

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

John Scanlon

v.

Johnston School Committee

DECISION

Held: The Johnston School Committee established “good and just cause” for its dismissal of Mr. Scanlon. The School Committee proved that the master schedule developed for Johnston High School for 2008-2009 resulted in the elimination of any position for which Mr. Scanlon held appropriate certification. Although a position for which the Appellant was certified was created in late August, Mr. Scanlon lacked sufficient seniority to fill that position and was properly maintained on lay off status with recall rights under the Collective Bargaining Agreement.

DATE: June 15, 2009

Travel of the Case

On October 21, 2008 John Scanlon filed an appeal with Commissioner Peter McWalters regarding a decision made by the Johnston School Committee with respect to his employment. The undersigned was designated to hear and decide this appeal, and sent a written acknowledgement and proposed hearing date to the parties on November 6, 2008. By agreement the matter was heard on December 4, 2008 and an evidentiary record was developed. Thereafter, the parties summarized their positions and legal arguments in writing,¹ a process that concluded on March 4, 2009.

ISSUES

- Was the Johnston School Committee's dismissal of John Scanlon supported by "good and just cause" as required by R.I. G.L. 16-13-3?
- Was Mr. Scanlon's dismissal accompanied by the procedures required by R.I.G.L. 16-13-3 and appropriate due process?

Findings of Relevant Facts:

- John Scanlon was a tenured teacher who was employed at Johnston High School in the Business and Technology Department during school year 2007-2008. Mr. Scanlon had been teaching at the high school since 1996. Tr. pp. 8. S.C. Ex.D.
- In school year 2007-2008 Mr. Scanlon held teaching certificates in vocational carpentry and technology education. These certificates qualified him to teach two courses at Johnston High School-Computer Applications and Portfolio Workshop.² App. Ex.5; Tr. p. 45. These two courses constitute two of the approximately ten course offerings in the Business and Technology Department. App. Ex. 7; In order to teach the other course offerings in that department, a teacher must be certified in Business Education. Tr. p.42.
- Based on the results of student course selections³ submitted in the beginning of February 2008, the principal of Johnston High School "projected" twenty-three (23) class sections in the Business and Technology Department. Ten (10) sections of the courses Mr. Scanlon was certified to teach were projected at that time. Principal Alicia Storey determined that she would need five teachers certified in business education for 2008-2009 and communicated this to the Superintendent. Tr. pp. 37-42, 57-58.

¹ The Appellant's representative also summed up his case orally at the conclusion of the hearing.

² A teacher certified in any subject area at the secondary level has appropriate certification to teach these two courses. After his "lay off," Mr. Scanlon obtained an additional teaching certificate as a professional special educator- mild moderate mid/sec level.

³ Students select courses based on what they need to take to graduate and their areas of interest and directly input that information into the school computer. Tr. p.15.

- Based on this information with respect to projected staffing requirements, Superintendent Margaret Iacovelli identified five teachers who would continue to be employed in school year 2008-2009 to teach course offerings in business and technology. She utilized information on each current teacher's certification and seniority as documented in the "Johnston Certified Employee Seniority Listing" (S.C. Ex. D) Tr. pp. 106-111.
- As a result of this process, Mr. Scanlon was notified by Superintendent Iacovelli on February 4, 2008 that she would be presenting a recommendation to the School Committee on February 12, 2008 that his contract "not be renewed." App. Ex.2.
- The reason identified at that time by the Superintendent for the nonrenewal of Mr. Scanlon's contract was:

Due to uncertainty in funding levels it is anticipated that it will be necessary to eliminate or consolidate positions or programs which will result in the lack of a position for a teacher with your seniority level.
App. Ex. 2.

- Mr. Scanlon was sent a subsequent notice on February 13, 2008 that indicated that the School Committee had voted to "lay him off" on February 12, 2008. The reason provided to Mr. Scanlon for his lay off was identical to that previously identified by the Superintendent. App. Ex. 3.
- In mid-August, a teacher schedule was developed by the principal that confirmed the need that had been projected for five teachers certified in business education to teach twenty-three courses in business and technology. S.C. Ex. A. Tr. p.97. When the student schedules were developed,⁴ the principal found that due to unanticipated increased enrollment, there was a "gap" in the available electives and approximately one-hundred (100) students had holes in their schedules that needed to be filled with a course. Tr. pp. 44-46, 54-55.
- This issue was brought to Superintendent Iacovelli's attention. She indicated, essentially, that of the various alternatives, Portfolio Workshop classes should be added to the schedule so that the needs of students would be met and a senior teacher who had been laid off could be recalled. Tr. pp. 45-49, 97-98, 131-132.
- Pursuant to the Superintendent's decision, which was made on or about August 27, 2008, a course in Portfolio Workshop was added to fill the gaps identified in students' schedules, and the Teacher Schedule for the Business and Technology Department was

