

**BEFORE THE BOARD OF EDUCATION
OF ROSELLE PUBLIC SCHOOL
DISTRICT/COMMISSIONER OF EDUCATION**

In the Matter of Tenure Charges

between

**Roselle Borough
Board of Education,**

Petitioner,

and

Lovena Batts, Teacher,

Respondent.

Agency Docket No. 66-4/19

FINAL AWARD

**Dr. Andrée Y. McKissick
Arbitrator**

APPEARANCES:

For the Petitioner:

Stephen J. Edelstein, Esquire
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For the Respondent:

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PROCEDURAL BACKGROUND

On October 14, 2019, rulings on the Motion to Suppress and Motion for Summary Decision issued, involving tenure charges filed by Appellant Roselle Board of Education (“the Board”) against one of its teachers, Respondent Lovena Batts. The Board sought interim relief to reverse rulings made by this Arbitrator. The Board appealed from Chancery Division orders that denied its request for a preliminary injunction and then

dismissed its complaint without prejudice. Finding no basis to disturb the challenged orders, the Superior Court of New Jersey, Appellate Division, affirmed this Arbitrator's rulings on August 20, 2021.

On December 29, 2021, Director Killough-Herrera authorized this Arbitrator to begin hearings on March 29, 2022, upon being reassigned this tenure dispute. Zoom Video Communications hearings were agreed upon and hearings commenced on: March 29, 2022; March 31, 2022 and April 5, 2022. Both parties had a full and fair evidentiary hearing by way of Zoom, videotelephony to socially distance from the still-raging Covid-19 virus. Post-hearing briefs were promptly mailed with a plethora of case law on or before May 27, 2022.

STATEMENT OF FACTS

Respondent Lovena Batts has been employed by the Board since 2010 as an elementary teacher. She was granted tenure in 2013. She sustained serious, life-threatening injuries, which precipitated from a severe motor vehicle accident on September 30, 2017. The record reflects that these current tenure charges are entirely based upon Respondent Batts's attendance record since September 30, 2017, the date of the car accident.

The record further reveals that the former Superintendent, Dr. James C. Baker, filed tenure charges on February 14, 2019. Members of the Board certified these charges on March 25, 2019. It is significant to note that Respondent Batts's attendance record predated the 2017-2018 school year. However, the ruling on the Motion for Summary

Decision, dated October 14, 2019, was granted by this Arbitrator. Thus, those particular charges were dismissed. The current tenure charges are comprised of two (2) counts. In essence, Count One alleges that Respondent Batts had a pattern and practice of chronic and excessive absenteeism, thus establishing her present inability to return to work and to perform any teaching duties, which constitutes incapacity. Count Two alleges that Respondent Batts engaged in pattern and practice of chronic and excessive absenteeism which constitutes: incapacity, excessive absenteeism and other just cause which warrants termination from her tenured employment with the Borough of Roselle Board of Education.

As to the precise days missed, is at issue and delineated fully in the “Positions of the Parties,” later within this Award.

ISSUES

The Board’s issues are as follows:

Whether or not the Respondent has failed to work since September 29, 2017, and has demonstrated no capacity to return to work with or without reasonable accommodations?

Whether or not the Respondent’s pattern and practice of chronic excessive absenteeism present an inability to return to work to perform any teaching duties constitutes incapacity requiring termination?

Whether or not the Respondent’s habitual and chronic absenteeism and failure to provide medical documentation demonstrates her inability to work?

Whether or not the Respondent’s pattern and practice of chronic absenteeism and inability to return to work and perform her teaching duties constitutes other just cause requiring termination?

The Union's sole issue is:

Whether or not Respondent Batts is guilty of conduct unbecoming a tenured teacher, and, if so, what penalty, if any, is appropriate?

PERTINENT PROVISIONS

NJSA 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 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 person appointed by him to act in his behalf, after a written charge or charges, of 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.

