0021-09

State of Rhode Island
And Providence Plantations

Commissioner of
Education

Bernard McCrink

V.

Providence School Board

DECISION

Held: The Providence School Board established good and just cause for its September 28, 2006 termination of Mr. McCrink in that he failed to leave written material for a substitute on May 16, 2006 and failed to call or report his absence from school on that date. The Appellant has a prior disciplinary history consisting of a three-day suspension for repeated failures (over a four year period) to leave written material for substitutes, a letter of reprimand for using the word "nigger" in class and had received a "final written warning" on July 1, 2005 notifying him that he would face further disciplinary action "up to and including termination" for any subsequent failure to leave material for substitute teachers when he was absent.

Date: October 20, 2009

Travel of the Case:

Bernard McCrink, a former tenured teacher in the Providence School Department, appealed his termination to the Commissioner, following the written decision of the School Board on June 21, 2007 upholding his prior dismissal on September 28, 2006. His June 25, 2007 appeal to then-Commissioner Peter McWalters was assigned to the undersigned for hearing and decision. The hearing officer wrote to the parties to acknowledge receipt of the appeal on June 26, 2007, requesting an agreed-upon hearing date. The hearing officer wrote again on September 20, 2007 and December 3, 2007 requesting that counsel agree upon a date for hearing. On February 5, 2008 the hearing officer notified counsel that the matter would be scheduled for hearing on March 11, 2008 unless they had a conflict. This date was then confirmed and the matter was heard on March 11, 28, July 16, November 24 and December 1, 2008 and February 5, 2009. Extensive testimony and documentary evidence were submitted by both parties. The record in this matter closed upon receipt of the legal memoranda submitted by counsel on May 14, 2009.

Jurisdiction for the Commissioner to decide this dispute arises under R.I.G.L. 16-13-4 since Mr. McCrink was a tenured teacher in the school system.

ISSUES

- Did the Providence School Board comply with the notice requirements of the teacher tenure law in terminating Mr. McCrink?

- Did the School Board have "good and just cause" to dismiss Mr. McCrink, a tenured teacher assigned to teach Mathematics at Mount Pleasant High School?

Findings of Relevant Facts:

- Bernard McCrink taught Algebra II to juniors and seniors at Mount Pleasant High School during the 2005-2006 school year. Tr.Vol. III p. 64. He had been teaching Mathematics in the Providence school system since 1990, assuming a full-time position at Mount Pleasant in January of 1993. Tr. p. 63.; He taught there from January of 1993 until January of 1995[1]. The Appellant returned to his teaching position at Mount Pleasant in September of 1997 where he remained until May 18, 2006 when he was placed on a

[1] From January of 1995 until September of 1997 Mr. McCrink was on a paid suspension, a fact that is relevant to this case only in that he was not teaching during this period of time.

paid suspension prior to being terminated by the Providence School Board on September 25, 2006. PSB Ex. 1 and 3, pp. 23-24; Joint Ex. B.

- In June of 2002 Mr. McCrink received a ten-day disciplinary suspension from the Providence School Board for conduct which included his failure to leave written material for substitutes when he was absent. This conducted had persisted for over four (4) years despite being brought to his attention through a series of written memos from his principal and Human Resources administrators. There had also been numerous attempts to counsel him to induce him to provide written material for substitutes. PSB Ex.3.

- On May 19, 2004 Mr. McCrink's ten (10) day suspension was reduced to three (3) days in a binding arbitration decision. The arbitrator concluded that over almost a five-year period of time[2] Mr. McCrink persistently left either no work or inadequate work for substitutes. The arbitrator found that Mr. McCrink's conduct was a violation of a clear and simple rule set forth in the collective bargaining agreement and a plain breach of Mr. McCrink's responsibility to his students to provide an adequate assignment when he was sick. The arbitrator also ruled that Mr. McCrink inappropriately used the word "nigger" in his classroom and that this should not be an additional basis for his suspension but rather a letter of reprimand. PSB Ex. 3.

