STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of	:	Agency Docket No. 181-6/24
	:	
ELIZABETH BOARD OF EDUCATION,	:	
UNION COUNTY, NEW JERSEY,	:	Opinion & Award
	:	
Petitioner,	:	
	:	
-and-	:	
	:	
VICTORIA LAWRENCE-WHITE,	:	
	:	
Respondent.	:	

APPEARANCES:

FOR THE PETITIONER:
LA CORTE, BUNDY, VARADY & KINSELLA
Brian J. Kane, Esq.

FOR THE RESPONDENT:
OXFELD COHEN, P.C.
Gail Oxfeld Kanef, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

PRELIMINARY STATEMENT

This matter comes before me on the Tenure Charges (the "Charges") certified on or about May 29, 2024 by the Elizabeth Board of Education (the "Board" or "Petitioner") against Victoria Lawrence-White ("Respondent"), a tenured Social Worker, alleging excessive absenteeism, neglect of duty and conduct unbecoming of a staff member, insubordination and/or other just cause regarding Respondent's failure to follow directives. (Petitioner Exhibit 1.) In accordance with N.J.S.A. 18A:6-16, on June 11, 2024, the Commissioner of the New Jersey Department of Education (the "Commissioner"), having determined the Charges were sufficient, appointed me as the arbitrator to hear and decide this matter.

A hearing on the Charges against Respondent was held on September 25, 2024, at the offices Oxfeld Cohen, P.C. in Newark, New Jersey.[1] At that time, both parties were afforded full opportunity to introduce evidence and present arguments in support of their respective positions. They did so. A stenographic record of the hearing was taken.[2] Upon the conclusion of the September 25, 2024 hearing day, the parties elected to submit post-hearing briefs. With the receipt of those briefs on November 12, 2024, I declared the hearing record closed as of that date.

BACKGROUND

Respondent's employment by the Board as a Social Worker dates to 2000. (Tr.

[1] On August 29, 2024, Respondent filed a motion in limine, by which she sought to have the Petitioner barred from presenting any witnesses or documents at the hearing due to its purported failure to comply with the discovery requirements of N.J.S.A. 18A:6-17.1(b)(3), and, in turn, requested a dismissal of the Charges. By Order, dated September 23, 2024, I denied the motion. In doing so, I found the Petitioner's August 29, 2024 production was timely.

[2] The hearing transcript consists of 256 pages. References to the hearing transcript will be designated as "Tr." followed by the applicable page number(s).

17; Petitioner Exhibit 2.) During that period, except for a service break from 2001 – 2008, she has held various assignments at the schools operated by Board, including most recently the Jefferson Arts Academy Annex, which is located within the Frank J. Cicarell Academy High School. (Tr. 84, 158-161; Petitioner Exhibit 3.) She has no record of prior tenure charges.

The Tenure Charges

The charges against Respondent read, in relevant part, as follows:

CHARGE I
EXCESSIVE ABSENTEEISM

The foregoing background information, and facts alleged therein, are incorporated by reference as if fully set forth herein. The Respondent is guilty of excessive absenteeism which violates the District's policy. For the school year of 2021-2022, Respondent has a total of 182 absences. Respondent was absent for the entirety of the 2021-2022 school year. This prolonged absence was unacceptable and is grounds for disciplinary action. (See Respondent's 2021-2022 Attendance Record attached a part of Exhibit 9).

In the 2022-2023 school year, the Respondent accumulated 138 unexcused absences. In that school year, the Respondent's absenteeism began in October 2022, and prevented her from completing the duties of her contract. (See Respondent's 2022-2023 Attendance Record attached as part of Exhibit 9).

In the 2023-2024 school year, as of April 3, 2024, the Respondent has eighty-three unexcused absences. The Respondent began taking unexcused absences in September of this current school year. (See Respondent's 2023-2024 Attendance Record attached as part of Exhibit 9). The Respondent has failed to offer any explanation for her failure to appear at work.

Respondent's excessive absenteeism prevents her and her co-workers from fully carrying out the district's educational programs. The above referenced facts demonstrate excessive absenteeism, warranting the Respondent's dismissal and/or reduction in salary pursuant to N.J.S.A 18A:6-10, et seq.

CHARGE II
NEGLECT OF DUTY BY FAILURE TO REPORT TO WORK

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. The Respondent is guilty of neglect of duty because of her failure to come to work and perform the responsibilities of a social

worker. The Respondent's neglect of her job responsibilities is apparent by the total number of absences for the three previous school years, as outlined in Charge I. Respondent had over 100 unexcused absences in each of the 2021-2022 and 2022-2023 school years and has over eighty absences for the 2023-2024 school year so far. The Respondent's failure to appear for work has prevented her from fulfilling the responsibilities of her position as a Social Worker. It is the district's policy that regular presence of assigned certified and non-certified personnel is vital to the success of the district's educational program. (See Elizabeth Board of Education Policy No. 4151/4251 attached hereto as Exhibit 5). However, the Respondent has failed to provide an explanation for any of her unexcused absences. The Respondent has continued to neglect the district's educational program by failing to report to work on a regular basis. The above referenced facts demonstrate neglect of duty by failure to report to work, warranting the Respondent's dismissal and/or reduction in salary pursuant to N.J.S.A. 18A:6-10, et seq.

CHARGE III
CONDUCT UNBECOMING OF A STAFF MEMBER, INSUBORDINATION AND/OR OTHER JUST CAUSE REGARDINGTHE RESPONDENT'S FAILURE TO FOLLOW DIRECTIVES.

The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. The Respondent has engaged in unbecoming conduct, including misconduct, insubordination and other just cause by her acts and omissions relative to her employment with the Board. The Respondent has adopted a habit of spontaneously signaling her late arrival or absence with an email message to Department of Special Services Administrator, Anabela Seabra. The Respondent has sent emails to the administrator in the early morning hours indicating she will be "late today" or "absent" without any further explanation. (See Emails from February 5, 2024 through February 9, 2024 attached hereto as Exhibit 10). The Respondent conveys these messages by writing in the subject line of her emails "Victoria White – Absent Today" or "Victoria White – Late Today." (Exhibit 10). This is the full extent of the Respondent's communication to the District on any given day where the Respondent knowingly does not arrive for work on time. On some occasions, the Respondent will write that she will be arriving late before sending a second email later that morning that she will instead be absent for the entirety of the workday.

For example, for the week of February 5, 2024 through February 9, 2024, the Respondent was either late or absent every day of the week. (Exhibit 10). On February 5, 2024, the Respondent sent correspondence at 6:35 a.m. to Ms. Seabra that she would be absent from work on that day. (See the February 5, 2024 Email attached as part of Exhibit 10). Respondent had used all excusable absences as of September 2024 and so this was an unexcused absence. (See Respondent's 2023-2024 School Year Attendance attached as part of Exhibit 9). This February 5, 2024 email offers no explanation as to her late arrival. (See February 5, 2024, Email attached as part of Exhibit 10). On February 6, 2024, Ms. White emailed Ms. Seabra at 7:38 a.m. with the subject line "Victoria White late today." (See the February 6, 2024, Email attached as part of Exhibit 10). Ms. White did not

provide an explanation as to her late arrival. (See February 6, 2024, Correspondence attached as part of Exhibit 10). This message was sent by the Respondent 20 minutes before Ms. White was required to report to work. (See the February 6, 2024, Email attached as part of Exhibit 10). According to the correspondence from district personnel, Respondent did not arrive until 10:45 AM on February 6, 2024. (See the February 6, 2024, Email attached as part of Exhibit 10).

