

**Gastman v Teachers Retirement Sys. of City of
N.Y.**

2008 NY Slip Op 32440(U)

September 5, 2008

Supreme Court, New York County

Docket Number: 0100219/2008

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn

PART 49

Index Number : 100219/2008

GASTMAN, DOROTHY E.

VS.

TEACHERS RETIREMENT SYSTEM

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 10021908

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED

SEP 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/15/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X

DOROTHY E. GASTMAN,
:
:
Petitioner,
:
:
-against-
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:
TEACHERS RETIREMENT SYSTEM OF THE
:
CITY OF NEW YORK,
:
Respondent.
:
-----X

Index No. 100219/08

FILED
SEP 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Herman Cahn, J.

Petitioner Dorothy E. Gastman brings this Article 78 proceeding to annul and reverse respondent's ruling, which denied her an Accident Disability Retirement Pension, and thereupon to award her all back employee benefits, including interest.

BACKGROUND

Petitioner was appointed as a teacher of the Department of Education (the "DOE") on February 23, 1983.

Petitioner has been suffering from impaired hearing ability since 1988.

During her tenure, petitioner made a request to her employer for a special accommodation due to her hearing loss. On October 20, 1997, an accommodation consisting of a small classroom "if administratively feasible" was granted to petitioner.

Petitioner alleges that the special accommodations were never forthcoming. However, respondent alleges that on several occasions, her employer requested that the DOE examine her to determine her physical fitness to perform her duties as a teacher and she refused to appear at

many of the scheduled fitness examinations.

On November 22, 2005, petitioner suffered an injury when she fell in the school in which she was teaching and sustained personal injuries. She alleges that this occurred due to her carrying heavy books to various classrooms, carrying materials up and down stairs, being assigned to three classrooms in the building and from the stress associated with working without the accommodation granted to her. Petitioner alleges she suffered severe injuries, including an injury to her cervical spine, all of which exacerbated her deafness.

Thereafter, petitioner applied for a Tier IV Accidental Disability Retirement Pension (“ADR”). In her ADR application, petitioner stated that she was unable to carry anything because of constant pain, that she could not hear, that she suffers from depression and stress due to working without a legally granted accommodation and that the “excessive noise” in the classroom puts her at risk of further hearing loss.

On April 19, 2006, petitioner was examined and interviewed by respondent’s Medical Board. The Medical Board also considered petitioner’s medical file, which included: a report from her treating physician dated November 22, 2005; notes from petitioner’s treating physician dated March 17, 2006; a report from a psychologist at Glens Falls Hospital; a report from one David Charnock, dated October 24, 2005; and various audiograms. The Medical Board found that petitioner’s medical records did not reflect any recent accident that rendered petitioner physically incapacitated. Instead, the Medical Board found that petitioner suffered from a progressive hearing loss for the past two decades and has suffered from depression.

Petitioner retired from the DOE, effective April 19, 2006. She alleges that she retired as a consequence of work-related injuries, which resulted in exacerbating her hearing loss and caused

her present level of “deafness.”

By letter dated April 24, 2006, petitioner was denied an ADR. This determination was based on the finding that although the documentary medical evidence supported a finding that her hearing loss and depression caused her to be disabled, her disabilities were not the result of an accident.

Both the Medical Board and the Board of Trustees of respondent Teachers’ Retirement System of the City of New York found that the injury was not caused by a sudden or out of the ordinary event and, therefore, does not qualify as an “accident” pursuant to NY RSSL § 605(f).

On May 9, 2006, petitioner filed an application for an Ordinary Disability Retirement Pension (“ODR”). By letters dated May 24, 2006, petitioner was informed that her application for ODR was approved by the Medical Board and that the application had to be voted on by the Board of Trustees.

In the meantime, petitioner submitted new medical evidence, stating that this evidence was not available at her initial Medical Board review, and that it supported her application for ADR. Thereafter, various Medical Board reviews occurred on February 21, 2007, April 18, 2007 and May 2, 2007. Each time, after reviewing the new information supplied, the Medical Board re-affirmed its prior determination that ADR be denied and ODR be granted to petitioner.