- Mr. McCrink was disciplined again for failure to leave material for a substitute when he was absent on May 6, 2005. He received a "Final Written Warning" for this conduct dated July 1, 2005 from Dennis Sidoti, Employee Relations Administrator of the Providence School Department, notifying him that, should he continue to neglect this responsibility, he would face further disciplinary action "up to and including termination." PSB Ex. 2; Tr. Vol. I pp. 45-48.

- On May 16, 2006 Mr. McCrink was absent from school, failed to call to indicate he would be absent,[3] failed to leave written material for a substitute

[2] September 30, 1997- December 4, 2001

[3] Mr. McCrink testified that he woke up too late on the morning of May 16, 2006 to call the automated system number (AESOP) so he instead called Mount Pleasant High School to report his absence. The Appellant also testified that he had received the memorandum with the two Human Resources telephone numbers that teachers were directed to use to report all absences after 6:30 a.m. and that these numbers were available to him on the morning of May 16, 2006. Tr. Vol. IV pp. 41-42; Vol. III p. 96. He had utilized the automated absence system or called Human Resources to report his absences (sick days) on forty-five previous occasions that year. Tr. Vol. I p. 36; PSB Ex. 1. The automated system is used by employees of the Providence School Department to log in personal and sick days up to 6:30 a.m. on the morning of an absence. When an absence is logged in by a teacher prior to 6:30 a.m., the system automatically makes contact with a substitute. After 6:30 a.m. absences are reported by calling one of two telephone numbers in

teacher and did not call in or email an assignment for his students to complete that day. PSB. Ex. 1; Tr.Vol. I pp. 40-41, 77, 113; App. Ex. G and T.

- On May 17, 2006 Mr. McCrink utilized the automated system to report a personal day and emailed Ms. Crisafulli, evidently at 6:03 a.m., providing her with an assignment for his students to complete in class. PSB. Ex.1; Tr. Vol.I p. 113.[4] App. Ex.G.

- The Collective Bargaining Agreement in effect between the Providence School Board and the Providence Teachers Union has, consistently over the years Mr. McCrink has been employed as a teacher, required that:

  all teachers are to leave enough written information for substitute teachers[5] so they can proceed with the subject matter from the point where the teachers left off. When the teacher knows of the absence before leaving the previous school day, the essential information shall be left with the principal for the substitute. When the absence is unexpected, the teacher shall call in the necessary information before classes begin except for obviating circumstances. ("8-23 Lesson Plans"). Joint Ex. D.

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the Human Resources office, speaking directly to a clerk who then makes arrangements for a substitute. Tr. Vol.I pp. 30-33. If a school reports that a teacher has been absent, and the teacher has not utilized the automated system or called Human Resources at either of the two numbers to report his or her absence, the absence is classified "No Call/No Pay." Tr. Vol. I pp. 40-41.

Mr. McCrink testified that he gave an assignment for students in his classes to complete on May 16, 2006 over the telephone to the same clerk to whom he reported his absence when he called Mount Pleasant High School that morning. He also testified that on each and every prior occasion (45 days) when he was out sick that year, he had emailed an assignment for students directly to his principal, Maureen Crisafulli because of "some discrepancies" in the past in getting assignments to where they were supposed to be. Tr. Vol. III p. 97; App. Ex. T.

[4] Ms. Crisafulli testified that although she had received emailed assignments for students from Mr. McCrink "on most occasions" when he was absent, she did not recognize specific emails that the Appellant had sent her. Tr. Vol.I p. 91. She testified that she did not receive an email from the Appellant on May 17, 2006. Tr. Vol .I p.78 and had a specific recollection that she never received an email from the email address bem401@aim.com. Tr.Vol. I pp.109-110. Later in her testimony she stated that she did not recall receiving an email from the Appellant on May 17, 2006. Tr. Vol. I pp. 141-142. She did not recognize the copy of an email to her dated May 17, 2006 that Mr. McCrink produced at the hearing (App. Ex.G.) and stated that she did not recognize the email address of "bem401@aim.com". Although Ms. Crisafulli testified that when she received emailed assignments from Mr. McCrink, she would print them out for the substitute and make a contemporaneous record of receiving them, the record to which she referred was not offered into evidence. She further testified that she wrote a memorandum to Human Resources documenting his failure to provide lesson plans on the 16th and 17th of May, but the memorandum was not produced.

