
In the Matter of the Tenure Hearing of Carson Steltz, School District of the
City of Elizabeth, Union County, Agency Dkt. No. 260-9/14

DECISION

Before
Robert C. Gifford, Esq.
Arbitrator

Appearances:

For the School District:

John G. Geppert, Jr., Esq.
Richard E. Golden, Esq. (Brief only)
Schwartz Simon Edelstein & Celso

For Carson Steltz:

No Appearances

The City of Elizabeth ["Board" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education against Respondent Carson Steltz. The Board charged the Respondent with "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." The Respondent filed an Answer in response to the charges.

On October 17, 2014, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c. 26. Hearing dates were scheduled for November 12 and 18, 2014. On November 12, 2014, the hearing officially commenced. Mr. Geppert was present on behalf of the Petitioner. Attorneys Nicholas Poberezhsky and Timothy Smith from the law offices of Caruso, Smith, and Picini were present on behalf of the Respondent. Although the hearing officially commenced, the parties held settlement discussions in lieu of proceeding on the record. The parties requested that the first day of hearing be adjourned in order to permit them to continue with their settlement discussions.

On November 17, 2014, the parties' attorneys informed me that a settlement agreement had been drafted, but remained unsigned. They requested, and I granted, a postponement of the November 18th hearing. On

November 18, 2014, I conducted a telephone conference with Counsel to confirm that the parties were still attempting to reach a settlement. On November 25, 2014, Mr. Geppert informed me that the settlement agreement remained unsigned. Mr. Poberezhsky did not object to scheduling a hearing date in December in the event that the parties were unable to execute a settlement agreement.

On December 1, 2014, I inquired into the status of the parties' settlement discussions. On December 2, 2014, I conducted a telephone conference with Mr. Geppert and Mr. Poberezhsky who agreed to schedule the hearing for Wednesday, December 17, 2014, 10:00 a.m. at Mr. Geppert's office in Whippany. On December 2, 2014, with the consent of the parties' attorneys, I requested an extension of time due to the fact that the parties had yet to execute a settlement agreement. Director Duncan granted my request later that day.

On December 4, 2014, Mr. Geppert wrote the following e-mail to me, a copy of which was sent to Mr. Poberezhsky and Mr. Smith:

In the event Mr. Steltz does not attend the trial on December 17, we may need to proceed simply as an ex parte hearing by the District.

I requested Mr. Poberezhsky to respond to Mr. Geppert's e-mail.

On December 9, 2014, Mr. Poberezhsky informed me of the following: (1) he has been unable to make contact with the Respondent; (2) he does not know whether the Respondent is aware that the hearing has been rescheduled for December 17th; and (3) his office is in the process of withdrawing its representation of the Respondent. That day, I provided an update on this matter to Director Duncan. The letter expressly indicated that the hearing remained scheduled for Wednesday, December 17, 2014, 10:00 a.m. at the law offices of Schwartz, Simon, Edelstein and Celso located at 100 South Jefferson Road, Suite 200, in Whippany, New Jersey. A copy of the letter was sent to the parties attorneys. In addition, a copy was sent to Mr. Steltz's last known address via first-class and certified mail. The U.S. Post Office attempted to deliver the certified mail on December 12, 17, and 27, 2014, but an authorized recipient was not available to accept service. The post office left a notice at the address. The Post Office returned the certified letter to me as "unclaimed". To date, the letter that I sent to Mr. Steltz via first-class mail has not been returned to me as undeliverable.

On December 11, 2014, Mr. Poberezhsky wrote the following letter to me:

Please accept the instant correspondence as a request to withdraw as counsel of record, representing Respondent Carson Steltz, in the above-captioned matter. This request is made on the basis of Mr. Steltz's lack of communication and cooperation with our office. Despite our best efforts, we have not been able to reach him since we

appeared for the hearing on November 12, 2014. His lack of cooperation has simply made it impossible for us to effectively represent him in this proceeding.

For the record, I advised Mr. Steltz, through notice issued to him by certified mail, that the hearing was rescheduled for December 17, 2014, at 10:00 a.m. at the law office of Schwartz, Simon, Edelstein & Celso, LLP. I notified him that if he fails to appear at the hearing, Petitioner intends, and is entitled to, conduct the hearing *ex parte*. I also advised him of the potential ramifications in the event that the tenure charges are sustained.

Please provide our office with a response to this request at your earliest convenience. Thank you for your time and consideration in this regard.

I granted Mr. Poberezhsky's request based upon the representations he made in his letter.

The hearing continued on December 17, 2014. A stenographic recording of the proceedings was taken. The Petitioner appeared with Counsel. The Respondent did not appear.

