IN THE COURT OF APPEALS OF TENNESSEE

FILED

October 31, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

LEONARD L. ROWE,	)	C/A NO. 03A01-9506-CH-00179
	)	HAMILTON COUNTY CHANCERY COURT
Plaintiff-Appellant,	)	
	)	
v.	)	HONORABLE R. VANN OWENS,
	)	CHANCELLOR
BOARD OF EDUCATION of the CITY OF CHATTANOOGA; and DR. HARRY REYNOLDS, SUPERINTENDENT OF SCHOOLS of the CITY OF CHATTANOOGA, TENNESSEE	)	AFFIRMED IN PART
	)	VACATED IN PART
Defendants-Appellees.	)	REMANDED

RICHARD T. KLINGLER of KENNEDY, FULTON, KOONTZ & FARINASH, Chattanooga, for Appellant.

KENNETH O. FRITZ and MICHAEL A. McMAHAN, Chattanooga, for Appellees.

O P I N I O N

Susano, J.

In this 42 U.S.C. § 1983 action, Leonard Rowe (Rowe) sued the Board of Education of the City of Chattanooga (Board) and Dr. Harry Reynolds (Reynolds), Superintendent of Chattanooga schools, alleging that the defendants' refusal to consider him for a teaching position in the Chattanooga school system violated his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Rowe sought a declaratory judgment that the Board's Policy No. 4117.5 (policy), which purported to prohibit the rehiring of any employee who had ever been discharged "for cause, inefficiency, or immorality" was unconstitutional as infringing upon his "property" and "liberty" rights to pursue his chosen occupation without arbitrary governmental interference. In his amended complaint, Rowe alleged that but for the policy, he would have been hired by the Board, and sought back pay from the time the Board adopted the policy.

After a bench trial at which both sides presented evidence, the Chancellor invalidated the policy, stating that "[t]he irrebuttable presumption it appears to make--the Court is of the opinion that such is in violation of the law." The Chancellor stated of the policy,

> The Court is of the opinion that if it were a conclusive determination that no one could be considered for rehire that had ever been discharged,. . .such would be in violation of the Constitution.

However, the Chancellor denied Rowe relief other than invalidating the challenged policy,[1] holding that Rowe had failed to prove that he would have been hired in the absence of the policy, and consequently that the defendants did not violate Rowe's constitutional rights. Rowe appeals, raising the following issues for review:

> 1. Whether the Chancellor erred by improperly placing the burden of proof upon the plaintiff to show that he would have been hired but for the existence of the constitutionally infirm policy.
>
> 2. Whether the evidence preponderates against the Chancellor's finding that Rowe would not have been hired in the absence of the policy.
>
> 3. Whether the Chancellor should have awarded Rowe damages and attorney's fees.

I

Rowe is a certified and licensed schoolteacher. In addition, he has two master's degrees and is certified as an educational specialist, which qualifies him for administrative positions such as superintendent. He began teaching in the Chattanooga school system in 1967, and was denied tenure at the end of the 1968-69 school year. After brief service in the military, Rowe returned to teaching in Chattanooga, and received

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[1] The Chancellor also taxed the costs against the defendants.

tenure in 1972 or 1973. He taught in the school system without incident until 1980.

On December 12, 1980, Rowe was notified of his proposed dismissal "for cause, including insubordination, and inefficiency," apparently based primarily on Rowe's conduct during and after a disagreement with the principal regarding Rowe's teacher evaluation. The charges against Rowe included walking out of two conferences called by the principal, refusing to enter into discussions with the principal, and stating that the principal had lied about earlier events. After a hearing before the Board, Rowe was dismissed.

Beginning in 1986 or 1987, Rowe again sought a teaching job in the Chattanooga school system. He was employed as a substitute teacher during the 1987-88 school year, and substitute taught for roughly half of the school days that year. By all indications, he performed satisfactorily, and there were no negative occurrences reported regarding his employment. In fact, Rowe received favorable recommendations[2] for full-time employment from the principals of two schools at which he taught.

