

NEW JERSEY DEPARTMENT OF EDUCATION
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 In the Matter of The Tenure
 Charges Proffered by X
 BOARD OF EDUCATION OF THE CITY OF NEWARK X Agency Docket No.
 "Petitioner" X 222-8/22
 -against- X
 LATEEFAH HENDERSON X
 "Respondent" X
 X
 ----- X

APPEARANCES

FOR PETITIONER

OFFICES OF THE GENERAL COUNSEL
 By: Bernard Mercado, Esq.

FOR RESPONDENT

Lateefah Henderson, pro se

BEFORE: Earl R. Pfeffer, Arbitrator

BACKGROUND

In Notice of Tenure Charges of Conduct Unbecoming and Other Just Cause ("Charges"), sworn on July 29, 2022, Roger León, Superintendent of the Board of Education of the City of Newark ("Petitioner" or "the Board"), made allegations against Respondent, Lateefah Henderson, of absenteeism, unbecoming conduct and other just cause upon which the Board requested Respondent's suspension and dismissal, and Respondent was served with same on August 1, 2022. On August 26, 2022, without a response to the Charges having been submitted, Board President Dawn Haynes certified that the Board, at a meeting held on August 25, 2022, considered the Charges and supporting statement of evidence, and determined that probable cause exists to credit the evidence submitted in support of the Charges and that same is sufficient to warrant dismissal or reduction in salary, and directed that the Charges and the Board's Determination be forwarded to the Commissioner of Education.

The Charges thereafter were submitted to the Commissioner of Education on August 29, 2022, and on that same date were again served upon Respondent, as well as her Attorneys. The Board suspended Respondent effective August 30, 2022, for 120 days under N.J.S.A. 18A:6-14. Respondent's Answer thereafter, on September 9, 2022, was submitted to the Acting Commissioner through the Department's Bureau of Controversies and Disputes,

and on September 12, 2022, the Acting Commissioner found the Charges were sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by an arbitrator of Respondent's defenses and any motions, and same were referred to me for a hearing and decision.

Respondent, in her answer, disputes the Charges, alleging that the allegations of conduct unbecoming or other just cause for her termination are false, unsupported and exaggerated, as well as distortions of the truth, and fail to state of cause of action for which relief may be granted. She further alleges that the District failed to comply with its governing policies and procedures with respect to her work assignments and leave of absence requests. Respondent demands an Order dismissing the Charges in their entirety, reinstating her to active employment and repaying her for all monies lost during the period of her suspension and all other emoluments of employment.

On September 27, 2022, the Prudential Insurance Company, Disability Management Services, completed its review of Respondent's claim for Long Term disability (LTD) benefits and approved her claim effective July 18, 2022. By email to the Board on January 6, 2023, Respondent demanded she be restored to pay status on the 121st day of her suspension, pursuant to New Jersey Rev. Statutes Section 18A:6-14. The Board Responded through its Assistant Superintendent advising Respondent that

based upon her inability to work due to her disability, she was not able to be returned to work and, as she had no available sick leave, she would continue to be in unpaid status. She was further advised that upon her submission of medical documentation of her fitness for duty she would be required to report to work pending the outcome of these proceedings.

By letter dated January 19, 2023, Prudential advised the Board that Respondent's LTD claim had been approved beyond the initial 12 months, and that her benefits would continue as long as she met the definition of disability.¹ The Board asserts Respondent's LTD benefits have been awarded at least until July 2024. Respondent has not disputed that assertion, or presented evidence she has submitted to the Board medical documentation of her fitness for duty. In short, according to the record, Respondent remains in no pay status with no expected date on which she will be fit for duty.

Prior to the commencement of hearings, in correspondence

¹In an email dated January 6, 2023, Assistant Superintendent Yolanda Méndez informed Respondent of the Board's receipt of notice of her application to the State Treasurer of New Jersey for long-term disability benefits demonstrating an inability to work. She was advised her suspension without pay, accordingly, will continue, and instructed, "[i]f and when you are able to return to duty, please submit medical documentation of your fitness for duty, and you will be required to report to work pending the outcome of the tenure charges." Respondent Exhibit 13. There is no record evidence Respondent has submitted medical documentation of her fitness for duty, or otherwise is able to work as a teacher.

dated January 8, 2023, Respondent's counsel advised me that he no longer represented her and that I therefore should communicate with her directly. A previously scheduled Pre-Hearing Conference was convened via Zoom on January 9, 2023, and hearings were scheduled for March 13, 2023, and March 14, 2023. I advised Respondent I would consider a postponement of the hearings if she advised me she was retaining new counsel or was medically incapable of participating in such proceedings. Thereafter, the March 13 and March 14, 2023, hearings were held via Zoom, as was a third hearing on May 23, 2023. In the course of the proceedings the parties each were afforded full opportunity to present evidence and argument in support of their respective positions. Respondent submitted hundreds of pages of documents, which were entered into the hearing record. At the close of the May 23, 2023, hearing, the parties each were afforded opportunity to submit post-hearing briefs by June 23, 2023, and did so. The hearing record closed on July 14, 2023.

The Charges essentially track correspondence to Respondent from the Board regarding her attendance and leave history, including of recitation of the periods of leave granted to her under the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2601 et seq., since May 2021, as well as the Board's denials of her requests for additional leave after her entitlement to FMLA leave had run out. Para. 2 of the Charges references an

"Approval Notice" emailed to Respondent by the Board's Human Resources (HR) Office on May 5, 2021, notifying her that her request for FMLA leave for two (2) weeks and two (2) days from April 22, 2021, through May 7, 2021, had been granted, using her available sick days. Board Exhibit A.² The notice instructed her she must timely submit a request for an extension of leave with updated medical documentation, if she needed to remain on leave after May 7, 2021, and otherwise she must report to her work location by May 10, 2021, to avoid AWOL charges.

Respondent did, in fact, request an extension of her FMLA, and as alleged in para. 3 of the Charges she was granted additional FMLA leave from May 7, 2021, through June 25, 2021. As recited in a May 14, 2021, email notice from HR, said additional period of leave was designated as seven (7) weeks and one (1) day of FMLA leave. Board Exh. B. The notice advised Respondent she was scheduled to return to work on August 31, 2021 at her work location. She was cautioned that if she failed to report as directed, she might be subject to AWOL charges.

Thereafter, Respondent did report to her work location at the Cleveland Elementary School at the start of the 2021-2022 school year. Respondent Exh. 5. Cleveland's Principal, Yakima

²Under the FMLA, 29 U.S.C. §2612(a)(1)(D), an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee."

Jackson, assigned her to an 8th Grade special education class.³ Id. At some point during the first month of the school year, Respondent complained that the 8th grade assignment was outside her training. Jackson thereupon checked Respondent's certification, and upon learning Respondent was certified to teach K-6, she transferred Respondent, as a substitute teacher, to a 4th Grade Special Education classroom effective October 12, 2021.⁴ Board records indicate that Respondent possessed three (3) standard Certificates during the relevant period under which she was licensed as (1) a Teacher of Students with Disabilities (Standard), (2) an Elementary School Teacher in Grades K-6 (Standard) and (3) a Teacher of Culinary Arts (Standard), all as of 2012. Respondent Exh. 11.

Starting in approximately late October 2021, Respondent sent multiple emails to various persons complaining that she did not

³Jackson's surname at the time was Johnson. Because of her name change, some of the record documents refer to her as Ms. Johnson. To avoid confusion, I refer to her in this Decision as Ms. Jackson.

