In the Matter of the **TENURE** Hearing of **KIMBLE WRIGHT** "Respondent" and **STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX CO.** "Petitioner/NPS"	)	**OPINION and AWARD** AGENCY DOCKET NO. 328-10/15

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26 and P.L. 2015, c. 109 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

The parties met on December 18, 2015 and January 11, 2016 at the offices of Zazzali Fagella Nowak Kleinbaum & Friedman, Newark, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sworn. Briefs were received as agreed.

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR PETITIONER:

Robert M. Tosti, Esq.
Sara J. West, Esq.
Purcell Mulcahy Hawkins Flanagan & Lawless, LLC

APPEARING FOR RESPONDENT:

Aileen O'Driscoll, Esq.
Zazzali Fagella Nowak Kleinbaum & Friedman

BACKGROUND:

The matter arose as a result of Tenure Charges filed against Respondent, Kimble Wright. According to a letter dated November 16, 2015 from M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, the charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary."

Prior to the first session, Respondent filed a "Motion to Dismiss" and Petitioner responded. The parties met on December 18, 2015 to further discuss their positions and the Charges:

Charge One:
Absence Without Leave, thirty (30) items

Charge Two:
Other Sufficient Cause, two (2) items

However, during that session, Mr. Tosti, on behalf of Petitioner, agreed that the only Charges to be addressed are those relating to

> what happened from September, unless there were other intervening things for historical references that you want to bring in, but from September 2nd of '14, to the end of the school year. That's all I'm interested in.

Based on the initial briefs and the discussions on December 18, 2015, this Arbitrator rendered the following decision on December 28, 2015 denying the "Motion to Dismiss" and restating the scope of the revised Charges as agreed to by Petitioner.

December 28, 2015

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Robert M. Tosti, Esq.
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One Pluckemin Way
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Bedminster, NJ 07921

Dear Ms. O'Driscoll & Mr. Tosti;

Re: Parties – **Kimble Wright & State Operated School District of City of Newark**
Docket No. 328-10/15

Respondent made a Motion to Dismiss the tenure charges. However, after carefully rereading the briefs and reviewing the positions stated at the meeting on Friday, December 18, 2015, the following decision was reached.

While the Board had a responsibility to accurately state the specific statute under which it was charging Respondent, the pleadings were sufficient notice that the issue was conduct unbecoming. The School District clearly made a mistake in citing the wrong statute but there was no evidence to suggest that this caused prejudice to Respondent. Further, there is nothing in the charges suggesting that the School District is claiming inefficiency. In the opinion of this Arbitrator, there was clear notice of the charges of conduct unbecoming.

Finally, the cases cited by Respondent can be differentiated from the fact pattern in this matter. The four tenure matters cited dealt with the issue of getting two bites at the apple. In those instances, inefficiency charges were dismissed because the District filed charges under Section 25 and then, after being dismissed, the District attempted to refile the same charges under Section 8. In this matter, there were no inefficiency charges, the charges were not refiled and the only issue was the fact that the Statute cited was 18A:6-17.3 whereas the matter should have been filed under 18A:6-17.1. No harm was done.

Therefore, on Monday, January 11, 2016 the parties will present testimony and evidence as to Respondent's absences during the 2014-2015 school year but will not address the charges of absences during the 2006-2007 school year or of intermittent leave requests for a family member.

Sincerely,

Mattye M. Gandel

POSITIONS OF THE PARTIES:

Petitioner's Position:

As to the Tenure Charges, Petitioner's position is that Respondent was unresponsive to NPS's letters during the 2014-2015 school year; that he was advised on July 18, 2014 that he was required to be examined both by his personal and district physicians to be medically cleared to return to work and that he failed to respond and failed to schedule an appointment with the District's physician. He further failed to respond to an October 2, 2014 letter advising him that his paperwork was insufficient and directing him to provide information from a physician. Similarly, he failed to respond to a Letter of Reprimand dated January 5, 2015 advising him that additional absences would lead to more severe discipline. On March 13, 2015, the District wrote a letter to Respondent regarding his continued absence without authorization and his continued medical leave with insufficient paperwork. Respondent failed to reply.

Further, it is Petitioner's position that Respondent was duty bound to respond to the July 18, 2014 letter advising of his assignment in the fall and his failure to report his status and intentions created a misunderstanding at the Talent Office. He did not report to work on September 4, 2015 but reported to his assigned location, Fast Track, on September 9, 2015 for only four days, which enabled him to receive a fully replenished bank of sick days. Petitioner asserts that while no one was looking closely at Respondent's activities, his AFLAC, private insurance, forms remained unchallenged and he remained out of work.

Additionally, Petitioner contends that though NPS employees filled out the AFLAC forms, which covered non-medical questions, that did not mean that his medical leave was authorized. Respondent continued to receive letters from NPS and should have responded as he was the person who knew best the disconnect between his AFLAC forms and the letters he was receiving from NPS. Rather, Respondent avoided an examination by a District physician and pursued a course that would least jeopardize his medical status as "disabled."

