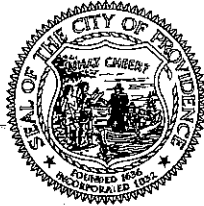


COUNCILMAN
SAMUEL D. ZURIER
55 DORRANCE STREET, SUITE 400
PROVIDENCE, RI 02903
Email: sdz@om-rilaw.com
Office: (401) 861-2900 ext. 105



COMMITTEES

Claims and Pending Suits
Chairman

Special Committee on Education
Vice-Chairman

November 3, 2015

City of Providence, Rhode Island

Honorable John J. Igliazzi
Chair, Finance Committee
Providence City Council

Re: Providence Teachers Union Contract

Dear Chairman Igliazzi:

Having reviewed the addendum to the tentative agreement concerning seniority, I have a question as to whether it conforms with the State's Basic Education Plan ("BEP"). In a "Dear Colleagues" letter to superintendents dated January 31, 2013 (copy attached as Exhibit A), then-Commissioner Deborah Gist stated that the BEP incorporates a "human capital management system that encompasses screening methods for determining candidate knowledge and skills that match the need of students." (Exhibit A, p.2) Of particular relevance to the tentative agreement before us, the letter, at page 4, states the following:

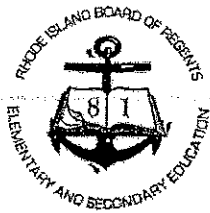
As a result, job fairs that award teacher assignments based solely on seniority, in contravention of BEP requirements, as well as the practice of "bumping" less senior teachers as a result of layoffs not governed by RIGL §16-13-6, shall be considered to be categorical violations of those BEP mandates that relate to the human capital management system.

RIGL §16-13-6 requires seniority-based layoffs in those instances of "a substantial decrease of pupil population within its school system." The contract language is not limited in this way, and therefore appears to contravene the Commissioner's letter. The Rhode Island Department of Education ("RIDE") is currently involved in litigation in Superior Court with the Warwick School Department seeking to enforce the portion of the Commissioner's letter relating to job fairs; therefore, I believe the Commissioner's letter is still a valid statement of RIDE policy. I also have learned that RIDE just became aware of the Providence contract language this week, and they are studying it.

With that in mind, I recommend that the School Department contact RIDE, review this portion of the contract with them, and obtain clarification regarding compliance with the BEP prior to final approval by the City Council. Thank you for your consideration.

Sincerely,

EXHIBIT A



State of Rhode Island and Providence Plantations
DEPARTMENT OF EDUCATION
Shepard Building
255 Westminster Street
Providence, Rhode Island 02903-3400

Deborah A. Gist
Commissioner

January 31, 2013

Re: Basic Education Program Regulations – Human Capital Systems

Dear Colleagues:

We are entering a very significant time of year for local education agencies as you make decisions regarding retention, hiring and placement of instructional staff. Because the effectiveness of classroom teaching remains the single most important school-based factor in improving student achievement, making these decisions is absolutely critical to our commitment to ensuring continuous improvement in learning and teaching. I am therefore convinced that the retention, hiring, and placement of instructional staff are core matters of educational policy that may not be closely regulated through the collective bargaining process. North Providence School Committee v. The North Providence Federation of Teachers, Local 920, American Federation of Teachers, 945 A.2d 339 (R.I., 2007); Bethlehem TP, BD of Ed. V. Bethlehem TP, ED, 489 A.2d 1254 (N.J., 1982).

Although I addressed the core aspects of the Basic Education Program regulations (BEP) as they relate to human capital decisions in the past (October 20, 2009 Memorandum and November 7, 2011 Legal Advisory Opinion to Lincoln School Committee), recent questions from the field show that there is some confusion about the implementation of BEP requirements in the area of human capital management.

As my previous memorandum and advisory opinion on the issue note, the BEP clearly states the significance of centering student learning within the scheme of an effective human capital management system. Each LEA must take affirmative steps to ensure that learning is at all times the focus of every individual whom the agency employs. To that end, the BEP requires an effective human capital management system, specifically stating that "each LEA shall maintain control of its ability to recruit, hire, manage, evaluate, and assign its personnel."¹ Full implementation of the BEP requires that student learning be the primary reference point for decision making, responsive policy development, resource allocation, and personnel assignment and evaluation. BEP G-12-4.1. To underscore this point, the BEP expounds on student learning by defining it as "the primary reference point for decision-making, responsive policy development, resource allocation, and personnel assignment and evaluation." BEP G-12-4.1.

