



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
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October 7, 2022

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Sent via email to: [REDACTED]

Oxford Cohen, P.C.
Samuel Wenocur, Esq.
[REDACTED]

RE: Michael Nappe
TPAF [REDACTED]
OAL DKT. NO. TYP 02823-20

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dear Mr. Wenocur:

At its meeting on September 1, 2022, the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) considered the Initial Decision (ID) of the Honorable Sarah G. Crowley, Administrative Law Judge (ALJ), dated July 21, 2022, together with the exceptions filed by Deputy Attorney Matthew Melton, dated August 5, 2022, and the reply to exceptions filed by Samuel E. Wenocur, Esq., dated August 10, 2022. After careful consideration, the Board voted to reject the ALJ's decision that Michael Nappe's separation from employment was due to a disability. Rather, the Board determined that Mr. Nappe was ineligible to apply for Accidental Disability retirement benefits (AD) because he left employment due to impending disciplinary actions. The Board directed the Secretary to prepare the Findings of Fact and Conclusions of Law as outlined below, which were approved by the TPAF Board at its meeting on October 6, 2022.¹ This will constitute the Board's Final Administrative Determination in this matter.

¹ As the 45-day statutory period for issuing a final decision would have expired, the TPAF Board properly requested and received an extension of time for issuing its final decision.

FINDINGS OF FACT

As set forth more fully below, the Board makes the additional findings of fact and corrections to the ID. Prior to applying for retirement, Mr. Nappe received poor performance evaluations that became more negative over time. 3T45:16-18.² The evaluations centered around Mr. Nappe's classroom management and his ineffectiveness in engaging the students and were not related to his alleged disability. 3T45:24-25. Danny Robertozzi, Superintendent of Schools, testified that Mr. Nappe received negative reviews because students were observed not working on their computers during an evaluation of Mr. Nappe. R-4. As a result, Mr. Nappe was placed on a performance improvement plan during the 2015-2016 school year. 2T56:13-21. The plan required that he observe other teachers so that he could learn different techniques. 2T57:3-10.

Mr. Nappe was said to continually overstep his bounds and attempt to run the technology department. 3T53:17-21. He went as far as creating a new procedure for requesting print jobs, by which everyone would submit orders through his personal website (nappe.net), even though he lacked the authority to do so. 3T62:6-8; 3T63:8-10. The existing procedure required a requestor to fill out a form that required the signature of an administrator and approval by the director of the program, prior to being submitted to the print shop. 3T62:1-5. He was asked to take the website down, as he did not have permission to change the Linden Board of Education's (Linden) procedure. 3T62:14-17.

Michael Walters, Director of Technology, managed Linden's network, supervised its technology teachers, and contributed to the development of the technology curriculum. 3T5:19-20; 3T52:17-22. Mr. Walters held a teaching certificate in technology, a Master's Degree in

² "1T" refers to the September 1, 2021 hearing transcript; "2T" refers to the September 2, 2021 hearing transcript; "3T" refers to the September 3, 2021 hearing transcript; "4T" refers to the October 7, 2021 hearing transcript.

Educational Administration, and attended many professional development opportunities. 3T51:23-52:2. Yet, Mr. Nappe, who had no background in technology, questioned his knowledge on this subject, and felt threatened by his experience. 2T104:23-106:9; 3T53:7-8.

Superintendent Robertozzi felt Mr. Nappe was creating issues for the administration and was an ineffective teacher. 3T67:25-68:2. Mr. Nappe showed a lack of effort in running the print shop, students were not learning the system, and orders were not being completely in a timely manner. 3T69:17-19; 3T74:4-6; 3T73:21-22. In addition, reports of frequent tardiness was documented in the school's system and a review of his computer log showed hundreds of searches for things unrelated to Mr. Nappe's job or teaching. 3T151:11-15; 3T154:15-16; 3T151:21-23. Video surveillance in his classroom showed Mr. Nappe at his computer most days, rarely teaching. 3T151:18-20. He also failed to submit a lesson plan all year. 3T152:24-25. Because of the aforementioned findings, Superintendent Robertozzi initiated the Settlement Agreement (Agreement) dated August 2017 as a way to remove Mr. Nappe from employment. 3T64:8-15.

