

New Jersey Commissioner of Education**Decision**

Corey Gallagher,

Petitioner,

v.

Board of Education of the Township
of Byram, Sussex County,

Respondent.

Synopsis

Petitioner, a tenured teacher in the respondent Board's school district, challenged the Board's withholding of his pay for certain dates that the Board contends were unexcused absences and not compensable. Petitioner, who also serves as an assistant basketball coach in the Lenape Valley School District (Lenape Valley), was approved for a medical leave of absence from his teaching position in Byram to undergo back surgery in September 2022; he returned to work in Byram on January 5, 2023. During the time he was on approved medical leave, petitioner continued to attend Lenape Valley's basketball practices. The days on which petitioner attended practices at Lenape Valley while on medical leave from Byram are at issue in this case. Petitioner alleged that Byram's actions violated his tenure rights because his salary was reduced without just cause and without the benefit of a hearing. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's argument that his tenure rights were violated is without merit as the withholding of his wages was a recoupment, rather than an arbitrary change to petitioner's pay and there was no evidence that his rate of pay changed; despite his claims that he was only a spectator at the Lenape Valley basketball practices, petitioner's attendance at Lenape Valley basketball practices constituted "other gainful employment" under Board Policy 3432, which provides that no day will be considered a sick leave day on which an employee has engaged in or prepared for other gainful employment; therefore, the dates at issue must be considered as unexcused absences rather than sick days. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's motion for summary decision, and dismissed the petition.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the Board's action in withholding petitioner's pay for unexcused absences was not in violation of the tenure laws and that petitioner's attendance at Lenape Valley basketball practices constitutes other gainful employment while on sick leave, which is prohibited under Board Policy 3432. However, the Commissioner finds that this matter must be remanded for factual findings regarding the specific dates on which petitioner attended Lenape Valley practices. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's decision.

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.

302-23

OAL Dkt. No. 00264-23

Agency Dkt. No. 373-12/22

New Jersey Commissioner of Education

Final Decision

Corey Gallagher,

Petitioner,

v.

Board of Education of the Township of
Byram, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C. 1:1-18.4*, and the reply thereto by the Byram Board of Education (Byram or Board), have been reviewed and considered.

Petitioner is a tenured teacher in Byram. He is additionally employed as an assistant basketball coach in the Lenape Valley School District (Lenape Valley). On September 21, 2022, petitioner requested a medical leave of absence from his duties in Byram because he needed to undergo back surgery. Petitioner's leave was approved, and he ultimately returned to work on January 5, 2023. However, it came to Byram's attention that petitioner continued to attend Lenape Valley Basketball practices while he was on leave. On December 5, 2022, Byram's Superintendent informed petitioner that Byram therefore expected him to return to work. On December 6, 2022, petitioner did not return to work, and Byram's Superintendent advised petitioner that he would not

be paid for the days that he was employed as a coach by Lenape Valley but failed to report to work in Byram – November 21, 22, 23, 28, 29, and 30, and December 1, 2, 5, and 6, 2022.¹

Petitioner appealed, alleging that Byram’s actions violated his tenure rights because his salary was reduced without just cause and without the benefit of a hearing. Following cross motions for summary decision, the Administrative Law Judge (ALJ) rejected petitioner’s argument, concluding that the tenure laws prohibit arbitrary changes to an employee’s pay, not the withholding of wages as a recoupment, and there was no evidence that petitioner’s rate of pay had been changed. Despite petitioner’s claims that he was only a spectator at the Lenape Valley basketball practices, the ALJ also concluded that petitioner’s attendance at Lenape Valley basketball practices constituted “other gainful employment” under Board Policy 3432, which provides that no day will be considered a sick leave day on which an employee has engaged in or prepared for other gainful employment. Accordingly, the ALJ found that the dates at issue must be considered as unexcused absences rather than sick days. The ALJ granted the Board’s motion for summary decision, denied petitioner’s motion for summary decision, and dismissed the petition.

