0009-98

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

****
FERDINAND VALERIO *
*
V. *
WILLIAM M. DAVIES, JR. CAREER *
AND TECHNICAL HIGH SCHOOL *
****

DECISION

Held: When the appellant was dismissed as a tenured teacher at Davies, he was never provided with a hearing before the Board of Trustees. Thus the Board did not give him opportunity to present reasons why he should not be dismissed, nor did it reconsider the Director's decision to eliminate the course he taught in response to budgetary constraints.

DATE: April 29, 1998

Travel of the Case

On February 5, 1996 the Board of Trustees of the Davies Career and Technical High School voted to terminate the appellant's employment as a tenured teacher in the computer-assisted drafting program. The appellant was the only instructor in that program. On March 1, 1996 Mr. Valerio requested a hearing before the Board of Trustees regarding his dismissal from employment. On December 17, 1996 the appellant appealed the issue of his dismissal to Commissioner Peter McWalters. The matter was heard before the Commissioner's designee on April 7, 1997 and at that time the parties requested that a decision be deferred until further attempts to reach a settlement could be made. On October 15, 1997, the parties requested that the transcript be ordered and a decision rendered. The record in the case closed on October 20, 1997 upon receipt of the transcript.

Issue:

> Was the appellant's dismissal as a tenured teacher supported by good and just cause and in compliance with procedures required by state law?

Findings of Relevant Facts

- Ferdinand Valerio was a tenured teacher in the computer-assisted drafting program at the William M. Davies Jr. Career and Technical School (hereinafter "Davies") until his dismissal at the close of the 1995-1996 school year. Tr. pp. 1, 42.

- The reasons supporting the appellant's dismissal, as recommended by the Director of Davies, Stephen G. Thornton, and approved by the Board of Trustees on February 5, 1996 were:

> uncertainty of the level of funding for the 1996-1997 school year; and/or possible elimination of positions pursuant to restructuring and reorganizing of programs. Davies Ex. 1 and 2.

- At the time the appellant was notified of his dismissal, the Davies school budget was anticipated to be "level funded" for the 1996-97 school year. Tr. pp. 5-6. After budgetary appropriations for the 1996-97 school year, Davies was in fact "level funded", with the same dollar amount available to operate the school in 1996-97 as was available in 1995-96. Tr. p. 30.

- This budgetary situation caused the Director to review and reorganize certain programs at the school and to eliminate certain courses, including that of the appellant. Tr. p. 6-8, 11.

- In making his decisions on the reorganizing and restructuring of programs, the Director decided to eliminate nonessential programs to ensure that adequate funds were available to operate the school. Tr. p. 33. The appellant's course was determined to be "ancillary" or nonessential. Tr. p. 7.

- The Board of Trustees has not formally approved a reorganization plan for Davies, nor has it voted to eliminate the appellant's position or program. Tr. pp. 11-13.

- Subsequent to the Board's action dismissing him, Mr. Valerio requested a hearing before the Board of Trustees (Valerio Ex. 1) request dated March 1, 1996. The request was timely. Stipulation Tr. p. 37.

- Over the course of the next several months a hearing before the Board of Trustees was not scheduled because the parties were preoccupied with such matters as lobbying for an increase to the Davies appropriation, collective bargaining with representatives of two bargaining units, and a "major personnel issue". [1] Thurston v. Davies, Tr. pp. 28-30.

- In addition, at this time the Board of Trustees was not "fully constituted", because of resignations and retirements, a situation which was resolved by December of 1996, Thurston v. Davies, April 7, 1997. Tr. pp. 28-30, 45.

- On August 30, 1996 the appellant, through his union representative, renewed his request for a hearing before the Board of Trustees. Thurston v. Davies. Tr. pp. 32-34.

- The Director acknowledged receipt of the renewed hearing request, and in his response asked that he be provided with the legal and/or contractual authority under which the hearing was sought. Thurston v. Davies. Ex. T-8.

[1] The parties have agreed to incorporate into the record that portion of the transcript in the hearing of Thurston v. Davies which relates to the facts of why the Board of Trustees did not hear appeals from dismissals/nonrenewals following the 1995-96 school year.

- To date, the Board of Trustees of Davies has not provided a hearing to the appellant on the issue of his dismissal as a tenured teacher. Thurston v. Davies. Tr. p. 65.

Position of the Parties

The Davies Board of Trustees

The Board acknowledges its statutory burden to demonstrate Mr. Valerio's dismissal was for good and just cause.[2] Counsel notes that the Director of the Davies School has broad authority under 16-45-6 to determine whether good and just cause exists for the dismissal of a tenured teacher. In this case, he determined that financial constraints required consolidation of certain courses and elimination of positions, including that of the appellant. His decision was a legitimate, rational response to severe budgetary constraints. The Director considered the educational needs of the students, the history of course enrollment, and the ability to incorporate the instruction into other subject areas. Underlying this process was the immediate need to cut operating costs to stay within the amount of the projected, and then actual, appropriation for fiscal year 1996-97.

