NICHOLAS J. VANGHELE *v.* TOWN OF FAIRFIELD ET AL.
(AC 36211)

Beach, Alvord and Pellegrino, Js.

Argued December 2, 2014—officially released April 21, 2015

(Appeal from Superior Court, judicial district of Fairfield, Tyma, J. [motion to dismiss]; Radcliffe, J. [judgment].)

Robin B. Kallor, for the appellant (named defendant).

Thomas W. Bucci, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. In this breach of contract action, the defendant town of Fairfield appeals from the judgment of the Superior Court rendered in favor of the plaintiff, Nicholas J. Vanghele. This action arose from the denial of the plaintiff's application to the Fairfield Police and Firemen's Retirement Board (board)[1] for a service connected disability retirement pension (disability pension). The Superior Court, in its memorandum of decision, concluded that the board had denied the plaintiff a disability pension upon insufficient evidence, and remanded the case to the board with instruction that the plaintiff was to undergo a physical examination by a physician chosen by the board. On appeal, the defendant claims that the court improperly (1) determined that it had subject matter jurisdiction, (2) concluded that the board had abused its discretion in denying the plaintiff's application for a disability pension, and (3) determined that a medical examination of the plaintiff by a physician chosen by the board was required. We agree with the defendant on the second claim and, therefore, reverse the judgment of the court and remand the case with direction to reinstate the decision of the board.[2]

The following facts as stated in the memorandum of decision from the Superior Court are relevant to this appeal. The plaintiff was employed as a police officer by the defendant beginning in 1993, and at the time of his resignation in October, 2009, he had reached the rank of sergeant. In July, 2005, while acting within the scope of his employment, the plaintiff injured his left elbow in an automobile accident.

After the accident, the plaintiff received treatment from Eric J. Katz, an orthopedic surgeon. Due to this injury, the plaintiff missed two months of work, but eventually returned to full-time duty as a police officer. He continued, however, to experience discomfort and pain. On a follow-up visit, Katz confirmed that the plaintiff had nerve damage to his left elbow and suffered from a condition known as cubital tunnel syndrome attributed to the injury he had sustained in the car accident. Because of this continued discomfort, Katz performed surgery on the plaintiff's left elbow in July, 2006, approximately one year after the initial accident. Two months after the surgery, in September, 2006, the plaintiff returned to work. After this date, the plaintiff was not absent from work for any period of time until his resignation in October, 2009, which he attributed to his elbow injury.

On September 20, 2009, while the plaintiff was off duty, he was involved in a series of events that resulted in his placement on administrative leave. The plaintiff spent an evening in New York City and returned to Fairfield early the next day. At about 2:15 a.m., the

plaintiff drove to the home of Keith Broderick, a fellow police officer for the defendant, which was located in Fairfield. The plaintiff attempted to access Broderick's home, and Broderick's wife heard such noise and called the police. At this point in time, Broderick was on duty.

The plaintiff was found lying face down in the front seat of his vehicle. When the responding officers questioned him as to the incident, he gave various contradictory statements. First, the plaintiff stated that he was at Broderick's home because he heard a call on the radio and came for help. Later, the plaintiff stated that his memory from the night was impaired due to blacking out from his alcohol consumption. Despite his claims of intoxication, officers on the scene when the plaintiff was found in his car stated that they did not smell alcohol on his breath.

After an internal affairs investigation and report, the plaintiff was put on administrative leave on September 23, 2009. This report established that the plaintiff had a prior history of trespassing on the properties of persons that he knew. The report further concluded that the plaintiff's conduct during this incident involved making false statements, endangering the safety of fellow officers as well as motorists, and violating provisions of the police manual. As a result of these findings, a disciplinary hearing was scheduled before the Fairfield Police Commission (commission) for October 22, 2009, and the plaintiff learned that the chief of the department was prepared to recommend to the commission that his employment be terminated.

Prior to this hearing, the plaintiff resigned from his position and signed a separation agreement on October 21, 2009. The day before the plaintiff signed this document, he had filed a claim for disability retirement with the defendant. The plaintiff attached letters from Katz, and Michael Troknya, a doctor of chiropractic medicine, to his claim for a disability pension.

