

0037-10

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

Gerald K. Foley

v.

North Kingstown School Committee

DECISION

Held: The School Committee has proven that Mr. Foley was insubordinate to the superintendent. This conduct provides a sufficient basis for a thirty-day unpaid suspension from his position as principal, despite Mr. Foley's exemplary service to the District over a twenty-one year period.

DATE: October 22, 2010

Travel of the Case:

During the course of school year 2009-2010, the undersigned was designated to hear three appeals filed with Commissioner Deborah A. Gist by Gerald K. Foley, the former principal¹ of North Kingstown High School. Mr. Foley initially appealed the decision of Superintendent Philip K. Thornton to place him on an indefinite disciplinary suspension with pay commencing on November 25, 2009. This first appeal was filed with the Commissioner on January 11, 2010. The North Kingstown School Committee subsequently approved Superintendent Thornton's recommendation that Mr. Foley be suspended without pay for a thirty-day period, and on February 10, 2010 his counsel requested that both appeals be consolidated for hearing. As these matters were being scheduled for hearing, a third issue arose when the School Committee reassigned Mr. Foley to be a "Co-Principal" of the town's two middle schools when his thirty-day suspension was up on March 24, 2010. On April 6, 2010, his counsel requested expedited hearing on this last issue so that Mr. Foley could be restored to his duties as Principal at the High School for the balance of the school year.

On June 8, 2010, Mr. Foley's new counsel notified the hearing officer that the Superior Court had issued a preliminary injunction placing Mr. Foley back into his position as Principal for the remainder of the school year. Counsel's letter also notified the hearing officer of the withdrawal of his appeal of his November 25, 2010 suspension with pay, and the parties' agreement that the sole issue on appeal was his thirty (30) day suspension without pay.

The matter was heard on July 12, 2010 at which time evidence was taken. The parties submitted written memoranda summarizing their arguments, a process that was completed on September 28, 2010.

Jurisdiction to hear this matter arises under R.I.G.L. 16-12.1-6.²

Issues

- Was Gerald Foley insubordinate when he sent an email on November 25, 2010 to all employees at North Kingstown High School using the school listserve?
- If he was insubordinate, does his insubordination constitute cause for a thirty (30) day suspension without pay?

Findings of Relevant Facts:

¹ A fourth appeal, on the issue of non-renewal of Mr. Foley's contract, was assigned on July 16, 2010.

² 16-12.1-6 indicates that the administrator aggrieved by a decision of a school committee may obtain review under the provisions of chapter 39 by petitioning the commissioner within ten (10) days of receipt of the decision.

- Gerald K. Foley has served as the Principal of North Kingstown High School for eighteen (18) years, and has been employed by the district for twenty-one (21) years. In 2005, he was selected as Rhode Island Principal of the Year. N.K. Ex.4; Tr. p.115.
- Mr. Foley’s direct supervisor in 2009-2010 was Dr. Philip Thornton, who had served as Superintendent of the district since March of 2009 and Interim Superintendent since July of 2008. Tr. pp. 9-10.
- At the opening of the 2009-2010 school year, a dispute existed between Mr. Foley and the Superintendent (and some members of the North Kingstown School Committee) as to whether Mr. Foley had exercised good judgment and proper oversight with respect to various student activities accounts within his control. N.K. Ex. 1, 3 and 4; Tr. pp. 10-20.
- On September 21, 2009, Superintendent Thornton notified Mr. Foley that he would be recommending that Mr. Foley be suspended without pay for five days for his “poor judgment” and “careless oversight” of student activities accounts. N.K. Ex.1. A majority of the members of the School Committee rejected the Superintendent’s recommendation at its meeting on October 6, 2009 and instead issued a vote of “no confidence” in Mr. Foley and requested his resignation. Tr. p.16.
- When he did not resign, Superintendent Thornton sent a letter of reprimand dated October 15, 2009 to Mr. Foley and placed a copy in his personnel file. The letter of reprimand noted his “general lack of oversight” of the student activity accounts, his failure to follow process, lack of sound judgment and criticized him for “not having the best interest of students in mind.” N.K.Ex. 2; Tr. pp. 16-23.
- On October 28, 2009, Mr. Foley wrote an “Open Letter to North Kingstown Community” in which he complained of a “witch hunt mentality” and presented facts supporting his handling of the student activity accounts. N.K. Ex.4; He personally placed a copy of this letter in the mailbox of each of the staff members at North Kingstown High School. Tr. pp. 26, 122;³ N.K. Ex.4.
- On October 30, 2009, Dr. Thornton sent a letter to Gerald Foley notifying him of his concern that Mr. Foley was “using parents, students, and staff to promote your own agenda of defending your actions regarding the inappropriate manner in which you managed student activity funds.” N.K. Ex. 5. In his letter, the Superintendent cited the distribution in school of a letter in which Mr. Foley outlined his position on his oversight

