



State of New Jersey

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December 12, 2017

GAYLORD POPP, L.L.C.
Samuel Gaylord, Esq.

[Redacted address information]

Sent via email to: [Redacted email address]

Re: Kelly Brophy
[Redacted subject details]

Dear Mr. Gaylord:

At its meeting on December 7, 2017, the Board of Trustees of the Teachers' Pension and Annuity Fund ("TPAF") considered the following documents in your appeal on behalf of your client, Kelly Brophy:

- a) All exhibits;
b) The Initial Decision (ID) of Chief Administrative Law Judge (CALJ) Laura Sanders, dated October 11, 2017¹; and
c) Exceptions filed by DAG Thomas Hower, dated November 8, 2017².

The Board noted the exceptions filed by DAG Hower. Thereafter, the Board voted to adopt the recommendation of CALJ Sanders to approve Ms. Brophy's application for Ordinary Disability retirement benefits but rejected CALJ Sanders' fact-finding regarding modern teaching techniques and the evaluation of the New Jersey public schools because they are unsupported in the record. Ms. Brophy was not qualified as an expert in teaching or in "modern teaching techniques" and her CV is not in evidence. Ms. Brophy only testified about her job duties and not about broader teaching techniques by others. Ms. Brophy also offered no testimony about how public schools in New Jersey assess their mathematics teaching. Moreover, no documents concerning school assessments are in evidence. Specifically, the Board rejected the CALJ's finding: "Based on her credible testimony, I FIND that modern teaching techniques are based on a combination of large group, small-group, and individual work; that students are not taught primarily through chalk-board instruction, but through a whole range of hands-on activities designed to illustrate the concepts; and that effective control of a classroom of twenty five active

¹ The Board requested and was granted an extension of time to issue its final decision until January 11, 2018.

² An extension of time was requested and granted to file exceptions.

eleven-year-olds requires constant focus, considerable energy, a lot of walking around.” ID at 3. A more limited finding that in Ms. Brophy’s district these techniques were used, is arguably supported by the record. However, the finding reading - “In addition, it should be noted that schools in New Jersey are measured on how well their math students are doing and, by extension, how effective their teachers are.” – was also rejected as it lacks any support in the record. ID at 15-16.

The Board modified the conclusions of law in the ID that Ms. Brophy has proved that she is disabled to ensure the application of the correct legal standard to the facts developed at hearing. ID at 15. The proper legal standard for ordinary disability retirement benefits requires that a preponderance of proofs demonstrate that Ms. Brophy “is physically or mentally incapacitated for the performance of duty and should be retired.” N.J.S.A. 43:15A-42; Getty v. Prison Officers’ Pension Fund, 85 N.J. Super. 383, 390 (App. Div. 1964). The standard also requires a finding that the disabling condition is permanent and not a temporary situation. See Rogers v. Public Employees Ret. Sys., 2013 N.J. Super. Unpub. LEXIS 1450, *7 (App. Div. 2013) (“We agree with the ALJ that there must be a finding of permanency, even though that term is not used in the statute. Disability pensions are not intended to provide coverage for temporary disabilities, which are addressed through programs such as sick leave and temporary disability benefits.”)

In the “Legal Analysis” section, the ID states “I CONCLUDE that Ms. Brophy is not currently capable of successfully commanding three or four elementary-school classes of twenty-five children a day, five days a week, for the entirety of the school year. . . . Therefore, I conclude that petitioner has proved that she is disabled from her position as an elementary-school teacher.” ID at 15-16. The Board modified the language in the ID to change that she “is not currently capable of” - to read that “Ms. Brophy cannot successfully command [] three” This language change ensures that the proper legal standard, including permanence, is applied in this case.

Ms. Brophy is now considered totally and permanently disabled from the performance of her regular and assigned duties as detailed by N.J.S.A. 18A:66-39 and relevant case law. As such, the Board approved Ms. Brophy for Ordinary Disability retirement benefits effective October 1, 2012, under her payment selection of the Maximum option.

Ms. Brophy has the right to change this selection to another retirement option by filing written notification with the Division of Pensions and Benefits’ Retirement Bureau within 30 days from the date of Board approval; otherwise, the retirement will stand as approved and cannot be changed for any other reason.

Once the Board approves a member for a disability retirement allowance, the member’s retirement application shall not be withdrawn or canceled, or amended to a later retirement date than the date specified in the approved retirement application.

By copy of this letter, I am requesting the Retirement Bureau to implement the Board’s decision and process the Ordinary Disability retirement benefits, retroactive to Ms. Brophy’s effective date of October 1, 2012. Please allow 4-6 weeks for the processing of the retirement benefit.

Ms. Brophy should be aware that a retirement allowance payable to a disability retiree is subject to adjustment if earnings from employment after retirement exceed the difference between the pension portion of the retirement allowance and the salary attributable to the former position.

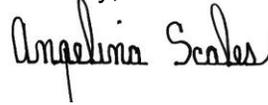
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The statute permits the Board of Trustees to require disability retirees to undergo annual medical examinations to determine if they continue to be totally and permanently disabled and, therefore, eligible for continued receipt of a disability retirement allowance. In that regard, the Board requests that Ms. Brophy be re-examined in one year.

Pension laws require re-enrollment of a retiree under certain conditions. Disability retirees needing guidance on returning to employment should visit our website at www.state.nj.us/treasury/pensions and refer to the Certifying Officer Memorandum dated August 22, 2014. Retirees needing additional clarification should contact the Division to determine the impact of a return to employment would have on their disability retirement benefits.

The Board of Trustees of the Teachers' Pension and Annuity Fund hereby modifies the findings of fact and conclusions of law of the Chief Administrative Law Judge's Initial Decision and further adopts the recommendations contained therein.

Sincerely,



Angelina Scales, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

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c: V. McManus (ET); L. Milton (ET);
DAG Thomas Hower (ET)
OAL, Attn: Library (OAL Decisions) (ET)
Kelly Brophy