

#477-12

STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION

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In The Matter of the **TENURE** Hearing

of the

**SCHOOL DISTRICT OF THE  
CITY OF JERSEY CITY, HUDSON COUNTY**  
"Complainant"

-against-

**ARBITRATOR'S**

**OPINION**

**AND**

**AWARD**

**JASON LEVINE**

"Respondent"

**PURSUANT TO P.L. 2012, C. 26  
AGENCY DOCKET NUMBER: 286-9/12**

-----X  
**BEFORE: RANDI E. LOWITT**

**APPEARANCES:  
FOR THE DISTRICT:  
LESTER E. TAYLOR, III, ESQ.  
Florio Perrucci Steinhardt & Fader, LLC**

**FOR THE RESPONDENT:  
PHILIP FEINTUCH, ESQ.  
Feintuch, Porwich & Feintuch**

## **BACKGROUND**

The School District of the City of Jersey City, Hudson County, New Jersey (District) preferred charges against Respondent, Jason Levine (Respondent), a tenured teacher previously assigned within the District, which charges were filed with the Commissioner of Education of the State of New Jersey, pursuant to N.J.A.C. 6A:3-5.1(b)(6). The undersigned was designated to be the Arbitrator for this matter, by the State of New Jersey Department of Education, by letter dated October 22, 2012. (Joint Exhibit 1).

A hearing was held at the Offices of the School District of the City of Jersey City, Hudson County, on November 26, 2012. Prior to that hearing, there were numerous teleconferences between the arbitrator and counsel for the parties. A second hearing date, November 29, 2012, which had been scheduled, was cancelled. The record was closed immediately subsequent to the hearing, on November 26, 2012. No stenographic record of either the hearing or the teleconferences was taken. All matters, while not necessarily cited in this Opinion and Award, have been considered.

## **BACKGROUND**

Mr. Jason Levine is a tenured teacher in the City of Jersey City School District, in Hudson County, New Jersey. In or about September 20, 2012, the Jersey City Board of Education determined to certify charges

against Mr. Levine to the Commissioner of Education. In or about September 21, 2012, Mr. Levine was suspended without pay.

Charge Number 1 charges Mr. Levine with "incapacity because of he (sic) has been chronically and excessively absent from his duties as a Special Education Teacher to that extent that there has been an adverse impact on the continuity of the educational process for District students." (District Exhibit #2).

Charge Number 2 charges Mr. Levine with "conduct unbecoming a board employee because of his chronic and excessive absenteeism during his tenure as an employee for the Board." (District Exhibit #2).

Charge Number 3 charges Mr. Levine with "neglect of duty because of his chronic and excessive absenteeism during his tenure as an employee of the Board." (District Exhibit #2).

Mr. Levine had previously been brought up on charges for his excessive absenteeism, in or around November 2011, prior to the inception of this arbitration process under the newly revised statute. The absences in question cover much of the same period of time as those covered in the current charges, along with subsequent absences. As to those charges, a settlement was reached by the parties. In or around June 4, 2012, an administrative law judge (ALJ) concluded that the settlement agreement reached by the parties "meets the requirement of N.J.A.C. 6A:3-5.6 and that approval of this settlement is in the public

interest.” (District Exhibit #17). The ALJ found that “Respondent has produced evidence that his is in a substance abuse program with the COPE Center, Inc. and that his condition is currently in remission. Respondent agrees to continue treatment in this program and maintain his sobriety.” (Id.). There was no agreement between the parties, at that time, to exclude the past absences from any future issues that might arise.

Susan Harbace has been the principal at PS 29, in the District, since September 2002. She has worked for the District since September 1974. Principal Harbace was Mr. Levine’s superior when he was a special education teacher at the school. Beginning in the school year 2009-2010, Principal Harbace noted that Mr. Levine began having attendance problems. According to school records, Mr. Levine was absent 72 days during the 2009-2010 school year. (District Exhibit #4). Principal Harbace did send notification to Mr. Levine regarding his absences, asking him to improve his attendance. (District Exhibit #7). Additionally, in her Summative Evaluation of Mr. Levine, dated May 2010 and signed in June 2010, Ms. Harbace noted that Mr. Levine needed improvement, highlighting that attendance was one area in which Mr. Levine needed to improve. (District Exhibit #8). However, according to school records, Mr. Levine was absent for 63 days during the 2010-2011 school year. (District Exhibit #5). Again, Ms. Harbace notified Mr. Levine of this issue. (District Exhibit #s 9-10). Additionally, Mr. Levine was denied his employment

increment for the school year 2011-2012 because of his lack of attendance improvement.