Tenure hearings are subject to the American Arbitration Association's Labor Arbitration Rules. Rule 26 provides:

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party

to submit such evidence as may be required for the making of an award.

During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the record. Sworn testimony was received from Bartolomeo Candelino – Principal at Joseph Battin School No. 4; Belinda Abruzzese – Principal at Madison Monroe School No. 16; and Arlene Frances Campbell – Principal at Ronald Reagan Academy School. The Petitioner submitted a post-hearing brief on December 23, 2014. Director Duncan granted an extension of time until February 2, 2015 to issue this Decision.

RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

N.J.S.A. 18A:6-10. Dismissal and reduction in compensation of persons under tenure in public school system

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

BACKGROUND

The Board filed tenure charges against the Respondent. The written charges were sworn to under oath by School Superintendent Olga Hugelmeyer on July 28, 2014:

I, Olga Hugelmeyer, of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:

I am employed by the Elizabeth Board of Education (the "Board") as its Superintendent. The Board maintains administrative offices at 500 North Broad Street, Elizabeth, New Jersey 07028. I am charged with the general oversight of the school district and all employees serving therein. During all times relevant herein, Carson Steltz ("Mr. Steltz" or "Respondent") has been employed by the Board as a teacher. Mr. Steltz is currently tenured pursuant to N.J.S.A. 18A:28-5.

I am fully familiar with all of the facts and circumstances regarding the Sworn Tenure Charges against Mr. Steltz. I have personally reviewed the accompanying Sworn Statement of Evidence. I hereby charge Carson Steltz with *incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary*, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10 et seq., as follows:

BACKGROUND INFORMATION COMMON TO ALL CHARGES

Mr. Steltz was hired by the Board on September 10, 2004 as a teacher. Mr. Steltz subsequently attained tenured in his position.

During the ensuing years, Mr. Steltz has received numerous warnings about his poor attendance and the potential consequences:

On March 19, 2010, George Washington School Principal Belinda Abruzzese recommended that Mr. Steltz's increment and salary adjustment be withheld for the 2010-2011 school year due to poor attendance.

On March 23, 2011, Ronald Reagan Academy School Principal Arlene Campbell wrote to Mr. Steltz informing him that he had exhausted his sick day allotment for the year and any further absence would be subject to payroll deduction.

On February 29, 2012, Battin School Principal Ben Candelino wrote to Mr. Steltz reminding him that he had already been absent for 23 days during that school year and urging Steltz to improve his attendance.

On June 28, 2012, the Board of Education passed a Resolution to withhold Mr. Steltz's increment and salary adjustment for the 2012-2013 school year for reasons of poor attendance.

On October 2, 2012, then Assistant Superintendent, Olga Hugelmeyer, wrote to Mr. Steltz confirming that his increment and salary adjustment would be withheld for the 2012-2013 school year due to poor attendance.

In each year of his employment, through the present date, Mr. Steltz entered contracts of employment with the District by which, among other things, he agreed to "faithfully do and perform (his/her) duties . . . and to observe and enforce the rules prescribed for governance of the schools by the Elizabeth Board of Education."

Elizabeth Board of Education Policy No. 4151/4251, *Attendance Patterns*, expressly states, among other things, "that the regular presence of assigned certified and non-certified personnel is vital to the success of the district's educational program. Consistent absenteeism or tardiness is subject to disciplinary action."

Elizabeth Board of Education Regulation No. 4151/4251, *Staff Attendance Improvement Plan*, expressly states, among other things, "Daily attendance is essential in contributing to the success of our District's Mission Statement. . . . 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."

Elizabeth Board of Education Policy No. 4119.3, *Duties*, expressly states, among other things, "Each employee shall comply with all requirements of the law, and shall perform all duties commonly performed in his/her position." Elizabeth Board of Education Regulation No. 4119.3, *Duties*, expressly states, among other things, "All teachers shall be in their classrooms and prepared for work at the start of the work day."

The job description for Respondent's position, Teacher, expressly states, among other things, "the teacher is responsible for the effective performance" of her assigned duties and responsibilities (emphasis supplied).

CHARGE I
(CHRONIC ABSENTEEISM)

Carson Steltz has displayed chronically poor attendance during the past seven (7) years of his employment and has been absent 560.55 days, which has adversely affected the proper operation of the school. 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, Mr. Steltz was absent from his post on at least 28 days: 1-family illness; 2-personal; 1-funeral and 24-sick, not including vacation days.

