

State of Rhode Island
And
Providence Plantations

Commissioner Of
Education

Gabrielle Hart

v.

Newport School Committee

DECISION

Held: Ms. Hart's nonrenewal was based on a valid reason i.e. the district's desire to find a better teacher. She has not sustained the burden of proof that must be met by a non-tenured teacher who is non-renewed for this reason in that she has not proven that the School Committee could not find a better-qualified teacher for the position she held. In fact, the evidence showed that Ms. Hart's evaluations during her probationary period included evaluations by two principals who found her performance to be merely "Acceptable".

DATE: November 6, 2009

Travel of the Case

On December 19, 2007 the Appellant, Gabrielle Hart, through her counsel filed an appeal with the Commissioner of Elementary and Secondary Education. She sought a reversal of the decision of the Newport School Committee in which it upheld its non-renewal of her contract of employment after three years of teaching. The Appellant's appeal sought the Commissioner's de novo review of a decision alleged to be an arbitrary abuse of the discretionary power of the School Committee, and one which was based, in part, on an evaluation that did not conform to procedures required by the collective bargaining agreement. As such, the Committee's decision was alleged to deny her due process.

The appeal was assigned to the undersigned hearing officer for hearing and decision on December 31, 2007 at which time the appeal was formally acknowledged. Hearing was initially set for February 28, 2008, but deferred because of the unavailability of one of the Appellant's witnesses. The matter was further deferred thereafter by agreement of the parties because the Appellant's attorney sought an opinion from the Rhode Island Ethics Commission as to whether there was a conflict between his representation of the Appellant and his service as a Special Education Due Process Hearing Officer for the Rhode Island Department of Elementary and Secondary Education. The July 31, 2008 ruling of the Ethics Commission cleared the way for the Appellant's attorney to continue to represent her in this matter. The appeal was finally heard on April 3 and May 21, 2009. The Appellant's brief was received on June 12, 2009 and the record closed on July 15, 2009 upon the filing of the brief of the Newport School Committee.

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

ISSUE

Was the decision of the Newport School Committee not to renew the teaching contract of Gabrielle Hart made for a valid reason and does the decision otherwise meet the legal requirements for the non-renewal of a non-tenured teacher?

Findings of Relevant Facts:

- Gabrielle Hart was a third-year probationary teacher at the Underwood Elementary School in school year 2006-2007. She taught third grade students, after serving as

- a fifth grade teacher in two other schools in the district in the previous two school years. Joint Ex. 1, Pet. Ex. 5, 6, 11, 12, and 13.
- Ms. Hart had approximately ten years of teaching experience¹ at the time of her appointment as a full-time teacher in the Newport school system. Joint Ex. 1; Pet. Ex. 2 and 3.
 - Evaluations of Ms. Hart's teaching performance by her principal in 2004-2005 indicated that it was "Acceptable".² Joint Ex. 1; Pet. Ex. 13.
 - Evaluations of Ms. Hart's teaching performance by her principal³ in the second year of her probationary period, 2005-2006 concluded that she was "Exemplary". Joint Ex. 1; Pet. Ex. 11 and 12.
 - Evaluations of Ms. Hart's teaching performance by her principal⁴ in the third year of her probationary period, 2006-2007 ranged from "Acceptable" to "Limited" in the first evaluation in the fall, and in January of 2007 improved to a range from "Acceptable" to "Acceptable-". Joint Ex. 1; Pet. Ex. 5 and 6.
 - Because the principal at the Underwood School did not think that Ms. Hart's performance warranted her reappointment, the collective bargaining agreement required that she be observed by the Superintendent. Joint Ex. 1, Tr. p. 162; Pet. Ex. 14. Superintendent John Ambrogi conferred with a representative of the Teachers' Association of Newport who agreed with him that the observation of Ms. Hart⁵ would be conducted by the Executive Director of Teaching, Learning and Professional Development for the district, Dr. Jacqueline Naspo. Joint Ex. 1, Tr. pp. 295-296, 299-300.
 - Pursuant to Superintendent Ambrogi's request and the agreement of the Teachers' Association of Newport, Dr. Naspo observed and evaluated Ms. Hart's teaching on February 7, 2007. She found that students were off-task and that there was other evidence of classroom management problems. In terms of instruction, she found a lack of rigor and differentiation and concluded that the classroom environment was

¹ Ms. Hart taught for six (6) years in Fort Worth, Texas, for two (2) years at a charter school in Fall River and for one (1) year at a parochial school in Newport. She had also served as a substitute teacher for three years, prior to her appointment to a full-time position in the district in September of 2004. Joint Ex.1; Pet. Ex. 2 and 3.

