IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

ELLIS JONES, Appellant	:	
	:	TTA No. 01-11
v.	:	(Remanded)
THE SCHOOL DISTRICT OF PHILADELPHIA, Appellee	:	

OPINION AND ORDER

In the appeal of Ellis Jones ("Appellant"), Commonwealth Court has remanded the matter to the Secretary of Education ("Secretary") to calculate the compensation Appellant is due taking into consideration his obligation to mitigate damages. The following adjudication is issued in accordance with the Court's direction. See *Opinion*, attached hereto.

FINDINGS OF FACT

1. Appellant was hired as a vocational teacher with the School District of Philadelphia ("District") in September 2002. Tr.[1] 42, 368-69.
2. Appellant was a vocational teacher at Dobbins Area Vocational-Technical School in the District for six years. N.T.[2] 136.
3. During the 2008-2009 school year, Appellant was assigned as a math teacher at Mastbaum Area Vocational-Technical School in the District. N.T. 136-139.

[1] "Tr." refers to the transcripts of the proceedings held before the hearing officer appointed by the Secretary for the hearings on the issue of damages.

[2] "N.T." refers to Notes of Testimony of the proceedings held before the School Reform Commission Chairman.

4. In 2009, the District received a letter signed by three members of City Year Greater Philadelphia regarding inappropriate statements made by Appellant in his classroom. N.T. 119.

5. Thereafter, an investigation commenced regarding the above-referenced statements made by Appellant. After an investigatory conference on June 1, 2009, the Principal at Mastbaum Area Vocational-Technical School prepared an unsatisfactory incident report and recommended that Appellant's employment be terminated. N.T. 120.

6. In August 2009, the District's Administration recommended that Appellant's employment be terminated. *Id.*

7. Appellant requested a hearing before the District's School Reform Commission ("SRC") and on April 16, 2010 a hearing was held before the SRC. *Id.*

8. Effective December 15, 2010, the SRC terminated Appellant's employment.

9. Appellant challenged his termination by pursuing litigation against the District before the Secretary and Commonwealth Court. On appeal, Commonwealth Court concluded that the Appellant's termination was a nullity. The Court reinstated Appellant with backpay. *Opinion* at 27, 30.

10. On November 9, 2016, and several times thereafter, the District offered to reinstate Appellant to his teaching position with the District. *See* Exhibits A, B, C, D and F to Appellant's *Application for Relief* filed with the Secretary on or about December 10, 2016.

11. Appellant has elected not to returned to his teaching position with the District. *Id.*

12. The record contains no credible evidence to support a conclusion that Appellant made any effort to find employment similar to his employment with the District at any relevant time until he obtained employment with the Delaware County Intermediate Unit ("DCIU") in 2014. Exs. EJ-11, 17-19, 22-25.

13. Appellant would have earned $83,381 in 2014 and $83,381 in 2015, if his District employment was never terminated, and he continued working for the District during those years. *Id.*

14. Appellant's actual earnings were $80,700 in 2014 and $81,759 in 2015. *Id.*

PROCEDURAL BACKGROUND

In February 2011, Appellant initiated litigation before the Secretary by appealing his termination from employment with the District. In an adjudication dated September 13, 2011, then-Secretary Ronald J. Tomalis reversed the decision of the SRC and ordered Appellant reinstated to his position with the District. ("Secretary's Order"). On September 28, 2011, the District filed with the Secretary a petition for reconsideration regarding the Secretary's order. Certified Record ("CR") at 15. On October 27, 2011, the Secretary granted the District's petition for reconsideration and issued a briefing schedule for the parties. CR at 14.

In October 2011, the District filed a petition for review in Commonwealth Court appealing the Secretary's order. The District also filed an application with the Court seeking to have its appeal stayed pending the Secretary's decision regarding the issues raised in the District's petition for reconsideration. The Court issued an opinion and order on December 6, 2011 remanding the matter to the Secretary with directions to consider the District's petition for reconsideration.

In December 2011, the Secretary agreed to consider the District's petition for reconsideration. CR 12. The Secretary ordered Appellant to file a brief by January 13, 2012,

setting forth his position on the substantive issues raised in the petition for reconsideration. *Id.* Appellant filed his brief on January 11, 2012. CR 11. The District filed a reply brief on January 27, 2012. CR at 10.

