In the Matter of the **TENURE** Hearing

of

PATSY CUNTRERA
"Respondent"

and

PASSAIC COUNTY VOCATIONAL SCHOOL DISTRICT
"Petitioner"

OPINION and AWARD

AGENCY DOCKET NO. 223-8/15

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

The hearings were held on October 14 and 21, 2015 at the Passaic County Technical Institute, Wayne, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sequestered and sworn. Briefs were received as agreed. (See Exhibit A)

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR PETITIONER:

Albert C. Buglione, Esq.
Buglione Hutton & De Yoe, LLC

APPEARING FOR RESPONDENT:

Ronald Ricci, Esq.
Ricci Fava & Bagley, LLC

BACKGROUND:

In the instant matter, it was established that the District approved and adopted the Stronge Evaluation Model for all teachers; that personnel were properly trained in this method of evaluation; that Respondent was rated "Partially Effective" for the 2013-2014 school year; that, as per TEACHNJ, a Corrective Action Plan (CAP) was developed for Respondent for the 2014-2015 school year with Salvatore Gambino designated as his supervisor; that Respondent received a rating of "Ineffective" for the 2014-2015 school year and that when a teacher, as in this matter, receives a rating of "Partially Effective" and "Ineffective" in two consecutive summative evaluations, "the Superintendent shall file a charge of inefficiency."

Therefore, the District filed tenure charges against Respondent, Patsy Cuntrera. According to a letter dated September 8, 2015, from M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, this Arbitrator was appointed pursuant to *P.L. 2012, c.26* to hear and decide this matter. Further, in a September 8, 2015 letter addressed to counsel and copied to the Arbitrator from Ms. Duncan, stated that

> Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator's decision with regard to those charges shall be made pursuant to *N.J.S.A. 18A:6-17.2*, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator.
>
> The balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges brought pursuant to *N.J.S.A. 18A:6-16* – which are not dismissed as a result of a motion – under the preponderance of the evidence standard.

POSITIONS OF THE PARTIES:

DISTRICT'S POSITION:

The School District's (District/Board) position is that TEACHNJ defines the criteria that arbitrators may consider in rendering a decision; that an arbitrator's authority is limited by the Statute; that the District did not violate items 3 and 4 as it did not discriminate against and did not act arbitrarily and capriciously against Respondent by failing to provide accommodations to his working conditions. However, observing administrators were not intimately aware of or involved in the correspondence between the Grievant's physicians or legal counsel and the District's Human Resources personnel.

Further, as to other assertions by Respondent, the District contends that not all members of the School Improvement Panel (SIP) can take part in the mid-year evaluation as there are teachers on the SIP and as per the Association's directive, teachers are not to participate in peer evaluations; that mid-year evaluations were not conducted during the middle of the 2014-2015 school year because Respondent was absent during the months of January through March and that his absences directly affected the District's ability to conduct a mid-year evaluation.

It is the District's position that Respondent was in control of the Student Growth Objects (SGO); that he knowingly falsified SGO spreadsheets and falsified his SGO data by submitting another teacher's documents to be used as evidence of effective planning and preparation. Based on his admitted false statements, Respondent's entire testimony should be disregarded.

Under TEACHNJ, if a tenured member is rated ineffective or partially effective in two consecutive summative annual evaluations, he or she will be charged with inefficiency and using the Stronge Evaluation Model, recommended by the NJ Department of Education and which is fair and equitable, Respondent has failed to meet the minimum standards that are required for a teacher to maintain his tenure, requiring these charges for tenure revocation to be sustained.

While Respondent chided the District for observing him the day he returned from absences in April and two days in a row in May, there are no provisions in the Statute indicating when or under what conditions observations are to be conducted. It is the District's position that when a teacher returns to work from an illness, he is expected to be prepared to work for a day of service and that he did not object to being evaluated and did not request an adjournment because he was not prepared.

As for Respondent's absences, he accumulated sixty (60) sick-days during the 2014-2015 school year; that due to his excessive absence, respondent disregarded and abandoned his professional responsibility to provide for the "efficient operation" of the District and disrupted the educational program at the expense of the students.

Further, Title I of the American's with Disabilities Act of 1990 requires an employer to provide reasonable accommodation to qualified individuals with disabilities; that Respondent and his doctors did not provide the requested and required information to assess the requested accommodation in a timely manner and that a reasonable accommodation was provided respondent after he provided the proper medical documentation.

Finally, credibility is at issue since Respondent has everything to gain or lose in this matter. The District asserts that its witnesses testified directly and without hesitation; that their testimony was consistent with the evidence submitted but that Respondent's testimony was not credible; that he contradicted himself and that Respondent's excuses for all of his non-compliance were unacceptable.