² The ratings on the evaluation instrument in use in Newport throughout the relevant period ranged from E-Exemplary Performance, A-Acceptable Performance, L-Limited Performance, and D-Deficient Performance.

³ A different principal from the prior school year.

⁴ Ms. Hart was evaluated by a third principal during the 2006-2007 school year.

⁵ And a second non-tenured teacher whose reappointment was not recommended.

not conducive to supporting good learning. She recommended that Ms. Hart's contract not be renewed. Joint Ex. 1, Tr. pp. 264-268; Pet. Ex. 7.

- Standardized testing of students in Ms. Hart's third-grade class indicated that almost all of her students improved in reading comprehension, writing and vocabulary during the year in her classroom. Joint Ex. 1, Tr. pp. 41-44; Pet. Ex. 9.
- Superintendent John Ambrogi looked at Ms. Hart's entire personnel file and conducted a review of all of the evaluative materials related to Ms. Hart's performance. He concluded based on this information and the "marketplace for elementary school teachers"⁶ that the district could find a better teacher for the position that Ms. Hart held. Joint Ex.1, Tr. pp. 170-171; S.C. Ex. A.
- Dr. Ambrogi recommended to the Newport School Committee that it adopt a resolution calling for the non-renewal of Ms. Hart's teaching contract at the end of the 2006-2007 school year. That resolution was accepted on February 13, 2007. Joint Ex. 1, Pet. Ex.8.
- After hearing Ms. Hart's appeal of its non-renewal decision, the School Committee voted to deny her appeal because it found that its original decision was not unreasonable or arbitrary in any way. The Committee found that the School Department had demonstrated that it could find a better candidate for the position held by Ms. Hart⁷. S.C. Ex. B.

POSITIONS OF THE PARTIES

The Appellant

In her brief, Ms. Hart argues that the facts in this case demonstrate that the decision of the Newport School Committee not to renew her teaching contract and grant her tenure in the school system was arbitrary. The Committee abused the discretion accorded to it to make these types of decisions and in doing so violated her rights to Due Process. Counsel for Ms. Hart submits that she is an experienced teacher whose performance, when properly evaluated, was exemplary. Clearly, there will always be many new teachers applying for work, but this is not a proper reason to "throw out" the teacher currently employed. The Superintendent's reliance on the marketplace and the size of the

⁶ The last time the district advertised for an elementary teacher in 2004, there were close to two hundred (200) applicants for the position. Joint Ex.1, Tr. p. 259

⁷ The Committee's original decision was also based on the potential lack of available funding, but by the time the Committee heard Ms. Hart's appeal, funding was no longer in issue.

pool of available teachers is a trivial reason that does not meet the test established in *Drown v. Portsmouth School District*, 451 F2d 1106 (1st Cir. 1971).

The second basis on which the Superintendent and the School Committee concluded that there were better qualified teachers available than Gabrielle Hart was that it placed upon her (improperly argues her counsel) an impossible burden of proving that there were no better qualified candidates available anywhere and required her to meet this burden of proof without any specification of an objective standards as to what a more qualified teacher would look like. Citing the decision of Judge Needham in *Helen Kagan and Thomas McGhee v. Rhode Island Board of Regents for Elementary and Secondary Education and Bristol/Warren Regional School Committee*,⁸ counsel for the Appellant submits that there are no objective criteria which establish a “better” teacher and thus any decision on this basis by a School Committee violates the substantive due process rights of the teacher whose contract is non-renewed.

If one reviews the information available on Ms. Hart’s performance, the conclusion must be drawn that she was an excellent teacher. First, the results of test performance of the students in her third grade (Petitioner’s Ex. 9) demonstrate that she was a highly effective teacher. Almost every one of her students performed at an accelerated level during the year they received instruction from her, according to the hard and objective evidence provided by their test results. Her formal evaluations during her probationary period showed that she received acceptable and exemplary evaluations by all three of her principals. It is uncontested that the district received not a single complaint about her teaching practices or performance during this period. Implicitly, the Appellant argues that the informal evaluation conducted by Dr. Naspo should be given no weight at all and her negative comments on Ms. Hart’s teaching performance discounted entirely. Dr. Naspo’s February 7, 2007 evaluation was conducted without prior notice and came at the end of the school day just before students were to be dismissed. Dr. Naspo lacked any experience in teaching at the elementary level and was not even knowledgeable as to the subject matter and purpose of the lesson she was observing. Furthermore, the collective bargaining agreement required that the observation be made by the Superintendent himself, not his designee. The Appellant’s other evaluations were positive, and even exemplary during her second year of teaching in Newport.