On November 5, 2013, then-Acting Secretary of Education Carolyn C. Dumaresq issued an adjudication directing that, due to procedural errors, Appellant shall be reimbursed any lost compensation due to his termination during the period from August 10, 2009 to December 15, 2010. CR at 7. However, the Acting Secretary decided that because the SRC formally resolved in favor of termination on December 15, 2010, after Appellant had a hearing, his termination as of December 15, 2010 was sustained. *Id.*

The parties appealed the Acting Secretary's adjudication to Commonwealth Court. On appeal, Commonwealth Court *inter alia* reversed the Secretary's adjudication, and in its Opinion dated June 2, 2016, directed the Secretary "to reinstate Appellant and to calculate the compensation which he is due taking into consideration Appellant's obligations to mitigate his damages." *Opinion* at 27-30.

On August 25, 2016, Secretary of Education Pedro A. Rivera ordered the District to reinstate Appellant and initiated proceedings to determine the amount of damages to which he is entitled. In December 2016, the parties requested hearings on this issue of damages. Those hearings commenced on January 24, 2017 and continued over the course of several days throughout 2017. The District and Appellant filed post-hearing briefs on March 27, 2018, and January 31, 2018, respectively. Appellant filed a reply brief on April 6, 2018.

DISCUSSION

In his appeal, Appellant requests an award for all "lost compensation" from August 14, 2009 through September 1, 2017. He calculated the amount he is owed at $394,426.51. Appellant

Brief at 2. In my view, the amount Appellant requests is significantly higher than the award to which he is entitled. The requested amount ignores the Appellant's duty to mitigate damages. It is not supported by the facts or the law.

"Where a teacher is wrongfully discharged, he is to be compensated for loss of salary during such period, but there is no requirement that the school district pay the compensation provided in the contract regardless of set-off or the amount of damages the employe[e] has suffered." *Coble v. Sch. Dist. of Metal Twp.*, 116 A.2d 113, 115 (Pa. Super. 1955). "[I]n an action for breach of contract by one employed as a teacher, the measure of damages is the wages which were to be paid, less any sum actually earned, or which might have been earned, by the [teacher] by the exercise of reasonable diligence in seeking other similar employment." *Id.* at 116. In the present matter, Appellant is entitled to an award for lost compensation which is significantly less than what he would have received pursuant to the applicable District contract because he did not properly mitigate damages for most of the relevant timeframe as explained below.

Based upon the evidence of record the following columns correctly reflect (1) the wages which were to be paid if Appellant remained employed by the District and (2) his actual earnings:

Year	**Wages which were to be paid**	**Actual earnings**
2009	$78,595	$57,788
2010	$79,110	$41,242
2011	$80,953	$52,728
2012	$83,381	$51,168
2013	$83,381	$46,403
2014	$83,381	$80,700
2015	$83,381	$81,759
2016	$83,381	$85,640[3]

[3] In 2017, Delaware County Intermediate Unit (DCIU) paid $68,991 to Jones under a negotiated settlement. Ex. EJ-46; Tr. 185, 187-188. Because that amount was attributable to the 2016-2017 school year, the District split that amount in half to determine the amount attributable to 2016. One-half of $68,991 is $37,846. That amount was added to the amount reflected on Appellant's W-2 from DCIU for 2016 ($47,794) to arrive at the grand total listed above for 2016 actual earnings ($37,846 + $47,794 =$85,640). I affirm the District's correct calculations.

See Exs. EJ-11, 16-19, 22-25.

Appellant disputes the above-listed amounts in wages which were to be paid if he remained in the District's employ and was never terminated. These amounts listed above are the master's degree pay levels. Appellant argues that he would have been compensated at the level of those who possessed a doctorate degree. Appellant claims that he would have been paid on the "doctorate" scale during the 2010-2011 and 2011-2012 school years. I disagree. Appellant did not have a doctorate degree at any relevant time. In my view, the above-listed amounts correctly reflect a salary at the level of the only graduate degree Appellant did hold from 2009 through 2016 (*i.e.*, master's degree +30, Step 11). Appellant's proper pay grade is correctly listed above.

