

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges

**ELIZABETH BOARD OF
EDUCATION, UNION COUNTY,**

Petitioner,

-and-

NIKITA CLARKE-HUFF,

Respondent.

AGENCY DOCKET
NO.: 290-9/15

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

John G. Geppert
Schwartz Simon Edelstein & Cellos, LLC
100 South Jefferson Road, Suite 200
Whippany, NJ 07931

For the Respondent:

Sheldon H. Pincus
Bucceri & Pincus
300 Broadacres Dr, Suite 210
Bloomfield, NJ 07003

This matter comes before me on tenure charges brought under N.J.S.A. 18A:17-2 and 18A:6-10 et seq. by Petitioner Elizabeth Board of Education, Union County, against Respondent Nikita Clarke-Huff. The tenure charges at issue here were filed with the Bureau of Controversies and Disputes on September 22, 2015. I was appointed the arbitrator to adjudicate this matter on October 16, 2015. The Respondent made a

motion to dismiss all of the charges, which I granted in part and denied in Part in a Decision and Award dated November 16, 2015.

I conducted hearings to take evidence in the City of Elizabeth, Union County, on December 4, 7 and 10, 2015 on the remaining charges, set forth below. The parties submitted written post hearing briefs to me on January 4, 2016 at which time the record was closed.

ISSUES PRESENTED

1. Did the Respondent engage in any or all of the charged misconduct related to falsifying her child's residency and chronic absenteeism?
2. If so, does the proven conduct constitute unbecoming conduct warranting dismissal from her employment with the Board or some lesser penalty?

TENURE CHARGES

CHARGE II

NEGLECT, MISBEHAVIOR OR OTHER OFFENSE, INCLUDING BUT NOT LIMITED TO UNBECOMING CONDUCT OR OTHER JUST CAUSE, RELATED TO RESPONDENT FALSIFYING HER CHILD'S RESIDENCY

The foregoing background information, charge, counts, and the facts alleged therein are incorporated by reference as if fully set forth herein. Nikita Clarke-Huff has violated by unbecoming conduct the public trust placed upon Respondent as an employee of this District, failed to exhibit the good behavior necessary to continued employment, and failed to comply with all requirements of the law, including, without limitation and over an extended period of time: by falsely certifying to the District that

her daughter resided in the District during the 2014-2015 school year, thereby depriving the District of tuition Respondent otherwise would owe the District for her non-resident child's enrollment and attendance at the Upper Academy High School in Elizabeth, New Jersey. These acts and omissions, more specifically set forth below, constitute conduct unbecoming a school employee, or other just cause, warranting the immediate dismissal of Respondent.

Count 1

On or about June 26, 2014, Respondent signed and submitted to the District a form entitled Temporary Guardianship Authorization for Care of Minor ("TGA"), in which Respondent falsely declared that during the period from July 1, 2014 to July 30, 2015, she had placed her child, N.H., a 12th grade student at all times relevant, in the care of a temporary guardian residing within the City of Elizabeth, for purposes of obtaining a free education for N.H. at the Upper Academy High School in Elizabeth, New Jersey, at a tuition cost to the District and its taxpayers of not less than \$17,283.00, when in fact both Respondent and her daughter resided during this period at a home located at 22 Colton Road in Edison, New Jersey, and notwithstanding that the TGA form signed by Respondent clearly indicated that execution of same by the declarant was "under penalty of perjury under the laws of the State of New Jersey."

Count 2

The facts alleged in Charge II, Count 1, above, are incorporated by reference as if fully set forth herein. The foregoing facts also constitute conduct unbecoming, including theft by deception, of tuition costs in an approximate amount of \$17,283.00 that

Respondent properly owed the District, for her non-resident child's enrollment and attendance at the Upper Academy High School in Elizabeth, New Jersey, during the 2014-2015 school year, had she not improperly falsified the foregoing forms.

The foregoing acts and omissions by Nikita Clarke-Huff, individually and cumulatively, constitute just cause for dismissal based upon conduct unbecoming or other just cause related to her acts of false declaration and theft by deception of tuition, by which Respondent has demonstrated that she is unworthy of the public trust placed upon Respondent as an employee of this District. The Board, a public employer charged with providing a thorough and efficient education to children who legitimately reside within the District, cannot have the proper allocation of tuition jeopardized by the reprehensible conduct of Respondent, an untrustworthy employee who occupies a confidential position, and the Board should no longer have to be burdened by such misfeasance. Immediate dismissal is fully warranted.

CHARGE III, Counts 15 through 18

CHRONIC ABSENTEEISM

The foregoing background information, charges, specific counts and the facts alleged therein, are incorporated by reference as if fully set forth herein. Nikita Clarke-Huff has displayed chronically poor attendance during the last nineteen (19) years of her employment with the Elizabeth School District, during which she has been absent from her post on not less than **379.37** occasions, which has adversely affected the proper

operation of the school, despite repeated warnings.¹ Ms. Clarke-Huff has been chronically absent for sick days and personal days. These acts and omissions, more specifically set forth below, constitute *neglect, misbehavior or other offense*, including but not limited to *chronic absenteeism, unbecoming conduct, or other just cause*, warranting her immediate dismissal.

Count 15

During the 2011/2012 school year, Respondent was absent from her post on no less than eighteen and one-fourth (18.25) occasions, including one (1) family illness, one (1) personal, and sixteen and one-quarter (16.25) sick.

Count 16

During the 2012/2013 school year, Respondent was absent from her post on no less than eighteen and one-fourth (18.25) occasions, including one (1) family illness, fifteen and one-quarter (15.25) sick and two (2) "accident on duty."

Count 17

During the 2013/2014 school year, Respondent was absent from her post on no less than ten and one-half (10.5) occasions, including one-half (.5) family illness, one (1) personal, and nine (9) sick.

Count 18

During the 2014/2015 school year, Respondent was absent from her post on no less than forty-eight and one-half (48.5) occasions, including one (1) family illness, one

¹ I include the introductory and concluding paragraphs, although they include a reference to Counts 1 through 14, which have been dismissed. The total number of alleged days absent for Counts 15 through 18 is 95.5.

(1) personal, ten (10) sick, thirty-four and one-half (34.5) paid administrative leave, two "Mitchell Building," and was one-tenth day (.1) tardy.

The foregoing acts and omissions by Nikita Clarke-Huff, individually and cumulatively, constitute *neglect, misbehavior or other offense*, including but not limited to *chronic absenteeism, unbecoming conduct, or other just cause*; during the last nineteen (19) years of her employment with the Elizabeth School District, Respondent has been absent from her post on not less than **379.37** occasions, which has adversely affected the proper operation of the school, warranting her immediate dismissal.

CHARGE IV

INSUBORDINATION, NEGLIGENCE, MISBEHAVIOR AND/OR OTHER JUST CAUSE FOR DISMISSAL, RELATED TO A PATTERN OF CONDUCT

All of the foregoing charges and the facts set forth therein are incorporated by reference as if fully set forth herein. The course of misconduct set forth in the above charges and counts, jointly and severally, manifests a pattern of numerous infractions over an extended period of time, and constitute *neglect, misbehavior or other offense, including but not limited to unbecoming conduct, chronic absenteeism, or other just cause*. This pattern and course of conduct during an extended period of time demonstrates Ms. Clarke-Huffs unfitness to serve in a position of trust as an Administrative secretary, warranting her immediate dismissal.

FACTUAL BACKGROUND

Respondent Nikita Clarke-Huff has been employed by the Petitioner, Elizabeth Board of Education, (Board) as a school secretary since 1996, that is, for the past 19 years. Her title at the time these charges were served upon her was Administrative

Secretary II at the Jerome Dunn Academy. She is assigned to a 12-month position. Prior to working for the Board, Respondent held a number of other jobs, including serving in the U.S. Army for twenty years as a soldier. In the army, she rose to the rank of Staff Sergeant. She was stationed in a number of locations, including overseas.

Respondent is currently married to Eddie Huff. The couple has been together for 25 years, and they have been married for the past 15 of those years. They have two children together: Dante, aged 24 and N., aged 18, who has now graduated from the Elizabeth public schools. This is the second marriage for both Respondent and Mr. Huff. Respondent was previously married to a man named Pittman, with whom she had two children: Veronica, now aged 34 and Christina aged 30. Veronica resides in Sicklerville, New Jersey, near Camden. Christina resides in Baltimore, Maryland. Christina is a graduate of Morgan State University in Baltimore, which N. now attends, having graduated from Elizabeth High School Upper Academy in June 2015. Mr. Huff has three children from his prior marriage, ages, 43, 42 and 39. One of those, Shakira, resides in Virginia.

Respondent is part of large, extended family. She has six siblings, one of whom, Robert Jones, resides at 1116 Anna Street in Elizabeth, New Jersey. A sister resides in Virginia. She also has a step-mother, Willie Mae Banks. who resides on Anna Street, in Elizabeth, at Number 1057. Respondent identified eight family members who reside with Ms. Banks on Anna Street: a disabled uncle, two sisters, one of whom has two children aged 13 and 11, an adult niece who has a 2 year old son, and a step-brother.

The Charges in this case involve two separate issues: Respondent's attendance for the school years: 2011-2015, and whether she lied regarding her residency and that

of her daughter N. during the spring of 2015, when N. was a senior in the Elizabeth school system.

Attendance Issues.

The collective bargaining agreement covering Respondent provides for 14² sick days per year, 2 personal days per year and other leaves of absence, including days for funerals. Unused sick and personal days roll over and accumulate. (R. 7, 8)

Respondent and other similarly situated employees were entitled to 20 vacation days per year. At the start of the 2011-2012 school year, Respondent had accumulated 55.63 days in her sick day bank.

During the 2011-12 school year, Respondent was diagnosed with ovarian cancer. She was operated upon and received treatment. Respondent used all but ¼ day of her vacation days for her operation and used 16.25 sick and one of her two personal days for treatment and doctors' visits. At the end of that year, Respondent still had a balance of 39.38 sick days in her bank. (P. 13)

During the 2012-13 school year, Respondent continued to use sick days for her cancer treatment. She also suffered an accident at work on May 2, 2013 that resulted in two days absence. In that year, Respondent used all of her 20 vacation days, one day for family illness, one and one-half day for a funeral, two days for her accident on duty and 15.25 for sickness. At the end of that school year, she still had a balance of 39.13 days in her sick bank, only fractionally different from the number of days in her bank at the end of the previous year. (P. 14)

² The record is somewhat unclear about the precise number of sick days Respondent was receiving in 2015; it may have been 15 or even 16. See Respondent's Brief, p. 43, n. 20.

During the 2013-14 school year, Respondent used 9 of her allotted sick days. She completed the year with 46.13 days in her sick bank, an increase of 7 days over the prior year. Respondent again took all of her vacation days. The only category of days she exceeded was for family funerals – she took a total of 7.5 days for this purpose – 2.5 days in August of 2013, and another 5 days in June of 2014. (P. 15)

During the final year at issue in this case, 2014-15, Respondent took 10 sick days. She took all of her vacation days. The remaining 37.50 days with which she is charged were due to her being involuntarily reassigned while these charges were under investigation. (P. 16)

Residency Issue.

In March 2015, the Board Superintendent received an anonymous tip that Respondent and her daughter did not reside in Elizabeth. The Superintendent handed the matter over to Marvin Lehman, Board General Counsel, who in turn assigned Donald Pulidore to investigate the matter.

As far as the Board knew, in the spring of 2015, Respondent resided in the City of Elizabeth with her daughter N. at 1022 Emma Street, 2nd Floor. This was the address listed for N. in Power School, the student information system (P. 11), as well as the address on file for Respondent in the employee information system, known as Edumet. (P. 24) After Mr. Pulidore was unable to verify that Respondent and her daughter resided at that address, he took further steps to locate a residence. Those steps are detailed in his Investigation Report dated March 25, 2015. (P. 1) Mr. Pulidore consulted several sources in the course of investigation, including a database called “Accurint” that identifies addresses associated with a given name from such sources as

property records, utilities, car registrations, cell phones, etc. Ultimately, Mr. Pulidore located Respondent leaving to go to work on three days – March 25, 26, 27 – from a house at 22 Colton Road, Edison, New Jersey, an address associated in Accurint with Eddie Huff. On those mornings, Respondent drove a car registered to Mr. Huff. On two of those mornings – March 25 and 26 – her daughter, N., left the home with her. Mr. Pulidore took photographs showing someone, allegedly Respondent, leaving the house. Those photographs are of poor quality, but are in evidence as exhibits to his report. (P. 1) On those days, Mr. Pulidore observed Respondent as she drove N. to her high school in Elizabeth. (P. 1)

Based upon Mr. Pulidore's report, Mr. Lehman made a preliminary determination that N. was ineligible to attend high school in Elizabeth. He sent Respondent a "Notice of Initial Determination of Ineligibility" (P. 5) and scheduled a meeting with Respondent for March 30, 2015. Respondent brought an attorney with her to the meeting.

Respondent admits that neither she nor N. was residing at the Emma Street address in 2015. When asked by Mr. Lehman where she lived, Respondent replied that at the moment she "had no domicile." Respondent told Mr. Lehman, however, that N. resided with her brother, Robert A. Jones, at 1116 Anna, Apt. 4F in Elizabeth. She presented some documents to support that statement. Of particular significance were two purported leases for the premises for the periods 2/1/14-1/31/15 and 2/1/15 – 1/31/16 (P. 4, R. 4) and a handwritten "Temporary Guardianship Authorization for Care of Minor" signed by both Respondent and Robert A. Jones, both signatures dated June 26, 2014 (P. 3).

Respondent's residence.

Respondent testified that she first reported the address on file for her with the Board – 1022 Emma – in approximately 2011. She and N. lived at that address during the 2011-12 and 2012-13 school years, along with a friend, Janet Moore. Her husband, Eddie Huff, N.'s father, did not live at the Emma Street address with them that year; they were having marital problems.

Respondent admits she never reported a change in address after she left Emma Street. When asked why she had not done so, she testified that all mail from the Board, including paychecks, was delivered to her at her school, and “she didn't think anything of it.”

In the following two years, Respondent and her daughter moved around, staying with various friends and family. This roaming, about which she testified for several hours through direct and cross-examination, was due to her marital problems, which continued through the spring of 2015. Her brother, Robert Jones, confirmed that Respondent was going through hard times with Mr. Huff. Respondent did not go into detail about the nature of the problems between her and her husband, other than to say:

- Huff had a history of substance abuse with drugs and alcohol and in recent years, “he fell off the wagon;”
- Although Huff never hit Respondent, he was volatile at times, raising his voice, belittling and disrespecting her;
- N. was affected by the tension in the household; she got embarrassed when her father came home drunk; Respondent felt hurt to have her daughter see all of this;

- There were financial problems as well in the marriage, as a result of which Respondent was short of money; Robert Jones confirmed his sister had no money during this time.

Respondent testified to the following other residences during the period from 2012-2015:

- In 2012 and/or in 2013-2014 while she was recuperating from surgery for ovarian cancer, she stayed with a friend named Vanessa at 2125 Fay Avenue, Linden New Jersey. That address was one identified with Respondent's name in the Accurint database consulted by Board investigator Pulidore.
- During 2014 and 2015 Respondent lived "off and on" with her step-mother, Willie Mae Banks, at 1057 Anna Street. Respondent testified that she still receives mail at that address. Residing in the house on Anna Street were the nine family members listed above, in addition to Respondent. N. stayed at Ms. Banks' house "less than five times," because it was crowded, and N. did not get along with Respondent's niece.
- For approximately 4 months Respondent lived with her aunt and uncle at 917 Kensington in Plainfield, New Jersey. She moved out after the house was severely damaged in a fire.
- After the fire, Respondent stayed for a bit – probably less than 10 days – with her daughter Veronica, in Sicklerville, New Jersey after a blow-up with Mr. Huff.

- Finally, Respondent resided at 22 Colton, in Edison, New Jersey with her sister-in-law, Vickie Larry. That was where Investigator Pulidore observed her in March 2015.
- Eddie Huff resided with different friends during this period of time, ultimately landing at 22 Colton with his sister, Vickie.

N.'s residency.

According to Respondent and her brother, Robert Jones, Respondent arranged to have N. move in with Mr. Jones at his apartment, #4F, 1116 Anna Street in the spring of 2014 – Mr. Jones placed this event at the end of April or beginning of May 2014. Mr. Jones testified that he offered to have both Respondent and her daughter move in with him, but Respondent stayed to work on her marriage. Mr. Jones, like Respondent, felt that N. should not have to stay with her parents while they were having “troubles.”

Mr. Jones lived in a large one-bedroom apartment. He gave N. his own bedroom and allowed her to put her clothes in his closet. While she resided with him, which was until she graduated from high school in June of 2015, he used the pull out couch in the living room as his bed. He purchased a partition that gave him more privacy and allowed N. to go to the bathroom or kitchen without disturbing him or seeing “her uncle sleeping with his shirt off.”

For the most part, N. stayed with her uncle during the week while school was in session. On weekends, she would frequently stay with other family members or with her girlfriends, C. and M.; over vacations, she would travel to visit family in Maryland and Virginia. Because 1116 Anna was over a mile from the high school she attended, N. would often get rides to school from her boyfriend, or her mother, who would pick her

up and drop her off at the school and then proceed to her own place of work. At times, N. would walk to or from school.

During the time N. lived with him, Mr. Jones was mostly unemployed, having been laid off from his job at a photography studio in August 2014. Thereafter, he collected unemployment compensation, and had at least one temp job. Mostly, however, he worked with the VA on finding new employment: since he was a veteran, the VA had him “moving around every day” for his job search, for example, attending classes on resume building. He started a new job in October of 2015, and the parties agreed to allow him to testify via telephone during his lunch break, so as not to jeopardize the job.

During her years in high school, N. was an A student. She was also a tutor and participated in girl scouts. But she was particularly active in band, chorus and drama. Band practice began in August with a one-week band camp in Elizabeth. After that the band played at football games every Friday, and would participate in competitions which involved practice on Saturday and travel to competitions. The big competition was an all-day event in Delaware on a Sunday around Thanksgiving. Respondent was active as a band parent, chaperoning the students on the bus, arranging for food and selling tickets at games. On occasions, when the band returned late, Respondent would have N. stay over with her wherever she was staying at the time.

Once band season was over, rehearsals picked up for drama at the Thomas Jefferson Arts Academy in Elizabeth. As with school band, Respondent was an active parent supporter: the drama production program identified her as one of several “Drama Mamas” who helped throughout the production process, helping find costumes,

feed the kids, drive them, and do other chores. In the 2012-13 school year, N. was in the cast as a soldier for the school production of Pippin in March. (R. 10, p. 00173); Respondent was thanked in the program (Id. p. 00177) In the 2014-15 school year, the drama group performed "Bring It On". (Program, R. 9) N. played part of "Danielle" (Id. p. 00153); Respondent was one of the "Drama Moms" thanked by the Director "for always offering your time and talents and for supporting your daughters' passion!" (Id. p. 00158)

The performances of "Bring It On" were on March 26, 27 and 28, 2015. Robert Jones testified that he was out of town that month, but returned to see his niece in the play. Respondent testified that some nights, when her brother was away, or when rehearsals went late, she brought N. to stay with her, rather than leave her alone in the Anna apartment in Elizabeth. At that time, as observed by Mr. Pulidore, Respondent was staying in Edison. Respondent does not dispute that Mr. Pulidore observed N. staying with her the two nights he identified: March 25 and 26. She testified these stays were a result of Mr. Jones' travels and the drama production schedule.

As further proof that N. resided with Mr. Jones in the spring of 2015, Respondent produced photographs of N. in front of 1116 Anna Street, dressed up for the prom, standing with her boyfriend. (R. 31., pp. 281-3) She also produced a receipt for the limousine paid for by Eddie Huff and Robert Jones, showing that the limo was to pick and drop off its charges at 1116 Anna Street in Elizabeth on June 3, 2015. (Id. p. 00280)

Certificate of Guardianship. Respondent testified that when she and her brother decided that N. would reside with him, in the spring of 2014, she downloaded a guardianship form from the internet, filled it out, signed it, and had her brother sign it.

The form, signed by her “under penalty of perjury” authorizes the temporary guardianship from July 1, 2014 to July 30, 2015. (P. 3, p. 0077) She testified:

- She thought her brother needed “something extra because he was taking care of” her daughter;
- She had used this procedure before when she was in the army: knowing her unit could be activated, she always had a contingency plan for the care of her children.

Mr. Jones confirmed in his testimony that he and his sister had executed the Guardianship form in June of 2014. He also signed an affidavit on April 4, 2015 to the same effect that was presented to the Board on Respondent’s behalf. (R. 4, p. 00073) He testified that it was when his sister asked him to sign the paper, that he realized “how serious the situation was at home with Eddie.” Mr. Jones testified that he provided most of the financial support for N. because his sister “was dealing with stuff on her own; Nikkie didn’t really have the money to pay me. I wasn’t asking her to, either.”

Leases for 1116 Anna Street.

Purported residential leases for Apartment #4F at 1116 Anna Street in the name of Robert A. Jones were placed in evidence for two years, 02/01/14 to 1/31/15 and 02/01/15 to 01/31/16. Pages of the leases were placed in evidence by both sides. (P 4, R. 4) Several features of these leases are of note:

- Although Mr. Jones signed the 2015-16 lease and his initials appear on each page throughout the lease, no signature from the leaser – FDG Management Corp – appears anywhere on the document.

- One copy of the 14-15 lease has Mr. Jones's signature on the first page (P. 4, pp. 0079); the other does not (R. 4, pp. 00059)
- N.'s name is typed onto 14-15 lease, even though the parties testified she did not move into the apartment until April or May of that year;
- N.'s name is also typed onto the 15-16 lease.
- Two different social security numbers appear on the two leases: for 14-15 the number ends in -9776; for 15-16 the number ends in -1596. Neither number is Mr. Jones' social security number.

A representative of the landlord, Alan Rosenbaum, testified in this proceeding.

Mr. Rosenbaum only started at FDG Management on March 31, 2015, when Mr. Jones was already a tenant in apartment 4-F. Regarding the purported leases, Mr. Rosenbaum testified:

- Neither copy of the lease appears in the management company's file, but the form of the leases is one that FDG uses; the rental amount shown on the lease for 15-16 is incorrect: it shows \$725, whereas the actual rent is \$730;
- It is not the company's practice to include social security numbers on any lease;
- While the company requires a signed lease for a new tenant, thereafter, the company sends out a renewal. If tenants do not agree to the renewal, they are continued on a month-to-month tenancy. FDG did send Mr. Jones a lease for 2015-16, but he did not return it signed.

Mr. Jones testified that he would not have put N.'s name on any lease: he was afraid that if he told the landlord about the situation the landlord might raise the rent. Respondent confirms that Mr. Jones told her he was apprehensive because he hadn't told the landlord about N.; he thought it might be an issue so had not put her formally on the lease. Mr. Jones said he did have a lease in 2011 when he first moved in, and that he turned in a lease last December. He didn't know how "that idiot Alan" couldn't find a lease. Respondent testified that she obtained the two lease documents from her brother's apartment along with utility bills for the apartment. (R. 4) It is not clear if Mr. Jones was present in the apartment when Respondent retrieved the documents; he had "no clue" when he was asked about having a lease in his apartment or giving it to his sister. Respondent was adamant that she did not alter the lease documents in any way.

POSITIONS OF THE PARTIES

The Board argues that it has proven the charges by a preponderance of the credible evidence; further, that the charges establish the Respondent is guilty of making false statements to the Board, knowingly committing theft of the Board's services, has exhibited chronic absenteeism; and has exhibited a pattern of conduct over a period of years constituting just cause and warranting dismissal from her tenure position. In particular: (1) the Board's full and fair investigation, including surveillance of the Respondent at an Edison address, established that Respondent was residing with her child in Edison, rather than Elizabeth, in the spring of 2015; indeed, she was observed leaving the Edison home with her daughter on "several" mornings to drive her daughter to school; (2) the Respondent blatantly lied to the Board in order to obtain free educational services from the City of Elizabeth for her daughter, specifically,

Respondent knowingly submitted false and fraudulent documentation in the form of a Temporary Guardianship Authorization form, prepared under penalty of perjury as well as fraudulent leases to establish that her daughter lived with her brother, Robert A. Jones, at 1116 Anna Street, Elizabeth; (3) the Temporary Guardianship Authorization must be rejected as legally inadequate to establish an actual guardianship by Robert Jones of the minor daughter in that (a) it was never presented to a court of law, as required by NJ AC 6A:22-1.2 (b) it was never submitted to the Board until Respondent was summoned to an investigative meeting in March 2015; (c) on its face the form states that support will be provided, presumably by Respondent to Mr. Jones, yet the parties testified that no such support was in fact provided; (d) the asserted residential arrangement – namely that a teenage girl would share a one-bedroom apartment with her uncle – is inherently unbelievable; further, Mr. Jones’ testimony is that the daughter did not reside at the apartment on weekends, and often not during the week, including “two nights per week” spent elsewhere; (4) the leases must be disregarded because (a) the landlord’s representative testified that no such leases are on file with the landlord; (b) Mr. Jones testified that he never gave any leases to Respondent, nor had he executed a lease for the year in question; (c) on its face, the leases are unsigned; further, they contain social security numbers which the landlord says are never included, and for the two years submitted, those social security numbers differ from one another and from Mr. Jones’ social security number; (5) All Board employees have an obligation to follow the Board’s rules and regulations with regard to residency; the obligation of Respondent, a school secretary, is particularly critical, and her failure to follow these rules must be deemed conduct unbecoming; (6) the Board has further proven excessive

absenteeism on the part of Respondent since 2011 that has deprived the Board of her services and warrants termination; (7) given that the Respondent was subject to an increment withholding in 2011 for unbecoming conduct and excessive absenteeism, which must be regarded as progressive discipline, the current charges must be considered as proving a pattern of misconduct over time that merits discharge.

The Respondent, on the other hand, argues that the Board has not proven the charges against Respondent involving falsification of her child's residency; nor can the Board claim theft of services or excessive absenteeism based upon the record in this case. In particular, (1) the Board is required to prove the allegations charged by at least a preponderance of the evidence; indeed, a stricter standard of proof – clear and convincing evidence – has been applied in some New Jersey tenure cases; (2) under either standard, the Board has failed to meet its burden of proof: the facts established through the credible testimony of Respondent and her brother, and not contradicted by any contrary facts presented by the Board, prove that Respondent's daughter, N., did in fact reside in the City of Elizabeth with her brother at all relevant times; (3) the credible and uncontroverted evidence shows that Respondent and her brother did execute, in good faith, a temporary guardianship form; the fact that this was somewhat less than the court order required by N.J.A.C. 6A:22-1.2 is irrelevant since (1) the temporary guardianship shows substantial compliance with Board policies and thus suffices as a matter of equity; (2) under the state's and the Board's own rules and regulations, N. was entitled to attend school in Elizabeth either because she in fact resided in Elizabeth with a relative who provided her with support without remuneration; or because her family was in crisis and under New Jersey law she was entitled to continue her education in the

district while the family worked on resolving the crisis; or because the Board had discretion – which it in fact exercised – to allow her to continue her education once the question of residency arose; (4) the Board failed to present any salient facts beyond the ones gathered by its investigator and reported on March 25, 3015; those facts are amply rebutted by the uncontroverted evidence from the Respondent and her brother who both testified credibly; indeed, their testimony had the “ring of truth”; there is no question that Mr. Jones did in fact reside in Elizabeth at the address noted in the leases; other record evidence, including the prom photograph and limousine receipt corroborate that N. resided with him; further, if the leases are flawed as legal documents, nevertheless, Respondent has not been charged with presented false leases, only with a false statement on the Guardianship form; (5) there is simply no evidence that the Respondent created the Temporary Guardianship form out of a motive to steal tuition dollars or mislead the Board; instead the evidence shows that the Respondent did what she felt was reasonably necessary despite difficult circumstances to provide a stable residence for her daughter with her brother, in the district, while she worked on her marriage; the essential statements in the Guardianship – namely that N. resided with her uncle while attending school – are true; (6) the Board cannot claim theft of services for tuition since Respondent’s daughter did qualify for free educational services; further, the Board did not at any time attempt to go through appropriate processes to determine a theft of service; finally the Board could and did exercise its discretion to allow the child to finish her education; it cannot now claim that it was deprived of funds to which it might have been entitled; (7) with respect to the charges that Respondent was excessively absent or tardy, the evidence shows that she was only tardy – and that

by a small amount – on one occasion; with respect to absences, Respondent underwent treatment for cancer during two of the years at issue and suffered an on-the-job injury and even then did not come close to depleted her accumulated sick bank; the final year at issue contained very few absences other than the days on which she was involuntarily reassigned, for which the Board alone retains responsibility; further the Board presented absolutely no evidence that her absences caused any harm to the Board; (8) finally, the Board has not demonstrated any pattern of conduct warranting dismissal; instead it continues to try to make this claim by relying on matters that were the subject of a settled increment withholding action and that have been dismissed from this proceeding. Consequently all charges against Respondent should be dismissed; she should be reinstated to her tenured secretarial position with full back pay, benefits and seniority.

DISCUSSION

Both parties were represented by counsel in this proceeding and had full opportunity to present evidence and make arguments in support of their respective positions. All witnesses were sworn. Two of the witnesses testified via telephone, with the consent of all parties. The parties submitted written closing statements with supporting legal authorities to me by January 4, 2016. Neither side has objected to the fairness of this proceeding.

In the preparation of this Opinion and Award, I have given careful consideration to the testimonial and documentary evidence, the legal authorities cited, and the positions and arguments set forth by the parties. I find that the Board has failed to prove the charges against the Respondent for the reasons set forth below.

Charge II. Falsifying Child's Residence.

By far the most serious of the charges against Respondent, and they are very serious indeed, are the charges in Charge II, Counts 1 and 2, that Respondent falsely certified to the District "that her daughter resided in the District during the 2014-2015 school year, thereby depriving the District of tuition Respondent otherwise would owe the District for her non-resident child's enrollment and attendance at the Upper Academy High School in Elizabeth, New Jersey." Count I recites the particulars of the false certification narrowly and specifically as the execution of a fraudulent Temporary Guardianship Authorization:

On or about June 26, 2014, Respondent signed and submitted to the District a form entitled Temporary Guardianship Authorization for Care of Minor ("TGA"), in which Respondent falsely declared that during the period from July 1, 2014 to July 30, 2015, she had placed her child, N.H., a 12th grade student at all times relevant, in the care of a temporary guardian residing within the City of Elizabeth, for purposes of obtaining a free education for N.H. at the Upper Academy High School in Elizabeth, New Jersey, at a tuition cost to the District and its taxpayers of not less than \$17,283.00, when in fact both Respondent and her daughter resided during this period at a home located at 22 Colton Road in Edison, New Jersey, and notwithstanding that the TGA form signed by Respondent clearly indicated that execution of same by the declarant was "under penalty of perjury under the laws of the State of New Jersey."

The overwhelming evidence adduced through three days of hearings establishes that Respondent did, indeed, place her daughter in the temporary care of her brother, Robert Jones, a resident of Elizabeth. I found the Respondent and her brother to be credible witnesses. Respondent testified at great length, through direct and a detailed cross-examination, about her personal situation. She was neither defensive nor hostile under the questioning. Instead, she responded calmly and in a forthcoming manner about what had to be a painful subject: the disruption to her life and that of her

youngest child because of her husband's instability after a return to drug use.

Respondent was not asked, and did not volunteer, details about the relationship or the couple's financial problems. But what was very clear was that she was in a tumultuous relationship and reached out to friends and family to help her through. She testified to an extended family – her own children from her own first marriage, children from her husband's first marriage, stepmother, and brothers, sisters, aunts, uncles and cousins. She related how she stayed with one or another of those, or placed her daughter in their care, as she went back and forth with her husband to try to save her marriage over at least a two-year period.

Often Respondent stayed with her stepmother. But she also turned to her brother, Robert Jones, for help. Both lived close by one another on Anna Street, in Elizabeth. There is absolutely no doubt that Mr. Jones lived in an apartment at 1116 Anna Street: in addition to the testimony to that effect of Respondent and Mr. Jones, the landlord's agent called as a witness by the Board confirmed that fact.³

As to whether the daughter resided with Mr. Jones, we have the uncontroverted testimony of Respondent and Jones. But, in addition, we have the photograph and limousine receipt from the prom, neither of which was fabricated for this hearing. The key photograph (R. 31, pp. 281-3) shows the daughter dressed up for the prom and standing proudly in front of 1116 Anna; the receipt (R. 31, p. 280) shows that she was to be picked up and delivered back to that address.

³ The leases introduced as evidence that Mr. Jones rented the apartment are problematic in many ways, including the unexplained appearance of N.'s name on the lease, two different and both incorrect social security numbers, a discrepancy in the rental amount. Yet, Respondent is not charged with presenting fraudulent leases, only a fraudulent guardianship form. The underlying fact of Mr. Jones' residence in the apartment at Anna Street is beyond question.

Against this evidence, the Board had very little to offer. The Board argues that it is improbable that a teenage girl resided with her uncle in a one-bedroom apartment, with him sleeping on a sofa bed and using a screen for privacy. Yet, many families do share apartments, as Respondent's testimony about her stepmother and daughters makes clear. The Board could have, but did not assign its investigator to visit the Anna Street apartment or to put it under surveillance. Instead it relied entirely upon Mr. Pulidore's observation of an address in Edison, New Jersey, where N. was observed on two occasions – not "several" as claimed by the Board in its brief – exiting the home with her mother.

Respondent does not challenge Mr. Pullidore's observations on those two days; she merely explained that they are not determinative of N.'s residence in March 2015. The two days are particularly significant: they are March 25 and 26, the evening before and the first night of her show, "Bring it On" at the Thomas Jefferson Arts Academy in Elizabeth. The program from the show (R. 9) provides independent corroboration of N.'s participation in the show, the dates of the show, and Respondent's active support as a "drama mama." These pieces of evidence support Respondent's testimony that on a few occasions, including March 25 and 26, she had her daughter stay with her in Edison when there were late rehearsals and when Mr. Jones was out of town. The Board countered none of this information: not the prom, nor the drama performance, nor Mr. Jones' claims about his travels out of town in March.

The Board rests its case upon the assumption that the Temporary Guardianship form was fraudulent. But, as shown above, I find that the underlying facts of the

guardianship, namely that Respondent had her daughter living with Mr. Jones in Elizabeth, are true.

Further, I find that that brother and sister, in June of 2014, filled out the Temporary Guardianship Authorization form for the purpose - not of obtaining a free education for the daughter that she was not entitled to – but rather to give Mr. Jones some documentation in case he would need to establish his relationship to the daughter while she was staying with him. The Respondent’s testimony about her experience as a member of the military with small children from her first marriage, when she used such forms because she anticipated being deployed overseas and left her children with family members, was entirely credible. The Board offered no evidence to rebut that testimony, so I conclude that Respondent’s prior military experience is as she asserted.

It is perhaps understandable that the Board would be suspicious of the guardianship document produced only when Respondent was questioned about her daughter’s residence. Further, the document is a casual document, certainly not a formal court order.⁴ Yet after a full hearing, with lengthy testimony and the opportunity for cross examination and further investigation, the Board has offered no reason why the Respondent and her brother would have manufactured such a document and backdated it specifically to June of the prior year. The document, like the testimony of Respondent and her brother, had the ring of truth about it. I find that there was no falsification of guardianship.

⁴ I find no particular significance to the “discrepancies” pointed to by the Board between the form’s statement that costs of the guardianship shall be paid “monthly” and the testimony that Respondent did not pay Mr. Jones for her daughter’s rent and food. The form does not say who will pay such expenses and it is clear that Mr. Jones covered basic expenses for his niece.

The Board refers me to requirements of local and state law regarding establishing domicile for a child: generally the child must be the child of a parent or guardian domiciled in the district. Guardianship, for such purposes is defined in to N.J.A.C. 6A:22-1.2:

A person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, provided that a residential custody order shall entitle a child to attend school in the residential custodian's school district unless it can be proven that the children does not actually live with the custodian.

Respondent counters by pointing out that both state and local laws and regulations give latitude to a school district to allow a student to attend without payment of tuition, even when the child in fact resides outside the district. The district may look at the totality of circumstances, including family crises, to determine whether a tuition waiver should be granted. (See Board's policy, R. 30, and N.J.A.C. 6A:22-3.4) The Board in this case did exercise its discretion to allow N. to complete the school year and graduate.

In any case, I need not address the issue of whether the Guardianship form is sufficient to establish that Robert Jones was the legal guardian of his niece in March 2015. The only issue before me is whether Respondent falsely declared, under penalty of perjury, that she had placed N. into her brother's guardianship for the purpose of obtaining a free education to which her daughter was not entitled. I find that she made no false declaration. I find that the Guardianship form was executed in good faith in June 2014 for the purpose stated above: namely, giving her brother some authority to act in the child's best interests should a need arise.

It is certainly true that the Respondent failed to report changes in her own and her child's address as required by Board policies and procedures. As a school secretary, she

certainly knew or should have known that she was supposed to report such changes. It is perhaps understandable why an employee, whose personal life is in such turmoil, would not want to share all of the ups and downs of her own and her daughter's residency with the Board. Certainly many employees do fail to report address changes. In any case, Respondent is not charged with failing to report address changes for herself or her child to the Board, only with falsely claiming guardianship in order to receive a free education for her daughter. That I find she did not do. Hence, I dismiss Charge II, Count 1.

As to Charge II, Count 2, the Board charges Respondent with theft by deception by falsely claiming residency for her daughter. For the reasons set forth above, I find no false claim of residence and hence, no theft by deception. Charge II, Count 2 is also dismissed.

Charge III, Chronic Absenteeism

In four counts, Counts 15 through 18, covering school years 2011/2012, 2012/2013, 2013/2014, 2014/2015, the Board charges Respondent with excessive absenteeism and tardiness. Respondent does not contest any of the dates at issue, arguing only that none of the evidence shows chronic absenteeism.

Respondent points out that she had only .1 day of tardiness, which is hardly "excessive." As to the absences, they, too, were not excessive, and Respondent never exceeded her allotment of days for sickness, family illness, personal leave, bereavement and the like. In the first two years charged, when she was under treatment for cancer, Respondent did dip into her accumulated sick bank, but even under those circumstances, she did not exceed days to which she was entitled. And, in the final two years that are charged, she actually increased, rather than decreased her bank of unused sick days,

using only 9 and 10 days respectively for sick leave. I agree with Respondent: this is not a record of excessive absenteeism.

In the final school year (Count 18), she is charged with absences when she was assigned involuntarily to sit in a “rubber” room, while these matters were investigated. I find no basis for the Board to charge Respondent with absenteeism for the days when it assigned her to desk duty rather than to her usual place of work. That assignment was done at the Board’s discretion and at its bidding: Respondent cannot be faulted for complying with that assignment.

Finally, the Board had no basis whatever to charge excessive tardiness for one tenth of one day over a four-year period.

All parts of Charge III, Counts 15 through 18, are dismissed.

Charge IV, Pattern of Conduct of Misbehavior

In this Charge, the Board incorporates all of Charges II and III. Insofar as Charge IV relies upon the matters pled in Charges II and III, which I have dismissed, this charge too must be dismissed. In addition, the Board refers in its brief to matters that were the subject of a settled increment withholding. In my Order dismissing charges based upon events prior to June 2011, I made clear that no claim could be prosecuted against Respondent now for those same issues. I stand by that decision. There is nothing new in Charge IV. I have found the Board failed to prove any of the charged misbehavior, let alone a pattern of misbehavior over a period of years.

Charge IV is consequently dismissed.

AWARD

For all of the reasons set forth herein, all of the charges herein are dismissed.
Respondent is ordered reinstated, with full back pay, seniority and benefits.



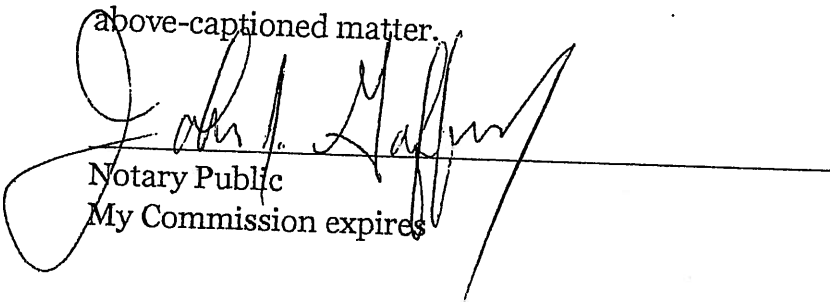
Ruth Moscovitch, Arbitrator

Dated: January 5, 2016

ACKNOWLEDGMENT

STATE OF NEW YORK)
 Orange) ss.:
COUNTY OF ~~NEW YORK~~)

On January 5, 2016, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.



Notary Public
My Commission expires

JOHN J. GAFFNEY
Notary Public State of New York
No. 4695982
Qualified in Orange County
My Commission Expires May 26, 2019