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**STATE OF NEW JERSEY**  
DEPARTMENT OF THE TREASURY  
POLICE AND FIREMEN'S RETIREMENT SYSTEM  
OF NEW JERSEY

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November 15, 2022

ELIZABETH MAHER MUOIO  
*State Treasurer*

ED DONNELLY  
*Chairman, PFRSNJ*

Sent via email to: [REDACTED]

Eric V. Kleiner, Esq.  
[REDACTED]

RE: Luis Fermin  
PFRS # [REDACTED]  
OAL DKT No TYP 03611-21

**FINAL ADMINISTRATIVE DETERMINATION**

Dear Mr. Kleiner:

At its meeting on October 17, 2022, the Board of Trustees ("Board") of the Police and Firemen's Retirement System of New Jersey ("PFRSNJ") reviewed the August 2, 2022 Initial Decision ("ID") of Administrative Law Judge ("ALJ") Jude-Anthony Tiscornia, the exceptions<sup>1</sup> filed by Juliana C. DeAngelis, Esq., dated September 6, 2022, your reply to exceptions<sup>2</sup> dated September 14, 2022, and other relevant documentation.

Thereafter, the Board voted to reject the ALJ's ID, which reversed the Board's denial of Fermin's request to apply for Accidental Disability ("AD") retirement benefits. In the ID, the ALJ denied the Board's Motion for Summary Decision, reversed the Board's finding that Fermin is ineligible to apply for AD, and ordered the Board to process Fermin's AD application on the merits.

Findings of Fact and Conclusions of Law as outlined below were presented and approved by the Board at its meeting of November 14, 2022.

**FINDINGS OF FACT**

Fermin began employment as a City of Paterson Police Officer in January 2005. In the early morning of January 1, 2018, Fermin was involved in an off-duty shooting incident where he discharged his service weapon at an individual he believed to be armed and dangerous. On January 2, 2019, Paterson served Fermin with a Preliminary Notice of Disciplinary Action ("PNDA") stemming from the January 2018 incident. The PNDA specified that Fermin "left the

<sup>1</sup> On August 8, 2022, the Board was granted an extension until October 31, 2022, to issue its final decision.

<sup>2</sup> On September 7, 2022, Mr. Kleiner was granted an extension until September 14, 2022, to file reply to exceptions.

scene [of the shooting] without reporting the incident to police headquarters . . . left the scene without attempting to identify or contain [the alleged assailant] . . . left the scene without reporting he fired the shots from his service weapon . . . [and] returned to the scene in a different vehicle to the one involved in the incident, thereby contaminating the scene.” The PNDA recommended termination but suspended Fermin without pay pending disposition of a disciplinary hearing.

On or about November 26, 2019 and March 12, 2020, Fermin entered into a Memorandum of Agreement (“Settlement Agreement”) with Paterson - wherein Paterson agreed to withdraw the disciplinary charges contained in the January 2019 PNDA in exchange for Fermin to “withdraw any requests for a hearing on any and all outstanding employment issues between [Paterson] and Fermin.” The Settlement Agreement also specified that “Fermin hereby understands and agrees that from February 1, 2020 forward he is forever barred from future employment with [Paterson] . . . [and] he is barred from taking any actions as a law enforcement officer for the Paterson Police Department.”

On the same day of the November 26, 2019 Settlement Agreement, Fermin submitted an AD application alleging that he is totally and permanently disabled from the January 2018 shooting incident. On or about January 11, 2021, the Board reviewed the AD application and Settlement Agreement (among other relevant documents) and found that Fermin is not eligible to apply for AD, citing N.J.S.A. 43:16A-8(2) as a basis of denial, because he has no job to return to should his alleged disability diminish in the future.

Fermin appealed the Board’s denial and the matter was transmitted to the Office of Administrative Law. Thereafter, the ALJ granted the parties’ requests to file cross-motions for summary decision. The Board filed its brief on April 27, 2022 and Fermin filed his brief on April 29, 2022. ALJ Tiscornia issued the ID on August 2, 2022. Ms. DeAngelis filed exceptions, dated September 6, 2022, and you filed a reply to exceptions, dated September 14, 2022, both of which were considered timely.

### **LEGAL CONCLUSIONS**

Under N.J.S.A. 43:16A-8(2), PFRSNJ may require any disability retiree to undergo a medical examination in order “to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished.” Additionally, “[i]f 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.” Ibid.

Fermin is unable comply with N.J.S.A. 43:16A-8(2) because he has no job to return to because he is forever barred from future employment with Paterson pursuant to the terms of the Settlement Agreement. As such, his inability to return to work for Paterson is fatal to his disability application. In Cardinale v. Board of Trustees, Police and Firemen’s Retirement System, 458 N.J. Super. 260 (App. Div. 2019), the Appellate Division explained why a member’s inability to return to work renders a member ineligible to apply for disability benefits. The court’s holding reads in pertinent part:

[W]hen a PFRS member . . . irrevocably resigns from active service, such a separation from employment automatically renders the individual ineligible for . . . disability benefits.

