

STATE OF RHODE ISLAND

COMMISSIONER OF EDUCATION

AND

PROVIDENCE PLANTATIONS

 JOHN THURSTON *
 *
 v. *
 *
 DAVIES CAREER AND *
 TECHNICAL HIGH SCHOOL *

DECISION

Held: The Board of Trustees approved the Appellant's nonrenewal only if he did not receive a satisfactory evaluation; therefore upon the appellant's receipt of two satisfactory evaluations, the Director was authorized only to rescind his nonrenewal, and could not instead hire another teacher to replace the appellant, even though he found her better qualified.

Travel of the Case

This appeal was originally consolidated with those of several other teachers at the Davies Career and Technical High School (hereinafter "Davies") and was filed on December 18, 1996 with Commissioner Peter McWalters. It was assigned on January 21, 1997 and scheduled for hearing by agreement of the parties on April 7, 1997. Transcript of the hearing was received on April 30, 1997, and the record closed at that time.

Issue

Was Mr. Thurston's non-renewal at the end of the 1995-1996 school year valid?

Findings of Relevant Facts

- John Thurston was a nontenured special education teacher at the Davies School during school year 1995-96.
- Mr. Thurston received a non-renewal notice from Stephen Thornton, Director/Principal of the school on February 6, 1996. Tr. pp. 37-40; Ex-T-2.
- The appellant's notice indicated that the Board of Trustees of Davies had approved his nonrenewal for the 1996-97 school year because of the "availability of other teaching personnel with better qualifications". (Ex-T-2) Testimony and minutes of the Board meeting indicated that non-renewal notices citing the availability of better qualified teachers as the sole reason were sent strictly because evaluations had not been completed. Ex-T-3, p. 5; Tr. pp. 39-40, 50.
- The nonrenewal notices of two other nontenured special education teachers cited not only the availability of better qualified teaching personnel, but also uncertainty of funding and possible elimination of positions as reasons for nonrenewal. Ex. T-3 p. 4; Tr. pp. 38, 40.
- At the time the nonrenewal notices were sent it was "readily apparent" that there would be a need for one less special education teacher because the number of special needs students was anticipated to decline in the 1996-97 school year. Tr. p. 20. Another factor was an anticipated shortfall in funding for the 1996-97 school year. Tr. pp. 14-15.
- The other two nontenured special education teachers who received non-renewal notices had less seniority than the appellant. Tr. p. 15.

- At the February 5, 1996 meeting of the Board of Trustees the Director/Principal stated that when supervisors completed evaluations of teachers receiving notices solely because of the availability of better qualified teachers, he would then petition the Board to “change the wording” if their evaluations were satisfactory. Ex. T-3 p. 5.
- The Board of Trustees voted to approve the recommended teacher non-renewal and dismissal notices at its February 5, 1996 meeting. Ex. T-3 p. 5.
- The Board of Trustees subsequently voted at that same meeting “to give authority to director to rescind non-renewal notices for nontenured teachers whose termination were due only to incomplete evaluation and whose evaluation were deemed satisfactory”. Ex. T-3 p.6.
- The appellant received two satisfactory evaluations from his supervisor, the Director of Special Populations Tr. p. 11; the other two special education teachers whose contracts had been nonrenewed received outstanding evaluations. Tr. pp. 24-28, 48.
- One position for a special education teacher was eliminated in the 1996-97 school year.
- The Director compared the appellant’s qualifications relative to the other two special education teachers who had been non-renewed. He decided that he should select the two individuals rated superior to the appellant for the two available positions rather than rescind the non-renewal of the appellant. Tr. pp. 23-28, 47-48.
- On February 29, 1996, the appellant requested a hearing before the Board of Trustees on the issue of the nonrenewal of his contract. Ex. T-4. He reasserted his request for a hearing before the Board on August 30, 1996 after the Director made the determination that the other two teachers would fill the available special education positions. Tr. pp. 32-33.
- Because the Board of Trustees did not have full membership from the time of the appellant’s request for hearing, and because of other pressing matters (contract negotiations, budgetary crisis etc.) the Board of Trustees of the Davies School has not yet held a hearing on the issue of the appellant’s nonrenewal. Tr. pp. 12, 29-32.
- All of the nontenured whose contracts were non-renewed solely due to availability of better-qualified teachers returned to their positions at Davies following their receipt of two satisfactory evaluations. Tr. pp. 39-40.