While employed by the defendant, the plaintiff was covered under the terms of the retirement program for Fairfield police and firemen's retirement system (retirement plan). Specifically applicable to this appeal is § 3.3, which reads:

"a. A member whose employment is terminated because of permanent and total disability at a time when he had at least five years (5) of creditable service shall be retired and become entitled to a retirement benefit beginning on the first day of the month following the month the disability commenced. A member shall be deemed permanently and totally disabled within the meaning of the plan only if the [board], in its sole and absolute discretion, shall determine on the basis of medical evidence that

"(1) such a member is totally unable, as a result of bodily injury or disease, to engage in or perform the

duties of any position in the Police or Fire Departments, and

"(2) such disability was not the result of the member's own willful misconduct and will be permanent and continuous for the remainder of his life. A member applying for disability retirement shall be required to submit to examinations by a physician or physicians selected by the [board], and may be required to submit to reexamination periodically as the [board] may direct. If a pensioner is found to be no longer disabled, the Disability Retirement benefit shall be terminated."

On October 19, 2010, the board held a hearing concerning the plaintiff's claim for a disability pension. After hearing evidence from both sides, the board unanimously denied the plaintiff's claim with one abstention. The plaintiff appealed from the decision of the board to the Superior Court, and in his amended complaint argued that the board had breached the terms of the collective bargaining agreement between the defendant and the police union, of which the plaintiff was a member, and the retirement plan. The defendant filed a motion to dismiss the plaintiff's appeal to the Superior Court for lack of subject matter jurisdiction, which the court denied.

The court denied the defendant's motion to dismiss and rendered judgment in favor of the plaintiff. In its memorandum of decision the court stated: "No physical examination of the plaintiff was requested by the [board], and no medical evidence was presented at the hearing, designed to contradict or undercut the brief, conclusory comments in [Katz'] 2009 letter. Were it not for the requirement that its decision be based upon 'medical evidence,' this court would have no difficulty upholding the decision of the [board] and finding the issues in favor of the [defendant]. An examination, limited to the evidence presented, would require no other result. . . . The only basis for finding in favor of the [plaintiff] in this action is that no 'medical evidence' supported the otherwise reasonable conclusion that he was not entitled to a disability pension." (Citation omitted.) The court then remanded the matter to the board, and mandated that the plaintiff submit to a medical examination by a physician of the board's choosing. The purpose of the examination was to enable the physician or physicians to render "an opinion, to a reasonable degree of medical probability, whether [the plaintiff] suffers from a 'permanent and total disability,' which renders him unable to 'engage in or perform the duties of any position in the Police or Fire Departments.' " After receiving this opinion, the board was to reconsider the plaintiff's eligibility for a disability pension. Prior to the board taking these actions, the defendant filed this appeal. Additional facts will be set forth as necessary.

I

The plaintiff alleged in his complaint to the Superior Court, and argues here, a breach of contract claim. Specifically, he alleges that a breach of the collective bargaining agreement and retirement plan occurred when he was denied a disability pension. The defendant filed a motion to dismiss, which the Superior Court denied. The Superior Court stated: "The court has the authority to hear and decide a claim that the [defendant] breached the collective bargaining agreement by rejecting the plaintiff's application for a disability pension." On appeal, the defendant claims that the court improperly determined that it had subject matter jurisdiction because the Fairfield Town Charter (charter) provides no express right to appeal from a decision of the board. We agree with the court's conclusion that it had subject matter jurisdiction over the plaintiff's cause of action.

We begin by setting forth the applicable standard of review. "Because a determination regarding the [Superior] [C]ourt's subject matter jurisdiction raises a question of law, our review is plenary. . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citation omitted; internal quotation marks omitted.) *One Country, LLC* v. *Johnson*, 314 Conn. 288, 298, 101 A.3d 933 (2014).

In the present case, the plaintiff sought to appeal to the Superior Court from the board's decision on the basis of the alleged breach of the collective bargaining agreement claim. The court properly determined that the board, while not an administrative agency, exercised powers and duties similar to that of an administrative agency and, therefore, the court had jurisdiction over the plaintiff's cause of action. The board was created by the charter, which enumerates the powers and duties of the board. This court in *Greene* v. *Waterbury*, 126 Conn. App. 746, 749, 12 A.3d 623 (2011), determined that when a retirement board was created by the Waterbury City Code and granted such board powers and duties similar to that of an administrative agency, this court "review[s] the actions of the board under the . . . standard[s] that [govern] review of an administrative agency's actions." (Internal quotation marks omitted.) See also *Diaz* v. *Board of Directors*, 2 Conn. App. 43, 48, 476 A.2d 146 (1984) (action in Superior Court arising from decision by pension fund directors to deny disability pension is proper when plaintiff is otherwise without recourse to protect claimed property interest from unconstitutional deprivation or impairment). Therefore, the court properly determined that it had subject matter jurisdiction over the plaintiff's claim.

