

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

Edwin B. Gordon

v.

**The BEACON School a/k/a
Beacon Charter High School**

DECISION

Held: The Appellant's dismissal from the Beacon School was not shown to be supported by just cause and was not accompanied by procedures required for the dismissal of a non-tenured teacher during the course of a school year. His termination was invalid, and he should be compensated for his loss of income for the period May 4, 2004 to the end of the 2004 school year.

DATE: June 6, 2006

Travel of the Case

On May 21, 2004 Edwin Gordon appealed from a May 4, 2004 decision of the Board of Trustees of the Beacon School terminating his employment. At the time of the Board of Trustees' decision, a prior appeal with respect to his earlier termination by the school's administrative directors was pending before the Commissioner of Education. The Commissioner ruled in an August 18, 2004 decision¹ that the administrative directors lacked legal authority to terminate teaching staff, and that only the "governing body" of the school, i.e. the Board of Trustees, could terminate Mr. Gordon's employment. After an initial delay because of the illness of one of the witnesses, the matter was heard on four different days, ending on July 14, 2005. The record in this matter closed on July 28, 2005 upon receipt of the final transcript.

Subsequent to the closing of the record of this matter, hearings were held on remand from the Board of Regents on the decision that his termination by the school directors in December of 2003 was invalid, and a decision on damages issued on September 26, 2005. By virtue of that decision, Beacon was ordered to pay monies owed to Mr. Gordon for lost salary and other benefits, together with interest at the statutory rate. Subsequent correspondence exchanged by the parties and shared with the hearing officer indicate that compensation for that period has been paid to Mr. Gordon. Thus, the amount in dispute with respect to his subsequent termination by the Board of Trustees of the Beacon School is limited to the salary he would have earned from approximately May 4, 2004 to the end of the 2003-2004 school year.

Jurisdiction to hear this dispute arises under R.I.G.L. 16-39-1 and 16-77-8, which provides for the Commissioner to resolve disputes arising from the operation of charter schools under his general appellate authority in school matters.

ISSUE

Was there just cause for Edwin Gordon's termination from the Beacon Charter School on May 4, 2004 and was his termination consistent with requirements of due process and statutory procedures which apply to the dismissal of nontenured teachers in Rhode Island public schools?

Findings of Relevant Facts:

- The Beacon Charter High School (hereinafter "the Beacon School") is a public charter school in Woonsocket, Rhode Island. It serves students in the region of northern Rhode Island and during school year 2003-2004 enrolled approximately seventy (70) students in grades nine and ten. Gordon Ex. N.

¹ Which was later affirmed by the Board of Regents on June 23, 2005

- The Beacon School is designed to provide students with a comprehensive high school level program, while at the same time providing an applied learning experience utilizing business plans based on arts, crafts and culinary skills. See Gordon Ex. N, Charter School Application Section 2 “Mission Statement”; July 24, 2003 Amendments to the charter school proposal approved by the Board of Regents.
- The Beacon School opened in August of 2003 when it received final approval of its charter from the Board of Regents. During its first year of operation it employed approximately fourteen (14) faculty and staff members. Gordon Ex. P.
- Edwin Gordon was hired as a special education teacher² at the school and began work officially on August 25, 2003³. His salary was fixed at thirty-two thousand, five hundred (\$32,500) dollars, the same as the other teachers at the school. Gordon Ex. F and P. Although Mr. Gordon was fully certified as a principal and special education director, he was not hired in either of these capacities. See Gordon Ex. F.
- Mr. Gordon’s job duties as a special education teacher included assisting students in and out of the classroom, providing instruction and ensuring that special education students met the goals and objectives of their IEP’s (individualized education program). Tr. Vol.I. p. 53.
- At the time of his retention as a special education teacher, Mr. Gordon understood that he would have involvement in the IEP process for students eligible to receive special education services at the school and would be a participant in IEP meetings. Tr. Vol. I, pp. 41, 53-54, 155.
- Upon beginning his employment at the Beacon School, Mr. Gordon did not have a job description, was not assigned instructional duties, was not provided with a class list or daily schedule. He was not assigned a work space. He met with students randomly, providing resource support to them in various academic subjects upon referral by other teachers at the school. He met with students in the cafeteria and during study halls. Beginning sometime in November, Mr. Gordon began to instruct individual students and small groups in a third floor space that was made available for his use at that time. Tr. Vol.I, pp.128-134; Vol. III, pp. 32-49.
- Instructional services provided by Mr. Gordon were not limited to students believed to be eligible for special education services⁴. He received referrals of any student who was experiencing academic and/or behavioral difficulties. Tr. Vol. I, pp. 128-129.
- While at the Beacon School, Mr. Gordon was also assigned various non-instructional duties. These included meeting with families of prospective students for recruitment to the school, assisting the head of school with student discipline, substituting for the head of the school and assisting her with various administrative tasks upon her request and