Therefore, the District asks this Arbitrator to determine that it has met its burden and to sustain the Charges.

RESPONDENT'S POSITION:

Respondent's position is that the evaluation process did not adhere substantially to the required evaluation process and the Corrective Action Plan (CAP) required by TEACHNJ and that these failures materially affected the outcome of Respondent's summative evaluation. Respondent points to the fact that some evaluations had no pre-conference; that pre-conferences must be done in person; that Respondent's supervisor, Salvatore Gambino, who was required by Statute to be present at all post-observation conferences only attended the post-observation conference for his own observation and that Gambino never reviewed the observations held during the school year until the Summative Evaluation in the spring of 2015, which meant that Gambino did nothing to help respondent correct his performance during the school year. Further, it is Respondent's position that a mid-year evaluation was required to be done by the SIP by February 15, 2015 but was never performed.

Respondent's position is that the District acted in an arbitrary and capricious manner when it conducted its second observation during the first period of the first day

that Respondent returned from an extended absence and when it conducted its third and fourth observations on back-to-back days. Doing two observations on consecutive days ignores the purpose behind TEACHNJ and the CAP and does not benefit the teacher on CAP especially because the law requires the fourth observation to give the teacher every opportunity to earn an effective rating.

Additionally, Respondent requested his accommodation in good faith in February 2015 based on his health condition but Respondent claims that the District, rather than give him the accommodations, suspended him in retaliation for his request. Respondent asserts that the suspension was unwarranted as the District had no information that indicated that he was unfit for duty but was reinstated after a month despite the fact that the District never received any further medical documentation regarding Respondent's condition, which indicated that there was no reason to have suspended him in the first place. The District's actions aggravated Respondent's hypertension and severely impaired his ability to improve to meet his goal and constitutes arbitrary and capricious behavior.

Respondent contends that regulations require that SGOs be developed by the teacher in consultation with the supervisor; that SGOs are not meant to be directed by central administration with little if any input from the teacher and are not to be across the board goals but rather geared to a specific teacher but that the SGO's for Respondent were done and directed by Gambino without any consultation with Respondent.

Finally, it is Respondent's position that the District did not provide any evidence supporting a tenure charge of excessive absenteeism; that the focus of absenteeism is not merely the number of days of absence but a consideration of the nature of the absence;

that some form of warning must be given to the employee that superiors are dissatisfied with the pattern of absences and that if the District was so concerned about his absence, it would not have suspended him for no reason after he returned from his extended absence.

Respondent asserts that the District utilized TEACHNJ to try to fire a teacher rather than to provide feedback to an educator; that the District must be strictly held accountable to follow all the procedures required to give a teacher the opportunity to become an effective teacher and that the District failed to follow the mandated procedures put in place to assist teachers.

Therefore, as the District has not followed the requirements of TEACHNJ and has clearly violated numerous requisite mandated procedures, the tenure charges must be dismissed and the Respondent must be reinstated to his former position as a teacher with back pay and remain on the CAP and receive its benefits for the remainder of the 2015-2016 school year.

OPINION:

Under the Teacher Effectiveness and Accountability for Children of New Jersey Act (TEACHNJ/ACT), for inefficiency charges, the arbitrator's role is limited and may only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan;
(2) there is a mistake of fact in the evaluation;
(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

Further, an arbitrator must determine if one or more of these considerations is proven, did that fact materially affected the outcome of the evaluation and, finally, the quality of an employee's classroom performance is not subject to an arbitrator's review.

Two charges were brought against Respondent.

Charge One - Inefficiency

The Board has the obligation to prove by a preponderance of the evidence that the statutory criteria for the tenure charges have been met and, in support of its position, the Board submitted all the evaluations and testimony to substantiate that Respondent did not meet the required standards of an effective teacher. Based on observations, he received a rating of 'Partially Effective" for the 2013-2014 school year and, after developing the required CAP, which according to Dr. Michael Parent, Principal "is meant to assist the teacher in helping our students achieve more, learn better and for them to be much more effective educators" and was designed to assist Respondent in deficient areas identified in the evaluation, he received a rating of "Ineffective" for the 2014-2015 school year.

As stated above, this Arbitrator is not empowered to evaluate the quality of the evaluations and, therefore, they remain in the record as fact. However, Respondent asserted that procedurally TEACHNJ was not followed in numerous ways; that the District failed to adhere substantially to the evaluation process and that the District's actions were arbitrary and capricious. Respondent cited several aspects of TEACHNJ to support its position.

TEACHNJ, in conjunction with the New Jersey Administrative Codes and Statutes, places numerous requirements on the District when evaluating a teacher, which must be followed in order for the tenure charges to be sustained. There are requirements for pre-observation conferences, for post-observation conferences, for the number of conferences per school year and for the responsibilities of the designated supervisor and the School Improvement Panel (SIP).

