

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 ELIZABETH, UNION COUNTY**

"Petitioner" or "District"

-against-

ARBITRATOR'S

OPINION

AND

AWARD

LESLIE ANN RAMOS

"Respondent"

**PURSUANT TO P.L. 2012, C. 26
AGENCY DOCKET NUMBER: 261-9/14**

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BEFORE: RANDI E. LOWITT

**APPEARANCES:
FOR THE DISTRICT:
JOHN G. GEPPERT, ESQ.
Schwartz Simon Edelstein & Celso, LLC**

**FOR THE RESPONDENT:
RANDI DONNER APRIL, ESQ.
OXFELD COHEN, P.C.**

BACKGROUND

The School District of the City of Elizabeth, Union County, New Jersey (Petitioner or District) preferred charges against Respondent, Leslie Ann Ramos (Respondent), a 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 10, 2014. (Joint Exhibit 1).

Hearings were held at the Offices of the School District's Counsel, Whippany, New Jersey, on November 10, 2014, and November 14, 2014. Written closings were received and the record was closed on December 10, 2014. 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.

Ms. Leslie Ann Ramos was a teacher in the City of Elizabeth School District, in Union County, New Jersey. In or about August 11, 2014, the City of Elizabeth Board of Education determined to certify charges against Ms. Ramos to the Commissioner of Education.

Charge Number 1 charges Ms. Ramos with Chronic Absenteeism, in that she has been absent approximately 490.75 days between July 1, 2007 and June 30, 2014.

Charge Number 2 charges Ms. Ramos with Incapacity, alleging that, by virtue of the absences and the conditions which led to them, Ms. Ramos has been rendered incapable of performing her assigned duties and, therefore, should be immediately terminated from her position

SPECIFICATION OF CHARGES

CHARGE I **(CHRONIC ABSENTEEISM)**

The foregoing background information and the facts alleged therein, are incorporated by reference as if fully set forth herein. Leslie Ann Ramos has displayed chronically poor attendance during the last seven (7) years of her employment with the Elizabeth Public Schools District, and has been absent approximately 490.75 days, which has adversely affected the proper operation of the school, despite repeated warnings, and shows no sign of abating. These acts and omissions, more specifically set forth below, constitute just cause for immediate dismissal due to chronic absenteeism:

Count 1

During the time period from July 1, 2007 through June 30, 2008, Ms. Ramos was absent from her post on some twenty-two and one-half (**22.5**) occasions: 1 family illness; 1 funeral; 2 "other;" 2 personal; and 16.5 sick, not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 2

During the time period from July 1, 2008 through June 30, 2009, Ms. Ramos was absent from her post on some forty-seven (**47**) occasions: 1 family illness; 1 funeral; 18 "other" (leave of absence); 2 personal; and 25

sick, not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 3

During the time period from July 1, 2009 through June 30, 2010, Ms. Ramos was absent from her post on some sixty-seven (**67**) occasions: 1 family illness; 2 personal; 12 sick; and, 52 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 4

During the time period from July 1, 2010 through June 30, 2011, Ms. Ramos was absent from her post on some fifty-eight and one-half (**58.5**) occasions: 1 family illness, 1 funeral; 2 personal; 12 sick; and 42.50 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 5

During the 2011-2012 school year, administrators repeatedly admonished Respondent for her ever-worsening attendance record, referred her to the District's attendance policies, and warned her of the potential adverse consequences of continuing excessive absences, including absence without pay and disciplinary action. By way of example, without limitation:

