

IN THE MATTER OF THE TENURE :  
HEARING OF SONIA VELEZ, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF HUDSON : DECISION  
COUNTY SCHOOLS OF TECHNOLOGY. :

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SYNOPSIS

The Board filed tenure charges against respondent – a tenured secretarial staff member – for incapacity, chronic and excessive absenteeism, and other just cause. Respondent admits that she has been absent from her secretarial duties since April 15, 1999, and asserts that her absence is the result of work-related illness. Respondent further asserts that tenure charges should be held in abeyance pending the final outcome of her Workers’ Compensation actions against the Board. The parties requested a disposition of the matter via Summary Decision.

The ALJ found that: the issue of incapacity is conceded by the respondent, and that respondent is incapacitated from performing the duties of her secretarial position; there are no genuine issues of material fact in this matter that would preclude a grant of Summary Decision, and the Board is entitled to prevail as a matter of law. Furthermore, the ALJ concluded that: there is no conflict with tenure charges being resolved while worker’s compensation claims are still pending; the Board has established that the tenure charges are well supported by evidence; the respondent should be permanently removed from her tenured secretarial position with the Board.

Upon careful and independent review, the Commissioner agrees with the ALJ’s determination that the tenure charges against respondent have been sustained and, therefore, summary decision – calling for respondent’s dismissal from her tenured secretarial position due to excessive and chronic absenteeism, incapacity and other just cause – is appropriately granted to the Board. In so deciding, the Commissioner emphasizes, *inter alia*, that – regardless of whether or not respondent is ultimately determined to have sustained an injury or illness arising out of her employment – the status of her workers compensation claims are irrelevant to the determination of the tenure charge of incapacity. Accordingly, the Commissioner directs that Sonia Velez be dismissed from her tenured secretarial employment with the Hudson County Schools of Technology as of the date of this decision.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>
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April 27, 2006

OAL DKT. NO. EDU 3255-05  
AGENCY DKT NO. 54-2/05

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The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto, filed in accordance with the requirements of *N.J.A.C. 1:1-18.4*, were fully considered by the Commissioner in reaching a determination herein.

Respondent's exceptions essentially recast and reiterate her sole argument advanced below, again contending that it was inappropriate for these charges to go forward until a determination is issued by Workers' Compensation as to whether a work-related injury or illness was the cause of her extensive absences. Citing to *Neptune Twp. Education Association v. Board of Education of the Township of Neptune*, 1989 *S.L.D.* 2086 and *Smith v. Board of Education of the City of Trenton*, 1989 *S.L.D.* 1506, respondent maintains that when absence related tenure charges are filed against an employee, a board may not merely rely on the sheer number of absences but, additionally, must take into consideration the *reason* for such absences. Should Workers' Compensation ultimately decide that respondent became unable to perform her duties due to a work-related injury, respondent professes that this would significantly impact the examination of the propriety of the Board's charges and any possible sanction. (Respondent's Exceptions at 1-2)

In reply, the Board urges that respondent's exception must be rejected. Contrary to her intimation, it professes, the Initial Decision obviously reflects that the Board did not rely on the sheer number of absences in bringing its charges against respondent. As presented by the ALJ (Initial Decision 12-14), the totality of factors surrounding these absences were thoroughly considered, not the least of which were the considerably long period of time involved and the accommodations provided respondent by the Board – including the deferring of action against her – to facilitate her return to work. (Board's Reply Exceptions at 3) The Board further proposes that the ALJ's rejection of respondent's contention that the instant tenure charges must be placed in abeyance until her Worker's Compensation matters have been determined is entirely consistent with the facts in this case and the settled law on this issue. Whatever the outcome is in that forum, it is without question that the underlying facts here – warranting respondent's removal from her position – remain unaltered and unaffected. By respondent's own admission, she has been absent from her position for almost 7 years and has no plans to return to work. As accurately observed by the ALJ in her decision, the Board submits, "[t]he charges are supported by evidence; [t]here are reasons for the alleged chronic and excessive absences, incapacity or other just causes that are good reasons, but [these] will not negate the facts of the case which show without dispute that Respondent is incapacitated and can not perform her duties." (Initial Decision at 17) (Board's Reply Exceptions at 4)

Upon careful and independent review, the Commissioner agrees with the ALJ's determination that the tenure charges against respondent have been sustained and, therefore, summary decision – calling for respondent's dismissal from her tenured secretarial position due to excessive and chronic absenteeism, incapacity and other just cause – is appropriately granted to the Board.

In so determining, the Commissioner initially notes – as was correctly observed by respondent in her exceptions – that when pursuing absence related tenure charges against one of its employees, a Board may not rely solely on the sheer number of absences to justify the termination of the employee but, rather must demonstrate that:

[t]here 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 absences. *In the Matter of the Tenure Hearing of Michele Hernandez, School District of the City of Elizabeth, Union County*, decided by the Commissioner October 15, 2001, citing *In the Matter of the Tenure Hearing of Lena White*, 92 N.J.A.R. 2d (EDU) 157, 161.

Review of the ALJ's analysis of these factors, based on the stipulated facts in this matter and applicable case law (Initial Decision 13-14), persuades the Commissioner that the Board has satisfied its burden in this regard.

Next, it is undisputed that respondent has been continuously absent from her secretarial position since May 7, 1999; during this period, she was – and continues to be – incapable of performing her work duties, and cannot now, almost seven years later, forecast when – or whether – she may ever be able to return to her position. Notwithstanding that respondent concedes that she is, in fact, incapacitated from performing her job, she – nonetheless – mistakenly harbors a belief that the tenure charges to this effect are “premature,” as her workman's compensation actions claiming that such incapacity is a result of a work-connected illness or injury have not yet been resolved. It is by now axiomatic that action can be taken against a tenured individual for excessive absenteeism even if such were the result of a work-related illness or injury. *In the Matter of the Tenure Hearing of Thomas Jabour, School District of the Delaware Valley Regional High School District, Hunterdon County*, decided by the

Commissioner January 8, 1999; *In the Matter of the Tenure Hearing of Phyllis Stanley, Board of Education of Freehold Regional High School District, Monmouth County*, 1995 N.J.A.R. 2d (EDU) 495; *In the Matter of the Tenure Hearing of Grace Folger, School District of the City of Orange, Essex County*, decided by the Commissioner May 15, 2000. Moreover, that respondent's lengthy absence may be related to her claims of work-related illness or injury is of no consequence whatsoever in this matter. As found in *Stanley, supra.*:

[w]hether or not [respondent] is ultimately determined to have sustained an injury [or illness] arising out of her employment with the petitioner, \*\*\*is irrelevant to the determination of the certified tenure charge of incapacity. "Incapacity" as identified in *N.J.S.A. 18A:6-10* relates to the inability to perform a position, irrespective of the cause of the inability to work. (at 498)

The Commissioner concludes that although a favorable decision from the Division of Worker's Compensation would entitle respondent to the full measure of remedies available under that body of law, it will in no way affect respondent's status as an individual who is incapable of performing the duties of her employment.

Accordingly, the Initial Decision of the OAL, as expounded upon above, is adopted as the final decision in this matter. The Commissioner hereby directs that Sonia Velez be dismissed from her tenured secretarial employment with the Hudson County Schools of Technology as of the date of this decision.

IT IS SO ORDERED.<sup>1</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 27, 2006

Date of Mailing: April 27, 2006

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<sup>1</sup> This decision 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. 6A:4-1.1 et seq.*