Sometime in 1988, after the 1987-88 school year, it came to the attention of Reynolds that Rowe had previously been fired by the Board, and that his name was on the list of eligible

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[2]Under the category "cooperation," Rowe received a rating of "good" on one recommendation, and "outstanding" on the other.

substitute teachers. Both Reynolds and Dr. Clifford Hendrix, acting superintendent during that school year, testified that they were not previously aware that Rowe had been placed on the substitute teacher list. Reynolds further testified that although the Board approved the list with Rowe's name on it, the Board was not in the habit of going over the names one by one, and that he suspected no one on the Board was specifically aware that it was giving Rowe a stamp of approval to substitute teach. Upon Reynolds' discovery that Rowe had been fired for cause some eight years earlier, he directed that Rowe's name be removed from the list.

During this time, and thereafter, Rowe continued his efforts to find permanent employment in the Chattanooga school system. He scanned the employment openings, sent letters and resumes applying for both administrative and teaching positions, and made several attempts to open lines of communication with the superintendent's office. He received no response to any of his inquiries. Rowe testified, "I was totally locked out, just ignored. . .In fact, I was treated like a nonperson."

In 1990, Rowe, who is African-American, filed a complaint with the City of Chattanooga Human Rights and Human Relations Commission, protesting his treatment and alleging that the Board discriminated against him in hiring white applicants for two vacant principal positions. The Commission reviewed Rowe's case and made the following findings:

> Mr. Rowe was unable to show that race or age was the basis for the Chattanooga Public Schools [sic] decision regarding the principal positions.
>
> The Chattanooga Public Schools need to ensure that timely notice is given to all applicants regarding the status of their application.
>
> The Chattanooga Public Schools need to establish uniform and consistent policies which address previously dismissed teachers' and substitute teachers' ability to obtain employment within the Chattanooga Public Schools.

On April 8, 1991, the Board adopted policy 4117.5, the policy attacked by Rowe in this case. It provides as follows:

> Any employee of the Board of Education terminated for cause, inefficiency, or immorality shall not be eligible for reemployment, whether at the same or different level. Neither shall such individuals be eligible for employment on a contract basis, including serving as substitute teacher.

Rowe has not been considered for any position with the Chattanooga school system since the Board adopted the policy.

II

In order for Rowe to prevail on his § 1983 claim, he must demonstrate that the defendants, under color of state law, deprived him "of . . . rights, privileges, or immunities secured by the Constitution. . ."[3] Rowe asserted that the defendants improperly refused to consider him for employment because of the policy. As stated earlier, the Chancellor ruled the policy invalid as creating an irrebuttable presumption[4] which, "if taken at face value, or its language on its face, [is] somewhat arbitrary and capricious." The defendants have not challenged this ruling on appeal.

The defendants argue that they have not violated Rowe's constitutional rights by failing to consider him for employment. Thus, we must initially determine whether they are correct in this assertion, or put another way, whether Rowe has presented a constitutionally cognizable claim.

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[3]42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[4]Irrebuttable presumptions of fact that are not universally true are generally disfavored in the law. *See, e.g.*, ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (Irrebuttable presumption that all unwed fathers are unfit parents unconstitutional); ***Vlandis v. Kline***, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) (Irrebuttable presumption of students' nonresidency, precluding in-state tuition eligibility, unconstitutional); ***Cleveland Bd. of Ed. v. LaFleur,*** 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) (Irrebuttable presumption that all schoolteachers incompetent to teach during last five months of pregnancy unconstitutional).

The essence of Rowe's complaint is that the defendants violated his "property" and "liberty" interests, embodied in the Due Process clause of the Fourteenth Amendment,[5] to pursue his chosen occupation and profession without arbitrary governmental interference.

Rowe does not have a protected "property" interest in being employed by the Board, as the United States Supreme Court's teaching in ***Board of Regents of State Colleges v. Roth***, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), makes clear:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Rowe cannot make any legitimate claim of entitlement to an employment position with the Chattanooga school system; consequently, we hold he does not have a property interest protected by the Fourteenth Amendment.

