

IN THE MATTER OF THE TENURE :
HEARING OF FRANCES R. METALLO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
UNION CITY, HUDSON COUNTY. :

SYNOPSIS

The Board certified tenure charges of incapacity, excessive absenteeism, unbecoming conduct and other just cause against respondent teacher of mathematics. The Board filed a motion for summary decision pertinent to Count 1 of the tenure charges, incapacity because of chronic and excessive absenteeism.

The ALJ found that, based on the number of absences and the extended period of time of the absences, respondent's absences constituted excessive absenteeism and warranted dismissal. The ALJ concluded that respondent's absences constituted unbecoming conduct, neglect of duty, and/or other cause for the imposition of the penalty of termination. The ALJ ordered that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges be granted and respondent be terminated.

The Commissioner noted that Count 3 of the tenure charges also alleges chronic and excessive absenteeism and that the ALJ's analysis is applicable to both charges. The Commissioner agreed with the findings and conclusions of the ALJ that the charges of chronic and excessive absenteeism set forth in Counts 1 and 3 were sustained and that such charges warranted respondent's removal from her tenured teaching position. The Commissioner concurred that chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. The Commissioner ordered respondent dismissed from her teaching position. Since the Commissioner found termination to be the appropriate penalty, it is unnecessary to require further litigation. The Commissioner dismissed Count 2 *without prejudice* in order to preserve the Board's right to move forward in the event that the determination on the adjudicated charges is reversed on appeal because the matter is being transmitted to the State Board of Examiners for its consideration. The Clerk of OAL was requested to return the file.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

May 12, 2003

IN THE MATTER OF THE TENURE :
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SCHOOL DISTRICT OF THE CITY OF : DECISION
UNION CITY, HUDSON COUNTY. :

This matter is before the Commissioner by virtue of a request by the Board for interlocutory review of the Administrative Law Judge's (ALJ) Order Granting the Board's Motion for Partial Summary Decision regarding Count 1 in the within tenure matter.¹ By letter of April 10, 2003, the Director of the Bureau of Controversies and Disputes notified the parties that the Commissioner had determined to grant the Board's request for interlocutory review. Because such review has the potential for fully disposing of this case, the parties were advised that the ALJ's Order Granting Motion for Partial Summary Decision would be considered as a Partial Summary Decision under *N.J.A.C.* 1:1-12.5(e) and the parties were, therefore, requested to submit exceptions to the ALJ's Order by April 23, 2003, with replies due by April 30, 2003.²

On April 28, 2003, counsel for respondent called the Bureau of Controversies and Disputes and requested an extension until the end of that business day for the filing of exceptions. Counsel was advised that, since exceptions were due on April 23 and the request was, therefore, being made *nunc pro tunc*, he would need to obtain the Board's consent, put his request in writing noting the Board's consent and file such request with his exceptions by the end of that business day.

¹ Respondent filed a letter opposing the Board's request for interlocutory review.

² In order to provide for the filing and consideration of the requested exceptions, the Commissioner obtained a 20-day extension for his review from the Director of the Office of Administrative Law.

Respondent's exceptions were received via facsimile at 3:02 p.m. on April 28 with an explanation that a call to his adversary to obtain the Board's consent for the requested extension had not been returned because petitioner's counsel was not in the office. In response, counsel for the Board submitted a letter, dated April 28, 2003 and received via facsimile on April 29, 2003, stating that:

Mr. Ortelere represents that he contacted this firm seeking an extension of time within which to file exceptions and received no response from me. I have voice mail and a full-time secretary. I received no message from Mr. Ortelere.

The Commissioner notes that the exceptions submitted by respondent are comprised of a one-page, three-paragraph letter reiterating arguments previously expressed before the ALJ, and the September 18, 2002 affidavit of Nicholas A. Marchese, M.D., which is already a part of the record. Given that respondent's arguments and Dr. Marchese's affidavit are contained in the record transmitted to the Commissioner by the Office of Administrative Law (OAL), it is unnecessary to resolve any disputes concerning consent and timeliness.

Thereafter, on April 30, 2003, respondent initiated a conference call and asked that the Commissioner review the ALJ's Orders of August 16, 2002 and October 11, 2002, denying respondent's request to place this matter on the inactive list.³ The parties were informed that respondent's request for review of the ALJ's determinations denying respondent's requests to place the matter on the inactive list would be addressed within the context of this decision.

Initially, the Commissioner observes that, although the ALJ states that the tenure charges certified against respondent consist of two counts, in actuality, the Board certified three counts in its tenure charges. (ALJ's Order at 1 and Petitioner's Certified Tenure Charges at 1-8) Count 1 alleges that respondent is guilty of incapacity because of chronic and excessive absenteeism, which, although predominately due to legitimate medical reasons, adversely affects

³ Respondent did not request interlocutory review of these Orders at the time of issuance.

the students in the District. (Petitioner's Certified Tenure Charges at 1-6) Count 2 alleges that respondent is guilty of unbecoming conduct because she encouraged her students to cheat on a national mathematics examination administered in 1996. (*Id.* at 6-7) Count 3 alleges that respondent is guilty of other just cause for dismissal because her chronic and excessive absenteeism threatens the integrity of the educational process by disrupting the continuity of the instructional process. (*Id.* at 8) However, in that Counts 1 and 3 are substantively the same charge, that of chronic and excessive absenteeism, the Commissioner finds that the analysis set forth in the Initial Decision is applicable to both charges.

Upon a careful and independent review of the record of this matter and the Order Granting Motion for Partial Summary Decision of the OAL, the Commissioner agrees with the well-reasoned findings and conclusions of the ALJ that the charges of chronic and excessive absenteeism certified by the Board on March 29, 2001, have been sustained and that such charges warrant respondent's removal from her tenured teaching position. In so determining, the Commissioner emphasizes that respondent does not dispute that she was absent approximately 650 school days during a six-year period. (Initial Decision at 4) As set forth by the ALJ, chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. *Trenton, supra; Pellicchio, supra; Kapowitz, supra and Rucker, supra.* (*Id.* at 13-14)

In light of the Commissioner's conclusion that termination is the appropriate penalty with respect to these charges, it is unnecessary to require further litigation of the remaining charge certified by the Board at this time. The Commissioner, however, dismisses Count 2 *without prejudice* in order to preserve the Board's right to move forward in the event that the determination on the adjudicated charges is reversed on appeal. This is of particular import since this matter will be transmitted to the State Board of Examiners for its consideration

under *N.J.A.C.* 6:11-3.6(a)(1) and, as such, that body's review will be limited solely to the adjudicated charges.

Accordingly, for the reasons expressed by the ALJ, the Commissioner adopts the recommendation of the OAL and directs that respondent be dismissed from her teaching position with the Union City School District. The remaining charge, Count 2, is hereby dismissed, without prejudice. Given the Commissioner's determination in this matter, respondent's request for review of the denial of her request for this matter to be placed on the inactive list is moot. Since no further proceedings at the OAL are necessary, therefore, the Clerk of the OAL is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

Moreover, the Commissioner further directs that this matter be forwarded to the State Board of Examiners in accordance with the above-referenced regulatory provision for any action it deems appropriate.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: May 12, 2003

Date of Mailing: May 13, 2003

⁴ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*