COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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500 N. King Street, Suite 11400
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Submitted: June 5, 2009
Decided: July 27, 2009

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RE: W. Denver Garrison, Jr. v. Red Clay Consolidated School District
C.A. No. 3385-VCL

Dear Counsel:

I have read and considered the briefs submitted on the parties' cross-motions for summary judgment, as well as the oral arguments presented at the hearing held on June 5, 2009. For the reasons set forth below, the court will grant the defendant's motion for summary judgment and deny the plaintiff's motion for partial summary judgment.

I.

W. Denver Garrison, Jr. was employed by the Red Clay Consolidated School District (the "District") as a drama teacher at Cab Calloway High School for the 2004-2005, 2005-2006, and 2006-2007 school years. This case arises out of the non-renewal of his teaching contract at the end of his third year of employment with the District.

Before he was hired by the District, Garrison had last been employed as a secondary school teacher in Ohio in 1985. After that, he taught continuing education and undergraduate theater courses at the college level until approximately 1992 or 1993. From 1993 until 1996, his income came from a mix of acting jobs and information technology positions. From 1996 until he was hired

by the District in 2004, his income came primarily from information technology work. Thus, at the time of his hire, Garrison had last taught in the secondary school setting nearly twenty years earlier, and had last had any significant drama teaching role (secondary school or otherwise) more than a decade earlier.

Based on his Ohio teaching license, and pursuant to 14 *Del. C.* § 1210(d), the Delaware Department of Education issued Garrison an "initial license," effective August 23, 2004. Section 1210(d) provides, in pertinent part:

> [T]he Department may issue an initial license to an applicant with less than 3 years of teaching experience who is licensed as an educator in another jurisdiction or to an applicant who previously held a valid Delaware certificate that has since expired.

In the letter from the Department of Education enclosing his initial license, the Department stated, "[d]uring the term of the Initial License, you are required to participate in mentoring and other prescribed professional development activities."

Because Garrison's secondary school teaching experience amounted to only two years of teaching two decades earlier, the District categorized Garrison as a teacher new to the profession. Accordingly, the District enrolled him in the state mandated three-year New Educator Mentoring Program for teachers.[1]

During the first two years of the program, Garrison had trouble attending the mentoring sessions at the assigned times. He was given special dispensation from the program coordinator to perform make-up work during the course of the year in lieu of attending some of the required sessions. For the third year program, the

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[1] The New Educator Mentoring Program consists of four "cycles" which are normally completed over three years. The site coordinator for the District may, in his or her discretion, place a teacher with one or two years of experience in cycles one, two, or three. Julianne Tankersley, the site coordinator at the District during Garrison's tenure, after consultation with Mary Ellen Kotz (the Education Associate for Professional Accountability/Mentoring Induction and Certification for the Delaware Department of Education since August 2003), placed Garrison in cycle one to start. Tankersley and Kotz agreed that this was the appropriate decision based on the more than 15-year gap in Garrison's teaching experience. First Kotz Aff. (Def.'s Opening Br. Ex. 8) 1-2.

coordinator lacked the discretion to grant such dispensations.[2] Garrison continued to have trouble attending the required meetings in his third year, ostensibly because of his after-school rehearsal supervision duties. When Tankersley asked Garrison by email why he had not been attending the cycle three meetings,[3] Garrison replied:

> Don't worry you won't have to bail me out this year. I had to make a decision about what was more important.....taking care of our students and getting the musical up or going to the mentoring workshops. I made the right choice. If [the Department of Education] gives me any options I will consider them, but it is what it is.[4]

Tankersley understood Garrison's response to indicate that he had given up on the mentoring program.

On February 15, 2007, Tankersley sent an email to all program participants confirming the attendance requirements. The email listed the dates of remaining meetings required for closure of the cluster, and also noted that the teachers must attend eight of the ten total meetings to get credit for the cluster, which closed no later than February 27, 2007.[5] The next day, Garrison emailed Tankersley, stating "[a]s I understand this email, I can finish the cluster next year is that correct?"[6] Tankersley replied on February 23, 2007, stating "[u]nfortunately this is not the

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[2] The third-year program consists of ten state-mandated meetings. Participants must attend at least eight of these in order to receive credit for the program. Def.'s Opening Br. Ex. 10 at 2. Each of the ten meetings was conducted in two identical sessions, one on Tuesday and one on Thursday, and the participants could choose on a meeting-by-meeting basis which one to attend. Def.'s Opening Br. Ex. 13 at 2. The program must be completed in order for the teacher to receive a Continuing License from the Department of Education. *See* 14 *Del. C.* §§ 1211(b), 1210(c).

[3] Garrison by that time had missed six of the first seven meetings. Def.'s Opening Br. Ex. 12. Tankersley noted as well that she would need to inform the Department of Education of his answer and offered help if it was needed. Def.'s Opening Br. Ex. 14 at 1-2 (email from Tankersley to Garrison, dated December 21, 2006).

