

IN THE MATTER OF THE TENURE :  
HEARING OF ABRAHAM MOORE, : COMMISSIONER OF EDUCATION  
SCHOOL DISTRICT OF THE :  
PASSAIC COUNTY TECHNICAL : DECISION  
INSTITUTE, PASSAIC COUNTY :

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### SYNOPSIS

Petitioning school district certified tenure charges against respondent – a tenured custodian – alleging excessive absenteeism, insubordination and conduct unbecoming over the course of the past eleven school years. Respondent contested the allegation of chronic absenteeism, arguing that: he was entitled to all the days off that he took; the days he took off due to illness cannot be counted against him; and he had improperly been subject to discrimination, harassment, unequal treatment, and a hostile workplace. Respondent did not, however, dispute the attendance records submitted with the tenure charges.

The ALJ found that: respondent’s absences increased from 1998 forward, and he received numerous warnings about his attendance problems; respondent’s separate discrimination, harassment and retaliation claims in Superior Court and in U.S. District Court were all dismissed prior to the ALJ’s consideration of this matter; respondent’s absences were disruptive to the operations of his department over many years; and petitioner’s tenure charges are well supported. The ALJ concluded that respondent should be terminated from his tenured employment with the District for excessive absenteeism.

Upon careful review and consideration, the Commissioner concurred with the ALJ that the record in this matter is more than sufficient to establish excessive and chronic absenteeism, and provided supplementation of the ALJ’s discussion. Accordingly, the Initial Decision of the OAL, sustaining the tenure charges of excessive absenteeism, insubordination, and conduct unbecoming, is adopted as the final decision in this matter. Respondent is dismissed from his tenured employment as of the filing 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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November 29, 2007

OAL DKT. NO. EDU 5518-04  
AGENCY DKT. NO. 110-3/04

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The record in this matter - including the four hearing transcripts and the more than three hundred exhibits entered into evidence, the Initial Decision and the parties' exceptions – have been reviewed. For substantially the same reasons set forth in the Initial Decision, the Commissioner finds that the evidence sustains the tenure charges against respondent, and that his termination for excessive absenteeism, insubordination, and unbecoming conduct is warranted.

#### BACKGROUND

The record reveals that respondent began employment with petitioner in 1992, as a custodian/bus driver. It is undisputed that during the first four years of his employment, the larger portion of his hours of work was devoted to driving school buses. His attendance was excellent during that period of time.

Respondent's wife, Cassandra Moore (C. Moore) held a similar position with petitioner. In the Autumn of 1996, they were both disciplined for failing to comply with their work assignments, and leaving students without drivers during a sports event. The discipline included a period of eighteen months in which they were assigned to custodial duties only. Respondent and his wife unsuccessfully grieved the discipline, and "began filing numerous

complaints of discrimination, harassment and retaliation, as well as miscellaneous complaints about their working conditions at Passaic County Technical Institute (PCTI).”<sup>1</sup>

Respondent’s attendance deteriorated markedly after the above referenced discipline. His performance appraisal dated November 3, 1997 – one year after the incident – indicated that respondent’s attendance needed improvement. His attendance further declined during the next six years, as indicated in both petitioner’s and respondent’s hearing exhibits. The following represents the parties’ combined representations about the number of absences during those years.

1. July 1, 1998 to June 30, 1999. Over and above his allotted vacation, personal leave and birthday, respondent took 17.5 “sick” days and requested three funeral days.
2. July 1, 1999 to June 30, 2000. Over and above his allotted vacation, personal leave and birthday, respondent took 31.5 “sick” days, left work after six hours on five different occasions, and requested four funeral days.
3. July 1, 2000 to June 30, 2001. Over and above his allotted vacation, personal leave and birthday, respondent took 12.5 or 13.5 “sick” days, left work after six hours on one day and requested six funeral days.
4. July 1, 2001 to June 30, 2002. Over and above his allotted vacation, personal leave and birthday, respondent took 26 “sick” days, left work after six hours on two different occasions, requested two funeral days and was docked for an additional six or more days.

