STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	
	::	DOE DOCKET NO. 119-4/16
between	::	
SCHOOL DISTRICT OF THE CITY OF BURLINGTON, BURLINGTON COUNTY	::	
	::	**OPINION**
Petitioner,	::	**AND**
-and-	::	**AWARD**
PENNY KEOUGH,	::	
Respondent	::	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE(S) OF HEARING: November 1, 2016; November 15, 2016; November 16, 2016

RECORD CLOSED: December 5, 2016 (Post-hearing briefs)

DATE OF AWARD: December 15, 2016

APPEARANCES:

For the Petitioner:

John B. Comegno, II, Esquire, COMEGNO LAW GROUP, P.C.
Alicia D. Hoffmeyer, Esquire, "
Patricia Doloughty, Ed.D., Superintendent of Schools
Susan Kirk, Bookkeeper/Health Benefits [November 1, 2016]
Raymond Coxe, School Business Administrator
Ingrid Walsh, Asst. School Business Administrator [November 16, 2016]

For the Respondent:

Alan H. Schorr, Esquire, SCHORR & ASSOCIATES
Adam Schorr, Esquire, "
Penny Keough, Respondent
Frederick L. Ballet, M.D. [November 15, 2016]

I. BACKGROUND CONSIDERATIONS

At all times that are relevant for the purposes of this proceeding, Penny Keough was employed as an Administrative Assistant/Payroll Secretary by the City of Burlington School District Board of Education, having held this position since December 1, 2011. By operation of law, she became tenured in this position as of December 2, 2014. On April 8, 2016, Superintendent of Schools Patricia T. Doloughty, Ed.D. filed tenure charges against Ms. Keough pursuant to N.J.S.A. 18A:6-10-11, alleging conduct unbecoming, incapacity, and other just cause. At its meeting of April 25, 2016, the Board of Education determined that the tenure charges and the evidence in support of the same were sufficient, if true, to warrant dismissal or a reduction in salary. By roll-call majority of the full membership, the Board thereafter voted to certify the tenure charges and suspend Ms. Keough from her position without pay for 120 days. See CERTIFICATE OF DETERMINATION by School Business Administrator/Board Secretary Coxe, dated April 26, 2016.

On April 27, 2016, M. Kathleen Duncan, Director Bureau of Controversies and Disputes, acknowledged receipt of the charges on behalf of the New Jersey State Department of Education. The boilerplate checklist advised Ms. Keough that she was required to file a written response to the same within 15 days, per N.J.A.C. 6A:3-5.3, 6A:3-5.4(f). On May 3, 2016, counsel for Respondent Alan H. Schorr, Esquire of SCHORR & ASSOCIATES, P.C. sent a representation letter to David C. Hespe, then-Commissioner of Education. This respectfully requested

that the Commissioner stay the tenure proceedings per Winters v. North Hudson Regional Fire & Rescue, 212 N.J. 67 (2012), pending the outcome of a New Jersey Superior Court, Burlington County, action that had been filed that same date. The complaint in that matter alleged inter alia, violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq. by the District.

On May 5, 2016, Ms. Duncan sent a correspondence to counsel, which acknowledged the May 4th receipt of the Respondent's Motion for a Stay. She went on to advise that within 7 days the Petitioner should file a response, with a reply by Respondent within 3 days. John B. Comegno, II, Esquire of the COMEGNO LAW GROUP, P.C. formally opposed the motion on behalf of the District, filing a letter brief. Mr. Schorr's May 16th reply was received by Controversies and Disputes on May 17, 2016. Then-Acting Commissioner Peter Shulman denied Respondent's request for a stay in a May 26, 2016 letter to the parties, principally citing the fact that the irreparable harm requirement of Crowe v. DeGioia, 90 N.J. 126 (1982) had not been satisfied. Mr. Shulman further concluded that Respondent had misread the import of Winters, and directed that an Answer to the tenure charges be filed within 10 days.

Mr. Schorr responded to Mr. Shulman on May 31, 2016, reporting that he had only just received the May 26th letter and requesting an additional 30 days so that an application for a stay could be made in Superior Court. On June 2, 2016, Ms. Duncan notified Mr. Schorr that his May 31, 2016 letter did not say that he attempted to obtain the consent of his adversary. She closed by stating,

"[w]hether he consents or not, please be advised that a 30-day extension will extend the 120-day period without pay pursuant to N.J.S.A. 18A:6-14. By copy of this letter I am requesting that Mr. Comegno promptly advise of any opposition to the request." Counsel for Petitioner indicated his opposition to Respondent's application that same date, while underlining that the purpose of the tenure reform laws was to streamline tenure cases.

Mr. Schorr again wrote to Mr. Shulman on July 1, 2016, informing him that as the Appellate Division's June 28, 2016 ORDER had denied the stay, Ms. Keough would be filing an ANSWER to the tenure charges no later than July 6, 2016. This was done on July 5, 2016. In a July 7, 2016 letter, Mr. Comegno responded to a July 6, 2016 email from Ms. Duncan, wherein counsel were requested to advise her of the status of Respondent's NOTICE OF MOTION seeking an emergent stay and leave to file an interlocutory appeal, filed on June 8, 2016. This recited the foregoing facts of the denial and emphatically requested that an arbitrator be assigned within the statutory time frame so that the matter could proceed.

On July 18, 2016, Ms. Duncan notified me that I had been appointed to serve as the Arbitrator in the case pursuant to *P.L. 2012, c. 26.* A conference call was conducted with counsel on July 28, 2016, with a correspondence sent afterwards memorializing the agreed upon discovery schedule, which included the propounding of interrogatories as well as a document exchange. Hearings were additionally set down for August 31, 2016 and September 12, 2016.

However, prior to the initial hearing, on August 30, 2016, the New Jersey Supreme Court granted temporary, emergency relief, staying the August 31, 2016 hearing. See SINGLE JUSTICE DISPOSITION ON APPLICATION FOR EMERGENT RELIEF (Rule 2:9-8) by Justice Timpone.

This led to the cancellation of the hearing on the 31st, and when no further notice by the Court was received the September 12th hearing as well. On September 19, 2016, Mr. Schorr wrote to report that the Court had apparently ruled on September 12, 2016 that the emergency stay was vacated, with a copy of the ORDER enclosed. After offering additional hearing dates to the parties on September 20, 2016 that were not mutually acceptable, a conference call was held which resulted in the selection of a number of dates.[1]

Hearings were held at the City of Burlington Board of Education, 518 Locust Avenue, Burlington, New Jersey, on November 1, 2016 and November 16, 2016. An additional hearing was also convened on November 15, 2016 at the Offices of SCHORR & ASSOCIATES, 5 Split Rock Drive, Cherry Hill, New Jersey, in order to accommodate Dr. Ballet whose offices were located nearby. All hearings proceeded in an orderly manner, and at that time counsel were provided with a full opportunity to introduce relevant and admissible documentary

1/ An additional conference call was conducted on October 11, 2016 in order to entertain Respondent's request for an Order to conduct a *de bene este* deposition of Dr. Ballet, which would obviate the need for live testimony and was opposed by Petitioner. My letter of that same date denied this motion based upon N.J.S.A. 18A:6-17.1, but requested that Mr. Schorr provide a draft affidavit to Ms. Hoffmeyer in order to explore the possibility of Dr. Ballet certifying the authenticity of Ms. Keough's medical records. Ultimately, there was no agreement on a stipulation and Dr. Ballet testified at the November 15th hearing.

evidence; to engage in oral argument; and to undertake the direct and cross-examination of witnesses who testified under oath. A verbatim transcription of the proceedings was provided by MASTROIANNI & FORMAROLI, INC., with the transcripts identified as TI (11/1/16); TII (11/15/16); TIII (11/16/16).

At the conclusion of the November 1, 2016 hearing, Respondent made a motion to restore Ms. Keough's salary effective November 9, 2016, pursuant to N.J.S.A. 18A:6-14. The parties were directed to submit their positions in writing, resulting in the issuance of a November 11, 2016 INTERIM AWARD & ORDER, which in pertinent part indicated:

> [t]he language which controls the resolution of the 120 day issue is found at N.J.S.A. 18A:6-14 **Suspension upon certification of charge; compensation; reinstatement.** This provides in full:
>
> > [u]pon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, **excluding all delays which are granted at the request of such person,** then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless

> and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.
>
> [*Emphasis added*].

As indicated by the position statements of the parties, they are in agreement that the delayed filing of Respondent's Answer to the tenure charges added 56 days to the 120 day period. They further concur that the New Jersey Supreme Court Appeal along with late notification by the Court was the source of 20 more days. Therefore, when this 76 day period is tacked on to the statutorily prescribed 120 day period, the result is the date of November 9, 2016.

There is a sharp dispute, however, as to whether or not that is the controlling date. In that regard, Respondent argues that the September 19, 2016 date should attach, as that is when counsel were notified of the lifting of the Supreme Court stay. She additionally posits that any delays are directly attributable to the Board's unavailability for a hearing. Petitioner takes a dim view of that assertion, contending that but for the Respondent's appeal to the Supreme Court, the matter would have concluded long ago. The argument is then advanced that the period of August 30th until November 1, 2016, when the first hearing took place is the correct measuring period. By Petitioner's computation, this extends the period of suspension until December 22, 2016.

My determination of the correct date of course turns upon an interpretation of the words highlighted above "excluding all delays which are granted at the request of such person." As this is a fact specific situation, the exact circumstances of the case are instructive. Hearings in the case were originally scheduled for August 31, 2016 and September 12, 2016. Petitioner is correct in that were it not for Respondent's Supreme Court appeal and resulting 11th hour stay entered on August 30th, the matter would have been heard and adjudicated by now, as my Award would have been statutorily mandated on or before October 15th.

In my view, a fair reading of this "delays" language involves delays in the case which are reasonably attributable and foreseeable. Respondent expressly recognized this by conceding that the extra 12 days until the receipt of the Supreme Court's order lifting the stay should be counted, even though it was not attributable to Ms. Keough because she had requested the stay. So it is with the

exigent scheduling of hearings, which based upon the full calendars of counsel and arbitrators set months before does not happen quickly. This consideration then requires an arbitrator to utilize a rule of reasonableness in determining when to place a tenured employee back on the payroll. Simply put, was a petitioner engaging in dilatory tactics to avoid rescheduling?

Notwithstanding the muscular assertions of Respondent in this regard, the facts do not support such a conclusion *vis-à-vis* Petitioner. Moreover, a review of my emails reveals that on September 20, 2016 (the day after the Supreme Court stay was lifted), I offered the dates of September 28-29, 2016; October 11, 2016; October 13, 2016. Mr. Schorr responded that he was available September 28, 2016, and the morning of October 11th only. He further advised that he began a 2 week trial on October 17, 2016. When the 28th was not good for the Board due to a scheduling conflict, on September 21st, I proposed a conference call for September 27th.

During the call, various dates for the hearings were discussed. The Board advised from the outset that the only date it was available was November 1, 2016, with the rest of the month devoted to other tenure cases the firm was handling. At the time I was not available on November 1st. Respondent is correct in arguing that I had told Petitioner that response was unacceptable and that I would set down the hearing dates, if necessary. Subsequently, my out-of-state case on November 1st cancelled, and the Petitioner was able to make itself available on November 15th. The foregoing facts were contained in my September 28th letter to Ms. Duncan, which resulted in the DOE granting an extension for the submission of the Award.

The bottom line is that November 1st was the first date both parties and I were available to start the hearing. That is so, notwithstanding the fact that Respondent was available on September 28th, and Petitioner was unavailable due to the N.J.S.B.A. Conference the week of October 24, 2016. On that count, I do not perceive the former as unreasonable, since that was only a week later. As to the latter, Mr. Schorr was on trial any way.

Accordingly, based upon the discrete facts of this case, I find that any delays in rescheduling the case are reasonably attributable to Respondent's Supreme Court filing and that the period from August 30, 2016 until November 1st should stay the running of the 120 day period. That will then set the date Ms. Keough would come back on

the payroll *after* the December 15, 2016 due date for my Award, and for these reasons, Respondent's motion is **DENIED**.

In lieu of oral closing argument, the parties agree to submit post-hearing briefs, which following receipt of the expedited transcripts were returnable December 5, 2016. By virtue of the delays caused by Respondent's Supreme Court appeal, the briefing schedule and at my request, on September 30, 2016, Director Duncan graciously granted an extension for the issuance of this AWARD until December 15, 2016. The same is accordingly submitted in timely fashion, pursuant to N.J.S.A. 18A:6-17.1.d.

II. FRAMING OF THE ISSUE

Has the District established whether the actions of Ms. Keough, a tenured Administrative Assistant and Payroll Secretary of the Board, amount to unbecoming conduct sufficient for her termination and/or alternatively, whether she is incapacitated and unable to complete and perform her job duties? And if not, what shall the remedy be?

III. STATUTORY & REGULATORY FRAMEWORK

NEW JERSEY STATUTES ANNOTATED TITLE 18A

18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) 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.

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

NEW JERSEY ADMINISTRATIVE CODE TITLE 6A EDUCATION

* * *

SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES' HEARING ACT

* * *

6A:3-5.3 Filing and service of answer to written charges

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

6A:3-5.5 Determination of sufficiency and transmittal for hearing

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

IV. APPLICABLE BOARD POLICIES

SUPPORT STAFF FAMILY LEAVE 4431.1 [Petitioner Exhibit 1 at Tab 9]

A. Introduction

The Board will provide family leave in accordance with the Federal Family and

Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA).

FMLA leave for eligible staff members shall be up to twelve weeks leave of absence in a twelve month period upon advance notice to the district for the birth of a son or daughter of the staff member and in order to care for such son or daughter; for the placement of a son or daughter with the staff member for adoption or foster care; in order to care for the spouse, son, daughter, or parent of the staff member if such spouse, son, daughter, or parent has a serious health condition; or for a serious health condition that makes the staff member unable to perform the functions of the position of such staff member, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call[ed] to active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees may take up to a combined total of twenty-six workweeks in a single twelve month period to care for a covered service member with a serious injury or illness.

NJFLA leave for eligible staff members shall be up to twelve weeks of leave of absence in any twenty-four month period upon advance notice to the district so that a staff member may provide care made necessary by the birth of a child of the staff member, the placement of a child with the staff member in connection with adoption of such child by the staff member, and the serious health condition of a spouse, parent, or child.

* * *

D. Eligibility

1. Federal Family and Medical Leave Act (FMLA)

   A staff member shall become eligible for FMLA leave after he/she has been employed at least twelve months in the district and employed for at least 1250 hours of service during the twelve month period immediately preceding the commencement of the leave. The twelve months the staff member must have been employed need not be consecutive months pursuant to 29 CFR §825.110(b). The minimum 1250 hours of service shall be determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work pursuant to 29 CFR §785. Entitlement to FMLA leave taken for the birth of a son or daughter or placement of a son or daughter with the staff member for adoption or foster care shall expire at the end of the twelve-month period beginning on the date of such birth or placement.

* * *

2. New Jersey Family Leave Act (NJFLA)

   A staff member shall become eligible for NJFLA leave after he/she has been employed at least twelve months in this district for not less than 1,000 base hours, excluding overtime, during the immediate preceding twelve month period. The calculation of the twelve month period to determine eligibility shall commence with the commencement of the NJFLA leave. NJFLA leave taken for the birth or adoption of a healthy child may commence at any time within a year after the date of the birth or placement for adoption.

* * *

SUPPORT STAFF ATTENDANCE 4212 [Petitioner Exhibit 1 at Tab 18]

The regular and prompt attendance of support staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program and the Board of Education considers attendance an important component of a staff member's job performance.

A support staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges.

In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to an injury or illness or because the support staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such disease in the staff member's immediate household. No support staff member will be discouraged from the prudent, necessary use of sick leave and any other leave provided for in the collective bargaining agreement negotiated with the member's majority representative, in an individual employment contract, or provided in the policies of the Board. In accordance with N.J.S.A. 18A:30-4, the Superintendent or Board of Education may require a physician's certificate to be filed with the Secretary of the Board in order to obtain sick leave.

The Superintendent, in consultation with administrative staff members, will review the rate of absence among the staff members. The review will include the collection and analysis of the attendance data, the training of support staff members in their attendance responsibilities, and the counseling of support staff members for whom regular and prompt attendance is a problem.

* * *

UNCOMPENSATED LEAVE 3431 [Respondent Exhibit 19]

The Board of Education recognizes, under certain circumstances, that the interests of the school district and of an individual employee may be served by the employee's extended absence from the school district for a purpose other than disability.