On February 7, 2024, at 7:09 AM, Respondent emailed Ms. Seabra the subject line of "Victoria White late today" without any content to the body of her email. (See the February 7, 2024, Correspondence attached as part of Exhibit 10). At 11:48 AM that same morning, the Respondent replied to her own email to notify the district that she would be absent for the entirety of the day. (Exhibit 10). The Respondent provided no explanation in either email. (Exhibit 10). On February 8, 2024 at 6:18 AM, the Respondent sent district personnel the message "Victoria White late today." (See the February 8, 2024, Email attached as part of Exhibit 10). No explanation was provided for her late arrival on that date. (Exhibit 10). On February 9, 2024, at 8:22 AM, the Respondent sent an email to district personnel that she would be absent. (See the February 9, 2024, Email attached as part of Exhibit 10). The Respondent did not provide any explanation for her absence. (Exhibit 10).

The week of February 5 to February 9, 2024 is only one example of the Respondent's unbecoming conduct. The correspondences have become the Respondent's routine and primary method of communication with the district regarding her attendance. The Respondent's conduct negatively impacts her ability to fulfill the responsibilities of her position, and this conduct negatively impacts district personnel.

The Respondent is held to the same high ethical standards as all other personnel of the district. The Respondent's behavior demonstrates a lack of respect for her fellow co-workers and a lack of respect for the students of the district.

The Respondent is well aware of the obligations and responsibilities of a social worker within the district, given her years of experience. The Respondent's conduct is nothing short of insubordination and a clear refusal to perform the responsibilities of a social worker within the district. The Respondent has violated the contractual and policy obligations to which she has agreed to be bound by as an employee of the district. The above referenced facts demonstrate conduct unbecoming of a staff member, insubordination and other just cause regarding Respondent's failure to follow directives, warranting the Respondent's dismissal and/or reduction in salary pursuant to N.J.S.A. 18A:6-10, et seq.

(Petitioner Exhibit 1.)

STATEMENT OF FACTS

The essential facts concerning the Charges, including the areas of dispute, can be

stated as follows:

Respondent's Employment History with the Board

Respondent has worked as a Social Worker for the Board since September 2000, excluding a service break from 2001 - 2008. (Tr. 17, 84, 158-161; Petitioner Exhibits 2 - 3.)[3] During that time, she has been assigned to various schools within the District, including most recently the Jefferson Arts Academy Annex, which is located in the Frank J. Cicarell Academy High School. (Tr. 84, 158-161.)

Her work assignments over the years have included serving as a school-based social worker and child study team social worker. The former involves providing counselling services to students at the school to which the social worker is assigned, along with performing other related tasks. (Tr. 114.) In the latter assignment, the social worker assists in the development of Individualized Education Plans ("IEPs") for special education students and provides counselling services, as required by the IEP. (*Id.)* For both the 2022-2023 and 2023-2024 school years, Respondent functioned as a child study team social worker. (Tr. 114-115, 210-211.)

District Employee Policies

Frank Cuesta, the Board's Chief of Operations, testified that his responsibilities include human resources. (Tr. 14.) In that capacity, he reported overseeing the application of various employee policies adopted and maintained by the Board. (Tr. 20-24, 28-32, 35; Petitioner Exhibits 4 - 9.)[4] These include:

[3] In or about April 2018, Petitioner placed Respondent on administrative leave, in which status she remained until in or about July 2021. (Tr. 68, 161-163, 168-169; Respondent Exhibits 2 & 4.) Respondent reported being unaware of the reason she had been placed on such leave. (Tr. 161-163.)

[4] Cuesta stated that the policies are contained in an employee handbook and are available, upon request, to members of the public. (Tr. 19-20.) On cross-examination, he acknowledged never having provided Respondent with copies of any of the referenced policies. (Tr. 70 - 71.)

1. **Dismissal/Suspension Policy:** This policy addresses the manner in which the Board responds when an employee fails to properly perform his/her duties, is excessively absent and/or engages in misconduct. According to Cuesta, if a tenured employee exhibits such deficiencies/failings, the superintendent presents the relevant evidence to the Board. If the Board concludes suspension/termination is warranted, it approves the filing of tenure charges against the employee. (Tr. 20-21; Petitioner Exhibit 4.)

2. **Conduct/Dress Policy:** This policy sets the expectation that staff members shall conduct themselves appropriately and professionally at all times. The specific aspects of conduct addressed include behavior unbecoming a school employee, civility and attendance. (Tr. 21-22; Petitioner Exhibit 5.)

3. **Duties Policy:** This policy specifies that a job description shall be maintained for each position in the District, which defines the position, identifies the applicable reporting structure and provides for job holder's evaluation. It further recites that each employee shall: (a) comply with all requirements of the law; and (b) perform all duties commonly associated with his/her position and/or assigned to him/her by the Board, the superintendent and/or his/her immediate supervisor(s). (Tr. 24; Petitioner Exhibit 6.)

4. **Leaves Policy:** This policy defines unauthorized leave as a non-approved absence resulting in non-performance of the employee's assigned duties and responsibilities, which may include a collective refusal to provide service, unauthorized use of sick leave, unauthorized use of other leave benefits, non-attendance at required meetings and failure to perform supervisory functions at school-sponsored activities. It provides, "an employee is deemed to be on unauthorized leave at such time and on such occasions as the employee absents him/herself from required duties." According to the policy, unauthorized leave constitutes a breach of contract, and, as such, may result in the initiation of dismissal procedures, loss of salary or such disciplinary action as may be deemed appropriate. It states further that all requests for authorized leave must be made in writing, with long term leaves needing to be brought to the Board's attention for approval, as appropriate. (Tr. 26-28; Petitioner Exhibit 7.)[5]

5. **Attendance Patterns/Sick Leave:** This policy states the Board's position that attendance and regular presence of assigned personnel is vital to the success of the District's educational program, and, as such, identifies consistent absenteeism and tardiness as being unacceptable and a basis for disciplinary action. It provides for the adoption of a plan to encourage excellent attendance and punctuality, which shall include a requirement that staff members report all illnesses and request all leaves at the earliest possible time.

[5] Cuesta testified that all leave requests are reviewed and approved either by him or the Superintendent. (Tr. 26.) In regard to leave requests pursuant to the Family and Medical Leave Act, he stated, human resources determines whether the employee has worked the requisite hours during the preceding 12 months (i.e., 1,250) to qualify for such leave. (Tr. 27.) He recalled denying a leave request submitted by Respondent in the last few years on this basis. (Tr. 27-28.)

It also details: (a) the availability and use of sick leave; and (b) the Board's response to intermittent and/or long term absences, including: (i) after six days' absence, principal/administrator conferences with employee and advises his/her attendance will be closely monitored; (ii) after eight days' absence, principal/administrator conferences with employee and advises his/her next absence will trigger a letter to the Chief School Administrator; and (iii) on the ninth day of absence, letter is transmitted to the Chief School Administrator, recommending review of employee's past and current absence record, the underlying reasons for such absences and their impact on the continuity of education or services, as well as proposing future action, where necessary.[6]

Following such review, the Chief School Administrator conferences with employee or advises that any future absence(s) may result in such a conference. An employee called for such a conference may be subject to disciplinary action. (Tr. 28-31; Petitioner Exhibit 8.)

6. **Pledge of Ethics Policy:** This Policy states the Board's Pledge of Ethics, which guides and unifies students and staff by setting a common standard of behavior to be supported and followed by all. The Pledge is provided to all staff members upon hire and recited at all staff meetings. (Tr. 35, 62; Petitioner Exhibit 9.)

