

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

JOHN JOHNSON

v.

PROVIDENCE SCHOOL BOARD

DECISION

Held: John Johnson was employed as a non-tenured teacher at Esek Hopkins Middle School in Providence during school year 2010-2011. The School Board sent “dismissal” notices to every teacher in the district on February 24, 2011 (effective as of the last day of the 2010-2011 school year). The Board subsequently rescinded most dismissals, but not that of Mr. Johnston. The Board’s failure to affirm its decision when it heard Mr. Johnson’s appeal removes all issues related to the validity of the February 24, 2011 “dismissal” from the Commissioner’s review at this time.

The School Board also took individual action to dismiss Mr. Johnson at a meeting held on June 13, 2011. The Board voted to terminate his annual contract effective immediately based upon inappropriate physical contact with a student that had occurred on January 31, 2011. The Board affirmed this decision by a unanimous vote of the full Board on November 7, 2011. On appeal to the Commissioner, the Providence School Board has proven by clear and convincing evidence that Mr. Johnson did engage in the alleged conduct. This misconduct provides good and just cause for his dismissal during his third annual contract term as a probationary teacher. The Board followed appropriate procedures and we find that the March 1st deadline is inapplicable to the dismissal of a nontenured teacher during his third annual contract term.

DATE: October 23, 2012

Travel of the Case:

On November 21, 2011 the Appellant, John Johnson, requested a de novo hearing before Commissioner Deborah A. Gist on the issue of his suspension without pay and his termination by the Providence School Board. The suspension without pay was imposed on June 13, 2011 and his termination made effective as of this same date.¹ The full Providence School Board voted unanimously on November 7, 2011 to uphold its previous decision to suspend Mr. Johnson without pay and terminate his employment, effective June 13, 2011. The Board cited as the basis for its action its finding that Mr. Johnson had made inappropriate physical contact with students, specifically that he had grabbed a student by the neck and side and pushed him out of his classroom. (Joint Ex.4) In this same decision, the School Board took no action on - and made no mention of – a separate action that it had taken on February 24, 2011 in which Mr. Johnson, and every other teacher in the Providence school district, was dismissed effective at the end of the 2010-2011 school year. Mr. Johnson, through his attorney, had filed a separate written appeal with respect to each “dismissal” of which he had received notice.

The undersigned was designated to hear and decide this case. The parties set two dates for hearing by agreement, the first on February 27, 2012 and the second on May 31, 2012. Post-hearing memoranda were submitted on August 30, 2012 at which time the record in this matter closed.

Jurisdiction to hear this case arises under R.I.G.L. 16-39-2 and, arguably, R.I.G.L. 16-13-4.²

Issues

- Prior to his dismissal/termination had John Johnson attained the status of a tenured teacher in the Providence school system?
- Was Mr. Johnson validly dismissed from his position as a teacher at Esek Hopkins Middle School by the decision of the Providence School Board on February 24, 2011?

¹ The reason for a simultaneous suspension without pay and termination is not clear, but the School Board took both actions on June 13, 2011 by a vote of 6 to 0 with one abstention. Joint Ex. 2.

² At the Commissioner’s level the School Board has taken the position that Mr. Johnson’s contract as a nontenured teacher was non-renewed pursuant to R.I.G.L. 16-13-2 and that he was dismissed for cause pursuant to R.I.G.L. 16-12-6. Counsel for the Appellant takes the position that Mr. Johnson was at all times a tenured teacher whose substantive and procedural rights are protected under the Teacher Tenure Act.

- Was Mr. Johnson’s dismissal on June 13, 2011 during the term of his third annual contract as a probationary teacher supported by good and just cause and accompanied by procedures that were consistent with Title 16?