⁴This occurred in mid-August as well. (Tr. P.48-49).

amended to reflect an additional teacher teaching five (5) sections of this course. S.C. Ex. B. The addition of five sections of Portfolio Workshop did not require adjustments to any of the previously developed schedules for students. It simply filled “holes” in the schedules of those one hundred students who required an additional elective. Tr. pp. 47-49, 96-97; S.C. Ex.B.

- The teacher who was recalled in late August of 2008 to teach the Portfolio Workshop course has the same certification as Mr. Scanlon but greater seniority. Tr. pp. 59-60; 132; S.C. Ex. D.
- Any changes to the master schedule in late August would have required that the entire schedule for students be re-done. pp. 90-96; Reconfiguration of the teacher schedule in late August to replace a business-certified teacher with Mr. Scanlon, even if it were possible to do, would have left the School Department with an extra business teacher for the 2008-2009 school year. Tr. p.83.
- Mr. Scanlon appealed his lay off. After hearing before the members of the School Committee, he received a decision dated October 15, 2008 notifying him that his appeal was denied “due to lack of proper certification.” App. Ex. 4.

Positions of the Parties

Johnston School Committee

Counsel for the School Committee accepts its burden of proving that good and just cause supported the dismissal of this tenured teacher. The position of the School Committee is that it has demonstrated good and just cause as required by the statute. The fact of the matter is that Mr. Scanlon’s position was eliminated and he did not have the proper certification for the remaining positions. Despite the argument made that the notices to him were defective, counsel for the School Committee submits that the Appellant was properly informed that his position was eliminated, resulting in the lack of a position for a teacher with his seniority, given his certification.

At Johnston High School, the schedule of courses and the assignment of teachers to teach those courses is the result of a complex process. Students make course selections based on their academic interests. They are also assigned courses required for them to meet

graduation requirements and courses to which they are entitled because of literacy initiatives or special education needs. A computer software program integrates this data to create a master schedule for all students. Conflicts in the students' schedules are resolved. The objective of this process is to ensure that all students are provided with the courses they need and desire to take. It is student needs that drive staffing decisions at Johnston High School and not vice versa.

When this schedule is broken down by each department at the High School, teacher schedules are constructed by the Principal so that each teacher (except for the department chair)⁵ has five courses to teach, has no more than three class preparations and has both a preparation period and an office assignment period. Schedules are then published to the students and to the teachers. Any subsequent problems in an individual student's schedule are worked out on an individual basis by the school's guidance counselors who make any last minute adjustments to student schedules. The master schedule is not adjusted.

As a result of the number of sections of business and technology courses projected in February of 2008 for the subsequent school year (twenty-three (23) sections, with thirteen (13) of them requiring a teacher certified in business education) Principal Alicia Storey projected that she would need five (5) teachers of business education to fulfill staffing requirements. When she communicated this information to the Superintendent, Mrs. Iacovelli literally went "by the book" to determine who would fill those positions. She selected the most senior teachers holding the necessary certification. Mr. Scanlon received a layoff notice.⁶ The teacher schedule ultimately developed in mid-August showed the schedule for five (5) business-certified teachers and confirmed what had previously been projected, i.e. that none of the positions could be filled by a teacher who was not certified in business education.

When a gap in electives was identified in mid- August, the district recalled a teacher from the lay off list who had more seniority than Mr. Scanlon. Five sections of Portfolio Workshop were added without any other adjustments to the master schedule being required. The district denies that at this point there was an obligation to try to reconfigure the schedule so that Mr. Scanlon could continue to be employed. First, the district at that point already had all six of the teachers it needed to provide twenty-eight sections in business and technology. Secondly, a hypothetical prepared at the time Mr. Scanlon's appeal was heard

⁵ Who teaches three courses per the collective bargaining agreement.

⁶ Counsel for the School Committee characterizes Mr. Scanlon's lay off as a "dismissal" (Tr. p.8). The Superintendent testified that Mr. Scanlon was not "dismissed" but was "laid off" because he has the "expectation of future employment".

by the School Committee (School Committee Exhibit C) showed that if another non-business teacher were utilized, it would cause one of the other teachers to have four (4) class preparations when the collective bargaining agreement sets the limit at three (3). The district submits that any tinkering with the master schedule at that point would be a “nightmare.”

