

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

Michael Sadow

v.

**Department of Children
Youth and Families**

DECISION

Held: Mr. Sadow's claims that he was terminated without good and just cause and that his dismissal did not comport with statutory and due process requirements are barred under the doctrine of laches. His claim that his compensation for teaching service after his dismissal was improperly fixed at the rate of a substitute teacher is without merit.

DATE: June 7, 2006

Travel of the Case

On June 2, 2005 Michael Sadow appealed the termination of his teaching service by the Rhode Island Department of Children, Youth and Families to Commissioner Peter McWalters. Mr. Sadow had been terminated on November 20, 2004 from his position as a teacher of Social Studies at the Rhode Island Training School in Cranston, Rhode Island. The undersigned was designated to hear and decide this appeal, and hearings were held on two dates selected by agreement of the parties, October 28, 2005 and November 8, 2005. Testimony and documentary evidence were taken on those dates and the parties presented their legal arguments at the close of the second hearing. The record in this case closed on December 20, 2005 upon receipt of the last transcript.

Jurisdiction to hear this appeal arises under R.I.G.L. 16-13-4.

Issues

- ◆ Was Michael Sadow's termination from his teaching position on November 20, 2004 supported by good and just cause?
- ◆ Was his termination in accordance with due process and applicable statutory procedures?
- ◆ Did his employment as a substitute teacher for the same class in which he had taught as a regular teacher violate the requirement that vacancies be filled by teachers employed under an annual contract pursuant to R.I.G.L. 16-13-2?
- ◆ Are any or all of the claims presented on Mr. Sadow's behalf barred under the doctrine of laches?

Findings of Relevant Facts

- On September 4, 2003 Michael Sadow was appointed to a position as a teacher at the Rhode Island Training School. The position to which he was appointed had a limited term ending on December 27, 2003. Sadow Ex. B.
- After an internal posting process a month later, Mr. Sadow bid into a vacant position, that of a social studies teacher at the Training School. He assumed this new teaching position on October 5, 2003. Sadow Ex. C.
- As he entered his second year as a teacher of Social Studies, the 2004-2005 school year, the teaching certificate he held expired. DCYF Ex. 3a.¹
- The renewal of Mr. Sadow's teaching certificate hinged on his passing a standardized test (Principles of Learning and Teaching Test) which he had taken

¹ Mr. Sadow held a Special Provisional Certificate as a Teacher of Social Studies/History which expired on August 31, 2004. See DCYF Ex. 3a and 4.

twice and failed on both occasions.² Mr. Sadow took the PLT test again on September 7, 2004 and failed again. Tr. pp. 124-128.

- Arlene Chorney, the Principal of the Training School, had been aware of the expiration of Mr. Sadow's Provisional Teaching Certificate in August of 2004 and knew that he was scheduled to take the test in September. She was unaware that he had taken the test twice before September 7th and not passed. Tr. Vol. II pp. 14-19; DCYF Ex.12.
- Sometime in mid to late October of 2004 Ms. Chorney became aware that Mr. Sadow was having difficulty passing the PLT test and that he was scheduled to take it again for the fourth time in November. Tr. Vol.II pp. 19-20.
- After discussions with staff at the Certification Office of the Rhode Island Department of Elementary and Secondary Education to determine if Mr. Sadow's certification could be extended until he passed the upcoming test and learning that it could not, Ms. Chorney recommended to Warren Hurlbut, the Superintendent³ of the Training School, that Mr. Sadow be terminated because he was not certified. Tr. Vol.II pp. 22-23, 93.
- After conferring with Ms. Chorney, Thomas Bohan, the Executive Director of the Department of Children, Youth and Families who oversees the personnel functions of the Department, sent a letter notifying Mr. Sadow that in light of the expiration of his teaching certificate in August, he must obtain and submit appropriate certification on or before November 19, 2004 or he would be terminated as of November 20, 2004. Tr. Vol.I, pp. 69-70; DCYF Ex. 1.
- Since Mr. Sadow did not submit the required teaching certificate by November 19th, he was terminated and on November 23, 2004 Mr. Bohan notified Michael Sadow of the termination of his employment as a teacher at the Training School, effective November 20, 2004. DCYF Ex. 2 and 2a.
- Thomas Bohan has been designated by the Director of the Department of Children, Youth and Families as the Appointing Authority⁴ in all personnel matters, including the termination of employees of the Department. Tr. Vol.I, pp. 70-71.
- On November 22, 2004 Mr. Sadow began employment as a substitute teacher at the Training School, assigned to the same class he had taught as a regular teacher, keeping the same teaching schedule and performing the same duties. He worked in this capacity from November 22 to April 7, 2005. Tr. Vol. I pp. 99-104. DCYF Ex.7.⁵
- On November 20, 2004 Mr. Sadow took the PLT test again and on December 23, 2004 he learned that he had passed the test. He was issued a teaching certificate on December 30, 2004. Tr. Vol.I, p.96-97; DCYF Ex. 5.

