#168-13

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	DOE DOCKET NO. 284-9/12
between	::	
SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,	::	
Petitioner,	::	
-and-	::	**OPINION**
ADELE STAPLETON,	::	**AND**
Respondent	::	**AWARD**

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATE OF HEARING: March 20, 2013

DATE OF AWARD: May 7, 2013

APPEARANCES:

For the Petitioner:

Lester E. Taylor, Esq. FLORIO, PERRUCCI, STEINHARDT & FADER, LLC
Jorge Fernandez, Principal
Dr. Hermoine McNeil, Associate Superintendent/Human Resources

For the Respondent:

Alan L. Krumholz, Esq., KRUMHOLZ DILLON, PC
Adele Stapleton, Respondent

I. BACKGROUND OF THE CASE

Adele Stapleton is a tenured career educator with the School District of the City of Jersey City ("the District") with approximately thirty-seven (37) years of service. At all times that are considered relevant for the purposes of this proceeding, Ms. Stapleton taught Special Education at Public School Number 20 on Danforth Avenue. On September 21, 2012, the District preferred tenure charges against Ms. Stapleton to the Commissioner of Education based on incapacity, excessive absenteeism and conduct unbecoming a teaching staff member.

In a correspondence sent that same date via regular and certified mail, the Department of Education Bureau of Controversies and Disputes directed Respondent to file an answer to the charges. Notice was also provided that pursuant to N.J.A.C. 6A:3-5.3 and N.J.A.C. 6A:3-5.4(f), an individual against whom charges are certified shall have 15 days from receipt of the same to file an answer. Respondent was further advised that failure to answer within the prescribed time period would be deemed an admission leading to a potential summary decision. Having received no ANSWER, on October 26, 2012, the Commissioner concluded in a DECISION that Petitioner's charges could be deemed admitted per N.J.A.C. 6A;3-5.3(c) and N.J.A.C. 6A:3-5.4(h), with the charges sufficient to warrant removal of Respondent from her tenured position as a teacher.

Upon the application of Respondent, on January 28, 2013 Commissioner of Education Christopher D. Cerf issued a decision and ORDER vacating the default judgment. By letter of February 7, 2013, M. Kathleen Duncan, Director Bureau of Controversies and Disputes, notified counsel that following the receipt of Respondent's ANSWER on January 28, 2013, the captioned tenure charges had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary. The director advised that the same had accordingly been referred to me for hearing and determination, pursuant to N.J.S.A. 18A:6-16 as amended by *P.L.* 2012, c. 26.

On February 7, 2013, a correspondence was sent to the parties advising of my appointment; offering potential dates for a conference call, and hearing; advising that in the event interrogatories were to be propounded, they should be limited to 25, with no subparts; directing with underlining that at least 10 days prior to the first scheduled hearing, the employee shall provide all evidence upon which she will rely including but not limited to: documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony.

Following Email correspondence, on February 19, 2013, another letter was sent to counsel. This confirmed that a conference call had been scheduled for February 22, 2013, with hearings set down for March 20-21, 2013. Prior directives related to the number of interrogatories and the

furnishing of Respondent's evidence and witness summary were also reinforced. The conference call went forward as scheduled, and on February 27, 2013, a final correspondence was sent memorializing all agreements reached. Based on a representation made by counsel for the Respondent, the Petitioner agreed to provide Ms. Stapleton with a copy of the tenure charges and exhibits by February 25, 2013; Petitioner was to forward its witness list immediately; Respondent was to propound interrogatories limited to 25 questions by March 1, 2013; Petitioner was permitted until March 11, 2013 to file answers to the same; Respondent was required to provide all the evidence upon which she would rely 10 days prior to the first scheduled hearing, or by March 10, 2013. This further provided that no court reporter would be utilized, with no post-hearing briefs filed.

Respondent propounded interrogatories upon Petitioner on February 28, 2013, which complied with the statutory prescribed limit. After an agreed upon extension, on March 14, 2013, Petitioner answered the interrogatories. Prior to that, in a March 12, 2013 letter, Respondent requested until March 15, 2013 to forward its evidence and witness list, due to the delay in its receipt of the interrogatory answers. They were provided on the latter date.