- On October 20, 2011, Principal Jennifer Campel ("Principal Campel") admonished Respondent, in an attendance memorandum, for her fifth (5th) intermittent absence, and advised Respondent that her "attendance is essential in contributing to the success of our District's Mission" and further, that the "absence of any Elizabeth Public School employee adversely affects the sequence of instruction, as well as disrupts the daily work schedules of all District operations," and referred Respondent to a copy of District Policy 4151/4251, the Staff Attendance Improvement Plan.
- On November 7, 2011, Principal Campel, in an attendance memorandum, cited Ms. Ramos for her ninth (9th) intermittent absence, again admonished Respondent that her attendance is essential and that her absence adversely affects instruction and disrupts District operations, and referred Respondent to a copy of District Policy 4151/4251.
- On November 29, 2011, Principal Campel, in an attendance memorandum, cited Ms. Ramos for her twelfth (12th) intermittent absence, similarly admonished Respondent and again referred her to the District's Attendance Policy, and further warned Respondent that as of November 30, 2011, she would be "on deduction" if she took further sick days.

- On December 6, 2011 Principal Campel, following a conference with Respondent after her seventeenth (17th) intermittent absence, authored a Staff Attendance Improvement Plan which recommended to the Superintendent of Schools a review of Respondent's current and past absence record, noting Respondent "had the same type of attendance pattern as last year," and further noting Principal Campel had spoken to Respondent "numerous times" about her attendance record.
- On January 2, 2012, Principal Sulisnet Jimenez ("Principal Jimenez"), in an attendance memorandum, cited Ms. Ramos for absences totaling some nine (9) sick days, admonished Respondent that her attendance is essential to the success of the District's mission, and referred Respondent to the District Attendance Policy.
- On January 18, 2012, Principal Campel, following a conference with Respondent after her twenty-second and one-half (22-½) intermittent absence, issued a "Second Notice" Staff Attendance Improvement Plan, again recommending a review of Respondent's current and past absence record, and further recommending an immediate withholding of Respondent's increment.

- On February 7, 2012, Principal Campel, in an attendance memorandum, cited Ms. Ramos for her twenty-sixth (26th) intermittent absence, again admonished Respondent that her attendance is essential and that her absences adversely affect instruction and disrupt District operations, and again referred Respondent to District Policy 4151/4251.

Despite having received the foregoing numerous and repeated admonitions and warnings, during the time period from July 1, 2011 through June 30, 2012, Ms. Ramos was absent from her post on some ninety-nine and one-fourth (99.25) occasions: 1 family illness; 2 personal; 12 sick; and 84.25 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 6

Despite Respondent's prior excessive absences having resulted in her increment being withheld by the Board for the 2012-2013 school year, during that year Respondent continued to amass an excessive number of absences, notwithstanding the warnings and admonitions of the administration. By way of example without limitation:

- On February 8, 2013, in an attendance memorandum, Principal Jimenez cited Ms. Ramos for absences totaling thirteen (13) sick days, admonished Respondent that her

attendance is essential, and again referred Respondent to the District Attendance Policy.

- On June 14, 2013, in an Annual Evaluation, Principal Jimenez, rated Respondent unsatisfactory in all evaluated categories of performance, and unsatisfactory overall; and further encouraged Respondent to improve her attendance, repeatedly noting she had been absent 86.5 days as of June 14, 2013, and repeatedly emphasizing, "SHE HAS NOT INSTRUCTED AT LEAST 60% OF THE REQUIRED INSTRUCTIONAL TIME" (capitalization in original), as a result of which, Principal Sulisnet noted, Respondent was not in attendance enough for her performance strengths (if any) to be determined.

Notwithstanding the foregoing, during the time period from July 1, 2012 through June 30, 2013, Ms. Ramos was absent from her post on some ninety-four and one-half (**94.5**) occasions: 1 family illness; 2 personal; 12 sick; 1 sick additional; 1 non-accumulated; 1 personal additional; and, 76.50 "other" (sick no pay, leave of absence and funeral-family), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

Count 7

Notwithstanding the foregoing, during the time period from July 1, 2013 through June 30, 2014, Ms. Ramos was absent from her post on some

one hundred and two (**102**) occasions: 1 family illness; 1 funeral; 2 personal; 12 sick; 2 sick additional; 2 personal additional; and 82 "other" (sick no pay and leave of absence), not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation.

