

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

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-3256-21

APRIL LOWERY,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES,  
TEACHERS' PENSION AND  
ANNUITY FUND,

Respondent-Respondent.

---

Argued October 23, 2023 — Decided November 6, 2023

Before Judges Sabatino and Mawla.

On appeal from the Board of Trustees of the Teachers' Pension and Annuity Fund, Department of the Treasury.

Barbara E. Riefberg argued the cause for appellant (Shimberg & Friel, PC, attorneys; Barbara E. Riefberg, on the briefs).

Jeffrey Padgett, Deputy Attorney General, argued the cause for respondents (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant

Attorney General, of counsel; Jeffrey Padgett, on the brief).

## PER CURIAM

April Lowery appeals from a June 3, 2022 final agency decision by the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) finding her ineligible for ordinary disability retirement benefits, and requiring her to repay \$90,047.10 in benefits. We affirm.

Lowery was a public-school teacher from 1996 to 2019. In August 2018, while employed by the Paulsboro Board of Education (PBOE), tenure charges were brought against her, alleging: (1) conduct unbecoming toward a student; (2) chronic absenteeism; (3) incapacity; and (4) conduct unbecoming a teacher. The first charge related to a January 2018 incident alleging Lowery offered students extra credit to remove a classmate from her classroom. The students then allegedly lifted their classmate, physically "carrying and dragging him out of the classroom, along the floor, and deposited him alone in the hallway outside." The second and third charges alleged Lowery was absent "405.5" days between 2003-2017, approximately thirteen percent of the time. The fourth charge asserted the totality of Lowery's conduct described in the other charges constituted conduct unbecoming and "warrant[ed] her immediate dismissal."

Lowery's answer to the first tenure charge noted the Department of Children and Families Institutional Abuse Investigation Unit investigated the January 2018 incident and found the allegation of "neglect/risk of harm was not established . . . ." The student "did not exhibit any physical manifestations of harm" and "corrective action [was] not required." As to the remaining three tenure charges, Lowery blamed her health (asthma), the loss of a family member, and having to care for her mother, who had her own health issues.

Lowery's tenure charges were forwarded to an arbitrator for adjudication. However, on April 29, 2019, the parties entered a separation from employment agreement and release, prior to the arbitration hearing. The agreement stated Lowery would be returned to the active payroll effective May 1, 2019 through June 30, 2019, although she was to remain on sick leave with pay and medical benefits. She would then tender her irrevocable resignation effective June 30, 2019. Further, "[i]f . . . Lowery decide[d] to apply for a disability retirement, the [PBOE] agree[d] to cooperate with regard to that application." The agreement attached Lowery's irrevocable letter of resignation bearing her signature. In consideration, the PBOE agreed the tenure charges would be moot and withdrawn.

On May 1, 2019, Lowery filed for ordinary disability retirement benefits with the Division of Pensions retirement unit (Division). Although she attached medical documentation to her application as required, she did not attach the settlement agreement and resignation letter. She was uncounseled at the time. On May 7, 2020, the Division approved her application.

On June 19, 2019, PBOE filed a letter with the Division's audit section detailing the timeline of Lowery's pay from September 30, 2018, the date she was suspended, until June 12, 2019. Notably, the letter attached a copy of the settlement agreement.

On March 10, 2022, the Board notified Lowery she was ineligible for ordinary disability benefits because under N.J.A.C. 17:1-6.4, disability was not the reason for her separation and she entered a settlement agreement due to the pending tenure charges, which were not based on her disability. The Board further noted as follows:

[A]s outlined in the Division of Pension and Benefits Fact Sheet: Disability Retirement Benefits:

If you have been terminated for cause, or have a settlement agreement which sets forth the terms of your departure in lieu of the termination for cause, you and your employer must provide that information to the [Division] at the time you file for [d]isability [r]etirement. It must be shown

that you have separated from employment  
as a result of the disabling condition.

[(second emphasis added).]

The Board ordered Lowery to repay the disability benefits she received.

Lowery appealed from this decision. Her attorney argued Lowery was deprived of due process because she had not received the Division's file concerning the disability application in time for the March 2022 hearing to explain why Lowery remained eligible for benefits. Furthermore, the Board's finding it was unaware of the tenure charges when it approved the disability benefits was erroneous, because PBOE had provided the Division with a copy of the settlement agreement.

Counsel also alleged the Board misread N.J.A.C. 17:1-6.4 to mean that a settlement agreement automatically disqualified Lowery from receiving disability benefits. She asserted the agreement evidenced she left her job because of the disability, since the underlying tenure charges were related to her disability and PBOE agreed not to pursue the misconduct charges. Therefore, counsel contended "[t]he relationship between . . . Lowery's disabling conditions and her negotiation of a [s]ettlement [a]greement need[ed] to be fully explored at a hearing[,]" in the Office of Administrative Law.