Superintendent Robertozzi also planned to recommend increment withholding and pursue tenure charges as a way to remove him from the classroom, but decided to delay initiating these disciplinary actions since discussion of the Agreement was ongoing. 3T68:23-69:2; 3T69:4-7; 3T128:19-120:2. Superintendent Robertozzi knew tenure charges. 3T128:19-120:2. He acknowledged that Mr. Nappe was rated "effective" for the 2016-17 school year, and that the principal who gave him this rating ignored evidence that he was not performing his duties. 3T123:1-22. As a result, the principal was later disciplined for this. 3T151:6-152:16; 3T124:12-14. Superintendent Robertozzi would have pursued tenure charges, regardless of the outcome because he believed Linden could have filed them under other categories, such as misconduct, but could not. 3T153:6-11.

Moreover, Mr. Nappe still faced discipline relating to the website (nappe.net) incident, such

as a letter of reprimand in his end of the year evaluation. 3T119:13-21. This issue was one of the outstanding issues that was revolved in the Agreement, for which Mr. Nappe could have been disciplined. 3T120:3-6. Linden declined to take disciplinary action against him because of the settlement discussions. 3T121:3-12.

Settlement discussions between Mr. Nappe's attorney, Samuel Wenocur, Esq., and Linden's attorney, Mark Tabakin, Esq., began in approximately April or May 2017. 2T75:16-19. Superintendent Robertozzi remembers a conference with the two attorneys, during which Mr. Tabakin outlined the reasons Linden believed they could discipline Mr. Nappe. 3T75:2-9. He also recalls seeing a drafted agreement in July 2017. 2T134:1-5. In pursuing the Agreement, Linden sought to avoid the costs and time involved with litigation, in exchange for Mr. Nappe accepting a year of paid leave and tendering his resignation. 3T68:14-20.

The Board notes that Dr. Hriso's (Mr. Nappe's treating doctor) May 13, 2017 treatment notes state: "[Mr. Nappe] still has the DCR case but the superintendent is urging him to drop it or he will be 'disciplined.'" P-5. He was also "accused of insubordination as he set up his own website and was asked to take it down which he refused." Ibid. On August 4, 2017, Mr. Nappe's expert, Dr. Rapkin noted: "[Mr. Nappe] was worried the superintendent was trying to suspend him without pay." 1T197:14-14; P-2. When the Agreement was finalized at the end of August 2017, Mr. Nappe benefitted by receiving a full year-salary (including the incremental raise) despite not working for the entire 2017-2018 school year. 3T76:1-3; 3T77:24-78:11. In exchange, he avoided litigation, agreed to resign as part of the Agreement and withdrew his non-medical DCR complaint. 3T78:5-7; 3T78:15-21. Superintendent Robertozzi was unaware that Mr. Nappe [REDACTED] as there was no information given to him during the settlement talks or at any point during his employment. 3T79:5-6; 3T158:16-19.

Dr. Hriso's treatment notes in November and December of 2017 indicate Mr. Nappe had been subject to a "forced retirement" and that he "still ruminates about being literally forced to

accept the leave after being harassed, humiliated at workplace for two years. He misses the kids, principal he was close to.” 1T49:20-22-1T50:22-3; P-6. Linden was unaware that Mr. Nappe [REDACTED]. 2T29:1-2; 2T29:4-7; 3T61:10-16; 3T79:5-6; 3T158:16-19. Mr. Nappe testified that the complaint he filed with the Division of Civil Rights (DCR) did not relate to [REDACTED], nor did he request any accommodations in this regard. 2T84:10-12; 2T85:10-86:14; 2T117:11-118:12.