The example provided of a better qualified candidate⁹ available for Ms. Hart’s position is in fact a first year teacher, who would fortuitously save the district the salary differential between Ms. Hart’s step-10 salary and that of a step-2 teacher. The Appellant

⁸ 1997 WL 1526517 (R.I. Super.)

⁹ Provided by Superintendent Ambrogi as an example of a teacher available and on Newport’s recall list at the time of the Appellant’s hearing before the School Committee. Joint Ex. 1 Tr. pp. 167-169.

submits that there is no way that a first year teacher, without the experience that she has, could be better qualified, given that teaching is an “acquired art”. Despite her solid, unblemished teaching performance in the Newport school system, and the objective evidence of her effectiveness as a teacher shown by student test results, the School Committee has determined that she should not be granted tenure. This, Ms. Hart submits, is an arbitrary and capricious decision that is not in the best interests of Newport students and violates her rights to Due Process.

Newport School Committee

Counsel for the School Committee argues that Ms. Hart has not met her burden of proving that there would not be more qualified teachers available to fill her position at the Underwood School. Precedent in this area clearly establishes that the desire to find a better-qualified teacher is a valid reason for non-renewal. The good-faith belief that the district can secure a more qualified teacher places the burden of proof on the Appellant to demonstrate that there are not better qualified teachers available. In light of the unfavorable evaluations of her teaching performance in the third year of her probationary period in Newport, the Superintendent would have been acting irresponsibly if he had recommended that Ms. Hart become a tenured teacher.

Counsel focuses on the Superintendent’s testimony that one of his most important functions is to hire, support and retain quality teachers. In his closing statement before the members of the School Committee, Dr. Ambrogi emphasized that of all the critical issues he faced as Superintendent - finance, school facilities, and curriculum innovations mandated by the state, these issues paled in comparison to the decisions he is called upon to make with respect to retaining teachers. The specific decision he made with respect to Gabrielle Hart, and the action he recommended to the School Committee to non-renew her contract, was consistent with these obligations.

The formal evaluations of Ms. Hart’s teaching performance over the probationary period ranged from “Limited” to “Exemplary,” with the latter assessment of her performance made in Ms. Hart’s second year of teaching by an interim, part-time principal. As a teacher with almost ten (10) years experience at this point, one would have expected (and the Superintendent testified he did expect) that she would have already “honed her skills”. To the contrary, counsel notes, by the third year of her probationary period she received three poor evaluations. In the fall her formal evaluation placed her in the range from “Limited” to “Acceptable”. Numerous recommendations for improvement were made by her principal at the Underwood School at that time. In her January 2007 evaluation the principal went so far as to give Ms. Hart a rating of A- in three out of the four categories even though she performed below an “Acceptable” level,

closer to a score of “Limited”. The final informal evaluation conducted by Dr. Naspo in early February confirmed the disappointing assessments that had previously been made by Ms. Hart’s principal at Underwood.

Counsel for the School Committee argues that the Appellant’s claims that these final evaluations were invalid on procedural grounds are “red herrings”. First of all, even though the A- rating may not be recognized on the evaluation instrument itself, in light of the principal’s testimony as to what she intended to indicate with such a score, it was a reasonable thing to do. It certainly does not render the January 2007 evaluation invalid. In fact, the “hybrid” score was intended to benefit Ms. Hart because the alternative would have been to score her performance “Limited” in these categories. As to the argument that the collective bargaining agreement required the Superintendent, rather than another member of the administration, to observe Ms. Hart prior to a final decision on her reappointment, the School Committee points to Dr. Ambrogi’s un rebutted testimony that this arrangement was approved in advance by the union. It was agreed that Dr. Ambrogi would review Ms. Hart’s entire file prior to making his decision and recommendation in her case. Furthermore, there is nothing in the collective bargaining agreement that prohibits the parties from collaborating on the evaluation process and determining that a delegation of the observation to the Superintendent’s designee in such situations is a better way to do this. Finally, if Dr. Naspo’s observation of Ms. Hart violated the contract, there would be evidence that a grievance had been filed- and there is not.

Ms. Hart’s argument is that the current burden of proof imposed by case precedent on a non-tenured teacher seeking to challenge his/her non-renewal- when the reason is “to find a better qualified teacher”- violates her rights to substantive due process. Her claim is that a teacher in such situations must prove a negative- that a better teacher is not available- and do so without any objective standards governing such determinations. In response, the School Committee takes the position that the Commissioner is bound by the precedent in such cases and, in any event, this is not the type of compelling case that would warrant a change in the law as it currently stands.

For the foregoing reasons the Committee requests that Ms. Hart’s appeal be denied.

