

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION

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**Jill Benum**

v.

**Providence School Board**

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**DECISION**

Held: The Providence School Board's termination of Ms. Benum is supported by evidence of good and just cause in that during the 2003-2004 school year she had an extended unexcused absence from work; and even though she requested an unpaid leave of absence, her request for a leave was not granted.

DATE: December 22, 2006

## **Travel of the Case**

On May 3, 2005 an appeal was filed on behalf of Jill Benum, whose termination as a tenured teacher in the Providence school department had been affirmed by the Providence School Board on March 28, 2005. Commissioner McWalters designated the undersigned to hear and decide this appeal. Hearings were scheduled by agreement of the parties on August 18, 2005 and May 8, 2006. Thereafter, memoranda on the legal issues were filed on July 21, 2006 at which time the record closed.

Jurisdiction to hear this appeal lies under R.I.G.L. 16-13-4.

## **ISSUE**

Did the Providence School Board have good and just cause to terminate Jill Benum as a tenured school nurse teacher in the Providence School Department on June 14, 2004?

## **Findings of Relevant Facts**

- Jill Benum was employed as a certified school nurse teacher in the Providence school system since September of 1990. Tr. Vol.I.p. 109-110.
- At the start of the 2003-2004 school year, she did not appear for work at the Charlotte Woods Elementary School and did not call to notify school officials of the reason or expected length of her absence. Tr. Vol. I pp. 20-22. A substitute was called. Tr.Vol.I pp. 20-22.
- Ms. Benum appeared for work on the sixth scheduled day of the school year and because there was a substitute nurse covering the school, she was asked to report to the Human Resources Office to discuss the situation with Donald W. Zimmerman, the senior executive director of the Human Resources Office. Tr. Vol.I. pp. 20-22.
- Ms. Benum informed Mr. Zimmerman that the reason for her absence from work, as well as her failure to call and notify the school of her anticipated absence during the first week of school, was because she had been incarcerated<sup>1</sup>. Tr. Vol.I p. 22.
- Mr. Zimmerman discussed with Ms. Benum a need for her to provide the school department with a medical release indicating that she was able to work because in the prior school year she had been on medical leave for a period of time. Ms. Benum

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<sup>1</sup> The reason for Ms. Benum's incarceration during the first week of school, as well as her subsequent imprisonment later in the school year are not relevant as the School Board did not rely on any allegations of criminal conduct as the basis for her termination.

agreed to provide, and the School Department received, the necessary documentation for her return to work on September 9, 2003. Joint Ex.3.

- On September 11, 2003 the School Department received notice that Ms. Benum had been admitted on September 9, 2003 to an alcohol treatment program in California. She was placed on a medical leave at that time. Joint Ex. 4; Tr. Vol.I pp. 26-29.
- On October 27, 2003 the Director of Human Resources received notice that Ms. Benum had completed the treatment program and would be medically fit to return to work on November 3, 2003. Joint Ex. 6.
- Ms. Benum did not return to work on November 3, 2003 and on November 17, 2003 Mr. Zimmerman received written notification from her mother that Ms. Benum was incarcerated. Ms. Benum's mother requested, on her daughter's behalf, that she be granted an unpaid leave of absence and indicated that a court hearing, scheduled for November 19, 2003 would determine her daughter's status. Joint Ex. 7; Tr. Vol.I p. 30-31.
- On November 24, 2003 Ms. Benum's mother advised Mr. Zimmerman that her daughter had been sentenced to serve six (6) months in prison and possibly an additional six (6) months of required participation in a residential treatment program. Joint Ex. 8; She reiterated her request that Ms. Benum be granted a leave of absence without pay to cover the period of her anticipated absence and noted that the matter was under appeal. Joint Ex. 8.
- Mr. Zimmerman determined that Ms. Benum was ineligible for an unpaid leave of absence pursuant to the provisions of the collective bargaining agreement, specifically Section 5-6 of the contract. The contract gave eligibility for an unpaid leave of absence to employees who had completed three years of continuous service. Benum Ex. A; The contract had been construed to require that the years of continuous service be just prior to the requested leave and, due to the medical leaves she had taken, Ms. Benum was not eligible. Tr. Vol.I pp. 31-32.
- Mr. Zimmerman called the president of the Providence Teachers' Union, Paul Vorro, to notify him of his denial of the request for an unpaid leave of absence. He did not call or write to Ms. Benum or her mother to notify them of his decision. Tr. Vol.I pp. 31-33, 37-38.<sup>2</sup>
- Ms. Benum continued to be absent from her assigned position as school nurse teacher at the Charlotte Woods School, and on January 29, 2004 Mr. Zimmerman gave her written notice that the Superintendent would be presenting a recommendation to the Providence School Board that it dismiss her from her position. The reason provided for the Superintendent's recommendation was Ms. Benum's continued unexcused absence due to incarceration and her record of criminal activity. Joint Ex. 9.
- On February 11, 2004 counsel for Ms. Benum requested that the date scheduled for the Board's consideration of the termination recommendation be postponed until

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<sup>2</sup> At some point Mr. Zimmerman also discussed the request for the leave of absence with the Superintendent Melody Johnson. Tr. Vol. I p. 38.

some time after April 23, 2004 at which time Ms. Benum would no longer be incarcerated<sup>3</sup>. PSB Ex. 1.