Further, the Board corrects two findings in the ID: First, in the ID, the ALJ found that “[Nappe] was assigned a new supervisor, Michael Walters [sometime in 2016], whom he did not get along with.” ID at 8. Further, the ALJ notes that “[t]he petitioner [REDACTED] . . . a personality conflict with his immediate supervisor.” ID at 10. The Board corrects this finding as follows: Michael Walters was Mr. Nappe’s supervisor from the time he began employment with Linden in 2012, until he transferred to the Academy of Excellence for the 2016-17 school year. 2T10:5-10; 2T32:10-13; 2T38:1-4.

Second, in the ID, the ALJ noted that Dr. Hriso “prepared a letter related to [Nappe’s] disability on November 7, 2017 . . . [that] provided for a medical leave of absence from work for the 2017-2018 school year.” ID at 3. The Board corrects this finding as follows: Dr. Hriso completed a “Loan Discharge Request” form on behalf of Nappe on November 7, 2017. P-9. The form did not provide for a medical leave of absence. Nappe was already on a leave of absence for the 2017-18 school year at that time pursuant to the Settlement Agreement. J-9.

CONCLUSIONS OF LAW

As set forth more fully below, the Board rejects the ALJ’s conclusion that Mr. Nappe is eligible to apply for AD because he left employment due to a disability. N.J.S.A. 18:66-39(c) sets forth the eligibility retirements for TPAF members for AD. A member is only eligible if he “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.” N.J.S.A. 18:66-39(c). To be eligible

to apply for a disability retirement, applicants must first prove “that their alleged disability is ‘the reason the member left employment.’” In re Adoption of N.J.A.C. 17:1-6.4, 454 N.J. Super. 386, 397 (App. Div. 2018) (affirming the separation from service rule in N.J.A.C. 17:1-6.4 and holding that “disability retirees must have left service because of the disability in the first instance”). The Board notes the ALJ failed to cite the pertinent parts of N.J.A.C. 17:1-6.4, which states:

- (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
 - 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.

[N.J.A.C. 17:1-6.4(a), (b) (emphases added).]

The Board notes the ALJ unreasonably found that Mr. Nappe left employment due to his alleged disability. The ALJ diminished the clear evidence that Mr. Nappe was forced to resign,

³ Despite the record to suggest that disciplinary charges were imminent, but not necessarily pending, Mr. Nappe must still prove that his disability was the reason he left employment. N.J.A.C. 17:1-6.4(b)(2) is just one reasons that would automatically preclude one to apply for AD. N.J.A.C. 17:1-6.4 does not require that a settlement agreement resolve pending charges in order for eligibility to be denied, especially where there is another reason, other than disability, that the member left employment, such as here whether the member is forced to leave employment so as to avoid future discipline. See N.J.A.C. 17:1-6.4(b)(4).

and that he would face disciplinary action had he chose not to enter into the Agreement. The Agreement permitted Mr. Nappe to leave employment on favorable terms and included a year of paid leave.

Although Mr. Nappe later denied that he faced future disciplinary action, the contemporaneous treatment notes of Dr. Hriso and Dr. Rapkin both mention that Mr. Nappe reported that he faced discipline and suspension without pay. 2T150:3-6; 1T197:14-14; P-2; P-5. While the documentary evidence corroborates Superintendent Robertozzi's testimony that Linden threatened Mr. Nappe with future disciplinary action unless he resigned as stated in the Agreement, the ALJ incorrectly found "Robertozzi's testimony that he was going to discipline [Nappe] was not credible and not supported by any documentary evidence or any other witnesses." ID at 7. The ALJ did not disclose the reason for this determination and required the facts to be confirmed by additional witnesses. As the Superintendent of Schools during Mr. Nappe's employment, Superintendent Robertozzi had intimate knowledge of his performance as a teacher and was present during negotiation of the Agreement. The Board notes that Mr. Nappe's testimony was not was not corroborated by a single administrator or witness to refute Superintendent Robertozzi's allegations, which are supported by language in the Agreement.

