0024-00

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

.. ..

Oscar R. Tassone

v.

Providence School Board

.. ..

DECISION

Held: It was not demonstrated that the nonrenewal of the appellant's contract as a non-tenured teacher was based on an invalid reason or that the Providence School Board had utilized improper procedures in effecting his termination.

DATE: June 26, 2000

Travel of the Case

On November 5, 1999 Oscar R. Tassone wrote to Commissioner Peter McWalters requesting a meeting to discuss his termination as a non-tenured teacher employed in the guidance department at Nathan Bishop Middle School in Providence, Rhode Island. Mr. Tassone later clarified that he wished to appeal the February, 1999 decision of the Providence School Board to terminate him on the basis of his failure to meet the residency requirement applicable to employees of the city of Providence. The matter was referred to the undersigned for hearing and decision on December 7, 1999. The matter was scheduled for hearing on January 18, 2000 by agreement of the parties. On January 10, 2000 a Motion to Intervene was filed on behalf of the members of the Providence Teachers' Union, Local 958, AFT, AFL-CIO.

No objection to the Motion to Intervene was filed by either of the parties, and counsel for the Providence Teachers' Union participated in the hearing to protect the interest of the union membership pertaining to the issue of residency. Counsel for the Providence School Board also participated in the January 18, 2000 hearing and the appellant appeared pro se. The record in this matter closed on February 10, 2000 upon receipt of the transcript.

Issue

> Was the termination of Oscar Tassone's employment as a nontenured teacher in the Providence School Department valid ?

Findings of Relevant Facts

- Oscar Tassone was appointed as a regularly-employed teacher on probationary status in the Providence School Department in September of 1998. He previously had served as a long term substitute. Tr. p. 65.

- At the time of his appointment as a teacher in the Providence school system, and continuing to date, he has been a resident of Pawtucket, Rhode Island. Tr. p.45.

- The city of Providence has a home rule charter which contains a provision that all employees of the city, including employees of the school department, must reside in

Providence within six months of the date of their appointment. See Section 1210 of the City Charter, Providence School Board Ex.3.

- Shortly after his appointment as a teacher on probationary status, Mr. Tassone wrote to then-Superintendent Arthur M. Zarrella requesting a waiver from the residency requirement contained in the home rule charter of the city of Providence. Tassone Ex. A.; Tr. pp.5,6.

- On or about November 19, 1998 Mr. Tassone received a residency affidavit for his signature. The residency affidavit informed him that as a condition of his employment he was required to become a resident of the city of Providence within six (6) months after being hired. The affidavit also confirmed that he had read and received a copy of Section 1210 of the City Charter. Providence School Board Ex. 3.

- The provisions of Section 1210 of the City Charter provide that in certain limited instances exemptions from the residency requirement may be granted by the City Council. Providence School Board Ex. 3.

- At no time did the appellant apply directly to the City Council for an exemption from the residency requirement. Tr. pp. 46-48.

- On or about February 9, 1999 the appellant received written notification that a resolution recommending his termination from employment would be presented to the Providence School Board on February 22, 1999. The reason for the proposed action was the failure of the appellant to meet the residency requirement of the charter. Providence School Board Ex.1. The February 9th notice confirmed that "any request made by you for an exemption from the residency requirements and/or extension of time to meet the residency requirements must be pursued by you". Providence School Board Ex. 1.

- Subsequently, on February 23, 1999 the appellant was notified of the Board's approval of the resolution terminating his teaching contract as of the last day of the 1998-1999 school year. The letter again confirmed that it was Mr. Tassone's responsibility to pursue any request for an exemption from the residency requirement directly with the City Council. The letter also noted that the appellant was entitled to appeal the decision to terminate him, and added "If you choose to do so, please notify this office at you earliest convenience". Providence School Board Ex.2.

- On or about June 18, 1999 Mr. Tassone forwarded a copy of his September 29, 1998 letter to Dr. Zarrella requesting a waiver of the residency requirement to an assistant to the Mayor of the City of Providence and later to the Mayor directly. At no point in time did he receive a response from the Mayor's office with respect to his request for a waiver, and he took no steps to forward his request for a waiver to the City Council. Tr. pp.17-20.

