benefits, 390 N.J. Super. 209, 213 (App. Div. 2007). "Instead, . . . the applicable guidelines must be carefully interpreted so as not to 'obscure or override considerations of . . . a potential adverse impact on the financial integrity of the [f]und.'" Ibid. (alteration in original) (quoting Chaleff v. Tchrs.' Pension & Annuity Fund Trs., 188 N.J. Super. 194, 197 (App. Div. 1983)). The burden to establish pension eligibility is on the applicant, not the Board. Patterson v. Bd. of Trs., State Police Ret. Sys., 194 N.J. 29, 50-51 (2008).

III.

Petitioner contends the Board's denial of a ten-year extension to her PERS account is contrary to the plain language of N.J.S.A. 43:15A-8(a), because she was terminated without fault. We conduct a de novo review of the Board's interpretation of the statute. Russo, 206 N.J. at 27.

Two statutory provisions control membership in PERS when a member's public employment ends. N.J.S.A. 43:15A-7(e) provides: "Membership of any person in the [PERS] retirement system shall cease if [they] shall discontinue [their] service for more than two consecutive years." In turn, N.J.S.A. 43:15A-8(a) provides:

If a member of the retirement system has been discontinued from service without personal fault or through leave of absence granted by an employer or permitted by any law of this State and has not withdrawn the accumulated member's contributions from the retirement system, the membership of that member may continue, notwithstanding any provisions of this act if the member returns to service within a period of [ten] years from the date of discontinuance from service.

N.J.S.A. 43:15A-8(a) is a "discrete and limited exception," Del Pomo v. Bd. of Trs., Pub. Emps. Ret. Sys., 252 N.J. Super. 430, 433 (App. Div. 1991), to the general rule that should be "narrowly construed," Petition of Singer Asset Fin. Co., 314 N.J. Super. 116, 121 (App. Div. 1998).

In Lally v. Pub. Emps.' Ret. Sys., 246 N.J. Super. 270, 272 (App. Div. 1991), a municipal councilperson argued they were entitled to the ten-year extension in N.J.S.A. 43:15A-8(a) after they served two three-year terms. We deferred to the Board, which found that they "was not laid off, nor was [their] position abolished." Ibid. Their separation from service was triggered by

"operation of law upon [their] departure from office as municipal council[person]." Ibid. We held N.J.S.A. 43:15A-8(a) is limited to circumstances where a member is on approved leave of absence without pay, or their employment terminates through no fault of their own, such as a layoff or abolishment of a position. Ibid.

Here, like in Lally, petitioner's employment carried an inherent uncertainty about when it would end. Petitioner accepted an unclassified position, which came with two risks which are relevant here: the risk that she could lose her job due to electoral consequences through no fault of her own; and the risk that her PERS account would expire under N.J.S.A. 43:15A-7(e) unless she returned to covered employment within two years. Petitioner, by her account, has been employed by State of New Jersey in various capacities for over twenty-five years. Based on her years of experience as a public employee, petitioner knew or should have known on the date she took the job that her unclassified position at the BPU could terminate upon a change in political administration, albeit through no fault of her own. Petitioner's discontinuance from service was foreseeable and not the result of a layoff or abolition of the position under N.J.S.A. 43:15A-8(a). See Lally, 246 N.J. Super. at 272.

Petitioner argues that the plain language of N.J.S.A. 43:15A-8(a) calls for her inclusion within the protected class of employees that can re-enroll in PERS within ten years. Her position is that she was "discontinued from service without personal fault" and therefore is entitled to re-enroll outside of the two-year window set forth in N.J.S.A. 43:15A:7(e). We are not persuaded. Such an interpretation of the statute would confer on unclassified public employees a protected status that the Board has declined to extend. We are not inclined to confer such status where the Board, with its expertise in managing the fiscal integrity of its pension funds, has not done so. Smith, 390 N.J. Super. at 213. While we are not bound by the Board's statutory interpretation, Richardson, 192 N.J. at 196, on this record we find its interpretation of N.J.S.A. 43:15A-8(a), a statute clearly "within [the Board's] implementing and enforcing responsibility," warrants our deference. Wnuck, 337 N.J. Super. at 56. See Colongna v. Bd. of Trs., Police and Fireman's Ret. Sys., 430 N.J. Super. 362, 376 (App. Div. 2013) (interpreting an analogous provision of the PFRS, N.J.S.A. 43:16A-3(5), to apply only to police and fire members who lost their public employment through layoff or reduction in force).

Petitioner next argues the Board should be equitably estopped from denying her the ten-year extension of her PERS account because the Board previously granted extensions to unclassified employees.

The doctrine of "[e]quitable estoppel is rarely invoked against a governmental entity . . . particularly when estoppel would 'interfere with essential governmental functions.'" O'Malley v. Dep't of Energy, 109 N.J. 309, 316 (1987) (internal citation omitted) (quoting Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)). The doctrine can be invoked against a governmental entity only "to prevent manifest injustice." Ibid. (quoting Vogt, 14 N.J. at 205).

Petitioner posits various arguments in support of her equitable theories, but none are persuasive. All but one of them are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We address the remaining argument briefly.

Petitioner alleges that a Board employee incorrectly told her she would be eligible for an extension. The record shows that after the Board wrote her to alert her of the pending deadline, petitioner wrote back on January 27, 2020, seeking an extension. The Board replied by explaining petitioner's lack of eligibility for an extension on February 10 and March 9, 2020. Even if we accept petitioner's assertion that a Board employee originally made an incorrect

statement to her about eligibility, the written record belies her detrimental reliance on such a statement.

Finally, petitioner argues that because of the COVID-19 pandemic, the Board should have extended eligibility for unclassified employees beyond the two-year limit established in N.J.S.A. 43:15A-7(e). Petitioner has not cited any COVID-19 related executive order or legislative act authorizing the Board to modify its statutory PERS membership criteria in such a sweeping manner, and we are not persuaded.

For these reasons, petitioner has not met her burden to establish pension eligibility. Patterson, 194 N.J. at 50-51. We defer to the Board where it properly exercised its authority to interpret N.J.S.A. 43:15A-8(a), a statute squarely within its implementing and enforcing responsibility. Wnuck, 337 N.J. Super. at 56.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION