



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
P. O. Box 295

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PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ELIZABETH MAHER MUOIO
State Treasurer

JOHN D. MEGARIOTIS
Acting Director

June 3, 2022

Sent via email to: [REDACTED]

SHIMBERG & FRIEL, P.C.
Barbara E. Riefberg, Esq.

[REDACTED]

RE: April Lowery
TPAF # [REDACTED]

FINAL ADMINISTRATIVE DETERMINATION

Dear Ms. Riefberg:

I am writing in reference to the decision of the Board of Trustees (Board) of the Teachers' Pension and Annuity Fund (TPAF) that your client, April Lowery, is not eligible to receive Ordinary Disability benefits due her separation from employment by way of a settlement agreement. The Board originally made that determination at its meeting of March 3, 2022. You filed a timely appeal on behalf of Ms. Lowery. At its meeting of May 5, 2022, the Board affirmed its previous decision, and finding no genuine issue of material fact in dispute, the Board also denied your request for an administrative hearing. The Board's Findings of Fact and Conclusions of Law as outlined below were presented to and approved by the Board at its June 2, 2022 meeting.

FINDINGS OF FACT

The record shows that Ms. Lowery established membership in TPAF under account # [REDACTED] on September 1, 1996, based on her employment as a teacher with Deptford Township Board of Education. On October 1, 2002, Ms. Lowery transferred to Haddonfield Public Schools

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where she served as a Physical Science Teacher. On December 1, 2003, Ms. Lowery accepted a position as a Teacher with the Paulsboro Board of Education (BOE). Ms. Lowery's TPAF contributions continued with this location until her resignation on June 30, 2019.

In August of 2018, Paulsboro BOE served Ms. Lowery with tenure charges for unbecoming conduct, chronic absenteeism during her tenure with Paulsboro BOE, and incapacity for allegedly directing her students to physically remove another student from her classroom against the student's will. In accordance with the rules of the Commissioner of Education, an arbitrator was assigned to decide the dispute.

In the Matter of the Tenure Charges against April Lowery, Ms. Lowery and Paulsboro BOE entered into a Separation From Employment and Agreement Release, dated April 29, 2019 which included the following stipulations: Paulsboro would return Ms. Lowery to active payroll from May 1, 2019 until June 30, 2019, although she would remain on sick leave with pay and medical benefits; Ms. Lowery would tender an irrevocable resignation effective June 30, 2019, and would agree to not seek any future employment or consultant relationship with the Paulsboro BOE; the Paulsboro BOE agreed to cooperate with Ms. Lowery's application for Ordinary Disability retirement benefits and the tenure charges filed against her would be deemed moot and withdrawn with no further action initiated. Ms. Lowery did not admit to any wrongdoing.

On May 1, 2019, two days after signing the above agreement, Ms. Lowery filed for Ordinary Disability retirement benefits online through the Member Benefit Online System. The Division of Pensions and Benefits' (Division) *Fact Sheet: Disability Retirement Benefits* includes:

If you have been terminated for cause, or have a settlement agreement which sets forth the terms of your departure in lieu of the termination for cause, you and your employer must provide that information to the NJDPB at the time you file for Disability Retirement. It must be shown that you have separated from employment as a result of the disabling condition.

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On June 21, 2019, the Division's Audit Section received a letter from Paulsboro BOE outlining the days Ms. Lowery was on an unpaid/paid suspension, attached a copy of the settlement agreement and enclosed a check for pension contributions and contributory insurance per the stipulations of the agreement. Although the Division's Audit Section received a copy of the settlement agreement for purposes of calculating and submitting payment per the terms the agreement, this document was not sent to the Disability Review Unit. Had Ms. Lowery or her employer submitted copy of the settlement agreement in conjunction with her application, it would have been part of the review for eligibility.

At its meeting of May 7, 2020, the Board approved Ms. Lowery for Ordinary Disability retirement benefits. A Board approval letter was issued on that same date and included the following language: "The approval of your retirement benefits is expressly conditioned upon the rendering of honorable service during your public employment. If any criminal or administrative charges are found after the date of this notice, your retirement benefits may be held in abeyance until the charges are fully adjudicated or the Board is satisfied pursuant to N.J.A.C. 17:1-6.2." The Board was unaware of any charges and/or misconduct at the time of the approval, as the Paulsboro BOE certified that Ms. Lowery had simply resigned.

