48-23

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of	:	Agency Docket No. 101-6/21
SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY	:	Opinion & Award
Petitioner,	:	
-and-	:	
ROTIMI OWOH,	:	
Respondent.	:	

APPEARANCES:

FOR THE PETITIONER:
ANTONELLI KANTOR RIVERA
Ramon E. Rivera, Esq.
Madeline P. Hicks, Esq.

FOR THE RESPONDENT:
THE LAW OFFICE OF ROTIMI OWOH
Rotimi A. Owoh , Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

PRELIMINARY STATEMENT

This matter comes before me on the tenure charges ("Tenure Charges") certified on or about June 24, 2021 by the School District of the City of East Orange, Essex County (the "District" or "Petitioner") against Rotimi Owoh ("Respondent"), a tenured teacher. The Tenure Charges allege that Respondent exhibited excessive absenteeism during the 2018-2019, 2019-2020 and 2020-2021 school years, which, together with other related conduct, amounts to Incapacity, Conduct Unbecoming, Insubordination, Neglect of Duty and Other Just Cause pursuant to N.J.S.A. 18A:6-10, 6-11, 6-16, 6-17.1 and N.J.A.C 6A:3-5.1. (Arbitrator Exhibit 1.)

In accordance with N.J.S.A. 18A:6-16, on July 28, 2021, I was appointed as the arbitrator to hear and decide this matter.[1]

A hearing on the charges against Respondent was conducted on December 13, 2022, by videoconference.[2] Respondent did not appear at the hearing despite having been

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[1] Following a pre-hearing conference, the District filed a motion for summary decision, asserting Respondent's failure to comply with the procedures governing the filing of his answer, N.J.A.C. 6A:3-5.3, compelled a determination that the Tenure Charges had been admitted and, in turn, that Respondent's dismissal was warranted. On November 2, 2021, after considering the parties' respective arguments on the matter, I denied the motion, finding insufficient support for

[2] It was necessary for the hearing to proceed by videoconference, so as to avoid further delay, as I tested positive for COVID-19 just prior to December 13, 2022, thereby precluding my conducting an in-person proceeding. By December 2022, the hearing in this matter had been delayed for more than a year. Hearing dates in December 2021 and January 2022 had to be adjourned due to the unavailability of meeting space and a fire at Respondent's home. At Respondent's request, I subsequently granted multiple adjournments of scheduled hearing days in February, March and April 2022, based upon his representation that Petitioner's failure to respond to his November 4, 2021 written requests for records pursuant to the New Jersey Open Meetings Act ("OPMA") and the New Jersey Open Public Records Act ("OPRA") was adversely effecting his ability to prepare properly for the hearing in this matter. On April 5, 2022, I granted Respondent's motion to stay this proceeding, based upon his having commenced an action in New Jersey Superior Court, Essex County, Docket No. L 001745-22, challenging Petitioner's failure to comply with his OPMA request ("OPMA Action"). On July 25, 2022, Respondent dismissed the OPMA Action and renewed a July 7, 2022 motion to stay this proceeding based upon his having filed an action against Petitioner in New Jersey Superior Court, Essex County, Docket No. L 001930-22, alleging discrimination and retaliation in violation of the New Jersey Law Against Discrimination ("NJLAD") and other statutes. ("LAD Action"). By interim Opinion and Order, dated August 17, 2022, I denied that motion. Thereafter, by notice dated September 23, 2022, I scheduled hearing dates for November 1 and 9, 2022. On October 31, 2022, at Respondent's request, the November 1, 2022 hearing was adjourned, due to health reasons. In granting that adjournment, I notified Respondent that the matter would be marked peremptory as to him going forward, such that no further adjournments would be granted absent extraordinary and compelling circumstances.

given due notice of the scheduled date and time and being previously informed that with the granting of prior adjournments at his request, including most recently for the November 1, 2022 hearing date, this matter would be marked peremptory as to him going forward.[3]

Upon the conclusion of the December 13, 2022 hearing day, the District elected to close by submitting a post-hearing brief.[4] With the receipt of the District's brief on January 20, 2023, I declared the hearing record closed as of that date.