[4] Def.'s Opening Br. Ex. 14 at 1 (email from Garrison to Tankersley, dated December 21, 2006).

[5] Def.'s Opening Br. Ex. 10 at 14-15; Tankersley Dep. 66-67.

[6] Def.'s Opening Br. Ex. 10 at 20 (email from Garrison to Tankersley, dated February 16, 2007).

case. Your initial license expires this summer."[7] On March 14, 2007, Tankersley again emailed Garrison, stating:

> Your required third year of participating in or [sic] district's New Teacher Mentoring Program is coming to an end this June. You have not fulfilled the third year state requirements for conversion from an initial license to a continuing license, and I will not be able to make that conversion. I will notify our Human Resources Department of this information.[8]

On February 23, 2007, Julie Rumschlag, dean of Cab Calloway, sent a memo to Debra Davenport, the Human Resources Manager for the District, stating that Garrison's contract should not be renewed for the following year because of his "lack of certification due to not completing 3rd year mentoring program."[9] At the Red Clay Board of Education (the "Board") meeting on April 18, 2007, the Board voted not to renew Garrison's contract based on his lack of certification.[10] The next day, Davenport advised Garrison by letter that the Board intended to terminate his services for lack of certification effective at the end of the 2006-2007 school year.[11] Garrison then requested and was granted a post-termination hearing before the Superintendent of the District. Garrison, his union representative, the Deputy Superintendent, and Superintendent Robert Andrzjewski attended the hearing, which was held on June 7, 2007. Following the hearing, Andrzjewski sent Garrison a letter upholding his termination. The letter stated:

> You did not complete the requirements to hold a State of Delaware teaching certificate. The opportunity for you to complete the mentoring program that is required was available and you were notified on numerous occasions of this requirement.[12]

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[7] *Id.* at 19 (email from Garrison to Tankersley, dated February 23, 2007).
[8] *Id.* (email from Tankersley to Garrison, dated March 14, 2007).
[9] Def.s' Opening Br. Ex. 39 at 1.
[10] Def.'s Opening Br. Ex. 40 at 4-7.
[11] Def.'s Opening Br. Ex. 41.
[12] Def.'s Opening Br. Ex. 43 (letter from Andrzejewski to Garrison, dated July 12, 2007).

Garrison filed his complaint on December 4, 2007. The complaint alleges wrongful termination (counts I and II),[13] violation of the Delaware Whistleblower's Protection Act (count III),[14] and breach of the covenant of good faith and fair dealing with respect to Garrison's employment agreement (count IV).[15] The District answered on February 20, 2007. On April 30, 2009, Garrison moved for partial summary judgment on the wrongful termination counts, and the District cross-moved for summary judgment on all counts. Oral argument was heard on the cross-motions for summary judgment on June 5, 2009.

II.

The legal standard for cross-motions for summary judgment is well settled. To prevail, each party must show that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law."[16] Where the parties have filed cross-motions for summary judgment and neither party has argued that there is an issue of material fact, the cross-motions are deemed to be a stipulation for a decision based on the submitted record.[17] However, even when presented with cross-motions, a court must deny summary judgment if a material factual dispute exists.[18] The court must view the facts in the light most favorable to the

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[13] Count I seems to be focused on a claim by Garrison that he was terminated for additional pretextual reasons which were not properly documented in his file, and therefore not proper grounds for termination. *See* 14 *Del. C.* § 1410. Count II, in contrast, focuses on Garrison's contention that he was misclassified as an inexperienced teacher, and that if properly classified as "experienced," he had met his mentoring requirements and should have been certified with a continuing license. If he had been certified as he should have been, the logic of the complaint goes, then lack of certification would not have been a ground for termination available to the District.

[14] *See* 19 *Del. C.* § 1703.

[15] The plaintiff withdrew count IV of the complaint in his brief in opposition to the defendant's motion for summary judgment. Pl.'s Br. in Opp'n 25. As a result, count IV of the complaint is dismissed with prejudice.

[16] Ct. Ch. R. 56(c); *see also Acro Extrusion Corp. v. Cunningham,* 810 A.2d 345, 347 (Del. 2002); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

[17] Ct. Ch. R. 56(h).

