

State of Rhode Island
and
Providence Plantations

Commissioner of Education

Rosa Garcia, Gloria Profughi,
Patrick Doyle, Eddy Remy, Saysay
Kamara, and Patricia DiPrete

v.

Providence School Board

DECISION ON REMEDY

Held: The Appellants have established their entitlement to lost compensation and other damages as set forth in this this decision. Because Mr. Remy was employed under the provisions of an “emergency certificate” at the time of his non-renewal, he has not substantiated his claim for the additional compensation he seeks for the period after December 8, 2008.

Date: February 25, 2010

Travel of the Case:

The Appellants first appeared before the Commissioner in May of 2007, appealing from their non-renewals as teachers in the Providence school system at the close of the 2005-2006 school year. The Commissioner, in a decision issued on July 2, 2007, found that the Appellants had not been provided with written notice of their nonrenewals by the statutory deadline of March 1st. For this reason “the non-renewals of the Appellants (were) ineffective and thus their annual contracts continued into the ensuing school year, 2006-2007.” This decision was appealed to the Board of Regents, and fourteen months later, on September 3, 2008, the Board of Regents affirmed the Commissioner’s decision.

On or about March 4, 2009 the parties notified this hearing officer of their inability to resolve the issue of remedy. The School Board had reinstated some but not all of the Appellants¹ to positions within the district on December 8, 2008. One of the Appellants had refused the position offered because it was a placement “in pool.” The parties also disagreed as to whether the Appellants were entitled to payment for professional development days, unused sick days, and statutory pre-judgment interest. The amounts claimed for lost wages were not in dispute, with the possible exception of Mr. Remy’s claim for ongoing lost wages.

Hearings were held on March 30, 2009 and November 20, 2009 so that any facts necessary for a determination of appropriate remedy could be established. Affidavits in proof of claim for each of the Appellants were received into evidence, other relevant documentation was made a part of the record, and the parties placed on the record their positions with respect to appropriate remedy for each of the individuals involved in this case. The record in this matter closed on December 4, 2009.

Findings of Relevant Facts:

The Findings of Relevant Facts contained in the Commissioner’s decision of July 2, 2007 are hereby incorporated into this decision. Additional facts with respect to each of the Appellants² are contained in Affidavits submitted into evidence at the time of hearing. A specific listing of all facts related to each of the Appellants by way of

¹ Mr. Doyle had declined an offer of reinstatement and elected to continue as a teacher in another community. Mr. Remy, as we will explain later, was not offered reinstatement.

² The salary losses in each year since the ineffective non-renewal, offsets reducing lost salary, medical expenses, etc. were presented in detail for each of the Appellants. The amounts set forth in the affidavits of each of the Appellants were uncontroverted. The affidavits were supplemented by additional facts at the November 20, 2009 hearing after the hearing officer requested clarification and further specification with respect to monetary claims made on behalf of each of the Appellants.

additional findings of fact in this decision is not necessary, and for the most part, the facts are not in dispute.

Positions of the Parties:

Appellants

The Appellants assert claims for lost salary in each of the years since their ineffective non-renewal up to the date of their reinstatement³ by the Providence School Department, i.e. December 8, 2008. Appellant Garcia asserts a claim for additional lost wages beyond that date and up to the date she was offered a position as a regular teacher assigned to her own classroom, rather than to a position “in pool” which she had declined. It was not until the beginning of the subsequent school year (August 6, 2009) that Ms. Garcia was “recalled” as a regular teacher in the Providence School Department and assigned to her own classroom.

As to Appellant Eddy Remy, even though he continues to lack a teaching certificate, his counsel submits that his claim for lost wages extends beyond December 8, 2008 and is ongoing because “but for” his non-renewal, he would have had his emergency teaching certificate “renewed” each year and continued in Providence’s employ despite his certification status. Evidence in support of this proposition was submitted verifying that in each and every year up through the current school year, Providence has requested and received emergency certificates from the Rhode Island Department of Education for teachers of secondary and middle school mathematics. Counsel recognized, however, that the need for the district to request “emergency certificates” for individuals it sought to employ was on a year-to-year basis. Thus it remained to be seen whether or not Providence would be unable to find a certified person to teach mathematics in the future or whether Mr. Remy would eventually obtain his certificate to teach mathematics.⁴ Mr. Remy requested additional time to complete the requirements to become fully certified as part of his remedy.

