

STATE BOARD OF EDUCATION

STATE OF GEORGIA

RICHARD LUSANE,	:	
	:	
Appellant,	:	CASE NO. 1987-26
	:	
V.	:	
CLAYTON COUNTY BOARD	:	DECISION
OF EDUCATION,	:	
	:	
Appellee.	:	

PART I

SUMMARY

This is an appeal by Richard Lusane (hereinafter "Appellant") from a decision of the Clayton County Board of Education (hereinafter "Local Board") not to renew his teaching contract for the 1987-1988 school year because of a reduction in force. Appellant contends on appeal that the Local Board did not have the right to non-renew him for the reasons given.

PART II

FACTUAL BACKGROUND

Appellant was a tenured teacher with a masters degree who had taught for five years in the Clayton County School System (hereinafter "Local System"). Appellant was a special education

1. After a specified period of employment, O.C.G.A. §20-2-942 grants teachers certain rights which are commonly called "tenure" rights, even though the statute does not use the term "tenure".

teacher in the area of behavior disorders. Declining enrollment in the area of behavior disorders caused the Local Board to reduce the number of teachers in that area. During the 1986-1987 school year, fifteen teaching positions were eliminated, and two additional positions were eliminated for the 1987-1988 school year. One of the positions to be eliminated for the 1987-1988 school year was in the school in which Appellant taught. On April 7, 1987, Appellant was notified by the Local Superintendent that his teaching contract for the 1987-1988 school year would not be renewed because of the reduction in force, and that he had been selected for non-renewal because of his excessive tardiness during the current and previous school years. A hearing before the Local Board was held on June 1, 1987. At the hearing, it was stipulated that the reason for the non-renewal was because a reduction in-force was necessary and Appellant was chosen as the teacher to be non-renewed because his attendance record was worse than the other two special education teachers at his school.

It was also established during the hearing that within the Local System there were teachers being retained in the special education program who had not been under contract for more than three years. Additionally, there were teachers being retained who did not have a masters degree.

Evidence was also presented that Appellant had been absent or tardy 50 1/2 days during the 113 days that school had been in session during the 1986 1987 school year. Nevertheless, even though he was counseled concerning his absenteeism and tardiness, Appellant's absenteeism and tardiness was not such that it would have resulted in a recommendation for non-renewal if the reduction in force was not required. There were other teachers within the same school who had tardiness and absenteeism records that were worse than Appellant's.

The Local Board issued its decision not to renew Appellant on June 1, 1987, and Appellant filed this appeal on June 18, 1987.

PART III
DISCUSSION

The issue to be decided in this appeal is whether a local board can terminate the services of a tenured teacher under a reduction in force program while retaining non-tenured teachers within the local system and within Appellant's department. In our opinion, it can.

The first issue to be decided is whether there is any requirement placed upon a local board to select tenured teachers over non-tenured teachers for retention during a reduction in force. The Georgia courts have not addressed this issue. O.C.G.A. §20-2-942 is the only section of Georgia law that establishes any distinction among teachers based upon their longevity within a school system. This code section essentially provides that a teacher who accepts a contract for the fourth consecutive school year can be non-renewed only for the reasons set forth in O.C.G.A. § 20-2-940. There are eight grounds for terminating a teacher's contract set forth in O.C.G.A. §20-2-940, with two of the grounds being "[t]o reduce staff due to loss of students or cancellation of programs", and "[a]ny other good and sufficient cause".

In some states, the courts have adopted the position that, when there is a statute that provides tenured teachers with a hearing, then a tenured teacher cannot be terminated if a non-tenured teacher is being retained. See, e.g. Pickens Cnty. Bd. of Ed. v. Keasler, 263 Ala. 231, 82 So.2d 197 (1955). One rationale is that to permit otherwise would allow a local board to dismiss a tenured teacher without cause and thus nullify the intent, purpose, and provisions of the teacher tenure statutes. See, e.g., Watson v. Burnett, 216 Ind. 216, 23 N.E.2d 420 (1939).

