013- 16

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

BRIAN GILMORE,	:
Petitioner,	:
	:
vs.	:
	:
PAWTUCKET SCHOOL	:
COMMITTEE,	:
Respondent	:

DECISION AND ORDER

Held: School department ordered to provide its retroactive approval to tenured teacher's request for unpaid leave to accept position as an assistant principal in another school district provided that teacher informs department as to the duration of the requested leave; teacher had statutory right to take an unpaid leave for up to three years under RIGL § 16-13-3(c), and school department: (a) was not entitled to consider time taken by teacher during a prior unpaid leave when calculating the three-year maximum period provided by statute; and (b) waived its right to insist that the timing of the leave not unnecessarily disrupt students when it improperly denied the request based solely upon the fact that the teacher had taken an unpaid leave in the past.

May 12, 2016

I. Introduction

Petitioner, BRIAN GILMORE ("Gilmore"), an Assistant Principal at a middle school in North Providence, filed a petition (the "Petition") with the Commissioner on or about December 29, 2015 pursuant to RIGL § 16-39-2 appealing the decision of Respondent, PAWTUCKET SCHOOL COMMITTEE (the "School Committee") to deny his request for an unpaid leave under RIGL § 16-13-3(c).[1]

The parties stipulated as to the accuracy of the facts and applicable law as stated below, and agreed to brief the relevant legal issues which, as will be discussed, dictate that the Petition be granted in part, absent an award of the requested monetary damages, attorneys' fees and/or costs.

II. Agreed Statement of Facts and Applicable Law[2]

1. Gilmore was appointed to the position of a full-time social studies teacher by the School Department on or about August 28, 2006.

2. Gilmore achieved tenure upon his completion of the 2008/2009 school year.

3. Gilmore took a one-year unpaid personal leave of absence from his position in the School Department during the 2011/2012 school year, pursuant to the applicable collective bargaining agreement.

4. During the 2011/2012 school year, Gilmore was employed as an assistant principal in the West Warwick Public School Department.

5. Gilmore returned to his position as a full-time tenured social studies teacher in the

[1] Pawtucket is correct that the Pawtucket School Department (the "School Department") is not a proper party. *See* Pawtucket's Memorandum of Law in Support of its Objection to Brian Gilmore's Petition dated March 31, 2016 ("School Committee Mem.") at 2, note 1. Thus, the School Department has been removed from the case caption, above.

[2] As noted, the following factual recitation was in substance written and agreed to by the parties.

School Department as of the 2012/2013 school year.

6. On July 16, 2013 an amendment to RIGL § 16-13-39(c) became effective so that the subsection provided as follows:

> ***[a]ny teacher employed by a local or regional school committee who has attained tenure in a Rhode Island public school system; who is appointed to an administrative position of*** principal, ***assistant principal,*** vice principal, superintendent, assistant superintendent, director, or other central office personnel in any Rhode Island public school system, including the original school district of employment; or who is hired for an administrative position as a fellow, education specialist, or director by the Rhode Island department of education, ***shall be granted an unpaid leave of absence, not to exceed three (3) years***, ***in order to be employed in an administrative position of*** principal, ***assistant principal***, vice principal, superintendent, assistant superintendent, director, or other central office personnel in any Rhode Island school system or the Rhode Island department of education. Said teachers shall, upon completion of their administrative position employment contract, or termination or resignation of the administrative position, be allowed to return to his or her former status as a tenured teacher within the system from which the leave of absence was taken. Such leaves of absence shall not be deemed to be an interruption of service for the purposes of seniority and teacher retirement.

Id. (emphasis added).

7. On or about October 28, 2015, Gilmore was appointed to the position of assistant principal of a middle school in the North Providence School Department. At the time of his appointment, Gilmore remained employed as a full-time tenured social studies teacher in Pawtucket.

8. Following his appointment to the administrative position in North Providence, Gilmore requested an unpaid leave of absence from his tenured teaching position in the School Department pursuant to RIGL § 16-13-3(c).

9. On or about November 17, 2015, the School Department advised Gilmore that his request for leave under RIGL § 16-13-3(c) had been denied, stating that:

> [t]he statute in question requires Pawtucket to provide you with a leave 'not to exceed three years.' Pawtucket has already done that by affording you a one year

> leave pursuant to the collective bargaining agreement with the Pawtucket Teachers' Alliance.

