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STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER
OF
EDUCATION

.....

Ellen Holm

v.

Providence School Board

.....

DECISION

Held: The appellant is entitled to credit for a year of service for school year 1997-1998 in which she taught for a total of 146 days as a substitute teacher in various public schools throughout Rhode Island.

DATE: April 6, 2000

Travel of the Case

On September 9, 1999 the appellant, through her attorney, appealed the issue of her placement on the salary schedule to Commissioner Peter McWalters. On September 13, 1999 the matter was assigned for hearing and decision to a hearing officer employed by the Rhode Island Department of Elementary and Secondary Education. By agreement of the parties, the matter was heard on October 7, 1999. Thereafter, also by agreement, the parties submitted legal memoranda summarizing their respective positions. The record in this case closed on February 29, 2000 upon receipt of the written response of the appellant's attorney to the memorandum submitted by counsel for the Providence School Board.

Issue:

Is the appellant entitled to credit in determining her placement on the salary schedule established under R.I.G.L. 16-7-29 for the year in which she served as a substitute teacher in various Rhode Island school districts for a total of one hundred and forty-six (146) days?

Findings of Relevant Facts:

- Ellen Holm is a certified teacher who was employed as a per diem substitute teacher in seven public school districts in Rhode Island during school year 1997-1998. Tr.p.3.
- The total number of days of her substitute service in 1997-1998 was 146 days, with 90 of these days served as a substitute in the Foster-Glocester Regional School District. Tr. p.9.
- In school year 1998-1999 Ms. Holm was employed as a long-term substitute teacher in the Providence School Department for a total of 148 days. Tr. pp.12-13.
- During school year 1999-2000 Ms. Holm has been employed as a long-term substitute teacher at Classical High School in Providence, Rhode Island. Tr. p.13. Upon the processing of an undisputed correction to her placement on the salary schedule, Ms. Holm will be placed on the second step of the salary schedule for this school year. Tr. p.13.¹

¹ We assume that this corrected placement will give her full credit for the 1998-1999 school year in which she served 148 days in the Providence School Department.

- Pursuant to a policy in effect in the Providence School Department, Ms. Holm has also been given an additional one half year's credit for the ninety (90) days served as a substitute teacher in the Foster-Glocester Regional School District in 1997-1998. Tr. p.18.²
- At some point in time not established in the record, a grievance was filed under the collective bargaining agreement challenging the failure of the Providence School Department to give a full year's credit for purposes of Ms. Holm's placement on the salary schedule for the 146 days of substitute teaching service in 1997-1998. Tr. pp.5-7. On September 2,1999 this grievance was withdrawn by mutual agreement with the parties' understanding that a resolution of the issue would take place through a Title 16 hearing. See letter of February 28, 2000 submitted by counsel for the appellant with its attachment dated September 2, 1999.

Positions of the Parties:

The Appellant:

The initial argument made by the Appellant is that the policy applied by the Providence School Board, which recognizes ninety (90)³ days of substitute service in a single community in a semester and 135 days in a single community in a school year, but does not fully recognize the 146 days served by Ms. Holm in 1997-1998 is illogical and inconsistent. There is no valid reason to distinguish the 146 days served by Ellen Holm in a variety of Rhode Island communities in 1997-1998 from a 135 day period of service as a substitute in a single community which would be recognized under Providence's policy. The policy does not require that the service be performed in one classroom or in a long-term assignment. The nature of the teaching service is, therefore, indistinguishable.

Secondly, counsel notes that statutory references to substitute teachers describe certain rights of teachers who have substituted at least three-quarters (3/4) of the number of days that the public schools are required by law to be in session during the year. Uniformly these laws describe the calculation of a substitute's total days as follows:

² Ms. Holm was not technically eligible for credit under this policy, which provides that one half year's credit for substitute service be given for 68 days served in one semester in a single community, and a full year's credit for 135 days served in a single community in one school year. Tr. pp.16-18. Ms. Holm did not serve 68 of her 90 days in a single semester in Foster-Glocester in 1997-1998, but was nonetheless granted this additional half-year's credit.

³ We should note that the record in this matter identified 68 days as the requisite number for a half-year's credit rather than 90 days, according to the testimony of Dr. DeRobbio and Ms. Holm.

In determining the number of days served by a substitute teacher, the total number of days served in any public school of any city or town in the state may be combined for any one school year. (See 16-16-1(11) and 16-16-5 (c))

Yet, in determining the eligibility of substitutes for service credit in the Providence School Department, the School Board arbitrarily limits creditable service to days served in a single district. The School Board has not articulated a reason why the policy requires that service must be in a single district to be creditable. This policy is also inconsistent with state law, which permits a substitute to total all days served in any Rhode Island district.