BACKGROUND

Respondent's employment by the District as a teacher dates to September 1, 2001. (Arbitrator Exhibit 1; District Exhibit 1.) Most recently, he was assigned to the Dionne Warwick Institute, an elementary school. He has no record of prior tenure charges.

The following day, November 1, 2022, Respondent gave notice of his unavailability on the next scheduled hearing date, November 9, 2022, due to a court appearance in another matter, as to which he had notice since September 15, 2022. Citing Respondent's delay in raising this issue and concluding that he had not presented extraordinary and compelling circumstances to warrant granting a further adjournment, by notice dated November 1, 2022, I declined to do so and advised that the November 9, 2022 hearing would proceed as scheduled. On that date, Respondent did not appear for the hearing. After recessing for an hour, Petitioner, in view of Respondent's absence, elected to defer presentation of its case until the next scheduled hearing day, December 13, 2022, and Respondent was so notified.

[3] I issued notice of the December 13, 2022 hearing date on November 3, 2022. Respondent had previously confirmed his availability on that day. From Respondent's communications, it appears his failure to attend the December 13, 2022 hearing stems from a motion for summary decision that he filed on November 4, 2022. By that motion, he requested a dismissal of the instant Tenure Charges, based upon an entry of default as to the District in the LAD Action. Although I informed him in writing that the motion would be addressed at the December 13, 2022 hearing, he replied that holding the hearing would defeat the purpose of the default and his attendance at the hearing would constitute implied consent to the District re-litigating the issues otherwise foreclosed by the default. At the December 13 2022 hearing, after giving due consideration to the parties' respective arguments, I ruled that the motion would be taken under advisement and addressed in my ultimate decision in this matter. I directed the parties to advise me of any developments in the LAD Action on which the motion was based. I have since learned that Respondent's motion has been mooted, as the Court in the LAD Action granted the District's motion to vacate the default. For this reason, Respondent's motion for a summary decision dismissing the Tenure Charges is denied.

[4] By correspondence dated December 13, 2022, I informed Respondent of what transpired at the hearing that day, including: (1) Respondent's motion for summary decision was taken under advisement and would be addressed in the ultimate decision in this case; (2) Petitioner commenced and concluded the presentation of its case in chief, which consisted of the testimony of Marissa McKenzie and 30 District Exhibits; (3) the Tenure Charges and Respondent's Answer were received as Arbitrator Exhibits 1 and 2, respectively; and (4) Petitioner had been granted until January 20, 2023 to submit its post-hearing brief, upon receipt of which the record would be closed. Since then, Respondent has not requested an opportunity to submit evidence or file a post-hearing brief.

The Tenure Charges

The charges against Respondent consist of the following:

CHARGE ONE: INCAPACITY (EXCESSIVE ABSENTEEISM)

CHARGE TWO: CONDUCT UNBECOMING (ABSENCE WITHOUT LEAVE)

CHARGE THREE: INSUBORDINATION

CHARGE FOUR: NEGLECT OF DUTY

CHARGE FIVE: OTHER JUST CAUSE

(Arbitrator Exhibit 1.)[5]

The essential facts concerning these charges can be stated as follows:

District's Attendance Policy

Marissa McKenzie, the District's Business Administrator, testified that the District maintains an attendance policy (the "Policy") that provides guidance to staff regarding the District's expectations as too time and attendance and the consequences of failing to satisfy them. (District Exhibit 2.)[6]

In particular, the Policy states, in relevant part:

> The East Orange Board of Education recognizes that an effective educational system is one in which all members, whenever possible, report for duty each and every working day. Therefore, to foster and maximize staff attendance at the 95 percent level, an attendance improvement program shall be developed and implemented.
>
> The primary purpose of the attendance program shall be to improve and maintain the quality of education. Improved attendance will increase the level of staff contact time and ensure the continuity of learning by reducing to a minimum the interruption of services provided students by full time staff.

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[5] The Tenure Charges include a detailed statement identifying the allegations supporting each individual charge. (Arbitrator Exhibit 1.)

[6] From June 2016 – April 2022, McKenzie served as the District's Director Labor Relations and Employee Services.