Generally, for individuals whose disability has vanished or materially diminished, benefits cease when the retiree refuses to return to duty after the Board has so ordered. In this sense, disability retirees are unique. But here, Cardinale can never return to duty solely because of his final resignation, rather than his refusal to do so upon disability rehabilitation. Under the governing legislative framework, the inability to return to duty – due solely to an irrevocable resignation – prevents the board from statutorily terminating any granted benefits, a result which would contravene important public policy underlying disability retirement benefits.

[. . .]

[R]ehabilitation statutes – like N.J.S.A. 43:16A-8(2) – expressly condition reinstatement for a disability retirees upon disability rehabilitation, and under such statutes, “the only obstacle to . . . reemployment is the disability itself” . . . [and the] obstacle for Cardinale is not [just] his [alleged] disability, but rather, his irrevocable resignation.

[Id. at 263, 270].

Similarly here, the terms of the Settlement Agreement forever barring Fermin from future employment create an additional impermissible obstacle to reinstatement. Permitting Fermin to proceed under these circumstances would “contravene important public policy underlying disability retirement benefits” because it would prevent the Board from statutorily terminating a granted benefit that Fermin is not eligible to receive “in the first place.” Id. at 263, 268; see also Mount v. Bd. of Trs., PERS, 133 N.J. Super. 72, 86 (App. Div. 1975)(holding that “the board of trustees are fiduciaries [that] . . . have a duty to protect the fund . . . exercise due care, diligence and skill in administering the trust[;] [i]t would not serve the statutory policy to pay out moneys to those not entitled thereto”). Accordingly, under its statutory authority and fiduciary responsibility to PFRSNJ, the Board properly denied Fermin’s request to apply for AD and reaffirms the denial herein.

The Board’s denial is also based on the provisions of N.J.A.C. 17:1-6.4, which states, in pertinent part:

- (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; . . .

The regulation is unequivocal in its assertion that a total and permanent disability must be the reason that the member applies for retirement. In the instant matter, Fermin's Settlement Agreement, whereby he avoided disciplinary charges and termination in exchange for his promise to retire, was clearly the impetus for his retirement application.

The Board noted your argument that Fermin separated from employment due to his disability and that the Board's refusal to process his AD application deprived him of due process. The Board disagrees. Indeed, the Appellate Division flatly rejected similar arguments made by the petitioner/appellants in Cardinale and M.R. v. Bd. of Trs., PFRS, 2020 N.J. Super. Unpub. LEXIS 615 (App. Div. Apr. 6, 2020). In Cardinale, the petitioner argued that the "Board's refusal to process his [disability] application . . . deprived him of the opportunity to show he suffered from a disability." Cardinale, 458 N.J. Super. at 267. The Appellate Division rejected this argument – holding that the existence of a disability "is irrelevant to our holding that his irrevocable resignation made him ineligible for benefits in the first place" and that "even if he was disabled - as a matter of law - the consequence of his irrevocable resignation is determinative"; his "permanent inability to return to duty is fatal." Id. at 268-69. Similarly, the petitioner in M.R. applied for a disability benefit and entered into a settlement agreement with his employer (the NJ Judiciary) agreeing to "not seek reemployment with the Judiciary in the future" in exchange for the Judiciary to drop pending disciplinary charges. 2020 N.J. Super. Unpub. LEXIS 615, at \*\*1-2. The PFRS board found that petitioner's "settlement . . . disallowed the processing of his disability claim" because he has no job to return to and cannot comply with the return to work statute, N.J.S.A. 42:16A-8(2). Ibid. The Appellate Division affirmed the Board's decision to not process M.R.'s disability application - finding that the issue of eligibility is a "critical threshold issue" and that M.R.'s inability to return to the Judiciary renders him "ineligible for participation in the disability pension scheme." Id. at \*5 (emphasis added). Likewise, Fermin's permanent inability to return to work in Paterson is fatal to his disability application because it renders him ineligible to participate in the disability pension scheme.

Lastly, the ALJ's ID ignores the binding and/or persuasive case law governing this matter and renders a legal conclusion that "would violate public policy, contravene the rehabilitation statute, and encourage abuse of the disability retirement system." Cardinale, 458 N.J. Super. at 273. As such, it must be rejected.

### **CONCLUSION**

For the foregoing reasons, the Board rejected the ALJ's ID and affirmed its decision that Fermin is ineligible to apply for AD.

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.

Eric V. Kleiner, Esq.  
RE: Luis Fermin  
November 15, 2022  
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Sincerely,

A handwritten signature in black ink that reads "Lisa Pointer". The signature is written in a cursive, flowing style.

Lisa Pointer  
Board Secretary  
Police and Firemen's Retirement System of New  
Jersey

G-2/sb

c: Luis Fermin  
Juliana C. DeAngelis, Esq., PFRSNJ Staff Attorney (ET)  
D. Lewis; S. Glynn; K. Ozol; (ET)  
OAL, Attn: Library (ET)