The foregoing acts and omissions by Leslie Ann Ramos, individually and cumulatively, constitute just cause based on chronic absenteeism warranting dismissal. In total, over the last seven (7) school years, Ms. Ramos has been absent some **490.75 days**, not counting any leave taken pursuant to military service, jury duty, on-the-job injury, or vacation. Ms. Ramos' ongoing failure to fulfill her assigned duties on those days has adversely affected the operation of the District and shows no signs of abating. The Board, a public employer charged with providing a thorough and efficient education without discontinuity and disruption of services, should no longer have to be burdened by such misfeasance. Immediate dismissal is fully warranted.

CHARGE II
(INCAPACITY)

The foregoing background information, Charge, specific Counts and the facts alleged therein, are incorporated by reference as if fully set forth herein. The acts and omissions set forth therein, in addition to chronic absenteeism, constitute incapacity. By virtue of the condition or conditions causing and/or associated with Respondent's chronic and excessive absences, she has been effectively rendered incapable of

performing her assigned duties, therefore requiring immediate termination from her tenured position. There is simply no meaningful accommodation to be made for an employee who persistently is unable to report to work over a protracted period of time. Immediate dismissal is the only meaningful remedy and is fully warranted here.

POSITIONS OF THE PARTIES

The District:

The District argues that "...(t)his case is a clear one. ...Notwithstanding the seeming validity of some of her absences or the fact Respondent presented for the most part as a satisfactory teacher, Respondent failed to perform her primary function, to be at work fulfilling her responsibilities as a teacher. Despite repeated verbal and written warnings, spanning many years, an increment withholding, and based upon legal precedent, Respondent was chronically absent. ...It is beyond dispute that excessive absenteeism may constitute either incapacity, unbecoming conduct, or just cause sufficient to warrant dismissal, even when legitimate medical reasons caused some of the absences, and accordingly, Respondent should be dismissed from her tenured position." (District Post Hearing Brief, pp. 16, 25).

The District cited New Jersey statutes regarding the burden of proof in a tenured teacher case and the demand for dismissal. The District reviewed the case law regarding dismissal, absenteeism, excessive absenteeism, and focused on *White*, 92 N.J.A.R.2nd (EDU)(191), specifically on the need to demonstrate that it had "(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.” (Id., p. 18, quoting *White*). By way of comparison, the District also examined the 2011 case of *True* and the 2012 case of *Dugan*, both of which involved chronic absences of a teacher.

Turning to the instant case, the District avers that “(t)he District has satisfied its burden. The Board has considered the circumstances of Respondent’s absences. ...The Board has given Respondent numerous opportunities to improve her attendance over the course of her employment. Despite the same, Respondent’s attendance has not improved. ...In fact, the record vividly illustrates that Respondent’s attendance record has worsened. ...Respondent has been given several warnings about her lack of attendance, which resulted in the denial of a salary increment for the 2012-2013 school year. Notwithstanding these warnings, Respondent continued to exhibit the same behavior. Therefore, it is reasonable for the Board to conclude that this conduct is likely to continue in the future.” (Id., pp. 21-22).

As to the question of negative impact, the District acknowledged that, although it did not point to specific instances regarding impact on students, it did rely on the testimony of Principal Sulisnet Jimenez and the documentation of Principal Jennifer Campel, as well as the emails received. It also relied on the testimony of Ms. Ramos, herself, in which

she acknowledged that her absences would have had a negative impact on her students. Finally, the District notes that Ms. Ramos was warned about her behavior; Ms. Ramos acknowledged as much. "Respondent does not dispute the accuracy of the Board's contention that she was absent 490.75 days. Moreover, Respondent admits that she was aware of the detrimental effect her absence had on her students educational progress. In addition, Respondent admits to receiving multiple warnings meetings with supervisors, and having her increment withheld. Notwithstanding these warnings, the record is clear that Respondent continued to exhibit the same behavior. For these reasons, the record in this matter clearly demonstrates that the Board has met its burden of establishing by a preponderance of the credible evidence that Respondent is guilty of chronic absenteeism and/or other just cause, including, but not limited to incapacity, warranting respondent's (sic) dismissal from her tenured position of teacher in the Elizabeth School District." (Id., p. 24).

