



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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February 26, 2019

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

Sent via email to [REDACTED]

OXFELD COHEN, PC
Arnold Shep Cohen, Esq.

[REDACTED]
[REDACTED]

RE: Oscar Tarboro

[REDACTED]
OAL DKT. NO. TYP 12438-2014 S

Dear Mr. Cohen:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At its meeting on January 16, 2019, the Board of Trustees of the Public Employees' Retirement System (PERS) reviewed the Initial Decision (ID) of the Hon. Elia A. Pelios, ALJ, dated December 6, 2018, together with the evidence submitted by the parties, and the exceptions submitted by your office and Vimal K. Shah, Esq., counsel for the Board, on December 17, 2018 and December 20, 2018, respectively. Thereafter, the Board voted to adopt the ALJ's factual findings, but reject the ALJ's legal conclusion modifying the Board's imposition of a total forfeiture of Mr. Tarboro's service credit to a reduction beginning as of April 1, 2013, approximately one year. The Board found that due to the egregious and continuing nature of the misconduct, and given Mr. Tarboro's limited years of service, Mr. Tarboro should forfeit all of his PERS service credit.

Findings of Fact and Conclusions of Law as outlined below were approved by the PERS Board at its meeting on February 26, 2019. These Findings of Fact and Conclusions of Law constitute the Final Administrative Determination in this matter.

FINDINGS OF FACT

The Board adopted the ALJ's findings of fact and the same are incorporated herein by reference. Briefly summarized, Tarboro was employed as a residential services worker at the Hunterdon Developmental Center (HDC) for approximately six and a half years. ID at 2. The HDC is a residential care facility for developmentally disabled individuals. Ibid. On April 2, 2014, HDC issued Tarboro an amended preliminary notice of disciplinary action (APNDA) (J-3) for numerous violations and charges. Ibid. Ultimately the parties settled the matter and the penalty was modified from removal to a twenty-day suspension to be served from April 3, 2014 to April 30, 2014. Ibid. As part of the settlement, Tarboro agreed to retire effective May 1, 2014. Ibid. The Final Notice of Disciplinary Action (FNDA) indicated that the following charges were sustained:

Any improper conduct which violates common decency (C11.1); Notoriously disgraceful conduct (C16.1); Violation of Administrative Decision No. 7 (E1.2); Generalized gender based remarks and behavior (F3a.1); Inappropriate unwanted, offensive physical, or verbal sexual advances and comments (F3b.1); Other Conduct (F3f.1) N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)9 Discrimination that affects equal employment opportunity, including sexual harassment; N.J.A.C. 4A:2-2.3 (a)12 Other sufficient cause.

[Ibid.]

The charges against Tarboro listed above were sustained and based on accounts of the incidents listed in the FNDA wherein Tarboro made egregiously inappropriate sexual comments and advances towards female colleagues. ID at 3.

1) On Friday morning, 3/21/14, you made a sexual comment to a co-worker while she was caring for a client, specifically, "Oh yeah, I'm really getting a hard-on". You were previously overheard making inappropriate comments to this same co-worker, specifically, "I'll help you. I'll do anything for you." and "I don't care. I'll help you not anybody else, just you."

2) On at least two (2) occasions within the last year, you made inappropriate comments to a co-worker that her "ass has gotten bigger". You also made comments to this co-worker that another female co-worker has "some big knockers" and "some big tits" and "Are they real? Do you think they are real?"

3) On numerous occasions within the last year, you have asked a co-worker for a hug or out on a date or for drinks even though she has told you no several times. Additionally, you continually tell this co-worker that she looks good or that you like her shirt while you are staring at her breasts.

4) Within the last year, you made a comment to a co-worker who had a rip in her jeans just above the knee that the rip should be higher and pointed to her "private area".

5) Several co-workers have observed you with your pants unzipped on numerous occasions in various area of Cottage 7 within the last year. Some ignored your zipper being down, others told you to close it. You continue to work with the zipper of your pants undone even though you were told in 2010 that this is inappropriate behavior when a supervisor observed you with your pants unbuttoned or unzipped and told to close your pants on there (3) separate occasions.

6) On more than one occasion with the last year when you were told to close your zipper by a co-worker, you grabbed yourself in the groin area, turned and walked away.

[Ibid.]

The HDC described Tarboro's conduct as including "unwelcomed sexual advances, notoriously disgraceful conduct and improper conduct that violates common decency." ID at 4.

As required under the terms of the settlement, Tarboro filed for a Service retirement with an effective date of May 1, 2014. Ibid. At its meeting of July 16, 2014, the Board considered Tarboro's work-related misconduct under the honorable service provisions of N.J.S.A. 43:1-3. After consideration of the 11-factor test outlined in the statute, the Board found that "due to the egregious nature of [Tarboro's] personal misconduct while on duty over the course of [his] brief public career, a total forfeiture of service and salary is appropriate and required." Ibid. Tarboro filed a timely appeal of the Board's decision and the matter was transferred to the Office of Administrative Law as a contested case. ID at 2.

In the ID, the ALJ properly summarized the testimony of the witnesses, and found that the accounts of the witnesses testifying against Tarboro were credible, whereas Tarboro's testimony consisted of him leveling denials and his own accusations at each of the individuals testifying against him. ID at 13-14.

