

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION**

In the Matter of the Tenure Hearing of:

**RATIBA AHMED,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY**

Agency Docket #281-9/15

Walt De Treux, Esq., Arbitrator

Hearing Dates: 11/13/15;

12/22/15

Briefs Received: 3/4/16

Decision Date: 4/4/16

Appearances: For the School District – Christina M. Michelson, Esq., *SCARINCI & HOLLENBECK, LLC*
For the Respondent – Nancy I. Oxfeld, Esq., *OXFELD COHEN, P.C.*

Introduction and Statement of Relevant Facts

Respondent Ratiba Ahmed is certified as a K-12 teacher of mathematics. During the 2013-14 school year, Ahmed taught at the Dr. William H. Horton Elementary School; and during the 2014-15 school year, she taught at the Lafayette Street School. Ahmed was subject to a Corrective Action Plan (CAP) during both school years. The CAPs focused, in part, on timely submission of lesson plans, measurement of student growth, and reading assignments for professional development.

Despite the CAPs, Respondent received an Ineffective rating on her 2013-14 and 2014-15 Annual Summative Evaluations. As a result, the State-Operated School District of the City of Newark issued tenure charges against her. Charge One alleged inefficiency based on the evaluations. Charge Two alleged conduct unbecoming and

neglect of duty based on an alleged pattern of excessive absenteeism and a failure to effectively manage and supervise her classroom. Charge Three alleged a failure to adhere to District policies and procedures in the management of Respondent's classroom, as well as violation of the District policies on attendance.

On October 9, 2015, the New Jersey Department of Education declared that it "is unable to determine that the evaluation process has not been followed," and that "the balance of the charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary..." The same day, the undersigned was appointed to hear the tenure charges.

On November 13, 2015 and December 22, 2015, hearings were held at the law offices of Scarinci & Hollenbeck in Lyndhurst, New Jersey, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs, and the matter was submitted to the Arbitrator for a decision.

Issue

Has the State-Operated School District of the City of Newark established the allegations of inefficiency, unbecoming conduct, neglect of duty, and/or other just cause against Ratiba Ahmed as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

Charge One – Inefficiency

On September 23, 2013, Respondent Ahmed was placed on a Corrective Action Plan (CAP) for the 2013-14 school year. School administration conducted Mini-Observations of Respondent six times in the first half of the school year and communicated with her on areas that needed improvement. She was also assigned a coach to provide guidance and feedback. An October 28, 2014 Long Observation resulted in an overall Ineffective rating and was followed by a Post-Observation Conference (POC). A February 14, 2014 Short Observation resulted in an Ineffective rating. A Mid-Year Review completed at the same time also rated Respondent as Ineffective overall and in each of the four areas of evaluation. Respondent's May 12, 2014 Annual Summative Evaluation concluded with an overall Ineffective rating and Ineffective ratings in each of the four evaluation areas.

In the 2014-15 school year, Ahmed was administratively excused/suspended from September 8, 2014 to mid-February 2015. On February 17, 2015, she was assigned to the Lafayette Street Elementary School and began teaching on February 24, 2015. A Corrective Action Plan was proposed on March 9, 2015. However,

Ahmed went on extended sick leave from March 10, 2015 to April 9, 2015. Upon her return on April 10, 2015, her CAP was finalized, and she received professional development, including training on the use of BloomBoard, assistance with creation and implementation of her lesson plans, and the assignment of a Math Teacher Coach.

On April 21, 2015, Respondent was rated Ineffective after a Long Observation by the Vice Principal; and she received a similar rating on May 13, 2015 after a Long Observation by the Principal. On June 1, 2015, a Short Observation by the Vice Principal resulted in an Ineffective Rating; and on June 15, 2015, she was rated Ineffective in her Annual Summative Evaluation.

Generally stated, the negative evaluation and ratings of Respondent focus on the quality of her instruction, her inability or refusal to draft adequate lesson plans, her failure to adequately measure student growth, and her inability to effectively manage the classroom. But the specifics of the evaluations and ratings have not been contested by the Respondent and need not be discussed in any detail. Rather, Respondent alleges that the inefficiency charges should be dismissed because the School District “failed...to appropriately provide Ms. Ahmed with a CAP and observations in time for Ms. Ahmed to have the opportunity to improve.”