⁴Respondent submitted documentation, Respondent Exh. 11, indicating that in 2018 she taught a tenth grade language arts/literacy class at Malcolm X Shabazz High School under supervision of Ms. Jackson. In the Formal Observation Report, Jackson determined that Respondent's teaching was "effective." On this record, I do not conclude Jackson's incorrect belief Respondent was licensed to teach an 8th grade class was anything other than a short-lived mistake, which Jackson promptly corrected, rather than a connivance to harass, as Respondent contends. See Respondent Exh. 3; See also Respondent Opening Statement, ¶1.

possess the training or experience to teach elementary school students. She contends she is qualified "as a Culinary Arts Teacher, Inclusion Teacher and a resource teacher" where lesson plans are provided to her. Respondent Exh. 15. She complained to Jackson and to the Union that being required to teach outside her training and experience was "causing great stress." Id. She asserted that her assignment to her 4th grade class and the teaching demands placed on her constituted "harassment, intimidation and bullying." Id. She stated, "I plan on filing a complaint." Id. In a December 8, 2021, email to Jackson, the Newark Teachers Union and Superintendent León, Respondent wrote:

I am trying my best to assist the 4th grade LDS classroom. I sent an email in September stating that my training is in career and technical education as a Culinary Arts Teacher. I attended the career and technical education alternate route program. I also received training in Teacher of Students with Disabilities. I took and passed the NJ K-5 praxis exam but I do not have any educational experience nor background training in teaching elementary school students. This new position is causing great stress to me and I live in fear and anxiety of Ms. [Jackson] and her actions. I have reached out to Newark Board of Education Affirmative Actions department concerning Ms. [Jackson's] harassment, intimidation and bullying this year and last year, yet still it continues.

Respondent Exh. 15. Subsequently, she was absent from School on "occasional absences" on December 10 and December 19, 2021, and thereafter from January 19 through January 26, 2022. In connection with prior multiple instances of "occasional absences," Respondent received a disciplinary letter on January

26, 2022. Board Exh. D.⁵

The next day, Respondent was approved for FMLA leave without pay for the period January 27, 2022, through February 14, 2022. In an approval letter sent via email on February 10, 2022, HR Representative Cenobina Patterson advised Respondent her total approved leave of absence "is for two (2) weeks and two (2) days with a scheduled date to return to work on February 15, 2022." Board Exh. E.⁶ Patterson's February 10, 2022, email advised Respondent, "[u]pon the employee[']s return, please send an email to confirm so our office can update accordingly. . . All employees returning to work from an FMLA . . . leave of absence, **MUST** obtain clearance from their physicians indicating diagnosis, and clearance date you expect to return prior to your return to work date. . . . You **MUST** attach the medical clearance documentation in order to be reinstated." Board Exh. E (emph. in orig.).

As alleged in para. 8 of the Charges, Respondent, on or

⁵Documents referenced in para. 5 and para. 6 of the Charges, memorialize counseling and discipline in connection with Respondent's "occasional absences" on 9/8/2021, 9/16/2021, 9/30/2021, 10/1/2021, 10/14/2021, 10/15/2021, 10/22/2021, 11/17/2021 and 12/02/2021. See Board Exh. C (10/18/2021 notice of 10/20/2021 AIP conference "to discuss your absenteeism and the state standard) and Board Exh. D (1/26/2022 warning letter that "continued absenteeism will result in more harsh disciplinary action being taken against you.")

⁶According to Board Exhs. A, B and E, Respondent was granted twelve (12) weeks of FMLA leave between April 22, 2021, and February 14, 2022.

about February 10, 2022, asked for an extension of her FMLA leave until March 15, 2022, which was denied on February 10, 2022, because she had "exhausted" her leave time. Board Exh. F. She was instructed by Patterson, "to maintain your status as an employee you must report back to work on Tuesday, February 15, 2022." Id. (emph. in orig.). She did not return to work on February 15, 2022, as alleged in para. 9 of the Charges.

Nor did she return thereafter, instead requesting, effective February 15, 2022, a "leave of absence without pay," from February 15, 2022 through April 30, 2022, for "medical" reasons. Board Exh. G, Respondent Exh. 14. Respondent asserts she submitted medical documentation in support of her request for the "medical leave" extension. Respondent Exh. 14.

Patterson forwarded Respondent's unpaid medical leave request to Jackson and other Board personnel, including Assistant Superintendent for the East Central Ward, Dr. Shakirah Harrington, on February 16, 2022, with a request to "advise our offices if you approve or deny the personal leave request." Board Exh. H.⁷ Jackson responded, "[t]his request is denied due

⁷Under the Board's Leave of Absence Policy, Respondent Exh. 13, "[t]he Board of Education understands that there will be times when an employee will need to take time off from employment. The district further recognizes that in such circumstances, it may be in the best interest of the district and the employee that a leave of absence be considered. Therefore, it is the policy of the district to provide the opportunity to take a leave of absence without regard to the employee's race, color, national origin, ancestry, age, sex, sexual orientation,

to the hardship that the teacher's absence will have on our students' learning." Assistant Superintendent Harrington responded, "I am in agreement with that denial." Jackson's and Harrington's respective denials were forwarded to Respondent by email dated February 17, 2022. Board Exh. H.

In response to Respondent's query why her personal leave request was denied, Patterson sent her copies of Jackson's and Dr. Harrington's hardship determinations, and explained to her that "personal leave is only approved if the principal and Assistant Superintendent approved the leave. As you can see below, the leave was denied due to a hardship it will cause the school." Id.; See fn. 7, supra.

At this juncture, the Union interceded. Eugene Liss, General Counsel for the Newark Teachers Union (the "Union") on February 23, 2022, submitted on Respondent's behalf a "Reconsideration Request for Denied Illness Leave" to Patterson, with copies to Scott Carbone, Esq., Director of Labor Relations and Superintendent León. Liss noted the Union's awareness Respondent's leave extension had been "denied due to the hardship

marital status, gender identity, religion, liability for service in the Armed Forces of the United States, or atypical hereditary cellular or blood trait. . . . The district will provide leaves of absence based on valid reasons. Where applicable, and in accordance with the law, the district reserves the right to . . . deny the request for leave if the district finds that the employee's absence will cause harm to the educational program and/or operation of the district." (emph. supp.)

that her absence will have on the students' instructional learning per the District of Newark," and requested that the denial "be reconsidered and granted until April 30, 2022, as outlined in the updated report of Joseph LaBelle, MA, LAC, NBCC attached hereto." LaBelle, a psychotherapist at the Montclair Personal Development Center, submitted on Respondent's behalf two letters, on February 14, 2022, and February 23, 2022, which stated "[t]he clinical severity of [Respondent's] diagnoses hinder[s her] from: planning, preparing, and delivering lesson plans, interactions, and instruction in ways that facilitate active learning as well as care to students under her management. . . . [She is] clinically unable to perform her professional [duties]." Respondent Exh. 21.⁸

The hearing record does not indicate whether the Board directly responded to Liss or LaBelle. In any case, Respondent did not return to work from her FMLA leave that expired on February 14, 2022. Jackson, noting the "serious matter" of Respondent's "substantial number of occasional absences" from September 8, 2021, through February 23, 2022, as well as the counseling she received on October 21, 2021, and the warning letter issued on January 26, 2022, sent Respondent a February 24,

⁸Respondent redacted a substantial portion of the record copies of LaBelle's letters. Respondent Exh. 21. Her diagnoses are not part of the hearing record, although the symptoms have been described.

2022, notice of her Request for Disciplinary Action, in which she recited the Board's reservation of its right "to take action against you as a result of your absenteeism," including tenure charges, disciplinary action, loss of increment and separation of employment.⁹ Board Exh. I. Jackson advised Respondent she was forwarding that notice to Labor Relations for disciplinary action, with a copy to the Union. Id.

The Board subsequently, on April 1, 2022, sent Respondent via certified mail, a notice of Unauthorized Leave of Absence. The April 1, 2022, Notice restated that Respondent's FMLA leave had been exhausted as of February 14, 2022, and noted that she twice had applied for and been denied unpaid leaves of absence following her FMLA leave.

The Notice erroneously asserted that Respondent's absences since January 12, 2022, had been recorded as AWOL,¹⁰ and directed Respondent she "must return to work by or before April 11, 2022 with documentation covering the unauthorized dates of absence." Board Exh. J (emph. in orig.). A letter to Respondent from Jackson dated April 5, 2022, indicated the correct dates of her

⁹As noted, Respondent did not report back to work following the denial of her request for unpaid medical leave effective February 15, 2022, and had been absent from February 15, 2022, through February 23, 2022, when Jackson sent the February 24, 2022, Request for Disciplinary Action. Board Exh. I.

