STATE BOARD OF EDUCATION

STATE OF GEORGIA

JOHN R. WILSON,	:	
	:	
Appellant,	:	
	:	
v.	:	**CASE NO. 2011-64**
	:	
HARALSON COUNTY BOARD OF EDUCATION,	:	**DECISION**
	:	
	:	
Appellee.	:	

This is an appeal by John R. Wilson from a decision by the Haralson County Board of Education ("Local Board") terminating his employment contract for the 2010-2011 school year. The Local Board charged Appellant with insubordination, immoral and unprofessional conduct, willful neglect of duties, and other good and sufficient cause pursuant to O.C.G.A. § 20-2-940. After a hearing, the Local Board terminated Appellant's employment contract. On appeal, Appellant asserts: (1) that the Local Board erred by refusing to issue subpoenas, (2) the Local Board erred by denying a continuance, (3) the Local Board failed to obtain Appellant's consent for the use of a Hearing Officer, and, (4) the Local Board violated Appellant's rights by proceeding with his hearing after he tendered his resignation. In addition, Appellant seeks to supplement the record. For the reasons set forth below, the motions to supplement the record are **GRANTED IN PART AND DENIED IN PART,** and the decision of the Local Board is **SUSTAINED**.

I. PROCEDURAL BACKGROUND

On or about January 28, 2011, the Local Board placed Appellant on administrative leave pending an investigation. Subsequent to Appellant's suspension, the parties attempted to settle Appellant's termination. However, on February 23, 2011, counsel for Appellant, Stewart Duggan, wrote counsel for the Local Board, A.J. Welch, Jr., stating "[w]e wish to proceed with a Due Process Hearing and cross-examine the brats[1] making these ridiculous and bald allegations. We'll see how they hold up when questioned by Mr. Wilson's advocate." Consequently, on March 4, 2011, the Local Board prepared a Notice of Termination Hearing letter ("charge or termination letter") for Appellant and requested that Appellant meet at the Local Board to receive the letter. Mr. Duggan requested that the Local Board mail the letter to Appellant and scan and email the termination letter to him. On March 7, 2011, Mr. Duggan received

[1] This Board finds Mr. Duggan's description of the students who complained about Appellant as "brats" completely inappropriate and lacking in professionalism.

Appellant's termination letter. The March 4, 2011, charge letter provided Appellant and Mr. Duggan notice for the hearing on March 21, 2011.

On March 17, 2011, Mr. Duggan notified Mr. Welch that his mother-in-law had passed and sought a continuance for that reason. Mr. Duggan also informed Mr. Welch that he needed a continuance because he had a family vacation planned on March 21, 2011. Mr. Welch informed Mr. Duggan that the Local Board would not agree to a continuance because Mr. Duggan had demanded a hearing be scheduled, which had been done, and because Mr. Duggan had been aware of the hearing date since at least March 7, 2011, but had never informed Mr. Welch that he had a vacation planned and was unavailable. Mr. Welch also informed Mr. Duggan that the Local Board had approximately forty (40) potential witnesses[2] scheduled to testify, and that the hearing could not be rescheduled the following two (2) weeks because of spring break and CRCT testing.

On March 20, 2011, Mr. Duggan emailed Mr. Welch stating "[o]n behalf of Mr. Wilson and at his direction, we do hereby tender Mr. Wilson's resignation of his employment with Haralson County Schools. Mr. Wilson's resignation is made under threat of termination." On March 21, 2011, the Local Board proceeded with the hearing. Mr. Welch informed the Local Board of Mr. Duggan's email regarding Appellant's resignation. The Superintendent recommended to the Local Board not to accept Appellant's resignation letter. The Local Board accepted the Superintendent's recommendation.

At the hearing on March 21, 2011, the Local Board also considered Appellant's request for a continuance. The Local Board offered evidence showing that, on February 7, 2011, Mr. Duggan had filed for a leave of absence in another court because of his family vacation from March 20, 2011through March 25, 2011. The Local Board offered evidence showing that Mr. Duggan had been representing the Appellant since at least February 10, 2011, and that Mr. Duggan had requested the Local Board to schedule the hearing. The Local Board further offered evidence showing that, by at least March 7, 2011, Mr. Duggan had received notice of the March 21, 2011 hearing date, but did not notify Mr. Welch of the conflict until March 17, 2011, four (4) days before the hearing. Consequently, the Local Board denied Appellant's motion for a continuance.

II. FACTUAL BACKGROUND

For the 2010-2011 school year, Appellant was employed as a teacher at Haralson County Middle School pursuant to a written employment contract. Appellant's employment contract with the Local Board provides that "[t]his contract shall not be terminated by Employee without written consent of the Superintendent." Appellant's employment contract ended on June 30, 2011. During the 2010-2011 school year, Appellant taught remediation classes. Appellant also taught a newspaper class, in which all the students were female.