Attendance Tracking Procedure

Cuesta testified that the Board's human resources department maintains an electronic attendance record for each employee (Tr. 40.) He explained that the various departments (e.g., special services) have responsibility for tracking their staff members' daily attendance. (Tr. 41.) The departments, he related, transmit the data recorded electronically to human resources, which then stores it in the employees' attendance file. (Tr. 41.)

In testifying, Michael Ojeda, Director, Special Services Department, to which Respondent was assigned, averred that within his department, Administrative Secretary Annabella Seabra-Silva records staff members' attendance. (Tr. 97 – 98.) In order to

[6] According to Cuesta, the conferences referenced in the Policy are conducted on Board property when the employee returns to work following his/her absence. (Tr. 30.)

accomplish this task, he explained, an employee, whenever absent or late, must notify Seabra-Silva, who, in turn, makes the appropriate entry into the staff management system, which is known as EDUMET. (*Id.)*

Describing her practices relative to attendance tracking, Seabra-Silva testified that employees communicate with her by email in reporting absences, lates and benefit time usage. (Tr. 126.)[7] The expectation, she stated, is for employees to send such emails prior to their scheduled starting time. (Tr. 129.)[8]

With the receipt of such emails, she continued, the appropriate entry (e.g., absent; late) is made in EDUMET for each reporting employee. (Tr. 135.) The EDUMET system, she averred, permits her to enter data only for the current day. (Tr. 136.) As a result, she explained, if a necessary correction is subsequently identified, human resources must be contacted to make the revision. (Tr. 136-137.) [9]

She testified further that absent an entry that an employee failed to report or was late, the EDUMET system records him/her as present. (Tr. 137-138.) Likewise, as a matter of practice, she deems employees to be present if they have not emailed her to report otherwise. (Tr. 138, 152.)

Respondent's Attendance During School Years 2021-2022, 2022-2023 and 2023-2024

Respondent's Annual Attendance Calendars for the years in question, as generated

[7] Seabra-Silva stated that as a matter of practice, employees copy their supervisor on such emails. (Tr. 126.)

[8] She identified Respondent's starting time as 7:45 a.m. (Tr. 131.) Also, she verified receiving several emails from Respondent during the period February 5 – 9, 2024, all but one of which lacked any content beyond the subject line, which read either "Victoria White absent today" or "Victoria White late today." (Tr. 130-131; Petitioner Exhibit 11.) The one exception, dated February 7, 2024, advised Respondent would be absent that day due to a family emergency, after reporting earlier that she would be late. (Petitioner Exhibit 11.)

[9] According to Seabra-Silva, corrections are rarely required, and none were needed for Respondent. (Tr. 138.) On cross-examination, she acknowledged that she and Respondent have different work locations, and, as such, she was not present to observe Respondent's attendance, relying instead on Respondent's emails for that purpose. (Tr. 149.)

from the EDUMET system, reflect the following aggregate absences per year[10]:

YEAR	TOTAL ABSENCES	UNEXCUSED ABSENCES
2021-2022	196	181
2022-2023	152	135
2023-2024[11]	109	92

(Petitioner Exhibit 10.)

Board's Response to Respondent's Absenteeism

Cuesta testified that several years prior, the Special Services Department advised him of Respondent's extensive number of absences. (Tr. 37.) In response, he reported that his department began monitoring her attendance. (*Id.)* Such monitoring (i.e., daily attendance review), he stated, occurs when an employee exhibits an attendance pattern that violates the Board's policy. (Tr. 37-39.)[12]

He continued that since that first notification, Respondent's attendance pattern was brought to his attention in each subsequent year. (Tr. 38.) As a result, he related, human resources continued to monitor Respondent's attendance through the 2023-2024 school year. (Tr. 44 – 46.) The monitoring, he said, did not result in him communicating directly with Respondent regarding her attendance. (Tr. 48 – 49.) On cross-examination, he also acknowledged that Respondent was never placed on an attendance improvement plan in response to her absenteeism. (Tr. 69-70.)[13]

[10] Cuesta testified that the days on which Respondent was absent are shaded in red on each calendar. (Tr. 42.)

[11] Respondent's 2023-2024 Annual Attendance Calendar reflects her attendance through April 3, 2024. (Petitioner Exhibit 10.) Cuesta testified that Respondent continued to exhibit a pattern of excessive absences after April 3, 2024. (Tr. 46.)

[12] Seabra-Silva confirmed being advised by human resources that Respondent's attendance was being monitored. As a result, she reported being directed to forward to human resources all emails received from Respondent, reporting an absence or tardy. (Tr. 144.)

[13] Cuesta confirmed communicating with Respondent on or about November 16, 2022, to advise that she was not eligible for FMLA leave in order to care for her daughter. (Tr. 55; Petitioner Exhibit 12.) He explained to Respondent that her ineligibility stemmed from her failure to complete 1,250 hours of service in the preceding 12 months. (Tr. 58;

Ojeda testified that he never met with Respondent regarding her record of absences or issued her any disciplinary memoranda, advising that she could be subject to dismissal for continued absenteeism. (Tr. 116-119.) He reported being unable to do so because Respondent's absences prevented them from having the in-person meeting required to convey such information. (Tr. 123.)[14]

From his ongoing review of Respondent's attendance, he averred concluding that it was adversely affecting his department's ability to service its client population of 180 students. (Tr. 103, 105.) For this reason, he recommended that the superintendent hire another social worker, explaining that his team was under-supported. (Tr. 103.)[15]

Respondent's Testimony Regarding Her Attendance

In testifying regarding her attendance during the years at issue, Respondent recounted returning from administrative leave in July 2021 and resuming regular service in September 2021. (Tr. 171-172.) After working briefly in October 2021, she related being out for the remainder of the school year through July 2022 due to a physical injury. (*Id.)*

According to Respondent, in connection with this absence, she applied for and was granted long term disability benefits by Prudential Insurance Company, which insured this employee benefit provided by the Board. (Tr. 172-173; Respondent Exhibit 7.) She maintained that the Board was made aware of her need for such long-term absence based upon its communications with Prudential. (Tr. 177.)

Petitioner Exhibit 12.) In doing so, he also highlighted that in the 2021-2022 school year, she was present for 6 days, and, to date, had worked approximately 30 days in the 2022-2023 school year. (Petitioner Exhibit 12.)

[14] Ojeda also related being unable to evaluate Respondent for the 2023-2024 school year due to her absences. (Tr. 92-93.) On cross-examination, he acknowledged never having informed Respondent that her absenteeism had prevented her evaluation, nor that she had failed to fulfill her responsibilities. (Tr. 116-117.)

[15] Ojeda detailed that his department had four social workers assigned to child-study teams, including Respondent. (Tr. 109.) At this staffing level, he estimated, each social worker was responsible, on average, for 35-50 students. (Tr. 106.)

She also affirmed notifying the Board during the 2021-2022 school year when she was absent. (Tr. 174.) According to Respondent, she did so by emailing Christina Francisco, the Principal at the school to which she was assigned. (Tr. 174; Respondent Exhibit 6.)[16] She related having been directed to communicate in this manner, as Francisco was her immediate supervisor. (Tr. 176.) This instruction, she stated, was never changed during that school year, nor was she advised that she was not correctly reporting her absences. (*Id.)*

Although her long-term disability benefits terminated as of April 22, 2022, she related not returning to work, because the Board had not provided her with an assignment, nor did it call her to return until July 2022. (Tr. 173-174, 177.)[17]

She affirmed eventually returning to work in July 2022 (Tr. 179.) After working that month, she next provided service to the Board, beginning in September 2022, at which time she was assigned to the Jefferson Arts Academy Annex, located at the Frank J. Cicarell Academy High School. (Tr. 179 – 180.)