¹⁰This error was corrected in subsequent letters. Board Exhs. I and J.

unauthorized absences, which totaled fifty (50) from September 8, 2021, through March 30, 2022. Board Exh. K. Jackson reiterated the previous caution to Respondent that "continued absenteeism will result in a Request for major disciplinary action." Id.¹¹

Respondent, in an April 5, 2022, email to the Board's Employee Relations Officer, Jacqueline Chavis, objected to the April 1, 2022, Notice of Unauthorized Leave (Board Exh. J) and the April 5, 2022, warning from Jackson of excessive absenteeism (Board Exh. K). She stated to Chavis:

**Good Day,
This mental harassment and retaliation is causing me
additional emotional distress, pain and suffering.**

Respondent Exh. 2. Respondent copied Superintendent León, Jackson, Union Representative Michael Maillaro, Dr. Harrington, Dr. Mendez, and Scott Carbone, Esq., Director of the Board's Office of Labor and Employee Relations, among others. According to Jackson, Respondent did not file a grievance or otherwise provide particulars for her claim of discrimination beyond the apparent assertion that the April 1, 2022, attendance notice and the April 5, 2022, warning letter, with their cautions that

¹¹In addition to the 25 Absence Occurrences Jackson had listed in her February 24, 2022, Request for Disciplinary Action, Board Exh. I, she noted the following additional 25 Occurrences: 2/24/22, 2/25/22, 2/28/22, 3/1/22, 3/2/22, 3/3/22, 3/4/22, 3/7/22, 3/8/22, 3/9/22, 3/10/22, 3/11/22, 3/14/22, 3/15/22, 3/16/22, 3/17/22, 3/18/22, 3/21/22, 3/22/22, 3/23/22, 3/24/22, 3/25/22, 3/28/22, 3/29/22 and 3/30/22.

Respondent must return to work or face discipline, alone constituted harassment and retaliation.

Carbone thereafter, on April 11, 2022, offered Respondent a last chance "opportunity to return to work" by April 25, 2022, which referenced her continued absenteeism since February 15, 2022, despite written instructions to return to work that were sent on February 10 2022, and which noted her failure to return by April 11, 2022, despite a clear directive given on April 1, 2022. Board Exh. L. Carbone's April 11, 2022, last-chance notice stated,

The purpose of this letter is to give you one last opportunity to return to work. You must return to work. You must return to work by April 25, 2022 with documentation covering the unauthorized dates of absence. Failure to return to work will result in disciplinary action being taken against you up to and including termination.

Id., Respondent Exh. 16 (emph. in orig.).

Respondent replied to the April 11, 2022, last-chance letter in an April 12, 2022, email stating, "[p]lease assist me with this matter. I look forward to hearing from you." Respondent Exh. 3. Attached to the email was a 2½ page, single spaced document entitled "Harassment 4.docx." The email and the "Harassment letter" were sent to Chavis, Supt. León, Newark Mayor Baraka, Jackson, Dr. Harrington, Maillaro and Carbone, among others. Id.

The Harassment letter recites many of the contentions

Respondent makes in this proceeding, some of which I highlight: She stated, "I am being bullied, intimidated, harassed and forced into completing 'teacher responsibilities' as stated by Ms. Yakima [Jackson] in which I have no formal teaching instruction or educational training. This harassment has caused me health and anxiety issues." She asserted, "[m]y training is in Teacher of Culinary Arts," and "I have served NPS as a high school Culinary Arts Teacher and Special Education Resource English Teacher." Respondent Exh. 3.

Respondent, in addition, noted her loss in October 2020 of a close family member who also was her 9th grade student, and she stated that her physician advised her at the end of the 2020-2021 school year to take FMLA leave. She complained that during that leave Ms. Jackson and Ms. Lawson, another school administrator, "would contact me concerning teacher responsibilities." She asserted, "I was harassed and bullied by Ms. [Jackson] and Ms. Lawson." She added that she contacted the Board about that matter. Respondent Exh. 3.

The "Harassment" letter further states that Respondent was assigned at the start of the 2021-2022 school year to report to Cleveland Elementary School, where she was told to report to the 8th grade "LCS Special Education classroom," despite not having "any formal teaching instruction or training in teaching elementary school students." According to Respondent, the

equipment in the classroom did not work, and essential materials and resources "were not readily available." Respondent Exh. 3.¹² There is no record evidence Respondent filed a grievance in connection with the claims stated in the Harassment Letter.

Moreover, Respondent did not thereafter return to work, although Maillaro had advised her by email on April 5, 2022, "[t]he law only obligates the district to give the 12 weeks of FMLA per year. There is nothing in the [Americans with Disabilities Act] that contradicts that. As I told you before, you need to work with our Employee Assistance Program. Keeping your protections under Chapter 69 would be the most viable option here." Respondent Exh. 16.¹³

Respondent enlisted the support of additional persons who, on her behalf, emphasized to the Board that she was in treatment.

¹²In fact, at the time, Respondent had three (3) certificates: Teacher of Students with Disabilities, Teacher of Culinary Arts, and Elementary School teacher in Grades K-6. Jackson testified she was not aware at the time that Respondent's license did not include 8th grade students. Thus, as acknowledged in Respondent's Harassment letter, Jackson by early October 2021 promptly corrected Respondent's misassignment, first by placing her in 4th and 5th grade special education classrooms as a substitute teacher, starting October 11, 2021, and on October 22, 2021, by naming her the teacher of record for a 4th grade special education class. See Respondent Exh. 3.

¹³Under L.2011, c. 69, a May 9, 2011, amendment to the New Jersey Employer-Employee Relations Act, N.J.A.C. §34:13A-40 et.seq. ("Chapter 69"), the state created certain protections for employees of New Jersey public employers in connection with said employees' receipt of various forms of assistance, including advice and counseling, from their employer's "employee assistance program."

On April 6, 2022, Terry Livorsi a Certified Employee Assistance Professional with Union Workforce Initiative, wrote to the Board's Executive Director of Health Services, Dr. Margaret Leuze, that Respondent "submitted herself to the Newark Education Association EAP on 3/2/22 "in an effort to determine and access the appropriate behavioral health medical treatment." Respondent Exhs. 13 and 14. Livorsi asserted "Chapter 69 PL 2011 protects Ms. Henderson from any further disciplinary actions until a behavior health medical program and appropriate protocols are established for her. It is our shared goal for Ms. Henderson to return to work in a restored capacity." Id. Livorsi stated, "Ms. Henderson fully understands the gravity of the situation and is seeking help in the appropriate fashion," and added, "we estimate that she will be able to return to work as successful contributor to her position within 45-60 days." Id.¹⁴

On or about April 6, 2022, Tash Duplain, MA, AC, NCC, and Salman Abouzied, respectively a Counselor and a Psychiatric Nurse at The Counseling Center at Clark, New Jersey, wrote Leuze "to inform [her] that Ms. Lateefah Henderson was admitted to our program for a behavioral health medical condition on March 30th, 2022. Ms. Henderson's estimated length of attendance in our program is a minimum of 30 days, which will be re-evaluated on

¹⁴That assessment projected Respondent would be medically fit to return to work sometime between May 21 and June 5, 2022.

April 29th, 2022." Respondent Exhs. 13, 16.

Respondent thereafter remained in treatment with LaBelle, Respondent Exh. 12, and continued receiving services from the Counseling Center.¹⁵ Liss remained in contact with her and met with her as late as July 19, 2023. Respondent Exh. 16. Also on July 19, 2022, Maillaro wrote to Carbone:

Since last September, we have been trying to help a teacher named Lateefah Henderson. Long story short, she was hired into the district via alternate route from her previous life running her own restaurant. She's a culinary arts teacher and has seniority over at least three staff still in that position. Last year, the district moved her into a spot that was an awful fit for her, and she never had any real support from her administrator. She was certified as an elementary teacher because she took the Praxis but had no experience or training as an elementary teacher. The

¹⁵Respondent submitted into evidence, Respondent Exh. 13, an August 10, 2022, follow-up letter from the Counseling Center, this time from Counselor Adil Yurekli, LSW, and Medical Director Gregory Bundt, stating that Respondent, following her March 30, 2022, admission to its "program for a behavioral health medical condition," was re-evaluated on April 28, May 26, July 13 and August 4, 2022, and "[i]t has been determined that Ms. Henderson is recommended to remain in the program and will be re-assessed in 30 days." The Counseling Center subsequently discharged Respondent from its program, effective September 28, 2022. Id. According to the Counseling Center,

At this time Lateefah is no longer using group and/or services therapeutically. She has reported that she felt as though she is not getting any help from the facility and feeling as though nothing was getting resolved.