- Despite the fact that he had been terminated, Mr. Tassone received a communication from the School Department in July of 1999 related to a transfer request, and another letter notifying him of his anticipated attendance at a workshop on August 19, 1999. Tassone Exhibits D and E.

- Two days prior to school year 1999-2000 Mr. Tassone received a telephone call notifying him not to report to work. Tassone letter of appeal dated November 5, 1999; Tr. pp. 6-7.

- At some point in the month of September, Mr. Tassone made a verbal request for a hearing before the Providence School Board on the issue of his termination. He was verbally advised at that time by the Executive Aide to the School Board that it had no jurisdiction over the residency requirement and his request for a hearing went no further. Tassone Ex. B.

- Oscar Tassone is a named plaintiff in a lawsuit filed by certain individual teachers and the Providence Teachers' Union against the City Council and the Providence School Board. The lawsuit, pending in the Superior Court of the County of Providence, alleges inequitable and discriminatory application of the residency requirement in violation of the plaintiffs' legal rights. See Teachers' Union Ex. 1.

Positions of the Parties

Oscar Tassone

The appellant makes several arguments to challenge the validity of his termination from both a substantive and procedural standpoint. Substantively, the appellant asserts that a residency requirement infringes on his constitutionally-protected right to liberty. He views such a requirement as "forced servitude." He notes that the residency requirement has not been construed as being applicable to per diem substitutes or even long term substitutes because they are not permanent employees. He argues that probationary employees should also not be subject to the residency requirement of the charter because similarly they are not permanent employees. He also has an impression, which he has been unable to verify in fact, that certain non resident employees to whom the residency requirement should be applicable have nonetheless been recalled to work as teachers during the current school year.

It was Mr. Tassone's understanding that the correct protocol for requesting a waiver or exemption from the residency requirement was to submit his request to the

Providence School Board, his employer. Tr. pp.46-47. This he did by written letter to Superintendent Zarrella dated September 29, 1998. Subsequent to his termination on the basis of nonresidency, he did take the additional step of providing the Mayor's office with a copy of the letter he had sent to Dr. Zarrella several months earlier requesting a waiver. This step was taken in mid-June, 1999. He argues that he has taken reasonable steps to secure a waiver, and believes that the failure of the City Council to act on his request is because "somebody didn't do their job and I'm the victim of it". Tr. p.46.

In response to the contention of the School Board that he did not even submit a timely request for a full hearing following his termination, and thus is now precluded from submitting the issue of his termination to the Commissioner, he argues that he did in fact approach the executive aide to the School Board to request a hearing in September, 1999. At that time he was told that the School Board had no jurisdiction over the issue of residency, and thus would not hear the matter. See Tassone Ex. B.

Implicitly, the appellant's position is that his termination should be rescinded as invalid, both because of the unconstitutionality of the residency provision and because he should be entitled to a waiver and would have received one if the city officials had properly processed his request.

The School Board

At the outset counsel for the Providence School Board moved to dismiss this appeal because there had been no timely request by the appellant for a hearing before the full Board following his termination. The statutory provisions applicable to the nonrenewal and dismissal of teachers require a teacher to seek a hearing immediately following receipt of written notice of the Board's action. In this case, Mr. Tassone failed to take timely action to seek a full hearing on the issue before the Providence School Board, and when he did, he did not follow the procedure outlined in state law.

With respect to imposition of the residency requirement on Mr. Tassone, the School Board takes the position that it has no discretion in this regard and has no authority with respect to exemptions. If an employee, other than one who is categorized

as a temporary employee such as a substitute, fails to take up residence within the city within the prescribed time, then the School Board must dismiss that person. At the time the Board acted on the resolution to terminate Mr. Tassone, it is undisputed that he was not a Providence resident and had not received an exemption from the residency requirement, although he had made limited efforts to obtain one. The School Board argues that the steps followed by the appellant to obtain an exemption were ineffective because they did not conform to the explicit procedure set forth in the city charter, i.e. written application to the Providence City Council.

Implicit in the arguments of the School Board is the issue of whether the appellant had a legitimate intent to request a waiver and whether there was any basis to his claim that compelling family circumstances should entitle him to an exemption from the residency requirement.

In any event, given the facts, the School Board argues that its termination of the appellant on the basis of non-residency is valid both substantively and procedurally.