² The score Mr. Sadow received would be considered passing in 48 other states.

³ Whose role as the supervisor of all operations, including the educational program, at the Training School differs from that of a school superintendent. See pp. 56-61.

⁴ The designation of an Appointing Authority is authorized by R.I.G.L. 36-4-60.

⁵ The substitute teaching employment contract was actually executed with Datalogic Consulting, Inc., a Texas corporation.

- On or about December 28, 2004 Mr. Sadow met with Thomas Bohan at which time he asked for rescission of his termination and reinstatement to his teaching position at the Training School, since he had met all requirements for renewed certification. Tr. Vol. I, pp. 104-105. Mr. Bohan indicated that he would talk to Arlene Chorney and get back to him. Tr. Vol. I, p. 105. Mr. Bohan did not reinstate Mr. Sadow, nor did he have any further contact with Mr. Sadow on this issue. Tr. Vol. I, p. 106.
- The vacant position created by Mr. Sadow's termination was posted internally on January 19, 2005. Tr. Vol. I, p. 146; Vol. II, p.35. DCYF Ex. 13. The position was advertised in the Providence Journal on February 6, 2005. Tr. Vol. II p. 39.
- The process for filling the position included a screening of applications by a committee, interviews of the top fourteen (14) candidates, and selection of three (3) finalists for a visit and further interviews at the Training School. Tr. Vol. II pp. 39-43.
- Michael Sadow was an applicant for the Social Studies position. Although he was one of the fourteen candidates interviewed, he was not one of the three finalists selected by the screening committee. Tr. Vol. II, pp. 42-43. He was notified that he was not selected as a finalist on April 7, 2005 at a meeting with Arlene Chorney and Robert Dumais. Tr. Vol. II, pp. 43-44.
- When notified that he was not chosen as a finalist for the position he had previously held, Mr. Sadow told Dr. Chorney and Mr. Dumais that April 7, 2005 would be his last day as a substitute at the Training School. Tr. Vol. I p. 152; Vol. II p.45
- Mr. Sadow received written notice that he was not selected for his former position on April 25, 2005. Appellant's Ex. D.
- The candidate who was selected for the Social Studies position began working as a regular full-time teacher some time in April of 2005. Tr. Vol. II p.46-47.
- On May 10, 2005 Mr. Sadow appealed his termination from his teaching position at the Training School, on both procedural and substantive grounds. He also raised the issue at that time of the propriety of his employment as a substitute during the period November 23, 2004-April 7, 2005. DCYF Ex. 8a and 8b.
- On May 20, 2005 Patricia Martinez, Director of DCYF summarily denied Mr. Sadow's appeal to her, and noted that Mr. Sadow had failed to appeal his termination within the period specified in R.I.G.L. 16-13-4. Ms. Martinez also denied Mr. Sadow's claim that he was improperly paid as a substitute, finding that he had by written contract with Datalogic Consulting, Inc. agreed to work as a per diem substitute at the rate of pay specified in that contract. DCYF Ex. 9.
- On June 2, 2005 Mr. Sadow filed a written appeal of his termination with Commissioner Peter McWalters. Sadow Ex. A.
- During the entire time he taught at the Training School, Mr. Sadow had adequately performed his teaching duties and had never been disciplined. Tr. Vol.II pp. 90-91.

