

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

* * * * *

National Education Association

v.

Middletown School Committee

* * * * *

DECISION

HELD: School Social Workers must be certified and they must be hired in accordance with the Teachers' Tenure Act (R.I.G.L. 16-13-1, et seq.). Collective bargaining agreements may not run contrary to the educational policy of the General Assembly and the Board of Regents.

DATE: October 17, 2000

TRAVEL OF THE CASE

At the start of the 1998-1999 school year, the Middletown School Committee signed a contract with the Newport County Mental Health Center, a private vendor, to provide social work services to students in the Middletown public schools. "The agreement with [the Newport County Mental Health Center] was to provide ...family centered social services primarily at home, beyond the school day and beyond the school calendar." ¹

The National Education Association (NEA), the authorized collective bargaining representative of the teachers in the Middletown public schools, requested an advisory opinion from the Rhode Island Department of Education (RIDE) on whether or not this social worker position had to be filled by a *certified* school social worker. The RIDE certification office replied that the position of school social worker was a position that required teacher certification. When the opinion of the RIDE certification office did not resolve the issue, the NEA, through its Deputy Executive Director, filed the present Appeal with the Commissioner's Office. The Appeal letter states:

Pursuant to RIGL 16-39-2, I hereby appeal the action of the Middletown School Committee to retain the services of a non-certified social worker to perform school social work services, which require certification from the RI Department of Education. The School Committee is seeking to evade and avoid the Department of Education certification requirements by contracting out the school social worker services to Newport County Mental Health.

Jurisdiction to hear this case is present under R.I.G.L.16-39-2 and R.I.G.L.16-39-2. This is a *de novo* hearing.² In this contested case the Commissioner is not bound by prior interpretive rulings issued by the RIDE certification office.³ The real issues in this case do not directly relate to teacher certification. The real issues in this case involve the Teacher Tenure law and collective bargaining.

FINDINGS OF FACT

In 1998 the Middletown School Committee signed a contract with the Newport County Mental Health Center, Inc. Under this agreement, which has the title of *Early Childhood Family Outreach Social Worker Program Agreement*, the Newport County Mental Health Center provides the Middletown public schools with:

¹ Brief of School Committee, page 2

² *Slattery v. Cranston*, 116 R.I. 252 (1976)

³ *Jennings v. Exeter-West Greenwich Regional School Committee*, 116 R.I. 90 (1976)

The services of a social worker, twelve-month schedule, five days per week, thirty-five hours per week, when and where needed. Staff schedule will be tailored to meet schools/students/family. Duties will include:

1. Homebound and orientation to students, parents and community regarding the Early Childhood Family-Based Program.
2. Prevention education regarding social, emotional, family, and academic issues for students, school personnel, and families when and where needed.
3. School-based consultation to school personnel regarding identification and coping with students who may have problems.
4. Individual student assessment (non-academic) and on-going counseling when appropriate.
5. Referral of individual students to community-based services when appropriate.
6. Assessment and referral of students and families whenever appropriate.
7. All services shall be rendered as needed, where needed, between the hours of 8:00 a.m. and 9:00 p.m.⁴

The goal of the *Early Childhood Family Outreach Social Worker Program Agreement* is to:

Provide a coordinated family-based home-school program to families and students at Linden, Aquidneck, Kennedy and Forest Avenue schools to use home-school relations as a medium through which an individual student's response to and benefit from the school and its programs can be strengthened and improved.

The Newport County Mental Health Center has hired a social worker licensed by the Rhode Island Department of Health to fill this position. This social worker is based at the Linden School in Middletown, but she also provides social work services to other students at other Middletown public schools. She is now providing social work services to approximately fifty-four families. Many of the home visits this social worker makes take place outside of regular school hours and some of them take place on weekends. She works a total of 35 hours a week.

