



## **Travel of the Case**

On November 27, 2006 an appeal was filed with Commissioner Peter McWalters on behalf of Paul Botelho, a teacher in the Providence School Department whose termination had been affirmed by the Providence School Board on November 12, 2006. The undersigned was designated to hear and decide this appeal. Hearing on the appeal took place on February 2, 2007 and the record closed on March 19, 2007 with the filing of final briefs in this matter.

Since Mr. Botelho held the position of a tenured teacher, jurisdiction for the Commissioner to decide this dispute arises under R.I.G.L. 16-13-4.

## **Issues**

Did the Providence School Board provide Paul Botelho with procedural due process in its termination procedures?

Is the Providence School Board's dismissal of Paul Botelho supported by good and just cause?

## **Findings of Relevant Facts:**

- On May 22, 2006 the Providence School Board met to consider a recommendation from its Superintendent that Paul H. Botelho be terminated from his position as a science teacher at Samuel Bridgham Middle School.<sup>1</sup> The Board voted unanimously at that meeting to terminate Mr. Botelho, effective June 1, 2006 and sent Mr. Botelho written notice of its action and the reasons on which it was based on May 24, 2006. Admin.Ex.1.
- Teachers in the Providence school system are required to follow a protocol for reporting their anticipated absences in which they call<sup>2</sup> either an automated system (AESOP) or contact staff at the Human Resources Office so that a substitute teacher can be assigned to cover the absent teacher's classroom. Tr. p.20; Admin.Ex.3.
- From March 17, 2006 through March 27, 2006 Mr. Botelho was absent a total of seven (7) successive school days.<sup>3</sup> During this time he did not call in to report his

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<sup>1</sup> The record does not indicate whether or not the Superintendent's recommendation was in writing.

<sup>2</sup> Or log in their absences by going to their internet website. Tr. p.16

<sup>3</sup> Mr. Botelho was also absent for four successive days from March 13-16<sup>th</sup>, but he did place calls on each of those days to the automated system and substitutes did provide coverage for his classes. Admin.Ex.2. Testimony indicated that after the fourth successive day of absence, the automated system would not accept a teacher's call, and contact with a staff person at the Human Resources Office was necessary in order to report an anticipated absence. The system was designed in this way so that after four days of successive

anticipated absence and it was not until the afternoon of March 27, 2006 that he provided the Human Resources Office with a note from his doctor, documenting that the reason for his absences was illness. Tr. pp.26-31; Admin.Ex.5.

- During the first three days of Mr. Botelho's absences – March 17, 20 and 21<sup>st</sup> – no coverage for his classes was obtained because he had not called in as required by the protocol. Tr. pp.26-27. During the last four days of this period, i.e. March 22, 23, 24 and 27<sup>th</sup> the Human Resources Office did obtain substitute coverage. Tr. pp. 27-28; Admin.Ex.2.
- On March 20, 2006 Mr. Dennis Sidoti, the Employee Relations Administrator for the Providence School Department, wrote to Mr. Botelho, directing him to report to a meeting on March 23, 2006 at 9:45 a.m. to review his continued excessive absences and his failure to follow absence protocols outlined in the collective bargaining agreement. He was also advised of his right to union representation at the meeting. Tr.pp. 28-29; Admin.Ex. 6;
- Mr. Botelho received the letter from Mr. Sidoti notifying him of the March 23, 2006 meeting on March 22, 2006. Tr. p.107; Mr. Botelho did not attend the meeting, and did not call Mr. Sidoti to notify him he would not be there.<sup>4</sup>
- Mr. Botelho came to the Human Resources Office on March 27, 2006 in the late afternoon, with a doctor's note documenting that he had been sick from March 17-27<sup>th</sup>. He gave the note to Mr. Sidoti, who told him to contact his union. Tr. pp. 30-32; 108-109. Mr. Botelho was placed on Administrative Leave with pay from the following day, March 28, 2006 up to the time of his subsequent dismissal by the School Board, which took effect June 1, 2006. Tr.pp.86-87; Admin.Ex.5 and 10.
- As of March 28, 2006 when he was placed on Administrative Leave with pay, Mr. Botelho had been absent for a total of fifty (50) school days during the 2005-2006 school year. Admin.Ex.10; Tr.p.123- 124.<sup>5</sup>
- Of the fifty (50) days Mr. Botelho was absent in 2005-2006<sup>6</sup>, all of his absences were either sick or personal days, and except for the period March 17-27, 2006, he always reported his absences according to the reporting protocol. Tr.p.83. He has provided doctor's notes documenting illness whenever such documentation has been required under the terms of the collective bargaining agreement. Tr. p.85.
- During school year 2004-2005 Mr. Botelho was disciplined with respect to his "excessive absences". Admin.Ex.7 and 8. The second warning, dated June 23, 2005