[2] The Local Board actually had twenty-two (22) witnesses testify.

At the hearing, the Local Board offered evidence showing that, during the 2008-2009 school year, a student complained that Appellant had made her feel uncomfortable by his actions. Specifically, the student wore a t-shirt with a kitten that said "purr-fect." Appellant sent an electronic message to the student stating she looked "purr-fect." The student complained and Appellant was redirected and advised not to exhibit inappropriate behavior with students. Also, during the 2008-2009 school year, the Local Board received complaints that Appellant was dancing with female students. Appellant was again redirected not to exhibit inappropriate behavior and place himself in situations where allegations could be made against him.

At the hearing, the Local Board offered evidence showing that, on or about January 28, 2011, it received complaints from female students about inappropriate behavior regarding Appellant. The Local Board offered evidence that Appellant continued to dance with female students, inappropriately touched female students, and made inappropriate comments to female students. For instance, on one occasion, Appellant kissed a female student on the cheek. On another occasion, Appellant threw a female student down and placed his penis on her buttocks and humped her. Appellant also tickled female students, picked a female student up and carried her like a bride, and placed his hands on the waists of female students.

As a result of these complaints, the Local Board proposed terminating Appellant's employment contract. After hearing the evidence, the Local Board terminated Appellant's employment contract.

III. ERRORS AND ISSUES ON APPEAL

A. Supplementation of Record.

On or about May 27, 2011, counsel for Appellant submitted an email[3] to this Board seeking to supplement the record with eight (8) exhibits on the basis these were relevant to this appeal but not included in the record submitted to this Board. On or about June 27, 2011, counsel for Appellant filed a motion to supplement the record with a March 27, 2011 Letter from Mr. Welch.

Pursuant to O.C.G.A. § 20-2-1160(b), the record before this Board is limited to "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." Furthermore, this Board only has jurisdiction over issues heard and decided by the Local Board. O.C.G.A. § 20-2-1160(e); Owen v. Long County Bd. of Ed., 245 Ga. 647, 649 (1980); Sharpley v. Hall County Bd. of Educ., 251 Ga. 54 (1983); Boney v. County Bd. of Ed. Of Telfair County, 203 Ga. 152, 153 (1947). Appellant does not contend that the Local Board omitted documents that should have been included in the record,

[3] This Board's rules do not allow for a party to file motions contained in the body of an email. Nevertheless, this Board has accepted Appellant's email motion to supplement the record.

but seeks to supplement the record with documents Appellant contends are relevant. For the reasons set forth below, Appellant's motion is granted to the extent the records may constitute "other matters in the file relating to the appeal to the state board" and appear relevant to the procedural issues in this case. However, several of the documents are dated after the March 22, 2011 decision of the Local Board. Thus, these documents cannot be related to the Local Board's decision, and therefore, this Board denies Appellant's motion to supplement the record with these documents.

Based upon a review of the record, Exhibits 1, 2, 3 and 6 are in the record submitted by the Local Board. Therefore, Appellant is incorrect in asserting these exhibits are not in the record. This Board was unable to locate Exhibits 4 and 5 in the record. These exhibits are emails dated March 7, 2011, and March 17, 2011. Since these emails are related to this appeal and dated prior to the Local Board's decision, this Board will accept these documents as part of the record, as they appear relevant to the procedural issues in the case.

However, Exhibits 7 and 8, and Exhibit A to Appellant's second motion to supplement the record are all dated after the March 22, 2011 decision of the Local Board. The contents of these exhibits relate to Appellant's request for the Local Board to vacate the March 22nd termination decision based upon his resignation and the issue related to the use of the hearing officer during the hearing. Since this Board is limited to reviewing the decision of the Local Board these exhibits, dated after the Local Board's decision, could not give rise to an appealable issue before this Board. Therefore, these exhibits are not properly part of the record, and Appellant's motion to supplement the record with Exhibits 7 and 8, and Exhibit A is denied.

B. Denial of a Continuance.

Appellant asserts that the Local Board erred by denying him a continuance because his counsel was unavailable due to a planned vacation. The denial of a continuance is within the sound discretion of the Local Board, and, absent a showing of clear abuse, it is not grounds for reversal. Talmadge v. Elson Properties, 279 Ga. 268 (2005); Craft v. Chickamauga County Bd. of Educ., Case No. 2009-12 (Ga. SBE, Nov. Jan. 2009); Yearwood v. Greene County Bd. of Educ., Case No. 2008-12 (Ga. SBE, Nov. 2007).

