STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 5, 2024)

JAMES VINER	:	
	:	
Appellant,	:	
v.	:	**C.A. No. PC-2021-02565**
	:	
COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION AND THE NORTH KINGSTOWN SCHOOL COMMITTEE, by and through its members, GREGORY BLASBALG, LISA HILDEBRAND, JENNIFER HOSKINS, JENNIFER LIMA, JAKE MATHER, AND SALLY SCHOTT,	:	
	:	
Appellees.	:	

DECISION

NUGENT, J. Before this Court is Appellant James Viner's appeal of the decision of the Rhode Island Council on Elementary and Secondary Education (Council) to uphold his termination. The Court's jurisdiction over this matter is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

In 2015, Appellant worked as a chemistry teacher at North Kingstown High School. *See* Appellant's Mem. in Supp. of Appeal Ex. B at 1 (Viner Report); Appellant's Mem. in Supp. of Appeal Ex. A (Commissioner of Education, Decision (Dec. 2016 Decision) at 2); Hr'g Tr. 116:5-9, Aug. 11, 2016 (Tr. Vol. IV, afternoon session). On July

6, 2015, one of Jane Doe's[1] (Doe) parents sent an e-mail to Assistant Principal Barbara Morse that stated her daughter became agitated when she learned she failed chemistry. (Viner Report at 8-9; Dec. 2016 Decision at 3.) Doe alleged that Appellant "repeatedly made inappropriate comments about other female students in front of [Doe]." (Viner Report at 9.) On May 5, 2015, Doe said she had a panic attack and walked up to Appellant's desk to request to go to the nurse's office. *Id.* At this time, Appellant said "[h]ey, [Doe], lean close, I want to whisper something in your ear[;]" she alleges that she leaned in and he "kissed her on the cheek." *Id.*

District Superintendent Philip Auger (Superintendent Auger) referred the matter to the School District's attorney, Mary Ann Carroll (Attorney Carroll). (Dec. 2016 Decision at 4.) Attorney Carroll referred the matter to Aubrey Lombardo (Attorney Lombardo) to conduct the investigation. *Id.*; Hr'g Tr. 120:13-121:4, May 25, 2016 (Tr. Vol. II). As part of the investigation, Attorney Lombardo interviewed Doe, Selena Jones (Jones), Amy Anderson, Kelly Rodriguez (Rodriguez), and Karen White. *See* Viner Report. Attorney Lombardo prepared a report that solely summarized said interviews (Viner Report). *See* Viner Report; Dec. 2016 Decision at 4-5.

On July 22, 2015, Attorney Carroll informed Appellant—via his union representative Mary Barten of the National Education Association of Rhode Island (union)—that a student alleged he had kissed her on the ear and an investigation was underway. (Dec. 2016 Decision at 5.) On August 7, 2015, Appellant's union representative told him that a meeting with Superintendent Auger was forthcoming. *Id.*; Tr. Vol. IV, afternoon session, 118:15-119:3. Superintendent Auger sent Appellant a

[1] Pseudonyms will be used throughout the Decision to maintain the confidentiality of the high school students.

letter dated August 24, 2015 formally informing him of the complaint and that a pre-deprivation hearing would occur that morning at 10:00 a.m. (Appellant's Mem. in Supp. of Appeal Ex. C.)

Appellant attended the pre-deprivation hearing in Superintendent Auger's office with his union representative and answered Attorney Carroll's questions. (Dec. 2016 Decision at 5-6.) North Kingstown High School's Principal Denise Mancieri (Principal Mancieri) also attended. *Id.* at 6. Later that day, Superintendent Auger sent another letter to Appellant stating that he would provide his recommendation based on the pre-deprivation hearing to the North Kingstown School Committee (School Committee) on August 25, 2015 at 6:00 p.m. (Appellant's Mem. in Supp. of Appeal Ex. D.) Superintendent Auger further said, "[b]ased on my review of the investigation and the pre-deprivation hearing in my office, I will recommend to the School Committee that you be suspended without pay for the 2015-2016 school year and terminated at the conclusion of the 2015-2016 school year." *Id.* Prior to the meeting before the School Committee, Appellant did not receive a copy of the Viner Report. (Dec. 2016 Decision at 6.)

The School Committee drafted a Statement of Cause—pursuant to the Teachers' Tenure Act, G.L. 1956 § 16-13-4(a)—that outlined the allegations from Doe and the other students in the Viner Report. (Appellant's Mem. in Supp. of Appeal Ex. F at 2-3 (Statement of Cause).) The Statement of Cause said that, during Appellant's pre-deprivation hearing, Appellant admitted to calling a female student a "ten out of ten," telling another female student she had a "complete body," often calling female students "baby" or something similar, referring to another student as "Daisy" as in the character "Daisy Duke," and making other sexual innuendos. (Statement of Cause at 2-3.) In

reference to Doe, the Statement of Cause says that Appellant "essentially corroborated [her] report, differing only in stating that [Appellant] merely 'blew a kiss by her ear' but [Appellant] denied actually kissing her." *Id.* at 2. Ultimately, the School Committee voted 4-0 to suspend Appellant for the remainder of the school year and subsequently terminate his employment for "good and just cause." *Id.* at 3.

