

AXEL JOHNSON, III,	:	
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PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE CITY :	:	
OF VINELAND, CUMBERLAND	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
_____	:	
	:	

SYNOPSIS

Petitioner challenged the Board’s determination denying his request to alter his retirement date for a second time, asserting that Board policy and principles of contract law compelled acceptance of his request. Petitioner sought reinstatement to his position retroactive to September 1, 2001, the date his retirement became effective. Respondent argued that it was not legally required to acquiesce to petitioner’s second request to alter his retirement date, and sought dismissal of the petition.

The ALJ rejected petitioner’s arguments, concluding that petitioner, without coercion, requested a retirement date that was accepted by the Board and that, pursuant to past practice, the Board permitted petitioner, on one occasion, to rescind his retirement date and select an alternate date. The ALJ determined that the Board was not required, either by law or past practice, to grant petitioner’s second request to alter his retirement date.

The Commissioner affirmed the decision of the ALJ, with clarification. The Commissioner determined that, contrary to petitioner’s argument, his initial request to retire was not nullified after TPAF voided the clause in his collective bargaining agreement permitting use of accumulated sick time to increase base salary in the final years of employment, since his retirement request was not made subject to gaining the benefits of that clause. The Commissioner also determined that the Board complied with past practice by awarding one rescission of petitioner’s retirement date, and was not bound by Board policy or principles of contract law to allow petitioner future rescissions of his retirement date. The petition was dismissed.

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The record, Initial Decision, petitioner’s exceptions and the Board’s response thereto have been reviewed. Upon such review, the Commissioner adopts, with clarification, the determination of the Administrative Law Judge (ALJ) recommending dismissal of the petition and denying petitioner’s request for rescission of his retirement and reemployment by the Board retroactive to September 1, 2001.

Petitioner’s exceptions and respondent’s reply summarize and incorporate the parties’ positions and will not be reiterated in their entirety. The operative facts and arguments are as follows.

Petitioner, on November 6, 1997, wrote the superintendent of respondent’s schools setting forth his desire to retire effective September 1, 2000. (*See*, J-1 In Evidence.) In a separate letter of the same date, petitioner wrote the superintendent and advised that he would be exercising his rights under the collective bargaining agreement allowing him to increase his salary through his final two years of his employment by utilizing unused sick pay to increase his salary. (*See*, J-2 In Evidence.) Petitioner’s retirement request was accepted by the Board on December 10, 1997. (*See*, J-3 In Evidence.) Some eight months later, the Board of Trustees of

the Teachers Pension and Annuity Fund (TPAF) determined that the clause of the collective bargaining agreement invoked by petitioner to increase his salary was invalid, with the result that petitioner and others similarly situated would be unable to utilize the clause to increase their final two years' salary. (*See*, J-6 In Evidence.)

Petitioner was made aware of the determination of TPAF. (Initial Decision at 3) However, petitioner did not seek to rescind his retirement until a year and a half later, on February 29, 2000, when he wrote the superintendent of respondent's schools, stating that,

I am requesting that my retirement date of 9/1/00 be rescinded.

On several occasions, during the past months, individual and collective groups of Dana Barse (sic) School staff members have asked me to reconsider this retirement date.

I have tried to carefully examine all factors and have concluded that it is currently in the best interest of the students of Dane Barse School that I ask for my retirement date to be rescinded.

Serious consideration was given to many factors, some of which I will share for your information. Dane Barse School is currently investigating and implementing new methods to present instruction to assure greater student success. We are currently establishing and refining special afterschool (sic) programs at all grade levels. In addition, we are adding several new dimensions to our literacy program both during the school day and during extended hours. Dane Barse School has elected to partner with Coalition of Essential Schools and will be moving into this whole school reform beginning in September 2000. Also, we have a newly formed SMT and will construct Dane Barse's first true school based budget in October and November of 2000.

I should also mention that several parents, after becoming aware of my possible retirement, has (sic) asked and encouraged me to remain.

Thank you for your consideration and I will anxiously wait for your response as we begin making plans for the coming school year.

(J-7 In Evidence)

By separate letter dated March 21, 2000, petitioner wrote the superintendent stating that, because he could not exercise his rights under the voided provision of the collective bargaining agreement, he believed his retirement request was no longer active, but that, if it were active, he was requesting to delay it so that his retirement date would be changed to September 1, 2001. (See, J-8 In Evidence.)

