

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF  
EDUCATION

.....

**Nellie Francis**

**v.**

**Providence School Board**

.....

**DECISION**

Held: The Providence School Board established that there was good and just cause for its termination of Ms. Francis on May 24, 2004 when it found that she had abandoned her position as a Biology teacher by not returning to work on May 10, 2004 as she had been instructed to do by the Director of Human Resources of the School Department.

DATE: May 19, 2008

## **Travel of the Case**

On May 23, 2005 Nellie Francis, through her attorney, filed an appeal of the decision of the Providence School Board at its May 9, 2005 meeting to sustain its prior action of terminating Ms. Francis from her position as a teacher in the Providence public schools. The undersigned was designated to hear and decide this appeal on May 31, 2005. Written acknowledgment and a request for an agreed-upon hearing date was sent to the parties on May 31, 2005. Hearing was held initially on October 25, 2005 at which time counsel for Ms. Francis requested additional time in which to obtain medical affidavits to substantiate a position taken by Ms. Francis at the hearing. Correspondence from Ms. Francis' attorney requested further extensions of time based on circumstances which prevented him from obtaining the medical affidavits he sought on Ms. Francis behalf.

On May 30, 2007 the hearing officer wrote to the parties indicating that, given the passage of time, the record would be closed. On July 27, 2007 a request for an agreed-upon briefing schedule was sent to counsel by the hearing officer. On August 16, 2007 counsel for Ms. Francis submitted a written request that further hearing in this matter be scheduled to complete his submission of evidence in support of Ms. Francis' appeal. After considering the School Board's objection to the reopening of the record at that time, the request for additional hearing was granted.

Final hearing was held on December 7, 2007 and the record closed on January 11, 2008 at which time briefs were filed.

Jurisdiction to hear this matter arises under R.I.G.L. 16-13-4 and 16-12-6.

## **ISSUE**

Did the Providence School Board have good and just cause when it dismissed Nellie Francis from her position as a biology teacher in the Providence School Department?

## **Findings of Relevant Facts:**

- Nellie Francis was a nontenured Providence teacher<sup>1</sup> who was assigned to teach biology at the Harrison Street High School during school year 2003-2004. Tr. Vol.I, pp.14, 27-30 and 40-41; PSB Ex.2.
- Ms. Francis did not report to work at the Harrison Street High School at the beginning of the 2003-2004 school year, nor did she work there at all that year.<sup>2</sup> Tr. Vol. I,

---

<sup>1</sup> The evidence shows that Ms. Francis had not worked under annual contract for three (3) full years within five (5) successive school years.

<sup>2</sup> There is information in the record of ongoing issues between the parties throughout this school year - Ms. Francis' medical condition, a claim for workers' compensation benefits, accommodations to be made available to her upon her return to work, and a sexual harassment allegation made by Ms. Francis against one of her supervisors.

pp.14-15, 32-34;PSB Ex.2. She did report to the school on one day, May 10, 2004,<sup>3</sup> following her receipt of an April 29, 2004 letter from the Director of Human Resources notifying her that her failure to report to work on May 10, 2004 would result in a recommendation to terminate her employment for abandoning her job. She did not perform any teaching duties at that time. PSB Ex.1; Tr. Vol.I, pp.15-19; PSB Ex.1.

