

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

.....

**Kimberly F. D'Arpino,
Deborah S. Marcellino,
and other similarly situated
teachers in the Middletown
School Department**

v.

Middletown School Committee

.....

DECISION

Held: The appellants have not demonstrated that at the beginning of school year 1999-2000 they were eligible under state law to advance on the salary schedule in effect for Middletown teachers. Any automatic annual advancement on the salary schedule which may be required by the collective bargaining agreement is a dispute over which the Commissioner lacks jurisdiction.

DATE: May 7, 2004

Travel of the Case

On August 23, 2000 general counsel for the National Education Association appealed to the Commissioner on behalf of the two named Appellants, Kimberly F. D'Arpino and Deborah S. Marcellino and other similarly situated Middletown teachers. In dispute was the decision of the Middletown School Committee that the appellants were not entitled to advance on the salary schedule in September of the 1999-2000 school year based on their service during the prior school year. The undersigned was designated to hear and decide this appeal, and a pre-hearing conference was held on October 11, 2000. At that time the parties indicated that the facts were not in dispute and that the case would be submitted for decision on the basis of a written stipulation of fact and memoranda summarizing their legal positions.

At some point, there was a change in counsel for the School Committee, and on November 15, 2002 the parties notified the hearing officer of their decision to go forward with a formal hearing. After providing available dates and scheduling the matter for January 27 and 28, 2003, the hearing officer was notified of a request for a telephone conference. At that time, the parties again agreed that this dispute was most efficiently decided on the evidentiary record created in a prior arbitration proceeding. The transcript from the arbitration matter, and a Statement of Stipulated Facts were then submitted to the hearing officer, along with written arguments of counsel. The record in this matter closed upon receipt of the Appellants' Reply Memorandum of Law on August 21, 2003.

Jurisdiction to hear this dispute is found in R.I.G.L. 16-39-1 and 16-39-2.

Issue

Were the Appellants entitled to credit for a year of service at the beginning of the 1999-2000 school year, recognizing their service during the prior school year during which they worked 81 and 104 days, respectively, and were on authorized maternity leave for the remainder of the school year?

Findings of Relevant Facts:

- Kimberly D'Arpino is employed as a teacher in the Middletown School Department; she was hired on the first step of the salary schedule in the 1990 when she was hired as an eighth grade French teacher at the Gaudet School. Statement of Stipulated Facts¹
- Ms. D'Arpino took an authorized maternity leave from her position on or about January 12, 1999 and was out of work for the remainder of the 1998-1999 school year. Stipulation.
- During the 1998-1999 school year, Ms. D'Arpino worked 81 days and was paid for an additional 26.5 days of sick leave. The school year that year consisted of 184 days. Stipulation.

¹ hereinafter referred to as "Stipulation". The Stipulation submitted by the parties is undated but was received into the record on August 12, 2003.

- At the time Ms. D’Arpino began her maternity leave, she was in her ninth year of teaching and was paid at Step 9 of the salary schedule. When she returned from her maternity leave in August of 1999, to begin the 1999-2000 school year, she was again placed on the ninth step of the salary schedule. Stipulation.
- Deborah Marcellino is employed as a teacher in the Middletown School Department; she was hired on the first step of the salary schedule in 1997, when she was hired as a eighth grade literary development teacher at the Gaudet School. Stipulation.
- Ms. Marcellino took an authorized maternity leave from her position on or about February 22, 1999 and was out of work for the remainder of the 1998-1999 school year. Stipulation.
- During the 1998-1999 school year, Ms. Marcellino worked 104 days and was paid for an additional seventeen (17) days of sick leave. The school year that year consisted of 184 school days. Stipulation.
- At the time she began her maternity leave, Ms. Marcellino was in her second year of teaching and was paid at Step 2 of the salary schedule. When she returned from maternity leave in August of 1999 to begin the 1999-2000 school year, she was again paid on the second step of the salary schedule. Stipulation.
- The requests of both of the appellants to be advanced on the salary schedule based on their service during the 1998-1999 school year were refused because they had not worked for one hundred and thirty-five (135) days. The Superintendent identified past practice and an unwritten policy of the school department as the basis for the 135-day requirement. Tr.pp. 19-24; 34-36.
- The collective bargaining agreement in effect during 1998-2001 contains various provisions pertaining to the salary of certified teaching personnel. One provision, Article XVII, Section D, provides: “Salary Increments: Advancement on a salary class shall be automatic on an annual basis”. Joint Ex.6.² Other provisions³ state that extended leaves of absence for Sabbatical Leave and Exchange Teacher Leave shall be considered a year of teaching service “for purposes of placement on the salary schedule...” (Article XIV Sections A and B) Joint Ex.6. Article XVII also states in Section C entitled “Salary Credits” that previous teaching experience will be credited to a person entering the Middletown school system “provided that such service during any one academic year...was no less than one hundred thirty-five days”...Joint Ex.6