[18] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003) (citing *Empire of Am. Relocation Servs., Inc. v. Commercial Credit Co.,* 551 A.2d 433, 435 (Del. 1988)).

nonmoving party.[19] The moving party bears the burden of demonstrating that there is no material question of fact.[20] "A party opposing summary judgment, however, may not merely deny the factual allegations adduced by the movant."[21] "If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight."[22] Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or "if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[23]

To begin with, neither of the parties dispute that, without a valid teaching license, Garrison could not have taught in the District. Nor do the parties dispute that Garrison's initial license expired by its terms in 2007 (at the end of its three-year term), and was non-renewable.[24]

Thus, with respect to the wrongful termination counts, the dispute between the parties centers on the question of whether Garrison was properly denied a continuing license.[25] If the court concludes that he was, the first count, related to

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[19] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).
[20] *Id.*
[21] *Tanzer*, 402 A.2d at 385.
[22] *Id.*
[23] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[24] *See* 14 *Del. C.* § 1210(e). Garrison mentions the possibility of a one-year extension of his initial license for exigent circumstances. Such an extension would have been at the discretion of the Department of Education, and the onus would have been on Garrison to request and obtain the extension. *See* 14 *Del. C.* § 1216(a) ("*Upon a showing by an educator of exigent circumstances, the Department may*, through rules and regulations promulgated and adopted pursuant to this chapter, issue a license extension for a period not to exceed one year."). There is no evidence that Garrison ever formally attempted to obtain such an extension.
[25] As a threshold matter, the court has grave reservations about its own subject matter jurisdiction with respect to this action. In essence, counts I and II constitute an appeal of the Board's decision to terminate Garrison. Yet pursuant to 14 *Del. C.* § 1414, a termination "decision of [a school board] shall be final and conclusive unless, within 10 days after a copy [of that decision] has been received by the teacher, the teacher appeals to the Superior Court for the county in which the teacher was employed." Even if the court assumes that the termination decision did not occur until the Superintendent sent the letter to Garrison denying his request for

other bases for termination, is irrelevant, as non-certification is clearly both a sufficient ground for termination of any teacher and in fact would mandate non-renewal. It is this question the court now addresses.

Garrison's argument turns on the construction of 14 Del. Admin. C. § 1503, which sets forth the Department of Education's educator mentoring requirements.[26] The basic tenets of regulatory (like statutory) construction are well-known: the court must endeavor to ascertain and give effect to the intent of the legislating body.[27] "Where the language of the [regulation] is unambiguous, no interpretation is required and the plain meaning of the words controls."[28] If the regulation, however, is ambiguous, it "must be construed as a whole in a manner that avoids absurd results."[29] A regulation is ambiguous if it "is reasonably susceptible of

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reinstatement pursuant to the June 7, 2007 hearing, that decision occurred no later than July 12, 2007. Thus, the time for Garrison to appeal would have run long before the filing of this complaint on December 4, 2007. As a result, no appeal could now be brought by Garrison, and if this court were to treat the complaint properly as a notice of appeal, it would have been untimely, and no jurisdiction would exist in the Superior Court to hear it if transferred. *See Draper King Cole v. Malave*, 743 A.2d 672, 673 (Del. 1999) ("When a party fails to perfect an appeal within the period mandated by statute, a jurisdictional defect is created that may not be excused in the absence of unusual circumstances that are attributable to court personnel and are not attributable to the appellant or the appellant's attorney.") (citing *Riggs v. Riggs*, 539 A.2d 163 (Del. 1988)). However, see generally DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2.02[c], at 2-8 to -16 (2008), discussing the limits on legislative authority to curtail the subject matter jurisdiction of the Court of Chancery.

[26] The wide-ranging nature of the arguments made by both parties serves as ample illustration of the inherent ambiguity of the structure and language of Section 1503.

[27] *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993) ("The basic rule of statutory construction [] requires a court to ascertain and give effect to the intent of the legislature."); *see also Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 19 (Del. 2000) (stating that the goal of statutory construction "is to ascertain and give effect to the intent of the legislature.").

[28] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000) (citing *Spielberg v. State*, 558 A.2d 291 (Del. 1989)); *Rubick*, 766 A.2d at 18; *Fid. & Deposit Co. of Md. v. Dep't of Admin. Servs.*, 830 A.2d 1224, 1228 (Del. Ch. 2003); *see also Swanson*, 632 A.2d at 1096-97 ("If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of the literal meaning of those words. However, where . . . the Court is faced with a novel question of statutory construction, it must seek to ascertain and give effect to the intention of the General Assembly as expressed by the statute itself.").

[29] *Ingram*, 747 A.2d at 547.

different conclusions or interpretations."[30] In construing a regulation, the court accords deference to the construction placed by an administrative agency on regulations promulgated or enforced by it, unless that construction is shown to be clearly erroneous.[31]

Garrison contends that the District mischaracterized him as a an "educator new to the profession" under 14 Del. Admin. C. § 1503-3.1. It is pursuant to that characterization that Garrison was enrolled in the New Educator Mentoring Program, which required his participation for three years. Instead, Garrison contends, if the District had properly characterized him as an "Experienced Educator" pursuant to Section 1503, he would have already completed his mentoring requirements at the end of his second year. Thus, he argues, he was entitled to receive a continuing license regardless of his participation or lack thereof in the third-year mentoring program. In support of this contention, Garrison relies on 14 Del. Admin. C. § 1503-4.4, which provides that:

