



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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JOHN D. MEGARIOTIS
Acting Director

November 20, 2017

Sent via email to: [REDACTED]

LAW OFFICES OF FEELEY & LAROCCA, L.L.C.
John D. Feeley, Esquire



Re: William Lunger
[REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Mr. Feeley:

I am writing in reference to the denial by the Board of Trustees of the Police and Firemen's Retirement System (PFRS) of your client, William Lunger's request to file for Ordinary Disability retirement benefits. The PFRS Board initially reviewed and denied his request at its August 14, 2017 meeting. On August 28, 2017, you appealed the Board's denial and requested a hearing in the Office of Administrative Law (OAL). At its meeting on October 16, 2017 the Board denied your request for a hearing in the OAL. Findings of Fact and Conclusions of Law, as outlined below, were approved by the PFRS Board at its meeting of November 13, 2017.

The PFRS Board has reviewed your letter dated August 28, 2017 and the relevant documentation and finds that the laws governing the PFRS do not permit the Board to grant Mr. Lunger's request to file for Ordinary Disability retirement benefits.

FINDINGS OF FACT

Mr. Lunger was enrolled in the PFRS on July 1, 2007 based upon his employment as a Sheriff's Officer with the County of Sussex. His PFRS membership continued based on his employment with the County of Sussex until his resignation on March 13, 2017. Pension contributions were remitted on his behalf through March 31, 2017 at which time his PFRS membership reflected a total of 8 years and 9 months of membership service.

An *Application for Disability Retirement* was electronically submitted via the Member Benefit Online System (MBOS) by Mr. Lunger on February 10, 2017 requesting an Ordinary Disability retirement effective March 1, 2017. You notified the Division of Pensions and Benefits (Division) by letter dated February 10, 2017, that you represented Mr. Lunger and that you would be submitting additional medical documentation to support his claim for disability. On February 13, 2017, the Division acknowledged receipt of the retirement application, and requested documentation necessary to begin the processing of Mr. Lunger's retirement.

In March 2017, the Division became aware that Mr. Lunger was facing criminal and administrative charges and requested copies of the charges from the County of Sussex.

The certifying officer for the County of Sussex completed an *Employer Certification for Disability Retirement* on April 24, 2017, wherein they indicated Mr. Lunger was facing disciplinary action and was removed on March 13, 2017. In addition to the certification they provided the following documents: a summary of leave time/suspension; a Preliminary Notice of Disciplinary Action (PNDA); a Final Notice of Disciplinary Action (FNDA); a transcript of the sentencing in the matter of the State of New Jersey vs. William J. Lunger; and a Change of Judgment of Conviction & Order for Commitment.

The documents submitted reveal, on March 31, 2016, the Sussex County Prosecutor's Office received information regarding misconduct on the part of Sussex County Sheriff's Officer William Lunger. Specifically, they received allegations that he was involved in a sexual/romantic

relationship with a drug court participant. Additionally, he alerted the participant of upcoming random drug screens and provided the participant with drug test kits used by the probation department.

As a result, on April 11, 2016, Mr. Lunger was arrested and charged with one count of Conspiracy-agree/aid in conduct constitute a crime in the 3rd degree, four counts of Official Misconduct in the 2nd degree and one count of Pattern of Official Misconduct in the 3rd degree. As a result, a Preliminary Notice of Disciplinary Action was issued the same day and Mr. Lunger was suspended immediately without pay.

On January 27, 2017, he pled guilty to count one of Conspiracy-agree/aid in conduct constitute a crime in the 3rd degree and Official Misconduct-unauthorized use of official function. On March 13, 2007 he was sentenced to three (3) years of probation, upon the condition that he serve 270 days at Sussex County Jail. He was also ordered to complete 30 hours of community service, to pay a total of \$200 in fines, resign and/or forfeit public office and agree not to seek public employment in New Jersey in the future.

A Final Notice of Disciplinary Action was issued on March 22, 2017 wherein the charges were sustained based on Mr. Lunger's guilty plea and conviction of the criminal charges¹. The County of Sussex removed him effective March 13, 2017. Pursuant to his sentence in the criminal matter, Mr. Lunger had already tendered his resignation as of that date.

By letter dated May 10, 2017, Valerie McManus of the Division's Disability Retirement Section wrote Mr. Lunger and informed him that he was not eligible to file for Ordinary Disability retirement benefits. Her determination was based upon N.J.A.C. 17:1-6.4(b), which prohibits members who have involuntarily or voluntarily terminated service for reasons unrelated to a disability, including (1) removal for cause or forfeiture of public office and (2) settlements reached

¹ The FNDA noted as follow: charges of termination sustained in accordance with N.J.S.A. 2C:51-2 (b) based upon "guilty plea entered on the record before Hon. Robert Reed, J.S.C. and subsequent conviction of criminal charges.

due to administrative or criminal charges unrelated to the claims disability from applying for a disability retirement. Further, she indicated that his application was closed because he could not comply with the provisions of N.J.S.A. 43:16A-8(2). Per the Court Order, he cannot seek public employment in New Jersey. Therefore, he has no position to return to should his alleged disability diminish to the point that he could return to employment.

The records indicate that you submitted medical documentation to the Division on June 30, 2017 to support his application for Ordinary Disability. On July 11, 2017, Ms. McManus of the Division's Disability Section, contacted your office via telephone to reaffirm that Mr. Lunger's application was closed. As a follow up to the telephone conversation, Ms. McManus emailed a copy of the May 10, 2017 letter to your office.

