

New Jersey Commissioner of Education

Decision

Noemia Gomes,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union
County,

Respondent.

Synopsis

Petitioner – formerly a tenured secretary in the respondent Board’s school district – appealed her removal from the Board’s health benefits plan, and sought reimbursement for the insurance premiums she continued to pay thereafter through COBRA. The action to terminate payment of her insurance premiums occurred after Ms. Gomes had been absent from work for more than 180 days during the 2016-2017 school year. The Board contended that its actions were lawful, as it acted in compliance with the school district’s collective bargaining agreement (CBA), which provides that the Board “...shall continue to pay the full premium for each employee working an average of 20 hours or more per week”; as petitioner had not been working the required number of hours, nor was she on an approved leave of absence, the Board terminated her health benefits on June 14, 2017. In a separate proceeding, the Board filed tenure charges against petitioner in February 2018, and she was subsequently dismissed from her position by an Arbitrator in a decision dated March 4, 2019. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; health insurance is a benefit subject to the CBA, and health insurance benefits are not compensation as set forth in *N.J.S.A.* 18A:6-10; however, the CBA is silent on how, or when, health insurance benefits should be terminated given the facts in this matter; petitioner had a long history of extremely poor attendance, and stopped working altogether in August 2017; prior to that date, in June 2017, the Board ceased payment of health insurance premiums for petitioner; and, for unknown reasons, the Board failed to file tenure charges against petition until February 2018. The ALJ concluded that the Board should have proceeded with the filing of tenure charges instead of waiting until eight months after the termination of petitioner’s health benefits before filing charges. Accordingly, the ALJ ordered the Board to reimburse petitioner for the cost of health benefits for the period from the date benefits were terminated in June 2017 to the date the Board certified tenure charges in February 2018, in the amount of \$40,276.46.

Upon review, the Commissioner concurred that health insurance benefits for a tenured employee are controlled by the CBA and are not compensation under *N.J.S.A.* 18A:6-10. However, the Commissioner found that the ALJ erred in determining that the Board was required to file tenure charges in order to terminate petitioner’s health benefits. Accordingly, the Initial Decision of the OAL was rejected as the final decision in this matter. Petitioner is not entitled to reimbursement for the cost of any health benefit premiums. The petition was dismissed.

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.

September 19, 2019

New Jersey Commissioner of Education
Final Decision

Noemia Gomes,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the parties pursuant to *N.J.A.C. 1:1-18.4*, and petitioner's reply thereto.

Petitioner, a tenured secretary, challenges her removal from the Board's health benefit plan after she was absent from work more than 180 days during the 2016-17 school year. Regarding health benefits, the school district's Collective Bargaining Agreement (CBA) provides: "The Board shall continue to pay the full premium for each employee working an average of at least 20 hours or more per week." As petitioner had not been working an average of 20 hours per week, nor was she on an approved leave of absence, the Board terminated petitioner's health benefits on June 14, 2017. Thereafter, the petitioner filed the within appeal.¹ The Board subsequently certified tenure charges against petitioner on February 22, 2018. In a

¹ Petitioner continued to pay her health insurance premiums through COBRA following her termination from the Board's health benefit plan.

separate proceeding on the tenure charges, petitioner was dismissed from her position by an Arbitrator in a decision dated March 4, 2019.

In the instant Initial Decision, the Administrative Law Judge (ALJ) found that health insurance is a benefit subject to the CBA, and is not compensation pursuant to the tenure law, *N.J.S.A.* 18A:6-10. However, the ALJ found that the CBA did not provide guidance as to how, or when, health insurance benefits should be terminated. As such, the ALJ concluded that the Board should have proceeded by filing tenure charges first, instead of waiting until eight months after the termination of petitioner's health benefits before filing the charges. Accordingly, the ALJ ordered the Board to reimburse petitioner for the cost of health benefits in the amount of \$40,276.46, representing petitioner's out of pocket costs from the date the benefits were terminated on June 14, 2017, to the date the Board certified tenure charges on February 22, 2018.