In his exceptions, petitioner argues that summary decision for the Board was not appropriate because, although the ALJ indicated that petitioner did not dispute that he appeared at Lenape Valley basketball practices on the dates at issue, petitioner does dispute those dates. According to petitioner, the Board provided no support as to the dates of Lenape Valley practices that it believes petitioner attended or what petitioner did at those practices. Petitioner contends that it does not make sense to prohibit him from “using his eyes at a time when he would not have been teaching in any case as it was after school.” Finally, petitioner argues that withholding his pay is in contravention of tenure law.

¹ It appears from the record that petitioner stopped attending Lenape Valley practices after receiving the December 6, 2022 notice.

In reply, the Board argues that the dates at issue were listed in exhibits that were jointly agreed to by the parties, and therefore there is no factual dispute. Distinguishing the cases cited by petitioner, the Board contends that docking a teacher's pay for an unexcused absence is consistent with the sick leave laws and does not violate the tenure laws or require the Board to bring tenure charges to effectuate the recoupment. Accordingly, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that the Board's action in withholding petitioner's pay for unexcused absences was not in violation of the tenure laws. The Commissioner has previously concluded that a board of education is not required to initiate tenure charges to withhold an employee's pay for an unexcused absence. *Charles Weisberg v. Bd. of Educ. of the Twp. of Riverside, Burlington Co.*, Commissioner Decision No. 126-07 (decided March 18, 2004). Petitioner's arguments to the contrary, which were already made as part of his motion for summary decision and rejected by the ALJ, are not persuasive.

The Commissioner concludes that Board Policy 3432, which prohibits the use of sick leave on a day when an employee has engaged in or prepared for other gainful employment, is not arbitrary, capricious, or unreasonable. The Commissioner concurs with the ALJ that petitioner's attendance at Lenape Valley basketball practices constitutes other gainful employment. Petitioner was contracted to perform the duties of an assistant basketball coach for Lenape Valley – duties which surely include attendance at practices. By appearing at those practices, petitioner was fulfilling the obligations of his employment contract, and therefore engaging in other gainful employment.

However, the Commissioner finds that this matter must be remanded for factual findings regarding the dates on which petitioner attended Lenape Valley practices. Throughout the case,

petitioner has repeatedly admitted that he attended practices in Lenape Valley while on medical leave from Byram, but nothing in the record specifies which dates are included in that admission.² Petitioner's exceptions indicate that he has proof that he did not attend practice on December 5, 2022, because he had an appointment with his therapist on that date.³ Also included in the record is a February 1, 2023 letter from petitioner to the ALJ that alleges that the district withheld petitioner's salary for two days that he did not attend practice; it is not clear what the second disputed date was. While the Board may withhold petitioner's pay for any days on which he engaged in other gainful employment by attending a Lenape Valley practice, it may not do so for days on which he did not appear at practice.

Accordingly, this matter is remanded for further proceedings consistent with this decision.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 6, 2023

Date of Mailing: October 11, 2023

² The Commissioner finds that petitioner's stipulation to exhibit J-11, which recites the dates at issue, is not tantamount to his agreement that he attended Lenape Valley practices on those dates.

³ In its reply to petitioner's exceptions, the Board disagrees that the therapist's note proves that petitioner did not attend practice, because the time of the appointment is allegedly different than the time of practice. The Commissioner does not make any factual findings regarding whether petitioner attended practice on December 5, 2022, and leaves that issue for the ALJ to determine on remand.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 00264-23

AGENCY REF. NO.: 373-12/22

COREY GALLAGHER,

Petitioner,

vs.

**TOWNSHIP OF BYRAM BOARD OF
EDUCATION, SUSSEX COUNTY,**

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld, Cohen, P.C., attorneys)

Paul E. Griggs, Esq., for respondent (Cornell, Merlino, McKeever & Osborne,
LLC, attorneys)

Record Closed: June 13, 2023

Decided: July 11, 2023

BEFORE: **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

On December 5, 2022 the BOE (i.e., Superintendent of Schools, John Fritzky) advised Petitioner Gallagher (hereinafter "Gallagher") by email that the Byram Board of Education (hereinafter the "BOE") learned that Gallagher was working as an assistant basketball coach for Lenape Valley High School while on medical leave from his teaching position with Byram BOE. Fritzky advised Gallagher to report to work on December 6. When Gallagher did not report to work in Byram on December 6, Fritzky

advised Gallagher by email that his pay would be docked for the dates of November 21, 22, 23, 28, 29, 30, December 1, 2, 5, and 6, 2023. Byram BOE withheld ten days of Gallagher's pay.