- When she received the April 29, 2004 letter directing her to report on May 10, 2004 Ms. Francis wrote to the Human Resources Director on April 30, 2004 stating that she contested his directive because (a) she had a medical situation which prevented her from working, (b) she was on medical leave for work-related injuries, both physical and mental, and (c) a claim for workers' compensation benefits she had filed was still pending. She requested that Mr. Zimmerman reconsider his directive that she return to work. Appellant's Ex.B.
- On May 4, 2004 the Director of Human Resources responded to Ms. Francis indicating that despite her protest, he was still ordering her to report for work on May 10, 2004. He reasoned that Ms. Francis had been "cleared for return to work" with limited restrictions that had been described "under oath" by her physician on April 30, 2004. He offered to put in place two workplace accommodations that had been offered when the School Department had previously "invited" Ms. Francis to return to work on a date certain. He also described Ms. Francis' pending workers' compensation claims as being "denied at the pretrial level" and "highly likely to be denied by the trial court". PSB Ex.3
- On May 7, 2004 Ms. Francis again wrote to the Director of Human Resources, Donald Zimmerman, summarizing all of her arguments as to why the Department should not require her to return to work. She wrote that she had not been cleared for return to work by her two physicians and that there had as yet been no decision in her workers' compensation cases. She attached two notes, one from Dr. Huntington dated April 23, 2004 and one from Dr. Gallo dated May 4, 2004 to support her claim that she had been "excused" from work. She also asserted that any failure to report to work on May 10, 2004 would not constitute her "abandonment" of her position. She argued that this term did not describe a situation in which an employee was medically incapable of returning to work, as she asserted she was. Appellant's Ex.C.
- On or about May 10, 2004 Mr. Zimmerman determined that Ms. Francis had exhausted her medical leave as well as leave available to her under the Family Medical Leave Act. Tr. pp.47-48; he also verified that she was not on workers' compensation leave at that time. Tr. pp. 48-49.
- Ms. Francis forwarded additional documentation to the Human Resources Office regarding her stay at Rhode Island Hospital from May 10, 2004 to May 13, 2004. Appellants Ex. D, E and F.
- On May 18, 2004 Mr. Zimmerman notified Ms. Francis that he would be recommending her termination to the Providence School Board on May 24, 2004. The reason for his recommendation was that Ms. Francis had abandoned her job by failing to work on May 10, 2004 as instructed, and by failing to work and failing to call and report since May 11, 2004. Joint Ex. 1.

---

<sup>3</sup> But was taken away by ambulance shortly after reporting to the school.

- The Providence School Board terminated Ms. Francis on May 24, 2004 based on its conclusion that she had “abandoned her job by failing to return to work as instructed by May 10, 2004”. Joint Ex.2
- The School Board held an evidentiary hearing almost one year later on April 4, 2005. The Board voted unanimously to sustain its prior termination of Ms. Francis on May 9, 2005. Its written decision expanded on the reasons for Ms. Francis’ termination, i.e. her insubordination, excessive absence and excessive absences without legitimate reason, in addition to the previously-stated reason of her “abandonment” of her position. Joint Ex. 3.
- Nellie Francis abandoned her teaching position by failing to return to work on May 10, 2004 and the days thereafter. She had received notice which in essence warned her that her continued absence would not be excused and that it was the position of the School Department that she was capable of returning to work at that time. Tr. Vol.II, pp.5-7; PSB Ex.3.

### **Positions of the Parties**

#### **Providence School Board**

In her opening statement, counsel for the School Board took the position that Nellie Francis was a non-tenured teacher who had been employed “off and on” in the district, since starting as a per diem substitute in 1995. Over the last several years, Ms. Francis had been out of work for a good amount of time with various illnesses and job-related injuries. In April of 2004 the Human Resources office determined that she had exhausted all types of leave to which she might be entitled, including workers’ compensation, sick, and family medical leave. The Director of Human Resources decided that her job should no longer be held open for her and notified her that she had to return to work on May 10, 2004 or face termination. When she did not resume her teaching duties on May 10, 2004, termination procedures were initiated. At the time of the hearing, counsel took the position that it mattered not whether Ms. Francis was unable or just unwilling to return to work by the deadline given to her. Because she had exhausted all leave time, the School Department was entitled to terminate her and fill her position with a regular teacher.

In its written brief, the School Department identifies the issue as whether Ms. Francis’ failure to return to work on May 10, 2004 and thereafter, when she had exhausted all leave time available to her, constitutes just cause for her termination. The Department’s brief contains arguments in support of the claim Ms. Francis abandoned her job, as well as arguments in support of other findings made by the School Board in the decision after its evidentiary hearing in 2005 (Joint Ex.3).

Arguments are advanced that Ms. Francis was guilty of “excessive absence and job abandonment” as well as “willful insubordination”. The Department argues that Nellie Francis did not return to work after being clearly and fairly informed that her attendance would be required on May 10, 2004 and each school day thereafter. Upon receipt of this direction, Ms. Francis simply did not comply when she was required to do so.