Beginning on or about October 29, 2022, she reported needing extensive absences to care for her daughter, who had been the victim of a physical assault. (Tr. 180.) In response, she applied to the State of New Jersey for what she then believed was a family medical leave of absence, but was actually family medical leave insurance. (Tr. 181; Respondent Exhibit 9.)[18]

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[16] Respondent represented that Respondent Exhibit 6 constitutes a summary of the emails that she sent for this purpose during the 2021-2022 school year. According to Respondent, the summary, which consists of 12 pages identifying the date, sender, recipient and partial content of the listed emails, was created by searching her email account for emails sent to Francisco during that time period. (Tr. 221-223; Respondent Exhibit 6.)

[17] Respondent reported that she did not receive any communication from the Board during the 2021-2022 school year. She maintained that her attorney notified the Board that her benefits had terminated. (Tr. 174.)

[18] On cross-examination, she related emailing the Board in or about November 2022, regarding a leave request, but never received a response. (Tr. 230, 232.)

The State, she said, approved her claim for the period from October 31, 2022 – October 31, 2023, allowing her to receive intermittent family leave insurance to compensate her for days she was unable to work while caring for her daughter. (Tr. 181-182; Respondent Exhibit 9.) According to Respondent, she understood that the State had communicated with the Board regarding this approval, as the Board would have had to verify her employment for the State. (Tr. 182.) Also, the approval form indicated that the Board would receive a copy. (Tr. 182; Respondent Exhibit 9.)

When using this benefit, she affirmed notifying Seabra-Silva to advise of her absence. (Tr. 183 – 184). Such notice, she said, was provided by email, but did not reference the use of intermittent family leave. (Tr. 184; Respondent Exhibit 11.)[19] During that year, she affirmed never being advised that her email communications to Seabra-Silva were not the correct method of communicating her absences. (Tr. 184 – 185.)

During the following school year (i.e., 2023-2024), Respondent reported continuing to take intermittent family medical leave. (Tr. 192.) She explained doing so based upon the belief that her coverage had been renewed for that year. (Tr. 193.) According to Respondent, neither Cuesta nor Ojeda communicated with her at any time that year regarding her attendance.[20]

Finally, Respondent testified to her belief that the Board proffered the instant Charges in retaliation for her having filed claims in 2021, alleging the Board had failed to

[19] Respondent related that Respondent Exhibit 11 was prepared in a similar manner to that described as to Respondent Exhibit 6. (Tr. 189-190)

[20] In testifying regarding her attendance, Respondent also identified a two-page summary, which she represented reflects the hours for which she was paid by the Board from July 2021 – May 2024. (Tr. 193-195, 202; Respondent Exhibit 12.) The summary, she stated, was prepared based upon the payroll records that accompany the exhibit. (Tr. 194-195; Respondent Exhibit 12.) Addressing Petitioner Exhibit 10, Respondent disputed its accuracy, citing Respondent Exhibits 11 – 12. On cross-examination, she cited that inaccuracies in the 2021-2022 Annual Attendance Calendar included the absences shown for October 1 – 28, 2022, as she did not begin her leave that year until October 29, 2022. (Tr. 219.)

compensate her in accordance with her contract. (Tr. 205.) The Board, she related, compensated her for these claims in consecutive years, with the most recent payment being made in March 2024.

DISCUSSION AND FINDINGS

Positions of the Parties

Both parties filed post-hearing briefs. Their respective positions are summarized here.

Petitioner's Position

Evidentiary Issues. As a preliminary matter, the Petitioner raises two evidentiary issues. Namely, it asserts: (1) Petitioner Exhibit 12 should be received and considered over Respondent's objection; and (2) Respondent Exhibits 2, 4, 6 - 8 and 11 - 12 should be stricken and accorded no weight.[21]

In regard to Petitioner Exhibit 12, it points out that the Administrative Code's Rules of Evidence, N.J.A.C. 1:1-5:1, provide that the New Jersey Rules of Evidence do not apply to this proceeding and grants the arbitrator discretion to exclude evidence if its probative value is substantially outweighed by the risk that its admission will either: "(1) [n]ecessitate undue consumption of time; or (2) create substantial danger of undue prejudice or confusion." *Id.*

Application of this standard, it maintains, confirms that Petitioner Exhibit 12 should be properly included in the record here. Contrary to Respondent's claims, it stresses, the document at issue (i.e., a November 16, 2022 email exchange with Respondent) was

[21] At the hearing, Respondent objected to the admission of Petitioner Exhibit 12, citing that it was not included in Respondent's August 29, 2024 disclosures pursuant to N.J.S.A. 18A:6-17.1(b)(3), but supplied to her on September13, 2024. In order to expedite the hearing, I ruled that the exhibit would be marked for identification purposes only, and the parties would be permitted to present their respective arguments on the issue in their post-hearing briefs. (Tr. 50-54.)

provided to her as a proper amendment to its disclosures pursuant to N.J.S.A. 18A:6-17.1(b)(3). Further, it avers, Respondent is without basis to argue undue prejudice from its admission, having received it two weeks prior to the start of the hearing and included it as potential exhibit in her own hearing binder.

It also points out that the content of this document bears heavily on the issue to be decided here. The document, it posits, evidences: (1) Respondent's circumvention of the Leave Policy, by applying for family and medical leave insurance from the State, as opposed to seeking a leave from the Board; and (2) the Board's notification to Respondent, advising of her unexcused absences

In sum, it concludes the probative value of this exhibit compels its admission.

Turning to the contested Respondent exhibits, it argues for their exclusion, citing Respondent's failure to disclose them prior to the hearing, as required by N.J.S.A. 18A:6-17.1(b)(3). As a result, it maintains, the Board was unaware of Respondent's intent to rely upon them.

Respondent's September 15, 2024 disclosure, it highlights, consisted of a two-page summary of Respondent's anticipated testimony, along with sixty-one pages of bates stamped documents without reference to their intended use. In contrast, it notes, Respondent, at the hearing, presented a tabbed exhibit binder, which included numerous additional documents and omitted others that were contained in her disclosure.[22] As a consequence, it asserts having been unduly prejudiced. In particular, it cites being denied the opportunity to prepare adequately for cross-examination, deprived of the chance to

[22] It notes that Respondent Exhibits 2, 4 and 12, which are not bates stamped, were not produced in the prior discovery. Also, the first two exhibits reference attachments that were not included. As to Respondent Exhibits 6, 7, 8 and 11, it highlights, although the pages are bates-stamped, they were not included in Respondent's N.J.S.A. 18A:6-17.1(b)(3) disclosure.

make additional discovery requests and prevented from calling rebuttal witnesses.

The remedy for this due process violation, it asserts, should be to strike these exhibits from the record. It stresses in this regard that the probative value of these exhibits is far outweighed by the resulting prejudice of their admission.

Merits. Addressing the merits, the Board asserts that it has established all three of the Tenure Charges brought against Respondent by a preponderance of the credible evidence, for which dismissal is the appropriate penalty.

As to the Charge of excessive absenteeism, it states, New Jersey's Tenure Employee Hearing Law ("TEHL"), N.J.S.A. 18A:6-10, allows for dismissal due to "inefficiency, incapacity, unbecoming conduct, or other just cause." *Id.* These statutory terms, it posits, should be accorded their common meaning, and, as such, "[e]xcessive absenteeism may constitute either incapacity, unbecoming conduct or just cause sufficient to warrant dismissal." *In Re: Tenure Hearing of Castro,* 2012 N.J. Super. Unpub. LEXIS 923 (App. Div. 2012).

