

212-20

**New Jersey Commissioner of Education
Decision**

Tina Gagliano,

Petitioner,

v.

Board of Education of the Village of
Ridgewood, Bergen County,

Respondent.

Synopsis

Petitioner – a home economics/food teacher formerly employed under tenure by the respondent Board’s school district – withdrew her application for disability retirement and sought to return to service in her previous position. The Board advised that her position had been filled, and no comparable position was available. Petitioner filed the within petition of appeal, contending that her tenure rights had been violated, and seeking immediate reinstatement, restoration of her sick and personal days, as well as salary and benefits. 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; the Board is not required to create a position for petitioner or bump another teacher; petitioner is, however, entitled to the next opening in her former position, provided she is able to perform her former duties; further, petitioner’s claim for salary and benefits is not yet ripe for review, as those claims are still pending before the Workers’ Compensation Court. The ALJ granted the Board’s motion for summary decision, denied petitioner’s cross motion, and dismissed the petition without prejudice.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusion, and adopted the Initial Decision as the final decision in this matter. Accordingly, 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.

October 2, 2020

212-20

OAL Dkt. No. EDU 09584-19
Agency Dkt. No. 146-6/19

New Jersey Commissioner of Education
Decision

Tina Gagliano,

Petitioner,

v.

Board of Education of the Village of
Ridgewood, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

In 2016, petitioner – a tenured home economics/food teacher – suffered job-related injuries, filed claims for workers’ compensation, and returned to work intermittently. On February 14, 2017, petitioner was granted leave under the Family and Medical Leave Act (FMLA) and subsequently filed an application for accidental disability retirement on August 14, 2017. The New Jersey Teachers’ Pension and Annuity Fund (TPAF) denied her accidental disability retirement application, and petitioner appealed that determination. On March 13, 2019, petitioner withdrew both her TPAF appeal and her application for accidental disability retirement and sought to return to her teaching duties. The Board denied her return because her position was filled, and no comparable position was available. Petitioner filed a

petition of appeal seeking immediate reinstatement, restoration of her sick and personal days, along with salary and benefits.

The Administrative Law Judge (ALJ) found that the Board is not required to create a position for petitioner or bump another teacher, but petitioner is entitled to the next opening in her former position, provided she is able to perform her former duties. With respect to the salary, benefits, and leave days, the ALJ found that they are not ripe for review as those claims are still pending before the Workers' Compensation Court.

Upon review, the Commissioner concurs with the ALJ's conclusion that while petitioner is entitled to the next opening in her former position, the Board is not required to bump an existing teacher or create a position for petitioner. *See Klumb v. Board of Education of the Manalapan-Englishtown Regional High School District, Monmouth County*, 199 N.J. 14 (2009). The Commissioner further agrees that he may not exercise jurisdiction on petitioner's claims involving her work-related injury until after the Division of Workers' Compensation makes a determination. *N.J.A.C. 6A:3-1.3(c)* and *N.J.A.C. 6A:3-1.3(i)(1)*.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. ¹

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2020
Date of Mailing: October 5, 2020

¹ 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

OAL DKT. NO. EDU 09584-19

AGENCY DKT. NO. 146-6/19

TINA GAGLIANO,

Petitioner,

v.

VILLAGE OF RIDGEWOOD

BOARD OF EDUCATION,

BERGEN COUNTY.

Respondent.

Lane J. Biviano, Esq., for petitioner

Jeffrey R. Merlino, Esq., for respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: July 6, 2020

Decided: August 19, 2020

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

Tina Gagliano, a former teacher in the Ridgewood Public School District, withdrew her application for disability retirement and sought a return to service in the school district, but no opening exists. Must the school district create a new position or

bump the incumbent? No. Under Klumb v. Board of Education of Manalapan-Englishtown Regional High School District, 199 N.J. 14, 19 (2009), a school district must return a disabled teacher to the next available opening and is not required to create a new position or bump an incumbent.

PROCEDURAL HISTORY

Gagliano was a tenured teacher in the Ridgewood Public School District.

On February 14, 2017, Gagliano applied for and was granted leave under the Family and Medical Leave Act (FMLA).