The Board of Examiners opened a matter by way of an Order to Show Cause that was issued to Ms. Lowery as to why her teaching certificates should not be suspended. After the matter was transmitted to the Office of Administrative Law, Ms. Lowery presented a proposal to the Board of Examiners in which she agreed to a suspension of her certificates for two years. At its meeting of June 25, 2021, the Board of Examiners voted to accept it. It was at this time that the Board Office became aware of the aforementioned tenure charges and subsequent settlement agreement. On February 15, 2022, the Board Office contacted Ms. Lowery by email to inform her that at the March 3, 2022 meeting, the Board would consider her eligibility for continued receipt of Ordinary Disability retirement benefits in accordance with N.J.A.C. 17:3-6.1.

On February 22, 2022, you wrote to the Division advising that you represent, Ms. Lowery and that you would be appearing on her behalf at the March 3, 2022 Board meeting. At that meeting, the Board determined that Ms. Lowery is ineligible for a Disability retirement and directed the Division to discontinue the benefit and assess the overpayment. You filed a timely appeal of the Board determination on April 13, 2022. At its meeting of May 5, 2022, the Board considered your appeal and request for a hearing. The Board ultimately found that no genuine issue of material fact was in dispute and therefore directed the Board Secretary to draft detailed findings of fact and conclusion of law for review at its meeting of June 2, 2022.

CONCLUSIONS OF LAW

The issue is whether Ms. Lowery is eligible to receive an Ordinary Disability retirement in light of her separation from employment and settlement agreement wherein she tendered her irrevocable resignation and agreed to not seek future employment or consultant relationship with the Paulsboro BOE.

To qualify for Ordinary Disability retirement benefits a member must meet the requirements set forth at N.J.A.C. 17:3-6.1, which states in pertinent part:

...

To qualify for disability retirement, a member must be unable to perform his or her regular and assigned duties due to a permanently-disabling medical condition present at the time of application, as a result of which disabling condition the member should be retired. Termination of employment, voluntary or involuntary, that was caused by any reason other than the claimed disability disqualifies a member from disability retirement. A member whose employment ended after his or her employer initiated disciplinary action, or who was the subject of criminal or administrative charges or party to a settlement resulting in resignation or termination, is considered to have separated from service as a result of the employer action, charges, or settlement, and not due to a disability, unless the action, charges, or settlement is shown to be a result of the disability.

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As N.J.A.C. 17:3-6.1 states, “ A member whose employment ended after his or her employer initiated disciplinary action, or who was the subject of criminal or administrative charges or party to a settlement resulting in resignation or termination, is considered to have separated from service as a result of the employer action, charges, or settlement, and not due to a disability, unless the action, charges, or settlement is shown to be a result of the disability. *The Separation from Employment Agreement and Release, In the Matter of the Tenure Charges Against April Lowery*, says in pertinent part:

Whereas, the parties, wishing to resolve the tenure charges presently pending against Ms. Lowery (including all claims for excessive absenteeism and misconduct as set forth herein) without the need for further litigation, hereby stipulate to settle the same, subject to the terms and conditions as set forth herein; and Ms. Lowery intends to, and by executing this Agreement, hereby does irrevocably resign effective June 30, 2019

Further, in order to comply with N.J.S.A. 18A:66-40, a member seeking a disability retirement must have a position to return to should the alleged disability diminish to the point that the member could return to employment. N.J.S.A. 18A:66-40 states, in pertinent part: “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.” Thus, if it was later determined that Ms. Lowery is no longer disabled, there is no mechanism for the Board to stop paying the pension because she could never be ordered to return to work, as required by N.J.S.A. 18A:66-40. Permitting Ms. Lowery to continue to receive Ordinary Disability retirement benefits under such circumstances would be in contravention of the statutory scheme, and place the Board in the position of potentially paying a pension for which the Board has no ability or mechanism to terminate the pension payment.

As noted above, the Board has reviewed all relevant documentation and written submissions, and because this matter does not entail any disputed questions of fact, the Board was able to reach its Findings of Fact and Conclusions of Law without the need for an

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administrative hearing. Accordingly, this correspondence constitutes the Final Administrative Determination of the Board of Trustees of the Teachers' Pension and Annuity Fund.

You have the right, if you wish, to appeal this final administrative determination to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter, in accordance with the Rules Governing the Courts of the State of New Jersey. All appeals should be directed to:

Superior Court of New Jersey
Appellate Division
Attn: Court Clerk
PO Box 006
Trenton, NJ 08625

Sincerely,

A handwritten signature in black ink, appearing to read "Saretta Dudley", enclosed in a rectangular box.

Saretta Dudley, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

G-2/SD

c: J. Ehrmann (ET)
DAG Jeffrey Padgett (ET)
April Lowery