Establishing a charge of excessive absenteeism warranting dismissal, it avers, requires a showing that: "(1) [the employer board of education] has 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." *Id.* at *14.

On the record here, it submits, each of these elements have been demonstrated relative to Respondent's absences during the school years at issue.

In particular, it contends, her total of 457 absence over those three years unquestionably meets the standard of excessive absenteeism. Respondent's challenge to the accuracy of the attendance records submitted, it avers, is unfounded. The testimony of

Ojeda and Seabra-Silva confirm the consistent and uniform practice by which her absences were entered daily into the EDUMET system.

Further, it asserts, Respondent's many absences had a significant impact on the Board's staff. In support, it cites the impact that Respondent's unavailability had on the Department of Special Services, including Ojeda's recommendation that the Superintendent hire another Social Worker to support the child study teams in her absence. It also points to the absence monitoring work required of Seabra-Silva and the human resources department.

Finally, it contends, Respondent received notice of the potential consequences of her excessive absenteeism. The repeated docking of her pay for such absences, in excess of fourteen days per year, it reasons, was more than sufficient for this purpose. *Castro,* 2012 N.J. Super. Unpub. LEXIS 923, *supra,* at *16 (docking of pay "constitute[d] notice of the real possibility of punishment as severe as tenure charges"). In addition, Cuesta's November 2022 email notified Respondent she was ineligible for FMLA leave, and, as such, all of her extended absences were unauthorized and, by Board policy, constituted a breach of her contract. The governing Leave Policy, it stresses, put Respondent on notice as to the potential consequences of her absenteeism, with its reference to dismissal procedures, loss of salary and other appropriate disciplinary action.

Accordingly, for all these reasons, it requests that the Charge of Excessive Absenteeism be sustained, and the penalty of dismissal be applied. Alternatively, if dismissal should somehow be found unwarranted, then it asks for a reduction in Respondent's salary, as authorized by the TEHL. N.J.S.A. 18A:6-10; *see Sanjuan v.*

School District of Western New York, 473 N.J. Super 416, 426 (App. Div. 2022) (holding TEHL authorizes arbitrator to determine the appropriate penalty).

Addressing the second Charge (i.e., neglect of duty), it asserts, numerous instances of absences and/or tardiness may evidence an attitude of indifference amounting a to a neglect of duty and thus, constitute grounds for termination. *See West New York v. Bock,* 38 N.J. 500, 521-522 (1962). Stated otherwise, it posits, neglect encompasses an employee's failure to perform his/her assigned duties, regardless of the reason. *Id.*

On this basis, it states, Respondent's repeated failure to appear for work prevented her from fulfilling her responsibilities, and thus, constituted a neglect of duty. Respondent's testimony, it highlights, provided further confirmation of her neglect of the child study team and her assigned students. Such disregard of her duties, it avers, was evident from the deficiencies in her recollection regarding such matters as the number of student counselling sessions she conducted and the keeping of counselling session notes.

Accordingly, for these reasons, it submits, the Charge of neglect of duty should be sustained and the penalty of discharge imposed. In the alternative, it argues, Respondent's failings in this respect warrant, at a minimum, a suspension without pay and withholding of her salary increment.

As to the third Charge (i.e., conduct unbecoming), it states, the requisite proof "requires only evidence of inappropriate conduct by … professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing [educational professionals] to behave inappropriately while holding public employment." *Caucino v. Board of Trustees, Teacher's Pension and Annuity Fund*, 475 N.J. Super. 405, 419 (App. Div. 2023).

Judged by this standard, it avers, Respondent's excessive absenteeism clearly meets the test of conduct unbecoming of a Board employee. Her total absences over the three years at issue, it points out, represents approximately two and one-half school years.

It highlights further that in addition to her failure to report for work, Respondent exacerbated matters by the manner in which she communicated with the Board regarding her absences and tardiness (e.g., late notices, switching from late to absent during the course of the day).

Such behavior, it concludes, offends publicly accepted standards of decency, and thus, warrants discharge, or, at a minimum, a suspension and withholding of Respondent's salary increment.

Respondent's Position

Evidentiary Issues. Addressing Petitioner's challenge to the admission of her exhibits (i.e. Respondent Exhibits 2, 4, 6-8 & 11-12), Respondent states the arguments asserted are unfounded.

A failure to attach documents disclosed in discovery to her initial disclosures letter, she states, provides no basis to exclude those documents from the record here. The governing statute, 18A:6-17.1(b)(3), she maintains, requires only disclosure of the evidence to be presented, and does not impose an obligation to attach copies of every document that will be used. Referencing her disclosure letter, she notes, all the documents at issue are cited there and it specifies that she may testify as to them. She further asserts that the majority of the documents were provided to the Board during the parties' discovery exchange, which occurred well prior to the September 25, 2024 hearing.

Also, she states, any concern that the Board had regarding the completeness of these documents should have been addressed at that time, by a supplemental discovery request. For example, she notes, the email summaries regarding her attendance, which have been identified as Respondent Exhibits 6 and 11, were part of her discovery production. As such, she asserts, Petitioner's belated claim that it would have requested full copies of the emails had it known of their intended use should be rejected as specious. Stated otherwise, she describes Respondent's challenge as a "ploy" designed to deprive her of the opportunity to present a defense to the Charges, which is without basis under the governing rules.

As for the documents included with her disclosures to the Petitioner ten days prior to the hearing, she avers, such production represents exactly what the rules require. Further, she posits, if the Petitioner, upon receipt of that disclosure, concluded additional time was required to prepare for the hearing, it had ample time to raise the issue, but failed to do so.

In sum, she argues, the Petitioner cannot have it both ways; namely, requesting that its late disclosure be accepted, while asserting that her timely disclosure be excluded. The doctrine of estoppel, she avers, should preclude the Petitioner from asserting such a challenge.

Accordingly, she concludes, all of her contested exhibits should be received and considered as part of the record in rendering a decision on the Charges.

Merits. Turing to the merits, Respondent asserts that the Petitioner has failed to satisfy its evidentiary burden as to the three Tenure Charges brought against her, all of which concern her purported excessive absenteeism.

Addressing the applicable legal principles, Respondent posits that under the governing statute, N.J.S.A. 18A:6-10, a school district may seek an employee's termination due to "inefficiency, incapacity, unbecoming conduct or other just cause." While acknowledging that such bases for termination may include absenteeism, she stresses, the district, as employer, bears the burden of proof. Doing so, she states, requires demonstrating by a preponderance of the relevant evidence that employee committed the charged offenses, and such offenses are sufficiently severe to warrant the employee's dismissal.

More specifically, she notes, the relevant case law confirms that to substantiate termination based upon a charge of excessive absenteeism, the district must establish: (1) it considered the number of days and circumstances of the employee's absences; (2) the impact of the absences had on the district; and (3) an appropriate warning was given to the employee. *In the Matter of the Tenure Hearing of Lena White,* 92 N.J.A.R.2d (EDU) 157 (1991). On the record here, she submits, the Petitioner has failed to substantiate all three of these required elements.

The attendance records submitted in support of the Charges, she contends, are entirely inaccurate. In support, she states, a comparison of her emails to Seabra-Silva with her Annual Attendance Calendars reveal she was marked absent on many days on which she had not sent an email reporting an absence.

For example, she references that the Petitioner marked her absent for November 23, 2023, although she had sent an email that day advising Seabra-Silva that she was present. Likewise, although she emailed Seabra-Silva that she would be late on February 6 and 8, 2024, her attendance record indicates instead that she was absent on both days.

