

STATE OF RHODE ISLAND

COMMISSIONER OF EDUCATION

AND

PROVIDENCE PLANTATIONS

UGURHAN AKTURK *

V. *

DEPARTMENT OF CHILDREN, YOUTH *

AND FAMILIES *

DECISION

Held: Although the elimination of the auto body/auto mechanics program at the R.I. Training School constituted good and just cause for the appellant's dismissal, there was insufficient proof that notice of termination was provided to the appellant on or before March 1st, as required by R.I.G.L. 16-13-3.

Date: September 25, 1996

Travel of the Case

Ugurhan K. Akturk appealed to Commissioner Peter McWalters on June 30, 1995 from a decision upholding Mr. Akturk's dismissal as a teacher in the vocational education program at the Rhode Island Training School. The Rhode Island Training School is a state facility operated by the R.I. Department of Children, Youth and Families (DCYF). Kenneth M. Fandetti, Acting Director of DCYF, had found that evidence presented by DCYF established good and just cause for termination of Mr. Akturk's employment.

Upon appeal to the Commissioner, the undersigned was designated as hearing officer, and hearings on three dates¹ (agreed to by the parties) were held. Testimony and documentary evidence was submitted by both parties and the record closed on March 6, 1996 upon receipt of the final transcript in the case.

Issues Presented:

1. Does good and just cause exist for Mr. Akturk's termination as a tenured teacher?
2. Does Judge Pettine's decision require continuance of the auto body/auto mechanics program?
3. Was the notice issued on February 28, 1995 informing Mr. Akturk of his dismissal and the reasons therefor, defective as a matter of law?
4. Was the notice issued on February 28, 1995 received by Mr. Akturk on or before March 1st?
5. Does Ugurhan Akturk have tenure in state service under R.I.G.L. 36-4-59 of the merit system?

¹October 6, 1995, January 4, 1996, and February 22, 1996.

Findings of Relevant Facts:

- Ugurhan Akturk was employed as a teacher in the vocational program at the Rhode Island Training School from July 16, 1975 until the date of his termination² at the close of school year 1994-1995. (Stipulation p. 4-5, 10/6/95).
- Mr. Akturk taught auto body/auto mechanics. It is only this subject area that Mr. Akturk is certified to teach. Stipulation Tr. 10/6/95 pp. 4-5.
- During fiscal year 1995 the Department of Children, Youth and Families experienced a budget shortfall in the amount of \$9,473,842. Tr. 10/6/95 p.38. The portion of the shortfall attributable to operation of the Training School was \$401,555.00. Tr. 10/6/95 p. 38.
- A projected deficit for fiscal 1996 existed for DCYF in the amount of \$17,284,940.00. Tr. 10/6/95 p. 47. The portion of the projected 1996 deficit attributable to operation of the Training School is \$202,379.00. Tr. 10/6/95 p.51.
- Sometime during January of 1995, Paul Shulver, Acting Superintendent of the Training School, requested Assistant Principal Arlene Chorney to conduct a review of the educational program to find ways to operate the program more efficiently. Tr. 10/6/95 pp. 70-71; Tr. 1/4/96 pp. 150-156.
- At the same time, a curriculum review committee was developing a long-term educational plan for the Training School. The purpose of the long-term plan was to put in place a vocational program which would better meet the needs of residents and one which would meet compliance standards for vocational programs set by the state department of education. Tr. 1/4/96 p. 154; Tr. 10/6/95 p.74.
- Dr. Chorney conducted a review of all educational programs at the school and made an assessment that the auto body/auto mechanics program lacked adequate resources and was not a viable program as it existed at that time. Tr. 10/6/95 pp. 78-80. It lacked equipment, a shop to house the necessary equipment, and tools. Tr. 10/6/95 p.79.

²The actual termination date is a fact in dispute; resolution of this factual issue is not necessary to the outcome of the decision in this matter.