Findings of Relevant Facts

- John Johnson’s appointment as a probationary teacher in the Providence School Department became effective on November 12, 2008. PSB Ex. K; Tr. Vol. II, pp. 69-70; 140. The record of the School Department that verifies the date of his appointment as a probationary teacher also indicates that Mr. Johnson was terminated on June 25, 2011. PSB Ex. K.
- During the 2010-2011 school year, Mr. Johnson was working as a probationary teacher under annual contract at Esek Hopkins Middle School in Providence as a seventh grade teacher of United States History. Tr.Vol. II p.144.³
- On January 31, 2011 Mr. Johnson forcefully pushed one of his students out of his classroom as he yelled the words “get out”. Mr. Johnson had his hand on the back of the student’s neck, squeezing it, and his other hand on the student’s side, squeezing his ribs as he pushed the student. Tr. Vol. I, pp. 152-154, 165-170, 178-181; PSB Ex. A, B and D.
- A teacher who observed this incident reported what she had seen to Principal Gloria Jackson whereupon Ms. Jackson used a walkie-talkie to call for the student, (who was at that time in the Assistant Principal’s office next door). Vol.I, pp. 39-41. When he came into her office, the student, who was twelve years old, had been crying, was emotional and “seemed very angry”. After relating what had happened, he was sent to the school nurse. The nurse examined him and found that he had a bruise on his neck. Tr. Vol. I, pp. 23, 25, 42-44; 187-188; PSB Ex. C.

³ Testimony was presented by the district’s Assistant Superintendent for Human Resources and Labor Relations that Mr. Johnson was “forced placed” into this position and that he did not “own” it because he had not been hired through a “criterion-based” hiring process. The School Board sought to explain the relevance of criterion-based hiring in its Post-Hearing Memorandum. The Appendix to the memorandum includes an unsigned copy of an “Order” of former Commissioner Peter McWalters dated February 17, 2009 requiring that Providence fill vacancies by using such a process. This documentation, along with evidence establishing that Mr. Johnson’s February dismissal was not “rescinded” by the School Board, goes to the validity of the mass firings of all Providence teachers that occurred in February of 2011. Because of the fact that the full Board did not affirm this action when it heard Mr. Johnson’s appeal (see its written decision dated November 10, 2011, Joint Ex.4) it is our conclusion that the issue of the validity of what the Board terms its “Non-Renewal Decision” is not before the Commissioner in this appeal. Therefore, findings of fact with respect to the “Non-Renewal Decision” and a discussion of numerous legal issues that are presented with respect to the validity of that action are omitted from this decision.

- On January 31, 2011 Mr. Johnson was placed on administrative leave with pay based on the allegation that he had grabbed a student by the neck, choked the student, and then forcibly removed the student from his classroom. PSB Ex. E.
- On June 3, 2011 Tomas Ramirez of the School Department's Human Resources and Labor Relations Office, notified Mr. Johnson that on June 13, 2011 the School Board would consider the Superintendent's recommendation that he be suspended without pay for the remainder of the year and terminated, effective immediately, based on the allegation that he had grabbed a student by the neck and side and pushed that student out of his classroom. Tr. Vol.I, p.231.
- At its June 13, 2011 meeting, the School Board voted to uphold the recommendation of the Superintendent, citing as the basis for its action information that Mr. Johnson had made inappropriate physical contact with students, "specifically that you grabbed a student by the neck and side and pushed that student out of his classroom". Joint Ex.2. Notice of the School Board's decision was sent to Mr. Johnson by letter dated June 17, 2011. Joint Ex.2.
- Upon Mr. Johnson's request for a full evidentiary hearing before the entire School Board, the School Board held a hearing on November 7, 2011 and voted 9-0 to uphold its previous decision to suspend and terminate Mr. Johnson's employment with the School Department. Joint Ex. 3 and 4.

Positions of the Parties

The Appellant

The Appellant requests that the November 7, 2011 decision of the Providence School Board be reversed. Both actions taken by the Providence School Board to terminate him in 2011- his "non-renewal" and his termination for cause- are fraught with procedural errors violating the Teacher Tenure Act. The single allegation of misconduct constituting the "cause" for his dismissal was an incident in which it is alleged that he forcibly removed a student from his classroom. Mr. Johnson does not deny that he pushed the student, but he contends that the witnesses who testified against him misinterpreted what they saw and were unaware of the context in which this action occurred. Mr. Johnson had in fact directed this disruptive student to leave the classroom and pushed him only

as a reflex when the student stepped back onto Mr. Johnson's foot, which was sensitive because of a prior injury. He had no intent to forcefully push the student out the door of the classroom.