As to the accuracy and clarity of the communications provided to Mr. Scanlon by the School Committee, counsel argues that he was sent an accurate and timely notice in February of 2008 that his position was eliminated. Mr. Scanlon did not have the proper certification for the remaining positions as the schedule was ultimately configured. His lack of proper certification formed the basis for the School Committee’s final decision reached after hearings in September and October. This decision was communicated to Mr. Scanlon in writing on October 15, 2008. Counsel submits that there has been no violation of Mr. Scanlon’s procedural rights.

The Appellant

Several arguments are raised on Mr. Scanlon’s behalf. First, as a tenured teacher Mr. Scanlon had a statutory right to continuing employment absent good and just cause for his dismissal. There is evidently confusion on the part of his employer as to the nature of the action taken against him. Initially the proposal of the Superintendent was that his contract be “non-renewed.” Then he was “laid off” by the School Committee at its February 12, 2008 meeting. For the first time at the hearing in this case, counsel for the School Committee asserted that Mr. Scanlon had been “dismissed.” None of the written communications he received from the School Committee indicated that he had been “dismissed.” Mr. Scanlon, as a tenured teacher, was entitled to receive a “notice of the dismissal” in writing on or before March 1st according to R.I.G.L. 16-3-3.

The reason for the action taken against Mr. Scanlon is similarly unclear. The written notices Mr. Scanlon received contained changing reasons- shifting⁷ references to “uncertainty of funding,” insufficient seniority, and lack of proper certification as reasons for the severance of his employment. The teacher tenure law, as construed in many prior decisions of the Commissioner, requires that a teacher be given a clear and accurate notice of the reason for his or her dismissal. When a district has failed to provide the required notice, the dismissal has been invalidated because of this procedural defect. So should Mr. Scanlon’s dismissal be invalidated.

The Appellant argues that the existence of each and every one of the reasons cited for Mr. Scanlon’s dismissal remains unsupported by the evidence in this case. Funding was

⁷ Mr. Scanlon’s representative describes the School Committee’s use of “multiple choice reasoning” to support its action against him.

never the issue. In fact, funding was sufficient for the employment of six teachers in the Business and Technology Department in 2008-2009. Mr. Scanlon, who was the second most senior teacher in that department, could have been assigned to teach five (5) of the initial ten (10) sections of Computer Applications and Portfolio Workshop that were projected in late February, 2008. In late August with the addition of six sections (for a total of sixteen (16) sections for a teacher with Mr. Scanlon's certification) the district could have recalled both his more senior colleague and Mr. Scanlon. At that time, all that was needed to retain a tenured teacher with Mr. Scanlon's seniority was to "flip" a section of Portfolio Workshop with a section of Computer Applications, thereby resolving the "problem" of four class preparations for one teacher. District officials dismissed this suggestion. Their ongoing claim that staffing decisions were dictated by a student-centered master schedule has not been substantiated. The needs of students were not necessarily inconsistent with the Appellant's rights to job security. Mr. Scanlon argues that his rights as a tenured teacher were simply ignored by district officials as they proceeded to develop the master schedule for the 2008-2009 school year.

In summary, the employment action taken against Mr. Scanlon was not based on good and just cause, nor was he provided with an accurate and truthful reason for the School Committee's action.

DECISION

This is a case of first impression in which a school district seeks to establish that the elimination of a position - caused by the **schedule** of classes - constitutes good and just cause for the dismissal of a tenured teacher. This case must be distinguished from "traditional" cases in which a teacher's position is eliminated by a management decision to eliminate or consolidate programs or reduce course offerings in the area of the teacher's certification based on financial constraints or insufficient student interest. There is no evidence in this case that the number of class sections in the Appellant's area of certification was reduced from the prior school year. No testimony was presented that programs were curtailed or consolidated, requiring fewer teachers in 2008-2009 than had been employed in 2007-2008. In this case, district officials did not make a management decision to eliminate the position for which Mr. Scanlon was certified. Rather, it was the computer-based configuration of the master schedule that required all of the teachers in the Business and Technology Department to hold a business education certificate in school year 2008-2009. To be more precise, it was the Principal's projection in February of 2008 that teachers providing twenty-three (23) sections of coursework in business and technology would have to be certified in business-education. When the actual teacher schedule was developed in mid-August, it confirmed what Principal Alicia Storey had anticipated in late February, i.e. that there would not be a position for which Mr. Scanlon would hold appropriate certification.