In this case, Appellant initially asked for a continuance on March 17, 2011, because his counsel, Mr. Duggan, notified Mr. Welch that his mother-in-law had passed. Mr. Duggan later informed Mr. Welch that he needed a continuance because he was unavailable on March 21st due to a family vacation. The record shows that since at least February 7, 2011, Mr. Duggan had a planned vacation from March 20th through March 25th. On February 23, 2011, when Mr. Duggan requested a hearing, he was aware of his planned vacation, but did not inform Mr. Welch he was not available on these dates. The record further shows that Mr. Duggan was aware of the hearing date since at least March 7, 2011, but for ten (10) days he never informed the Local Board of his conflict. Instead, Mr. Duggan waited until four (4) days before the hearing to notify the Local Board of his conflict.

On March 17th, Mr. Welch informed Mr. Duggan that the Local Board would not agree to a continuance because Mr. Duggan had demanded a hearing be scheduled, which had been done, and because Mr. Duggan had been aware of the hearing date since at least March 7, 2011, but had never informed Mr. Welch that he had a vacation planned and was unavailable. Mr. Welch also informed Mr. Duggan that the Local Board had approximately forty (40) potential witnesses scheduled to testify, and that the hearing could not be rescheduled the following two (2) weeks because of spring break and CRCT testing.

At the hearing on March 21, 2011, Appellant did not appear, nor did his counsel. On appeal, Mr. Duggan has failed to provide any explanation for waiting ten (10) days to notify the Local Board of his conflict. Moreover, while Mr. Duggan seeks to rely upon the death of his mother-in-law as the basis for seeking a continuance, this unfortunate event is unrelated to the planned vacation which was the reason for his unavailability on March 21st. Thus, this Board finds that the Local Board did not abuse its discretion by not granting a continuance.

C. Issuance of Subpoenas.

Appellant contends that the Local Board violated his rights because he requested document subpoenas[4] which the Local Board declined to provide without Appellant specifying which documents were needed.

Pursuant to the Fair Dismissal Act, Appellant is "entitled to have subpoenas or other compulsory process issued for attendance of witnesses and the production of documents and other evidence." O.C.G.A. § 20-2-940(d). Furthermore, "[s]uch subpoenas and compulsory process shall be issued in the name of the local board and shall be signed by the chairperson or vice chairperson of the local board." Id.

In this case, Mr. Welch declined to have the Local Board issue blanket document subpoenas to Appellant without Appellant specifying the documents needed.[5] This Board agrees with Appellant that the Local Board does not have the authority to withhold issuing subpoenas. The proper procedure is for the Local Board to issue subpoenas. Once Appellant served the custodian of the subpoenaed documents, then the subpoenaed party has the right to object to the subpoena. The Local Board then maintained the authority compel, quash or otherwise modify the document request made in the subpoena. See O.C.G.A. § 24-10-22(b).

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[4] Based on the record, this Board concludes that the Local Board provided witness subpoenas to Appellant with the charge letter. Therefore, the only dispute relates to subpoenas for documents.

[5] In this case, it appears that Mr. Welch may have been attempting to fast-forward the issue and addressing any objection on the front-end. While this practice may normally work amongst attorneys practicing before local boards, the record before this Board shows that the relationship between counsel is lacking in normalcy.

However, this Board finds any error on this issue to be harmless. First, Appellant has failed to make an offer of proof identifying the documents he sought to subpoena. Second, Appellant has failed to offer any proof as to how such documents were relevant to the merits of his case. Third, since Appellant failed to appear for his hearing, this issue is moot. For these reasons, this Board finds that while the Local Board erred by declining to issue document subpoenas, any error was harmless.

D. Utilization of a Hearing Officer.

Appellant asserts that the Local Board erred by utilizing a hearing officer in violation of O.C.G.A. § 20-2-940(e)(4). As an initial matter, Appellant did not appear at the hearing and therefore failed to raise this objection at the hearing.[6] Pursuant to O.C.G.A. § 20-2-1160(e), "[n]either the state board nor the superior court shall consider any question in matters before the local board nor consider the matter de novo . . . ." See Sharpley v. Hall County Bd. of Educ., 251 Ga. 54 (1983); Hutcheson v. DeKalb County Bd. of Educ., Case No. 1980-5 (Ga. SBE, May 1980); Z.G. v. Henry County Bd. of Educ., Case No. 2007-05 (Ga. SBE, Jan. 2007). For the reasons set forth below, even assuming Appellant timely raised this objection, the Local Board did not err in utilizing a hearing officer.

Official Code of Georgia Annotated § 20-2-940(e)(4) states in pertinent part:

> 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.

O.C.G.A. § 20-2-940(e)(4).

