

STATE BOARD OF EDUCATION

STATE OF GEORGIA

G. ANTHONY WHISENANT,	:	
	:	
Appellant,	:	
vs.	:	CASE NO. 1997-52
	:	
DOUGLAS COUNTY	:	
BOARD OF EDUCATION,	:	
	:	DECISION
	:	
Appellee.	:	

This is an appeal by G. Anthony Whisenant (Appellant) from a decision by the Douglas County Board of Education (Local Board) to terminate his teaching contract based upon the findings of a tribunal that he engaged in immoral activity and other good and sufficient cause under the provisions of O.C.G.A. § 20-2-940. Appellant claims that the Local Board denied him procedural due process, that the Local Board did not carry the burden of proof, and committed other procedural errors. The Local Board's decision is reversed.

The Local Board employed Appellant in 1987 and he served as a science and mathematics teacher and coach in the Chestnut Middle School. On April 6, 1993, Appellant was arrested and charged with sexual battery based upon the complaints of two of his students. The Local Superintendent suspended Appellant and notified him on April 15, 1993, that a hearing would be held before the Local Board on April 21, 1993 to decide whether his teaching contract would be terminated. On April 21, 1993, an agreement was reached between Appellant and the school system that the hearing would not be held until after the criminal trial was over.

Three and one-half years later, the criminal trial was concluded with Appellant's acquittal on December 2, 1996. The Local Superintendent was orally notified on December 2, 1996 that the trial was over and Appellant was ready to begin working. On December 4, 1996, Appellant's attorney wrote a letter to the Local Superintendent and advised him that Appellant was ready to return to work and asking for approximately \$146,500 in back pay and other compensation. In the absence of any response, Appellant's counsel wrote another letter on December 13, 1996 and stated that Appellant was ready to return to work, or, in the alternative, he wanted a hearing before a tribunal constituted by the Professional Practices Commission to consider his case. Appellant's attorney wrote three more letters on February 3, 1997, March 20, 1997, and April 8, 1997 and asked for a hearing or reinstatement. He also noted that Appellant was entitled to a hearing within 10 days after his initial suspension, which had been extended until the criminal trial was over.

The Local Superintendent finally responded on April 14, 1997 and informed Appellant that he was not going to recommend renewal of Appellant's teaching contract for the 1997-1998 school year. Appellant then requested a hearing on the non-renewal. The parties then began negotiating to see if a settlement could be reached without a hearing. On August 20, 1997, Appellant's counsel wrote another letter stating that Appellant was ready to go back to work and asking for immediate reassignment.

A three-day hearing before a tribunal constituted by the Professional Practices Commission began on September 24, 1997. At the beginning of the hearing, Appellant moved for dismissal of the proceeding because of the delay by the Local Board in holding a hearing. The Hearing Officer denied the motion and the hearing proceeded. After the hearing concluded, the Hearing Officer entered an order extending the time for the tribunal to make a decision until fifteen days after the receipt of the transcript from the court reporter. The transcript was completed and certified on October 16, 1997 and the tribunal issued its decision on November 7, 1997.

The tribunal found that:

During the 1992-1993 school year, Appellant made inappropriate physical contact with female students by embracing them with his arm draped over their shoulders "in a manner which [sic] allowed his hand and forearm to brush the bodies of female students close to their breasts, which was disturbing to the students, by "disturbing the hair of female student, with an intent to embarrass and aggravate the students," and by "touching a female student on her buttocks during basketball games."

Appellant made inappropriate statements to female students in that he told a student she had "sexy hair", he embarrassed a female student in front of a class of male students by comparing her physical appearance with a chart of the female reproductive anatomy, he made inappropriate remarks about the breasts of another female student, and he made inappropriate remarks about the physical appearance of other female students.

Appellant used inappropriate language in the presence of students by telling jokes and making remarks of a sexual nature, he used obscene words in classroom discussions, and he made derogatory remarks about a student's skill level.

Appellant used poor judgment by expressing a personal opinion about a film used in a Human Growth and Development Class during the 1991-1992 school year.

Appellant used poor judgment and exhibited gross insensitivity towards his students during a skit in a Human Growth and Development class when he rested a banana on the shoulder of a female teacher and asked, "Would you like to lick my banana?"

Appellant threatened and did retaliate against his students when reports regarding his inappropriate conduct were made to the school's administration.

Appellant failed to follow explicit directives given by the school's administration to avoid inappropriate physical contact with students.

The tribunal concluded that each of its findings constituted sufficient basis for finding that Appellant was guilty of immorality under the provisions of O.C.G.A. § 20-2-940(a)(4) and provided other good and sufficient cause for termination under O.C.G.A. § 20-2-940(a)(8). On November 17, 1997, the Local Board adopted the tribunal's findings and voted to terminate Appellant's teaching contract effective as of April 21, 1993. Appellant then filed a timely appeal to the State Board of Education.

