

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

-----X
In the Matter of the TENURE hearing of the

STATE OPERATED SCHOOL DISTRICT OF THE CITY
OF NEWARK, ESSEX COUNTY

Complainant,

and

Agency Dkt. No.
314-10/14

**OPINION
AND
AWARD**

ELIZABETH CORBACHO-MUSNGI,

Respondent.
-----X
Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

APPEARANCES:

For the Complainant

Purcell, Mulcahy, Hawkins, Flanagan & Lawless, LLC
Robert Tosti, Esq.

For the Respondent

Caruso Smith Picini, PC
Nicholas Poberezhsky, Esq.

Pursuant to *N.J.S.A. 18A:6-16*, as amended by *P.L. 2012, c 26* ("TEACHNJ"), the tenure charges brought by the State Operated School District of the City of Newark, Essex County (the "District") against Elizabeth Corbacho-Musngi ("Corbacho-Musngi") were referred to me for a hearing and decision. I conducted a hearing at the offices of Caruso Smith Picini, PC on February 3, 2015, February 19, 2015 and April 7, 2015. The record closed on April 17, 2015 upon the arbitrator's receipt of the parties' post hearing memoranda and supporting authorities.

Both parties were represented by counsel and had a full opportunity to adduce evidence, to cross-examine each other's witnesses and to make argument in support of their respective positions. A stenographic record of the proceedings was taken. Neither party has raised any objection to the fairness of this proceeding. The evidence adduced, the legal authorities cited and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

The Charges and Procedural Background:

A Statement of Charges, dated August 25, 2014, was served upon Corbacho-Musngi alleging chronic and excessive absenteeism, absence without leave and other just cause, as follows:

CHARGE ONE: CHRONIC AND EXCESSIVE ABSENTEEISM

1. On or about September 2003, Respondent began her employment with the District as a teacher and has attained tenure since that time.
2. Respondent has been chronically and excessively absent from her teaching duties for several years now.
3. During the 2010-11 school year, Respondent incurred approximately forty-two (42) absences in sick and personal days. . .
4. During the 2011-12 school year, Respondent incurred approximately sixty-nine (69) absences in sick and personal days. . .
5. During the 2012-13 school year, Respondent incurred approximately forty-seven (47) absences in sick, personal and bereavement days. . .
6. During the 2013-14 school year, Respondent incurred approximately One hundred twenty six (126) absences in sick, personal and AWOL days. . .
7. Respondent failed to meet an acceptable level of attendance under District and State guidelines for several years now.
8. Respondent's amount of absence from the classroom constitutes excessive absenteeism which adversely impacted the instruction to students, regardless of whether Respondent's absences were authorized by contract or otherwise caused by legitimate medical reasons.
9. Respondent was previously warned about her excessive absenteeism and that continued absenteeism would result in more harsh discipline...
10. Respondent's pattern of excessive absenteeism over the foregoing period caused a substantial interruption in the continuity of educational instruction and had a corresponding adverse impact upon the instruction to students of the District.
11. Respondent's conduct and pattern of excessive absenteeism as described above are sufficient to warrant dismissal from employment.

CHARGE TWO: ABSENCE WITHOUT LEAVE

12. The District restates the allegations contained in Charge One and reallege and incorporate them by reference as if fully set forth at length herein.
13. During the 2013-14 school year, Respondent was assigned to The Early Childhood School as a pre-kindergarten teacher.
14. In August of 2013, Respondent was previously warned about her excessive absences and that continued absenteeism would result in more harsh discipline...
15. During the 2013-14 school year, Respondent applied for intermittent family leave of absence pursuant to the Family Medical Leave Act of 1993 ("FMLA"). . .