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absences, the teacher could be reminded that a doctor's note would be needed to document the medical reason for absences due to illness. Tr. pp. 16-17.

<sup>4</sup> The meeting did not go ahead as scheduled when Mr. Botelho did not appear in the principal's office on that Thursday morning, March 23, 2006 at the scheduled time. Tr. pp. 29-30.

<sup>5</sup> Mr. Sidoti testified that the School Board's termination decision dated May 24, 2006 (Admin.Ex.1) mistakenly noted 52 days absence in school year 2005-2006.

<sup>6</sup> Mr. Botelho's absences in school year 2005-2006 do not include two periods during which he was on administrative leave with pay and the period of a five-day suspension in mid-December, 2005.

was entitled “Final Written Warning” and noted that Mr. Botelho had been absent a total of sixty (60) days during school year 2004-2005<sup>7</sup>. The final warning noted that a failure to improve attendance could result in further disciplinary action, including Mr. Botelho’s termination. Admin.Ex.8.

- On December 14, 2005 Mr. Botelho received a five (5) day suspension without pay for misconduct which occurred in October of 2005. The suspension was imposed pursuant to a settlement agreement<sup>8</sup> which cited Mr. Botelho’s verbally abusive conduct toward students as well as verbally abusive conduct and insubordination toward the principal of his school. Administrative Ex. 11.
- The collective bargaining agreement in effect during both school years in question does not place a limit on the number of sick days that an employee is eligible to take<sup>9</sup> and all of Mr. Botelho’s absences cited by the School Board as the basis for its termination, with the exception of the March 17-27 “no call-no pay” days, constituted excused sick days or personal days. Tr. pp. 124-126.

## **Positions of the Parties**

### **The Appellant**

The position of the Appellant is that the School Board did not have just cause when it voted to terminate Mr. Botelho as a tenured teacher in the school system. The major reason cited by the School Board for termination is excessive absences over the course of two school years. Yet, it is undisputed that each and every absence was due to a legitimate reason- Mr. Botelho’s illness. All of his absences were for a legitimate reason and excusable - in fact actually excused - by the School Department. Over the course of the 2005-2006 school year, Mr. Botelho went along to take sick days when he needed to without any objection from the administrators who, in giving him a final written warning the year before, had indicated that they would “continue to monitor” his absences during 2005-2006. He was led to believe that his attendance record in 2005-2006 was within the parameters of the “improved attendance” that had been requested, but not specifically defined, at the end of the 2004-2005 school year. At the time Mr. Botelho received a five-day unpaid suspension in mid-December of 2005 (for misconduct unrelated to attendance) he had already been absent from September 8, 2005-October 3, 2005 for seventeen consecutive school days. Yet, no issue with respect to his attendance record was raised when he was disciplined in December. It was not until the unfortunate episode in March of 2006 when Mr. Botelho was, for the first time, “closed out” of the automated reporting system and was unsuccessful in his attempts to contact staff at the

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<sup>7</sup> Mr. Botelho was actually absent a total of ninety (90) days during school year 2004-2005. Admin.Ex.9. The Providence School Board’s May 24, 2006 termination letter (Admin.Ex.1) also incorrectly notes that Mr. Botelho had been absent sixty (60) days during 2004-2005.

<sup>8</sup> Between the School Department and the teachers’ union.

<sup>9</sup> The agreement does, however, limit the number of sick days for which a teacher will be paid. Tr. p. 125. The parties indicated that the sick days which the School Board cites as “excessive absences” need not be identified as with pay or without pay for the purposes of either of their arguments. Tr. p.125.

