



# State of New Jersey

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

TRENTON, NEW JERSEY 08625-0295  
Telephone (609) 292-7524 / Facsimile (609) 777-1779  
TRS 711 (609) 292-6683  
[www.nj.gov/treasury/pensions](http://www.nj.gov/treasury/pensions)

ELIZABETH MAHER MUOIO  
*State Treasurer*

JOHN D. MEGARIOTIS  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

October 10, 2018

Oxford Cohen, P.C.  
Samuel Wenocur, Esq.

[REDACTED]  
[REDACTED]

Sent via email to: [REDACTED]

RE: Michael Nappe

[REDACTED]

## **FINAL ADMINISTRATIVE DETERMINATION**

Dear Mr. Wenocur:

I am writing in reference to the denial by the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) of your client, Michael Nappe's request to file for Accidental Disability retirement benefits. The TPAF Board initially reviewed and denied the request at its July 12, 2018 meeting. On August 15, 2018, you appealed the TPAF Board's denial and asked the TPAF Board to reconsider its decision and approve the request to file for Accidental Disability retirement benefits or, in the alternative, grant a hearing in the Office of Administrative Law (OAL). At its meeting on September 6, 2018, the TPAF Board reconsidered and denied the request to file for Accidental Disability retirement benefits and denied the request for a hearing in the OAL, finding no material facts in dispute. Findings of Fact and Conclusions of Law, as outlined below, were approved by the TPAF Board at its meeting of October 4, 2018.

The TPAF Board has reviewed your submissions and the relevant documentation and finds the laws governing the TPAF do not permit the TPAF Board to grant Mr. Nappe's request to file for Accidental Disability retirement benefits.

### **FINDINGS OF FACT**

Mr. Nappe enrolled in the TPAF effective February 1, 2010, based on of his employment as a Teacher with the Perth Amboy Board of Education. On January 1, 2012, Mr. Nappe transferred to Paterson Board of Education. Thereafter, on October 1, 2012, Mr. Nappe transferred to the Linden City Board of Education. While employed by Linden, Mr. Nappe filed several Affirmative Action Complaints against employees of the City of Linden School District. On or about November 30, 2015, Mr. Nappe filed a complaint with the Division of Civil Rights (DCR), alleging that he was subjected to discrimination and retaliation as a result of his disability, in which there was still a pending investigation. The Affirmative Action investigations completed by the City of Linden School District determined that the complaints file by Mr. Nappe were unfounded. On August 16, 2017, Mr. Nappe entered into a Settlement/Separation Agreement and General Release with the Board of Education of the City of Linden (Board), which settled his complaint filed with the DCR. Section 4.a of the Agreement states, in relevant part:

Nappe agrees to immediately withdraw any and all pending administrative, contractual, and civil actions that he has filed or has caused or anticipates to be filed against the Board or any of its current or former employees arising out of his claims that he was subjected to unlawful discrimination, harassment or retaliation at any time from his date of hire in the District through execution of this Settlement Agreement and Release, including but not limited to the November 30, 2015 complaint filed with DCR, docketed as EV09WE-65670. Nappe further agrees to take any and all actions necessary to effectuate the dismissal/withdrawal of all actions (with prejudice) upon execution of this Agreement and provide the Board with proof that such withdrawals/dismissals have been fully implemented.

Section 4.b of the Agreement, states:

The Board agrees that it will not seek to institute any formal disciplinary action against Nappe based upon any allegations or claims which the Board knew about or should have known about prior to the execution of the Agreement.

In addition, Section 4.c (V) of the Settlement Agreement states:

The Board shall provide Nappe with reasonable assistance in forwarding documents to the Division of Pensions and Benefits to facilitate Nappe's retirement, if he so desires. The Board shall complete the forms needed for Nappe to seek a retirement; however, Nappe acknowledges and understands that the Board will take no further action with regard to Nappe's retirement unless required by law. Nappe expressly agrees and understands that his resignation is final and irrevocable no matter what and regardless of whether or not his application for retirement is successful.

As part of the Agreement, Mr. Nappe was placed on a paid leave of absence for the 2017/2018 school year. Mr. Nappe was also required to submit an irrevocable letter of resignation in which he agreed to resign at the end of the school year for which he was taking the paid leave of absence. On August 17, 2017 Mr. Nappe submitted his formal resignation, which states:

Please be advised that I voluntarily and irrevocably resign from my employment with Linden Public Schools, effective at the end of June 30, 2018. My resignation is pursuant to my intention to file for my retirement with the TPAF, effective on July 1, 2018.

On February 14, 2018, the Division received Mr. Nappe's *Application for Disability Retirement* requesting an Accidental Disability retirement effective July 1, 2018, based upon an incident alleged to have occurred on March 8, 2017.

On May 3, 2018, the Division notified Mr. Nappe that in accordance with N.J.A.C. 17:1-6.4, he was ineligible to file for an Accidental Disability retirement because he had voluntarily and irrevocably resigned pursuant to the Agreement. For these reasons, the Division closed Mr. Nappe's application because he could never be in compliance with N.J.S.A. 18A:66-40(A) which states that there must be a position for him to return to should his alleged disability diminish at some time in the future to the point that he could return to employment. In that same letter, Mr. Nappe was notified that he could appeal the determination by writing to the TPAF Board Secretary.