A regularly employed [i.e. tenured teacher] Middletown school social worker was present at the hearing of this matter where she heard the duties of the "contract" school social worker described. The tenured school social worker then testified that there was a substantial overlap between the duties she performs and the duties performed by the "contract" social worker. We credit this testimony. However the record also showed that the regularly employed tenured social worker rarely provided services outside of the regular school day. Of course, one of the reasons why Middletown wished to hire a "contract" school social worker was to have greater flexibility in the scheduling of family visits. The "contract" school social worker is referred to in various exhibits as being an "Outreach Social Worker." Exhibit C describes the duties of the "contract" social worker:

⁴ Exhibit 1

POSITION SUMMARY: Provide outreach services primarily to families and children (K-12) in the Middletown School System. This position involves developing partnerships between families and schools to improve student adjustment at school and home and to promote success in learning. This position focuses on early intervention, particularly at the kindergarten level, working with families, teaching parenting skills and collaborative work with community agencies. Provide emergency services, including assessment for hospitalization. Conduct home visits in support of obtaining necessary information and/or services to students and families. Obtain family histories in order to identify conditions interfering or enhancing student performance. This position is school and community based.

Based upon the job specifications submitted, and the testimony at the hearing, we conclude that the “contract” social worker in this case is performing duties that are substantially equivalent to the duties performed by a regular school social worker. We can see no significant difference between the work performed by this “contract” school social worker and the work performed by the tenured school social worker employed by the Middletown School Committee. The only differences between the duties of the positions relate to work schedules.

As it turns out the social worker hired by the Newport Mental Health Center, Inc. also happens to have a valid school social worker certificate issued by RIDE. Of course this fact does not obviate the present dispute. The real issues in this case do not directly relate to teacher certification. Instead the real issues in this case relate to the Teacher Tenure Act and to the scope of collective bargaining. This case does not result from the fact that Middletown has secured the services of a certified school social worker, but rather from the fact that it has secured these services outside of the Teachers’ Tenure Act and outside of the collective bargaining agreement which it has with the NEA. Middletown argues that it has done this because, if it hired a social worker under the Tenure Act, this social worker would then be covered by the NEA collective bargaining agreement. This agreement contains contract language that prevents extensive teacher work outside of the regular school day and out-side of the regular school year. Of course the very point of hiring an “out-reach” school social worker was to reach out to parents and to students, and to do this outside of regular school hours.

In the case at hand the school committee has not argued that its “out-reach school social worker” is not performing the duties of a regular school social worker. The school committee was correct not to advance this argument. The record before us shows that, except for work schedule, there is no difference between the work performed by the out-reach school social worker and the work performed by the school committee’s regular certified school social worker. This is not a case where the work performed by the certified teacher can be distinguished from the work performed by a licensed, but uncertified, professional.⁵

⁵ *Rhode Island Department of Education v. Warwick*, 696 A.2d 281 (R.I.1997)

POSITION OF THE NEA

The NEA contends that only a person that is certified by the Rhode Island Department of Education may be employed by a public school district to provide school social worker services. Implicit within this argument is the premise that school social workers must be hired by the school district in accordance with the Rhode Island Teachers' Tenure Act—not through a purchase of services contract with a corporation.⁶ Moreover, under the Michaelson Collective Bargaining Act, the teachers employed by Middletown must be employed under the collective bargaining agreement existing between Middletown and the NEA.⁷ The Rhode Island Teacher Tenure Act states in pertinent part:

16-13-1. Scope of Chapter. ---The term “teacher” as used in this chapter shall be deemed to mean every person for whose position a certificate issued by the department of elementary and secondary education is required by law.

16-13-2. Annual contract basis---Automatic continuation. ---(a) Teaching service shall be on the basis of an annual contract, except as hereinafter provided, and contract shall be deemed to be continuous unless the governing body of the schools shall notify the teacher in writing on or before March 1 that the contract for the ensuing year will not be renewed.

The Rhode Island Teacher Certification law states in pertinent part:

16-11-1. Certification of public school teachers requires—Deductions from state aid for noncompliance. —No person shall be employed to teach, as principal or assistant, in any school supported wholly or in part by public money unless the person shall have a certificate of qualification issued by or under the authority of the board of regents....

