

CARMELLA MUCCI, :
PETITIONER, :
V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF MOONACHIE, BERGEN COUNTY, :
RESPONDENT. :
And :
IN THE MATTER OF THE TENURE HEARING : COMMISSIONER OF EDUCATION
OF CARMELLA MUCCI, SCHOOL DISTRICT : DECISION
OF THE BOROUGH OF MOONACHIE, :
BERGEN COUNTY. :
And :
CARMELLA MUCCI, :
PETITIONER, :
V. :
BOARD OF EDUCATION OF THE BOROUGH :
OF MOONACHIE, BERGEN COUNTY, :
RESPONDENT. :

SYNOPSIS

In consolidated matters, Carmella Mucci, tenured teaching staff member, challenged the withholding of her 2000-01 increments; the Board certified tenure charges of unbecoming conduct and incapacity against Ms. Mucci; and Ms. Mucci sought rescission of her letter of resignation, monies due her under the terms of an alleged Employment Separation Agreement, interest and counsel fees.

The ALJ found that, beginning in September 1999, Ms. Mucci was not capable of performing as a tenured teaching staff member. The ALJ found that although Ms. Mucci wanted to effect her retirement through a negotiated agreement with the Board, that agreement never resulted because it was never fully executed and never adopted by the Board. When Ms. Mucci rescinded her resignation, the Board certified tenure charges, then Ms. Mucci retired. Thus, the ALJ concluded that, having withdrawn her opposition to the tenure charges and having retired, Ms. Mucci had waived any claims for relief. Petitions were dismissed.

The Commissioner concluded that the Employment Separation Agreement at issue was never finalized and approved by both parties so as to constitute an enforceable agreement. In that Ms. Mucci retired from the District as of January 1, 2001, the other issues raised in these consolidated matters, including the tenure charges filed against Ms. Mucci and her challenge to her increment withholding, were moot. The Commissioner granted Summary Decision to the Board and dismissed the petitions with prejudice.

<p>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.</p>

June 21, 2004

OAL DKT. NOS. EDU 1820-01, EDU 1901-01 AND EDU 5286-01 (CONSOLIDATED)
AGENCY DKT. NOS. 438-12/00, 29-2/01 AND 90-4/01

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Ms. Mucci’s exceptions and the Board’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were considered by the Commissioner in reaching his decision.¹

¹ On June 15, 2004, Ms. Mucci submitted a letter with two attachments which were characterized as “additional documentation.” The Board filed a response to Ms. Mucci’s submission on June 16, 2004. In that *N.J.A.C.* 1:1-18.4 does not provide for submissions other than exceptions and replies, these additional submissions were not considered.

In her exceptions, Ms. Mucci asserts that this matter is not ripe for summary decision in that genuine issues of material fact exist. (Ms. Mucci's Exceptions at 6) In support thereof, Ms. Mucci reiterates her argument, presented before the Administrative Law Judge (ALJ), that "there is a substantial factual dispute as to whether there was a duly negotiated Employment Separation Agreement (Agreement) that was agreed upon prior to the Board's decision to proffer tenure charges against Ms. Mucci." (*Id.* at 7) Ms. Mucci points out that the Board accepted her letter of resignation, which was expressly conditioned upon the Board's acceptance of the Agreement, before it voted to certify tenure charges against her. (*Ibid.*) If the Board did not agree with the terms of the Agreement, Ms. Mucci avers, it could have refused to accept her letter of resignation since it was not an unconditional resignation. (*Ibid.*) Moreover, Ms. Mucci claims that there appears to be a dispute over whether the Board had communicated a date by which she had to accept the Agreement and whether there was a meeting of the minds with respect to the Agreement, given some minor revisions to the Agreement by Ms. Mucci's counsel. (*Ibid.*) Additionally, Ms. Mucci reasons, since she has not cashed any pension checks to date, there is a factual issue as to whether she has actually retired. (*Ibid.*)