- On or about March 22, 2004 Ms. Benum's mother filed a grievance on her daughter's behalf. One of the issues raised by the grievance was her entitlement to a leave of absence under Article 5 of the contract as requested on November 17 and 24, 2003. PSB Ex.4. The grievance was submitted to Superintendent Melody Johnson on April 22, 2004 with a request for hearing. PSB Ex.3.
- On May 28, 2004 Superintendent Melody Johnson denied the grievance filed with respect to the request for an unpaid leave of absence that had been requested by Ms. Benum's mother on November 17 and 24, 2003. PSB Ex.5.
- A copy of the Superintendent's decision on the grievance was forwarded to Ms. Benum on June 11, 2004. PSB Ex. 6; Benum Ex. B. The grievance was not pursued to any of the other levels provided for under Article 15 of the contract. PSB Ex. 7.
- On June 14, 2004 Ms. Benum was terminated by the Providence School Board. The Board's written decision, dated June 21, 2004 cites as the reason Ms. Benum's "record of absences from work because of her incarceration"<sup>4</sup>. Joint Ex. 10.
- Following an evidentiary hearing before the full board on March 28, 2005, the Providence School Board sustained its prior decision to terminate Ms. Benum on the basis of her "continued unexcused absence due to incarceration". Its written decision was sent to Ms. Benum on April 4, 2005. Joint Ex. 1.

## **Positions of the Parties**

### **Providence School Board**

Counsel for the Board submits that the Providence School Board responded appropriately to the fact that Ms. Benum had a chronic illness for which she sought help over a long period of time, starting in the year 2000 and continuing to September of 2003. However, after many sick days and medical leaves, admittedly excused absences, Ms. Benum was then absent for an extended period without an approved leave. During this period of unexcused absence in school year 2003-2004, Ms. Benum was unavailable to perform the necessary, even critical, duties of the school nurse teacher at the school to which she was assigned. Until her termination, a replacement could not be retained and the school had to rely on the services of a substitute nurse. In January of the school year, the district took steps to begin the process to terminate Ms. Benum and fill the position on a permanent basis. It was the School Board's prerogative to do this, since Ms. Benum did not qualify for an unpaid leave of absence during the lengthy period in which she was

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<sup>3</sup> The record does not indicate the date on which Ms. Benum was actually released. There is no evidence that she was available or presented herself for work prior to her actual termination by the School Board on June 14, 2004.

<sup>4</sup> The Board's letter goes on to refer to Ms. Benum's absences as "excessive, unacceptable, and unexcused".

incarcerated in school year 2003-2004. Her entitlement to an unpaid leave was an issue that she grieved under the terms of the collective bargaining agreement, and when the grievance was denied by the Superintendent, Ms. Benum accepted that determination.

Ms. Benum's extended, unexcused absence from her work during school year 2003-2004 and her ongoing unavailability to perform the functions required of her as a school nurse at the Charlotte Woods Elementary School constitute the required "good and just cause" for her termination as a tenured teacher in the school system.

### Jill Benum

At the outset, counsel for Ms. Benum raises the issue that the notices provided to her during the process of her termination by the School Board were not accurate in that they failed to convey the real reason why she was terminated. Ms. Benum's attorney points to allusions in the School Board's case to absences beyond those noted in the termination notices to Ms. Benum – including approved medical leaves and her use of sick time – as the reason the School Department "could not depend on Ms. Benum to perform her duties during the period 2001-2004."

In her opening statement, counsel for the Board referred to Ms. Benum's "extremely poor attendance", "missing approximately three quarters of the year 2001-2002, 46 days in 2002-2003 and the entire 2003-2004 school year". These statements indicate the School Department's true reason for terminating Ms. Benum – her cumulative record of absences, not just the period of unexcused absence due to her incarceration during the 2003-2004 school year. Counsel for Ms. Benum argues that in this case it is abundantly clear that the School Department was frustrated by the total number of absences that they had experienced with Ms. Benum and that the period of her incarceration in 2003-2004 was simply the "last straw". Implicit in this argument is that the requirement in R.I.G.L. 16-13-3 that a teacher be provided with a complete statement of cause for dismissal by the governing body of the school has not been met.