³ Neither the writing of the letter nor its placement in the mailboxes was done during working hours. A similar letter entitled “Setting the Record Straight” was sent to the local papers. Tr. pp. 24-25.

of the student activity accounts, and alleged⁴ that Mr. Foley had “allowed bumper stickers to be sold on your behalf and to be placed on the walls of the high school.” N.K. Ex. 5.

- Superintendent Thornton stated in his October 30, 2009 letter that he was “directing (Mr. Foley) to cease and desist any further involvement of students and staff on your behalf... Your personal activities are to be done on your own time and off school grounds.” The letter further indicated that while Mr. Foley had “every right to defend yourself to the public you do not have a right to bring this issue into the school environment.” N.K. Ex.5.
- On November 24, 2009, the North Kingstown School Committee voted to approve Superintendent Thornton’s recommendation that Mr. Foley’s contract as Principal of North Kingstown High School not be renewed at the end of the school year. The vote was four to three. N.K. Ex. 6 and 7.
- On the following morning and prior to the start of the school day, Mr. Foley composed and sent an email from his office at school using the school listserve. The email went to every staff member at North Kingstown High School.⁵ The message opened by thanking all who had shown up at the prior night’s school committee meeting and voiced support for him. Mr. Foley notified the recipients of the final vote of the School Committee and that he would not be principal after June 30, 2009 (sic). N.K. Ex. 7.
- The November 25, 2009 email (N.K. Ex.7) was entitled “Round Two.” It summarized each of the bases on which Dr. Thornton had made his recommendation and indicated Mr. Foley’s response to each point. Following this, Mr. Foley stated “Surely, all these matters in no way serve as a basis for non-renewal.” N.K. Ex. 7.
- Mr. Foley went on to state in his email that “I have had my reputation slandered by some school committee members and been asked to resign and pay back money which I do not owe them.” He stated that his rights had been repeatedly violated and that he had sued the school committee and the superintendent, noting that “they do not like being sued. You see ‘bullies’ like to throw stones. However, they don’t like stones thrown at them. I now have their attention and rightfully so. I am coming after them.” The email ended with “Round 2 starts today. Happy Thanksgiving to you and your families.” N. K. Ex. 7.

⁴ Incorrectly, according to the testimony of Mr. Foley at the July 12, 2010 hearing. There was no evidence presented that Mr. Foley allowed bumper stickers to be sold on his behalf or that he permitted stickers to be placed on the walls of the high school. The testimony was that as soon as he became aware that students had placed bumper stickers on the walls in various places in the school, Mr. Foley directed the custodial staff to remove them. Tr. pp. 119-121. The stickers said “Foley...is NK.” Tr. p. 66.

⁵ With a copy to the three members of the school committee who had voted against the Superintendent’s recommendation that his contract not be renewed at the end of the school year.

- When a copy of the email was forwarded to Superintendent Thornton later in the morning, Dr. Thornton called Mr. Foley to his office and, after a brief discussion, handed him a letter placing him on an immediate suspension with pay. Superintendent Thornton’s November 25, 2009 letter reiterated his position that “...you have every right to defend yourself to the public, however, you do not have the right to bring this issue into the school environment.” The letter stated “Using the school listserve is in violation of the directive that I gave you. Furthermore, sending this to teachers during the school day distracts from the teaching and learning that needs to occur at the North Kingstown High School.” N.K. Ex. 8.
- During the meeting with Superintendent Thornton on November 25, 2009, Mr. Foley denied that he had been insubordinate. He told the Superintendent that the email was meant to be informational, that is, to inform his staff that he was not being renewed as Principal and that they should continue to focus on teaching and learning at the school. Tr. pp. 125-128.⁶
- Mr. Foley testified that his understanding of the October 30, 2009 written directive from the Superintendent was that “I should not use my position to promote any personal issues I had going on.” He testified that he had no intent to violate the Superintendent’s directive and remained under the belief that he had not violated it at any time, including when he sent the email to staff on November 25, 2009. Tr. pp. 118-126, 148.
- On January 5, 2010, Dr. Thornton notified Mr. Foley that he considered the email a “second attempt to use the school environment to garner support for your position regarding the non-renewal of his employment contract with the district.” He wrote that he found his actions to be a serious lapse of judgment and a willful refusal to follow directives. He notified Mr. Foley that he would be recommending that he be suspended without pay for thirty days. After a hearing on February 9, 2010, the School Committee voted to suspend Mr. Foley for thirty working days without pay and place a letter of reprimand in his personnel file. N.K. Ex. 9 and 10. A written decision was issued by the School Committee on February 23, 2010. N.K. Ex. 10.
- The thirty working-day suspension without pay effectively reduced Mr. Foley’s one hundred and thirteen thousand (\$113,000.00) dollar annual salary by twelve thousand (\$12,000.00) dollars. Tr. pp. 102, 129-130.