Positions of the Parties

Michael Sadow

When DCYF terminated Michael Sadow, the decision was not made by a person with the authority under the law to do so. This would render his termination invalid, under a proposition affirmed most recently in the decision of Gordon v. The Beacon School⁶. His representative argues that an uncontroverted fact throughout this hearing was that the “governing body” for purposes of the R.I. Training School is the Director of DCYF. Only the “governing body” (which in most, but not all, cases is the school committee) can terminate a teacher under Title 16 of the General Laws.⁷ In this case the facts are that the person who terminated Michael Sadow was Thomas Bohan, who undisputedly was not the Director of the agency, but who is its Executive Director. Although Mr. Bohan exercises considerable authority as the Executive Director of DCYF and has been designated as the “Appointing Authority” with respect to personnel matters, Title 16 and in particular Section 16-13-4 requires that the governing body, in this case the Director of DCYF, determine whether or not a teacher should be terminated. This authority is non-delegable.

Furthermore, the procedures utilized by DCYF to terminate Mr. Sadow did not provide him with due process prior to the deprivation of his property interest, i.e. his right to continuing employment under an annual contract. The appellant points out that Mr. Bohan did not give him the pretermination hearing required pursuant to the U.S. Supreme Court’s 1985 decision in Cleveland Board of Education v. James Loudermill et al.⁸ This procedural defect alone is grounds on which to invalidate his termination or provide some other adequate remedy. Implicit in this argument is that if he had been given a pretermination hearing, Mr. Sadow could have provided the information that he was scheduled to take the PLT test again on November 20, 2004 and presented a request that any decision to terminate him be deferred for just a short time to enable him to become certified again. If Mr. Sadow had been provided a pretermination hearing, he could have received the assistance of his union representative who could have argued the merits of alternatives to termination, such as a suspension or even an unpaid leave of absence for a short period of time until Mr. Sadow’s re-certification was in place.

Mr. Sadow’s position is clearly not that he, as an uncertified teacher, should have been allowed to continue to teach as a regular teacher in his Social Studies classroom. He recognizes that there was cause to “suspend” him until he could retake the PLT test or, in the alternative, grant him an unpaid leave of absence from his position for a short period of time until he could meet recertification requirements. He submits, however, that under the circumstances here there was not “just cause” to terminate him from the position in which he had been performing satisfactorily for over a year. He points out that even after his termination, he was employed in a substitute capacity

⁶ Decision of the Commissioner dated August 18, 2004.

⁷ R.I.G.L. 16-12-8 makes the general laws applicable to certified teachers equally applicable to certified teachers in state schools.

⁸ 84 L Ed 2d 494 (1985)

assigned to the same class and performing the same duties so that the students in his class received continuity of instruction. DCYF's choice of termination over less drastic alternatives which would have served its interests is argued to be an unwarranted and extreme response to the situation. Clearly Mr. Sadow was making his best efforts to do what he needed to do to maintain his certification as a Social Studies teacher. Under the circumstances, DCYF could have utilized a suspension or leave of absence and met its objective of maintaining a properly-certified teacher in the classroom.

In response to the "laches" defense asserted by DCYF – that there was an unreasonable delay in presenting these claims- Mr. Sadow argues that there was a good reason for his failure to file an appeal with respect to his November, 2004 termination until May of 2005. He alleges that he had several conversations with Dr. Arlene Chorney in which she assured him that he would get his job back once he became recertified and that the recruitment process was "just a formality". Mr. Sadow asserts that because he had been "terminated", there was a technical requirement (which the Union insisted be followed) that the position be posted and advertised. Throughout the recruitment process, he was led to believe that he would be reappointed to his position. If it were not for these assurances and his reliance on Dr. Chorney's commitment to him, he would have appealed his termination sooner. It was not until April 7, 2005 that he learned he would not be reinstated - that he was not even a finalist for the position. His appeal was filed directly thereafter and is timely.

