

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

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

Agency Docket #263-9/14

Walt De Treux, Esq., Arbitrator

Hearing Dates: 11/20/14; 12/4/14

Briefs Received: 12/18/14

Decision Date: 1/4/15

Appearances: For the School District – John G. Geppert, Esq.; Patricia C. Melia, Esq.
(on brief) *SCHWARTZ SIMON*
For the Respondent – Michael T. Barrett, Esq., *BERGMAN & BARRETT*

Introduction and Statement of Relevant Facts

Respondent Gregory Short has been employed as a Health and Physical Education teacher for the City of Elizabeth School District since January 2006. In observations and evaluations through the years, administrators and supervisors have rated Short as a consistently proficient teacher with one glaring problem – absenteeism. In 8 years, Short has been absent 131 days. He received numerous attendance memorandums stressing the importance of regular attendance from March 2009 through March 2014. After the 2009-10 and 2011-12 school years, the Board of Education voted to withhold Short's salary increment based on his attendance record. Short grieved the Board's action both times, and the grievances were resolved.

After the 2013-14 school year, Carlos Lucio, Principal of Dr. Antonia Pantoja School No. 27, again recommended increment withholding for the next school year.

Instead, in September 2014, the Board filed tenure charges against Short, alleging chronic absenteeism and incapacity. On October 9, 2014, the Commissioner deemed the charges "sufficient, if true, to warrant dismissal or reduction in salary" and appointed the undersigned as Arbitrator.

On November 20 and December 4, 2014, hearings were held at the School District offices in Elizabeth, New Jersey, during which time both parties had a full and fair hearing to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. Both parties filed post-hearing briefs, and the matter was submitted to the Arbitrator for a decision.

Issue

Has the City of Elizabeth School District established the allegations of chronic absenteeism and incapacity against Gregory Short as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

Respondent Short's absences are a matter of record. In 2006-07, he was absent 13.50 days, six of which were attributable to an accident on duty. In 2007-08, he was absent 10 days, including one professional day (an excused absence). In 2008-09, he missed 14.5 days, including a professional day. In 2009-10, he missed 14 days, including a professional day. In 2010-11, Short was absent 23 days, nine of which were attributable to an accident on duty and one for a funeral (also an excused absence). In 2011-12, Short missed 18 days; and in 2012-13, he was absent 15.5 days. In his final year, 2013-14, Short was absent 25.75 days, including a ½-day professional day and one funeral day. Excluding the excused absences and including the absences attributable to an accident on duty, Short missed 128.75 days in his eight years as a teacher in the City of Elizabeth School District.

If a teacher is absent more than six times, it is District policy to notify the teacher that his/her attendance is being monitored and to stress the importance of regular attendance. Principal Lucio issued attendance memorandums to Short on 13 occasions between March 2009 and March 2014.

In addition, Short's 2008-09 Annual Improvement Plan noted his attendance as an area of weakness and encouraged him to adhere to the District's attendance

policy. His 2010-11 Annual Professional Performance Report again urged him to follow the District attendance policy and noted no improvement in attendance from the previous year. The 2011-12 Annual Professional Performance Report discussed his poor attendance with no improvement and set a goal “[t]o attend work every day and attain 95% attendance.” The same goal was included in a March 2012 Instructional Action Plan. A follow-up November 2012 Instructional Action Plan noted that he had met that goal and directed him “to be mindful of the importance of your punctuality.”

Despite the short-term improvement, Short’s attendance continued to be poor. On January 24, 2014, Principal Lucio directed that Short meet with the Superintendent regarding his attendance problems. Apparently, that conference never took place.

As previously noted, the Board withheld Short’s salary increment for the 2010-11 and 2012-13 school years; but the withholding was grieved, and the grievances resolved. Principal Lucio recommended withholding again for the 2014-15 school year before the Board filed tenure charges.

Cases abound in which school district employees have been dismissed for chronic absenteeism, even when the absences were for legitimate reasons. This Arbitrator authored one such recent opinion. *In the Matter of the Tenure Hearing of Lenore Francis, Jersey City Board of Education, Agency Docket #285-9/12* (January 10, 2013). Very generally, those cases examine whether the teacher’s repeated

absences render the teacher ineffective and/or negatively impact his/her students by interrupting the continuity of education.

Although they reach different conclusions, both parties cite to *Tenure Hearing of White*, 92 NJAR 2nd (EDU) 157 for the elements of proof required for termination in an absenteeism case. The District must demonstrate,

“there 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.” At 161.

Without question, the District has established the third element outlined in the *White* case. Short received 13 attendance memorandums in a 6-year period, several improvement plans and performance reports focused on his attendance problems, and Principal Lucio made three recommendations for salary increment withholdings. Short clearly was aware that the District was dissatisfied with his pattern of absences.