- As a result of her assessment that current resources did not support a viable program in auto body/auto mechanics and her knowledge that a current and projected deficit made additional financial support for the program improbable, Dr. Chorney recommended to the Acting Superintendent that the auto body/auto mechanics program be eliminated. Tr. 10/6/95 pp. 79-82.³
- Dr. Chorney's recommendation was also based on her knowledge that the average stay of residents was six (6) to nine (9) months, a period she adjudged too short to deliver a meaningful program in this vocational field. Tr. 10/6/95.
- Upon his receipt and review of Dr. Chorney's recommendation, Paul Shulver, Acting Superintendent of the Training School, recommended to the Director of DCYF that the automotive program be discontinued. Tr. 1/4/96 p. 163.
- The cost savings resulting from elimination of the auto body/auto mechanics program is the amount of Mr. Akturk's salary and a minimal amount expended for program materials. Tr. 10/6/95 pp. 93-94.
- At some point prior to February 28, 1995⁴ several termination notices were prepared at the Human Resources Office of DCYF. One of these notices was to the appellant. Tr. 2/22/96 pp. 5 and 7. They were signed by Kenneth M. Fandetti, Acting Director of DCYF and hand delivered to Paul Shulver at the Training School on February 28, 1995. Tr. 2/22/96 p. 6. Mr. Shulver was instructed to hand deliver the notices to the individuals involved on the same day. Tr. 2/22/96 p. 8.
- A copy of the February 28, 1995 notice to Mr. Akturk was also sent certified mail, return receipt requested on February 28, 1995. Tr. 2/22/96 p. 7. DCYF Ex. 2. The certified mailing notice was mailed to Mr. Akturk's home, where he received it on March 7, 1995. DCYF Ex. 3 and 4; Tr. 1/4/96 p. 221; Tr. 2/22/96 p. 47.

³Although there is some testimony in the record regarding a specific amount of money required to make the auto program viable (Tr. p.80) counsel for the appellant later objected to Dr. Chorney's testimony on this point as hearsay. (Tr. p.96). This objection was sustained. This finding of fact is not based on the hearsay testimony concerning a specific dollar amount required to provide facilities and equipment needed to make the program viable; however Dr. Chorney's testimony concerning the lack of a shop building, tools or equipment substantiates her conclusion that existing resources for the program were insufficient.

⁴Although there is no testimony in the record concerning Director Kenneth M. Fandetti's decision making process, he apparently agreed with the recommendation of Mr. Shulver and Dr. Chorney.

- The notice dated February 28, 1995 notified Mr. Akturk that his annual contract as a teacher with DCYF would "...not be renewed at the end of the 1994-95 school year" because of a change in the educational program at the Training School coupled with current and anticipated budgetary constraints. DCYF Ex. 2. The notice goes on to state that the situation results in a need "to eliminate a position for a teacher with your certification and seniority". DCYF Ex. 2.
- Mr. Akturk received the notice mailed to him on February 28, 1995 on March 7, 1995. He has no recollection of receiving the notice on February 28, 1995, by hand delivery at the Training School. Tr. 2/22/96 pp. 36, 39, 46, and 47. Tr. 1/4/96 pp. 221-223.
- Paul Shulver recollects hand delivering four (4) termination notices on February 28, 1995. He recollects that one of these notices was to Ugurhan Akturk. Tr. 2/22/96 p.62.

Decision

Ugurhan Akturk, as a tenured teacher⁵ at the Rhode Island Training School, is subject to dismissal only for good and just cause. R.I.G.L. 16-13-3. The elimination of the auto body/auto mechanics program at the Training School, for the reasons identified by the Acting Principal, constitute good and just cause. The program was eliminated as part of a cost containment effort after an assessment that it was not viable. The program lacked sufficient resources- operating without a shop, tools or equipment. It is precisely this type of management decision, made in good faith and grounded in objective fact, which was upheld as good and just cause for dismissal in the case of Lester J. Long vs. Board of Regents for Education and School Committee of the City of Newport decision of the Superior Court of the

