IN THE COURT OF APPEALS OF TENNESSEE

CHRISTINE BRADLEY NEBLETTE,	)	C/A NO. 03A01-9511-CH-00418
	)	HAMILTON COUNTY CHANCERY COURT
Plaintiff-Appellee,	)	
	)	
	)	
	)	
	)	
	)	
	)	
v.	)	
	)	HONORABLE R. VANN OWENS,
	)	CHANCELLOR
	)	
	)	
	)	
	)	
THE CITY OF CHATTANOOGA FIREMAN'S AND POLICEMAN'S INSURANCE AND PENSION FUND BOARD,	)	
	)	
	)	
	)	
	)	
	)	AFFIRMED AS MODIFIED
Defendant-Appellant.	)	REMANDED

ARVIN H. REINGOLD, P.C., Chattanooga, for Appellant.

ROBERT L. MOON, JR. and MICHAEL S. PRICHARD, Chattanooga, for Appellee.

OPINION

Susano, J.

On remand from this court, the trial court ruled that the plaintiff police officer's disability pension payments would commence, retroactively, as of April 14, 1992, and that the amount of those payments would be determined pursuant to the terms of the pension plan in effect prior to January 1, 1993. The City of Chattanooga Fireman's and Policeman's Insurance and Pension Fund Board (Board) appeals, arguing that the award should start, and be calculated, as of February 2, 1993, under the terms of the new pension plan. We agree with the trial court's determination that the old plan applies to Neblette's disability; however, we find and hold that the payments should commence as of October 15, 1992. The trial court's judgment is modified to so provide.

In the first appeal, we held that the plaintiff, Christine Bradley Neblette, was entitled to a disability pension based upon an injury she received while employed as a Chattanooga police officer. ***Neblette v. The City of Chattanooga Fireman's and Policeman's Ins. and Pension Fund Bd.,*** No. 03A01-9402-CH-00046, 1994 WL 449101 (filed at Knoxville, August 22, 1994, Goddard, P.J.). This time we are asked to resolve two additional issues: first, the starting date of Neblette's disability payments; and second, the version of the pension plan under which the amount of her payments is to be calculated. Regarding the second issue, we are presented with two possibilities: the plan in effect at the time Neblette was injured, ceased working, and filed her application for a pension, or the subsequently amended

plan, which took effect after she filed her application but before the Board acted on that application. The Chancellor held that Neblette was entitled to the more beneficial provisions of the earlier plan, and that her disability payments should start as of the date of her injury, April 14, 1992. We agree that the earlier pension plan controls, but are of the opinion that Neblette's benefit payments should start effective October 15, 1992, the date on which she ceased to receive her regular paycheck.

I

The facts relevant to a determination of the issues now before us are essentially undisputed. Neblette incurred a work-related injury[1] on April 14, 1992. According to her brief, Neblette continued to work "sporadically" over the next six months. She stopped working permanently on October 15, 1992. Regarding her pay during that period, her brief asserts the following:

> at most she received only part of her "injury on duty pay" or took personal sick days she had previously accumulated. At other times when she was unable to work she was carried on the police roll as absent without pay.

The record contains Neblette's "employee history report--salary

[1]Since we determined in our earlier opinion that Neblette was entitled to a pension and since that decision is now final, it is the law of this case. Cf. **Bivins *v. Hospital Corp. of America,*** 910 S.W.2d 441, 447 (Tenn.App. 1995); ***Jones v. Jones,*** 784 S.W.2d 349, 351 (Tenn.App. 1989).

detail for 1992," the accuracy of which is not challenged. That report clearly shows that Neblette received her regular salary during the six months beginning April 15, 1992 and ending October 15, 1992. She received her last paycheck for the pay period ending October 15, 1992. Neblette filed an application for a disability pension on October 15, 1992.

At all relevant times up to and including October 15, 1992, the Chattanooga city ordinance dealing with disability pensions provided, in pertinent part, as follows:

> If any employee of the department of fire and police while engaged in the discharge of his duties shall receive injuries resulting in such employee becoming disabled from performing his duties, he shall be placed on a full pension and paid the amount heretofore provided, regardless of the length of time served; provided, however, that before such injured employee shall be retired on a pension the board of directors shall have him examined by competent physicians to determine whether or not such disabled employee is unable to discharge his regular or any other duty that may be required of him by officials of the department of fire and police; provided, further, that no disabled employee shall be retired on a pension because of injury until six (6) months after such injury was received. Any employee retired on a pension because of an injury, in event of recovery to the extent that he is again able to perform any duty required of him, shall be removed from the pension roll and reinstated in service.

Chattanooga City Charter, Section 13.76. The ordinance was amended effective January 1, 1993. The amendment had the effect

of significantly reducing the dollar amount of benefits due a disabled officer.