Id. (emph. supp.) She was recommended to transition to individual services with LaBelle. Id.

whole situation was awful and resulted in bad evaluations, a withholding of increment, and students not receiving the service they needed because she was forced into a situation that was not the right fit for anyone. She ended up relinquishing her elementary certification to the state in the last week or so.

The district still seems to have opening in culinary arts posted on the district website, and she has seniority over other culinary arts teachers. She has been in the district since 2011 doing culinary arts and later resource and inclusion for special ed students. Isn't there anything that can be done to help make her situation better?

Respondent Exh. 16.

On July 29, 2022, the instant Charges were filed.

DISCUSSION AND FINDINGS

Issues Presented

The issues presented in the case are:

1. Has the Board satisfied its burden of substantiating the Tenure Charges it has proffered against Respondent?
2. If so, what discipline, if any, is warranted?

DISCUSSION

Positions of the Parties

The Board asserts the record evidence demonstrates that Respondent, during the 2021-2022 school year was excessively absent and AWOL for several months, and ignored the multiple directives she received from the Board to return to duty.

According to the Board, Respondent knew she was out of leave time when she remained absent in the wake of directives she return to work. As such, the Board contends her unbecoming conduct was intentional and disregarded the educational needs of her students.

Moreover, the Board adds, beyond the fact Respondent was excessively absent and AWOL, and as demonstrated through her testimony and argument, remorseless about the hardship she created for her students, she also demonstrated she is incapable of returning to duty in any teaching capacity. As noted by the Board, she admits to being disabled indefinitely, and in addition has given up her Elementary School Teacher license, Respondent Exh. 16, effectively disqualifying her from being a K-6 Teacher of Students with Disabilities.

Indeed, the Board argues, Respondent did not, and cannot, dispute the allegation she was absent without leave from February 15, 2022, until the end of the 2021-2022 school year. Nor can she overcome the evidence she is not capable of returning to work, despite her insistence it was only the Board's intransigence which kept her from working. The Board stresses that Respondent admitted in her testimony she no longer is licensed to teach elementary students, and further, after the instant charges were served, she applied for and received long-term disability benefits from Prudential. The Board asks that I

infer from Respondent's failure to comply with my directive to produce a record of what she told Prudential regarding her capacity to work, that her disability precludes her return to work.

Nor, the Board adds, can Respondent fairly claim she did not know that the consequences of her excessive absenteeism and interminable AWOL would be tenure charges seeking her termination. She was expressly warned that would be the Board's recourse in multiple letters and emails that she admits she received. The Board adds that Respondent offered no evidence to refute Jackson's testimony that Respondent never contacted her or anyone else in Cleveland School administration to explain why she was AWOL.

Moreover, the Board argues, Respondent did not, and cannot, dispute Jackson's testimony that Respondent's excessive absenteeism disrupted the delivery of instruction to her students and disrupted school operations in that other staff members had to be switched from their educational duties to address Respondent's absenteeism.

According to the Board, Respondent's claim she was misassigned to teach an 8th grade class at the beginning of the school year is not justification for her absenteeism and recurring AWOL. For a few weeks early in the school year, Jackson has admitted, Respondent was assigned outside her

license, but by early October 2022, she was placed in an elementary class that was within her certification. The Board adds that a technical misidentification of dates in Carbone's April 1, 2022, letter, or in any of Jackson's letters, does not constitute lack of notice to Respondent that she had been absent on fifty (50) occasions, and had been AWOL since February 15, 2022. Those facts were well known to Respondent, the Board argues, and she has failed to demonstrate that she was confused or uncertain about her rights on account of any such minor errors, all of which were ultimately corrected.

Regarding Respondent's contention she is protected under P.L. 211, Chapter 69, the Board asserts said provision only protects public employees who obtain services from an "employee assistance program" ("EAP") which is statutorily defined as a program of assistance provided by a public employer or by a provider under contract with a public employer to provide assistance to the employer's employees. The Union Workforce Initiative from which Respondent testified she received employee assistance does not have a contract with the Board, it argues, and therefore Chapter 69 does not apply. In any case, the Board argues, Chapter 69 by its express terms "shall not be construed as preventing the public employer from taking any action which the employer is otherwise authorized to take for workplace misconduct of the employee or poor work performance, even if the misconduct or poor

performance is related to a problem for which the employee is obtaining services provided by an employee assistance program.”

The Board argues that it has met its burden to prove Respondent's inefficiency, incapacity, and conduct unbecoming by a preponderance of the credible evidence. Indeed, it asserts it has demonstrated Respondent's unbecoming conduct from its showing that her recurring absences and persistent AWOL adversely affected the efficiency and morale at the School and constituted a willful and continued disregard for administrative directives and decisions. Citing In re Truitt 2014 WL 10208983; In re Simon, 2013 WL 363175 at 29. Her misconduct is demonstrated from the fact she was put on notice her conduct was forbidden and yet even then it persisted. See In re Molokwu, 2005 WL 3234798 at 1; In re Richardson, 1998 WL 668704.

The Board acknowledges its responsibility to teachers with medical problems, but insists its overarching responsibility is to the children. Citing In re Tenure Hearing of Randi True, School District of the Twp. Of Willingboro, 2011 N.J.Agen Lexis 354 at 53 (citing In re Green, 1991 S.L.D. 1103). Indeed, the Board argues, excessive absenteeism constitutes valid grounds for the dismissal of a tenured teacher, even where the absences have been excused or caused by legitimate medical or health related issues. Citing Matter of True at 53; State Operated School Dist. of Jersey City v. Pellecchio, 92 N.J.A.R.2d (EDU) 267, 269-70,

aff'd, State Bd., 93 N.J.A.R.2d (EDU) 30.

These rulings, the Board argues, are grounded in the recognition that many students who are deprived of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of their schooling, and the conclusion therefore, that regular contact of pupils with their assigned, regular teacher is vital to this process. Citing Matter of True at 55. According to the Board, the True decision found that the impact of a teacher's absence is even more severe when special education students are involved. Id.

The Board asks that I follow the analysis of Arbitrator Reilly in Matter of Sch. Dist. of East Orange and Owoh, Agency Docket No. 101-6/21. As here, the Board argues, the elementary school teacher in Matter of Owoh demonstrated a pattern of excessive absenteeism over time and continued to remain absent without authorization. The teacher asserted his absenteeism was on account of a medical condition, but the arbitrator ruled that dismissal nevertheless was justified. He reasoned that "substantiated medical issues . . . do[] not entitle Respondent to an indefinite medical leave." He found that where a teacher's excessive absenteeism included an extended period of unauthorized leave with no projected end date, his misconduct undermined the school district's educational mission and "reached an obvious inflection point." Matter of Owoh at 20.

In reaching his decision to terminate the teacher, the arbitrator used the three-prong test articulated in In re Castro, Docket No. A-4875-10 (App. Div. April 25, 2012), citing In re White, 92 N.J.A.R.2d (EDU) 157 (1991), under which a school district, when seeking the termination of a tenured teacher for incapacity/excessive absenteeism, 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) that an appropriate warning was given. Matter of Owoh at 15.