TENURE CHARGES

[See Exhibit 1A]

COUNT ONE: INCAPACITY

- 29. Despite the Board's reasonable expectation that Respondent regularly attend work, Respondent has failed to work since**

September 29, 2017, and demonstrates no present capacity to return to work with or without reasonable accommodation.

30. Notwithstanding the well-defined duties and responsibilities of a teacher as defined under New Jersey Statute and Regulation, District Policy, and Job Description, Respondent's pattern and practice of chronic and excessive absenteeism and her present inability to return to work to perform any teaching duties constitute incapacity requiring her termination.

CHARGE TWO: OTHER JUST CAUSE

31. The allegations set forth in Paragraphs 1 through 30 are repeated and realleged as if set forth at length herein.
32. Respondent's habitual and chronic absenteeism, failure to provide the District with medical documentation substantiating her need for leave and her present inability to return to work (with or without reasonable accommodation), and perform any teaching duties constitutes a consistent, long-term, and unimproved course of conduct which has interfered with the orderly operation of the district, has disrupted the continuity of instruction, and has adversely impacted the students and the District.
33. Notwithstanding the well-defined duties and responsibilities of a teacher as defined under New Jersey Statute and Regulation, District Policy, and Job Description, Respondent's pattern and practice of chronic and excessive absenteeism and inability to return to work to perform any teaching duties constitutes other just cause requiring her termination.

By virtue of the foregoing acts and omissions, Lovena Batts engaged in a pattern and practice of chronic and excessive absenteeism that constitutes Incapacity, Excessive Absenteeism, and Other Just Cause that warrants her termination from her tenured employment with the Borough of Roselle Board of Education.

Dr. James C. Baker
Interim Superintendent of Schools

Dated: February 11, 2019

POSITIONS OF THE PARTIES

It is the Board's position that this is a straightforward case involving the Respondent not fulfilling her obligation and responsibility to come to work. That is, the Board contends that the Respondent was absent four-hundred (400) consecutive days, from October 2, 2017 until February 11, 2019. Although the Respondent may argue that

these dates included approved leave or sick days or personal illness, the Board rebuts that case law does not support this premise. Specifically, the Board points out: State-Operated School District of Jersey City v. Pellecchio, 92 NJAR 2^d (EDU) 267 disallows such entitlements. Most importantly, the Board asserts that the Respondent was charged with incapacity because she demonstrates no present capacity to return to work with or without reasonable accommodations. Thus, the Board further argues that the Respondent has demonstrated a pattern and practice of chronic and excessive absenteeism. Moreover, the Board further asserts that she demonstrates a present inability to return to work to perform any teaching duties which constitutes incapacity requiring her termination. Although the Respondent counters that Respondent Batts was absent for legitimate reasons due to medical conditions from a car accident, the Board rebuts that case law does not support this reasoning. Instead, In the Matter of Gillespie, EDU 20524-15 (2016) clearly asserts that chronic absenteeism constitutes both incapacity and unbecoming conduct within the meaning of NJSA 18A-6-10 to warrant dismissal from employment, even for legitimate reasons of personal sickness.

In response to the Respondent's argument that Respondent Batts was not warned of the upcoming tenure charges or the charge of absenteeism, the Board counters that case law does not support that rationale. Specifically, in Elizabeth Board of Education v. Segall No. EDU 1077-00 (February 25, 2000) held that significant absences that are characterized as chronic and excessive absenteeism need not require any warning to the Respondent, the Board asserts. Moreover, in our current case, Respondent Batts was taken off the payroll in November 2017 and lost her health insurance plan in December 2017. Surely, the Board asserts, constitutes a warning that there is a major problem afoot.