Further, she highlights, her payroll records conflict with her Attendance Calendars. In this regard, she points out that although she was marked absent every day in February 2024, she received compensation for both pay periods that month. Such payment, she argues, rebuts the charged absences.[23]

She continues that the Petitioner failed to consider the circumstances of her absences. In this regard, she notes, the record lacks any evidence that during the years at issue, the Petitioner inquired as to the reason for her many absences or advised her regarding her obligations. Having failed to make such inquiry, she submits, it follows that the Petitioner neglected to consider the relevant circumstances.

As to the second element of this standard of proof, she argues, the Petitioner's evidence is wanting here, too. Ojeda's reported recommendation to hire another social worker, she asserts, does not show otherwise. In his account, he neither confirmed she had failed to complete assigned work or that any failure on her part was the basis for his recommendation.

Finally, in regard to the third element, she maintains, the Petitioner has failed to provide proof of an appropriate warning. Ojeda, she notes, acknowledged never meeting with her to discuss her attendance, even though Cuesta affirmed it was his responsibility to do so. Simply put, she concludes, the Petitioner neglected to issue a warning that her absenteeism placed her employment in jeopardy.

As such, she states, the record here differs starkly from those decisions in which the

[23] Respondent also references the Attendance Calendars attached to her post-hearing brief, which have been annotated to show additional errors. In particular, the dates marked with a hash line, which identify days on which she sent emails to Seabra-Silva reporting her absence, do not include many of the dates for which she was marked absent. Also, the circled dates, which total 28 for the 2023-2024 school year, represent days on which she emailed Seabra-Silva to report a late arrival, but was marked absent.

employee was found to have received ample notice prior to serious discipline. *See, e.g., State Operated School District of Jersey City, v. Pellecchio,* 92 N.J.A.R.2d 267 (held sufficient prior notice established based on multiple letters from principal advising employee's absences were affecting continuity of instruction and his increment might be withheld); *In the Matter of the Tenure Hearing of Kacprowicz,* 93 N.J.A.R.2D 147 (found annual performance report reference to employee's need for improved attendance constituted adequate prior notice).

In view of the absence of such prior warning here, Respondent characterizes the Charges as frivolous and asserts they constitute retaliation for her prior wage claims against the Board. In this regard, she notes, the Charges were served within one month of the date on which the Board made its last payment in resolution of the wage claims.

Accordingly, for all these reasons, she asks for an award dismissing the Charges and reinstating her with back pay.

Opinion

Evidentiary Issues. As a preliminary matter, I will address first the parties' respective evidentiary objections, which concern Petitioner Exhibit 12 and Respondent Exhibits 2, 4, 6-8 and 11-12.

Respondent's challenge to Petitioner Exhibit 12 represents an extension of her August 29, 2024 motion in limine. More specifically, Respondent contends, even accepting Petitioner's August 29, 2024 disclosures pursuant to N.J.S.A 18A:6-17.1(b)(3) were timely, its September 13, 2024 supplemental disclosure, which provided the

document now identified as Petitioner Exhibit 12, was not.[24] As such, Respondent maintains that it should be barred from the record based upon the express terms of the governing statute.

On review, I find such exclusion unsupported by the statutory language and unwarranted under the circumstances presented.

As stated in my September 23, 2024 Order (the "Order") denying Respondent's motion in limine, N.J.S.A 18A:6-17.1(b)(3) does not dictate a specific deadline for the Board to make its required disclosure beyond stating that it shall do so "upon referral of the case for arbitration." *Id.* This language, as I explained, is no doubt ambiguous relative to setting the time period for making the requisite disclosure and cannot logically mean that such disclosure occur on the same day as the referral to arbitration. (Order at 5.) Such construction, as the Order explains, could lead to harsh and unintended results given that the Commissioner determines the date of referral, without providing advance notice to the petitioner school board. (*Id*.)

On this basis, I concluded that the determination of whether a board's disclosure pursuant to N.J.S.A. 18A:6-17.1(b)(3) is timely must be guided by the principles of due process. Stated otherwise, the question to be answered is whether the timing of the disclosure deprived the respondent employee of a full and fair opportunity to prepare his/her defense to the tenue charges proffered against him/her. (*Id.* at 5 – 6.)

I note, however, that before that analysis can be performed, the Board's disclosure of the document at issue (i.e., Petitioner Exhibit 12) presents an additional question that

[24] My September 23, 2024 Order denying Respondent's motion in limine did not address the status of Petitioner's September 13, 2024 supplemental disclosure. As explained there, I found the issue was beyond the scope of the motion, which was filed prior to the date of the additional disclosure.

must be answered Namely, with the document having been produced on September 13, 2024, as a supplemental disclosure to the Board's August 29, 2024 disclosures, is its use barred per se by the terms of the statute? On review, I conclude that the statute does not impose such a preclusion.

In making this determination, I take note that here again, the statute is ambiguous. By its terms, N.J.S.A. 18A:6-17.1(b)(3) makes clear two points regarding the Board's disclosure obligation: (1) the required content of the disclosure (i.e., all evidence; and a list of witnesses with a complete summary of their testimony); and (2) the Board is precluded from presenting any evidence at the hearing beyond such disclosure, except for witness impeachment purposes.

The statute is silent, however, as to whether a petitioner board receives a single opportunity to make such disclosure or is permitted to supplement its initial disclosure, where appropriate. I am convinced that statute must be construed as permitting such supplemental disclosures, at least, where doing so does not violate the due process rights of the respondent employee. Such reading of the statute, I am satisfied is consistent with the well-recognized tenet of statutory construction dictating against adopting any interpretation that would create an absurd result, and thereby, contravene legislative intent.

In discerning such intent relative to N.J.S.A. 18A:6-17.1(b)(3), I find that the parallel disclosure requirements set forth in the statute for petitioner board and respondent employee serve to prevent the arbitration hearing from becoming a trial by ambush. At the same time, it is inconceivable that the statute was intended to create a trap for the unwary, by which an oversight in the initial disclosure could seriously undermine the errant parties' case, even though the deficiency is identified in advance of the hearing.

Indeed, such a result is at odds with the essence of arbitration, for which the governing statute was expressly crafted. In this regard, I note that it is well understood that arbitration represents a less structured dispute resolution procedure, which emphasizes efficiency and expediency. With the statute having been drafted in this context, it follows that it should be read as allowing the parties the flexibility to correct or supplement their initial disclosure in advance of the hearing, provided that the due process rights of the other party are properly protected.

Judged by this standard, I find that Petitioner Exhibit 12, a two-page email exchange, should be admitted and included in the record.

The Board's counsel has represented that its omission from the August 29, 2024 disclosures was a clerical oversight, which was corrected once discovered. Nothing in the record conflicts with this assertion and no other basis has been cited for rejecting it.

Further, I am persuaded that the timing of this supplemental disclosure did not deprive Respondent a full and fair opportunity to prepare her defense to the Tenure Charges. In this regard, I take note that Respondent included a copy of the document at tab 9 of her exhibit binder and has made reference to it in her post-hearing brief. (Respondent's Post-Hearing Brief at 12 – 13.)

In sum, weighing all of the relevant circumstances, and giving proper consideration to Respondent's due process rights, I conclude that Petitioner's September 13, 2024 disclosure was timely, and, as such, Petitioner Exhibit 12 was properly introduced as supporting evidence for the Petitioner's case.

In contesting certain Respondent Exhibits, Petitioner argues that N.J.S.A 18A:6-17.1(b)(3) bars their admission because Respondent's September 15, 2024 disclosure failed

to sufficiently describe these documents and/or include copies of them.[25] On review, I find these assertions unsubstantiated.