Therefore, the District demands that Ms. Ramos be dismissed.

The Respondent:

The Respondent highlights that "(t)his matter is unusual in that there is no dispute regarding the days that Ms. Ramos has been absent over the course of her tenure with the Board. There is no dispute as to the reasons why she has been absent. The Board has not argued that Ms. Ramos

failed to provide proper documentation for her sick days, funeral days or leaves of absence. The Board has not disputed the reasons for the leaves of absences taken by Ms. Ramos. Ms. Ramos admitted that she received memoranda regarding her absences. Sadly, Ms. Ramos went through an extraordinarily (sic) run of bad health due to two extremely dangerous pregnancies and gall bladder surgery.” (Respondent Brief, p. 7).

Respondent focuses on the burden placed on a District to terminate a teacher in absenteeism cases. It avers that, while it is true that Ms. Ramos may have been absent a great deal, and while those absences may be viewed under the microscope of In re the Tenure Hearing of White, 92 N.J.A.R. 2d (EDU) 76, it is still incumbent upon the district and the Arbitrator to examine the circumstances that led to the absences. Moreover, Respondent notes that Ms. Ramos always complied with District rules and policies regarding her absences, requests for leaves of absence, the furnishing of doctor’s notes and whatever else might have been necessary to gain permission for her absences. And, it queries how the District could argue any adverse impact that Ms. Ramos’s absences had on the educational system, in light of the fact that there was no testimony regarding adverse impact. In fact, it points out that the only testimony of the only witness, Ms. Sulisnet Jimenez, was based on one school year, was inconsistent, and proved nothing regarding adverse impact. And, the emails that were admitted, from another principal, are

inconclusive and do not prove or even imply that Ms. Ramos was made aware of the complaints contained within them. "Thus, for the one school year that The Board provided testimony, there was not a shred of evidence that the educational process was hindered. Surely, if the Board had any evidence that Ms. Ramos' absence led to any educational issues it would have so offered it. By failing to do so, it must be accepted that there is no such evidence." (Id., p. 9, citations omitted).

As to notice of her obligations and responsibilities, Ms. Ramos acknowledged receipt of the Board's policies, but contended that they were provided to her at times when she was having serious health issues. Additionally, although the District did withhold her increment one year, it did not provide documentation or explanation to her as to why that was done.

"...Ms. Ramos' issue of absenteeism is in the past. She testified that she is health (sic) and eager to return to work. The particular medical reasons that caused her absenteeism no longer exist. Her teaching ability was never an issue.... The Board in this matter has the burden of proof and must prove by a preponderance of the credible evidence that the allegations are not only true but the penalty of dismissal is just. ...While there may be agreement regarding the sheer number of days that Ms. Ramos was absent, the penalty of dismissal is not fair or just in this case." (Id., pp. 9-10, citations omitted).

Therefore, Respondent pleads for dismissal of the charges or, in the alternative, a penalty that does not include discharge, but that is deemed necessary by the Arbitrator.

OPINION

The facts are not in dispute, based on the documentary evidence. Ms. Ramos's attendance calendars show the absences alleged, and she acknowledged as much. Rather, Ms. Ramos asks that her acknowledgement of the issue be accepted hand-in-hand with her acknowledgement of her culpability, and then asks that she be given one more chance to prove that she will be present and able to teach. That opportunity will be given.