The appellant cites the decision of the Rhode Island Supreme Court in *Berthiaume v. School Committee of the City of Providence*, 397 A2d 889 (R.I. 1979) for the proposition that state law entitles the appellant to credit for her service as a substitute in 1997-1998. Quoting extensively from this decision, counsel argues that the Court therein established two basic principles with regard to substitutes and their compensation. The first principle is that substitute teachers who teach at least one hundred and thirty-five (135) days in a school year are “regularly employed”, and therefore are entitled to be paid according to a salary schedule established pursuant to R.I.G.L. 16-7-29. Secondly, the principle that the calculation of a “year of service” for substitute teachers is based on their accumulation of at least one hundred and thirty-five days of service, which may be served in several different school systems. In light of the Court’s ruling in *Berthiaume*, the appellant’s one hundred and forty-six (146) days of service in seven public school districts in the state in 1997-1998 clearly qualify for a year of service credit. Counsel argues that her step placement should be corrected retroactive to school year 1998-1999 and that she should receive additional compensation with interest at the statutory rate.

In response to the School Board’s argument that Ms. Holm elected to pursue a remedy under the Collective Bargaining Agreement and is now prevented from raising the same issue in a Title 16 hearing, counsel for the appellant argues that the filing of a grievance on this issue has no such effect. Ms. Holm’s grievance was in fact “withdrawn

without prejudice” simultaneous with an agreement that the matter would be presented to the Commissioner. This agreement to withdraw the grievance was premised on the parties’ analysis that the question presented was one of statutory interpretation, rather than interpretation or application of the contract.

The Providence School Board:

Counsel for the School Board stresses at the outset that the subjects of compensation and working conditions for long term substitutes such as the appellant are matters fully covered by the terms of the Collective Bargaining Agreement. In fact, it is pursuant to the Collective Bargaining Agreement that long-term substitutes, such as Ms. Holm, are paid according to the salary schedule and receive benefits. Supplementing the terms of the contract is the established practice in Providence of giving salary schedule credit for a half year, if a teacher substituted for at least sixty-eight days in one semester, and a full year if a teacher substituted for at least one hundred and thirty-five (135) days, provided all of the service is in a single school district. Counsel argues that any changes in this compensation scheme are best left to the negotiating table and should not be required by an interpretation of state law.

Secondly, the School Board takes the position that Ms. Holm has already raised the issue of her placement on the salary schedule through the grievance process under the Collective Bargaining Agreement. The grievance was resolved and she did receive some additional credit. Utilization of the grievance process precludes her from raising the issue in a separate forum and seeking a remedy additional to that which she received through the response to her grievance. At the time the grievance was resolved, Ms. Holm was given credit for an additional one half year of service because she substituted ninety (90) days in Foster-Glocester in 1997-1998. This is not only the appropriate remedy but also the one she has elected. This election now prevents her from raising the same issue in another forum, i.e. before the Commissioner of Education.

While the School Department would recognize that state law gives the appellant credit for retirement purposes for the year in dispute, there is no similar requirement that her 146 days count as a year of service for salary schedule credit. This is consistent with the notion that salary is a subject to be negotiated by the parties to a collective bargaining agreement. The fact of the matter is that the parties have not negotiated service credit for substitutes whose days of teaching are distributed among several different communities. Therefore, the appellant is not entitled to additional service credit beyond that which she has already received.

DECISION

Over the past several years, nuances in the subject of creditable teaching service have been explored in various decisions of the Commissioner. A line of decisions starting with *D'Ambra v. North Providence School Committee*,⁴ *Bigos v. Scituate School Committee*,⁵ continuing with *Lyons v. Warwick School Committee*,⁶ *Tipirneni v. Warwick School Committee*,⁷ and most recently *Martin v. North Providence School Committee*⁸ have extensively analyzed issues of creditable teaching service. The precise issue presented in this case, however, was settled over two decades ago by the Rhode Island Supreme Court in *Berthiaume v. Woonsocket School Committee*, 121 R.I. 243, 397 A.2d 889 (1979). The focus of the *Berthiaume* decision was a different issue – if and when a per-diem substitute teacher becomes “regularly employed” as that term is used in 16-7-29. The Court in *Berthiaume* also resolved a second, less well noted, issue of what constitutes a “year of service” for a per diem substitute teacher. With respect to this issue the Court found that a substitute who worked at least 135 days in the school year was entitled to a year of service credit for salary schedule purposes. The court found that the 135 day standard was established by our retirement law and incorporated by reference into R.I.G.L. 16-7-29. The Court characterized Section 16-16-5, a section of the