Except as may be otherwise provided by negotiated agreement, the Board reserves the right to establish the conditions under which uncompensated leaves of absence may be taken. An extended leave of absence may be granted for the purpose of study, childcare, recuperation, a special work assignment, or such other purpose as will tend to serve the best interests of the school district. No leave will be granted for a period of time longer than one school year, but may be extended following annual consideration by the Board to a maximum of one year following the completion of this year in which the leave was granted.

The Board reserves the right to require that the commencement and termination of an extended leave be such as to cause the least interruption to the instructional program of the schools. Wherever possible, partial year leaves of absence will begin and end at a division in the academic calendar and will cause not more than one interruption in teaching continuity during the school year in which the leave is taken.

A person absent from district service on an extended leave of absence does not enjoy a direct employment relationship with the Board, and the period of the leave will not accrue toward tenure and seniority, except as expressly permitted by law. No such person will receive compensation or benefits during the period of the leave.

Whenever possible, an uncompensated leave of absence will be granted for a time certain. When an employee cannot foretell the date on which the leave will terminate, the employee shall inform the Board not less than eight weeks in advance of the anticipated date of return to district employment.

A change in the purpose of a leave which has been granted must be reported to the Superintendent. The Board reserves the right to terminate any uncompensated leave of absence for which the purpose has been altered by the employee without permission.

At the expiration of the uncompensated leave of absence, the employee may return to district employment in a position for which he/she is appropriately certified.

V. CONTENTIONS OF THE PARTIES

Petitioner City of Burlington Board of Education

Ms. Keough has been employed by the Board as a Payroll Secretary since December 1, 2011, earning tenure in her position as of December 2, 2014. TI19:7; 20:20. During her time with the Board she was counseled by a prior supervisor due to her failure to transfer funds necessary to process payroll. TIII150:6-151:9. Ms. Keough's work history also shows evidence of significant and habitual absenteeism. Between January 2012 and June 2012, Ms. Keough was absent seven times (7). TI 21:22-25; Petitioner's Exhibit 1. During the 2012-2013 school year, Ms. Keough was absent twenty-eight (28) times. TI23:16-22; Petitioner's Exhibit 2. During the 2013-2014 school year, Ms. Keough was absent thirty (30) times. TI24:11-16; Petitioner's Exhibit 4. During the 2014-2015 school year, Ms. Keough was absent forty-three and a half days (43.5). TI24:18-25; Id. Finally, during the 2015-2016 school year, Ms. Keough was absent one hundred and twenty-eight and a half days (128.5), which only covers her absences through April 1, 2016. TI24:24-25:2; Petitioner's Exhibit 5. In total, Ms. Keough has been absent two hundred and sixty-seven days (267), in less than five years of employment.

Ms. Keough suffered a workplace injury in March, 2013, wherein she hit her face on a door while turning her head. Petitioner's Exhibit 6. As a result, Ms. Keough underwent jaw surgery, which was paid for by the Board's Workers'

Compensation insurance, and which required her to be out on Workers' Compensation leave beginning October 1, 2015. TI25:9-16. The Board's understanding was that Ms. Keough's Workers' Compensation leave would last anywhere from four (4) to eight (8) weeks. TI37:20; TII42:18. Due to the Board's understanding of the limited duration of Ms. Keough's leave, and the expectation that Ms. Keough would be returning to work, the Board opted not to hire anyone on a temporary basis. TI37:15-38:19. This decision was made, in part, due to the difficulty in finding a temporary employee that would be willing to undergo the background check required as a pre-requisite to employment, while not knowing how long the assignment would last. TII65:19-66:17.

Unfortunately, Ms. Keough's Workers' Compensation leave lasted beyond the originally forecasted duration, and she was not cleared to return to work until January 4, 2016. Petitioner's Exhibit 7. The Board learned of Ms. Keough's clearance to return to work on December 22, 2015, when Ms. Keough called Susan Kirk (a/k/a Susan Croce), the Board employee tasked with handling bookkeeping, health benefits, and Workers' Compensation, to advise of her ability and intent to return on January 4, 2016, the first day after winter break. TI161:11-19; 162:15; 163:11-19.

Upon being informed that the Board would require a note from her doctor, clearing her to return, Ms. Keough became frustrated, and accused Ms. Kirk and her colleagues of being useless. TI162:18-21; 163:11-19, 164:1-2. Ms. Kirk testified that Ms. Keough called several times during the day, and was "adamant"

that she could return on January 4th. TI163:5-19. Ultimately, the Board received the required clearance from Ms. Keough's Workers' Compensation doctor, which stated "Mrs. Keough is medically cleared to return to work on Jan. 4, 2016. Mrs. Keough had surgery on Oct. 1, 2015 and has had several follow-up visits to demonstrate that she had the *mental and physical capacity* to return to work on Jan. 4, 2016." Petitioner's Exhibit 7. [*Emphasis added*].

Despite Ms. Keough's insistence, and her doctor's assurance, that she was fit to return to work, just eight (8) days later, Ms. Keough's story changed. On December 30, 2015, Ms. Keough texted Ray Coxe, School Business Administrator, and her immediate supervisor, and advised that she would not be returning on January 4th, as she previously promised. TII18:25-19:1; TII24:1-6; TII25:5-21. The precise text exchange went as follows:

Keough (at 12:25 pm):	Hey Ray, is there a reason why I can't get into email?
Coxe (at 12:36 pm):	I know they were going to be taking the system down to work on issues. I'm not aware of anything else.
Keough (at 12:42 pm):	I have not been able to get in since I've been out.
	I just saw my hand doctor yesterday n [sic] he wants me out for 2-3 months cos [sic] I'm having it fused together. So effective the 4 of January I'm out so I needed to send a letter requesting a leave of absence w/o pay effective January 4th
	I have the Drs [sic] note
Coxe (at 12:44 pm):	When is your surgery?

Keough (at 12:45 pm): 4th

Respondent's Exhibit 16.

Based upon Ms. Keough's text messages, set forth above, Mr. Coxe was led to believe that Ms. Keough's surgery was scheduled prospectively for January 4th. TII26:4-8. Mr. Coxe's belief in this regard was bolstered by the note received by the Board from Ms. Keough on January 4, 2016, the first day back after the winter break. TII27:13-21; Petitioner's Exhibit 8. Ms. Keough's note read as follows:

> Dear Ray,
>
> Per our text conversation today my request for medical leave of absence effective January 4th, 2016.
>
> Please find this letter as my formal request for my medical leave of absence without pay effective January 4th, 2016.
>
> My doctor will be keeping me out of work for approximately two to three months.
>
> Sorry for the short notice but this was beyond my control.
>
> Thank you for your time and consideration.
>
> Sincerely,
> Penny Keough.

Petitioner's Exhibit 8.

Mr. Coxe understood Ms. Keough's statement that "this was beyond [her] control" to mean that Ms. Keough was unaware that she would be having the surgery she mentioned in her December 30, 2015 texts. TII29:1-6. Likewise, Dr. Patricia Doloughty, Board Superintendent, also understood Ms. Keough's note to

mean that she was having an unforeseen surgery. TI36:1-15. Ms. Keough's note was accompanied by a note from the Hand and Surgery Rehabilitation Center of New Jersey, and purportedly signed by Dr. Frederick Ballet. Petitioner's Exhibit 8. Dr. Ballet's note reflects that Ms. Keough was seen on December 29, 2015, and that she would be out of work starting January 4th, 2016, for 2-3 months. Dr. Ballet's note does not contain any diagnosis, provides no explanation of Ms. Keough's treatment, and gives no insight into why she was unable to work. Id.

Further confusing matters, on or about January 7, 2016, Ms. Keough's mother dropped off one (1) page of a disability application for Mr. Coxe to complete. TII31:11-16; TIII170: 9-10; Petitioner's Exhibit 10. The form contained no further information regarding Ms. Keough's diagnosis or the reason she was unable to work. Id. Having received clearance from her Workers' Compensation doctor on December 22, 2015, stating that she had the mental and physical capacity to return to work, Dr. Ballet's December 29, 2015 note provided little insight into the reason for Ms. Keough's supposed inability to return to work.

Both Dr. Doloughty and Mr. Coxe were confused regarding the type of leave Ms. Keough was requesting, and the justification for her request. TI35:23-36:-5; TII30:21-31:2. As a result, Dr. Doloughty sent Ms. Keough three (3) letters, seeking the information necessary to review her request for unpaid leave, as follows:

1. January 4th Letter. Petitioner's Exhibit 9. Dr. Doloughty sent Ms. Keough a letter, enclosing the Board's Family Medical Leave Policy, and advising Ms. Keough that the purpose of the letter was to respond

to her leave request, and clarify the designation of her leave. Id. The letter further advised that the leave request would be reviewed by the Board, pending receipt of a medical provider's certification, referenced and enclosed with the letter. Id. At the time Dr. Doloughty wrote the letter, Ms. Keough's eligibility for Family Medical Leave was uncertain. TI39:8-16. Nonetheless, as per the Board's standard practice, Dr. Doloughty provided information about Family Medical Leave, to be sure Ms. Keough had it in the event she was eligible. Petitioner's Exhibit 9.

2. January 13th Letter. Petitioner's Exhibit 11. After determining that Ms. Keough was not eligible for Family Medical Leave, due to not having worked sufficient hours to qualify, Dr. Doloughty sent Ms. Keough a second letter on January 13, 2016. Id. Dr. Doloughty's January 13th letter advised Ms. Keough that if she was seeking leave under Board Policy 3431, entitled "Uncompensated Leave" she must specify an emergent inability to work, supported by a physician's statement. Id. The January 13th letter also enclosed the Board's anti-discrimination policy, and invited Ms. Keough to contact Dr. Doloughty in the event she required an accommodation. Id. The letter advised Ms. Keough that she was not presently authorized to take uncompensated leave at that time and that in the absence of the appropriate documentation, she must return to work on January 22, 2016. Id.

3. February 4th Letter. Petitioner's Exhibit 15. Having received no clarification from Ms. Keough, Dr. Doloughty wrote to Ms. Keough, in another attempt to gain clarity. Id. She reiterated that Ms Keough still had not provided a physician's statement supporting her request for leave, a requirement that was noted in both the January 4th Letter and the January 13th Letter. Id. Dr. Doloughty reiterated the Board's willingness to engage in the interactive process if Ms. Keough required an accommodation due to a disability. Id. Dr. Doloughty's letter also advised Ms. Keough that the Board had received information from her Worker's Compensation doctor, which created more uncertainty, as Worker's Compensation had previously cleared her to return to work. Id. Specifically the Board received a fax from the Workers' Compensation doctor, dated January 21, 2016, but not received until February 2, 2016. Id. Dr. Doloughty warned Ms. Keough, consistent with her prior letter, that in the absence of the appropriate documentation, she must return to work within ten (10) days of receiving the letter. Id.

After receiving Dr. Doloughty's January 13th Letter, Ms. Keough called the Board offices and spoke with Dr. Doloughty. TI52:4-7; TIII65:16-68-6. Dr.

Doloughty testified that she advised Ms. Keough that a physician's certification was still needed to review her leave request, and in response Ms. Keough said that she would try to get what was needed. TI57:3-7. After this phone call, the Board received no response to Dr. Doloughty's February 4th Letter. TI70:11-25.

The next time the Board received any information from Ms. Keough was on or about March 14, 2016. TII40:2-25. On March 14, 2016, the Board received three (3) pages of medical documents regarding Ms. Keough, from the Hand Surgery Rehabilitation Center of New Jersey, in an envelope postmarked March 12, 2016, by Ms. Keough. TI169:19-170:1; TIII140:1-7; Petitioner's Exhibit 17. The first page is a note dated March 1, 2016, which indicates that Ms. Keough is having surgery, and cannot work until after surgery. Id. It does not contain a diagnosis, or any other information about the surgery, other than to note that her next appointment is on March 16, 2016. Id. The next page is a note dated February 11, 2016, which reflects that Ms. Keough had surgery on December 16th and December 18th. Id. The February 11th note encloses a page of dictation from the appointment, which reflects that Ms. Keough was "unable to return to work due to the pain she is experiencing." Id.

Rather than clarifying Ms. Keough's situation, the documents received on March 14th created greater confusion. TI72:15-73:8; TI41:1-8. Based on Ms. Keough's representations, the Board believed up until this point that Ms. Keough had surgery on January 4th. Id. This was the first time they learned that she had underwent not one, but two surgeries, and that those surgeries pre-dated her

representations on December 22nd that she would be returning on January 4th. Receiving the March 14th documents made clear that Ms. Keough had lied. TII41:9-43:3.

After more than two (2) months of requesting clarification from Ms. Keough, and receiving none, Dr. Doloughty recommended the certification of the Charges to the Board, as an act of last resort. TI79:2-80:5. As Dr. Doloughty testified, she waited as long as she thought she could, in the hopes that Ms. Keough would submit the necessary documentation. Id. After receiving the March 14th documents, and learning that yet another surgery was scheduled, and a return date was still not provided, the Board was left with no other option to compel Ms. Keough's compliance or be able to fill her position. Id. Ms. Keough was in violation of the Board's Attendance Policy, which puts staff on notice that if an employee fails to give prompt notice of an absence, falsifies the reason for an absence, or is absent without authorization, they will be subject to discipline, up to and including tenure charges. Petitioner's Exhibit 18; TI81:4-15.

Further, Ms. Keough's delinquency in paying both her Chapter 78 contributions, and her health insurance premiums, led to the conclusion that she would not be returning to her position. TI77:1-10; TII49:23-50:11. Mr. Coxe supported Dr. Doloughty's recommendation, referencing the pressure on the Business Office due to Ms. Keough's absence, and Ms. Keough's dishonesty. TII47:16-49:23. Mr. Coxe testified that he hoped receiving the charges would compel Ms. Keough to finally providing the clarification the Board had been

requesting. TII48:1-11.

Ms. Keough's testimony demonstrates in no uncertain terms that she lied to Mr. Coxe on December 30, 2015, and has been trying to explain it away ever since. Ms. Keough acknowledges that on December 22, 2015, she told Sue Kirk that she would be returning to work on January 4, 2016. TIII41:13-20. She claims she was bound and determined to return to work, despite having already had two surgeries, unbeknownst to the Board. TIII41:22-42:2. She further acknowledges that in the text exchange on December 30, 2015 with Mr. Coxe, she told him that she was "having" surgery, as opposed to having already "had" surgery. TIII46:2-9. Ms. Keough claims that despite what she typed, she was trying to tell Mr. Coxe that she "had" surgery. TIII46:8-19. Her exact testimony, when asked about this discrepancy, was as follows:

> Q. Why did you write "having"?
>
> A. You know what, I was -- I really don't have an answer for that. The text messaging, when you text message, there is a lot of like auto correct on the text messaging, and I can't honestly begin to tell you why in God's name I would put "having".
>
> Q. You were on narcotics at the time?
>
> A. Yes. I also need glasses to read, too.
>
> Q. Did you not have your glasses on?
>
> A. I may not have, no.

TIII46:10-19.

After first attempted to blame autocorrect for her supposed mistake, Ms.

Keough, when prompted by her attorney, also attempted to attribute her lie to narcotics and/or not having her glasses on. Id. When she was asked why she told Mr. Coxe that her surgery was on the "4th," Ms. Keough claimed she was still on the previous text. TIII47:7-15. On cross examination, she admitted that she did not think any other words were autocorrected in the text, other than the word "having." TIII109:25-113:24. In fact, she testified to abbreviating words, which were not autocorrected, claiming that she was "loopy" but still functioning. Id.

Notably, Ms. Keough has given different answers each time she has been asked about the December 30th texts with Mr. Coxe. During an initial phone hearing with unemployment, in response to the claims examiner relaying the Board's understanding that Ms. Keough had surgery on January 4th, Ms. Keough said "I don't know what they're talking about." Respondent's Exhibit 12 at KEOUGH046, 22:21-25. When asked again several weeks later, this time under oath, during an appeal hearing before an unemployment hearing officer, why she told Mr. Coxe her surgery was on the 4th, Ms. Keough finally acknowledged that she lied. Id. at KEOUGH074, 55:10-17. Her explanation for lying, however, was not that she was "still on the prior text" but rather that she was "very confused" because she was on "Dilaudid and Vicodin." Id. In total, Ms. Keough has given three different explanations for why she lied, after initially denying her lie, none of which are credible.

Ms. Keough told Mr. Coxe that her inability to return to work was "beyond her control." Petitioner's Exhibit 18. Combined with her text wherein she said she

"just saw [her] hand doctor," and that she was "having" her wrist fused together, Ms. Keough undoubtedly created the impression that her need for surgery had recently manifested. Respondent's Exhibit 16. Nonetheless, prior to her Workers' Compensation leave, Ms. Keough had told two (2) of her colleagues, Ingrid Walsh and Sue Kirk, that she planned on having wrist surgery over the winter break. TI168:24-169:9; TIII12:18-13:18.