On February 28, 2008, the Board of Trustees adopted the Medical Board’s recommendation to grant petitioner ODR and deny her application for ADR.

DISCUSSION

Administrative agencies are given broad discretion in making decisions on matters within their purview and, thus, judicial review of an agency’s determination under CPLR 7803 is

limited. *Canfora v Bd. of Trustees*, 60 NY2d 347, 352 (1983). In this instance, petitioner seeks review of the DOE's determination, asserting that the decision reached was arbitrary, capricious and an abuse of discretion. In deciding that a determination is subject to judicial review, a reviewing court must find that there was no rational basis for the agency's decision. *Pell v Bd. of Educ.*, 24 NY2d 222, 230-31 (1974).

Petitioner argues that respondent's decision was arbitrary and capricious because there was no rational basis for respondent to deny her ADR application. Petitioner contends that the accident of November 22, 2005, exacerbated her difficulties and qualified her for ADR.

Petitioner alleges that the report of her treating physician, dated November 27, 2007, (the "Report") supports her position that the November 22, 2005 accident contributed to her present deafness. The Report states: "Based on the overwhelming medical documentation of work-related injuries and the on-site accident of November 22, 2005 precipitated by the Department of Education's failure to provide appropriate accommodations, I urge you to immediately grant Ms. Gastman an Accident/Injury pension retroactive to her retirement date of April 19, 2006." (Verified Answer, Ex 24.) Petitioner argues that the Report confirms that her having to perform duties unrelated to classroom teaching activities, i.e. carrying heavy books, resulted in the accident.

"Accidental disability retirement is available . . . when a City employee is injured as a result of 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.'" *Kehoe v City of New York*, 81 NY2d 815, 816-17 (1993) (internal quotations and citations omitted). Petitioner contends that carrying heavy books was not part of her immediate and usual duties and must be defined as a sudden and unexpected incident.

Respondent argues that it properly concluded that petitioner's injuries were not the result of an "accident" and, therefore, the Petition should be dismissed. Respondent contends that its determination that the events of November 22, 2005 do not constitute an "accident" was based on credible evidence and was neither arbitrary nor capricious. Respondent argues the only mention of an actual fall in petitioner's medical reports states that the fall was off-site and that this statement supports a conclusion that petitioner was not performing her assigned duties when she fell. Respondent also asserts that there are no details of what caused petitioner to fall – therefore, there was no documentation to show any evidence that a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" event occurred while carrying the large quantity of books. *Id.*

In addition, respondent asserts that carrying a large quantity of books is a routine duty for a teacher. Respondent contends that carrying twenty pounds of books does not constitute an "accident" because injuring oneself while carrying or lifting objects which are part of a pension member's duties does not constitute an "accident." *Devoe v City of New York*, 259 AD2d 336, 336 (1st Dep't 1999).

Respondent argues that petitioner's other contentions – i.e. carrying materials up and down stairs, working in three classrooms in the building, exposure to excessive noise and stress from an allegedly hostile work environment – all do not amount to an "accident" because they were part of her duties as a teacher and cannot be classified under the definition for an "accident."

Petitioner has not met her burden of showing that respondent acted in an arbitrary and capricious manner in denying her ADR application. "Accidental disability retirement is available

... when a City employee is injured as a result of ‘sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.’” *Kehoe*, 81 NY2d at 816–17 (internal citation omitted).
Petitioner’s fall, as she was allegedly walking the halls of the school, with heavy books in her hands, does not fall under any “sudden, unexpected or out of the ordinary” category.

As such, respondent’s determination is not arbitrary and capricious.

Accordingly, it is

ORDERED that the Petition is dismissed; and it is further

ORDERED that the clerk enter judgment accordingly.

Dated: September 5, 2008

ENTER:



J.S.C.

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