Positions of the Parties

The Appellants

The Appellants take the position that Middletown’s policy, which gives credit only for a year in which a teacher taught for at least one hundred and thirty-five days, is inconsistent with state law. They point out that in state law a one hundred and thirty-five day minimum is found in the teachers’ retirement law, and not in the law requiring a salary schedule for teachers

² The appellants argue that this contractual provision is relevant to the issue of credit for advancement on Middletown’s salary schedule in that it should be interpreted as requiring automatic advancement “without any limitation on the number of days taught during the previous contract year”. See footnote on page 13 of the Appellant’s Memorandum of Law.

³ which we find equally relevant to the contractual issue

(R.I.G.L. 16-7-29). The appellants note that rules governing service credit for retirement purposes, set forth in Section 16-16-5⁴ of the Teachers' Retirement law, are inapplicable in the salary credit context, a proposition affirmed by the Rhode Island Supreme Court in D'Ambra v. North Providence School Committee, 601 A2d 1370 (1992). The Appellants argue there is no statutory definition of "years of service, experience or training" as that phrase appears in Section 16-7-29 and it must be given its ordinary and everyday meaning⁵. Liberally construed, the statute authorizes credit for the Appellants' work in the 1998-1999 school year.

The Appellants note that service eligible for credit under the statute must be recognized even if there is an inconsistent and more restrictive contractual provision between the parties. See Tipirneni v. Warwick School Committee, decision of the Commissioner dated June 19, 1998, decision on remand October 3, 2000. Thus, the Appellants argue that the Middletown School Committee cannot impose its "135-day rule", and accomplish by policy or past practice that which it could not, according to the Tipirneni case, do by contractual agreement.

The Appellants direct our attention to past decisions which require that school districts recognize service which falls substantially short of one hundred and thirty-five days. The Appellants worked eighty-one (81) and one hundred and four (104) days, respectively in school year 1998-1999. The number of days for each thus exceeds the total number of days worked by a part-time teacher employed for two days a week for an entire school year (72.4 days). The Commissioner has found such service fully creditable. Tipirneni v. Warwick School Committee, supra. In addition, the Appellants cite the Commissioner's decision in Martin v. North Providence, November 15, 1999, a case in which a teacher sought credit for a semester in which he was employed in the North Providence public schools. Even though Mr. Martin sought only a half-year's credit,⁶ counsel submits that a full year's credit should have been given if one follows the principle established in the Tipirneni decision. Thus, it is argued, their work in the 1998-1999 school year should be recognized and qualify them to advance a step at the beginning of the 1999-2000 school year.

An additional argument advanced by the Appellants is that, especially since state law does not establish a specific number of days constituting a "year" of service, the parties are free to determine this by contract. In this case, the teachers' union and the Middletown School Committee have agreed, in Article XVII, Section D, that annual step increases will be "automatic", without any limitation on the number of days taught during the previous contract year. In light of this contractual language, the practice and policy imposed by the Middletown School Committee not only violates state law, but the Agreement of the parties as well.

Finally, any reliance by the School Committee on a written advisory of the Department of Elementary and Secondary Education is misplaced. The advisory was never submitted into evidence in the record in this case. If it were, it is not entitled to any weight because the Appellants have not had the opportunity to cross-examine its author. Since it is not a binding

⁴ and elsewhere in Chapter 16.

⁵ The Appellant's memorandum does note that in D'Ambra the Commissioner concluded that giving the phrase "years of service" its ordinary and everyday meaning, it meant service "for the period of a (school) year". Appellant's memorandum at page 9.

⁶ The Commissioner denied the claim that credit for the half-year entitled Mr. Martin to a mid-year step adjustment upon his completion of the first semester of the 1997-1998 school year, since the salary schedule provided for "annual" steps.

decision of the Commissioner, it is not entitled to any weight. Finally, the conclusion of the author that one hundred and thirty-five days is required of all teachers, not just substitutes, in order for a year of teaching service to be creditable, is in error. The case cited in support of such proposition is Berthiaume v. School Committee, 121 R.I. 243, 397 A.2d 889 (1979). Counsel for the Appellants points out that the ruling in Berthiaume with respect to accrual of a “year of service” applies only to substitute teachers who have become regularly employed by virtue of their employment for 135 days in a school year.⁷