In response to Respondent Batts claiming to assert the right to reasonable accommodation, the Board retorts that she has no standing to make such an assertion because she is currently absent and is characterized as chronically absent from her job. The Board asserts that case law supports this analysis, see In the Matter of the Tenure Hearing of Jeanne Cook, EDU 8568-02 (January 26, 2005). In that case, she was not able to assert her request for reasonable accommodation because she was a teacher who was unable to be present to teach. Also see Svarnas v. AT&T Communications, 326 NJ Super. 59 (App. Div. 1999) in regards to a denial of accommodations. Ms. Cook was also charged with excessive absenteeism, tardiness, and unbecoming conduct. Moreover, Respondent Batts claims to have requested reasonable accommodation, yet the Board asserts, she failed to put it in writing. Nonetheless, such a request would not have been considered because of her current absenteeism.

In response to Respondent's assertion of Respondent Batts's ability, performance and accolades as a teacher, the Board retorts that case law again does not support her assertions against charges of incapacity and chronic absenteeism. In State-Operated School District of Jersey City v. Pellecchio, Respondent Pellecchio supported his case with satisfactory evaluations as well as no prior history of discipline, but both issues failed in the consideration of the charges of excessive absences and incapacity. Also see In the Matter of the Tenure Hearing of Jerome Kasprowiez, 93 NJAR 2nd 147 (NJ Adm., January 31, 1993), where he was described as a "very fine teacher" and his evaluations were "excellent," yet he was still terminated for incapacity and excessive absenteeism.

In regards to the issues discussed at the July 23, 2018 meeting, where Respondent Batts and her husband were present along with Mr. Huk, the Association Representative,

and Mr. Roth, the District Representative, Respondent Batts asserts that she was not told nor warned of the upcoming tenure charges by Mr. Roth. The Board questions the credibility of this assertion. After Mr. Roth reviewed her attendance reports for 2017-2018 and beyond, the Boards asserts, Mr. Roth told Respondent Batts that she had used her leave time. Most importantly, the Board further contends, he told Respondent Batts that if she returned for the start of 2018-2019 school year that the District would treat her record as a “no harm, no foul” situation. However, the Board further points out that Mr. Roth still further testified that Respondent Batts was warned that if she did not return by September 2018, the Superintendent would file tenure charges against her. Although this did occur, the Board asserts, but the Board also adds, that Respondent Batts and her husband, who was present at this meeting, strongly deny this occurrence. Thus, the Board further asserts that Respondent Batts is not credible.

Based on all of the above, the Board requests that this Arbitrator follows the supportive cited case law and terminate Respondent Batts for incapacity and chronic absenteeism.

On the other hand, it is the Respondent’s position that the Board incorrectly determined that Respondent Batts was absent for nineteen (19) months. Instead, the Respondent asserts that the charges reflect only one hundred and sixty-eight (168) absences that Respondent Batts accumulated during the 2017-2018 year and the thirty-eight (38) absences that she utilized in September and October 2018. Thus, the Respondent further asserts that, at best, only two hundred and six (206) total absences should be considered, as reflected in the charges. However, the Respondent also points out that a substantial portion of the two hundred and six (206) absences constituted

approved leave, which should not be subject to discipline. In sum, the Respondent strongly asserts that twenty-nine (29) personal business and illness days as well as sixty (60) Family and Medical Leave Act (FMLA) days should be deducted from the two hundred and six (206) total absences. As such, the Respondent reasons that only one hundred and seventeen (117) absences may be considered for disciplinary purposes.

In response to Count One, the Respondent counters that this should be dismissed with prejudice because the Board failed to prove that Respondent Batts was incapacitated by a preponderance of evidence. Moreover, the Respondent points out that the Board conceded that her absences were due to legitimate medical reasons caused by a harrowing car accident. Most importantly, she is currently ready and able to return without limitation. This is supported by medical documentation and testimony of Dr. Worth, her physician. Thus, the Respondent further reasons that the Board has failed to prove that Respondent Batts is incapacitated.