Here, the Board argues, the three-prong test also was met. Regarding prong 1, the Board observes respondent was absent on numerous occasions (not including FMLA leave) during the 2021-2022 school year prior to February 15, 2022, and was warned about them; and then, from February 15, 2022 until the end of the 2021-2022 school year was AWOL, and remained AWOL despite multiple demands she return to work. With respect to Prong 2, the Board argues Jackson credibly testified about the hardship on the school's students from Respondent's prolonged and recurring absences, and the negative impact her absences had on school operations, including staff morale. The Board stresses that this hardship was clearly explained to Respondent when she asked why her February 15, 2022, extension had been denied.

The Board insists, too, the third prong was met by the multiple communications to Respondent from Human Resources, Labor

Relations and Jackson that her absences were excessive, constituted AWOL and would result in discipline, including her termination, if she did not report back to duty. According to the Board, it was clearly stated to Respondent that she was needed back in her classroom.

According to the Board, Respondent has failed to present any defenses or other bases to excuse her excessive AWOL absenteeism. The Board argues that Respondent's objections to her supervision by Jackson, in particular to observations and various instructions which she characterizes as harassment, bullying and intimidation, have nothing to do with these charges, which are not related to her performance as a teacher, or to any classroom incidents which occurred prior to February 15, 2022, the date she was directed to return to work because her leave was exhausted.

The Board observes that Respondent's central defense is her claim she can self-designate herself on extended leave because she has suffered stress and feels harassed by the professional demands placed upon her by Jackson. According to the Board, there is no proper basis to allow Respondent to designate herself on an extended leave of absence without pay, when all of her available leave has been exhausted, because she feels stressed out by her teaching job.

Nor has Respondent raised a recognizable defense by asserting she was in counseling, the Board argues. The Board

asserts it does not seek to discipline Respondent for participating in counseling. Rather, she is charged with not coming to work when she had run out of leave. The Board insists there is nothing in Chapter 69 which prohibits its discipline of Respondent for excessive absenteeism and AWOL.

Further, the Board argues, Respondent effectively concedes she is ineligible for the remedy she seeks in this proceeding. She cannot be returned to her position teaching Elementary School Students with Disabilities, as she relinquished her teaching license as an Elementary School Teacher K-6.¹⁶ In addition, she has obtained long-term disability benefits for at least the next two years, and possibly an indefinite period thereafter, according to the Board, which may be inferred, the Board argues, from Respondent's refusal to provide copies of requested documents which it suspects contain her assertion to Prudential she is permanently incapable of coming to school and performing her job. Indeed, the Board asserts Respondent fairly cannot demand in this proceeding an order returning her to work in a position she has claimed, in order to receive long-term

¹⁶According to correspondence between the Union and the Board dated July 19, 2022, Respondent gave up her Elementary School Teacher Endorsement on or about July 15, 2022. Respondent Exh. 16. The Board points out that under N.J.A.C. 6A:9B-11.4, Teacher of Students with Disabilities, the ability of a teacher to teach students with disabilities is contingent upon her possession of a Standard Teaching Certificate. Board Brief at 41.

disability benefits, she is incapable of filling.

In sum, the Board argues, the record in this case requires Respondent's removal. She is culpable of excessive absenteeism and of being AWOL despite her knowledge that she was needed at her school, that she was out of contractual leave, that she had exhausted her FMLA, and that she had been properly denied for an extended leave without pay due to the hardship it would cause her students and the school. She remained absent despite directives to return to work. She gave up her teaching license in a gambit to force the Board to assign her as a Culinary Arts Teacher when she was needed as a Special Education Teacher. There is no prospect of her returning to teach the very students who need her instruction, as she is no longer qualified to provide that instruction. On top of that, the Board argues, even if she was given a chance to return to work, she is not eligible to do so because she is on long term disability and not fit for duty, and thus the hardship on the students and the school will continue.

According to the Board, its evidence substantiates the proffered charges and the appropriate discipline is Respondent's termination.

Respondent, on the other hand, asserts the tenure charges against her must be dismissed and she should be awarded back pay and reinstatement to her tenured teaching position. According to

Respondent, the "[t]enure charges fail to state a cause of action upon which relief may be granted." Respondent's Post-Hearing Brief ("Resp. Br.") at 1. She asserts they "are false in fact, and constitute an exaggeration and distortion of the truth." Id. Specifically, she alleges that "[t]he district failed to comply with its governing policies and procedures with respect to [her] work assignments and leave of absence requests." Id. She contends the Board "has unclean hands because it required [her] to work when [she] was entitled to leave(s) of absence." Id.

Respondent does not deny she was absent on the days referenced in the Charges. Although she makes several arguments in defense of the Charges, her central argument is her contention "my absenteeism was caused by Newark Public Schools, Newark Teachers Union EAP and my illness." Resp. Br. at 4. Thus, she claims, her assignment to teach an 8th grade class in September 2021, which was outside her certification, and her subsequent placement in a 4th grade special education class for which she claims she was unqualified ("I have no formal teaching training or educational training") caused "a medical episode" in or about December 2021. Resp. Br. at 1-2.

Indeed, Respondent asserts that observations and evaluations she received without "support required by statute . . . caused a significant amount of emotional distress and exacerbated my disability." Resp. Br. at 2-3. She contends, "[m]y symptoms

were caused by not having the proper training, support, placement and proper leave." Id. at 3.

Respondent stresses that she was hired by the Board in 2011 as a Skilled Trades Teacher. Resp. Br. at 2.¹⁷ She notes that she "completed the New Jersey Alternate Route Career and Technical Education Teacher Preparation Program," which she asserts represented "200 hours of Career and Technical Education Alternate Route Instruction." Id. She states that on September 9, 2021, she asked Human Resources to transfer her back to being a Culinary Arts teacher. Id. The denial by the Board of that request, according to Respondent, constituted "harassment [which] caused [her] health and anxiety issues." Id. So, too, she suffered "emotional distress" from having to teach without "proper training" and from having to endure "harsh" supervisory oversight of the teaching she was required to perform without "support." Id. at 3.

The harassment she received came in multiple forms, she alleges. She "was forced to teach outside [her] certifications by [Jackson]" at a time she was "suffer[ing] the tragic loss of a close family member whom was also my student that year and blamed myself." Resp. Br. at 2. She contends that Jackson "forced [her] to work during [her] FMLA," and that when she "returned to

¹⁷Respondent was hired in September 2011 and was granted a provision license as a Teacher of Culinary Arts, effective September 1, 2011.

work without a medical clearance and was transferred to an elementary school position" it "aggravated my disability." Id.

Respondent claims that when she "spoke up for the students and [her]self" she became "a subject of First Amendment retaliation," which caused her to "suffer another medical episode in January 2022." Id. She asserts she applied for FMLA leave on or about January 31, 2022, for the period January 27, 2022, through May 15, 2022, which was denied for "arbitrary and capricious" reasons. Id.¹⁸ She contends the Board, in denying her an extension of leave without pay for the period she requested, failed to acknowledge its culpability and the culpability of her school's administration in causing the illness which necessitated her absences. Resp. Br. at 2-3.

According to Respondent, the fundamental bad faith of the Board's Tenure Charges against her is demonstrated by the fact the Charges were brought "while I was trapped in The Counseling Center." Resp. Br. at 4. She asserts she entered the Counseling Center program on the advice of Livorsi and Liss, who advised her to "listen to" Livorsi and remain in The Counseling Center until it discharged her. Resp. Br. at 3. Thus, she

¹⁸According to February 10, 2022, correspondence summarized in the background portion of this Decision, Respondent applied for FMLA leave for the period January 27, 2022, through March 15, 2022, but was only granted FMLA through February 14, 2022, because she had exhausted her contractual and FMLA benefits. Board Exhs. E and F.

argues, she "tried to return back to work in April of 2022" but could not because she was in the Counseling Center on the recommendation of her representatives. Id. I interpret Respondent's argument as an assertion she was protected from these disciplinary charges because she had a proven medical disability.

