

**0023-00**

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER  
OF  
EDUCATION

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**Dennis Smith**  
  
v.  
**Tiverton School Committee**  
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**DECISION**

Held: The Commissioner lacks jurisdiction over this dispute because the issue involves an allegation that the School Committee violated the provisions of its contract with school Administrators.

DATE: June 26, 2000

## Travel of the Case

On October 29, 1999 Dennis Smith filed a written request for appeal with Commissioner Peter McWalters. Mr. Smith asserted that the Superintendent of Schools in Tiverton had failed to comply with the terms of the contract in effect between the Tiverton School Committee and the Tiverton Administrators Association. Specifically, Mr. Smith alleged that when he gave the Superintendent notice that he would be resigning his position as Assistant Principal at Tiverton High School effective August 17, 1999, the Superintendent changed his rate and terms of compensation as provided for in the written agreement between the School Committee and the Administrators Association. As of July 1, 1999 Mr. Smith was paid “per diem”, at a rate which varied from that of his contractual rate, and he was notified that he would not be compensated for any days he did not work, i.e. “vacation days”.

Mr. Smith objected to this arrangement at that time and pressed his objection at a hearing before the Commissioner’s designee on November 30, 1999. At the hearing, counsel for the Tiverton School Committee raised, inter alia, the issue of Mr. Smith’s failure to place this dispute before the members of the Tiverton School Committee prior to bringing it to the Commissioner’s level. It was agreed that the hearing would proceed so that the parties could present their evidence and arguments, with the understanding that the Tiverton School Committee would be given opportunity to consider the matter prior to any decision on the appeal being issued by the Commissioner’s office.

The appellant thereafter on December 6, 1999 forwarded a copy of his October 29, 1999 letter of appeal to Commissioner McWalters to the Chairperson of the Tiverton School Committee, with the request that the School Committee review the matter and render a prompt decision. On January 26, 2000 the appellant notified the hearing officer that the School Committee had still not acted on his appeal. On March 3, 2000 the hearing officer notified the parties that, given the inaction of the School Committee, the matter would no longer be held in abeyance, that the record would be closed and a decision issued.

## Issues

- ❖ Does this dispute “arise under” a law relating to schools or education such that the Commissioner has jurisdiction to decide the merits of this appeal?
- ❖ If so, did the Tiverton School Committee violate any education law or regulation in changing the rate and terms of compensation of Dennis Smith from July 1999 to August 17, 1999?

## Findings of Relevant Facts

- Dennis Smith was employed as an Assistant Principal at Tiverton High School pursuant to the terms of a written contract<sup>1</sup> between the Tiverton School Committee and the Tiverton Administrators Association dated October 2, 1996. Letter of appeal dated October 29, 1999; Joint Ex.A.
- The Administrators contract had a three-year term, but contained a provision that if at the end of the contract period a new contract is not finalized, the provisions of the agreement, other than wage increases, will remain in force until a new agreement is negotiated. Joint Ex. A at page 9.
- Under the terms of the Administrators contract, the “work year” consisted of two hundred and ten (210) required work days, including the one hundred and eighty (180) days of the school year, five (5) days before the opening of school and five (5) days after school closes, plus twenty (20) days, a minimum of fifteen (15) of which had to be scheduled during the summer recess and the other five (5) to be worked during the school year when school is not in session. Joint Ex. A. at page 1.
- Mr. Smith’s annual salary under the contract was \$63,800.00, which was paid in twenty-six (26) biweekly paychecks of \$2,453.85. Smith Ex. 1. His daily rate under the contract was \$260.41 (\$63, 800 divided by the potential 245 working days in the year). S.C. Ex. A.
- Upon giving written notice in June that he was resigning his position in order to accept a position in the Town of Middletown, effective August 17, 1999, Mr. Smith was advised that as of July 1,1999 he would not be paid biweekly pursuant to the Administrators contract, but rather would be paid on a “per diem” basis. The per diem rate was slightly higher than his daily rate under the contract since it was determined by dividing his annual salary by the number of days he was actually required to work each year, i.e. 210. However, as a “per diem” employee, he would not be paid for any days he did not work during this period. Tr. p.6; S.C. Ex. A; Smith Ex.1.
- When he voiced his objection to the plan to pay him on a per diem basis for the period July 1, 1999 to August 17, 1999, the Superintendent at first agreed to pay the appellant for the five (5) days that he was not planning to work at the per diem rate of \$304.00 per day. Smith Ex.2 and 3.
- Later on that same day, after conferring with the business manager for the Tiverton School Department, the Superintendent prepared a written memorandum to Mr. Smith indicating that he had “misspoken” about the number of days of “vacation” for which Mr. Smith would be compensated. He confirmed that the appellant would be paid per diem and would not be paid for days he did not work because “it has been past

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<sup>1</sup> Hereinafter the Administrators contract

practice to pay per diem to administrators who tender their resignations”. Smith Ex. 3.