Appellant makes two similar arguments. Firstly, Appellant argues that both the staff reduction and the other good and sufficient cause grounds set forth in O.C.G.A. § 20-2-940 require some element of one of the other six grounds to be present in order to provide a basis for non renewal. For example, the ground of any other good and

sufficient cause cannot stand on its own; there also has to be some showing of a degree of incompetency, or insubordination, or willful neglect of duties, or immorality, or improper advice to students. Secondly, however, Appellant also argues that a teacher's contract cannot be terminated due to a reduction in staff unless there is a showing of other good and sufficient cause.

By this line of reasoning, Appellant has attempted to establish that a tenured teacher cannot be terminated due to a reduction in staff unless there is some other good and sufficient cause for termination. Under Appellant's line of argument, it therefore follows that a non-tenured teacher cannot be retained over a tenured teacher.

The State Board of Education, however, does not agree with Appellant's logic, nor with the rationale adopted in some of the other states. O.C.G.A. § 20-2-940 establishes the eight reasons for terminating a tenured teacher's contract. The reduction in staff ground stands on the same basis as the first six grounds for termination; there are no qualifying phrases or words to set it apart from any of the other grounds. There also is no requirement appended that some other good and sufficient cause must also exist in order for a reduction of staff termination to be valid. O.C.G.A. §20-2-940 does not establish any requirement to maintain tenured teachers in preference to non-tenured teachers, nor is there any principle created that tenured and non-tenured teachers are to be treated differently. The code section merely establishes that a reduction of staff is a sufficient ground for terminating the contract of a tenured teacher, without regard to any other factors. A teacher who has taught more than three years, however, is entitled to a hearing. A local board, therefore, cannot subvert the provisions or intent of O.C.G.A. § §20-2 940 and 20-2 942 as they are presently written since Georgia has not adopted a true teacher tenure act. Appellant's contentions that good and sufficient cause were absent, therefore, do not establish any basis for reversing the decision of the Local Board.

Appellant then contends that the decision of the Local Board was arbitrary and capricious, first because the Local Board did not have a written reduction in force policy and did not take into consideration objective factors, and second, because the Local Board did not attempt to reassign him to another school within the Local System. The Local Board argues that there *is* no requirement for a written policy, but the use of Appellant's tardiness and absenteeism record was an objective factor, and there is no requirement that a teacher be reassigned to another school when there is a reduction in staff due to loss of students.

The issue to be decided is whether the action of the Local Board was arbitrary and capricious because the Local Board did not have a written reduction in force policy and because it compared Appellant only with other teachers within his department rather than looking to see if other positions were available within the School system. In our opinion, the decision of the local board was not arbitrary and capricious.

In order to find that the decision of a local board was arbitrary and capricious, it is necessary to find that there is no rational basis for the decision. See, Tackitt v. Prudential Ins. Co. of Amer., 758 F.2d 1572, 1575 (11th Cir. 1985). Although the absence of a written reduction in force policy makes it more difficult to ascertain the basis for terminating a teacher and opens the way for charges that the local board's decision was arbitrary and capricious, there is no requirement for a written policy. In the instant case, the Local Board's decision was based upon Appellant's attendance record vis-a-vis the attendance record of the other two teachers within his department within his school, and a desire by the Local Board not to transfer a problem situation into another school. These reasons constitute a rational basis for the Local Board's decision. While all of the factors Appellant considers important are often considered in standard reduction-in-force policies, it is not unreasonable for the Local Board to have considered attendance as a factor. Attendance is an objective factor which does impact on job performance. The

State Board of Education, therefore, decides that the decision of the Local Board was not arbitrary and capricious.

PART IV

DECISION

Based upon the foregoing discussion, the record presented, and the briefs and arguments of counsel, the State Board of Education determines that none of the contentions asserted by Appellant on appeal warrant reversal of the decision of the Local Board and, therefore, the decision of the Local Board not to renew Appellant's teaching contract for the 1987-1988 school year is hereby

SUSTAINED.

Mrs. Baranco was not present.

Mr. Foster was not present during any discussion or voting in the case of 1987-26.

Acting Vice Chairman for Appeals