⁴ Decision of the Commissioner dated January 3, 1990, affirmed by the Rhode Island Supreme Court at 601 A.2d 1370 (R.I. 1992)

⁵ Decision of the Commissioner dated October 3, 1994

⁶ Decision of the Commissioner dated June 3, 1998, on appeal to the Board of Regents

⁷ Decision of the Commissioner dated June 19, 1998, on appeal to the Board of Regents

⁸ Decision of the Commissioner dated November 15, 1999, on appeal to the Board of Regents

Teachers' Retirement Law, as definitional and found that its provisions were expressly incorporated into Section 16-7-16 (h).

The specific discussion of the incorporation of R.I.G.L. 16-16-5 into Section 16-7-16 (h) (the section of Chapter 7 then defining "regularly employed" and "service") occurs in the Court's analysis of whether per diem substitutes can become "regularly employed" as that term is used in 16-7-29. At page 248 the Court in *Berthiaume* states:

Section 16-16-5 directs that in calculating years of service for purposes of retirement benefits, a substitute teacher who has served for three-quarters of a school year be given credit for a year of service. Because Section 16-7-16(h) incorporates both this definition and the aforementioned definition of "regularly employed" into Section 16-7-29, we believe the sounder view is that the Legislature must have intended that petitioners be considered regularly employed. (emphasis added)

Given the Court's analysis that 16-16-5 was incorporated into 16-7-16 (h), it is not surprising that the decision goes on to quote Section 16-16-5(c)⁹ and concludes:

Thus, once a substitute teacher has taught 135 days he or she is credited with a year of service, and the salary schedule required by Section 16-7-29 must take into account that year of service. (*Berthiaume* at page 253)

In *Berthiaume*, the Court went on to note that a substitute teacher "may" reach the 135-day standard while serving in several different school systems. R.I.G.L. 16-16-5 now makes explicit the ability of a substitute to cumulate days taught in different public school systems in order to reach the 135 day standard for salary credit. Section 16-16-5-(c) now contains express language that:

...In determining the number of days served by a substitute teacher the total number of days served in any public school of any city or town in the state may be combined for any one school year.

The Court's decision in *Berthiaume* is still binding, and essentially resolves the issue presented in this case. However, we must note that our Court took a somewhat different approach when it again had before it the task of construing "service" in 1984, some five (5) years after the *Berthiaume* decision. The issue of whether "service" included teaching in private schools and/or schools outside the state of Rhode Island was presented in *Howard Union of Teachers v. State of Rhode Island*, 478 A.2d 563 (R.I. 1984). In this case, the Court limited its point of reference to Section 16-16-1 of the Teachers' Retirement Law, the definitions section. The Court declined to construe "service" with reference to the "more particularized provisions of chapter 16" even though the Court had interpreted "years of service" as that phrase appears in 16-7-29 through reliance on 16-16-5 in *Berthiaume* just five years earlier. In light of the Court's analysis in *Howard Union of Teachers*, supra, we have exercised caution in utilizing other provisions of 16-16-5 in a salary schedule context.¹⁰ With respect to the salary credit entitlement of substitute teachers, however, the holding of our Supreme Court in *Berthiaume* is binding, and we are constrained to follow it.

We do not agree with the School Department that the appellant is barred from seeking additional credit because she at one point filed a grievance on the issue of her placement on the salary schedule. Although the record does not contain a full and complete description of the circumstances surrounding the filing and resolution of the grievance, a letter has been submitted in the record which establishes that the parties agreed that the grievance would be "withdrawn" and the issue resolved through a Title 16 hearing (before the Commissioner of Education). See the letter dated September 2, 1999 from Joseph A. Almagno to Dr. Robert A. DeRobbio. Given these facts, it has not been established that the doctrine of election of remedies bars this appeal.

⁹ as it appeared prior to several recent amendments

¹⁰ See footnote 5 of *Lyons v. Warwick School Committee*, decision of the Commissioner dated June 3, 1998, presently on appeal to the Board of Regents.

The appeal is sustained. The appellant should have received credit for an additional year's service performed in 1997-1998. Her placement on the salary schedule should be adjusted retroactive to school year 1998-1999, and her compensation adjusted accordingly. She is also entitled to interest at the statutory rate.

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

April 6, 2000

Date