

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

-----X
In The Matter of the **TENURE** Hearing

of the

**SCHOOL DISTRICT OF THE
CITY OF ELIZABETH, UNION COUNTY**

"Petitioner" or "District"

-against-

LAKHISHA (a/k/a Lakisha) WHEELER

"Respondent"

PURSUANT TO P.L. 2012, C. 26
AGENCY DOCKET NUMBER: 18-1/14

-----X
BEFORE: **RANDI E. LOWITT**

APPEARANCES:
FOR THE DISTRICT:
STEPHEN M. BACIGALUPO, II, ESQ.
Schwartz Simon Edelstein & Celso, LLC

FOR THE RESPONDENT:
GREGORY T. SYREK, ESQ.
Buccieri & Pincus, Esqs.

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ARBITRATOR'S

OPINION

AND

AWARD

BACKGROUND

The School District of the City of Elizabeth, Union County, New Jersey (Petitioner or District) preferred charges against Respondent, Lakhisha (a/k/a Lakisha) Wheeler (Respondent), a secretary previously assigned within the District, which charges were filed with the Commissioner of Education of the State of New Jersey, pursuant to N.J.A.C. 6A:3-5.1(b)(6). The undersigned was designated to be the Arbitrator for this matter, by the State of New Jersey Department of Education, by letter dated February 21, 2014. (Joint Exhibit 1).

Hearings were held at the Offices of the School District's Counsel, Whippany, New Jersey, on April 2, 2014, April 22, 2014 and May 28, 2014. A hearing was to be held on April 30, 2014, but was adjourned to the May 28 hearing date because Respondent was ill. Written closings were received and the record was closed on June 12, 2014. No stenographic record of either the hearing or the teleconferences was taken. All matters, while not necessarily cited in this Opinion and Award, have been considered.

BACKGROUND

Ms. Lakhisha Wheeler was a secretary in the City of Elizabeth School District, in Union County, New Jersey. In or about January 23, 2014, the City of Elizabeth Board of Education determined to certify charges against

Ms. Wheeler to the Commissioner of Education. In or about January 23, 2014, Ms. Wheeler was suspended without pay.

Charge Number 1 charges Ms. Wheeler with Chronic Absenteeism and Tardiness, in that she has been absent approximately 362.13 days and tardy on approximately 20 occasions between July 1, 2014 and December 23, 2013.

Charge Number 2 charges Ms. Wheeler with Misbehavior/Neglect/Insubordination, alleging that she failed to follow certain procedures, returned from lunch late and without permission to be so, engaged in personal telephone calls, took a funeral day and failed to provide documentation, left work early without permission, acted unprofessionally with a parent, used sick days to take an unauthorized vacation, spoke rudely to school children, and et cetera, between September 2008 and December 2013.

Charge Number 3 charges Ms. Wheeler with a Pattern of Misbehavior over the period in question and maintains that this misbehavior constitutes conduct inappropriate for a public school secretarial staff member, thereby rendering her unfit to continue in her tenured position and warranting her dismissal.

THE CHARGES

CHARGE I

(CHRONIC ABSENTEEISM & TARDINESS)

Lakhisha (a/k/a Lakisha) Wheeler has been chronically absent and tardy during her employment, despite numerous warnings and progressively imposed disciplinary measures. Her poor attendance has adversely affected the District. From her date of employment on July 1, 2004 through the present, Ms. Wheeler has been absent a total of approximately 364.03 days (excluding 30 vacation days) and tardy on some 20 occasions, as more specifically set forth below:

1. 2004-2005 – 26.63 days absent

Ms. Wheeler used 14 paid sick days, 2 personal days, 1 family illness day, and 1 funeral day. In addition, she was absent for 8.63 "other" days for which she was not entitled to paid leave. Her attendance records indicate that the "other" days were listed as "Funeral-Family," and 3.63 were listed as "Sick Day No Pay."

