

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANNE SHOEMAKER,)
)
 Appellant,)
)
 v.) C.A. No. N10A-09-006 CLS
)
 BOARD OF EDUCATION OF THE)
 BRANDYWINE SCHOOL DISTRICT,)
 and BRANDYWINE SCHOOL)
 DISTRICT,)
)
 Appellees.)

Date Submitted: April 14, 2011

Date Decided: July 12, 2011

On Appeal from the Board of Education of the Brandywine School District.

REVERSED.

ORDER

Kathleen M. Jennings, Esq., Phillips, Goldman & Spence, P.A., 1200 N. Broom Street, Wilmington, DE 19806. Attorney for Appellant.

David H. Williams, Esq., James H. McMackin, Esq., Allyson M. Britton, Esq., Morris James, LLP, P.O. Box 2306, Wilmington, DE 19899. Attorneys for Appellee Board of Education of the Brandywine School District.

Scott, J.

Introduction

Before this Court is an appeal from the decision of the Board of Education of the Brandywine School District to terminate Anne Shoemaker, a tenured school teacher. The Court has reviewed the parties' submissions. For the reasons that follow, the decision of the Board of Education of the Brandywine School District is **REVERSED**.

Background

Anne Shoemaker ("Appellant") received notice of the Board of Education for the Brandywine School District's ("Board") intent to terminate her from her position as an English Language Learners ("ELL") teacher and English as a Second Language ("ESL") teacher and on April 20, 2010. A termination hearing took place on July 19, 2010. The Hearing Officer issued his report on August 2, 2010, recommending termination of Appellant. The Board issued its decision to terminate Appellant on August 23, 2010. Appellant received the Board's decision to terminate her on August 30, 2010 and filed a timely appeal to this Court on September 7, 2010.¹

¹ The record on appeal contains two volumes of hearing transcripts, numerous exhibits from the hearing, the Hearing Officer's report and while the decision of the Board of Education of Brandywine School District indicates it is included, it was not. The table of contents for the information was very vague. It did not list the exhibits individually, but rather lumped the 266 pages of Appellant's exhibits together with the label "Employee Exhibits to Transcript of Termination Hearing." The same thing occurred with the 185 pages of joint exhibits, collectively labeled "Joint Exhibits to Transcript of Termination Hearing," without specifying the number of exhibits or a description of each exhibit.

Appellant began teaching in the District in 2001. At the time she was terminated Appellant taught ELL at Claymont Elementary School. The school's enrollment for the 2009-2010 academic year was 757. In February of 2010, the enrollment for the 2010-2011 academic year was expected to drop to 681. The decrease was primarily in the regular education program², even though there was likely to be an increase in need for ELL services.

The District determined four teaching positions needed to be eliminated at Claymont Elementary School due to the projected decrease in enrollment, including a counselor position. In March of 2010, Principal Alfred James Grant recommended Appellant's position for elimination. At the termination hearing on July 19, 2010, Mr. Grant stated Appellant was not being terminated for cause, but as a result of a reduction in student enrollment in the regular education program.

Appellant received her bachelor's degree in Russian from Carlton College in Russia and a master's degree in ESL from the University of Delaware. Prior to teaching at Claymont Elementary School, Appellant taught at Christina School District as a contract teacher for three years. While working for the Christina School District she taught ESL to night school students.

The Brandywine School District (the "District") employed three different types of teachers in the ESL program: (1) Appellant, who was the only licensed

² There are three units of education programs at Claymont Elementary School: (1) regular education, (2) autism, and (3) gifted and talented.

ESL teacher, (2) Sugely Solano, coordinator of the ESL program and a bilingual teacher, and (3) non-certified tutors provided by an outsourcing agency.

At the termination hearing, Mr. Grant testified he eliminated Appellant's position because he believed the non-certified contract tutors could "pick up the slack."³ The Hearing Officer assumed Mr. Grant thought he "could best provide for the instructional needs of all students in his building by releasing the only certified ESL member of his staff, continue to provide instructional services for ELL students through an outside group whose individuals meet certification requirements and are trained to deliver instruction to ELL students"⁴

Issues on Appeal

On appeal, Appellant raises three issues for the Court to consider: (1) the Hearing Officer erred as a matter of law in applying the incorrect standard for termination of a tenured teacher, (2) the Hearing Officer erred as a matter of law in concluding Appellant could be terminated when contract tutors were retained or recruited to perform the same function, and (3) alternatively, the decision of the Board should be vacated for a rehearing to present new evidence, *i.e.*, the job posting for contract tutors. The Court finds the first two arguments have merit, each requiring reversal of the decision of the Board. As a result, the third argument, an alternative argument, does not need to be addressed.

³ Termination Hr. Tr. 45:10.