Count 2

During the time period from July 1, 2008 through June 30, 2009, Mr. Steltz was absent from his post on at least 11.5 days: 1-personal; and 10.5-sick, not including vacation days.

Count 3

During the time period from July 1, 2009 through June 30, 2010, Mr. Steltz was absent from his post on at least 34.05 days: 1-family illness; 2-personal; 1 funeral, 29.25-sick; 0.5-other and 0.3 tardy, not including vacation days.

Count 4

During the time period from July 1, 2010 through June 30, 2011, Mr. Steltz was absent from his post on at least 33 days: 1-family illness; 2-personal; 1-funeral; 12.25-sick and 16.75-other, not including vacation days.

Count 5

During the time period from July 1, 2011 through June 30, 2012, Mr. Steltz was absent from his post on at least 85 days: 1-family illness; 2-personal; 1-funeral 12-sick; and 69-other, not including vacation days.

Count 6

During the time period from July 1, 2012 through June 30, 2013, Mr. Steltz was absent from his post on at least 186 days: 186-other, not including vacation days.

Count 7

During the time period from July 1, 2013 through June 30, 2014, Mr. Steltz was absent from his post on at least 183 days: 183-other, not including vacation days.

The foregoing acts and omissions by Carson Steltz, individually and cumulatively, constitute chronic absenteeism. Over the last seven (7) years, Mr. Steltz has been absent from his post for a total of 560.55 days; not including any bereavement or vacation days. His ongoing failure to fulfill his assigned duties on these days has adversely affected the operation of the school district, and shows no signs of abating. The Board, as a public employer charged with serving the community 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, constitute incapacity. By virtue of the condition or conditions causing and/or associated with Respondent's absences, he has been effectively rendered incapable of performing his assigned duties, therefore requiring immediate termination from his 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.

On September 18, 2014, the Board determined by a unanimous vote during "that there was probable cause to credit the evidence in support of the charges and that the Sworn Tenure Charges are sufficient, if credited, to warrant dismissal and/or reduction of salary of Carson Steltz." The Board served the information upon the Respondent.

On September 22, 2014, the Board filed with the Commissioner of the Department of Education the written tenure charges and supporting evidence against the Respondent. On October 7, 2014, the Respondent, through his attorney, submitted an Answer to the charges.

On November 5, 2012, the matter was referred to me pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26*. The arbitration proceedings ensued.

The Board established the following facts during the arbitration proceedings.¹

The Respondent is a tenured employee of the Petitioner. The Respondent has been continuously employed by Petitioner since the 2004-2005 school year. His most recent assignment was as a Math teacher at the Joseph Battin School No. 4 during the 2011-2012 school year. The Respondent did not report for duty for the entirety of the 2012-2013 and 2013-2014 school years; and has not reported for duty up through the current date during the 2014-2015 school year.

The Board has established policies and procedures in place that require specific competencies and behaviors of teachers with respect to attendance:

1. Board Policy No. 4119.3, *Duties*, expressly states, among other things, "Each employee shall comply with all requirements of the law, and shall perform all duties commonly performed in his/her position." Elizabeth Board of Education Regulation No. 4119.3, *Duties*, expressly states, among other things, "All teachers shall be in their classrooms and prepared for work at the start of the work day." [Exs. P-16 & 17].
2. Board Policy No. 4151/4251, *Attendance Patterns*, expressly states, among other things, "that the regular presence of assigned certified and non-certified personnel is vital to the success of the district's educational program. Consistent absenteeism or tardiness is subject to disciplinary action." [Ex. P.14].

¹ The Petitioner submitted proposed findings of fact as part of its post-hearing brief. I have adopted the proposed findings as modified herein.

3. Board Regulation No. 4151/4251, *Staff Attendance Improvement Plan*, expressly states, among other things, "Daily attendance is essential in contributing to the success of our District's Mission Statement. . . . 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." [Ex. P-15].

The collective bargaining agreement between the Board and the Elizabeth Education Association, the agreement that governs the relationship between Respondent and the Board, provides, in pertinent part, that the absence of any employee adversely affects the sequence of instruction, as well as disrupts the daily work schedule of all District operations. [Ex. P-19].

Each year the Board and Respondent entered into an Employment Contract, which was in effect from September 1st through June 30th for each school year. In each employment contract, Respondent agreed to "faithfully do and perform (his/her) duties...and to observe and enforce the rules prescribed for governance of the schools by the Elizabeth Board of Education." [Ex. P-21].

The Respondent has been absent from his teaching duties for 560.55 days since the 2007-2008 school year:

1. From July 1, 2007 through June 30, 2008, the Respondent was absent from his post for 28 days: 1-family illness; 2-

personal; 1-funeral and 24-sick, not including vacation days. [Ex. P-1].