Human Resources Office, that school officials determined that his attendance record for the year to date was unsatisfactory. Since the school department had not notified him that his absences during school year 2005-2006 were a problem, it is unfair to allow the district to rely on these absences as cause for termination. Furthermore, the prior written warnings on the subject of his attendance had become stale.

Counsel for the Appellant argues that excused absences for sick leave can never form the basis for just cause to support the termination of an employee. There is no dispute that Mr. Botelho's use of sick leave was for a legitimate reason- his own illness. There has been no evidence that his use of sick leave was procured by fraud or that it constituted abuse of sick leave benefits. The only complaint of the School Department is that he was ill too often. Although it may be true that a teacher's frequent use of sick leave causes disruption in the educational program, it does not change the fact that Mr. Botelho's use of sick leave was legitimate. Counsel for Mr. Botelho submits that the School Department has a policy of allowing sick leave to employees who are legitimately ill, that it provides for up to twenty (20) days per year of sick leave and permits teachers to accumulate up to ninety (90) days of sick leave. Any sick leave taken beyond that becomes "unpaid sick leave". Mr. Botelho's "long term illness" warranted application of the School Department's policy of extending unpaid leave. In such situations, the collective bargaining agreement even provides for long-term substitutes. This is what the response of the School Department should have been in Mr. Botelho's case, not a recommendation that he be terminated.

The other elements of just cause alleged by the School Board do not demonstrate any misconduct on Mr. Botelho's part. Although it is alleged that he failed to notify the Human Resources Office that he was going to be absent from work during the period March 17, 2006 through March 27, 2006, the evidence is that he made reasonable efforts to notify the office that he was going to be out sick on those days. He tried to reach Mr. Sidoti, the Employee Relations Administrator of the School Department, but a recorded message directed him to call the numbers that had been provided for the reporting of teacher absences. Mr. Botelho's testimony was that on each of the days from March 17 forward, he called the two telephone numbers that teachers had been instructed to use. There was no answer at either number during the entire morning on each day during this period.

There is no reason to believe that Mr. Botelho would seek to avoid calling in to notify Human Resources staff of his anticipated absence. He had called in to the automated system on each and every prior occasion on which he was absent that school year- some forty-five (45) times up to that point. When he did return, he promptly provided a doctor's note attesting to the fact that he had been ill. There was no reason for him to avoid calling in, and he had consistently followed the protocol on all prior occasions. Implicitly, it is argued that his testimony on his attempts to notify the Human Resources Office should be accepted, and that it establishes that he made all reasonable attempts to notify school officials that he would be absent.

It is argued that Mr. Botelho was not insubordinate when he failed to appear for a meeting scheduled to discuss his attendance record and his failure to call in to alert school officials that he would be absent from March 17-27, 2006. The record shows that on the date scheduled for the meeting, March 23, 2006, Mr. Botelho was legitimately sick. He testified that he thought Mr. Sidoti was aware of this since he had been out of work since March 17<sup>th</sup>. Again, implicit is the argument that his behavior does not constitute insubordination. Thus, the allegations of misconduct set forth in the School Board's May 24, 2006 letter are not substantiated by the evidence in this record.

Finally, counsel for the Appellant submits that the termination procedures followed by the School Board failed to accord Mr. Botelho due process. In accordance with R.I.G.L. 16-13-4 the School Board was required to provide Mr. Botelho, as a tenured teacher, with a statement of cause for his dismissal at least one month prior to the close of the school year. According to principles of constitutional due process<sup>10</sup> Mr. Botelho was entitled to be informed as to the exact nature of the infraction(s) that the School Board would rely upon to support the proposed disciplinary action as well as to the specific nature of the discipline that it proposed.

In this case, the Appellant argues that the letter of March 20, 2006 from Dennis Sidoti to Mr. Botelho does not inform him that his position is in jeopardy, but merely advises him that a discussion would take place regarding attendance issues and his "continued failure to follow absence protocols outlined by the collective bargaining agreement". The argument advanced on Mr. Botelho's behalf implies<sup>11</sup> that the insufficiency of the notice to him continued up to the point at which the Providence School Board met on May 22, 2006 to consider the termination recommendation from its Superintendent and accepted this recommendation. We infer that the argument is that no subsequent notice from the Providence School Board, or its Superintendent, cured the deficiencies of the March 20, 2006 notice from Mr. Sidoti (Admin.Ex.6). Thus, the pre-termination procedures fell short of due process requirements set forth in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) and Cotnoir v. Univ. of Maine Systems, 35 F3rd 6 (1<sup>st</sup> Circuit, 1994). Given the absence of good and just cause, Mr. Botelho has been deprived of both substantive and procedural due process. For the foregoing reasons, he argues that his appeal should be sustained and his termination rescinded, with full reinstatement and other appropriate relief.