On March 20, 2013, a hearing was convened at the District Offices in Jersey City, New Jersey, which proceeded before me in an orderly fashion.

At that time, counsel were afforded a complete opportunity to undertake oral argument; to introduce relevant and admissible documentary evidence which had been previously submitted pursuant to the discovery schedule; and to conduct the examination and cross-examination of sequestered witnesses under oath. Ms. Stapleton was present in the hearing room at all times, with the exception of when an Executive Session was convened to discuss Respondent's attempt to supplement the evidentiary record with evidence related to Ms. Stapleton's workers' compensation claim. A bench ruling was later issued excluding this information, as the statute precludes the same. No post-hearing briefs were issued, and the record was declared closed at the completion of the hearing. This AWARD is rendered within 45 days of the start of the hearing, as mandated by statute.

II. FRAMING OF THE ISSUE

Whether the District satisfied its burden of establishing the tenure charges of incapacity, conduct unbecoming, and neglect of duty for chronic and excessive absenteeism, and if not what shall be the remedy?

III. RELEVANT STATUTORY LANGUAGE

P.L. 2012, Ch. 26 (TEACHNJ) ACT

* * *

8. N.J.S.A. 18a:6-16 is amended to read as follows;

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

9. N.J.S.A. 18A:28-5 is amended to read as follows:

18A:28-5. a. The services of all teaching staff members employed prior to the effective date of P.L. c. (C.) (pending before the Legislature as this bill) in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all other school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect and school business administrators shared by two or more school districts, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

* * *

[23] 22. (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. , c. (C (pending before the Legislature as this bill):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator

shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

IV. POSITIONS OF THE PARTIES

Petitioner Jersey City School District

First and foremost, the basis for the charge is not personal. Neither Mr. Fernandez nor Dr. McNeil said anything personal about Ms. Stapleton. They did not say she was a bad teacher or a bad person. Instead, Respondent has been absent six hundred (600) days, about one hundred ninety-five (195) of which were from 2002 through 2012. Even if the FMLA argument is credited, Ms. Stapleton testified that she did not give any

response to the leave of absence denial. She never verbally or in writing presented anything related to the medical leave issue, and never put the Employer on notice. The District does not have a crystal ball.

Respondent can't have it both ways, and the answer at paragraph 18 is worth noting. Counsel made the allegation that he was sand bagged, as if the target moved. Charge No. 1 states that Ms. Stapleton has been chronically and excessively absent and tardy, and reports six hundred (600) absences. Charge No 2 for Conduct Unbecoming, indicates that it is based upon the fact Respondent was chronically and excessively absent and tardy. Charge No. 3 Neglect of Duty also discusses chronic and excessive absenteeism. It was therefore clear from the charges that chronic and excessive absenteeism/tardiness was the basis for the tenure charges.

In fact, to suggest that the defense was prejudiced because it would have had medical documentation is not true. The statute clearly says that the employee shall provide all the evidence and documentation upon which she intends to use. The District took the time and the burden to produce all the documents for Respondent again. The intent of paragraph 18 of the answer was to deny the District's allegation, and maintain that in December 2011, Ms. Stapleton was assaulted by a student.

Nothing has been attached by Respondent to support that contention, which was raised in Ms. Stapleton's answer on October 14, 2012.

Additionally, nothing was raised in defense to the extent that the employee proffered she should be excused for that period. It is therefore respectfully submitted that this is unacceptable from an employee in general. Ms. Stapleton understood that the absences were unacceptable, only to continue that pattern and then hold the illusion that the allegations are related to a complaint that was filed eight (8) years ago.

In conclusion, even to suggest she had medical documentation, there are twelve (12) weeks of FMLA leave. This amounts to sixty (60) days. However, Ms. Stapleton still had ninety-six (96) days of chronic and excessive absenteeism which required that she be terminated from her position as a teacher.