Petitioner, Corey Gallagher challenges Respondent, Byram BOE's withholding ("docking") of his pay for the subject dates. The BOE contends that Gallagher's failure to report to work on the dates in question were unexcused absences and therefore not compensable. Gallagher contends that, per his physician's notes and the BOE's approval of the medical leave of absence based on the physician's notes, he was excused from work on the dates in question and should therefore be paid sick time benefits for those dates.

Gallagher, noting that he is a tenured employee, contends, pursuant to N.J.S.A. 18A:28-1 et seq. (particularly N.J.S.A. 18A:28-5) and N.J.S.A. 18A:6-10, that his salary was reduced without just cause and without the required benefit of a hearing.

The BOE contends that this is not a salary reduction case and that N.J.S.A. 18A:28-1, et seq. are inapplicable. The BOE also contends that this case is a sick leave (a/k/a "medical leave") case and that the applicable law governing this case is found in the parties' Collective Bargaining Agreement, the BOE's Policy Number 3432 (governing the granting of sick leave), and N.J.S.A. 18A: 30-1, et seq. (governing the requirements for sick leave and the docking of the employee's annual salary for days taken in excess of the limits of sick leave).

PROCEDURAL HISTORY

After Byram BOE withheld Gallagher's pay, Gallagher's counsel filed a Petition of Appeal with the Commissioner of the New Jersey Department of Education dated December 20, 2022. Upon receipt of the matter by the Department of Education's Office of Controversies and Disputes on January 6, 2023, the matter was transmitted on January 9, 2023 to the Office of Administrative Law, where it was filed on January 10, 2023 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 13. On January 18, 2023, the matter was assigned to Administrative Law Judge,

John P. Scollo. Judge Scollo held an Initial Telephone Conference with both counsel on January 24, 2023 and issued a Pre-Hearing Order on January 26, 2023, which set forth discovery obligations and set due dates and conference dates.

After discovery was completed, counsel for Petitioner-Gallagher filed a Motion for Summary Decision, which was followed by Respondent-BOE filing its Cross-Motion for Summary Decision. This writing is the Tribunal's Initial Decision on the Motion and Cross-Motion.

UNDISPUTED FACTS

From their submissions, the Parties are in agreement regarding the following statements of fact.

- (1) Gallagher has been a staff member (teacher) with the Township of Byram (the District or BOE) since 2002.
- (2) Gallagher is a tenured employee.
- (3) Gallagher's annual salary in Byram for the 2022-2023 school is \$82,912.
- (4) Starting in 2013 and continuing to the present time, Gallagher has signed multiple contracts with the Lenape Valley School District to serve as an assistant basketball coach in that school district. For the 2022-2023 school year (July 1, 2022 through June 30, 2023), Gallagher was compensated with a one-time stipend on February 28, 2023 of \$5,973 for his service as an assistant basketball coach.
- (5) On September 21, 2022, Gallagher requested a medical leave of absence from his teaching job with Byram because he needed to undergo back surgery. He presented a letter from his physician, Jay Chun, M.D. dated September 21, 2022 stating that Gallagher would undergo back surgery on October 12, 2022 and would not be able to return to work for four to eight weeks after the date of the surgery.
- (6) On October 26, 2022, The Byram BOE approved Gallagher's medical leave of absence based on Dr. Chun's September 21, 2022 letter.

(7) In a letter dated November 17, 2022, Dr. Chun reported that Gallagher was still under his care and he requested that Gallagher be excused from work until the completion of physical therapy in six weeks.