Appellant appealed the School Committee's decision to obtain a full evidentiary hearing, pursuant to the Teachers' Tenure Act, § 16-13-4(a), and Appellant's attorney requested copies of written or recorded statements and relevant documents relating to the investigation. (Dec. 2016 Decision at 8.) Appellant's attorney also requested the documents Superintendent Auger relied on in drafting his recommendation to the School Committee. *Id.* On September 28, 2015, the School Committee denied Appellant's request on the grounds that it invaded attorney-client privilege and attorney work product privilege, was overbroad, and sought "information and documentation that, if provided, would unlawfully violate the privacy rights of third parties[.]" *Id.*

A

Department of Labor and Training Board Hearing

On September 4, 2015, Appellant applied for unemployment benefits which were denied because the School Committee had discharged Appellant for "misconduct." (R. *Viner v. Department of Labor & Training, Board of Review*, 2016-85, August 22, 2019, at 3 (Goldman, J.).) Appellant timely appealed that decision to the Board of Review which affirmed the decision. *Id.* Appellant timely appealed the Board of Review's decision which was affirmed by the Referee. *Id.* at 3-4. Appellant timely appealed that

decision to the District Court, and the trial justice affirmed the decision that Appellant was ineligible for unemployment benefits. *Id.* at 3.

B

School Committee Hearing

On December 7, 2015, at the School Committee's evidentiary hearing, five witnesses testified: Doe, Jones, Kelly Rodriguez, Principal Mancieri, and Superintendent Auger. *See generally* Hr'g Tr. North Kingstown School Committee, Dec. 7, 2015; Appellant's Mem. in Supp. of Appeal Ex. G. Ultimately, the School Committee voted 4-1 to accept Superintendent Auger's recommendation to suspend Appellant for the remainder of the school year and terminate him thereafter. (Dec. 2016 Decision at 12.)

C

Rhode Island Department of Education Appeal

On December 18, 2015, Appellant timely appealed the decision of the School Committee. (R. Appellant's Appeal of School Committee Decision at 1.) A Hearing Officer from the Department of Education conducted a multi-day hearing in which a myriad of witnesses testified: Jane Doe, Selena Jones, John Smith, Abby Shapiro, Camila Fernandez, Amy Anderson, Jamie Sanders, Gemma Wong, Jordan Parker, Barbara Morse, Principal Mancieri, Appellant, and Superintendent Auger. *See* Tr. Vol. IV, afternoon session; *see also* Hr'g Tr., Aug. 11, 2016 (Tr. Vol. IV, morning session); *see also* Tr. Vol. II, May 25, 2016; *see also* Hr'g Tr., May 10, 2016, (Tr. Vol. I); *see also* Hr'g Tr., June 10, 2016, (Tr. Vol. III).

Subsequently, the Hearing Officer issued a decision. (Dec. 2016 Decision.) The Hearing Officer's decision summarized the facts and travel of the case before addressing the two main legal arguments as discussed *infra*. *See generally id.*

1

Whether the School Committee Afforded Appellant Procedural Due Process

The Rhode Island Department of Education (RIDE) Hearing Officer's decision outlined notice requirements for teachers under the Teachers' Tenure Act,

> "[t]he statement of cause for dismissal shall be given to the teacher, in writing, by the governing body of the schools. The teacher may, within fifteen (15) days of the notification, request, in writing, a hearing before the school committee or school board. The hearing shall be public or private, in the discretion of the teacher. Both teacher and school board shall be entitled to be represented by counsel and to present witnesses. The board shall keep a complete record of the hearing and shall furnish the teacher with a copy." Section 16-13-4(a); *see also* Dec. 2016 Decision at 32.

Section 16-13-5(a) requires that a school committee conduct a pre-suspension hearing before suspending a teacher, and, at said hearing, "consider any available evidence and afford the teacher or his or her counsel an opportunity to respond to that evidence." *See* Dec. 2016 Decision at 32-33.

The Hearing Officer found that Appellant's due process rights were violated. *See* Dec. 2016 Decision at 32-36. Superintendent Auger and the School Committee's Statement of Cause discussed the Viner Report which Appellant was not provided with until approximately eight months after Superintendent Auger gave his recommendation, and the School Committee drafted the Statement of Cause. *Id.* at 34. In addition, the Hearing Officer indicated that the Statement of Cause did not mention the School

District's Sexual Harassment Policy. *Id.* at 35; *see also* Statement of Cause. However, the evidentiary hearing that took place thereafter was an adequate remedy for prior due process violations. (Dec. 2016 Decision at 36 n.37.)

2

Whether School Committee Satisfied Its Burden to Show the Termination of Appellant's Employment Was for Good and Just Cause

The Hearing Officer discussed Appellant's alleged nicknames for students including "Crop Top Karen" and "babela," and that eight of the nine students who testified did not think Appellant made those comments with sexual intent. *Id.* at 39-40. Even Doe's initial complaint regarding the alleged kiss on the cheek was not intended by Appellant as a sexual act, rather it was meant to comfort her. *Id.* at 40. The Hearing Officer noted inconsistent testimony from Jones regarding Appellant allegedly massaging her shoulders which he concluded undermined her credibility. *See* Viner Report at 3; Dec. 2016 Decision at 41. Before Attorney Lombardo, Rodriguez said that Appellant frequently massaged her shoulders; before the School Committee, she testified that it happened only once. *See* Viner Report; Dec. 2016 Decision at 41. Additionally, the Hearing Officer took issue with the Viner Report not containing credibility determinations based on the interviews contained within it. Dec. 2016 Decision at 43; s*ee also* Viner Report.