2. From July 1, 2008 through June 30, 2009, the Respondent was absent for 11.5 days: 1-personal; and 10.5-sick, not including vacation days. [Ex. P- 2].
3. From July 1, 2009 through June 30, 2010, the Respondent was absent 34.05 days: 1-family illness; 2-personal; 1 funeral, 29.25-sick; 0.5-other and 0.3 tardy, not including vacation days. [Ex. P-3].
4. During the time period from July 1, 2010 through June 30, 2011, the Respondent was absent 33 days: 1-family illness; 2-personal; 1-funeral; 12.25-sick and 16.75-other, not including vacation days. [Ex. P-4].
5. During the time period from July 1, 2011 through June 30, 2012, the Respondent was absent 85 days: 1-family illness; 2-personal; 1-funeral 12-sick; and 69-other, not including vacation days. [Ex. P-5].
6. During the time period from July 1, 2012 through June 30, 2013, the Respondent was absent 186 days: 186-other, not including vacation days. [Ex. P-6].
7. During the time period from July 1, 2013 through June 30, 2014 the Respondent was absent 183 days: 183-other, not including vacation days. [Ex. P-7].

The Board progressively disciplined the Respondent as a result of his absences. The Respondent received multiple written warnings regarding his excessive absenteeism. These included, but were not limited to:

1. A March 19, 2010 memorandum from Belinda Abruzzese, Principal of George Washington School No. 1. [Ex. P-8].

2. A March 23, 2011 memorandum from Arlene Campbell, Principal of Ronald Reagan Academy School No. 30 (Respondent was specifically advised that he had used his full allotment of sick days and would be subject to payroll deduction.) [Ex. P-9].

During the 2011-2012 school year, Bartolomeo Candelino, then-Principal of the Joseph Battin School No. 4, advised the Respondent that, as of February 29, 2012, he had been absent for twenty three (23) days and that "Joseph Battin School #4 relies on all faculty/staff members to come to work each day in order to provide/support meaningful learning experiences that our students deserve. While we can hire substitutes or utilize teacher coverage, in your absence, your particular contributions are missed by ours students." [Ex. P-10]. Despite said warning, the Respondent was subsequently absent for sixty-two (62) days during that school year.

As a result of the Respondent's absences, both Principal Abbruzese and Principal Candelino recommended that the Respondent be subject to an increment withholding. [Exs. P-8 & P-9]. On June 28, 2012, the Board voted in favor of withholding the Respondent's increment and salary adjustment for the 2012-2013 school year. [Ex. P-12].

Sworn testimony was received from Bartolomeo Candelino – Principal at Joseph Battin School No. 4; Belinda Abruzzese – Principal at Madison Monroe School No. 16; and Arlene Frances Campbell – Principal at Ronald Reagan Academy School.² These individuals testified to the Respondent's absences at the time that the Respondent taught at their respective school buildings. They testified to the progressive discipline described above. They also testified that the Respondent's excessive absences had a negative impact upon the continuity of instruction, the Board's budget due to the cost of hiring substitutes at \$119 per diem, the overall running of the schools, and the morale of the other teachers who must cover the Respondent's classes when substitutes cannot be obtained. [T:20-21, 25-27, 37-40, 42, 47-48]. Candelino testified that the Respondent's absences since the 2007-2008 school year has cost the Board approximately \$67,000 for substitute teachers. [Ex. P-20]. He indicated that based upon the Respondent's attendance records that he has "never seen anything as poor or showing a lack of respect for himself and for the people he works for, and the students." [T:33].

² Candelino's testimony is located from T:12-35; Abruzzese's from T:35-40; and Campbell's from T:40-48.

The Board's Position

The Board provides the following legal arguments in its post-hearing brief:

THE BOARD HAS PROVEN BY THE PREPONDERANCE OF CREDIBLE EVIDENCE THAT RESPONDENT IS GUILTY OF CHRONIC ABSENTEEISM, INCAPACITY AND/OR OTHER JUST CAUSE WARRANTING HIS DISMISSAL FROM HIS TENURED POSITION

This case is a clear one: it is clear that Respondent was absent for 560.55 days over the last seven school years. The record confirms that the Board has proven by a preponderance of the credible evidence that Respondent's attendance, or lack thereof; constitutes sufficient cause for dismissal. The relevant statute states:

No person shall be dismissed or reduced in compensation . . . if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10.

Despite multiple written warnings, spanning three school years, and clearly established procedures, Respondent was chronically/excessively absent.

