#215-05 (OAL Decision http://lawlibrary.rutgers.edu/oal/word/initial/edu02892-03_1.doc)

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN	:	DECISION
REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, claims entitlement to reemployment by the Board of Education of the Manalapan-Englishtown Regional High School District pursuant to *N.J.S.A.* 18A:66-40, following a TPAF finding that she no longer suffers from alcoholism, the cause of her disability retirement in 1988. Cross motions for summary judgment were filed in this matter.

The Initial Decision enumerated 24 paragraphs of "undisputed facts" which were based on a statement of procedural and factual history prepared by the respondent Board; the ALJ found all 24 paragraphs to be pertinent facts in this matter. Based upon these pertinent facts, the ALJ concluded that the Board had the right to deny Klumb's request that she be rehired to her former position as teacher, and affirmed the Board's determination not to rehire Klumb. In so concluding, the ALJ emphasized that: the applicable statute, *N.J.S.A.* 18A:66-40a, provides for re-hiring by the former employer when a person recovers from a qualifying disability, but does not mandate that a former employer rehire the person; the Board offered petitioner an opportunity to show that she had the necessary qualifications to resume her teaching position; and the Board acted reasonably when it determined not to offer her a position after she failed to meet its qualifications for employment as a teacher.

Upon a thorough and independent review of the record and arguments in this matter, the Commissioner rejects the ALJ's findings and conclusions, and grants summary decision to petitioner. In accord with relevant court determinations in *DiMuzio, supra,* and *Allen, supra,* and the Commissioner's 1994 and 1996 determinations in *Bublin,* the Commissioner concludes that petitioner is entitled to be reinstated to her former tenured position of elementary teacher and orders the Board to reinstate her as of March 1, 1999 -- the date on which petitioner was interviewed for an existing elementary teacher vacancy -- with emoluments, back pay, and any support necessary to assure petitioner's seamless re-acclimation to her teaching duties.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 2892-03
AGENCY DKT. NO. 153-5/03

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4[1] and were duly considered by the Commissioner in reaching his determination.

In her exceptions, petitioner initially contends that the Administrative Law Judge (ALJ) decided this case contrary to *Sellers v. Schonfeld*, 270 *N.J. Super*. 424, 427-429 (App. Div. 1993), arguing that summary judgment cannot be granted where the attorney seeking summary judgment attaches exhibits to a certification by counsel which contain no indication that counsel had any firsthand knowledge concerning the exhibits and facts contained therein. (Petitioner's Exceptions at 1) This is particularly important in this matter, petitioner claims, because the ALJ "practically accepted exclusively as undisputed facts the attachments and facts contained in the brief of the respondent *** and itemized 24 paragraphs accepting items contained therein as 'undisputed.'" (*Ibid.*) Notwithstanding petitioner's cross-motion for summary judgment in this matter, therefore, the petitioner disputes all of the facts listed by the

[1] Petitioner's attorney requested and was granted two extensions for the filing of exceptions due to health problems.

ALJ as "Undisputed Facts," with the exception of facts numbered 14, 22, 23 and 24. (*Id*. at 1-10)

Moreover, petitioner argues, *inter alia*, that the ALJ disregarded the holding in *Allen, supra*, wherein the court construed *N.J.S.A.* 43:16A-8(2) as mandating that an employee who retires on a disability who regains the ability to perform his or her duties be returned to his or her former position. (*Id*. at 11-12) Petitioner submits that *N.J.S.A.* 43:16A-8(2) is not only similar to *N.J.S.A*. 18A:66-40a as noted by the ALJ, but that the two are the same. (*Id.* at 12) Petitioner also points out that both *Allen, supra,* and *DiMuzio, supra,* were cited and approved by the Commissioner in *Bublin, supra,* (*Bublin II*)[2] wherein he ruled that Bublin did not have to be rehired as a media specialist, but that she had to be rehired in the position she formerly held -- that of teacher. (*Id.* at 12-13) Additionally, petitioner claims the ALJ misapplied the holding in *Canavera, supra*, when he noted that the court stated therein that *N.J.S.A.* 43:16A-8(2) does not "expressly compel" the former employer to restore a previously disabled person. (*Id*. at 13) Petitioner points out that the facts in *Canavera* were entirely different from *Bublin II* or *Allen* because Canavera's police officer's certification had lapsed and he had to be completely retrained before returning to active service. (*Id*. at 14) Unlike Canavera, petitioner submits, she has both the proper teaching certification and 18 years tenure. (*Id*. at 15)

Petitioner also contends that the Board never properly appealed the Teacher's Pension and Annuity Fund (TPAF) determination of October 2, 1998[3] and, thus, the original TPAF determination should stand. (*Ibid*.) Moreover, petitioner asserts that the ALJ's reliance on *Laing, supra*, is misplaced because the *Laing* determination, made before *Bublin II*, *Allen*,

---

[2] This reference to *Bublin* is to the *Bublin* decision cited in the Initial Decision, *Bublin v. Board of Education of the Borough of Point Pleasant*, 96 *N.J.A.R.*2d (EDU) 768, *affirmed* State Board December 4, 1996, a Commissioner's Decision on Remand. In that the determination herein makes references to both this decision and the earlier Commissioner's Decision remanding the case to the Office of Administrative Law, this decision on remand will be referred to as *Bublin II.*

[3] The Commissioner notes that the TPAF determination to which petitioner refers ordered the Board to reinstate petitioner to her former position.