Assuming, arguendo, that the sole reason for Ms. Benum's termination is her "continued unexcused absence due to incarceration" there are several reasons why this reason is invalid. First, once it became clear that her incarceration would extend over a period of several months, Ms. Benum, acting through her mother, requested an unpaid leave of absence. According to the undisputed testimony in this case, the Director of Human Resources did not respond in writing to this request. A written response from the Superintendent or her designee was clearly required under the terms of the collective bargaining agreement. A formal response would have enabled Ms. Benum to invoke the grievance process and challenge the leave denial in a timely way. The entire termination process was tainted by the School Department's failure to respond formally to her request for unpaid leave.

Applying the contract's provisions related to Leave Without Pay (Article 5-6) counsel argues that Jill Benum's request should have been granted. Her requested leave

would have covered not only the period of her incarceration, but also the subsequent time she spent at the Providence Center.<sup>5</sup> The time she required away from work conformed exactly to the time allowed to employees under the contract's provision for unpaid leave. Any construction of the contract that would require three years of continuous employment immediately prior to an unpaid leave is not consistent with the language of the contract, but has evolved from past practice. Ms. Benum was unaware of eligibility requirements not clearly stated in the union contract. She had completed over a decade of continuous service at the time she requested an unpaid leave and this is all that the language of the contract requires. The district's interpretation would prevent long-term employees like Ms. Benum from qualifying for an unpaid leave because of alleged "interruptions" in their service, whereas a short-term employee who had accrued three continuous years of service just prior to requesting a leave would be eligible for unpaid leave. Furthermore, the absences alleged to disqualify her from eligibility for unpaid leave were all excused and sanctioned by other leave provisions of the teachers' contract.

Given that she had formally requested a leave and received no response, and that her eligibility for leave was supported by the contract's language, it is unfair, arbitrary and a denial of due process for the School Board to terminate her for "unexcused" absence during 2003-2004.

Finally, Ms. Benum's counsel argues that in order to discipline a teacher for certain conduct, an employer must inform the employee that the conduct is unacceptable and if it continues, will result in termination. In this case, it is submitted that the School Department was under an obligation to inform Ms. Benum that her absences from school were unacceptable and that she could be fired for her failure to be present for work. At no time did the Human Resource office warn Jill Benum of the consequences of her prolonged absence from her duties as a school nurse. In light of her pending request for a leave to cover the period in which she anticipated her absence, the obligation to provide notice or a warning was even more clear. The conduct of the School Department violated Ms. Benum's due process rights.

Ms. Benum has at all times remained qualified to perform her duties as a school nurse teacher in that she has retained both her nurse's license and teaching certificate. There is no question that, despite the initial reference to her "record of criminal activity" this reason was not one on which the Providence School Board relied when it dismissed her. There has been no probative evidence of criminal activity on Ms. Benum's part. She has been shown to be the victim of an unfortunate series of events and misunderstandings that led to an unwarranted period of incarceration. It was this situation that prevented her from working. Her absence was obviously not of her own volition. She should be restored to her position because there was no "good and just cause" to terminate her.

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<sup>5</sup> The record does not indicate the date on which Ms. Benum was released and attended a program at the Providence Center as described in her memorandum.

## DECISION

Jill Benum's termination by the Providence School Board on June 14, 2004 for unexcused absence from work presents some novel and difficult issues. These issues arise because at the time her lengthy absence began at the end of October 2003 she submitted, through her mother, a written request for a leave without pay under Article 5-6 of the teachers' contract. The district did not formally respond, in writing, to this request at any time, and in this record there is no precise statement of the reasons for the denial of this request. Although testimony would indicate that a decision was made that Ms. Benum was "ineligible" for leave<sup>6</sup>, the district presented an additional reason in its argument, i.e. that absence due to incarceration is not recognized as a legitimate reason for a leave. Because her claim of entitlement to unpaid leave is an issue arising under the collective bargaining agreement, and was a contractual right she asserted through the grievance process, we do not address this substantive issue.<sup>7</sup> However, the failure of the district to formally respond to the leave request has a direct effect on the nature of the "good and just cause" argued to support her termination.