> The regular and prompt attendance of teaching 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 the Board of Education considers attendance an important component of staff member's job performance.
>
> A teaching 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 salary increments, dismissal and/or certification of tenure charges.

(District Exhibit 2.)

Respondent's Attendance and Leave of Absence Record

McKenzie testified that throughout Respondent's employment with the District, he demonstrated a pattern of excessive absenteeism.

2018-2019 School Year. During the 2018-2019 school year, she said, his attendance deteriorated further. In particular, she noted, he was absent over fifteen days, which involved a combination of personal leave and personal illness leave. (District Exhibit 3.)

On February 28, 2019, Principal Flore-Nadeige Lovett issued Respondent a notice, advising that as of that time, he had been absent a total of 7.5 days and tardy 19 times. She expressed concern as to these statistics and reminded Respondent, "regular attendance is necessary to insure a smooth running educational program." She also scheduled for him to meet with Assistant Principal Kevin Williams to discuss this matter. (District Exhibit 4.)

2019-2020 School Year. During the following school year, 2019-2020, McKenzie related, Respondent, beginning September 16, 2019 and continuing for the balance of the year, was unable to report for work due to health reasons. During the course of the year,

she said, he supplied doctor's statements confirming his medical condition, some of which identified return work dates that were subsequently revised. (District Exhibits 5 -19.)

As of December 6, 2019, she noted, he applied and was subsequently approved for a Family or Medical Leave of Absence ("FMLA"). (District Exhibits 8-11.) The District extended his leave several times during the course of the year, ultimately continuing it through balance of the term (i.e., June 30, 2020). (District Exhibits 11, 13-14, 17-18.)

2020-2021 School Year. She continued that as of June 24, 2020, Respondent had submitted notice of his intent to return to work for the upcoming school year, but had failed to provide medical clearance. On June 24, 2020, a member of her staff, Jennifer Parrish emailed Respondent, advising him to provide his return to work clearance by no later than July 15, 2020 (District Exhibit 20.)

After receiving documentation from Respondent regarding a possible surgery, she noted, Parish emailed him again on June 29, 2020 to request his medical return to work clearance. In doing so, she extended the deadline for submission until August 14, 2020. (District Exhibit 20.)

On August 13, 2020, she said, Owoh advised Parish by email that he would not be able to meet the August 14, 2022 deadline due to an upcoming medical procedure. Parish, in turn, replied by directing Respondent to keep her posted as to his return to work status. (District Exhibit 20.)

On August 27, 2020, she recounted, Parish sent a follow up email to Respondent, requesting that he advise as to his return to work status and provide appropriate medical documentation to support his continued absence if he would not be returning to work.

Respondent answered that same day by informing Parish his surgery had been delayed, pending clearance from his primary care physician. (District Exhibit 20.)

In response, she stated, Parish, on August 27, 2002, advised:

> As you know, we require a medical note that indicates an estimated return to work date for staffing purposes. Due to your signed contract and intent to return we are trying to prepare accordingly but need to know how long you are slated to be out of work since you've been out of work since last September and are no longer protected by FMLA. Please forward the attached medical certification form after your appointment tomorrow.

(District Exhibit 20.)

She reported that on or about August 31, 2020, Parish received correspondence from Ellen Land, APN, advising that she had seen Respondent and was excusing him from work for medical reasons through October 2, 2020. (District Exhibit 21.) By subsequent correspondence, Land extended this period through November 2, 2020. (District Exhibit 22.)

Respondent, she related, emailed Parish on November 2, 2022, stating he would not be able to return to work the next day. As explanation, he cited an upcoming medical review that would determine whether he was cleared for a necessary surgery. (District Exhibit 23.)

Parish, she noted, subsequently received further correspondence from Land, reporting that Respondent was undergoing additional medical follow up, and requesting that he be excused from work through December 2, 2020. Land also stated that if medical clearance is obtained, Respondent intends to have surgery, which would necessitate his being off work through December 23, 2020. (District Exhibit 24.)