- On July 16, 1999 Mr. Smith reiterated his objection to being paid on a per diem basis and argued that a binding verbal agreement had been reached with respect to additional payment for the five “vacation” days he was planning to take. He noted that the district’s insistence on compensating him on a per diem basis did not conform to the terms of the Administrators contract.. Smith Ex.2.
- The appellant worked a total of thirty days at a per diem rate of \$303.81. During this same period, i.e. June 30, 1999 to August 16, 1999 he did not work a total of five (5) days. S.C. Ex. A.
- The appellant was not paid for the five (5) days he did not work during the period June 30 to August 16, 1999. S.C. Ex.A.
- The amount earned by the appellant for the thirty (30) days he worked at his per diem rate from June 30 to August 16, 1999 is about the same amount he would have earned for this thirty-five (35) day period at his contractual rate of \$260.41 per day, i.e. \$9,114.00. S.C. Ex. A.
- The appellant did not file a grievance under Article XVIII of the Administrators contract to contest the method or amount of compensation paid to him during this period. Tr. p.43.
- The practice of the Tiverton School Committee has been to pay administrators who work less than a full year on a per diem basis, calculated by dividing annual salary by the 210 days they are required to work in their work year. Tr. pp. 25-26; S.C. Ex. B.

### **Positions of the Parties**

#### **The Appellant**

Dennis Smith argues that the Tiverton School Committee violated rights granted to him under the terms of the Administrators contract. When he took the professionally correct action of notifying his employer well in advance of his plan to leave the district to assume a position in Middletown, his employer responded by “taking him off the contract”, effective July 1, 1999 and compensating him on a per diem basis. As a result of this unilateral action, to which he voiced his objection, he was paid at a per diem rate and not paid for five days of vacation which he took during his final weeks of employment in Tiverton. Had he retained his rights under the Administrators contract,

Mr. Smith argues he would have continued to be paid at his biweekly rate<sup>2</sup> and been entitled to take a substantial number of days off. Under the Administrators contract he was obligated to work only fifteen (15) days over the course of the summer. Instead, and to his detriment, all five (5) days that he took off from work were unpaid. These were not all vacation days, since some of the days were used for a computer training seminar taken at the request of his new employer.

The appellant argues that when he raised his objection to these changes in a conversation with the Superintendent on July 9, 1999, he and the Superintendent reached a “gentleman’s agreement” that even though he was to be a per diem employee, he would be paid at the per diem rate for five additional days of “vacation” he was planning to take during this period. It was only after the Superintendent conferred with the business manager that the Superintendent changed his mind, and wrote the memorandum of July 9, 1999 in which he stated that the appellant would be paid only for the days he actually worked.<sup>3</sup>

In addition, because of Tiverton’s practice of paying employees their salaries in advance, the appellant argues that he worked for his last two weeks in June (under the contract) and did not receive a final check. Although he accepted the testimony of the district’s business manager that this situation resulted from the practice of paying salaries in advance, and did not dispute that he received the full amount of his annual salary in fiscal year 1999, he noted that this “disadvantage” could have been avoided if had he continued to work under contract until August 16, 1999. He could have received his salary for these last two weeks, despite the “advance payment” practice in Tiverton by taking the two weeks subsequent to August 16, 1999 as vacation days. Because he was a per diem employee at that time, it was not possible for him to do this, again to his financial detriment.

Finally, the appellant emphasized that given his exemplary employment record, he can not understand why he was subjected to such unfair and illegal treatment after four years as Assistant Principal at Tiverton High School. He notes that had he not acted as a professional and considered the district’s best interests in giving as much notice as possible of his resignation, his employment status would not have been altered, and the advantages and benefits of the Administrators contract would have been available to him. He argues that payment for an additional five days is an appropriate remedy for the district’s violation of the Administrator’s contract..

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<sup>2</sup> which he incorrectly argued was equivalent to the per diem rate on which he was placed as of July 1, 1999. As our findings of fact indicate the per diem rate was \$303.81 and his daily rate under the contract was \$260.41

<sup>3</sup> because of the appellant’s statement that he made a commitment to take computer training on several of the days he was not working in Tiverton, based on the gentleman’s agreement, the Superintendent offered to pay him for any of the five days for which he submitted proof of attendance at such computer workshops. As of the time of hearing, the appellant had not submitted such proof.

