

IN THE MATTER OF THE TENURE :
HEARING OF GRACE FOLGER, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
ORANGE, ESSEX COUNTY. :
_____ :

SYNOPSIS

Petitioning Board certified tenure charges of excessive absenteeism, unbecoming conduct, insubordination, and/or other just cause against respondent teaching staff member.

The ALJ found that in light of the number of days respondent was absent during the 1994-95, 1996-97, 1997-98 and 1998-99 school years, such absences, on their face, constituted excessive absenteeism. Respondent had been given notice of the Board's goals regarding absenteeism, yet she was absent much more than the average teacher in the District. The number of absences and the fact that they had a substantial negative impact on her students warranted termination relevant to Charges one through four. The ALJ dismissed Charges five through nine and eleven through thirteen (failure to follow administrative directives and insubordination), concluding that the Board did not prove said charges by a preponderance of credible evidence. The ALJ did conclude that the Board proved Charge ten (noncompliance with Board directive on beepers and cellular phones) and that withholding of an increment was the appropriate penalty. The ALJ ordered respondent terminated relevant to Charges one through four and ordered respondent's personnel file to reflect the withholding of an increment regarding Charge ten.

Upon examination of the record, including the transcripts of the matter, the Commissioner found that the Board met the standard for termination of a tenured employee for excessive absenteeism. (*In re Lena White*) Moreover, the Commissioner found nothing in the record to indicate that the Board based its decision to certify tenure Charges one through four against respondent solely upon the application of a mechanistic, mathematical or statistical formula. The Commissioner noted that he was in agreement with the ALJ that action could be taken against a teacher for excessive absenteeism even if such were the result of work-related injuries. The Commissioner also agreed with the ALJ that the Board proved Charge ten but the Commissioner declined to accept the recommended penalty to the extent that such increment withholding was intended to be prospective. Commissioner ordered respondent terminated from her teaching position and a copy of this decision forwarded to the State Board of Examiners for action as it deems appropriate.

May 15, 2000

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SCHOOL DISTRICT OF THE CITY OF : DECISION
ORANGE, ESSEX COUNTY. :
_____ :

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed.¹ Respondent's exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent excepts to the Administrative Law Judge's (ALJ) recommended Initial Decision that she be dismissed from her teaching position as a result of the absences set forth in Charges 1 through 4. She does not dispute the number of absences but does argue, however, that nothing in the ALJ's findings establishes that any of these absences were taken without medical cause. Further, respondent contends that, by definition, excessive absences must mean absences in excess of what can be justified by medical verification. She also avers that in suspending her in June 1999, the Board never gave her a chance to prove that she was healthy.

Next, respondent takes exception to the ALJ's finding at page 40 of the Initial Decision that the State monitoring guidelines are relevant to the question of the discipline of an

¹ It is noted for the record that the Initial Decision incorrectly identifies counsel for the parties. Joseph Morano, Esq. and Daniel S. Goodman, Esq. represent the Board. Respondent's counsel is Louis Bucceri, Esq.

individual for absenteeism, arguing that those guidelines may not be used as a standard to judge her absences. With respect to this, respondent contends that the Orange School District did not exceed the State's 3.5% guideline and that a mere statistical analysis based on State guidelines may not be applied to discipline an individual without considering the legitimacy of the reasons for those absences. In support of her position, respondent cites *Montville Ed. Assoc. v. Bd. of Ed.*, 1984 *S.L.D.* 550, *rev'd* St. Bd. of Ed. 559, *rev'd* Appellate Division 1985 *S.L.D.* 1972, *cert. denied* 103 *N.J.* 500 (1986), decision on remand St. Bd. of Ed. 1986 *S.L.D.* 3113.