As a result, the Hearing Officer concluded that the School Committee did not satisfy its burden to show the dismissal of Appellant was for "good and just cause." (Dec. 2016 Decision at 44.) Therefore, the Hearing Officer reversed the School Committee's findings. *Id.* at 44-45.

D

Commissioner of Education Ken Wagner's Decision

On May 9, 2017, Commissioner of Education Ken Wagner (Commissioner Wagner) issued a final decision and order in which he accepted the Hearing Officer's conclusions of law and findings of fact. (Appellant's Mem. in Supp. of Appeal Ex. A at 2 (May 9, 2017, Commissioner Wagner's Decision).) However, Commissioner Wagner found that the Hearing Officer applied the incorrect legal standard leading to the wrong conclusion and that the "School Committee met its burden of proving that its suspension and dismissal of [Appellant] was for 'good and just cause' . . ." *Id.*

Commissioner Wagner concluded that Appellant's admitted behavior of blowing a kiss in Doe's ear and, generally, not maintaining a classroom with adequate professional boundaries with his students satisfied the "good and just cause" standard for termination. *Id.* at 5-6. Commissioner Wagner asserted that, for sexual harassment, the intent of the accused is immaterial; thus, making Appellant's argument about lacking intent to sexually harass students unavailing. *Id.* at 6. Instead, the focus lies with the impact, and Doe and Jones made clear that those experiences detrimentally influenced their education. *Id.* In conclusion, Commissioner Wagner affirmed the School Committee's decision to terminate Appellant's employment following suspension due to a violation of the Sexual Harassment Policy, finding that the School Committee satisfied its burden to show "good and just cause" for the suspension and dismissal of Appellant. *Id.*

E

Subpoenas

Appellant's attorney requested the Hearing Officer issue three subpoenas: witness subpoenas for Attorney Carroll and Attorney Lombardo and a subpoena *duces tecum*.[2] Dec. 2016 Decision at 12-13; *North Kingstown School Committee v. Wagner*, 176 A.3d 1097, 1098 (R.I. 2018). The School Committee opposed these subpoenas by filing a Miscellaneous Petition in the Rhode Island Superior Court to quash them. (Dec. 2016 Decision at 13; *North Kingstown School Committee*, 176 A.3d at 1099.) Subsequently, the trial justice granted the petition in part and denied it in part which Appellant appealed. (Dec. 2016 Decision at 13-14; *North Kingstown School Committee*, 176 A.3d at 1099.)

While Commissioner Wagner's May 9, 2017 decision was pending on appeal to the Council, the Rhode Island Supreme Court issued its Opinion on the subpoenas. *See generally North Kingstown School Committee*, 176 A.3d 1097; Appellant's Mem. in Supp. of Appeal Ex. N at 2 (Commissioner Infante-Green's Ruling on Mot. to Reopen the R.). "[T]he sole issue on appeal is the hearing justice's grant of the school committee's motion to quash the subpoenas compelling the attorneys' testimony." *North Kingstown School Committee*, 176 A.3d at 1099. The Rhode Island Supreme Court remanded the case to the Superior Court, requiring the trial justice to examine the applicability of the attorney-client privilege for each question. *Id.* at 1100.

Subsequently, Attorney Carroll and Attorney Lombardo were deposed, and neither party raised any issue regarding privilege. (Commissioner Infante-Green's Ruling on Mot. to Reopen the R. at 3); Appellant's Mem. in Supp. of Appeal Ex. K (Attorney

[2] These subpoenas were issued pursuant to G.L. 1956 § 16-39-8. *North Kingstown School Committee v. Wagner*, 176 A.3d 1097, 1098 (R.I. 2018).

Carroll Dep.); Appellant's Mem. in Supp. of Appeal Ex. L (Attorney Lombardo Dep.).) On October 15, 2018, Appellant filed a Motion to Reopen Record and Supplemental Memorandum on Remand. (Appellant's Mem. in Supp. of Appeal Ex. M.)

1

Attorney Lombardo Deposition

On April 30, 2018, Aubrey Lombardo, Esq. was deposed, and she testified that she interviewed North Kingstown High School students about the allegations against Appellant. (Appellant's Br. Ex. L 5:2-5 (Lombardo Dep. Tr.).) First, Attorney Lombardo interviewed Doe on July 21, 2015 with her mother present. *Id.* at 12:10-20, 14:18-22. Attorney Lombardo testified that she also interviewed Selena Jones, Karen White, Amy Anderson, and Kelly Rodriguez. *Id.* at 17-20. During each interview, Attorney Lombardo brought a list of questions and typed the students' answers. *Id.* at 15:2-13.

Subsequently, Attorney Lombardo prepared the Viner Report and received text messages between Jones and Doe that she included therein. *Id.* at 23:1-24:10; Viner Report. While Attorney Lombardo found the students credible, she did not include that finding in the Viner Report. *Id.* at 40:9-41:1. Attorney Lombardo testified that she wanted to interview Abby Shapiro but was unable to contact her. *Id.* at 25:1-15. Attorney Lombardo testified that she had previously conducted similar investigations. *Id.* at 53:15-18.