Notwithstanding her assertion to the Human Resources Office that she was on “medical leave” at the time she was directed to report to work, Ms. Francis was not on a medical leave, and in fact, she had exhausted all leave of any sort whatsoever. The Department is not required to hold a position open for employees who do not report to work when they are required to do so. Ms. Francis’ failure to report to work constituted abandonment of her job which is just cause for termination.<sup>4</sup>

The School Department also argues that Ms. Francis was willfully insubordinate when she was directed to return to work. First, she in essence threatened Mr. Zimmerman if he did not withdraw this directive. Ms. Francis wrote in her letter to Mr. Zimmerman of April 30, 2004 that he should reconsider his directive or risk “something beyond man’s imagination”. In her testimony, Ms. Francis described this as a situation in which terminated employees return to their workplace and “kill everybody”. She noted that her own situation at that time was one of great stress in that she was under the care of a psychologist because of her medical conditions and the stress of her prospective termination.

Ms. Francis continued this insubordinate behavior when she refused to comply with Mr. Zimmerman’s directive. On May 10, 2004, although she did appear at the school to which she had been directed to report, she had no intention of remaining or performing her duties. The Board argues that there was no evidence presented to support Ms. Francis claim that she was medically unable to work on May 10, 2004 or on any of the days that followed. Furthermore, one of Ms. Francis’ own doctors, whom she called as a witness, testified that his opinion was that she was in fact able to return to work in May of 2004. The doctor’s note he had previously signed to support her absence from work was provided only because Ms. Francis had insisted in May of 2004 that if she were forced to return to work she would kill her former principal.<sup>5</sup> Thus, the School Department submits, the validity of the alleged illness that prevented Ms. Francis from returning to her teaching duties in May of 2004 has not been established by the evidence presented. Her continued absence was entirely voluntary- it was insubordinate and constituted her abandonment of the position that had been held for her for a very long period of time, to the detriment of Providence’s students.

### **The Appellant**

Counsel for Ms. Francis submits that upon receipt of the ultimatum of Mr. Zimmerman that she return to work by May 10, 2004, Ms. Francis provided medical documentation of the same type that she had provided up to that point in the school year. She also sought to correct Mr. Zimmerman’s specific “misapprehension” that the doctor

---

<sup>4</sup> The School Department does not identify the specific period of time in which Ms. Francis was alleged to be guilty of “excessive absence”. The Department does indicate that absences up until August of 2003 are irrelevant to its allegation of just cause (see page 4 footnote 3 of the Department’s brief), but does not indicate which absences are relevant. The record in this case does not clarify Ms. Francis’ status from the beginning of the 2003-2004 school year up to May 10, 2004 during which time she was also absent from work. We draw no inference that these absences were unauthorized.

<sup>5</sup> Against whom she had made a complaint of sexual harassment.

who had been treating her for two physical injuries that had resulted in workers' compensation claims (Dr. Huntington) had "cleared her for work".<sup>6</sup> It should have come as no surprise to school officials that when Ms. Francis reported to work on May 10, 2004, she became ill and had to be taken from school to the hospital, where she was treated for three days and then released. Despite this medical situation and the documentation Ms. Francis continued to provide to validate it, the Director of Human Resources initiated disciplinary action against her on May 18, 2004.

Even after receipt of the May 18<sup>th</sup> notice Mr. Zimmerman would be recommending her termination to the School Board, Ms. Francis continued to provide documentation of her medical situation in a manner which, up until April 29, 2004, had been sufficient to excuse her attendance. On May 20, 2004 she forwarded a note from the physician who had treated her at Rhode Island Hospital, requesting that Ms. Francis be excused from work until June 8, 2004. Without responding to all of the documentation with which he had been provided and contrary to the practice that had accompanied Ms. Francis' absence throughout the year, Mr. Zimmerman persisted with his contention that Ms. Francis was "abandoning" her job. Clearly she was not abandoning it but struggling to hold on to it. According to her counsel, during this time "she unequivocally stated her interest in her continued employment upon being medically fit to perform her duties". See page 9 of the Appellant's brief. Additionally, she has proven that throughout the period of May 10, 2004 - May 18, 2004 she was medically unable to perform her duties. The appellant implicitly argues that given her medical condition, she was not voluntarily relinquishing her position as a Providence teacher, but prevented from resuming her position because of illness.

