

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

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JOSEPH A. MAGLIOCCO :  
                          : :  
                          : :  
vs.                      : :  
                          : :  
MIDDLETOWN              : :  
SCHOOL COMMITTEE       : :  
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D E C I S I O N

June 14, 1990

### Travel of the Case

On June 30, 1989 Joseph A. Magliocco appealed to the Commissioner of Education from the decision of the Middletown School Committee not to rehire him as head varsity football coach for the 1989 season. The matter was heard by the undersigned Hearing Officer, under authorization from the Commissioner on August 16, 18, 28, September 8 and 12, 1990. The voluminous transcripts were received, briefs submitted, and the record of the case closed on October 4, 1989.

Jurisdiction to hear this appeal lies under R.I. G.L. §16-39-2.

### Issues Raised

1. Did Mr. Magliocco have statutory tenure under R.I. G.L. §16-13-3 in his position as head varsity football coach?
2. If not, did Mr. Magliocco have a legitimate claim of entitlement to continuing employment as coach such that any decision not to renew him must be accompanied by procedural due process?
3. If he had no legitimate claim of entitlement to continuing employment as coach, was the School Committee's decision to consent to the Superintendent's appointment of another person as coach in error?

### Findings of Relevant Facts

- Joseph A. Magliocco has served as head varsity football coach at Middletown High School since 1965.
- Mr. Magliocco's service as football coach was under a series of annual (later seasonal) appointments by the School Committee.
- The practice in the Middletown School System from at least as far

back as 1976 up until the spring of 1989 was that once an appointment was made to a coaching position, it was not reposted or re-advertised, the incumbent was not required to reapply, and the incumbent would be reappointed absent his/her resignation or the presence of some cause for the coach's termination or non-renewal.<sup>1</sup>

- The above-described School Committee practice during this period was consistent with an understanding shared by the athletic coaches and members of the School Committee that incumbent coaches would be reappointed, absent cause. (Testimony of former Superintendent Coen, Vol. II p.32 and 34).
- During 1976-1989 no coach was terminated for cause and on those few occasions when the administration had a problem with the coach's performance, the coach was "counseled" to resign. (Vol. I, testimony of Mr. Arthur P. Moitoza, Athletic Director for the Middletown High School System, pp.33-34; Vol II, testimony of former Superintendent of Schools, Philip Coen, p.35).
- Sometime in the fall of 1988, the Superintendent of Schools, Dr. D. William Wheatley, had advised the School Committee of his administrative regulation providing for the written evaluation of all coaches at the end of each season (Petitioner's Ex. II).
- On being informed of both the process and form, the members of the School Committee raised no objection. (Vol. II, Dr. Wheatley's testimony, p.130).

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1] Testimony of Mr. Moitoza, Athletic Director during 1976-present (Tr. Vol. I, pp. 19-20; Testimony of Mr. Philip Coen, Superintendent, 1975-1986, Vol. II, pp. 31-33, 36; Testimony of Dr. Wheatley, Superintendent, 1986-present, Vol. II, pp. 143-144; Testimony of Mr. Magliocco, Vol. III, pp. 28-29.

- In May of 1989 the Athletic Director was instructed by Dr. Wheatley to post all coaching positions, not just new positions or those in which the incumbent had decided he/she was not interested in reappointment. (Vol. I, testimony of Mr. Moitoza, p.19).
- At the June 8, 1989 meeting of the School Committee, Mr. Moitoza explained that (1) an evaluation instrument had been developed for use and was used in evaluating all coaches; (2) the past practice for filling coaching positions had been changed in that "all jobs were up for application". (Vol. I, Moitoza testimony, pp.38-39). (Vol. II, Wheatley testimony, pp.131-132).
- On recommendation of the Athletic Director,<sup>2</sup> appointment by Superintendent<sup>3</sup> Wheatley, and approval of this appointment by unanimous vote of the School Committee, Barry Clark was appointed head varsity football coach for the 1989 fall season on June 8, 1989.

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2] The written evaluation of Mr. Magliocco by Mr. Moitoza completed on December 29, 1988 had recommended Mr. Magliocco for reappointment.