The requirement that LEAs "develop, implement, and monitor a human capital management system that is connected to its educational improvement strategy,"² coupled with the requirement

¹ BEP, G-15-2.2(a), Board of Regents Regulations.

² Insert citation to BEP

that LEAs "establish a set of policies and an array of strategies to recruit, hire, and retain highly effective district and school personnel"³ means that LEAs must establish their own policies and procedures for recruitment, hiring and retention of school staff. Moreover, the fact that the BEP delineates the required policies and procedures in comprehensive terms means that the governing body of the LEA must develop and implement such policies and procedures for the human capital management system, independent of the collective bargaining process. There will remain working conditions and terms of professional employment, however, that will be subject to collective bargaining within the legal parameters of the BEP, as they are more clearly delineated in local policies and procedures that comport with the BEP.

The human capital policies and strategies that the BEP requires must align to LEA needs, focus on screening methods for determining candidate knowledge and skills to match the needs of the LEA, promote early identification of openings, use research-based protocols and incentives to address LEA-related factors affecting retention and its impact on mobility trends, and address staffing low-achieving schools with highly effective and experienced staff.⁴ Staffing decisions for instructional staff must be made pursuant to a district's policies and procedures relating to effective staffing, and those decisions must be measured to guarantee a high-quality education⁵ and improve achievement for all students.⁶

To summarize, the BEP requires that every LEA do four things in the realm of human capital management:

1. The LEA must have a human capital system that encompasses screening methods for determining candidate knowledge and skills that match the needs of students.
2. This human capital system must be created by policies and procedures adopted by the governing body of the LEA – typically the school committee. Once those legally adherent policies and procedures are adopted, there will most likely remain concomitant items that can be negotiated through collective bargaining.
3. The aforementioned policies and procedures must clearly provide that student learning is the primary reference point for decision making regarding personnel assignment and evaluation.
4. To the greatest extent possible, evidence of candidate knowledge and skill must be based on measureable, clearly defined attributes.

³ BEP, Insert citation

⁴ BEP G-15-2.2(1).

⁵ G-12-1 provides in pertinent part:

The BEP, along with other applicable regulations and standards promulgated and adopted by the Board of Regents, is designed to ensure that high-quality education is available to all public school students, regardless of where they reside or which school they attend. The standards set forth in this title are designed to be measurable in order to determine compliance with the law and, more generally, to determine whether equality of educational opportunity is being provided at the local level. (Emphasis added)

⁶ G-12-2.2 provides in pertinent part:

To accomplish the delivery of a sound, high-quality education to every student, the school, LEA, and state must ensure that policies, programs, and systems are connected and directed toward the common purpose of improving achievement for all students.

Telephone (401)222-4600 Fax (401)222-6178 TTY (800)745-5555 Voice (800)745-6575 Website: www.ride.ri.gov

The Board of Regents does not discriminate on the basis of age, sex, sexual orientation, gender identity/expression, race, color, religion, national origin, or disability.

January 30, 2013

Basic Education Program Regulations – Human Capital Systems

Page 3 of 4

Taken together, the four BEP requirements listed above mean that teacher assignment can no longer be based solely on seniority. The term "seniority" refers to years of service within a particular LEA. Seniority should be distinguished from measures of "experience," which can be more relevant to staffing decisions if they incorporate relevant experience in the same area of certification, grade span, and/or content area. Neither "seniority" nor "experience," however, captures relevant past performance levels unless such past performance is made explicit in the relevant guiding document.

Although seniority *may* correlate to a teacher's degree of "experience," it must be considered as secondary to other performance criteria aligned with the needs of the LEA and its students. There exists no rational link between seniority per se and educational achievement. To make staffing decisions on the mere length of time that a teacher has been in the system does not afford a reliable performance metric, and may in fact contribute to an arbitrary process resulting in forced or inappropriate placement. Therefore, as an evaluation factor, seniority can be only a component of an overall system for gauging the relative merit of competing, qualified candidates. Although it is clear that the BEP does not require recognition of seniority, the BEP also does not dictate a precise degree to which seniority may be taken into account – although it is clear that the interests of students must be the *primary* factor in all staffing decisions regarding education service providers.