⁵Under R.I.G.L. 16-12-8, our teacher tenure law is applicable to certified teachers in state schools.

state of Rhode Island, C.A. No. 78-2725 dated December 18, 1979. The ruling in this case affirmed the decision of both the Commissioner and the Board of Regents that the bona fide discontinuance of an educational program was good and just cause. Presumably, such decisions result from school administrators' exercise of their responsibility to provide a sound instructional program in a cost efficient manner. The facts presented in the record support DCYF's decision to eliminate this vocational program. The issue was not the lack of a comprehensive auto program but a "viable" one.⁶ The situation was not likely to change with the fiscal constraints brought on by a current and projected deficit of substantial proportion. Mr. Akturk himself testified as to his own efforts to deal with these budgetary problems by obtaining donations of materials from various sources. Tr. 1/6/95 p. 183-185, 205-206. Dr. Chorney's conclusion that the program was not viable and that this situation could not be addressed given DCYF's financial status is substantiated in this record. Since Mr. Akturk was certified to teach only auto body/auto mechanics, his position was necessarily eliminated at the end of the 1994-1995 school year.⁷

The appellant has argued to us that the provisions of an ongoing federal court order require that the auto

⁶Dr. Chorney admitted that none of the vocational programs at the Training School are "comprehensive", given the length of stay of the inmates. See Tr. 10/6/95 p. 106.

⁷We would note that the curriculum committee report, which also proposed the elimination of the auto body/ auto mechanics program cannot buttress Mr. Akturk's dismissal because it was not issued until after DCYF's decision to eliminate his position i.e. August of 1995. Tr. 10/6/95 pp. 90-91.

body/auto mechanic program be maintained, despite justification for its elimination. We have taken administrative notice of "Appendix C" which contains the relevant portions of Judge Pettine's order. A close review of that document does not support the contention that auto body/auto mechanics, or any component of the vocational program as it existed at the time of the decision, cannot be eliminated. We find the listing of vocational courses at pages 47 and 48 of the court order to be illustrative only. An interpretation that the curriculum at the Training School is somehow cast in stone would be inconsistent with a requirement that overall the vocational program meet the changing needs of the residents.

The notice issued by Mr. Fandetti on February 28, 1995 (DCYF Ex. 2) describes Mr. Akturk as a teacher whose contract is "on an annual basis" and informs him of the "nonrenewal" of that contract for the stated reasons.⁶ The appellant argues that such notice is defective since Mr. Akturk, as a tenured teacher, is not on an annual contract and, therefore, not subject to annual renewal or non renewal.

As a tenured teacher, Mr. Akturk was a teacher in continuous service and not subject to annual contract renewal or nonrenewal. This aspect of a tenured teacher's

⁶Although counsel has not taken issue with the clarity of the reasons as set forth in the February 28, 1995 notice, the reference in the letter is to elimination of "a position for a teacher with your certification and seniority". There is no specific mention of elimination of the program for which Mr. Akturk is certified.

employment was clarified by our R.I. Supreme Court in 1986 in Cicccone v. Cranston School Committee, 513 A.2d 32 (1986) at page 34. Subsequent to the Cicccone decision our state legislature amended R.I.G.L. 16-13-3 to expand the notice requirements for dismissal of tenured teachers and affirmed that they are not subject to annual renewal or nonrenewal of their contracts. See R.I.G.L. 16-13-3.

It does not necessarily follow that because Mr. Akturk was in continuous service and was not subject to nonrenewal, that a notice communicating to him his "non renewal" at the close of the 1994-95 school year was defective. While the letter of February 28, 1995 inaccurately described the action as nonrenewal, it nonetheless effectively conveyed the information that his employment would be terminated at the close of the 1994-1995 school year. The notice thus substantially complies with R.I.G.L. 16-13-3, and is not defective as a matter of law.