3] Although the minutes of the meeting indicate this vote was on the "Superintendent's Recommendations on Personnel" the Public Laws of 1988, Ch. 336 §1, altered the functions of superintendent/school committee with regard to selection and appointment of school department personnel; the superintendent appoints, the school committee's function is to grant or withhold consent. R.I.G.L. §16-2-18.

DECISION

Arguments of the Parties:

The parties to this dispute view much differently the longevity of Joseph A. Magliocco in the position of head varsity football coach at Middletown High School. Petitioner's counsel argues that his lengthy period of service, coupled with other circumstances of his employment entitle him to continuing employment in that position, absent cause. Counsel for the School Committee views the employment relationship, despite its length, as a series of annual/seasonal appointments which once expired, entitle the petitioner to no claim on the position in the succeeding season, and certainly imposing no obligation on the School Committee to justify its decision not to reemploy Mr. Magliocco on "cause" related to his past performance. Hence, the parties differ on whether Mr. Magliocco was entitled to notice and hearing before the School Committee at which time he could dispute the existence of reasons for his non-renewal, or whether those reasons were sufficient for not reappointing him for the 1989 fall season.

If Mr. Magliocco's non-renewal for the 1989 fall season was not required to be accompanied by procedural due process because he had no entitlement to continuing employment, both parties agree that on appeal the Commissioner must review the merits of the School Committee's decision and consider the matter de novo.

The School Committee argues de novo consideration of the matter at issue should not result in over-turning the Committee decision if it acted within the parameters of its discretion. Without the restrictions of the

need to identify "cause" for Mr. Magliocco's non-appointment, counsel for the Committee argues the administration was free to exercise its unfettered discretion and judgment as to who would be the "best person" for the job (see last page of Mr. McAleer's brief dated October 4, 1989). In substantiating the exercise of this judgment much of the Committee's case was directed at proof of the reasons why Barry Clark was selected for the position and the petitioner was not.

Apart from its legal and procedural due process elements, the petitioner's case pointed to the alleged invalidity of the reasons proffered by the administration, and the overall arbitrariness and unfairness of the process utilized in Superintendent Wheetley's decision making.

I. Did Mr. Magliocco have statutory tenure under R.I.G.L. §16-13-3 in his position as head varsity football coach?

Petitioner holds a certificate in first aid and CPR from the Rhode Island Heart Association and Red Cross (see Petitioner's Ex. #10, resume of Mr. Magliocco). This is the certificate required of athletic coaches under R.I.G.L. §16-11.1-1, a law enacted by the General Assembly in 1979. It is also a certificate which he is required to hold in his coaching position separate and distinct from his position as a tenured instructor of health and physical education at Middletown High School. The Teacher Tenure Act defines teacher in §16-13-1 as

. . . every person for whose position a certificate issued by the state department of elementary and secondary education is required by law . . .

Although petitioner did not present this argument at time of hearing,

in the brief submitted on his behalf, it is argued:

. . . although prior to 1979 coaches would not have required a certificate and were, therefore, not covered by the Teacher Tenure Act, after passage of §16-11.1-1 they do require a certificate and, therefore come squarely within the coverage of the Teacher Tenure Act. (Liguori brief at p.23).

Since the petitioner has held the requisite certificate in the position of football coach and completed three (3) successive annual contracts in that position, his argument is that he enjoys tenure in that position under R.I.G.L. §16-13-3.

In considering petitioner's claim that he enjoys such tenure as a coach and can be discharged only for cause, we rely on the guidance of the Rhode Island Supreme Court in Bryant v. Cunniff, 111 R.I. 211 (1973) and the earlier case of Irish v. Collins, 82 R.I. 348 (1954). These cases indicate that the definition and meaning of "teacher" found in §16-13-1 must be interpreted in the context of the entire chapter, and that the employee must actually be engaged in teaching duties to come within the scope of the Teacher Tenure Act. While it is true that a coach instructs in the fundamentals of a sport, we do not find that he is a teacher in the ordinary usage of that term. We view coaching duties as substantially different from teaching duties. Also, we must look for a clear indication of legislative intent to bring coaches within the scope of the Teacher Tenure Act when it enacted the law requiring athletic coaches to hold certificates. The Legislature obviously did not find the terms "teacher" and "coach" synonymous when it enacted §16-11.1-1, since, at that time, §16-11-1 already re-

quired persons employed to teach in the public schools to hold a certificate. We thus conclude that Mr. Magliocco had no statutory tenure rights in his coaching position.