Under TEACHNJ, an inefficiency charge can be brought against a teacher if, as in Respondent’s case, she received a final rating of Ineffective for two straight school years. An Arbitrator adjudicating the charges can only dismiss the charges for very specific reasons, including, as applicable in the present case,

“the employee’s evaluation failed to adhere substantially to the evaluation process, including but not limited to providing a corrective action plan.” N.J.S.A. 18A:6-17.2(a)1

TEACHNJ also imposes requirements on a School District seeking to remove a teacher for inefficiency. The requirements include the following,

“Each teacher shall be observed...at least three times during each school year but not less than once during each semester.” N.J.A.C. 6A:10-4-4(c)

The Administrative Code requires an additional observation if the teacher is on a CAP. However, the Code further provides at N.J.A.C. 6A-10-4.4(e)(1),

“If a teacher is present for less than 40 percent of the total student school days in an academic year, he or she shall receive at least two observations to earn a teacher practice score.”

According to the School District, Ahmed was absent for more than 90 days in the 2014-15 school year, representing less than 40% of the 191 total teacher school days. Accordingly, it contends that it only needed to make at least two observations of the Respondent.

But Respondent’s challenge to the inefficiency charge is not based on the number of observations, but rather the timing of the observations. Respondent notes that a CAP was proposed on March 9, 2015, immediately prior to Ahmed going on extended sick leave from March 10 to April 9, 2015. The CAP was finalized on April 10, 2015, the day after her return to work. Thereafter, Respondent was observed on the following dates: April 21, 2015; May 13, 2015; June 1, 2015; and June 15, 2015. Respondent argues that the time period between the CAP and the final observation and the first and last observation were not sufficient to provide Respondent with the time needed to improve.

Respondent cites to the decision in the case of *In the Matter of the Tenure Hearing of Patsy Cuntrera, Passaic County Vocational School District*, Agency Docket No. 223-8/15 (Gandel, 2015). Cuntrera was observed in mid-October 2014, late April 2015, and two consecutive days in May 2015. Cuntrera had worked in the fall of 2014, but went on extended medical leave of absence from December 8, 2014 to February 17, 2015. She was suspended by the School District from February 25, 2015 to March 25, 2015 and was out again for approximately two weeks in mid-April. Arbitrator Gandel noted, "...evaluations are supposed to help the teacher with his strengths and weaknesses and to give him guidance so he can improve." With that purpose in mind, Arbitrator Gandel concluded, "there has to be a reasonable time period between evaluations to show improvement." The Arbitrator noted that in Cuntrera's situation, "...the timing of the evaluations, the second the day he returned from an extended leave of absence and suspension and the third the day he returned from another absence followed by the fourth on the very next day did not appear to represent a District that was trying to work with its staff member..."

Similarly, in *In the Matter of the Tenure Hearing of Marie Ebert, State-Operated School District of the City of Newark, Essex County*, Agency Docket No. 49-3/15 (Denenberg 2016), Respondent Ebert returned to work in May 2014 after a lengthy absence and was subject to a "series of observations...in rapid succession." Arbitrator Deneberg found that "[n]o time was left in between for the teacher to improve her performance on the basis of each preceding observation."

The School District is at a distinct disadvantage in evaluating a teacher who is absent for an extended portion of the school year. Unlike the District described in

the *Cuntrera* Award, the State-Operated School District of the City of Newark appears to have been making every reasonable effort to address Respondent's performance deficiencies. A CAP was proposed on March 9, 2015, soon after her return from administrative suspension. But finalization of the CAP is largely dependent on the teacher, and Ahmed went out on a month-long sick leave the day after the CAP was proposed. As a result, it was not finalized until April 10, 2015, the day after her return to work. Around that time, the District provided her with assistance and coaching and professional development reading assignments to improve her performance and cure her deficiencies.

The first observation occurred on April 21, 2015, only 7 school days (3 of which Ahmed was out sick) after the CAP was finalized. It found her lacking in all four areas of evaluation. The second evaluation occurred on May 13, 2015, approximately 16 school days (3 of which Ahmed was out sick) after the preceding observation. A Short Observation occurred approximately 12 school days later on June 1, 2015. The Annual Evaluation was completed on June 15, 2015, approximately 9 school days (4 of which Ahmed was out sick) after the Short Observation. Accordingly, Respondent was observed and evaluated four times over approximately 34 school days for which she was present.

TEACHNJ anticipates that the observations scheduled throughout the school year, the mid-year review, and the CAP will provide guidance and feedback so that an underperforming teacher will have the opportunity to improve performance and correct deficiencies with assistance from the District. Unlike the situations described in *Cuntrera* and *Ebert*, the truncated observation schedule was not

attributable to any mismanagement or bad faith on part of the District. Rather, the shortened time period was simply due to Respondent's frequent and lengthy absences from the school, initially due to an administrative suspension and later due to sick leave use.

