

#97-10 (OAL Decision: Not yet available online)

IN THE MATTER OF THE TENURE :
HEARING OF VIVIAN LLEO, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF : DECISION
WEST NEW YORK, HUDSON COUNTY. :

SYNOPSIS

Petitioning school district certified two sets of tenure charges of unbecoming conduct, insubordination, inability to complete duties and other just cause against respondent – a tenured secretary – alleging chronic absenteeism and persistent tardiness over the course of eight school years, and filed a motion for summary decision dismissing respondent from her tenured position. Respondent argued that her absences were not sufficiently egregious to require termination, and further alleges, *inter alia*, that termination is inappropriate because the district failed to progressively discipline her for alleged infractions, and a district-appointed psychologist’s report found her unfit for duty, thereby obligating the Board to allow her up to two years to improve her health and report back to work.

The ALJ found respondent was chronically absent and tardy in every full year of her employment from 2001 to 2009, and concluded that petitioner has sustained the burden of proving the charges of conduct unbecoming based on chronic and excessive absenteeism, insubordination based on respondent’s failure to follow a legal direction to report for fitness for duty exams, and inability to complete duties, and, based on the foregoing, the fitness for duty determination is moot. Accordingly, the ALJ ordered respondent’s employment terminated.

Upon a comprehensive review of the record, the Commissioner concurred with the ALJ’s findings and adopted the Initial Decision of the OAL as the final decision in this matter. The respondent is hereby removed from her tenured secretarial position.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

March 25, 2010

OAL DKT. NOS. EDU 1608-09 AND EDU 3191-09 (CONSOLIDATED)
AGENCY DKT NOS. 14-1/09 AND 30-2/09

IN THE MATTER OF THE TENURE :
HEARING OF VIVIAN LLEO, : COMMISSIONER OF EDUCATION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent and the District requested and were granted extensions of time within which to file exceptions and replies, respectively, to the Initial Decision. These submissions were fully considered by the Commissioner in reaching his determination herein.

Respondent initially excepts to the Administrative Law Judge's (ALJ) finding that she had been absent 471 days. Rather, she avers, the District's own witness at hearing, Mr. Lentini, acknowledged that this figure included the sick, personal and vacation days to which she was entitled pursuant to her union contract and that the excess absences more closely approximates 254 days during the course of the 10 years she worked in the District. Therefore, respondent contends, the ALJ's finding in this regard must be rejected. Additionally, she proposes, an average of 25 absences a year is not sufficiently egregious to require respondent's termination. (Respondent's Exceptions at 2) Next, respondent contends that the ALJ's recommendation that she be terminated from her position is inappropriate given the District's

failure to progressively discipline her for alleged infractions, notwithstanding that she always exceeded her allotted sick days – even prior to attaining tenure. Respondent argues:

...although her attendance was mentioned in her evaluations from time to time, Ms. Lleo did not receive a single formal written warning until January of 2008. Moreover, the district never withheld a salary increment or took other more severe action against Ms. Lleo. In this regard, Ms. Lleo was never progressively disciplined. Consequently, the district lacks “good cause” to terminate Ms. Lleo’s employment at this time. (*Id.* at 4)

Respondent’s exceptions further allege that the ALJ failed to consider or address her argument that – as a consequence of the District’s psychologist’s report finding her unfit for duty – the fact that her attendance was poor prior to this exam is “water under the bridge” and tenure charges are inappropriate at this time. Rather, she maintains, once she was sent for a fitness for duty exam, the District was obligated to follow the doctor’s determination and, pursuant to *N.J.S.A. 18A:16-4*, must allow her up to two years to improve her health and report back to work. (*Id.* at 5-6) Finally, given that the second set of tenure charges covers the same issues as the first and the District knew about the December 11, 2008 doctor’s report when it certified the first set of charges on January 14, 2009, respondent charges that the District cannot impose a second 120-days of suspension from the certification date of the second set of charges and, therefore, must compensate her for approximately five weeks of pay it erroneously withheld. (*Id.* at 6)

In response to respondent’s assertions with respect to her attendance record, the District cites to Exhibit P-1 and specific hearing testimony which reflect that for school years 2001-02 through 2008-09, respondent took a total of 125 sick days, was docked 319 days (docked days are those which respondent was absent but did not have any accrued leave available), was late 84 days and took 27 days as leave without pay – for a total of 555 days over this eight year period. Subtracting out the 84 days respondent was late leaves 471 days of

absence – the precise figure found by the ALJ. As to respondent’s claim that the number of absences reflected in her attendance record is artificially inflated due to the District’s inclusion of her annually allotted 14 sick days each year, the District urges that even excluding these days from the calculation, respondent was absent 347 days and late 84 days over this eight year period. Even assuming, *arguendo*, that respondent’s habitual utilization of her entire sick leave allotment every year was not to be considered,¹ the District contends that this abysmal attendance record warrants respondent’s removal from her position. (District’s Reply Exceptions at 2-3)