Positions of the Parties:

Appellant Gerald K. Foley

⁶ Dr. Thornton testified that Mr. Foley indicated at the meeting that he didn’t mean to send the email. Mr. Foley did not recollect saying he had sent the email by mistake. Tr. pp. 41, 127-128.

Counsel for the Appellant argues that Mr. Foley's email was not an act of insubordination. The message he sent on November 25th to his entire staff was intended to inform them that his principalship would be coming to an end, provide them with the reasons given to him by the school committee and, because it was necessary to do so, defend his credibility. The email did not "involve students and staff on (Foley's) behalf" – Superintendent Thornton admitted on cross-examination that the email message did not ask teachers to do anything at all to show their support of Mr. Foley. Thus, the email did not violate the directive.

Insubordination must be willful and intentional defiance of a supervisor's directive. Mr. Foley's intent in sending the email was a matter on which Superintendent Thornton never inquired. If he had, Mr. Foley would have explained: 1) that he had no intent to violate his directive; 2) that his purpose was solely to inform his staff that his tenure would be coming to an end on June 30, 2010; 3) that teaching and learning should continue to be the focus of school staff. The information included in the email on his assessment of the School Committee's reasons for his non-renewal was incidental to the basic message he intended to convey. Counsel notes that while Mr. Foley could have chosen better language in some parts of the message, he was only seeking to "defend his credibility." The record lacks any evidence of his intentional and willful noncompliance with Dr. Thornton's directive.

Counsel for Mr. Foley points out that in the period following Mr. Foley's alleged "insubordination," it became evident that the thirty day suspension was imposed as part of an "agenda" to accelerate Foley's removal as Principal of North Kingstown High School. First, there was the lengthy period of paid suspension during which Mr. Foley was barred from school and prohibited from performing his duties. No investigation of the charge of insubordination was conducted by Superintendent Thornton during this time. After more than two months on indefinite suspension,⁷ the thirty (working) day suspension without pay was then imposed. The latter suspension was scheduled to expire on March 24, 2010. When Mr. Foley was scheduled to resume his position, he was notified that he had been reassigned to a newly-created position as "Co-Principal" of the middle schools in North Kingstown. It was only through a court order that Mr. Foley was ultimately restored to the position as Principal at the high school. In this context, it becomes clear that a 30-day suspension was imposed as part of a plan to keep him from ever returning to his position. It was imposed only after he went on the offensive to challenge the criticism about his oversight of student activity accounts and after he had vowed to fight his non-renewal.

This suspension is an overly-harsh penalty for an administrator who has an impeccable work record and who has given twenty-one (21) years of service to the North Kingstown school district. The circumstances here were such that Gerald Foley felt that he had to "clear the air" and defend his performance as Principal to maintain "credibility" with staff at the high school.

⁷ Which is argued to constitute sufficient punishment for a person with an impeccable twenty-one year history of employment in the district.

There was surely no intent to disrupt school operations. There is no evidence that the message Mr. Foley sent to his staff on November 25, 2009 created a significant disturbance at school. Certainly, a lesser penalty such as a verbal or written warning would have been effective discipline. The suspension imposed reduces Mr. Foley's annual salary by twelve thousand (\$12,000) dollars and was based solely on the Superintendent's belief that this sanction was appropriate. Dr. Thornton, Superintendent for less than one (1) year, did not review Mr. Foley's disciplinary history (or lack thereof)⁸ and did not take the time to familiarize himself with any similar disciplinary circumstances that might have provided guidance with respect to an appropriate penalty. Taking into account that Mr. Foley had already been suspended from his position since November 25, 2009, any further suspension was unnecessary. The substantial reduction of his salary is not supportable.