[5] The interpretation made of this language by both the Appellant and school administrators was that an absent teacher must leave a meaningful assignment for students to complete during the class period. See Tr. Vol. I p.77. PSB Ex. 3 p. 4.

- During the 2005-2006 school year Principal Maureen Crisafulli and Mr. McCrink had established email as the method by which he would provide her with written material for substitutes when he was absent. Tr. Vol. I pp. 89-90; Vol. III p.97. App. Ex.T.

POSITIONS OF THE PARTIES

Providence School Board

Counsel for the School Board submits that there are five grounds for Bernard McCrink's termination which, standing individually or taken collectively, constitute good and just cause as required under the teacher tenure law. They are:

(1) his failure to report his absence on May 16, 2006 and leave a lesson plan for the substitute;
(2) his failure to leave a lesson plan when absent on May 17, 2006
(3) his failure to adequately supervise computer use in his classroom
(4) inappropriate discussions with students involving exotic dancing
(5) his solicitation of bribes from students in exchange for grades.

Considering the above items of cause in the context of Mr. McCrink's disciplinary history (a three (3)-day suspension for failure to leave lesson plans in 2002 and a July 2005 final warning letter for the same conduct) the Providence School Board had, and has established in evidence before the Commissioner, good and sufficient cause for the action it took on September 25, 2006.

The School Board submits that it has proven each of the above-listed items of cause by a preponderance of the evidence, the standard applicable in teacher-termination hearings. With respect to May 16, 2006 the Appellant has admitted that he failed to report his absence utilizing the AESOP system or by telephoning the Human Resources office. His implicit claim that an unexpected illness resulted in his inability to follow the required process and/or that he was unaware of the required process for reporting absences is "disingenuous" He was eminently familiar with the process for reporting absences and admitted that he had access to the Human Resources telephone number at home. Although he had practice of emailing lesson plans to Ms. Crisafulli when he was absent, he indisputably did not do so on May 16, 2006.

As for his absence on May 17, 2006 again there was no lesson plan provided. The Appellant's contention that he emailed a lesson plan in an email to Ms. Crisafulli on this date (Appellant's Ex. G.) is disputed, despite the production of the email claimed to have been sent. The email submitted into evidence was

sent from a different email address from that previously used by Mr. McCrink, in that the domain name had changed from "aol.com" to "aim.com." Mr. McCrink had not informed Ms. Crisafulli of this change and the email she had received from him just five (5) days earlier had the "aol.com" domain name. Ms. Crisafulli testified that she did not recognize the email to her dated May 17, 2006 and was certain she had not received it because she was careful to record these emails given the "history" with respect to disputed lesson plans.

The charge that Mr. McCrink failed to provide adequate supervision of computer use in his classroom, with the result that a student accessed pornography during his Algebra II class, has been substantiated by the evidence. The School Board produced the student who had previously corroborated this finding[6]. Although the student proceeded to testify that when he viewed pornography in Mr. McCrink's classroom it was when Mr. McCrink was not in the classroom or was absent, his prior testimony to the contrary was read into the record. He had answered "Yeah" in response to the question of whether he had ever "searched porn" when Mr. McCrink was in the room when he testified before the Providence School Board on May 29, 2007[7]. The School Board points to additional evidence of access to pornographic images by an unidentified student or students. An expert's analysis of the hard disk from the computer in the Appellant's classroom indicates that pornography was accessed under Mr. McCrink's computer account on three separate dates. Although it does not contend that Mr. McCrink was the user of the computer on these occasions[8] the district argues that this evidence substantiates the charge that he failed to provide adequate supervision of students in his classroom.

With respect to the charge that the Appellant repeatedly engaged in inappropriate conversations and contacts with students, the School Board argued that even though one of its student witnesses had relocated and was unavailable to testify, there was nonetheless sufficient testimony from others, even from Mr. McCrink himself, to support its contention that he had discussed exotic dancers with various students in different classes. The student who had "searched porn" testified that Mr. McCrink would tell "funny stories" involving a friend of his who had been "in the porn business" at one time. Two other student witnesses, called by the Appellant, verified that discussions of exotic dancing had taken place in two different classes, when Mr. McCrink cautioned students that exotic dancing was not a good career choice. Even if it were in such context, counsel for the district submits that such discussions were clearly inappropriate in the classroom.