² This finding of fact will be discussed later in this decision

³ Testimony was that Mr. Gordon began working at the school before it actually opened in order to review applications and files on students who would be enrolling at the school. Tr. Vol. I, p.9

⁴ The prior educational records of many students enrolled at Beacon had not yet been received by the school and existing IEP’s were not available on all students who had been receiving services prior to their enrollment at the Beacon School.

supervising students during lunch and in the parking lot. Tr.Vol. I, pp. 103, 130; Vol. II, pp. 42-45,154-155; Vol.III, p.44-49. Approximately one-half of his work day was comprised of non-instructional duties. Tr. Vol. III. pp. 44-45, 48.

- In early October, the issue of the Beacon School's compliance with special education laws and regulations was raised by Mr. Gordon in discussion at a faculty meeting and in ongoing discussions with the school's administrative directors. Tr. Vol. I, pp. 69-76; Mr. Gordon had input into these discussions and advised the administrators that the Beacon School needed to conduct certain activities with respect to evaluation of students, review of existing IEP's and revision as determined by a properly-constituted IEP team. Tr. Vol.I, pp. 47-52; 153-157.
- After the early October faculty meeting at which concerns with special education compliance were brought to light, the administrative directors decided that a written job description for Edwin Gordon needed to be developed. Tr. Vol.I, p.185;
- Mr. Lawhead, one of the three administrative directors, believed that Mr. Gordon had responsibility for the special education program, because, in his opinion, Mr. Gordon was hired to be an "expert", "to handle special needs", and Mr. Lawhead remembers being annoyed when he learned that the IEP process was not being handled by Mr. Gordon.Tr. Vol. I, pp. 170, 188-190.
- The purpose of the administrative directors in developing a written job description for Mr. Gordon was to clarify their position that he was responsible for special education at the Beacon School, including the IEP process for students eligible for special education services. Tr. Vol.I, pp. 170 184-194; Vol. III, p. 138.
- On or about October 7, 2003 the administrative directors provided Mr. Gordon with a draft job description setting forth job duties "they thought he should be doing" at that time. Tr. Vol.I,pp. 193-194;Vol.III, p.54;Beacon Ex. 3.
- Mr. Gordon made certain revisions to the draft job description to attempt to clarify his job responsibilities. Among other changes, he left blank on his revised draft the "title" of his job because he was uncertain as to what it was. The revisions he made included adding the function of "facilitating" IEP reviews. Tr. Vol.I, pp. 96-105. Beacon Ex. 4.
- Mr. Lawhead testified that he placed a revised job description (Beacon Ex.5) in Mr. Gordon's mailbox sometime during the beginning of October, and he assumed Mr. Gordon had "no problem with it" when he did not hear otherwise from Mr. Gordon. He assumed all issues with respect to job duties and responsibility for IEP's had been clarified to make Mr. Gordon responsible for the school's special education program. He believed that Mr. Collette had a discussion with Mr. Gordon with respect to the revised job description and, in particular, his designation as the school's "special education coordinator". Tr. Vol. I, pp. 197-201; Vol.III, p 60.
- Mr. Gordon testified that there were no further discussions with the school's administrators specifically with respect to his job title or duties, and that he did not receive a finalized job description from the administrative directors. He testified that there were subsequent discussions with the administrative directors focusing on the

concern that IEP's were not being done. Although he continued to consider himself "strictly a special education teacher", he did agree to develop some forms to use in the IEP review process, agreed to complete the special education census which was due December 10, 2003, and offered at one point to schedule IEP meetings. Tr. Vol. I, pp. 81, 108-111; 153-157; Vol.II, p.77; Gordon Ex.H.