Ms. Mucci also contends that whether her absenteeism warrants her dismissal is a fact-sensitive question that should not be resolved by summary decision, contending that her attendance prior to 1997 was excellent and that it is only since September 1999 that her attendance record dramatically changed due to a severely debilitating environmental illness. (*Id.* at 8) Ms. Mucci points out that the Board did not charge incapacity, but, rather, charged her with chronic and excessive absenteeism and argues that the cases cited by the Board in support of its Motion for Summary Decision highlight the type of analysis that must occur, noting that none of the cases cited by the Board were decided by summary decision. (*Ibid.*)

With respect to *In the Matter of the Tenure Hearing of Pellagatti*, 93 N.J.A.R.2d (EDU) 121 (1992), cited by the Board in support of its motion, Ms. Mucci points out that a

two-day hearing was conducted in that matter and, in contrast to her situation, Pellegatti had averaged over 40 absences a year over a 10-year period, had been counseled on numerous occasions about her lateness and absences and had a substance abuse problem she was trying to conceal. (*Id.* at 8-9) Ms. Mucci further points to *In the Matter of the Tenure Hearing of Jerome Kacprowicz*, 93 N.J.A.R.2d (EDU) 147 (1993), another case cited by the Board where a teacher was terminated following a hearing on his record of absenteeism, claiming that her situation differs in that Mr. Kacprowicz's attendance was a problem for nine years and there was evidence presented that Mr. Kacprowicz's absences caused a disruption of the continuity of instruction; whereas, this case simply assumes a negative impact on students. (*Id.* at 9) Ms. Mucci claims that a long-term replacement could be hired while she was absent from work, unlike intermittent absences which compel a Board to use substitute teachers who are often not able to provide continuity of instruction. (*Ibid.*) Moreover, Ms. Mucci contends that "increment withholdings have often been used by local boards of education to discipline an employee for excessive absenteeism prior to the pursuit of tenure charges," and that "[i]t is possible that based on all of the circumstances and factors that may be brought forth during a hearing, a conclusion could be reached that an increment withholding is appropriate." (*Id.* at 10)

Ms. Mucci submits that only her absenteeism for the last several years is at issue and that these absences must be evaluated in light of her 37 years of employment with the District. (*Id.* at 10-11) Such evaluation, Ms. Mucci avers, cannot take place without a full hearing. (*Id.* at 11)

Finally, Ms. Mucci avers that there were numerous inconsistencies in the documents submitted to and relied on by the ALJ, including, *inter alia*:

1. The minutes of the meeting of January 9, 2001 which were supplied were unsigned. Ms. Mucci has questioned whether this meeting actually took place. The minutes state the Board attorney (Mr. Sciarillo) "would get in touch with Ms. Mucci's attorney to discuss the package further and report back to the Board." (Exhibit "E"). This never occurred.

2. The Board purportedly conducted a special meeting on February 6, 2001 to consider the tenure charges. (Exhibit “G”). Only 3 members attended the meeting and 2 were absent, yet the Resolution indicates that it was “upon a majority vote of the full membership of the Moonachie Board of Education,” (Exhibit “H”). The full membership of the Board was not in attendance according to the Board’s own minutes.
3. The copy of the Separation Agreement referenced in the Judge’s Initial Decision was not signed by Ms. Mucci because all of the ones she signed had been picked up at her home by the Board’s Business Administrator. (See Exhibit “A”, paragraph 11).
4. The Administrative Law Judge notes that the Board “did not submit any counter-affidavits or certifications specifically related to the facts”, yet he makes findings of fact in the Board’s favor.
5. Contrary to the Judge’s finding, Ms. Mucci has not waived any claims for relief she has against the Board. A waiver must be “knowing” and “intentional”. Testimony would need to be taken on those issues since they involve Ms. Mucci’s state of mind. (*Id.* at 12)

In conclusion, Ms. Mucci urges the Commissioner to reject the Initial Decision, commenting that “[w]hile it may be economical and efficient to dispose of Ms. Mucci’s claims by summary decision, it is neither equitable, fair, just or in accordance with applicable law. (*Id.* at 13)