[6] Item Number 3 in the June 21, 2007 written decision of the Providence School Board
[7] He had also testified before the Board on that date that he did this activity at lunch time. Vol. I. p. 27.
[8] Although in its initial notice on September 19, 2006 it did so charge Mr. McCrink. See Joint Ex.A.

Although there was no evidence that Mr. McCrink actually solicited bribes from students in return for passing grades or excuses from class, the district argues that there is evidence that he would "joke" with students about doing so. The Appellant testified that he would joke with students that they would need a lot of money in order to pay for a passing grade unless they "got their act together" and stopped "goofing up." One of the student witnesses called by the Appellant also indicated that Mr. McCrink would make jokes along these same lines. Counsel for the School Board argues that these jokes were characteristic of Mr. McCrink's inappropriate "laid back" teaching style.

As to claims that the School Board failed to provide Mr. McCrink with notice by March 1st of its intent to dismiss him, effective the subsequent (2006-2007) school year, the district responds that it was impossible to provide such a notice since the conduct that precipitated the Appellant's termination occurred after March 1, 2006. If this is a requirement in all terminations of tenured teachers, then it could have the illogical effect of permitting a teacher who commits serious misconduct early in the school year[9] to avoid discipline until after a March 1st notice is given for a dismissal to take effect in the ensuing school year.[10] The School Board argues that if it did not comply with a statutory notice requirement in dismissing Mr. McCrink, then the appropriate remedy would be back pay for the affected academic year.[11]

In response to the argument that Mr. McCrink was terminated prior to an evidentiary hearing before the full Board and that this full evidentiary hearing was unduly delayed from September 25, 2006 to May 29, 2007, some eight (8) months later, counsel submits that a fair reading of the statute (R.I.G.L. 16-13-4) provides for a post-termination hearing, not a pre-termination hearing. It is only after the dismissal has occurred and the teacher has been provided with a written statement of cause, that the affected teacher can then request a hearing before the full Board. In Providence, it is required that a quorum of the School Board vote to dismiss a tenured teacher and this is why the Providence School Board was required to consider and vote on Mr. McCrink's dismissal on September 25, 2006. There was no undue delay between that action and the full evidentiary hearing provided to Mr. McCrink on May 29, 2007. The hearing was followed immediately by the unanimous vote of the full School Board to uphold its previous decision to

[9] The example given by counsel is a teacher who walks into a classroom on the first day of school and threatens students with physical violence to remain employed by a district for the remainder of that academic year.

[10] Implicit in this argument is that such an illogical interpretation of R.I.G.L. 16-13-3 should be avoided in this case.

[11] The Board cites Quattrucci v. R.I. Board of Regents, WL 1628824 (R.I. Super. May 30, 2006)

terminate Mr. McCrink. In any event, the record does not attribute the delay to the actions of the School Board and there is no evidence that any prejudice to the Appellant resulted.

Based on the evidence presented and the arguments advanced, counsel for the School Board argues that the Commissioner must uphold Mr. McCrink's termination.

Bernard McCrink

From the outset, the School Board's dismissal of Mr. McCrink was beset by procedural flaws which render his termination for the 2006-2007 school year ineffective, argues his attorney. According to R.I.G.L. 16-13-3 (a) a tenured teacher is entitled to a notice of dismissal, in writing, on or before March 1st of the school year immediately preceding the school year in which the dismissal is to become effective. This section of the teacher tenure law also requires that the teacher receive a complete statement of the cause(s) for dismissal by the governing body of the school. Pursuant to R.I.G.L. 16-13-4(a) the statement of cause for dismissal must be given to the teacher, in writing, by the governing body of the schools at least one month prior to the close of the school year. Within fifteen (15) days of the notification the teacher may request a hearing before the full board.

