

IN THE MATTER OF THE TENURE :
HEARING OF TIMOTHY KASONY, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION ON REMAND
OF LAWRENCE, MERCER COUNTY. :
_____ :

SYNOPSIS

Board certified tenure charges of incapacity and excessive absenteeism against respondent custodian.

Parties initially agreed to a settlement, which was rejected by the Commissioner. Matter was remanded for either revision of settlement agreement, mutual consent to hold matter in abeyance pending respondent's application to the Public Employees Retirement System for disability retirement, or for hearing on merits.

After a hearing on remand, the ALJ found that the stipulated absence of respondent has adversely affected the Board's ability to provide sanitary, clean and secure facilities and created a morale problem for other custodial staff who are subject to reassignment or demands for overtime or both. ALJ further found that respondent was incapacitated from performing his duties.

The Commissioner affirmed the initial decision of the ALJ. Respondent was dismissed from his position as a tenured custodian.

IN THE MATTER OF THE TENURE :
HEARING OF TIMOTHY KASONY, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION ON REMAND
OF LAWRENCE, MERCER COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were considered by the Commissioner in his determination of this matter.

Upon review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). Initially, the Commissioner notes it is undisputed that respondent has been out of work for three years (Initial Decision at p. 3). The Board's tenure charges assert, and respondent does not refute, that

[o]n or about March 14, 1995 and again on March 20, 1997 [respondent] suffered injuries to his back and right leg, the first injury occurring during the course of his performing his duties. Respondent has not worked for the District since suffering that first injury. (Statement of Evidence, September 2, 1998 at p. 2)

The Board has demonstrated a negative effect from respondent's prolonged absence. Further, there is no indication in the record when, or even whether, respondent will be able to resume his duties. Thus, the Commissioner concurs with the ALJ that the appropriate penalty under such circumstances is dismissal, notwithstanding that respondent's absenteeism constituted a legitimate use of sick leave and the possibility remains that he might ultimately, at

some point not presently foreseeable, once again become physically capable of performing his duties.¹

Further, to the extent respondent argues in exceptions that he has, as of May 1999, applied to the New Jersey Department of Treasury, Division of Pensions and Benefits, for a disability retirement, and the within decision should, therefore, accommodate the time period required to review his application (Respondent's Exceptions at p. 2), the Commissioner notes that not only is the record devoid of any evidence of respondent's application,² but the parties specifically *chose* to move forward to a plenary hearing in this matter, notwithstanding that they had an opportunity to consent mutually to an abeyance of proceedings before the OAL pending a review of any application respondent might submit to the Public Employees Retirement System. (Initial Decision at p. 2)

Accordingly, the initial decision of the ALJ is affirmed for the reasons expressed therein. Respondent is dismissed from his position as a tenured custodian as of the date of this decision.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

July 22, 1999

¹ Although the ALJ appears to equate excessive absenteeism with unbecoming conduct (Initial Decision at p. 8), the Commissioner specifically observes that the Board did *not* charge respondent with unbecoming conduct.

² The Board expressly notes that, as of June 28, 1999, it has received no papers from the Division of Pensions and Benefits confirming that respondent has applied for disability retirement. (Board's Reply at p. 2)

³ This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.