Respondent Adele Stapleton

Ms. Stapleton has been employed by the Jersey City Board of Education since 1975, or over 37 years. During that time, she performed faithfully and well for all those years. She has spent the last period of time on documenting her case, which is a horrible waste of her talent as she is a qualified, competent, quality teacher. However, instead of utilizing alternate measures that were available, the District imposed a *Draconian* sanction. This is a disgrace, as many alternatives could have been provided to her. She could have been transferred to a different school. It is clear in looking at the evaluations, that Mr. Fernandez has a bias that is so strong it is clouding his

judgment. Respondent believes that the principal retaliated against her after several complaints. That is blatantly unfair.

This is not about a teacher who has refused to perform her assigned duties, but about one who has tried to comply. Special education requires a degree of difficulty more than is faced by the average teacher. Respondent should not be here and the District should have found a way to avoid the situation. These charges should therefore be rejected as out of hand. The performance issue revolves around and relates to Ms. Stapleton's attendance. The fact that she had 300 plus days in her attendance bank shows that she did not abuse sick leave.

In 2011 Respondent was under harassment, and required to be out of work for successive months. With regard to her workers' compensation injury, she only could have gotten to Concentra if the District sent her. Her career has been destroyed by being brought up on tenure charges for one part of the absences that were for the workers' compensation injury. That is not only patently unfair which boggles the mind, but also is in violation of the Family Leave Act. There is no indication that she was ever provided with any notice under the Act. Therefore, they are in probable violation of the FMLA and workers' compensation laws because of Mr. Fernandez.

Due to the circumstances of the workers' compensation injury, Respondent asks that they be treated as uncontested. For the District to

dare to say that Ms. Stapleton did not get treatment is outrageous. Because there were so many charges, the focus placed by Respondent was on the quality of her job performance. She did not expect the District to contest the fact that she was treated by a doctor after her injury.

In closing, Respondent argues that the question however, is whether she should be denied her job. The remedy sought by the District is so strong and devastating for any transgression. Emphasis is placed upon the fact that Ms. Stapleton was out sick. People do get sick, but the remedy is so harmful, severe and devastating, that it must be rejected.

V. STATEMENT OF THE CASE

It is well settled that tenure laws were originally enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons." *See generally* Viemeister v. Prospect Park Board of Education, 5 N.J. Super. 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should accordingly not be lightly removed. See In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 28, 2009).

By virtue of the fact that it is the moving party, the District encumbers the initial burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the subject charges by a

preponderance of the credible evidence. *See* Cumberland Farms, Inc. v. Moffett 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974 *cert. denied* 65 N.J. 292 (1974)); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); *see also* State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as the "[g]reater weight of the credible evidence in the case."); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

In reaching a determination of whether to remove Ms. Stapleton from her tenured teaching position with the Jersey City School District, I am required to consider the totality of the circumstances, the nature of the act(s), and the impact on her career. *See* In re Fulcomer, 93 N.J. Super 404, 421 (1967). Parenthetically, the evidence needed to meet a board's burden is not to be taken frivolously and must be viewed on a case by case basis. In the Matter of Ziznewski, School District of Township of Edison, Middlesex County, OAL Docket No. EDU 4727-08 (May 5, 2010).

Upon a comprehensive analysis of the evidence of record, with full consideration given to the respective positions, I find that Petitioner's prefatory showing was not successfully rebutted by Respondent, requiring that the instant tenure charges be **SUSTAINED**. The material facts of the case are largely not in contention, and any credibility determinations support the District's position. The procedural aspects have been previously

addressed. For the purposes of this proceeding, all positions adopted by the parties in their pleadings have been incorporated by reference into the following findings of fact, which include:

1) Adele Stapleton is a graduate of Jersey City State College (now New Jersey City University) receiving a Bachelor's Degree in 1974 and a Master's Degree in 1975. Ms. Stapleton is certified as a Teacher of the Handicapped K-12 and Principal/Supervisor. She also has sixty-four (64) additional credits and has engaged in continuing education courses. *See* Respondent Exhibit 1.

2) In a correspondence dated September 11, 1975, then-District Superintendent of Schools Michael Ross notified Ms. Stapleton that on September 10, 1975, the Board of Education had appointed her to a position as a Special Education Instructor at Dickinson High School. *See* Petitioner Exhibit 1, at Exhibit 1.

3) After the Dickinson appointment, a leave of absence, and interim appointments, Ms. Stapleton was assigned to PS No. 24 in around 1993. She remained at PS No. 24 until 1999, when she was reassigned to PS No. 20. *See* Respondent Exhibit 1, *supra*.