Ms. Harbace referred Mr. Levine to the Employee Assistance Program (EAP), having concerns that he was an alcoholic. Prior to that referral, at no time did Mr. Levine ever approach Ms. Harbace about need for any leaves of absence, about any illnesses or disabilities he might have, or about any need to go to EAP, proactively.

From April 4, 2011 through the end of the school year, Mr. Levine was out of school. At no time did Ms. Harbace receive any information from EAP or any other certified treatment program regarding Mr. Levine.

Ms. Harbace did acknowledge that Mr. Levine had sufficient days in his "bank" to take the days off and receive pay. However, she stressed that the fact of having sufficient days to receive payment does not mean that Mr. Levine should not have been in school and it does not mean that Mr. Levine should have been absent all those days.

Dr. Hermoine McNeil is the Associate Superintendent of Human Resources for the District. She filed the instant tenure charges, subsequent to speaking with the principal, meeting with the superintendent, reviewing the records and meeting with the school board.

Dr. McNeil explained that each teacher was entitled to 13 personal illness days per year. Teachers can accumulate days into a "bank," but for long term absences they must apply for a leave and, for absences

over 5 days, they must submit appropriate documents. Ms. McNeil is not aware of Mr. Levine ever having requested any type of leave of absence for any of his absences. When asked if an employee could be subject to disciplinary action even if that employee had "doctors notes," Ms. McNeil said that the employee could be. She explained that, as students are expected to be at school, similarly teachers are expected to come to work each day.

During the 2011-2012 school year, Ms. McNeil noted that Mr. Levine was suspended without pay, pursuant to the prior tenure charges. Upon his return, Mr. Levine was then absent, again, for approximately 39 days. Ms. McNeil recalled Mr. Levine allegedly going to EAP for assistance, but did not recall receiving any formal requests for Mr. Levine to be excused from work and did not recall ever receiving any information regarding successful completion of any program.

Mr. Levine testified on his own behalf. He explained that he had worked at the District, at PS 29 for fifteen (15) years. Subsequent to his return from suspension, after the first set of charges, Mr. Levine was assigned to the Infinity School.

Recalling school year 2009-2010, Mr. Levine said that he had deep vein thrombosis, which caused his many absences. He was paid because he had sufficient days in his bank. He did not have any medical documentation with him that would have verified his contention.

As to school year 2010-2011, Mr. Levine contended that he was out from April 4, 2011 through June 27, 2011 because Principal Harbace told him that he had alcohol on his breath, sent him to EAP and refused to permit him to return until he was authorized to do so by a "program." When asked if he did have an alcohol problem, Mr. Levine said he was drinking a little because he had problems. He acknowledged that he did not send any information from any program to the District. He did not know whether or if any program sent information to the District.

Mr. Levine insisted that Ms. Harbace would not permit him to return to work, although he acknowledged that he never went to seek advice from his Union regarding this issue. Additionally, Mr. Levine insisted that he did not receive the documents Principal Harbace claimed to have given him regarding his absences. In both instances, Mr. Levine maintained that Ms. Harbace was lying.

As to why he was absent, again, the following school year, Mr. Levine explained that he was not permitted to return to his old school and he was told to report to the Board of Education, although he alleges that the Union told him to stay home until he heard from someone from the Union. When asked why he was absent from May through June 2012, Mr. Levine alleged to have had a cardiac issue. Mr. Levine did not have any medical documentation to validate his claim.

Mr. Levine was asked about any assistance he might have received from EAP or other programs. Mr. Levine explained that he was sent to Florida for inpatient treatment, but that he left of his own accord after one week. Mr. Levine stated that he was not under the influence of any prescription drugs during the course of the hearing. Mr. Levine acknowledged that he had not consumed any alcoholic beverages the day of the hearing, but that he had a drink or two the day before the hearing, and, also, possibly the day before that and at other times, stating that he was under stress. Mr. Levine maintained that he had not been drunk within the last 30 days, but was unsure as to whether he might have been drunk within the last 60 days. Mr. Levine stated that he did not have any certificates of successful completion of any substance abuse program, and recalled that the last time he might have gone for any treatment was July 2012. And, Mr. Levine stated that he did not have a substance abuse problem, but went to EAP because Ms. Harbace told him to go.