⁴ Record on Appeal R491.

Standard of Review

On appeal from a decision of the Board of Education, “[t]he Court shall decide all relevant questions of law and all other matters involved, and shall sustain any board action, findings and conclusions supported by substantial evidence.”⁵ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶ The review is on the record.⁷ The decision of the Board of Education may be reversed, affirmed, modified, or the case may be remanded for a rehearing.⁸ Statutory construction and other questions of law are reviewed *de novo*.⁹

Discussion

I. The Hearing Officer Erred as a Matter of Law When He Found Any Decrease in Enrollment Justified the Termination of Appellant, Despite an Increase in Enrollment for ELL Services.

The Hearing Officer erred as a matter of law in recommending the termination of Appellant because the “Annual Report of Delaware’s English Language Learners, Staff, and Programs” produced by the Delaware Department of Education, entered into evidence at the termination hearing, indicates an

⁵ 14 Del. C. § 1414.

⁶ *Bd. of Educ., Laurel Special Sch. Dist. v. Shockley*, 155 A.2d 323, 327 (1959) (citation omitted).

⁷ 14 Del. C. § 1414.

⁸ *Id.*

⁹ *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (citation omitted).

increase in enrollment in ELL from 2000 through 2009.¹⁰ Appellant argues a tenured teacher cannot be terminated as a result of decreased enrollment when the service taught by the tenured teacher has an increase in enrollment.¹¹ The Court agrees. The Tenure Teacher Act¹² permits the termination of a tenured teacher if there is “a reduction in the number of teachers required as a result of decreased enrollment.”¹³ “In interpreting undefined statutory terms, [the Court] must give them a reasonable and sensible meaning in light of their intent and purpose.”¹⁴

¹⁰ Each academic year, the Department of Education issues its “Annual Report of Delaware’s English Language Learners, Staff, and Programs.” Brandywine School District has experienced an increase in enrollment for ELL services over the 9 academic years provided, found in Teacher Exhibits 1-8 at R50, R81, R112, R143, R173, R204, R237, and R269, respectively. The information is summarized as follows:

Academic Year	Number of Students Enrolled in ELL in Brandywine School District	Increase/Decrease in Number of Students Over Last Year	Percentage Increase/Decrease in Students Over Last Year
2008-2009	408	16	4.1%
2007-2008	392	-14	-3.4%
2006-2007	406	60	17.3%
2005-2006	346	-38	-9.9%
2004-2005	384	No change	No change
2003-2004	384	60	18.5%
2002-2003	324	44	15.7%
2001-2002	280	32	12.9%
2000-2001	248	N/A	N/A

¹¹ Appellant also urges the Court to hold that a substantial decrease in enrollment over time is required in order to justify termination of a tenured teacher due to decreased enrollment. Since the Board was not justified in terminating Appellant “as a result of decreased enrollment” when the service she taught, ELL, is experiencing an increase in enrollment, the Court does declines to set a standard to quantify a decrease in enrollment to justify termination.

¹² 14 Del. C. §§ 1401-1420.

¹³ 14 Del. C. § 1411.

¹⁴ *Angstadt v. Red Clay Consol. Sch. Dist.*, 4 A.3d 382, 390 (Del.), *reh'g and reargument denied* (July 30, 2010) (internal quotations and citation omitted).

The purpose of the Tenure Teacher Act is to protect tenured teachers.¹⁵ Since tenured teachers have a constitutional interest in their continued employment,¹⁶ the Tenure Teacher Act is strictly construed against school boards.¹⁷ The annual reports entered into evidence at the termination hearing demonstrate an increase in enrollment for ELL services in the Brandywine School District; it has increased by 160 students over the nine year period. At the hearing, Mr. Grant testified a decrease in enrollment in ELL was not likely and he expected enrollment to either remain the same¹⁸ or increase.¹⁹ Accordingly, the Court finds a tenured teacher cannot be terminated “as a result of decreased enrollment” when enrollment for the service taught by the tenured teacher is expected to remain the same or increase.

None of the cases cited by the Appellee persuade this Court that the findings of the Hearing Officer are supported by established case law. Unlike in *Atkinson*,²⁰ and *Brumbley*,²¹ where the programs taught by the tenured teacher experienced a decrease in enrollment, justifying elimination of the programs, the service at issue here, ELL, was not being eliminated and was not expected to have a decrease

¹⁵ *Bd. of Pub. Ed. in Wilmington v. Delaney*, 155 A.2d 51, 54 (1959).

¹⁶ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

¹⁷ *New Castle County v. Bd. of Educ. of the New Castle county Vocational Technical Sch. Dist.*, 1986 WL 9923, *3 (Del. Super. Ct.) (citations omitted).