On March 14, 2019, Gagliano reported to the Ridgewood Board of Education to return to service as a Home Economics/Food teacher for the Ridgewood Public School District, but the position had already been filled and no other position was available.

On June 18, 2019, Gagliano filed a petition of appeal with the Department of Education, Office of Controversies and Disputes. Gagliano seeks an order reinstating her to her former duty, or any other comparable duty; restoring her sick and personal days, as well as her health benefits retroactive to the date of cancellation; and indemnifying her for any medical costs she incurred, including hospital and pharmaceutical costs. Finally, Gagliano seeks an order requiring Ridgewood to pay her an amount equal to her full salary for the period following her disability for up to one year.

On July 16, 2019, the Department of Education, Office of Controversies and Disputes, transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On September 10, 2019, the parties participated in a prehearing telephone conference call. During that conference, the parties determined that no genuine issues

of material fact existed, that the case was ripe for summary decision, and that I could render a decision as a matter of law. A briefing schedule was to follow.

On April 15, 2020, Gagliano filed her motion for summary decision; on May 11, 2020, Ridgewood filed its opposition and cross-motion for summary decision; and on June 25, 2020, Gagliano filed her reply.

STATEMENT OF FACTS

Based on the documentation the parties submitted in support of and in opposition to the motions for summary decision, including their stipulation of facts, I **FIND** the following as **FACT** for the purpose of these motions only:

On September 1, 2008, Gagliano began serving as a Home Economics/Food teacher for the Ridgewood Board of Education in the Ridgewood Public School District, eventually becoming a tenured teacher in that position.

On March 28, 2016, Gagliano suffered job-related injuries to her shoulder.

On May 16, 2016, Gagliano suffered job-related injuries to her head, neck, and upper body, including a concussion.

Gagliano filed claims for workers' compensation in Workers' Compensation Court.

Those claims are pending.

Meanwhile, on September 1, 2016, Gagliano returned to work, but her return was intermittent, due to her injuries.

On February 14, 2017, Gagliano applied for and was granted leave under the FMLA. Her end date for leave under the FMLA was June 22, 2017. During this time, Ridgewood provided no pension contributions on behalf of Gagliano. In fact,

Ridgewood has provided no pension contributions on behalf of Gagliano since February 13, 2017.

According to the Division of Pensions, Gagliano has eight years and seven months of service credit in the New Jersey Teachers' Pension and Annuity Fund (TPAF), which requires ten years of service credit to be eligible for a regular pension at age sixty.

A regular pension through the TPAF, however, may include purchase of service credit from another jurisdiction outside of the State of New Jersey.

Toward this end, Gagliano has purchased service credit from the State of New York for her prior employment there, which brings her total years of service credit to more than ten.

Thus, Gagliano is eligible to retire on a regular pension at age sixty.

Eligibility for retirement for ordinary disability through the TPAF, on the other hand, requires ten years of service credit exclusively in the State of New Jersey, but eligibility for retirement for accidental disability through the TPAF only requires a teacher to be an active member of the TPAF on the date of his or her application.

Hence, Gagliano filed an application for accidental disability retirement with the TPAF on August 14, 2017.

On July 16, 2018, the TPAF denied Gagliano's application for accidental disability retirement but approved her application for deferred retirement at age sixty.

On August 27, 2018, Gagliano appealed the denial of her application for accidental disability retirement, but on March 13, 2019, Gagliano withdrew both her appeal and her application for accidental disability retirement, as well as her application for deferred retirement at age sixty.

Any New Jersey public employee may withdraw his or her retirement application without penalty before its acceptance and implementation by the Division of Pensions.

On March 14, 2019, Gagliano reported to the Ridgewood Board of Education to return to service as a Home Economics/Food teacher for the Ridgewood Public School District.

Ridgewood, however, denied her return.

The position to which Gagliano sought to return was filled and no comparable position was available.

CONCLUSIONS OF LAW

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a).

The decision sought may be rendered if the papers and discovery that have been filed show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

In this case, no genuine issue of material fact exists, and Ridgewood is entitled to prevail as a matter of law.