16. Respondent was denied an FMLA leave from December 3, 2013 until March 3, 2014 because she did not qualify due to insufficient hours worked. Respondent was granted a leave of absence due to illness from January 9, 2014 through January 28, 2014 without pay with a scheduled return to work date of Tuesday, January 28, 2014...
17. Respondent failed to return to her assigned location on January 28, 2014...
18. Respondent failed to contact the District with regard to her continued unauthorized absence from the District beyond January 28, 2014...
19. On March 28, 2014 and April 4, 2014, the District corresponded with Respondent providing formal notice that her failure to return to work on January 28, 2014, coupled with her failure to provide the District with notice of her intentions to return to work resulted in her being marked AWOL and that, as a result, the District would be taking disciplinary action against her...
20. The District's March 28, 2014 correspondence also indicated that an immediate response regarding her absences was required...
21. Respondent failed to respond to the District's March 28, 2014 or April 4, 2014 correspondence.
22. Respondent failed to provide the District with any notice of her intention to return to work.
23. Respondent's AWOL resulted in additional costs to the District and caused a substantial disruption to the continuity of educational instruction and had a corresponding adverse impact upon the students of the Newark Public Schools.
24. Respondent's failure to follow the District's directive as well as her actions in failing to report her absences constitute acts of unbecoming conduct and serve to substantially disrupt and/or interfere with the orderly operation of the District and the school.
25. Respondent's unbecoming conduct and disregard of District directive touches upon her character and highlight her propensity to engage in prohibited behavior.
26. Respondent's actions in being AWOL since January 28, 2014 as well as her failure to respond to the District's request for a response is extremely inappropriate and highly egregious in and of itself given the heightened standards of conduct to which educators are held to.
27. Respondent's willful, inappropriate and unbecoming conduct as described above constitutes Conduct Unbecoming of a Teacher sufficient to warrant dismissal from employment and/or reduction in salary.

CHARGE THREE: OTHER SUFFICIENT CAUSE

28. The District restates the allegations contained in Charge One and Two and reallege and incorporate them by reference as if fully set forth at length herein.
29. The cumulative effect of Respondent's absenteeism, AWOL and misconduct as set forth above constitutes other sufficient cause sufficient to warrant dismissal or a reduction in salary.

On October 20, 2014, the State District Superintendent of Newark Public Schools, Cami Anderson, determined that there was "probable cause to credit the evidence in support of the charges."¹ Respondent filed an Answer to the tenure charges on November 6, 2014, and an Amended Answer on December 4, 2014.

The tenure charges were referred to me on November 17, 2014. An initial request for an extension of time under TEACHNJ due to scheduling difficulties was granted. During the first hearing on February 3, 2015 the parties discussed settlement. During the second hearing on February 19, 2015, the parties continued settlement discussions and counsel for both parties then represented that a settlement had been reached. Thereafter, however, the settlement was not finalized. A further extension of time was granted under TEACHNJ to allow the case to proceed to a hearing on the merits on April 7, 2015 and for the issuance of a decision.

At the end of the day on April 2, 2015, Respondent filed a voluminous Motion to Dismiss. Given the late filing of the motion, prior to a holiday weekend and just two business days prior to the scheduled hearing, the motion was not considered. At the start of the hearing, however, Respondent moved to preclude the District's presentation of any witnesses due to the District's failure to provide a complete summary of their testimony as required by TEACHNJ. Respondent had not previously raised this issue during two prior hearing dates, many communications regarding the hearing and a prior conference call regarding witnesses. In addition, information as to earlier disclosures by Claimant's counsel² to verify whether such a statement had been previously provided was not readily available at the hearing. Therefore, under the unique circumstances of this case, including the inability to adjourn the hearing again to resolve the issue, Respondent's motion was denied and the hearing went forward on the merits. Respondent also raised concerns regarding Claimant's failure to produce documents relating to the Respondent's FMLA leaves despite multiple requests and the arbitrator's order that such documents be produced. This issue will be addressed in the discussion below.

¹ Although Anderson's Certificate of Determination indicates that Respondent filed a response to the notice of charges prior to her determination of probable cause, the Affidavit of Service indicates that no response was received.

² Although the same law firm represented the District throughout the proceedings, a different attorney was assigned after the initial stages.

Background:

The following is a summary of the relevant evidence in this case. Corbacho-Musngi is a tenured teacher in the District. She is a pre-school teacher. Corbacho-Musngi began working in the District in September 2003 and over the years has been assigned to several schools, including the old Belmont-Runyon, the new Belmont-Runyon, Clifton Avenue and Chancellor Avenue Annex schools.