Our statute further requires that a dismissal notice to a tenured teacher be given "in writing on or before March 1st of the school year immediately preceding the school year in which the dismissal is to become effective". While substantial compliance may be sufficient for the form of the notice, strict compliance governs the time requirements of the statute. See Appeal of Narragansett Teacher Non-Renewal, decision of the Commissioner dated August 24, 1993. See in general Rapp, Education Law §6.15 (4)(b).

In this case there is undisputed evidence that the teacher received notice of dismissal in the mail on March 7, 1995. While DCYF contends that on February 28, 1995 a hand-delivered notice was also given to Mr. Akturk, he testified that he has no recollection of receiving a hand-delivered copy of the February 28, 1995 notice.

The status of the record on this important issue of whether Mr. Akturk received notice of dismissal on February 28, 1995 is in conflict.⁹ We cannot in fairness say that the record is evenly balanced on this issue, since Mr. Akturk's testimony on this point was consistent throughout the hearings, and Mr. Shulver's recollection of where, when, by whom, and how many termination notices were delivered varied substantially over the course of the hearings. His memory, he explained, was refreshed by the testimony of other witnesses. It is understandable that the details of a business day one year prior could not be quickly recalled by a person in Mr. Shulver's position. While there is no issue raised as to Mr. Shulver's credibility, there is an issue with regard to sufficiency of the proof of hand delivery of the dismissal notice on February 28, 1995.

⁹Counsel for DCYF argues that there is no evidence in opposition to Mr. Shulver's February 22, 1996 testimony that he hand delivered the notice to Mr. Akturk at the Training School; however, we find that there is conflicting testimony from the appellant. The direct implication of Mr. Akturk's testimony that he has no recollection of the notice being hand-delivered to him at any time is that it was not delivered to him by Mr. Shulver. The link is the argument that if it were hand delivered, he would remember it. His counsel has argued that the appellant's is the more accurate recollection. Tr. 2/22/96 p. 75.

The employer of a tenured teacher has the burden of proof in dismissal proceedings--not just as to the existence of good and just cause¹⁰ but of demonstrating compliance with the notice requirements imposed by statute. Otherwise, an employee challenging timely receipt of a dismissal notice would have the impossible burden of proving a negative, or the non-existence of a fact. We thus disagree with DCYF's assertion that lack of timely receipt of notice is an affirmative defense which must be raised and proven by the employee.

Since the record stands in conflict as to whether Mr. Akturk actually received the notice of his dismissal on or before March 1st as required, and since DCYF has the burden to prove¹¹ that he received the notice by March 1st, we find the record insufficient on the fact of timely notice to the appellant. His dismissal at the close of the 1994-95 school year was not effectuated pursuant to 16-13-3. We thus sustain his appeal on this basis.

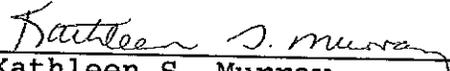
The appellant wishes us to determine his tenure rights as such may exist under R.I.G.L. 36-4-59. We decline to rule on whether, based on the record before the Commissioner, Ugurhan Akturk has acquired tenure in state service under R.I.G.L. 36-4-59. This statutory provision forms part of the merit system law and presents no issue

¹⁰See the discussion in footnote 4 of the Commissioner's decision in Rotella vs. Providence School Committee, July 11, 1984. (Decision on remand).

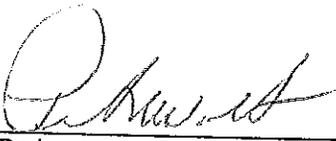
¹¹By a preponderance of the evidence.

arising under a law relating to schools or education. The Commissioner lacks jurisdiction to rule on the appellant's claim since it presents no issue of education law, even though Mr. Akturk is a teacher in a state school. Lapierre v. Cranston School Committee, decision of the Board of Regents dated May 11, 1989.

In light of this decision, the parties should confer to determine what compensation may be owed to Mr. Akturk.


Kathleen S. Murray
Hearing Officer

Approved:


Peter McWalters
Commissioner

Date: September 25, 1996