2

Attorney Carroll Deposition

On April 30, 2018, Mary Ann Carroll, Esq. was deposed, and she testified that she received the allegation against Appellant in early summer of 2015. (Attorney Carroll

Dep. 8:6-12.) She testified that she decided to investigate and requested Attorney Lombardo to do so. *Id.* at 9:21-23. After the investigation, Attorney Carroll held the pre-deprivation hearing. *Id.* at 13:4-6. Attorney Carroll testified that Attorney Lombardo provided her with a list of questions for the pre-deprivation hearing. *Id.* at 21:24-22:18. She testified that she discussed the allegations against Appellant with the union representative, Mary Barten. *Id.* at 25:3-11, 17-19. Attorney Carroll testified that she had never read the Viner Report because she did not work on the investigation. *See id.* at 32:6-11.

F

Commissioner Infante-Green's Ruling on the Motion to Reopen the Record

On February 19, 2020, Angelica Infante-Green, sitting Commissioner of the Department of Education (Commissioner Infante-Green), ruled on Appellant's Motion to Reopen the Record. (Commissioner Infante-Green's Ruling on Mot. to Reopen the R.) Appellant argues that the depositions of Attorney Carroll and Attorney Lombardo show that the investigation was biased, and, therefore, the Hearing Officer should reissue his initial decision which should be approved by Commissioner Infante-Green. *Id.* at 4.

Commissioner Infante-Green incorporated the two depositions into the record, finding that they were material. *Id.* at 6. Commissioner Infante-Green agreed with Appellant's assertion that his due process rights were violated during the investigation but concluded that those violations were cured through the subsequent hearing. *Id.* at 6-7. In summation, Commissioner Infante-Green concluded that the new evidence from the depositions was 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 [Appellant'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." *Id.* at 7.

Therefore, Commissioner Infante-Green affirmed Commissioner Wagner's decision. *Id.*

G

Council on Elementary and Secondary Education Decision

Appellant timely appealed Commissioner Infante-Green's decision on four grounds, alleging that Commissioner Infante-Green erred by

> "(1) not applying the appropriate de novo standard of review for a teacher termination;
> "(2) disregarding the factual findings of the hearing officer;
> "(3) failing to apply the appropriate standard for "good and just cause" for a teacher termination; and
> "(4) ignoring the failure to give Appellant his due process rights." (Appellant's Mem. in Supp. of Appeal Ex. O at 1-2 (Council's Decision).)

The School Committee argued that Commissioner Infante-Green's decision should be affirmed and requested that the finding that the School Committee violated Appellant's due process rights be overturned. *Id.* at 2. The Council concluded that Commissioner Infante-Green properly applied the *de novo* standard of review because the record indicates the fact finding by Commissioner Infante-Green. *Id.* at 2-3. The Council found Appellant's second argument unavailing because Appellant was unable to indicate any rejection by Commissioner Infante-Green of a finding of fact by the Hearing Officer. *Id.* at 3. For Appellant's third argument, the Council determined that Commissioner

Infante-Green cited to good law for the "good and just cause" standard, and thus was not in error. *Id.* Lastly, the Council determined the subsequent *de novo* hearing cured any due process violations. *Id.* at 4.

II

Standard of Review

Section 16-13-4, governing the dismissal of tenured teachers, allows any party aggrieved by a decision of a school board to appeal to the Department of Elementary and Secondary Education and to further obtain judicial review of that decision in the Superior Court. Section 42-35-15(g) of the Administrative Procedures Act (APA) states:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

In reviewing an agency decision, this Court is limited to an examination of the certified record in deciding whether the agency's decision is supported by legally competent evidence. *Nickerson v. Reitsma*, 853 A.2d 1202, 1205 (R.I. 2004) (citations omitted). Legally competent evidence has been defined as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" *Elias-Clavet v. Rhode Island*

Department of Employment and Training Board of Review, 15 A.3d 1008, 1013 (R.I. 2011) (quoting *Foster-Glocester Regional School Committee v. Board of Review*, 854 A.2d 1008, 1012 (R.I. 2004)).

This Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Interstate Navigation Co. v. Division of Public Utilities & Carriers of Rhode Island*, 824 A.2d 1282, 1286 (R.I. 2003) (citations omitted). Thus, "if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" *Auto Body Association of Rhode Island v. Rhode Island Department of Business Regulation*, 996 A.2d 91, 95 (R.I. 2010) (quoting *Rhode Island Public Telecommunications Authority v. Rhode Island State Labor Relations Board*, 650 A.2d 479, 485 (R.I. 1994)). The Superior Court's power to order a remand under § 42-35-15 is merely declaratory of the inherent power of the court '"to remand, in a proper case, to correct deficiencies in the record[.]"' *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427, 449 (R.I. 2010) (quoting *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974)). This broad power ensures litigants a meaningful review of their action. *Id*. (quoting *Lemoine*, 113 R.I. at 290, 320 A.2d at 614).

Section 16-13-4 provides for a multi-tier review process for the dismissal of tenured teachers. *Bochner v. Providence School Committee*, 490 A.2d 37, 39-40 (R.I. 1985). This system is similar to a funnel. *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 207-08 (R.I. 1993). At the first level of review, the hearing officer "sit[s] as if at the mouth of the funnel" and analyzes the evidence, issues, and live testimony. *Id.* At the second level of review, the "discharge end" of the funnel, the board only considers

evidence that the hearing officer received firsthand. *Id.* Our Supreme Court has held, therefore, that the "further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the factfinder." *Id.* Determinations of credibility by the hearing officer, for example, should not be disturbed unless they are "clearly wrong." *Id.* at 206.

