

IN THE MATTER OF THE TENURE : COMMISSIONER OF EDUCATION
HEARING OF GIUSEPPE AMODEI, :
NEW JERSEY STATE JUVENILE : DECISION
JUSTICE COMMISSION. :

SYNOPSIS

The petitioner certified tenure charges of chronic and excessive absenteeism constituting unbecoming conduct and other just cause against respondent – a teacher of culinary arts at the Juvenile Justice Commission’s (JJC) New Jersey Training School – for, *inter alia*, allegedly failing to return from an approved leave of absence without authorization, refusing to comply with requests to return to work or voluntarily resign from his position, and for chronic and excessive absences that constitute abandonment of his position. Respondent contends that his absences were due to a work-related injury, and that petitioner failed to warn him of its displeasure with his absences. Petitioner sought removal of respondent from his tenured position, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: the undisputed facts in this matter are sufficient to support the dismissal of the charge of abandonment of position; on the charge of excessive absenteeism, the petitioner appropriately considered the circumstances of respondent’s absences and not just their sheer number; the fact that JJC knew respondent’s absences were the result of knee replacement surgery and the recovery thereafter, and continued to consider them excessive does not make its consideration of his absences unreasonable; respondent’s absences for nearly nine months of authorized and one month of unauthorized leave negatively impacted the continuity of JJC’s culinary program; JJC provided sufficient warnings to respondent and appropriately relied upon them when certifying the tenure charges of excessive absenteeism; JJC asserts that respondent’s attendance record prior to the most recent leave of absence contributed to its decision to file the instant tenure charges; however, respondent’s attendance record prior to his leave in 2009-2010 is in dispute and it can therefore not be determined from the evidence submitted whether respondent engaged in a pattern of absenteeism prior to October 2009 as JJC alleges; further material facts are needed to resolve the issue of whether dismissal is warranted; accordingly, although petitioner has established that respondent’s absences were excessive, it has not established that the excessive absences justify his dismissal. Accordingly, the ALJ granted petitioner’s motion for summary decision on the issue of respondent’s excessive absences, but denied petitioner’s motion for summary decision on the issue of dismissing respondent based on his excessive absenteeism. The ALJ further granted respondent’s motion seeking a determination that he had not abandoned his position and denied petitioner’s request for summary decision on this issue.

Upon independent review of the record, the Commissioner concurred with the ALJ that petitioner had not proven that respondent abandoned his position. The Commissioner agreed that a school district may, under certain circumstances, terminate the employment of a staff member whose absences have been prodigious – even where those absences have been caused by work-related injuries – but found that the factual record must support such a termination by harmonizing with the legal principals in *In the Matter of the Tenure Hearing of Lena White, State-Operated School District of the City of Jersey City, Hudson County*, 92 N.J.A.R. 2d (EDU) 157 and similar cases. Accordingly, the Commissioner: denied petitioner’s motion for summary decision, granted respondent’s motion for a ruling that he did not abandon his position; and ordered that the record of this matter be developed to allow a full application of the legal analysis in *Lena White, supra* – confined, however, to the time period specified in the within tenure charges.

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.
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_____:

In this matter, petitioner alleges that the absences of the respondent – a culinary arts teacher – have been excessive to a degree warranting dismissal. Respondent counters that because his absences were due to a work-related injury, and because petitioner did not disclose its displeasure with his absences, the tenure charges for excessive absenteeism and abandonment of position must fail. Before the Commissioner is a recommendation for disposition of some – but not all – of the issues raised by the parties. Upon review of the record, partial Initial Decision of the Office of Administrative Law (OAL), and parties’ exceptions, the Commissioner determines as follows.

First, the ALJ’s conclusion that respondent did not abandon his position at the New Jersey Training School (NJTS) is adopted for the reasons set forth in the Initial Decision. Petitioner’s reliance, in its exceptions, upon *N.J.A.C. 4A:2-6.2(b)* – a civil service regulation which provides that absences of five or more days without employer approval constitute abandonment of position – is misplaced. At the outset, the Commissioner notes that the regulation itself requires that leave requests must not be unreasonably denied, and petitioner’s bald assertion – on page eleven of its exceptions – that its denial was reasonable is not sufficient to support a finding in its favor on that point.