Counsel points out that Mr. Johnson received a "medley of confusing correspondence that set the stage for a comedy of errors" through which the School Board sought to terminate him- not once but twice during the school year. The first action was what the Board now claims was a "non-renewal" of his teaching contract in February of 2011 (although no notice of "non-renewal" was ever given to him). The second action was a dismissal "for cause" in June of 2011 (although notice of this action was sent well after the March 1st deadline). The "non-renewal" notices provided to the Appellant did not specify that non-renewal of his contract was being considered or that such action had been approved. Furthermore, the February 2011 notices were not issued by the "governing body" as is required by the Teacher Tenure Act and left open the possibility that his employment in the district would continue if certain conditions were met. Mr. Johnson never received a statement of cause, as R.I.G.L. 16-13-4 requires, "at least one month prior to the close of the school year".⁴ Based on these procedural defects Mr. Johnson argues that his "non-renewal" was invalid.

The Appellant takes the position that he had the status of a tenured teacher in Providence.⁵ He asserts that he attained the status of a tenured teacher "as a result of three (3) annual contracts of continuous employment as of November 2011". (Memorandum of Mr. Johnson at pages 2-3). He points to additional evidence of his tenured status stemming from "the manner in which the Board communicated with him" throughout the termination process initiated in June of 2011. The Board provided him with a "statement of cause" for his dismissal per the Teacher Tenure Act. The Board relied on the existence of "cause" for Mr. Johnson's termination - and cited facts establishing such "cause". In doing so, the School Board acknowledged that it needed to establish "cause" in order to terminate Mr. Johnson's employment- a burden it would not have had in terminating the employment of a non-tenured teacher. The Board also placed Mr. Johnson on paid administrative leave throughout the period from January 31, 2011 (the date of the incident) until it made its decision to dismiss him on June 13, 2011. This procedure is consistent with the process utilized in investigating reports of misconduct against tenured teachers in the Providence school system. The

⁴ The February 19, 2011 notice informed Mr. Johnson that "Also, in accordance with Rhode Island General Law, and upon request, a statement of cause for dismissal will be given to you , in writing, at least one month prior to the close of the current school year". PSB Ex.M.

⁵The precise date on which the Appellant argues that he attained tenured status is not clear. The Appellant states in his memorandum that he attained tenure "as of November 2011" but this date is well after his June 13, 2011 termination for cause and would demonstrate that he was a non-tenured teacher at the time of his termination. (see Appellant's memo at page 2-3),

School Board deviated from the required process, however, when it failed to provide Mr. Johnson with written notice of his dismissal on or before March 1st of the school year immediately preceding the school year in which the dismissal is to become effective. This is required under R.I.G.L. 16-13-3 (a). Thus the June 17, 2011 notice to him from School Board President Kathleen Crain clearly does not comply with the Teacher Tenure Act and this constitutes grounds to overturn his dismissal.

Because Mr. Johnson was a tenured teacher, the Providence School Board also has a burden to establish that his dismissal is supported by good and just cause. Counsel for Mr. Johnson submits that the evidence in this record demonstrates that he was terminated after only a single incident of physical contact with a disobedient student. Although he acknowledges that case law supports termination on the basis of a single, serious incident, the majority of cases indicate that dismissal is warranted only upon a showing of a course of persistent misconduct or a series of varied acts of impropriety on the part of the teacher. In this case, Mr. Johnson has been dismissed for a single incident and not a pattern of misconduct.⁶ Even if the Commissioner should find that his physical contact with this student was intentional and not accidental, this single act of misconduct does not justify his termination. The Board should be directed to follow principles of progressive discipline and impose another, more appropriate, sanction.

The School Board's decision to terminate Mr. Johnson must, on this record and with no evidence of a prior disciplinary history, be reversed.

Providence School Board

Counsel for the School Board outlines the legal implications of a relatively complex series of events affecting all Providence teachers collectively and John Johnson, individually. According to School Board counsel, Mr. Johnson is a former probationary teacher who was dismissed during his annual contract term for good and just cause, pursuant to R.I.G.L. §16-12-6. Just cause was provided by a January 31, 2011 incident in which Mr. Johnson grabbed a seventh grade student in his social studies class by the neck and side and, while choking him, forced the student from the classroom. Earlier in the school year the Providence School Board had voted not to renew Mr.