See letter from Pawtucket's Superintendent of Schools to Gilmore (attached as Exhibit D to the parties' Agreed Statement).

III. The Positions of the Parties

1. Gilmore

Gilmore relies upon the plain language of RIGL § 16-13-3(c), which, as noted, provides in pertinent part that any tenured teacher who, like Gilmore, has been appointed as an assistant principal, "shall be granted an unpaid leave of absence, not to exceed three (3) years, in order to be employed in [the] administrative position . . ." *Id*. While admitting that "the statute, as amended, is silent as to who was permitted to make the decision as to how long [a] leave under RIGL § 16-13-3(c) will last," he interprets the amended statute as affording tenured teachers the right to an unpaid leave whenever they are appointed to one of the administrative positions enumerated in the statute, as long as no single leave exceeds three years in total. *See* Petitioner Brian Gilmore's Memorandum of Law and Request for Relief dated March 10, 2016 ("Gilmore Mem.") at 10-11. Gilmore posits that:

> . . . it is obvious that the 2013 amendment to RIGL § 16-13-3(c) was intended to create a vehicle through which tenured teachers could preserve their constitutionally protected interest in employment while pursuing administrative positions either in other school districts or at RIDE. While the statute, as amended, is silent as to who is permitted to make the decision as to how long leave under RIGL § 16-13-3(c) will last, provided that the teacher is eligible and the leave does not exceed three (3) years, the answer to the question of who holds that right is obvious: it is the eligible teacher whose constitutionally protected interest in employment the amendment was intended to preserve.

Id. at 10.

Gilmore contends that the School Department had no right to deny his 2015 leave request based upon the fact that he had taken an unpaid leave in 2011/12 – which, as noted, was prior to

the effective date of the 2013 amendment to subsection (c), *see* Agreed Statement, ¶¶ 3 - 6, *supra* at 2-3 – nor to include his prior unpaid leave time when calculating the maximum three-year period to which he was statutorily entitled in 2015. *See* Gilmore Mem. at 3.

2. The School Committee

The School Committee, on the other hand, argues that the unambiguous term "not to exceed" within section 16-13-3(c) means that tenured teachers are entitled to only one unpaid leave, in total, and that Gilmore had already taken that one unpaid leave during the 2011/12 school year, even though it was taken prior to the effective date of the 2013 amendment to subsection (c). *See* School Committee Mem. at 1-2, 3-6.

In addition, the School Committee has a different take on the legislative intent behind the 2013 amendment, arguing that the General Assembly "never contemplated the open-ended abandonment of responsibility in the middle of the school year that Mr. Gilmore seeks to justify here." *Id*. at 2.

IV. Discussion

1. Jurisdiction and Procedural Matters

The Agreed Facts make clear that: (a) Gilmore is "aggrieved," (b) his appeal involves a "decision" or "doing" of a school committee,[3] and (c) the school committee "decision" or "doing" in question "[arose] under a law relating to schools or education." Thus, the Commissioner has jurisdiction over Gilmore's appeal under RIGL § 16-39-2. *See Sch. Cmmttee. of the City of Providence v. Bd. of Regents for Educ.*, 429 A.2d 1297, 1300-01 (R.I. 1981).

[3] Although it is unclear whether formal action was taken by the School Committee with respect to the Superintendent's denial of Gilmore's request, the School Committee has not challenged Gilmore's claim that his "efforts to resolve the dispute directly with the [Pawtucket School] Committee [were] unsuccessful." *See* Petition at 2. Thus, there exists a "decision" or "doing" of a school committee within the meaning of section 16-39-2.

In addition, it should be noted that the burden of proof is on Gilmore to prove his case by a preponderance of the evidence, and that the Commissioner's review of the School Committee's decision is *de novo*.[4]

2. The Merits

As noted by the Rhode Island Supreme Court, "when the language of a statute is clear and unambiguous" the statute must be interpreted "literally," and one interpreting the provision "must give the words of the statute their plain and ordinary meanings." *Alessi v. Bowen Court Condominium*, 44 A.3d 736, 740 (R.I. 2012). And the Court has indicated that "[w]ords are clear and unambiguous if, read within the context in which they appear, they give rise to but a single rational interpretation." *Drs. Pass and Bertherman, Inc. v. Neighborhood Health Plan of Rhode Island*, 31 A.3d 1263, 1269 (R.I. 2011).