2. 2005-2006 – 61.5 days absent (excluding 10 vacation days)

Ms. Wheeler used 13.75 sick days, 2 personal days, 1 family illness day, and 1 funeral day. In addition, she was absent for 43.75 "other" days for which she was not entitled to paid leave. The "other" days were coded as "Sick Day No Pay." These days of unpaid leave include absences for the entire months of May and June, 2006.

3. 2006-2007 – 26.95 days absent; 2 tardies (excluding 10 vacation days)

Ms. Wheeler used 14.25 sick days, 2 personal days, 1 family illness day, and 1 funeral day. In addition, she was absent for 8.5 "other" days for which she was not entitled to paid leave; 4.5 of the "other" days were

coded as "Personal No Pay" and 2 as "Funeral – Family." She was also docked a total of .2 days pay for 2 incidents of tardiness.

4. 2007-2008 – 72.70 days absent; 7 tardies

Ms. Wheeler used 12 sick days, 2 personal days, 1 family illness day, and 1 funeral day. In addition, she was absent for 56 "other" days for which she was not entitled to paid leave. The "other" days include a leave of absence which began on December 10, 2007 and lasted through February 29, 2008, 2 absences were coded as "Sick Day No Pay"; 2 absences were coded as "Sick No Pay ½ Day"; and 1 absence was coded as "Personal No Pay." The medical leave of absence was requested and recommended for approval. She was also docked a total of .7 days pay for 7 incidents of tardiness.

5. 2008-2009 – 47.6 days absent

Ms. Wheeler used 12 sick days, 2 personal days, and 1 family illness day, and 1 funeral day. In addition, she was absent for 31.6 "other" days.

6. 2009-2010 – 44 days absent

Ms. Wheeler used 12 sick days, 2 personal days, 1 family illness day, 1 funeral day, and 2 "non-accumulated" days. In addition, she was absent for 26 "other" days. As a result of the foregoing, her salary increment was withheld for the next school year.

7. 2010-2011 – 21.5 days absent

Ms. Wheeler used 12 sick days, 2 personal days, 1 family illness day, and 1 funeral day. In addition, she was absent for 5.5 "other" days for which she was not entitled to paid leave.

8. 2011-2012 – 18.4 days absent; 4 tardies

Ms. Wheeler used 12 sick days, 2 personal days, 1 family illness day, and 1 funeral day. In addition, she was absent for 2 "other" days for which she was not entitled to paid leave. The attendance code indicates

these days as "Sick Day No Pay." She was also docked a total of .4 days pay for 4 incidences of tardiness.

9. 2012-2013 – 32.15 days absent; 9 tardies

Ms. Wheeler used 14 sick days, 2 personal days, 1 family illness day, 1 funeral day, and 1 "non-accumulated" day. In addition, she was absent for 12.25 "other" days for which she was not entitled to paid leave. The "other" days were recorded as: 7.75 "Sick Day No Pay"; 3 "Funeral-Family"; and .5 "Personal No Pay." She was docked .9 days pay for a total of 9 incidents of tardiness. She was also absent 1 day for jury duty. As a result of the foregoing, her salary increment for the upcoming year was withheld.

10. 2013-2014 – 12.60 days absent; 8 total tardies (excluding 10 vacation days)

Ms. Wheeler used 8 sick days, 2 personal days, .50 family illness day, and 1 funeral day. In addition, she was absent for 1.10 "other" days for which she was not entitled to paid leave. The "other" days were recorded as: .50 "Unexcused Absence ½ Day"; .50 "Prof No Pay ½ Day"; and .10 "Tardy." She was also docked a total of .80 days pay for an additional 8 incidences of tardiness.

CHARGE II

(Misbehavior/Neglect/Insubordination)

All of the allegations of Charge I are incorporated by reference as if fully set forth herein. In addition to Ms. Wheeler's absences and tardies, she has also exhibited a failure, refusal, and/or otherwise obvious inability to adhere to district policies and procedures and engaged in the following misbehavior in contravention of her role as a school employee:

1. During the 2008-2009 school year, Ms. Wheeler failed to follow the procedure for reporting absences and failed to come to

work dressed in a professional manner.