The parties agreed that as a teacher on a CAP, Respondent must receive four evaluations per school year and, in fact, Respondent was evaluated on October 14, 2014 by Lydia Yikon'a; on April 27, 2015 by Salvatore Gambino, Respondent's supervisor, and Joe Sabbath;[1] on May 26, 2015 by Dr. Michael Parent, Principal, and on May 27, 2015 by Director of Special Education, Candice Chaleff. Additionally, Title 6A of the Code §6A:10-4.4 (c) states that

> . . . For all teachers, at least one of the required observations shall be announced and preceded by a pre-conference.

It was undisputed that Yakon'a's conference was announced but was not preceded by a pre-conference and, in fact, Parent testified that the pre-observation is "an opportunity to give us an indication of what they would like us to look at and focus on during the observation." Respondent disagreed with the District's position and rather asserted that the pre-observation is for the observer to advise the teacher what things the observer would be looking for. Certainly, whether the pre-observation conference is as stated by the District or as asserted by Respondent, it was undisputed that no pre-observation conference was conducted by Yakon'a. Further, §6A:10-4.4 states that

> A pre-conference, when required, shall occur at least one but not more than seven teaching staff member working days prior to he observation.

However, in this matter it was undisputed that Yakon'a did not have a pre-observation conference with Respondent as required by law.

Further, as for post-observation conferences, §6A:10-2.5.4 (f) states that

> The teaching staff member's designated supervisor and the teaching staff member on a corrective action plan shall discuss the teaching staff member's progress toward the goals outlined in the corrective action plan during each required post-observation conference, . . .

Parent acknowledged that as Respondent was on a CAP, post-observation conferences were required after all four of observations on him. However, the record established that Gambino, as Respondent's supervisor, was not at the post-observation conference with Yakon'a[2] and that, according to Parent, Gambino was not at the third post-observation with Parent. As for the fourth observation Chaleff testified that she wrote her comments in a memo to Respondent. Therefore, as there was no post-observation conference after Chaleff's observation, which she testified she did not know was required, Gambino, by definition, was not at that conference.

Further, regarding the purpose of post-observation conferences §6A:10-4.4 (2) stated that

> The post observation conference shall be for the purpose of reviewing the data collected at the observation . . . and offering areas to improve effectiveness.

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[1] TEACHNJ requires at least one co-observation per year.

[2] In fact, Gambino admitted that he never even read Yakon'a's evaluation until he compiled the summative report in the spring of 2015. Certainly, Gambino was unable to give Respondent guidance during the year as he had not read the evaluation until the end of the year.

In the opinion of this Arbitrator, the Code is very clear. Not only are there to be four evaluations per school year for a teacher on a CAP so that the teacher can improve but also, as testified to by Chaleff,

> the goal behind the evaluation process is to work in the best interest of the community to assure the parents and the community that their students are receiving an appropriate education by effective teachers.

As for the CAP she stated that

> The goal is to first alert them that their teaching is not meeting the effective standard, to provide them . . . a means to which the teacher can improve themselves and provide the guidance to help the teacher learn or improve their ability in those areas that the CAP was developed for.

Additionally, the requirement under §6A:10-2.5.4(f) is that the designated supervisor and the teacher "shall discuss" the teacher's progress during each required post-observation conference. This was clearly not followed.

While Parent asserted that post-observation conferences can be in writing and do not have to be face-to-face, this Arbitrator cannot agree. The word "discuss" has a very specific meaning and when legislators write law and codes, each word must be given meaning. To discuss is not to write an evaluation and send it to the teacher as was done by Chaleff. She testified that while she did not conduct a post-observation conference, she submitted her comments regarding her observation on D-1, the Formal Classroom Observation Form, which Respondent reviewed. She further stated that if she had had an actual face-to-face conference she would not have had any recommendations that were not included in D-1. However, that is not the point. The Code says "discuss."

While the Board asserted that according to the Stronge Evaluation model "Acknowledgment of any document is equivalent to a digital signature indicating receipt review, and acceptance of the observation," this Arbitrator must make a decision based on the TEACHNJ Statute, not on an evaluation model, despite being approved by the Board and endorsed by the Department of Education. Acknowledgement that the teacher has read and commented on an observation does not negate the necessity, under TEACHNJ for the observer, the supervisor and the teacher to "discuss" the observation.

Further, though Respondent could have requested a meeting to discuss an observation, the responsibility is on the District to follow the procedures set forth in TEACHNJ, not on the teacher to request a discussion. If a board of education wants to help a teacher improve, to discuss must mean to sit down and have a discussion as to areas in which the teacher can improve and to discuss the negative and positive aspects of an observation.