Appellant's first claim on appeal is that he was denied procedural due process because the Local Board failed to conduct a hearing within ten days after the criminal trial was over. The Local Board argues that there was an agreement to postpone the proceeding until after the Local Superintendent received a transcript of the criminal trial, and there was a further agreement on May 1, 1997 to delay the proceedings while the parties attempted to negotiate a settlement. The Local Board argues that Appellant waived his rights to a timely hearing by entering into the postponement agreements.

O.C.G.A. § 20-2-940(g) requires a local board to conduct a hearing within ten days after a teacher is suspended unless the hearing is postponed at the request of the teacher. O.C.G.A. § 20-2-942(b)(2) requires a local board to give a notice of charges to a teacher within 14 days after a teacher requests a hearing; it does not establish any time within which the local board must conduct a hearing.

The standard for review by the State Board of Education is that if *any evidence* exists to support the decision of the local board of education, then the local board's decision will stand unless there has been an abuse of discretion, violation of due process, or the decision is so arbitrary and capricious as to be illegal. See, Ransom v. Chattooga County Board of Education, 144 Ga.App. 783 (1978); Antone v. Greene County Board of Education, Case No. 1976-11 (Ga SBE, Sept. 8, 1976); Roderick J. v. Hart County Board of Education, Case No. 1991-14 (Ga SBE, Aug. 8, 1991).

The record in the instant case shows that the parties agreed to postpone the hearing until after the criminal proceedings were completed. Although the Local Board claims that there was an agreement to further delay a hearing until the Local Superintendent reviewed a transcript of the criminal proceedings. This claim, however, is belied by the numerous letters written by Appellant's counsel before May 1, 1997, in which he repeatedly asked for a hearing. Since the teacher controls whether a hearing can be postponed under O.C.G.A. § 20-2-940(g), the Local Board was bound to provide him with a hearing when he asked for the hearing, regardless of any previous postponement agreements. Accordingly, the State Board of Education is of the opinion that the Local Board denied Appellant due process by not granting him a hearing when he requested one after the criminal proceedings were over. The State Board of Education wishes to make it clear that the allegations involved in this case are serious and the State Board of Education does not approve of such actions, if true, nor does it believe that teachers should remain employed if there is evidence that the teacher engaged in any form of molestation or in any other similar inappropriate behavior. Notwithstanding the severity of the charges, however, local boards of education must respect a teacher's due process rights as enacted by the legislature, and the State Board of Education is duty bound to reverse when those rights are not observed.

Appellant next claims that he was denied procedural due process because the tribunal hearing officer denied his motion to appeal to the entire tribunal her denial of his motion to dismiss the proceedings. O.C.G.A. § 20-2-940(e)(4) provides:

All questions relating to admissibility of evidence or other legal matters shall be decided by the chairman or presiding officer, subject to the right of either party to appeal to the full local board or hearing tribunal, as the case may be; provided, however, the parties by agreement may stipulate that some disinterested member of the State Bar of Georgia shall decide all questions of evidence and other legal issues arising before the local board or tribunal.

Under the plain language of the statute, if the parties agree to have a disinterested member of the State Bar of Georgia rule on questions of law, then the parties are bound by those decisions. It is only when the local board or a tribunal sits without a hearing officer that the parties have a right to appeal the decisions of the chairperson to the entire board or tribunal. The State Board of Education, therefore, concludes that Appellant was not denied due process because the hearing officer denied his motion to appeal her decision to the entire tribunal.

Appellant next claims that his due process rights were denied because the evidence allowed at the hearing went beyond the charges set forth in the charge letter. The Local Board did not advance any arguments concerning this issue. The charge letter, however, was not admitted into evidence and was not included in the record forwarded on appeal, although Appellant specifically challenged the evidence and the scope of the charge letter in his notice of appeal. The State Board of Education, therefore, cannot make any determination about the sufficiency of the charge letter or the scope of the evidence admitted.

Under O.C.G.A. § 20-2-1160, it is the responsibility of the local superintendent to file “a copy of the appeal together with the transcript of evidence and proceedings, the decision of the local board, and other matters in the file relating to the appeal to the state board.” O.C.G.A. §20-2-1160(b). The only requirement placed on the teacher is to file a copy of the transcript with the Local Superintendent. O.C.G.A. §20-2-940(E)(4) places the burden of proof in any termination hearing on the school system.

Because the school system has the burden of proof, and the local superintendent is responsible for forwarding the record to the State Board of Education, the burden should fall on the school system, and not the teacher, when the teacher makes an attack on the sufficiency of the charge letter or the scope of the evidence as it relates to the charge letter. The State Board of Education, therefore, concludes that Appellant was denied procedural due process because evidence was admitted that went beyond the scope of the charge letter, thus depriving Appellant the opportunity to properly defend against such charges.