In this regard, I take note that Respondent's September 15, 2024 disclosure includes copies of both Respondent Exhibits 2 and 12. (Petitioner Exhibit 14.) Also, the summary of her testimony provided as part of her disclosure references these documents with sufficient particularity. (*Id.*)

As to Respondent Exhibits 4, 6-8 and 11, Petitioner correctly states that copies of those documents were not included in Respondent's September 15, 2024 disclosure. (*Id.*) On balance, however, I find this failure to be a technical violation that does not warrant excluding these exhibits from the record. Simply put, I am convinced that the admission of these documents into the record does not transgress Petitioner's due process rights by depriving it of a full and fair opportunity to present its case in chief, as well as any rebuttal.

In making this determination, I rely on two key factors. First, each of these five challenged exhibits are clearly identified and well described in Respondent's summary of testimony provided with her September 15, 2024 disclosure. (*Id.*) Second, each page of these five exhibits bears a bates number, indicating they were provided to Petitioner during the parties' prior exchange of discovery. (*Id.*)

On this basis, I am satisfied that Petitioner received adequate notice of Respondent's intention to introduce these documents as evidence at the hearing and had sufficient opportunity to prepare for such use by Respondent.

Petitioner's other challenges to these exhibits (e.g., missing attachments; summary

[25] Petitioner included a copy of Respondent's September 15, 2024 disclosure as an exhibit to its post-hearing brief. (Petitioner Exhibit 14.) The disclosure consists of a three-page letter addressed to Petitioner's counsel, summarizing Respondent's testimony and identifying the documents that she would address. (*Id.*) It also includes copies of some of the referenced documents, which bear bates stamp numbers "White 95" through "White 156." (*Id.)*

format), I find unavailing. Under the evidentiary standards of arbitration, the cited deficiencies go to the weight to be accorded to the documents and not their admissibility.

Moreover, Petitioner's claim that it was deprived of the opportunity to request the missing attachments and/or obtain complete copies of the documents is unpersuasive. Having received notice of Respondent's intention to rely upon these documents by her September 15, 2024 disclosure, I am satisfied Petitioner had sufficient time to make such supplemental discovery requests prior to the September 25, 2024 hearing in this case. Alternatively, it could have made an application at the hearing for such production and requested time to review and present additional testimonial or documentary evidence, as appropriate.

In sum, I conclude that the admission of Respondent Exhibits 2, 4, 6-8 and 11-12 do not deprive Petitioner of due process, and, as such, its request for their exclusion from the record is denied.

Merits. In turning to the merits of the proffered Charges, certain introductory comments are appropriate here. Per the governing statute, the Board is authorized to seek Respondent's dismissal for "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. It is well recognized that such standard for dismissal encompasses excessive absenteeism. This principle holds true where the employee's absences are frequent and/or prolonged, no matter how justifiable they may be based upon the underlying circumstances. *See Pellecchio, supra,* 92 N.J.A.R.2d at 270.

The reason for this standard is obvious. Maintenance of a regular and consistent record of time and attendance represents a fundamental obligation of the employment relationship. Indeed, in the context of an educational setting, it is essential to the employer

board's ability to fulfill its educational mission to the students it serves. As such, an employee's failure or inability to meet that expectation, even for understandable reasons, such as illness or injury, effectively disqualifies him/herself from continued employment.

When seeking a tenured employee's dismissal for reasons of excessive absenteeism, the school board 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 transgression/failure warrants the employee's discharge, as opposed to some lesser disciplinary penalty.

As both Petitioner and Respondent acknowledge, established arbitral case law recognizes that in determining the appropriateness of dismissal for excessive absenteeism, three factors must be weighed: (1) the circumstances of the absences and not merely the number of absences; (2) the impact the absences had on the employer board; and (3) the issuance of an appropriate warning notifying the employee of his/her deficient attendance. *See, e.g., In the Matter of the Tenure Hearing of Castro, supra,* 2012 N.J.Super. Unpub., LEXIS 923; *In the Matter of the Tenure Hearing of Lena White, supra,* 92 N.J.A.R.2d (EDU) 157.

With these principles in mind, I turn to the Charges presented here. As the gravamen of each Charge concerns Respondent's alleged excessive absenteeism, I will address them collectively. After a careful and thorough review of the evidence and the parties' respective arguments, I conclude that the Petitioner has substantiated each Charge, but has failed to demonstrate that dismissal is warranted. My reasons follow.

As a preliminary matter, before analyzing the evidence bearing on the requisite elements of proof to support a dismissal for excessive absenteeism, I will address first

Respondent's claim that the Charges should be dismissed, as they constitute unlawful retaliation for her having filed a wage claim some three years earlier. On review of the record, I find her contention in this regard to be unsubstantiated.

As a general matter, proof of unlawful retaliation requires the affected employee to show: (1) he/she engaged in protected activity under the law, which was known to his/her employer; (2) the employer took an adverse employment action against him/her; and (3) a causal connection exists between the adverse action and the protected activity, evidencing a retaliatory motive. The requisite causal connection satisfying such third element can be established either: (1) directly through evidence of retaliatory animus towards the employee by his/her employer; or (2) indirectly, by showing a temporal proximity between the protected activity and the alleged retaliatory action or through other circumstantial evidence.

I find the supporting evidence that Respondent has proffered relative to her claim of retaliation plainly falls short as to this third element of the governing standard of proof. Nothing in the record permits me to find that anyone involved in the Petitioner's decision to bring the instant Charges ever expressed any retaliatory animus towards Respondent for asserting her wage claims. In fact, I do not understand Respondent to dispute as much.

Likewise, the record does not contain any circumstantial evidence establishing a causal connection between Respondent's wage claims and the Charges. Indeed, with the events separated by some three years, the temporal proximity needed to make an indirect showing of such linkage is lacking.

The fact that the Petitioner made a payment in satisfaction of Respondent's wage claims in or about two months prior to the issuance of the Charges does not demonstrate

otherwise. The required showing of temporal proximity must be between the protected activity and the adverse action. Plainly, an action taken by the Petitioner in resolution of the wage claims is distinct from the underlying protected activity.

Further, even assuming *arguendo* that Respondent's evidence is sufficient to make a *prima facie* showing of retaliation, I nonetheless find that her claim still fails. Simply put on the record here, I am satisfied that the Petitioner has articulated a legitimate non-discriminatory reason for the Charges, which Respondent has not shown to be a pretext.

More specifically, as discussed in greater detail below, although Respondent takes issue with her total number of absences, the Petitioner had ample basis to charge her with excessive absenteeism given her acknowledged attendance record for the 2021-2022, 2022-2023 and 2023-2024 school years. In addition, she has not offered any evidence indicating that the Petitioner in proffering the Charges on such grounds treated her disparately in comparison to similarly situated co-workers. Indeed, she presented no comparator evidence.

In sum, I conclude that the record does not support a finding of unlawful retaliation that compels dismissal of the Charges.

Returning to the evidentiary standard governing the dismissal of a tenured employee for excessive absenteeism, I find that the Petitioner's evidence satisfies the first two elements, but not the third.

Plainly, Respondent's total absences for the three school years at issue, as reflected in the Petitioner's records, is, no doubt, excessive. Indeed, judged by any rational standard, her unexcused absences during these years warrant such characterization, as they ranged from 92 – 181 days or approximately fifty to more than eighty percent of her scheduled

workdays. This label holds true even weighing the circumstances underlying these absences (e.g., Respondent's injuries; Respondent's need to care for her daughter due to injuries she sustained from an assault).