In response, the Board contends that the ALJ correctly concluded that there was no binding settlement agreement between Ms. Mucci and the Board, noting that the ALJ found that the Board never executed the Agreement. (Board’s Reply Exceptions at 1-2) The Board also points out that Ms. Mucci admitted that she revised the Agreement that was circulated between the parties. Thus, the Board argues, “[a]ny issues regarding deadlines to accept the agreement, or issues related to whether her resignation was conditional are irrelevant, as they do not change the fact that the Board never accepted Petitioner’s terms, the only material fact at issue.” (*Id.* at 2)

With respect to Ms. Mucci's assertion that there is a factual dispute as to whether she is retired since she has not cashed her retirement checks, the Board contends that whether or not Ms. Mucci has cashed her retirement checks is irrelevant in that there is no legal basis to claim that Ms. Mucci's failure to deposit her retirement checks negates her status as retired. (*Ibid.*) The Board points out that Ms. Mucci admits that she applied for her pension and is now receiving checks from the Teachers' Pension and Annuity Fund. (*Ibid.*) Moreover, the Board claims that Ms. Mucci "has acknowledged that her tenure charges are now moot, based in part on her employment status." (*Ibid.*)

The Board also maintains that summary decision on the issue of Ms. Mucci's absenteeism is appropriate in that the law does not mandate a hearing where no material factual issues remain. (*Id.* at 3) The Board points out that Ms. Mucci has been absent since September 1999 and that "[t]he law is clear that chronic or excessive absenteeism 'has been found to constitute both "incapacity" and "unbecoming conduct" within the meaning of N.J.S.A. 18A:6-10, such as to warrant dismissal from employment.'" (*Ibid.*, citing *Kacprowicz, supra*, at 147, quoting *In the matter of the Tenure Hearing of David Williamson, Trenton School District, Mercer County*, 1986 *S.L.D.* 1462, 1467. Moreover, again citing *Kacprowicz, supra*, at 151, the Board avers that "excessive absenteeism constitutes valid grounds for dismissing a tenured teacher *even when the absences have been excused or caused by legitimate reasons of personal illness.*" (*Ibid.*) (emphasis in text) The Board thus claims that the reasons for Ms. Mucci's absences, as well as the history of her absences before 1999, are irrelevant. (*Id.* at 3-4)

Finally, with respect to the alleged inconsistencies which Ms. Mucci raises, the Board contends that none of these facts, if true, are material to this case because they do not change the fact that the Board did not accept any settlement, noting that Ms. Mucci's claim that the ALJ erred in making findings of fact in favor of the Board because the Board did not provide

any counter-affidavits in response to Ms. Mucci's opposition to the Board's motion for summary judgment is flawed because Ms. Mucci admits that she revised the Agreement and that the Agreement was never signed by the Board. (*Id.* at 4) "In light of these admissions, which the Board does not contest, there is no need for the Board to submit any additional factual support for its relief when the Petitioner's admissions provide enough support." (*Ibid.*) The Board thus concludes that no hearing was, therefore, needed to reach a fair, equitable and just decision in light of the magnitude of Ms. Mucci's absences. (*Ibid.*) The Board also points out that Ms. Mucci "has not worked since 1999,*** [is] retired in the eyes of the Board and the Teacher's Pension and Annuity Fund (regardless of what she is doing with her checks), and has no intention of returning to work. (*Id.* at 5)

After a careful and independent review of the papers filed in this matter, the Commissioner has determined that grant of summary decision to the Board is appropriate in this instance. 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 Ms. Mucci's assertions to the contrary, the Commissioner finds that 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." "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. Additionally, the Commissioner finds that the Board is entitled to prevail as a matter of law for reasons provided in the Initial Decision and explicated below.

Notwithstanding Ms. Mucci’s challenge to the withholding of her increment and the filing of tenure charges against her by the Board, this matter, in actuality, turns on the resolution of two issues: 1) whether the Employment Separation Agreement at issue was finalized and approved by both parties to this action and 2) whether Ms. Mucci’s retirement renders the consolidated petitions in this matter moot.