Whereas TEACHNJ was implemented so that teachers can improve instruction through the adoption of evaluations that provide specific feedback to educators, the idea of the acceptability of written communication as a form of a post-observation does not fit within the goals of the statue. Further, Parent agreed that the idea of a CAP is for a teacher, with the help of the school district, to improve. Therefore, in the opinion of this Arbitrator, post-observations, in accordance with the language of TEACHNJ and the Code, must be, by their very nature and objective, in person.

Gambino acknowledged that in the fall of 2014 (September, October and November) Respondent was doing better under the CAP; that he was doing things he was supposed to be doing and on his way but that he was still not proficient. Of course, the record reflected and, will be discussed below, that Respondent took a leave of absence beginning on December 8, 2014 due to an approved extended medical absence. However, from Gambino's testimony and the fact that Respondent had a good evaluation in October 2014 from Yakon'a, one would expect that he would have had a good year but for his illness and his suspension discussed below.

The District's witnesses repeatedly stated that Respondent did not request an adjournment of his evaluations and did not ask to cancel or redo an evaluation. However, this is not the responsibility of a teacher. It is the District that is the driving force behind the observations and it was well aware that Respondent was having medical issues and of his requests for accommodations.

Another issue affecting Respondent's performance in the spring of 2015 when he returned to work on February 17, 2015 was that he was not put back into his regular math class but was assigned to in-class support classes as a certified math teacher to teach math. The Board's position was that it did not want to disrupt the flow of the teaching while Respondent was absent and wanted to retain the teacher who was covering for him. If this had been the only action toward Respondent, this Arbitrator would have understood the Board's position. However, the cumulative effect of the Board's actions toward Respondent affected the outcomes of the evaluations.

Shortly thereafter Respondent was suspended from February 25 and was reinstated on March 25, 2014, which will be discussed below. However, the relevant part of these dates is that Respondent was absent again for a few days at the end of March and the beginning of April, then was out again from April 13 to April 24, 2015 and the very first day he was back to work, on April 27, 2015, the second evaluation was conducted.

Parent acknowledged that in order to improve one's teaching skills, one has to teach. However, the record established that the last time Respondent taught his regular math class was on December 5 and that he taught his regular class a few days in March and April before he was observed on April 27, 2015, the first day he was back. Clearly, Respondent did not have sufficient time to acclimate himself back to the classroom after such a tumultuous year. While Parent did not believe this was unreasonable, this Arbitrator cannot agree.

The Board cited a previous decision of this Arbitrator (#235-13) in support of its position that given Respondent's many years as a teacher he should have been ready the day he returned to the classroom to teach at his best. As a general principle, this Arbitrator agrees. However, the fact pattern in the instant matter can be differentiated from the previous Award. This Respondent clearly had medical problems and was continually frustrated at the way the District handled his issues especially his suspension and his back-to-back evaluations and its not granting him any of his requested accommodations until the last month of the school year. Further, whereas this Respondent was absent due to approved medical leaves for long stretches of time,

the teacher in the previous decision taught everyday. It was not a situation where he was absent and returned to the classroom and was unfamiliar with the students and where they were in the curriculum. Rather his issues were that he was unable to control the class; that he treated the students in an unprofessional manner; that he received many complaints from students and parents and that received coaching over several years as to his behavior in the class including swearing and using inappropriate language.

Returning to Respondent's fact pattern, he was absent again for several weeks in mid-May and returned on May 25 to once again be evaluated on the first day of his return. However, the District needed one more evaluation before the end of the school year, so what did it do? It evaluated Respondent on May 26, one day after the third evaluation.

This Arbitrator understands that there are requirements under TEACHNJ to observe a teacher on a CAP four times. However, it was undisputed that evaluations are supposed to help the teacher with his strengths and weaknesses and to give him guidance so he can improve. Therefore, there has to be a reasonable time period between evaluations to show improvement. Additionally, the Code requires a post-observation after each conference, which certainly did not happen after the third and before the fourth evaluations.

Respondent also contended that the language regarding the School Improvement Panel, Section C was not followed. According to §6A:10-2.5 (j)

> The School Improvement Panel shall ensure teachers with a corrective action plan receive a mid-year evaluation . . . The mid-year evaluation shall include,

> at a minimum, a conference to discuss progress toward the teacher's goals outlined in the corrective action plan. . .

Further, §6A:10-3.1 states that

> The School Improvement Panel shall include the principal, a vice principal, and a teacher . . .[3]

Additionally, 18A:6-120, Section C states that

> the panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially ineffective in his most recent evaluation.