Here, the relevant statutory language provides that any tenured teacher "who is appointed" to any one of several enumerated administrative positions, "shall be granted an unpaid leave of absence, not to exceed three (3) years . . ." *See* RIGL § 16-13-3(c), quoted *supra* at 3.

The School Committee has spent much of its brief arguing that the term "not to exceed" is unambiguous. *See* School Committee Mem. at 3-6. Yet, in so doing it has missed the salient point that the term, while admittedly unambiguous, merely refers to the permissible duration of a leave, not to the right to the leave itself. In other words, the term upon which the School

[4] *See, e.g., Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases); *see* also 2 Richard Pierce, *Administrative Law Treatise*, § 10.7 at 759 (2002); *see also Pawtucket Sch. Cmmttee. v. Bd. of Regents*, 513 A.2d 13, 17 (R.I. 1986), citing *Brown v. Elston*, 445 A.2d 279, 285 (R.I.1982) and *Slattery v. School Committee of Cranston*, 116 R.I. 252, 263, 354 A.2d 741, 747 (1976) ("We have consistently held that section 16–39–2 provides aggrieved persons *de novo* review by the commissioner of education of school committee decisions").

Committee dwells sheds no light upon when a tenured teacher has the right to take such a leave, or upon how many times that right may be invoked. The term merely specifies that whenever that may be the case, the leave that is granted is "not to exceed three (3) years." RIGL § 16-13-39 (c).

In short, the plain language of section 16-13-3(c) provides no support for the School Committee's claim that tenured teachers are limited to one unpaid leave; nor does it support its claim that school districts, rather than teachers, have the right to decide the length of any leave (up to the three-year maximum). As noted by Gilmore, the statute confers a right upon teachers, not school districts, and thus it is illogical to infer that the General Assembly intended by mere silence to confer the unilateral right to decide the length of the leave upon school districts rather than teachers.

Gilmore's leave during the 2011/12 school year thus did not eliminate or diminish his right to the maximum three years of unpaid leave in 2015. Indeed, Gilmore would have been entitled to a maximum three-year unpaid leave in 2015 even if his prior unpaid leave had occurred after the effective date of the 2013 amendment to subsection (c), and even if his prior leave had been three years rather than one year, since whether or not the 2013 amendment was in any respect retroactive (and it was not),[5] the plain language of amended subsection (c) makes clear that a tenured teacher has a separate right to an unpaid leave of up to three years each time he or she is appointed to one of the listed administrative positions.

Gilmore is thus correct when he states that the length of the requested leave is for the requesting teacher to decide, as long as it does not exceed three years. However, in 2015,

[5] *See, e.g., Dulgarian v. City of Providence,* 507 A.2d 448, 453 (R.I 1986) (articulating the "time-honored principle that a statute is presumed to operate prospectively"); *see also* Sutherland, *Statutes and Statutory Construction,* § 75:1 (Westlaw database updated November, 2015) (rule applies to employment statutes and amendments).

Gilmore did not specify how long a leave he was he requesting. Instead, he requested "up to three (3) years of leave (to the extent leave of that duration may be necessary)." *See* Petition at 1. And the School Committee, while conceding that the term "shall" in subsection (c) means that leave requests not exceeding three years which otherwise qualify cannot be denied outright, *see* School Committee Mem. at 6, argues at the same time that the provision "does not require Pawtucket to afford Mr. Gilmore the leave that he wants on the terms that he wants when he wants it." *See id.*

The School Committee is correct when it notes that absent ambiguity, one's view of legislative intent is largely irrelevant. *See* School Committee Mem. at 3, citing *Gem Plumbing & Heating Co. v. Rossi*, 867 A.2d 796, 811 (R.1. 2005). Yet, by claiming that it was entitled to deny Gilmore's request due to its timing, i.e., in the middle of a semester, *see id.* at 5-6, the School Committee raises an issue which is not addressed by the plain statutory language, and thus, an issue where legislative intent may be relevant.

Yet curiously, when discussing legislative intent, neither party noted that prior to the 2013 amendment, subsection (c) afforded administrators who had been tenured teachers with an unqualified right to return to their formerly-held teaching positions without mentioning unpaid leaves. *See* P.L. 2013, ch. 362, § 1.[6] Thus, contrary to Gilmore's suggestion that the 2013 amendment was intended to liberalize the rights of tenured teachers, the amendment actually limited a previously existing right by mandating that leaves requested by teachers could not exceed three years.