The PFRS Board received your letter of July 11, 2017 wherein you reiterated your representation of Mr. Lunger and appealed the Division's decision of May 10, 2017 denying Mr. Lunger's request to file for Ordinary Disability and the closure of his application. You also requested a hearing before an Administrative Law Judge in the event the PFRS Board "upholds the decision to close Mr. Lunger's application for disability retirement."

Thereafter, on July 17, 2017, the County of Sussex provided the Division with a copy of the Accusation, the New Jersey Judiciary Plea Form and a copy of the sentencing transcript. Also, on July 24, 2017, you submitted copies of the aforementioned documents. On August 11, 2017, the Board Office received your letter requesting that his matter be postponed for two months to allow you time to obtain his medical records from the Department of Veteran Affairs.

At its meeting of August 14, 2017, the PFRS Board denied your request for a postponement because the issue before the Board was the request to file for an Ordinary Disability retirement and it was not necessary for the Board to review his medical records as they were not germane to the matter before the Board. Thereafter, the Board denied Mr. Lunger's request to file for an Ordinary Disability retirement. The Board's denial was based upon: (1) Mr.

Lunger's guilty plea to an enumerated offense² under N.J.S.A. 43:1-3.1(b) which requires an automatic total forfeiture of his pension; and (2) as a result of his guilty plea on January 13, 2017 Mr. Lunger was required to resign or forfeit public office and he is not permitted to seek public employment in New Jersey in the future. Therefore, under these circumstances Mr. Lunger is unable to comply with N.J.A.C. 17:1-6.4 because he did not leave employment due to his disability but rather due to the his guilty plea and criminal sentence requiring him to resign or forfeit his position and the FNDA removing him office. Further, he cannot comply with N.J.S.A. 43:16A-8(2) because he has no job to return to should the alleged disabling condition diminish.

Subsequently, on August 28, 2017, you appealed the Board's denial and requested a hearing in the OAL. At its meeting on October 16, 2017, the Board denied your request for a hearing in the OAL. This Final Administrative Determination serves as formal notice that the Board denied your request for a hearing.

CONCLUSIONS OF LAW

The PFRS provides for an Ordinary disability retirement in N.J.S.A. 43:16A-6, which states:

1) Upon the written application by a member in service, by one acting in his behalf or by his employer, any member, under 55 years of age, who has had four or more years of creditable service may be retired on an ordinary disability retirement allowance; provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him and that such incapacity is likely to be permanent and to such an extent that he should be retired.

In addition, N.J.S.A. 43:16A-8 (2) states in pertinent part:

(2) Any beneficiary under the age of 55 years who has been retired on a disability retirement allowance under this act, on his request shall, or upon the request of the retirement system may, be given a medical examination and he shall submit to any examination by a physician or physicians designated by the medical board once a year

² Count 1 Conspiracy-Agree/Aid in conduct constitutes a crime; Official Misconduct-unauthorized use of official function in the 3rd degree.

for at least a period of five years following his retirement in order to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished. If the report of the medical board shall show that such beneficiary is able to perform either his former duty or any other available duty in the department which his employer is willing to assign to him, the beneficiary shall report for duty; such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service. If the beneficiary fails to submit to any such medical examination or fails to return to duty within 10 days after being ordered so to do, or within such further time as may be allowed by the board of trustees for valid reason, as the case may be, the pension shall be discontinued during such default.

[Emphasis Added]

Also, N.J.A.C. 17:1-6.4. which states:

- (a) Each disability retirement applicant must prove that his or her retirement is due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment; the disability must be the reason the member left employment.
- (b) Members who have involuntarily or voluntarily terminated service for any of the reasons listed below will not be permitted to apply for a disability retirement;
 - 1. Removal for cause or total forfeiture of public service;
 - 2. Settlement agreements reached due to pending administrative or criminal charges, unless the underlying charges relate to the disability;
 - 3. Loss of licensure or certification required for the performance of the member's specific job duties;
 - 4. Voluntary separation from service for reasons other than a disability; and
 - 5. Job abolishment or reduction in force.
- (c) The Division will review all disability retirement applications submitted after a member has terminated service to determine whether the member's application is eligible for processing, pursuant to (a) above.

As noted above, Mr. Lunger did not leave employment due to a disabling condition. Rather, he was required to resign as a result of his criminal matter. As part of his criminal sentence Mr. Lunger was ordered never to seek public employment in the future. The FNDA also upholds the administrative charges against him and orders his removal from employment. As there is no evidence that these charges relate to any alleged disability, he cannot comply with N.J.A.C. 17:1-6.4(b). Further, because his criminal sentence prohibits him from seeking public employment in the future, he cannot comply with N.J.S.A. 43:16A-8(2), in the event that his application for disability retirement was approved and his alleged disability diminished to the point that he could return to employment.

If his application was processed and he was granted an Ordinary Disability pension and later it was determined that he was no longer disabled, there is no mechanism for the Board to stop paying the pension because he could never be ordered to return to work, as required by N.J.S.A. 43:16A-8(2). Granting a disability retirement under these circumstances would be in contravention of the statutory scheme, and place the Board in the position of potentially paying a disability pension which the Board has no ability or mechanism to terminate if the member is no longer totally and permanently disabled.

The Board determined that since he did not meet the regulatory or statutory requirements to file for an Ordinary Disability retirement, the documents submitted to support his claim were not considered.

As noted above, the PFRS Board has reviewed your written submissions and because this matter does not entail any disputed questions of fact, the PFRS Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's enabling statutes and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Police and Firemen's Retirement System.

John D. Feeley, Esquire
RE: William Lunger
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You have the right, if you wish 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 black rectangular border.

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

G-14/MER

C: V. McManus (ET); DAG Danielle Schimmel (ET); DAG Amy Chung (ET)
William Lunger