2. On or about December 10, 2012, Ms. Wheeler returned from lunch over a half-hour late without notifying school administration of this decision or receiving permission to extend her lunch.
3. During the 2012-2013 school year, Ms. Wheeler was involved in personal telephone/cellular calls throughout the day.
4. On or about February 19, 2013, Ms. Wheeler took a funeral day but failed to provide the necessary documentation.
5. On or about March 10, 2013, Ms. Wheeler returned from lunch over a half-hour late without notifying school administration of this decision or receiving permission to extend her lunch.
6. On or about March 11, 2013, Ms. Wheeler reported to work late.
7. On or about September 13, 2013, Ms. Wheeler went to lunch at 12:00 p.m. and never returned to work without notifying any administrator.
8. On or about September 16, 2013, Ms. Wheeler reported to work late.
9. On or about September 27, 2013, Ms. Wheeler left work one-half hour early without notifying any administrator nor receiving permission.
10. On or about October 2, 2013, Ms. Wheeler left work early without notifying any administrator nor receiving permission.
11. On or about October 25, 2013, Ms. Wheeler treated a parent in an unnecessarily, unprofessional, condescending and rude manner in front of others. It was during this incident, after the parent had asked Ms. Wheeler for another lunch application, that Ms. Wheeler said words to the effect, "You need another

one, we gave your kids several already!" Ms. Wheeler then stood up and said, "Now let us pray," before getting another lunch application.

12. In or about October 2013, Ms. Wheeler utilized sick days in order to take a trip/family vacation.
13. In or about October/November 2013, Ms. Wheeler rolled her eyes and spoke to parents of school children in a rude manner.
14. In or about December 2013, Ms. Wheeler wore her personal cellular phone blue tooth device during school hours.
15. On or about December 19, 2013, Ms. Wheeler submitted a Request for Personal Day(s) so that she could use a personal day and not report to work the following morning. Ms. Wheeler did not submit this request in accordance with applicable policies and procedures as it was submitted only the day before the personal day/time was needed.

CHARGE III

(Pattern of Misbehavior)

All of the allegations of the foregoing Charges are incorporated by reference as if set forth herein. The course of misconduct set forth above in the various incidents, jointly and severally, manifests a pattern of misconduct over an extended period of time and constitutes conduct inappropriate for a public school secretarial staff member. This pattern and course of misconduct demonstrates Ms. Wheeler's unfitness to continue to serve in her tenured position, warranting her immediate dismissal.

POSITIONS OF THE PARTIES

The District:

The District argues that Ms. Wheeler "...(1)...should be dismissed from her tenured position; and (2) the imposition of prior warnings and/or discipline should not, in any way, save Respondent's fate, especially in light of the fact that her behavior has not improved despite said warnings, etc. In this case, Respondent's attendance record was terrible and she exhibited an attitude that she only had to follow the rules which she chose to follow. ...Accordingly, Petitioner respectfully requests the dismissal of Respondent from her employment as a tenured secretary with the Elizabeth Board of Education." (Petitioner's Written Closing, p. 20).

As an initial premise the Petitioner notes that, notwithstanding her tenured position, the District is well within the law in seeking to discharge Respondent, Ms. Wheeler. "The relevant decisional law clearly confirms that Respondent should be dismissed: No 'person' shall be dismissed if she is under tenure of office 'except for neglect, misbehavior or other offense.'" (Id., p. 9). As to the burden of proof and standards to be met, the Petitioner maintains that "...if the evidence in support of and against the charges is equally balanced on the scales of justice, where the Board adds so much as the weight of a feather to its proofs, the Board has carried its burden by a preponderance of the evidence." (Id., p. 10). Pointing to other cases involving excessive absenteeism, the District

argues that "(t)here is no doubt that excessive absenteeism may constitute sufficient independent grounds for the removal of a school board employee, whether she be a member of the teaching staff or the secretarial unit. ...In fact, chronic or excessive absenteeism may warrant removal even when the absences have been excused or caused by legitimate medical reasons such as long-term poor health, or work related injuries." (Id., p. 10).