On February 2, 1993, the Board denied Neblette's pension application. That action sparked the first round of litigation, resulting in this court's affirmance of the Chancellor's reversal of the Board's decision to deny disability benefits. ***Neblette,*** *supra*. On remand, the Board awarded Neblette benefits retroactively, effective February 2, 1993. The Board calculated her benefits under the terms of the less favorable amended ordinance.[2] Neblette requested that her disability benefits be calculated under the earlier version of the ordinance, and that they be made retroactive to April 14, 1992, the date of her injury. At a hearing held April 20, 1995, the Board denied both requests. Neblette appealed the Board's decision to the Hamilton County Chancery Court, and, on June 20, 1995, Chancellor R. Vann Owens ordered that disability pension benefits be paid effective April 14, 1992, and that they be calculated under the earlier version of Chattanooga's ordinance. This appeal followed.

[2]We referred to the earlier version of the pension plan in our first opinion; however, we did not expressly decide that the earlier version was applicable to Neblette's case.

II

Our standard of review is set forth at T.C.A. § 4-5-322(h), a part of the Uniform Administrative Procedures Act:

> The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

Id. We review this case with this standard in mind.

III

We first address the Board's contention that the Chancellor erred in reversing the Board's determination that the amended ordinance controlled Neblette's benefits. The Board argues that since it did not act to deny Neblette's pension application until after the amended ordinance took effect, her pension must be determined pursuant to the amended ordinance. On

the other hand, Neblette argues that since her injury, disability, and the filing of her pension application all occurred before the amendment became effective, she acquired a vested right in the contractual terms of the earlier version of the ordinance. We agree that the earlier version applies to her disability pension.

A line of Tennessee cases starting with ***Weesner v. Electric Power Bd. of Chattanooga,*** 344 S.W.2d 766 (Tenn. App. 1961), is controlling on this issue. In ***Weesner***, the court stated the following:

> A board of directors cannot legally strip an employee of the benefits of a pension plan where the employee has complied with the terms of the offer of a pension since the purposes of the plan could be readily frustrated at the whim of the directors.

Id. at 768, quoting from ***Bird v. Connecticut Power Co.,*** 133 A.2d 894, 897 (Conn. 1957). In 1976, the Supreme Court, in a case dealing with a public pension, cited ***Weesner*** as follows:

> The case of ***Weesner***. . .dealing with the private pension of an electric power board in Chattanooga, clearly holds that an offer of a pension, the acceptance of same, and the completion of the service of the employee, creates a vested interest in said pension which will not be denied either to the participant or his family.

> The Appellants insist that the General Assembly is empowered to reasonably modify pension benefits, even if vested. We do not agree.

Miles v. Tennessee Consol. Retirement System, 548 S.W.2d 299, 304 (Tenn. 1976). This rule has been consistently followed by the Supreme Court in a series of cases since *Miles*. *Blackwell v. Quarterly County Court of Shelby County*, 622 S.W.2d 535, 543 (Tenn. 1981) (adopting "Pennsylvania rule, which permits reasonable modifications. . .provided that no such modification can adversely affect an employee who has complied with all conditions necessary to be eligible for a retirement allowance."); ***Roberts v. Tennessee Consol. Retirement System***, 622 S.W.2d 544, 545 (Tenn. 1981); ***Felts v. Tennessee Consol. Retirement System***, 650 S.W.2d 371, 374-75 (Tenn. 1983); ***Abernathy v. Tennessee Consol. Retirement System***, 655 S.W.2d 143, 145 (Tenn. 1983); ***Knox County v. City of Knoxville***, 786 S.W.2d 936, 941 (Tenn. 1990).

The underlying rationale for the rule is the recognition that

> a non-contributory pension and profit sharing plan is not a gratuity but is an offer of additional deferred compensation and the offer is accepted by the employee remaining in the employment of the employer which is sufficient consideration to support the employer's promise to pay the benefits and is, therefore, a contract enforceable by the employee.

Simmons v. Hitt, 546 S.W.2d 587, 591 (Tenn. App. 1976).

We examine the terms of the earlier ordinance to determine if Neblette complied with the conditions precedent to her entitlement to disability benefits prior to the enactment of the new plan. In so doing, we keep in mind the principle, clearly recognized in Tennessee law, that

> the statutes creating pensions are remedial in their nature and are to be liberally construed in favor of the applicants for pensions, as a matter of sound public policy.

Collins v. City of Knoxville, 176 S.W.2d 808, 811 (Tenn. 1944); ***Pless v. Franks,*** 308 S.W.2d 402, 405 (Tenn. 1957); ***Miles,*** 548 S.W.2d at 304.

The ordinance, Section 13.76 of the Chattanooga City Charter, provided in part as follows:

> If any employee of the department of fire and police while engaged in the discharge of his duties shall receive injuries resulting in such employee becoming disabled from performing his duties, he shall be placed on a full pension and paid the amount heretofore provided, regardless of the length of time served. . .