Regardless of the reasons for the absence, Ahmed had a very limited time period in which to improve between the finalization of her CAP and her first observation (4 school days for which she was present); between her first and second observations (approximately 13 school days for which she was present); between her second and third observations (approximately 12 school days); and between her final observation and her Annual Summative Evaluation (5 school days for which she was present). The time span is simply not sufficient to allow the teacher to fully meet the goals of her CAP, for the School District to effectively assist her in improvement, and for her to achieve improvement sufficient to affect her evaluation ratings.

For these reasons, I find that the School District's evaluation of Respondent did not adhere substantially to the evaluation process in that the time period of the evaluations did not afford Ahmed the opportunity to correct her deficiencies and improve on her performance. Accordingly, the tenure charge of inefficiency is not sustained.

Charges Two and Three – Conduct Unbecoming, Neglect of Duty, and Other Just Cause

Charges Two and Three are related because they focus on Respondent's alleged excessive absenteeism and her alleged inability to effectively manage and supervise her classroom. Respondent's attendance record is as follows:

2011-12: 46 days absent for sick leave;

2012-13: out on worker's compensation November 19, 2012 – June 28, 2013;

2013-14: 11 days absent for sick leave; out on worker's compensation March 2, 2014 – June 30, 2014;

2014-15: administrative suspension September 8, 2014 – February 24, 2015; 29 days sick leave from February 26, 2015 – June 30, 2015, including extended leave from March 10 – April 9.

In addition to her attendance record for which she received multiple warnings throughout 2014-15, Respondent was cited by the School District for the following:

- Failing to record grades for all students (January 14, 2014);
- Allowing students to leave her classroom without permission and failing to notify security (January 24, 2014);
- Creating a safety hazard by locking her classroom door (January 24, 2014);
- Failing to require students to remove hoodies in class and failing to teach while the class was in progress (January 30, 2014);

- Allowing students to leave the classroom without supervision (February 7, 2014);
- Leaving 25 students unattended in her classroom (May 20, 2015);
- Failing to request an assignment from the main office when her students were on a class trip (June 1, 2015); and
- Leaving her class unattended to observe other teachers conduct a lesson (June 15, 2015).

As the District notes in its brief, excessive absenteeism may lead to a termination of tenure rights even if the absences were excused or for legitimate reasons because of the negative impact such absences have on the educational program and the continuity of instruction. See, e.g., *Metallo v. Union City Board of Education*, 2003 N.J. Agen Lexis 227 (March 2003), *aff'd* by State Board, EDU No. 3454-01 (April 2004).

Beginning the 2011-12 school year and through the 2014-15 school year, Respondent missed a substantial amount of time from school – 46 days in 2011-12; approximately 7 months in 2012-13; more than 4 months in 2013-14; and a total of approximately 6 months in 2014-15. Arbitrator Michael Pecklers explained in *In the Matter of the Tenure Hearing between State Operated School District of the City of Newark, Essex County and Jajuana Vaughn*, Agency Docket No. 336-10/15 (Pecklers 2016) that the School District bears the “burden of making a prima facie showing that it has satisfied or established the sufficiency of the subject tenure charge by a preponderance of the credible evidence.” (at 12) The sheer number of absences goes a long way in making a prima facie showing of excessive absenteeism.

But Respondent argues that the District's shoddy attendance record keeping precludes an accurate account of Ahmed's presence or absence during the school day. Specifically, Respondent focuses on the month of September 2014 and the months of January and February 2015.

The District introduced several different attendance records; and therein lies the confusion. The records are not consistent as to the reason for her absence in the contested time periods. For example, a "Time Detail" record indicates that Ahmed was "administratively excused" from September 1, 2014 through September 25, 2014 before going on Suspension Without Pay through January 23, 2015. An "Attendance Editor" document indicates that Ahmed was "Sick" on September 11, 12, 15, 16, 17, and 18.

Respondent came off Suspension Without Pay on January 23, 2015, but did not start working until February 24, 2015. (She was assigned to the Lafayette Street School on February 17, 2015.) A "Time Detail" document lists her as administratively excused in the last week of January 2015 and does not account for her time between February 1 and 13. It includes an unexplained notation of "Regular Settlement" for the week of February 16, and another "Time Detail" document indicates she returned to work on February 24, 2015.

Homere Breton, Executive Legal Assistant in the District's Talent Office, explained that the attendance documents reflect the type of report requested by the user. That is, the report only answers the query posed by the user. Accordingly, no single report conveniently sets forth Respondent's attendance record.