On May 5, 2022, the Board denied Lowery's request for a hearing and on June 3, 2022 issued written findings of fact and conclusions of law concluding she was ineligible for disability benefits. The Board cited N.J.A.C. 17:3-6.1(g)(3), which states:

Termination of employment, voluntary or involuntary, that was caused by any reason other than the claimed disability disqualifies a member from disability retirement. A member whose employment ended after [their] employer initiated disciplinary action, . . . or [was a] party to a settlement resulting in resignation or termination, is considered to have separated from service as a result of the employer action, charges, or settlement, and not due to a disability, unless the action, charges, or settlement is shown to be a result of the disability.

[(emphasis added).]

Lowery was ineligible because the settlement agreement showed she resigned to resolve the tenure charges against her, "including all claims for excessive absenteeism and misconduct . . . ."

The Board further noted a public employee who leaves employment pursuant to an irrevocable resignation is ineligible to apply for disability benefits because they cannot be re-examined as required by N.J.S.A. 18A:66-40(a). The statute provides: "If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty

which his former employer is willing to assign to him, the beneficiary shall report for duty . . . ." Therefore, if Lowery were no longer disabled, "there is no mechanism for the Board to stop paying the pension because she could never be ordered to return to work . . . ."

The Board concluded Lowery should have submitted the agreement and irrevocable resignation with her disability retirement application. Although the audit section received a copy of the agreement from PBOE, which was "for [the] purposes of calculating and submitting payment per the terms of the agreement," it should have been sent by Lowery to the Division's disability review unit. Had Lowery and PBOE followed the proper procedure, the settlement agreement "would have been part of the review for eligibility."

#### I.

On appeal, Lowery reprises her arguments that the Board erred by denying her a hearing, misapplying N.J.A.C. 17:1-6.4, and failing to find her separation was "directly related to her disability." She alleges the Board had the settlement agreement and yet paid her benefits for two years, and therefore should be equitably estopped from terminating the disability benefits and recouping the funds paid to her due to the passage of time and its inaction.

Our "review of a pension board's decision in the fact sensitive matter of disability retirement benefits is limited." Rooth v. Bd. of Trs., Pub. Emp.'s Ret. Sys., 472 N.J. Super. 357, 364 (App. Div. 2022) (citing Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018)). An agency's action on the merits will be sustained unless that action is arbitrary, capricious, or unreasonable. In re State & Sch. Emps. Health Benefits Comm'ns' Implementation of Yucht, 233 N.J. 267, 279 (2018).

Our role in reviewing decisions of an administrative agency is generally limited to three inquiries: (1) whether the agency's action violates legislative policies; (2) whether the record contains substantial evidence to support the agency's findings; and (3) whether "the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Allstars Auto Grp., 234 N.J. at 157 (quoting In re Stallworth, 208 N.J. 182, 194 (2011)). However, we are not bound by an agency's interpretation of a statute, or its determination of a strictly legal issue. Id. at 158.

Guided by these principles, we affirm substantially for the reasons expressed in the Board's decision. We add the following comments.



## II.

There is no doubt "pension statutes are 'remedial in character' and 'should be liberally construed and administered in favor of the persons intended to be benefited thereby.'" Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., Monmouth Cnty., 199 N.J. 14, 34 (2009) (quoting Geller v. N.J. Dep't of Treasury, Div. of Pensions & Annuity Fund, 53 N.J. 591, 597-98 (1969)). However, "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). In determining a member's eligibility, statutory 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)).

We have previously addressed the interplay of a claim for disability benefits where a member of a pension has separated from employment. In Cardinale v. Board of Trustees, Police and Fire Retirement System (PFRS), we held "that when a [PFRS] member . . . voluntarily irrevocably resign[ed] from active service, such a separation from employment automatically renders the individual ineligible for ordinary disability benefits." 458 N.J. Super. 260, 263

(App. Div. 2019). Therefore, the officer's claim of disability was "irrelevant to our holding that his irrevocable resignation made him ineligible for benefits in the first place." Id. at 268.

In Rooth, we rejected a school bus driver's claim she was entitled to accidental disability retirement where she entered a settlement agreement that resolved pending administrative charges related to her operating a school bus, while intoxicated and causing an accident. 472 N.J. Super. at 360-61. Rooth irrevocably resigned from her position pursuant to her settlement agreement. Ibid. She then applied for accidental disability retirement benefits, arguing the accident caused her to suffer from depression and anxiety. Id. at 362. She was denied because she resigned and there would be no position awaiting her if she were no longer disabled. Ibid. On appeal, she claimed the administrative charges were related to her disability. Ibid. The Public Employee Retirement System (PERS) denied her appeal due to her irrevocable resignation and because "nothing in the [a]greement pertain[ed] to an alleged disability . . . ." Ibid. (second alteration in original).

Rooth reiterated her arguments on appeal, and further claimed "the settlement agreement [was] silent as to her disability and . . . therefore immaterial since she received treatment from various medical providers" before

the accident. Id. at 364. She argued PERS should have ordered a hearing because her disability was a contested fact. Ibid.