II. Did Mr. Magliocco have a legitimate claim of entitlement to continuing employment as coach?

Our conclusion that coaches in Rhode Island are not covered by the Teacher Tenure Act, leaves the School Committees of the various cities and towns free to determine whether employment of coaches will be seasonal or will be characterized by some commitment or engagement beyond each successive school year. Certainly we recognize the benefits flowing from a school district's ability to have complete flexibility to select the best person for the job at the time it seeks to fill a coaching position.. Such flexibility is impeded by the concept of "job security" for coaches and the need to accompany a decision that "cause" exists for non-reappointment with costly and time-consuming hearing procedures. We, therefore, require clear evidence that a school district has intentionally given up its prerogatives in this area and intentionally committed itself to reemploy a coach, or all of the school district's coaches, on a continuing basis, absent cause related to the coach's (s') performance.

We cannot ignore the evidence presented at the hearing before us that the Middletown School Committee followed, without a single deviation, a uniform practice for at least fourteen (14) years in which coaches were reappointed, absent cause. This practice was accompanied by the mutual understanding of the coaches, members of the School Committee, and school administrators that once appointed, a coach would be entitled to reappoint-

ment unless it was determined that some cause or reason related to performance justified a decision not to reappoint that person.

All witnesses questioned concerning this practice - Athletic Director Mr. Moitoza, former Superintendent of Schools Coen, Superintendent Wheatley, and Coach Magliocco, were in concert as to their understanding of the "practice or policy" followed during this period. In addition, Mr. Coen was asked twice (Vol. II, p. 32 and 34) and answered affirmatively both times, that this "practice or policy" was known by the School Committee. Therefore, whether the practice stemmed from a directive of the Superintendent or the School Committee (and the evidence does not indicate the origin of this practice) the School Committee, with knowledge of the practice, acted affirmatively with this knowledge every time it voted on the reappointment of athletic coaches. We must conclude that over the years the School Committee at a minimum knowingly assented to this arrangement. We might note that despite this testimony, not one member of the School Committee appeared to testify before us to dispute the existence of this practice, or to challenge Mr. Coen's statements concerning the extent of the School Committee's knowledge of it.

Given our factual findings and conclusions as to the existence of a custom or practice of reappointment absent cause, accompanied by the mutual understandings of all concerned as to the significance of this practice, we find, in this instance, that the petitioner has established a legitimate claim of entitlement to continuing employment as head football coach. Our review of the myriad of cases following the decision of the United States Supreme Court in Perry v. Sindermann, 408 U.S. 593 (1972), convinces us

that when a claimant establishes the existence of such custom or practice, accompanied by such mutual understandings, his claim to reemployment rises to the level of a property interest for due process purposes.<sup>5</sup>

It is not necessary that the custom or practice giving rise to the claim of entitlement be reduced to a written policy for a legitimate claim of entitlement to be presented. In fact, both Perry, supra, and Board of Regents v. Roth, 408 U.S. 564 (1972) discuss the prospect of such a claim being based on a practice which amounts to an unwritten common law of a particular institution or school system (92 S.Ct. 2694, 2700)

In the case of Lagos v. Modesto City Schools District, 843 F.2d 347 (9th Cir. 1988), cited by the school committee, a baseball coach alleged that it was:

The custom, practice, and procedure of the school district that it would keep coaches in their coaching positions as long as they 'performed their tasks satisfactorily' p. 348.

The Court ruled that a cause of action was not stated even if there was allegation of a "custom" creating an entitlement to the coach's renewal, because the California Education code, as a matter of law, refuted this allegation. California Education Law §44923 specifically provided that a tenured full-time teacher could be terminated at any time from any employment additional to his full-time teaching assignment. 843 F.2d, 347, 348 (1988).

In the matter before us, evidence of the custom or practice in Middletown stands unrefuted as a matter of law, since we have no state  
5] See Perry v. Sindermann, 92 S.Ct. 2691, 2699 (1972)

statute which addresses the issue of extra-curricular assignments of full-time teachers, or provides for "at will" termination from such assignments.

