

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

MARK ASADOORIAN et. al.

V.

WARWICK SCHOOL COMMITTEE

DECISION

Held: Appellants failed to establish that they taught three full years under successive annual contracts with the Warwick School Committee and thus had not achieved tenured status under R.I.G.L. 16-13-3 at the close of school year 1992-1993.

Date: August 12, 1994

### Travel of the Case

On October 19, 1993 counsel for the appellants, fifteen teachers employed in the Warwick school system, appealed the decision of the School Committee upholding the Superintendent's determination that they had not achieved tenured status. The basis of the Superintendent's decision was that they had not, in one or more of the three preceding school years taught full school years because of absences of twenty-seven (27) days or more. See Joint Exhibit 3. Upon appeal, a hearing officer was designated by the Commissioner and hearings were held on November 29 and 30, 1993. The record in the case closed with the submission of briefs by counsel on January 18, 1994.

### Issues

- I. Did the appellants' absence for twenty-seven (27) or more school days during school years 1990-91, 1991-92, or 1992-93 prevent them from becoming tenured teachers at the close of the 1992-93 school year?
  
- II. Did appellant Sharon Rix achieve tenured status by virtue of her three years of employment during school years 1988-89, 1989-90, and 1990-91?

### Findings of Relevant Facts

- On June 30, 1993 each of the appellants received a letter from Superintendent Henry Tarlian notifying them that because of the substantial time they had missed from school (in one or more of the three years which would have constituted their probationary period) that school year (or years) would "not be counted toward tenure". S.C. Ex. A.
  
- Superintendent Tarlian made this decision because he considered the number of absences to be excessive to the point that they impacted on the school department's opportunity to determine the teachers' "ability to perform teaching, instruction at certain acceptable levels". Tr. Vol. I. p. 19.

- Superintendent Tarlian also identified his reliance, in making this decision, on a ruling by the Commissioner's office which indicated a "full" year of teaching was required for the year to count toward tenure. Vol. I. p. 19.
- In each of the years considered by Superintendent Tarlian, the teachers' contract required a school year of one hundred and eighty (180) days, plus one orientation day. Tr. Vol. I. pp. 11-12.
- In each of the years not counted by Superintendent Tarlian, the absence of the individual teacher was twenty-seven (27) or more days, i.e. fifteen percent (15%) or more of the school year. Tr. Vol. I. p. 19; Joint Ex. 2.
- Reasons for the absences included pregnancy-related and other personal illness, illness of a family member, birth of a child, and maternity leave. Joint Ex. 2.
- All of the absences used by the Superintendent in determining the total number of days missed in a given school year were authorized under the teachers' collective bargaining agreement. All of the absences were properly taken according to the terms of the agreement. Stipulation of the parties Vol. II p. 48.
- All of the appellants were recommended for reemployment in the 1993-94 school year by their respective principals. Tr. Vol. I p.7.
- All of the appellants' annual contracts were in fact renewed for the 1993-94 school year. Stipulation of the parties Vol. II p. 48.

(The following findings relate only to appellant Sharon A. Rix).

- During school years 1988-89 and 1989-90 Sharon Rix was employed under a one year contract. Tr. Vol. II p. 44. During those school years she filled in for a teacher who was on a leave of absence. Tr. Vol. I pp. 28-31; Vol. II p. 40.
- Commencing in school year 1990-91 Ms. Rix was employed under annual contract as a regular teacher. She was absent eight (8) days in that school year. In school year 1991-92 she was absent for sixty-nine (69) days and in school year 1992-93 she was absent for ninety-six (96) days. Joint Ex. 2.
- During 1988-89 and 1989-90 when she was employed under one-year contracts, Ms. Rix performed the duties of a regular teacher, was evaluated,

received fringe benefits and was paid at the appropriate step of the salary schedule. Vol. I pp. 29-30 and Vol. II. pp. 38-39.

- The contract engaging Ms. Rix for a "one year only" position stipulated that she was replacing a teacher on a leave of absence and her employment would be for a period of one year. Tr. Vol. II p.46.