A fair reading of these two statutes, taken together, would have required that Mr. McCrink receive both a March 1st notice and a full evidentiary hearing before his pay and benefits could be terminated for school year 2006-2007. Instead, his first notice that he had been officially terminated was the letter from the Providence School Board dated September 28, 2006 (Joint Ex. B), so clearly his dismissal could not take effect in the 2006-2007 school year. In addition the Appellant argues that within fifteen (15) days of the September 28, 2006 notice, the Board was required to provide him with an evidentiary hearing before the full Board. It was not until some eight (8) months later, on May 29, 2007, that he finally received an evidentiary hearing and not until June 21, 2007 that he received the Board's written decision in his case. Given these procedural deficiencies, even if the Board is successful in establishing that there was just cause for his dismissal, it could not take effect until the subsequent school year, i.e. 2007-2008. Pursuant to the legal principles established in the Quattrucci case[12] failure to comply with the statutory notice requirement entitles a dismissed teacher to back pay for the entirety of the year for which the dismissal is rendered

[12] Quattrucci v. R.I. Board of Regents, No. PC 04-0767, 2006 R.I. Super LEXIS 69 (R.I.Super. May 30, 2006).

ineffective. Thus at the very least, the Appellant submits, he is entitled to back pay plus interest for the 2006-2007 school year.

The allegations of good and just cause advanced by the School Board are not supported by the evidence in this case. Just cause requires the presentation of substantial grounds, supported by legally sufficient evidence, to justify the disciplinary action taken. In Mr. McCrink's case, the Board has fallen short on its burden with respect to each of the five grounds advanced in support of his termination.

There was absolutely no evidence whatsoever presented to support the contention that Mr. McCrink had solicited bribes and favors from students in exchange for passing grades or excusals from class. The specifics of this allegation had not previously been incorporated in the notices provided to Mr. McCrink and, at the hearing, this allegation remained unsubstantiated.

Mr. McCrink's alleged failure to provide adequate classroom supervision such that students in his class accessed pornography on the classroom computer, was an allegation that surfaced only after he was placed on paid administrative leave on May 18, 2006, when the hard disc of his classroom computer was removed for forensic analysis. The School Board's computer forensics expert was given a directive to inspect the computer's hard disc and locate pornographic activity during the times that Mr. McCrink was teaching in his classroom. He was able to identify only one student who had accessed pornography, and although he concluded that the student had accessed pornographic material during Mr. McCrink's fourth-period class, this was the result of a mistake he made in calculating the time. The expert retained by the Appellant, whose credentials and methodology are argued to be far superior to those of the Board's expert, concluded that the time analysis was off by one (1) hour. As a result, the times during which the student accessed pornographic material was after Mr. McCrink's class had ended and during lunch, when the Appellant had testified without contradiction that he had left the room and consistent with the Student's testimony that Mr. McCrink was not in the room when he engaged in this activity.

Counsel submits that evidence of three other occasions on which pornography was accessed on the computer in Mr. McCrink's classroom[13] is irrelevant to the charge against him - even though there is evidence that the

[13] Contained in PSB Ex. 8 and 9.

computer was logged on to the McCrink account at the time.[14] Even if this evidence is considered relevant, it is not indicative of any lapse in student supervision by the Appellant. The expert who conducted a thorough analysis of all of the images appearing on the School Board's exhibits, found that on one of the three dates on which pornography was alleged to be accessed by an unidentified student, May 9, 2006, there was no pornography at all, but rather a "pop up" for a dating service.

Evidence of inappropriate use of the computer on two other dates (May 5th and May 15th) was very limited and, although it was during times when Mr. McCrink was teaching Algebra to his students, the evidence in this case is that frequently students from the classroom across the hall, a computer business class, came into Mr. McCrink's room to use the computer because the printer in their classroom often did not work. This fact was verified by Mr. McCrink, the computer teacher who sent his students across the hall to use the computer in Mr. McCrink's classroom and two students who testified. Implicitly, the Appellant argues that he cannot be faulted for inadequate supervision for such limited inappropriate computer use on a total of only two occasions, especially given the fact that while he was engaged in teaching his class, numerous other students entered his classroom to use the computer because there was no other working computer or printer available to them.