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<sup>1</sup> *Abraham J. Moore v. Passaic County Technical Institute, et al.*, Docket No. A-2929-04T5, decided June 12, 2006, p. 4. (affirming the dismissal of respondent’s Superior Court lawsuit alleging violations of the New Jersey Law Against Discrimination (LAD) and Conscientious Employee Protection Act (CEPA), and invoking various tort causes of action).

5. July 1, 2002 to June 30, 2003. Over and above his allotted vacation, personal leave and birthday, respondent took 13 or 13.5 “sick” days between July 1, 2002 and March 9, 2003, left after six hours on two or three occasions, and was docked for an extra eleven days. In addition, respondent took FMLA leave from March 10, 2003 through June 30, 2003. During the course of the year he requested six funeral days.
6. July 1, 2003 to June 30, 2004. Between July 1, 2003 and January 30, 2004, over and above his allotted vacation, personal leave and birthday, respondent took approximately 37 “sick” days, at least 25 of which were docked. In addition, respondent was docked for 4.5 days when he either failed to call in or left before his shift was over. From January 30, 2004 onward, respondent was absent and on dock status; the certified tenure charges were served upon him on or about March 25, 2004; and he was suspended thereafter.

The record also contains several evaluations that were completed for respondent during the period in which his attendance was slipping, and memoranda describing meetings at which management discussed the attendance issues with respondent and his union representatives. As mentioned above, attendance was flagged as a problem on respondent’s November 1997 evaluation – which he signed. It was likewise addressed on his March 25, 1998 evaluation – which he signed. Further, on May 14, 1998, his supervisor met with him to discuss the need for improvement in attendance.

Respondent’s November 1998 evaluation contained a grade of “satisfactory” for attendance, but his May 1999 evaluation, which he signed, showed attendance as “unsatisfactory.” At this point in time, respondent filed a lawsuit in Superior Court alleging that

he was experiencing discrimination, harassment, a hostile work environment, and retaliation for a lawsuit that his wife filed against petitioner.

Respondent's May 2000 evaluation designated attendance as unsatisfactory and articulated the need for respondent to improve same. Respondent signed this evaluation. And two months later – on July 10, 2000 – a meeting was held with him to discuss his poor attendance and to explain the burden it placed upon respondent's colleagues, the students, and the staff at PCTI. He was advised that attendance would be the focus of each of his 2000 and 2001 evaluations, that further absences without doctors' notes would be grounds for withholding his increment, and that the next step after increment withholding would be tenure charges.

Respondent's November 21, 2000 evaluation showed attendance as satisfactory, but two months later a meeting was held – on January 31, 2001 – to again discuss attendance. Between November 21, and January 31, respondent had been absent ten times. At the January 31, 2001 meeting, respondent produced a doctor's note for January 3-5, 2001.

The April and December 2001 evaluations for respondent both showed that attendance needed improvement, and both stated that respondent's absenteeism created a burden for fellow workers, as well as an impact on the cleanliness of the school.

On April 1-5, 2002, respondent called in sick. Three of petitioner's witnesses – as well as petitioner's wife – testified that on those days, respondent was in court at the hearing that was held for C. Moore's lawsuit against petitioner.

Also among the documents in the record is a certified letter to respondent, dated April 18, 2002, concerning dates upon which he was absent without: 1) calling in before reporting time, or 2) producing a doctor's note upon his return to work. These days, *i.e.*, April 10-17, 2002, were immediately after the above hearing for his wife's lawsuit in

Superior Court. Steps were taken to terminate respondent for abandonment of position, but respondent belatedly produced a doctor's note for the five days and petitioner ultimately decided to reinstate respondent -- notwithstanding that petitioner had no record of respondent calling in for those days.

Respondent's next performance evaluation was dated July 3, 2002 and covered November 2001 through June 2002. It rated attendance as unsatisfactory and warned that respondent's increment could be withheld.