As to the issue of the failure of the Board to accord the appellant a hearing, counsel incorporates the arguments he made in the collateral case of Thurston v. Davies, decision of the Commissioner dated August 25, 1997.[3] In that case he acknowledged the undisputed fact that the appellant, among others, did not receive a hearing before the Board of Trustees. He argued that, initially, the Board's preoccupation with other pressing and important matters prevented the scheduling of a hearing. After matters

[2] R.I.G.L. 16-13-3.
[3] These arguments are included in pages 65-66 of the transcript of that case.

which had priority were resolved, and the appellant, through his union representative, pressed for a hearing, counsel argued that although the Board did not act, it was unlikely to reverse the decision to dismiss Mr. Valerio. Again, he argued that this decision was a sound exercise of the Director's managerial discretion.

Ferdinand Valerio

Noting that the Board has the burden of proof to establish the existence of good and just cause for the dismissal of a tenured teacher, counsel for the appellant argues that this evidentiary burden has not been met. He argues that the first reason specified in Mr. Valerio's notice of dismissal—uncertainty of the level of funding for the 1996-97 school year—requires proof of "financial exigency". He cites Barry and Healey v. Warren School Committee. (Board of Regents decision dated May 27, 1982) and other cases for the proposition that a state of bona fide financial exigency can be demonstrated only by evidence of comprehensive budget cuts made to respond to the fiscal crisis, not just the dismissal of the tenured teacher. The budget cuts must be shown to be proportionate to the amount of the budgetary shortfall. In addition, he argues that a district must show that every (reasonable) alternative to the teacher's dismissal was considered.[4] The existence of a true fiscal crisis was also questioned because the record in this case shows that the budget was sufficient to provide two (2%) percent raises to all unionized staff members and raises for management as well. Counsel also points out that two teacher aides were hired as certified teachers at significant cost during the alleged state of financial exigency.

[4] Including reduction of that teacher to part-time status.

The basis for targeting the computer-assisted drafting course for elimination was also questioned. While there may have been evidence of declining enrollment, and a need to cut costs, counsel argues this would call for reducing Mr. Valerio's position to that of a half time or three-fourths teacher. Again, the fact that he was a tenured teacher required that all alternatives be considered before termination of his employment at Davies.

When the Board of Trustees officially acted on the issue of Mr. Valerio's dismissal, it approved this action in part because of the "possible elimination of positions pursuant to restructuring and reorganizing of programs". Counsel for the appellant argues that the subject of elimination of positions pursuant to a reorganization was not thereafter brought before the Board. Since there was never any final action on a reorganization, counsel argues that this second reason for dismissal has not been established. If one considers the Director's decision to eliminate the appellant's position and consolidate the subject matter of his course into other instructional programs as a final decision, counsel for the appellant submits that the Director is without statutory authority to take this action. Such action is argued to have no validity unless and until it is approved by vote of the Board of Trustees. Thus, counsel for the appellant argues that neither of the two reasons advanced as "cause" have been established in the record in this case.

On the issue of the failure to provide Mr. Valerio with a hearing, his counsel incorporates the arguments made in the companion case of Thurston v. Davies, supra. Essentially his position is that some initial delay in providing a hearing would be attributable to the Board's preoccupation with pressing matters such as the school budget

and collective bargaining. The Board's subsequent refusal to provide Mr. Valerio with a hearing, despite his renewed request for a hearing, violates the requirements of R.I.G.L.16-13-3 and 16-13-4, as well as his rights to due process under our federal and state constitutions. It is submitted that the legal effect of such violations is to invalidate Mr. Valerio's dismissal.

Decision

R.I.G.L. 16-13-3 and 16-13-4 provide the statutory framework for the dismissal of a tenured teacher. Such action must be based on "good and just cause". Notice of dismissal must be given the teacher in writing on or before March 1st of the school year immediately preceding the school year in which the dismissal is to become effective. State law further requires that:

> The teacher shall be furnished with a complete statement of the cause(s) for the dismissal by the governing body of the school and shall be entitled to a hearing and appeal pursuant to the procedure set forth in §16-13-4. (R.I.G.L. 16-13-3).

