

SBE # 531-06/99-227
SB # 49-00

IN THE MATTER OF THE SUSPENSION : STATE BOARD OF EDUCATION
OF THE TEACHING CERTIFICATE : DECISION
OF SAWSAN LABIB. :

Decided by the State Board of Examiners, May 11, 2000

For the Respondent-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Petitioner-Respondent, Michael C. Walters, Deputy Attorney General
(John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal from a determination by the State Board of Examiners to suspend for two years the teaching certification of Sawsan Labib (hereinafter "respondent"), a special education teacher who had been dismissed from her tenured employment by the Commissioner of Education on the basis of tenure charges filed against her by the State-Operated School District of the City of Jersey City (hereinafter "District").

The District's charges were based on respondent's attendance record over an eight-year period. The focus of the charges and of the tenure proceedings was exclusively on the fact of respondent's absences, rather than the circumstances of those absences, and there was no dispute between the parties as to the substance of respondent's attendance record. Hence, the parties were able to stipulate as to respondent's absences during her employment by the District.

As stipulated by the parties, respondent had been absent for 15 days in the 1988-89 school year, 15 days in 1989-1990, 14 days in 1990-1991, 30 days in 1991-1992, 15 days in 1992-93, 85 days in 1993-1994, 150 days in 1994-95, including a continuous absence from March 7, 1995 to the end of the school year, and the entire 1995-96 school year. The parties further stipulated that respondent had been absent without leave since September 21, 1995, that her increment had been withheld in 1994-95 for unsatisfactory teaching performance caused by her absenteeism in 1993-94 and in 1995-96 based on her absenteeism during 1994-95. The parties stipulated that respondent's absences had adversely impacted her classroom teaching performance and had adversely affected the continuity of instruction. The parties also stipulated that respondent claimed that she was permanently disabled and would never be able to return to her employment with the District in any capacity, and that she had applied for an accidental disability pension.

The Administrative Law Judge ("ALJ") based her determination of the tenure charges entirely on the parties' stipulations, which, again, focused on the fact of respondent's absences. On the basis of the parties' stipulations, the ALJ found that respondent's absenteeism was chronic and excessive and that it had adversely affected the continuity of instruction to her students so as to warrant removal from her tenured position. As expressed by the ALJ:

Whatever the reason for the employee's absence, chronic and excessive absenteeism such as here obviously does not benefit the pupils or the community.

Initial Decision, slip op. at 6.

Neither party filed exceptions to the ALJ's recommended decision with the Commissioner. On the basis of the record before him, the Commissioner concurred with the ALJ that the District had demonstrated that respondent was guilty of excessive absenteeism. In doing so, the Commissioner noted that respondent did not dispute that her absenteeism had adversely affected her classroom teaching performance. The Commissioner also observed that the District had proven its efforts to fairly notify respondent about her absenteeism problem and that respondent had not asserted that her problem would improve. Therefore, on November 17, 1998, the Commissioner adopted the ALJ's recommended decision and directed respondent's dismissal from her tenured position.

At that point, the matter was transmitted to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6 in order for that board to ascertain whether action against respondent's certification was warranted. Based on its review of the Commissioner's decision in the tenure matter and the charges of excessive absenteeism upon which that decision was grounded, the Board of Examiners issued an order on June 17, 1999 for respondent to show cause why her teaching certificates should not be revoked or suspended.

Following notice from the Board of Examiners that her request for a hearing was denied because "it appeared that no material facts were in dispute regarding the tenure charges," State Board of Examiners' decision, slip op. at 3, respondent filed a written submission in response to the show cause order. That submission included substantial documentation relating to respondent's teaching performance, the circumstances surrounding her absences, and the medical consequences of the incidents that had

resulted in the absences that had led to the tenure charges. In her submission, respondent argued that no action against her certification was warranted because her absenteeism had resulted from three separate incidents of student assault, that her evaluations established that she was a quality teacher, and that all of her absences were for legitimate reasons and were medically verified. She further argued that she had stipulated her absences during the tenure proceedings because she was still unable to return to work at that time. Respondent contended that this fact gave the Commissioner no choice but to remove her from her tenured position, but did not preclude her from performing some type of educational work in the future. She also argued that revocation was not appropriate because she had not been found guilty of unbecoming conduct.

The Board of Examiners rejected respondent's arguments. Initially, the Board found that respondent's "offense" as set forth in its show cause order provided a proper basis to take action against her certificates because respondent's "chronic and excessive absenteeism greatly affected the students in her charge," and because although respondent can document her absences during 1994 and 1995, "she has not explained her excessive absenteeism for the years prior to those." Id. at 5.

Without any further discussion, the Board of Examiners then considered the "appropriate sanction" in this case. While indicating that it was bearing in mind that many of respondent's absences stemmed from injuries that were sustained through no fault of her own, the Board of Examiners found that respondent's actions prior thereto indicated that she had a pattern of absenteeism about which the District had warned her. Stating once again that respondent's absences had adversely affected the

continuity of education, the Board of Examiners concluded that while revocation was not warranted, “some sanction is necessary to remind [respondent] of her professional responsibilities.” Id. Consequently, it directed that her certification as a Teacher of the Handicapped be suspended for two years.