The statute governing disability retirement for teachers is N.J.S.A. 18A:66-39. Subsection (b) governs ordinary disability, and subsection (c) governs accidental disability, but reemployment is still possible for either under N.J.S.A. 18A:66-40. In fact, that provision requires a beneficiary under the age of sixty to undergo a medical examination once a year for five years, if asked, to determine whether the disability had vanished or materially diminished, and if so, the beneficiary must report for his or her former duty, or some other comparable duty that his or her former employer is willing to assign:

Once each year the retirement system may, and upon his application shall, require any disability beneficiary who is under the age of 60 years to undergo medical examination by a physician or physicians designated by the system for a period of 5 years following his retirement in order to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished. If the disability beneficiary is engaged in an occupation, then the amount of his pension shall be reduced to an amount which, when added to the amount then earned by him, shall not exceed the amount of the salary now attributable to his former position.

.....

If a disability beneficiary, while under the age of 60 years, refuses to submit to at least one medical examination in any year by a physician or physicians designated by the system, his pension shall be discontinued until withdrawal of his refusal. If 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 assign 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. If the beneficiary fails to return to duty within 10 days after being ordered so to do, or within such further time as may be allowed by the board of trustees for valid reason, as the case may be, the pension shall be discontinued during such default.

[N.J.S.A. 18A:66-40(a).]

In Klumb v. Board of Education of Manalapan-Englishtown Regional High School District, 199 N.J. 14, 19 (2009), the New Jersey Supreme Court held that under the above subsection, N.J.S.A. 18A:66-40(a), “a school district must return a formerly disabled teacher to the next available opening in the position that he or she held at the time of the disability retirement, so long as the teacher meets the standards set by the State Board of Education for that position.”

In reviewing agency decisions interpreting that statutory provision, the Court noted that in Bublin v. Board of Education of Point Pleasant, 96 N.J.A.R.2d (EDU) 768,

the TPAF determined that Bublin, an English teacher, was no longer disabled, and that she could return to teaching, but that no positions were open in the school district, whether for English teachers or librarians. When Bublin was not hired, she appealed to the Commissioner of Education. The Court noted that the Commissioner held that the school district was not required to create a new position or bump an incumbent. In short, Bublin was merely entitled to the next opening. Indeed, the Court asserted that this holding remained the Commissioner's interpretation of N.J.S.A. 18A:66-40(a), which the Court sanctioned. According to my research, this remains the Commissioner's interpretation.

Accordingly, in this case, two obstacles stand in the way of petitioner's return to service. First, a genuine issue of material fact exists whether Gagliano's disability has vanished or materially diminished. Second, if Gagliano's disability has vanished or materially diminished, the fact remains that an opening for her position, or for some other comparable duty which Ridgewood is willing to assign, does not exist, and Ridgewood is not required to create a new position or bump the incumbent. Therefore, I **CONCLUDE** as a matter of law that Gagliano is merely entitled to the next opening—should she be able to perform her former duty, or some other comparable duty that respondent is willing to assign.

Finally, Gagliano's claims to salary and to benefits are not yet ripe. Under N.J.S.A. 18A:30-2.1(a), whenever an employee is absent due to personal injury caused by an accident at work, the employer shall pay the full salary or wage for up to one year, but the employee must have received or was eligible to receive a temporary disability benefit under the workers' compensation laws, and any amount must be reduced by the amount of any such award. As such, N.J.A.C. 6A:3-1.3(c) requires such a petitioner to include a copy of the ruling or settlement agreement issued by the Division of Workers' Compensation.

In this case, Gagliano's claims for workers' compensation in Workers' Compensation Court are pending. Stated otherwise, no ruling or settlement yet exists. Therefore, I **CONCLUDE** that Gagliano's claims to salary and benefits are not yet extant

and, in the absence of a ruling or settlement from the Division of Workers' Compensation, must be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Gagliano's motion for summary decision is **DENIED**, that Ridgewood's cross-motion for summary decision is **GRANTED**, and that Gagliano's petition is **DISMISSED** without prejudice.

I **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 is authorized by law to make a final decision in this case. 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 under 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, PO 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.

August 19, 2020
DATE


BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

August 19, 2020

Date Mailed to Parties:

August 19, 2020

dr