

EDU #8969-98 and #10489-98 (consolidated)
C # 181-99
SB # 30-99

IN THE MATTER OF THE TENURE :
HEARING OF GREGORY VEREEN, :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF LAWRENCE, MERCER COUNTY, STATE BOARD OF EDUCATION :
AND :
DECISION :
IN THE MATTER OF THE TENURE :
HEARING OF THEODORE :
PRUSAKOWSKI, SCHOOL DISTRICT OF :
THE TOWNSHIP OF LAWRENCE, :
MERCER COUNTY. :
_____ :

Decision on motion by the Commissioner of Education, February 22, 1999

Decided by the Commissioner of Education, June 9, 1999

Decision on motion by the State Board of Education, October 6, 1999

For the Petitioner-Respondent, Parker, McCay & Criscuolo (James F. Schwerin, Esq., of Counsel)

For the Respondent-Appellant, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

The Board of Education of the Township of Lawrence (hereinafter "Board") certified tenure charges of incapacity and excessive absenteeism against Gregory Vereen and Theodore Prusakowski (hereinafter "respondents"), tenured custodians in the district. As stipulated by the parties, Vereen had been employed by the Board as a custodian since October 1979. He suffered injuries to both of his knees in June 1996 while on the job and received medical treatment authorized by the Board's workers'

compensation carrier. It was further stipulated that his absences were related to the workers' compensation matter. He returned to work, in a limited capacity, in late 1998 or early 1999.¹

On February 1, 1999, the Administrative Law Judge ("ALJ") issued an order dismissing the tenure charges of excessive absenteeism. The Commissioner granted the Board's request for interlocutory review of that determination, and, on February 22, 1999, he set aside the ALJ's order and directed that the matter proceed to a hearing on the merits of the Board's charges for both incapacity and excessive absenteeism.

On April 23, 1999, following a hearing, the ALJ concluded that the Board had demonstrated by a preponderance of the credible evidence that the extended absences of the respondents rose to the level of unbecoming conduct. The ALJ found that the respondents' absences had had a negative effect on the operation of the district's schools, and he concluded that the appropriate penalty for such conduct was dismissal of the respondents from their tenured positions. In addition, the ALJ concluded that the respondents were incapacitated as a matter of law unless they could demonstrate to the contrary in the immediate future.

On June 9, 1999, the Commissioner of Education adopted the ALJ's recommended decision and directed that the respondents be dismissed from their positions. In so doing, the Commissioner observed that respondent Vereen "has not returned to the District in full capacity, although he is, apparently, back at work, 'on a

¹ Although the Board suspended Vereen from his custodial position when it voted to certify the instant tenure charges to the Commissioner in September 1998, the record indicates that he returned to work on a part-time basis shortly thereafter. According to the counsel for the respondents, "Vereen is back at work now, on a modified or work hardening schedule to determine whether he will be able to return to his full time duties....[T]he petitioner Board is not paying any salary to either respondent and has not for some time. They are being paid under workers' compensation." Letter from Michael T. Barrett, Esq. to Administrative Law Judge Bruce R. Campbell, dated March 10, 1999.

modified or work hardening schedule to determine whether he will be able to return to his full time duties.’ (Respondents’ Letter Memorandum, March 10, 1999 at p. 1) There is no indication in the record when, or even whether, Respondent Vereen will be able to resume his duties in full capacity.” Commissioner’s Decision, slip op. at 12-13.

The Commissioner agreed with the ALJ that the Board had demonstrated a negative effect from the respondents’ absences and that the appropriate penalty was dismissal of the respondents from their tenured employment, “notwithstanding that their absenteeism constituted a legitimate use of sick leave and the possibility remains that one, or both, of them might ultimately, at some point not presently foreseeable, once again become physically capable of performing their duties.” Id. at 13. In addition, the Commissioner noted that although the ALJ had equated excessive absenteeism with unbecoming conduct, the Board had not charged the respondents with unbecoming conduct.

The respondents filed the instant appeal to the State Board. Prusakowski subsequently withdrew his appeal. Consequently, the matter before us is now limited to the appeal filed by respondent Vereen. In a decision dated October 6, 1999, we directed that the record be supplemented with documentation from Vereen’s treating physician “with regard to his medical status and ability to return to full-time employment in the district at the time of his dismissal by the Commissioner of Education.”

On October 18, 1999, Vereen submitted the requested documentation, which included reports from his treating physician, Dr. Eric Gokcen. In a response filed thereto, the Board maintained that “such medical information is irrelevant to the

excessive absenteeism charge which was the prime basis for Vereen's dismissal by the Commissioner." Letter from James F. Schwerin, Esq., dated October 19, 1999.

After a thorough review of the record before us as supplemented on appeal,² we reverse the determination of the Commissioner to dismiss Vereen from his tenured employment.

The medical reports prepared by Dr. Gokcen, which were included in the supplemental materials submitted on behalf of respondent Vereen, show a steady improvement in Vereen's condition following knee surgery in 1998.³ Dr. Gokcen cleared Vereen to return to work part-time in December 1998. In a letter to the counsel for the Board in January 1999, Dr. Gokcen confirmed that Vereen "will be able to return to his full physical capacity at some point in the foreseeable future. Presently, both he and I and his rehabilitation nurse are in the process of progressively getting him back to increasing levels of employment. Please note that with the type of surgery that he had, it is not uncommon to take six to twelve months for return to work status."