III

Analysis

Before this Court, Appellant contends there were substantive and procedural due process violations. *See generally* Appellant's Br. in Supp. of the Appeal from a Decision of the Council on Elementary and Secondary Education at 75-87, 92-100 (Appellant's Br.) In addition, Appellant avers that Commissioner Wagner's decision, the Council's decision, and Commissioner Infante-Green's decision contained errors of law and improper analysis. *Id.* at 38-74, 89-92.

A

Due Process

1

Substantive Due Process

Appellant contends that his substantive due process rights were violated by the School Committee failing to provide the Viner Report, other significant documents related to Appellant's termination, and an adequate Statement of Cause. *Id.* at 75. Those actions, according to Appellant, "deprived [Appellant] of his statutory right and opportunity to convince its members not to terminate his employment and instead, to employ a lesser form of discipline, if necessary." *Id.*; *see also* § 16-13-3(a). The School

Committee and the Council's argument pertaining to substantive and procedural due process violations are identical; Appellant's *de novo* hearing before the Hearing Officer cured prior due process violations. (Appellee North Kingstown School Comm.'s Br. in Opp'n to Appeal at 16 (School Comm.'s Br. Opp'n); Council's Br. Opp'n at 13-14.)

Tenured teachers possess a property interest in continued employment which cannot be stripped from them without due process. *Barber v. Exeter-West Greenwich School Committee*, 418 A.2d 13, 19-20 (R.I. 1980). "Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process." *Goss v. Lopez*, 419 U.S. 565, 573 (1975); *see also generally Lynch v. Gontarz*, 120 R.I. 149, 386 A.2d 184 (1978). Section 16-13-3(a) mandates that a tenured teacher may only be dismissed for "good and just cause;" therefore, a tenured teacher may not be dispossessed of the position absent due process of law under the Fourteenth Amendment. *Barber*, 418 A.2d at 19-20.

The School Committee and the Council's argument is supported by controlling case law. In *Barber*, an adequate posttermination hearing remedied due process violations, making a pretermination hearing superfluous. *Barber*, 418 A.2d at 20. There, a tenured teacher argued that the Exeter-West Greenwich School Committee trampled his due process rights by terminating him without providing him with a Statement of Cause amongst other things. *Id.* at 19. Likewise, in this case, a posttermination hearing took place before a Hearing Officer from the Commission of Education. *See* May 9, 2017, Commissioner Wagner's Decision. Therefore, the posttermination hearing before the Hearing Officer cured the substantive due process violations that occurred beforehand.

2

Procedural Due Process

Appellant makes numerous arguments concerning procedural due process violations contained in the May 9, 2017 Commissioner Wagner Decision, Commissioner Infante-Green's Ruling on Motion to Reopen the Record, and the Council's Decision. (Appellant's Br. at 75-89, 92-100.)

i

Commissioner Wagner's Decision

Appellant argues that the May 9, 2017 Commissioner Wagner Decision did not include a remedy for due process violations. Appellant's Br. at 78-79; *see also* May 9, 2017, Commissioner Wagner's Decision. Additionally, the Hearing Officer's decision stated that the School Committee violated Appellant's procedural due process rights which were subsequently cured through the *de novo* evidentiary hearing, and, according to Appellant, this mandated discussing a remedy on appeal. Appellant's Br. at 75-78; *see also* Dec. 2016 Decision at 32-37. In opposition, the School Committee and the Council contend that the *de novo* hearing before the Hearing Officer cured any procedural due process violations that occurred previously. School Comm.'s Br. Opp'n at 16 (citing *Ciprian v. Providence School Board*, No. 2009-6059, 2009 WL 4479251 (R.I. Super. Nov. 27, 2009); Council's Br. Opp'n at 13-14 (citing *Richardson v. Providence School Board*, RIDE, slip op at 10 (R.I., filed May 25, 2005)).

The Hearing Officer's decision states that Appellant was not provided with an adequate opportunity to prepare a defense because he was not given the identities of his accusers or a sufficient description of the charges against him which is a procedural due

process violation. (Dec. 2016 Decision at 35-36.) Further, the Hearing Officer discussed the general rule that a *de novo* evidentiary hearing after giving adequate notice of the charges properly remedies such due process violations, and such a hearing occurred before the Hearing Officer. *Id.* at 36.

In *Richardson*, Commissioner McWalters found there were procedural due process violations pertaining to notice that were cured through a full and fair *de novo* hearing. *Richardson*, RIDE at 10-11.[3] Likewise, in *Barber*, the Rhode Island Supreme Court held that a sufficient posttermination hearing cures procedural due process violations. *Barber*, 418 A.2d at 20. There, the Exeter-West Greenwich School Committee voted not to renew a teacher's (Barber's) contract for, *inter alia*, hitting students. *Id.* at 15-16. Barber contended that the school district violated his procedural due process rights because the school district never held a hearing, and Barber never received a statement of cause. *Id.* at 18-19. However, the Rhode Island Supreme Court noted that Barber received prior warnings from the principal. *Id.* at 19. Ultimately, the Rhode Island Supreme Court concluded, "[w]e believe that the procedures employed by the school committee in dismissing Barber minimized the likelihood that the dismissal was erroneous and afforded him an expeditious posttermination hearing to remedy any errors that might have arisen. By so providing, the procedures satisfied the minimal requirements of due process." *Id.* at 20.