Therefore, as Respondent thwarted efforts by NPS to gather information and assess the validity of his absence, Petitioner asks this Arbitrator to sustain the Tenure Charges and not reinstate Respondent to the District.

Respondent's Postion:

Respondent's position is that the purpose of the tenure act is to ensure competent and efficient school systems by affording teachers security in their positions and protection from dismissal and by preventing boards of education from abusing their superior power. In the instant matter, Petitioner, having the burden of proof, failed to prove by a preponderance of the evidence that Respondent was AWOL. Rather, the record established that Respondent was diligent and responsible in submitting medical notes to Health Services and requisite forms to Human Resources. Respondent's actions were correct, not contrary to District policy or otherwise unauthorized. With the exception of one letter, no one contacted Respondent to inquire of his status and when he did receive

the AWOL letter, he contacted the Union's general counsel, who communicated with the District's general counsel to no avail. Therefore, any penalty is unjustified.

Further, Respondent cited many decisions supporting the proposition that absenteeism must be prolonged and excessive and that the burden is on the District to prove that it tried and failed in eliciting any change in correcting the pattern of absences. There was no evidence that Respondent did not follow a recognized procedure for reporting his absences; no evidence that he was contacted to determine his status or to advise him that he was proceeding improperly and no evidence that he was required to call subfinder daily for a year to report his absences as he was submitting forms, which the District was approving. No one questioned him on the way he was submitting paperwork.

To the contrary, Respondent asserts that the evidence shows that he suffered a serious injury, chose to recover through a non-surgical, holistic approach, as is his right, submitted documents, which were never questioned, and that once he was cleared to return to work in September 2015, the District sought to terminate him.

Moreover, while Respondent's position is that no penalty is appropriate because Petitioner failed to prove the Tenure Charges, if the Arbitrator determines some penalty is warranted, the doctrine of progressive discipline applies. Respondent, a long time employee, was never progressively disciplined for the alleged AWOL charge and there was no intent on his part to obfuscate the system.

Therefore, Respondent asks this Arbitrator to dismiss the Tenure Charges and to direct Petitioner to reinstate Respondent to a teaching position together with all back pay,

benefits, and emoluments, retroactive to the date the Tenure Charges were filed. Alternatively, mitigating factors warrant a conclusion that progressive discipline be applied with a much less severe penalty.

OPINION:

Respondent has been a teacher for approximately twenty-three (23) years, the last fourteen (14) of which were spent in the Newark Public Schools, until these Tenure Charges were filed on October 23, 2015. Respondent never received any form of discipline prior to these charges. On March 31, 2014, Respondent suffered an off-duty back injury while playing basketball. The record established that Respondent sought medical care immediately and regularly submitted doctors'[1] notes from April 4, 2014 through April 1, 2015 each note stamped as the received by the District's Office of Health Services and that no one from the District questioned these doctors' notes, no one told him that they were insufficient and no one told him he needed better documentation.

Respondent's unrefuted testimony was that because he was injured and could not work, he received disability forms from the District with instructions as to how to fill them out; one form was to be completed by him, a second by his doctor and the third by his Employer. The completion of these forms allowed Respondent to receive disability payments under his private insurance plan. A series of disability claim forms were entered into the record of the hearing beginning with the Initial Disability Claim Form in April 2014

[1] Respondent sought medical care from several chiropractors and there was no evidence to convince this Arbitrator that Respondent was required to go to another kind of doctor for his treatment. He testified that the chiropractors sent him to two medical doctors, who performed an MRI, R-12, and a CT scan and

through April 2015. Each form followed the same pattern. Respondent completed his form, his doctors completed their forms and these forms were presented to the District, which completed its form. Respondent's unrefuted testimony was that upon submitting these forms, he was approved for disability benefits and received his payments under his policy for a full year.

Petitioner claimed that these forms were only signed by two District clerks and only provided responses to non-medical questions. However, the forms completed by the District did not claim to be medical forms but rather sought confirmation that Respondent was a teacher in the District, the number of hours he worked prior to his injury and other non-medical questions. In each instance, while the forms were very difficult to read, it was undisputed that Respondent's doctors completed the forms confirming that Respondent was under their care, for what period of time and the codes for the types of procedures the doctors administered. Of importance was that Respondent's wife's undisputed testimony was that she regularly submitted these forms, plus the doctors' notes, to the Office of Health Services and Office of Employee Resources and that she was never told that she needed more or different information.

The packet of three forms was submitted to the insurance company and Respondent's disability was continually approved. The record established that no one from the District questioned the forms submitted by Respondent and no one told him he was doing anything improper. Therefore, it must be concluded that the District's Office of Health Services as well as its Office of Employee Services were aware of Respondent's

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who recommended surgery or shots in the spine, but Respondent chose to continue with the chiropractor.

medical condition and his inability to return to work. Ultimately, the doctor cleared Respondent to return to work on September 1, 2015.