Furthermore, her counsel argues, at this juncture Ms. Francis was - or at least could have been - protected by certain provisions of the collective bargaining agreement had she known her medical documentation was questioned or that she had exhausted sick leave. Arguably, Sections 4-5 and 4-7 of the Collective Bargaining Agreement, relating to misuse of sick leave and termination after exhaustion of sick leave<sup>7</sup> would have protected her from termination. Rather than challenge her medical documentation, Mr. Zimmerman chose to rely on the reason that Ms. Francis was abandoning her job by failing to return to work by May 10, 2004. Clearly, she had no intent to voluntarily relinquish her teaching position in May of 2004.

The collective bargaining agreement, specifically section 6-1, also provides for a full-pay leave, which may be extended if circumstances warrant, when a teacher is injured and out of work because of an "assault" sustained in the course of the teacher's employment. Leave taken pursuant to this section of the Agreement may not be charged against a teacher's accrued sick leave. This provision of the Agreement would have protected Ms. Francis from the exhaustion of her sick leave since her absence was caused by an assault by one of her students on March 4, 2003. Under this provision, if the district

---

<sup>6</sup> The circumstances of Dr. Huntington's "testimony" regarding Mr. Francis' capability for work are not specified in this record. References are made to the doctor's "oath" and "testimony" on the subject of her physical condition. We infer that it was part of the litigation surrounding a pending workers' compensation claim Ms. Francis had asserted which is also alluded to in the record.

<sup>7</sup> We should note that the Providence Teachers' collective bargaining agreement is not in evidence in this case.

questions the legitimacy of the claim, it may seek an independent medical examination. Since the district would have had the burden of requesting and receiving an independent evaluation that established Ms. Francis could return to work in May of 2004, Mr. Zimmerman never granted Ms. Francis rights under this section of the union Agreement.

It is also argued that Section 5 of the collective bargaining agreement would have entitled Ms. Francis to request a leave of absence without pay after her Workers' Compensation leave expired in August of 2003. Ms. Francis could have justified her request for a leave without pay on the basis of her ongoing medical incapacity and a statement of her intent to return to her teaching position as soon as she was medically able to do so. Under the Agreement, the School Board would have been obligated to approve such a leave, since its consent may not be "unreasonably withheld". When Mr. Zimmerman received Ms. Francis' April 30, 2004 letter demonstrating her belief that she was on a medical leave because of her work-related injuries, he should have treated her request as one for a medical leave without pay and responded appropriately under the Agreement. Instead, he sent her a follow up letter which reiterated his grounds for demanding her return to work and persisted in his erroneous belief that Ms. Francis had been cleared to return to work by Dr. Huntington. Again, her right to a leave without pay under the union Agreement was violated. Finally, Section 5-13.1 of the collective bargaining agreement allows the Providence School Department to replace a teacher on leave or on sick leave on condition that the replacement teacher may be required to relinquish his or her position when the teacher returns. This provision should have protected Ms. Francis' rights to her position in the system for a longer period of time.

From a procedural standpoint, the process used in terminating Ms. Francis fails to conform to the provisions of the Teacher Tenure Act in that the communications from Donald Zimmerman were ambiguous and contradictory and failed to provide her with sufficient notice of what the response of the Department would be if she had requested any further absences, whether they were medically excused or not. Furthermore, certain protocols outlined in the Agreement were not utilized, to the detriment of the Appellant.

The Appellant's position is that she was in fact a tenured teacher at the time of her dismissal. Therefore, a request is made that her termination be reversed and that she be reinstated to her teaching position with back pay and other relief appropriate to the circumstances.