Positions of the Parties

Davies

Counsel for the Davies School argues that the appellant received appropriate and timely notice of his contract nonrenewal. The reason identified for termination of his employment- availability of a more qualified teacher was accurate at the time the notice was issued and approved by the Board. It continued to be accurate at the time the decision was made by the Director of the school as to which of the three nontenured special education teachers would return to the two positions available in the 1996-97 school year. Throughout the nonrenewal process, and in his subsequent decision making, the Director retained the prerogative to make “qualitative comparisons” of the three special education teachers who had been notified of nonrenewal. Management at the school retained the right as well as the obligation to retain those assessed as most qualified for the two available positions.

Counsel argues that the hearing officer should put aside testimony that the Board of Trustees actually voted to rescind those nonrenewal notices issued solely on the basis of “availability of a better qualified teacher” if the individuals subsequently received two satisfactory evaluations. He argues that the minutes do not reflect a commitment to rescind those notices automatically upon the teachers’ receipt of two satisfactory evaluations from their supervisors. Rather, he argues, the minutes indicate only a recommendation from Mr. Thornton, accepted by the Board, that he (Thornton) would “petition the Board to change the wording” of their notices if the evaluations are satisfactory. (Tr. p. 67) This was the extent of Mr. Thornton’s recommendation and in voting to approve the non renewals (p. 5 of Ex. T-3) it was only this commitment, not a

commitment to rescind or cancel the notices, which was incorporated in the vote of the Board of Trustees.

Since the Director subsequently took into account the actual availability of better-qualified teachers in making his eventual decision, the wording of the appellant's notice could not be changed, despite his satisfactory evaluation. There was no clearer or more appropriate way to express the reason Mr. Thurston did not return to Davies for the 1996-97 school year.

With respect to the fact that the Board of Trustees has yet to accord the appellant a hearing, counsel states that there were several matters of greater priority which required the Board's attention over the year since Mr. Thurston's request. It is also unlikely, he stated, that the Board of Trustees would reverse its earlier decision in this matter, and therefore, he argues that any remedy to be sought by the appellant is more properly before the Commissioner of Education.

The Appellant

Counsel for the appellant argues that clearly there was a commitment by the Board of Trustees at its February 5, 1996 meeting. The nature of the commitment made to the appellant, as well as the several other teachers nonrenewed by the Board at that time for the same reason, was to rescind or cancel their nonrenewals upon receipt of satisfactory evaluations. Citing Richards v. Newport School Committee a May 31, 1979

decision of the Commissioner of Education, the appellant's attorney argues that such a commitment is binding¹. In light of this binding commitment, the Director was obligated to rescind the nonrenewal notices upon the teachers' receipt of two satisfactory evaluations. He was not free to make qualitative comparisons and select another teacher in place of the appellant. The selection of another nontenured teacher over the appellant is especially objectionable since that teacher was less senior to him and her notice of nonrenewal cited the elimination of a position as an additional reason for nonrenewal. The appellant's notice did not, i.e. his seniority had already been taken into account in determining who among the non-tenured special education teachers would be affected by the elimination of a position.

All the other teachers returned to their positions after their receipt of satisfactory evaluations; the appellant did not. While it may be that his immediate supervisor evaluated his performance as satisfactory and the other two special education teachers as outstanding, the Board of Trustees did not authorize the Director to make qualitative comparisons in determining the appellant's status – his authority was limited to rescission of the appellant's nonrenewal.

Finally counsel notes that the failure to accord Mr. Thurston a hearing presents a clear statutory² violation, which prior decisions have found to be cause to invalidate the nonrenewals. Counsel also notes that during this period the Board of Trustees nonetheless had sufficient opportunity to conduct a hearing involving a teacher on a leave of absence, despite that teacher's request that the hearing be postponed. To summarize,

¹ In Richards, the Superintendent stated as part of his recommendation to the school committee, that those teachers whose contracts were nonrenewed would be recommended to be called back according to seniority as openings occurred. Footnote 4 page 2.

² R.I.G.L. 16-13-2 and 16-13-4.

on both substantive and procedural grounds, the appellant argues his nonrenewal is defective.

Decision

On review of the record, particularly the minutes of the February 5, 1996 meeting of the Davies Board of Trustees (Ex. T-3) we find the facts of this case to be dispositive of the issue presented. The Board of Trustees actually took two votes relevant to the appellant's employment status at that meeting. The parties have directed our attention to the first vote of the Board. The outcome of this case is controlled, however, by the second vote, which neither of the parties raised in their arguments.