In response to Count Two, the Respondent asserts that this charge must also be dismissed with prejudice because the Board failed to show that it sufficiently warned Respondent Batts that her absences were a cause of concern. Specifically, the Respondent contends the Board also failed to demonstrate that her absences adversely impacted the operations of the School District. In addition, the Respondent further points out that the Board failed to make any accommodations or offer Respondent Batts assistance to improve her attendance issues. That is, the Respondent further asserts that the Board failed to implement progressive discipline to avert her attendance issue in the future. In sum, the Respondent still further contends that the totality of circumstances all militates against the draconian penalty of termination.

Although the Board focuses only on the amount of chronic absenteeism, the Respondent counters that New Jersey law does not support this conclusion that only the number of absences is controlling. Stated differently, the Respondent maintains that the arbitrator should consider also the reasons for the absences and other mitigating factors. See the Board of Education of Toms River v. Marsden, OAL Docket EDU 1188-84 (August 26, 1985), among other cases.

Although the Board asserts that Respondent Batts's ability, performance and accolades as an excellent teacher cannot support charges of incapacity and chronic absenteeism, the Respondent vehemently disagrees. Instead, the Respondent rebuts this analysis and conclusion with In Re Fulcomer, 93 NJ Super. 404 (App. Div., 1967). This case requires this Arbitrator, the Respondent points out, to consider ten (10) factors before making a final determination. Some of these factors include: the longevity of one's career, one's performance, abilities, whether acts at issue were premeditated, cruel or done with intent to punish, one's disciplinary history, and any harm caused to the operations of the School District.

In response to the Board's argument that Respondent Batts's absences adversely impacted the School District's operations or continuity of instruction, the Respondent strongly argues that the Board failed to prove that her absences caused such harm. The Respondent points out that New Jersey law requires that the District must demonstrate there were particular circumstances where the absences must corroborate with the adverse impact of one's absences during the period in question and with some warning given to the employee that's one's supervisor was dissatisfied with the patterns of

absences. See In Re Greg Short, Agency Docket No. 263-9/14, Final decision (January 4, 2015), citing Tenure Hearing of White, 92 NJAR 2nd (EDU) 157.

In regards to the July 23, 2018 meeting, the purpose of this meeting was to ascertain answers regarding Respondent Batts's health insurance, FMLA leave and other work-related issues. That is, the Respondent points out that it was not disciplinary in nature. Notwithstanding Mr. Roth's testimony, Respondent Batts and her husband vehemently disagree that Mr. Roth gave a verbal warning of future tenure charges, as alleged. Instead, the Respondent contends that the Board was negligent in failing to implement progressive discipline measures before resorting to tenure charges. As to credibility, the Respondent further contends that Mr. Roth's testimony should carry no probative value as he was a sole, uncorroborated witness.

As to the appropriate penalty, the Respondent requests that the Arbitrator considers the totality of events and delays surrounding these tenure charges and the extraordinary hardship Respondent Batts endured such as: loss of her house and car during this delay. Specifically, the Respondent explains that the hearing process was on appeal for three (3) years and ultimately rejected by the Appellate Division of the Superior Court of New Jersey. The Respondent points out that the Board refused to reinstate Respondent Batts to the payroll despite an arbitration order requiring it to do so.

Lastly, there are several cases where mitigating factors required a remedy less than termination. A few of such cases are as follows: the Fulcomer case, op. cit. as well as In Re Elizabeth Corbacho-Musngi, Agency Docket. No. 314-10/14 Final decision (May 12, 2015); and In Re Leslie Ann Ramos, Agency Docket No. 261-9/14 (January 5, 2015). In summation, the Respondent reminds the Arbitrator that Respondent Batts is not

only a long-term employee for more than twenty (20) years and without a disciplinary record and with stellar reviews but also her supervisors were extraordinarily pleased with her performance and her absences caused no harm to the School District. For all of the above reasons, the Respondent requests a lesser penalty than termination. Moreover, the Respondent further requests that the Board be ordered to reimburse her in full the compensation and emoluments withheld from her during the pendency of this proceeding. Specifically, the Respondent points out that this should consist of reimbursement of her full salary from the date she was first authorized to return to work on September 1, 2019.