[3] "We have reviewed the law relating to appropriate relief, or remedy, for due process violations. Based on that review, we decline to award actual damages in the nature of lost wages in this case. The better rule on procedural violations, both constitutional and statutory, is ensuring that the required procedures are furnished without delay." *Richardson*, RIDE at 10.

Similarly, Appellant did not receive a copy of the Viner Report prior to the hearing which was a violation of his procedural due process rights. *See* Dec. 2016 Decision at 34-36. Appellant's subsequent hearing before the Hearing Officer—with counsel present and copious witnesses testifying—cured the procedural due process violations. *See* Tr. Vol. IV, afternoon session; *see also* Tr. Vol. IV, morning session; *see also* Tr. Vol. II; *see also* Tr. Vol. I; *see also* Tr. Vol. III. Hence, Commissioner Wagner and the Hearing Officer did not err by not discussing remedies for due process violations in their respective decisions.

ii

Commissioner Infante-Green's Decision

Appellant avers that Commissioner Infante-Green improperly relied on Commissioner Wagner's decision regarding procedural due process violations because Commissioner Wagner never expressly discussed the rule outlined *supra*. (Appellant's Br. at 79.) In addition, Appellant contends that Commissioner Infante-Green's decision relied on incorrect law, and the case law shows that a *de novo* hearing does not cure procedural due process violations. *Id.* at 83-89. Alternatively, Appellant argues that the novel, material evidence before Commissioner Infante-Green—Attorney Lombardo and Attorney Carroll's depositions—makes a posttermination hearing inadequate to cure procedural due process deficiencies. *Id.* at 88-89.

In Commissioner Infante-Green's decision, she concludes, "even with this new evidence, based upon the analysis that the violation of [Appellant's] statutory and constitutional rights to due process was fully remedied by the *de novo* hearing before the

hearing officer, we affirm [Commissioner Wagner's] May 9, 2017 decision in this respect." (Commissioner Infante-Green's Ruling on Mot. to Reopen the R. at 7.)

Appellant argues that Commissioner Infante-Green should have relied on other case law in reaching her decision. *See* Appellant's Br. at 83-87. For instance, in *Cotnoir v. University of Maine Systems*, 35 F.3d 6, 12 (1st Cir. 1994), the court found "[w]here an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation." *See* Appellant's Br. at 83-86 (citing *Cotnoir*, 35 F.3d 6). Appellant also relied on *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 263 (1st Cir. 1987). *Id.* at 80-81. The court there found that a posttermination hearing was inadequate to remedy procedural due process violations. *Id.* (citing *Kercado-Melendez*, 829 F.2d 255). However, *Kercado-Melendez* is distinguishable from the case at hand both factually and procedurally. *Kercado-Melendez*, 829 F.2d at 257-58. Namely, Kercado worked as a superintendent, and she averred that she was removed from the position due to her political involvement. *Id.* at 256-57. In addition, Kercado never sought an administrative appeal, instead opting to bring her action in federal court. *Id.* at 258. Whereas here, Appellant brought an APA appeal and does not contend that the School Committee removed him due to an ulterior motive. *See* Compl.; *see also generally* Appellant's Br.

Appellant's final argument takes issue with how Commissioner Infante-Green weighed the additional evidence at her disposal, Attorney Carroll's and Attorney Lombardo's depositions. (Appellant's Br. at 88-89.) This Court does not weigh evidence on appeal; rather, it only disturbs the finding if there is a lack of substantial evidence. *Interstate Navigation Co.*, 824 A.2d at 1286. There is substantial evidence to support

Commissioner Infante-Green's finding that the additional evidence did not materially alter the factual findings of the Hearing Officer and Commissioner Wagner. *See* Commissioner Infante-Green's Ruling on Mot. to Reopen the R. at 7. The depositions of Attorney Carroll and Attorney Lombardo, as summarized afore, did not provide consequential information that made the Hearing Officer's factual findings erroneous. The depositions did not alter the undisputed evidence on the record.

In conclusion, the Rhode Island Supreme Court cases analyzed *supra* are controlling authority, and Commissioner Infante-Green properly relied on them. Plainly, Commissioner Infante-Green did not err as a matter of law, and there is substantial evidence to support how Commissioner Infante-Green weighed the new evidence.

iii

Council on Elementary and Secondary Education's Decision

Appellant makes the same procedural due process arguments as discussed previously—that the Council did not rely on the correct legal standard when finding that the due process violations were cured by the posttermination hearing, and Appellant is entitled to a remedy as a result. (Appellant's Br. at 92-100.)

For the same reasons as previously stated, Appellant's procedural due process arguments are not persuasive. Therefore, the Council did not violate Appellant's procedural due process rights in its decision.

B

Sufficiency of the Decisions

The remainder of Appellant's arguments center around the sufficiency of Commissioner Wagner's decision, Commissioner Infante-Green's decision, and the Council's decision. (Appellant's Br. at 38-65, 89-92.)