Mr. McCrink submits that contrary to the assertion that he did not report his absence or provide a lesson plan on May 16, 2006, he did in fact do both. Although the Appellant concedes that he had a practice of emailing lesson plans established over the numerous days he was absent in school year 2005-2006 up to May 16, 2006[15] he submits that on the morning of May 16th because he had awakened late after sleeping through the symptoms caused by a heart ailment and medication it required him to take, he telephoned Mount Pleasant High School directly with the information that he would be absent and gave an assignment for students to complete that day. Because Ms. Crisafulli was not available, he left his telephone message with a clerk. Counsel for Mr. McCrink argues that Section 8-23 of the Collective Bargaining Agreement permits teachers who have an

[14] We infer that counsel is referring to the mention of only a single student in the June 21, 2007 decision of the School Board (Joint Ex. C) in its discussion of inadequate supervision in paragraph number 3. The memorandum of the Appellant also contains an argument rebutting an allegation that Mr. McCrink himself used the computer to access pornographic material. There was no claim at the Commissioner's level that Mr. McCrink used the computer in his classroom to access pornography. Although this was an initial charge in the School Board's pre-termination letter of September 19, 2006 (paragraph number 4), this allegation evolved into a factual finding that a single student had accessed pornography during his class (see paragraph number 3, decision of the School Board June 21, 2007 (Joint Ex. C).

[15] The practice was established so that he could document the fact that he was leaving material for substitutes with the principal, given his prior problems with the administration on this precise issue.

unanticipated absence to call in the necessary information with respect to lesson plans before classes begin, except for obviating circumstances. In this case, Mr. McCrink experienced symptoms of increasing concern starting in school on the afternoon of May 15, 2006. Both the Principal and school nurse responded to Mr. McCrink's class at that time. Mr. McCrink went home to rest and slept on and off, awakening at approximately 9:00 a.m. Clearly, his counsel argues, he was not in a medical condition to report to work that day and he justifiably missed the call-in deadline as well as the requirement that a telephoned lesson plan be provided to the Principal prior to the beginning of classes. The Appellant submits that Ms. Crisafulli never bothered to find out if Mr. McCrink had called the school that day, and that she simply checked to see if he had adhered to "formal protocols" because of her negative attitude toward him.

On the second successive day on which it is alleged that Mr. McCrink failed to provide written material for a substitute, May 17, 2006 he argues that there is unrebutted evidence that he emailed a lesson plan to Maureen Crisafulli at 6:09 a.m. on the morning of the 17th. The email speaks for itself, in that it indicates that it was from Mr. McCrink, to Maureen Crisafulli, and it contained a specific assignment for students to complete that day. This same email was forwarded to the head of the Providence Teachers Union on the following day, May 18, 2006 when the administration contended that he failed to leave a lesson plan on both May 16th and May 17th.[16] Mr. McCrink explained that the email was from a different email address than that which he had previously used, but it was his email account nonetheless. Although the Board reserved the right to recall Ms. Crisafulli to rebut evidence that this email was sent to her on May 17, 2006 it did not do so. Further, the Appellant points out, her prior testimony that she had not seen the email (App.Ex.G.) and was certain she had not received it came amidst her disclaimers of familiarity with any of the specific emails from Mr. McCrink that were generated during that year. The Board also could have rebutted this evidence through further testimony from its computer expert, but this did not occur. The "bottom line" is that Mr. McCrink has established that he emailed an acceptable lesson plan, a specific assignment for his students to complete in the early morning on May 17, 2006 and the charge that he did not remains unsupported.

The School Board's contention that he "engaged in repeated inappropriate conversations and contacts with students" is similarly without evidentiary support

[16] The Appellant argues that the email on the 17th supports his claim that he did in fact call to report his absence and provide an assignment on the prior morning because it states "I apologize for yesterday's confusion but my health seems to be getting the better of me at the moment." He submits that the apology was for the tardy telephone call, not for the absence of any notice at all.

in this record. There is no testimony whatsoever that he encouraged students to view a picture of a "porn star" or that he permitted students reviewing a computer image to comment on a woman's breasts. None of the students called to testify supported such assertions, and the only student witness called by the School Board[17] denied ever discussing porn with Mr. McCrink and had not viewed a picture of a so-called "porn star". However, counsel points out, Mr. McCrink and two students did testify that when the subject of exotic dancing came up, it was raised by a student or students, and Mr. McCrink merely discouraged the notion of getting involved in such activity. One of the students testified that the Appellant coupled his remarks with statements emphasizing the importance of finishing high school. The Board has failed to substantiate these allegations, again seriously undermining its position that there was good and just cause to terminate Mr. McCrink.