¹⁸ Termination Hr. Tr. 32:15-20.

¹⁹ *Id.* at 54:22-55:2.

²⁰ *Atkinson v. Sussex County Vocational Technical Sch. Dist.*, 1997 WL 127976, *9 (Del. Super. Ct.) (elimination of a tenured teacher was appropriate when the program was being eliminated and most of the skills taught by that teacher were not being taught in other classes).

²¹ *Brumbley v. Bd. of Educ. of Polytech Sch. Dist.*, 1998 WL 283378, *3 (Del. Super. Ct.) (elimination of the least senior cosmetology teacher was appropriate when the program was reduced due to a high student attrition rate).

in enrollment. This case is also distinguishable from *Furrow*,²² where the elimination of full-time counselors in favor of newly created contract counseling positions was justified because the contractors provided different services; the contractors in this case are not newly created and will continue to provide the same services provided by Appellant. As Mr. Grant stated at the termination hearing, he expected the contracted tutors to pick up the slack created by the elimination of Appellant. The cases cited by the Appellee involved services other than the one being taught by the tenured teacher or the service was eliminated due to lack of student interest, contrary to this case.

II. The Hearing Officer Erred as a Matter of Law When it Found Termination of a Tenured Teacher Appropriate While the School Continued to Employ Contract Tutors to Provide the Same Services as the Tenured Teacher.

The Hearing Officer erred when it recommended termination of Appellant, a tenured teacher, when the school continued to employ contract tutors to provide the same services as Appellant. A tenured teacher cannot be terminated so that a non-tenured teacher may remain to perform the functions of the tenured teacher.²³ The purpose of the Teacher Tenure Act is to protect tenured teachers.²⁴ Appellee argues the contracted tutors are not the equivalent of a non-tenured teacher because they do not work full-time, but on an as needed basis. Therefore, it was justified in

²² *Furrow v. Bd. of Educ. of the Christina Sch. Dist.*, 12 A.3d 1154 (Del. 2011) (TABLE).

²³ *Bd. of Sch. Trustees of Gunning Bedford Jr. Sch. Dist. No. 53 v. O'Brien*, 190 A.2d 23, 27 (1963).

²⁴ *Delaney*, 155 A.2d at 54.

terminating Appellant. The Court disagrees. Even though Appellant was terminated from her position as an ELL teacher, the school continued to employ contract tutors to provide ELL services, performing the same function as Appellant. At the hearing, the principal, Mr. Grant, testified the contract tutors “would be able to pick up the slack” because they perform the same type of services as Appellant,²⁵ making this case very similar to the facts in *O’Brien*, where the Delaware Supreme Court did not permit a non-tenured teacher to remain when the tenured teacher could perform the same function.²⁶ Since the contract tutors will continue to perform the same function as Appellant, it was error for the

²⁵ On direct examination of Mr. Grant, the following interaction occurred:

Q. All right. So you made a determination that eliminating the position as a certified teacher for English Language Learners or certification in English as a Second Language would have the least impact on the regular program; is that correct?

A. I did.

Q. And why did you believe that to be true?

A. Because I felt under the parameters I was given that paraprofessionals who were trained in especially Spanish speaking – fluent Spanish speaking paraprofessionals would be able to pick up the slack, so to speak.

Q. Okay. Is Ms. Shoemaker fluent in Spanish?

A. To my knowledge, she is not fluent. Although with my encouragement back at Darley Road, I did encourage her to take Spanish classes, and she eagerly did sign up and has taken several courses.

Q. Okay. So is it your opinion that she has taken steps to be able to meet the needs of students who speak Spanish?

A. Yes. She has taken the steps that I suggested.

Termination Hr. Tr. 44:24-45:21.

²⁶ *O’Brien*, 190 A.2d at 27.

Hearing Officer to recommend termination of the Appellant in favor of contract tutors.

III. The Record Does Not Contain Substantial Evidence to Support the Termination of Appellant.

The record does not contain substantial evidence to demonstrate a reduction in enrollment justifying the termination of Appellant. To the contrary, the evidence presented indicates either enrollment for ELL services will remain the same or increase. The eight annual reports prepared by the Delaware Department of Education indicate enrollment, for the most part, is increasing over time. Five of the eight academic school years in the reports have experienced an increase in enrollment for ELL services in the Brandywine School District.²⁷ Additionally, Mr. Grant testified he expects enrollment in ELL to remain the same or increase. Therefore, there is insufficient evidence in the record to justify termination of Appellant due to a decrease in enrollment.

Conclusion

Based on the forgoing, the appeal from the Board of Education of the Brandywine School District is **REVERSED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

²⁷ 2001-2002, 2002-2003, 2003-2004, 2006-2007, and 2008-2009.