⁶ The Appellant argues in his Memorandum that evidence of other occasions on which Mr. Johnson was alleged to have grabbed students should not be considered for any purpose. The hearing officer ruled on June 22, 2012 that redacted statements of two students (PSB Ex. S and T) were admissible pursuant to Rule 404(b) only for the limited purpose of proving that the contact between Mr. Johnson and a student on January 31, 2011 was intentional and not an accident.

Johnson's annual teaching contract on February 24, 2011 and subsequently informed him in writing that his non-renewal was based on his having been "placed in a position for one (1) year only" and his "lack (of) a regular teaching position for 2011-2012". Underlying these stated reasons was the necessity to lay off teachers because of a documented fiscal emergency faced by all municipal departments in the city of Providence.

The School Board urges the Commissioner to exercise her authority to affirm the School Board's dismissal of Mr. Johnson because the Board has proved by a preponderance of evidence that Mr. Johnson intentionally engaged in an unwarranted physical intervention which amounted to physical and emotional abuse of a student, in violation of state law and district policy. The district also argues that the Board's "non-renewal" decision of February 24, 2011 should be affirmed "in the alternative" because the Board's layoff of all Providence teachers was needed to protect the educational and financial interests of Providence public schools. The Board sought to take emergency action within time constraints imposed by the Teacher Tenure Act. Ultimately, layoffs were rescinded except for those teachers who lacked a permanent position. Although Mr. Johnson appealed his non-renewal, he has not presented any evidence that would invalidate the reasons for this action. Instead, he takes the position that he was a tenured teacher who could be terminated only for "good and just cause".

The School Board points out that state law does not confer tenure to a public school teacher in Rhode Island until he or she has satisfactorily completed three (3) years of service under three (3) annual contracts within a consecutive five (5) year period. R.I.G.L.16-13-3 (a). Since Mr. Johnson was not hired to work as a probationary teacher until November 12, 2008, it is clear that at no point did he ever achieve tenure in the Providence school system. Mr. Johnson erroneously contends that the fact the Board dismissed him for "cause" indicates that the Board "treated him as a tenured teacher" and therefore his probationary status was transformed into that of a tenured teacher. Citing Barber v. Exeter-West Greenwich School Committee, 418 A.2d 13 (R.I. 1980), counsel for the Board points out that the duration of the probationary period is exclusively within the domain of the Legislature and cannot be altered. Thus, it is not possible for conduct of the school department to have conferred tenure upon Mr. Johnson prior to his successful completion of the probationary period.

Counsel points out that the "just cause" standard applies to the dismissal of a non-tenured teacher during the contract year, a proposition expressly affirmed by the Supreme Court in Jacob v.

Board of Regents for Education, 365 A.2d 430, 433, n.3 (R.I. 1976). The Court in Jacob (citing R.I.G.L. 16-12-6) stated:

...any committee which dismisses a nontenured teacher during the school year is required to afford the teacher a hearing at which just cause for the committee's action must be shown.

Thus, the Board's reliance on just cause to dismiss Mr. Johnson was not a concession that Mr. Johnson was a tenured teacher, but the standard cited only because the Board sought to comply with the requirements for such dismissals as set forth by our Supreme Court.

The Board goes on to devote several pages of its post-hearing memorandum to a discussion of the facts supporting Mr. Johnson's non-renewal in February of 2011. Several of the arguments contained in the memorandum respond to the Appellant's claim that procedural defects invalidate this action. Counsel for the Board points out that the burden is on a non-tenured teacher to demonstrate the invalidity of his or her non-renewal and that Mr. Johnson has failed to come forward with evidence to show that his non-renewal was arbitrary or capricious, or devoid of a factual basis. Mr. Johnson has failed to present such evidence on two occasions – first at the evidentiary hearing held by the Providence School Board on November 7, 2011 and again at the Commissioner's hearing. At this point, Mr. Johnson has effectively waived his right to raise the issue of the validity of his non-renewal.

If the November 10, 2011 written decision of the School Board suffers from a fundamental flaw in failing to address the merits of Mr. Johnson's appeal of his non-renewal, the remedy for this procedural defect should not be to overturn this decision, especially when there is no evidence that the reasons advanced for his non-renewal did not exist or were invalid. Implicitly, the Board also argues that if any other procedural defects accompanied the Board's decision not to renew Mr. Johnson's contract, the remedy should be to provide him with the appropriate procedures, but not to reverse the Board's decision.