DiMuzio and *Canavera*, is no longer the rule of law. (*Id.* at 17) Additionally, petitioner contends that the Board's failure to rehire her conflicts with its New Jersey Education Association contract and is an unfair labor practice. (*Id.* at 19) Finally, petitioner avers that in the damages sought in the Superior Court Complaint she not only asked for her return to active service, but also asked for "comparative" and punitive damages, interest, attorney's fees and costs of suit and that these claims were overlooked by the ALJ. (*Id. at 18*)

Upon a thorough and independent review of the record in this matter and the arguments raised, the Commissioner has determined to reject the ALJ's findings and conclusions of law and grant summary decision to petitioner for the reasons that follow. Initially, pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super*. 106, 121-122 (App. Div. 1995) (*citing Brill v. Guardian Life Ins. Co.*, 142 *N.J*. 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding petitioner's assertions to the contrary, there are no "material facts" in dispute in this matter. *Black's Law Dictionary, seventh edition,* at 610-611, defines "fact" as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation" and a "material fact" as "[a] fact that is significant or essential to the issue or matter at hand." The central issue in this matter is the question of a disabled employee's entitlement to reemployment under *N.J.S.A*. 18A:66-40, which is a question of law. Notwithstanding petitioner's dispute of the facts surrounding the Board's decision to initiate tenure charges against her and the events leading up to her disability retirement, therefore, these facts are not "material facts" to the question at hand.

"It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J*. 13, 24-25

(1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super*. 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Moreover, the submission of cross-motions for summary judgment suggests the parties' agreement that summary judgment is appropriate in this matter and, as set forth below, petitioner is entitled to prevail as a matter of law. Accordingly, the Commissioner concludes that summary judgment is appropriate in this instance.

With respect to the issue of whether a disabled retiree has a right to return to his or her former position upon a determination by TPAF that he or she is able to return to work, the Commissioner finds the Board's and the ALJ's reliance on *Laing, supra*, is misplaced. As set forth by the Commissioner in *Christine Bublin v. Board of Education of the Borough of Point Pleasant, Ocean County*, decided by the Commissioner January 26, 1994 (*Bublin I*):

> Initially, the Commissioner notes that *Laing* does indeed stand for the general proposition that retirement constitutes a resignation from the district of employment, and that action by TPAF to rescind such retirement does not necessarily obligate a district to reinstate a retired employee. Following this reasoning when turning to the specific question of a disabled employee's entitlement to reemployment under *N.J.S.A.* 18A:66-40, the Commissioner in *Kopel* interpreted that statute to make reinstatement by the former employer following a determination of fitness by the TPAF medical board optional rather than mandatory. However, in the wake of subsequent Court decisions (*DiMuzio, supra, and Allen, supra*), this interpretation can no longer be held valid. To the contrary, in interpreting language substantially

identical to that of *N.J.S.A.* 18A:66-40,[4] the Court explicitly stated that

> ***Although the statute does not expressly compel the appointing authority to restore the employee to his former position, the [Police and Fireman's Retirement System] Board's construction of *N.J.S.A.* 43:61A-8(2) is fully consonant with the legislative purpose. It is apparent that the grant of disability retirement is conditioned on the continuation of the incapacity. If the retired employee regains the ability to perform his or her duties, the Legislature mandated that he or she be returned to the former position. The Legislature clearly recognized that individuals returning from a disability retirement are in a unique situation, plainly different from all other employees returning to active service. Their separation from employment is unlike the voluntary separation of other civil servants whose seniority is not aggregated. In our view, *N.J.S.A.* 43:16A-8(2) contemplates that a restoration to employment return the formerly disabled individual as nearly as possible to the status held at the time he or she was pensioned. *** (*Allen, supra*, at 444)

Thus, the Commissioner can reach no other conclusion but that upon TPAF's determining that a disabled retiree is able to return to work, that retiree has a right to return to his or her former position. That right, however, is not unfettered as noted by the Court in *DiMuzio*:

> We recognize that *N.J.S.A.* 43:16A-8 does not require that an additional slot be created if there are no existing vacancies at the former duty level, nor does it require that incumbents be "bumped" to make room. The PFRS order does not so require, nor do we. If a vacancy at the former level, *i.e.,* the

[4] It is noted that the language at issue, "[i]f the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty which his former employer is willing to assigned to him, the beneficiary shall report for duty; such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service," appears in both *N.J.S.A.* 18A:66-40 and *N.J.S.A.* 43:16A-8(2). In *Fairweather v. Employees' Ret. Sys.*, 373 *N.J. Super* 288, 291, Footnote 2, (App. Div. 2004) the court noted the precedential value for construing similar statutes:

> A similar requirement that the disability result from a traumatic event appears in connection with the statutes providing for accidental disability pension benefits under New Jersey's Police and Fireman's Retirement System, *N.J.S.A.* 43:16A-7, and the Teachers' Pension and Annuity Fund, *N.J.S.A.* 18A:66-39. Accordingly precedent construing each of the three statutes is relevant here.