All of the Appellants submitted proof of offsets to their salary claims consisting of wages they were paid from other employment during this period, and in some cases, unemployment benefits they received as well.

³ In Mr. Doyle’s case, the date of the offer of reinstatement, which he declined presumably because he preferred to continue in the teaching position he had acquired in another community.

⁴ At the time of the hearing on November 20, 2009, Mr. Remy indicated on the record that he still had not met the certification requirements to teach mathematics. Tr. November 20, 2009 pp. 14-23.

Each of the Appellants asserts that, in addition to lost salary, they are entitled to monetary payments authorized under the collective bargaining agreement for thirty-eight (38) hours of professional development pay each year (Article 8-34 of the Agreement between the teachers union and the School Board) and for five days of pay at their contractual rate for unused sick days in each of these years (Article 4-8 of the Agreement). According to their counsel, all of the Appellants would have earned these additional monies “but for” their wrongful non-renewal.

Three of the Appellants seek reimbursement for expenses they incurred because they were not covered by the health insurance they previously received as Providence teachers during the period after their non-renewal and before their reinstatement. These claims include reimbursement of various amounts for out-of-pocket medical expenses, prescription costs and health insurance premiums.

All six of the Appellants request that the Commissioner add statutory interest at the rate of twelve (12%) per cent per year for each consecutive year they were not employed retroactive to the date their contracts were terminated.

Providence School Board

The Providence School Board does not dispute the Appellants’ entitlement to the amounts put forth in their affidavits as lost salary and expenses, except as to Ms. Garcia’s claim that her loss of salary extended beyond the date she was offered reemployment. On the second day of hearing, the School Board clearly indicated that it is its contention that Ms. Garcia was in fact offered reinstatement on December 8, 2008 and that this offer of reinstatement terminated her claim for additional loss of salary for the balance of the 2008-2009 school year⁵.

Counsel for the School Board also takes the position that the additional amounts claimed for professional development pay and compensation for unused sick days are not appropriate to be included in the Appellants’ damage awards. Counsel for the School Board submits that these payments are not automatic payments to employed teachers under the collective bargaining agreement. There is no evidence that any of the Appellants necessarily would have qualified for additional compensation by utilizing no more than five (5) sick days in each of these years. Similarly, there is no evidence that the Appellants would have attended thirty-eight (38) hours of professional development thereby earning additional salary payments in each of the years in question.

⁵ On the first day of hearing, counsel had explained that the district had offered all of the Appellants (except Eddy Remy) positions as teachers “in pool” until the spring job fair would be conducted and assignments into open classroom positions for the following school year would be made based upon teachers’ seniority.

As we understand the Providence School Board's position with respect to Mr. Remy, since he was ineligible for reinstatement on December 8, 2008⁶ because he did not hold a regular teaching certificate that would have enabled the Board to re-hire him at that time⁷, his entitlement to ongoing lost wages ceased as of that date. Counsel indicated that Mr. Remy's certification status rendered the issue of an appropriate remedy a very difficult one.

DECISION

Although the parties have agreed on many of the issues related to the remedies for the individual Appellants in this matter, and the issue of reinstatement for all of the Appellants except Mr. Remy has been resolved by agreement of the parties, they diverge on several issues, including professional development pay, stipends for unused sick days, and entitlement to statutory interest⁸. Both the School Board and the Appellants request the Commissioner to resolve the issue of whether Ms. Garcia is entitled to ongoing lost wages after the date the Board offered to rehire her as a teacher "in pool" on December 8, 2008. Mr. Remy's certification status clouds his claim to ongoing monetary damages for the period after December 8, 2008. Each of these issues will be addressed in turn, and guided by the principle that damages must be proven with a reasonable degree of certainty, must establish reasonably precise figures and cannot be based on speculation. In Re Degnan, 361 BR 650 (Bkrtcy D.R.I. 2007); National Chain Co. v. Campbell, 487 A2d 132 (R.I. 1985).