FINDINGS AND DISCUSSION

After a careful review of the record in its entirety and having had an opportunity to weigh and evaluate the testimony of witnesses, this Arbitrator finds that Count One and Count Two of these tenure charges should be dismissed with prejudice for the following reasons.

First, Count One, which encompassed Respondent Batts's chronic and excessive absenteeism as well as her inability to return to work to perform any teaching duties constitutes incapacity requiring termination has been successfully challenged from the evidence presented.

In the Tenure Hearing of White, 92 NJAR 2nd (EDU) 157 at 161 sets forth the three (3) elements of proof which are requisites for termination. That is, the Board must prove that there was consideration of: "1) the particular circumstances of the absences and not merely the number of absences, 2) 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 3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences.”

Applying this prevailing standard of elements to this tenure case, the Respondent has shown the nexus between the car accident, September 30, 2017, and her subsequent absences through Dr. Worth, her physician’s medical documentation, as well as his letter of clearance (Respondent’s Exhibit M). In addition, Dr. Worth corroborated these records with his concurrent testimony in TR-2 at 150-153.

As to the impact of those absences, the Board presented no showing as to this subject matter. Instead, Vice President Bullock, Respondent Batts’s direct supervisor at the middle school testified that she was a “superior teacher” (TR-2 at 167). She went to great lengths to testify that Respondent Batts was named Teacher of the Year at Polk Elementary School and by the [N]AACP in Roselle (TR-2 at 169). These same sentiments were expressed for Respondent Batts by her direct supervisor, Principal Harry at Polk Elementary School, where she states in a text message, “I am definitely trying to keep your position here at Polk. Miss you and love you always” (see TR-2 at 262). In sum, there was no dissatisfaction shown by either supervisor against Respondent Batts.

As to the requirement that a warning be given to the Respondent Batts that her supervisors were “dissatisfied” with her pattern of absences, the record reflects just the opposite, as noted above.

Clearly, the Board failed as to the showing of a negative or adverse impact of Respondent Batts's absences as well as the third element, requiring a warning to an employee that one's supervisors were dissatisfied with Respondent Batts's absences.

Second, Count Two, which encompassed Respondent Batts's chronic and excessive absenteeism that constitutes incapacity and "other just cause" that warrants termination, Respondent Batts, herself, testified that she was currently ready and able to return to her work. Specifically, she testified "I'm ready and willing and I want to get back to work" (see TR-2 at 329). This is what she testified to in concurrence with Dr. Worth and his medical documentation alluded to earlier. Clearly, the charge of incapacity must be dismissed with prejudice.

As to "conduct unbecoming," a tenured teacher which could fall within the ambit of "other just cause," that too must fail. That charge cannot be supported alone by hearsay. Stated differently, legally competent evidence to support supplemental hearsay must be present to be actionable. Thus, the hearsay evidence of emails or statements of witnesses alone cannot stand (see NJAC, 1: 1-15.5(b) and State of Weston, 60 NJ 36 (1972)).

Third, as to what specific dates are actionable, the record reflects that Respondent Batts was approved for coverage by the Family and Medical Leave Act (FMLA), amounting to twelve (12) weeks by Mr. Roth, the Board's sole witness, on October 2, 2017 (see TR-1 at 94-96 and Board's Exhibit 13). However, the FMLA approved leave was not reflected in the Board's Exhibit 10, her attendance record. This omission was confirmed by Mr. Roth's testimony at our hearing (see TR-1 at 100-101). Mr. Roth also confirmed that the Collective Bargaining Agreement (CBA) additionally allows for

“other leaves of absences without pay,” but such leaves are optional and discretionary (see TR-1 at 118-119).