Comparing that to the case at hand, the District avers that "(t)he evidence presented overwhelmingly demonstrates that Respondent has been chronically absent and persistently tardy, substantiating the tenure charges of neglect, misbehavior, chronic absenteeism or other offense sufficient to warrant dismissal from her tenured employment with the Board." (Id., p. 11). Further, the District contends that, notwithstanding the legitimacy of the absences, it still has the right to dismiss. "Excessive or chronic absenteeism of a tenured employee, even if related to a legitimate medical or health problem, has been held to constitute incapacity, unbecoming conduct and/or just cause within the meaning of N.J.S.A. 18A:6-10, so as to warrant dismissal from employment." (Id., p. 12). More importantly, the District adds, Ms. Wheeler admitted to and acknowledged the absences, admitted to and acknowledged the many warnings given to her, but continued to be absent and tardy. "The Board has considered the circumstances of Respondent's absences and

tardiness. The Board has given Respondent numerous opportunities to improve her attendance and punctuality over the course of her employment. Despite the same, Respondent's attendance and punctuality have not improved. ...Given that Respondent's attendance and punctuality have not improved over the course of her employment (i.e., 10 school years), despite repeated warnings and increment withholdings, it is reasonable for the Board to conclude that this conduct is likely to continue in the future. ...The Board has considered the impact of Respondent's absences and tardiness. ...Respondent has been repeatedly warned both verbally and in writing of her unacceptable attendance and punctuality. ...Additionally, Respondent has received both annual evaluations and a Staff Attendance Improvement Plan in which she was notified that either her attendance and/or punctuality were unsatisfactory. ...For several years, Respondent has had her increment withheld as a result of her unsatisfactory attendance. ...Nonetheless, Respondent has not demonstrated any effort to improve her chronic absenteeism or punctuality." (Id., p. 15).

Finally, the District points out that, having withheld an increment and/or warned her previously, it is not violating the principle of double jeopardy. Citing "...precedent set by the Commissioner, the Administrative Courts, and State Courts in tenure matters, all of which have consistently held that the principal of double jeopardy does **not**

apply to a review of tenure charges filed by a Board of Education...," the District insists that "...a board's determination to withhold an increment does not preclude a determination to file tenure charges based on the same conduct." (Id., pp. 18, 19).

Therefore, the District asks that Ms. Wheeler be dismissed.

The Respondent:

The Respondent avers, preliminarily, that Ms. Wheeler's non-confrontational manner, coupled with the District's lack of follow-up vis a vis the memos its personnel sent to Ms. Wheeler was clearly what led to the District bringing charges against Ms. Wheeler seeking her dismissal. "When coupled with Wheeler's admitted avoidance of confrontation, this lack of discussion resulted in an exacerbation of an already difficult situation and should be taken into account in reviewing this matter." (Respondent Written Closing, p. 1).

Respondent argues that "(t)he Board...seeks Wheeler's termination for conduct already punished through increment withholdings. Having chosen his level of sanction for Wheeler's attendance record, the Board would be barred from demanding a greater level of discipline for the same events." (Id., p. 2). Highlighting *Elkouri*, Respondent also points to cases in which double jeopardy was recognized and, therefore, precluded additional discipline. "Here the same principle applies. Wheeler was previously disciplined for her absenteeism and the Board is

thus barred from re-charging her with the same conduct and attempting to discipline her a second time. The charges should therefore be dismissed or, at a minimum, the years for which Wheeler has already been punished by increment withholdings should be removed from consideration on these charges." (Id., p. 4).

Specifically, as to Charge 1, dealing with absences, Respondent points out that the charge incorporates each type of absence as if it were the same, without taking into account those which were permissible. "One of the difficulties in addressing the attendance records and testimony of Board witnesses is the inflation of absences by including virtually all days as absences, including those allowed pursuant to a local collective negotiations agreement. ...When these factors are taken into account, the issue of attendance becomes less significant." (Id., p. 5). Respondent's mathematical calculations diminish the charged absences to a minimal, more manageable amount. "Once Wheeler's attendance records are reviewed in light of allowed versus not allowed days, the Board's claims of excessive absenteeism are substantially reduced in scope. She has acknowledged her absences. While discipline of some sort might be appropriate, loss of employment would not." (Id., p. 7).

