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STATE OF NEW JERSEY

In the Matter of L.L.,
Department of the Treasury

CSC Docket No. 2015-258

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

Administrative Appeal

ISSUED: MAY 0 8 2015 (DASV)

L.L., an Auditor 2, Taxation with the Department of the Treasury, appeals his retirement effective June 1, 2014.

By letter dated July 24, 2014 to the Civil Service Commission (Commission), the appellant requested that he be returned to his "auditing position or an equivalent position with the State of New Jersey." He asserted that he was "currently employed" by the State but had been "relieved" of his duties. He explained that he had to drive from his home in Hamilton to his new office near the New York border. Even though he left for work prior to 6:00 a.m., he was late. The appellant claimed that the appointing authority did not consider changing his work hours. He also stated that he was cleared for duty as an auditor. In that regard, he submitted a letter, dated April 23, 2014, from a neurologist, who indicated that the appellant had been seen at the office only once and his diagnosis was inconclusive. Nonetheless, the neurologist stated that although the appellant had "mild memory loss . . . he is still neurological[ly] clear to be an auditor." However, the appellant presented a letter, dated April 29, 2014, from another neurologist, stating that it is suspected that the appellant is suffering from "early dementia, likely Alzheimer's disease." Moreover, the appellant submitted a report with respect to a psychological assessment and fitness for duty examination which he underwent on February 21, 2014 and February 28, 2014. The report indicated that he was referred for an evaluation due to suggestions from "multiple sources" that he may be suffering from severe problems with memory. For example, it was reported that the appellant gets "desperately" lost from his home in Hamilton to his office in Hackensack; he was unable to find his office or the kitchen at work despite that the layout was not

complicated; he repeatedly asked the same questions to his supervisor; and after being granted a change of start time from 8:30 a.m. to 9:00 a.m., he would ask for permission again although the conversation just occurred. The assessment concluded that the appellant was unable to perform the duties of an auditor and it was unlikely that his condition was reversible.

Furthermore, the appellant claimed that he was "given an appointment with personnel" and was placed on a leave with pay which became a leave without pay with no indication that he would be returned to work. It is noted that agency records indicate that the appellant was on a leave of absence from January 31, 2014 through February 17, 2014. He was considered to have returned to work on February 18, 2014, but was again placed on a leave from March 24, 2014 until his retirement on June 1, 2014. The appellant asserted that he was not given any guidance from his personnel office. However, the appellant submitted letters, dated March 20, 2014 and April 15, 2014, from the Manager, Human Resources, indicating that at a meeting conducted on March 18, 2014, the appellant advised that he would be applying for retirement as recommend by the State-authorized physician. The appellant was informed that should he not apply for retirement, further leave would be considered unauthorized and the matter will be referred to the labor relations unit for appropriate administrative action since he was found not fit for duty. The appellant was also informed not to report to work because of that finding.

It is noted that in reply to the appellant's July 24, 2014 letter, the Division of Appeals and Regulatory Affairs advised the appellant in a letter, dated July 29, 2014, that because of his retirement, effective June 1, 2014, no action could be taken on his request to be returned to his position as an Auditor 2, Taxation, with the Department of the Treasury or to an equivalent title. Thereafter, the appellant contacted the division, suggesting that he had no choice but to retire, and filed the aforementioned documents in pursuit of an appeal. The parties were provided with an opportunity to submit additional information. However, the appellant did not set forth his arguments against his retirement in writing.

In response, the appointing authority explains that on January 30, 2014, a meeting was held with the appellant, his union representative, the Americans with Disabilities Act Coordinator, and the appointing authority's representatives. The purpose of the meeting was to discuss the concerns that management had regarding the appellant's fitness for duty and the many incidents which occurred due to his memory loss. Thereafter, as a result of the findings from the fitness for duty examination, another meeting was held on March 18, 2014, at which time, the appellant "voluntarily agreed to be placed on a medical leave of absence and indicated he would be applying for retirement." The appointing authority emphasizes that the appellant's own physicians documented his medical circumstances that were consistent with the findings of the fitness for duty

examination. Moreover, it notes that although the appellant was not eligible for disability retirement, he was eligible for service retirement which he filed with the assistance of his union representative. The appointing authority also indicates that the appellant met more than once with the Division of Pensions and Benefits, and his union representative was present at those meetings. Therefore, the appointing authority maintains that appropriate action was taken regarding the appellant's circumstances. Accordingly, it asserts that the appellant's return to employment is not warranted since he voluntarily retired and it would be contrary to the medical documentation regarding the appellant's fitness for duty.

CONCLUSION

The appellant initially requested assistance to return him to employment with the Department of the Treasury as an Auditor 2, Taxation, or to an equivalent title. However, since it was confirmed that he received a service retirement on June 1, 2014, no action could be taken on his request. In response, the appellant pursued the within appeal by presenting documentation, which consisted mainly of medical documents regarding his condition. *N.J.A.C.* 4A:2-1.1(b) states that unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. The appellant's retirement was effective June 1, 2014. However, he did not contact this office until July 24, 2014. Accordingly, his appeal is untimely. Even if his appeal were timely, there is no basis to grant him the remedy he seeks. As set forth above, the appellant retired. Moreover, to the extent that the appellant claims his retirement was the result of duress or coercion, that assertion is also untimely. *N.J.A.C.* 4A:2-6.1(d) provides that where it is alleged that a resignation was the result of duress or coercion, an appeal may be made to the Commission under *N.J.A.C.* 4A:2-1.1. It is noted the burden of proof is on the appellant. It is further noted that although not expressly addressing "retirement," *N.J.A.C.* 4A:2-6.1 provides the appropriate framework for a voluntary separation from employment. *See In the Matter of Geraldine Bryant, City of East Orange* (MSB, decided January 30, 2008). Nonetheless, even if the Commission found good cause to justify relaxing the time requirements of *N.J.A.C.* 4A:2-6.1(d), the appellant has not shown that his retirement was a result of duress or coercion.