Similarly instructive is the First Circuit case of Willens v. U. Mass. 570 F.2d 403 (1st Cir. 1978) in which a professor had alleged before the District Court that the University of Massachusetts had a de facto tenure system giving her a claim to continuing employment and resulting due process rights. In upholding the District Court's grant of the University's summary judgment motion, the First Circuit noted that there was uncontroverted sworn testimony that U. Mass had not adopted the de facto tenure system alleged by the plaintiff. The Court stated:

Lacking a claim of entitlement under state law or justifiable expectation based on institutional practice, plaintiff has no property interest sufficient to invoke the Fourteenth Amendment's guarantee to due process. Willens, p.405.

We have before us uncontroverted, sworn testimony of a well-known, accepted institutional practice under which all those connected with the athletic program in Middletown labored for some fourteen (14) years.

If Mr. Magliocco had presented a case which did not include the uncontroverted testimony concerning both long-term practice and mutuality of the understandings at work in the Middletown School System, we would be constrained to find that upon expiration of his seasonal appointment any expectation of reemployment was merely subjective. Considering only the longevity of his service and the fact that he had been reappointed for twenty-four (24) successive years, we would find the case indistinguishable from

the case of Smith v. Bd. of Education of Urbana School District No. 116, 708 F.2d, 258 (1983). In that case, the Seventh Circuit, after finding no statutory or contractual entitlement to reappointment of the coach/plaintiffs, also found that merely showing a practice of reappointment, without more, did not establish a property right in being rehired. We stress the important distinction in the case before us of additional evidence, establishing clearly what the mutual understandings of the parties were as to the significance of the practice followed uniformly in the Middletown School System.

Conclusion

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Mr. Magliocco had a legitimate claim of entitlement to continued employment as head varsity football coach at Middletown High School. Hence, he had a property interest which entitled him to notice of and hearing on the grounds for not reappointing him for the fall of 1989 season. This matter is remanded to the local school officials for the petitioner to be accorded the procedural protections to which he was entitled at that time. He is also awarded nominal damages of One (\$1.00) Dollar. We decline to reinstate Mr. Magliocco, or award him back pay for the loss of compensation for the fall 1989 season, since we are unable to determine (and it would be inappropriate for us to do so in light of our decision to remand

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6] The parties have not raised or briefed, so we need not consider the issue of whether or not the 1988 passage of those amendments, previously referred to, in §16-2-18, and other sections of Title 16, which gave the power to "select and appoint" School Department personnel to the Superintendent, with the consent of the School Committee, operated to relieve Superintendent Wheetley of any obligation to recognize any property rights stemming from prior practices of the School Committee. It would be an interesting question, but one which we are not obligated to research and consider, whether this change in the law and the Superintendent's initiation of a "new policy" extinguished a previously-held property interest.

the matter for hearing before the School Committee) that his non-  
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appointment was unsupported by "cause".

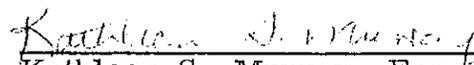
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footnote 6 continued

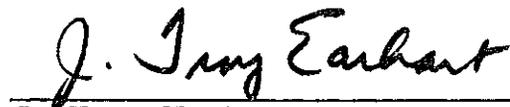
We do not mean to imply by the foregoing statement that without the statutory change which transferred the power of appointment to the Superintendent that a school committee previously utilizing such a system could not change this system. We can foresee that as a result of this decision, school committees and superintendents will scrutinize very carefully the "practices and understandings" present in employing coaches. They may decide to take all steps possible to terminate such a system to preserve the flexibility they should enjoy under our statutory scheme.

7] We have previously addressed the issue of appropriate remedies for due process violations in Simmons v. Tiverton School Committee, Decision on Remand, March 4, 1986 and Hobson v. South Kingstown School Committee, April 4, 1988.

We would further note that our reference to "cause" is the type of legally sufficient cause accepted in the coaching context objectively supportable, and with due regard for the particular performance areas taken into account in determining whether a coach is adequately performing his duties. See; Discussion on Reasons for Removal, p.841 "Employment Status of a Teacher-Coach" Beezer and Goldberg, Ed. Law Rep. December 1988.

  
Kathleen S. Murray, Esq.  
Hearing Officer

Approved:

  
J. Troy Earhart  
Commissioner of Education

June 14, 1990