Rowe also claims a violation of a due process "liberty" interest--the right to pursue his occupation and profession

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[5]The Fourteenth Amendment reads in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

without arbitrary state interference. As early as 1915, the Supreme Court recognized that this right merits constitutional protection:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915). The Court has further expounded on the "liberty" right protected by the Fourteenth Amendment:

> "While this court has not attempted to define with exactness the liberty. . .guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual. . .to engage in any of the common occupations of life. . ." [cite] In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2706-07 (1972), quoting ***Meyer v. Nebraska,*** 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). Thus, Rowe does have a protected liberty interest in pursuing his chosen occupation; however, the question remains whether the defendants' actions violated this right.

III

The Chancellor held that although the policy was invalid, the evidence did not show that the Board would have hired Rowe in the absence of the policy, or, in other words, the existence of the policy was not a major or determinative factor in the decision not to rehire Rowe. The Chancellor expressed the following:

> Here in this case, however, the Court has a difficult time in placing this policy as having much cause or relationship to Mr. Rowe's difficulties. The Court has seen nothing in the proof today to indicate that Mr. Rowe would have been rehired but for this policy statement.

The Chancellor specifically placed the burden upon Rowe to show he would otherwise have been hired, holding, "the Court finds that the plaintiff has not established that he would have been rehired but for the policy that is the subject of this case. . ." Rowe challenges both the finding that the policy was not a determinative factor in the decision, and the Chancellor's placement of the burden upon him to prove otherwise. We agree with Rowe on both points.

We review the Chancellor's findings of fact *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. T.R.A.P. 13(d). No such presumption of correctness attaches to the Chancellor's conclusions of law.

Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993).

At trial, Rowe called Stuart Silverman, associate superintendent for resource management for the Chattanooga school system. His testimony was as follows:

> Q: Has [sic] Mr. Rowe's inquiries, applications regarding employment been. . .fed into the screening process since the adoption of this policy, 4117.5 in April of 1991?
>
> A: . . .To my knowledge, at least for the two years that I was in personnel directly, no, and to this point, no.
>
> Q: Okay. Is the reason for that--the existence of that policy--that precludes him from being eligible for a position?
>
> A: Yes.
>
> * * *
>
> Q: Is the reason that his applications and inquiries regarding employment are not fed into the screening process the existence of that policy that makes him ineligible for employment? I believe that was the question I asked.
>
> A: My interpretation of the policy is once a person has been terminated that that they are not eligible for employment after that.

Defendant Reynolds' testimony on this point was as follows:

> Q: You say the first knowledge about Leonard Rowe you received came from Board Members?
>
> A: The first recollection I have of this particular instance, I believe came from the question from the Board members about why we were

hiring somebody back that the Board had fired, specifically taken action, and it's already been testified that the Board had the action to hire and fire at that time.

Q: That's correct. Did you then do some further investigation into Mr. Rowe's circumstances after that first contact?

A: I simply inquired as to whether or not that was the case, and I found out that it was the case.

* * *

Q: Okay. Did you then make further inquiry into his past employment with the Chattanooga City Schools?

A: Just to determine whether or not he had been fired by the Board. And I determined that by looking at his records.

* * *

Q: Did you investigate further into the circumstances of the original termination beyond just determining from the record that he had been terminated by the Board?

A: No.

* * *

Q: Okay. So the determining factor, as far as you were concerned, was the mere fact that he had been terminated?

A: That's right. And I did not have the authority to rehire him without having--without the Board's expressed approval, just as they expressly fired him.

* * *

Q: When you were considering this policy, isn't it true that pretty much all you considered was your sort of conclusion or opinion that someone should not be rehired who was terminated?

A: That's my administrative prerogative.

* * *

> Q: You have never sat down in a room with Leonard Rowe and discussed his qualifications, outlook, view of teaching, view of the role of the teacher administrator in a school system?
>
> A: It wasn't necessary. Mr. Rowe was already a terminated employee when I came on board.
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> * * *
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> Q: [After pointing out that Reynolds had never seen Rowe teach or discussed school matters with him, and that Rowe had received several recent favorable recommendations] Yet you still wouldn't. . .even consider him, without discussing his circumstances any further, for employment by the board?
>
> A: That's correct. That's what I have testified.

