THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Nancy Belliveau,

 Petitioner

 v. Docket No. CR-13-456

 DATED: April 1, 2016

State Board of Retirement,

 Respondent

Appearance for Petitioner:

*Pro se*

189 Sherman Street

Gardner, MA 01440

Appearance for Respondent:

Salvatore Coco, Esquire

State Board of Retirement

One Winter Street, 8th FL

Boston, MA 02108

Administrative Magistrate:

Judithann Burke

 **Case Summary**

Summary Decision in favor of the State Board of Retirement is appropriate where the Petitioner, who applied for a termination allowance pursuant to G.L. c. 32, § 10(2), was terminated from her position for violations of the laws, rules and regulations pertaining to that position.

 **SUMMARY DECISION**

Pursuant to G.L. c. 32, § 16(4), the Petitioner, Nancy Belliveau, is appealing from the September 3, 2013 decision of the Respondent, State Board of Retirement (SBR) denying her request for termination retirement benefits pursuant to G.L. c. 32, § 10(2). (Exhibit 1.) The appeal was timely filed on September 10. 2013. (Exhibit 2.) I held a hearing on January 7, 2016 at the Offices of the Worcester Registry of Deeds, 90 Front Street, Worcester, MA. I marked nine (9) exhibits, including Exhibit 7 which includes several attachments that were submitted by the Petitioner to the SBR. (Exhibits 7a-ff.) The Petitioner provided testimony and argument in her own behalf. The SBR presented no witnesses. At the outset, the Respondent filed a Motion for Summary Decision in support of its argument that there are no issues of material fact and that the SBR is entitled to prevail as a matter of law. The hearing was digitally recorded. The Respondent also submitted a pre-hearing memorandum and Exhibit List (Attachment A.).

 **FINDINGS OF FACT**

Based upon the evidence presented in this case, I hereby render the following findings of fact:

1. The Petitioner, Nancy Belliveau, born in 1964, was formerly employed as the Fiscal Director of the Montachusett Regional Planning Commission (MRPC).
2. The Petitioner entered state service on or about September 2, 2001. She also had prior creditable service from July 23, 1990 through June 28, 2001 while she was a member of the Worcester Regional Retirement System.
3. On February 3, 2012, subsequent to two written warnings, the Petitioner’s employment at MRPC was terminated as a result of “Insubordination,” “Sick Time Accrual Violation,” “Time Sheet Policy Violation,” and her “office behavior, communication and conflict issues.” (Exhibit 6.)
4. The Petitioner never filed an appeal of the termination. (Petitioner Testimony.)
5. In a Settlement Agreement and General Release, the Petitioner and her former employer settled an action that she had filed with the Massachusetts Commission Against Discrimination, Charge number 16C-2112-01101. Paragraph 4 of the Agreement provides as follows:

Belliveau understands and agrees that payment of the Settlement Amount constitutes a compromise of disputed claims and does not constitute an admission by the Employer (or any of the Releases) that it has violated any law or legal obligation with respect to her in any way.

(Exhibit 5.)

1. The Petitioner applied for a Termination Retirement Allowance pursuant to G.L. c. 32, § 10(2) on April 19, 2013. (Exhibit 3.)
2. The Petitioner is being paid a superannuation retirement allowance calculated pursuant

to G.L.C. 32, 10(1) effective as of May 18, 2013. (*Id.*)

1. On May 29, 2013, the MRPC completed an Employer’s Certification form for a Termination Retirement Allowance pursuant to G.L. c. 32, §10(2). (Exhibit 4.)
2. The SBR voted to deny the Petitioner’s request on August 29, 2013 and so notified her in a letter dated September 3, 2013. (Exhibit 1.)
3. The Petitioner filed a timely appeal, which was received by this agency on September 10, 2013. (Exhibit 2.)

**CONCLUSION**

The SBR’s Motion for Summary Decision is allowed. Summary Decision in administrative proceedings is the functional equivalent of summary judgement in civil proceedings. See *Jack King and National Refrigerators, Inc. v. Office of the Attorney General, Fair Labor Division,* LB-12-367 and LB-12-407 (DALA January 29, 2014) citing *Caitlin v. Board of Registration of Architects,* 414 Mass. 1, 7 citing Mass. R. Civ. P. 56 for summary decision in administrative case. See also *Calnan v. Cambridge Retirement Board,* CR-08-589 (DALA 2012) and *Steriti v. Revere Retirement Board,* CR-07-683. (DALA 2009). Summary decision

is appropriate where there are no genuine issues of material fact and the case may be decided as a matter of law. *King,* supra at p. 7, 801 CMR 1.01(7) (h) and Mass. R. Civ. P. 56. A fact is only “material” if it might affect the outcome of the case. *King, supra.* citing *Lockridge v. The Univ. of Maine System,* 597 F. 3d 464, 469 n. 3 (1rst Cir. 2010) citing *Anderson v. Liberty Lobby, Inc.*  An issue of a material fact is only “genuine” if a fact-finder could reasonably resolve the dispute in favor of either party. *Id.* (citing *Santoni v. Potter,* 369 F. 3d 594, 598 (1rst Cir. 2004).

 The moving party must demonstrate the absence of any genuine issue of material fact. 801 CMR 1.01(7) (h). See also Mass. R. Civ. P. 56, *Flesner v. Technical Communications Corp.,* 418 Mass. 805, 808 (1991). *King, supra.* Citing *Beatty v. NP Corp.*, 31 Mass. App. Ct. 606, 607 (1991). Evidence “may be in the form of affidavits, depositions, interrogatories, admission and sworn pleadings.” Inferences from these materials must be drawn in favor of the opposing party. *Beatty, supra* at p. 687. However, a judge may not make creditability determinations at the summary decision stage. *Id.* Therefore, if the moving party’s evidence establishes a material fact, the opposing party must in turn “set forth specific facts showing that there is a genuine issue for trial.” Mass. R. Civ. P. 56(3). (“Mere allegations or denials” are not sufficient). Absent such “countervailing materials” from the opposing party, summary decision may be properly granted on the basis of the moving party’s undisputed evidence. *King, supra,* citing *Kourouvvacilis v. Gen. Motors Corp.,* 410 Mass. 706, 715 (1991).

 G.L. c. 32, § 10(2) permits a member of the Massachusetts State Employees’ Retirement System (MSERS) to qualify for an enhanced benefit , or termination allowance, if she meets the criteria noted therein. The law applies only to:

(a) any member who retires under the provisions of this section, who has completed twenty or more years of creditable service **and** who…is removed or discharged from her office or position without moral turpitude on her part….”

(Emphasis added.) The retiree must also meet the other statutory requirements.

any member who is removed or discharged for violations of the laws, rules and regulations applicable to her office or position….shall not be entitled to a termination allowance provided for in this subdivision.

 Here, the SBR properly denied the Petitioner’s request for a termination allowance because she was terminated from her employment due to violations of laws, rules, and/or regulations applicable to her position. She never challenged the merits of these contentions until her attempts to address the allegedly “wrongful termination” during the January 2016 DALA hearing. Never at any time did DALA have jurisdiction over the validity of the merits of the termination and/or the employer’s action.

 Based upon the foregoing, the SBR’s Motion for Summary Decision is allowed and the decision is upheld.

So ordered.

 Division of Administrative Law Appeals,

 BY:

 Judithann Burke,

 Administrative Magistrate

DATED: April 1, 2016