Even if Appellant's testimony regarding his graduate degrees is assumed to be true, he did not obtain a doctorate degree until 2017. He testified that he received a doctorate degree from Gwynedd Mercy University in May 2017.[4] Tr. 135-36. There is no evidence in the record to support a conclusion that Appellant was entitled to payment on the District's "doctorate" scale prior to 2017. In my opinion, 2017 is outside the proper timeframe for the calculation of damages in this matter. To the contrary, Appellant contends that he is entitled to a damage award for lost compensation through 2017 and invites me to conclude that the District never validly reinstated him. Appellant Brief at 2. Appellant argues that the District's offer to return him to work was invalid because it was not made at a public meeting. Appellant Brief at 4-5. Again, I disagree.

Appellant's arguments have no merit. Unquestionably, the District has offered Appellant reinstatement, and Appellant has refused it. Therefore, the correct timeframe for the calculation of damages ends on November 9, 2016—the day on which the District first offered Appellant reinstatement. The District has offered to return Appellant to his position several times. Appellant

[4]Appellant's Gwynedd Mercy transcript entered into evidence in this matter does not indicate that he was even awarded a doctorate degree. Ex. EJ-63.

has chosen not to return to work. *See* Exhibit A, B, C, D and F to Appellant's *Application for Relief* filed with the Secretary on or about December 10, 2016. I cannot reward Appellant for refusing to accept reinstatement. Accordingly, I find that the relevant timeframe for the calculation of damages must end on November 9, 2016, when the District first offered Appellant his job back. His wages must be calculated at the master's degree pay level commensurate with the only graduate degree he held during the relevant timeframe (2009-2016).

Appellant also claims that he is entitled to additional pay as a senior career teacher. Appellant Brief at 5. I find no support in the record for this claim. The evidence does not support a conclusion that Appellant would ever have held senior career teacher status with the District. The prerequisites for senior career teacher status are as follows: "Possession of a Vocational II certificate issued by PDE; and ten (10) years of satisfactory teaching in the [District]; and forty-five (45) approved college credits." Ex. EJ-16. It is undisputed that the 2009 issuance of an unsatisfactory incident report regarding Appellant would have prevented him from being considered as having satisfied the requirement of ten years of satisfactory teaching. Tr. 375-78. It is further undisputed that Appellant did not obtain his 45th credit until after the Fall Semester of 2014. Tr. 392-93. Even if he did, there is no evidence to support a conclusion that he would have been able to obtain 45 credits by that time if he was working full-time for the District. It is undisputed that, after termination Appellant had a reduced work load at his non-District jobs. Accordingly, I find that Appellant would not have been paid as a senior career teacher or at the "doctorate" pay level at any relevant time.

I. Appellant's failure to exercise reasonable due diligence in seeking alternative employment that was available to him.

To prove that the plaintiff failed to properly mitigate damages, the employer has the burden of proving that substantially comparable work was available and that the plaintiff failed to exercise

reasonable due diligence in seeking alternative employment. *Circle Bolt & Nut Co. v. Pa. Human Relations Comm'n*, 954 A.2d 1265 (Pa. Cmwlth. 2008). Based upon the evidence of record, the District has proven that Appellant failed to properly mitigate his damages from his last day of work with the District in 2009 until 2014 when he began employment with the Delaware County Intermediate Unit ("DCIU").

The District established Appellant's failure to exercise reasonable due diligence to obtain a teaching position in a school where he had similar responsibilities, compensation, and opportunities for promotion. The record is devoid of credible or persuasive evidence to support a conclusion that Appellant made much effort at all to obtain similar employment from the last day he worked for the District in 2009 until he began his job with DCIU in 2014. He testified that he made one submission to PA REAP[5] on June 6, 2010. He provided testimony, which in my opinion was not credible, that his job search during this timeframe consisted of "pounding on doors," asking colleagues if they knew of teaching openings and contacting a small number of employers. Appellant had a difficult time even remembering the names of the alleged employers at the hearing. Tr. at 163, 234, 272. Appellant testified as follows:

Q. What efforts did you make to obtain new employ [after your termination]?
A. I was making efforts, but on the same token I thought I'd be back at the School District.
Q. Well, what I want to know is, what did you do, if anything, to obtain new employ – specifically?
A. I asked around and saw what was available.
Q. You asked around, meaning you spoke with – was it a friend?