Further, Ms. Keough's own doctor's records confirm that she was planning on having this surgery as far back as March 24, 2015, a fact which Ms. Keough admits. TIII40:10-19; Respondent's Exhibit 11 at KEOUGH130. Her medical records further reflect that on December 8, 2015, Ms. Keough attended a pre-operative appointment with Dr. Ballet, wherein "the procedure, the recovery and expected outcomes" were reviewed. R11 at KEOUGH183. Dr. Ballet testified that the expected recovery from a wrist fusion was eight to twelve weeks. TII177:25-178-8. As such, Ms. Keough was aware of her surgery, and recovery time well in advance of the representations she subsequently made to the Board.

Ms. Keough's attempts to characterize her surgery as emergent are further contradicted by her own request for clarification to Dr. Ballet. TII185:19-21. As evidenced by Dr. Ballet's records, even Ms. Keough, herself, was not clear on why her surgeries were "emergent." Respondent's Exhibit 11 at KEOUGH100. Dr. Ballet's records reflect that he scheduled her surgery on an "urgent" basis due to the pain Ms. Keough had been experiencing. Id. Further, Dr. Ballet described her December 16th, surgery as "urgent" rather than

emergent, which he defined as "sooner than later was recommended" due to the pain Ms. Keough was experiencing. TII145:9-18. Accordingly, as Ms. Keough was aware of the underlying symptoms, and as the surgery had been discussed for months, both with Dr. Ballet, and with her colleagues, there is no credible explanation for Ms. Keough's obfuscation. While her surgery may have become urgent, it was not unforeseen, and there was no reason she could not have notified the Board.

Similarly, Ms. Keough would have been well aware of her inability to return to work on December 22, 2015, despite her representations to the contrary to the Board. Ms. Keough testified that when she saw her doctor on December 29, 2015, he told her she could not go back to work due to the narcotics she was taking and the extent of her pain. TIII43:7-16. She claims that this was the first time she learned of the 2-3 month recovery period for her surgery. Id. Even if this were believable, Ms. Keough was still aware of the underlying conditions preventing her return, per Dr. Ballet, namely her pain and her medication. Again, Ms. Keough's feigned surprise, and implausible explanations, do not detract from the fact that she was well aware of her inability to return to work, despite what she has represented to the Board.

Three (3) witnesses testified that the Board only received one (1) page of Ms. Keough's disability application, despite Ms. Keough claims that all four (4) pages, including Dr. Ballet's certification, were dropped off to the Board on January 7th. Ingrid Walsh, Assistant School Business Administrator, testified that

she received a single page of a State disability application to complete on Ms. Keough's behalf. TIII11:21-12:14. Dr. Doloughty, likewise, testified that a single page of a disability form was received. TI118:2-14. Mr. Coxe testified that he only ever saw one (1) page of a disability application, with a handwritten post-it note affixed to the front from Ms. Keough's mother. Petitioner's Exhibit 10; TIII170:14-17. He further testified that he did not see the full (4) four page application until after the parties were in litigation. TIII174:1-4.

While the Board's witnesses were consistent in this regard, Ms. Keough's testimony has been far more mercurial. In prior sworn testimony, both Ms. Keough and her mother testified that the disability paperwork was dropped off on January 8, 2016. Respondent's Exhibit 12 at KEOUGH071, 44:9-15; Id. at KEOUGH075, 60:18-24. That testimony was subsequently contradicted by text message conversations between Ms. Keough and Mr. Coxe, evidencing their discussion of the disability form on January 7, 2016. Respondent's Exhibit 17.

Ms. Keough now claims that the paperwork was dropped off on January 7, 2016. TIII58:14-24. Interestingly, in her text conversation with Mr. Coxe on January 7, 2016, Ms. Keough states "You told me that the paperwork would be ready yesterday." Respondent's Exhibit 17. Ms. Keough's statement makes no sense given that she testified that the paperwork was not dropped off until January 7, 2016, and that she did not speak with Mr. Coxe in the prior days. TIII63:14-19. When questioned about this statement, Ms. Keough merely replied "I don't understand why I would put that." TIII63:23-64:2.

Ms. Keough also testified that her mom suggested she put the disability papers in an envelope to protect her social security number, and that she recalls seeing all four (4) pages of the disability application be placed in the envelope. TIII57:2-22; Respondent's Exhibit 2. In prior testimony before an unemployment hearing officer, Ms. Keough's mother testified that the disability papers were not in an envelope. Respondent's Exhibit 12 at KEOUGH076, 63:15-18.

According to Ms. Keough, regardless of when and how the disability paperwork was provided, the Board would have had the disability paperwork by the time she spoke with Dr. Doloughty on January 21, 2016. During that conversation, in addition to her January 4th and January 13th letters, Dr. Doloughty advised Ms. Keough that she needed to provide a physician's certification. Petitioner's Exhibits 9 & 11; TI57:3-7. Nonetheless, Ms. Keough admitted that she never mentioned the disability paperwork to Dr. Doloughty, or the fact that it contained the very medical certification that Dr. Doloughty was seeking. Respondent's Exhibit 12 at KEOUGH072, 47:14-18; TI57:3-7. Further, after receiving the February 4th letter, which again advised of the need for a physician's certification, Ms. Keough still never contacted the Board to inquire what was deficient in the certification contained within the disability paperwork she claims she provided, and claims, despite the numerous letters, that Dr. Doloughty never told her she needed a medical certification. Petitioner's Exhibit 15; TIII69:14-22.

Ms. Keough maintains she was in constant contact with the Board during

her unauthorized absence. As proof of this, Ms. Keough testified to the phone calls she made to the Board offices during the month of January, and provided her phone records. Respondent's Exhibit 9. Ms. Keough's phone records show she made nine (9) calls in the month of January. Id. Seven (7) of those nine (9) calls were made to Sue Meredith, who was a secretary in the business office, rather than a person who held authority over Ms. Keough's leave request. Id. Two (2) of the calls were placed on January 5, 2016, for the purpose of confirming receipt of the letter Ms. Keough's mom dropped off the day before. TIII54:1-7. Four (4) calls were placed on January 7th, for the purpose of making sure the disability paperwork would be filled out. TIII58:16-60:2. The January 8th call was also for the purpose of making sure the disability paperwork would be filled out. TIII64:3-9.

As such, despite her representations about being in "constant contact" with the Board, only two (2) of the phone calls were in any way responsive to the Board's request for clarification, specifically the January 21st call with Dr. Doloughty, and the January 22nd call to Sue Meredith. TIII66:1-7; TIII71:9-19. Further, the phone calls were ultimately irrelevant, as the necessary medical certification would have to be provided in writing, from a physician.

Ms. Keough also claims that she mailed in all her doctor's notes. The Board acknowledges receiving the December 29, 2015, note. Petitioner's Exhibit 8. The Board further acknowledges receiving the March 1, 2016, and February 11, 2016, notes, both on March 14, 2016. Petitioner's Exhibit 17. Ms. Keough

claims that she sent the February 11, 2016 note within a few days of receiving it, but that "something just told [her]" to send it again with the March 1, 2016 note. TIII73:1-74:22; TIII76:7-77:17. Nonetheless, the February 11, 2016 note was eventually received. Ms. Keough admits that she did not sent the Board the April 12, 2016 and May 3, 2016, notes, but that she had her lawyer do it after she commenced litigation. TIII90:14-92:19.

Accordingly, the only note whose receipt is in dispute is the March 22, 2016, note. Respondent's Exhibit 6; Petitioner's Exhibit 20. Ms. Keough claims she sent it immediately, while Mr. Coxe confirms that the first time he saw that note was after litigation commenced, in June 2016. TIII77:21-78:6; TIII180:14-25. Further, none of the notes prior to the April 12, 2016 note, provided a return to work date. As of April 12th, the Charges had been served, and were pending certification. Joint Exhibit 1; Petitioner's Exhibit 19.

Ultimately, rather than take accountability for her own request, and protect her position, Ms. Keough assumed an adversarial posture with the Board and stopped communicating in any productive way after being advised that she needed to provide a medical certification in support of her leave. Ms. Keough testified that after receiving Dr. Doloughty's January 13th letter, she called several attorneys to see what her legal rights were. TIII67:1-10. Ms. Keough claims at that time that she had not received the January 4th letter. TIII51:9-15. So by her version of the facts, she received one letter from the school, seeking clarification, and offering accommodation, and Ms. Keough's response was to immediately

call an attorney, rather than try to clarify what she could do to have her leave approved.

Ms. Keough claims she can return to work in her full capacity, yet Dr. Ballet's testimony in this regard was less convincing. Dr. Ballet testified that a total wrist fusion results in permanent loss of motion. TII128:4-17. He further testified that someone with a heavily keyboard oriented job could "probably" return to that job with some modifications to the work station. TII128:18-24. Ms. Keough has acknowledged that she has not requested any modifications to her work station. TIII129:3-7.

Further, Ms. Keough points to two notes that purport to clear her to return to work. She provides an April 12, 2016, note that clears her to return on May 16, 2016, to sedentary duty. Respondent's Exhibit 14. She also provides a note from May 3, 2016, that clears her to return to work on May 4, 2016. Id. Ms. Keough testified that after receiving the Charges, she went back to the doctor to obtain a note that allowed her to return soon. TIII91:10-92:3. Dr. Ballet testified that, notwithstanding these two notes, he never performed a functional capacity examination on Ms. Keough. TII192:9-14.

Tenure is intended to protect teachers, supervisors, and employees from dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for

"inefficiency, incapacity, unbecoming conduct, or other just cause," but only after a hearing in compliance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to - 30.1. While tenure laws are designed to protect public employees from arbitrary action or political favoritism, they were never intended to perpetuate the employment of individuals who are not properly performing their jobs. In re Tenure Hearing of Giglio, EDU 11457-2003, Initial Decision (August 9, 2004).

Although tenure protections are generally reserved for those with a statutory entitlement (e.g., teachers), there is no dispute that Ms. Keough is a tenured, albeit non-certificated, secretary. Accordingly, although much of the authority regarding tenured employees does not speak specifically to tenured secretaries, it is nevertheless applicable. The Charges brought by the Board collectively demonstrate conduct unbecoming an employee, incapacity and other just cause in the form of absenteeism. In short, Ms. Keough intentionally misrepresented her medical information to the Board. Although she claims it was unintentional, and that she was confused at what the Board needed, her long history of absences demonstrates she had substantial experience in requesting time off. Further, Ms. Keough has yet to prove definitively she can return to work in her prior capacity, with or without accommodations.

Ms. Keough's has gone out of her way to ascribe motive to the Board, going so far as to accuse them of discrimination, in an attempt to avoid answering the Charges. To the contrary, the Board provided documentation of

misrepresentations made by Ms. Keough's via text, leading to the certification of the Charges. As such, and in light of the conflicting testimony, the credibility of the witnesses must be evaluated. The choice of accepting or rejecting the witness' testimony or credibility rests with the finder of facts. In re Tenure Hearing of Giglio, EDU 11457-2003, Initial Decision (August 9, 2004) (citing Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. Id. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. Id. (citing Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super 1 (App. Div. 1961). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. Id. (citing Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed 2d 380 (1973)). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Id. (citing Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963)).

Ms. Keough is guilty of unbecoming conduct, due to her misrepresentations about her surgery dates, her failure to provide adequate documentation to support her leave request, and her failure to advise the Board of her wrist surgeries, thereby preventing them from filling her position and prejudicing their operations. Her bad faith conduct is further evidenced by her

decision to sue the Board for discrimination, although she failed to plead discrimination as a defense, rather than provide the documentation clarifying her condition, as requested several times.

"Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Giglio, supra (citing Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998)). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which develops upon one who stands in the public eye as an upholder of that which is morally and legally correct. Id. (citing Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." Id. (citing In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), cert. denied, 65 N.J 292 (1974)). The determination of whether to remove an individual from a tenured position requires consideration of the nature of the act, the *totality of the circumstances*, and the impact on the individual's career.

Ms. Keough admits that she never told the Board about her two surgeries prior to having them. Both she and Dr. Ballet acknowledge that the surgery was scheduled well in advance, and that she was advised of the recovery time prior to submitting to surgery. Ms. Keough claims that she was "bound and determined"

to return to her position, despite claiming to be in incredible pain, and "loopy" from narcotics. At best this evidences terrible judgement, and at worst, further lies. Ms. Keough was aware that she was having this surgery, and, in fact, discussed it with her colleagues prior to going out on worker's compensation leave. She has offered no credible or justifiable reason for withholding this information from the Board. In doing so, Ms. Keough prejudiced the Board's operations, as testified to by Dr. Doloughty and Mr. Coxe. Furnishing false information to the Board, and withholding critical information about her medical condition, unequivocally constitutes conduct unbecoming a public employee.

None of the notes provided to the Board provided a diagnosis, or a return date, or specified the emergent nature of Ms. Keough's inability to return to work. As Ms. Keough's initial Workers' Compensation leave was anticipated to be one (1) to two (2) months, no temporary employee was hired. That leave, which began October 1, 2015 was unexpectedly extended an additional month, until January 4th. In light of Ms. Keough's representations that should would be returning, again, no temporary employee was sought.

After Ms. Keough failed to return in January, and as the duration of her absence remained uncertain, the Board was unable to find temporary help, as none of the potential candidates were willing to undergo the fingerprinting process, and pay the application fee, for only a few months of work. Ms. Keough herself acknowledged that her position is "irreplaceable." TIII99:14-100:11. Both Dr. Doloughty and Mr. Coxe, and Ms. Walsh testified to the disruption in the

Board's operations caused by a hole in this irreplaceable position. But for Ms. Keough's obfuscation of her surgeries, the Board could have secured someone for the several months of Ms. Keough's absence.

Ms. Keough holds a position of trust within the Board's operations, and yet she betrayed that trust by lying about her surgery dates, and then failing to provide the necessary documentation to support her leave request, presumably in an attempt to delay the Board's inevitable discovery of her lie. In doing do, Ms. Keough has displayed, at best poor judgement, and at worst, a willingness to lie without compunction. Ms. Keough was warned repeatedly that failure to communicate or provide information regarding her leave, in addition to her failure to return to work, may result in discipline, yet she ignored those warnings and began communicating with an attorney, rather than her employer. While Ms. Keough may paint this all as a big misunderstanding, it was her obligation as an employee to provide this information. In light of the foregoing, it is clear Ms. Keough's engaged in conduct unbecoming a public employee.

Ms. Keough's excessive absenteeism alone constitutes just cause to bring these Charges, despite her claim that her absences were permitted and/or justified. Further, Ms. Keough provided no proof of her ability to return to work until after the Charges were certified, and after she had sued the Board. To date, her ability to return remains uncertain.

There is ample authority amidst tenure cases holding that "chronic or

excessive absenteeism has been found to constitute both 'incapacity' and 'unbecoming conduct,' within the meaning of N.J.S.A. 18A:6-10" justifying dismissal from employment. In re Tenure Hearing of Gillespie, EDU 09195-11, Initial Decision (April 26, 2016). Excessive absenteeism warrants dismissal, even where absences are the result of a legitimate physical ailment, and even where an employee is contractually entitled to time off. Id. (quoting Bd. of Ed. of the City of Camden v. Rucker, 94 N.J.A.R. 2d (EDU); State-Operated School District of Jersey City v. Pellecchio, 92 N.J.A.R. 2d (EDU) 267). In fact, removal of tenure can be justified even where the employee's absence is the result of a workplace injury. Id. It is within the Board's discretion to determine whether the absenteeism is excessive. Id. (Citing Trautwein v. Bd. of Educ. of Bound Brook, 1 980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980)). See also In re Tenure Hearing of Stapleton, EDU 168-13, Initial Decision (May 7, 2013). In sum, excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute incapacity, unbecoming conduct, and/or just cause within the meaning of N.J.S.A. 18A:6-10, so as to warrant dismissal from employment.

Here, it is uncontested that as of April 1, 2016, Ms. Keough has been absent from her position for a total of two hundred and sixty-seven days (267). By her testimony, she was cleared to return, effective May 4, 2016, which adds and additional five weeks worth of absences to that total. The Board's witnesses testified as to the disruption in its operations occasioned by Ms. Keough's

absences, and Ms. Keough herself confirmed that she plays a vital role in the Board's functioning. In fact, she confirmed that her position is irreplaceable. Accordingly, in light of the Board's need to have an employee in this position, the Board determined, in its discretion, that being absent for approximately twenty percent of working days over a less than a five (5) year period, constitutes excessive absenteeism and/or incapacity, justifying Ms. Keough's termination.

Ms. Keough claims that she is prepared to return to work, yet she admits she did not provide the Board the notes clearing her until after the Charges were filed. She further admits that they were provided by her attorney, in connection with notification that she was suing the Board for discrimination. The two (2) notes she relies upon to support her ability to return offer conflicting conditions. One appears to have no conditions, and the other requires sedentary duty.

Having established Ms. Keough's unbecoming conduct, incapacity and excessive absenteeism, there is no doubt that just cause exists to discipline Ms. Keough. The Board is limited by N.J.S.A. 18A:6-10, which prohibits the Board from imposing any discipline beyond a warning letter, or increment withholding. The Board has no independent ability to impose any greater discipline without the filing of tenure charges, such as an unpaid suspension. Here, Ms. Keough's misconduct justifies her termination, in light of the totality of the circumstances.

Just cause has been regularly defined as "[a]n adverse employment action based on facts that (1) are supported by substantial evidence; and (2) are

reasonably believed by the employer to be true; and (3) not for any arbitrary, capricious, or illegal reason." See Maietta v. United Parcel Service, 749 F. Supp. 1344, D.N.J. (1990). The concept of "just cause" requires an arbitrator to make two (2) essential inquiries. "First, is the employee guilty of misconduct. Second, assuming the employee is guilty, is the discipline imposed a reasonable penalty under the circumstances of the case." Lozier Corp., 121 LA 1187 (Fitzsimmons, 2005). Put differently, the just cause standard requires that the consequence assessed in a given situation be reasonable in light of **all of the circumstances**. City of Portland, 77 LA 820, 826 (Axon 1981).

Here, under the above-cited authority, Ms. Keough's excessive absenteeism alone justifies her termination. The Board needs, and is entitled to have an employee in the position of payroll secretary who reliably shows up to work. The number of days Ms. Keough has been absent in her less than five year tenure is excessive, and constitutes just cause to terminate her.

More importantly, the Board has the right to trust in the honesty of its employees, and an employee's dishonest act compromises not only the Board's trust, but the public's trust. In re Tenure Hearing of Depasquale, 92 N.J.A.R.2d (EDU) 537 (N.J. Adm. Aug. 31, 1992). Ms. Keough lied by omission when she failed to advise the Board of the two wrist surgeries she underwent while out on worker's compensation leave. She again lied by omission on December 22nd when she called the Board offices and claimed to be returning to work on January 4th, again failing to mention the surgeries. Ms. Keough affirmatively lied

to Mr. Coxe on December 30th when she told him she was having her wrist fused on January 4th, all the while knowing that surgery had already occurred. She lied to him again on January 7th when she claimed that Mr. Coxe told her that her disability paperwork would be ready yesterday, when they had never spoken, nor had the paperwork been dropped off. Ms. Keough claims she provided a medical certification with the disability paperwork, yet admits that she never mentioned it to Dr. Doloughty when they spoke on January 21st. Whether intentionally, or recklessly, Ms. Keough has destroyed her credibility with the Board, such that she should not be returned to the highly sensitive role of payroll secretary.

In conclusion, Ms. Keough's pattern of lies, omissions and deflections, along with her habitual absenteeism and incapacity, was amply demonstrated by both the documentation and testimony offered in these proceedings. Accordingly, the Board has carried its burden of proof in demonstrating that Ms. Keough's termination is not only appropriate, but necessary to ensure the Board can continue to function with full confidence in the honesty and capacity of its employees.

Respondent Penny Keough[2]

N.J.S.A. 18A:6-17.2 states that "[t]he board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for

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2/ During his cross-examination of Dr. Doloughty at the November 1, 2016 hearing, counsel for Ms. Keough pursued a line of questioning related to the New Jersey Law Against Discrimination, and whether or not it contained a leave provision that was broader than the Family Medical Leave Act. Counsel for Petitioner objected, arguing that the question was beyond the scope of the arbitration proceeding and crossing over into discrimination issues and theories that had been asserted in another tribunal. Mr. Schorr then emphatically replied that "[t]his goes to their policy, Okay? If their policy is an unlawful policy, the Department of Education has assured me that I would [be] able to have a full hearing on the discrimination issue in this tribunal. I have a letter from Acting Commissioner Shulman which says I assure you you will have a full opportunity to discuss the discrimination issues. Now, whether or not Burlington believes that the FMLA is the only law that protects Ms. Keough is one of the most relevant issues we have here, because it goes to their motive in seeking to terminate her." TI101:10-25; 102:1-6.

Arbitrator: "I don't believe Respondent raised that though, as an issue here, within this forum. I know, I read your whole Complaint in Superior Court, it's everywhere there, I understand that, but all you did in your Answer [before the Commissioner] was you just admit deny, you raise no affirmative defenses, I saw, right?" Mr. Schorr: "Correct." Arbitrator: "And in the August 5th response, your Statement of Evidence, I don't think you raised anything in there, right? Mr. Schorr: "No. I am not seeking to litigate - - I want to be clear. I am not seeking to litigate the discrimination matter here." TI102:7-22.

When I then permitted Respondent to ask the limited question posed, Mr. Comegno again objected "I think it's inappropriate to get into any policy points, any legal conclusions, any issue that's going to come up in the Superior Court matter. This cannot be used as a vehicle for taking an early deposition or further developing theories. The District has separate counsel that's appointed on the discrimination matter. Frankly, I think the District is being prejudiced if we go down that road. I just want to note it on the record." TI104:17-25; 105:1.

Similar skirmishes ensured leading to an Executive Session with counsel followed by a period of deliberation. My decision to exclude that line of questioning was then placed on the record. After reiterating my prior observations, I found that "[t]herefore, at no point in this proceeding has Respondent chosen to argue any of those affirmative defenses. The very line of cross-examination as being pursued here is attempting to in some ways get in the back door to firm up, if you will, that contention. But that contention at the choice of Respondent is being heard in Superior Court at some point. So this is not the proper forum for that on that basis. That line of questioning is not going to be permitted." TI114:20-25; 115:1-4.

At the beginning of the November 15, 2017 hearing, Mr. Schoor renewed his objection to the prior ruling, with parallel arguments made. I then responded as follows: "Since that time, I did have the opportunity to review the entire file and when Assistant Commissioner Shulman made that comment, that preceded the filing of Respondent's Answer, as well as her Statement of Evidence in this matter. And as I noted the last time, neither of those documents contains any kind of a pleading or affirmative defense regarding those discrimination claims which are properly the subject of a Superior Court action and wherever that goes. And at the risk of an editorial comment, I do not read Winters as standing for the proposition that if you don't raise that defense here that you can't raise that then in Superior Court. I read Winters to say that you don't get two

tenure charges have been met." As a general rule of law, establishing the truth of the charges presented in either an administrative proceeding or in a discipline or discharge arbitration means proof by a preponderance of the believable evidence. Atkinson v. Paresekian, 37 N.J. 143, 149 (1962); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971). Where the standard is preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 104 (App. Div. 1959). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience or because its overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

(n. 2 continued) bites of the apple. You don't raise it here in this proceeding and then if you're unsuccessful then try to raise it in Superior Court.

So I would like the record to be abundantly clear how Respondent repeatedly attempted to raise this defense. I have ruled that that's not proper because its been preserved, it's a - - it's in my view, very clearly an election of remedies issue and Respondent has chosen to go to Court, as is her right, but that will not be the subject of any kind of examination here." TII8:20-25; 9:1-20.

In his brief, counsel for Respondent thanked me for my courtesy and respect throughout the proceeding, and I echo those comments. He then went on to make a number of muscular arguments related to this evidentiary ruling, insisting that I had committed reversible error by barring all actions related to the District's purportedly discriminatory and retaliatory actions against Ms. Keough. See Brief at pps. 27-30. These primarily focused on Mr. Shulman's May 26, 2016 Order, as well as the Appellate Division and Supreme Court's decisions denying Respondent's motion(s) for an Interlocutory Appeal. In the interest of arbitral economy, these arguments have not been summarized, but are incorporated by reference herein.

While not specifically referenced in my bench ruling, Respondent is reminded that per N.J.S.A. 18A:6-17.1, the arbitrator is to determine the case under the American Arbitration Association labor arbitration rules unless there is a conflict with the statutory procedures in which case, the latter govern. Pursuant to AAA Labor Arbitration Rule 27, "[t]he arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary."

Whatever standard of proof the arbitrator determines applies in this case, it is an established tenet of law that, when evidence is in equipoise and there is no other persuasive evidence, the question in issue must go against the party who has the burden of persuasion, in this case, against the School District. In re Tenure Hearing of Clare Miller, Union County Educational Services Commission, O.A.L. Dkt. No. 5812-01, Agency Dkt. No. 240-7/01 (decided April 8, 2002).

The School District seeks to strip Ms. Keough of her tenure and terminate her employment based upon conduct which they claim is "unbecoming". The statute, N.J.S.A. 18A:6-10, provides that a tenured school employee cannot be dismissed or reduced in compensation except for inefficiency, incapacity, or "conduct unbecoming". The statute does not define "conduct unbecoming", but our Supreme Court has. Recently, the Supreme Court defined "conduct unbecoming" as "conduct which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services. In re Young, 202 N.J. 50, 66 (2010).

"'Conduct unbecoming' is not specifically defined in the statute. It has been called an elastic standard that incorporates any conduct that adversely affects the morale or efficiency of the public entity or which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. The touchstone of the decision as to whether particular behavior is properly considered conduct unbecoming lies in the certificate holder's fitness to discharge the duties and functions of one's office or position.

Conduct unbecoming is a type of disciplinary charge that is determined on a case-by-case basis and can embrace a wide range of conduct. Under appropriate circumstances, unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." In the Matter of the Tenure Hearing of Thomas Strassle, Agency Dkt. No. 131-5/16 (internal citations and quotations omitted).

Ms. Keough is not a certificate holder and she is not a teacher. Arguably, since she does not have contact with children as part of her job duties, her behavior should be required to meet a lower bar as opposed to a teacher, whose behavior directly impacts children and students. Virtually every case reported on conduct unbecoming involves the alleged bad actions of a teaching professional. Ms. Keough is not a teaching professional. She is a payroll clerk. Nevertheless, the cases and arbitrations that have found good cause to affirm a charge of conduct unbecoming have included for following behaviors:

- Having inappropriate sexual conversations with a student, resulting in 120 days without pay, In the Matter of the Tenure Hearing of Thomas Strassle, *supra*;
- Sending and receiving nude photographs on district-issued laptop and iPad, on four occasions during the school day and on multiple occasions outside of school, resulting in 120 days without pay, In the Matter of Tenure Hearing of Glenn Ciripompa, Agency Dkt. No. 177-7/14, *aff'd* Bound Brook Board of Education v. Glenn Ciripompa, 442 N.J. Super. 515 (App. Div. 2015);
- Helping students to exchange marijuana for money in her presence without reporting the students, resulting in termination, In the Matter of Tenure Hearing of Loretta Young, Agency Dkt. No. 8-1/14;

- Having sexual relations with a student, resulting in termination, In re Young, *supra*;

- Making racist statements, resulting in a decision by the Appellate Division that termination was not the appropriate penalty, In re Tenure Hearing of Geiger, 2015 N.J. Super. Unpub. LEXIS 2649 (App. Div. 2015).

The Tenure Charges for "Conduct Unbecoming" are in six separately categories:

1. Ms. Keough was cleared to return to work on or before January 4, 2016, but failed to report, thereby abandoning her position. ¶49-50.

2. Ms. Keough scheduled elective surgery while out on leave without notifying the Board, demonstrating poor judgment. ¶51.

3. Ms. Keough willfully provided false and incomplete information and intentionally withheld other information in an attempt to mislead the Board. ¶52-53.

4. Ms. Keough refused to provide a response to the Board's numerous attempts to clarify her leave. ¶54, ¶57.

5. Ms. Keough refused to provide the Board with information regarding her potential return to work date, despite being warned repeatedly. ¶55, 56.

6. Ms. Keough refused to pay her Chapter 78 contributions. ¶58.

The School District falsely alleges that Ms. Keough simply abandoned her position because she was cleared to return to work and simply decided not to do so. The evidence clearly demonstrates that this was not the case. While the Workers' Compensation physician cleared Ms. Keough to return to work after her jaw surgery caused by a work-related injury, Ms. Keough also had a wrist injury that had been causing her increasing pain and other difficulties during the

previous year.

The medical records and testimony from Dr. Frederick Ballet demonstrate that Ms. Keough had urgent wrist fusion surgery on December 16, 2015 and then an emergent carpal tunnel surgery on December 18. See *Dr. Ballet's medical records, KEOUGH100 and KEOUGH117-118, and Dr. Ballet's testimony,* TII169:19-170:8. Ms. Keough had every intention to return to work, as scheduled, on January 4, 2016. *Ms. Keough's testimony,* TIII102:16-23. She believed at the time she had the surgery that she would be able to return to work on January 4, 2016. *Ms. Keough's testimony,* TIII41:19-42:2.

Unfortunately, she did not initially understand the severity of the surgery or the amount of recovery that would be necessary. *Ms. Keough's testimony,* TIII106:4-21. Dr. Ballet's records and testimony confirm that he did not tell her how long she would be out of work. While one can opine that he should have told her that she would be out of work for an extended period of time, he does not recall telling her and there is nothing in his records to indicate that she was told prior to surgery that she would out of work for any amount of time. *Keough96-206; Dr. Ballet's testimony,* TII125:12-24.

Ms. Keough based upon her medical history, reasonably believed on December 22, 2015 that she would be returning to work as scheduled on January 4, 2016. She based her belief upon two (2) previous procedures she had on her wrist. *Ms. Keough's testimony,* TIII106:8-15. On December 31, 2014,

Ms. Keough underwent arthroscopic surgery on her wrist and promptly returned back to work on the first day after break. *Ms. Keough's testimony,* TIII106:8-15; *KEOUGH133, KEOUGH140.* She also reasonably believed that the School District would accommodate her injury as they had in the past. When she had her arthroscopic surgery and returned to work one-handed, her supervisor bought her a left handed keyboard so that she could calculate her numbers left-handed. *Ms. Keough's testimony,* TIII38:10-39:11.

Similarly, in February 2015, Ms. Keough's wrist became aggravated and her arm was placed in a cast as the result of an accident. *KEOUGH133-134; Ms. Keough's testimony,* TIII39:12-16. Again, despite being airlifted from the accident and missing a week because of other accident-related injuries, Ms. Keough returned to work with her cast and worked. *Ms. Keough's testimony,* TIII39:12-40:9. Ms. Keough was shocked when she received unexpected news from Dr. Ballet on December 29, 2015 that she would not be able to return to work on January 4, 2016. *Ms. Keough's testimony,* TIII43:7-23.

Dr. Ballet explained that due to the significant pain from the wrist fusion surgery, Ms. Keough would need to be on morphine and oxycodone, narcotics that would render her unable to work. *Dr. Ballet's testimony,* TII143:2-144:4. He provided Ms. Keough with a note excusing her from work for "2-3 months". Respondent's Exhibit 1; Petitioner's Exhibit 8. Ms. Keough provided this note, along with a letter, on December 30, 2015, which Petitioner received on January 4, 2016. Respondent's Exhibit1/Petitioner's Exhibit 8. *Dr. Doloughty's testimony,*

TI34:24-35:22.

The School District would not wait for Ms. Keough to be medically cleared to return to work. They brought these Tenure charges for abandonment on April 26 or 28, 2016. *Dr. Doloughty's testimony,* TI146:8-19. As soon as Dr. Ballet cleared Ms. Keough to return to work, this office sent a copy of the Doctor's note to Mr. Comegno, who was by then already representing the School District. Respondent's Exhibit 18. Ms. Keough was ready and able to return on to work May 4, 2016, just a few days after these Tenure Charges were brought.

Nevertheless, the School District refused to permit her to return to work because the Tenure Charges had already been brought. *Dr. Doloughty's testimony,* TI146:8-148:8. This charge brought by the School District is false. There IS no evidence whatsoever to support the School District's claim that Ms. Keough abandoned her job. She was not cleared for work by her physician after urgent and emergent surgeries and provided medical documentation from her doctor. When she was cleared by her doctor to return to work, the return-to-work note was immediately submitted and the School District refused to allow her to work because the tenure charge was already pending and for no other reason. Accordingly, the arbitrator should reject this charge.

The School District accuses Ms. Keough of exercising poor judgment by scheduling elective surgery. First of all, the allegation is untrue. Secondly, there is a substantial difference between exercising poor judgment and engaging in

conduct unbecoming a public employee. Many educational employees make decisions that in retrospect could have been wiser. That is not the standard for stripping tenure and terminating employment. Nevertheless, Ms. Keough did not exercise poor judgment. She had wrist surgery because it was urgent.

When pressed during cross-examination, Superintendent Doloughty explained that she believes that Ms. Keough's surgery was "elective" because it was scheduled and was without a diagnosis. *Dr. Doloughty's testimony,* TI139:6-11. By Dr. Doloughty's own definition, Ms. Keough's surgery was not elective. Dr. Doloughty then claimed that she was unaware of any diagnosis. *Dr. Doloughty's testimony,* TI139:12-14. That was also proven to be completely untrue. Although the parties disagree on the date that the School District received Dr. Ballet's detailed explanation of the diagnosis and surgeries, the School District admits that they received Dr. Ballet's documents no later than March 12, 2016. *Dr. Doloughty's testimony,* TI139:15-140:8. Therefore, on April 26, 2016, when Dr. Doloughty filed these tenure charges, the School District was well aware that there was a diagnosis and had an explanation of the reason for each of the two (2) surgeries.

Furthermore, Dr. Ballet testified in detail regarding the surgeries, which he considered to be urgent, emergent, and unavoidable. *Dr. Ballet's testimony,* TII145:9-146:11. Throughout his testimony, we reviewed his medical records where he had been recommending wrist fusion for almost a year. See *testimony and medical records, Dr. Ballet's testimony,* TII119:19-140:13. Respondent's

Exhibit 11. *(KEOUGH124-144, 183, 205).* The second surgery, which was unexpected, was emergent and according to Dr. Ballet would have resulted in permanent injury if not performed immediately. *Dr. Ballet's testimony,* TII145:19-24. Dr. Ballet's definitions comport with generally understood definitions of the urgency of surgeries. See https://en.wikipedia.org/wiki/Elective_surgery.

In this case, the surgery had been scheduled for August 2015, but because Ms. Keough needed urgent surgery on her jaw (a surgery ordered by the District's Workers' Compensation physician), the wrist surgery needed to be postponed until the jaw was stable due to the potential complications with the anesthesia. *Dr. Ballet's testimony,* TII136:17-138:3. And, as stated above, the second surgery was emergent. *Dr. Ballet's testimony,* TII145:19-24.

Furthermore, the Board does not believe that Ms. Keough intended to return immediately after her surgery, but that contention is belied by the testimony of Sue Kirk, who spoke to Ms. Keough repeatedly on December 22 - less than a week after her two wrist surgeries - and during those conversations Ms. Keough repeatedly insisted that she was planning to return to work on January 4, 2016, as planned. *Ms. Kirk's testimony,* TI161:25-164:21.

Accordingly, the School District cannot prove the allegations of Paragraph 51 in that (1) the surgeries were not elective, they were urgent and emergent; (2) Ms. Keough did not exercise poor judgment; and (3) even if Ms. Keough had used poor judgment in scheduling the surgery while out on Workers'

Compensation leave, it would not rise to the level of conduct unbecoming a public employee.

The School District admitted that its sole basis for accusing Ms. Keough of providing false information to the Board is her text of the word "4th" to Raymond Coxe, allegedly in response to the question "When is your surgery". *Dr. Doloughty's testimony,* TI141:17-144:5. There is no other alleged false information provided.

At the outset, it is important to note that Ms. Keough text-messaged Mr. Coxe on December 30, 2015 because she could not access the School District's e-mail system. Respondent's Exhibit 16 *(CITPK327)*. During this text message conversation, Ms. Keough advised Mr. Coxe that:

> I have not been able to get in since I've been out.
>
> I just saw my hand doctor yesterday n he wants me out for 2-3 months cos I'm having it fused together. So effective the 4 of January I'm out so I needed to send a letter requesting a leave of absence w/o pay effective January 4th.

This message truthfully advised the School District that her hand doctor wants her out for 2-3 months effective "the 4 of January". The text also contains a request for the reasonable accommodation of a leave of absence without pay "effective January 4th." The entire remainder of this very brief conversation was as follows:

> I have the Drs note 12:42 PM

When is your surgery? 12:44 PM

4th 12:45 PM

The School District's entire claim of fraudulent misrepresentation against Ms. Keough is based upon her typing of "4th" which appears in this text message to be in response to the question, "When is your surgery?" Ms. Keough testified, and medical records confirm, that she was under the influence of narcotics at the time this text was written. *Ms. Keough's testimony,* TIII46:2-17. She clearly does not remember why she responded "4th" and opined that she was answering the previous question. *Ms. Keough's testimony,* TIII47:7-20. She testified that she was still on the previous question, correcting where she made a typo "4 of January" to make clear she meant to say "4th of January", so she corrected it by writing "4th". *Id.* It was never meant to answer Mr. Coxe's question about the date of surgery.

Clearly, the purpose of the text message was to advise that Ms. Keough's physician had put her out of work and she needed a leave of absence for 2-3 months. Logically, there would be reason for Ms. Keough to lie about the dates of her surgeries. It would not matter whether the surgery was December 16th and 18th or on January 4th because she needed a 2-3 month leave of absence beginning January 4, 2016. Ms. Keough had her mother deliver the Doctor's note along with a written request for a leave of absence on January 4, 2016, the first day back from winter break. *Ms. Keough's testimony,* TIII50:6-51:8. The School District received it on January 4, 2016. *Mr. Coxe's testimony,* TII71:5-7.

We know that because the Business Administrator testified that it is the School District's policy to stamp incoming mail and deliveries so that they know when mail is received. *Mr. Coxe's testimony*, TII73:25-74:23.

The only other allegation of misrepresentation was made by Superintendent Doloughty at the arbitration. Dr. Doloughty alleges that Ms. Keough made a misrepresentation by stating that the physician-imposed leave of absence was beyond Ms. Keough's control. *Dr. Doloughty's testimony*, TI142:9-17. That allegation was fully debunked by Dr. Ballet's testimony. *Dr. Ballet's testimony,* TII149:21-151:2. Under cross-examination, Mr. Coxe was unable to name a single misrepresentation other than when he asked the date of surgery, Ms. Keough responded "4th". *Mr. Coxe's testimony,* TII66:18-67:10.

Ultimately, as will be discussed in the subsection below, Ms. Keough and her physician repeatedly provided additional information regarding the dates, but it does not change the fact that Ms. Keough was not lying or misrepresenting anything when she contacted Mr. Coxe to tell him that she could not return on January 4, 2016, and that her physician had put her out for 2-3 months. The School District has not produced any competent evidence that Ms. Keough made any knowing or intentional misrepresentations, and certainly has not demonstrated any deliberate conduct unbecoming a public employee due to typing "4th" in a text message.

The most unfair and patently untrue allegations against Ms. Keough are

the Board's continued complaints that Ms. Keough never contacted the School and refused to provide information. At the arbitration it was clearly established that Ms. Keough did everything possible to keep the Board up to date on her condition. It was equally clear that the Board interfered and affirmatively prevented Ms. Keough from communicating on numerous occasions.

There is absolutely no history during her entire employment of Ms. Keough failing to provide communications to the School Board regarding her absences. *Dr. Doloughty's testimony,* TI88:4-8. It is uncontested that there was nothing in Ms. Keough's prior years of employment that would have caused Ms. Keough to have been disciplined or terminated from her position. In fact, Mr. Coxe testified that they were "fully prepared to welcome her back" on January 4, 2016. TII25:11-16.

Ms. Keough testified and presented documented evidence that she constantly and consistently kept communication with the School regarding her absence. She started on December 30 by immediately, as soon as she knew, notifying Raymond Coxe via text message that she would not be returning on January 4, 2016 due to wrist surgery, and that she would require a leave of absence. Respondent's Exhibit 16. She followed that text conversation with a letter which requested the leave of absence and enclosed a note from Dr. Ballet placing her out of work for 2-3 months. Respondent's Exhibit 1. The School Board admits that they received the December 30th letter, which was hand-delivered on January 4, 2016 by Ms. Keough's mother. *Mr. Coxe's testimony,*

TII71:5-7. It was stamped received, as is the School's policy to stamp incoming documents. *Mr. Coxe's testimony,* TII73:25-74:23.

The School alleges that it sent Ms. Keough a letter and package on January 4, 2016, but Ms. Keough insists that she never received the letter or package. *Ms. Keough's testimony,* TIII51:9-15. There is ample evidence to conclude that the letter was never sent. Ms. Keough, who received all the other letters, did not receive it. The school keeps no mail log, so they cannot prove it was ever mailed. If it was sent certified as they claim, they should have some certified mail receipt. None have been produced. There is no returned mail unclaimed.

In addition, the School keeps producing different versions of this package. The package identified as an exhibit in the School's initial identification of exhibits was different than the version introduced at arbitration. The School attempted to insert a blank certification that was not part of the original package. The arbitrator correctly barred the attempt to "revise" the package that the School claimed it sent.

Even though she did not receive any January 4 letter, Ms. Keough followed up her own letter and note with a telephone call on January 5, 2016, to make sure that the School received it. That is proven by Ms. Keough's telephone records. Respondent's Exhibit 9. Ms. Keough testified that she called for the express purpose of making sure that the note was sufficient and that Ms.

Meredith told Ms. Keough that the School had all the documentation it needed. *Ms. Keough's testimony,* TIII54:1-10.

Ms. Keough then had four (4) pages of disability papers delivered to the school by her mother on January 7, 2016. *Ms. Keough's testimony,* TIII56:23-57:16. The third page of that package contained a medical certification from Dr. Ballet, explaining that Ms. Keough had wrist surgery on December 16 and 18, 2015, and provided dates that Ms. Keough was expected to need for recovery. Respondent's Exhibit 2. Ms. Keough followed that up with five (5) phone calls on January 7 and 8, 2016. Respondent's Exhibit 9. The School admits that no one ever returned any of Ms. Keough's five (5) telephone calls.

The School claims that they only received one (1) of the four (4) pages, but the School's claim is full of holes. First, there is no "received" stamp on the page it claims it received, even though it is the School policy to stamp incoming documents. *Mr. Coxe's testimony,* TII73:25-74:23. A logical conclusion is that the school stamped the top page of the four pages and then lost or discarded the other three pages. This theory is supported by the text message that Raymond Coxe sent Ms. Keough on January 7 regarding the disability paperwork. While referring to the disability paperwork, Mr. Coxe referred to the paperwork in the plural by stating:

> You will be contacted when they are ready if we are able to complete them.

Mr. Coxe admitted on cross-examination that he does not generally refer to one

piece of paper as "they" or "them". *Mr. Coxe's testimony,* TII81:9-82:3.

The School claims it then sent a letter to Ms. Keough on January 13, 2016 denying Ms. Keough's request for leave and demanding that Ms. Keough must return to work by January 22, 2016 or face disciplinary action. Ms. Keough testified that she did not receive the letter until "four (4) or five (5) days later". *Ms. Keough's testimony,* TIII65:14-18. It was corroborated at arbitration that the School marked the letter as having been mailed on January 19, 2016. *Dr. Doloughty's testimony,* TI123:2-12. Ms. Keough spent the next day trying to obtain legal advice because she believed that the School was violating the law by refusing to grant her leave. *Ms. Keough's testimony,* TIII67:6-9.

Dr. Doloughty certified in her statement, which she signed subject to punishment for false statements, that Ms. Keough never responded to the January 13, 2016 letter. *See Statement of Evidence ¶35, Joint-1.* At arbitration, that statement was proven untruthful. Ms. Keough's phone records confirm a telephone call from Ms. Keough on January 21 responding to the letter. Respondent's Exhibit 9. Furthermore, Dr. Doloughty admitted that Ms. Keough spoke to her about the leave on January 21. *Dr. Doloughty's testimony, TI122:15-123:1.* Dr. Doloughty's statement in ¶35 that Ms. Keough never responded to the letter was knowingly false. Dr. Doloughty was well-aware that Ms. Keough responded to the letter because she spoke to her on January 21 about it.

Ms. Keough testified that Dr. Doloughty insisted that Ms. Keough must return on January 22nd. When Ms. Keough told that her physician has her out on disability, Dr. Doloughty responded that "I don't know what to tell you." *Ms. Keough's testimony,* TIII68:23-69:9.

Ms. Keough received another threatening letter which was mailed by the School around February 5. Petitioner's Exhibit 5. She promptly responded by scheduling an appointment with Dr. Ballet. In another attempt to keep the School District fully informed regarding her condition, on February 11, 2016, Ms. Keough saw Dr. Ballet, and promptly mailed the School an updated status report and Dr. Ballet's dictation from the visit. Respondent's Exhibit 4. *Ms. Keough's testimony,* TIII73:1-8. The School admits it received the report but claims it did not receive the report until March. *Dr. Doloughty's testimony,* TI129:21-22. Regardless, the School clearly had all of these documents prior to bringing the tenure action in late April. The School's repeated allegations that Ms. Keough never provided them with any information at all are demonstrably false.

Ms. Keough continued to keep the School updated and provided more physician's notes in March. Respondent's Exhibits 5 & 6. In direct contradiction to the School's certified statement that Ms. Keough never responded to its requests for medical information, Raymond Coxe testified that Ms. Keough "inundated" the School with a "plethora of documents". *Mr. Coxe's testimony,* TII48:23-5, 99:4-100:8. Mr. Coxe and Dr. Doloughty had absolutely no excuse as to why nobody ever returned any of Ms. Keough's phone calls. *Mr. Coxe's testimony,* TII102:12-

103:3. Nobody ever spoke to Ms. Keough to try to clarify any confusion despite her repeated calls.

The School should not have been confused. They admittedly had all of Dr. Ballet's records long before any Tenure action was taken. This tribunal should not accept the Petitioner's outlandish claim that Ms. Keough's typing of the word "4th" in a text message (which was followed up the next day with medical documentation) so confused them that all of the other medical documentation was a mystery. The letters to Ms. Keough do not indicate confusion - they reflect an employer determined to rid themselves an employee who had too many disabilities for their liking.

The burden here is upon the employer to prove their allegations that Ms. Keough never responded to their requests. They cannot come close to meeting that burden. Ms. Keough did everything possible to respond to the School's numerous requests and always did so promptly. The arbitrator should reject these meritless allegations

The final allegation of conduct unbecoming alleges that Ms. Keough refused to pay her Chapter 78 contributions. The allegation is every bit as false as the previous allegations. Ms. Keough produced at arbitration the bills that she received and her canceled checks evidencing payment in full for the Chapter 78 contributions. Respondent's Exhibit 20. The Petitioners were forced to admit that there were never any Chapter 78 contributions that were unpaid. *Ms. Walsh's*

testimony, TIII27:10-12. The allegations are meritless and the charge accusing Ms. Keough of not paying her Chapter 78 contributions is false.

In summary, none of the allegations of conduct unbecoming a public employee are true, and none of them indicate any conduct by Ms. Keough that was unbecoming a public employee. The arbitrator should reject the meritless allegations of the Petitioner.

The Petitioner additionally does not state an actionable claim for removal due to incapacity. The Petitioner merely concludes that "Ms. Keough's abandonment of her position, her excessive absenteeism, her unprofessional conduct, her failure to cooperate, and her decision to willfully provide false information leads to only on conclusion: Ms. Keough no longer has the capacity to perform the essential functions of her job." *Tenure charges at ¶62.* The Petitioner's logic is fatally flawed because it begins with a series of untrue premises, assumes facts that are false, employs definitions that are erroneous, and reaches a conclusion that has absolutely nothing to do with its major premise.

First of all, as set forth in the previous sections, Ms. Keough did not abandon her job. She did not act unprofessionally, she cooperated at all times, and did not provide any false information. Most importantly for this section is that even if she had done all of the things she is alleged to have done, it still would not result in a finding of incapacity. The Petitioner confuses conduct unbecoming

with incapacity.

Incapacity does not refer to the misconduct of an employee. Incapacity refers to the physical ability of the employee to perform labor. The term "incapacity" is not defined by the tenure statute but the Courts that have defined the term have always equated incapacity with the inability to perform the job due to physical or mental limitations. "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 Carson Steltz, Agency Dkt. No. 260-9/14 at 25 (internal citations and quotations omitted). For example, the inability to work due to severe depression warranted tenured clerk's dismissal for incapacity. Matter of Tenure Hearing of Stanley, 95 N.J.A.R.2d (EDU) 495.

In the absence of a statutory or regulatory definition of "incapacity", the arbitrator should be guided by the plain meaning of the word. Webster's Dictionary defines "incapacity" as "the quality or state of being incapable; especially lack of physical or intellectual power or of natural or legal qualifications". See *https://www.merriam-webster.com/dictionary/incapacity.*

If Ms. Keough was unable to return to work or perform her duties because her injuries prevented her from working, then a charge of incapacity might be applicable. That is not the case here. Within days of being charged with incapacity, Dr. Ballet released Ms. Keough to return to work full-duty. Respondent's Exhibit 18. The return to work note was promptly served upon the

District's attorney. Id. Nevertheless, the School District refused to reinstate Ms. Keough despite the fact that Ms. Keough was not incapacitated in any way.