The Michaelson Collective Bargaining Act states in pertinent part:

28-9.3-2. Right to organize and bargain collectively. – The certified teachers in the public school system in any city, town, or regional school district shall have the right to bargain collectively with their respective school committees and to be represented by an association or labor organization in the negotiation or collective bargaining concerning hours, salary, working conditions, and all other terms and conditions of professional employment. For purposes of this chapter, certified teachers shall mean certified teaching personnel employed in the public school systems in the state of Rhode Island engaged in teaching duties, including support personnel whose positions require a professional certificate issued by the state department of education and personnel licensed by the department of health as physical therapists or occupational therapists.

⁶ R.I.G.L.16-13-1

⁷ R.I.G.L.28-9.3-1 to 28-9.3-16

The NEA points out that the Board of Regents, under R.I.G.L.16-11-2 has established a certificate “valid for service as a school social worker in grades PK-12.”⁸ The NEA argues that because a teaching certificate is required for the position of school social worker it necessarily follows that a social worker is, by operation of law, a *teacher*.

Under Rhode Island law public school teachers must be hired in accordance with the Teacher Tenure Law.⁹ The Teacher Tenure law requires school committees to fill all genuine teacher vacancies with a certified teacher under a regular annual contract. If a teacher completes three years of service under a regular annual contract he or she acquires tenure.¹⁰

Of course the school social worker in this case has not been hired under an annual contract, and she has not be placed in a tenure track position. In fact the Middletown school committee has not hired her at all. Instead she is employed by a private corporation as an *at will* employee. She will never acquire tenure or be covered by the collective bargaining agreement that exists between Middletown and the NEA.

The NEA understands the school committee’s argument that a purchase of services contract with a private corporation allows the school committee to obtain the services of a school social worker at a cheaper rate than it would have to pay for the services of a certified school social worker hired under a regular annual contract in a tenure track position. It also understands the school committee’s argument that by using a purchase of services contract the committee hopes to avoid the strictures of the collective bargaining agreement between the NEA and the Middletown school committee.

While the NEA understands these arguments it feels that they are shortsighted. The NEA points out that the common purpose of the Tenure Act¹¹, the Certification Act¹², and the Collective Bargaining Act¹³ was to benefit school children by improving the qualifications and working conditions of teachers, thereby encouraging qualified people to enter the teaching profession. Before the passage of the Teachers’ Tenure Act in 1946 teachers had little in the way of employment security:

⁸ The Board of Regents adopted the present version of the School Social Worker certificate on April 30, 1997. This certificate specifies that: “Continued service as a School Social Worker in the public schools of Rhode Island requires that the individual maintain his/her license as a certified Social Worker as required by the Rhode Island Board ...of Social Workers.” See: R.I.G.L.5-39.1-2

⁹ R.I.G.L. 16-13-1, et seq.

¹⁰ Now 3 annual contracts within 5 years. See: 16-13-3

¹¹ R.I.G.L.16-13-1

¹² R.I.G.L.16-11-1

¹³ R.I.G.L. 28-9.3-1

Before the enactment of public laws 1946, chap. 1775, the teachers' tenure act (now G.L.1956, chap. 13 of title 16), school committees could appoint teachers at will and for shorter periods than on the basis of an annual contract. The title of chap. 1775 is: "An Act to Guarantee and to Improve the Education of Children and Youth In This State By Providing Continuing Teaching Service." Section 2 thereof reads as follows:

"Teaching service shall be on the basis of an annual contract, except as hereinafter provided, and such contract shall be deemed to be continuous unless the governing body of the schools shall notify the teacher in writing (on or before March 1) that the contract for the ensuing year will not be renewed." ¹⁴

The NEA argues that the course of action being pursued by the Middletown school committee tends to subvert this legislation—legislation that has been enacted to promote public education. The NEA also argues that even if the school committee thinks that it has found a better and cheaper way to hire teachers, the school committee is still bound by the Tenure and Certification law to hire teachers in the way that has been established by the General Assembly.