In addition to the claims presented above, Mr. Sadow alternatively argues that his compensation as a substitute from November 23, 2004 through April 7, 2005 was in violation of the statute requiring that vacancies be filled by teachers retained under an annual contract. Mr. Sadow argues that all of the functions he performed as a substitute were identical to those he performed as a regular teacher. His teaching duties, hours of work, submission of lesson plans and attendance at faculty meetings all continued without interruption. He filled a "true vacancy" throughout this entire period. For all but payroll purposes, he was employed by the same agency he had been employed by as a regular teacher at the Training School. Based on prior decisions from the Commissioner's office which require that "true vacancies" be filled by regular teachers employed under annual contract, Mr. Sadow requests that his compensation for this period be adjusted to that of the salary of a regular teacher.

Department for Children, Youth and Families

At the outset, DCYF argues that consideration of the claims presented by Mr. Sadow is barred under the doctrine of laches. Mr. Sadow was terminated on November 20, 2004 and clearly his claim that proper procedures were not followed and that there was insufficient cause for such action were not presented within the fifteen (15) days specified in R.I.G.L. 16-13-4. If appeal from his termination is not governed by the fifteen (15) day time limit of the statute, then DCYF submits, Mr. Sadow was required to request a hearing before the "governing body" of the Training School within a reasonable period of time. In this case the delay was almost six months during which time DCYF hired a replacement for Mr. Sadow on the assumption that there were no pending issues with respect to his termination. The changes that occurred during this

passage of time, the lengthy recruitment process and the contractual commitment made to a new teacher are factors which must be taken into account in assessing whether or not the delay has worked to the detriment of DCYF.

The reason for the delay which has been offered by Mr. Sadow is disputed by the Department. DCYF submits that there were no assurances given to him at the time of, or subsequent to, his termination that once re-certified, he would be reinstated. The Department contends that at no time did Dr. Chorney, or any one else, advise Mr. Sadow that the recruitment process was “just a formality” rather than a legitimate effort to fill the vacant position with the most qualified candidate for the job. DCYF points to the testimony of both Dr. Chorney and Mr. Dumais, the Assistant Principal at the Training School as evidence that the alleged statements and assurances simply were not made. Thus, the filing of a claim of unjust termination on May 10, 2005 for a termination which occurred on November 20, 2004 is time-barred.

On the merits of Mr. Sadow’s claims, DCYF responds that a prior Commissioner’s decision found there was just cause for the termination of even a tenured teacher (Mr. Sadow was non-tenured) when his certification lapsed. See Wheless v. Westerly School Committee.⁹ Counsel for DCYF argues that Mr. Sadow had a clear professional responsibility to maintain a valid teaching certificate as a condition of his employment at the Training School and in the absence of certification, there was good and just cause for his immediate termination. In fact, if Mr. Sadow had been permitted to continue to teach as the regular teacher in that classroom, the Department would have been subject to sanctions under R.I.G.L. 16-11-1. DCYF was not obliged to suspend Mr. Sadow as an alternative to terminating him. Firstly, Mr. Sadow had not been forthcoming with respect to the problems he was incurring in passing the PLT test and it was not until he was questioned by Dr. Chorney some time in October that he admitted he had already taken the test twice unsuccessfully. In light of the fact that he had already failed the test twice, Dr. Chorney chose the more prudent course of action of recommending that he be terminated and soliciting applications for the vacancy from fully-certified candidates. As to the notion that Mr. Sadow could have been placed on an unpaid leave of absence until he passed the test, DCYF’s response is substantively the same as with the suspension proposal, and counsel notes that at no time did Mr. Sadow file a written request for a leave of absence under Article XIV of the collective bargaining agreement.