Finally, Mr. Foley's attorney argues that the November 25, 2009 email was an exercise of his right to free speech and must be protected under the First Amendment. There is precedent establishing that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and, therefore, be an impermissible basis for termination of employment. The subject matter of Mr. Foley's email was a highly-publicized matter of public concern in North Kingstown. Mr. Foley cannot be disciplined for speaking out on these matters because to do so violates his constitutionally-protected right to free speech.

For the foregoing reasons, Appellant Gerald Foley requests that the Commissioner overturn his thirty (30) day suspension and award him other relief as may be appropriate under these circumstances.

North Kingstown School Committee

Counsel for the School Committee specifically addresses the claim that Mr. Foley's email is constitutionally-protected speech in his reply brief. The case of Curran v. Cousins, 509 F. 3rd 36 (1st Cir. 2007) is cited as controlling precedent in this jurisdiction. This case establishes, he argues, that in a public employment setting, the First Amendment's protections are not absolute. The required First Amendment analysis involves an initial inquiry to determine whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment protection insulating him or her from an adverse reaction (i.e. discipline) by the employer.

Counsel argues that in the case before the Commissioner, Mr. Foley was not speaking as a citizen. He was speaking in his capacity as Principal, to his staff, about his own personal battle with the Superintendent and members of the School Committee. The issue at hand was his employment status with the district. Thus, his First Amendment rights were not implicated when he was subsequently disciplined for the inflammatory email sent to his staff using the

⁸ Counsel for Mr. Foley argues that his alleged insubordination was his first offense. Counsel for the district responded in his reply memorandum that the October 15, 2009 letter of reprimand with respect to oversight of student activity accounts establishes that Mr. Foley had a "disciplinary history."

listserve at school. Superintendent Thornton's directive was necessary to prevent this personnel matter from displacing the school's focus on teaching and learning. Based on what had already happened, Dr. Thornton had reason to believe that the school community was becoming embroiled in Mr. Foley's employment issues. The Superintendent clarified in his directive that Mr. Foley was not constrained from defending his record as Principal to the public, just that he must not bring these issues into the school environment.

Counsel for North Kingstown submits that the thirty-day suspension and placement of a letter of reprimand in Mr. Foley's personnel file was fair and reasonable, fully supported by his direct act of insubordination on November 25, 2009.

The Superintendent issued the directive based on legitimate concerns that Mr. Foley's personal dispute with him and the School Committee was becoming a distraction to teaching and learning. Earlier in the week, Mr. Foley had personally placed a letter in the mailboxes of all staff at North Kingstown High School. The letter provided staff with a detailed response to each of the allegations that had been made against him based on an audit of student activity accounts. The Superintendent also had information at that time that Mr. Foley had allowed bumper stickers expressing support for him to be sold and placed on the walls of the high school. At that point Dr. Thornton had a legitimate concern that students and staff would become even more involved in the controversy during the school day. Hence, the Superintendent directed Mr. Foley not to bring these issues into the school environment. Counsel argues that Dr. Thornton's letter of October 30, 2009 (N.K. Ex.5) was clear. Mr. Foley was to "cease and desist any further involvement of students and staff on your behalf" and ensure that his "personal activities are to be done on your own time and off school grounds." The email of November 25, 2009 violated this directive. Again, Mr. Foley sought to involve staff at the High School in his personal controversy with the Superintendent and the North Kingstown School Committee.

Mr. Foley's conduct undermined the authority of the Superintendent, broke down the chain of command and called into question the ongoing ability of the Superintendent to exercise his management responsibilities. It was serious and warranted the discipline imposed. For these reasons, the Commissioner should uphold Mr. Foley's suspension for thirty days without pay.

DECISION

Without taking any side as to the underlying controversy with respect to Mr. Foley's oversight of student activity accounts, we find that Superintendent Thornton's October 30, 2009 directive was a reasonable measure to address a situation in which this controversy was becoming a distraction at North Kingstown High School.⁹ Although the directive was, in part,

⁹ One would expect that reprimands and non-renewal of a successful, long-term principal would be on the minds of many students and staff at North Kingstown high school even if no communications on this subject were generated by the Principal himself.

based on incorrect information as to Mr. Foley's involvement in the posting of bumper stickers supporting him in school that week, it legitimately addressed his future communications with staff and students while at school on the subject of his employment dispute. The directive was clearly intended to prohibit Mr. Foley's future communications on this subject while at school. The language of Dr. Thornton's directive was sufficiently clear to do so. Yet, not one month after his receipt of this order, Mr. Foley again communicated with staff at school on this same subject, only this time electronically rather than using their mailboxes for traditional mail. Although it is true that the email sent by Mr. Foley to staff on the school's listserv did not specifically ask for the staff's support or request that they demonstrate their support in any way, it did plead his case to them. With the exception of two or three sentences, the lengthy email listed the allegations discussed at the prior night's School Committee meeting, and cogently presented Mr. Foley's defenses.

