Exhibit AA

SUPREME COURT OF NEW JERSEY
C-91 September Term 2023
088236

Judy Thorpe;

Petitioner-Petitioner,

v.

ORDER

Board of Trustees,
Public Employees'
Retirement System,

Respondent-Respondent.

A petition for certification of the judgment in A-000689-20 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 19th day of September, 2023.

CLERK OF THE SUPREME COURT

Exhibit BB

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0689-20

JUDY THORPE,

Petitioner-Appellant,

v.

BOARD OF TRUSTEES,
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Respondent-Respondent.

Argued March 1, 2023 – Decided March 8, 2023

Before Judges Haas and Mitterhoff.

On appeal from the Board of Trustees of the Public Employees' Retirement System, Department of Treasury, PERS No. xx8918.

Judy Thorpe, appellant, argued the cause pro se.

Robert E. Kelly, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Robert E. Kelly, on the brief).

PER CURIAM

Appellant Judy Thorpe appeals from the August 20, 2020 final decision of the Board of Trustees of the Public Employees' Retirement System (Board) finding that Thorpe was not eligible to apply for ordinary disability retirement benefits because she was removed from her position for reasons unrelated to a disability. We affirm.

By way of background, it is well established "that eligibility for disability retirement benefits requires members to make a prima facie showing that they cannot work due to a disability. To that end, voluntary or involuntary termination of employment, for non-disability reasons, generally deems a member ineligible for disability benefits." In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 394 (App. Div. 2018). In this regard, N.J.A.C. 17:1-6.4 plainly 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.

[(emphasis added).]

"Thus, '[m]embers who leave public service for reasons unrelated to a disability are not entitled to disability retirement benefits in the first instance.'" Rooth v. Bd. of Trs., Pub. Emps.' Ret. Sys., 472 N.J. Super. 357, 367 (App. Div. 2022) (quoting In re Adoption of N.J.A.C. 17:1-6.4, 458 N.J. Super. at 404) (emphasis in original).

In this case, Thorpe began working for the Juvenile Justice Commission (JJC) in April 2005. Thorpe v. State, Nos. A-0104-11, A-5603-11 (App. Div.

June 10, 2015) (slip op. at 2). Following a series of incidents, the JJC directed Thorpe to undergo a fitness for duty evaluation in January 2008. Id. at 2-8. Thorpe refused to participate in the required evaluation and the JJC removed her from employment on that ground in August 2008. Id. at 8-9.

Thorpe subsequently pursued a series of legal actions following the JJC's decision to remove her from her position as a supervisor of nursing services. These actions are summarized in our most recent decision in Thorpe v. Cipparulo, Docket No. A-0418-20 (App. Div. May 17, 2022) (slip op. at 1-3). Thorpe's union filed a grievance challenging her removal by the JJC, but the arbitrator upheld Thorpe's termination. Id. at 1. Thorpe also filed an action in the Law Division alleging discrimination and unlawful retaliation under the Law Against Discrimination, N.J.S.A. 10:5-1 to -50, and the Conscientious Employee Protection Action, N.J.S.A. 34:19-1 to -14. Id. at 1-2. "The trial court dismissed this action after finding that [Thorpe] failed to establish a prima facie case of discrimination or retaliation. We affirmed." Id. at 2.

In 2018, ten years after her termination from the JJC, Thorpe filed an application with the Board for ordinary disability benefits. As required by N.J.A.C. 17:1-6.4(c), the Board reviewed the application to determine whether it was eligible for processing under N.J.A.C. 17:1-6.4(a). The Board determined

that Thorpe's alleged disability was not the reason she left the JJC's employ in August 2008 as required by N.J.A.C. 17:1-6.4(a). Instead, the record clearly demonstrated that Thorpe was not permitted to apply for a disability retirement because she had been involuntarily removed from employment in August 2008. N.J.A.C. 17:1-6.4(b)(1).

Accordingly, the Board found that Thorpe was not eligible to apply for ordinary disability retirement benefits. Thorpe appealed this decision to the Board, which again reviewed her application. In the Board's August 20, 2020 final decision, the Board relied on the clear language of N.J.A.C. 17:1-6.4 and concluded that because the JJC removed Thorpe from employment on disciplinary grounds, she was not eligible to apply for pension benefits. This appeal followed.

On appeal, Thorpe largely does not address the Board's finding of ineligibility. Instead, she argues that the JJC should not have been permitted to require her to submit to a fitness for duty examination and, in the alternative, that she left her position because of an alleged disability. These arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(D). We affirm substantially for the reasons stated by the Board in its thorough August 20, 2020 written decision, and add the following comments.

Our review of an agency's decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). "In order to reverse an agency's judgment, [we] must find the agency's decision to be 'arbitrary, capricious, or unreasonable, or [ ] not supported by substantial credible evidence in the record as a whole.'" Ibid. (second alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). In determining whether agency action is arbitrary, capricious, or unreasonable, our role is restricted to three inquiries:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
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> [W.T. v. Div. Med. Assistance & Health Servs., 391 N.J. Super. 25, 35-36 (App. Div. 2007) (quoting Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985)).]

Thus, the burden of showing the agency acted in an arbitrary, capricious, or unreasonable manner rests on the party opposing the administrative action. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 349 (App. Div. 2010) (citing In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006)). It is not the function of the reviewing court to substitute its independent

judgment on the facts for that of an administrative agency. In re Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974).

We must also "'defer to an agency's technical expertise, its superior knowledge of its subject matter area, and its fact-finding role,'" and therefore are "obliged to accept all factual findings that are supported by sufficient credible evidence." Futterman v. Bd. of Review, Dep't of Labor, 421 N.J. Super. 281, 287 (App. Div. 2011) (quoting Messick v. Bd. of Rev., 420 N.J. Super. 321, 325 (App. Div. 2011)). Although we are not bound by an agency's interpretation of law, we accord a degree of deference when the agency interprets a statute or a regulation that falls "within its implementing and enforcing responsibility . . . ." Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (citation omitted). Our authority to intervene is limited to "those rare circumstances in which an agency action is clearly inconsistent with [the agency's] statutory mission or with other State policy." Futterman, 421 N.J. Super. at 287 (alteration in original) (internal quotation marks omitted).

Furthermore, "[i]t is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" E.S., 412 N.J. Super. at 355 (second alteration in original) (quoting Wnuck, 337 N.J. Super. at 56).

"Nevertheless, 'we are not bound by the agency's legal opinions.'" A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330, 340 (App. Div. 2009) (quoting Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)). "Statutory and regulatory construction is a purely legal issue subject to [our] de novo review." Ibid.

Applying these principles, we discern no basis for disturbing the Board's well-reasoned determination that Thorpe was not eligible for ordinary disability benefits. The record firmly establishes that the JJC removed Thorpe from employment and that Thorpe was unsuccessful in her challenges to the agency's decision. Contrary to Thorpe's newly minted arguments on appeal, she did not leave her employment because of an alleged disability.

Affirmed.

Additional material from this filing is available in the Clerk's Office.