4) At all times that are relevant for the purposes of this proceeding, Ms. Stapleton worked as an Inclusion Teacher at PS Number 20. Prior to that she had been assigned as a computer teacher until 2003.

5) Ms. Stapleton's principal at PS 20 was Jorge Fernandez. In 2003, a dispute arose with Mr. Fernandez as to whether Ms. Stapleton was entitled to additional compensation for teaching an extra period, and what her role and duties were.

6) On January 13, 2004, Ms. Stapleton filed a compliant with the EEOC against the Jersey City Public Schools, particularly as it related to Principal Fernandez. The charge was eventually discontinued by the Respondent. In or about September-October 2010, Ms. Stapleton

consulted with then-JCEA Grievance Officer Bob Cecchini, with regard to perceived verbal harassment, reprimands and retaliation by Mr. Fernandez. A complaint was also filed with the Jersey City Municipal Court. On December 9, 2010, a Step 2 Grievance Meeting was held with Mirna Weglarz, Special Assistant/Human Resources. In denying the grievance, Ms. Weglarz found that the Human Resources Department was not the appropriate forum for the grievance. *See* Respondent Exhibit 1, *supra* at Tab A, # 17; Respondent Exhibit 8.

7) Illness-related leaves of absence were approved by the District at Ms. Stapleton's request for the following periods of time: September 14, 1988 to September 26, 1988; December 10, 1988 to February 15, 1989; February 15, 1989 to March 30, 1989; April 3, 1989 to April 22, 1989; April 22, 1989 to June 27, 1989; September 6, 1989 to September 11, 1989; November 2, 1989 to June 30, 1990; January 25, 1991 to February 25, 1991; February 25, 1991 to April 15, 1991; April 15, 1991 to June 20, 1991; September 3, 1991 to September 30, 1991. *See,* Petitioner Exhibit 2, *Ibid* at Exhibits 3; 4; 5; 6; 7; 9; 11; 12; 13; 14; 16.

8) The District denied additional leaves of absence requests by Ms. Stapleton based on personal business reasons during the following periods: December 1, 1989 to June 30, 1990; October 14 through November 23, 2011. *Id.* at Exhibit 10; Respondent Exhibit 10. The latter was denied by Dr. McNeil based upon the District's policy that a leave of absence cannot be submitted for an identical diagnosis as a workers' compensation injury. *Ibid.*

9) During the course of her tenure with the District, Ms. Stapleton had the following attendance during the period measured:

Year	Absent	Tardy
2002-3	4	0
2003-4	25.5	0
2004-5	3.5	0
2005-6	29	0

2006-7	6.5	.2
2007-8	4.5	.4
2008-9	4.0	.2
2009-10	5.41	.8
2010-11	15.5	2
2011-12	96.37	.4

10) Ms. Stapleton's EMPLOYMENT INCREMEMENT and ADJUSTMENT INCREMENT were withheld by the District for the 2008 – 2009; 2010 – 2011; and 2011 - 2012 school years. *Id.* at Exhibits 28; 29; 30.

11) The withholding of the 2010 – 2011 increments was contested by Ms. Stapleton before the Commissioner of Education and referred to the Office of Administrative Law. On May 13, 2011, the Honorable Michael Antoniewicz entered an ORDER dismissing Ms. Stapleton's petition with prejudice. This was based in part upon a finding that in a withholding of increment proceeding, the burden of proof by a preponderance of the competent and credible evidence is on the petitioner. *citing* In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Judge Antoniewicz further found that both Special Education Supervisor Daniels and Principal Fernandez had numerous conversations with Ms. Stapleton during the 2009 – 2010 school year about her performance, wherein they conveyed to her that she was not fulfilling the expectations of a teacher in her position. Petitioner was therefore aware that Fernandez felt her performance was deficient, and notwithstanding her assertion that she performed satisfactorily she failed to present credible evidence that the action in withholding her increment was arbitrary, capricious or unreasonable. *Ibid.*

12) On October 6, 2011, Dr. Charles T. Epps, then-District Superintendent of Schools sent Ms. Stapleton a letter notifying her that a Charge of Inefficiency had been filed against her, and that a ninety (90) day Professional Improvement Plan (PIP) would be implemented to allow her the opportunity to remedy the inefficiencies. *Id.* at Exhibits 33; 34.