With respect to the arguments that Thomas Bohan lacked the authority to terminate Mr. Sadow, since he was not the equivalent of the “governing body” of the Training School, counsel for DCYF submits that Article XXIV of the collective bargaining agreement in effect between the Howard Union of Teachers and the State of Rhode Island (DCYF Ex. 10) empowered Mr. Bohan to terminate teachers at the Training School for just cause. As the delegated Appointing Authority for personnel matters, Mr. Bohan acted with the authority R.I.G.L. 36-4-60 permits to be delegated to him. According to the terms of the collective bargaining agreement, particularly Section 24.1 the parties have agreed that the appointing authority does have the authority to dismiss or

⁹ decision of the Commissioner dated February 14, 1979; affirmed by the Board of Regents September 25, 1979.

suspend an employee for just cause. Thus, there was a valid termination even though it was not effectuated by the Director of DCYF.

As to the claim that the termination process failed to provide Mr. Sadow with a predeprivation hearing, counsel for DCYF asserts that Mr. Bohan's November 5, 2004 letter satisfies the requirements of the Loudermill case in that if he had wanted to be heard prior to the date on which he was terminated, November 20, 2004, Mr. Sadow had ample time to protest or question Mr. Bohan's contemplated action. Mr. Sadow chose to accept the decision that he would be terminated for the reason that was uncontroverted—he was not a certified teacher. This opportunity to be heard, together with the statutory post-termination appeals available to him, provided him with adequate due process. Mr. Sadow also could have challenged his termination pursuant to the grievance and arbitration procedures available under Article XXV of the collective bargaining agreement.

Finally, with respect to Mr. Sadow's claim that his compensation during the period November 23, 2004-April 7, 2005 was inappropriately that of a substitute teacher, DCYF argues that the provisions of the Teacher Tenure Act were not violated in this case. Counsel submits that those cases in which the Commissioner has ordered that a substitute be paid as a regular teacher involve the existence of a true vacancy coupled with a failure on the part of a district to act to fill the position with a teacher employed under annual contract. In this matter it is clear that once the Social Studies position became vacant, a process was begun and actively continued until a qualified replacement was retained. There has been no demonstration that the amount of time it took to post, advertise, interview, and select the most qualified candidate from a large number of applicants was an unreasonable period of time. Thus, Mr. Sadow was properly paid as a substitute. The use of Datalogic Consulting Inc. as the entity to employ and pay substitute teachers at the Training School has not been shown to be illegal or improper and, therefore, no adjustment to Mr. Sadow's compensation for this period should be ordered.

DECISION

Although we agree with the arguments of the Appellant, Michael Sadow, that the process followed by DCYF in terminating him was defective in that he was not provided with a pretermination hearing and that only the Director of DCYF had the legal authority to terminate him, his inexcusable delay in asserting these claims, coupled with the significant disadvantage posed to DCYF by the lapse of time, causes these claims to be barred under the doctrine of laches. Although Mr. Sadow sought to prove that his delay was due to his reliance on statements made to him by Dr. Chorney that he would be reinstated once he was re-certified by the Rhode Island Department of Education, his proof of this statement was insufficient. Similarly, his allegation that Dr. Chorney assured him at various points in the recruitment process that the search was "just a formality" (and implicitly that Mr. Sadow was assured of being selected by the search committee) was not substantiated by a preponderance of the evidence. Mr. Sadow's testimony as to Dr. Chorney's statements in this regard were directly and specifically contradicted by Dr. Chorney. Both witnesses appeared credible and we can conclude

only that recollections of these conversations may be inaccurate. In any event, the burden of proof as to the statements was that of the Appellant, and the weight of the evidence is simply not in his favor on this crucial fact. Thus, his delay in asserting *procedural* claims for which we would ordinarily attempt to fashion an adequate remedy¹⁰ is barred under the doctrine of laches.