It is undisputed that Respondent was absent 42 times during the 2010-2011 school year, 69 times in 2011-2012, 47 times in 2012-2013 and 126 times in 2013-2014. (See District Exhibits 1-4.) Homere Breton, Executive Legal Assistant for the District's Talent Office, testified that his office prepared the information contained in the charges regarding Corbacho-Musngi's absences. Breton acknowledged that Corbacho-Musngi had been granted both consecutive and intermittent FMLA leave during the 2010-2011 and 2011-2012 school years. He also admitted that approved FMLA days cannot be used for purposes of imposing disciplinary action. (Tr. at 40, 51.) Nonetheless, Breton testified that the number of absences contained in the Statement of Charges and supporting documentation include the gross number of absences, i.e., total absences, including leave days pursuant to the parties' collective bargaining agreement as well as approved FMLA leave days. When asked if he could calculate the number of FMLA days included in the absence totals, Breton testified that he could not. (Tr. at 37.) He testified that there are clerks in his office who are charged with reviewing time records and information from the Health Services Department in order to determine whether absences are properly considered approved FMLA leave. While the clerks would have the information as to which absences are properly considered FMLA, that information was not considered in preparing the charges. Nor was that information produced to the Respondent notwithstanding multiple requests.

Jeanne Ramirez, now CIO (Vice Principal) at Elliot Street School, was Corbacho-Musngi's Vice Principal for three years, including the last three years listed in the Statement of Charges. According to Ramirez, District policy requires that employees be given a letter when they reach five absences and again when they reach 12 absences. A meeting is held to discuss the absences. After 18 or more absences, disciplinary action can be imposed. For purposes of disciplinary action, absences do not include personal days or

bereavement leave; they do include sick leave. Ramirez also confirmed that disciplinary action cannot be imposed in connection with FMLA approved absences. She testified that she was provided information as to which absences were approved FMLA leave, but she was not asked to produce this information in connection with this proceeding.

Ramirez was unaware of any letter regarding attendance being issued to Corbacho-Musngi during the 2010-2011 or 2011-2012 school years, notwithstanding that the charges allege excessive absenteeism in those years. Ramirez issued the first letter addressing attendance under the District's policy on December 21, 2012 after six sick days. A meeting was held to discuss absences. (District Exhibit 6.) On January 23, 2013, Ramirez issued a second letter, after 11 sick days. A meeting was held to discuss attendance. (District Exhibit 7.) On May 29, 2013, Corbacho-Musngi was referred for disciplinary action, after 18 or more absences. (District Exhibit 9.) Ramirez did not know what discipline was imposed.³

Ramirez testified that in the 2013-2014 school year, the year with the highest number of absences, a long-term substitute qualified to teach the students was retained to teach Corbacho-Musngi's class for the second part of the school year. Ramirez and other teachers all provided assistance to the long term substitute. On direct examination, Ramirez testified that she had no communication with Corbacho-Musngi after February 1, 2014 and that she did not know that Corbacho-Musngi would be absent for the rest of the school year. On cross-examination, however, when shown copies of multiple text messages between Corbacho-Musngi and Ramirez during the period from January 9, 2014 through February 21, 2014, Ramirez confirmed that the text messages were accurate. (Respondent Exhibit 2.)⁴

Corbacho-Musngi testified at length as to the reasons for her absences over this period of time, including the periods for which FMLA leave had been approved. In February 2009, her brother died unexpectedly of heart failure at age 46. In April 2009, her uncle died of brain cancer. In November 2009, her husband died of prostate cancer at age

³ Corbacho-Musngi testified that she worked for three days without being paid as discipline; in other words, she received a fine equal to three-days pay. This is the only discipline she has ever received in connection with absenteeism prior to these tenure charges.

⁴ Ramirez' first reaction when shown the text messages after testifying that there was no contact between her and Corbacho-Musngi was "does she have a right to make a copy of my text messages?" (Tr. at 81.)

45. She testified that she and her children watched her husband's health decline due to cancer until his death. The psychological impact of his death was significant, not only upon Corbacho-Musngi but also upon her children. [REDACTED]

[REDACTED] Corbacho-Musngi is not charged with excessive absenteeism during the 2009-2010 school year.)

Following her husband's death, in 2010 Corbacho-Musngi was diagnosed with severe depression, panic/anxiety attacks and post-traumatic stress. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thereafter, Corbacho-Musngi began suffering from what was ultimately diagnosed as restless leg syndrome. Her symptoms became especially bad by November 2013. She testified that when she would get ready to go to sleep, her legs would start to kick uncontrollably. As a result, she was unable to sleep. She became so sleep-deprived that she was no longer able to function. Her mother moved in with her to help care for the children. She suffered from loss of memory and balance. She applied for another FMLA leave, but the request was denied, as she was not eligible for another leave. Corbacho-Musngi testified that she tried coming to work from November until January until it became impossible for her to continue teaching due to lack of sleep. Although she was not eligible for FMLA, a leave of absence was granted in January 2014. Upon her return to work on January 28, 2014, Ramirez stopped by her class and seeing her condition, sent Corbacho-Musngi home. She did not return to work for the remainder of the 2013-2014 school year, although as discussed below, Corbacho-Musngi testified she was in contact with Ramirez and the school regarding her absence.