It is undisputed that Ms. Mucci and the Board were engaged in active negotiations to develop an Employment Separation Agreement during the 1999-2000 school year, but that such negotiations did not ultimately result in a finalized, executed Agreement during that year. (Ms. Mucci’s Exceptions at 2, Petition of Appeal Regarding Agreement at 2 and Answer at 1) It is also undisputed that, although negotiations continued into the Fall of 2000, on or about September 5, 2000, the Board voted to withhold Ms. Mucci’s employment, adjustment and longevity increments for the 2000-01 school year (Petition of Appeal Regarding Increment Withholding at 1 and Answer at 1), and on December 13, 2000, Ms. Mucci was served with tenure charges. (Ms. Mucci’s Exceptions at 3 and Board’s Motion for Summary Decision at 5) Moreover, there is no dispute that: 1) Ms. Mucci sent a letter to the Board on December 27, 2000 notifying it of her intention to retire as of December 31, 2000 (*ibid.*, and Ms. Mucci’s Opposition to Motion for Summary Decision, Exhibit G); 2) Ms. Mucci’s attorney

made changes to the latest version of the proposed Agreement and Ms. Mucci delivered a signed copy of the revised Agreement on or about January 5, 2001, along with the letter of resignation required by the Agreement, to the Board Secretary (*ibid.*); 3) on January 9, 2001, the Board voted to accept Ms. Mucci's retirement effective December 31, 2000, but did not vote on the revised Agreement submitted by Ms. Mucci (*ibid.* and Ms. Mucci's Certification of May 23, 2001 at 3); and 4) on February 6, 2001, the Board voted to certify tenure charges against Ms. Mucci to the Commissioner (*id.* at 4 and Board's Motion for Summary Decision at 5).

The "genuine issues of material fact" set forth in petitioner's exceptions with respect to the Agreement, therefore, *i.e.*, the dispute over whether there was a duly executed Agreement that was agreed upon prior to the Board's decision to proffer tenure charges against Ms. Mucci; whether the Board ever communicated a date to Ms. Mucci, and whether there was a meeting of the minds (Petitioner's Exceptions at 7) are facts not material to the determination as to whether the Employment Separation Agreement at issue was finalized and approved by both parties to this action given Ms. Mucci's concession that the revised Agreement was neither approved by the Board nor signed by a duly designated Board representative. (*Id.* at 3 and Petition of Appeal Regarding Employment Separation Agreement at 2) Moreover, the Commissioner cannot ignore that Ms. Mucci made revisions to and signed the proposed Agreement following the December 13, 2000 notification from the Board that it was contemplating the filing of tenure charges against her. The action of the Board initiating the filing of tenure charges and Ms. Mucci's revisions to and signing of the proposed Agreement shortly thereafter clearly demonstrate that there was no finalized Agreement between the parties. In this context, Ms. Mucci's signature on the Agreement she revised cannot be construed as an acceptance of a settlement, but, instead, was a counteroffer that the Board did not act upon. *See Larson & Fish v. Schultz*, 69 A.2d 328 (App. Div. 1949) and *Carlin v. City of Newark*, 114 A.2d 761 (Law Div. 1955). Accordingly, the Commissioner finds that the Employment

Separation Agreement at issue in this matter was never finalized and approved by both parties to this action and, thus, Ms. Mucci's request to enforce such Agreement is hereby denied.