1

Commissioner Wagner's Decision

i

Commissioner Wagner's Deference to the Hearing Officer

Appellant contends that Commissioner Wagner failed to provide adequate deference to the Hearing Officer and did not rely on substantial evidence when he rejected the Hearing Officer's conclusion that Appellant did not sexually harass any students. (Appellant's Br. at 44-45.) In opposition, the School Committee argues that Commissioner Wagner based his decision on facts the Hearing Officer clearly established and did not substitute his own credibility determinations in lieu of the Hearing Officer's credibility determinations. (School Comm.'s Br. Opp'n at 15-16). The Council did not address this argument. *See* Council's Br. Opp'n.

The Rhode Island Supreme Court's decision in *Durfee* is illustrative on this issue. There, the Department of Environmental Management (DEM) maintained a two-tiered system for proceedings in which a hearing officer presides over the hearing and issues a decision containing recommendations for the DEM director who issues the final decision. *Durfee*, 621 A.2d at 207. In administrative appeals utilizing the two-tiered system, the decisionmaker should afford deference to the credibility determinations of the factfinder.

Id. at 207-08. However, the agency's final decision may overrule the hearing officer's decision as long as the final decision is supported by substantial evidence. *Id.* at 209.

Turning to the case at hand, the Hearing Officer made credibility determinations on what he viewed as wildly contradictory testimony about Appellant by a myriad of witnesses. *See* Dec. 2016 Decision. Commissioner Wagner accepted the Hearing Officer's findings of fact and most of the conclusions of law. (May 9, 2017, Commissioner Wagner's Decision at 2.) Commissioner Wagner rejected only the Hearing Officer's conclusion of law that the School Committee did not meet its burden to suspend Appellant for "good and just cause." *Id.* Commissioner Wagner relied on undisputed evidence to conclude the School Committee satisfied the "good and just cause" standard. *Id.* at 4-6. For instance, Commissioner Wagner referenced the undisputed evidence of Appellant calling female students by a litany of nicknames such as "Crop Top Karen," "baby," and "babala." *Id.* at 4.

Therefore, Commissioner Wagner's finding meets the substantial evidence standard. He did not ignore the deference he is required to afford to the Hearing Officer's credibility determinations. Thus, Appellant's argument on this point is unavailing.

ii

Commissioner Wagner's Explanation of His Findings

Appellant makes a tangential argument that Commissioner Wagner's decision is arbitrary and capricious because he did not provide an adequate explanation of where the Hearing Officer misapplied the law. (Appellant's Br. at 63-65.) As a result, Appellant contends that this makes judicial review impossible. *Id.* at 64. Neither the School

Committee nor the Council addressed this argument. *See* School Comm.'s Br. Opp'n; *see also* Council's Br. Opp'n.

Commissioner Wagner laid out multiple actions Appellant took that satisfied the "good and just cause" standard, including frequently commenting on female students' appearances and giving them distasteful nicknames. *See* May 9, 2017, Commissioner Wagner's Decision at 4. Therefore, Commissioner Wagner found that an amalgamation of these actions satisfied the "good and just cause" standard. *Id.* at 5-6. This Court, which may not substitute its judgment for Commissioner Wagner as to the weight of the evidence, concludes that Commissioner Wagner provided an appropriate explanation for how the Hearing Officer misapplied the law. *See generally id.*

iii

Commissioner Wagner's Application of the Good and Just Cause Standard

Appellant contends that Commissioner Wagner applied the incorrect legal standard for "good and just cause." (Appellant's Br. at 58-63.) Appellant takes issue with the cases that Commissioner Wagner cited which explained the "good and just cause" standard, including *McCrink v. City of Providence*, No. PC-10-4304, 2012 WL 4739138 (R.I. Super. Sep. 28, 2012), and *McKenney v. Barrington School Committee*, No. 2014-2223, 2016 WL 3927584 (R.I. Super. July 14, 2016). Conversely, the School Committee argues that the cases that Commissioner Wagner relies on for the "good and just cause" standard, and the case law writ large all point to a flexible standard that requires fact-intensive analysis. (School Comm.'s Br. Opp'n at 11-13.) Accordingly, Commissioner Wagner engaged with the facts to conclude that "good and just cause" exists for the suspension and termination of Appellant. *Id.* at 12-13. The Council cites to *McCrink* to

support its contention that "good and just cause" may be satisfied by a single instance of conduct. (Council's Br. Opp'n at 3.)

Section 16-13-3(a) states that "[n]o tenured teacher in continuous service shall be dismissed except for good and just cause." The Rhode Island Supreme Court has not provided a definition of "good and just cause." Commissioner Wagner relied on persuasive authority when outlining the legal standard for "good and just cause." (May 9, 2017, Commissioner Wagner's Decision at 3 (citing *McCrink*, 2012 WL 4739138, at *5) ("It has been said that the phrase includes 'any ground that is put forth by the school board in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the task of building and maintaining an efficient school system.'"); *McKenney*, 2016 WL 3927584, at *6 n.14 ("[O]ther jurisdictions have explained that 'the term [good and just cause] includes any cause which bears a reasonable relation to the teacher's fitness or capacity to discharge the duties of his position.'").

Appellant addresses this issue by stating that these cases are not controlling authority. (Appellant's Br. at 58-61.) Appellant found the hearing justice's holding in *McCrink* to be enlightening: "a decision to terminate a tenured teacher must be reached after a careful examination of all the pertinent factors relating to the situation, with due consideration of the effect the teacher's conduct will have on the school authorities as well as on the students." *Id.* at 61 (quoting *McCrink*, 2012 WL 4739138, at *5).