## Tiverton School Committee

Counsel argues that Mr. Smith's claim for additional compensation is frivolous<sup>4</sup>. From the School Department's perspective, Mr. Smith received even more as a per diem employee than he was entitled to receive under the Administrators contract. His per diem rate, substantially higher than his daily rate under the contract, was initially projected to net him approximately five hundred (\$500.00) dollars more than he would have made had he worked for the same period at his contractual rate. As it turned out, Mr. Smith was compensated per diem for thirty days that he worked during the thirty-five day period from June 30, 1999 to August 16, 1999, a total sum of \$9,114.30. S. C. Ex. A. If he had been paid on the basis of the Administrators contract for this same thirty-five (35) day period he would have been paid a total of \$9,114.35. S. C. Ex. A.

The School Department acknowledges that a misunderstanding existed at the time the Superintendent agreed to pay Mr. Smith for the five days he was not planning to work during the months of July and August. This misunderstanding was quickly corrected in a written memorandum prepared by the Superintendent and sent to Mr. Smith that same day, July 9, 1999. In a later memorandum on July 19, 1999 the Superintendent again affirmed that past practice supported the payment of employees who had tendered their resignations on a per diem basis, and with that arrangement, compensation only for those days actually worked. If the appellant had made a commitment to attend a computer workshop on the basis of the so-called gentleman's agreement, short-lived though it was, counsel notes that the district has even offered to pay him for the days he spent in attendance in such training, if and when Mr. Smith provides documentation of his attendance.

In summary, the school district emphasizes that Dennis Smith has been paid all that he would have been entitled to under the Administrators contract, since working per diem for thirty days (out of the potential 35 days from June 30 to August 17) results in compensation that is substantially equivalent to the amount he would have earned during the same thirty-five day period under the Administrators contract, i.e. \$9,114.00. Mr. Smith's claim for payment for an additional five days on which he did not report to work has no legal basis. Furthermore, administrators, as professional employees, are not in general "paid" for vacation days<sup>5</sup>. Many administrators work beyond the 210 required work days specified in the Tiverton Administrators Contract since this is expected of professional educators. The School Department argues that a claim for "vacation days" is contrary to the understanding that professionals will work the number of days it takes to "get the job done".

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<sup>4</sup> Counsel takes the position that there is no legal theory to support the claim for additional compensation and requests therefore that Mr. Smith be required to pay a reasonable attorneys fee to the School Committee. Tr. p.60.

<sup>5</sup> except for those administrators hired prior to July 1, 1992 who are entitled to payment for twenty-three vacation days upon severance from the Tiverton school department by virtue of Memorandum II of the Administrators Contract.

## DECISION

Since the parties have created an extensive record on the merits of this dispute and in the hope that our analysis will be of assistance to the parties or some other forum to which this dispute might be submitted, we will briefly analyze the merits of the appellant's claim. However, it is clear that this dispute is not one over which the Commissioner has jurisdiction, since it does not arise under any law relating to schools or education as required by R.I.G.L. 16-39-1 and 16-39-2. As an employment dispute between a school administrator and a school district, a dispute which focuses upon the terms and conditions of employment and seeks the enforcement of the terms of the Administrators contract, the subject matter of this dispute is exclusively based on contract. A long line of Commissioner's decisions confirms that this office has no jurisdiction over disputes which arise under collective bargaining agreements or are governed exclusively by the terms of contracts entered into by school committees. See *Madden v. Warwick School Committee*, decision of the Commissioner dated April 23, 1984; *Hoag v. Providence School Board*, decision of the Commissioner dated June 27, 1988; *LaSalle v. Cranston School Committee*, decision of the Commissioner dated November 12, 1991; *McGuinn v. East Providence School Committee*, decision of the Commissioner dated November 6, 1997.

