

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

JAMES VINER
Petitioner

v.

NORTH KINGSTOWN SCHOOL COMMITTEE
Respondent

RULING ON MOTION TO REOPEN THE RECORD

Held: The Petitioner's Motion to Reopen the Record to receive into evidence the deposition transcripts of Attorneys Mary Ann Carroll and Aubrey Lombardo dated April 30, 2018 is hereby granted. Although this additional evidence generally further supports the finding that Mr. Viner's constitutional and statutory rights to due process were undermined during the investigation process, the general rule that a *de novo* hearing at the Commissioner's level is a sufficient remedy for a due process violation occurring before a teacher's employment has been effectively terminated continues to be applicable. None of the additional facts contained in the transcripts now in evidence is material to any of the factual findings made by the hearing officer and accepted by the Commissioner in making his May 9, 2017 decision that the North Kingstown School Committee had proven "good and just cause" for suspension and termination of Mr. Viner's employment as a tenured teacher. Presented with an identical factual record of what a prior Commissioner has determined to be "good and just cause" for termination, any re-examination of such decision by a subsequent Commissioner occurring because of a lapse of time is inappropriate.

Date: February 19, 2020

Travel of the Case:

The issues in this case involve the 2015 termination of Mr. James Viner, a tenured Chemistry teacher at North Kingstown High School who had taught in the district for at least eighteen (18) years. In a Commissioner's decision dated May 9, 2017 the Commissioner¹ accepted in their entirety the findings of fact contained in the hearing officer's proposed decision, which was attached as Exhibit A. The Commissioner also accepted the hearing officer's conclusion of law that the North Kingstown School Committee (the "School Committee") had violated Mr. Viner's constitutional and statutory rights to due process (as detailed at pages 32-36 of the hearing officer's decision). However, the Commissioner rejected the hearing officer's conclusion that the School Committee had failed to meet its burden of proving that its suspension and dismissal of Mr. Viner had been for "good and just cause". The Commissioner found that:

"...Mr. Viner's admitted behavior of blowing a kiss in [a student's] ear, together with his failure to maintain a respectful atmosphere in his classroom and failure to maintain appropriate professional boundaries with students, is sufficient to satisfy termination for just cause. The record in this case is replete with testimony supporting the School Committee's ultimate conclusion that just and good cause existed and was sufficient to terminate Mr. Viner's employment. (See pages 5-6 of the Commissioner's May 9, 2017 decision)

The Commissioner's ruling went on to state:

The School Committee has discretion to determine what constitutes good cause to terminate a teacher, which includes any ground that is not irrational, unreasonable, or unrelated to maintaining an efficient school system. The School Committee's decision was rational and reasonable because it found, based on the evidence presented to it, Mr. Viner's conduct was unwelcome conduct of a sexually harassing nature, as defined in the District's Staff Policy on Sexual Harassment, and that Mr. Viner's conduct unreasonably interfered with the educational environment in his classroom. (Id at page 6)

While the Commissioner's May 9, 2017 decision was pending on appeal before the Council on Elementary and Secondary Education, the Rhode Island Supreme Court issued a decision on January 19, 2018 resolving the issue of whether the School Committee's attorneys' testimony could be compelled by subpoena. The attorneys had participated in an investigation, interviewed a number of student witnesses and prepared a written report with respect to allegations of misconduct made against Mr. Viner during the summer of 2015. In light of the fact that Mr. Viner's appeal of his termination had already been ruled upon by the

¹ The Commissioner at the time was Ken Wagner, Ph.D.

Commissioner and an appeal was pending before the Council on Elementary and Secondary Education, the Court ruled that:

... the attorneys should testify either in person or by deposition and the school committee can assert a claim of privilege on a question-by-question basis. [citations omitted] *N. Kingstown School Committee v. Wagner*, 176 A 3d 1097, 1100 (R.I. 2018); 2018 R.I. Lexis 10, **7.

The Supreme Court further indicated:

We expect that the council on elementary and secondary education will refrain from proceeding further on this matter until the issue is resolved by the hearing justice. Following the hearing justice's privilege determination, any party in interest may request the RIDE hearing officer to reopen the evidence to receive any testimony from the attorneys that has been deemed to be nonprivileged by the hearing justice. *Id.* at 1100.

The parties stipulated on September 7, 2018 as to the identification of the transcripts of testimony of Attorneys Mary Ann Carroll and Aubrey Lombardo². There apparently were no issues of privilege that either of the parties sought to have resolved by the Superior Court.³ On October 15, 2018, the Council on Elementary and Secondary Education transmitted the record back to the Commissioner in accordance with the Rhode Island Supreme Court's instructions. Mr. Viner, through his counsel, filed a Motion to Reopen Record and Supplemental Memorandum on Remand on October 15, 2018. Counsel for the School Committee filed the Committee's Objection and Supporting Memorandum on December 27, 2018.