Whether Short’s absences have impacted the continuity of instruction for his students raises an interesting question and highlights the dilemma Short presents as a teacher. Vice-Principal Jennifer Campbel described Short as “an average to above average” teacher who “engaged with the students.” Observations, evaluations, and annual performance reports consistently rated Short as a “proficient” teacher. Observers and evaluators noted “a positive, encouraging and enthusiastic attitude,” “the active participation” of his students, and the effective communication of his expectations for his students. Even his final evaluation in 2013-14 found him to be

“effective.” In short, the District conceded that Short was a good teacher – when he was present. The question is whether his absences impacted that effectiveness.

District witnesses talked generally of the impact of a physical education teacher’s absences on students. Districts have to provide 90-minutes per week (2-45 minutes sessions) of physical education for K-5 students and 180-minutes per week (4-45 minute sessions) for students in grades 6th through 8th. A teacher’s absence threatens the District’s ability to meet that state requirement. In addition, the District often has to find substitutes to cover the teacher’s absence. When another regular teacher or a substitute without subject matter knowledge is used, students may go to study hall rather than to the gym. Substitutes, of course, cost the District additional money (in the present case, more than \$17,000 to cover Short’s absences). The District also expects teachers to model good attendance for students, who are expected to have less than 9 absences per year.

The District’s testimony on the impact of a physical education teacher’s absence is well noted. Respondent cannot seriously argue against the importance of regular attendance by a teacher. Respondent notes that the District did not offer much in the way of specific evidence on the impact of Short’s absences. Short suggested that many times the District simply combines gym classes when one of the three physical education teacher is absent. But Respondent walks a fine line when he argues that his absences don’t affect the continuity of education. Such an argument diminishes the importance of Short’s employment. If he does not need to be present on a regular basis, what value does he bring to the District?

Although Short is considered a good teacher, he can only be effective if he is present on a regular basis. I find that the District has sufficiently demonstrated that Short's absences impacted the continuity of education for his students.

Neither the District nor the Respondent focused on the circumstances of Short's absences prior to the 2013-14 school year. Fifteen days of his absences were attributable to a work-related injury. In some cases, it would not be appropriate to hold absences related to an accident on duty against the employee; but in this case, the missed time due to work-related injury is relatively small (less than 12% of his absences). Even if they are excluded from consideration, Short still missed significant time over the course of his employment.

In the 2013-14 school year, Short testified that his newborn son suffered from chronic ear infections, a situation known to Principal Lucio and other administrators. Since Short's wife holds a part-time job and does not get paid sick leave, Short took time off to care for his son and take him to doctor's appointments. The infant had tubes placed in his ears in May 2014, which has apparently resolved his frequent illnesses.

It was the absences in the 2013-14 school year, added to the many absences in the previous years, which led the District to seek dismissal through tenure charges. The particular circumstances of those absences are significant because they are, at least in part, a predictor of whether Short's attendance will improve in the future. The District did not distinguish between Short's prior absences and his absences in 2013-14. Short's unrefuted testimony regarding his son's illness and

subsequent medical resolution suggests the possibility that Short can improve his attendance in the future.

Further, although not an overriding factor, it must be noted that Short's absences were covered by paid leave time. Many of the cases in which arbitrators, ALJs, and the courts have upheld dismissals for chronic absenteeism involve teachers whose absences exceeded the amount of paid leave time granted. While the District has a right and an obligation to stress the importance of regular attendance, it is more difficult for the District to demonstrate cause for dismissal when an employee's absences are within the limits of his/her paid leave time.

As noted, Short is considered "an average to above average" teacher who engages his students. His proficiency in the classroom holds the promise that he can be a very high-performing teacher if he could remedy his attendance problems. He has not done that yet, but the 2013-14 school year is not a fair gauge of his willingness to improve because of his son's illness and his family responsibilities. That illness is resolved, and there is no reason Short, if he so chooses, can meet the attendance goals set by the District.

Because of the circumstances of his absences in 2013-14, I find that although the District has established the allegations of chronic absenteeism and incapacity, the charges are not sufficient to warrant dismissal. Principal Lucio did recommend salary increment withholding, which the Board did not address since it moved for termination. Increment withholding for 2014-15 is an appropriate sanction for Short's attendance issues. It should provide a necessary incentive for him to remedy his attendance problems to avoid more severe disciplinary action.

Award and Remedy

The School District of the City of Elizabeth has established its allegations of chronic absenteeism against Respondent Gregory Short. However, the charges are not sufficient to warrant termination.

As a remedy, the District is ordered to immediately reinstate Short to his tenured position with no loss of seniority. It is further ordered to make Short whole for back pay and all other benefits lost for the time period of his suspension without pay through the date of his reinstatement. In lieu of termination, Short shall be subject to salary increment withholding for the 2014-15 school year.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any dispute over the implementation of the remedy.



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Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.



WALT De TREUX