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[6] Prior to the 2013 amendment, subsection (c) merely provided as follows:

> [a]ny teacher appointed to a position of principal, assistant principal, or vice principal within the school system in which the teacher has attained tenure shall, upon termination or resignation of the administrative position, be allowed to return to his or her former status as a tenured teacher within the system.

Id.

More significant than speculation as to legislative intent is the fact that, as noted, section 16-13-3 is silent on the timing issue raised by the School Committee. Yet, it would be ill-advised – if not, as the School Committee suggests, "absurd," *see* School Committee Mem. at 7 – to suggest that the General Assembly intended "to allow tenured teachers . . .to get up and walk out of their classes in the middle of the school year to return whenever . . . they . . .see fit (as long as it is within three years)." *Id.* Indeed, nothing in the section suggests that school districts – which all face scheduling difficulties of one sort or another – should be compelled to accede to mid-semester leave requests, or guess from year to year whether or not a tenured teacher on unpaid leave will return to work. Without some limitation, the right provided to tenured teachers under the section could easily be abused. In fact, the three-year limitation included in the 2013 amendment to subsection (c) suggests that the Legislature intended to make the exercise of the right to such unpaid leaves, and their timing, more predictable.

Thus, although Gilmore was statutorily entitled to a maximum three-year leave in 2015, he should have informed the School Department how long a leave he was requesting. And rather than denying the request outright, the School Department should simply have asked Gilmore how long a leave he was contemplating, and then could have conditioned its approval upon timing which would minimize the disruption to his students.[7]

Yet, as noted, when it denied Gilmore's request, the School Department neither asked him how long a leave he was requesting nor mentioned student disruption. Instead, it denied the request outright, based solely upon its erroneous claim that by taking an unpaid leave in 2011/12,

[7] Although, as will be discussed, the timing issue is moot here, the Commissioner does not want to imply that specific determinations concerning whether a leave would unduly disrupt students is always straightforward. School Departments may want to provide written guidance to tenured teachers on the issue, or alternatively, deal with each request on a *sui generis* basis. In any event, such details are not for the Commissioner to dictate, but for administrators and tenured teachers to work out.

Gilmore had exhausted his statutory right to an unpaid leave in 2015. *See* Agreed Statement of Facts and Applicable Law, ¶ 9, *supra* at 3-4.

The School Department has thus effectively waived its right to deny Gilmore's leave request because of student disruption. After all, Gilmore has already left the School Department's employ and presumably, his students already have been disrupted by his mid-semester departure. However, the School Department does remain entitled to know how long an unpaid leave Gilmore will be taking.

3. Damages, Attorneys' Fees and Costs

Gilmore seeks unspecified "monetary and other damages" in addition to attorneys' fees and costs. *See* Gilmore Mem. at 12. However, Gilmore's failure to specify the length of his requested leave was a concurrent cause of any "monetary and other damages" which he might in theory be able to prove.[8] Thus, the request for such damages is denied.

Finally, it cannot be said that the School Committee was not "substantially justified" within the meaning of the Rhode Island's Equal Access to Justice Act, RIGL § 42-92-1 *et seq*.,[9] or that there was "a complete absence of a justiciable issue of either law or fact" under RIGL § 9-1-45, which provides for attorneys' fees in certain breach of contract actions. Thus, the Commissioner need not address the source and extent of his authority to award such fees and costs.

[8] Indeed, it is hard to see how Gilmore – who, as noted, has been serving as an assistant principal in North Providence, *see* Statement of Facts and Applicable Law, ¶ 7 at 3 – has sustained any legally cognizable monetary damages other than attorneys' fees.

[9] *See* RIGL§ 42-92-2 (a). Under the Act, "substantial justification" requires that the position taken "has a reasonable basis in law and fact." *Id*. at (f)

V. Conclusion

For all the above reasons:

1. Gilmore's appeal is hereby granted, in part, exclusive of any award of monetary damages, attorneys' fees and/or costs;

2. Gilmore shall forthwith inform the School Department precisely how long an unpaid leave he is requesting, and with respect to which particular school year or years; and

3. The School Department shall provide its retroactive approval to Gilmore's amended request for any period not exceeding three years, subject to any reasonable additional limitation with respect to the timing of his return which is designed to minimize student disruption.

For the Commissioner,

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Anthony F. Cottone, Esq.,
Hearing Officer

_____
Ken Wagner, Ph.D.,
Commissioner

Dated: May 12, 2016