Respondent further excepts to the finding that she committed the offense listed in Charge 10 relative to possession of a beeper. She avers, *inter alia*, that the proofs were purely a matter of what a single Board witness heard, but never claimed to see, versus respondent's own testimony that she did not have a beeper, but was using a tape recorder that emitted a sound when the tape ran out. Moreover, it is respondent's contention that the penalty assessed for Charge 10 is moot because no increment can be withheld unless she is reinstated and, for the record, she states that a preponderance of evidence does not exist to support the charge.

The Board avers that the ALJ applied the appropriate standard in this matter and that the recommended decision is correct. The Board further maintains that, even though respondent claims to be fit to return to work, her absences in the past have clearly had a negative impact on instruction and compromised her students' education.

As to respondent's exceptions regarding the State's 3.5% monitoring guidelines for staff absenteeism, the Board contends that the ALJ properly found them relevant to the question of a school employee's absenteeism, urging, *inter alia*, that the statistical analysis was not an isolated consideration in judging respondent but only one factor of many. In response to the exceptions relative to Charge 10, the Board argues that the testimony as to whether or not respondent committed the offense listed in that charge is based on a matter of credibility and

reliability. It further avers that the ALJ appropriately reached a determination to sustain Charge 10, urging that the ALJ had the right to hear the evidence, weigh the evidence, and make a determination that respondent was insubordinate for her noncompliance with the school rules regarding such items as beepers and cellular telephones.

Lastly, it is the Board's position that the ALJ had the power to withhold respondent's increment even if she is terminated, arguing that the preponderance of the evidence supported Charge 10 and the ALJ was not precluded from making determinations regarding each individual charge.

Upon a careful and independent review of the record in this matter, the Commissioner agrees with and adopts the ALJ's findings and conclusions with respect to the charges certified against respondent, except as modified below. As to respondent's exceptions with respect to the four charges involving chronic and excessive absenteeism, the Commissioner finds meritless her argument that, by definition, excessive absenteeism must mean absences in excess of what is justified by medical verification. As correctly determined by the ALJ:

Excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons of personal illness or were approved leave or sick days to which the teacher was entitled and even if the teacher's classroom performance was sufficient. *Kacprowicz, supra. Pellecchio, supra.* In addition, chronic or excessive absenteeism may be found to warrant discipline, including dismissal, even when the individual was entitled to days off pursuant to a contract. *Rucker.* (Initial Decision at 40)

Likewise, the Commissioner is in full agreement with the ALJ's determination that "action may be taken against a teacher because of excessive absenteeism even if such is the result of work-related injuries. *Kochman v. Board of Education of the Borough of Keansburg,* [supra]. *See also, Board of Education of the Twp. of Irvington v. Pearson,* [supra]." (*Id.* at 41) As aptly stated by the Board in the present matter, "From the students' point of view, it does not

matter whether their teacher is absent for an excessive amount of time due to work related injuries, approved leaves of absence, legitimate medical excuses or illegitimate excuses. The bottom line is whether the regularly scheduled teacher is present to teach or whether he/she is absent a majority of the time.***” (Board’s Post-hearing Brief at pp. 37-38)

As to respondent’s exception contending that the ALJ erred in finding the State’s 3.5% monitoring guideline for staff attendance to have relevance in the instant matter, the Commissioner finds that, even accepting her contention *arguendo*, it would be of no consequence in reaching a final decision herein. Clearly, the factual circumstances in the present matter are vastly different than those in *Montville, supra*, the case respondent cites in support of her exception. In the *Montville* case, the board of education added to the district’s annual teacher’s evaluation an attendance component which correlated the number of days absent with ratings of “satisfactory,” “needs improvement,” or “unsatisfactory.” Even though there was a narrative section included which allowed for an explanation of the absences, the ratings themselves were not affected by the narrative explanation. After a rather tortuous path of litigation, the New Jersey Appellate Court agreed with the Commissioner’s rejection of the ALJ’s recommendation to uphold the board policy. The Commissioner determined, *inter alia*, that such a policy was not reasonable because the teacher’s attendance evaluation was based solely on a cumulative number of days of absence. The State Board reversed the Commissioner’s determination but the Court affirmed the Commissioner, holding that, irrespective of the narrative explanation, the assigned rating was mathematical and unaffected by the reason for the absence.