II

Second, the defendant claims the court improperly concluded that the board abused its discretion when it

denied the plaintiff's application for a disability pension. We agree with the defendant.

We first set forth the applicable standard of review. "An appellate court, in reviewing a decision from a local personnel and pension appeals board, may not adjudicate facts or otherwise substitute its judgment for that of the board. . . . The court's function is limited to the examination of the record to determine whether the ultimate decision was factually and legally supported to ensure that the board did not act illegally, arbitrarily or in abuse of its discretion." (Citations omitted.) *Ferrier* v. *Personnel & Pension Appeals Board*, 8 Conn. App. 165, 166–67, 510 A.2d 1385 (1986).

"Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . It is fundamental that a plaintiff has the burden of proving that the [municipal board], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . . The law is also well established that if the decision of the [municipal board] is reasonably supported by the evidence it must be sustained." (Citation omitted; internal quotation marks omitted.) *Greene* v. *Waterbury*, supra, 126 Conn. App. 750.

"Our analysis begins with the proposition that an applicant for service connected permanent disability benefits must make an affirmative showing that he or she has met the requirements of [the retirement plan]. . . . Until a proper factual showing has been made, however, there is no presumptive entitlement to permanent disability benefits. The board therefore had no duty to rebut the evidence produced on the plaintiff's behalf if it concluded that the plaintiff had not satisfied his burden of proof.

"In evaluating the evidence before it, the board was obligated to exercise its independent judgment about the sufficiency of the evidence with regard to the permanency of the plaintiff's condition. Because of its professional expertise, the determination of the plaintiff's entitlement to disability retirement benefits required the exercise of discretion by the [board]." (Citation omitted.) *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 219, 554 A.2d 292 (1989).

The following additional facts are relevant to our discussion of this claim. In order to qualify for a disability pension under article XXVI, § 26.03, of the collective bargaining agreement,[3] the plaintiff must satisfy § 3.3 of the retirement plan. A plain reading of § 3.3 states that to be eligible for a disability pension, the member's employment *must be terminated because of a permanent and total disability*. (Emphasis added.) Moreover, the section states that the board, in its sole and absolute

discretion, makes this determination "on the basis of medical evidence . . . ." This portion of the retirement plan was unambiguous, and therefore the contract was to be given effect according to its terms.[4] According to its terms, in order to qualify for a disability pension, the plaintiff's employment must have been terminated due to his elbow injury, which resulted in a permanent and total disability, and the board must make the determination as to whether the plaintiff qualifies for a disability pension.

The following evidence was before the board at the time of the plaintiff's hearing for a disability pension. The plaintiff submitted (1) an October 19, 2009 letter from Katz, his orthopedic surgeon, and (2) an October 19, 2009 letter from Troknya, his chiropractor at Physical Synergy. The defendant submitted (1) an August 3, 2010 letter from Thomas W. Bucci, the attorney for the plaintiff, to Mary Carroll-Mirylees, the director of human resources for the defendant (2) an October 29, 2009 letter from Michael J. Rose, the defendant's attorney, to the plaintiff, (3) an unsigned copy of the plaintiff's separation agreement, (4) the Fairfield police and fire retirement booklet, (5) an October 19, 2010 facsimile from Rose forwarded by Bucci, (6) a printout of the plaintiff's workers' compensation file, and (7) the plaintiff's attendance sheet from October, 2009.

The board, after hearing the plaintiff's request for disability pension from Bucci and Carroll-Mirylees, moved to deny the plaintiff's request. After a vote of four to zero, with one abstention, the board denied the plaintiff's request for a disability pension.[5]

The board's conclusion that the plaintiff failed to sustain his burden of establishing his entitlement to a disability pension was well supported by the record. The facts before the board included that the plaintiff was injured in an automobile accident in 2005. The plaintiff had surgery in July, 2006, for the injury sustained to his left elbow in that automobile accident. No evidence was before the board that detailed complaints from the plaintiff to his supervisors at the police department regarding his inability to perform the duties at his job due to the injury to his left elbow and the subsequent surgery, which had occurred more than three years prior. Therefore, the board's conclusion that the plaintiff failed to show that his employment was terminated *because of* a permanent and total disability was reasonable; the board also had before it evidence that the plaintiff had avoided disciplinary action by resigning. This was the first requirement the plaintiff needed to meet in order to qualify for a disability pension under the retirement plan.