By letter dated November 13, 2022, she recounted, Parish informed Respondent that he had exhausted his applicable paid leave accruals as of October 28, 2020, and thus, had

transitioned to unpaid status. Parish advised further that his last paycheck from which his employee share of his group health insurance premiums were deducted was mailed on October 30, 2020. Going forward, Parish explained, he would responsible for making direct payment of the employee portion of the group health insurance premiums until his return to work. (District Exhibit 25.)

On January 8, 2021, she reported, Parish emailed Respondent requesting an update on his status. In doing so, Parish noted that the last medical documentation supplied excused him from work through December 2, 2020. (District Exhibit 26.) Respondent replied by email dated January 15, 2021, stating that due to uncertainty as to his health insurance coverage, he could not undergo surgery, which, in turn, prevented him from providing a medical return to work certification. (District Exhibit 26.)[7]

In response, on January 19, 2021, Parish instructed Respondent to provide a medical note to support his absence from December 3, 2020 to the present. She also provided him with a contact at the District to consult regarding the status of his health insurance. (District 26.) In a separate email, she advised Respondent that if his return to work would be subject to physical limitations, he would need to submit medical note identifying them, so the District could assess if they are feasible. (District 26.)

Replying to Parish's January 19, 2021 email, Respondent referenced his own January 15, 2021 email, which mentioned Land's prior note, but did not contain the information requested.

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[7] Citing Parish's November 13, 2020 letter, he also advised being compelled to seek other employment, as he was now without pay or health insurance coverage from the District. In another email to Parish on January 15, 202, he stated, "I had no choice but to find a job that I can do with my medical condition 'as is.' Hopefully, I will get health insurance to finally get the surgery that I need to recover fully without 'limitations.'" In a subsequent email, Parish reminded Respondent that he remained a District employee on a personal illness leave. However, with his being in unpaid status, she noted, he had no wages from which to deduct his employee share of the group health insurance premium, and therefore, must make direct payment of that sum. (District Exhibit 26.)

McKenzie testified that with Respondent having failed to supply the requested medical documentation, she wrote him on April 26, 2021 to address his situation. In particular, her letter noted: (1) he has been out of work since September 16, 2019; (2) the District had approved him for FMLA leave and subsequent health leave from September 16, 2019 – June 30, 2020; (3) despite submitting an intent to return to work form, identifying a September 1, 2020 return date, he has yet to return or report for clearance; (4) the last medical documentation supplied supported his absence through December 2, 2020; and (5) Parish had emailed him on January 8, 15 and 19, 2021 requesting updated medical information to support his continued absence to no avail. (District Exhibit 27.)

In view of these circumstances, her letter stated:

> This letter will serve as a final request for medical information to support your absence from December 3, 2020 to present. I am enclosing a medical certification form for your convenience. Be advised that the form must be completed in its entirety and must include a projected return to work date.
>
> Please forward the requested information no later than **Friday, May 14, 2021**.
>
> Be advised that failure to respond by the due date may result in a determination that you have abandoned your position. You will be considered absent without leave effective December 3, 2020 and subject to discipline.

(District Exhibit 27 (emphasis in original).)

Having received no reply from Respondent as of May 14, 2021, McKenzie confirmed notifying him by letter, dated May 17, 2021, that due to his failure to provide the requested information, after being afforded extended time to do so, the District had determined that he has abandoned his position. Her letter stated further that the District would pursue tenure charges against him for insubordination, job abandonment and any other applicable charges. (District Exhibit 28.)

McKenzie averred receiving a subsequent letter from Respondent, dated May 20, 2021, stating:

> This is in response to your two letters dated 4-26-2021 and 5-17-2021. See Exhibit 1. In response to the two letters, I have attached herewith the email I sent to Ms. Parish on 1-19-2021. Who abandoned who? Thank you.

(District Exhibit 29.)

In an email response, McKenzie related advising Respondent that his correspondence did not include the information requested per her April 26, 2021 letter, which also set a May 14, 2021 deadline for submission. Respondent, in turn, replied:

> Nothing more will be sent to your school district. The days of "forced" labor is LONG gone. It was called slavery. A contract requires a good faith obligation and performance on both sides.