Middletown School Committee

At the outset, the Middletown School Committee notes that prior to proceeding to arbitration, counsel sought and received a legal opinion from counsel for the Department of Education that salary step advancement required a minimum 135 days of work experience. Implicit is the argument that some weight should be given to this opinion in this proceeding.⁸

A review of case precedent, it is submitted, does not support the Appellants’ claim for credit for a year of service for less than 135 days and certainly not for the 81 and 104 days actually worked in the 1998-1999 school year. The School Committee argues that the Appellants have misconstrued the import of the Commissioner’s decisions in both the Tipirneni and Martin cases, supra. In the Tipirneni case, counsel notes, although Ms. Tipirneni worked fewer than 135 days in the school year, she did work two full days a week for the entire school year.⁹ Thus, under the statutory scheme in place at that time she met the definition of “regularly employed” and worked for an entire school year¹⁰. These facts are distinguishable from those of both Appellants in that neither of them worked for the entire school year, but worked for a period closer to one-half of the school year.

In the case of Anthony Martin v. North Providence School Committee, supra, counsel argues that Mr. Martin worked for only one semester of the school year, and received credit for that semester in the decision of the Commissioner dated November 15, 1999¹¹. In addition, recent amendments to R.I.G.L. 16-16-1 would render a teacher working for one semester

⁷ The Court in Berthiaume concluded that “Substitute teachers who teach for more than 135 days during a school year are “regularly employed” and entitled to be paid a salary that recognizes their “years of service, training, and experience...”. The additional conclusion of the Court was that “... 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”. (121 R.I. 243,253). The Court, in reaching this conclusion, relied on the language existing at that time in R.I.G.L. 16-16-5, a provision dealing with calculation of service credit for retirement purposes; we would note that the Court’s later ruling in Howard Union of Teachers, 478 A.2d 563 (R.I. 1984) restricted reference to the definitional section of the Teachers’ Retirement Law, in construing R.I.G.L. 16-7-29, and subsequent decisions of the Commissioner have adhered to this principle. See D’Ambra, and Tipirneni, supra.
⁸ although we must note that the written opinion referenced in the School Committee’s Memorandum was not submitted into evidence in this case.

⁹ Under the Warwick School Department’s job share program.

¹⁰ R.I.G.L. 16-7-29 applies to regularly-employed teachers and requires payment according to a salary schedule recognizing “years of service, experience, and training”.

¹¹ It should be noted that the Commissioner did not give, nor was it claimed that Mr. Martin was entitled to, a full year of service credit. Only one-half year was claimed, and although the Commissioner found the semester creditable, 16-7-29 did not require mid-year advancement on a salary schedule with “annual” steps.

ineligible for even one-half-year's service credit, counsel submits. It is not clear if the School Committee is arguing that in light of the current language of the statute a teacher serving for only one semester in the school year is not "regularly employed" or does not have a year of service to qualify for advancement, or both.

The central argument advanced by the School Committee is that the General Assembly has recently acted to restrict salary credit to teachers who work a minimum of 135 days in the school year. In the Public Laws of 2002, Chapter 383, Section 1, the following amendment was enacted to R.I.G.L. 16-16-1 (a)(12) which defines "Teacher"

...a person required to hold a certificate of qualification issued by or under the authority of the board of regents for elementary and secondary education and who is engaged in teaching as his or her principal occupation and is regularly employed as a teacher in the public schools of any city or town in the state...and any ~~substitute~~ teacher who serves during a school year 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.

The School Committee argues that, by extending the 135-day reference to *all* teachers, not just substitute teachers, all teachers are required to work 135 days (three-quarters of the number of days schools are required to be in session) to meet the definition of "regularly employed". The amendment effectively renders teachers who serve fewer than 135 days ineligible for "regularly employed" status and service credit. The appellants, therefore, fail to meet the definition of "teacher", were not "regularly employed" in 1998-1999, and certainly fail to qualify for service credit, the school committee argues¹².

DECISION

R.I.G.L. 16-7-29 requires that districts have in place a salary schedule which recognizes the "years of service, experience, and training for all certified personnel regularly employed in the public schools and having no more than twelve (12) annual steps. In the 1990 Commissioner's decision in D'Ambra v. North Providence School Committee¹³, affirmed by the Rhode Island Supreme Court¹⁴ we found that the phrase "years of service" in 16-7-29 was not defined and that it must be given its ordinary and everyday meaning- service "for the period of a (school) year". (See D'Ambra, supra, at page 5). It is on this basis that the claim of the Appellants lacks merit. Neither of the Appellants was employed for the period of a school year, but for a period more closely approximating one half of the school year. Clearly eighty

¹² In its memorandum the School Committee addresses the applicability of the Rhode Island Parental and Family Medical Leave Act, R.I.G.L. 28-48-1et seq.; however, in their reply Memorandum the Appellants clarified that they do not rely on this statute in making their claim for service credit for the year in question. We will not, therefore, summarize the School Committee's argument on this point.