Positions of the Parties:

Petitioner James Viner:

Mr. Viner moves to reopen the record to receive into the record transcripts of testimony that became available after issuance of the Commissioner's May 9, 2017 decision and only through his persistence in litigating the School Committee's claim that such information is protected by attorney/client privilege. Now that the Rhode Island Supreme Court has resolved this issue in his favor, he seeks the admission into evidence of non-privileged testimony that is relevant to "key issues in this case". Counsel asserts that the testimony of Attorneys Carroll and Lombardo supports the proposition that the School Department's investigation was not conducted in a fair and unbiased manner. Furthermore, if one accepts this proposition, then the "correctness" of the hearing officer's original decision is underscored.

² Ex. 1 and Ex. 2 respectively.

³ In the School Committee's brief, footnote 2 explains that "The parties had agreed that all attorney client privilege arguments had been resolved through the deposition process. The hearing justice was not utilized further."

The depositions support the notion that key witnesses were not interviewed as part of the “investigation,” discrepancies exist between notes of statements of witnesses and later written reports of these same statements and no attempt was made to assess relative credibility at any point as the case proceeded to the School Committee for hearing. A fair assessment of the facts was not given to Mr. Viner at any level of the School Committee’s consideration of his proposed termination. Distortions in the case were not eliminated until the hearing officer heard from student witnesses directly and actively engaged in an assessment of their credibility. Thus, the position of the Petitioner is that the Commissioner on remand should refrain from intruding on the hearing officer’s role in drawing the factual determinations of whether or not Mr. Viner engaged in harassing behavior toward his students and whether or not Mr. Viner’s behavior had such an impact on the school district as to warrant immediate termination. Counsel for the Petitioner requests that the hearing officer’s original decision, reinstating Mr. Viner with back pay, be approved by the Commissioner and issued without further delay.

The School Committee:

Counsel for the School Committee takes the position that the Commissioner should deny the Petitioner’s request to reopen the record and to reconsider the decision upholding the School Committee’s decision to suspend and terminate Mr. Viner’s employment. There is no reason to reopen the record based on the deposition transcripts of Attorneys Carroll and Lombardo. In the *de novo* hearing before the Commissioner, multiple days of hearing, multiple witnesses and multiple exhibits were introduced. The hearing officer made findings of fact based upon all of this evidence. The Commissioner, in his May 9, 2017 decision, accepted all of the hearing officer’s factual findings. Facts were not contested that Mr. Viner put his head next to a student’s ear and made an “air kissing sound”. Mr. Viner admitted that he sometimes referred to female students with nicknames based on the clothing that they wore. Not denied were allegations that he regularly called students “baby,” “sweetheart” and “honey” or that he referred to a student as a “ten out of ten, a total package”.

Further established in the record before the Commissioner is that these actions were unwelcomed, and that they resulted in a failure to maintain a respectful atmosphere and professional boundaries within the classroom. They constitute, with or without Mr. Viner’s intent, blatant violations of the District’s Staff Policy on Sexual Harassment.

There is nothing in the transcripts that changes either the facts that Mr. Viner admitted to or the facts found by the hearing officer. Not a single one of the cited thirty-three (33) “Additional Facts Adduced” has any impact whatsoever on the admitted and found facts. It is evidence of these facts that resulted in the Commissioner’s conclusion that the School Committee had met its burden of proving “good and just cause” for Mr. Viner’s termination. There is no sound reason for the Commissioner to reconsider a conclusion reached on May 9, 2017 when the record remains unchanged. The Commissioner’s decision in this regard should also be upheld as it is not patently arbitrary, discriminatory, or unfair. The Committee

continues to assert, however, that the Commissioner's acceptance of the Hearing Officer's conclusion of law relative to the School Committee's violation of Mr. Viner's constitutional and statutory rights to due process should be overturned, as it is patently arbitrary, discriminatory and unfair. (See the Committee's Memorandum at pages 9-10)

Ruling

The Petitioner, Mr. Viner, has requested that the record in this case be reopened to admit additional evidence generated following the Rhode Island Supreme Court's January 19, 2018 ruling. The Court found that a blanket assertion of the attorney-client privilege by the School Committee should not insulate potentially relevant testimony from consideration. The Petitioner's depositions of its two attorneys resulted in transcripts of testimony not protected by the attorney-client privilege and offered as evidence in this case. Any reopening of the record to receive this additional evidence contemplates both the creation of an amended record and a reconsideration of the merits of this case almost three (3) years after the Commissioner's original decision -- and by a different decision maker.⁴ The Board of Education's Procedural Rules for Appeals to and Hearings Before the Commissioner⁵ do not address the circumstances that would permit a reopening the record either prior to or after issuance of a Commissioner's decision -- or a "Final Decision and Order of Commissioner of Education," as Commissioner Wagner's May 9, 2017 decision was entitled. A legal framework for an agency's consideration of such a request may, however, be borrowed from our state's Administrative Procedures Act (the "APA") and specifically §42-35-15 (e) of the APA. Under the APA a party to a contested case may request to present additional evidence to the agency. Such request may be granted when:

... it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency. In such circumstances, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court. §42-35-15 (e).