On November 25, 2003, a certified letter was sent to respondent by petitioner's business administrator, memorializing "management's" attempts to meet with him to discuss his attendance. By that time, respondent was on dock status because -- after only five months of the 2002-2003 school year -- he had used up his allotted sick leave, and because he had been absent several days without calling in.<sup>2</sup> The doctor's note that respondent later submitted did not identify a reason for his absences, and did not cover all of the days that he was out.<sup>3</sup>

The November 25 letter reiterated the unfair burden that respondent's absences put on his colleagues, reminded him of the verbal and written warnings he had already been given, and advised him to regard the letter as a "final reprimand" antecedent to further discipline -- including tenure dismissal charges -- if his attendance did not improve. Nonetheless, respondent apparently missed another 1.5 days, causing another registered letter -- dated December 2, 2003 -- to be sent to him, requiring that he submit a doctor's note verifying and explaining the medical need for those absences. In addition, petitioner's business administrator warned that any future absences without provision of the necessary medical documentation would result in a three day suspension without pay for abuse of the sick leave policy.

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<sup>2</sup> He had also used all of his personal leave and all but three days of his vacation.

<sup>3</sup> This period of time corresponds to the onset of respondent's drug dependency, according to the testimony of respondent and his wife.

Respondent failed to provide a doctor's note for one of the days mentioned in the December 2 letter and – further – he left work early on December 3, 2003, and did not report to work on December 4. These deficiencies resulted in a certified letter dated December 4, 2003, summoning respondent to a meeting to discuss his attendance problems, and requiring him to bring to the meeting doctors' notes explaining his absences on November 26 and December 3. The letter warned that failure to attend the meeting and/or provide the doctor's note(s) would result in a three day suspension without pay for abuse of the sick leave policy.

Petitioner's Business Administrator, Human Resources Director and Compliance Officer met with respondent and his union representative on December 10, 2003. Petitioner's representatives explained to respondent that his poor attendance was unfair to his co-workers, and that the custodial department could not continue to absorb his absenteeism. They specifically told respondent that he could not just tell management that he was sick and fail to report to work with such frequency, and without medical documentation from a physician.

Respondent stated that he had an illness that caused him to often miss work, but provided no details. The human resources director stated that she would provide respondent with information about the Family Medical Leave Act (FMLA), but unless respondent was qualified for FMLA leave, he would be required to submit medical documentation explaining the need for each future absence.

A memorandum was sent to respondent about a month later, *i.e.*, January 7, 2004, referring to three days (subsequent to the December 10, 2003 meeting) upon which respondent failed to report to work and did not provide medical documentation. He was suspended for three days without pay.

Respondent grieved the suspension and submitted a doctor's note after-the-fact. Petitioner rescinded the suspension and paid respondent for three days, but respondent was again absent from January 21 through the end of January, except for January 27. In a letter dated January 30, 2004, petitioner drew respondent's attention both to the district policy about leave time and to *N.J.S.A. 18A:30-4*, which allows boards of education to require that a "physician's certificate" be filed by employees with the board secretary "in order to obtain sick leave."

The letter also stated:

As you know, you have exhausted all of your sick leave, have already been docked 35 days and, despite repeated requests, you failed to submit a doctor's note in a timely manner. The foregoing represents a repeated and blatant abuse of the school's leave provisions. Therefore, effective immediately any future absences due to illness will require a doctor's note to return to work, whether that absence is for one day or more.

Petitioner also reminded respondent that if he wished to apply for FMLA leave he was obliged to fill out the application for same. However, when respondent's attendance record was examined, it was ascertained that respondent had not worked enough days in the previous twelve months to qualify for FMLA leave.

Respondent was absent for the entire month of February 2004, and on March 5, 2004, petitioner sent him a Statement of Tenure Charges, and Certification of Evidence supporting them. The gravamen of the charges were respondent's excessive absenteeism, his insubordination (*i.e.*, in failing to follow petitioner's sick leave policies concerning calling in and providing medical explanations for absences), and unbecoming conduct (*i.e.*, for using sick leave for other purposes). On March 23, the petitioning board voted to certify the charges to the Commissioner and suspend respondent without pay, pursuant to *N.J.S.A. 18A: 6-16*. On March 24, the charges were forwarded to respondent and the Commissioner.