Respondent's challenges to the Petitioner's attendance records, even if credited, do not support a different conclusion. Stated otherwise, evaluating Respondent's attendance based upon her acknowledged absences still substantiates that she is guilty of excessive absenteeism.

For example, as to the 2021-2022 school year, she contests only the absences charged for the period from October 1 – 28, 2021, or a total of nineteen days. Therefore, by her own admission, she had 162 unexcused absences that year.

For the 2022 – 2023 school year, Respondent represents that the email summary identifying the dates on which she notified Principal Christina Francisco of her inability to report for work represents the entirety of her absences that year. (Respondent Exhibit 6.) Her assertion in this regard strikes me as dubious, inasmuch as the email summary does not reflect any reported absences after January 7, 2022. Indeed, she offered no explanation for this mid-year cut off, which is at odds with her stated ongoing need to take time off to care for her daughter. Nonetheless, accepting her assertion still demonstrates a total of fifty-nine absences for the year, which is plainly excessive by any accepted definition of that term.

Similarly, as to the 2023-2024 school year, she relies on another email summary, this time listing notices sent to Seabra-Silva, to dispute the number of absences charged by the Petitioner for that year. However, crediting her assertion that this email summary represents the totality of the days she failed to report for work in 2023-2024, she still

amassed seventy-seven absences for the year. Once again, I am compelled to conclude that her acknowledged attendance confirms a record of excessive absenteeism.

In sum, whether judged by the Petitioner's records or Respondent's account, I am convinced that this first element of the requisite standard of proof has been satisfied. Respondent's unexcused absences over the three school years at issue were plainly excessive, even when weighing the stated circumstance underlying those absences.

Turning to the second element of the governing standard, I find it axiomatic that Respondent's annual absentee rate during the years at issue, whether using the Petitioner's count (i.e., approximately 50 – 80%) or Respondent's representation (i.e., approximately 25 – 75%), had a severe adverse effect on the Special Services Department's ability to provide social work services to its student population. Indeed, with Respondent serving as one of four Social Workers supporting the child study teams during 2022-2023 and 2023-2024, the staff was frequently operating at seventy-five percent of capacity.

Ojeda's testimony substantiates this conclusion. Namely, it stands unrebutted that during the 2023-2024 school year, Respondent's absences caused him to recommend that the Superintendent hire another Social Worker for his department.

Addressing the final element of proof, I find the Petitioner's evidence wanting. Simply put, the record does not permit me to conclude that the Board or Respondent's supervisors issued her a warning confirming their dissatisfaction with her attendance and advising of the consequences of a failure to remedy her failings.

Indeed, both Cuesta and Ojeda acknowledged that they never had any direct conversations with Respondent regarding her deficient attendance. Likewise, they confirmed that Respondent was never issued any documentation, such as an attendance

improvement plan, identifying her excessive absences and the consequences of failing to achieve and maintain a regular and consistent record of attendance.[26]

I find unavailing Ojeda's assertion that Respondent's absences prevented him from taking such steps. Even if Board procedure mandates an in-person meeting when counselling or issuing a written warning or other documentation for excessive absenteeism, it cannot excuse the Petitioner from taking such action as predicate step before seeking Respondent's dismissal. Stated otherwise, the Petitioner's obligation in this regard compelled that it utilize an appropriate means by which to provide Respondent with such notice.

Finally, contrary to the Petitioner's assertion, I am not persuaded that its withholding of pay for the vast majority of Respondent's absences satisfied this notice requirement. The mere docking of her wages simply does not represent a satisfactory proxy for a warning notice or an attendance improvement plan. Such action failed to put Respondent on notice, with the requisite level of certainty, that her attendance was unacceptable and her failure to remedy it jeopardized her employment.[27]

Conclusion – Penalty. In sum, on the basis of this analysis, I am compelled to find

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[26] The November 16, 2022 email from Renee Henry, Cuesta's Administrative Secretary, to Respondent does not suffice for this purpose. (Petitioner Exhibit 12.) Although Henry conveyed a message from Cuesta to Respondent, advising that Respondent was not eligible for FMLA leave to care for her daughter and listing her absences during the 2021-2022 and 2022-2023 school years, this communication did not inform Respondent that her record of attendance was unacceptable and failure to remedy it would lead to discipline, up to and including dismissal. (*Id.)* Likewise, I find unavailing, Petitioner's argument that the Leave and/or Attendance Patterns/Sick Leave Policies satisfied this notice requirement. I reach this conclusion for two reasons: (1) Petitioner failed to rebut Respondent's claim that she had never received or seen the Policies; and (2) Petitioner failed to conference with Respondent in response to her absences, as specified in the Attendance Pattern and Sick Leave Policy. (Petitioner Exhibits 7 – 8.)

[27] Contrary to the Petitioner's claim, I do not read the Court's ruling in *In Re Tenure Hearing of Castro, supra,* 2012 N.J. Super. Unpub., LEXIS 921 (App. Div. 2012), as instructing otherwise. Although the Court referenced the docking of the respondent employee's pay in finding the notice element satisfied, it also highlighted that in doing so, the petitioner board issued him six separate letters, each of which cited his obligation to report to work for continuity of education and referenced that continued absences would result in disciplinary action, including tenure charges. *Id.* at *16.

that while the Petitioner has substantiated Respondent is guilty, as charged, of excessive absenteeism and the related offenses of neglect of duty and conduct unbecoming, it has failed to demonstrate that dismissal is warranted.[28] Simply put, given the Petitioner's failure to give the requisite notice, it lacks just cause to support her discharge.

This finding, however, does not absolve Respondent from all fault. Quite the contrary, while insufficient for dismissal, her demonstrated record of excessive absenteeism over three school years unquestionably provides just cause for lesser discipline.

Accordingly, weighing all of the relevant circumstances, I conclude that Respondent shall be issued a final written warning and suspended without pay for thirty days. Such suspension will be reduced by such period, to date, that Respondent has been removed from her position without pay as consequence of these Charges.

[28] Insofar as Charge III – Conduct Unbecoming is premised, in part, on Respondent's alleged failure to give proper notice of her absences and instances of late reporting, I find it unsubstantiated on the record here, and therefore it is dismissed as to such allegations. The timing and the very terse content of the emails that Respondent sent for this purpose are no doubt open to criticism. (Petitioner Exhibit 11.) The record, however, does not include a policy that Respondent contravened by that practice. Nor was any evidence presented that she was directed to revise her method of communication in this regard and failed to do so. As such, I am compelled to conclude that her actions in this regard do not rise to the level of conduct unbecoming of a staff member.

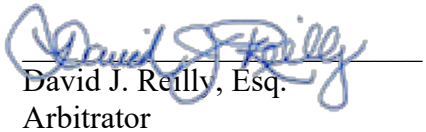
AWARD

1. Respondent is culpable of excessive absenteeism, as reflected in Charges I - III.

2. The appropriate penalty for Respondent's proven failing in this regard is a final written warning and suspension without pay for thirty days. Such suspension will be reduced by the period, to date, that Respondent has been removed from her position without pay as consequence of these Charges.

3. I will retain jurisdiction of this matter to resolve any dispute that arises as to the implementation of this award

Dated: January 13, 2022

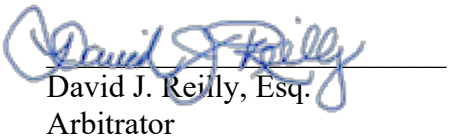


David J. Reilly, Esq.
Arbitrator

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: January 13, 2022



David J. Reilly, Esq.
Arbitrator