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<sup>10</sup> Such principles are applicable to a tenured teacher by virtue of the property interest in his/her tenured position. The Appellant cites Barber v. Exeter –West Greenwich School Committee, 418 A.2d 13 (R.I. 1980)

<sup>11</sup> There is fleeting mention of another written notice from the School Board to Mr. Botelho in the opening paragraph of the Appellant's Brief (page 1) "a letter dated May 2, 2006 advising him that the School Board intended to discuss his job performance in executive session on May 8, 2006". (the meeting was rescheduled to May 22, 2006). The May 2, 2006 letter from the School Board is not in evidence. The brief of the Appellant focuses on the Sidoti letter of March 20, 2006 as the notice alleged to be insufficient for constitutional purposes.

## **Providence School Board**

The position of the School Board is that good and just cause for Mr. Botelho's termination from his position at the Bridgham Middle School occurred during the period of March 17 through March 27, 2006, when Mr. Botelho did not report for work for seven (7) consecutive days and did not notify the Department of his absences or the reason for them. He then also failed to attend a scheduled meeting on March 23, 2006 with school administrators to discuss his unacceptable attendance and his failure to follow the absence protocol. The issue in this case is, according to the School Board's memorandum:

...whether Mr. Botelho's conduct of failing to report to work for seven consecutive days, failing to call in, and failing to attend a scheduled meeting with school administrators is just cause for termination in light of his uncontested disciplinary history reflecting his excessive absenteeism and insubordination.

Counsel for the School Board argues that Mr. Botelho's disciplinary record is one of willful misconduct and a pattern of insubordination. His conduct has disrupted the educational program of the Bridgham Middle School and been contrary to the best interests of his students.

The brief of the School Board initially focuses on Mr. Botelho's disciplinary history, prior to the incidents which precipitated his termination in March of 2006. During school year 2004-2005 Mr. Botelho received two written reprimands for "excessive absences"<sup>12</sup>, both of which were placed in his personnel file and were not contested. In school year 2004-2005 Mr. Botelho was absent for a total of ninety (90) school days. Because of a calculation error, he was actually reprimanded for being absent sixty (60) days during that school year. In two meetings with school officials and his union representative that year, Mr. Botelho acknowledged that his absences were excessive and that they adversely impacted on school operations. He promised to make a sincere effort to improve his attendance. At the time of the issuance of the second, "Final Written Warning" that his sick days had been "excessive" on June 23, 2005, Mr. Botelho was informed that failure to improve his attendance could result in further disciplinary action up to and including termination.

The subsequent school year, 2005-2006 brought additional misconduct and a five (5) day unpaid suspension. The December, 2005 suspension was based on Mr. Botelho's verbally abusive conduct toward students, his insubordinate and verbally abusive conduct toward the principal, and his failure to return keys to the desk in his classroom. Again, Mr. Botelho was warned, in writing, that future acts of misconduct could result in additional disciplinary action, up to and including his termination. The record of this five-day unpaid suspension, and the reasons for it, are memorialized in Mr. Botelho's personnel file.

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<sup>12</sup> Although the first written warning dated February 18, 2005 discussed other issues with respect to Mr. Botelho's teaching performance, it is not clear that he was disciplined for these other issues raised at the February 16, 2005 meeting.

It is against this backdrop that the March, 2006 incidents occurred. First, despite the fact that Mr. Botelho had been warned and directed to improve his attendance in late June of 2005, his attendance from September of 2005 to March, 2006 had not improved. His use of sick leave had continued throughout the school year— evidence that he continued to engage in insubordinate conduct.