### Positions of the Parties

#### Appellants:

The appellants contend that the so-called "twenty-seven day rule" adopted by Superintendent Tarlian is not based on any existing policy or rule duly adopted by the Warwick School Committee. Not only is such a rule unauthorized, but it operates as an arbitrary and illegal mechanism to deny the appellants their tenure rights. Since all of the absences in question were sanctioned by the agreement in effect between the School Committee and the Warwick Teachers' Union, the appellants argue that such absences cannot be used as a basis to deny the appellants status as tenured teachers in the Warwick school system.

Additionally, for those female teachers whose absences were due to pregnancy and/or maternity<sup>1</sup> reasons, it is argued that state law<sup>2</sup> requires such absences to have no impact on their eligibility for tenure. In no event, it is argued, should absences covered by the Rhode Island Parental and Family Medical Leave Act interrupt the continuity of the appellants' teaching service under successive annual contracts. Even if time on such leaves does not "count" toward tenure, it should not result in starting the probationary period anew upon the teacher's return from leave.

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<sup>1</sup> We assume that when counsel for the appellants notes that "ten of the fifteen appellants herein are protected by the Rhode Island Parental and Family Leave Act" (page 7 of the "post-hearing brief of the appellants") he refers to those whose absences stem from complications of pregnancy, birth of a child, and/or maternity leave.

<sup>2</sup> R.I.G.L. 28-48-1 et seq.

Finally, it is alleged that the 27-day rule, so-called, constitutes an unlawful employment practice under 42 USC 2000(e) in that it has a disparate impact on women.

School Committee:

The School Committee contends that the Superintendent's determination that 27 absences or more in a school year disqualifies such year from credit for tenure purposes is consistent with state law. R.I.G.L. 16-13-3 has been interpreted in prior decisions of the Commissioner of Education to require completion of three full years of teaching service under successive annual contracts to attain tenured status. The Superintendent's action received any necessary endorsement by the Warwick School Committee in its decision of October 12, 1993.

With regard to the Rhode Island Parental and Family Medical Leave Act, the School Committee argues that application of that statute to the facts here does not prevent absences sanctioned by the statute from affecting tenure eligibility. The School Committee notes that §28-48-4 (a) provides:

the taking of parental or family leave pursuant to this chapter shall not result in the loss of any benefit accrued before the date on which the leave commenced.  
(emphasis added)

The Committee argues that tenure is a "benefit" to which the appellants seeking the acts' protection had not yet become entitled. Therefore, the committee's position is that completion of the probationary period is jeopardized by absences which constitute a family leave or parental leave under this statute.

Decision

Consistent with prior decisions of the Commissioner in Dunn v. Middletown School Committee, July 26, 1976; Bullock et al v. Warren School

Committee, July 21, 1976, and Brunetti v. Woonsocket School Committee, April 24, 1992 we find that tenure for public school teachers is conditioned upon completion of three full years of service under three successive annual contracts. We incorporate by reference the extensive analysis and discussion of R.I.G.L. 16-13-3 entitled "Probationary Period -- tenure after probation" contained in the Brunetti decision. Documentation submitted as part of the record in this case clearly establishes that although each of the appellants<sup>3</sup> was issued an annual contract for school years 1990-91, 1991-92, 1992-93, they did not complete three full years of service under these successive annual contracts. Those school years which were less than "full" are reduced by anywhere from 27 days to as many as 109 days out of the 180-day school year. The line drawn by the Superintendent to exclude any school year in which absences were in excess of fifteen percent (15%) or more of the year is consistent with the notion of a "full" school year yet permits brief routine absences of a de minimis nature for such reasons as illness, death in the family, etc.