Through review of the testimony and the joint exhibits, it is clear that Ms. Ramos was, indeed, absent for all the days that the District noted within its charges. (Joint Exhibit #1). It is clear that Ms. Ramos received numerous attendance memoranda from her principals. (Joint Exhibit #s 2-6, 8). Additionally, Ms. Ramos did have an increment withheld for the 2012-2013 school year; however, it is not clear that Ms. Ramos was ever made aware of the exact reason for the withholding (although it should have been something about which she could draw a logical conclusion). (Joint Exhibit #7; District Exhibit #7).

The question now changes. Even if Ms. Ramos is culpable of charges preferred against her, is the appropriate penalty termination. Termination is not the appropriate penalty, in this instance. While it is true that a District has the right to expect its employees to be available to work each and every day, and while it is true that even legitimate illnesses and absences may result in termination, there may be circumstances that mitigate the result of termination. One example of that circumstance can be found the commentary by Principal Campel in her formal observation of Ms. Ramos in January 2012. Ms. Campel states that "Mrs. Ramos has the ability to plan and write lesson plans. ...She can take them (her students) to great places." (Joint Exhibit #10). In a February 2013 observation, Vice Principal Joan Tomek said that Ms. Ramos's "...kindergarten plans and methods of instruction are carefully implemented to ensure student progress and growth." (Joint Exhibit #11). And, in an April 2014 observation, Dora Kunitz told Ms. Ramos that she "...could be a master teacher if (her) attendance were to improve." (Joint Exhibit #12). Notwithstanding all her absences, it is clear that when Ms. Ramos was in the classroom, she had the ability to be an effective teacher, one from whom a kindergartener would benefit. It is important for a district to have a teacher on whom it may rely. Ms. Ramos has not been present sufficiently to be that teacher, but she appears to have the qualifications and talent to be that teacher, if she, indeed, corrects her

attendance issue. I found Ms. Ramos to be a credible witness. She testified honestly and sincerely, not denying or making excuses for her absences, but, rather, acknowledging her past health issues and maintaining that they are behind her. She asserted that she would be more than capable of working, as required, when required, and would relish the opportunity to do so.

If Ms. Ramos shows the District that she is that teacher, that she can be present to teach her students, then it would be a positive event for the District and a positive event for Ms. Ramos. If, however, it becomes clear that Ms. Ramos is not capable of being at work, ready to work, as she should be, then she will have wasted this opportunity and the District would certainly be able to seek to dismiss her.

In conclusion, I am persuaded that, if given the chance, Respondent would render competent service. However, I am compelled to remind Ms. Ramos that she is being given this opportunity, in part, because she has the potential to be a wonderful addition to the District, if she teaches in the manner in which she is capable and if she is not absent, except as permitted. Ms. Ramos is cautioned that future instances of excessive absenteeism will be juxtaposed with this opportunity and will likely not result in a similar opportunity being given. In lieu of removal, it will be directed that Ms. Ramos be suspended for the remainder of the 2014-2015 school year, that her increment be withheld

upon her return, in the 2015-2016 school year, and that she not receive any payment for any time lost.

Therefore, based on the above, I render the following

AWARD

1. I find Respondent Leslie Ann Ramos culpable of the charge of Chronic Absenteeism, as preferred against her in Charge I.
2. I do not find Respondent Leslie Ann Ramos culpable of the charge of Incapacity, as preferred against her in Charge II.
3. Ms. Ramos shall remain on suspension for the remainder of the 2014-2015 school year, returning to work in the District at the appropriate time for teachers to return to work for the 2015-2016 school year. There shall be no back pay for any time during which Ms. Ramos was out of work.
4. Ms. Ramos is reminded that she is expected to be at work, ready to work, and that she is entitled to a very specific number of absences within the bounds of the collective bargaining agreement that covers her.



Randi E. Lowitt
Arbitrator

Dated: January 5, 2015

STATE OF NEW JERSEY)

ss:

COUNTY OF MORRIS)

On this 5th day of January 2015 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, 2020