- On December 1, 2003 Mr. Gordon was called to a meeting with Mr. Lawhead and Mr. Collette, two of the administrative directors of the Beacon School, and terminated⁵. Tr. Vol.I, p.10.
- On April 1, 2004 Mr. Gordon was sent a letter from Mr. Lawhead, on behalf of the administrative directors (the "Board of Directors") notifying him of his opportunity to be heard by the Beacon School's Board of Trustees on the issue of his prior termination. Beacon Ex. 1.
- On May 4, 2004 the subject of Mr. Gordon's termination by the Board of Directors was heard by the Board of Trustees. Beacon Ex. 2. The members of the Board were instructed that the hearing presented an opportunity for Mr. Gordon to convince the Board "why he should not be terminated" (Beacon Ex. 2 at pages 44-45). Board members were also instructed that because Mr. Gordon was a nontenured teacher, his termination did not have to be supported by a "good reason" or "cause". Beacon Ex. 2 at page 74-78.
- The Board of Trustees approved a motion "to uphold the decision of the Directors" by a unanimous vote⁶. Although the motion did not identify the reason or findings of the Board of Trustees, the subsequent notice to Mr. Gordon, dated May 5, 2004⁷ states that the reason was "inadequate performance in that (Mr. Gordon) failed to complete IEP evaluations in a timely fashion". Beacon Ex. 2; Gordon Ex. A.
- During the time of his employment at the Beacon School Mr. Gordon was not evaluated. The Faculty Handbook for 2003-2004 provides for a formal evaluation process, which should have resulted in an evaluation of his performance by the head of the school prior to November 1, 2003. Gordon Ex.C. Tr. Vol. III, pp. 114, 123; Vol. IV, pp.105-106.
- During the time he was at the Beacon School, Mr. Gordon did not supervise the IEP process for students eligible for special education, nor did he assume the responsibility to make sure reviews and revisions of IEP's were conducted and completed in a timely fashion. Tr. Vol.I, pp. 53-58, 128-131, 153-155, 207-208, 210.⁸

⁵ A termination ruled procedurally invalid in Mr. Gordon's first appeal to the Commissioner in a decision issued August 18, 2004.

⁶ The Board of Trustees included the three members of the Board of Directors who had previously fired Mr. Gordon.

⁷ Mr. Lawhead also prepared the Board of Trustees' written decision but in signing the notice, indicates that he acts on behalf of the "Board of Directors". One of Mr. Gordon's procedural arguments is the inappropriate overlap between the administration and governing board of the school.

⁸ Although the census filed by the Beacon School indicated a special education population of thirteen (13) students in school year 2003-2004 (Gordon Ex. G), testimony fixed the number of special education students at the Beacon School anywhere from 20 to 32 students. See Tr. Vol. I, p.218; Vol. II, p. 63.

- The day after Mr. Gordon’s termination by the administrative directors on December 1, 2003, Pamela Boulais began work as a teacher of special education.⁹ Gordon Ex. I and P. Tr. Vol. II, p.82-86. Immediately after Mr. Gordon was terminated, the Beacon School hired two part-time directors of special education. The Beacon School has since employed a director of special education as well as a full-time special education teacher. Tr. Vol. III, p.108, 132-136; Vol. IV, pp. 37-42; Gordon Ex.I.

Positions of the Parties

The Appellant

Mr. Gordon raises both procedural and substantive issues with respect to his May 4, 2004 termination by the Beacon School’s Board of Trustees. Firstly, he argues that his status at the school was strictly that of a teacher. This is the position for which he was hired and the position for which his salary was set at the beginning of the year. It was indicated to him at the very beginning that as the school grew there would be opportunities for his “expanded role and responsibility”. He argues there was no agreement that he would immediately function as both a special education teacher and as the school’s director of special education. He notes that in the chaotic environment of the Beacon School during its first months of operation, there was an uncertainty as to which students were eligible to receive special education services, and how services would be provided to them at Beacon. Also unclear was how the requirements of special education law with respect to the need to evaluate students and review and revise IEP’s annually would be accomplished. His role as the school’s sole special education teacher was similarly uncertain and ill-defined, he argues. He submits it was unfair that those in charge of the school sought to redefine his role to include the duties of a director of special education, a position he was not hired for and did not agree to take on after it became clear that no other staff member was qualified to do it. Because of his qualifications and experience he was able to advise the administrators of what needed to be done, but he did not agree to run the special education program. Moreover, he could not have performed these duties along with all of the activities he was already performing during his full-time work day as a teacher at Beacon.