Given that the Rhode Island Supreme Court has not provided a definition for "good and just cause," this analysis leads to the conclusion that the Commissioner of Education, Hearing Officer, and this Court must rely on persuasive authority and closely review the facts of each case. Here, Commissioner Wagner engaged in fact-intensive

analysis and accepted the credibility determinations of the Hearing Officer as the factfinder. *See* May 9, 2017, Commissioner Wagner's Decision. Consequently, Commissioner Wagner did not apply the incorrect legal standard for "good and just cause."

iv

Was the Hearing Before Commissioner Wagner *De Novo*?

Appellant avers that Commissioner Wagner afforded the School Committee's decision improper deference. (Appellant's Br. at 65-72.) Namely, Appellant argues the language contained in Commissioner Wagner's decision incorporated conclusions by the School Committee which amounts to an error of law. *Id.* The School Committee argues that its decision took center stage during the proceedings before the Hearing Officer due to the burden on the School Committee. (School Comm.'s Br. Opp'n at 16.) Thus, Commissioner Wagner commenting on the School Committee's decision does not show improper deference by Commissioner Wagner. *Id.* The Council did not discuss Appellant's argument on this issue. *See* Council's Br. Opp'n.

G.L. 1956 § 16-39-2 mandates that "appeals from school committee actions to the Commissioner of Education . . . contemplates a de novo hearing by the commissioner." *Slattery v. School Committee of City of Cranston*, 116 R.I. 252, 262, 354 A.2d 741, 747 (1976) (citing *School Committee v. State Board of Education*, 103 R.I. 359, 364, 237 A.2d 713, 716 (1968)). In Commissioner Wagner's decision, he discusses the School Committee's decision in depth twice.[4] (May 9, 2017, Commissioner Wagner's

[4] Commissioner Wagner discusses the School Committee's decision in two main portions of his decision:

Decision at 6-7.) However, Commissioner Wagner does not discuss deference to the School Committee's findings or decision. *See id.*

For the aforementioned reasons, Commissioner Wagner's discussion of the School Committee's decision does not show improper deference. *See id.* Commissioner Wagner properly reviewed the *de novo* hearing by the Hearing Officer.

2

Commissioner Infante-Green's Decision

i

Did Commissioner Infante-Greene Commit Plain Error?

Appellant contends that Commissioner Infante-Greene found the new evidence from Attorney Carroll and Attorney Lombardo to be material, but failed to analyze said

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> "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." (May 9, 2017, Commissioner Wagner Decision at 6.)
>
> "Based on the evidence before RIDE, the North Kingstown School Committee's conclusion that Mr. Viner's conduct was inappropriate and a violation of the District's Staff Policy on Sexual Harassment was in good faith and was not arbitrary, irrational, unreasonable or irrelevant to the task of building and maintaining an efficient school system. In summary, the School Committee met its burden of proving that there had been 'good and just cause' to justify its December 7, 2015 decision to suspend and then dismiss Mr. Viner." *Id.* at 7.

evidence. (Appellant's Br. at 72-73.) Therefore, according to Appellant, this action on the part of Commissioner Infante-Green amounts to plain error, and this Court should vacate her decision. *Id.* at 74. Again, neither the Council nor the School Committee mentioned this argument. *See* School Comm.'s Br. Opp'n; *see also* Council's Br. Opp'n.

In Commissioner Infante-Greene's decision, she outlines the APA standard for reopening a record based on new, material evidence. (Commissioner Infante-Green's Ruling on Mot. to Reopen the R. at 5.) A court will permit the additional evidence if

> "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 . . . 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." *Id.* (emphasis added) (citing § 42-35-15(e).

Appellant's argument on this point is unsupported by the facts and the law. Appellant did not cite to any controlling authority in support of this assertion. (Appellant's Br. at 74 (citing *Sparrow v. D.C. Office of Human Rights*, 74 A.3d 698, 703 (D.C. 2013); *Singh v. Mukasey*, 264 F. App'x 83, 86 (2d Cir. 2008)). Section 42-35-15(e) indicates that the School Commissioner is not required to modify her findings if she reopens the record. Therefore, Appellant's argument that Commissioner Infante-Greene was required to provide a detailed analysis based on this new evidence—the two depositions—is not persuasive. Commissioner Infante-Green did not commit an error of law by not providing detailed analysis of the new material evidence.

3

The Council on Elementary and Secondary Education's Decision

Appellant further argues that the Council did not give proper deference to the Hearing Officer's fact finding, and the Council's Decision did not provide sufficient analysis, making the decision arbitrary and capricious. (Appellant's Br. at 89-92.) The Council is not required to provide lengthy analysis given that it is not a factfinder in this case. *Durfee*, 621 A.2d at 207-08. There is substantial evidence in the record to support the Council's finding that there was "good and just cause" for Appellant's termination.

IV

Conclusion

After review of the entire record, this Court affirms the Council's Decision which concluded there was "good and just cause" for Appellant's termination because there is substantial evidence to support this conclusion. Counsel shall prepare the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**James Viner v. Council on Elementary and Secondary Education, et al.**
CASE NO:	**PC-2021-02565**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 5, 2024**
JUSTICE/MAGISTRATE:	**Nugent, J.**
ATTORNEYS:	
For Plaintiff:	**Carly B. Iafrate, Esq.** **John E. DeCubellis, Jr., Esq.**
For Defendant:	**Paul V. Sullivan, Esq.**