13) On September 21, 2012, the District forwarded tenure charges against Ms. Stapleton to the Commissioner of Education Christopher Cerf, along with the supporting STATEMENT OF EVIDENCE and Exhibits; September 21, 2012 CERTIFICATE OF DETERMINATION; and September 20, 2012 Board resolution approving the certification of the tenure charges. *See* Petitioner Exhibit 1, *supra.*

14) The tenure charges included the following allegations: CHARGE No. 1 contended that Ms. Stapleton was guilty of incapacity because of her chronic and excessive absenteeism throughout the span of her thirty-seven (37) years she had been employed by the Board, totaling one hundred ninety-four (194) days since the 2002 – 2003 school year. The District went on to assert that during the five (5) year period from 1987 – 1992, Ms. Stapleton missed over six hundred (600) days of work. And since the 2008 – 2009 school year, Ms. Stapleton's supervisors have expressed their dissatisfaction with her capacity to perform her duties, resulting in her attendance being closely monitored. CHARGE No. 2 found that Ms. Stapleton is guilty of conduct unbecoming a board employee because of her chronic and excessive absenteeism during her tenure as a employee of the District, and incorporated by reference the facts set forth in CHARGE No. 1. CHARGE No. 3 determined that Ms. Stapleton was guilty of neglect of duty because of her chronic and excessive absenteeism and tardiness during her tenure as an employee of the District. The facts of the prior charges were once again incorporated by reference. *Ibid.*

15) By letter dated September 21, 2012, District Interim Business Administrator/Board Secretary Richard Rosenberg notified Ms. Stapleton of the Board action, and advised that effective the 21st, she was suspended without pay pending a determination of the charges. *Ibid.*

The District's *prima facie* showing was accomplished on the bases of its moving papers, coupled with the testimony of Mr. Fernandez. and Dr.

McNeil. The principal initially discussed his duties and responsibilities since he arrived at PS 20 fifteen (15) years ago; explained the evaluation structure; and indicated his familiarity with the subject tenure charges based on excessive absenteeism.

Mr. Fernandez categorically denied that he was biased toward Ms. Stapleton. While grievances were filed, they were found to be groundless, the principal recalled. He then reviewed her Summative Evaluation for the 2011 school year, and remarked that the fifteen (15) unscheduled absences were unsatisfactory. He further explained that the overall rating of "Unsatisfactory" reflected evaluations that took place during the year by at least three (3) individuals. As testimony continued, the principal offered that Ms. Stapleton was a special education inclusion teacher, working as part of an instructional team. The opinion was provided that poor attendance affects teaching performance, with Mr. Fernandez agreeing that it was fair to say Ms. Stapleton had been put on notice. Warning letters to this effect were then discussed.

Mr. Fernandez confirmed that the fifteen (15) absences incurred by Ms. Stapleton during the 2010 – 2011 school year were included in her Summative Evaluation. All days Respondent was absent during the 2011 – 2012 school year were next addressed, with the concomitant warning letters. An observation was made that Ms. Stapleton had already been out

thirty-nine (39) days by January 12, 2012. By the fifth warning on April 18, 2012, Respondent had been out ninety-four (94) days. A denial was issued that Ms. Stapleton had ever requested any FMLA leave. As with the last three (3) years, the principal indicated that Respondent's Summative Evaluation for that year did not recommend her for an increment or rehire.

Upon cross-examination, Mr. Fernandez agreed that the March 5, 2002 Summative Evaluation was probably the last time that he had rated Ms. Stapleton "Satisfactory" in all four (4) domains. The principal said that he recalled that she had filed a formal complaint in 2003. As to the action taken, Mr. Fernandez allowed that he was not sure, but knew that Assistant Superintendent Bill Ronsitt was contacted. Completing answers to this line of questioning, Mr. Fernandez denied that since 2002 he had never found Respondent "Satisfactory" in any domain.