(8) On December 5, 2022, Byram's Superintendent of Schools John Fritzky (hereinafter "Fritzky") sent an email to Gallagher stating that his absences were permitted based on Dr. Chun's request; he (Fritzky) learned that during the time of Gallagher's leave he continued to be employed as a coach with Lenape Valley School District; and he quoted BOE Policy 3432, which provides, in applicable part, "no day will be considered a sick leave day on which the employee is engaged in or prepared for other gainful employment ... or has engaged in any activity that would raise doubts regarding the validity of the sick leave request." Fritzky's email ended with his statement that he expected Gallagher to be present on December 6, 2022 to carry out his teaching responsibilities. Fritzky also warned Gallagher saying, "If you do not appear for work, you will not be paid for days absent because they are unexcused and not sick days."

(9) On December 6, 2022, Gallagher did not appear for work in Byram. On December 6, 2022, Fritzky sent an email to Gallagher again quoting Board Policy 3432 and advised Gallagher that he would not be paid for the days he was employed as a basketball coach at the Lenape Valley Regional School District but failed to report to work in the Byram School District. He set forth the dates as: November 21, 22, 23, 28, 29, and 30 and December 1, 2, 5, and 6, 2022.

(10) Gallagher does not dispute that he appeared at basketball practices at Lenape Valley on November 21, 22, 23, 28, 29 and 30 and on December 1, 2, 5, and 6, 2022. However, Gallagher maintains that although he appeared at Lenape Valley on the above dates, he was a mere spectator and was not working.

(11) Gallagher returned to his work duties in Byram on January 5, 2023.

DISCUSSION

Gallagher's Position

Gallagher maintains that N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 constitute the applicable law governing this matter. These statutes have been cited in the APPLICABLE LAW section of this Initial Decision. Gallagher argues that he is a tenured employee and thus comes under the protections afforded by these statutes. He argues that no tenure charges have been brought against him and he was not afforded any type of hearing before the Byram BOE unilaterally withheld ten days' of his wages.

Gallagher argues that the Byram BOE, without good cause, and despite the opinions expressed in his physician's letters, arbitrarily concluded that he was not eligible for sick leave. Gallagher argues that although Board Policy 3432 provides that employees who engage in or prepare for other gainful employment are not eligible for sick pay, he remained eligible for sick pay on the subject dates because he was not engaged in or preparing for gainful employment when he merely appeared at Lenape Valley basketball practices as an observer and not as an active participant in coaching activities.

Byram BOE's Position

Byram BOE maintains that this is not a matter about a reduction (diminution) of someone's rate of pay. Therefore N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 are inapplicable. Byram BOE maintains that this is a sick (medical) leave policy matter. Byram BOE maintains that the applicable principles of law governing this case are found in N.J.S.A. 18A:30-1, et seq. This statute is cited in the APPLICABLE LAW section of this Initial Decision. Byram BOE maintains that the BOE's policies, specifically Board Policy 3432 controls this matter. Byram BOE also maintains that the Collective Bargaining Agreement dated June 10, 2022 controls this matter. Both Board Policy 3432 and the applicable sections of the Collective Bargaining Agreement are cited in the APPLICABLE LAW section of this Initial Decision.

Byram BOE relies upon the definition of “sick leave” set forth in N.J.S.A. 18A:30-1. There it states that “sick leave” means “the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district’s medical authorities on account of a contagious disease”

In the matter at bar, there is no doubt that Gallagher underwent a surgical procedure to his back and thereafter underwent a course of physical therapy. There is no doubt that his physician supplied notes to the Byram BOE explaining the need for a period of sick leave for Gallagher to recover from his procedure. By way of background, in addition to his employment as a schoolteacher in the Byram School District, Gallagher is also employed as an Assistant Basketball Coach in the Lenape Valley School District. This is a paid position. The problem presented in this matter arises out of the fact that, while on sick leave from Byram, Gallagher appeared at high school basketball practice sessions (and perhaps games) at Lenape Valley. Byram BOE argues that Gallagher’s appearance at Lenape Valley was in furtherance of his employment obligations with Lenape Valley and thus constituted engagement in or preparation for “other gainful employment” while on sick leave, thus, in the BOE’s judgment, making him ineligible to collect sick leave pay.