Based on the tenure charges, it would seem that two hundred and six (206) total absences should only be subject to discipline. Specifically, Respondent Batts accumulated one hundred and sixty-eight (168) absences during the 2017-2018 school year with thirty-eight (38) absences from September and October 2018. Nonetheless, the record reflects that a sizable portion of the two hundred and six (206) absences were comprised of approved leave, for which Respondent Batts should not be disciplined for such as: the usage of two (2) personal business days and twelve (12) personal illness days in 2017-2018 and twelve (12) weeks of Family and Medical Leave Act (FMLA), using sixty (60) work days. Based upon 29 CFR §825.216(b), the Board cannot institute disciplinary action for any absences within the ambit of FMLA. The bottom line is: that if, twenty-nine (29) personal business and illness days plus sixty (60) FMLA days are deducted from two hundred and six (206) total absences, as delineated from the charges, then there are one hundred and seventeen (117) absences, the residue which must be considered for disciplinary purposes.

Fourth, as to the July 23, 2018 meeting, the record reflects that the purpose of this meeting was not disciplinary in nature. Instead, the meeting was to further discuss the health insurance, FMLA leave and other work-related matters, but initiated by Respondent Batts (see TR-1 at 53). Most importantly, Mr. Roth, the Board’s labor counsel, claims to have warned Respondent Batts of upcoming tenure charges. However, she denies that such a warning ever occurred. Respondent Batts, her husband, who was also present at this meeting, also denies that this warning was given as well. On cross-

examination, Mr. Roth admits that he never consulted Principal Harry to inquire about Respondent Batts's performance or the possible dissatisfaction with Respondent Batts before authorizing tenure charges (see TR-1 at 82-83). Although the Board could have authorized an independent medical exam for Respondent Batts during this period, Mr. Roth admits this was not done (see TR-1 at 85-90). In addition, Mr. Roth also confirms that the Collective Bargaining Agreement (CBA) allows for "other leaves of absences without pay," but they were optional and discretionary (see TR-1 at 118-119). On the other hand, Respondent Batts explains that for two (2) years between the time of her car accident, September 30, 2017, and April 2019, when she received tenure charges, she never had any communications from the Board. That is, the record reflects that after a plethora of letters, emails and text messages that she sent, there was no response until she received tenure charges, April 2019 (see Respondent's exhibits DD, E, F, GN, O, P, Q, R, S, T, W, X, Y, Z and AA). Based on the totality of events and testimony from both Mr. Roth and Respondent Batts, this Arbitrator finds that Respondent Batts to be credible regarding these events.

Fifth, In Re Fulcomer, 93 NJ Super, 404 App. Div. 1967, this Arbitrator finds this case to be pivotal. It requires this Arbitrator to consider a list of varied factors before making a determination of the appropriate penalty in tenure cases. There are approximately ten (10) operative factors that are particularly relevant to our present case such as: the longevity of the respondent's career; the respondent's overall performance record; the respondent's abilities; whether there are acts at issue that were: premeditated, cruel or done with intent to punish; evidence of provocation, extenuating association; the likelihood of such behavior recurring; and whether or not the discipline is fair compared with other public employees.

Comparing these viable elements to our case at hand, Respondent Batts has been a tenured teacher for more than twenty (20) years with a stellar record. In addition, she has no disciplinary record (see TR-2 at 222). Every year, she was observed at least three (3) times plus evaluated twice every year (see TR-2 at 224).

As to the inquiry if her absences harmed the School District, the record reflects excellent recommendations by both of her supervisors, as noted earlier. As to the occurrences of absenteeism being a continuing factor for the future, the record reflects that this is a singular but catastrophic car accident, that is unlikely to ever occur again.

As to whether or not such discipline is fair under the circumstances presented, the record is clear that the Board never responded to any of Respondent Batts's inquiries for two (2) years until April 2019, when it issued the tenure charges. This reflects negligence of the Board by its omission to be responsive to Respondent Batts's many inquiries.