In addition, during the period March 17 through March 27, 2006 Mr. Botelho did not report for work, did not call in and did not notify the School Department as to why he was not present. As a result, there was no substitute coverage obtained for the first three days of Mr. Botelho's absence. These days were recorded as "no call/no pay" days in which a teacher's failure to report anticipated absence is sanctioned immediately by a loss of pay for the school day in question<sup>13</sup>. Counsel for the School Board submits that Mr. Botelho's testimony regarding his numerous unsuccessful attempts to call in to the Human Resources Offices to report his absences is implausible and simply not credible. Even assuming, arguendo, that Mr. Botelho did try to contact the Human Resources Offices and was unsuccessful in doing so, given his disciplinary history, he should have made an attempt to contact his school, his principal, or his union representative. He did not contact any of these people. His conduct violated the well-established protocol which is in place so that classrooms will be staffed each day and school operations will not be disrupted. In this specific case, a substitute for Mr. Botelho's classes was not obtained until the fourth day of his unreported absence. At no time was Mr. Botelho led to believe that his absences during the period March 17-27 were excused. In fact, when he spoke with Mr. Sidoti on March 27<sup>th</sup>, Mr. Botelho was advised to "contact his union".

It is not disputed that Mr. Botelho received the letter from Mr. Dennis Sidoti on March 22, 2006, notifying him that a meeting was scheduled for March 23, 2006 to discuss his continued excessive absences and his failure to follow the absence protocol. Mr. Botelho did not attend the meeting and, moreover, did not call to say he could not attend. There was no explanation for this conduct provided when Mr. Botelho appeared in the late afternoon of March 27<sup>th</sup>, other than his statement that he thought that Mr. Sidoti knew that he was out sick that day. The School Department submits that Mr. Botelho's refusal to attend the meeting was a blatant disregard for authority, amounting to insubordination. His decision not to report to work for seven (7) consecutive days without notifying the Department also amounts to insubordination. He had previously been warned, twice, that further acts of misconduct could lead to his termination. His subsequent production of a doctor's note indicating that the seven (7) day absence was due to illness did not legitimize this last period of absence because, as Mr. Sidoti testified, the absence protocol required him to call to report his absences on a daily basis— which he did not do on a single day during this period.

The School Board's case is focused on the specific period of March 17-27, 2006 in which Mr. Botelho did not report for work, did not call in and did not attend a scheduled meeting with school administrators. His uncontested disciplinary history included the fact that his prior absences were excessive- he had already conceded this and yet failed to improve his attendance. This case is not about legitimate use of legitimate

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<sup>13</sup> Apparently, this provision is contained in the collective bargaining agreement.

sick leave,<sup>14</sup> the Department argues, but rather about continued and unacceptable insubordination which constitutes good and just cause for Mr. Botelho's termination.

As to the claim that Mr. Sidoti's March 20, 2006 letter was inadequate pre-termination notice under the constitutional principles enunciated in the Loudermill and Cotnoir cases, counsel for the School Board notes the Sidoti letter and scheduled meeting were not relevant to such constitutional issues. It is only the Providence School Board which has the authority to terminate a tenured teacher. Thus, it is the process followed by the School Board which is determinative of compliance with due process requirements. Counsel for the Board submits that Mr. Botelho had his pre-termination meeting before the School Board on May 22, 2006, at which he had both legal counsel and union representation. He then had a full evidentiary hearing on November 6, 2006 at which time he was again represented by counsel. Prior to these hearings, he had received ample notice of the conduct which the School Department found so disruptive of its operations and harmful to its students. This notice included information provided to him in two disciplinary meetings and in three written letters of reprimand. These warnings provided him with notice<sup>15</sup> that he would be subjected to disciplinary action and that his job was in jeopardy.

Given that the items of cause set forth in the School Board's termination decision dated May 24, 2006 have been substantiated, and since the termination procedures followed by the School Board were in accordance with both the statute and due process, Mr. Botelho's termination should be affirmed by the Commissioner.