Byram BOE argues that it has never sought to reduce, nor has it reduced Gallagher’s rate of pay. Byram argues that by withholding ten days’ of Gallagher’s pay it was merely recouping money paid to Gallagher as sick pay for time when he was ineligible to collect sick pay (i.e., on the aforesaid subject dates).

APPLICABLE LAW

The statutes under discussion in this matter are N.J.S.A. 18A:6-10 (Dismissal and Reduction in Compensation of Persons Under Tenure in the Public School System); N.J.S.A. 18A:28-5 (Requirements for Tenure); and N.J.S.A. 18A:30-1, et seq. (Sick Leave).

N.J.S.A. 18A:6-10 reads as follows:

No person shall be dismissed or reduced in compensation,

- (a) If he shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

N.J.S.A. 18A:28-5 (in applicable part) reads as follows:

- (a) The services of all teaching staff members employed prior to the effective date of P.L. 2012, c.26 (C.18A:6-117 et al.) in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal assistant superintendent, and all school nurses ... , shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title. after employment in such district or by such board for ... (specified time periods).

The services of all teaching staff members employed on or after the effective date of P.L. 2012, c.26 (C. 18A:6-117 et al.) in the position of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses ..., shall be under tenure during good behavior and efficiency and they

shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for... (specified time periods). (Section (b) continues with criteria which a teacher must meet in order to gain tenure, including the successful completion of a mentorship program. (Section (c) provides that tenure in an administrative or supervisory position shall accrue only by employment in that administrative or supervisory position.

N.J.S.A. 18A:30-1 through 13 governs all aspects of sick leave policy. For the matter at bar the applicable sections are: 18A:30-1(Definition of Sick Leave); 18A:30-2 (Sick Leave Allowable); 18A:30-3 (Accumulated Sick Leave); 18A:30-4 (Physician's Certificate Required for Sick Leave); and 18A:30-6 (Prolonged Absence Beyond Sick Leave Period). The text of each of the aforementioned sections follow.

N.J.S.A. 18A:30-1 reads as follows:

Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or being quarantined for such a disease in his or her immediate household.

N.J.S.A. 18A:30-2 reads as follows:

All persons holding any office, position, or employment in all Local school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

N.J.S.A. 18A:30-3 reads as follows:

If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall

be accumulative to be used for additional sick leave as needed in subsequent years.

N.J.S.A. 18A:30-4 reads as follows:

In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave.

N.J.S.A. 18A:30-6 reads as follows:

When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimate cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

Article 13 of the Collective Bargaining Agreement dated June 10, 2022 between the Byram Township Board of Education and the Byram Education Association, tracks the provisions of N.J.S.A. 18A:30-1, et seq. Section 'A' provides that teachers are entitled to ten sick leave days per school year and that unused sick leave time shall be accumulated from year to year with no maximum limit. Section 'C' allows the BOE to require a physician's certificate in order to obtain credit for sick leave. Under Section 'D', the BOE may, in its sole discretion, grant extended paid leave of absence to a teacher who has exhausted his or her accumulated sick leave due to a lengthy illness, in accordance with N.J.A.C. 18A:30-6.

The Byram BOE's Sick Leave Policy is set forth in District Policy number 3432. In applicable part, District Policy 3432 provides as follows:

The Board of Education shall grant sick leave, in accordance with law, to teaching staff members absent from work because of personal disability or quarantine. Each steadily employed employee eligible for sick leave will be entitled annually to the number of paid sick leave days negotiated with the employee's majority representative or provided in this policy or in an individual contract with the Board.

The Board reserves the right to require of any employee who claims sick leave, sufficient proof, including a physician's certification, of the employee's illness or disability. As a minimum, no day will be considered to be a sick leave day on which the employee has engaged in or prepared for other gainful employment, has participated in a work stoppage, or has engaged in any activity that would raise doubts regarding the validity of the sick leave request.

ISSUES

- (1) Did Byram BOE reduce Gallagher's salary?
- (2) Was Gallagher working when he attended Lenape Valley basketball practices or games?
- (3) Was there sufficient justification for Byram to withhold ten days' pay from Gallagher?