At page 5 of the minutes of the meeting, the Board voted to approve Mr. Thornton's recommendation that the appellant, along with six other teachers, be non-renewed by reason of the availability of better-qualified teachers³. The parties argued at length, attributing different meanings to the language of Mr. Thornton's recommendation, which was incorporated into the Board's action approving these nonrenewals. The appellant's attorney argues the Board "agreed" to "cancel" the notices if evaluations were satisfactory. Davies' counsel notes that a literal reading of the language appearing at page 5 commits the Board only to revising the language of the notices sent to this group of non-tenured teachers.

The Board's second vote with respect to this same group of nontenured teachers appears at page 6 of the minutes. It is clearly consistent with the appellant's position on

³ The minutes note that the reason for nonrenewal is actually the fact that evaluations for this group of teachers were not completed at that time. (Ex. T-3 at page 5). We express no opinion on whether the nonrenewal of a nontenured teacher can be premised on this reason without the availability of some evaluative data. The Superior Court is presently dealing with this issue in the appeal from the Regents decision in Kagan and McGhee v. Bristol-Warren Regional School Committee, decision of the Board of Regents dated October 12, 1995.

the facts. After a discussion concerning teacher assistants at the Davies School the Board took the following action:

Motion made by Austin Ferland seconded by Carlos Pedro to give authority to director to rescind non-renewal notices for nontenured teachers whose termination were due only to incomplete evaluation and whose evaluation were deemed satisfactory. Motion carried unanimously.
Ex. T-3 p. 6.

The cited language eliminates the need to make any interpretation of the language or discern the intent of the Board in its earlier vote to approve the appellant's nonrenewal. The language of the Board's vote with respect to this group of nontenured teachers is clear. Having approved the nonrenewals, the Board authorized the Director to rescind or cancel those nonrenewals upon receipt of evaluations "deemed satisfactory". This language clearly supports the appellant's contention as to the nature of the Board action with respect to his employment status at Davies.

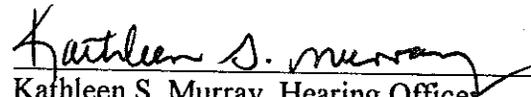
The legal effect of the second vote authorizing the Director to rescind the non-renewal notice to the appellant and others similarly situated, was to restrict the Director's authority to take other action, once evaluations "deemed satisfactory" were received. The constraints placed on Mr. Thornton by the Board's action required him to cancel the appellant's nonrenewal. He could not instead rescind the nonrenewal notice sent to another teacher, even though he found her, on comparison of the evaluations, to be the better teacher. While it is regrettable that he did not have the discretion to exercise in determining which individuals from the group of nontenured teachers would be selected for the positions available, such was the effect of the Board's action.

The Commissioner has in the past upheld the use of qualitative comparisons of previously non-renewed teachers in determining which of those teachers will be recalled

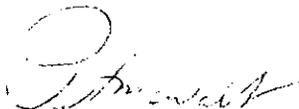
to the available positions. See Marshall v. Burrillville School Committee, decision of the Commissioner dated June 8, 1994. However, such a competitive process cannot be used when there is a commitment to use another method for filling vacancies (seniority, for example as in the Richards v. Newport case, supra). Similarly in this case, the governing board predetermined that certain individuals would be re-employed automatically through the process of rescission of their contract non-renewals.

We need not address the procedural deficiencies in Mr. Thurston's nonrenewal, since we find that his reemployment for the 1996-97 school year was determined under the condition specified in the Board's vote. However, the failure to accord him a hearing is in clear violation of R.I.G.L. 16-13-2 and 16-13-4. We would note that a timely hearing by the Board of Trustees was required. A hearing would have enabled the Board to consider the appellant's claim and assess and respond to his arguments. In this case, initial consideration of important personnel issues has been shifted to the Commissioner's office, when they are more properly placed before the Board of Trustees.

For the reasons expressed herein, the appeal is sustained, and the parties are directed to confer to determine an appropriate remedy. In the absence of agreement as to the appropriate remedy, the parties may seek further hearing before the Commissioner's designee.


Kathleen S. Murray, Hearing Officer

Approved:


Peter McWalters, Commissioner

Date: August 25, 1997