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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0611-21**

DWAYNE SMITH,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES,
POLICE AND FIREMENS'
RETIREMENT SYSTEM,

Respondent-Respondent.

Submitted May 24, 2023 – Decided July 17, 2023

Before Judges Accurso and Vernoia.

On appeal from the Board of Trustees of the Police and Firemens' Retirement System, Department of the Treasury, PFRS No. xx2482.

Alterman & Associates, LLC, attorneys for appellant (Stuart J. Alterman and Timothy J. Prol, on the brief).

Robert S. Garrison, Jr., Director of Legal Affairs, attorney for respondent (Juliana C. DeAngelis, Legal Counsel, on the brief).

PER CURIAM

Dwayne Smith was discharged from his position as a senior corrections officer at Northern State Prison in 2010 for conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). In re Smith, No. A-0698-11 (App. Div. Oct. 2, 2012) (slip op. at 1, 6). He and another officer were the only two corrections officers assigned to a locked infirmary unit at the prison on an overnight shift. Id. at 2-3. The other officer controlled the only door. Id. at 5. A University of Medicine and Dentistry nurse caring for prisoners in the unit had complained to Smith on several occasions that his colleague was "bothering her." Id. at 2, 7.

On the night that led to Smith's termination, the nurse reported to him that his fellow officer was "starting up again." Id. at 3. Smith told her to ask the other nurse in the unit to switch places with her so she wouldn't be near the other officer, and to report the officer to the sergeant when she next saw him. Ibid. The other nurse refused to switch places. Ibid. In the middle of the night, Smith's colleague sexually assaulted the nurse. Ibid. Afterward, the nurse angrily showed Smith a wad of tissues she was using to wipe semen from her hands, prompting Smith to ask, "What are you showing me?" before the nurse walked away from him. Ibid.

Smith challenged his termination at a hearing in the Office of Administrative Law at which he and the nurse, as well as an investigator from the prison, testified. Id. at 2-6. Smith acknowledged "friction" between the nurse and his fellow officer, id. at 5, and that the nurse told him the other officer was "starting up" on the night she was assaulted, id. at 6. He maintained, however, that he never knew the nature of the problem between the nurse and his colleague, and that he'd tried to help her by suggesting she switch places with the other nurse in the unit. Id. at 5-6. He admitted the nurse had shown him something that evening, but never told him she'd been sexually assaulted. Id. at 6.

The nurse testified she'd told Smith his colleague was bothering her, and that she didn't "want any prison scandal," she just wanted him to stop. Id. at 2. She also testified Smith told her to report his colleague to the sergeant. Id. at 2-3. The nurse acknowledged she'd not told Smith she'd been sexually assaulted when she showed him the tissues in her hands that night. Id. at 3. The investigator testified Smith admitted the nurse told him she was being harassed by his colleague and that he'd "advised her to report it to a supervisor." Id. at 4.

The Administrative Law Judge made detailed credibility findings, deeming Smith "evasive and unresponsive" and the nurse and the prison investigator "believable and persuasive and more credible than Smith." Id. at 7. The ALJ found the nurse told Smith his colleague was bothering her and that it was his responsibility to have asked her for the details because he was her "first line of protection. He was told something had happened and did nothing in response, and as a result [the nurse's] safety and security were compromised." Ibid. (alteration in original). The ALJ also concluded the nurse had told Smith she'd been sexually assaulted and his response had been to tell her "to report it to a supervisor." Id. at 8. The ALJ concluded "the egregiousness of the offense" made "removal the proper penalty." Ibid.

Smith filed exceptions with the Civil Service Commission, claiming the ALJ had "misconstrued the nurse's testimony," that she'd never told him she'd been sexually assaulted and what he had been told "did not give rise to a duty to report." Ibid. He also claimed his firing was in retaliation for his failure to assist in the defense of the nurse's suit against the DOC, ibid., and termination was too harsh a remedy.

The Civil Service Commission, although disagreeing with the ALJ's finding that the nurse told Smith that she was sexually assaulted the night it

happened, otherwise affirmed on its de novo review of the record. Id. at 8-9. The Commission found ample support for the ALJ's finding the nurse had advised Smith of the problem she was having with his colleague and did so the night she was assaulted. Id. at 9. The Commission concluded that Smith, although aware of a problem, failed to address it before the assault and further failed to investigate the nurse's report afterwards. Ibid. The Commission, like the ALJ, had no hesitation in concluding Smith's removal was the appropriate penalty given the egregiousness of Smith's offense. Ibid.