Corbacho-Musngi was diagnosed with restless leg syndrome in January 2014. After trying various treatments over a period of time, the condition is now under control. In April 2014, however, while still suffering the effects of restless leg syndrome, Corbacho-Musngi fell down the stairs in her home. She broke the right side of her jaw and fractured her left cheekbone. She was hospitalized and had surgery. Her mouth was wired shut for a

period of time and she was taking pain medicine. She was bedridden for several months. With her face broken in two places, she experienced "intense headaches and dizziness" and was not able to get around. (Tr. at 138.) In May, she developed an abscess and required another operation.⁵ This recurred in July, with a final operation in August 2014.⁵ She is now fully recovered.

During this time, Corbacho-Musngi testified that she was unable to come to work. She and Ramirez exchanged text messages throughout January and February 2014 regarding her absences. In addition, she testified that she continued to call Sub-Finder and spoke to Ms. Wojuck, a secretary at the school, about her absences. At one point, after her jaw was wired and she could barely speak, she called the school and spoke to Wojuck. Corbacho-Musngi testified: "It was very hard for [Wojuck] to understand me because I was wired shut, but I told her what was going on and that I wasn't going to be able to make it back for the rest of the year, and she said don't worry about it, that she will put it in and I don't have to call anymore." (Tr. at 161.)

Corbacho-Musngi testified that she did not receive the District's March 28, 2014 and April 4, 2014 letters regarding her absences until May 2014 as she was not residing at the address to which they were sent. Her aunt, who suffers from dementia, was living at this address and had not told her that she received these letters. The letters indicated that she was considered AWOL and directed that she contact the Administrative Operation Services regarding her intent to return to work. (District Exhibit 10.) When Corbacho-Musngi finally received the letters, she asked her mother to drive her to the District offices, where she submitted the medical documentation with respect to her absences. (Respondent Exhibit 5.) This was just prior to her second operation in May 2014 for the abscess. She testified that she had planned to give the documentation to the District when she returned to work; she did not think that she needed to submit the medical documentation all along. When asked whether she thought it advisable to tell the District that she was under a doctor's care during this period, she responded: "You're absolutely right, and I'm sorry that I - again, that was my mistake, and I was just not thinking clearly." (Tr. at 135.)

⁵ In October 2014, after she returned to work for the 2014-2015 school year, she had a PICC line inserted in her arm to remedy repeated infections. She missed two days of work, when the line was inserted and removed. She has not had any problem since that time.

Corbacho-Musngi learned during the summer 2014 that Clinton Avenue School was being closed and teachers reassigned. Other teachers told her that she was assigned to the Chancellor Annex. She confirmed this assignment with the school over the summer and reported to the school at the start of the 2014-2015 school year as a preschool 3 teacher assigned to her own class with an assistant. On October 27, 2014 she was advised that she was suspended due to these tenure charges. Corbacho-Musngi testified that if returned to the classroom, she would not have a problem with absenteeism. The issues causing the absences have now been remedied. She is recovered from the surgeries and her restless leg syndrome is now under control; she is not feeling any of the effects of the fall or of the restless leg syndrome. (Tr. at 117.)⁶

Positions of the Parties:

On this record, the District argues: (a) that the Commissioner of Education has long held that chronic and excessive absenteeism may warrant dismissal even where legitimate illness and approved leaves were involved; (b) that this standard has been affirmed by arbitrators; (c) that the District need not prove the adverse impact of chronic absenteeism on students' achievement; (d) that while Corbacho-Musngi's "personal family circumstances over the time since her husband passed away in 2009 have been tragic, the inquiry should not end there" (Closing Memorandum at p. 5); (e) that chronic absenteeism has been held to constitute "incapacity", "unbecoming conduct" and/or "just cause" warranting dismissal; and (f) that the tenure charges and termination should be sustained.