(District Exhibit 30.)

She stated that at no time has Respondent ever offered any explanation for his failure to provide the requested medical documentation supporting his continued absence since December 3, 2020.

Recommendation of Tenure Charges

In testifying, McKenzie affirmed her conclusion that Respondent's record of absenteeism, his extended period of absence during the 2019-2020 and 2020-2021 school years, excluding his FMLA leave, and his failure to provide medical documentation supporting his absences beyond December 2, 2020 warranted bringing the instant Tenure Charges. She further averred that discharge was the appropriate penalty. In support, she said, his failure to meet the District's attendance expectations undermined the achievement of its mission to operate and maintain an effective and consistent educational

system, and his conduct, in total, constituted incapacity, conduct unbecoming, insubordination and neglect of duty.

DISCUSSION AND FINDINGS

The Issues

The issues to be decided here are:

1. Has the District satisfied its burden of substantiating the Tenure Charges that it has proffered against Respondent?

2. If so, what discipline, if any, is warranted?

Positions of the Parties

District's Position. The District submitted a detailed post-hearing brief. Its position is summarized here.

While acknowledging the restrictions on dismissing a tenured teacher per N.J.S.A. 18A:6-10, the District stresses that excessive absenteeism represents a well-recognized basis for doing so. This principle, it states, holds true even where the absences have been excused or stem from a bona fide illness or injury. *See State-Operated School District of Jersey City v. Pellecchio,* 92 N.J.A.R.2d (EDU) 267, 269-270. In addition, it notes, the teacher's satisfactory performance in the classroom provides no defense, where the absences otherwise support dismissal. *See In re Sheets,* 1979 S.L.D. 790, 798, *adopted, State Board of Education,* 1980 S.LD. 1536.

It argues that the record here demonstrates that the standards for a dismissal due to excessive absences have been satisfied. *Kelsey v. Board of Education of the City of Trenton,* EDU 5773-88 (1989). In particular, it highlights, not only was Respondent absent for more than an entire school year, he failed to communicate as to the status of his medical condition and expected return to work date, as instructed by the District.

Respondent, it stresses, was afforded generous paid leave, and after exhausting such leave, was retained in an unpaid status, subject only to providing required medical documentation regarding his continued need for leave and his anticipated return date. Yet, he failed to satisfy this requirement despite being repeatedly advised of what he needed to submit. Further, when he did communicate, he advised of finding other employment.

In addition, on the evidence presented, it argues, Respondent has been shown to have abandoned his employment with the District.

The circumstances here, it maintains, did not simply involve Respondent exhibiting a lack of responsiveness to its requests for an updated medical status. Nor is there any evidence suggesting his medical condition impeded his ability to respond. Instead, it asserts, his non-compliance represented a conscious choice on his part.

Thus, it submits, when the totality of the circumstances are judged, the only reasonable conclusion is that Respondent abandoned his position. Stated otherwise, it avers, Respondent constructively resigned his employment in January 2021, when he ceased responding to the District's requests and began employment elsewhere. *See In re Stanley, 95 N.J.A.R. 2d (EDU) 497; Westfield Board of Education v. McLear Poffenberger,* EDU 7612-97.

Finally, citing Respondent's failure to appear at the hearing in this matter and present evidence supporting his position, it contends that he has effectively waived all defenses and admitted the Tenure Charges are true and sufficient to warrant his dismissal.

Respondent's Position. As noted, Respondent did not appear at the December 13, 2022 hearing in this case, despite having received due notice and reportedly being

available to attend. Nor at any time since then, has he requested or attempted to present any evidence or argument to advance a defense to the Tenure Charges.

Therefore, the only record document setting forth Respondent's position is his Answer to the Charges. There, in denying the Charges, he states that they are pretexutal and constitute retaliation for his having engaged in protected activities under LAD, federal anti-discrimination and anti-retaliation laws and the New Jersey Conscientious Employee Protection Act. He notes that the District is fully aware of his medical justification in this matter.

His Answer also references his June 18, 2021 letter to the District's Board of Education, in which he denied all of the Charges.