As to respondent’s claim that she was never notified of or previously disciplined for her poor attendance, the District avers that such a contention fully ignores five years of evaluations which served to advise respondent that her attendance was progressively deteriorating and required improvement. Notwithstanding at least five years of notice, respondent’s attendance worsened. (*Id.* at 4)

In response to respondent’s argument that – as a consequence of the District’s psychologist finding her unfit for duty – she must be provided with two years’ leave to recover pursuant to *N.J.S.A. 18A:16-4*, the District contends that respondent fails to recognize that there were two separate tenure charges here which were consolidated at the OAL. The first of these arises from respondent’s chronic and excessive absenteeism and lateness over an eight year period, and the second relates to respondent’s fitness for duty. (District’s Reply Exceptions at 1-2) Notwithstanding that both the District’s and Respondent’s experts found that she was not fit for duty, the District points out:

¹ The District urges, however, such a position is unwarranted, citing *Trenton Board of Education v. Williamson*, 1986 *S.L.D.* 1462 and *Stanley v. Freehold Regional School District*, 95 *N.J.A.R. 2d.* (EDU) 495 for the proposition that “chronic and excessive absenteeism warrants dismissal even in cases where the sick days were approved.” (District’s Reply Exceptions at 4)

...there was not a scintilla of evidence offered at the hearing, nor cited in Respondent's exceptions, which indicates that her excessive absences were related to the diagnosis contained in either of the reports of the two (2) experts.

...Respondent argues that her 471 absences are now "water under the bridge" and should be ignored by the Commissioner because she is unfit for duty....Such a holding is not supported by law and is poor public policy. In fact, Respondent does not cite any authority for such a contention. Additionally, to so hold would encourage any employee with an attendance problem to obtain a medical report which finds them unfit for duty in order to protect their job. Here, Respondent had been examined by both a doctor chosen by the Board and her own doctor. Neither doctor causally linked their findings to her attendance records. Respondent offered no evidence during the hearing, nor in her exceptions, that her current mental illness was related to her absences. In fact, in support of her absences, Respondent provided the Board with various medical notes and correspondence, none of which are related to findings of either expert. She was determined unfit for duty on unrelated grounds. Because of this, Judge LaFiandra correctly concluded that this issue was moot. This decision is supported by the facts as adduced at hearing and supported by law. (District's Reply Exceptions at 7)

Finally, the District argues, notwithstanding that respondent continues to be on leave with pay more than 14-months after the District certified tenure charges and suspended her, she takes the position that she should receive pay commencing 120 days after the certification of the first set of charges rather than 120 days after certification of the second set of charges. The crux of respondent's argument, it advances, is that the District could have included the information contained in the second set of charges in the first set. What she fails to realize, the District proffers, is "the statutory requirement of filing the charges and Respondent's opportunity to reply **prior** to the Board's certification of the charges." The first charges were filed on December 8, 2008. At that time, the Board's psychologist's report was not complete. In light of respondent's 3-month refusal to undergo the exam, the process required for the District to make the determination to bring additional charges – seeking legal advice and drafting amended charges – coupled with the District's impending winter recess, made it impossible for the Board to have included the fitness for duty charges in the first set of charges. Consequently, the

District argues, the 120 day period must run from the certification of the second set of charges, February 11, 2009. (Board's Reply Exceptions at 8-9, quote at 8)

Upon a comprehensive review of the record of this matter – which included transcripts of the hearing conducted at the OAL on July 14, August 12, August 21, and September 21, 2009 – and after full consideration of the parties' exception submissions, the Commissioner concurs with the ALJ – for the reasons detailed in her decision – that the District has sustained its charges of unbecoming conduct, based on her chronic and excessive absenteeism; inability to complete her duties based on her failure to adhere to an acceptable standard of attendance and punctuality; and insubordination as a consequence of her failure to follow directives of her superior regarding reporting for a fitness for duty examination, warranting respondent's removal from her tenured secretarial position.² The Commissioner similarly agrees with the ALJ and the District – for the reasons cogently advanced by the District in its Reply Exceptions and fully supported by the record – that in light of the above, it is not necessary to reach the additional issue in the second set of charges dealing with respondent's fitness for duty as this charge has been rendered moot. Finally, the Commissioner finds and

² The Commissioner is compelled to note that, contrary to the apparent belief of respondent, the civil service concept of progressive discipline plays no role whatsoever in this matter. As an employee working as a secretary in a school district, respondent was granted tenure pursuant to *N.J.S.A. 18A:17-2*, which in paragraph (c) specifies:

Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

As such, dismissal or reduction of salary for these individuals is governed by *N.J.S.A. 18A*, not rules and regulations of civil service.

concludes, for the reasons persuasively presented in the District's Reply Exceptions, that respondent should have commenced receiving pay 120 days after the certification of the second set of tenure charges in this matter, on February 11, 2009.

Accordingly, the recommended decision of the OAL, as expounded on above, is adopted as the final decision in this matter. Respondent is hereby removed from her tenured secretarial position in the School District of the Town of West New York.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: March 25, 2010

Date of Mailing: March 26, 2010

³ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)