In that regard, the law in New Jersey concerning the concept of duress has been extensively examined. As stated by Administrative Law Judge Robert S. Miller and affirmed in *In the Matter of Dean Fuller* (MSB, decided May 27, 1997):

> Duress is a force, threat of force, moral compulsion, or psychological pressure that causes the subject of such pressure to become overborne and deprived of the exercise of free will. *Rubenstein v. Rubenstein*, 20 *N.J.* 359, 366 (1956) . . . This test is subjective, and looks to the condition of the mind of the person subjected to coercive

measures, not to whether the duress is of "such severity as to overcome the will of a person of ordinary firmness." [*Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200, 212 (App. Div. 1987)] (citation omitted). Therefore, "the exigencies of the situation in which the alleged victim finds himself must be taken into account." *Id.* at 213, *quoting Ross Systems v. Linden Dari-Delite, Inc.*, 35 *N.J.* 329, 336 (1961).

However, a party will not be relieved of contractual obligations "in all instances where the pressure used has had its designed effect, in all cases where he has been deprived of the exercise of his free will and constrained by the other to act contrary to his inclination and best interests." *Wolf v. Marlton Corp.*, 57 *N.J. Super.* 278, 286 (App. Div. 1959). Rather, "the pressure must be wrongful, and not all pressure is wrongful." *Rubenstein, supra* at 367. Further, "it is not enough that the person obtaining the benefit threatened intentionally to injure . . . provided his threatened action was legal . . ." *Wolf, supra* at 286, *quoting* 5 Williston, Contracts (rev. ed. 1937), § 1618, p. 4523.

It is a "familiar general rule . . . that a threat to do what one has a legal right to do does not constitute duress." *Wolf, supra* at 287. "A 'threat' is a necessary element of duress, and an announced intention to exercise a legal right cannot constitute a threat." *Garsham v. Universal Resources Holding, Inc.*, 641 *F. Supp.* 1359 (D.N.J. 1986). Thus, as long as the legal right is not exercised oppressively or as a means of extorting a settlement, the pressure generated by pursuit of that right cannot legally constitute duress. *See generally, Great Bay Hotel & Casino, Inc. v. Tose*, 1991 W.L. 639131 (D.N.J. 1991) (unrep.) and citations therein.

Additionally, the ALJ concluded in *Fuller*, that:

It is clear that respondent [the appointing authority] had a legal right to pursue disciplinary action against the appellant. Therefore, respondent's conduct cannot constitute duress unless it pursued its legal right in an oppressive manner or purely as a means to extort a settlement. None of the facts alleged by appellant, however, indicates that respondent acted in an oppressive manner. Respondent pursed disciplinary action and gave appellant due notice thereof. Appellant was informed of the conduct upon which the disciplinary action was based. There has been no showing that respondent's conduct was any more "oppressive" than it would have been in any other action to remove an employee.

> There is also no evidence suggesting that respondent instituted the disciplinary action to extort a settlement from appellant . . . As stated by the court in *Ewert v. Lichtman*, 141 *N.J. Eq.* 34, 36 (Ch. Div. 1947), "Assuredly action taken by one voluntarily and as a result of a deliberate choice of available alternatives cannot ordinarily be ascribed to duress." (citation omitted). Thus, although appellant may have accepted the settlement under the weight of adversity and was subject to stress, courts . . . should act with supreme caution in abrogating and countermanding such dealings. The qualities of the bargain which the litigant once regarded as expedient and pragmatical ought not to be reprocessed by the court into actionable duress. *Id.* at 38.

Considering the instant matter in the light most favorable to the appellant, the Commission finds that, although the appellant suggested that he had no choice but to retire, the appellant did not act against his will in retiring from his position as an Auditor 2, Taxation. With the exception of the April 23, 2014 letter, the medical documentation clearly establishes that the appellant was not fit for duty. Even in the April 23, 2014 letter, the neurologist indicated that the appellant had "mild memory loss," although the appellant was seen only once by the neurologist. The record also demonstrates that the appointing authority could have proceeded with disciplinary procedures to remove him from employment had the appellant not retired. As indicated above, an appointing authority has the legal right to pursue disciplinary action. It is not considered a form of duress unless the appointing authority pursues its legal right in an oppressive manner or purely as a means to extort a settlement. The facts of this case do not reveal that the appointing authority acted in such a manner. Moreover, while the Commission is cognizant of the appellant's condition, it is emphasized that the appellant was represented by his union regarding his employment status and through the filing of his retirement. The appellant also did not submit any arguments or evidence to support that he was subjected to duress or coercion. Accordingly, the appellant has not sustained his burden of proof in this matter.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF MAY, 2015

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