In its exceptions, the Board maintains that the ALJ properly determined that health benefits are governed by the CBA and are not considered compensation under *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:28-5. However, the Board takes exception to the ALJ's conclusion that petitioner is entitled to reimbursement for health benefits through the date upon which the Board certified tenure charges against petitioner. The Board argues that the ALJ erred in finding that the CBA did not delineate how or when termination of health benefits should occur. The CBA states that an employee must work a minimum of 20 hours per week to qualify for health benefits. As such, there is no need for further detail regarding how or when to terminate health benefits since a staff member who does not work at least 20 hours does not qualify for such benefit. Here, the Board emphasizes that petitioner was not working an average

of 20 or more hours per week when the benefit was terminated, nor was she on an approved leave of absence.

The Board also contends that the ALJ erred in finding that the ability to terminate health insurance benefits hinges on the filing of tenure charges, as there is no support for such a finding. The ALJ's determinations contradicted one another: he first found that the CBA is the controlling document regarding the payment of health insurance premiums, and that health insurance benefits are not compensation under the tenure laws; he then concluded, however, that tenure charges should have been filed pursuant to the tenure laws in order to terminate petitioner's health benefits. The Board maintains that health benefits are not contemplated by the tenure laws, so the filing of tenure charges should not be a prerequisite to the termination of premium payments, especially since health benefits under the CBA cover non-tenured employees in addition to tenured employees.

Alternatively, the Board argues that the ALJ concluded the respondent was untimely in filing tenure charges, yet the ALJ failed to conduct any fact-finding on the issue before reaching his conclusion. The Board maintains that the tenure laws do not set forth specific timeframes for the filing of tenure charges in matters, such as this one, wherein petitioner abandoned her position. Additionally, tenure charges are fact specific and are part of a lengthy process. The Board contends that the ALJ improperly made the determination that eight months was an unreasonable period of time to wait before certifying tenure charges, without first conducting fact-finding as to the history of petitioner's attendance issues or why the Board certified charges when it did.

In reply to the Board's exceptions, petitioner argues that the ALJ properly found that the CBA does not provide guidance on how or when to terminate health insurance

premiums. Petitioner contends that the Board cannot act unilaterally by canceling health benefits anytime it chooses; rather, such decisions should be part of the collective negotiation process. Petitioner disputes the Board's interpretation of the ALJ's finding that the Board was required to file tenure charges in order to terminate the payment of health premiums. Instead, petitioner argues that the ALJ found that the Board waited a lengthy time to file tenure charges without explanation, and that in effect, the board terminated petitioner – a tenured employee – by ceasing to pay her salary and insurance payments, thereby bypassing the tenure laws. Petitioner further contends that the issue of the timeliness of the tenure charges was not raised *sua sponte* by the ALJ, and was instead raised by petitioner in her cross motion for summary decision. As such, petitioner urges the Commissioner to reject the Board's exceptions and adopt the Initial Decision without modification.

Upon review, the Commissioner agrees with the ALJ that health insurance benefits for a tenured employee are controlled by the CBA, and are not considered compensation for the purposes of *N.J.S.A.* 18A:6-10. The Commissioner has made clear that “the term ‘compensation’ with respect to the tenure right protections provided by education law is by now well-established, having been explicitly defined as encompassing **only salary.**” *Thomas Manna v. Board of Education of the Somerset County Vocational Technical School District, Somerset County*, Commissioner's Decision No. 178-10, June 14, 2010, at 4 (emphasis in original). Additionally, the Commissioner has found that health insurance benefits – in addition to other benefits such as accumulated sick leave – are not preserved and protected by the tenure statutes, and instead are “a contractual benefit subject to collective bargaining negotiations.” *Manna, supra*, at 5; *Arlene C. Allen, et al v. Board of Education of the Township of Clark, Union County*, Commissioner Decision No. 189-04, April 30, 2004, *aff'd* State Board,

September 1, 2004. As such, the Commissioner agrees that petitioner's health benefits are governed by the CBA.