Respondent, on the other hand, contends: (a) that the number of absences alleged in the tenure charges inappropriately include FMLA approved leave, personal days and bereavement days which the District's own witnesses concede cannot be used for discipline; (b) that the tenure charges should be dismissed due to the District's failure to comply with disclosure and discovery obligations, including the failure to produce documentation as to Corbacho-Musngi's FMLA approved leave days; (c) that disciplinary

⁶ Respondent also called Mario Cardinale, a former Superintendent in other NJ school districts, as an expert witness. He testified about accommodations that the District might have offered to Corbacho-Musngi and that additional counseling would have been appropriate prior to commencing tenure charges.

action for excessive absenteeism may not be based solely on the sheer number of absences, but should take into account the reasons for the absences; (d) that the "harrowing circumstances" in this case provide "more than ample justification for Respondent's absences during the relevant calendar years" (Closing Memorandum at p. 9); (e) that the District had not imposed an increment withholding, or made any accommodations to assist Corbacho-Musngi, prior to seeking dismissal; (f) that Corbacho-Musngi's observations and evaluations were, by and large, extremely positive, without a negative end of year evaluation during her entire career with the District; (g) that the evidence demonstrates that Corbacho-Musngi "has the ability to be an effective teacher who would benefit her students" (Closing Memorandum at p. 9); (h) that there is no evidence that the District's operations or students were adversely impacted by Respondent's absences; (i) that Corbacho-Musngi was in contact with the school about her absences and was not AWOL; (j) that Corbacho-Musngi has indicated that if returned to the classroom, she will "dramatically improve" her attendance issues (Closing Memorandum at p. 9); (k) that under all of these circumstances, termination is not the appropriate penalty; and (l) that Corbacho-Musngi should be returned to the classroom with a lesser penalty.

Discussion:

On the record before me, including my assessment of witnesses' credibility and the probative value of evidence, I find that the District has established that Corbacho-Musngi engaged in conduct unbecoming her position as a tenured teacher, but termination is not warranted under the particular circumstances of this case. The reasons for these conclusions are set forth below.

First, the absences set forth in the tenure charges for the 2010-11 and 2011-12 school years impermissibly include approved FMLA leave.⁷ The District's own witnesses testified that Respondent had approved FMLA leave during these school years and, moreover, that FMLA days cannot be considered in making disciplinary decisions. Significantly, Breton, the person who prepared the information and signed the tenure

⁷ The number of days listed also included personal and bereavement days that Ramirez testified cannot be used for purposes of imposing discipline under District policies.

charges, testified that based on the information available at the hearing, he could not determine how many days during those school years were FMLA approved and, therefore, not properly considered for disciplinary purposes. Further, both Breton and Ramirez testified that this information is available, yet the information was not produced to Respondent despite multiple requests and the arbitrator's direct order.⁸ Based on the above, therefore, in deciding whether to sustain the tenure charges against Corbacho-Musngi, I will not consider the absences for 2010-11 and 2011-2012.

Second, while not considering the absences for these two years improves Corbacho-Musngi's overall attendance record, it is undisputed that she was absent on 47 days during the 2012-2013 school year and 126 days during 2013-14 school year.⁹ Approximately 170 absences over a two-year period is an excessive number of absences. That these absences were due to legitimate reasons does not require dismissal of the tenure charges. As the District states, chronic and excessive absenteeism, even if for legitimate reasons, can warrant imposition of discipline, including discharge. In a case involving 197 absences over a six-year period, one ALJ found that:

excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause," within the meaning of N.J.S.A. 18A:6-10, to warrant dismissal from employment."

The Commissioner of Education upheld this decision in June 2012. *IMO A. Dugan and Jersey City BOE*, 2012 N.J. AGEN LEXIS 249. See also, *IMO Lenore Francis and Jersey City Board of Education, Hudson County, NJ*, Agency Dkt. No. 285-9/12 (Arbitrator Walt De Treux, 1/10/13); *IMO Lisa Rosa – Jersey City BOE*, 2011 NJ AGEN LEXIS 390 (9/1/11); *Camden School District v Rucker*, OAL Docket No. 4327-92 and 6204-92 (12/30/92).

Further, contrary to Respondent's argument, it is not necessary for the District to produce "direct, tangible, evidence that its operations or its students were adversely impacted by Respondent's absences." (Closing Memorandum at p. 10.) As set forth by the

⁸ In so finding, I accept the District counsel's representation that he requested the documents from the District.

⁹ This number includes personal and bereavement days, despite Ramirez' testimony that these days are not considered by the District in imposing discipline.