By letter dated May 24, 2018, you appealed the Division's decision to the TPAF Board, asserting that Mr. Nappe's application meets the standards for Accidental Disability retirement benefits. Accompanying your submission was a letter of the same date from Mark A. Tabakin, Esq. counsel for the Board stating that the settlement agreement would not preclude Mr. Nappe from applying for employment with Linden in the future. At its meeting of July 20, 2018, the TPAF Board considered your personal statements, and all relevant documentation regarding Mr. Nappe's request to apply for Accidental Disability retirement benefits and voted to deny Mr. Nappe's request pursuant to N.J.A.C. 17:1-6.4.

By letter dated August 15, 2018, you again appealed and requested that the TPAF Board reconsider its prior denial or grant a hearing in the OAL. At its meeting of September 6, 2018, the TPAF Board denied Mr. Nappe's request to apply for Accidental Disability retirement benefits and denied the request for an administrative hearing, essentially for the reasons set forth in the Board's letter dated July 20, 2018. The TPAF Board directed the Board Secretary to draft the findings of fact and conclusions of law.

### **CONCLUSIONS OF LAW**

The TPAF provides for an Accidental Disability retirement in N.J.S.A. 18A:66-39(c) which states, in relevant part:

A member, under 65 years of age, shall, upon the application of his employer or upon his own application or the application of one acting in his behalf, be retired by the board of trustees, if said member is permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of his regular or assigned duties, on an accidental disability allowance.

In addition, N.J.S.A. 18A:66-40(a) states, in pertinent part:

Once each year the retirement system may, and upon his application shall, require any disability beneficiary...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 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

In furtherance of the statutory requirements, N.J.A.C. 17:1-6.4 requires:

(a) Each disability retirement applicant must prove that his or her retirement is due to a total and permanent disability that renders the applicant physically or mentally incapacitated from performing normal or assigned job duties at the time the member left employment; the disability must be the reason the member left employment

(b) Members who have involuntarily or voluntarily terminated service for any of the reasons listed below will not be permitted to apply for a disability retirement:

1. Removal for cause or total forfeiture of public service;
2. Settlement agreements reached due to pending administrative or criminal charges, unless the underlying charges relate to the disability;
3. Loss of licensure or certification required for the performance of the member's specific job duties;
4. Voluntary separation from service for reasons other than a disability;  
and
5. Job abolishment or reduction in force.

(c) The Division will review all disability retirement applications submitted after a member has terminated service to determine whether the member's application is eligible for processing, pursuant to (a) above.

As noted above, Mr. Nappe did not leave employment due to a disabling condition. Mr. Nappe left employment pursuant to a settlement agreement in the case he filed with DCR. The settlement agreement placed him on a paid leave of absence for one year and required his irrevocable resignation at the end of that time. Mr. Nappe actually filed his irrevocable and voluntary letter of resignation a day after signing the settlement agreement. He did not apply for disability retirement until almost 6 months later. N.J.A.C. 17:1-6.4(b)(2) expressly prohibits members who leave employment pursuant to settlement agreements due to administrative charges from filing for a disability retirement, unless the underlying charges relate to the disability. Further, N.J.A.C. 17:1-6.4(b)(4) prohibits members from applying for a disability retirement when they voluntarily separate from service for reasons other than a disability. Mr. Nappe's separation from service pursuant to settlement agreement cannot comply with the statutory or regulatory requirements for accidental disability retirement.

If Mr. Nappe's application for disability retirement was approved and his alleged disability diminished to the point that he could return to employment, he is unable to comply with N.J.S.A. 18A:66-40(a). As the Appellate Division explained, in In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 402 (App. Div. 2018) the rehabilitation statutes, including N.J.S.A. 18A:66-40(a) "presume that, unlike other retirees attempting to return to state service, the only obstacle to a disability retiree's reemployment is the disability itself." Here, the settlement agreement and irrevocable resignation bar Mr. Nappe's reinstatement from disability. While the Board did review the May 24, 2018, letter from Mark A. Tabakin, Esq., on behalf of the Board, that letter only indicates Mr. Nappe could reapply for employment in the normal course, not that he could be reinstated from disability retirement, which would not require the filing of a new application for employment.

As noted above, the TPAF Board has reviewed your written submissions and because this matter does not entail any disputed questions of fact, the TPAF Board was able to reach its findings of fact and conclusions of law in this matter on the basis of the retirement system's

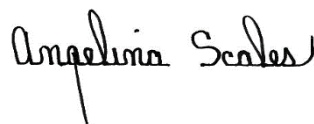
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enabling regulations and without the need for an administrative hearing. Accordingly, this correspondence shall constitute the Final Administrative Determination of the Board of Trustees of the Teachers' Pension and Annuity Fund.

You have the right, if you wish, to appeal this final administrative action 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  
Phone: (609) 292-4822

Sincerely,

A handwritten signature in black ink that reads "Angelina Scales". The signature is written in a cursive style with a long, thin vertical stroke extending downwards from the end of the name.

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

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c: DAG Amy Chung (ET)  
DAG Danielle Schimmel (ET)  
Cheryl Chianese (ET)  
Val McManus (ET)  
Michael Nappe