Superintendent Robertozzi clearly explained the course in which Linden planned to pursue disciplinary action against Mr. Nappe, yet the ALJ found that Linden "had nothing concrete upon which to discipline [Mr. Nappe]," that none of Linden's concerns with him were "ever documented," and that he was "never written up or disciplined." ID at 7. However, the record reflects that Linden was ready to pursue several disciplinary actions, including tenure charges, increment withholding, and a letter of reprimand in Mr. Nappe's file related to the website incident. 3T64-69.

The ALJ also failed to mention Dr. Hriso's December 2017 notes, wherein Mr. Nappe expressed grief over his "forced retirement" and being "literally forced to accept the leave."

1T49:20-22; P-6. Someone who leaves employment due to a disability is not forced to resign because they are facing future disciplinary charges. Rather, they simply end employment, and apply for disability retirement benefits. The record shows Mr. Nappe continued to send out job applications and did not file for disability retirement until February 2018, some six months after tendering his resignation. 2T154:15-23. Therefore, when he resigned pursuant to the Agreement, he did not leave employment due to his disability, but as a means to avoid future disciplinary charges.

The Appellate Division remanded the matter to resolve this factual dispute. The court noted, “[w]hile the record is silent as to precisely when Nappe’s [REDACTED], the evidence he has provided suggests that it was caused by [REDACTED] before the execution of the settlement agreement.” Nappe, 2019 N.J. Super Unpub. LEXIS 2669, *12 (App. Div. Dec. 31, 2019). Nevertheless, the record now establishes that Mr. Nappe [REDACTED] well before execution of the Agreement ([REDACTED]). ID at 5. Further, Dr. Rapkin did not consider Mr. Nappe permanently disabled at the time of the Agreement. Ibid. Mr. Nappe’s alleged disability [REDACTED] prior to the Agreement [REDACTED], as the Appellate Division speculated. Rather, [REDACTED] [REDACTED]. 3T74:4-6; 3T151:18-20; 3T73:21-22; 3T151:11-20; 3T62:1-17.

The court also implied that Linden had “contemplated Nappe’s [REDACTED] when negotiating the terms of the settlement agreement” because the “language in the agreement certainly indicates that Nappe’s leave of absence was for medical reasons and explicitly states that the Linden Board intended to assist Nappe in applying for retirement benefits.” Nappe, 2019 N.J. Super Unpub. LEXIS at *13. As previously mentioned, the record establishes that Linden was unaware of Mr. Nappe’s [REDACTED]. Mr. Nappe even admitted that his DCR complaint did not relate to [REDACTED] and that he never made any requests for

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accommodations in relation to [REDACTED] 2T84:10-12; 2T85:10-86:14; 2T117:11-118:12. Linden was only aware of his [REDACTED].

Linden is silent as to what type of retirement it agreed to assist Mr. Nappe obtain.

N.J.A.C. 17:1-6.4(a) clearly sets forth that Mr. Nappe's disability "must be the reason [he] left employment." Ibid. (emphasis added). Further, N.J.A.C. 17:1-6.4(b) deems Mr. Nappe ineligible if he voluntarily separated from service "for reasons other than a disability." It is clear there were several reasons Mr. Nappe left employment, none of which were related to any [REDACTED]. He was facing future disciplinary action had he not signed the Agreement and resigned. The Board finds that Mr. Nappe's [REDACTED] not the reason he left employment.

You have the right to appeal this 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

Sincerely,



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

G-7/SD

c: Dawn Lewis (ET); A. McCormick (ET) K. Ozul (ET); S. Siracusa (ET);
Retired Health Benefits Section (ET)
DAG Matthew Melton (ET)
OAL, Attn: Library (ET)

Michael Nappe (via regular mail)