In doing so, he asserted that the charges should be dismissed because: (1) he provided medical documentation to Parish until the District unilaterally terminated his health insurance coverage; (2) he decided against undergoing back surgery because his treating physician and surgeon could not guarantee that the procedure would permanently resolve his medical issues so as to allow him to return work at the District without limitation or restriction; (3) in view of his medical condition, it is medically impracticable for him to "keep up" with "twenty-one energetic and vibrant elementary school children in the classroom" and "climb up and down stairs at the Dionne Warwick Institute," which lacks an elevator; and (4) the real reason for the Tenure Charges is "actually retaliatory" because (a) he helped another teacher to file a discrimination lawsuit against the District; and (b) he also filed a discrimination complaint on his own behalf against the principal(s) at the Dionne Warwick Institute with the District's Central Office.

Finally, he stated in his June 18, 2021 letter that as of that date, he was practicing law. However, he may choose to return to teaching if he becomes medically able to do so without any limitations or restrictions.

Opinion

Certain introductory comments are appropriate here. Per the governing statute, the District is authorized to seek Respondent's dismissal for reasons of "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. It is recognized that excessive absenteeism may constitute incapacity, unbecoming conduct or just cause sufficient to warrant dismissal. See *In re Castro*, Docket No. A-4875-10 (App. Div. April 25, 2012) (citing *State Operated School District of Jersey City v. Pellechio,* 92 N.J.A.R. 2d 267 (1992)). The existence of legitimate reasons for the absences, such as long-term health issues, may not represent a defense to such a charge or preclude a finding that dismissal is warranted.

In seeking a tenured teacher's dismissal based upon charges of incapacity, unbecoming conduct or other just cause, the school district bears the burden of proof. It must establish the charged allegations by a preponderance of the relevant evidence. In addition, it must demonstrate that the gravity of substantiated offenses warrants the teacher's discharge, as opposed to some lesser disciplinary penalty.

I am not persuaded that the District should be excused of this burden due to Respondent not appearing at the December 13, 2023 hearing or offering any valid explanation for his absence. Stated otherwise, I am not convinced that Respondent's failure in that regard constitutes an admission of the Tenure Charges, so as to warrant a

summary decision of this matter. Instead, I conclude, the District should be held to its proofs.[8]

With these principles in mind, I turn to the charges presented here. After a careful and thorough review of the evidence and arguments presented, I conclude that the District has substantiated Charge Nos. 1 - 3. However, I find that Charge Nos. 4 and 5 have not been sustained and must be dismissed. My reasons for these determinations follow.

Charge No. 1: Incapacity -- Excessive Absenteeism

In seeking the termination of a tenured teacher on grounds of incapacity/excessive absenteeism, the District must show: (1) it considered the number of days and the particular circumstances of the absences; (2) the impact the absences had on the District; and (3) the appropriate warning was given. *In re Castro, supra,* at 13 (citing *In re White,* 92 N.J.A.R. 2d (EDU) 157 (1991)). On the evidence presented, I am satisfied that each prong of this 3-part standard has been satisfied.

First, as McKenzie's testimony and the documentary evidence reflects, the District's assessment of Respondent's protracted absence, which spanned nearly the entirety of two school years, addressed both the number of days and the particular circumstances involved. Indeed, the record substantiates that the Department gave due consideration to Respondent's medical conditions, which precluded him from performing his teaching duties. It did so by reviewing his supporting medical documentation and approving/extending his leave through and including December 2, 2020. Further, it has

[8] As referenced above, Respondent, by his Answer, asserts that the instant Tenure Charges constitute retaliation for his protected activities under LAD and other statutes. I find this claim of pretext represents an affirmative defense for which Respondent carries the burden of proof. While Respondent's Answer has been received as part of the record in this matter (i.e., Arbitrator Exhibit 2), his stated claim of retaliation represents hearsay, and, as such, cannot satisfy his evidentiary obligation. Moreover, even if his Answer could be accepted at face value, it proves inadequate. His claim of retaliation, as stated there, is entirely conclusory, with no supporting factual assertions included. Accordingly, it must be rejected and, as such, has been given no consideration in my decision here.

expressly acknowledged that the period of leave covered by the FMLA has been and should be excluded from the charge of excessive absenteeism/incapacity.