However, the Commissioner disagrees with the ALJ's determination that the Board was required to file tenure charges in order to terminate petitioner's health benefits. As the payment of health benefit premiums is controlled by the CBA, and is not considered salary under *N.J.S.A.* 18A:6-10, the termination of health benefits cannot logically be impacted in any way by the filing of tenure charges. The Commissioner agrees with the Board that, as petitioner did not work for 20 hours per week and was not on an approved leave, she was not eligible for health benefits under the CBA. As the Commissioner found in *Manna, supra*, when the petitioner went from a full-time position to a part-time position following a reduction in force, "because petitioner did not qualify as 'eligible' for health insurance benefits pursuant to the Contract, he possesses no entitlement to this benefit." Similarly, here, petitioner has no entitlement to health insurance benefits if she does not meet the minimum requirement of working 20 hours per week. Accordingly, the Board's action in terminating the payment of petitioner's health benefit premiums was not arbitrary, capricious, or contrary to the law.

The Commissioner does not find petitioner's reply exceptions to be persuasive. Contrary to petitioner's argument, the Board is not able to act unilaterally and cancel health benefits anytime it chooses. The Board must act in accordance with the eligibility requirements for health benefits, which were part of the collective negotiation process and are set forth in the CBA. Additionally, the termination of petitioner's health insurance premiums did not effectively terminate her employment and bypass the tenure laws. As detailed above, health insurance benefits are not compensation pursuant to *N.J.S.A.* 18A:6-10.

Accordingly, the Initial Decision of the OAL is rejected as the final decision in this matter for the reasons expressed herein. Petitioner is not entitled to reimbursement for the cost of any health benefit premiums. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2019

Date of Mailing: September 20, 2019

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 17465-17

AGENCY REF. NO. 214-9/17

NOEMIA GOMES,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY

OF ELIZABETH, UNION COUNTY,

Respondent.

Paul W. Tyshchenko, Esq., for Petitioner (Caruso, Smith, Picini, attorneys)

Nishali Amin Rose, Esq., for Respondent (Floria, Perrucci, Steinhardt & Cappelli, attorneys)

Record Closed: May 24, 2019

Decided: June 21, 2019

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Noemia Gomez, appeals her removal from Respondent Board's health benefit plan.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on November 17, 2017, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A pre-hearing telephone conference was held on December 1, 2017, and a Pre-Hearing Order was entered on the same date.

Petitioner's counsel submitted correspondence requesting an adjournment of the March 21, 2018, hearing date, and that the matter be placed on the inactive list pending the outcome of a tenure charge hearing. Respondent's counsel joined in the request. The matter was placed on the inactive list by order dated March 26, 2018. The matter was continued on the inactive list by order dated September 28, 2018.

By letter dated October 17, 2018, Petitioner's counsel requested the matter be restored to the active list. The matter was thereafter restored to the active list.

Respondent filed a motion for summary decision, and brief in support of said motion, dated March 5, 2019. Petitioner filed a cross-motion for summary decision, and brief in support of said motion and in opposition to Respondent's motion for summary decision, dated April 15, 2019. Respondent filed its reply brief in opposition to the Petitioner's cross-motion on April 26, 2019. Petitioner filed her reply brief on May 9, 2019.

The undersigned requested supplemental briefs, which were due on or before May 24, 2019.

The record closed on May 24, 2019.

FACTUAL DISCUSSION

The following **FACTS** are not in dispute:

1. Petitioner was hired by Respondent Board in February 2008 as an administrative secretary.
2. Petitioner was hired as a twelve-month employee.
3. Petitioner obtained tenure during her third year of continuous full-time employment.
4. Health insurance benefits were provided to Petitioner pursuant to the Collective Bargaining Agreement (CBA) between the parties.
5. During the 2016-2017 school year commencing on July 1, 2016, and ending June 30, 2017, Petitioner was absent from work for one (1) illness day, eleven and one-half (11.5) vacation days, one and eighty-eight hundredths (1.88) personal days, fifty-three and thirty-eight one hundredths (53.38) sick days, one hundred seven (107) days on leave of absence, and seven (7) unexcused absences.
6. By letter dated June 13, 2017, the Respondent Board, through its Interim Assistant Superintendent for Human Resources Francisco Cuesta, informed Petitioner that her health benefits would be terminated effective June 14, 2017.
7. The basis for Respondent's termination of health benefits was that Petitioner did not work full time or on an approved leave of absence in order to qualify for health benefits.
8. The CBA provides in pertinent part at Article XVII as follows: "The Board shall continue to pay full premium for each employee working an average of at least 20 hours or more per week."
9. Petitioner has not been at work since August 23, 2017, which is an unpaid, unapproved leave of absence.
10. Petitioner avers that she paid her own health insurance premiums through COBRA from June 2017 through November 2018, totaling \$40,279.46.
11. The Respondent certified tenure charges against Petitioner on February 22, 2018.
12. On March 4, 2019, Petitioner was dismissed from her position with Respondent following a hearing on the tenure charges.

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. at 536 (citation omitted).

The parties do not dispute the facts in the instant matter. Rather, the parties dispute whether or not Respondent Board’s termination of medical benefits for Petitioner are permitted pursuant to statutory and case law. Accordingly, the matter is ripe for summary decision.

Initially, Respondent asserts that Petitioner’s submissions on the instant motion and cross-motion should not be considered as they were not timely filed. Respondent cites N.J.A.C. 1:1-12.5(b) which sets forth the time frames for filing responsive papers, which is twenty (20) days from the date of service of a motion for summary decision. Respondent also asserts that Petitioner failed to submit a signed affidavit in support of her cross-motion for summary decision.³ A signed affidavit was thereafter submitted.

³ Petitioner submitted an unsigned affidavit.

Petitioner does not dispute that her response and cross-motion were not timely filed, and that an unsigned affidavit was submitted, and offers an excuse for same. I need not delve into the merits of the excuse here.

N.J.S.A. 1:1-3(b) states:

Except as stated in (c) below, procedural rules may be relaxed or disregarded if the judge determines that adherence would result in unfairness or injustice. The judge shall make such determinations and state the reasons for doing so on the record.

Respondent suffers no prejudice from the late filing. Striking Petitioner's response and cross-motion would be a Draconian response, and one not merited herein. It would be more prudent to consider all papers filed regarding the motion and cross-motion for summary decision and to render an opinion on the merits of same.

Respondent asserts in its motion for summary decision that it correctly terminated health insurance benefits to Petitioner in accordance with the CBA, citing Article XVII thereof, which states in pertinent part, "The Board shall continue to pay the full premium for each employee working an average of at least 20 hours or more per week" It is not disputed that Petitioner did not work an average of twenty hours or more per week.

In support of its argument, Respondent cites Allen v. Board of Education of the Township of Clark, Union County, Commissioner's Decision No. 189-04 (April 30, 2004), <https://www.nj.gov/education/legal/commissioner/2004decisions.shtml>, affirmed, State Board (September 1, 2004), affirmed, A-754-04T2. In said decision the Commissioner found that payment upon retirement for unused sick leave is not compensation. Such payment for unused sick leave is a benefit subject to collective bargaining.

Respondent argues that, likewise, the payment of health benefit premiums is also a benefit subject to collective bargaining and that the CBA is controlling herein.

In further support of its argument Respondent cites Manna v. Board of Education of the Somerset County Vocational Technical School District, Somerset County, Commissioner Decision No. 178-10 (June 14, 2010), <https://www.nj.gov/education/legal/commissioner/2010decisions.shtml>, the Commissioner interpreted Basset v. Board of Education of the Borough of Oakland, 223 N.J. Super. 136 (App. Div. 1988). Therein the Commissioner determined that health insurance benefits are not preserved and protected by this statute⁴ but, rather – as recognized by the ALJ – are a contractual benefit subject to collective bargaining negotiations.

Manna involved a teacher whose hours were reduced below thirty-five hours per week, thereby rendering him ineligible to receive health insurance benefits. Manna argued that this was a reduction in compensation pursuant to N.J.S.A. 18A:28-5 and therefore impermissible.