> Experienced teachers and specialists new to the State of Delaware who hold Initial Licenses shall complete the requirements of the New Educator Mentoring Program, which shall consist of no more than 60 hours, inclusive of meetings between the mentor and the experienced teachers and specialists.[32]

Rule 4.4 is contained within Rule 4, entitled "Experienced Educators New to the State of Delaware." While the phrase "experienced teachers," used in Rule 4.4, is defined nowhere in the code, the term "Experienced Educator" is. 14 Del. Admin. C. § 1503-2.0 provides in pertinent part that an "'Experienced Educator' is an educator who holds a Continuing or Advanced License . . . ." Based on this definition then, while it is clear that Garrison's contention that he properly should

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[30] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).
[31] *See Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 n.9 (Del. 1999); *accord J.N.K., LLC v. Kent Cty. Levy Ct.*, 2009 WL 2047969, at *7 (Del. Ch. July 15, 2009).
[32] *Compare* 14 Del. Admin. C. § 1503-4.4 (stating in the context of "experienced teachers" that the New Educator Mentoring Program shall consist of no more than 60 hours) *with* 14 Del. Admin. C. § 1503-3.4 (stating in the context of "new educators" that the New Educator Mentoring Program shall consist of no more than 60 hours *in the first year*). Counsel for the District suggested at oral argument that the two sections are actually supposed to be read as *in pari materia*, and that the difference was a drafting error.

have been characterized as an Experienced Educator cannot be true (since he did not have a Continuing License), it is far less clear what an "experienced teacher" is for the purposes of Rule 4.4.[33]

The Delaware Department of Education offers a way out of this interpretive morass. According to the document entitled "Regulatory Guidance For New Teacher to the Profession,"[34] a teacher new to the profession is one "with less than three years of experience."[35] Because the Department of Education both promulgated and is responsible for enforcing these regulations, and because of the reasonableness of this interpretation (thus making it not clearly erroneous), the court will defer to the Department of Education's construction.

Applying this interpretation, it was not erroneous for the District to categorize Garrison as an "educator new to the profession,"[36] and to therefore require him to complete the full three-year mentoring cycle in order to be eligible for a continuing license.[37] Because his initial license was expiring without the possibility of renewal, and he had made no effort to obtain an extension for exigent circumstances,[38] and because he had not met the requirements for issuance of a continuing license, Garrison was properly not eligible for renewal for lack of

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[33] It cannot be that the phrase "experienced teacher" is to be read synonymously with "Experienced Educator." This becomes immediately obvious once the definition of "Experienced Educator" is "test-fitted" in the place of "experienced teacher" in Rule 4.4. This would render the rule as reading: "An educator who holds a Continuing or Advanced License, new to the State of Delaware, who hold Initial Licenses . . . ." This would clearly be a nonsensical provision as so read. Unfortunately, much of the confusion present in this case results from the inartful drafting of 14 Del. Admin. C. § 1503.

[34] Def.'s Opening Br. Ex. 7. Kotz states that she wrote this document while the "Education Associate for Professional Accountability/Mentoring Induction and Certification" for the Delaware Department of Education prior to the 2004-2005 school year. First Kotz Aff. ¶¶ 1, 3. Thus, there is no question that this is the long-standing understanding within the Department of the rules regarding the New Educator Mentoring Program, and not a litigation position.

[35] Def.'s Opening Br. Ex. 7 at 1.

[36] An outcome that seems entirely reasonable, given the short length of Garrison's prior experience combined with its remoteness in time.

[37] *See* 14 Del. Admin. C. § 1503-3.5 ("Failure by a new educator to complete the requirements of the New Educator Mentoring Program shall result in the denial of a Continuing License.").

[38] Nor would he have been likely to receive one based on the representations of the Department of Education. First Kotz Aff. ¶¶ 12-16.

certification at the end of the 2007 school year. Both of his claims (counts I and II) for wrongful termination must, therefore, fail.

With respect to Garrison's claim under the Delaware Whistleblowers' Protection Act,[39] Garrison cannot prevail given the court's conclusion above. In any action under the Act, the burden is on the plaintiff to "show that the primary basis for the discharge" was the plaintiff's protected action as a whistleblower.[40] Because his non-certification not only justified but required his non-renewal as a teacher by the District, no reasonable trier of fact could find (and therefore Garrison cannot possibly succeed in proving) that any whistleblowing he may or may not have engaged in was the primary basis for his termination

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For the reasons set forth above, the defendant's motion for summary judgment is GRANTED, and the plaintiff's motion for partial summary judgment is DENIED. Judgment shall be entered in favor of the defendant. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

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[39] *See* 19 *Del. C.* § 1701 *et seq*.
[40] 19 *Del. C.* § 1708.