Burden of Proof

In tenure proceedings, the Board has the burden of establishing the allegations supporting the charges by a preponderance of the credible evidence. See In re Polk License Revocation, 90 N.J. 550, 560 (1982); I/M/O Tenure Hearing of Marrero, 97 N.J.A.R.2d (EDU) 104, 106 (1996); I/M/O Tenure Hearing of Graceffo, 2000 N.J. AGEN LEXIS 365, *5 (2000), aff'd and modified 2001 N.J. AGEN LEXIS 805 (St. Bd.). "Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of

witnesses, but having the greater convincing power." Id. at *35 citing State v. Lewis, 67 N.J. 47, 49 (1975).

The New Jersey Model Civil Jury Charge 1.121 states, "To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive...than the contrary evidence. It makes no difference if the heavier weight is small in amount." In other words, if the evidence in support of and against the charges is equally balanced on the scales of justice, where the Board adds so much as the weight of a feather to its proofs, the Board has carried its burden by a preponderance of the evidence. Proof "need not have the attribute of certainty, but it must be well founded in reason and logic..." Lesniewski v. W.B. Furze Corp., 308 N.J.Super. 270, 279 (App.Div. 1998) quoting Lister v. J.B. Eurell Co., 234 N.J.Super. 64, 72 (App. Div. 1989). An agency's finding of fact will be accepted if supported by substantial credible evidence. See Quinlan v. Bd. of Ed. of No. Bergen Twp., 73 N.J.Super. 40, 46-47 (App. Div. 1962); Lesniewski v. W.B. Furze Corp., supra, 308 N.J.Super. at 279. Thus, findings are "considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974).

General Legal Precedent on Excessive Absenteeism

In his Answer to the Tenure Charges, Respondent avers that his absenteeism has been due to chronic medical issues, particularly, several surgeries on his left knee. A review of the medical records confirms that Respondent did indeed suffer some maladies. Respondent essentially asks the tribunal to ignore the absences because of their alleged "legitimacy". However, the weight of legal precedent militates against such an outcome.

Chronic or excessive absenteeism may warrant removal even when the absences have been excused or caused by legitimate medical reasons such as long-term poor health, or work related injuries. See State-Operated School District of Jersey City v. Pellechio, 92 N.J.A.R.2d (EDU) 267 (1992). This may be the case even when legitimate reasons, such as long-term health issues, caused the absences. Ibid. (Much like the Respondent herein, Pellechio received multiple warnings about his attendance over several years, including

a threat to have his increment withheld, yet his attendance did not improve.) Also see I/M/O Tenure Hearing of Marsden, OAL Docket No. EDU 1188-84, Initial Decision (1985), adopted Comm'r (October 10, 1985); Kelsey v. Bd. of Educ. of the City of Trenton, 1989 S.L.D. 1622; State-Operated School District of Newark v. Gillespie, OAL Docket No. EDU 3399-03 (2011)(stating "[c]learly, the mere fact that the absences were excused does not obviate the possibility that the teacher may be dismissed for excessive absenteeism"); I/M/O Tenure Hearing of Castro, 2012 N.J. Super. Unpub. LEXIS 923, *13 (App. Div. 2012); In the Matter of the Tenure Hearing of Randi True, Willingboro Board of Education, 2011 N.J. AGEN LEXIS 839 (Commissioner's Decision). Randi True, like the Respondent herein, was granted multiple leaves of absence for extended periods of time. Yet, both an Administrative Law Judge and the Commissioner sustained tenure charges for chronic absenteeism, among other infractions.

The point at which absenteeism is so chronic as to warrant dismissal falls within the prerogative and discretionary authority of the local board of education. See I/M/O Tenure Hearing of Sheets, 1980 S.L.D. 1536, rev'g 1979 S.L.D. 790; Pellechio, supra.

The underlying rationale for the dismissal of teachers for absenteeism is that teachers must be in the classroom for purposes of instructional continuity, even in the face of medical problems:

The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. . . . The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

In Re Reilly, 1977 S.L.D. 403, 414.

Respondent has cited his teacher observation reports, in an effort to establish that satisfactory performance outweighs excessive absenteeism, and therefore he should retain his position. (P-28, P-30, P-31) However, legal precedent clearly establishes that "[E]ven if a teacher's performance in the classroom is sufficient . . . the absences may nevertheless be considered as material to the issue and can justify removal of the teacher." In the Matter of the Tenure Hearing of Jeanne Cook, Old Bridge Board of Education, OAL DKT. NO. EDU 8568-02 AGENCY DKT. NO. 374-11/02; citing Trautwein v. Bd. of Educ. of Bound Brook, 1980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980); In Re the Tenure Hearing of Sheets, *supra*.