> lieutenant, then existed the order (and the statute) requires that DiMuzio be there placed. If not, he should be returned to "any other available duty" to which the Department "is willing to assign him." *** (*DiMuzio, supra*, slip opinion at p. 9)

Bublin I, slip op. at 23-25

Turning to the ALJ's deference to the December 16, 1998 letter from the Secretary, Board of Trustees, TPAF, pursuant to *Texter, supra,* at 385, the Commissioner observes that this letter does not appear to be a legal determination in that it does not contain an analysis of the statute in light of the interpretative court decisions, but simply restates the language of the statute. The letter states, in pertinent part:

> The governing statute, *N.J.S A*. 18A:66-40, states that if a member becomes employed again in a position covered by the retirement system his or her retirement will be canceled until they retire again, The statute does not address reemployment nor does it require an employer to reemploy the member. However, it does guarantee the continued payment of benefits until the member is reemployed in a position covered by the Teachers' Pension and Annuity Fund.

Assuming, *arguendo*, that the above letter is a legal determination of the TPAF, however, the practice of traditional deference to an agency's interpretation is not binding when it conflicts with judicial interpretation. As the appellate division has explained:

> In the interest of justice we abandon our traditional deference to agency decisions when an agency's decision is manifestly mistaken. (citations omitted) Moreover, although we respect the agency's expertise, ultimately, interpretation of statutes is a judicial, not an administrative function and we are in no way bound by the agency's interpretation. (citations omitted) *Fairweather, supra,* at 295.

In the instant matter, therefore, the Commissioner concludes that, in accord with the court's determinations in *DiMuzio, supra, and Allen, supra,* and the Commissioner's determinations in *Bublin*, petitioner is entitled to be reinstated to her former position of elementary teacher. Accordingly, the Board erred when it did not appoint petitioner to its opening for the position of elementary teacher, for which petitioner was interviewed on March 1, 1999.

With respect to petitioner's claim that the Board's actions are a violation of the New Jersey Education Association contract and an unfair labor practice, the Commissioner notes that he does not have jurisdiction over these issues as they are under the purview of the Public Employee Relations Commission. Petitioner also complains that the damages sought in the Superior Court Complaint -- which not only asked for her return to active service, but also for "comparative" and punitive damages, interest, attorney's fees and costs of suit -- were overlooked by the ALJ. With respect to petitioner's claim for "comparative" and punitive damages, it is well-established that the Commissioner lacks authority to award money damages or monetary sanctions that constitute compensation for "damages" other than lost earnings or restoring an increment which has been improperly withheld. See *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.2d* (EDU) 279, 281 (*Citing McLean v. Bd. of Ed. of Glen Ridge*, 177 *S.L.D.* 311, 3154; *Mith v. Bd. of Ed. of Hamilton,* OAL Dkt. No. EDU 5468-87 *adopted in part and rejected in part on other grounds*, decided by the Commissioner April 21, 1998) See also *Scott and Yarnall, et al., v. Bd of Educ. of the City of Trenton, et al.,* decided by the Commissioner September 30, 2002, and *Winter v. Bd of Educ. of the Twp. Of North Bergen,* 1975 *S.L.D.* 236. In the absence of express statutory authority to award damages or monetary "sanctions" to compensate for damages, therefore, I may not direct that petitioner be compensated for any alleged damages in this matter beyond her lost earnings.

Turning to petitioner's claim for "interest," the Commissioner does not find that the Board deliberately violated the statute, acted in bad faith or acted from other improper motive. Accordingly, the Commissioner concludes that petitioner is not entitled to prejudgment interest in this matter. The Commissioner also observes that a claim for post-judgment interest is not properly before him at this time, since the requisite time period has not passed pursuant to *N.J.A.C.* 6A:3-1.17(c)2. Accordingly, petitioner's claim for the award of "interest" is denied.

Finally, in the absence of express statutory authority to award counsel fees, the Commissioner may not direct that the Board compensate the petitioner for legal fees in this matter. *See B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No. 1 and Donald Merachnik, Superintendent of Schools, Union County,* 1987 *S.L.D.* 323, 336*; Balsley v. North Hunterdon Bd. Of Educ.,* 117 *N.J.* 434 (1990*); and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).

Accordingly, for the reasons set forth above, summary decision is granted to petitioner. The Board is, therefore, ordered to reinstate petitioner to her former position as an elementary teacher as of March 1, 1999,[5] with all emoluments and back pay to which she is entitled, and to provide her with the support necessary to familiarize her with current methods and educational trends to assure petitioner's seamless re-acclimation to her teaching duties and the provision of quality educational services to her students.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2005

Date of Mailing: June 20, 2005

---

[5] It is noted that the Board interviewed petitioner on March 1, 1999, for an existing elementary teacher vacancy. See Board's Statement of Facts, Number 24.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*