Appellant next claims that his due process rights were denied because the tribunal hearing officer, the tribunal, and the Local Board violated the timelines for issuing a decision. The Local Board argues that Appellant was not harmed by the delay because he had already been out of work for four and one-half years when the hearing was held and a few extra days are inconsequential.

O.C.G.A. §20-2-940(t) provides, in part:

The local board shall render its decision at the hearing or within five days thereafter. Where the hearing is before a tribunal, the tribunal shall file its findings and recommendations with the local board within five days of the conclusion of the hearing, and the local board shall render its decision thereon within ten days after the receipt of the transcript.

The language of the statute is mandatory in requiring a tribunal to issue its findings and recommendations within five days after the hearing. It is also mandatory for a local board to issue its decision within five days after the hearing if the local board conducts the hearing. If a tribunal conducts the hearing, the local board is required to issue its decision within ten days after it receives the transcript. The statute does not provide for any extension of time to await a transcript when a tribunal conducts the hearing.

Arguably, a tribunal cannot make a considered decision or properly prepare findings of fact without the benefit of a transcript. The counter to this argument is that the local board has only five days to make a decision and the tribunal is no different. A tribunal, however, is not in the same position as a local board because a local board does not have to make findings of fact before it issues its decision. Regardless of the merits of these arguments, they are better addressed to the legislature, which has imposed a mandatory requirement upon a tribunal to issue a decision within five days after the hearing, and a mandatory requirement upon a local board to issue a decision within ten days after the transcript is received.

The State Board of Education concludes that Appellant was denied procedural due process when the tribunal issued its findings of fact 37 days after the deadline, and the Local Board issued its decision 27 days after its deadline.

Appellant next claims that he was denied due process because his right of cross-examination was denied. During the hearing, Appellant sought to elicit testimony from the Local Superintendent about the amount of back pay he would be due and what effect that had on the Local Superintendent’s decision to seek termination of Appellant’s teaching contract. The hearing officer ruled that Appellant could not ask such questions and Appellant proffered that the

amount would be approximately \$120,000. The Local Board argues that the testimony was not germane to the issue of whether Appellant committed immoral acts. Additionally, the Local Board argues that since the Local Superintendent was not personally liable for the back pay, the amount would not have any influence on the Local Superintendent's decision whether to reinstate Appellant.

The State Board of Education concludes that if it was error to restrict Appellant's cross-examination in this area, it was harmless error. The members of the tribunal were aware that Appellant had been on suspension for more than four years, and, without any difficulty, could determine that the amount of back pay would exceed \$100,000. The tribunal could also ascribe the degree of motivation this sum would have had on the Local Superintendent without Appellant directly asking any questions.

Appellant claims that he was denied due process because the tribunal hearing officer would not allow him to introduce evidence concerning his reputation for morality, when that was the central issue in the case. When the hearing officer made her ruling, Appellant did not preserve any objections to the ruling. Instead, Appellant's attorney began questioning on a different topic. In addition, Appellant was able to introduce several witnesses who testified favorably about his character. The State Board of Education, therefore, concludes that Appellant was not denied due process because he was limited on introducing evidence concerning his morality.

Appellant next claims that the evidence and record does not support the findings made by the tribunal. The Local Board argues that the specific findings of the tribunal are illustrative only, and there is an abundance of evidence in the record to support the tribunal's general findings. The Local Board, however, is bound by the specific findings of a tribunal unless it examines the record and prepares its own findings of fact. *See, e.g., Balthrop v. Bd. of Public Educ. for the City of Savannah and Cnty. of Chatham*, Case No. 1983-20 (Ga. SBE, Sep. 8, 1983). Because we reverse the Local Board's decision based upon the violations of procedural due process, the State Board of Education will not address Appellant's claims concerning the weight of the evidence.

As stated previously herein, the State Board of Education reiterates that the standard for review by the State Board of Education is that if *any evidence* exists to support the decision of the local board of education, then the local board's decision will stand unless there has been an abuse of discretion, violation of due process, or the decision is so arbitrary and capricious as to be illegal. *See Ransom v. Chattooga County Board of Education*, 144 Ga. App. 783 (1978); *Antone v. Greene County Board of Education*, Case No. 1976-11 (Ga SBE, Sept. 8, 1976); *Roderick J. v. Hart County Board of Education*, Case No. 1991-14 (Ga SBE, Aug. 8, 1991). Unfortunately, the procedural problems discussed herein compel the State Board to reach the decision that the Local Board denied Appellant his rights of due process. The Local Board's decision, therefore, is hereby REVERSED.

This 12th day of March, 1998.

Mr. Larry Thompson, Vice Chair for Appeals, was not present.

Larry Thompson
Vice Chairman for Appeals