Arbitration Decisions

Arbitrators have repeatedly taken the same position as Administrative Law Judges and the Commissioner that excessive absenteeism is actionable even if the absences are "justified." As stated by Elkouri and Elkouri: "The right to terminate employees for excessive absences, even where they are caused by illness, is generally recognized by arbitrators." *How Arbitration Works*, 822 (6th Ed.). That is because:

[a]t some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Numerous other arbitrators have also upheld terminations involving frequent and extended absences due to illness.

Elkouri at 822 citing Cleveland Trencher Co., 48 LA 615 (Teple, 1967).

Thus, "if an employee has demonstrated over a long period of time an inability due to chronic bad health or proneness to injury to maintain an acceptable attendance record, an employer is justified in terminating the relationship,

particularly where it has sought through counseling and warnings to obtain an improvement in attendance." Elkouri at 823 citing Louisville Water Co., 77 LA 1049 (Volz, 1981).

Based upon this well-established precedent, Respondent should be dismissed from his position.

Substantive Standards of Proof

In order to terminate a tenured employee for chronic absenteeism, the Board must demonstrate that there was consideration of:

- (1) the particular circumstances of the absences and not merely the number of the 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 supervisors were dissatisfied with the pattern of absences.

I/M/O Tenure Hearing of Velez, School District of Hudson County Schools of Technology, OAL Dkt. No. EDU 3255-05 (2006), aff'd C.D. (April 27, 2006); In Re White, 92 NJAR 2d (EDU) 157, 161. A review of these factors based upon the numerous documents presented at trial reveals that the Board has satisfied its burden in this regard.

1. *The Board has considered the circumstances of Respondent's absences.*

The Respondent was issued a memorandum on March 23, 2011 from Ronald Reagan Academy Principal Arlene Campbell in which Respondent was notified that he had exceeded his annual allotment of sick days and would be subject to payroll deduction. (P-9). In that Memorandum, Campbell specifically reminded Respondent that she understood that all of Respondent's absences "may be due to injury or sickness."

The Respondent was issued a memorandum on February 29, 2012 in which Joseph Battin School Principal Ben

Candelino warned Respondent about his poor attendance. Candelino, like Campbell before him, understood that all of Respondent's absences "may be due to injury or sickness." Moreover, Candelino expressed his optimism that Respondent would improve his attendance. **(P-10)**

As was the case in Randi True, *supra*, the Petitioner herein repeatedly granted several leaves of absence in an effort to accommodate the Respondent as he attended to his medical problems. **(P-25)**

A tenured employee may be dismissed when the underlying reasons for the absenteeism indicate there is a likelihood that the conduct will continue in the future. See Velez, *supra*, citing State-Operated School District of Jersey City v. Pellecchio, *supra*. Given that Respondent's attendance has not improved over the course of his employment (*i.e.*, the last seven school years), despite repeated warnings and an increment withholding, it is reasonable for the Board to conclude that this conduct is likely to continue in the future.

2. The Board has considered the impact of Respondent's absences.

Respondent's absences have had a negative impact on the efficiency and effectiveness of the operation of those schools to which he has been assigned. Since the commencement of the 2007-2008 school year through the end of the 2013-2014 school year, the Petitioner has been compelled to repeatedly hire substitutes, at a total cost of \$67,056.50. **(P-20)** Moreover, Respondent's frequent absences prevent the satisfactory performance of the duties of his position. Board Regulation 4119.3 (Duties) specifically states that "All teachers shall be in their classrooms and prepared for work at the start of the work day." **(P-16)** In the same vein, Board Regulation 4151 (Staff Attendance Improvement Plan), clearly states "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." **(P-15)**

In I/M/O/ Randi True, *supra*, the ALJ noted that the petitioning board need not "point to specific instances or

examples supporting its contention; rather, it need only demonstrate the likely result of the absences." Also, I/M/O Tenure Hearing of Alicia Dugan, Jersey City School District, OAL DKT. No. EDU 12243-11N (2012) (affirmed by Commissioner, June 14, 2012); the mere fact that a teacher was absent for 197 days over a six-year period was sufficient to infer a negative impact on students.

In testimony before the arbitrator, George Washington School Principal Belinda Abruzzese specifically noted the inherent difficulties of hiring substitutes and the negative impact on instructional continuity; and that Respondent should be dismissed.