### **DECISION**

As indicated in the Findings of Relevant Facts, Nellie Francis was employed as a non-tenured teacher in the Providence school system at the time she was terminated from her position as a biology teacher. Pursuant to the teacher tenure law she was employed under annual contract. A non-tenured teacher who is dismissed, as Ms. Francis was, during the school year and prior to the expiration of the annual contract must be afforded a hearing at which just cause for the termination must be shown. See Jacob v. Board of Regents for Education, 117 R.I. 164, 169 (1976) (footnote 3), citing Town of North

Kingstown v. Robinson, 99 R.I. 348, 207 A 2d 389 (1965). Principles of procedural due process apply to a termination prior to the expiration of the annual contract and operate co-extensively with the procedures required under the teacher tenure law and R.I.G.L. 16-12-6. One of the procedural requirements is that the teacher must receive a clear notice describing the allegations against him or her, so that he or she might respond appropriately prior to any termination decision. The notice, which in some instances then becomes a formal “statement of cause”, also ensures that the teacher will be able to prepare for and participate in any post-termination evidentiary hearing before the “full board”, as required by the Teacher Tenure Act.

In evaluating whether or not the Providence School Board has proven the existence of good and just cause for its termination of Nellie Francis we confine our review to the existence of the single reason stated by the School Board in its termination letter of June 21, 2004, which notified Ms. Francis that she had been terminated, effective May 25, 2004. We do this because the Appellant has raised the general issue of the sufficiency of the notice to her under the teacher tenure act (see page 10 of the Appellant’s brief) and there is no proof of any other document intended to notify Ms. Francis of the reason for her termination by the School Board.<sup>8</sup> In fairness to Ms. Francis, issues with respect to “excessive absences”<sup>9</sup> and “insubordination” were not raised as additional bases for her termination until almost one year after she had been terminated. See Joint Ex. 3, decision of the Providence School Board dated May 9, 2005. Also not stated in the Board’s June 21, 2004 letter of termination was the reason that as of May 10, 2004 Ms. Francis had exhausted all types of leave to which she might be entitled, and that her absence after that date was unauthorized and unexcused.<sup>10</sup>

The reason for Ms. Francis’ termination was the conclusion of the School Board on May 24, 2004 that:

Ms. Francis has abandoned her job by failing to return to work as instructed by May 10, 2004. (Joint Ex. 2.)

The evidence shows that Donald W. Zimmerman, the district’s director of Human Resources, sent Ms. Francis a letter on April 29, 2004 which notified her of a May 10, 2004 deadline for her return to work. Her absence after that date would constitute “abandonment” of her position. Abandonment has been defined as the “voluntary relinquishment of a known right”.<sup>11</sup> In an employment context, the failure to be at work when required without a legitimate reason would create an inference that the employee was not interested in continuing employment. If the failure to return to work was based on a legitimate reason, such an inference would be incorrect. Thus, if Ms. Francis’ failure to

---

<sup>8</sup> There were distinct differences in each of the notices sent to Ms. Francis. See Joint Ex.1, 2 and 3.

<sup>9</sup> Although it is clear that Ms. Francis was absent from work from the very beginning of school year 2003-2004, as indicated in our findings of fact, it is unclear as to whether her absences prior to May 10, 2004 were authorized. The arguments presented on the School Board’s behalf do not directly bring her absences prior to May 10, 2004 into issue nor do they clarify Ms. Francis’ status during that period of time.

<sup>10</sup> This reason would have presented the School Board with the simple burden of proving that Ms. Francis had exhausted all leave to which she was entitled as of May 10, 2004. In fact, at the hearing on October 25, 2005 counsel for the School Board framed the Board’s case precisely in that way. See pages 10-11, 65.

Unfortunately, this reason had not previously been provided to Ms. Francis in writing.

<sup>11</sup> See Jakober v. E.M. Loew’s Capitol Theatre, Inc. 265 A.2d 429, 107 R.I. 104 (R.I. 1970).