Eight months later, in November 2004, respondent's complaint in Superior Court was dismissed in its entirety.<sup>4</sup>

In the Initial Decision in this matter the ALJ found that respondent's absences increased markedly from 1998 forward. At that time he had banked several sick leave days. The Commissioner notes that by the 2001-2002 school year, however, respondent had used all the banked days and exceeded the amount of leave allotted to him annually. This pattern continued in the following years.

The ALJ further found that petitioner gave respondent numerous warnings about his attendance – via his evaluations, in certified letters, and during meetings specifically arranged to discuss the issue of his absenteeism and the impact it had upon his colleagues, his department, and the school.

By the time the hearing in this matter took place, respondent's discrimination, harassment and retaliation claims in Superior Court had been dismissed and his appeal had been denied. The ALJ made note of this. In addition, the ALJ took judicial notice of the fact that, before the post hearing briefs had been submitted and before the record in this matter was closed, the United States District Court for the District of New Jersey had dismissed respondent's federal discrimination complaint.

## DISCUSSION

The ALJ determined that if a school district shows that a custodian's absences “make it difficult to keep the building clean and further jeopardize the health and safety of

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<sup>4</sup> His appeal was denied by the Appellate Division in June 2006, and a lawsuit that respondent filed in federal court articulating substantially the same claims was dismissed in December 2006.

the staff and student[s],” a sufficient basis for that custodian’s dismissal is established. (Initial Decision at 16) This is in keeping with school law precedent.

In *North Bergen Board of Education, Hudson County v. John Siano* 97 N.J.A.R. 2d (EDU) 631), a tenured custodian was charged with excessive absenteeism and insubordination due to his poor attendance and reporting habits over a period of years. The petitioning district provided testimony about the effect upon the school of respondent’s excessive absences, some of which he attributed to unspecified medical issues, and the Commissioner – recognizing the importance to the staff and students of keeping the school clean, sanitary and safe – approved the dismissal of the respondent. *See, also, State-Operated School District of Paterson v. Watson*, 93 N.J.A.R. 2d (EDU) 362, which involved charges of excessive absenteeism and insubordination against a tenured custodian, and entailed a factual scenario similar to that of the instant matter. In *Watson*, a dismissal was deemed warranted because the duties of custodians are essential for the well being of school employees and students, and because respondent was notified of his problem of excessive absenteeism but failed to rectify it.

In the present case, the ALJ further explained that even where legitimate health issues drive chronic absenteeism, removal may be warranted. (Initial Decision at 16) This proposition is in keeping with such precedent as that established in *State-Operated School District of Jersey City, Hudson County v. Vincent Pellecchio*, 92 N.J.A.R. 2d (EDU) 267, where a tenured teacher with undisputedly good pedagogical skills – but with a protracted record of excessive absenteeism due to asthma – was dismissed from his employment, and *In the Matter of the Tenure Hearing of Monica Meade-Stephens, State-Operated School District of the City of Jersey City, Hudson County*, 93 N.J.A.R. 2d (EDU) 134, *aff’d*. A-3076-92 (App. Div.), *certif. den.* 137 N.J. 167, *certif. den.* 513 U.S. 991, 115 S. Ct. 491, 130 L. Ed. 2d 403 (1994), where a

teacher was dismissed for excessive absenteeism which she attributed to illness and the medications which she took for same.

Citing to *In the Matter of the Tenure Hearing of David Riddick*, 93 N.J.A.R. 2d (EDU) 345, the ALJ also discussed the importance of reliability in evaluating a custodian's performance. (Initial Decision at 17) Respondent Moore's work on the night shift was important in preparing the school for the next day, as was the case in *Riddick*. The lack of reliability of respondent Moore's attendance disturbed the night shift operations, resulting in extra work for colleagues and/or less satisfactory conditions in the school at the commencement of classes the following morning. This was considered grounds for dismissal in *Riddick*.