The Appellant argues that he accepted and competently performed the duties of a special education teacher, as well as certain other tasks that were assigned to him by the head of the school, Norma Mousseau. He did the best he could without the benefit of a class list, teaching schedule, or work space to instruct students referred to him. He recognized that upon the opening of this small charter school, there would of necessity be a certain amount of multi-tasking, and readily helped out with recruiting prospective students, imposing student discipline, supervising lunch and even overseeing the school parking lot. There is no evidence that he performed his instructional or non-instructional duties in anything but a complete and competent manner. Thus, Mr. Gordon submits there is no evidence of just cause for his termination.

⁹ Ms. Boulais had been interviewed for a position at the school by Mr. Lawhead on November 3, 2003. Tr. Vol. II, pp. 77-78.

When he advised his supervisors as to certain responsibilities the Beacon School had under special education law, he argues that the administrative directors thereupon determined that *he* was their special education director or “coordinator”, and it was then his job to “handle everything.” He was abruptly terminated on December 1st when he had not completed the tasks he himself had identified as needing to be done. He argues that although the administrative directors may have perceived his failure to review and revise outdated IEP’s as a failure to “step up to the plate”, his inability/unwillingness to assume such responsibilities does not constitute just cause for his termination. Mr. Gordon points out that school officials never argued that he was hired as anything but a special education teacher in the course of his first appeal to the Commissioner, wherein he challenged his termination by the three administrative directors on December 1, 2003. The argument that he was also a special education “coordinator” or director was raised only in the course of his second appeal. The Beacon School should be precluded from taking the position that he was anything but a teacher.

Mr. Gordon asserts that he worked diligently from early morning until four o’clock each afternoon performing instructional duties and assisting the head of the school in a variety of tasks. The responsibility to review and update IEP’s for all special education students, and to evaluate those students who might be eligible for services, is a “team effort” and requires the oversight of an administrator with authority to conduct these activities. Mr. Gordon argues that his teaching position was in and of itself a full-time commitment. It was not reasonable to expect that he accomplish this work on his own. In support of his argument, Mr. Gordon points out that upon his termination, a full-time teacher of special education was hired to replace him, as well as two part-time directors of special education. The Beacon School continues to utilize two professionals to perform the duties that were alleged to be his alone.

Several arguments are raised with respect to the process followed by the Beacon School. Mr. Gordon notes that his termination was not preceded by any notice of deficiencies from his supervisor. Although he admits that there were discussions which focused on concerns about compliance with special education, he denies that he was ever told that his job was in jeopardy because he was not taking full responsibility for the IEP process. A warning, verbal or written, would have provided him with the opportunity to bring his performance into conformity with the expectations of his supervisors, or at least explain why he could not. If his supervisor at the Beacon School had followed the provisions of the Faculty Handbook, he would have received a written evaluation prior to November 1, 2003. An evaluation would have provided him with feedback on his performance. More importantly, it would have corrected any misconceptions as to what his duties were. If Mr. Gordon had been aware that the administrative directors held him directly responsible for deficiencies in special education administration, he would have been able to advise them of his position that his job as a special education teacher was a full-time commitment and that he could not accept additional duties. The expectation that he could also function as a special education administrator during this demanding initial year of operation was not, he submits, realistic. Since the administrative directors made the decision to fire him on December 1, 2003 without first giving him prior warning or notice, the opportunity to raise these issues was never provided to him.

Finally, Mr. Gordon questions whether the hearing process utilized by the Beacon School's Board of Trustees remedied the defects in the procedure by which he was abruptly terminated. His position is that the process used by the Board of Trustees was similarly arbitrary and unfair and did not approach due process. He notes that the Board of Trustees actually made no independent decision on whether he should be terminated. When the Board heard the matter on May 4, 2004, some five months after his termination by the administrative directors, it merely deferred to the decision already made by three of its members who also function as the school's administrative directors. The Board of Trustees decision was not based on any "evidence" it took that demonstrated Mr. Gordon had done anything wrong, but on a discussion dominated by the three administrative directors who had been disappointed when he did not solve the special education problems they themselves had created.