Smith appealed, reprising his arguments to the Commission. We affirmed in a short opinion, concluding

Smith was a law enforcement officer charged with the safety of staff in the prison. He was well aware that the nurse was not at liberty to leave the infirmary and go about the prison at will, and that [his colleague] controlled the only door into the unit, in any event. [Smith] further knew that [his colleague] had "bothered" the nurse on prior occasions and that "he was starting up" on the night of the assault.

[Id. at 13.]

We stressed that

Smith was the only other officer in the unit on the overnight shift, the only one to whom the nurse could have turned for assistance. His response, that the nurse should try and switch spots with another nurse

and report [his colleague] to a sergeant, fell far below what is expected of a law enforcement officer.

[Ibid. (citing Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965)).]

We agreed Smith's failure to act, "contributing as it did to the safety and security of the nurse being compromised," was severe misconduct warranting Smith's removal. Ibid. See In re Herrmann, 192 N.J. 19, 33 (2007) (holding progressive discipline may be bypassed "when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property").

In June 2019, Smith filed an application for a deferred retirement, which the Board of Trustees of the Police and Firemen's Retirement System denied because Smith's 2010 removal for misconduct makes him ineligible for a deferred pension under the plain language of N.J.S.A. 43:16A-11.2 (providing a member with ten years of creditable service, who was separated before reaching the age of 55, may elect to receive deferred retirement benefits so long as the member's separation was "not by removal for cause on charges of misconduct or delinquency").

Smith appealed, and the Board transferred the matter to the OAL for a hearing. The parties having agreed "the issues in the case were essentially

legal" ones, the ALJ set a schedule for summary decision. After the Board filed its motion, however, Smith responded by claiming issues of material fact entitled him to a hearing. Smith contended the nature of his misconduct did not warrant forfeiture of his retirement benefits under the Uricoli¹ factors subsequently codified at N.J.S.A. 43:1-3(c).

The ALJ disagreed, finding the facts resulting in Smith's removal were established at a hearing at the OAL, as modified by the Civil Service Commission, on Smith's appeal of his 2010 termination by the DOC. Because Smith does not dispute he was removed "for cause on charges of misconduct" in 2010, N.J.S.A. 43:16A-11.2, which charges were upheld by the Commission and affirmed by this court, the ALJ found Smith's right to deferred retirement benefits was automatically forfeited under the express language of N.J.S.A. 43:16A-11.2. See Borrello v. Bd. of Trs., Pub. Emps.' Ret. Sys., 313 N.J. Super. 75, 77 (App. Div. 1998) ("interpret[ing] N.J.S.A. 43:1-3 as applying only to those claims for benefits where the specific pension statute is silent respecting the effect of a conviction for a crime relating to the applicant's public office").

¹ Uricoli v. Board of Trustees, 91 N.J. 62, 77-78 (1982).

The ALJ found Smith was not entitled to a balancing of the Uricoli factors because, as the Supreme Court acknowledged in Uricoli, N.J.S.A. 43:16A-11.2, the statute under which Smith applied for benefits, contains an "express provision for forfeiture in the case of an employee who seeks early retirement benefits and who was removed 'for cause or charges of misconduct or delinquency.'" 91 N.J. at 74 n.4.

Smith filed exceptions contending "[t]he injustice inherent in this situation rises from the all-or-nothing, unwavering posture of N.J.S.A. 43:16A-11.2," which does not require a balancing test as in Uricoli or N.J.S.A. 43:1-3. The Board adopted the ALJ's summary decision that Smith is ineligible for deferred retirement benefits under N.J.S.A. 43:16A-11.2.

Smith appeals, reprising the arguments he made before the ALJ and the Board that "there are questions of fact regarding the underlying alleged conduct" and "the appropriateness" of the penalty. He adds that the Board's decision was arbitrary and capricious because notwithstanding he "was technically 'removed for cause,' factual questions remain as to whether the underlying conduct legitimately constitutes 'misconduct' or 'delinquency.'"

We reject his arguments as without sufficient merit to justify discussion in a written opinion. See R. 2:11-3(e)(1)(E).

As Smith acknowledges, neither N.J.S.A. 43:1-3 nor Uricoli applies here because N.J.S.A. 43:16A-11.2, the statute under which he applied for deferred retirement benefits, expressly disallows a claim for deferred retirement to members fired for misconduct — as Smith was here. He is not entitled to relitigate the finding of egregious misconduct, which resulted in his removal more than ten years ago. The statute makes forfeiture automatic here, and it is simply not our place to ignore or rewrite it. See DiProspero v. Penn, 183 N.J. 477, 492 (2005).

Affirmed.

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



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