Turning to Respondent Exhibit 9, Mr. Fernandez confirmed that Ms. Stapleton had filed a grievance against him in 2010. He further affirmed that during the course of his observations of Ms. Stapleton, her methods of instruction had been criticized. This was also the case with the other evaluators, Assistant Principal Daughtry, and Special Education Supervisor Coccaro. Mr. Fernandez denied that he was certified in special education. An awareness was expressed that from time to time, Respondent had been granted leaves of absence and had been ill. The accumulation of the thirteen

(13) annual sick days was also discussed.

As cross continued, Mr. Fernandez said he was aware that Ms. Stapleton had suffered a work-related injury, but was not sure when it was. She also received medical treatment and received workers' comp, according to the testimony. The principal denied that any such days were counted toward her absences. In response to the question of at what point was a determination made to bring Respondent up on tenure charges, Mr. Fernandez replied "2012."

Dr. McNeil provided brief testimony next on the District's case-in-chief. She initially explained that she has served in her current title for a period of about two (2) years and has eleven (11) years n Jersey City overall. Detailing her job responsibilities, the associate superintendent discussed the procedure for increment withholding that had been described by Mr. Fernandez noting that Ms. Stapleton's prior increments had been withheld for approximately three (3) or four (4) years. One (1) of the withholdings was a direct result of Respondent's attendance, Dr. McNeil recalled.

The filing of the current tenure charges was then reviewed with the amount of days Ms. Stapleton missed each year enumerated. The witness allowed that instructors receive thirteen (13) sick days per year, which may be accumulated without limit. The expectation is that teachers come to work, however, Dr. McNeil emphasized. She reported that there is a

contractual provision that after six (6) consecutive absences, a request for a leave of absence must be submitted. In all, Ms. Stapleton acquired ninety-six (96) absences during the 2011 – 2012 school year, Dr. McNeil advised. While being unsure of whether Ms. Stapleton was out on a workers' compensation case, those days would not have been counted, according to the testimony. The testimony reflected that Dr. McNeil was aware Ms. Stapleton had applied for an extended leave of absence. This was denied, however, because it was workers' comp related.

Cross-examination centered upon the circumstances of the compensation case. Dr. McNeil explained that if a person is injured, she must use the compensation doctor and not her own physician. Regarding the question of whether Ms. Stapleton was injured on the job in 2011 – 2012, Dr. McNeil replied that had no knowledge of that. She was also unclear as to any of the related details. The associate superintendent denied that workers' compensation had authorized Ms. Stapleton to be off from work, or that at any time Respondent was advised of her rights under the FMLA. On the latter issue, Dr. McNeil offered that if Ms. Stapleton had called this would have been provided to her.

Dr. McNeil confirmed that even after she was absent ninety-six (96) days in 2011 – 2012, Ms. Stapleton still had over three hundred (300) days in her sick bank. She acknowledged that these had been accumulated over

her thirty-seven (37) year career. The witness said she was unaware if any medical notes had been provided by Respondent or what her medical condition was. On equally limited re-direct examination, Dr. McNeil stated that Ms. Stapleton had not filed a grievance related to the leave of absence denial in 2011.

These considerations shift the burden of persuasion to Ms. Stapleton to attempt to establish affirmative or exculpatory defenses. At the outset, Respondent has accused the District of imposing a *Draconian* sanction, which is harmful, severe and devastating. The evidence, however, reflects that the District has attempted to correct Ms. Stapleton's pattern of absenteeism through employing progressive discipline. Such a result is contemplated by the statutory scheme. *See* In the Matter of the Tenure Hearing of Owen Newsome, State Operated School District of the City of Newark, DOE Docket No. 276-9/12 (Pecklers, January 10, 2013); *see also* I/M/O Tenure Hearing of Gilbert Alvarez, OAL Docket No. EDU 10067-09 (March 5, 2010; Green Brook School District v. Fodor, OAL Docket No. EDU 8407-83 (January 13, 1984); In the Matter of the Tenure Hearing of Claudia Ashe-Gilkes, School District of the City of East Orange, OAL Docket No. EDU 07135-08 (January 12, 2009); In Re Tenure Hearing of Wesley Gilmer, State Operated School District of the City of Newark, 2011 WL 2237628 (May 6, 2011) *adopted* by Commissioner of Education (July 28, 2011); School District of the City of Newark, Essex County, v. Stanley Slovney,

OAL Docket No. EDU 1269-84 (1984). In that regard, the District withheld Ms. Stapleton's increments for three (3) school years, 2008 – 2009; 2010 - 2011; 2011 - 2012. The efforts were unsuccessful.

