IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502013CA018598XXXXMB

ROBERT E. EPSTEIN,
Petitioner,

v.

BOARD OF TRUSTEES OF THE
BOYNTON BEACH POLICE OFFICERS'
PENSION FUND,
Respondent.
_____/

Opinion filed: OCT 20 2014

Petition for Writ of Certiorari from
Board of Trustees of the Boynton Beach Police Officers' Pension Fund

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PER CURIAM.

This Petition for Writ of Certiorari ("Petition") concerns the "Final Order and Notice of Appeal Rights" ("Final Order") issued by the Board of Trustees of the Boynton Beach Police Officers' Pension Fund ("the Board") on November 19, 2013, in which the Board denied Petitioner Robert E. Epstein's application for disability retirement benefits. Epstein asks the Court to quash the Board's Final Order, primarily contending that the Board did not properly

interpret the terms of the Boynton Beach Municipal Police Officers' Retirement Trust Fund ("the Fund"), codified at section 18-164, *et seq.*, Article III of Code of Ordinances of Boynton Beach, Fla. ("the Article").

Epstein was hired by the Boynton Beach Police Department as a law enforcement officer on August 23, 2005, which was also his "pension hire" date. He was employed as a full-time law enforcement officer with the City from August 23, 2005 through October 3, 2012. During his employment, Epstein contributed a portion of his salary to the Fund. The Fund is a defined benefits pension plan that is codified in Boynton Beach's Code of Ordinances and is operated in accordance with the Marvin B. Clayton Police Officers Pension Trust Fund Act, section 185.01, *et seq.*, Florida Statutes.

On January 7, 2012, while responding to the scene of a house fire, Epstein inhaled smoke from burning plastic. Epstein received medical treatment on January 8 and 13, 2012 for the smoke inhalation. His medical providers recommended that he be functionally limited to work at a desk. Epstein apparently continued to work in this capacity until October 3, 2012, when he was terminated.[1]

After he was terminated, Epstein filed an "Application for Disability/Pension Benefits."[2] The application was dated October 10, 2012, and notarized October 22, 2012. On August 13, 2013, the Board held an informal hearing to determine whether Epstein was entitled to apply for a disability benefit after his employment was terminated. Epstein was represented by counsel,

[1] Epstein asserts that he was "unilaterally and without warning terminated . . . due to medical reasons." He cites no record evidence showing the reason for his termination, however. Epstein also asserts that "[d]ocuments show that the Boynton Beach Police Department had an indication that they were going to terminate Officer Epstein as early as September 25, 2012, as some of the termination paperwork received much later reflected this date." Again, Epstein cites no record evidence in support of this assertion.

[2] Again without citing any record evidence in support, Epstein asserts in his Petition that he spoke with Barbara Ladue, the Pension Administrator, in July of 2012 about applying for line-of-duty disability if his physicians concluded that he "would never be able to return to full duty status as a law enforcement officer." Epstein further asserts that Ms. Ladue failed to inform him of any timing requirements for filing.

Paul Kelley, Esq., at the hearing. The Board ultimately determined "that the Pension Plan document did not permit [Epstein] to file his application after his termination." Epstein did not request an appeal within the required time period.[3]

The Board proceeded to render its Final Order on November 19, 2013. The Board found that Epstein was no longer a "member" as that term was defined when he filed his application, and that only members were permitted to file for disability retirement. The Board also found that Epstein's Notice of Appeal was not timely filed. The instant Petition followed on December 19, 2013.

A party may seek review of the Board's decision in its quasi-judicial capacity by filing a petition for writ of certiorari. Fla. R. App. P. 9.100(b) & 9.190(b)(3); *see, e.g., Terry v. Bd. of Tr. of City Pension Fund*, 854 So. 2d 273, 275 (Fla. 4th DCA 2003). Our review follows the three prongs set forth in *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982): (1) whether procedural due process has been afforded; (2) whether the essential requirements of law have been observed; and (3) whether competent substantial evidence supports the Board's decision. *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002). In essence, Epstein takes issue with the Board's interpretation of the relevant language from the

[3] The Board sent a notice of denial explaining its determination to Epstein care of his attorney, Kelley, dated August 21, 2013. The Board explained in its notice that Epstein had the right to appeal the Board's decision within 20 days of receipt of the notice. Under the Hearing Review Procedures for the Fund, an applicant for benefits may appeal within 20 days of being informed of the denial of his request for pension benefits. If no appeal is filed within that time, the denial becomes final. A "UPS Delivery Notification" shows that the notice was delivered on August 22, 2013. Epstein asserts in the Petition that his attorney, Kelley, "was handed the notice of denial and rehearing procedure information" on September 16, 2013. Kelley emailed the Pension coordinator and the Board a Notice of Appeal the same day. According to Epstein, "the notice delivered to [Kelley's] office was misplaced until this date." On September 17, 2013, the Board provided notice to Kelley that the appeal was untimely.

Article and its conclusion that he could not file an application for disability retirement benefits after being terminated from his employment.[4]

The Board is "solely responsible for administering the pension fund," § 18-166(a), Code of Ord., Boynton Beach, Fla., and it is vested with "[t]he sole and exclusive administration of, and the responsibilities for, the proper operation of the retirement fund," *id.*, § 18-167(b). "Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration." *Las Olas Tower Co. v. City of Ft. Lauderdale*, 742 So. 2d 308, 312 (Fla. 4th DCA 1999). "Of course, that deference is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand." *Id.* An agency's construction of a statute is clearly erroneous if it "clearly contradicts the unambiguous language of the rule or if it is arbitrary or unsupported by evidence." *Citizens of State of Fla. v. Wilson*, 568 So. 2d 1267, 1271 (Fla. 1990) (internal quotation marks and citations omitted). This case turns on the Board's interpretation of two provisions.