Providence Teachers' Union

On behalf of the Union, counsel argues that as a named plaintiff in the lawsuit which has been filed to challenge the manner in which the residency requirement has been applied to Providence School Board employees, the appellant has "elected his remedy" and is precluded from asserting a simultaneous challenge to the residency requirement in this forum. The issue of residency, particularly a claim that the residency requirement has been inequitably applied, is an issue that is not properly within the jurisdiction of the Commissioner of Education as a dispute arising under education law as required by R.I.G.L. 16-39-1 and 16-39-2. The charter provision applies to all municipal employees, not just those of the school department. The proper forum for resolution of the issue of inequitable application of the charter provision is the Superior Court, where this matter is pending and this issue will be resolved.

DECISION

The record in this case demonstrates that the appellant did not request a hearing on his termination in writing within fifteen days of his notification of the February 22, 1999 decision of the Providence School Board. R.I.G.L.16-13-4, incorporated into 16-13-2 by reference, requires that such procedure be followed by non-tenured teachers who seek to appeal their termination to the department of elementary and secondary education. There is no explanation contained in the record as to why the appellant waited until several months after the fifteen day time period had expired, and then made only a verbal request to an executive aide to the School Board for a hearing on his dismissal. We might observe that his failure to follow the required procedures in this instance is consistent with his failure to follow the procedure attendant to obtaining an exemption from the residency requirement from the Providence City Council. The failure of the appellant to make a written and timely request for a hearing before the School Board on the issue of his termination leaves the Commissioner without jurisdiction and warrants the dismissal of this appeal. The motion to dismiss made by the Providence School Board is hereby granted.

In the event that a higher authority disagrees with our ruling dismissing this matter, we will briefly address the merits. Contrary to the assertion of counsel for the Providence Teachers' Union that residency is never an issue within the Commissioner's jurisdiction, when the procedural requirements of the statute have been observed, a teacher may appeal the propriety of his or her discharge even if the basis for the action is noncompliance with the residency requirement of the charter. The Commissioner heard such an appeal in the case of *Leslie Angelone, et al. v. Providence School Board*, decision of the Commissioner dated August 16, 1990, affirmed by the Board of Regents on May 2, 1991.

We start from the premise that a residency requirement, as a condition of municipal employment, does not violate the constitutional right to equal protection of the laws. *Loiselle v. City of East Providence*, 116 RI 585, 359 A2d 345 (R.I. 1976). Mr. Tassone, as a probationary teacher hired in September of 1998, was subject to the residency requirement contained in Section 1210 of the city's home rule charter. The

charter provision has been found to supercede inconsistent state laws prohibiting the imposition of residency requirements on certified teaching personnel. See *Local No. 799, Firefighters v. Napolitano*, 516 A2d 1347 (R.I. 1986). Exclusive authority over exemptions from the residency requirement rests with the City Council. At no point in time did the appellant effectively place his request for a waiver before the City Council. At the time the February 1999 resolution on his dismissal was presented to the School Board, he was not in compliance with the residency requirement. As discussed in *Angelone*, supra, noncompliance with the charter's residency requirement is a valid reason for termination, or in the case of a non-tenured teacher such as Mr. Tassone, his non-renewal. We incorporate herein the Commissioner's decision in *Angelone* for a discussion of our concerns and opinion as to the wisdom and effectiveness of a residency requirement for certified school personnel. Despite our difference of opinion on the residency requirement, it remains a legally valid reason for termination of the appellant.

While the communications sent to the appellant in the summer with respect to his transfer request and his anticipated attendance at an August 31 workshop are confusing, and undoubtedly confused Mr. Tassone as to his employment status, they had no legal impact on his termination. It is unfortunate that some sort of "final notice" on termination was conveyed to the appellant only a couple of days before the opening of school, but these circumstances taken together do not amount to a rehiring of Mr. Tassone or to a rescission of his February, 1999 termination. We would, however, urge the School Department to take whatever steps are necessary to prevent such confusing and arguably misleading communications from being sent to its former employees.

For the foregoing reasons, the appeal is denied and dismissed.

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Kathleen S. Murray, Hearing Officer

APPROVED:

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Peter McWalters, Commissioner

June 26, 2000
Date