Providence asserts that the dismissal of Mr. Johnson on June 13, 2011 in the course of his annual contract for school year 2010-2011 has been supported by evidence of "good and just cause" and that Providence has therefore met its burden of proof to support its termination of his employment. Counsel for the district summarizes a substantial amount of testimony and documentary evidence demonstrating that Mr. Johnson forcefully and forcibly removed a student

from his classroom. The district contends that the evidence rebuts Mr. Johnson's contention that he pushed the student unintentionally. There are many implications that flow from a teacher's unwarranted and unreasonable use of physical force with his students. Among them are the violation of a student's basic educational right to be safe in the hands of his teacher, violation of Regents' Physical Restraint Regulations, and the Providence School Department's Physical Restraint/Crisis Intervention policy. A teacher guilty of such conduct cannot serve as a credible role model for students because he has engaged in exactly the type of violent behavior that district officials wish to discourage.

Where the conduct of a teacher poses a threat to students' safety, principles of progressive discipline do not apply to require the district to fashion a sanction less drastic than the teacher's dismissal. The memorandum of the School Board contains citations to several cases in which the courts have affirmed the proposition that a school committee is not only the employer of its teachers, but also the agency of government charged with the responsibility for the physical, mental and moral health of the pupils in its school system. The School Board emphasizes that its dismissal of Mr. Johnson was in furtherance of its clear legal duty to protect students from the plainly foreseeable risk of harm that would be posed by his retention.

For the reasons stated above, the Providence School Board respectfully requests that the Commissioner affirm its decision to dismiss the Appellant for good and just cause pursuant to R.I.G.L. 16-12-6. In the alternative, the School Board requests that the Commissioner affirm its decision not to renew Mr. Johnson's annual teaching contract, pursuant to R.I.G.L. 16-13-2.

DECISION

This appeal initially appears to present for resolution complex legal issues raised by the collective or "mass" dismissal of all Providence teachers that occurred when the Providence School Board took extraordinary action to address a fiscal crisis in February of 2011. John Johnson was a member of the group of teachers who were "dismissed" at that time with the promise that reasons would be forthcoming and the optimism that rescission of the dismissal notices was possible. The parties to this appeal have presented evidence of the factual scenario that existed when all Providence teachers were "laid off" and what happened in the aftermath of this controversial action. Memoranda submitted have addressed the legal issues raised. Although the mass dismissal of

Providence teachers in 2011 raises a host of challenging legal issues and invites a treatise-length discussion of substantive and procedural rights of Rhode Island teachers, the procedural history of this particular matter renders such a discussion (and a ruling on these issues) inappropriate.

Interestingly, either through inadvertence or design, the Providence School Board never took any action on Mr. Johnston's appeal of his February 24, 2011 "dismissal" as a member of the group of all Providence teachers. When the School Board decided⁷ Mr. Johnson's appeal on November 7, 2011, it addressed only the merits of his June 13, 2011 dismissal "for cause" and upheld this decision by a unanimous vote of the full Board. It evidently did not address the merits of, or affirm, its other decision, i.e. its February 24, 2011 dismissal of Mr. Johnson as a member of the group of all Providence teachers. It is our view that the Board was required to reconsider and affirm this prior action when it acted on Mr. Johnson's appeal in order for legal issues related to this action to be properly before the Commissioner.⁸ We find that Mr. Johnson's appeal to the Commissioner does not raise the issue of the validity of the February 24, 2011 dismissal of all Providence teachers, including his own.⁹ Stated another way, it would be premature for the Commissioner to rule on the validity of the mass termination of all Providence teachers (including John Johnson) when the Providence School Board has yet to affirm (or reverse) its own decision to take this action. It is also not necessary to rule on the validity of Mr. Johnson's "non-renewal" -as the School Board describes the February 24, 2011 action- because we find that this appeal is resolved "in the alternative" by our ruling that his June 13, 2011 dismissal for cause was valid in all respects. The record establishes that Mr. Johnson was a non-tenured teacher in his third annual contract year,¹⁰ and that he was validly dismissed "for cause" under R.I.G.L. 16-12-6 on June 13, 2011. Since he was hired as a probationary teacher on November 12, 2008 Mr. Johnson was clearly a non-tenured

⁷ The record does not indicate what the full Board actually "heard" when Mr. Johnson presented his appeal on November 7, 2011. Counsel for the School Board argues that Mr. Johnson did not present any evidence related to the validity of his "non-renewal" at either the full Board hearing or at the Commissioner's hearing and therefore waived his right to challenge the Board's action in this regard. At this level, however, it is clear that the Appellant has not conceded the validity of his February 24, 2011 dismissal even though he has consistently argued that he was a tenured teacher at the time this action was taken.