Turning to the issue of Ms. Mucci's retirement and its effect on the remaining issues in these consolidated petitions, the Commissioner notes that, in her certification dated May 23, 2001, Ms. Mucci states that she filed an application for retirement with the Division of Pensions for a January 1, 2001 retirement, that there was a delay in the Board submitting its portion, which was finally submitted, and that there is now a delay because she cannot locate a copy of her birth certificate. (Certification of Ms. Mucci, dated May 23, 2001, Item #13) The Board of Trustees at the Division of Pensions subsequently approved Ms. Mucci's retirement, effective January 1, 2001, at their regular meeting on October 11, 2001. (Letter of October 11, 2001 from the Division of Pensions Attached to the Board's Letter to the ALJ of October 18, 2001) Notwithstanding Ms. Mucci's claim in her exceptions that there is a factual issue as to whether she has retired, given that her letter of resignation was expressly conditioned upon the Board's acceptance of the revised Employment Separation Agreement and that she has not cashed any pension checks, the Commissioner observes that, as of May 23, 2001, the date of the above-cited certification, Ms. Mucci was proceeding to complete the process to effectuate her retirement, with an effective date of January 1, 2001, some five months after she was aware that the Board had not acted to accept her proffer of a revised Agreement, and that there is nothing in the record to suggest that Ms Mucci made any attempt to rescind or nullify her retirement with the Division of Pensions, pursuant to *N.J.A.C. 17:3-6.3(a)*.² Accordingly, there is no basis for

² *N.J.A.C. 17:3-6.3(a)* provides that:

A member shall have the right to withdraw, cancel or change an application for retirement at any time before the member's retirement allowance becomes due and payable by sending a written request signed by the member. Thereafter, the retirement shall stand as approved by the Board.

and *N.J.A.C. 17:3-6.2(a)* provides that:

A member's retirement allowance shall not become due and payable until 30 days after the date the Board approved the application for retirement or 30 days after the date of retirement, whichever is later.

the Commissioner to conclude that Ms. Mucci has nullified her retirement status with the Division of Pensions.

Moreover, with respect to Ms. Mucci's not cashing her retirement checks, it cannot be ignored that Ms. Mucci has a history of not cashing checks. In this regard, as of September 11, 1998, the Commissioner observes that Ms. Mucci had not cashed nine of her paychecks totaling \$21,662.64 (Tenure Charges, Exhibit 11), and that the proposed Agreement provides that "[t]he Board will reimburse Ms. Mucci for any prior salary checks paid to her by the Board, which she has not yet negotiated, regardless of the age of these checks." (Ms. Mucci's Motion for Summary Decision, Exhibit B at 3, #e) Given the absence of notification to the Division of Pensions nullifying or revoking her retirement status, therefore, Ms. Mucci has provided no basis for the Commissioner to conclude that there is a question as to her retirement status simply because she has not cashed her retirement checks.

In light of the Commissioner's conclusions that the Employment Separation Agreement at issue was never finalized and approved by both parties so as to continue an enforceable Agreement and that Ms. Mucci retired from the District as of January 1, 2001, the other issues raised in these consolidated matters, including the tenure charges filed against Ms. Mucci and Ms. Mucci's challenge to her increment withholding,³ are moot and there is, therefore, no basis upon which this matter can be ordered to proceed.

³ The Commissioner notes that, by letter to the ALJ of May 13, 2002, counsel for Ms. Mucci states:

I believe the dismissal of the Workers' Compensation cases probably does dispose of the issues contained within the increment withholding and the tenure cases. [The Workers' Compensation matters were dismissed for failure to sustain the burden of proof. (See Counsel for Ms. Mucci's letter of April 29, 2002 with Attachment, and the Board's Letter of May 7, 2002 with Attachment.)] I must point out, as I'm sure Ms. Mucci will, that there still remains one pending Workers' Compensation matter which she filed pro-se concerning occupational exposure after 1995. (Counsel for Ms. Mucci's Letter, May 13, 2002)

Additionally, with respect to the withholding of Ms. Mucci's increment for the 2000-01 school year, there is nothing in the record to suggest that there would be any effect on her retirement benefits should she prevail in that Ms. Mucci was not in pay status at any time during the 2000-01 school year prior to the effective date of her retirement.

Accordingly, for the reasons set forth above, as well as those expressed in the Initial Decision, the Commissioner grants Summary Decision to the Board and dismisses the within petitions, with prejudice.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: June 21, 2004

Date of Mailing: June 23, 2004

⁴ 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.*