Second, McKenzie's testimony that Respondent's extended absence undermined the District's ability to fulfill its educational mission stands uncontested. In fact, it strikes me as axiomatic that such a prolonged absence by one of the District's teachers would have such effect.

Third, while the District was apparently open to extending Respondent's leave beyond December 2, 2020, it made clear that his continued absence without leave was unacceptable. Simply put, as McKenzie's testimony and the documentary evidence confirms, the District appropriately informed Respondent of both the requirements (i.e., submission of supporting medical documentation for his continued absence) and the consequences of non-compliance (i.e., a determination of job abandonment and discipline). Further, it afforded him ample time to comply, with its initial request being made on January 8, 2021 and its final request being issued on April 26, 2021, which set a May 14, 2021 deadline for compliance.

Accordingly, for all these reasons, I am satisfied that this charge has been substantiated by the weight of the credible evidence presented.

Charge Nos. 2 & 3: Conduct Unbecoming (Absence Without Leave); and Insubordination

I will address these two charges together, as they both rest upon Respondent's failure to comply with the District's instruction to provide supporting medical documentation to substantiate his need for leave beyond December 2, 2020.

In the first of these two charges, the District alleges that by failing to supply the requested medical documentation, Respondent has been absent without leave since

December 3, 2020, and, in turn, has abandoned his position with the District. On review, I am satisfied that the evidence presented substantiates these allegations,

McKenzie's testimony and the exhibits received confirm: (1) the last record that Respondent supplied from his medical practitioner specified he was medically unable to work through December 2, 2020; (2) beginning in January 2021 and continuing through April 2021, the District instructed Respondent to provide medical information supporting his continued absence beyond December 2, 2020; and (3) Respondent never supplied the requested documentation.

On the record here, I am convinced that no basis exists to excuse Respondent's failure in this regard. Simply put, there is no evidence that he was incapable of doing so, nor are there any other mitigating circumstances present.

Quite the contrary, it is plain to me that Respondent made a conscious and willful decision to disregard the District's requests for medical documentation. After allowing the District's May 14, 2021 deadline to expire, Respondent submitted copies of two January 2021 emails to Parish, neither of which included the necessary medical documentation. (District Exhibit 29.) When McKenzie informed him of this deficiency, Respondent confirmed his refusal to comply with the District's request. Indeed, in no uncertain terms, he advised McKenzie, "Nothing more will be sent to your school district." (District Exhibit 30.)

In sum, after weighing the totality of the circumstances, I am persuaded that Respondent was absent without leave, commencing December 3, 2020, and, in turn, abandoned his position with the District by willfully refusing its request to provide medical documentation

supporting his need for additional leave.[9] Accordingly, I am satisfied that on the record here, Charge No. 2 should be sustained.

Turning to Charge No. 3, it accuses Respondent of insubordination based upon these same circumstances.

It is well recognized that insubordination is defined as "the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor." *In the Matter of the Tenure Hearing of Charles Motley,* Commissioner's Decision No. 252-99 at 2-3 (August 4, 1999).

Judged by this standard, Respondent's conduct, no doubt, constitutes insubordination. The District clearly had a right to determine whether Respondent had a bona fide medical reason justifying his inability to return to work on December 2, 2020. Its ability to direct and manage its teaching staff dictates as much. As such, the requests Respondent received from McKenzie and her staff member Parish to supply such documentation represented a lawful and reasonable direction from supervision.

Therefore, I am satisfied, it follows that Respondent's willful and intentional disregard of these requests was insubordinate. In fact, by his May 20, 2021 email to McKenzie, he exhibited utter contempt for her authority, stating dismissively, "Nothing more will be sent to your school district." He then doubled down by mischaracterizing her legitimate information request as an attempt at "forced labor."