[5] PA REAP is an online recruitment service for school districts and job seekers. *See* http://www.pareap.net/. Appellant made his one submission to PA REAP on June 6, 2010, approximately one year after his last working day for the District. Tr. 140-41. The submission was not an application *per* se but merely an indication of availability for employment. Jones testified: "As soon as I go on [PA REAP] all the districts can see me. If they want me they can call me." Tr. 354-55. Appellant's submission to PA REAP does not, in my opinion, constitute reasonable due diligence.

A. Colleagues, colleagues, -- because this whole thing occurred as a shock on August 31. And there aren't a lot of jobs at the beginning of the school year because they're mostly filled.
Q. Did you send out any resumes?
A. I believe so, but I can't swear to it. I mean, there were resumes sent out, but I can't swear exactly when they were sent out.
Q. You don't have any copies of any resumes?
A. No, no.
Q. Did you make any written applications?
A. I can't answer that question. In my mind – I think there were so many things going on, to swear to it I can't say, yes, at that point, but there were written applications within period of fall 2009.
Q. Do you remember how many?
A. No.
Q. Do you have any copies of them?
A. No.
Q. How many interviews did you go on?
A. Oh, I can't say. I was on quite a few, but I – I would say ten maybe.
Q. Ten. With whom did you interview?
A. [He had an initial interview with North Penn School District"]
Q. Can you give me a list of schools that you remember speaking with?
A. . . . I can't swear to it, but I think at one time I did talk to the people at Hope Charter which I later worked at.

Tr. 351-352.

Appellant further testified specifically regarding why he did not make more of an effort to obtain employment when he obtained employment at Hope Charter School in 2011. Appellant testified: "I was fine at Hope. There was no need." Tr. 362. Appellant' testimony further established that, when he worked for MAST Charter School in the 2010-2011 school year, he similarly did not look for other employment. Tr. 359. The same held true when he worked for Upper Darby School District. He testified: "I wouldn't say I was making efforts [to obtain other employment] but my

supervisor . . . asked me to come to DCIU . . . I guess you could say I stumbled on [the DCIU position].” Tr. 362.

The law is clear that “the duty to mitigate damages 'is not onerous and does not require success.' All that is required to mitigate damages is to make 'an honest, good-faith effort’.” *Merrell v. Chartiers Valley School District,* 51 A.3d 286 (Pa. Cmwlth. 2012) *quoting Circle Bolt & Nut Co. v. Pa. Human Relations Comm'n,* 954 A.2d 1265 (Pa. Cmwlth. 2008) (internal citations omitted).

The District has shown that Appellant has not put forth the requisite effort to demonstrate proper mitigation of damages. Appellant’s testimony supports a conclusion that he was not diligently searching for employment at any relevant time and documentary evidence produced by Appellant in response to the District’s request for information was insufficient to demonstrate otherwise. Appellant produced no job applications or other written requests for employment to school districts. Appellant produced no cover letters, no resumes, no job advertisements he responded to, no records of interviews, nor even a list of schools where applied for a job. It was not onerous for the District to ask Appellant to produce such documentation if it existed. In response to the District’s requests for information to substantiate a job search, Appellant produced practically nothing.

In contrast, the evidence provided by the District establishes that similar employment opportunities were available to Appellant at all relevant times. Terry Leslie, a nationally certified vocational expert, provided expert testimony and a report in this matter. The report, data, and testimony provided by Leslie supports the conclusion that (1) Appellant did not exercise reasonable due diligence in obtaining available employment prior to the time he was employed at

DCIU, and (2) Appellant could have reasonably expected to earn more money than he actually earned if he pursued similar employment with reasonable diligence. Ex. SDP-4.