The plaintiff submitted medical evidence in support of his application for a disability pension. Although the letter from Katz stated that the plaintiff was unable to perform the duties of a police officer, the letter from

Troknya did not; it simply stated that the plaintiff had reached maximum medical improvement. The board also had, in the October 19, 2010 facsimile from Rose forwarded by Bucci, treatment notes from Katz from July, 2005, until October, 2010, as well as medical evidence from Bindu Chennattu, a doctor of physical medicine and rehabilitation.[6] The board, in its discretion under the retirement plan, could accept or reject this medical evidence.[7]

The board's decision also was supported by a letter dated October 29, 2009, from Rose to the plaintiff explaining that the plaintiff did not meet the requirements to warrant consideration for disability retirement. This letter detailed the results of the internal affairs investigation as to the plaintiff's conduct. That investigation concluded that the plaintiff was trespassing on Broderick's property, that he claimed to have had an affair with Broderick's wife, and that he then later admitted to lying to the internal affairs investigator in order to hide his true activities. Specifically, this letter to the plaintiff that was before the board stated: "[Y]ou were not terminated *because of* a 'permanent and total disability' that precluded you from police work; *you resigned* in order to avoid the termination process." (Emphasis added.) To bolster this claim, the defendant also submitted the plaintiff's attendance sheet from October, 2009, showing that he was on administrative leave, as well as his unsigned separation agreement. The fact that the plaintiff had resigned also was before the board. The defendant submitted a letter from Bucci to Carroll-Mirylees stating that the plaintiff resigned from his position from the defendant on October 21, 2009. Accordingly, the board's decision to deny the plaintiff a disability pension because his employment was not terminated due to a permanent and total disability was reasonably supported by the evidence before it and, therefore, it was not illegal, arbitrary or an abuse of its discretion.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant and to reinstate the decision of the Fairfield Police and Firemen's Retirement Board.

In this opinion the other judges concurred.

[1] The board formerly was a codefendant in the matter, but the plaintiff withdrew the action against the board on May 21, 2013, prior to the hearing before the court that commenced on May 22, 2013.

[2] We do not reach the defendant's third claim because we find that there is no merit to the plaintiff's position.

[3] Section 26.03 provides in relevant part: "Any employees who are retired . . . for disability shall receive an annual pension, payable monthly, equal to two percent (2%) of their base annual salary . . . provided that no pension payable to account for permanent disability sustained during the performance of their duties pertaining to employment by the Town shall be less than sixty-six and two-thirds percent (66 2/3%) of such salary . . . ."

[4] "The law governing the construction of contracts is well settled. When a party asserts a claim that challenges the . . . construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . Where the language of the contract is clear and unambigu-

ous, the contract is to be given effect according to its terms." (Internal quotation marks omitted.) *Greene* v. *Waterbury*, supra, 126 Conn. App. 751–52.

[5] The Superior Court, due to a transcription error, incorrectly stated that the vote was five to zero. The meeting summary shows that five members were present at the hearing, and that four voted to deny the plaintiff's request for a disability pension, and one member abstained.

[6] This chart summary from October 5, 2010, included information regarding the plaintiff's complaints of his injury on his nondominant left elbow, that he was not currently taking any medication, that a physical examination was conducted, and the impression after electrodiagnostic study revealed evidence consistent with carpal tunnel syndrome, cubital tunnel syndrome, and no electrodiagnostic evidence of left cervical radiculopathy

[7] In *Briggs*, our Supreme Court evaluated whether the medical examining board in that case correctly evaluated the plaintiff's claim for permanent disability retirement benefits. In doing so, the court came to the conclusion that "[i]n light of the testimony presented at the hearings, the board was entitled to conclude that the plaintiff had presented insufficient evidence of the permanency of his disability. Certainly the board was not bound by the expert opinion of the plaintiff's [physician] on the permanency of his condition. That was the ultimate issue before the board and only the board could decide it. . . . Even more than lay finders of fact, the board was free to accept what it found persuasive in the [physician's] reports and to disregard the rest." (Citation omitted.) *Briggs* v. *State Employees Retirement Commission*, supra, 210 Conn. 220.