To the contrary, the record suggests that long before July 2010, petitioner was made aware – by two doctors selected by petitioner – that respondent needed a knee replacement. (*See, e.g.*, Email from Manzer in State Department of Treasury to Velez in petitioner’s Human Resources Department, marked “JJC Amodei 266” in Exhibit A to certification of Lisa F. Bell; report of W. Thomas Gutowski, M.D., dated December 17, 2009, attached as Exhibit 5 to respondent’s May 20, 2011 brief.) Respondent maintained that one of the doctors advised him that failure to correct his knee would undo the multiple repairs that he had undergone to mend the ankle that had been injured on the job in November 2004. The record also suggests that respondent disclosed to petitioner that without a knee replacement he would not be able to stand for the extended periods required by his culinary classes. Nonetheless, petitioner decided to end the series of leave approvals that it had given respondent on a date – July 7, 2010 – that it knew fell between respondent’s knee surgery and his in-patient rehabilitation. This decision was made notwithstanding the provisions in *N.J.A.C. 4A:6-1.10(a)* which allow agencies to extend unpaid leave beyond the period of one year – with the approval of the Department of Personnel. In view of the foregoing, a question of fact is raised as to the reasonableness of petitioner’s denial of respondent’s request for leave for his knee replacement.

Further, the facts suggest that respondent’s decision to undergo a knee replacement was driven, at least in part, by his desire to restore his ability to physically handle his teaching position. It would thus be counterintuitive to conclude that his actions signified an intent to abandon that position.

The determination that respondent did not abandon his position, however, does not dispose of the ultimate issue in this case. Frequent or prolonged absences can, regardless of the reason, warrant dismissal from a position. *See, e.g. State-Operated School District of*

Jersey City, Hudson County v. Vincent Pellecchio, 92 N.J.A.R. 2d (EDU) 267, 270.¹ The ALJ found that respondent's absences were excessive, but that the record thus far is insufficient to resolve the question of whether dismissal is warranted. The Commissioner concurs with the latter finding.

The appropriate legal analysis can be found in such cases as *In the Matter of the Tenure Hearing of Lena White, State-Operated School District of the City of Jersey City, Hudson County*, 92 N.J.A.R. 2d (EDU) 157; and *Kelsey v. Board of Education of the City of Trenton, Mercer County*, Commissioner Decision No. 127-89, May 11, 1989. In those cases, three factors were examined in determining the appropriateness of dismissal for absenteeism: 1) the particular circumstances of the absences and not merely the number of absences; 2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred; and 3) whether some warning had been given to the employee that his or her supervisors were dissatisfied with the pattern of absences. *Lena White, supra*, at 161.

As to these factors, only those allegations contained in the tenure charges which were certified to the Commissioner herein may be considered. Those charges reference only absences between July 7, 2010 and the date of the tenure charges. Earlier absences could have been included in the charges; they were not, however, and therefore they may not be used to establish the within charges.² The case upon which the ALJ relies for his view that the earlier

¹ Accordingly, it is well settled that absences due to work-related injuries will not be excluded from consideration in determining whether absenteeism is excessive and warrants dismissal. *In the Matter of the Tenure Hearing of Phyllis Stanley, Board of Education of the Freehold Regional High School District, Monmouth County*, 95 N.J.A.R.2d (EDU) 495, 498; *In the Matter of the Tenure Hearing of Sonia Velez, School District of the Hudson County Schools of Technology*, Commissioner Decision No. 162-06 (April 27, 2006); *Malone v. Aramark Services, Inc.*, 334 N.J. Super. 669, 676-77 (2000). Thus, respondent cannot argue that the leave related to his ankle surgeries must be disregarded when evaluating his attendance.

² The Commissioner further notes that tenure charges may not be amended by motion. If a board wishes to make additional charges, it must comply with the requirements of the entire process and then seek to consolidate the subsequent case with the first if it is still pending.

absences may be considered, *i.e.*, *Trautwein v. Board of Education of the Borough of Bound Brook, Somerset County*, 1980 *S.L.D.* 1539 (App. Div. 1980), *certif. den.* 84 *N.J.* 469 (1980), is an increment withholding case and consequently does not provide any guidance on this issue.

Accordingly, petitioner's motion for summary decision – requesting that the Commissioner find that respondent abandoned his position and may be dismissed from employment – is denied. Respondent's related motion seeking a finding that he did not abandon his position is granted. The Commissioner further orders that the record be developed to allow a full application of the legal analysis in *Lena White, supra*, to the time period specified in the tenure charges. Pending such an analysis, the OAL's finding that petitioner has established that respondent's absences were chronic and excessive is premature. Finally, the Commissioner adopts the OAL's order placing certain documents under seal.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2011

Date of Mailing: October 14, 2011

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)