On April 7, 1999, Dr. Gokcen recommended that Vereen increase his work hours to five days a week, four hours per day. In a report dated June 2, 1999, Dr. Gokcen recommended that Vereen "continu[e] with his work duties and increas[e] them to one day a week at eight hours and remaining days at four hours per day." In a report dated June 30, 1999, Dr. Gokcen indicated that Vereen "appears to be doing fairly well. He

² We note that the record before us does not include a transcript of the hearing held in the Office of Administrative Law in this matter.

³ Counsel for Vereen relates in his appeal brief that: "Respondent was initially injured in June, 1996. He underwent authorized conservative treatment related to his right knee, the situs of the injury. When that treatment was ineffective, surgery was recommended. The Petitioner's Workers' Compensation carrier refused to provide surgery. Respondent had to fight for months to obtain the authorization for surgery. Finally, Respondent was compelled to apply to the division of Workers' Compensation for court approval of the surgery which was obtained in November of 1997." Appeal Brief, at 7.

was able to tolerate 24 hrs. of work per week....I feel that he may be able to increase the hours as his knee continues to improve and I anticipate that the knee should continue to improve for the next year.”

In determining the appropriate penalty, it is necessary to consider the nature and gravity of the offense under all the circumstances involved, mitigating and extenuating circumstances, and any injurious effect the conduct may have on the maintenance of discipline and the proper administration of the school district. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Although excessive absenteeism may be found to warrant dismissal of a tenured staff member even when the absences in question were for legitimate medical or health reasons, e.g., State-Operated School District of Jersey City v. Pellecchio, decided by the Commissioner of Education, 92 N.J.A.R.2d (EDU) 267, aff'd by the State Board of Education, 93 N.J.A.R.2d (EDU) 30, we cannot ignore the fact that Vereen’s absences in this instance were the result of injuries he had suffered on the job and that he was receiving medical treatment authorized by the Board’s workers’ compensation carrier.

The record further reveals that Vereen had returned to work on a part-time basis and that he was gradually increasing his work hours pursuant to his doctor’s instructions. There is no indication in the record before us that he was uncooperative or otherwise recalcitrant in his dealings with the Board during the period of his absence. See In the Matter of the Tenure Hearing of Robert C. Bates, decided by the State Board of Education, December 3, 1986, aff'd, Docket #A-2700-86T7 (App. Div. 1987). It is also noteworthy that Vereen had been employed by the Board for 17 years at the time he was injured on the job in 1996, and the instant tenure charges relate solely to

absences resulting from those injuries. Finally, while we do not diminish the importance of the Board's ability to maintain its schools, we recognize that Vereen was not a teaching staff member and that his absences did not directly impact upon instruction in the district.

Therefore, upon consideration of all the circumstances involved, we conclude that dismissing Vereen from his tenured position for excessive absenteeism would not be appropriate in this instance.

We turn therefore to the tenure charge alleging incapacity. "Incapacity" as identified in N.J.S.A. 18A:6-10 relates to the inability to perform a position, irrespective of the cause of the inability to work." In the Matter of the Tenure Hearing of Stanley, decided by the Commissioner of Education, 95 N.J.A.R.2d (EDU) 495, 498. Under the circumstances, we find that the Board has failed to demonstrate by a preponderance of the credible evidence that Vereen is incapable of fulfilling his duties as a custodian. See In the Matter of the Tenure Hearing of William Gramlich, decided by the Commissioner of Education, June 27, 1986, aff'd by the State Board of Education, November 7, 1986, aff'd, Docket #A-1934-86T8 (App. Div. 1988).

As previously stated, the medical reports in the supplemented record reveal that Vereen had been making steady progress towards recovering from his injuries and had gradually been increasing his work hours. The prognosis offered by Dr. Gokcen was for a return to full physical capacity. Compare with In the Matter of the Tenure Hearing of Margaret McCoy, decided by the Commissioner of Education, 93 N.J.A.R.2d (EDU) 297 (incapacity demonstrated where there was little prospect for improvement of teacher's condition). We stress in that regard that the Board has provided no evidence other than

the fact of Vereen's absence to support its charge of incapacity. Indeed, the Board acknowledges that Vereen returned to work on a part-time basis, and it does not contend that he was not capable of fulfilling his duties during that period. Nor has the Board provided any evidence contrary to Dr. Gokcen's reports that would indicate that Vereen is not capable of making a full recovery from his injuries. Under these circumstances, we conclude that incapacity has not been demonstrated.⁴

Hence, on the basis of the record as supplemented on appeal, we reverse the decision of the Commissioner to dismiss respondent Vereen from his tenured employment. We therefore direct the Board to reinstate Vereen to his tenured custodial position with back pay and other emoluments, less mitigation, which would include any moneys he received as the result of the Workers' Compensation proceedings. See, supra, note 1.

Attorney exceptions are noted.

July 10, 2001

Date of mailing _____

⁴ We reject the Board's contention in its exceptions to the Report of our Legal Committee that an absence of more than one year should create a presumption of incapacity and that the burden of proof in such cases "should shift to the employee to demonstrate a reasonable likelihood of ability to perform the job duties in the reasonably near future." Board's Exceptions, at 3. We stress that it is well established that a district board has the burden of proving the truthfulness of tenure charges by a preponderance of the credible evidence. In the Matter of the Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. den., 121 N.J. 615 (1990). See In re Polk License Revocation, 90 N.J. 550, 560-61 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).