The evidence would indicate that the first formal notice Ms. Benum received that her absences in 2003-2004 were unexcused was when she was notified on January 29, 2004 that her "continued unexcused absence" would be one of two grounds for the Superintendent's recommendation to terminate her. This became the only ground on which her termination was upheld by the Providence School Board. Ms. Benum argues that because the district never formally responded to her request for an unpaid leave of absence and because the district had an obligation to respond to her request under the contract, her termination is "tainted". In essence, her position is that the district's breach of its duty to formally respond, or to warn her that continued absence from work would be considered grounds for termination, makes this reason invalid. Stated another way, the argument is that her termination was arbitrary and unfair in that it followed a violation of her right to due process, i.e. her right to a formal response from the district and a warning that her absence was unacceptable.

This argument has some merit, but not to the extent Ms. Benum's termination is invalidated. As we view the effect of the district's failure to provide her with a formal response to her November 24, 2003 request for an unpaid leave, her employment status was in question for a period of approximately two months. This state of uncertainty, resulting from the lack of communication from school administrators, would make it unfair for the district to claim her absence was "unexcused". This situation existed for over two months. Notice was not sent until January 29, 2004, when Ms. Benum was notified in writing, and in no uncertain terms, that her absence was unexcused and that it would constitute grounds for a recommendation that she be terminated. Implicit, but not

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<sup>6</sup> Because she lacked three years of continuous service in the period immediately preceding her request for unpaid leave.

<sup>7</sup> The issue of the Commissioner's jurisdiction to decide issues arising under a collective bargaining agreement was clarified in Madden v. Warwick School Committee, April 23, 1984, and Hoag v. Providence School Board, June 27, 1988.

expressly stated in this communication was notice that the district had not granted her request for an unpaid leave from her position. The January 29, 2004 letter from Mr. Zimmerman (Joint Ex. 9) constituted sufficient notice to render her absence from that date forward “unexcused” and provided sufficient warning to her that her job was in jeopardy if she did not return to work.<sup>8</sup> Under the facts in this case, then, the School Board is limited to her post-January 29, 2004 absence as a valid basis for adverse job action. The precise issue thus becomes whether this shorter period of unexcused absence constitutes “good and just cause” for Ms. Benum’s termination.

The School Board found the period in which it was required to procure substitutes to cover Ms. Benum’s duties to be “unacceptable” according to its initial decision on June 14, 2004. Although the period of absence that we have found to be unexcused is some two months less in duration, it is nonetheless substantial. The district argues that when an employee is absent for a substantial period of time and unavailable to perform his/her job duties, this leaves the district in a “difficult position”.<sup>9</sup> When the ongoing absence is that of the school nurse, the need to have coverage for her duties is critical. The school nurse is essential to the efficient operation of the school’s health program. The district argues that it had a pressing need to fill Ms. Benum’s position on a permanent basis and that it was not required to leave the position open indefinitely for her return.

This analysis backs into the contractual issue of whether she was entitled to an unpaid leave of absence during school year 2003-2004, an issue which was resolved after a grievance hearing by a decision which was adverse to Ms. Benum. She did not press her right to challenge the Superintendent’s decision on this issue. The parties have determined by contract the circumstances under which an employee’s absence from work will be excused or unexcused, and application of the contract’s terms has resulted in a determination that Ms. Benum’s extended absence was unexcused. These circumstances create a prerogative on the part of the school district to fill the position on a permanent basis, not with substitutes who might happen to be available for such work. We take administrative notice of the district’s obligation to secure the benefits that flow to students when school staff are not temporary, but are stable and long-term employees. Under the circumstances of this very unusual situation, we find that Ms. Benum’s extended, unexcused absence of over four months in the 2003-2004 school year constitutes “good and just cause” for her termination by the Providence School Board.<sup>10</sup>

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<sup>8</sup> Had Ms. Benum returned to work at that time, her absence prior to January 29, 2004 would not have been a valid ground to terminate her. Given her situation, she was not able to return to work at the time she received the January 29, 2004 letter, or at all during the 2003-2004 school year.

<sup>9</sup> Since Ms. Benum was not receiving her salary during this time, there is no allegation that she was receiving pay for services she was not performing.

<sup>10</sup> We do not find the reference “due to her incarceration” to be relevant and suggest that the School Board refrain from making such reference in any future context. In light of the fact that the School Board, for whatever reason, has not alleged that Ms. Benum has engaged in criminal conduct, the ongoing reference to her unexcused absence “due to her incarceration” is unfair and unnecessarily stigmatizing. Given the lack of evidence with respect to criminal conduct on her part, it suffices to conform the reason for her termination to her “extended unexcused absence”. No inference was drawn, nor was there any argument that an inference of criminal conduct on Ms. Benum’s part should be drawn, by the School Board’s references to her “incarceration”.

For the foregoing reasons, this appeal is denied and dismissed.

For the Commissioner,

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Kathleen S. Murray, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

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December 22, 2006  
Date