ALJ in *Metallo v Union City Board of Education* (May 12, 2003) aff'd State Board (January 7, 2004):

It is not necessary for a school district to prove a direct correlation between student achievement and a teacher's attendance to validate concerns about the effect of a teacher's absence on the educational program. As the Commissioner has recognized, '... the repeated absences of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the District in the most fundamental obligation of an educator to the student.' (citations omitted.)

Id., at p. 13. See also, *Camden Board of Education v Ricker*, OAL Docket No. 4327-92 and 6204-92 (ALJ Duncan, 12/30/92).¹⁰

Nonetheless, it is not true that a finding of chronic and excessive absenteeism requires discharge in all instances. In deciding whether discharge is warranted, it is appropriate to consider the reasons for the absences and, more importantly, whether the underlying reasons for the absences have abated such that the pattern of absenteeism will not continue in the future if the teacher is returned to the classroom. See e.g., *School District of the City of Elizabeth, Union County v Ramos*, Agency Dkt No. 261-9/14 (Arbitrator Randi Lowitt, 1/5/15); *Passaic Board of Education v Viani*, OAL Dkt. No. EDU 2535-90, 1991 WL 419896 (ALJ Reiner, 12/9/91); *Board of Education of the Toms River Regional School District, Ocean County v. Marsden*, (OAL Dkt No. EDU 1188-84 (ALJ Tylutki, 8/26/85). As will be discussed more fully below, the circumstances in this case warrant giving Corbacho-Musngi an opportunity to return to the classroom, rather than termination.

Third, Corbacho-Musngi is also charged with being absent without leave ("AWOL") during the 2013-2014 school year. The District has not proven these charges and, therefore, Charge Two must be dismissed. The essence of this charge is that Corbacho-Musngi failed to return to work on January 28, 2014 following an authorized leave of absence,¹¹ and that she was thereafter absent without notifying the District that she would be absent or the reason for the absence. Corbacho-Musngi, however, testified that she did return to work on January 28, 2014 as required and that when Ramirez came by her

¹⁰ I note that in this case, a long term licensed substitute teacher was retained to cover Corbacho-Musngi's pre-school class during the spring 2014, covering many of the absences during that school year, reducing some of the negative impact of the absenteeism upon the students.

¹¹ It is undisputed that Corbacho-Musngi was ineligible for another FMLA leave at this time.

classroom, she told Corbacho-Musngi to go home. This testimony is supported by the fact that the absence on January 28, 2014 is designated as "Administratively Excused." (District Exhibit 4.)

Further, despite Ramirez's testimony on direct-examination that after this date Corbacho-Musngi did not communicate with her regarding her absences, documentary evidence, authenticated by Ramirez, established that Corbacho-Musngi communicated by text message with Ramirez through February 2014. In addition, Corbacho-Musngi testified that she continued to call Sub-Finder and that she called Wojuck to keep the school apprised of her situation and absences. She spoke to Wojuck when her jaw was wired following surgery and told Wojuck that she would not be able to return to school for the remainder of the school year. According to Corbacho-Musngi, Wojuck told her that it was not necessary to continue to call. Significantly, the District provided no evidence to rebut this testimony. That the District hired a long-term substitute for Corbacho-Musngi's classroom also suggests that the District was aware that Corbacho-Musngi would be absent for a prolonged period of time.

The tenure charges also allege that Corbacho-Musngi failed to respond to the March 28, 2014 and April 4, 2014 letters regarding her absence. Corbacho-Musngi acknowledged that she did not timely respond to the letters the District sent, as they were sent to an address where she was not living at the time. When she received the letters, however, she acted promptly to provide medical documentation to the District. Corbacho-Musngi testified that she planned to submit the medical documentation upon her return to school. She admits she was wrong in failing to submit the documentation on an ongoing basis, stating that she was "not thinking clearly" during this period. (Tr. at 135.) While this testimony does not excuse her failure to respond to the letters in a more timely manner or to produce the medical documentation on an ongoing basis, on this record it does not require a finding of AWOL particularly given the unrebutted testimony that Corbacho-Musngi was calling Sub-Finder and communicating with the school as to her situation and her inability to return to school for the remainder of that school year.¹²

¹² I also note that the District apparently did know of her intent to return to school for the 2014-2015 school year. She called the new school during the summer to confirm her assignment and started at the school with

Accordingly, on this record, the District has established that Corbacho-Musngi is guilty of chronic and excessive absenteeism and, therefore, conduct unbecoming as a result of the approximately 170 absences over a two year period, most in 2013-2014. She is not guilty of being AWOL as charged. Charge Two, therefore, is dismissed.