We are aware that the Board of Regents has adopted "Regulations Concerning The Employment And Duties Of Principals (July 23, 1998). However, this dispute does not "arise under" those regulations. There is no provision of the aforementioned regulations which controls the issues under consideration here.<sup>6</sup> See *Jane A.U. Doe v. Portsmouth Abbey School*, decision of the Commissioner dated February 19, 1997; See also *Laidlaw Transit, Inc. v. South Kingstown School Committee*, decision of the Commissioner dated April 6, 1992.<sup>7</sup>

As the facts in this case clearly show, Dennis Smith was paid an annual salary of \$63, 800.00 as an Assistant Principal at Tiverton High School. This sum was paid to him in twenty-six equal installments throughout the fiscal year. As an assistant principal whose terms and conditions of employment were governed by a written contract, Mr. Smith was obligated to perform his professional duties according to Paragraph III of the Administrators Contract, which defines his work year and specifies that of his 210 work days, a minimum of 15 days must be scheduled during the summer recess. Upon receiving notice of his resignation, effective August 17, 1999, the administration notified him that the terms and conditions of his employment would change, effective July 1, 1999. The appellant appears before the Commissioner asserting that the school department had no right to change the terms and conditions of his employment unilaterally. In addition he disputes the fairness of his new employment arrangement

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<sup>6</sup> Note that the Regulations do not require specific terms, but require that principals (including assistant principals, vice principals and directors of area career and technical centers) and school committees discuss and come to written agreement on matters of salaries, benefits, and conditions of employment. School Committees have the option of developing individual or group written agreements.

<sup>7</sup> Particularly pages 4-5.

according to which he received a higher daily rate as a per diem employee, but was paid for not one “vacation” day.

In order to make the same amount he would have been paid under the Administrators contract for the thirty-five day period of his employment after June 30, 1999 (\$9,114.00), Mr. Smith worked a total of thirty days as a per diem employee. From a monetary standpoint it is true that Mr. Smith thereby received the same amount as he would have had the school department not made him a “per diem” employee. However, as he has pointed out, had he remained under the contract he could have earned this same amount and been required to work only 15 days of the summer recess. Rather than challenge the action of his employer at that time and adopt a summer work schedule as provided for in the Administrators Contract, he acquiesced in this new arrangement. Mr. Smith conformed his schedule to that of a per diem employee and to maximize his compensation as a per diem employee, he took only five days off from work. Realizing the disadvantages which he experienced, he now seeks to obtain a remedy for the School Department’s action, and the remedy he seeks is compensation (at his per diem rate) for the five days he did not work.

Although the legal arguments advanced by the appellant, who appeared pro se, are not clearly articulated, it appears on this record that the appellant seeks to recoup additional monies from his employer under two different legal theories, neither of which bring this matter within the purview of the Commissioner under R.I.G.L. 16-39-1 or 16-39-2. First, he seeks to enforce the terms of a verbal agreement with the Superintendent that he would be paid “per diem” and be compensated at the per diem rate for five additional days. Secondly he complains that the action of the School Department violated the terms of the Administrators Contract, and requests the Commissioner to provide a remedy for this contractual violation. As we have discussed, these claims are clearly contractually based and do not “arise under” a law or regulation relating to schools or education. We will, therefore, only briefly discuss the merits of these contractual claims.

A review of the Administrators Contract indicates a three year contract term commencing July 1996. Article XXII provides that if at the end of the contract period a new contract is not in effect, all provisions of the agreement, except wage increases, remain in force until a new agreement is negotiated. Annual salaries of administrators who are covered by the agreement result from an initial base salary negotiated by each newly-hired administrator, with increments to the base negotiated by the Tiverton Administrators Association. The contract describes the work schedule commitments of the administrators in detail in Article III “Work Year”. As stated in our findings of fact, administrators such as the appellant were required to work for five days after school closes and five days before school reopens, plus an additional at least fifteen days during the summer recess. There is no provision for different work schedule requirements in the event an administrator is working for less than a full year. The contract further requires that any modifications or amendments to this agreement must be in writing and signed by both parties to the agreement. See Article XVII “General.”

Given these provisions of the Administrators Contract, the School Committee was not acting in conformity with the agreement of the parties, i.e. violated the contract, when it altered the terms of compensation and working conditions of Dennis Smith to pay him on a per diem basis. Although the School Committee was attempting to establish equitable terms to address the situation of the departure of an employee other than at the end of a fiscal year, it could not change the terms of the contract unless it negotiated such terms with the Tiverton Administrators Association and incorporated them into the written contract.

Applying the same terms of this contract, Mr. Smith's request to enforce the "gentleman's agreement" with the Superintendent must fail. Even if there were a verbal agreement reached between Mr. Smith and the Superintendent on July 9, 1999 as to his payment for thirty-five days at a per diem rate, such agreement is not binding unless it is incorporated into the Administrators Contract. Thus his claim for payment for an additional five days at the per diem rate is unenforceable.

We have no authority to direct a remedy for the contractual violation we have identified in this decision, but leave such resolution to the agreement of the parties, or resolution of this dispute in some other forum.

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Kathleen S. Murray, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

DATE: June 26, 2000