Guidance has also been provided by our Appellate Division, which stands for the proposition that generally when deciding penalty/sanctions in a tenure proceeding, relevant factors to be considered in the equation of whether dismissal or something less is appropriate, include the nature and the gravity of the offense; any extenuating or aggravating circumstances; and the harm or injurious effect the conduct may have had on the proper administration of the school system. In re Fulcomer, 404, 422 (App. Div. 1967).

Respondent has maintained that a transfer to another school should have been considered. Dr. McNeil testified that Ms. Stapleton never requested a transfer. Mr. Fernandez made a similar representation, and also disclosed that roughly four (4) years ago, he had worked out a transfer to McNair with the Association and was happy to go along with it. However, Ms. Stapleton said she was happy at PS 20.

Mr. Fernandez also provided credible testimony on the effect that Respondent's absences had upon her special education population. In that respect, the principal urged that they were disruptive, as in the early morning he would be trying to find a substitute. There was also no continuity, and

with the special education population, strong bonds need to be developed. Counsel for Respondent in fact recognized in his opening statement that special education requires a degree of difficulty not faced by regular teachers.

I credit the position of Ms. Stapleton that she has over 300 days in her sick bank, and that her attendance was not bad in certain years. These considerations, however, do not vitiate the fact that following the withholding of three (3) increments, and the filing of initial tenure charges on inefficiency grounds in October 2011, Respondent was then out ninety-six (96) days during the 2011 – 2012 school year.

This served as the catalyst for the current tenure charges being preferred against her. Notice is also taken that in dismissing Respondent's petition challenging her increment withholdings for 2010 - 2011, ALJ Antoniewicz specifically found that both Special Education Supervisor Daniels and Principal Fernandez had numerous conversations with Ms. Stapleton about her performance not meeting expectations, during the 2009 – 2010 school year. There is also not a scintilla of evidence that was provided by Ms. Stapleton that somehow, this was an anomaly and that the circumstances surrounding the excessive absenteeism had abated that would permit me to consider reinstatement with a lesser penalty.

A consistent theme of Respondent's pleadings and testimony at

hearing was that Principal Fernandez harbored *animus* toward her and had retaliated for a number of complaints filed against him with various administrative agencies. In that regard, the record establishes and Ms. Stapleton verified that a charge was filed with EEOC in 2003 - 2004 but abandoned; a meeting was held with the JCEA Grievance Officer and Human Resources in 2010; a Jersey City Municipal Court complaint was also filed at that time. Ms. Stapleton additionally testified that Principal Fernandez had put her desk in the hallway, which she found to be humiliating. This required her to seek stress counseling, which continued into 2005.

By any measure the EEOC charge was remote in time, and the evidence suggests that while a grievance was heard at Step 2 with Human Resources in 2010, the case was never moved to arbitration by the JCEA. Nor is there any indication of a final disposition of the municipal court matter. The bottom line is that absent Respondent's allegations with related paperwork, there was never any finding of retaliation by any administrative agency or court, and viewed simply in burden of proof terms, Ms. Stapleton has not sustained her burden of proof in this respect. I accordingly conclude that there was no bias or retaliation by Mr. Fernandez demonstrated.

Respondent addressed many of the cited absences during her testimony, as well as the classroom assignments she had at the time She said that the fifteen (15) days during 2010 – 2011 were due to adminis-

trative leave occasioned by a charge of institutional abuse, later determined to be unfounded. Additional difficulties with some of the boys in her class were chronicled, leading to a discussion of the December 2011 incident when she was injured. This was only realized a couple of days later, when an incident report was filled out and she was sent to Concentra. Ms. Stapleton characterized this time period as "very stressful," and maintained that things were happening at school that added to the stress as a student was threatening her.