¹³ January 3, 1990

¹⁴ at 601 A2d 1370

one (81) and one hundred and four (104) days fall substantially short of a 184-day school year¹⁵.

The Appellants argue that the number of days they worked in 1998-1999 exceeds that of many part-time teachers employed for an entire school year. They cite the Tipirneni case in which the Commissioner ruled that a 2/5th teacher, working 72.4 days was entitled to a year of service credit.¹⁶ We do not agree that teaching for approximately one half of the school year qualifies as a “year of service”. The appellants focus on the quantitative nature of their service, whereas our focus is on the period of time in which their service was performed. In fully recognizing part-time service performed for an entire school year (a principle affirmed by our Supreme Court) one must accept the quantitative differences in what will comprise a “year of service”, as well as the time equivalencies of those working substantially less than a year.

We have relied on the language of the statute and significant policy considerations which support the interpretation that a year of regular teaching service for a part time teacher is fully creditable. A contrary interpretation of the law would allow the creation of a class of part-time teaching personnel who would not significantly advance on a salary schedule even though they might be employed in such status for several years and in subject areas that districts find difficult to staff. In a similarly liberal interpretation of Section 16-7-29, the Commissioner has also ruled that portions of years worked by a regularly employed teacher are creditable and entitled to recognition for advancement on the salary schedule if and when they total a year of service at the beginning of the school year. See Martin v. North Providence School Committee, decision of the Commissioner dated November 15, 1999. Consistent with the Martin decision, the teaching service of the Appellants in the 1998-1999 school year would be “creditable” and entitled to recognition if, when added to other portions of years they may have worked, it totals another year of service at the beginning of the school year. As we discussed in Martin, supra, Section 16-7-29 provides for “annual steps” and districts are not obligated to advance teachers mid-year.

It is not necessary to address the School Committee’s argument that the General Assembly’s amendment to R.I.G.L. 16-16-1 (12) in Chapter 383 of the Public Laws of 2002 establishes a 135-day rule. As we understand the School Committee’s argument, this amendment results in a statutory requirement that all teachers, not just substitutes, work at least 135 days in a school year to be “regularly employed” and thus to accrue any service credit. The amendment relied on by the School Committee was obviously not in effect at the time this dispute arose. It was also not the law at the time the Appellants performed the service they argue should have advanced them on the salary schedule. Thus, we do not find the statutory amendment cited by the School Committee controlling in this case.

We would note, however that the 2002 amendment to the definition of teacher as set forth in 16-16-1(a)(12), and the deletion of the word “substitute” presents a potential quandary

¹⁵ Following the principle set forth in Berthiaume, most districts have accorded regularly-employed teachers who are not substitutes a year of service credit even if they have not worked every day, if they have worked for at least 135 days in the year. We find such extension of the rule adopted for substitutes to be reasonable.

¹⁶ The collective bargaining agreement in Warwick contained an inconsistent provision which required teaching for 90 days during the school year for advancement on the salary schedule.

for future interpretation of Section 16-7-29 as well as the provisions of the Teachers' Retirement Act. If the amendment to Section 16-16-1 (a) (12) is construed to require all teachers, not just substitutes, to serve at least 135 days in order to meet the definition of "teacher" and "regularly employed", the eligibility of *all* teachers who serve fewer than 135 days to be paid pursuant to the salary schedule and earn credit for years of service is jeopardized. This amendment could have broad, and perhaps unintended, implications in a retirement context as well.

As a final matter, any claim that the contract in effect between the teachers' union and the School Committee requires automatic advancement of Middletown teachers, regardless of the number of days they work in the prior school year, is not a matter over which we have jurisdiction. In the event that our determination on this issue is subsequently overruled, it is our assessment that the contract as a whole does not support this interpretation. In our findings of fact we have included provisions of the contract which we find relevant to this claim. Although the section cited by the Appellants (Article XVII Section D) may provide a basis on which the argument for "automatic" advancement could be made, we infer from other provisions of the contract that advancement on the salary schedule is not automatic.

For the foregoing reasons, the Appellants' claim is denied and dismissed.

Kathleen S. Murray
Hearing Officer

APPROVED:

Peter McWalters, Commissioner

May 7, 2004
Date