Chaleff acknowledged that as a member of the SIP, she did not recall any mid-year evaluation done for Respondent despite the fact that the N.J.A.C. 6A:10-2.5(j) states that the SIP "shall ensure" teachers with a CAP receive a mid-year evaluation.[4] In contrast, Parent testified that Gambino did the mid-year evaluation "at the same time that . . . that I had done my observation," in other words on May 28, 2015, which was Exhibit 1.4 of Joint Exhibit J-2.[5] However, he acknowledged that the purpose of a mid-year evaluation is "to gauge the progress or lack thereof in a corrective action." With this purpose in mind, it must be concluded that no mid-year evaluation was done in this matter. Clearly, Respondent had no opportunity to gauge his progress. Parent's response was that if Respondent had been in school, the mid-year review could have been done in the middle of the year.

In the opinion of this Arbitrator, the actions of the District certainly did not support an approach whereby it was trying to help Respondent to succeed and to meet

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[3] The parties agreed that as it relates to evaluations, teachers are not included in the SIP.

[4] The language of N.J.S.A. 18A:6-120 is very clear that the Panel shall conduct a mid-year evaluation.

the goals of the CAP. The District acknowledged that Respondent did not fake his illness and it was aware of the reasons for his absences. This Arbitrator can agree that evaluations cannot be done when the teacher is not in attendance but the timing of the evaluations, the second the day he returned from an extended absence and suspension and the third the day he returned from another absence followed by the fourth on the very next day did not appear to represent a District that was trying to work with its staff member, a member who was a longtime employee with no disciplinary record and no history of medical leaves of absence.

A decision rendered by Arbitrator Daniel Brent[6] can be applied directly to this matter. He stated

> Respondent's performance for the year was fatally tainted by an arbitrary and capricious action that materially impaired Respondent's right to be judged and rated on the basis of valid observations and evaluations as required under the TeachNJ statute.
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> The District has credibly described deficiencies in Respondent's performance observed during that evaluation visit, but the arbitrary and capricious timing and circumstances of this evaluation session was unjustified by sound educational policy, prohibited by applicable statute and undermined the validity of the District's summative evaluation of Respondent Jodi Thompson for the 2013-2014 school year, resulting in the tenure charge of inefficiency.

Similarly, though the evaluations described significant deficiencies in Respondent's work performance in this matter, the surrounding circumstances and the District's response to those circumstances were arbitrary and capricious and unjustified given that Respondent cooperated with administration and was forthright in explaining his illness

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[5] Parent also testified that Gambino did the mid-year evaluation in the "same time period" as he did the second observation (meaning April 27, 2015) and submitted it on May 28, 2015 (According to J-2, Exhibit 1.4 was submitted, May 29, 2015.)

from the very beginning and supported by medical documentation. Further, as stated by Arbitrator Brent, this Respondent must significantly improve his teaching skills, take the guidance and direction offered in the evaluations over the past two years and avail himself of all assistance so that he can return to being an effective teacher. If not, tenure charges may lie in his future. Further, the District must find a way to work with Respondent as set forth in the CAP so that he can improve his teaching methods.

Charge Two - Other Just Cause (Exploitation of Apportioned Sick-Time)

Absenteeism is a very serious matter and affects the educational opportunities students are entitled to expect and affects the productivity of the teacher. In addition, boards of education have a right to expect that its teachers are in class daily and ready to teach every day. Further, as in any form of discipline, the employer must advise the employee that attendance is the employee's responsibility and is a key component to being a productive employee; that excessive absenteeism will not be tolerated and that a series of counseling sessions and progressive warnings will be issued to the employee.

In the instant matter, Respondent, a math teacher, was awarded tenure during the 2008 school year. Assistant Superintendent John Maiello confirmed that prior to December 2014 Respondent never took any extended leave of absence and that he was unaware of any discipline for Respondent before the 2014-2015 school year. However, the record established that during the 2014-2015 school year Respondent was absent

[6] In the matter of Tenure Charges against Jodi Thompson and The State-Operated School District of the City of Newark, Docket No. 240-8/14 and 16-1/15.

on an approved sick leave for sixty (60) days; that the first day that Respondent was absent was December 8, 2014; that he was absent for the months of December of 2014, January 2015, part of February and returned to work on February 17, 2015.[7]

It was undisputed that Respondent kept the District informed of his medical condition including a memo and Excuse Slip, District Exhibit D-2, which indicated that Respondent would return to work on February 17, 2015. Additionally, the Board received a letter from Respondent's doctor, Respondent Exhibit R-2,[8] dated February 12, 2015, which indicated that Respondent was under his care, and cited "significant chronic health conditions that impair activities of daily living for Mr. Cuntrera." The doctor listed ten (10) Significant Health Impairments and identified twelve (12) accommodation ideas that Respondent and the doctor discussed and advised the District that "If these accommodations cannot be provided, please let Mr. Cuntrera know so that we can discuss alternatives." He further suggested that he could be called at any time for further discussions. Maiello acknowledged that he received this memo from Respondent; that he did not call the doctor for further discussions regarding Respondent's medical condition and that though he was concerned about Respondent's fitness for duty, there was nothing in the doctor's note that said Respondent was not fit for duty.