Finally, as to penalty, there are mitigating factors to support a lesser penalty than termination as sought by the District. As a preliminary matter, I note that there is no evidence that Corbacho-Musngi had any attendance issues in the years before her husband's illness and subsequent death in 2009. The evidence also establishes that Corbacho-Musngi's observations and evaluations were satisfactory in prior school years. (Respondent Exhibits 7 and 4.) Further, despite the District's claim of excessive absenteeism over a four year period and the District policy for addressing absenteeism on an ongoing basis, Corbacho-Musngi was disciplined only once prior to tenure charges seeking her dismissal. Corbacho-Musngi did not receive any letters, warnings or discipline prior to the letters Ramirez issued on December 21, 2012 and January 23, 2013 and the subsequent imposition of a three-day fine. Nor was any other discipline imposed, such as increment withholding, after the three-day fine. Indeed, there is little evidence of counseling or progressive discipline.

In addition, Corbacho-Musngi's circumstances were, indeed, "tragic" as described by the District, and "harrowing" as described by Respondent. Her absenteeism problems started with the death of three family members, including her husband, and continued due to the psychological impact of her husband's death on her [REDACTED] and then the onset of restless leg syndrome followed by a serious fall resulting in her face being broken in two places. More importantly, however, on this record I am persuaded by Corbacho-Musngi's testimony that the causes of the absences have been addressed and have abated, that she is now able to return to work and that she is confident that she will be able to be regular in her attendance. Significantly, the series of events causing the excessive absenteeism is not likely to recur. It is now several years since the unfortunate death of her husband. The psychological issues she [REDACTED] [REDACTED] faced following his death appear to have abated with treatment and the

an assigned class at the start of the school year. She continued to work until suspended at the end of October 2014.

passage of time. Following the diagnosis of restless leg syndrome and treatment, the illness is now controlled by medication and she no longer suffers from the adverse effects. Finally, she has recovered from the serious damage incurred by her fall in the spring 2014, which was the cause of a significant number of absences during that school year.

Under all of the circumstances of this case, therefore, with particular focus on the conclusion that it is not likely that the pattern of absenteeism will continue, it is appropriate to provide Corbacho-Musngi with an opportunity to establish that she again can be an effective teacher with regular attendance who will benefit the students in her class and be a credit to the District. Corbacho-Musngi is on notice, however, that should the problem with excessive absenteeism continue, she will likely face additional tenure charges and she may not be given another opportunity to return to the classroom as a District employee.

Although Corbacho-Musngi's employment with the District is not being terminated, her pattern of excessive absenteeism as proven in this case warrants a significant penalty. Accordingly, Corbacho-Musngi shall be suspended without pay from the date of this Opinion and Award through the end of the 2014-2015 school year. Further, she shall not be entitled to back pay for the 120-day period she was suspended without pay pending resolution of these tenure charges. She shall be reinstated to her teaching position at the start of the 2015-2016 school year, with an increment withheld for the 2015-2016 school year .

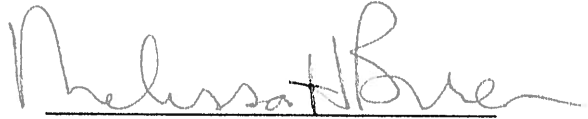
By reason of the foregoing, I issue the following:

AWARD

- a) Charge 1 is sustained to the extent consistent with the findings in this Opinion and Award; by these actions, Elizabeth Corbacho-Musngi engaged in conduct unbecoming a tenured teacher. All other charges are dismissed.
- b) For the violation set forth above, the penalty shall be a suspension without pay from the date of this Opinion and Award through the end of this school year, and further reduction in salary equal to the salary withheld during the 120-day suspension period without pay pending resolution of these tenure charges, and,

upon her return, the withholding of a salary increment for the 2015-2016 school year only. The District shall reinstate the Respondent to her teaching position at the start of the 2015-2016 school year.

Dated: May 12, 2015

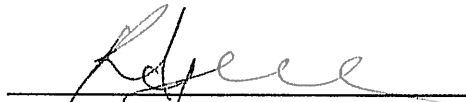


Melissa H. Biren, Arbitrator

State of New Jersey)

County of Essex)

On this 12th day of May 2015 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.



Robert D. Agree
Notary Public

ROBERT D AGREE
ID # 2429835
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018