However, during the 2014-2015 school year the District asserted that it sent Respondent several letters to which he did not respond. Specifically Vanessa Rodriguez, Chief Talent Officer, sent Respondent the same exact two letters except for the dates, JT051[2] (July 18, 2014) and JT053 (September 4, 2014), indicating that Respondent was scheduled to return to work on September 2, 2014 and directed him to "make an appointment with your personal physician and the school district's physician in order to be medically cleared to return to work." The record confirmed that the address on the letters, 12 Vanderbilt Court, Irvington, NJ, was Respondent's correct address. Respondent was not asked if he received these letters.

Another letter dated October 2, 2014, JT057, was entered into the record of the hearing. Though Respondent was not questioned about this letter, his lack of response, if he received it, was reasonable. The letter denied him a leave of absence because of insufficient paperwork and advised him if he had any questions, he could call the Talent Office. Respondent was already approved for disability during this time period and, therefore, there was no reason to respond because he did not need the leave of absence.

He was asked about letters dated January 5, 2015 (JT059) and March 13, 2015 (JT061). Regarding the January 5th letter,[3] Respondent replied that he did not

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[2] JT is a Joint Exhibit and is followed by the bates stamp.

[3] This was a strange letter in that it issued a reprimand and docked his pay for one day because Respondent was absent from his duties on January 5, 2015 at Fast Track without calling subfinders to report his absence. However, Respondent had been absent every day beginning in April 2014 and had not reported to work any day from that time until the end of the 2015 school year, while he was on approved disability, except for four days in September 2014. This letter clearly illustrates the District's lack of communication between departments as to Respondent's employment status.

remember receiving it. Though there was no proof that in fact he received it,[4] his unrefuted testimony was that because he had been out on disability since April 2014, he would not have been calling subfinders on a daily basis. As for the March 13th letter, which was sent via UPS, Respondent acknowledged that he received this letter. The March 13th letter from Rodriguez addressed the issue of being AWOL and the possibility of discipline but Respondent did not respond to her directly. His testimony regarding returning to work and in particular the AWOL claim was that forms had been submitted regularly to two departments in the District; that the District knew that he had been going to his doctors and that he was approved for a disability leave and that he believed that he had complied with the requirements.

In fact, though Respondent did not contact Rodriguez, he did enlist the assistance of the Union's attorney, Eugene G. Liss, who sent a letter, dated May 18, 2015 with supporting documentation, Respondent Exhibit R-13, to Bernard Mercado, General Counsel for the NPS requesting that the District not pursue an AWOL charge because Respondent was injured and was regularly submitting disability forms and that Tenure Charges should not be filed.

While this Arbitrator agrees with the District that it would have been reasonable for Respondent to have contacted Rodriguez regarding her letters just to clarify the record, the fact that he did not, given that the District was well aware that he had been approved for disability benefits, was not a reason to bring Tenure Charges against a

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[4] Ms. Wright also testified that she had never seen this letter before the hearing.

twenty-three (23) year teacher with no prior discipline and to seek his termination. The burden of proof in this matter is on the District and it has not sustained its burden.

Finally, a letter from Christopher Cerf, State District Superintendent, indicated that, in accordance with TEACHNJ Act when Tenure Charges are filed, Respondent was suspended without pay starting on October 21, 2015 for 120 calendar days, JT014. Despite the fact that Respondent did not believe he had to contact Rodriguez as requested in her letters because he was submitting all the paperwork, it would have been reasonable to have done so and, therefore, Respondent shall receive a one (1) month suspension without pay. Further, not only will Respondent be reinstated to his employment at NPS at a school, preferably Fast Track, where his expertise as a special education educator can be utilized to the fullest for the benefit of the students, but Respondent will also receive three (3) months back pay and benefits.

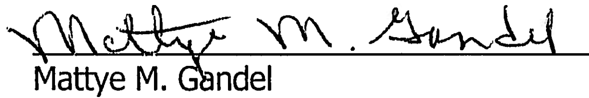
In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that the Tenure Charges shall be dismissed.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

A W A R D

1. Tenure Charges are dismissed and reduced to a one (1) month suspension with three (3) months back pay, benefits and emoluments.

2. Respondent shall be reinstated to a school, preferably Fast Track, where his expertise as a special education educator can be utilized.

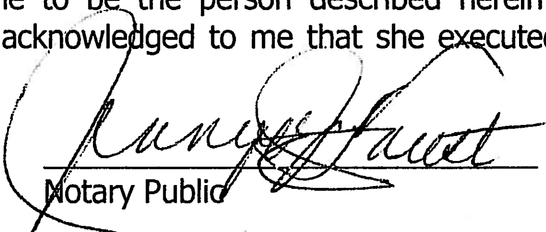


Mattye M. Gandel

Dated: January 28, 2016

State of New Jersey)
:SS
County of Essex)

On the 28th day of January 2016 before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.



Notary Public