Initially, we stress that as reflected by our decision in In the Matter of the Revocation of the Teaching Certificates of John Ahern, decided by the State Board of Education, August 5, 1987, it has long been established that the responsibility of the State Board of Examiners under N.J.S.A. 18:6-38 is not the same as the Commissioner’s obligation to determine the appropriate penalty once tenure charges brought against a teaching staff member have been sustained. In Ahern, we indicated that:

dismissal from a tenured position and revocation of certification serve different purposes, and that the responsibilities of the Commissioner under N.J.S.A. 18A:6-10 are distinct from those of the Board of Examiners under N.J.S.A. 18A:6-38. [Cox v. State Board of Examiners, Docket #A-3527-81T3 (App. Div. 1983)], slip op. at 2-3. Accordingly, revocation of certification is not automatic following dismissal pursuant to N.J.S.A. 18A:6-10. See N.J.A.C. 6:11-3.7. Because the Board’s decision to revoke or suspend precludes employment as a teacher in any school district in this state, and because revocation is not automatic following dismissal pursuant to N.J.S.A. 18A:6-10, the responsibility imposed on the State Board of Examiners when it makes its decision to revoke or suspend is a significant one. We conclude that this responsibility requires that the Board make an independent determination as to whether the individual should be precluded from employment in other districts, whether permanently or temporarily, based on all the evidence relating to this question.

Ahern, supra, slip op. at 3-4.

We find the record in this matter to be such that it does not sustain the Board of Examiners' conclusion that a two-year suspension of respondent's certification was warranted in this case. To the contrary, on the basis of our own review of the record as developed before the Board of Examiners, and given our authority as the ultimate administrative decision-maker and fact-finder in school matters, In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), we reverse the decision of the State Board of Examiners.

It was not inappropriate for the Board of Examiners to rely on the conduct established in the tenure proceedings as its point of departure. In the Matter of the Teaching Certificate of Michael Gwaley, decided by the State Board of Education, August 5, 1987 (subsequent history omitted). However, examination of the Board of Examiners' decision shows that it misconstrued the factual record established in those proceedings. As set forth above, the stipulations in the tenure proceedings establish respondent's attendance record over an eight year period. In contrast to the Board of Examiners' conclusion, examination of that record shows that respondent's attendance record during her first five years was acceptable. As shown by the parties' stipulations, respondent was not criticized or warned concerning her attendance until February 1994, shortly before she suffered the first of her on-the-job injuries that caused her attendance to deteriorate dramatically. The first sanction imposed on her by the District was the withholding of her increment for 1995-96, when she had already begun to be continually absent because of work-related injuries. In short, the record from the tenure proceedings does not support the Board of

Examiners' conclusion that the respondent had a pattern of excessive absenteeism prior to 1994.

Moreover, respondent has not failed to explain her "excessive" absenteeism before that time. Prior to 1994, the only year when respondent's absenteeism exceeded her annual allotment of contractual sick days was 1991-92, when respondent was absent 30 days. However, the record before us clearly shows that her absences that year were due to a surgical procedure, arthroscopic cholecystectomy.

While the parties' stipulations for the tenure proceedings indicate that the District considered the circumstances of respondent's absences when it certified the tenure charges, the tenure matter did not focus on those circumstances. However, the documentation submitted in these proceedings clearly establishes the circumstances of respondent's absences. Most significant is that the dramatic deterioration in respondent's attendance beginning in 1994 was due to the fact that she suffered three separate assaults by students while at work. The record before us fully documents the medical consequences of those assaults, including the fact that on November 4, 1999, the State Division of Workers' Compensation found respondent to be 35% permanently disabled and awarded her 234 weeks of benefits covering the period from March 1, 1995 through September 1999.

Thus, in contrast to the tenure proceedings, it is now clearly established that beginning in 1994, respondent suffered three work-related injuries that rendered her incapable of fulfilling her role as a full-time teacher and caused the continuous absences that led to the tenure charges. As respondent now argues, those

circumstances, including her incapacity to return to work at the time of the tenure proceedings, may have given the Commissioner no choice but to direct her dismissal from her tenured employment. However, based on all of the evidence, there is no justification to suspend her certification. To the contrary, although the record indicates that respondent lacks the physical capacity to be employed as a full-time classroom teacher, there is nothing to suggest that she is unfit to be a teacher. Rather, the record shows that respondent was a good teacher who can no longer work full-time because of the medical consequences of a series of work-related injuries.

Under these circumstances, it is ludicrous to “remind [respondent] of her professional responsibilities” by imposing a “sanction” on her in the form of a two-year suspension of her certification. State Board of Examiners’ Decision, slip op. at 5. Nothing in the record suggests that respondent engaged in any inappropriate conduct or was in any way responsible for the assaults that led to her disability. Nothing indicates that she is not fit to teach, although the record establishes that she currently lacks the physical capacity to be employed as a full-time classroom teacher. Again, lack of capacity to fulfill one’s responsibilities may justify dismissal from tenured employment. It does not, however, justify suspension of an individual’s teaching certification. In this respect, we stress that, as respondent argues, her certification is important to her because, despite her disabilities, her certification may qualify her for part-time employment or other employment in education for which she has the physical capacity. In the Matter of the Revocation of the Teaching Certificate of Thadeus Pawlak, Docket #A-3298-87T7 (App. Div. 1998).

In sum, for the reasons expressed herein, we reverse the determination of the State Board of Examiners and direct that respondent's certification be reinstated. In light of our decision, we need not act upon respondent's motion for a stay of the Board of Examiners' determination.

January 3, 2001

Date of mailing _____