LEGAL ANALYSIS AND CONCLUSIONS

Analysis of Issue Number One

It has been stipulated that Gallagher's rate of pay in Byram Township for the school year 2022-2023 was \$82,912. Gallagher's argument is that Byram's withholding of his pay is not a recoupment of wages improvidently paid as sick leave, but is a reduction of his salary without just cause and without a hearing. The statutes upon which Gallagher bases his reduction claim, N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5, prohibit arbitrary changes to an employee's *rate* of pay without just cause and without a hearing. They do not contemplate whether an employer's withholding of wages in order to recoup wages improvidently or mistakenly paid to an employee as sick leave is a reduction of that employee's rate of pay. There is no evidence in this matter that demonstrates that Gallagher's rate of pay has been changed. There is abundant evidence that what occurred in this matter was that Byram BOE paid sick leave benefits to Gallagher, but later came to learn that Gallagher was not eligible to receive sick leave pay for the subject dates. There has been no disagreement about the amounts paid /

received. The only dispute is whether this is a matter of recoupment or of reduction of Gallagher's rate of pay. Moreover, there is no dispute that if Gallagher or any other employee were absent without being excused, the Byram BOE would not be obliged to pay for unexcused absences. I **CONCLUDE** that there has been no evidence adduced in this matter, which proves that the Byram BOE reduced Gallagher's rate of pay.

Analysis of Issue Number Two

Policy 3432 says "...no day will be considered to be a sick leave day on which an employee has *engaged in or prepared for* other gainful employment" If Gallagher, while at Lenape Valley stepped onto the basketball court, picked up a note pad, drew diagrams, picked up a clip board, made notes, spoke with a player or other coaches about the subject of basketball, or simply picked up a basketball, a towel, or other equipment, then it would be clear that he "engaged in" coaching, which is a "gainful employment". Board Policy 3432 also says "... no day will be considered a sick leave day on which the employee 'prepared for' other gainful employment." Gallagher claims that he did not engage in basketball coaching activities on the days that he appeared at Lenape Valley. He claims that he was only a spectator at the team's practice. If he were not under contract with Lenape Valley and were to observe the team during its practice session, he would be like any other spectator. He could not be construed to be 'preparing for' other gainful employment. However, Gallagher was under contract with Lenape Valley as an assistant basketball coach on the subject dates when he appeared at Lenape Valley to watch his team. It is beyond dispute that he would remember his observations of his team when he returned to work. Those observations could, and likely would, serve as insights into the performance of individual players and into the performance of the team as a whole unit. The observations that Gallagher made of his team during practice sessions on the subject dates could, and likely would, aid him when he returned to active coaching. It follows that these observations can and should be deemed to be "preparations for" his job at Lenape Valley, which, of course, is "other gainful employment". Therefore, I **CONCLUDE** that Gallagher's attendance at Lenape Valley basketball practices constitutes "other gainful employment" under Board Policy 3432.

Analysis of Issue Number Three

Under Board Policy 3432, days on which the employee either engages in or prepares for other gainful employment cannot be considered as sick leave days. If an employee fails to report to work without being excused from his work duties by his employer, he has no right to demand payment and the employer has the right to withhold wages for any unexcused absences. Having concluded that Gallagher was engaged in or preparing for “other gainful employment” while attending Lenape Valley basketball practice, I **CONCLUDE** that Byram BOE was correct when it decided that the subject dates should not be considered as sick leave days.

Since Gallagher was absent and did not perform his work duties for Byram BOE on the subject days, I **CONCLUDE** that the subject dates must be considered as unexcused absences.

Since Byram BOE had already paid sick leave pay to Gallagher for the subject dates, and since it was later realized that Gallagher was neither entitled to receive sick leave pay nor any pay for unexcused absences, I **CONCLUDE** that Byram BOE was justified in withholding ten days of Gallagher’s wages in order to recoup the monies which Gallagher had already received from Byram BOE.

ORDER

It is hereby **ORDERED** that the Byram BOE’s motion for **SUMMARY DECISION** is **GRANTED**, and it is further **ORDERED** that Gallagher’s motion for **SUMMARY DECISION** is **DENIED** and his Petition is **DISMISSED** in its entirety.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



July 11, 2023
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db