Also, in this specific case, we must also be responsive to the direction of the Supreme Court and its instruction that:

... any party in interest may request the RIDE hearing officer⁶ to reopen the evidence to

⁴ Commissioner Ken Wagner left in April of 2019 and was succeeded by Commissioner Angélica Infante-Green.

⁵ These Procedural Rules are found in §4.3 of 200-RICRI-30-15-4.

⁶ In its January 19, 2018 ruling, the Supreme Court mistakenly refers to the May 9, 2017 decision as the final decision and order of the RIDE hearing officer. The "Final Decision and Order of the Commissioner of Education" dated May 9, 2017 was that of Commissioner Wagner, with Hearing Officer Anthony Cottone's earlier decision attached as Exhibit A. The Petitioner's Motion to Reopen has not involved the participation of the hearing officer.

receive any testimony from the attorneys that has been deemed to be nonprivileged by the hearing justice. *North Kingstown School Committee v. Wagner, supra* at 1100.

In accordance with the above, we find that the transcripts of deposition testimony of Attorneys Carroll and Lombardo are material to the issue of the procedures utilized by the School Committee in investigating allegations of misconduct and in determining that it would terminate Mr. Viner from its employment. These facts are material to Mr. Viner's claim that such procedures did not conform to statutory and constitutional due process requirements. We also find that there were "good reasons" for failing to present this evidence in the proceeding before the RIDE hearing officer in 2016. The reason such testimony was not presented in a more timely way was due to the position of the School Committee that the testimony was protected by attorney-client privilege. It was not until after the ruling of the Rhode Island Supreme Court on January 19, 2018 that potentially non-privileged information from the two attorneys became available to the Petitioner and the subsequent depositions were thereupon taken. Based upon the legal framework set forth in the APA, the R.I. Supreme Court's implicit permission for the record in this matter to be reopened, and our finding that the proffered evidence is material, the Petitioner's Motion to Reopen the Record is hereby granted. The transcripts of the two depositions, previously marked for identification as Exhibits 1 and 2 (the April 30, 2018 depositions of Attorney Carroll and Lombardo, respectively) are hereby incorporated into the evidence and record in this case⁷.

A full consideration of the deposition transcripts generally supports Mr. Viner's claim that the School Department investigation was not conducted in a fair and unbiased manner and fortifies the arguments made in an earlier Memorandum that the North Kingstown School Department engaged in a "rush to judgment" with respect to Mr. Viner. (See pages 9, 13-14 of the Petitioner's Memorandum in support of his Motion to Reopen the Record). The additional evidence thus strengthens the conclusion that Mr. Viner's statutory and constitutional rights to due process were violated. However, as pointed out in the Commissioner's (and the Hearing Officer's) May 9, 2017 decision:

... as a general rule providing a teacher with a *de novo* evidentiary hearing *after* he or she has been provided with adequate notice of the charges against him -- as is required under the Tenure Act, see RIGL §16-13-4 (a) and as took place here -- is itself a sufficient remedy for a due process violation occurring before a teacher's employment has been effectively terminated. (footnote omitted) There does not appear to be any reason to depart from this general rule here. (footnote omitted)

⁷ See *Brown University v. Rhode Island Commissioner for Human Rights and Charlotte King*, 2001 R.I. Super. LEXIS 21; 2001 WL 91399, a case in which the Commission's decision to reopen the record on remand (to accept evidence of complainant's damages) was challenged as unlawful procedure and abuse of discretion. The Superior Court upheld the Commission's decision that it was appropriate to reopen the record and that it was authorized to do so based upon its own rules and regulations and the APA.

Thus, even with this new evidence, based upon the analysis that the violation of Mr. Viner's statutory and constitutional rights to due process was fully remedied by the *de novo* hearing before the hearing officer, we affirm the Commissioner's May 9, 2017 decision in this respect.

We find that the newly-introduced evidence is not material to any of the factual findings made by the hearing officer and accepted by the Commissioner as the basis for his May 9, 2017 decision that the School Committee had met its burden of proof with respect to "good and just cause" for Mr. Viner's termination. This part of the factual record remains identical to that relied upon by the prior Commissioner in making his decision. In light of this, it would be inappropriate for the undersigned to reassess the evidence, arrive at different conclusions, or "review" the decision of a predecessor to determine legal error. This is the prerogative of the Council on Elementary and Secondary Education.

For the above reasons, the decision of the Commissioner dated May 9, 2017 is hereby affirmed in all respects.

Angélica Infante-Green
Commissioner

February 19, 2020