The Johnston School Committee has proven by a preponderance of the evidence in this case that both in February, and continuing up through the time of his full hearing before the School Committee in September and October 2008, there was good and just cause for Mr. Scanlon's dismissal.⁸ The complexity of the scheduling process and the requirements that must be met - not just for students but for teachers as well - were described in detail on this record. The process is so complex that the master schedule is constructed with the use of "School Max" scheduling software. After student course requests are inputted, the principal reviews student schedules in detail to make sure that all course requirements will be met. It is only at that point that she moves on to teacher schedules and all that that entails. The district made a compelling and convincing case that the master schedule must control the teacher schedules and that there is no other way that scheduling can be accomplished.

Ms. Storey's mid-February projections were verified as the 2008-2009 school year approached. When she developed the Teacher Schedule in August of 2008 (S.C.Ex.A) all of the five positions projected in the Business and Technology Department did in fact require a business-education certificate. Because Mr. Scanlon was certified to teach only non-business courses in the Business and Technology Department, the circumstances supporting his dismissal that were projected as early as February continued to exist at that time. It continued to be the situation up through the time of Mr. Scanlon's termination hearing before the School Committee on October 14, 2008.⁹

The district's recall of a teacher more senior to Mr. Scanlon in late August to provide an additional elective for students¹⁰ did not require the school department to start its scheduling process anew. Mr. Scanlon has argued that the district should have attempted to re-do the master schedule in late August to create a second non-business position for which he was certified. The School Committee points out correctly that this would have created the nightmare of having to do over the entire master schedule at that time, with no guarantee at the end of the process of creating a second position in the department for which Mr. Scanlon was certified. Even if the district could have created a second non-business certified position by redoing the entire schedule, a business-certified teacher it had retained would then have been left without a position.

⁸ There is absolutely no evidence that Mr. Scanlon's performance is at issue in this case.

⁹ For tenured teachers, the burden of the school committee is to demonstrate that projected "good and just cause" extends beyond the circumstances which existed at the time the dismissal notice was issued. See Nixon et al. v. Cranston School Committee, decision of the Commissioner dated March 28, 1995.

¹⁰ Five (5) sections of Portfolio Workshop

The teacher tenure law does not require a school district to retain a teacher when no position for which he is certified is available in the system.¹¹ We are not persuaded that the teacher tenure law required the Johnston School Department to redo the entire master schedule in late August in an attempt to create a position to which Mr. Scanlon could be recalled at that time. It is undoubtedly very unfortunate that there was no position for which Mr. Scanlon was certified in 2008-2009, but the elimination of his position has not been shown to be arbitrary or in bad faith. The job security he enjoyed as a tenured teacher was not unconditional. Precedent in teacher tenure cases has required reasonable steps to be taken by School Committees to preserve the position of a tenured teacher.¹² The district has sustained its burden of proving that the alternative process the Appellant has suggested for developing the master schedule (or to reconfigure it in late August) was unreasonable, if not impossible. Scheduling around teaching positions would not have ensured that students at Johnston High School received the courses they needed to take. The Johnston School Committee has proven that good and just cause for John Scanlon's dismissal existed because in the 2008-2009 school year, there was no position available for which he was certified at Johnston High School, or for that matter, anywhere in the school system.

In dismissing a tenured teacher, school committees must follow both statutorily-prescribed procedures set forth in Title 16 Chapter 13, and those procedures required by constitutional due process. Mr. Scanlon argues that the notices he received were defective in that they did not notify him that he was being dismissed-rather that the Superintendent intended to recommend that his contract "not be renewed" and that the School Committee had voted to "lay him off." Additionally, there were varied reasons provided to him from the initial statement of reasons provided in the Superintendent's letter of February 4, 2008 to the single reason provided by the School Committee after it heard Mr. Scanlon's appeal- his "lack of proper certification." None of these reasons was clear or accurate, the Appellant has argued.

The actual reason for Mr. Scanlon's lay off was concisely described by counsel for the School Committee in his brief: "...the fact of the matter is that Mr. Scanlon's position was eliminated and he did not have the proper certification for the remaining positions." (pages 6-7 of the School Committee's brief) Counsel goes on to argue that Mr. Scanlon was "properly informed" by the School Committee "that in accordance with R.I.G.L. 16-13-3 that his position was eliminated, resulting in the lack of a position for a teacher with his seniority

¹¹ The seminal case on this point is Lester Long v. Newport School Committee, decision of the Commissioner dated February 27, 1978; affirmed by the Board of Regents on August 24, 1978; affirmed by R.I. Superior Court decision dated December 18, 1979.