Likewise, Respondent's effort to shift blame to the Respondent is unavailing. In his January 2021 emails to Parish, Respondent posits that the District acted improperly by

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[9] Respondent's June 18, 2021 letter to the District's Board of Education further evidences his intent to abandon his position. There, he reported that he was then practicing law and would consider returning to teaching in the future only if he became medically able to do so. He also acknowledged his decision not to have the surgery needed to resolve the medical issues preventing his to return to work at the District. (Arbitrator Exhibit 2.)

discontinuing his salary and requiring him to make direct payment of his employee share of his group health insurance premium. This assertion is unsubstantiated, and in any event, cannot excuse or justify his insubordination.[10] The time honored principle of work now -- grieve later compelled him to comply with Parish and McKenzie's request for supporting medical documentation. His willful and intentional refusal to do so constituted undeniable insubordination.

Therefore, I conclude that this Charge has been sustained.

Charge No. 4: Neglect of Duty

In support of this alleged misconduct, the Charge references Respondent's January 15, 2021 email to Parish stating he had been actively seeking employment elsewhere. On the evidence presented, I am not satisfied that the District has established a neglect of duty by Respondent's actions in this regard.

With Respondent having exhausted his paid leave accrual and apparently unable to afford the required monthly employee contribution to maintain his group health insurance, he had an apparent legitimate need to secure another source of income.[11] Therefore, absent a showing that his efforts to obtain alternate employment undermined or otherwise compromised his recovery from the medical condition preventing his return to work for the District, no basis exists for me to find him guilty of a neglect of duty, as charged.

The District's evidence, I am convinced, falls short in meeting this standard.

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[10] In fact, this assertion is contradicted by the evidence presented, which shows the District acted appropriately. Its actions in this regard flowed simply from Respondent's exhaustion of his paid leave accruals. With Respondent having no paid leave available, the District properly transferred him to unpaid status, which, in turn, required him to satisfy his employee share of the group health insurance premium by direct payment, as opposed to a payroll deduction.

[11] The legitimacy of such need turns on Respondent's inability to resume his duties with the District on and after December 3, 2020. A determination to that effect is not possible here, as the record does not include any evidence as to Respondent's medical condition after that date. Respondent deprived the District of the opportunity to do so by rejecting its requests for such medical documentation.

Accordingly, I conclude that this Charge has not been sustained and must be dismissed.

Charge No. 5: Other Just Cause

The District has not offered any separate and independent allegations in support of this Charge. Instead, it repeats the allegations on which the first four Charges are based. As such, I am compelled to conclude that this Charge is duplicative, and therefore, should be dismissed.

<u>Penalty</u>

Turning to the issue of penalty, I find Respondent's proven excessive absenteeism weighs heavily in favor of dismissal, notwithstanding his substantiated medical issues through December 2, 2020. Tenure does not entitle Respondent to an indefinite medical leave. Where, as here, the absence has continued over the course of more than a full school year (after excluding FMLA leave), with no projected end date, and undermines the school district's educational mission, it has reached an obvious inflection point.

Simply put, on review, I am persuaded that the balance tips overwhelmingly in favor of Respondent's dismissal, especially when consideration is given to the other sustained charges of absence without leave/abandonment of his position and insubordination. By his willful actions in that regard, he deprived the District of the information essential to verify his medical inability to work and determine whether he should be granted further leave.

Therefore, with their being no mitigating factors present, I find Respondent's dismissal is justified.

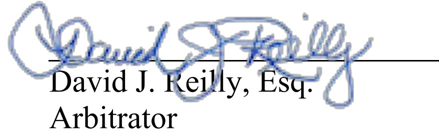
AWARD

1. Respondent is culpable of Charge Nos. 1 – 3.

2. Charge Nos. 4 and 5 have not been sustained, and therefore, are dismissed.

3. The appropriate penalty for the substantiated Charges is dismissal.

Dated: February 21, 2023

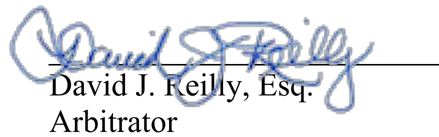


David J. Reilly, Esq.
Arbitrator

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

I, David J. Reilly, Esq., affirm that I am the individual described herein and who executed this instrument, which is my Opinion and Award.

Dated: February 21, 2023



David J. Reilly, Esq.
Arbitrator