Professional Development Compensation

Article 8-34 of the Collective Bargaining Agreement currently in effect between the Providence Teachers Union and the Providence School Board requires⁹ all teachers to be in attendance at all Professional Time sessions. The parties have agreed that during the relevant time period, thirty-eight (38) hours of professional activities were required by the Board of Regents and were scheduled by the Professional Time Joint

⁶ At that point in the school year the School Board could not represent to the Rhode Island Department of Elementary and Secondary Education that it had a vacancy for which it could not find a fully-certified teacher because it had already requested and received the two emergency certificates for mathematics teachers that were needed for the 2008-2009 school year.

⁷ Nor did he hold a teaching certificate at the time of the two hearings held on the issue of remedy.

⁸ The Board's position on the payment of statutory interest was made clear in a letter to the hearing officer dated December 30, 2009. Counsel for the Appellants has objected to the receipt of any arguments from the School Board with respect to the issue of interest because the record in this matter closed on December 4, 2009.

⁹ And required during the entire period after non-renewal and prior to reinstatement of the Appellants

Committee created under the contract. The contract requires that the teachers be compensated at their daily/hourly rate for the hours they are required to be in attendance. Based on the foregoing, we find that it is reasonably certain that all of the Appellants would have been in attendance at the professional time sessions and that they would have earned the additional pay¹⁰ provided for under this section of the contract. Their claim for damages on this basis is sustained.

Sick Pay Stipend

Article 4-8 of the Collective Bargaining Agreement provides that:

any teacher who utilizes no more than five (5) sick days during a work year (including both sick leave reserve and emergency sick leave) shall receive upon request a separate check no later than thirty (30) days after the last day of that work year equal to no more than five (5) days pay. All unused sick leave (minus the five (5) days pay) shall be credited to the teacher's sick leave bank.

It is not possible to be reasonably certain which, if any, of the Appellants would have enjoyed the benefits of good health to such extent that they would have utilized no more than five (5) sick days during school years 2006-2007, 2007-2008, and up to the date of reinstatement, December 8, 2008¹¹. We would be speculating in trying to determine whether or not the Appellants would have opted for the cash payment in each of those years, or would have opted instead to have the five (5) days credited to their sick leave bank. For the foregoing reasons, their claim for damages on this basis is denied.

Interest Pursuant to R.I.G.L. 9-21-10

On August 6, 2009 the Board of Regents reversed a decision of the Commissioner awarding pre-judgment interest on the salary owed to a tenured teacher whose dismissal was not effective for the "ensuing" school year because her notice of dismissal was sent after the March 1st deadline provided by the statute. The Regents ruled that R.I.G.L. 9-21-10 contains no explicit waiver of sovereign immunity and that a

¹⁰ A pro-rated payment is proposed for the 2008-2009 school year.

¹¹ A pro-rated payment is proposed for the 2008-2009 school year.

school committee's sovereign immunity in the exercise of its governmental functions is not waived. The Board of Regents went on to find that in fulfilling its functions under R.I.G.L. Chapter 16-13 of the Teachers' Tenure Act, a school district exercises "its obvious governmental function" of properly managing its schools. We are constrained by the ruling of the Board of Regents in Quattrucci v. East Providence School Committee¹². In the case at hand, the Providence School Board similarly ran afoul of statutory deadlines applicable to the non-renewal of, in this case, non-tenured teachers pursuant to Chapter 16-13 of the Teachers' Tenure Act. The precedent recently set by the Board of Regents is binding and the Commissioner must therefore deny the Appellants' request that pre-judgment interest be added to any amounts to which they may be entitled at this juncture.

Appellant Garcia's claim for post-December 8, 2008 compensation

On December 8, 2008 Ms. Garcia was offered a position as a "Regular Teacher-in-Pool" and notified that she would be assigned to a position when one became available consistent with her seniority and with the provisions of the Collective Bargaining Agreement (Appellants' Ex.2). She declined the offer of a position at that time even though the position offered would have provided her with the salary and benefits to which she was entitled and which she now claims. She continued to teach in another community at a much lower salary. A position acceptable to her became available the following August, effective for school year 2009-2010 (Appellants' Ex. 9¹³) Ms. Garcia seeks to recover the difference between the salary she would have received if she were "fully reinstated" on December 8, 2008 and the much lower salary she earned in Central Falls for the remainder of the 2008-2009 school year.