Also in testimony before the arbitrator, Ronald Reagan Elementary School Principal Arlene Campbell noted the manner in which chronic absenteeism among teaching staff is "academically disruptive" to students; and that Respondent should be dismissed.

Finally, in testimony before the arbitrator, Joseph Battin School Principal Bartolomeo Candelino noted that not only was the Respondent unavailable for observation, but the frequent absenteeism negatively impacted the "continuity of instruction" for students. According to Candelino, the morale of the remaining staff was affected because they had to sacrifice their own preparation periods to cover Respondent's classes. Moreover, Respondent's absenteeism showed a lack of respect for the students; and that Respondent should be dismissed.

3. Respondent has been repeatedly warned, in writing, of his unacceptable attendance and potential consequences.

As noted earlier, Respondent has been subject to three written warnings for attendance, the last of which resulted in an increment withholding by the Board of Education for the 2012-2013 school year. **(P-8 through P-10)** Nonetheless, Respondent has not demonstrated any effort to improve his chronic absenteeism; instead the absenteeism worsened as it reached two entire school years (2012-2013 and 2013-2014).

As a member of the Elizabeth Education Association, Respondent is subject to the terms and conditions of a collective bargaining agreement between the Petitioner and the Association. The Agreement clearly warns Respondent, and all other members of the bargaining unit, that poor attendance may subject an employee to disciplinary action. **(P-19)**

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.

Respondent works under a Job Description that includes the following responsibilities:

Meets and instructs assigned classes in locations and at times designated.

Continues the educational process by being available to students and parents for education-related purposes.

Performs all other assigned duties deemed necessary and essential by the Superintendent of Schools or his designee. **(P-22)**

Respondent is subject to Board Policy 4117.52 (Dismissal/Suspension), which grants Petitioner the authority to challenge the continued employment of any employee who is "incapable of performing" his or her duties. **(P-18)**

Finally, Board Policy 4151/4251 Attendance Patterns, governs all employees and clearly states "Consistent absenteeism or tardiness is unacceptable and subject to disciplinary action." See also, I/M/O Tenure Hearing of Alicia Dugan, supra, where employee was given several warnings regarding where attendance, but continued to exhibit the same behavior.

In the present case, Respondent's more than 500 absences over the course of a 7-year period is far more egregious. Moreover, Respondent has been given numerous

warnings concerning his chronic absences, yet has failed to rectify his pattern of poor attendance. These facts warrant his dismissal.

Incapacity

It is well settled that chronic and excessive absenteeism constitutes not only unbecoming conduct and other just cause, but also incapacity, such as to amount to just cause for removal. In re Tenure Hearing of Kacprowicz, 93 N.J.A.R. 2d (EDU) 147, 151 (citing Trenton Bd. of Educ. v. Williamson, OAL Dkt. EDU 7335-85 (Apr. 14, 1986), aff'd, Comm'r (May 28, 1986); In the Matter of the Tenure Hearing of Frances Metallo, Union City School District, Commissioner, May 12, 2003. (Teacher absent for 650 days in a six year period); Camden City Board of Education v. Florence Rucker, 94 N.J.A.R. 2d (EDU) 190, affirmed by State Board of Education, 95 N.J.A.R.2d (EDU) 350 (Teacher absent for 263 days in four-year period.)

Respondent suggested in his Answer that the charge of incapacity is inappropriate because he has established that his absenteeism is justified for medical reasons. However, "[i]ncapacity" as identified in N.J.S.A. 18A:6-10 relates to the inability to perform a position, irrespective of the cause of the inability to work. (at 498). In the Matter of the Tenure Hearing of Phyllis Stanley, Freehold Regional Board of Education, 95 N.J.A.R.2d (EDU) 495, 498.

More recently, arbitrators have had occasion to consider incapacity for chronic absenteeism under the new arbitration system implemented pursuant to the New Jersey TEACH Act, N.J.S.A. 18A:6-117, et. seq. Though the process of adjudication has changed, the end results (dismissal of the employee) are the same. In the Matter of the Tenure Hearing of Jason Levine, Jersey City School District, (Agency No. 286-9/12; Lowitt, 2012), the teacher had chronic medical issues, yet the arbitrator found that a teacher "has a duty to be in the classroom, ready to teach. . .Mr. Levine is culpable of Incapacity, since he was not in the classroom, ready to teach, on even a semi-regular basis."

A similar result was found In the Matter of the Tenure Hearing of Lenore Francis, Jersey City Board of Education, (Agency No. 285-9/12; DeTreuX, 2013), where a teacher had

been absent for approximately 350 days in a 10-year period. After reciting the litany of problems faced by Francis, the arbitrator (who ultimately sustained the charge of incapacity) framed the issue thusly:

"The issue is not whether Francis experienced personal injuries and events that forced her to miss work. The issue is whether the District must continue to employ a teacher who misses significant amounts of work throughout the school year."