¹² See Arnold and Clifford v. Burrillville School Committee, decision of the Commissioner dated July 9, 1982 at page 7.

given his certification.”¹³ Counsel for the School Committee has made a valiant attempt to state more clearly that which had not been clearly expressed in any of the written notices provided to Mr. Scanlon. See Appellants Ex. 2, 3, and 4. Although the first two notices identify the anticipated “lack of a position” as the basis for his nonrenewal/layoff,¹⁴ the School Committee, after its evidentiary hearing, does not even mention this fact.¹⁵ The Committee’s post-hearing notice of October 15, 2008 references only Mr. Scanlon’s “lack of proper certification.” The October 15, 2008 letter (App. Ex.4) does not indicate whether the Committee found that Mr. Scanlon’s position had been justifiably eliminated or that it knew that this had resulted from the teacher schedule that had been created for 2008-2009. The decision doesn’t even indicate whether the Committee concluded that there was “good and just cause” for the dismissal of Mr. Scanlon, a senior tenured teacher in its school system.¹⁶ Considering that Mr. Scanlon had been notified of the “non-renewal” of his contract and his “lay off,” not his “dismissal,” it is unclear whether the School Committee knew that it was in fact dismissing Mr. Scanlon and that such action required good and just cause.

An appropriate remedy for the procedural defects identified above is not clearly dictated by the record in this case. The suggestion on the record is that despite the lack of clarity of the notices, Mr. Scanlon was aware of the accurate reason his position had been eliminated and that he had opportunity to address this reason at his evidentiary hearing before the Johnston School Committee. References are made in this record of the preparation of S.C. Ex. C, a “theoretical” alternative teacher schedule that was prepared for use at the time of his hearing before the School Committee. The inference we draw from this is that despite the procedural deficiencies, Mr. Scanlon had a fair opportunity at that time to make his case before the committee that his position should have been retained.

We have consistently declined to invalidate a teacher’s dismissal because of defects in procedure when good and just cause has been established. Although some early precedent in teacher tenure cases overturned the dismissal upon proof of defective notice/procedures, the more recent and we believe the better rule on procedural violations, both statutory and

¹³ the essential fact was probably closer to: the lack of a position for a teacher with his **certification**, given his seniority. Mr. Scanlon’s seniority had been a factor in the recall process undertaken by the district in late August.

¹⁴ Because of “uncertainty in funding levels.”

¹⁵ Shifting of reasons has been found to be problematic in cases on compliance with the teacher tenure law. See Nixon et al. v. Cranston School Committee, decision of the Commissioner dated March 28, 1995 at pages 9-11; Germani et al. v. Providence School Committee, decision of the Commissioner dated March 30, 1984 at pages 7-8.

¹⁶ The Commissioner has found that due process and Guidelines of the Board of Regents (January 9, 1975) require that a school committee provide the tenured teacher with “a written decision, based exclusively on the record detailing the reasons and factual basis” for the teacher’s dismissal. Desrochers v. School Committee of the Town of Johnston, decision of the Commissioner dated January 27, 1976; Hobson v. South Kingstown School Committee, decision of the Commissioner dated April 4, 1988; Richardson v. Providence School Board, decision of the Commissioner dated May 25, 2005; aff’d Board of Regents December 14, 2006; Farias v. Providence School Board, decision of the Commissioner dated November 22, 2006; aff’d Board of Regents September 27, 2007;

constitutional, is ensuring that the required procedures are furnished without delay. The Commissioner has awarded nominal damages for violations of due process, when the underlying termination is supported.¹⁷ A de novo hearing at the Commissioner's level has also been viewed as providing an adequate remedy for procedural violations.¹⁸ However the Board of Regents has indicated that it is not prepared to adopt the theory that any and all failures to follow the required procedures are cured by de novo hearing at the Commissioner's level.¹⁹ We therefore direct the parties to confer to attempt to agree upon an appropriate remedy for the procedural defects that accompanied Mr. Scanlon's dismissal. After sixty (60) days if the parties have been unable to agree on a remedy, we will reconvene the hearing on this issue.

The appeal of Mr. Scanlon is sustained as to procedural violations only.

Kathleen S. Murray

APPROVED:

Peter McWalters, Commissioner

Date

¹⁷ Dana Reed Simmons v. Tiverton School Committee, decision on remand, March 4, 1986

¹⁸ Richardson v. Providence School Board, supra.

¹⁹ Farias v. Providence School Board, decision of the Board of Regents dated September 27, 2007