DECISION

It has been a well-settled principle of education law that the non-renewal of a probationary teacher may be based on a school committee’s desire to find a better teacher, as yet unidentified, or as it is sometimes stated, its belief that a better qualified person is available for the position. Tracy v. Scituate School Committee, decision of the

Commissioner March 12, 1984. This is a valid reason for non-renewal in that it is not trivial and is not unrelated to the education process. The third criterion for such decisions, established by the First Circuit in Drown v. Portsmouth School District, 451 F2d 1106 (1st Cir.1971) is that the reason for the non-renewal of a non-tenured teacher must not be “wholly unsupported by a basis in uncontested fact either in the statement of reasons itself or in the teacher’s file”.¹⁰ In the 1997 decision of the Superior Court in Kagan and McGhee v. Bristol/Warren Regional School Committee¹¹ the Court clearly indicated that in a “better qualified teacher” case, a school committee need not go forward to prove facts supporting this reason. The burden of proof is entirely that of the non-tenured teacher to show that the school committee could not find a better teacher from somewhere if it sought to do so. This creates somewhat of a presumption that there is a factual basis for a conclusion that a better-qualified teacher is available to replace the non-renewed teacher.¹² In other words, the burden is on the teacher to “rebut” the presumption that a more qualified teacher, as yet unidentified, exists for the position. See Kagan, supra at page 5.

On the basis of this record, the Appellant clearly failed to meet her burden of proving that the Newport School Committee could not find a better teacher than she to teach the third grade at the Underwood School. Although she did produce evidence that her students had made substantial progress in all of the areas of district and state-level testing while in her class that year, other evidence of her performance, specifically evaluations based on classroom observations, are agreed¹³ to be the basis of any assessment of her teaching performance. Her evaluations do not support the conclusion one would draw from the test scores of Ms. Hart’s students.

Despite the absence of any burden to do so, it is often the case¹⁴ that a school committee will proceed on appeal before the Commissioner to establish facts which support its conclusion that a better teacher could be found. In doing so, a school committee affirmatively demonstrates that its non-renewal decision was not “arbitrary and capricious”. The Newport School Committee did so in this case. The Committee established on this record that its conclusion that it could find a more qualified teacher than Ms. Hart was clearly supportable, not in the least arbitrary and capricious.

¹⁰ Drown, supra at 1108.

¹¹ 1997 WL 1526517

¹² In the Kagan case, the Superintendent had no information with respect to the non-renewed teachers’ performance and had not reviewed their files. His testimony was that there were always more qualified teachers available to replace the current teachers.

¹³ Pursuant to the collective bargaining agreement with Newport’s teachers’ union.

¹⁴ See Namerow v. Pawtucket School Committee, decision of the Commissioner dated November 9, 1999; Tanguma v. Providence School Board, decision of the Commissioner dated January 27, 2006; Dajer v. Providence School Board, decision of the Commissioner dated June 6, 2006; Carr v. Pawtucket School Committee, decision of the Commissioner dated March 5, 2008.

Although it is true that Ms. Hart is an experienced teacher, was highly-recommended by those who worked with her in the past, and in her second year of teaching in Newport she received ratings that were uniformly “Exemplary”- not all of her evaluators during her probationary period were in agreement. The first and third years of her probationary period produced less glowing reviews of her teaching performance. Even if we were to discount the assessment of Ms. Hart’s teaching made by Dr. Jacqueline Naspo¹⁵ based on the fact that her observation of Ms. Hart was unannounced and occurred at the end of a school day, there are two other evaluators who rated Ms. Hart’s teaching merely “Acceptable” or “Acceptable-”. There is no evidence of any fact that would cast doubt on the validity of these evaluations or the good faith of the administrators who performed them. In making tenure decisions, the Newport School Committee was not required to retain a teacher whose evaluations failed to demonstrate consistent exemplary performance during her entire probationary period. The conclusion that a better teacher would be available was not, on the basis of this record, a mistake and was not arbitrary and capricious.

For the foregoing reasons, the appeal of Ms. Hart is denied and dismissed.

For the Commissioner:

Kathleen S. Murray

APPROVED:

Deborah A. Gist, Commissioner

November 6, 2009

Date

¹⁵ The Appellant’s argument that Dr. Naspo’s observation violated Article XV (A) of the collective bargaining agreement is without merit- the evidence here was that Superintendent Ambrogi cleared his designation of Dr. Naspo to make the observations called for by the Superintendent with the Union. If there were a contractual violation presented by the Superintendent’s failure to observe Ms. Hart, the Commissioner does not have jurisdiction over such issue as it is contractual in nature and not so interconnected to the resolution of the issues in Ms. Hart’s case to require the Commissioner’s extension of her jurisdiction.