As stated above, Respondent returned to work on February 17, 2015,[9] worked the 17th through the 24th and attended two meetings on February 24th. According to

[7] Respondent's unrefuted testimony was that he received a bug bite while on vacation in Florida in July 2014; that he had severe side effects from that bite and blood pressure problems combined with anxiety. There was no evidence in the record that disputed Respondent's assertions as to his medical condition.

[8] Respondent's Exhibit R-2 and R-7 are the same document.

Respondent, the first meeting was with William Betar, head of human resources, and John Manning, Association Representative (neither of whom testified), at which time Betar told Respondent that the accommodations requested in R-2 could not be given as it would affect the quality of the education of the students. Later that same day Respondent attended a meeting with Superintendent, Diane Lobasco, who also did not testify. Respondent's unrefuted testimony was that Lobasco stated that the doctor did not have the authority to write this letter; that she was concerned about Respondent's safety and that of the students and that he was suspended. However, Maiello testified that when Respondent was suspended the concern was based on the February 12, 2015 memo but he acknowledged that there was no concern for the safety of the students and that there were no complains that Respondent was acting irrational or in a dangerous manner.

Lobosco wrote to the doctor on February 26, 2015, R-9, requesting additional information regarding accommodations and on March 10, 2015, in response to a request by the District, Respondent wrote a memo to Lobosco, R-12, which advised her that Respondent had given authorization to the doctor to release any and all medical records. However, Respondent acknowledged that no notes were sent to the District from the doctor between February 12th and March 19, 2015.

On March 19, 2015, Maiello wrote a memo to Respondent regarding his accommodation requests, R-4. In that letter, of the twelve (12) accommodations requested, the first was granted. Though the District asserted that this was only a

[9] Conditions under which he returned to work were discussed above.

suggestion, the memo was very clear regarding the first requested accommodation, which stated:[10]

> **Extra time will be provided to complete work.**[11]
> An additional period will be allowed. Mr. Cuntrera will no longer be assigned a duty period. All other extra time needed is to be after the contractual end of the day.

For the following requested accommodations, Maiello asked for more information: bullet points 3 through 6, 8 and 9. For bullet points 2, 7 and 10 through 12 Maiello gave suggestions and stated Board policy. In the opinion of this Arbitrator, the first bullet point was accommodated but the record clearly reflected that the accommodation did not take effect until June 2, 2015. In a memo with that date from Maiello to Respondent, R-10, Maiello stated that

> As a result of interactive process conduced with you and review of Dr. Braverman's letter dated April 1, 2015, and the additional medical information you have supplied, please find the PCTI's position with regard to your requests for reasonable accommodations.
>
> . . .
>
> **Extra time will be provided to complete work.**
>
> Request granted. Mr. Cuntrera is no longer being assigned a duty period, this will allow him an additional 42 minutes to complete his work. All other extra time needed is to be after the contractual day.

Though the District claimed that this was the memo that approved Respondent's request to be relieved of his duty period, this Arbitrator cannot agree. The only difference between the response regarding duty period on R-4 and the response on June 2, 2015, R-10, was that it said request granted. However, the March 19, 2015

[10] Maeillo testified that he told Gambino around March 25, 2015 that Respondent was no longer to be assigned a duty period.

memo was also in the affirmative when it stated that "Mr. Cuntrera will no longer be assigned a duty period." However, it was undisputed that Gambino continued to assign Respondent a duty period from March 19 until June 2, 2015 in contravention of Maiello's directive.

This Arbitrator agrees with the District that it is only required to grant reasonable accommodations and is not required to lower its standards. However, while the District asserted that the doctor did not respond in a timely manner, this Arbitrator cannot agree. In response to Lobosco's letter dated February 26, 2015, the record established that the Board received a letter from Dr. Braverman dated April 1, 2015 with his assessments but Maeillo did not grant or deny requests until June 2, 2015, R-10.

The record established that Lobosco and Maeillo were very concerned about Respondent's fitness for duty and, therefore, he was suspended beginning on February 25, 2015. As per R-3, dated February 24, 2015, Lobosco wrote to Respondent to advise him that he was suspended, "subject to the validation of your medical documentation, as well as fitness for duty." However, with no reason given and with no additional medical documentation received by the Board at that time, Respondent's suspension was rescinded and he returned to work on March 25, 2015.[12] A careful review of the testimony and documentation convinced this Arbitrator that there was no reasonable

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[11] Bold and underlined sentence was the accommodation requested by the doctor in R-2 dated February 12, 2015. The next sentences are the response from the assistant superintendent.