Should any review of this decision be assisted by further analysis of our findings as to violations of Mr. Sadow's procedural rights, we specifically find that the Director of DCYF is the equivalent of the "school committee" as these words appear in R.I.G.L. 16-12-6 and 16-13-2 and that the agency Director serves as the "governing body" as those words are used in R.I.G.L. 16-13-4. Giving the words of these statutes full effect and consistent with the strict construction that has traditionally been placed on such language, Thomas Bohan's termination of Mr. Sadow did not meet the requirement of the statute. Also lacking in the process was "some kind of hearing" prior to termination, as dictated by the ruling of the Supreme Court in the Loudermill case. While Mr. Bohan's November 5, 2004 notice did defer the date of actual termination to November 20, 2004, it did not present the opportunity for Mr. Sadow to respond to the proposed adverse action which, absent his submission of a renewed certificate, was certain to occur. Such opportunity to respond and to request consideration of alternatives which might have served DCYF's interests and accommodated the timing of the upcoming administration of the PLT test were not presented to Mr. Sadow.¹¹

As to Mr. Sadow's claim that his termination was not supported by good and just cause, we find that this claim is similarly barred under the doctrine of laches. Again in the event our ruling that the claim is time-barred is not upheld, the merits will be addressed. Unlike his procedural claims, we find no merit in this basis for his appeal. Mr. Sadow's failure to hold the teaching certificate required under state law to teach Social Studies at the Training School constitutes good and just cause for his termination. Inasmuch as Mr. Sadow was employed as a non-tenured teacher under annual contract, the requirement of just cause for a termination prior to the expiration of his contract¹² is imposed and has been proven by DCYF. Even in the case of a tenured teacher, both the Commissioner and the Board of Regents have sustained termination for failure to maintain proper certification. See Wheless v. Westerly School Committee, decision of the Commissioner dated February 14, 1979 affirmed by the Board of Regents on September 25, 1979. Although it is true that other options existed which would have effected compliance with the statute¹³ DCYF exercised its prerogative to terminate Mr. Sadow and open up the position for a search to find the most qualified candidate available at that time. In her

¹⁰ Remedies for violation of a teacher's statutory or constitutional due process rights do not necessarily include reinstatement or back wages. See Hobson v. South Kingstown School Committee, April 4, 1988, May 17, 1989 and October 2, 1990; also see Valerio v. William M. Davies, Jr. Career and Technical High School, April 29, 1998 and Gordon v. The Beacon School, August 18, 2004.

¹¹ We should note the existence of some precedent that a teacher whose certification lapses and who seeks to assert due process rights may have forfeited the property interest which is protected by the Constitution. See Nunez v. Simms, 341 F 3rd 385, 180 Ed.Law Rep. 74 (2003).

¹² An issue discussed in Gordon v. The Beacon School, decision of the Commissioner dated August 18, 2004 at page 5.

¹³ Mr. Sadow's suspension is one alternative that his advocate has argued as more appropriate to the circumstances in this case.

testimony Dr. Chorney explained the reason she recommended termination to Mr. Hurlburt and Mr. Bohan. She stated that she did not consider the option of suspension at all. (Tr.Vol.II p. 93) Although reasonable minds might differ on whether suspension or termination was the more appropriate option, Dr. Chorney's decision has not been shown to be unreasonable under the facts of this case.

Mr. Sadow's claim that his compensation should be adjusted because when he served as a substitute from November 23, 2004 through April 7, 2005 he filled a true vacancy is not barred under the doctrine of laches. The passage of time is not the same as that accompanying his other claims and there is no indication that delay has affected the amount of increased compensation he seeks or caused any other type of detriment to DCYF. See Berthiaume et al v. School Committee of the City of Woonsocket, 121 R.I. 243, 397 A2d 889 (1979). However, we find this claim to lack merit. During this period Mr. Sadow did fill a true vacancy, but during this entire period of time DCYF was actively seeking to fill the position through a process of posting, advertising and narrowing down the field of candidates. The case law on this subject affirms the allowance of a reasonable period of time for filling a vacancy. See Autieri v. Warwick School Committee, decision of the Commissioner dated June 28, 1989; The mere fact that in some situations the substitute's duties are indistinguishable from those of a regularly employed teacher does not mandate an increase in compensation. See Martin v. Barrington School Committee, decision of the Commissioner dated June 29, 1992. Thus, Mr. Sadow's claim for additional compensation for this period is denied.

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

For the Commissioner,

Kathleen S. Murray, Hearing Officer

APPROVED:

Peter McWalters, Commissioner

June 7, 2006
Date