



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PENSIONS AND BENEFITS  
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*State Treasurer*

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*Acting Director*

December 12, 2017

Jeffrey W. DeSimone



RE: 

## **FINAL ADMINISTRATIVE DETERMINATION**

Dear Mr. DeSimone:

I am writing in reference to the action of the Board of Trustees of the Police and Firemen's Retirement System (PFRS) in denying your request for Deferred retirement pursuant to N.J.S.A. 43:16A-11.2. The PFRS Board initially reviewed the request at its August 14, 2017, meeting and denied your application for Deferred retirement. On September 15, 2017, you appealed the Board's denial and requested a hearing in the Office of Administrative Law ("OAL"). At its meeting of November 13, 2017 the Board denied your request for a hearing in the OAL. Findings of Fact and Conclusions of Law, as outlined below were presented and approved by the PFRS Board at its December 11, 2017, meeting.

The PFRS Board has reviewed your written submissions and the documentation accompanying your appeal and finds that the statutes and regulations governing the PFRS do not permit the PFRS Board to grant your request to collect Deferred retirement benefits because you were removed from your employment on charges of misconduct or delinquency.

### **FINDINGS OF FACT**

You were enrolled in the Public Employees' Retirement System ("PERS") on May 1, 1984 based upon your employment as a Communications Operator with the Township of Nutley. An

*Application for Inter-fund Transfer* was submitted to the Division of Pensions and Benefits (“Division”) on August 27, 1985, to execute the transfer of your PERS membership to the PFRS because you accepted a position as a police officer with Irvington Township. Pension contributions were remitted in your PERS membership through September 30, 1985. Your transfer in the PFRS was effective October 1, 1985 and your accumulated time in PERS was transferred to PFRS. Subsequently, on September 30, 1985 you accepted a position as Patrolman with the Township of Brick and remained with this employer until your removal.

The records show that on January 5, 1998,<sup>1</sup> a Preliminary Notice of Disciplinary Action (“PNDA”) was filed charging you with violating N.J.A.C. 4A:2-2.3(a): 1. Incompetency, inefficiency or failure to perform duties; 3. Inability to perform duties; 6. Conduct unbecoming a public employee; 7. Neglect of Duty; and 11. Other sufficient cause (violating Brick Township Police Department Rules and Regulations 3:7-1, 3:1-8, 3:8-4, 3:1-1, 3:1-5, 3:1-6 and 3:12-4) and sought your removal. The charges stemmed from two incidents, one which occurred in August 1996 and the other in August 1997. These incidents are fully detailed in the in the OAL decision and Final Administrative Action of the Merit System Board, in DeSimone v. Township of Brick, CSV2335-99, initial decision November 17, 1999, final decision May 12, 2000, and those facts are incorporated by reference. Generally, the 1996 “LaScala” incident relates to your conduct while securing a scene for investigation and detaining and later charging an individual. The 1997 “Raso” incident related to your interaction with an individual who threatened to kill his girlfriend, and your statements made and conduct during an investigation.

After several departmental hearings a Final Notice of Disciplinary Action (“FNDA”) was issued sustaining all the charges and you were removed from your position as Police Officer on October 22, 1998. Thereafter, you filed an appeal and on April 7, 1999, the matter was transferred

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<sup>1</sup> The original PNDA was dated January 2, 1998, it was served January 5, 1998.

to the OAL as a contested case. In its Initial Decision on November 17, 1999, the Administrative Law Judge (ALJ) Robert S. Miller found that Brick Township had sustained its burden of proving that you were guilty of failure to perform duties, neglect of duty and conduct unbecoming an employee. The ALJ determined a six month suspension without pay was the more appropriate penalty. At its meeting on March 21, 2000, the Merit System Board (MSB) accepted and adopted the Findings of Fact as contained in the ALJ's initial decision, made additional findings on conduct charged but not addressed in the Initial Decision, and rejected the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the MSB concluded that the appointing authority's action in imposing a removal was appropriate for the reasons set forth in that decision. Thus, you were removed from your position as a result of charges or misconduct or delinquency related to your position.

The record indicates that the Division issued you an expiration notice indicating that your PFRS membership would expire on June 30, 1998, and set forth your options at that time, including filing for a Deferred Retirement. On March 11, 2017, the Division received your *Application for Retirement Allowance* wherein you requested a Deferred Retirement, effective September 1, 2017, under Option C. The certifying officer for Brick Township completed a *Certification of Service and Final Salary Retirement* on March 16, 2017 and certified that you were dismissed on October 22, 1998. Thereafter, the Business Administrator for Brick Township submitted a letter to follow up the certification in which they informed the Division that your dismissal resulted from the aforementioned administrative charges and provided the supporting documentation.

At its meeting of August 14, 2017, the PFRS Board denied your application for Deferred retirement benefits based on the documentation which confirmed that you were removed from your position as a police officer on October 22, 1998. Thereafter, you submitted an appeal of the Board's denial. You included an argument refuting the facts found in DeSimone v. Township of

Brick, CSV2335-99, initial decision November 17, 1999, final decision May 12, 2000, letters of character reference, awards, commendations, and an analysis under N.J.S.A. 43:1-3. However, these arguments do not change the fact that you were removed from your position as a police officer on charges of misconduct or delinquency. At its meeting of November 13, 2017, the Board denied the hearing request essentially for the reasons set forth in the Board's letter dated August 15, 2017 and because there are no issues of disputed fact to be adduced at a hearing.