On cross-examination, Reynolds stated the following:

> Q: Now, since the VEP went into effect, you have had additional rights as superintendent with regard to hiring and firing; is that correct?
>
> A: That's correct.
>
> Q: And now that you have that authority, as you say, would you exercise your prerogative to hire Leonard Rowe?
>
> A: No.
>
> Q: One other minor question. Obviously there is--the superintendent and the Board have to work together in sort of a cooperative relationship.
>
> A: That's correct.
>
> Q: And is it for that reason that you would not want to hire somebody such as Mr. Rowe without Board approval?
>
> A: That's correct.

The above testimony largely speaks for itself; we find that it establishes by a preponderance of the evidence that the

defendants, in deciding not to consider Rowe's applications and inquiries, did consider and rely upon the unconstitutional policy, and therefore it was a major factor in the decision. The testimony clearly demonstrates that little, if anything, was considered beyond the fact that Rowe had, some eight years earlier, been terminated by the Board.

IV

We thus arrive at the question of whether the defendants' actions in refusing to consider Rowe for employment, and relying substantially on the invalidated policy, rise to the level that Rowe's constitutionally protected liberty interest in pursuing his chosen profession is infringed, therefore entitling him to procedural due process. We hold that on the facts of this case, Rowe was entitled to due process.

Roth, *supra,* is the seminal case in this area of constitutional law. In ***Roth,*** the Court held that a state university's decision not to rehire a nontenured teacher for a specific position did not violate his constitutional rights. However, the Court elaborated on situations where such a decision might infringe upon a liberty right:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the

> nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality.
>
> *   *   *
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . ."

Roth, 408 U.S. at 573-4, 92 S.Ct. at 2707. The federal Sixth Circuit Court of Appeals, extrapolating upon the ***Roth*** court's statements, has stated,

> [t]he concept of "liberty" recognizes two particular interests of a public employee: 1) the protection of his or her good name, reputation, honor and integrity; and, 2) his or her freedom to take advantage of other employment opportunities.

Sullivan v. Brown, 544 F.2d 279, 283 (6th Cir. 1976). This is substantially the same general rule applied by the other federal circuit courts. *See, e.g.,* ***Wells v. Hico Indep. Sch. Dist.,*** 736 F.2d 243, 256 (5th Cir. 1984); ***Larry v. Lawler,*** 605 F.2d 954, 957 (7th Cir. 1978); ***Buhr v. Buffalo Public Sch. Dist. No. 38,*** 509 F.2d 1196, 1199 (8th Cir. 1974).

In the instant case, Rowe has not alleged that the state has impermissibly impugned his reputation or integrity by refusing to consider hiring him; he instead relies on the second prong of the analysis, contending that the policy placed upon him such a "stigma or other disability" that entirely foreclosed his freedom to take advantage of the majority of teaching opportunities in his home community of Chattanooga. Regarding this contention, the applicable caselaw reveals two clear propositions: (1) a public employer's refusal to consider rehiring a prospective employee for a single position does not rise to the level of a constitutional violation;[6] and (2) a state cannot constitutionally impose arbitrary restrictions or classifications on a prospective employee which foreclose his or her pursuit of an entire chosen occupation.[7] The facts of this case fall squarely in the middle of these two propositions.

It requires little analysis to demonstrate that the defendants, by virtue of the policy, imposed upon Rowe a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." The policy operated to entirely bar Rowe from any and all employment within the school system, without regard to how long ago he was dismissed or the

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[6]***Roth,*** 408 U.S. at 575, 92 S.Ct. at 2708 ("It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.")

[7]***Schware v. Board of Law Examiners***, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) ("A State cannot exclude a person from the practice of law or any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); ***Roth,*** 408 U.S. at 574-75, 92 S.Ct. at 2707.

underlying basis of his "for cause" dismissal. Further, the policy makes no provision for an individualized determination that a prospective employee has been rehabilitated or become more mature over time; it creates a conclusive presumption which stands without exception.

We think that where a public employer acts to entirely bar, forever, without further consideration, an otherwise qualified applicant from all employment in a community-wide school system, the applicant is entitled to the protection of procedural due process. The defendants make much of the fact that Rowe was free to move somewhere else in the state to apply for a teaching job, or that he could seek a county position. However, the defendants have admitted that the Chattanooga school system comprises the majority of employment opportunities for a teacher living in Chattanooga. We do not think it a sufficient answer for a public entity to say that the prospective employee's due process rights are not implicated because he is free to pack his bags and leave his home community in search of a job in his chosen profession. In response to an inquiry as to why he would return to a system which previously had terminated his employment, Rowe testified,

> Well, this has been my life-long dream. I felt that as an American citizen I'm entitled to go after my dream and hopefully become--and continue to become a productive citizen giving a contribution back to the community that I was a product of.