We rejected these arguments because the settlement agreement incorporating "Rooth's irrevocable resignation, alone, made her ineligible for disability benefits regardless of her claimed inability to work." Id. at 367. Her argument the agreement was silent as to disability, and therefore the issue was not covered by the settlement, was "disingenuous." Id. at 368. We noted "the underlying charges against Rooth concerning her bus accident were not shown to 'relate to' a disability. She has not shown the bus accident occurred because of a disability that impeded her ability to drive the bus. No proofs were submitted by Rooth demonstrating an inability to work." Ibid. We concluded a hearing was not necessary because there were no disputed facts showing Rooth retired due to disability. Id. at 369.

"Generally, a settlement agreement is governed by principles of contract law." Thompson v. City of Atl. City, 190 N.J. 359, 379 (2007). "Our strong policy of enforcing settlements is based upon 'the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone.'" Brundage v. Est. of

Carambio, 195 N.J. 575, 601 (2008) (quoting Peskin v. Peskin, 271 N.J. Super. 261, 275 (App. Div. 1994)).

"A basic tenet of contract interpretation is that contract terms should be given their plain and ordinary meaning." Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 321 (2019). The court cannot "remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other." Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div. 1991).

We acknowledge Lowery's case is slightly different than Rooth, in that her answer to the PBOE's charges asserted her conduct was, in part, due to her health. However, this assertion was abandoned and never proved when Lowery entered the settlement and resigned. There is no evidence she resigned for health reasons, let alone a disability because the settlement agreement makes no mention of her medical condition. Rather, the plain language of the agreement shows she resigned in consideration for dismissal of the tenure charges. Holding a hearing to consider testimony about Lowery's unexpressed reasons for entering the settlement would ignore the plain language of the agreement and vitiate the entire purpose of the settlement.

Moreover, as the Board noted, N.J.A.C. 17:3-6.1(g)(3) provides a mechanism for a party to memorialize in their agreement the settlement was the result of a disability. If Lowery wanted to include this language she could have done so, but she did not. For these reasons, we conclude the Board's decision was not arbitrary, capricious, or unreasonable, and did not constitute a mistake of law.

### III.

"Equitable estoppel is rarely invoked against a governmental entity . . . ." In re Johnson, 215 N.J. 366, 378 (2013) (internal quotations and citations omitted). "Nonetheless, equitable considerations are relevant to assessing governmental conduct . . . and may be invoked to prevent manifest injustice . . . ." Id. at 379 (first citing Skulski v. Nolan, 68 N.J. 179, 198 (1975), and then citing Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)).

Under an estoppel theory, a litigant must prove that the opposing party "engaged in conduct, either intentionally or under circumstances that induced reliance . . . ." Knorr v. Smeal, 178 N.J. 169, 178 (2003). This involves "a knowing and intentional misrepresentation" by the party against whom estoppel would apply. O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987).

N.J.S.A. 18A:66-56 vests the Board with "the general responsibility for the proper operation of the [TPAF] . . . ." The Board has authority to correct errors in the retirement system if an individual receives a retirement benefit they are not legally entitled to receive. N.J.S.A. 18A:66-63. Allowing ineligible members to receive retirement benefits "place[s] a greater strain on the financial integrity of the fund in question and its future availability for those persons who are truly eligible for such benefits." Smith, 390 N.J. Super. at 215.

There is no evidence PBOE or the Board knowingly or intentionally made a misrepresentation to Lowery that she was entitled to receive disability benefits. Lowery received disability payments because she and PBOE neglected to submit the settlement agreement to the appropriate unit in the Division. Once the Board noticed the error, it corrected it in accordance with its oversight powers. Equitable estoppel does not apply.

Lowery likens her case to Indursky v. Board of Trustees, Retirement System, where we denied an agency's attempt to recoup retirement benefits after it failed to timely seek a modification of the retiree's benefits following changes to the governing statute. 137 N.J. Super. 335, 344 (App. Div. 1975). There, we held:

In determining whether administrative action has been taken within a reasonable time or with reasonable

diligence, we . . . consider as factors: (1) whether there was fraud or illegality in the original action; (2) whether the beneficiary of the action contributed to any illegality or fraud, and (3) the extent of reliance or change in position by parties affected by the modifying action.

[Id. at 343.]

We concluded Indursky was not responsible for the Board's failings because nothing in his conduct "[could] be fairly concluded [to have] contributed to the failure by [the agency]" to correctly assess his eligibility for benefits. Ibid. Lowery's case is different, because her own failure to submit the settlement agreement to the Division played a direct role in the error.

Notwithstanding our conclusion that Lowery must make the TPAF whole, we note that in July 2022 she qualified for Social Security disability. Therefore, the Board shall factor not only the duration, but also her ability to pay in establishing Lowery's repayment obligation and a fair installment plan.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION