

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION**

In the Matter of the Tenure Hearing of:

**NOEMIA GOMES, BOARD OF EDUCATION
OF THE CITY OF ELIZABETH, UNION COUNTY**

Agency Docket #69-3/18

Walt De Treux, Esq., Arbitrator

Hearing Date: 11/5/18

Briefs Received: 1/28/19

Decision Date: 3/4/19

Appearances: For Respondent – Paul W. Tyshchenko, Esq., *CARUSO SMITH PICINI*
For the District – Nishali A. Rose, Esq.; Lester E. Taylor, III, Esq., *FLORIO PERRUCCI*

Introduction and Statement of Relevant Facts

Respondent Noemia Gomes served as an Administrative Secretary (12 months) for the City of Elizabeth Board of Education since February 25, 2008. During her employment, Gomes had a poor attendance record. She missed 27.38 days in the 2008-09 school year and was on a paid leave of absence for the entire 2009-10 school year. She missed 68.43 days in 2010-11; 112.13 days in 2011-12; 33.93 days in 2012-13; 40.75 days in 2013-14; 47.58 days in 2014-15; 109.05 days in 2015-16; and 74.76 days in 2016-17 with an additional 107 days on leave of absence. In 2017-18, Respondent missed 108.60 days through January 22, 2018. She worked a total of 13 days that school year. Her last day of work was August 23, 2017. Respondent provided medical certification for her absence until October 2017, but provided no other certification or reason for her absence since that time. She was absent from work without any approved leave of absence.

The City of Elizabeth Board of Education certified tenure charges against Respondent on February 22, 2018. The charges sought dismissal from employment for excessive absenteeism, neglect of duty for failing to report to work, abandonment of position, conduct unbecoming, and insubordination and/or other just cause. The Commissioner of Education referred the charges to arbitration. Respondent filed a Motion for Summary Decision, which was denied by Order dated June 25, 2018.

On November 5, 2018, a hearing was held at the Board of Education offices in Elizabeth, New Jersey, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs, and the matter was submitted to the Arbitration for a decision.

Issue

Has the City of Elizabeth Board of Education established the allegations against Respondent Noemia Gomes as set forth in the tenure charges? If so, do those charges warrant dismissal? To what remedies are the parties entitled?

Analysis and Decision

The Board of Education (BOE) calculated that Respondent was absent 970.42 days during her 10 years of employment. Remarkably, she faced only minor discipline for such poor attendance. During the 2007-08 and 2008-09 school years, Respondent received several memos admonishing her on her attendance. The BOE withheld her salary increment for the 2010-11 school year after she took a leave of absence during the entire 2009-10 school year. It also withheld a salary increment for the 2012-13 school year. It apparently issued no other disciplinary action other than to advise her to improve her attendance.

Respondent cites to this lack of discipline and the District's failure to place her on an Attendance Improvement Plan as reasons to dismiss the tenure charges. The District's lax approach to Respondent's attendance is troubling. The recitation of absences over a 10-year period rings hollow when the BOE failed to adequately and seriously address those issues during the course of Respondent's employment. The BOE certainly has the right to discipline and discharge an employee who consistently fails to show for work over a period of time, whether or not those absences are excused or justified. It also has an obligation to monitor an employee's attendance and counsel and progressively discipline the employee in an effort to improve that attendance. If this case rested solely on Respondent's past attendance record,

the District would have difficulty overcoming the absence of any recent, significant, and progressive discipline. But the resolution of this case is much simpler than assessing Respondent's 10-year attendance record and the BOE's response or lack thereof to that record.

Charges II and III of the tenure charges allege, respectively, Neglect of Duty for Failure to Report for Work and Abandonment of Position. During the 2017-18 school year, Respondent worked a total of 13 days prior to the filing of the tenure charges. She was absent for all but 6 days in July and 5 days in August. Her last day of work was August 23, 2017. As of August 29, 2017, her time off was recorded as "SICK DAY – NO PAY." She provided medical certification for her absences into October 2017, but failed to provide any further medical documentation or give reasons for her continued absence.

BOE Policy No. 4150/4250 defines an unauthorized absence as "a non-approved absence resulting in non-performance of those duties and responsibilities assigned by the district...An employee is deemed to be on unauthorized leave at such time and on such occasions as the employee may absent himself/herself from required duties." The policy further explains, "Unauthorized leave shall constitute a breach of contract, and therefore, may result in the initiation of dismissal procedures, loss of salary or such disciplinary action as may be deemed appropriate."

Respondent has been on an unauthorized leave of absence at least since October 2017, and she has failed to document to the BOE any reasons for that continued absence. She has abandoned her position, and her unauthorized leave constitutes neglect of duty.

In her brief, Respondent attributes the multiple absences through the years of her employment to "acute chronic lumbar pain that includes symptoms of debilitating pain that

renders [her] immobile for long periods of time.” Presumably, Respondent’s absence since August 23, 2017 is due to the same alleged chronic condition. However, Respondent offer no proof at hearing as to any such condition. Respondent, without explanation, did not attend the hearing. She offered no testimony and no explanation for her unauthorized and undocumented absence from work. The only conclusion that can be drawn is that Respondent abandoned her position.

In her brief, Respondent raises several procedural, due process, and substantive defenses to the tenure charges. But those defenses fail to address the most striking and pertinent allegations in the tenure charges, i.e., she abandoned her position by failing to work since August 23, 2017 and failed to provide documentation or reasons for her absence since October 2017.

Respondent’s attendance record over her 10 years of employment is dismal, but it need not be considered to resolve the tenure charges. The resolution rests squarely on the fact that Respondent cease working on August 23, 2017 and has failed to provide justification for her absence since October 2017. Her actions are the exact definition of abandonment, and the Board’s policy on unauthorized leave allows for dismissal. Respondent’s failure to communicate and document the reasons for her absences left the BOE with no choice but to seek dismissal.

For these reasons, I find that Counts II and III of the tenure charges have been established and warrant dismissal.

Award

The City of Elizabeth Board of Education established the allegations of neglect of duty for failure to report to work (Count II) and abandonment of position (Count III) and as set forth in the tenure charges. Those proven charges are sufficient to warrant dismissal.



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Affirmation

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

Walt De Treux

WALT De TREUX