In the instant matter, the Commissioner finds nothing in the record indicating that the Board based its decision to certify tenure Charges 1-4 against respondent solely upon application of a mechanistic, mathematical or statistical formula. As stated by the Board:

Respondent incorrectly asserted the Board's position with regards to the State's mandated attendance guidelines (Respondent's Brief, at 28). [Assistant Superintendent] Cohn testified that the State requires a 96.5% attendance rate for all of the certificated staff in the district as an entire unit [T1, 53:1-54:5]. [He] never testified that each teacher could not be absent for more than 3.5% of any given school year. Rather, he clearly testified that this 3.5% ratio was a *district-wide average*. Nonetheless, those guidelines are not "irrelevant to the proceeding," as Respondent incorrectly asserted [cite omitted]. Rather, Cohn testified as to the State's requirements in order to inform [the ALJ] as to the excessiveness of Respondent's absences. For the past five years, Respondent was absent from work on three hundred thirty-two and one-half (332.5) occasions, or thirty-six (36) percent of the time. If one were to only look at the four years included in the tenure charges, Respondent was absent from work on three hundred twenty-two and one-half (322.5) occasions, or forty-four (44) percent of the time. [footnote omitted] If one were to simply look at the past three years, Respondent was absent from work on two hundred ninety-five and one-half (295.5) occasions, or fifty-four (54) percent of the time. Finally, if one were to look at just the past two years, Respondent was absent from work on two hundred twenty-six and one-half (226.5) occasions, or sixty-two (62) percent of the time. Clearly, these amount[s] of absences are excessive. The State's 3.5% attendance guideline was introduced into evidence merely to provide [the ALJ] with a reference point as to what attendance ratio is generally deemed acceptable on a district wide basis.*** (emphasis in text) (Respondent's Post-hearing Reply Brief at pp. 6-7)

Contrary to respondent's assertions, the Commissioner finds upon full examination of the record, including the transcripts of the matter, that the Board has met the standard for termination of a tenured employee for excessive absenteeism set forth in *In the Matter of the Tenure Hearing of Lena White*, 92 N.J.A.R.2d (EDU) 157, 161; *i.e.*, that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period

of time the absences occurred, not merely after the fact and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of the absences. *See also, In the Matter of the Tenure Hearing of Celese Segall, School District of the City of Elizabeth, Union County*, decided April 17, 2000.

Lastly, as to Charge 10, which alleges violation of the District's beeper/cellular phone policy, the Commissioner finds the ALJ properly applied the law with respect to weighing the evidence in this matter, including conflicting testimony, and assessment of credibility. *Lazorick v. Brown*, 195 N.J. Super. 444, 456 (App. Div. 1984); *In re Perrone*, 5 N.J. 514 (1950); *Middletown Tp. v. Murdoch*, 73 N.J. Super. 511 (App. Div. 1962); *State v. Salimone*, 19 N.J. Super. 600, 608 (App. Div. 1952), *cert. den.* 10 N.J. 316 (1952). Moreover, the Commissioner finds no cause to challenge the credibility assessments made by the ALJ or to disturb the ALJ's findings of fact with respect to this Charge.

Having sustained Tenure Charges 1-4 and 10 against respondent, the Commissioner accepts and adopts as his own the recommendation of the OAL that respondent be terminated from her tenured position as a special education teacher in the Orange School District. However, in light of such termination, the Commissioner declines to accept the recommended penalty assessed for Charge 10, to the extent that such increment withholding is intended to be prospective.

Accordingly, respondent is hereby terminated from her tenured teaching position in the Board's employ. Further, a copy of this decision shall be forwarded to the State Board of

Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for review and action, if any, as it deems appropriate.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: May 15, 2000

Date of Mailing: May 15, 2000

² This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.