With respect to the allegations in the Charges Respondent was AWOL and did not report her absences or otherwise communicate the reasons for her absences, she contends she "used the district's electronic reporting process to report [her] attendance." Resp. Br. at 3. She claims that Jackson thereafter acted dishonestly and in bad faith when she "modified the [Board's electronic attendance] system to show [Respondent's] absence until on or about 4/20/22." Id.¹⁹

Respondent claims she was told by Maillaro to "work with" Livorsi, because "keeping [her] protections under Chapter 69 would be the most viable option." Resp. Br. at 3. She asserts

¹⁹The AESOP record, Respondent Exh. 7, documents Respondent's call-ins to report her absences. In her claim that Jackson "modified" these records, which is not substantiated by hearing evidence, she appears to be referring to an entry of a call-in "sick" for the period February 28, 2022, through April 29, 2022. The Board's time records, Board Exh. M, show Respondent was carried "EST-ExhaustedSick" for the duration of the period. However, after April 29, 2022, there are no entries in the Board's time records, which, according to Jackson, means Respondent had stopped making call-ins. The AESOP record is consistent in showing no call-ins by Respondent from Monday, May 2, 2022, until the close of the 2021-2022 school year at the end of June 2022. Cf. Respondent Exh. 7 and Board Exh. M.

she was told by Livorsi that "[her] job is protected under Chapter 69." Id. She contends the answer filed by her former counsel and union-provided attorney did not provide "correct evidence." Resp. Br. at 4.

Respondent submitted the following summation of her position:

I maintain that the district has failed to support its tenure charges. The basis of the charge relating to absenteeism - the district failed to comply with its governing policies and procedures with respect to my work assignments and leave of absence requests. The evidence shows I only used 5 weeks of FMLA in the 2020-2021 school year. In the 2021-2022 school year, I was approved for FMLA leave from January 17, 2022, to February 14, 2022 - at which point is only 9 weeks of FMLA leave. And I have already received the harsh discipline of an increment withholding relating to them and it is unfair to then punish me a second time for the very same conduct. Additionally, in regard to Unbecoming Conduct Absent Without Leave, the evidence establishes that my absenteeism was caused by Newark Public Schools, Newark Teachers Union EAP and my illness. The evidence establishes that I submitted myself to the Newark Teachers Union on 3/2/22. I was admitted to The Counseling Center on 3/30/22 until 9/22.

Resp. Br. at 4.

Respondent accordingly requests an order dismissing the Tenure Charges in their entirety, and for back pay of all monies lost during the period of her suspension and all other emoluments of employment. Resp. Br. at 5.

Opinion

Excessive absenteeism may constitute incapacity, unbecoming conduct or just cause sufficient to warrant dismissal. Matter of Owoh at 154, citing In re Castro, Docket No. A-4875 (App. Div. April 25, 2012), and Matter of Pellecchio. Moreover, excessive absenteeism may constitute valid grounds for the dismissal of a tenured teacher even where the absences are excused or caused by legitimate medical or health related reasons. Matter of Tenure Hearing of Grace Folger, School District of City of Orange, Commissioner Decision No. 147-00, Agency Docket No. 163-6/99 (2000) at 85-86. See also Matter of Pellecchio at 269-70; Matter of the Tenure Hearing of Jerome Kacprowicz, State Operated School District of the City of Jersey City, 93 N.J.A.R.2d (EDU) 152, aff'd, State Bd., 93 N.J.A.R.2d (EDU) 604, aff'd, App. Div., 95 N.J.A.R.2d (EDU) 105. These principles are well-settled.

Absences may be deemed excessive and a basis for discipline even if, as here, the teacher asserts the illness which caused her incapacity to work was work-related. "It is by now axiomatic that action can be taken against a tenured individual for excessive absenteeism even if such were the result of a work-related illness or injury." In the Matter of the Tenure Hearing of Sonia Velez, School District of Hudson County, County Schools of Technology, Agency Dkt No. 54-2/05 (April 27, 2006), citing In the Matter of the Tenure Hearing of Grace Folger,

School District of the City of Orange, Essex County, decided by the Commissioner May 15, 2000 ("From the student' point of view, it does not matter whether their teacher is absent for an excessive amount of time due to work related injuries, approved leaves of absence, legitimate medical excuses or illegitimate excuses").

Based upon my careful review of the hearing evidence, I find that Respondent was AWOL from February 15, 2022, until the close of the 2021-2022 school year, as alleged in the charges, and that her four and one-half (4½) month continuous absence from performing her teaching duties constituted chronic and excessive absenteeism. She is culpable of the misconduct alleged in Charges One and Two, and she thereby engaged in conduct unbecoming.

In reaching this determination, I make no finding regarding Respondent's medical diagnosis, save for her assertion the symptoms of her illness precluded her from coming to her work location and performing her teaching duties. Respondent claims her supervision by Jackson constituted "harassment, intimidation and bullying." Respondent's Sworn Testimony at ¶¶43, 48, 57, 59. She asserts her classroom assignments were difficult and stressful. Id. at ¶32. She has submitted into the hearing record a portion of a "To Whom It May Concern" letter prepared by LaBelle on February 14, 2022, which states, "[t]he clinical

severity of [Respondent's] diagnoses hinder [her] from: planning, preparing, and delivering lesson plans, interactions, and instructions in ways that facilitate active learning as well as care to students under her management. . . [She is] clinically unable to perform her professional [duties]." Respondent Exh. 21. She presented no information to the Board regarding when her symptoms might abate and thereby enable her return to perform teaching duties.²⁰

A school district is not required to endure the hardship of a teacher's excessive AWOL absences, particularly where, as here, the duration of a continuous absence is indefinite, and credible evidence demonstrates hardship on students, negative impact on school operations and damage to the morale of staff who must take on added responsibilities of covering the absent teacher's classes. Indeed, Respondent has not refuted the Board's good faith determination in February 2022 that her absences had been and would continue to be harmful, especially to her special education students.

Notwithstanding LaBelle's assertions regarding impairment of Respondent's "major life activities" and the nature of her

²⁰Record evidence indicates Respondent was awarded Long Term Disability benefits on or about September 27, 2022, Board Exh. N, Respondent Exh. 23, approximately two (2) months after service of these Charges. According to record documents, the effective date of her disability coverage was July 18, 2022, which was several weeks after the time period covered by the Charges.

disability, Respondent Exh. 21, it remains that her status under the ADA is not before me. LaBelle, moreover, did not testify in this proceeding, and none of his written opinions were sworn or subject to cross examination by Board counsel. Indeed, there is no record basis for me to deem him qualified to assess the impact of Respondent's absences on her students, or competent to draw his conclusion that the Board had an obligation to "cooperat[e] with [Respondent's] needs." Id.

What is before me, quite simply, is Respondent's absence from her teaching duties the entire period from February 15, 2022, until the close of the 2021-2022 school year. This four-plus month period of absence was without leave. It was continuous. Initial assessments from LaBelle and from The Counseling Center that her leave would be for a possibly finite period, with an "expected time for remission of symptoms [in] two and a half months," Respondent Exh. 21, proved to be false, and without Respondent calling LaBelle to testify, I will not presume he would agree that the Board's decision to proffer these Charges after Respondent remained absent for four and one-half (4½) without any communication from her indicating an intention to return to work was "uncooperative," to use his term.

In none of Respondent's evidence, either in her testimony or in the hundreds of pages of documents she submitted into this record, is there any information to refute, or even merely to

cast doubt upon, the Board's determination Respondent's extended, continuous absence past February 15, 2022, would "cause harm to the educational program and/or operation of the district." See Board Policy on Leave of Absence, Respondent Exh. 13 and fn. 6, supra. Jackson explained she would not approve the extension "due to the hardship that the teacher's absence will have on our students' instruction/learning," and, as noted, Dr. Harrington concurred.

To the extent Respondent is arguing LaBelle's assessment of her entitlement to a leave outweighs the Board's determination of hardship, I reject that contention. Respondent has presented no authority for her proposition that the school must subordinate the students' needs and the operational hardship of a teacher's persistent and excessive AWOL absences to that teacher's claimed need for medical leave beyond the time off granted under statute (12 weeks over 12 months under the FMLA) and contract (3½ weeks of sick and personal leave per school year). The decision to extend a teacher unpaid leave is for the Board, and I find no record basis to conclude the Board's decision in this case against extending Respondent's leave past February 15, 2022, was not based on proper factors or was not made in good faith.