LEGAL CONCLUSIONS

The ALJ first properly cited to the honorable service statute, N.J.S.A. 43:1-3, which governs the Board's determination in this case. N.J.S.A. 43:1-3 directs the Board to apply and balance an eleven factor test in order to determine the appropriateness of forfeiture. The parties stipulated that the Board accurately applied factors 1-6 and the ALJ adopted the same. ID at 24. With respect to factors #7 through #9, the Board found that Tarboro's misconduct was continuous, egregious, and involved "unwelcome sexual advances...repeated requests for dates even after being turned-down, making lewd and provocative comments and gestures towards female co-workers, etc." ID at 22. With respect to factor #8, the Board found that the relationship between the misconduct and Tarboro's employment was direct. Ibid. With respect to factor #9, the Board found Tarboro's misconduct demonstrated a high degree of moral turpitude and the misconduct was for personal gain. Ibid.

The ALJ considered the testimony of the witnesses, as well as his credibility determinations, and with respect to factors 7-9 found that:

Considering the analysis provided against the settlement agreement, preliminary and final notices of disciplinary action, and the testimony provided by the witnesses at hearing, I **CONCLUDE** that the Board's analysis of factors 7-9 is appropriate and should be **AFFIRMED**.

[(emphasis in original.)]

Although the ALJ found that the Board appropriately found factors #7-9, he nevertheless concluded that Tarboro should only forfeit approximately one year of PERS service credit, notwithstanding the continuous and egregious behavior wherein he harassed his female coworkers with unwanted sexual comments and advances. ID at 25. The ALJ reasoned that because the offenses charged in the PNDA and FNDA occurred within one year of his retirement, that any forfeiture beyond that date was unwarranted. Without balancing Tarbor's limited public service and continuous, egregious workplace behavior, the ALJ found that the one year forfeiture was "reasonably calculated to impose a forfeiture

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that reflects the nature and extent of the misconduct and years of honorable service...” The Board disagrees and rejects the ALJ’s legal conclusion.

First, the ALJ failed to consider the entire record as required under N.J.A.C. 1:1-18.1, and instead relied solely upon the dates listed in the PNDA and FNDA to reduce Tarboro’s forfeiture. The record here reveals that in addition to the charges as outlined and sustained in the FNDA, Tarboro engaged in highly inappropriate conduct, including “lewd and provocative comments and gestures towards female co-workers” and made “unwelcome sexual advances towards his co-workers” for a number of years, not just the one year prior to the FNDA. ID at 22. The ALJ affirmed the Board’s findings on factors #7- #9, upon which the Board may place more weight than the other factors. See Corvelli v. Bd. of Trs., Police and Firemen’s Ret. Sys., 130 N.J. 539 (1992). Given the limited nature of Tarboro’s public service, the Board concludes that Tarboro engaged in this egregious behavior over the course of his entire tenure with HDC. Moreover, the ALJ found the testimony of the witnesses credible, and all of the witnesses testified that the misconduct occurred beyond the one year time frame as determined by the ALJ. Accordingly, the Board finds that the ALJ should have considered the entire record, including the credible witness who testified that Tarboro’s egregious misconduct had occurred for years prior to the charges in the FNDA.

The Board also finds that the ALJ’s imposition of forfeiture of approximately one year of service credit is not “reasonably calculated to impose a forfeiture that reflects the nature and extent of the misconduct and years of honorable service...” as contemplated by N.J.S.A. 43:1-3. Rather, the substantial credible evidence in the record as found by the ALJ supports the Board’s finding that, given his limited service and the continuous and egregious nature of Tarboro’s workplace misconduct, the Board’s decision forfeiting his six and a half years of service credit is reasonably calculated to impose a forfeiture that “reflects the nature and extent of the misconduct” in light of the years of honorable service. Because Tarboro continued his misconduct throughout his brief tenure with HDC, the Board’s decision

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to forfeit his service credit during that time was correct. The Board therefore rejects the ALJ's legal conclusion.

Finally, Tarboro sought to rescind the settlement agreement and asserted that he was assured by his employer and union representatives that signing the agreement would not affect his pension benefit. The ALJ rejected Tarboro's request to rescind the settlement, finding that:

...I **CONCLUDE** that petitioner has failed to establish that the elements of equitable (or legal) fraud have been met, and therefore has not demonstrated that the petitioner entered into a settlement agreement under fraud in the inducement, and that therefore the settlement agreement will not be rescinded.

[ID at 19-20 (emphasis in original).]

The Board has no authority to consider whether a duly executed settlement agreement between Tarboro and HDC should be rescinded. The Board did not refer this issue to the OAL and takes no position on whether the settlement should stand.

Accordingly, the Board has determined, pursuant to N.J.S.A. 43:1-3, that a total forfeiture of Tarboro's approximately 6 years and 6 months of PERS service credit should be forfeited. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Public Employees' Retirement System.

As a result of the Board's decision, Tarboro is only eligible to withdraw his accumulated pension contributions remitted during active membership. Your client may obtain an *Application for Withdrawal* with instructions for filing through the Divisions' website. Your client should review this packet carefully as it contains information about rollover provisions. **Nonetheless, your client is cautioned against filing the Withdrawal Application if he intends to appeal the Board's determination. Withdrawal terminates all rights and privileges of membership.**

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

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with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed
to:

Superior Court of New Jersey

Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,



Jeff Ignatowitz, Secretary
Board of Trustees
Public Employees' Retirement System

G-13/JSI

C: D. Dinkler (ET); E. Wade (ET); OAL, Attn: Library (ET)

Oscar Tarboro

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLC
Vimal K. Shah, Esq.

[REDACTED]

Hunterdon Developmental Center
Jerry Serfass, Certifying Officer

[REDACTED]