#451-11 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu1839-11_1.html)

IN THE MATTER OF THE TENURE HEARING OF DONALD DUDLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

Petitioning school district certified four tenure charges against respondent – a tenured custodian – alleging neglect, misbehavior and other offense including insubordination and chronic absenteeism. These charges stem from the Board's contentions that respondent: frequently left early or missed work without properly reporting his absence; was on two occasions found to be asleep on the job; and was frequently absent from his position. The Board sought to terminate petitioner's tenured employment. Petitioner acknowledged absences that he contended were legitimate, but denied all of the Board's allegations and asserted that no disciplinary action was warranted.

The ALJ found, *inter alia*, that: for a Board to remove a tenured custodian, a showing must be made of the harm the employee's poor performance has had on the provision of a thorough and efficient education in adequately equipped, sanitary and secure facilities; additionally, the Board must show that the tenured custodian was adequately warned and failed to correct the unacceptable attendance and/or behaviors; in the instant case, the Board has produced sufficient evidence to support all four of the tenure charges; specifically, respondent repeatedly failed to follow procedures related to requesting and reporting time off, was twice caught sleeping on the job, and was chronically absent, and this conduct amounted to an ongoing pattern of misbehavior and neglect; however, the Board failed to provide timely warning to respondent that he needed to improve his attendance patterns; and respondent's unacceptable performance was not generally a significant problem for the overall safety and security of the school. Accordingly, the ALJ concluded that the appropriate penalty in this matter is not termination, but rather a suspension of six months and the withholding of any salary increment to which respondent would otherwise be entitled.

Upon careful review and consideration, the Commissioner concurred with the ALJ's finding that the tenure charges are supported by the record, but disagreed regarding the penalty to be imposed. The Commissioner concluded that: respondent had reason to be aware of the district's required rules and procedures, and the expectations of his supervisors, but persisted in rejecting them; there is no statutory mandate in tenure matters to impose progressive discipline; and the record is sufficient to support respondent's dismissal from employment. Accordingly, the tenure charges were affirmed, and the respondent was dismissed from his employment as of the date of this decision.

October 24, 2011

OAL DKT. NO. EDU 1839-11
AGENCY DKT. NO. 30-2/11

IN THE MATTER OF THE TENURE HEARING OF DONALD DUDLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Four separate charges against respondent Donald Dudley, a tenured custodian in petitioner's district, are at issue in the instant tenure matter: 1) failure to follow attendance and reporting procedures, 2) sleeping on the job, 3) chronic absenteeism, and 4) persistent pattern of neglect, misbehavior and other offenses. Upon careful review of the record, Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions – which contain arguments similar to those contained in the post-hearing briefs – the Commissioner concludes that the record supports the charges.

As to CHARGE I, concerning attendance and reporting procedures, the Commissioner agrees with the Administrative Law Judge (ALJ) that the record supported the following facts: 1) respondent left work early on October 27, 2007 without reporting same to the appropriate supervisor; 2) respondent took June 21, 2010 off without reporting the absence to the appropriate supervisor or AESOP (the automated system that enters absences into the district's payroll records and calls substitute custodians to replace the absentees); 3) respondent left early on August 13, 2010 without contacting the appropriate supervisor or AESOP; 4) respondent took August 19, 2010 off without reporting the absence to the appropriate supervisor or AESOP; 5) respondent left early on August 24, 2010 without reporting to the appropriate supervisor or AESOP; 6) respondent took August 27, 2010 off without reporting to AESOP; 7) respondent left early on September 9, 2010 without notifying the supervisor or AESOP; and 8) respondent

applied for and took vacation without having received approval for the week before the opening of the 2010-2011 school year – a period of time where vacation is prohibited under the terms of the applicable collective bargaining agreement.

In addition to the foregoing, the Commissioner finds that respondent signed in but could not be found in petitioner's high school on two occasions during the week that included March 12, 2004. A business record, P-2, was presented memorializing the incidents. The business record was signed by the high school building principal, whose signature was identified by respondent's custodial supervisor, Donald Frangipane, who was familiar with same. (T20)[1] Under New Jersey's rules of evidence, *bona fide* business records may be regarded as exceptions to the hearsay rule. *N.J.R.E.* 803 (c) (6). Further, under the rules of evidence, a writing/signature may be authenticated by one who is not the signator, but is familiar with the signature. *See*, *N.J.R.E.* 903.

In summary, and particularly in light of the fact that the rate of respondent's reporting infractions increased in August and September of 2010, the Commissioner upholds CHARGE I.

As to CHARGE II, the charge that respondent slept on the job on two separate occasions (November 2, 2007 and January 27, 2010), the Commissioner agrees with the ALJ that the underlying facts are virtually undisputed. The charge is upheld.

As to CHARGE III concerning absenteeism, a review of the record reveals that the dates of absences identified in the charge are largely accurate. What remains to be evaluated is whether said absenteeism warrants discipline.