The Board responded to petitioner's February 29, 2000 request by taking formal action expressly *rescinding* petitioner's initial retirement request at its June 14, 2000 meeting and making petitioner's retirement effective September 1, 2001. (See, J-9 and J-10 In Evidence.) Petitioner raised no objection to the Board's action, nor did he file any challenge based on his belief that a rescission was, in fact, unnecessary.

By memorandum of April 25, 2001 and letter of June 14, 2001, petitioner *again* sought to change his retirement date, to September 1, 2002, subject to further requests for change. (See, J-11 and J-12 In Evidence.) However, petitioner's request to change his retirement date to September 1, 2002 was denied by the Board at its August 22, 2001 meeting. (See, J-17 In Evidence)

Petitioner, in his exceptions and brief below, argues that, because his initial retirement request was made in reliance upon his obtaining the benefits of a subsequently voided provision of the collective bargaining agreement, such request was void *ab initio*, and therefore, his first request to retire was his March 21, 2000 request. (See, J-8 In Evidence.) As such, petitioner contends that, pursuant to the purported policy of the Board, his subsequent request to extend his retirement date to September 1, 2002, subject to additional requests for change, was his first request for an extension and should have been granted by the Board based on past practice.

Petitioner also argues that, because his requests for retirement were contingent on exercising his rights pursuant to the collective bargaining agreement, or upon his changing his mind in the future, the Board's acceptance of the requests indicated an acceptance of the contingent nature of same, and imposed a requirement on the Board to permit petitioner to alter his requests. As such, petitioner asserts that he is entitled to reemployment by the Board retroactive to September 1, 2001.

Upon review of the record, Initial Decision and exceptions, while the Commissioner agrees with and adopts the ALJ's determination to dismiss the petition of appeal, he provides the following clarification. First, as to petitioner's assertion that his initial request to retire was of no effect after TPAF voided the provision in the collective bargaining agreement he had exercised, and that Board policy thus compelled the Board to accept his April 25, 2001 request to rescind and change his retirement date as an initial request, the Commissioner does not agree. Petitioner's initial request for retirement (J-1 In Evidence) was not contingent. It stated in clear terms that petitioner wished to retire effective September 1, 2000. The letter reads as follows:

This letter is to express my desire to retire from the Vineland Public Schools as of September 1, 2000.

It will have been my pleasure to have been a member of the educational community for forty years as of that date. Thirty six of these years would have been spent as a member of the Vineland Public School's Staff.

If you should need or require any additional information, please contact me.

(J-1 In Evidence)

By separate letter (J-2 In Evidence) petitioner also expressed a desire to exercise his right under the collective bargaining agreement to increase his salary through unused sick

time. That petitioner did not link his request for an increased base salary as a necessary condition precedent to his retirement is confirmed by his letter, which reads as follows:

This is to express my desire to exercise Article IX section B of the Vineland Administrators and Supervisors Association contract with the Vineland Board of Education.

It is my intent to fully exercise provision number 3 which will allow a twelve per cent (*sic*) (12%) increase over the final two years of employment. This would encompass the school years 1998-1999 and 1999-2000.

If any additional information is needed or required, please contact me.

(J-2 In Evidence)

Therefore, the Commissioner rejects petitioner's argument that his first request for retirement became of no force and effect after TPAF voided the provision of the collective bargaining agreement he sought to exercise by separate letter, since his request for retirement was not made contingent on his seeking and obtaining the benefits of this provision of the collective bargaining agreement.

Additionally, petitioner's February 29, 2000 letter seeking to rescind his September 1, 2000 retirement date states that "I am requesting that my retirement date of 9/1/00 be rescinded," and lists reasons for the request including requests of school staff, and the implementation of a whole school reform model and school based budgeting at his school. (*See*, J-7 In Evidence.) By separate letter one month later, petitioner notes that he has been counseled that his previous retirement request is not active because the article of the collective bargaining agreement he invoked two years earlier was voided by TPAF, and requests "if necessary," a delay in his retirement date to September 1, 2001, "with the understanding that [petitioner] may request additional delays in the future." (*See*, J-8 In Evidence.) This letter reflects petitioner's position that his retirement was void and that his request for a

September 1, 2001 retirement date was, in effect, his initial request to retire. Subsequently, the Board, at its June 14, 2000 meeting, "rescinded [petitioner's] retirement [as requested in his February 29, 2000 letter], from September 1, 2000 to September 1, 2001." (J-10 In Evidence, *See, also* J-9 In Evidence.)