### **DECISION**

Although the parties did not refer to the May 24, 2006 letter of the Providence School Board as the Statement of Cause in this case, it is the document which sets forth the basis for the School Board's initial decision to terminate Paul Botelho from his position as a tenured teacher. In a de novo hearing before the Commissioner, the burden is on the School Board to prove its allegations by a preponderance of the evidence and substantiate that "good and just cause" supports the termination. Of the four items of cause set forth in the May 24, 2006 letter from the Providence School Board to Mr. Botelho, two deal with incidents occurring in March of 2006 and two relate to his attendance record in school years 2004-2005 and 2005-2006.<sup>16</sup> The Board concluded, after a pre-termination hearing on May 22, 2006<sup>17</sup> that Mr. Botelho's pattern of absences and failure to follow absence reporting protocols were inherently disruptive to the educational process. The Board also found that he had been insubordinate in failing to

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<sup>14</sup> The School Board notes that Mr. Botelho exhausted his sick time under the collective bargaining agreement by January 19, 2006, but this fact is not in evidence and was indicated by counsel for both parties not to be relevant to the issues at hand. See Tr.p.125.

<sup>15</sup> See the reply brief of the Providence School Board, March 19, 2007 at pages 3-4.

<sup>16</sup> The May 24, 2006 letter of the School Board is attached to this decision as Appendix A.

<sup>17</sup> The conclusions of the School Board after its full evidentiary hearing on November 6, 2006 are not part of the record.

follow the directive he received on June 23, 2005 to improve his attendance during school year 2005-2006. The Board indicated in its letter that it found any one of the reasons cited to be sufficient grounds for termination. Taking into account Mr. Botelho's past disciplinary record, the Board also found that Mr. Botelho had demonstrated a lack of professionalism and inability to cooperate such that his employment as a teacher in the system could not continue.

Although our analysis of the facts of this case is different from that of the School Board, we also conclude that good and just cause existed to terminate Mr. Botelho's employment, but *only after* taking into account his disciplinary history. We find that the March incidents precipitating Mr. Botelho's termination are insufficient, in and of themselves, to warrant his termination and we do not view his absence of fifty (50) days due to illness during the 2005-2006 school year (other than those days in March on which he did not follow the absence reporting protocol) as constituting insubordination. The School Board has not explained how, since it concedes that Mr. Botelho was truly sick on the days he took sick leave, he could be in willful violation of a reasonable order to be well. We further find that the School Board has failed to demonstrate that the numerous days of sick<sup>18</sup> leave utilized by Mr. Botelho during the 2005-2006 school year were unauthorized absences or in excess of the number of sick days available to him under the collective bargaining agreement<sup>19</sup>. There is no doubt that Mr. Botelho had numerous absences during school year 2005-2006 due to an unspecified illness, and that in fact he had been sanctioned the prior year for "excessive absences" due to illness. The status of his use of sick leave during 2005-2006, however, has been referred to by both parties as "excused absences" and, without additional evidence which would render such sick leave unauthorized or illegitimate<sup>20</sup> it cannot be relied on as cause to terminate Mr. Botelho. A review of the brief submitted by the School Board would indicate that on appeal, its arguments as to the existence of just cause for termination focus on the "March incidents" and away from Mr. Botelho's absences due to illness during 2005-2006. (See page 1 of the School Board's reply brief). This is our focus as well.

Mr. Botelho's absence from school for seven successive days from March 17 through March 27, 2006 -without notifying school officials of his absence so that a substitute could be called- is serious misconduct in the nature of insubordination.<sup>21</sup> The disruption to school operations and the potential for harm to students are the reasons why a teacher is required to report each and every anticipated absence from school, unless

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<sup>18</sup> Or personal leave

<sup>19</sup> There is a reference in the Board's brief that Mr. Botelho had exhausted his sick leave on January 19, 2006 (see page 1 of the Board's reply brief). This fact is not in evidence, and the parties appeared to agree on questioning by the hearing officer that the provisions of the collective agreement with respect to sick leave were not material. See Tr. pages 124-126.

<sup>20</sup> Such as a notice to Mr. Botelho that he had exhausted his available sick leave under the collective bargaining agreement, or that the pattern of his use of the leave required further documentation and/or medical examination by the district's physician

<sup>21</sup> The testimony references an "absence protocol" described in the collective bargaining agreement, a document not in evidence. We infer from the testimony that the agreement requires that teachers follow the "absence protocol" such that the failure to do so would constitute insubordination. Admin. Ex.3 also includes specific procedures for reporting absences which teachers are advised they "must" follow.

there is some good reason he or she is prevented from doing so. Mr. Botelho's testimony with respect to his attempts to follow the absence reporting protocol was not credible. Even if we were to accept his testimony that he tried without success to call the two numbers for the Human Resources Office on each and every morning during this period, there were other reasonable options for giving notice of his absence to those who needed to know. He could have called his principal or other staff at his school. He did not even notify the Human Resources Office or his school of his anticipated absences for three additional days after receiving a letter from Mr. Sidoti which was clearly critical of this behavior.