The only other charge of incapacity is equally faulty. The Petitioner alleges that, "[e]ven though being on Workers' Compensation leave may be a good reason to justify a number of absences, such status is irrelevant to the determination of incapacity." *Tenure charge at ¶63.* We agree that this is a correct recitation of the law, but it is confusing as to why the Petitioner would make such statement. Ms. Keough was cleared to return to work on January 4, 2016. Petitioner's Exhibit 7. There should be no issue or controversy regarding Ms. Keough being incapacitated due to her Workers' Compensation injury.

Apparently, the Petitioner is arguing that due to the number of days that Ms. Keough missed due to the Workers' Compensation injury, the arbitrator should declare her incapacitated and permit the School District to fire her. Such an argument is discriminatory and retaliatory on its face, and should be rejected in any event as patently false. It was admitted by Petitioner that missing time due to a Worker's Compensation injury is not a reason to be fired. *Dr. Doloughty's testimony,* TI89:16-18. Ms. Keough is not incapacitated and the arbitrator should reject the baseless claims of the School District.

Excessive Absenteeism has been well-defined by previous Arbitration decisions, and the language has been consistently followed. In order to terminate a tenured employee for chronic or excessive absenteeism, the Board must

demonstrate that there was consideration of:

A. the particular circumstances of the absences and not merely the number of the absences;

B. the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and

C. that there be some warning given to the employee that his or [her] supervisors were dissatisfied with the pattern of absences.

In the Matter of the Tenure Hearing of Carson Steltz, *supra*, at 21, citing In the Matter of the Tenure Hearing of Velez, OAL Dkt. No. EDU 3255-05 (2006), aff'd C.D. (April 27, 2006) and In re White, 92 NJAR 2d (EDU) 157, 161.

The Board fails to demonstrate any of these three factors. First, it was admitted that Ms. Keough's absenteeism in the prior years was not a factor in the decision to terminate. *Dr. Doloughty's testimony,* T189:3-7, 90:14-17. She had never even been warned that there was a problem with her attendance. *Dr. Doloughty's testimony,* T189:25-90:4. In fact, if Ms. Keough had been able to return on January 4, 2016, she would have been welcome to return without any warnings or consequences at all. *Dr. Doloughty's testimony,* T190:14-17.

The allegations that Ms. Keough's absences were unexplained are patently false. The Petitioner fully knew at all times that Ms. Keough's absences in 2015-2016 were due to a Workers' Compensation jaw injury that was suffered the previous year, followed by wrist surgery. The analysis requires the arbitrator to take into consideration the reasons for the absences. Ms. Keough's absences were caused by a series of bad luck events that are not likely to occur - a car

accident which aggravated an old wrist injury and a Workers' Compensation injury - and there is no basis to believe that these events would be an indicator of poor attendance in the future.

The Petitioner falsely accuses Ms. Keough of creating "bookend" weekends during the 2015-2016 school year by taking off Fridays and the following Mondays. Ms. Keough's attendance records show nothing of the sort. The school year begins July 1, 2015 and ends June 30, 2016. As Ms. Keough testified, she was out Friday, August 21 and Monday, August 24, but that was for a pre-approved vacation. *Ms. Keough's testimony,* TIII95:3-10. The next Friday-Monday was September 18 and September 21. But Ms. Keough was not absent that Friday. The School's physician required her to be examined that Friday so she was only able to work a ½ day. She was sick on Monday. *Ms. Keough's testimony,* TIII95:21-96:6. There were no other Friday-Mondays. Her last physical day of work before her Workers' Compensation leave was Thursday, September 24. Although her records reflect that Friday September 25 and Monday September 28 were personal days, they were called personal days because Ms. Keough was paid by the school rather than the Workers' Compensation carrier, but this was part of her leave of absence, not a bookended weekend. *Ms. Keough's testimony,* TIII96:9-21.

The Petitioner complains that Ms. Keough's absence caused the School District a hardship, but the arbitrator should take those claims with a grain of salt. The School District never hired a temporary employee. *Mr. Coxe's testimony,*

TII65:14-15. Not a single employee incurred a minute of overtime. *Mr. Coxe's testimony,* TII65:4-5. Despite the fact that Ms. Keough has been out for 15 months as the result of her unpaid suspension, she has not been replaced by anyone either temporarily or permanently. *Mr. Coxe's testimony,* TII64:12-16. The only testimony this tribunal heard regarding the School District's claim of "a detrimental effect on the Board's operations" was that the Assistant Business Administrator, Ms. Walsh, is now working through most of her lunch periods instead of working through some of her lunch periods. *Ms. Walsh's testimony,* TIII19:-20:2.

Given the complete lack of hardship, it is far more likely that the real reason that the School District is so anxious to get rid of Ms. Keough is because it realized while she was out that they could complete all of their work with one less person, and this way they could save payroll.

The final step in the analysis is whether she had ever been warned before about her attendance. It was established that Ms. Keough had never before been warned or counseled regarding her attendance. *Dr. Doloughty's testimony,* TI89:25-90:4. She would have been welcomed back with open arms. *Mr. Coxe's testimony,* TII57:8-14. The Petitioner has not come close to establishing good cause for terminating Ms. Keough for excessive absenteeism. Accordingly, the Arbitrator should reject the charges in their entirety.

In conclusion, the Petitioner has not met its burden of establishing any

basis for terminating the Respondent. Accordingly, Ms. Keough should be reinstated with full back pay to May 4, 2016, the date that she was cleared to return to full duty.

VI. STATEMENT OF THE CASE

It is well settled that the tenure laws of our State were originally enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons. See generally Viemeister v. Prospect Park Board of Education, 5 N.J. Super, 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should accordingly not be lightly removed. See In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 2, 2009).

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause..." And as the moving party in this disciplinary matter, the District accepts the prefatory burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the unbecoming conduct and/or incapacity tenure charges by a *preponderance* of the credible evidence. See Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div.

1974 *cert. denied* 65 N.J. 292 (1974)); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); see also State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as "[g]reater weight of the credible evidence"); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954); In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super 478 (App. Div. 1989); In re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ. 1996). As to *just cause*, see e.g. Maietta v. United Parcel Service, 749 F. Supp. 1344 D.N.J. (1990); City of Portland, 77LA 820 (Axon, 1981); Lozier Corp. 121 LA 1187 (Fitzsimmons, 2005).

In that event, the burden of production will shift to Respondent to proffer and establish her affirmative or exculpatory defenses. Finally, the burden returns to the District to rebut the same with substantial, credible evidence. Additionally, once a determination has been made of whether the tenure charges have been established, Petitioner thereafter is encumbered with the additional burden of demonstrating that the dismissal of Ms. Keough for the charged conduct is warranted and proportional. In deciding whether to remove Respondent from her tenured Administrative Assistant position with the City of Burlington School District, I am required to consider the totality of the circumstances; the nature of the act(s) and the impact on her career. See In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

As I have previously taken notice in other tenure cases, in Karins v. Atlantic

City, 152 N.J. 532 (1998), the Supreme Court of New Jersey determined the phrase *unbecoming conduct* "is an elastic one that has been defined as 'any conduct which adversely affects the morale or efficiency of the bureau... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" citing In re Emmons, 63 N.J. Super. 136, 164 A.2d 184 (App. Div. 1990) (quoting In re Zeber, 398 Pa. 35, 156 A. 2d. 821, 825 (1959); see also Laba v. Board of Education, 23 N.J. 364, 129 A.2d 271 (1957); In re Young, 202 N.J. 50, 66 (2010); Hartman v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

Upon a comprehensive analysis of the evidentiary record coupled with careful consideration of the respective positions and supporting case citation, I find that the instant tenure charges are **SUSTAINED IN PART**, as Petitioner's *prima facie* showing of conduct unbecoming has not been rebutted by the Respondent. The remaining charges however have not been established and are dismissed with prejudice. The material facts of the case are both disputed and undisputed, and on balance the former must be resolved in favor of the District's witnesses, whose testimony was far more credible than that of Ms. Keough. They are found to be as follow:

1. Penny Keough has been employed by the City of Burlington School District Board of Education as an Administrative Assistant/Payroll Secretary since October 1, 2011. She earned tenure in the position as of December 2, 2014. TI19:7; 20:20.

2. District Attendance records reflect that between January 2012 and June 2012, Ms. Keough was absent seven (7) times. During the 2012 - 2013 School Year, Ms. Keough was absent twenty-eight (28) days.

During the 2013 – 2014 School Year, there were a total of thirty (30) absences. During the 2014 – 2015 School Year, Ms. Keough accumulated a total of forty-three and one-half (43.5) absences. Finally, from July 2015 until April 2016, she was out a total of one hundred twenty-eight (128) days. See Petitioner's Exhibits 1-5; TI21:22-25; 23:16-22; 24:11-16; 24:18-25; 24:24-25:2. All told, these amounted to two hundred and sixty-seven (267) days in less than five (5) years of employment.

3. Throughout the course of her employment with the District, Ms. Keough has not been counselled regarding not bringing in a doctor's note when out for more than a three (3) day period, or for attendance deficiencies. TIII35:13-25; 36:1-24; 37:1; TI89:25-90:4. The only element that appears in Ms. Keough's personnel file is a counselling by a prior supervisor due to her failure to transfer funds that were necessary to meet payroll. TIII150:6-151:9.

4. On March 1, 2013, Ms. Keough suffered an on-the-job injury when she hit her face on a door while walking out of the Board offices. She was later seen at the Concentra Urgent Care Center. See CITY OF BURLINGTON BOARD OF EDUCATION WORKERS' COMPENSATION EMPLOYEE REPORT, Petitioner's Exhibit 6.

5. The injury ultimately required Ms. Keough to undergo jaw surgery, resulting in a Workers' Compensation leave, effective October 1, 2015. Based upon a September 30, 2015 meeting she had with District personnel, the expectation was that she would be out between four (4) to six (6) weeks. TIII9:21-22; 10:1-5; TI25:9-25.

6. During the period of time that she was on the Workers' Compensation leave, Ms. Keough was required to make certain payments. Included among them was her portion of the Chapter 78 contributions, which would have covered the period of time from October through December 2015 and for which she was billed monthly. TIII14:1-22; 15:1-9; TIII25:23-25. This obligation was satisfied, with Ms. Keough sending one check on January 11, 2016 in the amount of $308.14, with the balance deducted from a retro check following the conclusion of negotiations over the 2014 – 2015 C.B.A. TIII15:1-25; 16:1-17; TIII26:1-4; See also Respondent's Exhibit 20.

7. On December 22, 2015, Ms. Keough called the phone line of Administrative Assistant Susan Meredith, who was on vacation. The call was picked-up by Bookkeeper Sue Kirk (formerly Croce). During the conversation, Ms. Keough indicated that she would be returning to work on January 4, 2016, which was the first day back after Winter

break. Because Ms. Kirk handled Workers' Compensation, she knew that Ms. Keough couldn't return without formal approval or a doctor's note and there were procedures that had to be done. She therefore told Ms. Keough that a doctor's note was necessary and also contacted the District's Workers' Compensation company. TI162:1-21; TI27:13-25; TII20:21-25; 21:1-20; TIII10:11-25.

8. In a subsequent conversation with Ms. Kirk, Ms. Keough stated that she had spoken with her doctor, who assured her there would be no problem and that a note was available, if necessary. At one point Ms. Keough became frustrated because they were not able to get the doctor's note right away and was adamant that she was going to be returning on January 4th. She also expressed her belief that all the employees in that Department were useless. TI162:23-25; 163:1-25; T164:1-9.

9. The procedure that Ms. Kirk had to follow involved sending an e-mail to the Workers' Compensation company, confirming that Ms. Keough had contacted the District and was looking to come back to work. They in turn reached out to the doctor so that a note could be provided by the end of the business day, if possible. The handwritten note from the doctor clearing Ms. Keough came in at 4:21 p.m. on December 22, 2015. As this was after business hours, it was received by the District on December 23rd. TI164:10-25; 165:1-15. The note from Dr. David Sheen stated: "Mrs. Keough is medically cleared to return to work on Jan. 4, 2016. Mrs. Keough had surgery on Oct. 1, 2015 and has had several follow-up visits to demonstrate that she has the mental and physical capacity to return to work on January 4, 2016." [*Emphasis in original*]. See Petitioner's Exhibit 7.

10. On December 30, 2015, Raymond Coxe, School Business Administrator and supervisor of Ms. Keough, received a text message from her. After briefly inquiring as to why she could not get into the District's e-mail system, Ms. Keough texted "I just saw my hand doctor yesterday n [*sic*] he wants me out for 2-3 months cos [*sic*] I'm having it fused together. So effective the 4th of January I'm out so I needed to send a letter requesting a leave of absence w/o pay effective January 4th. I have a Drs. [*sic*] note." Mr. Coxe texted back asking "[w]hen is your surgery?" Ms. Keough replied "4th." TII24:1-25; TIII44:15-23; 49:1-18. See Respondent's Exhibit 16.

11. That same date, Ms. Keough wrote a letter to Mr. Coxe. This provided in full:

Dear Ray,

Per our conversation today about my request for medical leave of absence effective January 4th 2016.

Please find this letter as my formal request for my medical leave without pay effective January 4th of 2016.

My doctor will be keeping me out of work for approximately 2-3 months.

Sorry for the short notice but this was beyond my control.

Thank you for your time and consideration.

Sincerely

Penny Keough.

See Respondent's Exhibit 2/Petitioner's Exhibit 8; TII27:13-21; TI34:24-25; 35:1-10.

12. The letter, which had been hand carried by Ms. Keough's mother, included a note from Frederick L. Ballet, M.D. See Petitioner's Exhibit 8/Respondent's Exhibit 1. Dr. Ballet's note provided that Ms. Keough was seen in his office on December 29, 2015, with the box "Patient may not return to work until further evaluation" checked. It further indicated "out of work starting January 4th 2016 for about 2-3 months. Next apt 1/12/2016." Id. TI35:11-18.

13. Ms. Keough's December 30, 2015 text message to Mr. Coxe that "I just saw my hand doctor yesterday n he wants me out for 2-3 months cos I'm having it fused together," coupled with the response "4th" when the BA asked when the surgery was, created the reasonable impression in District officials that her need for surgery had recently developed. This was buttressed by the statement in her January 4, 2016 leave request letter that she was "sorry for the short notice but this was beyond my control." See Respondent's Exhibit 2/Petitioner's Exhibit 8.

14. Because she was unsure what Dr. Ballet's note was in reference to and the nature of the leave, on January 4, 2016, Superintendent of Schools Dr. Patricia T. Doloughty sent a correspondence to Ms. Keough, which indicated in whole:

Dear Ms. Keough:

I am in receipt of your leave request letter, dated December 30, 2015 and received January 4, 2016. In your letter, you requested a leave of absence without pay due to medical reasons. Specifically, you requested a leave of absence without pay beginning January 4, 2016 for approximately two to three months. The purpose of this letter is to respond to your leave request and clarify the designation of your leave by the City of Burlington Public School District ("the District").

In accordance with attached Policy 443.1 Family Leave, 'the Board may, in its discretion, permit an eligible staff member, who is on an FMLA leave for reasons of the staff member's own serious health condition, to apply his/her accumulated sick days, to the extent available, during the period of otherwise unpaid leave...' During this time, you may utilize your accumulated sick days, to the extent they remain available, in order to receive pay for days which you otherwise would have been required to work. Our records indicate that you have 10 ½ sick days available to you. Your period of disability will run from January 4, 2015 through and including March 25, 2016. During this time, you will be permitted to utilize 10 of your available sick days in order to be paid for the work within that timeframe. These ten days will be withheld by the district as payment for the two weeks that were to be reimbursed because you were being paid by [W]orkers' Compensation.

The FMLA provide[s] qualified employees with up to twelve (12) work weeks of leave for certain specified reasons, which is unpaid but with the continuation of health benefits. A work week is any week in which you would otherwise have been required to work at least one (1) day.

Please be advised that your request for leave will be submitted to the City of Burlington Board of Education ("the Board"), **pending receipt** of the attached Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) according to the following schedule. If we do not receive the Certification of Health Care Provider for the Employee's Serious Health Condition, your leave will be

denied.

- Your leave will commence on January 4, 2016. Leave with pay will begin January 4, 2016 and continue during that period through January 15, 2016, which will be with pay, utilizing 10 of your available sick days, and with the continuation of medical benefits. This leave will be designated as FMLA leave based on your own disability, and you will utilize two (2) work weeks of your allotted twelve (12) work weeks of FMLA leave.