Respondent's position is that the CBA is controlling herein and that the termination of payment for health insurance premiums for Petitioner was justified thereunder. Respondent further asserts that, as health insurance is a benefit subject to the CBA, it is not compensation pursuant to N.J.S.A. 18A:6-10. I agree.

Petitioner argues that both Allen and Manna are not controlling and that DePasquale v. State of N.J., 211 N.J. 40 (2012) is controlling. I disagree. The issue in DePasquale was the compensation of New Jersey Judges and Justices. It did not involve public employees. Further, DePasquale was decided on the New Jersey Constitution provision regarding the diminishment of the salaries of sitting Judges and Justices.

Petitioner also asserts that the termination of health insurance by Respondent violates N.J.S.A. 18A:6-10(b), which provides that "No person shall be dismissed or

⁴ N.J.S.A. 18A:25-8.

reduced in compensation” . . . “except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle.”

It is clear that health insurance benefits for a tenured school employee are controlled by the CBA. This is supported by both Allen and Manna. However, the CBA is silent as to how, or when, health insurance benefits should be terminated given the facts herein. In the instant matter Petitioner simply stopped going to work. After a long history of extremely poor attendance Petitioner stopped working altogether on August 23, 2017. Prior to that date, on June 14, 2017, Respondent ceased payment of health insurance premiums for Petitioner. For unknown reasons Respondent failed to file tenure charges against Petitioner until February 22, 2018.

While I have determined that the CBA is the controlling document concerning the payment of health insurance premiums, and that health insurance benefits are not compensation as set forth in N.J.S.A. 18A:6-10, it is clear from the undisputed facts that tenure charges should have been filed as set forth in N.J.S.A. 18A:6-10.

As the CBA offers no guidance on how to terminate payment of health insurance premiums given the facts herein the only reasonable way for Respondent to proceed would be to timely file tenure charges. It did not. Rather, Respondent waited eight months from the time it stopped payment of Petitioner's health insurance premium to the time tenure charges were filed. Why Respondent waited is not explained.

Petitioner notes that she was not reinstated to health insurance benefits by Respondent on the 120th day after the filing of tenure charges.

N.J.S.A. 18:6-14 states in pertinent part:

Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid

beginning on the one hundred twenty-first day until such determination is made.

N.J.S.A. 18:6-14 is not applicable in the instant matter. Petitioner was not suspended. She did not report to work at all from August 23, 2017. Further, N.J.S.A. 18:6-14 refers only to reinstatement of salary.

Based upon the foregoing, I **CONCLUDE** that Respondent's motion for summary decision should be denied. I further **CONCLUDE** that Petitioner's cross-motion for summary decision should be granted.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **DENIED**; and,

It is further **ORDERED** that Petitioner's cross-motion for summary decision is **GRANTED**; and,

It is further **ORDERED** that Respondent shall reimburse Petitioner for the cost of health benefits premiums paid by her from the date such benefits were terminated by Respondent (June 14, 2017) through the date of tenure charges were certified (February 22, 2018) totaling \$40,279.46; and,

It is further **ORDERED** that no reimbursement shall be made until such time Petitioner submits adequate documentation as to the payment of insurance premiums by way of canceled checks and/or receipts from the insurance provider; and

It is further **ORDERED** that reimbursement to Petitioner shall be made within sixty (60) days after receipt of such adequate documentation.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



June 21, 2019 _____

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

List of Moving Papers

For Petitioner:

Memorandum of Law in Opposition to Respondent's motion for summary decision and in Support of Her Cross-Motion for Summary Decision dated April 15, 2019

Certification of Petitioner (Exhibit A of Memorandum of Law)

Reply letter brief dated May 9, 2019

Supplemental brief dated May 23, 2019

For Respondent:

Memorandum of Law in Support of Motion for Summary Decision dated March 5, 2019, with Exhibits A through C

Reply letter brief dated April 26, 2019

Supplemental letter brief dated May 24, 2019

Exhibits:

J-1 Collective Bargaining Agreement between City of Elizabeth Board of Education and The Elizabeth Education Association (July 1, 2009 – June 30, 2012)

Pleadings:

Petition for Relief

Answer and Affirmative Defenses