The defendants assert that the general notion that there is no right to a governmental benefit such as public employment should control this case, citing, *inter alia*, ***Elrod v. Burns***, 427 U.S. 347, 360-61, 96 S.Ct. 2673, 2683, 49 L.Ed.2d 547 (1976). However, the ***Elrod*** case refutes that principle: "'The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Id.,* quoting ***Keyishian v. Board of Regents***, 385 U.S. 589, 605-606, 87 S.Ct. 675, 685, 17 L.Ed.2d 570 (1967). Further, the Supreme Court, in the companion case to ***Roth***, stated,

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 548 (1972). Thus, the general principle that there is no right to government employment is of little aid to our due process analysis. "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authorities." ***Slochower v. Board***

of Higher Ed. of City of N.Y., 350 U.S. 551, 555, 76 S.Ct. 637, 639-40, 100 L.Ed. 692 (1956).

Roth, again, speaks to this issue:

> The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose *a range of opportunities* "in a manner. . .that contravene[s]. . .Due Process," [cite], and, specifically, in a manner that denies the right to a full prior hearing.

Roth, 408 U.S. at 574, 92 S.Ct. at 2707 (emphasis added). We think the "range of opportunities" foreclosed in this case was sufficiently large to implicate Rowe's liberty interest, requiring that due process be met.

V

Finally, we address the question of what process was due Rowe. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Id.*, 408 U.S. at 569-70, 92 S.Ct. at 2705. The Supreme Court has further noted,

> "[M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed. 725 (1975), quoting ***Mullane v. Central Hanover Trust Co.***, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

In the present case, Rowe was afforded absolutely no process before his applications and inquiries were given no consideration. The defendants gave him no reasons for refusing to consider his applications; indeed, he was given no response at all. Rowe testified,

> I was totally locked out, just ignored. There were no rights that I had that they respected, none whatsoever. In fact, I was treated like a nonperson.

He further stated that when he contacted Stu Silverman, Silverman told him "that he had received specific instructions from the City attorney's office not to have dealings with me." In this situation, we believe it is clear that the defendants' actions did not comport with due process.

We also agree with Rowe's assertion that once a plaintiff has shown that his or her constitutional rights have been violated by a decision not to consider him or her for employment, the burden then properly shifts to the defendant to show that the plaintiff would not have been hired in the absence of the constitutional violation. *See* ***Mt. Healthy City Sch. Dist.***

v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); ***Kendall v. Board of Ed. of Memphis City,*** 627 F.2d 1, 6 (6th Cir. 1980) ("Once the plaintiff has established a deprivation of constitutional rights, the burden of proof shifts to the defendant to demonstrate that the deprivation of constitutional rights did not cause the plaintiff's injury." [f. 6]). We note that placing the burden on the plaintiff to prove that the defendants would otherwise have hired him saddles him with a nearly impossible task; absent the unusual case where the defendant makes some kind of admission, about the best a plaintiff could do is make a conclusory assertion that "they would have hired me." As the discussion in section III above demonstrates, the defendants in this case did not carry their burden. Both Silverman and Reynolds frankly admitted that the reason they would not even consider Rowe was that he had been previously fired by the Board.

Of course, we do not hold that Rowe is entitled to a teaching position within the school system, and our holding is not to be construed as providing all job applicants who are not considered for a position a "right" to a hearing. We merely hold that under the facts of this case, Rowe's liberty interest was infringed by the application of an unconstitutional policy which swept too broadly and indiscriminately, and that he was consequently denied due process.

So much of the judgment of the trial court as finds that the Board's Policy No. 4117.5 is unconstitutional and taxes the costs below to the defendants is affirmed. The remainder of the judgment below is vacated and this case is remanded for a hearing to determine the damages, if any, to which the plaintiff is entitled. Costs on appeal are taxed against the appellee.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.