- You will be granted a leave for medical purposes from January 18, 2016 through March 25, 2016 pending the Certification of Health Care Provider for Employee's Serious Health Condition, which will be without pay but with the continuation of medical benefits. This period of leave will run under FMLA from January 18, 2016 through March 25, 2016, until the expiration of the twelfth (12th) work week of FMLA (the week of March 12, 2016).

- You have indicated your intention to inform the Board at a later date of your expected return date. Be aware that, based on the above designation and your statutory entitlement, if you were to utilize your entire statutory entitlement under FMLA, the latest possible date of your return to work would be March 29, 2016. Please advise the Board within a reasonable period of time concerning the expected date of your return. Unless you advise the Board with advanced notice within a reasonable time of your intention to return to work at an earlier date, you will be expected to return to your position at that time.

During your period of leave, you remain responsible to continually meet all obligations concerning your contributions toward health insurance premiums. Please contact the business office to make the necessary financial arrangements to ensure continued health coverage. If you are eligible for COBRA during your leave, you will receive the necessary paperwork from the business office.

> If you have any questions concerning the designation of your leave period, you may contact my office.
>
> Very truly yours,
>
> Patricia T. Doloughty, Ed.D.,
> Superintendent of Schools

Petitioner's Exhibit 9; TI36:1-15; 38:23-25; 39:1-25. [*Emphasis in original*].

15. On January 7, 2016, Ms. Keough's mother dropped off a one (1) page state disability application for Mr. Coxe to complete. This contained a Post-It note which read "[p]lease complete and notify as soon as possible when this can be picked up. She worked in private industry. Sandra 609 xxx-xxxx." It was only during the appeal process after the initial unemployment hearing in May or June of 2016 that Mr. Coxe saw the other three (3) pages of the packet which contained medical information. See Petitioner's Exhibit 10; TII31:11-21; 32:1-22; 33:1-18; TIII170:9-21.

16. Following submission of the January 4th and January 7th paperwork, Ms. Keough made a number of phone calls to the District. Per Respondent's Exhibit 9, two (2) calls were made on January 5, 2016 to Ingrid Walsh and Sue Meredith, respectively, to confirm receipt of the letter dropped off by Ms. Keough's Mom the prior day. The exhibit also indicates a total of four (4) calls were placed on January 7, 2016 to Ms. Meredith and Mr. Coxe to ensure that the disability paperwork was filled out. The January 8th call to Sue Meredith was also undertaken for the same purpose. Id. TIII54:1-7; 58:16-60:2' 64:3-9. A January 21, 2016 call that was ultimately routed to Dr. Doloughty and a January 22, 2016 call to Sue Meredith also appear. Id. TIII66:1-7; 71:9-19. No further calls were made to the District. TII133:1-23.

17. The phone calls to Sue Meredith and Mr. Coxe on January 7th were not returned. Mr. Coxe did initiate a text conversation with Ms. Keough that same date as follows:

> I am out today for some medical tests and was tied up with things yesterday. I looked at that form, but we can't fill it out. We do not pay into state disability. 12:45 PM
>
> I worked private company that I did pay into. I need this form filled out by my current employer. There was a note explaining this when dropped off. 12:49 PM

I didn't see a note... I'll look into it. 12:53 PM

How long will it take? I never held up anyone's disability paperwork. 12:54 PM

We've never filled out anyone's disability paperwork as we do not pay into it. 1:39 PM

I did family bonding with child so I did. 1:40 PM

You will be contacted when they are ready if we are able to complete them. 1:41 PM

Well I would appreciate it if my paperwork is not held up. I have never held up anyone's disability paperwork and I would hope that I am given the same consideration. There is nothing on that form that specifically states if you don't pay into it you are not to complete. You told me that the paperwork would be ready yesterday. I need to get it back asap so that the states [*sic*] gets it because it is already a long processing time with them. 1:53 PM

Respondent's Exhibit 17.

18. The January 4th letter from the Superintendent was sent to Ms. Keough via Certified and Regular Mail. While the former was unclaimed, the latter was not returned to the District. When Ms. Keough did not respond to Dr. Doloughty, on January 13, 2016, another letter was sent. See Petitioner's Exhibit 10. This provided:

Dear Ms. Keough:

On January 4, 2016, I received your request for unpaid medical leave, which you indicated would begin effective January 4, 2016. As you know, you were cleared by your physician to return to work on January 4, 2016, and stated that you would return to work on that date, but failed to do so.

Your request for unpaid medical leave has been reviewed under relevant law and Board policies. First, you do not qualify as an eligible employee for leave under the Family Medical Leave Act (FMLA) or Policy 4431.1 (Family Leave) because you have not worked the required 1,250 hours during the previous twelve-month

period. Rather, our records indicate that you accrued only 1,136 hours during the relevant calendar year. If you have any information which you contend supports your eligibility for FMLA, please immediately forward same to my attention for review and consideration.

Policy 3431 (Uncompensated Leave) provides that the Board of Education may consider an employee's request for uncompensated leave under certain circumstances and for a particular purpose, other than disability. However, it is unclear from your letter whether you are requesting leave pursuant to this Policy or whether you are requesting an accommodation because of a disability, for some other purpose, or pursuant to some other policy or Agreement. Please be advised that to constitute a valid request pursuant to Policy 3431, you must specify an emergent inability to work or a reason supported or validated by a physician's statement that such leave is required. Additionally, per the policy, the request must provide dates for start or termination of the unpaid leave. If you require a disability accommodation, please contact me immediately and provide for any supporting documentation for evaluation.

At this time, the Board has not authorized you to take uncompensated leave. Accordingly, you must report to work no later than January 22, 2016. In the absence of information or documentation that you are not able to return to work, or that you require an accommodation, should you fail to return to work by the above-specified date, you may be subject to appropriate discipline.

19. The District's January 13, 2016 letter was not received by Ms. Keough until four (4) or five (5) days later, with the Superintendent confirming during her testimony that the document bore the postmark of "January 19th." TIII65:14-18; TI123:2-12.

20. On January 21, 2016 Ms. Keough phoned the District with the call eventually routed to Superintendent Doloughty. During the ensuing conversation that was short, Ms. Keough was told the District still needed the physician certification for the leave. The response was "I will try to get you what you need." At that time, Ms. Keough failed to disclose either the December surgeries or explain why she was not reporting to work. TI57:1-20.

21. On February 4, 2016, Dr. Doloughty sent another letter to Ms. Keough. See Petitioner's Exhibit 15. This stated:

Dear Ms. Keough:

On January 4, 2016, I received your request for unpaid medical leave, which you indicated would begin effective January 4, 2016. As you know, you were cleared by your physician to return to work on January 4, 2016, and stated that you would return to work on that date, but failed to do so. In my letter dated January 13, 2016, I advised you that the Board has not authorized you to take uncompensated leave pursuant to Policy 3431 and that you do not qualify as an eligible employee for leave under Family Medical Leave Act (FMLA) or Policy 4431.1 (Family Leave). As previously stated, if you have information that you contend permits eligibility for FMLA, please forward same to my attention immediately. Because you do not qualify for FMLA and have not been approved for any unpaid leave, you were directed to return to work on or before January 22, 2016.

At this time, you have failed to return to work or provide the necessary documentation to justify your absence. It was requested that you specify the nature of your emergent inability to work or provide a reason validated by a physician's statement that such leave is required. To date, this information has not been provided. The only documents we received came from Penn Medicine's Department of Oral & Maxillofacial Surgery, the same entity that previously cleared you to return to work from Workers' Compensation, in a fax dated January 21, 2016. However, we did not receive these documents until February 2, 2016. We have no information with which to verify that you are currently receiving Workers' Compensation benefits or are eligible for same. The relevance and meaning of the Penn Medicine documents is, therefore, uncertain, and we ask for clarification from you in that regard.

In the meantime, please know that if you are requesting a reasonable accommodation pursuant to Policy and Regulation 1510 (Rights of Persons with Handicaps or Disabilities/Non-Discrimination) you must do so in writing within ten (10) days of the date you

receive this letter. At this time, we have no information that would lead us to believe you are disabled, but we deem it important to communicate that the Board is willing to engage in the interactive process should a reasonable accommodation be requested.

In the absence of information or documentation that you are not able to return to work, or that you require a reasonable accommodation, you must return to work within ten (10) days of the date you receive this letter. Should you fail to return to work, you may be subject to appropriate discipline.

Very truly yours,

Patricia T. Doloughty, Ed.D.
Superintendent of Schools

22. On March 14, 2016, the District received an envelope from Ms. Keough that was postmarked March 12, 2016. This contained three (3) pages of medical documentation from the Hand Surgery Rehabilitation Center of New Jersey. See Petitioner's Exhibit 17; TII40:2-25; TI169:19-170:1; TIII140:1-7. Included among them was:

- A note from Dr. Ballet indicating that Ms. Keough was seen on February 11, 2016 and explaining that "Patient had surgery on December 16, 2015 and December 18, 2015, which included a right total wrist fusion and carpal tunnel release. A copy of Dr. Ballet's dictation from today's visit is attached;"

- The dictation from the February 11, 2016 visit, reported in part:

  Assessment/Plan

  The patient is seen in follow-up today. She continues with symptoms about her distal radioulnar joint. The prior scars are well-healed. Finger and thumb motion are full. The patient has limited forearm rotation. The patient is having increasing difficulty with ADL and cannot do her complete therapy due to pain at

the distal ulnar joint. The exam today demonstrates persistent pain and swelling over the distal radioulnar joint. Her forearm rotation is limited. Scars well-healed. There is still residual peak reaction phenomena.

The patient is advised of a matched distal ulnar resection arthroplasty. The patient has documented tear of TFCC and review of previous x-ray is suggestive of the distal radioulnar arthropathy as well. I advised the patient that I would like to defer such surgery however until the soft tissue has reach[ed] better equilibrium and there is more consolidation of the bone graft. We are temporizing with therapy modification and I [have] given a prescription for Vicodin. She will follow-up with us in 3 weeks.

She is unable to return to work due to the pain she is experiencing at this time.

1. Osteoarthritis of wrist
   M19.031 Primary osteoarthritis, right wrist
   Narco 5 mg-325 mg tablet – Take 1 tablet(s) every 4-6 hours by oral route. Qty: 29 tablet(s) Refills: 0

- Dr. Ballet's note confirming that Ms. Keough was seen on March 1, 2016, and was having surgery on March 16, 2016. This went on to say: "No work until at least after surgery. She will know about how long on 1st post op apt."

23. The medical records and testimony in evidence from Dr. Ballet establish that Ms. Keough had urgent wrist fusion surgery on December 16, 2015 followed by emergent carpel tunnel surgery on December 18, 2015. See KEOUGH100 and KEOUGH117-118; TII169:19-170:8. The physician does not recall telling Ms. Keough how long she would be out of work. TII125:12-24.

24. Ms. Keough had previously discussed the fact that she was having difficulty with her hands due to carpal tunnel with her co-workers. She advised Sue Kirk and Ingrid Walsh during the Summer of 2015 that

her doctor had suggested hand surgery, but said she wasn't going to do it until Winter break when they were all out on leave. TI168:24-169:9; TIII13:1-7; 47:1-2.

25. On December 8, 2015 Ms. Keough underwent a Pre-Operative Evaluation with Dr. Ballet's Physician's Assistant Jane L. Fowler. According to the Assessment/Plan "[w]e reviewed the procedure, the recovery and expected outcomes..." Respondent's Exhibit 11. KEOUGH183-184.

26. District Attendance Policy 4212 provides that: "[a] support staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of a salary increment, dismissal, and/or certification of tenure charges."

27. On April 8, 2016, District Superintendent Patricia T. Doloughty preferred tenure charges against Ms. Keough on the grounds of: Charge One, Conduct Unbecoming, Charge Two, Incapacity, Charge Three, Other Just Cause, Excessive Absenteeism. TI79:2-80:5. By roll call majority vote of the Board of Education at its April 25, 2016 Meeting, the charges were certified and referred to the Commissioner of Education. See Joint Exhibit 1.

28. Both during the period of time after January 4, 2016, when Respondent was cleared to return from her Workers' Compensation leave and following the institution of Tenure Charges, the District was unable to find any temporary help, because none of the potential candidates were willing to undergo the fingerprinting process and pay the application fee for potentially only a few months of employment. TIII99:14-100. This caused a disruption in the operation of the Business Office and required the Assistant School Business Administrator Ingrid Walsh to perform Ms. Keough's job as well as her own, necessitating working through her lunch on a regular basis.

29. Following the initiation of tenure charges against Ms. Keough, a fact finding conference call was held by the New Jersey Department of Labor And Workforce Development, in connection with Respondent's filing for unemployment which the District had contested. After recounting the circumstances of her application, and in response to a question from Claims Examiner Traphagen, Ms. Keough replied: "*** And I didn't have surgery on January 4th. I don't know what they're

talking about. I told them I wasn't going to be returning on January 4th because I had urgent, you know, emergency surgery December 16th and 18th." See Respondent's Exhibit 12 KEOUGH046.

30. When the initial Appeal Tribunal Hearing on June 30, 2016 had to be adjourned due to incomplete paperwork, the case was assigned to Appeals Examiner Ian Spurlock and heard August 8, 2016. At that time while under cross-examination, Ms. Keough acknowledged that she had told Mr. Coxe her surgery was on the 4th of January, but urged that she was very confused as she was on two (2) types of narcotics — Dilaudid and Vicodin. Id. at KEOUGH074. Both Respondent as well as her mother also testified that the disability paperwork had been dropped off at the District on January 8, 2016. See Respondent's Exhibit 12. KEOUGH075.

At the outset of this discussion, it is abundantly clear to me that the District's alternatively pled incapacity and other just cause charges by virtue of excessive attendance contained in Charges Two and Three have not been established and must be dismissed with prejudice. I share Respondent's posture that Petitioner has improperly conflated numerous allegations in support of its incapacity theory, which has been traditionally interpreted per N.J.S.A. 18A:6-10, as "the inability to perform a position, irrespective of the cause of the inability to work." See e.g. In the Matter of the Tenure Hearing of Carson Steltz, Agency Docket No. 260-9/14.

On that count, the record reveals that Ms. Keough had been previously returned to duty on January 4, 2016 by the comp physician. She was then cleared by Dr. Ballet on April 12, 2016 to come back to the City of Burlington School District Board of Education with no restrictions on May 16, 2016. Respondent then received an earlier date of May 4th. However, the District

refused to take her back because the instant Tenure Charges had been filed. TI146:8-148:5. Concerning abandonment of position, notwithstanding any dilatory tactics by Respondent in providing full medical documentation, she did speak with the Superintendent on January 21, 2016 and by any measure the District had most of the requested medical documentation by March 14, 2016, which was several weeks before the charges were filed.

The District's excessive attendance allegation overlaps Charge Two into Charge Three, but is equally unavailing. One of the central tenets of industrial democracy is that an employee be placed on notice of a perceived deficiency and provided with the opportunity to correct her behavior. See I/M/O/ Tenure Hearing of Steltz, Agency Docket No. 260-9/14, supra. The Board's Attendance Policy, No. 4212 explicitly contemplates such a contingency where it discusses "[t]he counseling of support staff members for whom regular and prompt attendance is a problem."

On the record before me, there is not a scintilla of evidence that Respondent was counselled at any time or in any manner concerning perceived attendance improprieties. See Testimony of Dr. Doloughty, TI89:25-90:4. Moreover, as her counsel effectively established during his cross- examination of the Superintendent — attendance was not a factor in the District's decision to grant Respondent tenure on December 2, 2014; being out for Workers' Compensation was not a reason to fire an employee; and if Ms. Keough had come back on January 4th, she would not have been terminated for her prior

absences. TI89:7-18; 90:14-17.

Rather, the record establishes that due to the increased workload, the District was willing and even anxious to accept Respondent back to work in January 2016 following her clearance by the Workers' Compensation physician. Parenthetically, Mr. Coxe recalled during his testimony on direct examination that the District was "[f]ully prepared to welcome her back into the office. Fully prepared to have a fully staffed Business Office and begin the process of business operations as usual." TII25:11-16.

There also is scant support for the proposition that Respondent purportedly bundled Fridays and Mondays together in an attempt to create "bookend weekends". Instead, many of these days were the result of Workers' Compensation doctor's appointments; pre-approved vacation days; and personal days. See Petitioner's Exhibit 5. TIII95:3-10; 95:21-96:6; 96:9-21.