R.I.G.L. 16-13-4 describes a formal hearing process which includes the presentation of witnesses and the maintenance of a complete record of the proceedings.[5]
This post-dismissal hearing process provided for under our state law also provides the tenured teacher with procedural due process required under our federal and state constitutions. See Providence Teachers Union v. Donilon, 492 F. Supp. 709 (D.R.I 1980). Tenured teachers have a property right to continued employment which is protected by due process requirements of the Fourteenth Amendment. Constitutional due

[5] In Rhode Island, even nontenured teachers whose contracts are nonrenewed are entitled to the same formal hearing, although the issue and burden of proof are different from that involved in the dismissal of a tenured teacher. See R.I.G.L. 16-13-2.

process requires that the hearing provided to a tenured teacher who has been dismissed be provided at a meaningful time and in a meaningful manner. See Providence Teachers Union v. Donilon, supra at 713.

In this case, Mr. Valerio, a tenured teacher, has not been provided with the hearing required under state law and due process requirements of the Fourteenth Amendment of the Constitution. The record here shows that the governing body of Davies, the Board of Trustees, was faced with serious issues which were prioritized during the first several months after the appellant's dismissal on February 5, 1996. The record indicates there was implicit agreement by both parties to defer the requested hearing for several months. As our findings of fact indicate, however, the appellant renewed his request for hearing in late August, 1996. Rather than accord him a prompt hearing, the response he received questioned the legal or contractual authority for the requested hearing. Given the appellant's status as an unemployed tenured teacher, the basis for his request was, we find, somewhat obvious at that point.

We have considered the information in the record regarding the unavailability of a full complement of board members to provide the requested hearing during the months following his August 30, 1996 request.[6] The record contains no specific evidence regarding this situation or efforts made by the Board or the Director to secure the appointment of any additional board members who may have been necessary to provide the appellant with a hearing during this time.[7] The record does, however, show that a full

[6] We would note that 16-45-6(g) requires that the Board of Trustees meet monthly and permits nine (9) members of the board to attend teacher appeal hearings under §16-13-4.

[7] See the case of Certain Former Teachers vs. Providence School Committee, decision of the Commissioner dated February 26, 1982. In the case, the Commissioner's ruling permitted some latitude in the timing of the teachers' hearings, given that the filling of vacancies on the school committee was not within the committee's control. The Commissioner ordered that the hearing be provided within thirty (30) days after the committee was "restored to full strength".

board was available for hearing in December of 1996. Yet, even then, no steps were taken to provide Mr. Valerio with a hearing.

Prior cases appealed to the Commissioner have raised numerous issues involving the substantive and procedural rights of tenured teachers who have been dismissed. This is, however, the first case on appeal to the Commissioner wherein a governing body has dismissed a tenured teacher without providing any hearing whatsoever. This prevented the appellant from having the opportunity to present to the board all of the reasons it should not discontinue his program and dismiss him from employment. Counsel for the Board characterizes the decision to eliminate his course as one on which "reasonable minds could differ" (Tr.pp. 55-56). The opportunity to present evidence and argument on the issue to the governing board becomes especially critical in such situation. Although the record shows that a bona fide determination was made by the Director that consolidation of the appellant's course was prudent, this was an exercise of his business judgement. State law required the Board of Trustees to review this decision after the appellant had a full and fair opportunity to address the merits at a formal hearing. See Long v. Board of Regents, decision of Superior Court, (Rodgers, J.) dated December 18, 1979; Akturk v. DCYF, decision of the Commissioner dated September 25, 1996. Under the circumstances here, the failure to provide a hearing requires that this matter be remanded to the Board of Trustees for immediate hearing. The appellant should also be compensated for loss of wages.

The remedy in this matter differs from that directed for procedural violations found in the case of Hobson v. South Kingstown School Committee, decision of the Commissioner dated May 17, 1989 and October 2, 1990. This case is distinguishable

from the Hobson matter in that there has been a complete deprivation of Mr. Valerio's rights to a hearing, in violation of both the Teacher Tenure Act and his constitutional rights to due process. Payment of lost wages here does not create a windfall, which is the concern in providing such remedy for a procedural violation. While we cannot find, on this record, that dismissal of Mr. Valerio was substantively invalid, this is a case in which "reasonable mind could differ" on the merits of his dismissal. Thus, compensation paid prior to according him his statutory right to make his case before the board would not, in our opinion, constitute a "windfall". See the analysis in the Hobson decision October 2, 1990 at pages 14-25 in which such remedy was found to be inappropriate.

For the foregoing reasons, the appeal is sustained and this matter is remanded for hearing before the Board of Trustees. Hearing should be held within sixty (60) days of the date of this decision. The appellant shall be paid his lost earnings, minus any amounts properly mitigating his damages, for the period from his dismissal up to the date of the issuance of the Board of Trustee's decision in this matter.

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Kathleen S. Murray, Hearing Officer

Approved:

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Peter McWalters, Commissioner

DATE: April 29, 1998