[12] Maeillo testified that he told Gambino on March 25, 2015 that Respondent will no longer be assigned a duty period. However, the record established that Respondent continued to be assigned a duty period by Gambino. Despite the fact that the duty period accommodation was granted, Respondent was told by Gambino that he had duty period responsibility. Respondent emailed Gambino on May 6, 2015, R-5, reminding him that he no longer had a duty period and asked Gambino to confirm. It was not until the June 2, 2015 memo, R-10, was issued, that Respondent was not assigned a duty period.

reason to have suspended Respondent on February 25, 2015. The doctor did not state in his memos that Respondent was not fit for duty and though the District continued to claim that it was concerned about Respondent's fitness and the safety of the students, the District did not send Respondent for a second evaluation and did not receive any further information from Respondent's doctor as was stated in the February 24th letter. However, with no explanation, the Board reinstated Respondent on March 25, 2015.

This Arbitrator can understand that the District may have wanted additional medical information but having not received that documentation, if it really believed that Respondent was a danger to himself and to the students or unfit for duty, why did it reinstate him on March 25, 2015? This curious set of facts led this Arbitrator to question the District's actions.

Respondent was absent most days in April and May and taught from May 26 through the end of the school year when Respondent was rated "ineffective" and the Board filed the tenure charges in accordance with TEACHNJ.

Board Policy #3212 (Attendance) stated in pertinent part that

> a teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

There was no evidence in the record of the hearing that Respondent did not promptly notify the District of his absences, that he misused sick leave, that he failed to verify an absence, that he falsified the reason for any absence, that he was absent

without authorization or that he was repeatedly tardy.[13] However, it was the Board's position that Respondent was excessively absent when he was absent sixty (60) sick days in the 2014-15 school year. As testified to by Maiello, the 2014-2015 school year was the first time since Respondent was hired in 2005 that he had "excessive leaves of absence."

The District cited the decision by Arbitrator Robert Gifford in a prior tenure matter, Docket No. 260-9/14,[14] in support of its position that the excessive absence charge should be sustained. However, in the opinion of this Arbitrator, the instant charge can be differentiated from the prior tenure decision in significant ways and does not support the Board's position.

- Steitz had a record of 560.55 days of excessive absenteeism over seven (7) school years.
- Steitz was progressively disciplined and warned about his poor attendance multiple times.

While this Arbitrator agrees that teachers must come to school regularly so that students will have the benefit of consistent instruction, this Respondent was absent sixty (60) days in one school year and never used leaves of absence in the past. Further, Respondent was never warned that his absenteeism would lead to disciplinary charges and, in fact, he was never disciplined for absenteeism, progressively or not, from the 2005 school year through the 2013-2014 school year.

[13] On the contrary, the record established that Respondent kept the District informed about all of his absences and followed the Attendance Policy completely.

[14] In the Matter of the Tenure Hearing of Carson Steitz, School District of the City of Elizabeth, Union County. Decided by Arbitrator Robert C. Gifford, Esq.

Arbitrator Gifford cited the well established "Substantive Standards of Proof" to conclude that Steitz was excessively absent sufficient to warrant dismissing him from his tenured teaching position. Two of the three items cited are applicable in this matter.

> 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 absences.
>
> . . .
>
> (3) That there be some warning, given to the employee that his or (sic) supervisors were dissatisfied with the pattern of absences.[15]

However, in this matter, the District did not demonstrate that it took into consideration the particular circumstances of Respondent's absences. He notified the District when he would be out. He had doctor certification of his condition. His doctor explained that he had significant health impairments, and that he needed accommodations, which, except for one were not given, and even that one was given the last month of the school year, and the doctor offered to discuss the accommodations with the Board but that never happened.

There was no testimony to convince this Arbitrator that the Board considered the circumstances of his absences. Rather, it merely looked at the number. Further, the record of the hearing was devoid of any notice to Respondent that his continued absences could lead to tenure charges and he was not progressively disciplined for this matter. Finally, despite the fact that the Board was so concerned for the progress of the students and that there be a consistent teacher's presence in the classroom, it suspended him for nineteen (19) days when he could have been in the classroom thus

increasing his anxiety and exacerbating the medical condition cited by his doctor. There was no proof in the record of the hearing that Respondent "exploited" his apportioned sick time.

For all of the above reasons, this Arbitrator must decide that the Board did not sustain its burden of proving the Tenure Charges.