Finally, the manner in which the Principal and the School Board initiated and conducted its investigation against Mr. McCrink violated his due process and is fraught with bias and inconsistencies. The Board initially lodged five (5) allegations against Mr. McCrink which, with the exception of the failure to report his absence and leave a lesson plan on May 16, 2006, were squarely false and unsupported by evidence. Implicit is the argument that the invalidity of the five allegations made on September 19, 2006 (contained in the Board's pre-termination notice) resulted in factual findings by the Board (in its June 21, 2007 post-termination decision) which varied substantially from those initial allegations. Arguably, the only factual issue in true contention at this point, based on the evidence heard at this level, is whether or not Mr. McCrink placed a phone call on May16, 2006 to both report his absence and provide a verbal lesson plan. Given the history of "trumped up" allegations against Mr. McCrink and the fact that he is the more credible witness, his testimony on this point should be accepted. Clearly, Ms. Crisafulli had an agenda and it was to terminate him from the district's employ. Just as she denied that she had any responsibility to check with a clerk in the office at Mount Pleasant to determine if Mr. McCrink had called on the morning of May 16, 2006, she contended that Mr. McCrink had received prior discipline for unauthorized use of the computer, when he had not. Mr. McCrink's testimony on the important factual issue of whether he called the school on May 16th must be accepted, in light of all of these factors.

In the event that the hearing officer should find that Mr. McCrink failed to report his absence on May 16, 2006 or leave lesson plans, consideration should be given to his service with the Providence School Department. Mr. McCrink has

[17] The same student who testified that Mr. McCrink was not in the room when he "searched porn" on the classroom computer

participated in numerous extra-curricular programs, was considered a good teacher by the students who testified on his behalf, and actively supported students interested in learning how to play golf, teaching them how to play and arranging for students to caddy at various golf courses. He mentored one student in particular who developed her talent as a golfer to the point that she earned scholarships and state championships.

Despite Mr. McCrink's prior three (3) day suspension for failing to leave lesson plans, termination under the circumstances in this case would be excessively harsh. The May 19, 2004 decision of the arbitrator factored what he perceived as a five (5) year history of documented issues regarding the administration's attempt to remedy a failure to leave lesson plans or leaving incomplete lesson plans. The current incident of May 16, 2006 is drastically different in that Mr. McCrink had a serious medical condition and symptoms which support the notion that obviating circumstances existed. He did call the school later in the morning that day. Termination under the circumstances is unwarranted.

For the foregoing reasons, the School Board's decision to terminate him should be reversed and Mr. McCrink should be reinstated to his teaching position with back pay and further relief as appropriate.

DECISION

As indicated in our Findings of Relevant Facts, the School Board has proven that on May 16, 2006 Mr. McCrink failed to report his absence or provide written materials for a substitute teacher. The Board did not meet its burden of proving by a preponderance of the evidence the other grounds on which it had sustained Mr. McCrink's dismissal. See Joint Ex. C. It is our conclusion that Mr. McCrink's conduct on May 16, 2006 is adequate good and just cause, standing alone, to dismiss him- for several reasons. The first is that his conduct disrupted the educational environment at Mount Pleasant High School and deprived all of his students of meaningful instructional time. The responsibility of a teacher to provide written material for substitutes is so important that it is the subject of a provision of Providence's Collective Bargaining Agreement with its teachers union, explicitly described in Section 8-23 ("Lesson Plans"). Especially in a situation in which the teacher's health resulted in numerous absences[18] during the school year, this responsibility takes on heightened importance to students who needed to receive adequate instruction in core subjects such as Mathematics.