The email notified staff that "Round 2"¹⁰ had just begun. As with the prior communication to staff that he had physically placed in their mail boxes on October 28, 2009, the email expressed appreciation for the support demonstrated by all those who had "stepped up" on his behalf. By again presenting and arguing Mr. Foley's case, it implicitly sought support but not necessarily any specific action on his behalf. The message implicitly welcomed continued support from those who had already demonstrated it, especially as the next "round" began. For those who were not aligned with Mr. Foley, or at least not convinced that the accusations and complaints against him were false, their position aligned them with the "bullies" who had voted to non-renew his contract. The email was divisive and injected Mr. Foley's personal issue into the environment at North Kingstown High School. Mr. Foley's conduct in sending the email of November 25, 2009 was insubordinate to the extent that it was both an intentional and willful refusal to obey the reasonable directive of his superior that he not do so.

Insubordination is serious misconduct and undermines the authority of those who must manage and direct a school system in an efficient and productive manner. On the other hand, a twelve thousand (\$12,000.00) dollar penalty constitutes a substantial reduction in Mr. Foley's salary and, considering the length of his successful tenure as Principal of North Kingstown High School, is a very harsh punishment. The Commissioner reviews disciplinary cases de novo and is not confined to a determination of whether a school committee's decision was patently arbitrary, discriminatory, or unfair. Pawtucket School Committee v. Board of Regents, 513 A.2d 13 (R.I. 1986) However, as has been stated with respect to the Commissioner's authority in such cases, "a commissioner would seldom reverse a decision of a committee unless he was satisfied that the public good or justice to individuals required it." Appeal of Cottrell, 10 R.I. 615, 618 (1873). This is not a case in which the long-term suspension has been shown to be unjust¹¹ or inappropriate. It is troubling, however, that the choice of thirty (30)

¹⁰ We presume Round 2 of the fight

¹¹ There is no evidence or argument that the reduction in Mr. Foley's salary that resulted from his suspension had an adverse impact from a retirement perspective, i.e. would reduce his base salary for retirement purposes.

days was based on the Superintendent's belief, rather than on his experience or his review of similar cases. A review of case precedent on the issue of insubordination by educational administrators failed to provide the hearing officer with a basis for concluding that the thirty-day suspension was unjust.

Mr. Foley himself made a lesser penalty somewhat problematic since he took the consistent position that his communication did not violate the directive he had received and refused to acknowledge that he had been insubordinate. In his hearing before the School Committee, and at this level, he argued that he was merely exercising his constitutional right to freedom of speech in communicating with his staff in this manner. We do not agree that Mr. Foley's email was constitutionally protected speech because even though it was transmitted in a public employment context, Mr. Foley was not speaking as a public "citizen" at the time, but as the Principal of the school. According to the precedent in the First Circuit cited¹² by the School Committee, a public employee's speech under such circumstances is not protected.

Since Mr. Foley did not view his email as insubordination and took the position he had every right to continue to send communications of this nature to staff at the high school, we infer that he would not have been able to assure the Superintendent that this conduct would not be repeated. Because Mr. Foley was immersed in his own personal controversy with Philip Thornton, it was especially important that Principal Foley could nonetheless recognize and acknowledge Superintendent Thornton's authority and demonstrate that he could continue to work together with him on accomplishing certain objectives for the High School. This was not the situation when the School Committee considered the Superintendent's recommendation for a thirty-day unpaid suspension on February 9, 2010. Unfortunately, Mr. Foley's inability to recognize and acknowledge that he had been insubordinate called into question his ongoing ability to work with Dr. Thornton and carry out his directives. Under such circumstances, we find that the School Committee had sufficient cause for the thirty (30) day unpaid suspension it imposed.

For the foregoing reasons, the appeal is denied and dismissed.

For the Commissioner,

Kathleen S. Murray

Deborah A. Gist

October 22, 2010

Date

¹² Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007)