As we stated in Brunetti, construction of our statute to require that a teacher be in attendance every single day of the school year in order for the year to be counted for tenure purposes, while it would provide a definitive number of days, would result in a teacher's starting the probationary period anew when he or she was absent a single day during the probationary period. This reading of our statute would be unduly rigid and would produce the irrational result of restricting the class of tenured teachers to those with perfect attendance during the probationary period. Our interpretation of the statute permits for some flexibility, yet, as we discussed in Brunetti effectuates the legislative objective to require a demonstration of the probationary teachers' ability to give satisfactory service over a sustained and uninterrupted period. We would note that Rhode Island is not the

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<sup>3</sup> With the exception of Susan Sylvester, whose contract in 1990-91 was for "one year only".

only state which has recently grappled with the issue of the impact of absences on a teacher's service of a probationary period. See Matthews v. School Committee of Bedford 494 NE 2d 38 (1986); Breuhan v. Plymouth-Canton Community Schools, 389 NW 2d 85 (Mich. 1986); England v. Commissioner of Education of the State of New York 564 NYS 2d 809 (A.D. 3 Dept. 1991); Fairbanks N. Star School v. NEA Alaska, 817 P 2d 923 (Alaska 1991).

Counsel for the appellants cites Fortunato v. King Philip Regional School Committee, 406 NE 2d 426 (1980), a decision of the appeals court of Massachusetts, as authority for the proposition that absences sanctioned by a contract "should not weigh against a teacher's entitlement to tenure". This language is contained in dicta found at page 429 of the Fortunato decision. This legal principle if accepted, would permit parties to a contract to reduce the length of the probationary period for non tenured teachers by agreeing that certain absences, no matter how lengthy, were acceptable to the employer. Parties to a collective bargaining agreement cannot nullify the provisions of our state's Teacher Tenure Act, or any provision of state law for that matter, by creating an inconsistent contractual provision. See Conway et. al. v. Warwick School Committee, decision of the Commissioner dated January 15, 1988. The length of the probationary period is a function of state law, §16-13-3 and not of individual contract. We therefore reject this argument.

The appellants argue that many of the absences relied on by Superintendent Tarlian are "protected" under the provisions of R.I.G.L. 28-48-1 et seq., the Rhode Island Parental and Family Medical Leave Act. Consideration of this argument requires us to interpret our teacher tenure law and the specific requirements of R.I.G.L. 16-13-3 in light of the provisions of R.I.G.L. 28-48-1 et seq. Neither of the parties has raised the question of whether reconciliation of the two statutes presents an issue over which the Commissioner has jurisdiction. We raise this

issue, and resolve it in favor of exercising jurisdiction. However we would note at the outset that we do not have jurisdiction, and do not in this case resolve, other issues which may be presented in this dispute, such as which absences of the various appellants fall within the scope of a "parental leave" or family leave" as defined in Section 28-48-1 (d) and (g) of that act or the entitlement of a particular employee to be granted such a leave. These issues must be resolved by the parties in the appropriate forum, to the extent that they cannot be resolved by agreement.<sup>4</sup>

Assuming, arguendo, that an absence relied on by the Superintendent in determining whether a probationary teacher has taught for a full school year qualifies as a parental or family leave under R.I.G.L. 28-48-1, we must determine the impact of such leave on a teacher's eligibility for tenure. R.I.G.L. 28-48-3 provides that those employees covered by the act who exercise rights to parental or family leave:

shall, upon the expiration of such leave, be entitled to be restored by the employer to the position held by the employee when the leave commenced, or to a position with equivalent seniority, status, employment benefits, pay and other terms and conditions of employment; including fringe benefits and service credits that the employee had been entitled to at the commencement of leave. Section 28-48-3 (a).

Section § 28-48-4(a) states:

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<sup>4</sup> The briefs submitted would indicate such issues do exist. We would note that counsel for the appellants argues that one ten (10) of the fifteen (15) appellants are protected by the act. (P. 7 of appellants' brief). We would observe, however, that the scope of the act goes beyond maternity leave to include leaves by reason of serious illness of a family member, including the employee him or herself. The School Committee implies in its brief that personal illness of the employee herself "does not implicate the Rhode Island Parental and Family Medical Leave Act". (P. 8 of school committee's brief). Perhaps a "second look" at the act's provisions will produce a voluntary resolution of the issues arising under that statute. Since they do not arise under a law "relating to schools or education", the Commissioner is without jurisdiction to adjudicate these issues.

the taking of parental leave or family leave pursuant to this chapter shall not result in the loss of any benefit accrued before the date on which the leave commenced.