[18] Mr. McCrink had been absent forty-five (45) days prior to May 16, 2006. The School Board does not dispute the legitimacy of Mr. McCrink's use of sick leave in this case.

More importantly, the evidence here demonstrates that Mr. McCrink has refused to accept this important responsibility, having persisted in his failure to comply with this provision of the contract over a period of years, despite many requests by school administrators, his receipt of counseling as to why this is so important, the imposition of a disciplinary suspension[19] and his receipt of a "Final Written Warning" for this same conduct on July 1, 2005. Stated another way, conduct described by Arbitrator Michael C. Ryan on May 19, 2004 as "eminently correctable"[20] has proven to be irremediable, to the detriment of Providence students. His failure to call to report his anticipated absence on May 16, 2006 so that a substitute could be secured for his classes and his students adequately supervised is a basic responsibility that Mr. McCrink also neglected on that same day.

His conduct on May 16, 2006 was not excused by "obviating circumstances." Despite the valiant attempt to establish that Mr. McCrink's medical condition prevented him from following the required protocol of calling one of two telephone numbers for the Human Resources Office to report his absence and from following the established practice of emailing his Principal with an assignment that day, his explanation was implausible. In light of the numerous times Mr. McCrink had followed the required protocol that year for reporting his absences and communicated assignments in a mode so that he could document compliance if challenged, his assertion that he chose to communicate that day by telephone is implausible. Mr. McCrink's testimony that he in fact called the office of Mount Pleasant High School and left a message with a clerk there was simply not credible.[21]

To those who would argue that Mr. McCrink should have been given one more opportunity by the School Board to conform his conduct to the expectations with respect to providing written material for substitutes when he was absent- one last warning- the record in this case is that it did so. Following the May 19, 2004 arbitration decision citing him for a persistent pattern of neglecting this responsibility over a period of years, Mr. McCrink subsequently, on May 6, 2005, was absent and again failed to provide materials for the substitute. There is no evidence that on this occasion there was any justification or excuse offered for his

[19] Imposed by an arbitrator who found that Mr. McCrink had persistently failed to provide material for substitutes during a period of almost five years.
[20] See PSB Ex. 3 at pp. 46-47.
[21] It was the documentation Mr. McCrink produced (Appellant's Ex. G) that established he had provided written material for the substitute for his absence on the following day, May 17, 2006. The School Board did not rebut the inference that the email containing the requisite assignment had been received by Ms. Crisafulli on that date.

neglect of this professional responsibility. In response, his employer did not seek to terminate him at that time, but rather issued him a "Final Written Warning" dated July 1, 2005. Providence's Human Resources administrator testified that he also tried to counsel Mr. McCrink with respect to the importance of lesson plans and the need for him to comply with this requirement. The School Board has demonstrated on this record that it made extraordinary efforts in the way of progressive discipline of Mr. McCrink, without success.

The "good and just cause" for Mr. McCrink's dismissal did not arise until May 16, 2006, well after the March 1st deadline for notice as provided in R.I.G.L. 16-13-3. The interpretation we must give to the teacher tenure act, read in conjunction with R.I.G.L. 16-12-6 "Dismissal of teachers – Special rules as to Woonsocket and Cumberland" is to read these statutes in pari materia. In construing these two applicable laws the Commissioner must also avoid an absurd result. As the School Board points out in its memorandum, such would be the case if a district were required to retain (or at least continue to pay) a teacher dismissed for serious misconduct for the entire ensuing school year because of a March 1st notice requirement. To avoid such absurd result, and to rule consistently with the decision of the Commissioner in the case of Quattrucci v. East Providence School Committee,[22] we interpret the March 1st notice as inapplicable to those cases in which the tenured teacher is being dismissed for misconduct which justifies immediate termination of his or her otherwise-continuous service. Thus, the School Board's September 25, 2006 termination of Mr. McCrink was effective as of that date.

For the foregoing reasons, the appeal is denied and dismissed, and the decision of the Providence School Board is sustained.

For the Commissioner:

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Kathleen S. Murray

APPROVED:

_____ October 20, 2009
Deborah A. Gist, Commissioner Date

[22] Decision of the Commissioner dated October 28, 2002.