First, there is the "Membership" provision of the Fund: "All police officers who are participants in the fund as of the effective date of this article shall be members of this retirement system. Each police officer shall be included in this plan on the date of hire." § 18-168, Code of Ord., Boynton Beach, Fla. A "Police officer" is defined as

> [a]ny person who is elected, appointed, or employed full time by the City of Boynton Beach, who is certified or required to be certified as a law enforcement officer . . . , who is vested with authority to bear arms and make arrests, and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic or highway laws of the state.

[4] Of note, the Board contends that this Court should deny the Petition because it lacks subject matter jurisdiction, as Epstein failed to timely appeal the Notice of Denial, and the Board did not hold a formal hearing as a result. We find the Board's contentions in this regard unavailing.

Id. § 18-165(a).

The Board concluded that "a 'member' is a police officer," and that Epstein was not a member because he had been terminated from his employment as a police officer. Of course, what the relevant section actually provides is that all police officers shall be members, not that they must remain active police officers to remain members. *See id.* § 18-168. Still, there is no reference anywhere in the Article to a member who has been terminated from his employment as a police officer.[5] Accordingly, even if the Board's interpretation that only active police officers could be members was questionable, its interpretation that a terminated police officer was not a member was not unreasonable. Nor was it clearly erroneous, since it is not arbitrary and it does not clearly contradict the unambiguous language of the Article.

What remains, then, is the Board's interpretation of the "Disability retirement" provision. Without citing to any particular provision of the Article, the Board concluded that "[t]he Pension Plan only permits members to file for disability pensions." Subsection "a" of the "Disability retirement" provision indicates the following about eligibility:

> Any member who receives a medically substantiated service connected injury, disease or disability which injury, disease or disability totally and permanently disabled him or her to the extent that in the opinion of the Board of Trustees, he or she is wholly prevented from rendering useful and efficient services as a police officer shall receive a monthly benefit equal to 66 2/3% of his or her basic rate of earnings in effect on the date of disability.

Id. § 18-169(c)(1)a.

[5] The term "member" is used three times in section 18-169(4) of the Article in reference to someone who is actually receiving disability retirement benefits: "a member who has been retired on a pension on account of permanent and total incapacity," a "member receiving a pension for disability," and a "retired member." *Id.* § 18-169(4). The term "retired member" also appears in section 18-170(c): "Any retired member who desires to change his or her joint annuitant or beneficiary shall file with the Board of Trustees a notarized notice of such change." While these references suggest that membership may continue while a person is receiving benefits under the Fund, they in no way contradict the Board's interpretation that police officers who have been terminated are no longer members.

Relying on this language alone, Epstein observes that he was a member at the time he received the injury that purportedly rendered him disabled. He thus contends that he was eligible for benefits if the Board found that he was wholly prevented from rendering useful and efficient services as a police officer at the time of his injury. However, subsection "b" of the "Disability retirement" provision continues that "[t]he final decision whether a member meets the requirements for duty disability pension rests with the board and shall be based on substantial competent evidence on the record as a whole." *Id.* § 18-169(c)(1)b. The subsection on "Disability exclusions," meanwhile, provides that "[n]o member shall be granted a disability pension" where any of a number of excluding factors are shown to the Board's satisfaction. *Id.* § 18-169(c)(5). These provisions indicate that the disability determination will be made by the Board while the member is still currently a member.

Other provisions in the Article further support the Board's conclusion that only current members may file applications for disability retirement. Subsection (3) of section 18-169 describes the procedure for the Board to follow in designating a Medical Board when necessary to process an application for disability retirement. That subsection provides, *inter alia*, that the Medical Board "shall investigate all essential statements or certificates made by or on behalf of a member in connection with an application for disability retirement . . . ." *Id.* § 18-169(3). Elsewhere, the Code provides that "[e]ach member applying for a service incurred disability benefit from this fund shall be required to apply for disability benefits under social security, and, if applicable, workers' compensation." *Id.* § 18-169(6).

There are no provisions anywhere in the Article that make reference to anyone other than a current member filing an application for disability retirement benefits. The Board's interpretation that only current members could file such applications thus did not contradict any

unambiguous language in the Article. Moreover, the Board's interpretation was consistent with the Article read as a whole. It was therefore not unreasonable or arbitrary.

Although the Board's interpretation could be perceived as unduly harsh as applied to Epstein, given his asserted link between his disability claim and his work as an officer, in light of the language of the Article, the Board's interpretation was neither unreasonable nor clearly erroneous. The Board therefore did not depart from the essential requirements of law. *See Las Olas Tower Co.*, 742 So. 2d at 312. Additionally, given that the Board's interpretation was not unreasonable or clearly erroneous, Epstein's contention that the Board's Final Order was not supported by competent substantial evidence – because the Board did not find that Epstein "did not have a medically substantiated service connected injury, disease or disability on January 7, 2012" – is moot. The Petition for Writ of Certiorari is **DENIED**.

BLANC, SASSER, and SMALL, JJ., concur.