The NEA submits that the Commissioner should rule that the Middletown School Committee has no authority to enter into the purchase of services contract at issue. The NEA also argues that the law requires the school committee to hire only certified school social workers, and that these social workers must be hired in accordance with the Teachers' Tenure Act. The NEA, while holding its cards close to the vest, points out that it has not yet been asked by school authorities if it might be willing to modify the collective bargaining agreement to permit the hiring of an *out-reach* social worker. Of course, by pointing this out, the NEA has not indicated that it would agree to a modification--it has simply pointed out that it has not yet been asked to agree to a modification.

POSITION OF MIDDLETOWN

The Middletown School Committee argues that state education policy, as enunciated in a 1996 document entitled *All Kids, All Schools: The Rhode Island Comprehensive Education Strategy* "prepared by the state's "Goals Two Thousand Panel" and approved by the Board of Regents, requires Middletown to make efforts to increase student access to social services. In Rhode Island the Board of Regents has the authority to set the educational policy of the state.¹⁵ The Rhode Island Goals Two Thousand Panel was created as result of federal legislation entitled "National Education Goals" better known as *Goals 2000*.¹⁶ The *Rhode Island Comprehensive*

¹⁴ *North Kingstown v. Robinson*, 99 R.I. 348 (1965)

¹⁵ R.I.G.L.16-60-4

¹⁶ 20 USCA 5811, et seq. The Rhode Island Goals 2000 Panel wrote: "The appointment of the Panel was called for by the Goals 2000 federal initiative.... However, in Rhode Island...the framework for reform had already

Educational Strategy, as approved by the Board of Regents, adopts a number of policy goals for public education:

- School days will be restructured and/or extended so that there is time for families, school, staff, business and community members to engage in partnership activities.¹⁷
- School committees will create policy to restructure and/or extend the school day to provide time for families, school staff, business and community members to engage in partnership activities.¹⁸
- Policy, procedures, regulations, mandates and contractual agreements will be modified to reflect support for improved learning for all students and to meet state and district education goals.¹⁹
- In order for all children to be successful as lifetime learners, citizens and workers, their families must actively engage in the work of the schools. Likewise school staff must improve their capacity to sustain consistent, comprehensive family involvement in the education of children both at home and at school.²⁰

The *State Comprehensive Education Strategy* has been adopted by the Rhode Island General Assembly. In fact recent legislation of the General Assembly has been “designed to accelerate the implementation of the *State Comprehensive Education Strategy*.” (R.I.G.L. 16-7.1-1)

Middletown argues that to reach these goals it needs to employ an “out-reach” school social worker to work with students, and with their families, during times when school is not in session. It argues that the strictures of the collective bargaining agreement, and the Tenure Law, in practice, prevent it from using a regularly employed school social worker to perform the duties of an “out-reach” school social worker. Middletown simply argues that it has not illegally *evaded* the force of the Teachers’ Tenure Act or the force of the Michaelson Collective Bargaining Act. Instead Middletown claims that it has astutely *avoided* these Acts by hiring a private corporation to provide the services which it needs. It submits that it had to avoid the Tenure Law and Collective Bargaining Act in order to carry out state education policy of reaching out to students and their families during days and hours when the schools are not in session.

been established. The 21st Century Education Commission report, the ongoing efforts of the Skills Commission...and the Board of Regents reform agenda provided a foundation for reform. (*All Kids*, page 8.)

¹⁷ Page 42

¹⁸ Page 42

¹⁹ Page 34

²⁰ Page 41

CONCLUSIONS OF LAW

As we have seen the Teachers' Tenure law requires school committees to hire teachers on the basis of annual contracts.²¹ Under the Tenure law "...the term 'teacher' [is] deemed to mean every person for whose position a certificate ...is required."²² The Board of Regents has authority "to issue certificates of qualification which shall be valid throughout the state for the grade and time specified therein."²³ We take notice of the fact that the Board of Regents issues a certificate for the position of School Social Worker.²⁴

Given all of this we must conclude that school social workers must be hired in accordance with the Teachers' Tenure law. The policy of our General Assembly is to support teacher tenure and collective bargaining-- not as ends in themselves-- but rather as mechanisms to benefit school children by ensuring a high quality teaching corps.