Moreover, Respondent's characterization of the Board's actions as discriminatory and in violation of law is unsubstantiated. She contends she improperly was granted only

nine and one-half (9½) weeks of FMLA leave during the relevant 12 month period, but my review of the record indicates she received the full 12 weeks to which she was entitled. The correspondence which Respondent contends constituted harassment consisted of letters that fairly and accurately tracked her attendance, and alerted her to the Board's concerns about her mounting absence occurrences and warning her of the consequences she should expect if she did not improve. These are the very communications the Board is required to initiate in order to help a teacher avoid discipline.

Thus, Respondent was cautioned about her occasional absences starting on October 18, 2021, which was relatively early in the school year. Board Exh. C. Nevertheless, by November 29, 2021, she had exhausted her personal leave for the entire school year (5 days), and by December 10, 2021, had exhausted all of her sick leave (12 days). Board Exh. M. When the Board properly and fairly communicated to her its concern about her absenteeism and fairly put her on notice she faced potential discipline, Respondent experienced the Board's appropriate and required efforts to caution her as bullying and harassment. It is not surprising, therefore, that she has deemed every adverse consequence of her poor attendance to be a targeted attack and evidence of bad faith.

Her allegations are unjustified, however. She knew she had

no more FMLA leave after February 14, 2022. She admits that on or about January 27, 2022, she asked for leave until April 30, 2022, but was told her statutory maximum would be reached on February 14th. Board Exh. G. Further, after Respondent was cautioned on February 10, 2022, "you must report back to work on Tuesday, February 15, 2022," Board Exh. F (emph. in orig.), she remained out, and did so without ever contacting Jackson or anyone else in the Cleveland School administration who was expecting her return. Jackson credibly testified Respondent's continuing absences caused disruption. Each day she was out placed "strain" on Jackson's ability to run the school, because the Principal had to assign coverage by other staff members who then could not perform their own previously scheduled tasks. As an example, Jackson explained she frequently had to pull teachers from parent conferences in order to ensure coverage of Respondent's classes.

Jackson described truthfully I find, how Respondent's absences directly impacted her special education students. They did not have their regular teacher, which is something children rely on for consistency. Indeed, the regular teacher knows the curriculum and knows the circumstances of each student, and with that knowledge prepares the lesson plans. In contrast, substitute teachers often do not fully understand the curriculum, are not involved in creating the lesson plans and in many cases

are simply not qualified, especially in special education. Jackson's determination, sustained by Dr. Harrington, that there would be hardship on students and the school's operations if Respondent remained out on extended leave past February 14, 2022, was grounded in her experience, sound professional judgment and good faith assessment of the educational needs of the Respondent's students. Neither Respondent, nor her therapist, LaBelle, were empowered to overrule Jackson's assessment.

Respondent, moreover, quick to blame others for her excessive AWOL absenteeism, ignores the multiple opportunities the Board gave her to return to work before bringing disciplinary charges. I discern from the hearing record that the Board did not accelerate discipline as it might have done if that had been the end-goal that Respondent surmises. Rather, the Board was not quick to act and, rather, even extended Respondent's deadline as it implored her to return to work.

Indeed, notwithstanding Carbone's warning to Respondent in his April 1, 2022, Notice, Board Exh. J, that her "[f]ailure to return to work by or before April 11, 2022 . . . will result in disciplinary action being taken against you up to and including termination," determined, when she did not return by that date, to give her still another chance. Board Exh. L. After noting Respondent's continued AWOL status at the April 11th deadline, and her failure to heed his previous warning she must return to

work by that date or face disciplinary action, he told her that "[t]he purpose of this letter is to give you one last opportunity to return to work." Id. And he then even allowed her two (2) additional weeks, until April 25, 2022, to do so. Id. Respondent, however, did not return to work. Rather, she remained AWOL through the end of the school year, two (2) months past the extension of time Carbone had given her.

Respondent, rather than accepting Carbone's April 2022 correspondence as an opportunity to return to work and avoid the consequences of her excessive AWOL absences since February 15, 2022, deemed the Board's letters encouraging her return to work, simply because they contained the required warnings of the negative consequences she would face if she remained AWOL, to be "mental harassment and retaliation." Respondent Exh. 16. She asserted that Carbone's April 1, 2022, Notice, Board Exh. J, and Jackson's April 5, 2022, letter cautioning her about the consequences of her "continued absenteeism," Board Exh. K, had caused her "additional emotional distress, pain and suffering." Respondent Exh. 16.

Respondent's defense against these Charges amounts to a claim the Board's attendance requirements for effective and consistent pedagogy take a back seat to her personal circumstances, even after she exhausted all of the leave to which she was entitled under law and contract. Thus, Livorsi, on

Respondent's behalf, wrote to Leuze on April 6, 2022, that, "Chapter 69, PL 2011 protects Ms. Henderson from any further disciplinary actions." Respondent Exh. 16. Livorsi presumed the right, again on Respondent's behalf, unilaterally to set the terms for her attendance. The Counseling Center, also on April 6, 2022, wrote to Leuze that Respondent will be re-evaluated on April 29, 2022, but offered no estimate of when she might return to work. Id.²¹ Respondent has offered no legal authority to support her claim that the symptoms and illness she contends were caused by Jackson's purportedly overzealous supervision exempted her from regular attendance and permitted her indefinite unapproved absences. Without reference to any decisional, statutory or regulatory law, save for her blanket assertion she is covered under P.L. 2011, Chapter 69, she insists she was protected from disciplinary action, notwithstanding uniform rulings that excessive absenteeism may constitute valid grounds for the dismissal of a tenured teacher even where the absences are excused or caused by legitimate medical or health related reasons. Matter of Folger at 85-86; Matter of Pellecchio at 269-70. In Matter of Folger at 85, the Commissioner deemed

²¹The Counseling Center subsequently re-evaluated Respondent on April 28, May 26, July 13 and August 8, 2022, and each time recommended she remain in its program an additional 30 days, Respondent Exh. 13, until it made a decision to discharge her on September 28, 2022, after she reported she was "not getting any help from the facility and feeling as though nothing was getting resolved." Respondent Exh. 24.

"meritless [the] argument that, by definition, excessive absenteeism must mean absences in excess of what is justified by medical verification." As noted, that principle holds even where the absences are due to work-related injuries. Matter of Velez at 4. It gains traction where, as here, the absences are without leave.

My review of Chapter 69, N.J.A.C. 34:13A-42, persuades me Respondent's reliance on it is misplaced. It reads,

No public employer shall take any action against an employee of the employer, including termination, because the employee or a dependent of the employee has obtained counseling, referrals or other services from an employee assistance program or has obtained treatment or other services from any program to which the employee assistance program refers the employee . . . unless the employee was referred by the employer to the employee assistance program due to issues related to job performance and fails to make a good faith effort to comply with the recommendations made by the employee assistance program. The provisions of [Chapter 69] shall not be construed as preventing the public employer from taking any action which the employer is otherwise authorized to take for workplace misconduct of the employee or poor work performance, even if the misconduct or poor performance is related to a problem for which the employee is obtaining services provided by an employee assistance program or other program to which the employee assistance program refers the employee.

Respondent Exh. 16. Respondent contends the charges against her and the Board's efforts to discipline her for excessive AWOL absences are violations of this law.

I do not concur. The Board's Charges against Respondent are unrelated to counseling, treatment or other services she has

obtained from an employee assistance program, or from any other entity. The basis for the charges and for the discipline the Board seeks to impose is Respondent's continued, unremitting absence from work without leave for more than four (4) months, from February 15, 2022, until the end of June 2022. There is nothing in the language of Chapter 69 which bars a public employer from requiring acceptable attendance and from disciplining employees who are excessively AWOL.

Nor does Chapter 69 evince an intention by its drafters to subordinate a school board's need for a teacher's regular attendance to that teacher's demand for unpaid medical leave after her entitlements are exhausted. Where, as here, a teacher's AWOL absenteeism has been persistent, continuous and unremitting for the final four and one-half (4½) months of the school year, without any clear communication from the teacher of a date on which the teacher will return, and for the final two and one-half (2½) months, without any communication at all, I find that tenure charges seeking that teacher's dismissal is an appropriate consequence, and one that fairly could be expected after multiple warnings.