I do not take issue with Respondent's position that any days related to a workers' compensation incident should not be counted against Ms. Stapleton for the purpose of tenure charges. It is axiomatic however, that the proponent of an affirmative defense bears the burden of establishing every element of the same and the proofs are deficient in this regard. The District has complained that Respondent referenced the fact that she was assaulted by a student in December 2011 in her ANSWER, but failed to provide any evidence in support of the position that any related days should be excused.

That is not entirely true, as Exhibit 1 that was attached to Respondent Exhibit 1 does reflect that Ms. Stapleton was seen by Dr. Parmar of Concentra Medical Center on January 25, 2012. The PROGRESS NOTES do reflect an injury of December 7, 2011, and state that this is six (6) weeks

after the injury, with Ms. Stapleton not working despite being on regular duties. Anxiety not related to the same is also noted, with a PRESCRIPTION BLANK attached from Internist Dr. Perveen that Respondent was seen on November 30, 2011 for anxiety from an incident in school. That would have pre-dated the assault by the student, as the District probed on cross-examination.

It is not the responsibility of the Arbitrator to connect the dots and extrapolate the dates that Respondent may (or may not) have been excused from school because of this injury. Mr. Fernandez maintained during cross that any days related to the 2011 comp injury were not counted in computing total absence and Dr. McNeil echoed the same during her direct examination. In any event, as the District correctly submits even if this time period was discounted based on twelve (12) weeks of protected FMLA leave, the record verifies that Ms. Stapleton was still absent ninety-six (96) days for the year and that period would only be for sixty (60) days at most.

And while Respondent testified that she was unable to work for two (2) to three (3) months following the comp injury, she denied that she was able to work because she was stressed. Ms. Stapleton represented that she was also seeing her psychologist during this period of time, starting in October 2011. This was due to depression/anxiety. The ninety (90) day improvement plan given to her on October 6th was also referenced. From my

perspective, the critical element of this testimony was Respondent's admission on cross that she had not provided the District with any documentation showing that any of the absences were comp-related and should therefore have been excused. Ms. Stapleton also conceded that at the time of the comp injury in December, she had already been absent twenty-seven (27) days. Nor was any documentation provided for the fifteen (15) days that she had been absent in 2010 – 2011, or Principal Fernandez advised when Mr. Stapleton signed her Summative Evaluation that she believed some of the days should be medically excused. The outcome of this proceeding accordingly would not be altered.

Concluding this point, I do not share the view expressed by counsel for Respondent at hearing, that Ms. Stapleton was somehow prejudiced by my refusal to require the District to provide additional workers' compensation records. Rather, as I emphasized in reading the language of the Act to support my bench ruling, statutory time periods are to be strictly construed under the Act, and arbitrators are barred from entertaining evidence that is not submitted within those time periods, except for impeachment purposes. And as previously discussed, my correspondence stressed this fact with underlining for emphasis purposes. Furthermore, the District went to extraordinary lengths to ensure fairness, to the point of photocopying the pleadings based upon the representation by counsel for Respondent during the February 22, 2013 conference call that he did not have all the evidence.

In conclusion, the totality of the foregoing considerations requires a finding that the Jersey City School District satisfied its burden which was not rebutted, establishing the sufficiency of the subject tenure charges. These cumulatively establish that Ms. Stapleton incurred chronic and excessive absenteeism, which was not corrected following numerous attempts to modify this behavior by withholding her increments. No evidence was provided by Respondent that any of the dates should be protected, and the District had a legitimate expectation that she would be regularly in school to perform her critical role as an inclusion teacher for special ed students. The subject discipline shall accordingly be **SUSTAINED**, with Respondent removed from her teaching position. IT IS SO ORDERED.

VI. CONCLUSION

The Petitioner has satisfied its burden of demonstrating the sufficiency of the incapacity, conduct unbecoming, and neglect of duty tenure charges by a preponderance of the credible evidence.

AWARD

THE INSTANT TENURE CHARGES ARE SUSTAINED.

Dated: May 7, 2013
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ., ARBITRATOR

STATE OF NEW JERSEY
SS:
COUNTY OF HUDSON

ON THIS 7TH DAY OF MAY 2013, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME AND THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ZOILA R. VARGAS 2374097
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/27/2013