return to work on May 10, 2004 and thereafter was due to illness or injury as she contends, she would not be deemed to have abandoned her position. Her absence from work would not be without a legitimate explanation, but rather be due to the fact that she was unable to resume her duties. On this record, we find that Ms. Francis was able to return to work on May 10, 2004, despite her contention that she was not. We find that her failure to resume her teaching duties as of May 10, 2004 was voluntary. Although we do not agree with the argument of the School Board in its brief that there was “no evidence presented to support (Ms. Francis’) claim that she was medically unable to work on May 10, 2004 or thereafter” (brief of the School Board at page 5), we found the evidence she did present to be unpersuasive. The preponderance of evidence showed that Ms. Francis was capable of returning to work as of May 10, 2004. Evidence presented by Ms. Francis (in the form of an affidavit of Dr. Christopher F. Huntington dated December 4, 2007<sup>12</sup>) that she was not capable of working at that time was overwhelmingly contradicted by direct testimony from her other treating physician, who had examined her in the beginning of May, 2004.<sup>13</sup> Ms. Francis’ own testimony that she was physically and mentally unable to resume work on May 10, 2004 was simply not credible. Ms. Francis relied on her alleged medical condition to explain her continued absence from work. This explanation was clearly rejected by her employer at the time she was terminated. Based on this record, medical incapacity was not substantiated. Her failure to resume her position in May of 2004 was evidently voluntary.

It is a fact that the period of Ms. Francis’ absence from work from May 10, 2004 up to May 24, 2004 when the board found she had “abandoned” her position was not an extensive period of time. In another context, this period of time might be insufficient for a conclusion to be drawn that there was intent to abandon a position. However, in this case we find that Ms. Francis’ failure to resume her position on May 10, 2004 enabled the Director of Human Resources (and the School Board) to draw a conclusion of “abandonment”. The letter of April 29, 2004 gave Ms. Francis specific advance notice that as of May 10, 2004 her failure to return to work would constitute abandonment of her position. This warning removed all doubt as to the significance that would be attached by her employer to each day she was absent starting on May 10, 2004. Thus, while in another context a longer period of absence might be required to prove abandonment, Ms. Francis’ failure to resume work on the “deadline” conveyed her decision to relinquish her rights to her teaching position.

Implicit in his April 29, 2004 directive and explicit in Mr. Zimmerman’s May 4, 2004 letter<sup>14</sup> to her was the School Department’s rejection of the proposition that she was ill and/or incapacitated at that time.<sup>15</sup> Also rejected were Ms. Francis’ claims that she was on “medical leave” or that pending proceedings in worker’s compensation court somehow

---

<sup>12</sup> Appellant’s Ex. G.

<sup>13</sup> See testimony of Dr. James A. Gallo, Tr.Vol.II, pp.5-10.

<sup>14</sup> See PSB Ex. 3.

<sup>15</sup> In his May 4, 2004 letter to Ms. Francis, Mr. Zimmerman had offered to provide two “accommodations” that would facilitate Ms. Francis return to school. He indicated that these accommodations had been offered previously when the Department had “invited” Ms. Francis to return to work on a date certain. See PSB Ex. 3.

validated her absence from work.<sup>16</sup> If the Department had previously accepted documentation from Ms. Francis of her alleged medical incapacity as sufficient to excuse her absence prior to May 10 of the 2003-2004 school year, she was put on notice that this documentation would no longer be accepted. In his letter of May 4, 2004 Mr. Zimmerman made it clear that Ms. Francis' ongoing assertion that she was medically incapable of returning to work would not explain or excuse her absence as of May 10, 2004. The correspondence and medical documentation that she provided to Mr. Zimmerman during the period April 30, 2004-May 20, 2004 clearly indicated that Ms. Francis' intent was to continue to claim incapacity, not to resume the position that had been held for her up to that point in time.

It is not possible to evaluate the arguments of the Appellant which relate to rights and protections arising under the collective bargaining agreement. That agreement is not in evidence in this case, and even if it were, the rights arising under that agreement would not constitute matters over which the Commissioner exercises jurisdiction. The forum for such matters is the grievance and arbitration process.

In light of our finding that Ms. Francis was medically capable of returning to work as of May 10, 2004, the Providence School Board's decision to terminate her for abandonment of her position is sufficient good and just cause for termination.

The appeal is denied and dismissed.

For the Commissioner,

\_\_\_\_\_  
Kathleen S. Murray, Hearing Officer

APPROVED:

\_\_\_\_\_  
Peter McWalters, Commissioner

\_\_\_\_\_  
May 19, 2008  
Date

<sup>16</sup> Ms. Francis presented no evidence that she was in fact on a medical leave or that she was on a leave pursuant to workers' compensation laws as of May 10, 2004. As indicated in our findings of fact, Ms. Francis had exhausted all her medical leave.