As to the inquiry regarding the last factor regarding the intent to punish, the Respondent has pointed out the three (3) year appeal which caused a delay in this case regarding the procedural issues set forth earlier in the award. As to the result of this three-year procedural delay, Respondent Batts testified that she lost her home as well as two (2) cars (see TR-2 at 326-327). During this time, she was not offered progressive discipline, nor accommodations, as she requested by email. Based upon the totality of events, significant harm has been established to Respondent Batts by these delineated events.

Sixth, the burden of proof is on the Board to prove by a preponderance of evidence the three (3) elements required for termination, as delineated in the White case, op. cit., noted earlier. In sum, 1) the particular circumstances of the absences, not just the sheer number of absences; 2) the impact of those absences on the School District; 3) the need for a warning to an employee that a supervisor was dissatisfied with the pattern of absences, all three (3) requisites must be met for a termination to be viable. It is significant to note that two (2) of the Board's own cited cases also utilize White's analysis of the three (3) viable elements in accessing the appropriate penalty for termination (see In the Matter of the Tenure Hearing of Jeanne Cook School, District of the Township of Old Bridge County, OAL, Docket No. EDU 8568-02 Agency Docket No. 374-11/02 (January 26, 2005); and In the Matter of the Tenure Hearing of Christine Gillespie State-Operated School District of the City of Newark, Essex County, OAL Docket Nos. EDU 20524-15, EDU 9195-11 (On Remand) Agency Docket No. 67-2/03 (January 9, 2016)).

As applied earlier to our current case, these concurrent requirements were not met for the reasons delineated earlier.

As for case law, the Board asserts that their cited cases must be followed without exception. That is, the Board maintains the general rule of termination must be strictly adhered to in all cases. However, case law also embraces the totality of circumstances approach which is tailor-made for our current tenure dispute, as personified by Fulcomer op. cit., cited earlier and analyzed. Specifically, that requires analyzing and applying the approximately ten (10) factors. Other case law also embraces this totality of circumstances approach, which allows the analysis of mitigating factors, such as: In Re

Greg Short, Agency Docket No. 263-9/14 Final Decision (January 4, 2015); Board of Education of Toms River v. Marsden OAL, Docket EDU 1188-84 (August 26, 1985); In Re Elizabeth Corbacho-Musngi, Agency Docket, No. 314-10/14 Final Decision (May 12, 2015); and In Re Leslie Ann Ramos, Agency Docket No. 261-9/14 (January 5, 2015).

Seventh, thus based upon case law earlier cited which embraces the totality of circumstances approach to tenure cases, this Arbitrator finds that Respondent Batts with more than twenty (20) years with an exemplary performance record and no disciplinary record should be reinstated to her former position as a tenured teacher.

The record reflects that she is ready and able to return without accommodations and buttressed by the full clearance of her physician and supported by viable medical documentation.

In addition, this Arbitrator orders the Board to reimburse her in full with compensation and emoluments withheld during the pendency of this appeal process detailed earlier. Lastly, Respondent Batts's reimbursement shall include her full salary from the date she was authorized to return to work on September 1, 2019 for reasons stated herein.

AWARD

**Respondent Batts is hereby reinstated.
Count One shall be dismissed with
prejudice as the Board failed to prove**

that she was incapacitated by a preponderance of evidence, as required. Count Two shall also be dismissed with prejudice as the Board failed to present a showing that her absences adversely impacted the School District, as required. Moreover, there was a showing of complete satisfaction with Respondent Batts's performance. Accordingly, the Board is ordered to reimburse Respondent Lovena Batts her full compensation and emoluments withheld from her during the pendency of this appeal process of this proceeding. In sum, her reimbursement shall include her full salary from the date she was first authorized to return to work on September 1, 2019.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE OF AWARD: June 15, 2022



ARBITRATOR