The second March incident, in which Mr. Botelho failed to call or show up at a meeting scheduled for March 23, 2006, has not been shown to constitute insubordination, but certainly demonstrated unprofessional conduct on Mr. Botelho's part. The facts of this incident are that<sup>22</sup> Mr. Botelho provided documentation to Mr. Sidoti on March 27, 2006 that his absence for this entire period, including Thursday, March 23<sup>rd</sup>, was due to illness. The inference drawn from this and other evidence is that his illness prevented him from attending the meeting scheduled for 9:45a.m. Thursday, March 23, 2006. In the same way that the doctor's note would have excused Mr. Botelho's absence from school that entire day, if he had followed the absence protocol, it demonstrates that Mr. Botelho's failure to attend the meeting was not willful noncompliance with the directive that he attend. However, the fact that he did not call to let Mr. Sidoti know that he would not be able to attend the meeting on March 23<sup>rd</sup> constitutes unprofessional conduct. Mr. Botelho offered no reasonable or sufficient explanation as to why he did not call to say he was unable to attend the meeting.

The failure to follow the absence reporting protocol for a seven (7) day period, the failure to call to reschedule the March 23<sup>rd</sup> meeting, one of the purposes of which was to find out the circumstances surrounding Mr. Botelho's ongoing failure to follow the protocol, constitute insubordination and unprofessional conduct. This conduct, coupled with Mr. Botelho's past disciplinary record of a five day suspension in December of the same school year (for verbal abuse of students, his principal and insubordination) constitute sufficient good and just cause for his termination. We would note that his disciplinary record also includes two written warnings for "excessive sick days" in the prior school year. Because these warnings or reprimands exist and are contained in Mr. Botelho's personnel file, they presume that there exists between the parties no dispute that these past "excessive" absences form a proper basis for past discipline. As we have indicated for the reasons stated above, his numerous absences in the 2005-2006 school year have not been shown to be "excessive" in the nature of illegitimate or unauthorized absences from school. We find that even disregarding the two prior written reprimands, sufficient evidence of just cause is present. If the written reprimands for the prior year's absences were taken into account, they would further support our finding that good and just cause exists for his termination.

The procedural issue raised by the Appellant with respect to violation of his due process rights has not been raised or responded to with sufficient particularity for a

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<sup>22</sup>See Tr. pp.83-85.

definitive ruling. Because counsel for the Appellant focuses on the March 20, 2006 letter from Mr. Sidoti as a defective pre-termination notice for due process purposes, his argument implies that there was no subsequent “pre-termination” notice from the Providence School Board prior to its May 22, 2006 termination of Mr. Botelho<sup>23</sup>. In the School Board’s responding briefs, there is no indication that there was a pre-termination notice from the School Board or the Superintendent and there is no document in the record which would constitute such a notice. Typically, a notice to the teacher of the matter being presented to the School Board by the Superintendent, and the reasons for the Superintendent’s recommendation are included in the record, but in this case it is not. It is sometimes the case that procedural arguments in administrative hearings of this type are presented for the first time in closing memoranda, and the record may not contain the evidence related to these arguments.

We decline to rule on the merits of the procedural due process (defective pre-termination notice) claim in the context of this case, given the status of the parties’ arguments and the burden of proof that the Appellant has on this issue. If indeed the procedures utilized at the level of the School Board at the pre-termination stage did not comply with due process requirements, it may be that subsequent communications between the parties, coupled with the de novo hearing at the Commissioner’s level have provided him with a full and fair hearing.

For the foregoing reasons, the 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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July 25, 2007  
Date

<sup>23</sup> The appellant’s brief at page 1 mentions a May 2, 2006 letter notifying Mr. Botelho that the School Board intended to discuss his job performance at a meeting on May 8, 2006. No further information is provided and the arguments with respect to inadequate notice do not mention this letter.