Under Rhode Island law, properly promulgated agency regulations have the full force and effect of statutes.⁷ The BEP became effective on July 1, 2010. For constitutional reasons derived from the application of the Contracts Clause, the BEP did not become fully effective upon passage in those instances in which its dictates directly conflicted with lawfully bargained for language in existing collective bargaining agreements between teachers' unions and their employer LEAs. The BEP, however, did become the law in Rhode Island on July 1, 2010. Any collective bargaining agreement that has expired, been extended, re-opened, or been ratified after that date must reflect the legal requirements of the BEP regulations.⁸

"Contract language that is required by applicable statutes or regulations is automatically incorporated in a contract regardless of whether the parties are aware of such a requirement or even if the written contract specifically provides otherwise." Women's Development Corporation v. City of Central Falls, 764 A.2d 151, 159, n.7 (R.I. 2001).⁹ The Rhode Island Supreme Court has long found it to be "a fundamental rule that contracts are made subject to any law prescribing their effect or conditions to observed in their performance." Sterling Engineering & Construction Co., Inc. v. Town of Burrillville Housing Authority, 279 A.2d 445, 108 R.I. 723, 726 (R.I. 1971). In other words, the existent law is as much a part of the contract as if the law itself had been actually written

⁷ "Regulations that are duly promulgated by an administrative agency ..., pursuant to a specific grant of legal authority to do so, are legislative rules that carry the force and effect of law and thus enjoy a presumption of validity." In re Advisory Opinion to the Governor, 732 A.2d 55, 75 (R.I. 1999).

⁸ Expired collective bargaining agreements are of no further force or effect. Providence Teachers Union v. Providence School Board, 689 A.2d 388 (R.I. 1997).

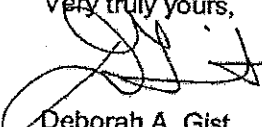
⁹ The same is true under federal law. See, e.g., United States v. Bills, 822 F.2d 373, 377 (3d Cir. 1987) "Where valid regulations apply and require inclusion of a specific clause in public contracts, it will be incorporated even if omitted from the writing or not approved by the parties."

in the contract. Of course, the legal requirement will trump any contractual language to the contrary, making the contract provision unenforceable and non-arbitrable. See, e.g., State Department of Mental Health, Retardation, and Hospitals v. Rhode Island Council 94, AFL-CIO, 692 A.2d 318, 322 (R.I. 1997).¹⁰

To summarize, every Rhode Island LEA that has had a collective bargaining agreement with its teachers expire upon or after July 1, 2010, or that has ratified a modification or re-negotiation of such a collective bargaining agreement after July 1, 2010, now has a collective bargaining agreement that has the aforementioned requirements of the BEP effectively written into the agreement. As a result, job fairs that award teacher assignments based solely on seniority, in contravention of BEP requirements, as well as the practice of "bumping" less senior teachers as a result of layoffs not governed by RIGL § 16-13-6, shall be considered to be categorical violations of those BEP mandates that relate to the human capital management system. Individuals engaging in or countenancing such infractions in derogation of the BEP shall face sanctions by this Department, up to and including loss of certification. LEAs engaging in or countenancing such infractions in derogation of the BEP shall be subject to administrative orders enforceable in Superior Court and the potential loss or diversion of State aid.

My October 20, 2009, letter stated clearly that I was committed to giving all LEAs time to understand the then forthcoming requirements of the BEP and to make the necessary adjustments. If you are in a leadership position in a school district, charter school, or state-operated school and have not made the changes necessary to meet the BEP requirements set forth in this memorandum, you are now on notice that I will henceforth consider your actions to be purposeful and willful violations of state law. Our students deserve nothing less than what the BEP considers to be "essential to the mission of education" – to ensure that our students are served by the most effective educators we can attract to the classroom.

Very truly yours,



Deborah A. Gist
Commissioner of Education

DAG/crb

¹⁰ Cf. Pawtucket School Committee v. Pawtucket Teachers' Alliance, 652 A.2d 970, 972 (R.I. 1995) ("[w]e have stated clearly that while the school committee can negotiate many items with the professional and nonprofessional employees of the system, it cannot bargain away statutory powers and responsibilities[.] * * * requirements of state law * * * cannot be submitted to arbitration"); Rhode Island Laborers' District Council v. State, 592 A.2d 144, 146 (R.I. 1991) ("there are limits to the extent that a statutory power and responsibility may be bargained away in a labor contract"); see also Belanger v. Matteson, 115 R.I. 332, 359, 348 A.2d 124, 140 (1975) (Paolino, J., concurring in part and dissenting in part) (discussing School Teachers' Arbitration Act; stating further that "some disputes, being formally designated as matters of management * * * do not properly fall within the ambit" of arbitrability). See also, State v. Rhode Island Alliance of Social Service Employees, Local 580, SEIU, 747 A.2d 465, 469 (R.I. 2000).