Finally, Mr. Levine acknowledged that the settlement of his prior case did not stipulate that the absences in those charges would not be pursued in any subsequent proceeding.



## **POSITIONS OF THE PARTIES**

### **The District:**

The District argues that it Mr. Levine had not conformed to the requirements of his prior settlement. By his own admission, Mr. Levine has not successfully completed any program and he continued to be excessively absent. The District asserts Mr. Levine is culpable of all the conduct charged. Therefore, the District asserts that Mr. Levine is not entitled to have his job back.

### **The Union:**

The Union maintains that Mr. Levine had medical issues that caused much of his absenteeism. The Union contends that Mr. Levine had sufficient days in his bank to take the days off. The Union requests that Mr. Levine be reinstated to the District.

## **OPINION**

Both the Employer and the Union argued their respective positions vigorously. Most of the facts are not in dispute. Mr. Levine was excessively absent. Mr. Levine was previously suspended for that absenteeism. Mr. Levine did enter into a settlement agreement, in which he agreed to continue treatment and maintain sobriety. It would be difficult to know if Mr. Levine has maintained sobriety, inasmuch as Mr. Levine acknowledged that he continued to drink, the reason for which he

attributes to stress. It is apparent that Mr. Levine did not continue treatment. He said he did not. At the outset, he checked himself out of the Florida treatment facility because he said he did not have a need to be there. He did not engage in any regular outpatient treatment once he returned to New Jersey. He was not able to recall when he last went to a meeting or to any kind of treatment. This lack of acknowledgement of any problem is an indication that, were Mr. Levine to be returned to work, he would continue down the same path that led him to be suspended twice. It is unfortunate that Mr. Levine did not avail himself of the EAP that was available to him.

I do not find credible Mr. Levine's contentions that he had medical problems that caused much of his excessive absenteeism. Mr. Levine had no medical documentation or copies of medical documentation that would have borne that out. Mr. Levine had no copies of any requests for leave that he filed with the District. In fact, Mr. Levine had nothing but his testimony, which was not credible. Conversely, the District had its records, and the testimony of Ms. Harbace and Ms. McNeil, which stand unrebutted.

A teacher has a duty to be in the classroom, ready to teach. Mr. Levine's students were seriously disadvantaged by not having him in the classroom and by having to rely on substitute teachers. Mr. Levine is culpable of Incapacity, since he was not in the classroom, ready to

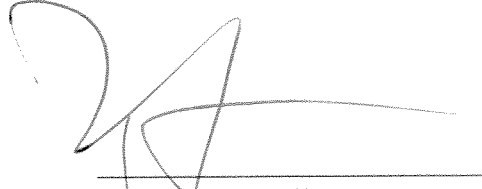
teach, on even a semi-regular basis. Mr. Levine is culpable of Conduct Unbecoming a Board of Education employee because he was not available to teach, in the classroom, on a regular basis. Mr. Levine is culpable of Neglect of Duty because he was not available to teach, in the classroom, on a regular basis.

The question now becomes, even if Mr. Levine is culpable of all the charges preferred against him, is the appropriate penalty termination. Termination is the appropriate penalty. It is clear that, even if Mr. Levine were to be returned to work, he would likely continue his pattern and practice of excessive absenteeism. Mr. Levine has evidenced no growth as a result of his prior suspension or this suspension. To this point, he continues to make excuses and not take responsibility. There is minimal likelihood that he would do things differently if he were returned to the classroom.

In conclusion, I am not persuaded that, if given the chance, Respondent would render competent service. I am persuaded that, for all the reasons discussed in this decision, Mr. Levine has forfeited his right to continue to teach in the Jersey City Public Schools. Therefore, based on the above, I render the following

**AWARD**

1. I find Respondent Jason Levine culpable for all the Charges preferred against him.
2. For the reasons stated above, Respondent, Jason Levine, is to be terminated from his position as a teacher in the Jersey City Public Schools.



Randi E. Lowitt  
Arbitrator

Dated: December 16, 2012

STATE OF NEW JERSEY)

ss:

COUNTY OF MORRIS )

On this 16 day of December 2012 before me came and appeared Randi Elyse Lowitt, Esq., to me known and known to me to be the individual described herein, and who executed the foregoing instrument and she acknowledged to me that she executed the same.



Notary Public

ROSS L. GNESIN  
Notary Public State of New Jersey  
Commission Expires April 4, ~~2015~~