See also, In the Matter of the Tenure Hearing of Lakhisha Wheeler, (Agency No. 18-1/14, Lowitt, 2014), for the proposition that "extreme health conditions as well as personal tragedies" will not excuse chronic absenteeism, and dismissal of the employee will still be warranted.

In the instant case, the Petitioner has set a clear standard for its teachers, as expressed in the aforementioned Job Description, Collective Bargaining Agreement and Board Policies. By no measure has Respondent shown that he is capable of performing his duties and responsibilities, particularly when he has not entered a classroom since March 2012, a total of 423 days. As was stated by the ALJ in Rucker, supra:

". . . when absences are as numerous as respondent's herein, the principle of *res ipsa loquitur* applies. It is unnecessary to provide testimony of an administrator that the absences have adversely impacted the students. The conclusion is obvious; the situation speaks for itself."

VI. CONCLUSION

Based upon all of the foregoing, it is beyond dispute that Respondent should be dismissed from his tenured position. In this case, Respondent's attendance record was terrible, including 560.55 absences in a seven-year period. Consequently, Respondent received numerous warnings and had his increment and salary adjustment withheld. Despite such progressive discipline, Respondent "has evidenced no growth . . . [and t]here is minimal likelihood that he would do

things differently if he were returned to" his position. I/M/O Tenure Hearing of Levine, supra. Over time, the absenteeism worsened, to the point of Respondent missing two full school years in 2012-2013 and 2013-2014. Accordingly, based upon abundant legal precedent, Petitioner respectfully requests the dismissal of Respondent from his employment as a tenured teacher with the Elizabeth Board of Education. [Board Brief, pp. 8-19].

DISCUSSION

I have carefully reviewed the entire record of this proceeding. The Board must prove the basis for the tenure charges against the Respondent by a preponderance of the credible evidence. If it meets this burden, it must also demonstrate that dismissal is the appropriate penalty.

The record contains undisputed evidence of the Respondent's 560.55 days of absence from his teaching duties since the 2007-2008 school year. It also includes the progressive discipline imposed upon the Respondent during his employment with the Board. Principals Candelino, Abruzzese and Campbell provided unrefuted testimony concerning the negative impact that the Respondent's absences had upon the school, students and teachers. The Respondent did not appear for the December 17, 2014 hearing, but his Answer cites multiple surgeries and medical difficulties as the basis for his absences. The Respondent emphasized that he "always provided the District with appropriate documentation as to his medical conditions, operations, treatments, and absences." He also indicates that his doctor indicated that he "should be able to make a full recovery in the near future as a result of the knee replacement."

I have considered all of the foregoing facts and the applicable law that the Board cited in-depth in its post-hearing brief. The case law cited by the

Board is on point and need not be recited. The Board considered the circumstances surrounding the Respondent's absences, and the impact they had on the school, students and teachers. The Board imposed progressive discipline upon the Respondent prior to the filing of tenure charges. The Respondent's absences show that he has not been in the classroom, even semi-regularly. I conclude that the Board has sustained its tenure charges of "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." I also conclude that the penalty of dismissal was not arbitrary or excessive and instead was justifiable and reasonable under all of the relevant circumstances. The fact that a portion of the Respondent's absences were excused does not preclude a finding of the Board's charges conduct nor does it require a modification of the penalty imposed under the circumstances presented.

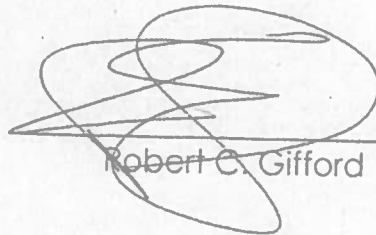
DECISION

The Board has sustained its tenure charges of "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." against Respondent Carson Steltz. The Respondent is dismissed from his tenured teaching position with the City of Elizabeth School District.

DECISION


The Board has sustained its tenure charges of "incapacity and/or other just cause, including, but not limited to, chronic absenteeism, constituting cause for dismissal and/or reduction in salary...." against Respondent Carson Steltz. The Respondent is dismissed from his tenured teaching position with the City of Elizabeth School District.

Dated: January 20, 2015
Sea Girt, New Jersey


Robert C. Gifford

State of New Jersey }
County of Monmouth }ss:

On this th 20 day of January, 2015, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.


Linda L. Gifford
Notary Public
Expires 1-10-16