

**STATE BOARD OF EDUCATION
STATE OF GEORGIA**

JAN HERSH,	:	
	:	
Appellant,	:	
	:	
v.	:	CASE NO. 2011-49
	:	
FULTON COUNTY BOARD OF EDUCATION,	:	DECISION
	:	
	:	
Appellee.	:	

This is an appeal by Jan Hersh from a decision by the Fulton County Board of Education (“Local Board”) terminating her employment contract. The Local Board terminated Appellant, finding that her conduct in playing a YouTube video violated the Local Board’s policy and thereby constituted willful neglect of duty and other good and sufficient cause under O.C.G.A. § 20-2-940(a). On appeal, Appellant asserts that the Local Board’s decision is not supported by the evidence. For the reasons set forth below, the decision of the Local Board is **REVERSED**.

I. PROCEDURAL BACKGROUND

Appellant was employed as a social studies and science teacher at Crabapple Middle School (“Crabapple”) for approximately eleven (11) years. On or about December 13, 2010, Appellant was notified that her 2010-2011 employment contract was being proposed for termination. Appellant appealed her proposed termination from employment. On January 24, 2011, the Local Board provided Appellant a hearing at which Appellant was given the opportunity to present evidence. At the conclusion of the hearing the Local Board terminated Appellant’s employment contract, finding that the evidence proved that she had engaged in willful neglect of duty, and other good and sufficient cause existed based upon her profound lack of judgment. Appellant has appealed the decision of the Local Board to the State Board of Education (“State Board”).

II. FACTUAL BACKGROUND

For the 2010-2011 academic year Appellant taught a seventh grade social studies class to gifted children at Crabapple Middle School (“Crabapple”). On December 2, 2010, Appellant showed a nine (9) minute YouTube clip to her seventh grade gifted social studies class. The clip was from a movie entitled *Amistad*. The *Amistad* movie is rated “R”. Several days after Appellant showed the YouTube clip, a parent of a student expressed concern to the Assistant Principal because he had been told by his child that the clip was brutal. The parent further expressed concern was that he had not been asked to sign a permission slip. The Assistant Principal and the Principal asked Appellant for the YouTube link. Upon doing so, they learned

that the clip came from the movie *Amistad* and that the movie was rated "R." The Local Board then concluded that Appellant failed to obtain approval for the YouTube clip from the Principal under its Guidelines FOR VHS/DVD USAGE.

At the hearing, Appellant testified that the written curriculum she was teaching directs the teacher to read or tell the story *Out of Africa*. Appellant showed the YouTube clip because it was consistent with the written objective of the lesson plan she was teaching regarding the transatlantic slave trade. The YouTube clip provided a graphic depiction of the written material included in the school approved curriculum. Appellant used the YouTube clip to augment the unit she was teaching on the transatlantic slave trade.

The Local Board's Guidelines FOR VHS/DVD USAGE does not refer to YouTube video clips, but specifically only refers to VHS and DVD. Appellant did not seek approval of the YouTube clip prior showing it because she did not believe the Local Board's Guidelines FOR VHS/DVD USAGE required her to do so for YouTube clips. Appellant testified that she considered YouTube video clips different from VHS and DVD films, and that YouTube video clips were not mentioned in the policy or on any forms requiring approval.

Appellant concedes that the clip contained nudity, but contends that it was not gratuitous. Appellant further admitted that she did not check the movie rating prior to showing it to the class. However, Appellant testified that YouTube clips do not have ratings.

At the hearing, approximately five (5) teachers testified about their understanding of the Local Board's Guidelines FOR VHS/DVD USAGE. All five (5) teachers testified that they showed YouTube clips for educational purposes. All five (5) teachers further testified that they did not seek approval from the Principal before showing YouTube clips because they did not believe the Local Board's Guidelines FOR VHS/DVD USAGE applied to YouTube videos. Appellant and all five (5) teachers testified that the Principal sent an email at the beginning of the school year stating that a grade level meeting would occur to discuss the use of videos and DVDs', but that the meeting never occurred.

At the hearing, one teacher testified that she used a YouTube video clip during class on a day that she was under an observation by the Principal. The teacher further testified that she had not obtained approval from the Principal, and the Principal did not advise her that she needed to do so. In the observation, the Principal referred to the teacher's use of the YouTube video as an "excellent way to start the lesson."

III. ERRORS ASSERTED ON APPEAL

Appellant asserts that the evidence in the record does not support the Local Board's decision. The State Board is required to affirm the decision of the Local Board if there is any evidence to support the decision of the Local Board, unless there is abuse of discretion or the decision is arbitrary and capricious as to be illegal. See Ransum v. Chattooga County Bd. of Educ., 144 Ga. App. 783 (1978); Antone v. Greene County Bd. of Educ., Case No. 1976-11 (Ga.

SBE, Sep. 1976). For the reasons set forth below, the State Board finds that the record does not contain legally sufficient evidence to support the decision of the Local Board.

A "willful neglect of duty" requires "a flagrant act or omission, an intentional violation of a known rule or policy, or a continuous course of reprehensible conduct. . . . '[W]illfulness' requires a showing of more than mere negligence." Terry v. Houston County Bd. of Educ., 178 Ga. App. 296, 342 S.E.2d 774 (1986). Moreover, willful neglect of duties exists if Appellant knew, or should have known, what her obligations were pursuant to the Local Board's policy. See Clemmons v. Chattooga County Bd. of Educ., Case No. 1998-27 (Ga. SBE, Sep. 1998); see also Maria Beal-Parker v. DeKalb County Bd. of Educ., Case No. 2008-17 (Ga. SBE, Feb. 2008); Mahone v. Clayton County Bd. of Educ., Case No. 2010-77 (Ga. SBE, July 2010). Furthermore, this Board has held that "it is axiomatic that 'good and sufficient cause' must be construed consistently with the other grounds for discipline contained in the Fair Dismissal Act." See Beale-Parker v. DeKalb County Bd. of Educ., Case No. 2008-17 (Ga. SBE, Feb. 2008).

Appellant contends that she did not engage in a willful neglect of duty, but at best, exercised poor judgment. Appellant relies upon this Board's decision in Tookes v. Atlanta City Bd. Of Educ. in support of her position that "poor judgment" is not a ground to support her termination under the Fair Dismissal Act. See Tookes v. Atlanta City Bd. of Educ., Case No. 2005-31 (Ga. SBE, May 2005). As set forth below, the record shows that Appellant's actions do not constitute more than "mere negligence" or "poor judgment."

In this case, it is clear that the Local Board's Guidelines FOR VHS/DVD USAGE does not include or refer to YouTube video clips. It is further clear that Appellant and all the teachers that testified did not believe that this policy applied to YouTube video clips, and that approval from the Principal was not required for YouTube video clips. The Principal's actions regarding the observation with the teacher who used a YouTube video clip which was not approved shows that the Principal did not believe that the policy applied. Thus, the Local Board has failed to show that Appellant willfully violated its policy. Furthermore, the Local Board in its own findings concluded that Appellant showed a "profound lack of judgment." Lack of judgment is not an intentional or flagrant act sufficient to uphold Appellant's termination. Therefore, this Board finds that the Local Board's decision is in error.

IV. CONCLUSION

Based upon the reasons set forth above, it is the opinion of the State Board of Education that the evidence supports the decision of the Local Board, and it is, therefore, **REVERSED**.

This 21st day of July 2011.

MARY SUE MURRAY
VICE CHAIR FOR APPEALS