This, however, does not mean that the Tenure law and the Collective Bargaining law should be read in ways that defeat other valid expressions of state educational policy. Instead these Acts must be read in harmony with the other Acts of the General Assembly. The Rhode Island Supreme Court has said:

It is well settled that "[i]n construing the provisions of statutes that relate to the same or similar subject matter the court should attempt to harmonize each statute with the other so as to be consistent with their general objective and scope." More importantly, we shall not "interpret a legislative enactment literally when to do so would produce a result at odds with legislative intent. Rather, we will give the enactment "what appears to be the meaning most consistent with its policy or purpose..."²⁵

Since the General Assembly, under Article XII of the Constitution, and the Board of Regents, under R.I.G.L. 16-60-1, set the educational policy of the state we do not believe that collective bargaining can be used to oust these bodies from their right to set policy. We, therefore, do not believe that a collective bargaining agreement has the power to defeat the educational policy established by the General Assembly, formulated by the Board of Regents, and implemented by a local school committee.

We recognize that teachers have the right to bargain collectively concerning hours, salary, working conditions, and other terms of professional employment.²⁶ We also recognize that the Rhode Island Supreme Court has stated that "the legislative mandate for good-faith bargaining is broad and unqualified and we will not limit its thrust in the absence of an explicit statutory provision which specifically bars a

²¹ R.I.G.L.16-13-2

²² R.I.G.L.16-13-1

²³ R.I.G.L.16-11-2

²⁴ Copy attached to this Decision

²⁵ *Billington V. Fairmount Foundry*, 724 A.2d 1012 (R.I. 1999) Citations omitted.

²⁶ R.I.G.L.28-9.3-1

school committee from making an agreement as to a particular term or condition of employment.”²⁷ We also recognize that the Board of Regents may not “engage in the operation or administration of any...local school district...”²⁸ But none of this changes the fact that the Board of Regents has the authority:

To formulate broad policy to implement the goals and objectives established by the board of regents from time to time; to adopt standards and require enforcement and to exercise general supervision over all elementary and secondary public and nonpublic education in the state....”²⁹

Our Supreme Court has made it clear that public sector collective bargaining does not extend to matters of policy and management.³⁰ The Court has also stated that in a collective bargaining agreement a governmental employer:

May not bargain away authority that has already been delegated to management or to other governmental agents by state law or other paramount public policy.³¹

The Rhode Island Supreme Court is not alone in taking this position. For example the New Jersey Supreme Court has stated:

Public employees’ special access to government applies only where the government is acting in the capacity of an employer, and not where it is acting in its capacity as public policy maker. A private employer may bargain away as much or as little managerial control as it likes...However, the very foundation of representative democracy would be endangered if decisions of significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded. This Court would be most reluctant to sanction collective agreements on matters which are essentially managerial in nature, because the true managers are the people. Our democratic system demands that governmental bodies retain their accountability to the citizenry.³²

The Alaska Supreme Court has stated:

If teachers’ unions are permitted to bargain on matters of educational policy, it is conceivable that through successive contracts the autonomy of the school boards could be severely eroded, and the effective control of educational policy shifted from the school boards to the teachers’ union. Such a result could threaten the ability of elective government officials and appointive officers subject to their authority, in this

²⁷ *Belanger v. Matteson*, 115 R.I. 332, 346 A.2d 464 (1975)

²⁸ R.I.G.L.16-60-4 (3)

²⁹ R.I.G.L.16-60-4(3)

³⁰ *Pawtucket School Committee v. Pawtucket Teachers’ Alliance, AFT*, 652 A.2d 970(1995); *Rhode Island Brotherhood of Correctional Officers v. Department of Corrections*, 707 A.2nd 1229 (1998); *Rhode Island Laborers’ District Council v. State*, 592 A.2nd 144 (1991)

³¹ *Rhode Island Brotherhood of Correctional Officers v. Department of Corrections*, 707 A.2nd 1229 (1998);

³² *Ridgefield Park Educ. Association v. Ridgefield Park Bd. Of Education*, 393 A.2d 278 (N.J., 1978)

case school boards and administrators, to perform their functions in the public interest.³³