While we agree that Ms. Garcia was entitled to be reinstated to a position substantially equivalent to that which she had at the time she was non-renewed (i.e. assigned as a regular classroom teacher), she was at all times under an ongoing obligation to mitigate her damages. The School Board did not require her to waive any claim she had to "her own classroom" when it offered her a position "in pool" on December 8, 2008. Because she failed to mitigate her damages by accepting the

¹² August 6, 2009

¹³ The August 6, 2009 letter also makes mention of an assignment "R in Pool" but according to counsel for Ms. Garcia this notice effectuated her reinstatement. See pp. 10-13 of the Transcript November 20, 2009.

position that was offered to her on December 8, 2008, she is prohibited from recovering the damages she could have reasonably avoided. Tomaino v. Concord Oil of Newport, Inc. 709 A 2d 1016, on remand Cotsoridis v. Johnson, 1999 WL 710656. Thus, her claim for loss of compensation terminated on December 8, 2008 when she refused the position offered to her by the School Board.

Eddy Remy's claim for ongoing compensation and reinstatement

Counsel for the School Board pointed out at the hearing on March 30, 2009 that the district was precluded from reemploying Mr. Remy at the time it offered reemployment to the other five Appellants in this case. According to counsel for the School Board, Mr. Remy was not eligible for reinstatement on December 8, 2008 because he was not fully certified and the district could not **at that point in the school year** establish a need for issuance of an emergency certificate to employ him.¹⁴ We would infer from this argument that when Providence did have a subsequent need for a mathematics teacher for which it could not secure a fully-certified candidate, it intended to hire Mr. Remy for that position. However, at the subsequent hearing on remedy held on November 20 2009, the evidence showed that the district did not choose to reemploy Mr. Remy by requesting an emergency permit for him at the start of the 2009-2010 school year. Instead Providence requested, and was issued, emergency permits for two other individuals to meet its needs to teach middle school mathematics¹⁵.

Counsel for Mr. Remy argues that Mr. Remy is entitled to ongoing damages based on evidence that the Providence School Department had an “ongoing need” for teachers of mathematics and that the district continued to be unable to secure the services of fully-certified teachers to meet its needs. This argument presumes that a district is bound to continue to request emergency certification for a particular teacher once it has done so on one occasion. This is a premise that is inconsistent with our understanding of the conditions under which an emergency permit is “renewable.” By its terms, the emergency permit is renewable annually “upon the request of the school superintendent and completion of six (6) semester hours of college credits required for certification in the area that emergency permit is held and successful teaching experience as verified by the local appointing authority.”¹⁶ Providence has not

¹⁴In order to obtain an emergency certificate or “emergency permit” a district must document that the services of a fully-certified educator are unavailable. Counsel explained that at the beginning of the 2008-2009 school year the School Department had filled the single math position for which it could not find a fully-certified teacher. Documentation indicated that this emergency permit was issued to authorize the hiring of a middle school mathematics teacher. See App. Ex. 4.

¹⁵ See App. Ex. 11.

¹⁶ Language from the “Application for Issuance/Renewal of an Emergency Permit”

requested the issuance of another emergency permit for Mr. Remy at any time since his non-renewal, even for the school year after its professed “inability” to reemploy him in early December of 2008. Based on this fact and because Mr. Remy was ineligible for reinstatement because he was not a certified teacher, it is our conclusion that any entitlement he may have had to lost wages ceased on December 8, 2008. Stated another way, his claim for loss of salary is speculative, and not reasonably certain, for the period subsequent to the date up to which the district has agreed to compensate him. For these reasons, his claim for loss of wages after December 8, 2008 is denied.

In light of the foregoing, on the basis of the uncontroverted affidavits placed on the record in this matter, the Providence School Board is directed to pay the Appellants the following amounts:

Rosa Garcia	\$129,273.57
Eddy Remy	\$104,521.30
Patricia DiPrete	\$102,212.37
Patrick Doyle	\$ 40,042.80
Gloria Profughi	\$134,704.35
Saysay Kamara	\$165,282.99

For the Commissioner

Kathleen S. Murray, Esq.
Hearing Officer

Approved:

Deborah A. Gist
Commissioner of Education

DATE: February 25, 2010