Although he is not requesting that he be reinstated, Mr. Gordon is seeking the remedy that he be made whole for his loss of salary and other benefits which he would have received had he not been terminated¹⁰. He also asks that his termination be declared invalid so that any adverse impact the fact of his termination has had upon his reputation in the education community is corrected.

The Beacon School

Counsel for the Beacon School submits that the Board of Trustees acted within its legal rights in terminating Edwin Gordon by unanimous vote on May 4, 2004. The Board of Trustees was convinced that Mr. Gordon had failed to handle the special services component of the Beacon School program and that these services were both necessary and desired by his supervisors. It is un rebutted that Mr. Gordon had not completed a single IEP during the time he was employed by the school. Whether because of the confusion that existed because the school had just opened, or because of his own failings, the fact that all necessary IEP review and revisions had not taken place was reason enough for his dismissal, counsel submits.

Mr. Lawhead testified that it was his expectation that Edwin Gordon would function as an "expert" to advise them on what was required in the area of special education and to "handle special needs". Counsel argues Mr. Gordon was supposed to function as a special education administrator and that the preponderance of the evidence at this hearing proves that he was not a teacher. He had no regularly-assigned students, no grade book, never had a regular classroom – none of the indicia of a regular teacher. The Board of Trustees takes the position that Mr. Gordon failed to direct the special services program and this was an adequate basis¹¹ on which to terminate him.

¹⁰ The amounts at issue have been reduced to the period May 4, 2004 to the end of the school year, since in a prior decision, Mr. Gordon was found to be entitled to salary and other benefits up to the date of his termination by the Board of Trustees. See decision of the Commissioner dated September 26, 2005.

¹¹ The Board does not address Mr. Gordon's argument that just cause was required to terminate an employee mid-year.

Even though the Board of Trustees did not resolve the issue of what Mr. Gordon's job at the Beacon School was, the Board acted properly when they sustained the decision of the administrative directors to terminate him. The Board acted after considering what was presented to them and after giving Mr. Gordon opportunity to present his own witnesses and make his arguments as to why he should not have been terminated. Even though the Board of Trustees couched its decision in language of "sustaining" or "endorsing" the decision of the administrative directors, it made a determination that Mr. Gordon should not retain his job at the Beacon School – whatever that job might have been.

DECISION

On May 4, 2004 the Board of Trustees of the Beacon School endorsed Edwin Gordon's termination by the school's administrative directors on December 1, 2003. The reason it provided to Mr. Gordon at that time was his "inadequate performance in that (he) failed to complete IEP evaluations in a timely fashion". (See Gordon Ex. A). It is true that Mr. Gordon did not undertake the "completion" of IEP's for all special education students at the Beacon School upon assuming his position in late August of 2003. From the evidence on this record, however, we find that Mr. Gordon's insistence that this was not his responsibility and that he was hired strictly as a teacher is well supported. We further find that even if this responsibility were his in some type of hybrid position as "coordinator" of special education, this reason does not support his mid-year termination. His argument that a single employee (even one with extensive experience and qualifications) could not handle all activities with respect to special education is persuasive. The fact that the Beacon School, since terminating Mr. Gordon, has separated the teaching and administrative functions and retained two professionals, a teacher and a director of special education demonstrates that Mr. Gordon's performance was not substantially deficient.

It is evident that confusion reigned as to how the special education program would be conducted during at least the first semester at the school. Records on students were incomplete, so there was uncertainty as to which students had IEP's and what they called for in terms of services. The number of special education students was fixed anywhere from thirteen (by the special education census filed by the Beacon School for that year) to as many as thirty-two (32) students, according to the testimony of Mr. Lawhead.¹² The confusion as to the nature of the special education program created uncertainty as to what the "special education person" would do and be responsible for. This confusion persisted throughout the first semester of the 2003-2004 school year. The problems that resulted were not attributed to poor planning, but were blamed on the only person working in the special education program – Edwin Gordon.