The record clearly reflects that the Board did not accept petitioner's assertion that his initial request to retire was no longer active after TPAF voided the section of the collective bargaining agreement invoked by petitioner in 1997. (*See*, J-9 and J-10) If it had, it would not have *rescinded* petitioner's September 1, 2000 retirement date, but rather, it would have *accepted* his retirement request effective September 1, 2001. The significance of the Board's rescission of petitioner's prior request, rather than an acceptance of September 1, 2001 as an initial retirement date, should have been understood by petitioner, especially considering that, as he stated in his March 21, 2000 letter, he was receiving counsel with regard to the matter. As such, petitioner cannot have reasonably construed, and cannot now construe, his second request to rescind and change his retirement date, by memorandum of April 25, 2001 and letter of June 14, 2001, as a first-time request required by policy and practice to be accepted by the Board.

In addition, the Commissioner finds that principles of contract law do not compel a determination that petitioner's initial request for retirement was void because respondent could no longer satisfy the terms of the retirement request. Petitioner's unilateral request specified no conditions or contingencies. Further, petitioner did not seek to rescind his retirement request for almost two years after the clause in the collective bargaining agreement was voided, suggesting that the TPAF action was not the impetus for the request to rescind. Therefore, the Commissioner concludes that petitioner's February 29, 2000 and March 21, 2000 communications, rescinding and changing to September 1, 2001 his retirement date, constituted

his first request to alter his retirement date, so that this is the only request the Board could be held bound by prior policy to honor.

Petitioner relies heavily on an unreported decision of the Appellate Division in *Cutler v. Board of Education of the Township of Parsippany-Troy Hills, Morris County*, Docket No. A-1464-90T3 (January 27, 1992) in support of his argument. In *Cutler*, the Appellate Division held that, as a matter of ordinary contract law, acceptance by a board of a conditional notice of intention to retire preserved petitioner's right to rescind, as such offers could only be accepted in accordance with their explicit terms. (Slip Opinion at 5) Because his requests for retirement were contingent, petitioner herein argues, he was entitled by their terms to rescind the offers and continue his employment in the district effective September 1, 2001. However, the Commissioner finds that, while the Appellate Division's decision in *Cutler, supra*, can be read as standing for the proposition that, unless modified, the terms of offers of retirement accepted by a board must be honored, petitioner's first request to retire contained no contingency or provision for further delays, and was accepted by the Board in accordance with its terms.

As to petitioner's February 29 and March 21, 2000 requests to change his retirement date by rescinding his request for September 1, 2000 and changing it to September 1, 2001, with no indicia in its June 13, 2000 letter to petitioner (see J-9 In Evidence) that it accepted his statement that it was "[understood] that [petitioner] may request additional delays in the future," (see, J-8 In Evidence), the Board cannot be deemed bound by the principle set forth in *Cutler* to permit petitioner additional rescissions of his retirement date at his discretion. In fact, the offer that was set forth as being accepted by the Board in the June 13, 2000 letter from the district to petitioner was that it "rescinded [petitioner's retirement] from September 1, 2000 to September 1, 2001." (See, J-10 In Evidence.) Nowhere in its letter

does the Board indicate an acceptance of, and agreement with, the proposition in petitioner's second letter seeking to rescind his retirement date and entitle him to request future delays. The failure to mention this condition in the Board's letter must be construed as an acceptance by the Board of the unconditional rescission offered in petitioner's February 29, 2000 letter, rather than the conditions imposed in the March 21, 2000 letter. This determination comports with petitioner's assertion that the Board has a policy and practice of accepting *one* change in retirement date by its employees. Under such policy and practice, the Board would have accepted only the requested change, and would not have agreed to permit petitioner future alterations of his retirement date, since doing so would contravene Board policy.

Accordingly, for the reasons expressed in the Initial Decision and herein, the Commissioner affirms the decision of the ALJ and dismisses the petition with prejudice.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: July 26, 2002

Date of Mailing: July 29, 2002

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.