The District asserted in its brief that Respondent was not a credible witness and that this Arbitrator should credit the testimony of its witnesses. While the District's position is that an employee has a reason to not tell the truth whereas the employer's witnesses should be given greater weight, this Arbitrator cannot agree with that general statement. Each situation is unique and whereas sometimes the Board's premise is accurate, other times it is not. In the instant matter, each witness was evaluated based on his or her own testimony and compared to the testimony of others and, in fact, this Arbitrator concluded that most witnesses were credible. Not only did this Arbitrator conclude that the Grievant was forthright in his testimony, but also that the Board's actions and its implementation, or lack thereof, of TEACHNJ and the Code were important factors in determining that it did not meet its burden.

Finally, the District issued two Formal Reprimands to Respondent on May 4, 2015 for changing historical grades and for fabrication of Student Growth Objectives (SGO), which appeared to this Arbitrator to be related to the same issue. However, Performance Standard 7, Student Academic Progress, or the SGO measure, is part of the evaluation system and, according to N.J.S.A. 18A:6-17.2, Considerations for

[15] I/M/O Tenure Hearing of Velez, School District of Hudson County Schools of Technology.

Arbitrator in Rendering Decision, the evaluator's determination is not subject to an arbitrator's review. Therefore, these two reprimands will not be addressed.[16] Regarding the third reprimand for using another teacher's information, Respondent specifically noted in the Documentation Log that the material was created by another teacher. Contrary to the District's assertion, Respondent did not try to pass the material off as his own. In the opinion of this Arbitrator, this reprimand was insufficient to support tenure charges.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator must decide that the District did not carry its burden of proof by a preponderance of the evidence; that the manner in which the District conducted the evaluations materially affected the outcome of the evaluations and that the Tenure Charges are to be dismissed.

In consonance with proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

[16] In fact, at the hearing, Respondent's attorney objected to a discussion of Respondent's conduct in part because it is "part of the evaluation that I can't object to anyway. So I don't think this is relevant."

A W A R D

(1) The Tenure Charges are dismissed.

(2) Respondent shall be reinstated immediately to his former position as a math teacher with back pay and continue to receive the benefits of the CAP for the remaining of the 2015-2016 school year.

Dated: November 27, 2015

Mattye M. Gandel

State of New Jersey)
:SS
County of [redacted] Morris)

On the 27th day of November before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

MUSARRAT MOGHAL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 20, 2017

EXHIBIT A

The Board of Education requested to submit reply briefs in this matter first asserting that we had agreed to reply briefs but that if there had been no agreement, it asserted that reply briefs were appropriate so that both parties could present their entire positions. Respondent did not agree to the filing of reply briefs and after several emails from both parties and after due consideration, the Arbitrator issued this ruling via email on November 20, 2015.

Gentlemen;

I have checked my notes and the transcript and there is no mention of reply briefs. The following is from the transcript when we discussed filing of briefs at page 221:

Arbitrator: As you know, we have a very short window of opportunity for briefing schedules because we have 45 days from last Wednesday for my decision to be in, which turns out to be Thanksgiving or the next day, Friday. I'm wondering - unfortunately, I'm going to be away the 12th through the 19th. I'm wondering if you can have it to me by the 6th of November, which gives you like ten days.

Mr. Buglione: Yes

Therefore, it is clear that we never discussed the filing of reply briefs. I know that reply briefs have been submitted sometimes in arbitrations but is the exception and is usually when the parties have agreed in advance to submit such.

Additionally, I have carefully considered Mr. Buglione's reasoning for submitting a reply brief. However, while I believe that it is important for each party to have a full opportunity to present its arguments, reply briefs will not be considered in this matter for the following reasons. The parties never agreed to reply briefs, TEACHNJ requires a very short time schedule so that these matters are resolved quickly and because of Petitioner's main reason for wanting to submit a reply brief. While I agree that Petitioner has the right to question Respondent's credibility and to try to impeach his testimony, Petitioner had the opportunity when it submitted its first brief. As Petitioner said in the November 18 emails at 10:14 a.m. and again at 3:32 p.m.,

"It is abundantly clear that the respondent made misstatements <u>at the hearing</u> and we are allowed to point them out through the briefing process." (emphasis added)

At 3:32 p.m.: .. . the respondent was not candid <u>when he testified</u> before Your honor, and the petitioner should be able to point out the inconsistencies in his testimony, and to demonstrate that he provided false testimony." (emphasis added)

I certainly agree that Petitioner has the right to point out these inconsistencies and to try to impeach Respondent. However, whatever Respondent said was testified to at the hearing on October 21, 2015 and Petitioner had every opportunity to argue those points in its first brief. The hearing cannot be reopened to add new documents. Finally, as far as the reading of TEACHNJ, each party submitted several exhibits with its brief and its positions on the law and I will consider both parties' arguments and exhibits in forming my decision.

Respectfully submitted,
Mattye M. Gandel, Arbitrator