[1] T shall designate the hearing transcript dated May 11, 2011; 2T shall designate the hearing transcript dated June 8, 2011 and 3T shall designate the hearing transcript dated June 23, 2011.

As the ALJ noted, excessive absenteeism may constitute sufficient independent grounds for the removal or suspension of a tenured employee. ***Passaic*** *Bd. of Ed. v.* ***Viani***, 92 *N.J.A.R.*2d (EDU) 76. In fact, chronic or excessive absenteeism may warrant removal even when the sick leave is taken for legitimate medical or health reasons. *State-Operated School District of Jersey City v. Pellechio*, 92 *N.J.A.R.*2d (EDU) 269; *In the Matter of the Tenure Hearing of Marsden*, OAL Docket Number EDU 1188-84; *Kelsey v. Board of Education of the City of Trenton, Mercer County*, 1989 *SLD* 1622. Excessive absenteeism may also be found to constitute incapacity, unbecoming conduct, and other just cause for removal. *Ibid.*

A custodian is not held to the same attendance requirements as a teacher. ***Passaic*** *Bd. of Ed. v.* ***Viani,*** *supra*, 92 *N.J.A.R.*2d 76. Nevertheless, a school custodian holds a position of trust and responsibility requiring high standards of dependability. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170. Regular attendance is essential because repeated absences may make it difficult to keep the building clean and possibly jeopardize the health and safety of the students and staff members of the school. *State-Operated School District of Paterson v. Watson*, 93 *N.J.A.R.*2d (EDU) 362.

The point at which absenteeism is so chronic as to warrant dismissal falls within the prerogative and discretionary authority of the local board of education, subject to review pursuant to the Commissioner's general authority to hear and determine controversies and disputes arising under the school laws. *In the Matter of the Tenure Hearing of Sheets*, 1980 *S.L.D.* 1536, *rev'g* 1979 *S.L.D.* 790. The nature of any warnings given to an employee and any corrective action taken by the board, as well as the reasons for the absences, are relevant to the question of whether discipline should be imposed. ***Passaic*** *Bd. of Ed. v.* ***Viani,*** *supra*, 92 *N.J.A.R.*2d 76. There must also be a showing of the harm the custodial employee's absences have

had on the provision of a thorough and efficient education. *Ibid.* And, as the ALJ noted, the coupling of absenteeism with other significant problems has served as a basis for dismissal. *See, e.g., In the Matter of the Tenure Hearing of Fabio Jiminez, Woodbridge Township School District, Middlesex County,* Commissioner Decision No. 123-10 (March 8, 2010).

Application of the foregoing principles to respondent's record of absences reveals factors that mitigate both for and against discipline. On the one hand, many of the absences appeared to be for medical reasons, including an August 2010 work-related injury. (R-14) On the other hand, head custodian William Jenkins and custodian Gregory Bacon testified that Dudley's many absences – especially when no substitute materialized – had a significant negative impact on the rest of the staff and the cleanliness of the building. (3T156-57; 3T183; 3T186-87) The ALJ noted that there were a limited number of exhibits memorializing advice or warnings to respondent about his general absenteeism. However, the record does include evaluations from 2006 and 2008 which memorialized dissatisfaction with respondent's attendance, as well as many instructional memoranda and written and verbal warnings issued to respondent about absences in the second half of his shift. Those notices and warnings did not appear to ultimately curb respondent's absenteeism – which included half days as well as full days.

Upon consideration of the foregoing, the Commissioner finds that the level and nature of respondent's absenteeism – referenced in CHARGE III – combined with his other performance deficiencies, warrants discipline.

Finally, as to CHARGE IV, the Commissioner concurs with the ALJ that the incidents referenced in the first three charges can be deemed to cumulatively constitute a pattern of neglect, misbehavior and other offenses, providing that the record shows that respondent was

aware of, or should have known about the attendance and reporting procedures that he was violating, and was on notice about petitioner's dissatisfaction with such issues as respondent's absenteeism and sleeping on the job The Commissioner concludes that respondent did indeed have notice of those procedures, rules and issues.

In the record, for example, is a written evaluation from March 2006 in which respondent received below average grades for reliability/dependability due to his excessive absences. (P-3; R-10) Building Principal Smith wrote: "Mr. Dudley's excessive absences have put quite a burden on those he works with. Substitutes are not readily available, which has often resulted in day custodians cleaning his area the next morning." Respondent signed this evaluation.

A disciplinary notice from Facilities Supervisor Frangipane – dated October 27, 2007 – warned respondent that another early departure without notifying his supervisor could subject him to dismissal. (P-5) The notice further stated that respondent had been verbally warned about the same problem in September 2007.