As such and while recognizing that discipline may be imposed even for legitimate illnesses, from my perspective these do not fall into the generally recognized category of days counted toward incapacity charges. They are also readily distinguishable from a situation where an employee is "banging-in" sick leave with impunity to enjoy an extended weekend. A prior case of mine cited by the District is also very clearly factually inapposite. See I/M/O School District of the City of Jersey City and Adele Stapleton, DOE Docket No. 284-9/12 (District attempted to correct Ms. Stapleton's attendance irregularities over a period of

years through progressive discipline, withholding her increments for 2008 – 2009; 2010 - 2011; and 2011 – 2012); see also State-Operated School District of Jersey City, Hudson County, v. Vincent Pellecchio, OAL Docket No. EDU 5129-90 at *8 ("Pellecchio had been advised during a number of years, as indicated in the record, that his absenteeism did not properly serve the District. Although he was aware of the concern of the District and indicated his willingness to improve his attendance, his record does not reflect the necessary improvement for the continued success of his students. While it may be that his increment was not withheld, he was advised on a continuing basis that his attendance was of concern and needed improvement.").

The District acknowledges the fact that absences on many of the dates were occasioned by the comp case, but nevertheless argues at Paragraph 63 that "[e]ven though being on Workers' Compensation leave may be a good reason to justify a number of her absences, such status is irrelevant to the determination of incapacity." This assertion ignores the fact that Ms. Keough had been cleared by her comp physician almost three months before the subject tenure charges were preferred.

The District additionally questions whether or not Ms. Keough is currently even able to return to her former duties. This argument suggests that there is a conflict between Respondent's return to work clearances by Dr. Ballet, with the April 12 note prescribing sedentary work and the May 4th note returning Ms. Keough to full duty with no restrictions. Concern is also expressed based on Dr.

Ballet's testimony that a total wrist fusion results in permanent loss of motion, and that someone with a heavily keyboard-oriented job could probably return to that job with some modifications to the work station. A reservation was also expressed over the fact that a Functional Capacity Test was not performed.

Dr. Ballet's testimony was clear. When asked "if your job, like Ms. Keough's job was heavily keyboard oriented, can you still do that function after you have a ...: The response was "Probably," with the explanation that "Yeah, you might have to modify the work station a little bit." He then replied affirmatively in response to the question "So people can type after they have that," stating "Oh, yeah." TII129:18-25; 130:1-2. Later in his direct examination, Dr. Ballet reiterated that Ms. Keough was able and available to work full duty. TII171:6-10. That conclusion in fact is reflected on his May 4th note as detailed above. And even assuming without deciding that Ms. Keough required a reasonable accommodation, Dr. Doloughty's letters, as recently as February 4th, all offered to engage in the interactive process in the event Respondent requested the same.

That leaves the unbecoming conduct count in Charge 1, which survives. In partial support of this allegation, the District avers in Paragraph 58 that "Ms. Keough's refusal to pay her Chapter 78 contributions or respond to the Board's attempts to obtain payments constitutes unbecoming conduct." Assistant School Business Administrator Ingrid Walsh testified regarding this topic during her direct examination at the November 16, 2016 hearing. Recalling that Respondent made one payment of roughly $300, Ms. Walsh explained that Ms.

Keough's monthly contribution would have been about $138, and said that Respondent had paid in part with the rest deducted from her retro pay following the settlement of contract negotiations for the 2014 – 2015 school year. TIII15:1-25; 16:1-17.

However, Ms. Walsh continued, once a person is out of either Workers' Comp or a protected disability, meaning Family Leave or New Jersey Family Leave which limits their contribution to their portion, the employee is required to pay the full cost contribution. Therefore after January 4, 2016, Ms. Keough had to pay the full premium. TIII16:18-25; 17:1-14. As established under cross-examination, however, when an employee isn't being paid, as was the case with Ms. Keough, those are no longer Chapter 78 payments. The assistant BA thereafter conceded that Respondent had accordingly not failed to make any Chapter 78 payments, either while she was on the Workers' Compensation leave or at any other time. TIII26:24-25; 27:1-13. Based upon these admissions, I find that the accusation of a failure to make Chapter 78 contributions has no basis in fact and was not established.

With respect to the other conduct unbecoming allegations and preliminarily, I do not read Petitioner's position to be that the sole basis for Ms. Keough being so charged was her text of the word "4th" to Mr. Coxe, allegedly in response to his question "[w]hen is your surgery?" See Respondent's Exhibit 16/Petitioner's Exhibit 23. Moreover, there is ample evidence of purposeful obfuscation on the part of Ms. Keough.

Respondent is likewise perplexed as to why the District was unclear as to Ms. Keough's medical treatment and prognosis *vis-à-vis* her unpaid leave request. However, I credit Paragraph 53 of Charge One which asserts that "[f]urther, Ms. Keough intentionally kept critical information regarding her medical condition a secret from the Board while at the same time requesting leave for medical disability, which constitutes conduct unbecoming a public employee." See Joint Exhibit 1. There is no evidentiary support for the premise that Ms. Keough refused to provide a response to the Board, per Paragraph 54, as previously discussed.

The medical prism through which this case must be viewed is that in the late afternoon of December 22, 2015, the District's Workers' Compensation physician returned Ms. Keough to full duty with no restrictions, effective January 4, 2016. See Petitioner's Exhibit 7. This was the end result of Respondent's repeated calls to Sue Kirk in the Business Office, at one point growing frustrated and referring to the entire department as "useless." TI64:1-2. After responding to these emphatic entreaties from Ms. Keough, District personnel then left for the Christmas holidays secure in the fact that she had recovered from the comp leave and would be back at work January 4th.

That nascent expectation was shattered by Respondent's December 30, 2015 text to Mr. Coxe, which as I have previously determined along with her January 4th letter requesting leave, created the reasonable impression that Ms. Keough's need for surgery had recently developed. Dr. Ballet's December 29,

2015 note at Petitioner's Exhibit 8/Respondent's Exhibit 1 did little to explain Ms. Keough's current medical situation. As detailed within, the Superintendent then sent a number of correspondence to Ms. Keough seeking clarification. Respondent denies receiving the January 4, 2016 letter that also explained FMLA leave entitlement, if applicable, but the record demonstrates that while the Certified Mail was unclaimed, the Regular Mail was not. A follow-up letter was then sent out on January 13, 2016 by Dr. Doloughty, advising that Respondent did not qualify for an FMLA leave because the 1,250 hours were not worked the preceding year but explaining the parameters of the District's Uncompensated Leave Policy 3431. See Petitioner's Exhibit 10.

While I do not believe that Ms. Keough had "elective surgery" in the sense that the District has used it in Paragraph 51 of the Charges, there is ample evidence that she used extremely poor judgment which falls just short of deception. Dr. Ballet's very credible testimony and the accompanying medical records demonstrate that Ms. Keough had been treating with him for a considerable period of time at least since 2014. The initial December 16, 2015 wrist fusion surgery was originally scheduled to be performed in August 2015, but had to be postponed due to anesthesia considerations attendant to the jaw condition. TII136:17-138:3. Petitioner has also properly underlined that Ms. Keough had discussed having the surgery over the Winter break with her colleagues Ingrid Walsh and Sue Kirk during the Summer of 2015. TIII13:1-7; 47:1-2; TI168:24-169:9. These considerations beg the question then of, why was

this apparently a secret?

Dr. Ballet classified Respondent's December 16, 2015 surgery as "urgent" by virtue of the threshold of pain that Ms. Keough was experiencing. The December 18, 2015 carpel tunnel surgery was unexpected and thus "emergent," he testified. TII169:19-170:9; KEOUGH100; KEOUGH117; KEOUGH118. Petitioner has emphasized that on December 8, 2015, Ms. Keough attended a pre-operative appointment for the wrist fusion with Dr. Ballet's Physician Assistant. According to the progress notes at Respondent's Exhibit 11 KEOUGH183, KEOUGH184 "[w]e reviewed the procedure, the recovery and expected outcomes..."

I am aware of the fact as Petitioner highlights, that Dr. Ballet testified that the expected recovery from a wrist fusion is eight (8) to twelve (12) weeks. TII177:25; 178:8, but accept his recollection that he had not specifically discussed this with Ms. Keough. TII125:12-24. Analyzed simply in burden of proof terms, the District has accordingly not established that Ms. Keough was aware of the fact that she would be incapable of returning January 4, 2016 when she spoke to Ms. Kirk on December 22, 2015.

But even accepting for the purposes of this discussion that Ms. Keough was shocked when Dr. Ballet told her on December 29, 2015 that she could not return to work for two (2) to three (3) months, her December 30th text to Mr. Coxe was not truthful, and supports the allegations of Paragraph 52 of the charges

under Karins. Rather, no mention was made of the fact that she had already undergone two (2) surgeries, and was in considerable pain taking potent narcotics. Respondent would have me perceive the texting of the date "4th" in isolation, as a byproduct of the tortured argument that this was somehow due to the "auto correct" function of her phone. Her fallback positions were that she was "loopy" because of taking the narcotics and may not have had her glasses on. TIII46:2-19; 47:7-15.

Petitioner has correctly pointed out that Ms. Keough has given different answers each time she has been asked questions about her December 30th text to Mr. Coxe. When the unemployment Claims Examiner expressed the District's understanding that she had surgery on the 4th of January during the initial phone hearing, she replied "I don't know what they're talking about." During the August 8, 2016 Appeal Hearing and under oath, Respondent acknowledged that she had told Mr. Coxe the surgery was on the 4th, but demurred that she was on "Dilaudid and Vicodin." See Respondent's Exhibit 12 KEOUGH046 and KEOUGH074.

In I/M/O Indian River Medical Center and International Brotherhood of Teamsters, Local 769, F.M.C.S. Case No. 11-51617-3 (Pecklers, 2011 at page 33, n.4), I cited with approval the analysis of a witness' credibility advanced by Arbitrator Berquist in Abbott Northwestern Hospital, 94 LA 621, 630-631 (Berquist, 1990), which includes consideration of the following:

(1) interest or lack of interest in the outcome of the case;

(2) their relationship to the parties;

(3) ability and opportunity to know, remember and relate the facts;

(4) their manner and appearance;

(5) their age and experience;

(6) their frankness and sincerity or lack thereof;

(7) the reasonableness or unreasonableness of their testimony in light of all the other evidence in the case;

(8) any impeachment of their testimony;

(9) any other factors that bear on believability and weight.

See also Hearing of Giglio, EDU 11457-2003, Initial Decision (August 9, 2004) citing Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960); Spagnuolo v. Bonnet, 16 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961); Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed. 2d 380 (1973); Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

The totality of the record evidence convinces me that the credibility of the Respondent is unreliable at best. The Board's witnesses evidenced no apparent bias toward Ms. Keough, and their testimony was internally as well as externally consistent. For her part, Respondent's testimony was marred by prior inconsistent statements and at times incredible when considered in the context of the entire record. That was certainly true in regard to her position that she was not attempting to mislead Mr. Coxe in her December 30th text and January 4th letter, but trying to explain that she *already* had surgery and was not *having* surgery.

This conclusion is equally applicable to what is perhaps Respondent's *linchpin* defense — Ms. Keough's testimony that she had four (4) pages of

disability papers delivered to the District by her mother on January 7, 2016, the third page of which contained a medical certification from Dr. Ballet which explained that she had wrist surgery on December 16th and December 18th and additionally provided anticipated recovery dates. Again however, Ms. Keough's proclivity for fabrication cannot be overlooked. Petitioner has again called my attention to the unemployment hearing, when Respondent maintained that this paperwork had been provided to the District on January 8th. See Respondent's Exhibit 12 KEOUGH071; TI44:9-15; KEOUGH075.

Ms. Keough also maintained that this packet had been put into an envelope to protect her social security number at the suggestion of her mother, notwithstanding the fact that contrary testimony had previously been elicited. Respondent's Exhibit 2; TIII57:2-22; Respondent's Exhibit 12 KEOUGH076, TIII63:15-18. Finally, during the January 7th email exchange with Mr. Coxe, Ms. Keough stated that he had told her the paperwork would be completed yesterday.

To underpin her position that the District had the information it sought all the time, Respondent relies upon the fact that the one (1) page that was completed had no date stamp, along with the January 7, 2016 text message of Mr. Coxe. This stated that "you will be contacted when they are ready if we are able to complete them." TII73:25; 74:23; 81:9; 82:3. I acknowledge that the BA testified on cross that he does not ordinarily refer to one (1) piece of paper as "they or them." That said, these facts must be analyzed in conjunction with the

other evidence.

Three (3) of the District's witnesses testified that they had received only the 4th page of the disability packet, which was what the employer filled out — Dr. Doloughty, TI118:2-14; Mr. Cox, TIII170:14-17; Ms. Walsh, TIII11:21-12:14. It also defies logic that the Superintendent would send out her January 13th follow-up letter seeking inter alia, the very medical certification that she had been provided with. The obligation to provide the same or return to work within ten (10) days was also reinforced in the Superintendent's February 4th letter. Perhaps the most telling evidence that the entire packet was not dropped off on January 7th, however, is Respondent's failure to mention the medical certification to Dr. Doloughty during her January 21st conversation with her. See Respondent's Exhibit 12 KEOUGH072; TI57:3-20. Accordingly, given the implausibility of this theory of the case coupled with credibility concerns, this position has been discounted.

I further do not credit Respondent's position that she was in constant contact with the District due to her documented phone calls. It is true that there were many calls made during the month of January, ostensibly for the purpose of confirming that Ms. Keough's application for leave and disability paperwork were received. There was a call that was routed to the Superintendent with a conversation ensuing on January 21, 2016, and then a final one to Ms. Meredith on the 22nd. Noticeably absent from the phone records is any indication that Respondent attempted to contact anyone at the City of Burlington School District

Board of Education after the Superintendent's February 4th letter was received. However, based upon this conversation, Dr. Doloughty's assertion in Paragraph 35 of the Charges that Ms. Keough did not respond to her January 13th letter is simply factually incorrect.

In conclusion, the only remaining issue is the correct penalty for Respondent's unbecoming conduct. Our Appellate Division has provided useful guidance in this regard. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967) stands for the proposition that I should take into account the totality of the circumstances; the nature of the act(s); and the impact upon Ms. Keough's career.

I do not endorse the Respondent's position that the District was not prejudiced by the absence of Ms. Keough. It is accurate that no overtime was expended or temporary manpower hired. But as Mr. Coxe credibly testified, a number of individuals contacted as potential candidates were not willing to undertake the fingerprinting and application fee for a job of indefinite duration. TIII99:14-100. That does not mean that there was not a disruption in the operation of the Business Office as pled in Paragraph 59 of Charge One, and Ms. Keough herself described her position as "irreplaceable." Ms. Walsh also credibly testified to additional time she was now required to spend in performing two (2) jobs.

Ms. Keough is apparently a good worker, as there is no evidence to the

contrary in the record. I also recognize that this is a small Business Office in a relatively small district, and that there is still an ongoing Superior Court lawsuit, which may create underlying tension. Those factors however, are not dispositive in determining what discipline should be meted out. Instead, the District's Attendance Policy 4212 expressly recognizes that proportionality must anchor any penalty imposed. It is beyond dispute that Respondent violated the same, by failing to verify an absence in accordance with Board policy; falsifying the reason for an absence; and being absent without authorization.

The policy then establishes a progressive discipline scheme of escalating penalties, beginning with the withholding of a salary increment. See Petitioner's Exhibit 18; TI81:4-15. In my considered opinion, that penalty will comport with the intended statutory scheme and fall within the acceptable range of discipline in the TEACHNJ tenure cases, some of which were cited by Respondent. Under these circumstances, Ms. Keough is entitled to back pay, retroactive to May 4, 2016, when she was medically cleared to return to duty with no restrictions by Dr. Ballet, minus an offset for appropriate mitigation. IT IS SO ORDERED.

VII. CONCLUSION

The District has established by a preponderance of the credible evidence that the actions of Ms. Keough, a tenured Administrative Assistant and Payroll Secretary of the Board, amounted to conduct unbecoming sufficient to withhold her salary increment for School Year 2016 – 2017.

AWARD

THE SUBJECT TENURE CHARGES ARE SUSTAINED IN PART, WITH CHARGE ONE, CONDUCT UNBECOMING UPHELD AND CHARGE TWO, INCAPACITY AND CHARGE THREE, OTHER JUST CAUSE, DISMISSED WITH PREJUDICE. MS. KEOUGH'S SCHOOL YEAR 2016 – 2017 SALARY INCREMENT SHALL BE WITHHELD. SHE SHALL BE IMMEDIATELY RETURNED TO DUTY WITH FULL SENIORITY. BACK PAY, RETROACTIVE TO MAY 4, 2016 IS ALSO AWARDED, SUBJECT TO ANY OFFSET FOR APPROPRIATE MITIGATION. THIS CONSTITUTES THE ENTIRE AWARD IN THIS MATTER.

Dated: December 15, 2016
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 15TH DAY OF DECEMBER, 2016, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.,** TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

OFFICIAL SEAL
ANGELICA SANTOMAURO
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires July 29, 2019