Despite that significant and disturbing shortcoming in the District's attendance record keeping, it is not particularly relevant to the present tenure charges. The issue for the tenure charges related to excessive absenteeism is whether Ahmed was absent on the many days in question. The records leave no doubt that Respondent was absent, and Respondent does not contend that she actually worked any of those days. The inconsistent record keeping in September 2014 and January-February 2015 only prevents a true understanding of the reasons for her absences. To be clear, the District has sufficiently demonstrated that Ahmed was absent during the relevant time periods in September 2014 and January and February 2015, although the exact reason for her absence has not been conclusively shown.

In *Vaughn*, Arbitrator Pecklers further explained "the burden of production shifts to Respondent to plead and establish her affirmative or exculpatory defenses." Respondent, who did not testify at hearing, did not offer any affirmative or exculpatory defenses other than her challenge to the sufficiency of the record keeping. But the Commissioner of Education enunciated the standard for termination of a tenured teacher for excessive absenteeism in *In the Matter of the Tenure Hearing of Lena White*, 92 N.J.A.R.2d (EDU) 157. The standard requires consideration of the particular circumstances of the absences, not just the number of absences; the impact that the absences had on the continuity of instruction; and some warning to the employee regarding the District's dissatisfaction with the pattern of absences. (at 161)

The total number of absences in and of itself demonstrates the impact on continuity of instruction. Absences of approximately 1-1/2 months, 7 months, 4 months, and 6 months in four consecutive school years indicates that students have experienced considerable interruption in the continuity of instruction. Further, Respondent was warned via memorandum and evaluations about her pattern of absenteeism beginning in 2012 and continuing through 2015. The only consideration to be examined is the particular circumstances of the absences.

Again, Respondent offered no testimony regarding the reasons for her absence. As can be seen from the District's records, the 46 absences in the 2011-12 school year are attributable to sick leave. The 7-month absence in 2012-13 was due to work-related injury, as was the 3-month absence in the 2013-14 (with an additional 11 days due to sick leave). The September 2014-February 2015 absence primarily related to Respondent's Suspension Without Pay, and she was absent an additional 29 days on sick leave from February 2015 through June 2015.

Although one can reasonably argue that absences due to work-related injuries should be given some consideration, the Commissioner of Education had held that "action may be taken against a teacher because of excessive absenteeism even if such is the result of work-related injuries." *In the Matter of the Tenure Hearing of Folger and the School District of the City of Orange*, Commissioner Decision EDU 147-00 (May 2000).

Four school years can be equated to approximately 40 months (i.e., 10 months per year). Respondent was absent for approximately 19 months out of 40, or just less than half of the four-year period. Tellingly, after her return to work on

February 24, 2015 after an approximate 6-month suspension without pay, Ahmed was absent on sick leave for 29 days, i.e., approximately one-quarter of the remaining school year.

The District has offered undisputed evidence that Respondent was excessively absent over the most recent four-year period. The pattern of those absences in the 2014-15 school year, left unexplained by Respondent, is particularly troubling. After a lengthy suspension without pay, she returned to work on February 24, 2015, took sick leave February 26 and 27, received a proposed CAP on March 9, and used sick leave from March 10 to April 8. After returning April 9, she again used sick leave from April 13-15. After being charged with excessive absenteeism on April 30, 2015 and facing a May 8, 2015 disciplinary hearing, Ahmed was absent on sick leave May 4, 5, and 6. After being fined one day's pay on May 8, 2015 for excessive absenteeism, she used an additional four days of sick leave between June 2 and June 17.

The record clearly demonstrates excessive absenteeism for the four-year period from the 2011-12 school year through the 2014-15 school year with particularly excessive absenteeism from the period February 24 – June 30, 2015.

In addition, as noted, the District offered evidence of classroom management and supervision issues on at least 8 occasions in the 2014-15 school year, for which Respondent was cited. Respondent offered no defense to those allegations other than to dismiss them as minor violations not warranting dismissal. Absent contrary evidence, the District has sufficiently demonstrated that Respondent has committed neglect of duty through these violations.

For all the reasons noted above, I find that the District has established the allegations of neglect of duty and other just cause as set forth in Tenure Charges Two and Three.¹ As Respondent has not shown, and has resisted, improvement in her attendance and classroom supervision issues particularly in the 2014-15 school year, I find that the charges warrant dismissal.

Award

The District has failed to establish the tenure charges alleging inefficiency and conduct unbecoming. The District has established the allegations alleging neglect of duty and other just cause as set forth in Tenure Charges Two and Three. Accordingly, those tenure charges are sustained, and dismissal is warranted.



WALT De TREUX

¹ I am not persuaded that the charges support an allegation of conduct unbecoming.

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Affirmation

I, Walt De Treux, affirm that I am the individual who executed this Decision and Award.



WALT De TREUX