Respondent has a similar argument regarding the tardiness allegations. "...Wheeler acknowledged that it occurred, but there is no indication of any willful action or violation of rules. Circumstances outside

the control of any employee should not be used as a basis for termination." (Id., p. 8).

Turning to Charge 2, Respondent reviews each charge, individually, and insists that "...(t)he allegations in this charge do not warrant employment loss. They represent, when correct, minor errors by Wheeler regarding procedures, as well as her own desire to avoid confrontation. Calling a fellow secretary, rather than the Principal, fits into this category. Other allegations, such as rudeness to parents, are simply not true. Finally, others, such as dress code, cell phone and Bluetooth use, were corrected after warning. Termination is not warranted under these circumstances." (Id., p. 15).

Therefore, Respondent maintains that the District has not shown that Ms. Wheeler's conduct warrants her termination.

OPINION

Both the Employer and the Union argued their respective positions vigorously. Many of the facts are not in dispute, based on the documentary evidence. Ms. Wheeler's attendance calendars show the absences alleged. (Petitioner Exhibit #s 6, 8, 11, 12, 14, 19, 23, 24, 28, 42). Some years clearly had more absences than others. But, Ms. Wheeler's pattern and practice of being absent is also clear. At times, Ms. Wheeler's supervisors recommended the withholding of her increment, a direct

relation to her absenteeism. (Petitioner Exhibit #s 21, 26, 35, 41). There was testimony from Mr. Aaron Goldblatt, currently the Director of Secondary Education but, for a period of time, with the Human Resources Department of the District. There was testimony from Deborah Brady, a principal in one of the schools in which Ms. Wheeler worked. There was testimony from Mr. James Mondesir, the Vice Principal at one of Ms. Wheeler's schools. There was testimony from Mr. Christopher Mingoia, the Principal at one of the schools in which Ms. Wheeler worked. Tellingly, Mr. Mingoia said that, if he needed to have something done and to know that it would be done in a timely fashion, especially if he needed it the following business day, he would give it to someone else to do because he could never be sure that Ms. Wheeler would be at work. However, he also testified that Ms. Wheeler did good work, when she was present. Unfortunately, that lack of knowing that someone will be in to work, to do work as assigned, and to regularly be at work hindered his and others ability to function efficiently and in the best interests of the students they serve. Ms. Wheeler also testified on her own behalf. There is no need to go through the testimony in detail or to dissect the phrases or parse the words used in the questions and answers. As stated above, Ms. Wheeler did not deny the absences. She acknowledged with explanation.

The District did not submit closing argument regarding some of the myriad charges that did not have to do with absences and/or tardiness

and/or leaving the building (which is also an absence). That said, after review testimony about it, I do not find that Ms. Wheeler was culpable of the conduct charged in Charge 2 (1), regarding the dress code violation, (3), (11), (12), (13), (14). I do not find that Ms. Wheeler engaged in continued and continuous conduct that was, as charged in Charge 2 (11), (12), (13) and (14), misbehavior, neglect or insubordinate. Rather, when most of that behavior (other than absences and latenesses) was noted to her, Ms. Wheeler engaged in corrective action. There was no showing of any pattern and, frankly, much of that charged conduct was *de minimus*.

I do not concur with Respondent's examination of the attachment of double jeopardy. While acknowledging the principle and the law, in this instance I do not find that Ms. Wheeler was disciplined twice for the same acts. Rather, I find that the increment withholdings and the memos were forms of progressive discipline, meant to correct her behavior, in this instance and unfortunately, to no avail.

Additionally, while acknowledging Respondent's statements about the District's compulsion to paper its employees with memos, lacking significant follow-up, neither did Ms. Wheeler follow up, make appointments as requested, or conform her behavior to that which the district required, in the area of absenteeism.