In fact, the language of Chapter 69 expressly authorizes the Board to impose disciplinary action for workplace misconduct or poor work performance, which plainly includes excessive AWOL absenteeism, even if the absenteeism and the

failure to report to work is related to a problem for which Respondent is obtaining counseling or therapeutic services from an EAP. I further note, as the Board points out, that the service providers from whom Respondent has obtained her counseling and therapy do not fall within the definition of an "employee assistance program" covered by Chapter 69.²²

Nor do I accept Respondent's claim that her objections to her supervision by Jackson, however unfair or belittling that supervision might have felt, entitled her simply to not come to work for the balance of the school year after her contractual and FMLA leave entitlements were exhausted and her requests for additional leave were denied.²³ Such a ruling, I find,

²²Respondent has presented no case law which demonstrates that Chapter 69, C. 34:13A-42, recited above, has been enforced to preclude discipline of a public employee culpable of excessive and persistent AWOL absenteeism. Nor has she presented evidence that this is the proper forum in which to assert a violation of her Chapter 69 rights.

²³I observe there is no evidence of a grievance filed in connection with Respondent's contention Jackson's supervision was abusive or otherwise improper. So, too, notwithstanding Respondent's statement to Jackson in a December 1, 2021, email that "I plan on filing a complaint" of "harassment, intimidation and bullying," Respondent Exh. 15, and her assertion to Jackson and Maillaro on December 8, 2021, "I have reached out to Newark Board of Education Affirmative Action department concerning Ms. [Jackson]'s harassment, intimidation and bullying this year and last year," *Id.*, and her representation to Patterson on January 6, 2023, Resp. Exh. 13, that a refusal by the Board to give her a leave of absence when her FMLA "run[s] out," will be a violation of the ADA, the record in this proceeding is devoid of evidence any related claims or complaints have been filed, investigated and adjudicated in a forum of appropriate jurisdiction. I fairly conclude therefore that there is no proper basis for me to

potentially might handicap a district's or a school administrator's ability to supervise staff and otherwise run a school.

As noted above, the relevant case law holds that excessive absenteeism may constitute valid grounds for the dismissal of a tenured teacher even where the absences are caused by legitimate medical or health related reasons, Matter of Pellecchio at 269-70, and even if the teacher asserts the illness which caused her incapacity to work was work-related. Matter of Velez at 3, Matter of Folger at 85-86. There is no record basis to doubt the sincerity of Respondent's belief she was harassed and bullied by Jackson, or to discount her claim she suffered stress and trauma from Jackson's supervision or from the Board's notices imploring her to return to work. Where, however, as here, Respondent has no available leave entitlements, and her AWOL absenteeism has been excessive, and the Board has determined in good faith her continued absence from school will impose a hardship on students and the educational program, and she nevertheless remained AWOL despite multiple warnings and a second last chance to return to work, she fairly now faces disciplinary charges alleging conduct

conclude Jackson and/or the Board unlawfully created conditions under which Respondent was unable to work, which is what Respondent asserts in her post-hearing brief. Resp. Br. at 3, 4 (she contends her disability and illness "were caused by not having the proper training, support, placement and proper leave," and therefore "[her] absenteeism was caused by Newark Public Schools, Newark Teachers Union EAP and [her] illness").

unbecoming, for which I find she is culpable. To rule otherwise would risk eviscerating the Board's ability to regulate attendance by teachers who are resentful of their assignments and of the methods and demands of their supervisor's oversight.

Turning to penalty, I observe that the Commissioner of Education has established a three-part test for determining if dismissal is the appropriate penalty for a tenured teacher charged with excessive absenteeism, and this test continues to be the appropriate guide. As set forth in Matter of the Tenure Hearing of Lena White, 92 N.J.A.R.2d (EDU) 157, 161 (1991), the record must establish that the Board considered (1) the particular circumstances of Respondent's absences and not merely the number of absences; (2) the impact that her absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact, and (3) that there shall have been some warning given to Respondent that her supervisors were dissatisfied with her absenteeism. See Matter of Owoh at 15.

My review of the hearing record persuades me that the Board did consider: not only the number of Respondent's absences, but also the fact her absences were without leave, that her AWOL was chronic and continuous, on every school day, unabated, for more than four (4) months, and further, that she did not adhere to the Board's letters directing her return to work, that the multiple

representations from her counselor and therapist which advised the Board to expect she would be able to return to work by April 30, 2023, Respondent Exh. 21, and then by early June 2022, Respondent Exh. 16, were not accurate, and that Respondent never explained why she did not return after either date, or offer when she would return.

The hearing record additionally shows that the Board considered the impact that Respondent's absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact. When Respondent requested an extension of her FMLA leave past February 14, 2022, for a period of time she initially placed as ending April 30, 2022, she was told the extension of leave was denied "due to a hardship it will cause the school." Board Exhs. G, H. Under Board policy, File Code 4150/4250, Respondent Exh. 13, the Board considered Respondent's request, and then, again following said Policy, it asked Respondent's Principal, Ms. Jackson, and the Assistant Superintendent, Dr. Harrington, to determine if the requested extension would cause harm. Jackson determined, as discussed above, that Respondent's continuing absence created "hardship . . . on our students' instruction/learning," and Dr. Harrington agreed. Board Exh. H. Respondent has presented no evidence or argument disputing the reasonableness of those determinations or the propriety of the Board's reliance upon them. Nor did she

present hearing evidence refuting Jackson's testimony regarding the specific hardship on the school's ability to cover the instruction of Respondent's special education students during her prolonged and unremitting AWOL absence.

The hearing record is also clear on the fact the Board considered that Respondent was told, and was aware, that her supervisors were dissatisfied with her absenteeism. Prior to being AWOL, she was counseled and warned about the importance to her students and their education of her regular attendance, and the Board's dissatisfaction with her attendance record. Board Exhs. C and D. On February 24, 2022, approximately 10 days after she commenced being AWOL, she was again advised in unmistakable terms the Board's determination her recurring and numerous absences were "a serious matter" which might result in disciplinary action and separation from employment. Board Exh. I. Subsequent letters and notices the Board sent Respondent on April 1, 2022, April 5, 2022 and April 11, 2022, placed her squarely on notice that her "continued absenteeism," which had been recorded as AWOL since February 15, 2022, will result in disciplinary action including termination if she did not return to work. Board Exhs. J, K, L.

Faced with these Charges, and the evidence presented in support of them in this proceeding, Respondent has nevertheless demonstrated no apparent understanding of the hardship caused by

her excessive AWOL absenteeism from February 15, 2022, through the end of June 2022. She insists her absences were justified. She blames her supervisors and administrators, refusing even to acknowledge the importance to her students and the school of her regular attendance. Her answer to the Board's hardship of having a special education teacher fail to appear at school for months and months is for the Board to assign her back to being a Culinary Arts Teacher. Indeed, in an effective attempt to dictate the terms under which her demand for relief should be granted, she relinquished the license which permits her to work as an Elementary School Teacher. Respondent essentially has communicated, "I don't have the skills to be an Elementary School Special Education teacher, and now the Board cannot compel me to perform that work because I have relinquished my Elementary School Teacher's License;" and, "the Principal's efforts to supervise me within my former certification constituted bullying and harassment which gave me a valid reason to not come to school;" and, "I am prepared to provide regular attendance when I am assigned back to being a Culinary Arts Teacher." As I read the record and evaluate Respondent's exhibits, testimony and arguments, her reassignment to a Culinary Arts classroom is an outcome she seeks. The Education Law does not entitle her to take extended unapproved leave until she obtains the assignment she wants.

In sum, I find Respondent is culpable for the misconduct alleged in Charges 1 and 2 of the Charges, and with respect to the allegations in Charge 3, I find her dismissal as a Tenured Teacher for the Newark Board of Education is justified and appropriate.