⁸ The written decision of November 10, 2011 does not address issues related to the validity of the mass dismissals nor does it indicate that the School Board voted to affirm its February 24, 2011 decision. See Joint Ex.4.

⁹ No ruling is made as to whether the result of this procedural snafu is a waiver of Mr. Johnson's right to contest this action or a waiver of the School Board's ability to continue to rely on this action to terminate his employment.

¹⁰ Mr. Johnson would have had to work for three (3) full years under three (3) annual contracts within five (5) successive school years before achieving tenured status. See Asadoorian et al. v. Warwick School Committee, 691 A.2d 573 (R.I. 1997).

teacher during the entire 2010-2011 school year. In accordance with the Rhode Island Supreme Court's ruling in Jacob, supra, the School Board provided Mr. Johnson with notice of its intent to dismiss him for cause on June 3, 2011 and proceeded to take this action at its meeting on June 13, 2011. After an evidentiary hearing before the full Board on November 7, 2011, the Board affirmed its prior decision that there was "cause" to dismiss Mr. Johnson from his position as a social studies teacher.

After a full evidentiary hearing at this level and a de novo review of the evidence, our conclusion is that good and just cause existed for Mr. Johnson's dismissal from his position on June 13, 2011. The School Board has met its burden of proof to demonstrate by a preponderance of evidence that Mr. Johnson made inappropriate physical contact with a student, specifically that he grabbed a student by the neck and side and pushed him out of his classroom. Despite Mr. Johnson's testimony that he grabbed and pushed this student only as a reflex action when the student stepped back onto his foot, the evidence is clear and convincing that in fact he grabbed the student by the neck and side, squeezing the student and forcibly and forcefully pushed him for several feet out the door, in full view of another teacher, a teacher's aide, and his entire class of students. The record indicates that the student was bruised, upset and crying as a result of Mr. Johnson's conduct.

Counsel for the School Board has included in her memorandum a thorough discussion of the implications of such conduct for school authorities in terms of the obligation a school committee has to protect students from the foreseeable risk of harm. She also cites to several well-reasoned cases in which a single, serious incident constitutes sufficient good and just cause for termination of even a tenured teacher. We will not repeat the Board's extensive and persuasive arguments. We find, on this record, that sufficient cause existed to dismiss Mr. Johnson during the term of his annual contract and to terminate him from the district's employ. If Mr. Johnson were a tenured teacher (which he was not at any point, even at the time of the "final" decision of the School Board on November 10, 2011) and the "good and just" cause standard were being applied to his dismissal from continuous service, that standard has been met as well. Physical abuse of an individual student and the fear it instills in the children who witness it is simply not tolerated in Rhode Island's public schools.

The March 1st deadline did not constrain the district from acting when it completed its investigation. We acknowledge the recent ruling of the Superior Court in McCrink v. Providence School Board (2012 WL 4739138 (R.I. Super. September 28, 2012)). The Superior Court found that

Mr. McCrink's dismissal, although supported by good and just cause, could not take effect until a subsequent school year because the district had not notified him until after March 1st of its intent to dismiss him. The McCrink case is not binding precedent and is to be distinguished from this matter in that Mr. Johnson was at all relevant times a non-tenured teacher and the district dismissed him pursuant to R.I.G.L. 16-12-6. Thus, R.I.G.L. 16-13-3 (a) does not apply to him.

We find that the School Board's dismissal of Mr. Johnson is supported by just cause and that it became effective on June 13, 2011. The Appellant's appeal is denied and dismissed.

For the Commissioner,

Kathleen S. Murray
Hearing Officer

Date: October 24, 2012

David V. Abbott, Acting Commissioner