Neither of the above-cited provisions nor any other section of this law, would require that time spent on a family or parental leave be ignored in determining whether an employee worked a full year for tenure purposes. However, we do interpret the above-cited language as preventing such statutory leaves from interrupting the consecutive nature of the teachers' service for tenure purposes. For those teachers who had served one or two full years of the probationary period prior to taking a statutorily -protected leave, restoration of "service credits"<sup>5</sup> would include crediting them with the year(s) of the probationary period they had already completed. While we agree with counsel for the School Committee that tenure is not a "benefit" which had "accrued" to those appellants entitled to invoke the act prior to the time their leave commenced, requiring them to begin the probationary period anew would result in the loss of a benefit<sup>6</sup> which had accrued to them -- the benefit of completion of a portion of the probationary period under 16-13-3. We would note that our interpretation is consistent with the Massachusetts Supreme Judicial Court's construction of substantially similar language in Solomon v. School Committee of Boston, 478 NE 2d 137 (Mass. 1985).

In summary, the appellants' absence for twenty-seven (27) or more school days during school years 1990-91, 1991-92 or 1992-93 prevented them from becoming tenured teachers at the close of the 1992-93 school year. For those teachers whose absences constituted a parental or family leave under R.I.G.L. 28-48-1 et seq. continuity of their service was not interrupted for tenure purposes.

With regard to Sharon Rix, we reject counsel's argument that at the close of the 1990-91 she became a tenured teacher by virtue of having completed three full

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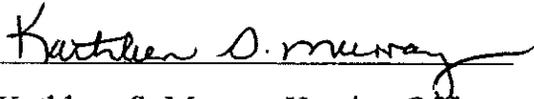
<sup>5</sup> Under R.I.G.L. 28-48-3 (a).

<sup>6</sup> Loss of such benefits is prohibited under Section 28-48-4 (a) of the Act.

years of service with the Warwick school department. During the first two years of her employment, 1988-89 and 1989-90, as our findings of fact indicate, she was employed under a contract of one year's duration. We find that a contract for one year only is not the same as an annual contract, as that term is used in R.I.G.L. 16-13-2 and 3. The difference is not semantical. A teacher employed under "annual contract" is one who serves under a contract which is "deemed to be continuous," i.e. extends from one year to the next, unless proper notice is given to the teacher under Section 16-13-2. A teacher employed for "one year only" is not at any point during the year in continuing teaching service. From its inception the contract is of one year's duration and no longer. The teacher employed under such contract is merely filling in for the regular teacher who is on a one year leave of absence. Such an employment arrangement is not violative of our teacher tenure law's requirement that teaching service be "on the basis of an annual contract," because the teacher employed for the year is not filling a vacant position. In this case Ms. Rix knew from the outset that she did not have an appointment as a regular teacher under a continuing, annual contract, but rather that she was employed for the limited period of one year. Although her duties were those of a regularly employed teacher and she was evaluated by school administrators, her contractual status clearly distinguished her from a teacher employed under a continuing annual contract. She was employed under an annual contract with the Warwick School Committee for the first time in the 1990-91 school year, the first year of her probationary period. Thus, she was not a tenured teacher during the 1991-92 school year, as argued by her counsel.

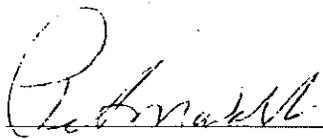
Whether or not the 27-day rule, so-called, constitutes an unlawful employment practice under 42 USC 2000 (e) is an issue which is clearly beyond the jurisdiction of the Commissioner, as it does not arise under a law relating to schools or education.

For the foregoing reasons, the appeals of the appellants are denied and dismissed.

  
Kathleen S. Murray, Hearing Officer

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Approved:

  
Peter McWalters, Commissioner

Date: August 12, 1994