Having articulated the relevant legal principles, the ALJ applied them to the facts of this matter. First, the ALJ pointed out that in his answers to discovery and at the hearing, respondent did not dispute the number of absences that petitioner had recorded and presented as evidence. (Initial Decision at 18) Rather, respondent suggested that the absences should either be discounted because of alleged discrimination and retaliation perpetrated against him by petitioner, or excused as manifestations of medical problems that were not accommodated by petitioner. This position was rejected by the ALJ because the identical claims had been litigated and dismissed in other forums. (*Ibid.*)

The remaining thesis advanced by respondent was that his absences were, in fact, not excessive. He argued that his days of absence corresponded to the leave days to which he was entitled under the collective bargaining agreement (CBA) between his union and petitioner. The ALJ pointed out, however, that for the period outlined in the tenure charges, respondent was absent 259 days – not counting vacation time and FMLA leave. (Initial Decision at 19)

Weighing the evidence before him, the ALJ found that petitioner's decision to seek respondent's termination was well supported. Respondent's absences were disruptive to the important operations of his department and, in particular, his shift. The absences often occurred one or two days at a time with no advance warning and precluded compensatory planning. They unfairly burdened his colleagues. (*Ibid.*) Respondent's attendance – by his own admission – became progressively worse, in spite of verbal and written warnings, explanations of the negative effects that his absences had on the school and his co-workers, suspensions, and a prior attempt to terminate him. (Initial Decision at 20)

Nor could the ALJ ignore the evidence before him that – beginning in 2003 – respondent developed a dependency on illegal drugs which he admitted was a factor in his absences, which he could not seem to control, and which he hid from petitioner and his own doctors who were writing medical excuses for respondent to present to petitioner. (*Ibid.*)

Respondent's exceptions to the Initial Decision restate the positions that he took in the Office of Administrative Law. He argues, for instance, that he was entitled under the CBA to all the days that he took off. However, his own exhibits, *i.e.*, R-27, R-37, R-47, R-55, R-64 and R-84 reveal that he exceeded the leave to which he was entitled and lapsed into dock status for each school year from 2001-2002 forward.

Respondent reiterates his belief that days taken due to illness cannot be counted against him. The Commissioner agrees with the ALJ, however, that the relevant case law does not support that argument. *See, Pellecchio and Meade-Stephens, supra.*

Finally, petitioner alleges that the tenure charges should fail because he was subject to discrimination, harassment, unequal treatment and a hostile workplace. These are the claims that he articulated in Superior Court and federal court. As such they are barred by the doctrine of issue preclusion. *See, e.g. R.O. on behalf of minor child, R.O., II, v. Board of Education of the West Windsor-Plainsboro School District, Mercer County*, decided by the Commissioner March 17, 2006.<sup>5</sup>

In summary, the Commissioner adopts the Initial Decision as supplemented herein, and rejects respondent's exceptions. The record shows that respondent's absences from work were excessive, and that he was insubordinate with regard to petitioner's instructions to him about calling in his absences before the commencement of his shift and timely producing doctors' notes explaining the medical reasons for his use of sick leave. Further, the evidence supports petitioner's claim that respondent used sick leave for other purposes, such as attending the hearing for his wife's lawsuit against petitioner.

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<sup>5</sup> The Commissioner notes that during the six-year time period covered by the tenure charges, a number of events occurred which respondent frequently identified as germane to his attendance. First, respondent's wife filed a lawsuit against petitioner in 1999 which suit was settled in 2002, and pursuant to which settlement C. Moore resigned from the employ of petitioner. Respondent's claims that this suit cause petitioner to retaliate against him were rejected in his Superior Court action. The respondent's similar claims that he was "picked on" because he filed actions against petitioner and the union are without support in the record.

Second, the district outsourced its bus transportation in Spring 2000 – causing respondent and others to become full-time custodians. While respondent was not happy with this change, he presented no evidence to show that it was improper or that the consequences affected him alone.

Third, respondent unsuccessfully requested – in 1997 and 2000 – to be put on the day shift. The evidence presented at the hearing showed that, contrary to respondent's contentions, no one was transferred to the day shift during the period in question, except for the individual who held the stipend position of transportation coordinator.

Accordingly, the petition in this matter is granted. Respondent's employment with petitioner is terminated.

IT IS SO ORDERED.<sup>6</sup>

COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2007

Date of Mailing: November 30, 2007

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<sup>6</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.*