Any school district employee teacher has a duty to be in the school, ready to teach. Ms. Wheeler is a very articulate woman, one who clearly had the skills to do the tasks at hand, as was validated by the testimony of her superiors, Mr. Mingoia in particular. I appreciate Ms. Wheeler's honesty, her acknowledgement that she was out of work or late for work for myriad reasons. However, by failing to be at work, she was unavailable to and unable to do the job assigned to her. Notwithstanding the seeming validity of each of her absences, Ms. Wheeler simply did not come to work and that is the primary function of any job, to be at work to do the work assigned. And, while Ms. Wheeler may have called in or texted or notified someone about her absences and latenesses, and while she was granted approval, or received acknowledgement that the day off would be noted, that does not abrogate her obligation to be at work, each day, on time, for full days.

Although Ms. Wheeler maintained that she was "not confrontational" and "not a debater," thereby stating that she did not confront her supervisors about any allegations of misbehavior or insubordination, or correct any incorrect listings on her absentee record, there are far, far too many days absent for any of the minor errors of attendance to hold significance. As to the other alleged misconduct, it is *de minimus*, and, therefore, not the basis for any determination made by this arbitrator. The crux of and the rationale behind this decision is the

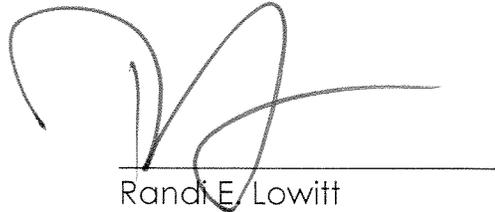
sheer number of absences and tardinesses. It is understood that Ms. Wheeler suffered some extreme health conditions as well as personal tragedies. However, during the entire course of time, she only asked for and received one leave of absence. The remainder of time was time off without leave. Ms. Wheeler is culpable of misconduct in that she was unavailable to work during a great number of days. Ms. Wheeler is culpable and, therefore, unfit to serve in her tenured position.

The question now becomes, even if Ms. Wheeler is culpable of charges preferred against her, is the appropriate penalty termination. Termination is the appropriate penalty. It is in no way clear that, even if Ms. Wheeler were to be returned to work, she would not continue her pattern and practice of excessive absenteeism. Ms. Wheeler has shown no change in her actions as a result of any of the warnings or discussions her superiors had with her, relative to her absenteeism and latenesses. To this point, she acknowledged the time out, but made no effort to correct it.

In conclusion, I am not persuaded that, if given the chance, Respondent would render competent service. I am persuaded that, for all the reasons discussed in this decision, Ms. Wheeler has forfeited her right to continue to work in the City of Elizabeth School District. Therefore, based on the above, I render the following

AWARD

1. I find Respondent Lakhisha (a/k/a Lakisha) Wheeler culpable for all the charges preferred against her in Charge I.
2. I find Respondent Lakhisha (a/k/a Lakisha) Wheeler culpable of the charges preferred against her in Charge II (1) excluding the dress code violation, (2), (4), (5), (6), (7), (8), (9), (10), (15). I do not find sufficient evidence to find her culpable of the remainder of the charges preferred against her in Charge II.
3. I find Respondent, Lakhiska (a/k/a Lakisha) Wheeler culpable of the conduct charged in Charge III.
4. For the reasons stated above, Respondent, Lakhisha (a/k/a Lakisha) Wheeler, is to be terminated from her position as a secretary with the City of Elizabeth Board of Education.



Randi E. Lowitt
Arbitrator

Dated: June 23, 2014

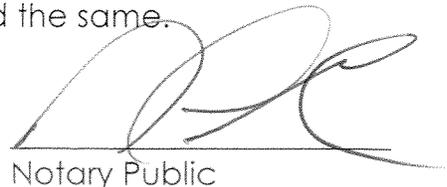
STATE OF NEW JERSEY)

ss:

COUNTY OF MORRIS)

On this 23rd day of June 2014 before me came and appeared Randi Elyse Lowitt, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and she acknowledged to me that she executed the same.

ROSS L. GRESIN
Notary Public State of New Jersey
Commission Expires April 4, 2015



Notary Public