### **CONCLUSIONS OF LAW**

The Board determined that because you were removed for cause from your position with Brick Township, you are not eligible for Deferred Retirement, in accordance with N.J.S.A. 43:16A-11.2, which states:

Should a member, after having established 10 years of creditable service, be separated voluntarily or involuntarily from the service, before reaching age 55, and not by removal for cause on charges of misconduct or delinquency, such person may elect to receive the payments provided for in section 11 of P.L.1944, c. 255 or section 16 of P.L.1964, c. 241, or a deferred retirement allowance, beginning on the first day of the month following his attainment of age 55 and the filing of an application . . .

[Emphasis added.]

Consequently, the Board determined that you are not eligible to file for Deferred retirement because you were removed for cause on October 22, 1998 based on the aforementioned charges. The record clearly demonstrates that you exhausted all administrative remedies; however ultimately the charges were sustained and you were dismissed from employment. Additionally, the MSB determined that the disciplinary charges touched upon and were related to your employment with the Township of Brick; the infractions evidenced several errors in judgment and the underlying conduct was of an egregious nature. The MSB noted, such behavior by a 13-year veteran is not conducive to your position as a police officer, who by nature of your position has a duty to "be on the lookout for infractions of the law and to use due diligence in discovering and

reporting them..." See *City of Asbury Park v. Department of Civil Service*, 17 N.J. 419, 429 (1955). Therefore, the PFRS Board denied your request to collect Deferred retirement benefits. While you challenge the characterization of the incident by both the ALJ and the MSB, your challenge to the facts of the incident is barred by collateral estoppel. Collateral estoppel bars re-litigation of an issue that was determined in prior litigation, usually between the same parties, but under different causes of action. Zigelhein v. Apollo, 128 N.J. 250, 265 (1995). One purpose of the doctrine is "to promote efficient justice by avoiding the re-litigation of matters which have been fully and fairly litigated and fully and fairly disposed of." Lopez v. Patel, 407 N.J. Super. 79, 93 (App. Div. 2009). Collateral estoppel requires:

(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (internal quotations omitted).]

Here, you seek to challenge the facts underlying your removal from the position of police officer, a matter that you fully litigated through the OAL and the MSB. The factual determinations related to the "LaScala" and "Raso" incidents were essential to determining whether the charges against you were sustained and the appropriate penalty. After an OAL hearing, the MSB affirmed your removal from office. Your attempt to challenge the underlying facts of your removal are therefore barred by collateral estoppel.

The Board's decision that you were removed for cause on charges of misconduct or delinquency pursuant to N.J.S.A. 43:16A-11.2 is further supported by relevant case law. In In the matter of Suzanne Hess, 422 N.J. Super. 27, 37 (2010) the Court held that "forfeiture of Deferred retirement benefits pursuant to N.J.S.A. 43:15A-38 is conditioned on an involuntary removal due

to misconduct related to employment.” Because you were removed for cause based on misconduct or delinquency related to your employment, the Board's decision is fully consistent with this court's opinion in Hess. See also Danny Glenn v. Board of Trustees, Public Employees' Retirement System, Dkt. No. A5271-14T1, decided June 30, 2017, slip op at \*4 (“The plain language of this statute [N.J.S.A. 43:15A-38] leaves no room for discretion by the Board: any member removed as a public employee for charges of misconduct or delinquency is ineligible to receive benefits from PERS as a matter of law”).

Lastly, the Board noted in your appeal letter you set forth an argument that the Board should have reviewed your matter under N.J.S.A. 43:1-3 which establishes 11 factors for which the Board is to consider and balance in view of the goals of the pension statutes when determining whether forfeiture or partial forfeiture is appropriate. However, this law is not applicable in your case. At the time you were removed from your position you were under the age of 55 and only had 14 years and 2 months of membership service posted to your PFRS account. Therefore, the only benefit that you could file for was a Deferred retirement. Removal for cause on charges of misconduct or delinquency automatically disqualifies you from eligibility for a Deferred retirement. N.J.S.A. 43:16A-11.2.


You do qualify for the return of your accumulated pension contributions. Please be cautioned that if you intend to file an appeal of this Final Administrative Determination, you should NOT withdraw your pension contributions. If you wish to withdraw, you must complete an Application for Withdrawal by logging into the Member Benefits Online System (MBOS). Nonetheless, you are cautioned against filing the withdrawal application if you intend to appeal. Withdrawal terminates all rights and privileges of membership.

Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Police and Firemen's Retirement System.

Jeffrey W. DeSimone  
December 12, 2017  
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You have the right to appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey.

Sincerely,

A handwritten signature in black ink that reads "Mary Ellen Rathbun". The signature is written in a cursive style and is enclosed within a thin vertical rectangular border.

Mary Ellen Rathbun, Secretary  
Board of Trustees  
Police and Firemen's Retirement System

G-13/MER

C: DAG Danielle Schimmel (ET) DAG Amy Chung (ET)  
C. Law (ET) G. Sasileo (ET)