There was no written documentation that accompanied Mr. Gordon's hiring in August of 2003 – no job posting, letter of appointment, or a written contract. There was not

¹² See the testimony of Mr. Lawhead at Vol.I, pp169-170 that the number was "28 to 32" special education students.

even evidence as to a forthright discussion that took place between Mr. Gordon and his superiors as to what his job duties would be.¹³ Mr. Lawhead's assertion that Mr. Gordon was hired as a special education director¹⁴ is not based on his recollection of a specific discussion he had with him, but rather on his belief that he "must have had" such discussion because he had told Mr. Gordon he would be "handling special needs" and he recalls being annoyed when he learned that IEP reviews were not being handled by Mr. Gordon. (See Tr. Vol. I. pp. 170-178, 186-190.) Mr. Gordon testified that he was hired strictly as a special education teacher and his testimony is persuasive on this point. His salary was that of a teacher at the Beacon School. In a prior hearing on the issue of the validity of his termination by the administrative directors, the Beacon School conceded his status was that of a nontenured teacher. Even when this matter was heard by Beacon's Board of Trustees, they considered his rights to be those of a "nontenured teacher".

There is no persuasive evidence that at any point subsequent to his retention by the Beacon School that Mr. Gordon agreed to assume a different position, or incorporate the duties of a special education director into his already existing duties. There is evidence that he advised his supervisor and the administrative directors that certain special education activities were required of a charter school, and that he attempted to obtain student records and develop forms for use in the IEP process. There is some evidence of discussions that his responsibilities at the school would be expanded to include the duty to "facilitate IEP reviews" as a "special education coordinator". There is no evidence that these discussions resulted in an agreement on the part of Mr. Gordon to assume responsibility for the entire IEP process. Mr. Lawhead testified that he thought that Mr. Collette had such a discussion, but the remarks of Mr. Collette before Beacon's Board of Trustees on May 4, 2004 do not show this. Mr. Collette did not testify at the hearing at this level.

As the date for filing certain reports with the state department of education approached, the school's administrative directors, and Mr. Lawhead in particular, were obviously frustrated with Mr. Gordon's reticence to accept responsibility for the entire special education program. His termination on December 1, 2003 was not because he failed to perform his teaching duties in a competent fashion, but because he failed to undertake additional duties more typically performed by a director of special education. This reason is not a valid reason, nor does it constitute "cause" for termination of a person who was competently performing a plethora of duties as a teacher at the Beacon School. In the environment of a charter school, multi-tasking may be more common than in the traditional school setting, and overlapping job duties may occur. However, where, as here, a teacher is terminated, school officials must prove that the employee accepted additional duties. If the school seeks to terminate prior to the expiration of the annual contract, it must demonstrate good and just cause for termination.

¹³ Even at the time of hearing before the Board of Trustees, one of the administrative directors, Paul Collette stated "...in retrospect (Mr. Gordon's) correct, assumptions should not have been made, but on the other hand, we were looking to Mr. Gordon to provide us with the insights regarding the special ed. areas because he was hired, and I don't know exactly what the discussions were in the hiring process, but as far as I was concerned anyway, he was our special ed. expert, and that would be the purpose that we would ask for guidance in that area". See Beacon Ex. 2 at pages 61-65.

¹⁴ See his remarks to the Board of Trustees at the May 4, 2004 hearing at page 15, Beacon Ex. 2.

Finally, Mr. Gordon's arguments as to the lack of due process in his termination are sustained. Without repeating all of his arguments, the effect of these deficiencies is that the process was not fundamentally fair. The Board of Trustees clearly was not acting as an unbiased decision-maker making an independent decision on the basis of evidence heard by its members at the May 4, 2004 hearing. Mr. Gordon was entitled to full and fair hearing at which evidence of just cause was presented.¹⁵

On both substantive and procedural grounds, his appeal is sustained. The Beacon School is ordered to determine the amount of back wages and other benefits, with interest, owed to Mr. Gordon. If appropriate remedy is not reached in thirty days, we will reconvene the hearing on the issue of damages.

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

June 6, 2006
Date

¹⁵See the Commissioner's prior decision in Gordon v. Beacon School dated August 18, 2004 at page 5; Hulecki v. School Committee of the Town of Gloucester, February 17, 1976, and see also Hobson v. South Kingstown School Committee, April 4, 1988.