Leslie obtained the data for the period January 1, 2009 through May 22, 2017 from a database known as "CEB Talent Neuron." (CEB) Ex. SDP-4; Tr. 290-91. CEB has a database of over one billion advertisements from 25,000 sources since 2005. *Id.* CEB is the industry's most comprehensive source of global talent demand and supply data, predictive analytics and insights into real-time job market, location, and competitive intelligence data to assist employers in making talent planning and recruiting decisions. *Id.* CEB's database is used by, among other entities, government agencies and medical companies, and it is used in assessing leading economic indicators. *Id.* The job advertisements Leslie obtained included numerous positions located within the Philadelphia area. *Id.*

Leslie reviewed data from several school districts in the Philadelphia area regarding the math and special education teacher positions filled since Appellant's termination. Ex. SDP-4. His report, includes the positions filled in the following school districts: Abington School District, Lower Merion School District, Marple Newtown School District, Spring-Ford School District, Upper Darby School District, Upper Moreland School District, Wallingford-Swarthmore School District, and William Penn School District. Leslie found that since Appellant' termination this group of school districts filled hundreds of indicated positions. The report indicates that those positions were just a sampling of the data submitted by 56 school districts and charter schools throughout the area. *Id.*

Leslie explained the compensation Appellant could have earned following his termination from the District if he exercised reasonable due diligence. He consulted the data published by the United States Department of Labor, Bureau of Labor Statistics, and the Pennsylvania Department

of Labor & Industry, Occupational Employment and Wage Rates for the years 2009 through 2016. He compiled in his report the wages for the occupations Appellant was qualified to hold. Ex. SDP-4, p. 6. After compiling and analyzing the relevant data, Leslie concluded that the data showed that: "Appellant had teaching positions available to him [from 2009 to 2016], and those teaching positions were substantially equivalent to the teaching position he had while working for the District, because the teaching positions were specifically designated for persons with the certifications that Appellant held." *Id.* at 7. Leslie's report also called attention to the fact that Appellant worked for multiple employers by his own choice after his termination. He noted that Appellant's decision to move from employer to employer after the District terminated him caused him to receive lower wages than he would otherwise have received had he not elected to switch jobs so frequently. Leslie explained that Appellant "became a transient employee with many educational institutions through his own choice and if he would have maintained employment, he could have had earnings greater than what he has experienced." *Id.* I find Leslie's report and testimony to be credible. The evidence provided by Leslie when considered in conjunction with (1) Appellant's testimony which establishes very little effort on his part to find similar work and (2) the lack of documentary evidence in the record to demonstrate otherwise, leads me to conclude that Appellant failed to properly mitigate damages until he began employment with DCIU in 2014. It was not until Appellant became employed by DCIU that he had obtained a job with similar pay, benefits and possibilities of promotion as he had in the District. [6]

[6] Appellant's requests for reimbursement for transcript costs and expungement of his disciplinary record with the District are outside the scope of this matter. Those issues are therefore not addressed herein because they are not before the Secretary for review.

II. Calculation of Damages

Given the above analysis, Appellant is entitled to $4,303 as a total gross amount due to him for lost compensation in this matter to be calculated as follows: For 2014, Appellant is owed $2,681, the difference between what he would have earned in 2014 ($83,381) and his actual earnings that year ($80,700). For 2012, Appellant is owed $1,622, the difference between what he would have earned in 2012 ($83,381) and his actual earnings that year ($81,759). Appellant is not entitled to an award for any other timeframe because he did not properly mitigate damages during any other relevant period. Appellant is entitled to this award regardless of whether he returns to work with the District.

Accordingly, the following order is hereby entered:

IN THE OFFICE OF THE SECRETARY OF EDUCATION
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ELLIS JONES, Appellant	:	
	:	TTA No. 01-11
v.	:	(Remanded)
THE SCHOOL DISTRICT OF PHILADELPHIA, Appellee	:	

ORDER

Ellis Jones shall be entitled to **$4,303** as a total gross amount for lost compensation during 2014 and 2015. Mr. Jones also shall be entitled to payment for any leave that he would have earned during those two years if he remained employed with the School District of Philadelphia. The District shall have the right to make deductions for applicable retirement contributions and other payroll deductions in accordance with legal and/or contractual requirements.

Pedro A. Rivera
Secretary of Education

Date Mailed: May 1, 2018