After an incident on November 2, 2007 where respondent was found sleeping on the job, respondent was issued a written warning signed by Building Principal Mark Alfone, Evening Custodial Supervisor Dawn Corbin, Custodial Supervisor Frangipane and respondent, that another sleeping incident could result in dismissal. (P-14)

In April 2008, respondent's evaluation by Frangipane noted attendance deficiencies. Respondent signed this evaluation. (P-47; T76-78) And on April 3, 2008, Frangipane issued a memorandum to all custodians – including respondent – reminding them of

the requirement to call the appropriate supervisor[2] before leaving work early. The memo also instructs that lunches must be taken mid-shift. (P-15; R-4, at 6)

In March of 2009 all employees, including respondent, were given instructions and training on using the AESOP attendance reporting system. (P-51; P-52; T194-95; T227)

On October 27, 2009, then evening custodial supervisor Edward Russell distributed a memorandum to all custodians, including respondent, concerning attendance and reporting. It directed, *inter alia*, that all absences be reported on AESOP, and that leaving early would not be permitted without prior authorization from a custodian's building administrator (principal), custodial supervisor or the facilities engineer (Frangipane). (P-16; R-4 at 7)

After respondent failed to report an August 27, 2010 absence on AESOP, and failed to contact a supervisor before leaving work early on September 9, 2010, Frangipane sent respondent a letter dated September 14, 2010 directing him to attend a meeting – with union representation – to discuss, *inter alia*, those incidents. (P-43) The letter warned that the meeting could impact respondent's continued employment in petitioner's district.

On September 21, 2010, Frangipane distributed yet another memorandum to all custodians, including respondent, reminding them about the previously distributed procedures for reporting absences, leaving before the end of the shift, and the prohibition against saving lunch or breaks until the end of the shift. (R-4 at 3-4; T187-189; P-15)

Finally, Frangipane testified that on several occasions he personally counseled respondent about his performance issues – such as sleeping on the job – his attendance, and his noncompliance with reporting procedures. For example, Frangipane testified that he advised Dudley verbally (as well as via memo P-5) that he needed to notify a supervisor whenever he

[2] According to Frangipane , head custodians – such as William Jenkins – were not supervisors and had no authority to approve early departures from work. Nor did a head custodian ever try to give such approvals. (T210-11)

needed to leave early. (1T37) Frangipane also recalled that Dudley had been specifically told on August 24, 2010 by head custodian Jenkins that it was Dudley's responsibility to call his supervisor about leaving early. (At that time there was no evening custodial supervisor, so a call to Frangipane was required.) (T162-63) And Frangipane verbally reminded Dudley that sleeping in the building was prohibited, referred to the fact that he had done it before, and warned that it could lead to termination. (T70; T204) The Commissioner notes, moreover, that it should be self-evident to any employee that sleeping on the job is unacceptable.

As regards proper reporting through the AESOP system, Frangipane testified that Dudley had blamed some of his unreported absences on an alleged failure of the system to register the correct day. However, after checking the AESOP printouts, Frangipane determined that there had been no problem attributable to AESOP. (T214-15) He verbally reprimanded Dudley. (T215)

In light of the foregoing, the Commissioner concludes that respondent had reason to be aware of the required rules and procedures, and the expectations of his supervisors, but persisted in rejecting them. Thus, CHARGE IV is supported by the record.

The Commissioner is mindful of the ALJ's concern that respondent did not receive many written warnings about his shortcomings – which concern led to the recommendation that respondent receive a six-month suspension as opposed to separation from service. In that vein, the Commissioner finds it somewhat surprising that respondent's March 2010 evaluation included no reference to the January 27, 2010 incident where respondent slept on the job. But it is noteworthy that the March 2010 evaluation was not completed by

Frangipane, the individual who had been most responsible for supervising and disciplining respondent.[3]

The March 2010 evaluation notwithstanding, the Commissioner finds that the record is sufficient to support respondent's dismissal from employment. More specifically, the Commissioner finds that over the course of respondent's six or seven years of permanent employment – despite some periods without documented infractions – the same problems concerning attendance and reporting were manifested by respondent. In August and September of 2010 the problems accelerated. The Commissioner is not persuaded that further warnings would have cured respondent of his pattern of ignoring district procedures.

Nor is there, in tenure matters, any statutory mandate to impose progressive discipline. *See, e.g., In the Matter of the Tenure Hearing of Marcelino Basulto, School District of the Town of West New York, Hudson County*, Dkt. No. A-1493-09 (App. Div. July 23, 2010). Had petitioner, for example, chosen to seek respondent's removal after the second sleeping incident, no progressive discipline would have been required.

Accordingly, the tenure charges are affirmed and respondent is terminated from his employment in petitioner's district.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2011
Date of Mailing: October 24, 2011

[3] The individual who signed the March 2010 evaluation was Edward Russell, an evening supervisor who was no longer employed by petitioner as of June 2010. (T163)

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)