Thus, by the terms of the pension plan, the conditions precedent to receipt of a "full" disability pension are: (1) the sustaining of an injury; (2) while engaged in discharge of duty; (3)

resulting in an inability to perform police duty. We note that there are several other conditions precedent to being "retired" on a pension:

> provided, however, that before such injured employee shall be retired on a pension the board of directors shall have him examined by competent physicians to determine whether or not such disabled employee is unable to discharge his regular or any other duty . . . provided, further, that no disabled employee shall be retired on a pension because of injury until six (6) months after such injury was received.

The apparent purpose of the doctor's examination and the six-month waiting period is to insure and prove that the substantive conditions precedent have actually been satisfied, i.e., the employee has sustained a disabling (as defined) injury that is permanent in nature. *See* ***Music v. Western Conf. of Teamsters Pen. Trust Fund***, 712 F.2d 413, 418-20 (9th Cir. 1983). In any event, there is nothing in the record tending to show that Neblette did not comply with the requirements for being "retired" on a pension before the enactment of the amendment. Thus, we hold that under the express provisions of the pension plan, Neblette complied with all conditions precedent to receiving a disability pension *before* the ordinance was amended, and therefore the Board could not apply the less favorable terms of the amended ordinance to calculate her benefit payments. We

affirm the Chancellor's judgment on this issue.[3]

IV

The Board's second issue is whether the Chancellor erred in awarding disability payments retroactively to the date of Neblette's injury, April 14, 1992. The parties agree that the ordinance does not explicitly specify when disability payments are to commence. The Board argues that the payments should not begin before it first acted on Neblette's pension request on February 2, 1993.

We reject the Board's argument for three reasons. First, the language of the ordinance does not support the Board's interpretation; second, as previously indicated, it is our duty to liberally construe the terms of the pension plan in favor of the employee; and, finally, the date on which the Board decides to act on a disability pension application is purely arbitrary and logically unrelated to the occurrence of the officer's disability. To hold that an applicant cannot receive benefit payments until the Board acts would mean, as a practical matter, that similarly situated applicants could begin receiving disability benefits at different, and possibly widely varying, times based solely upon when the Board happened to schedule its

[3]Since the earlier version of the pension plan was in effect at the time of injury; when the six-month period was satisfied; and when Neblette's application was filed, it is not necessary for us to decide in this case which of these three dates is determinative of the applicable plan.

hearings.[4] We decline to interpret the pension plan ordinance in that manner.

However, under the present facts, we do not think the payments should start on the date Neblette incurred her injury, because she received a full salary for six months after the injury. We again look to the terms of the ordinance to determine if a "double recovery" is in accordance with the intention of the parties. In ***Fultz v. Union Carbide Corp.***, 409 S.W.2d 541, 544 (Tenn. 1966), the court, in construing a pension plan, applied the following general principle:

> The answer to this question is contingent upon the meaning to be derived from the terms of the Pension Plan. In order to determine the meaning of this contract, we must ascertain the intention of the parties; and so long as it is not inconsonant with established legal principles, we must give effect to that intention.

Id. Accordingly, we look to the plan's terms to determine and effectuate the parties' intention.

We find two provisions in the ordinance that persuade us that the intention of the parties was that an employee should

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[4]This is not to say that an employer and employee could not contractually agree to exactly that arrangement, provided those terms are clearly spelled out in the pension plan. In the context of a pension plan which does not provide a date for payments to start, however, we decline to interpret the plan to mean an employee is not entitled to receive benefits until the Board acts upon his or her application when the employee has otherwise done everything required to hold up his or her end of the pension "bargain."

not receive a disability pension while also drawing a regular salary. The first is the requirement that the employee be examined by a doctor "to determine whether [the] disabled employee is *unable to discharge* his regular or any other duty that may be required of him . . ." (Emphasis added). The second provides as follows:

> Any employee retired on a pension because of an injury, in event of recovery to the extent that he is again able to perform any duty required of him, shall be removed from the pension roll and reinstated in service.

The clear import of these provisions is that if an employee is able to work in the department, he or she is not entitled to a disability pension. Accordingly, since Neblette worked "sporadically" and received a full regular salary through October 15, 1992, we feel that her disability payments should not begin until that date. The Chancellor's holding to the contrary is not supported by "substantial and material" evidence. *See* T.C.A. § 4-5-322(h)(5).

For the aforementioned reasons, the judgment of the Chancellor is modified to provide that Neblette's disability benefits will begin as of October 15, 1992. As modified, the trial court's judgment is affirmed. Exercising our discretion, we tax the costs on this appeal to the appellant and its surety. This case is remanded to the trial court for enforcement of the judgment, as modified, and for collection of costs assessed below

pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

_____
Don T. McMurray, J.