In Rhode Island it is of particular importance that matters of management and educational policy not be included in collective bargaining agreements. Under Rhode Island law, it must be remembered, collective bargaining agreements are subject to arbitration and “except for complete irrationality, arbitrators are free to fashion applicable rules and determine the facts of the dispute before them.”³⁴ Even if an arbitrator makes a complete error of law this, in itself, will not suffice to overturn the arbitrators’ decision.³⁵

Therefore, if educational policy could be set through collective bargaining, we would have a situation where state educational policy was being set through some 34 separate collective bargaining agreements. The various meaning of these collective bargaining agreements would then be subject to essentially unreviewable interpretation by randomly selected, private arbitrators, whose decisions only have to meet the test of marginal rationality. Moreover, as we have seen, arbitration decisions do not even have to correctly construe the law. By saying this we do not mean to suggest that in Rhode Island school committees have bargained away the people’s authority or that arbitrators are not conscientious in the decisions that they make. We are simply pointing out that educational policy must be set in forums that are responsive to the people.

We conclude that it is possible to harmonize the Teachers’ Tenure Act, the Michaelson Collective Bargaining Act, the Board of Regents Act and the certification law. To accomplish this all we have to do is follow the holdings of the Rhode Island Supreme Court which have made it clear that policy matters and management authority are not subject to collective bargaining.

In the present case we find that the Tenure Act requires the Middletown school committee to obtain the services of school social workers by hiring them under regular annual contracts—not by contracting with a private corporation for a purchase of services contract. At the same time we find that the Board of Regents has established a policy of involving families in the educational process so that these families will be able to help their children stay in school and make good academic progress. It is obvious to us that troubled families will not always be reachable by appointment, on school property, during regularly scheduled business hours, at the appropriate terms of the duly scheduled academic year. It is therefore the educational policy of this state that school social worker services should be made available outside of the rounds of the regular school clock and calendar.

CONCLUSION

³³ *Kenai Peninsula Borough v. Kenai Peninsule Educ. Association*, 572 P.2d 416, 419 (Alaska ,1977)

³⁴ *Belanger v. Matteson*, 115 R.I. 356, 346 A.2d 124 (1975)

³⁵ *Belanger v. Matteson*, *ibid*

We therefore find that any terms of a collective bargaining agreement which prevent a school committee from hiring a reasonable number of school social workers to work outside of a regular school hours are void as encroaching on the policy setting authority of the Board of Regents. This does not mean that collective bargaining may not take place concerning the wages and hours of such social workers. It does mean, however, that the collective bargaining agreement may not be used to nullify the decision to hire a school social worker to work outside of regular school hours.

We adhere to the rule that the Commissioner does not exercise jurisdiction over collective bargaining agreements or over the course of collective bargaining.³⁶ On the other hand, it is within the jurisdiction of the commissioner to hear statutory disputes that arise under the school laws of this state.³⁷ One of the school laws of this state is R.I.G.L. 16-60-4, which gives the Board of Regents authority to “approve a master plan defining broad goals and objectives for elementary and secondary education in this state.”

All Kids, All School; The Rhode Island Comprehensive Education Strategy is just such a master plan. No school district, and no collective bargaining unit created under the Michaelson Collective Bargaining Act, has authority to enter into contracts which contain provisions which would tend to frustrate the education policy established by the Board of Regents and endorsed by the General Assembly.³⁸

This case is remanded with a direction that the parties meet and reach an agreement on a collective bargaining contract that accommodates the special work schedule required for the efficient employment of an out-reach school social worker.

Forrest L. Avila, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

October 17, 2000

Date

³⁶ *Hoag v. Providence School Board*, Commissioner of Education, June 1988; *Asadoorian v. Warwick School Committee*, 691 A.2d 573 (R.I. 1997); *Warwick School Committee v. Teachers Union*, 613 A.2d 1273 (R.I. 1992)

³⁷ R.I.G.L. 16-39-1 and R.I.G.L.16-38-1

³⁸ R.I.G.L.16-7.1-1