This provision allows for a hearing officer to decide and rule on evidentiary matters by stipulation of the parties. In the absence of the parties stipulating to a hearing officer, this Board has recognized the use of a local board's attorney as a legal advisor. See Lewis v. Carroll Cnty. Bd. of Educ., Case No. Ga. SBE, Nov. 1996). Under Lewis, a legal advisor can be used by a Local Board, but can only provide legal advice to the chairman who then makes the rulings.

[6] Appellant did request the identity of the hearing officer before the hearing. However, O.C.G.A. § 20-2-940(e)(4) does not require a local board to do so prior to the hearing. While as a courtesy this information may be normally exchanged by counsel prior to the hearing, as set forth above, counsels' relationship is lacking in normalcy.

In this case, the individual identified as a hearing officer[7] only acted as a legal advisor. For instance, the Local Board, not the individual referred to as a hearing officer, ruled on the denial of a continuance. The record further shows that, the individual referred to as a hearing officer, advised the Chair, and then the Chair made the ruling. Moreover, even assuming, the individual referred to as a hearing officer on occasion did more than serve as a legal advisor, Appellant has failed to identify any rulings in the record that prejudiced his right to a fair hearing. Thus, this Board finds that the Local Board properly utilized a legal advisor. To the extent this role could be construed to have been more than a legal advisor, this Board finds that any error was harmless. See Evans v. Jefferson Cnty. Bd. of Educ., Case No. Ga. SBE, Oct. 2009).

E. Resignation Email.

Appellant contends that he resigned by email notification on the evening of Sunday, March 20, 2011. Thus, Appellant contends that the Local Board erred by proceeding with the hearing. At the same time, Appellant makes the contradictory contention that he is entitled to a new hearing because his resignation was made under duress. Appellant cannot have it both ways. As set forth below, both of Appellant's contentions are without merit.

Appellant contends that, pursuant to Vizcarrondo v. Cobb Cty. Bd. Of Educ., Case No. 1981-13 (Ga. SBE, July 1981), the Local Board did not have the authority to conduct a hearing after Appellant submitted his resignation. In Vizcarrondo, this Board did hold that a local board did not have authority to conduct a hearing after a teacher tendered a resignation. However, after this Board issued the Vizcarrondo decision, the Georgia Court of Appeals issued the decision in Allen v. Lankford, 170 Ga. App. 605 (1984).

In Allen, the teacher contended that she withdrew her resignation prior to the local board's acceptance, and therefore she could only be terminated in accordance with the Fair Dismissal Act. Allen, 170 Ga. App. at 606. The Georgia Court of Appeals agreed with the teacher, and held that a teacher's resignation was ineffective until it was accepted by the local board. Id. Thus, the Vizcarrondo decision has clearly been overruled by the Court of Appeals decision in Allen.

[7] Appellant asserts that his contention is supported by the record in which the individual is referred to as a hearing officer. This assertion is without merit. The relevant issue is whether the individual functioned as a hearing officer or as a legal advisor. The label placed on the individual by the Local Board and the court reporter is irrelevant.

Furthermore, the language in Appellant's employment contract supports this conclusion. Appellant's employment contract with the Local Board provides that "[t]his contract shall not be terminated by Employee without written consent of the Superintendent."[8] Appellant's employment contract ended on June 30, 2011. In this case, the Appellant did not resign with the written consent of the Superintendent. Moreover, unlike the teacher in Vizcarrondo, Appellant did not provide a date of his resignation, and stated that it was under "threat of termination." Thus, Appellant's termination notice was vague and unconditional.

In addition, Appellant has failed to provide any evidence showing that his resignation was under duress. Appellant's counsel sent an email stating Appellant was resigning under "threat of termination." Simply because Appellant had a termination hearing the next day under the Fair Dismissal Act, at which he could be terminated, does not constitute duress. Every employee who is provided a termination hearing under the Fair Dismissal Act is being subject to the threat of termination. For these reasons, this Board rejects Appellant's contentions.

F. Record Evidence.

On appeal, Appellant does not challenge that the record contains sufficient evidence to support the decision of the Local Board. This 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 Appellant's contention without merit. The State Board further finds that the record contains legally sufficient evidence to support the decision of the Local Board.

In this case, the record shows that the Local Board received complaints from female students about inappropriate behavior regarding Appellant. The record further shows that, during the prior school year, the Appellant had been warned regarding his inappropriate conduct towards female students. The record shows that, despite being warned, Appellant continued to dance with female students, inappropriately touch female students, and made inappropriate comments to female students. On one occasion, Appellant kissed a female student on the cheek. On another occasion, Appellant threw a female student down and placed his penis on her buttocks and humped her. Appellant also tickled female students, picked a female student up

[8] This Board recognizes that the employment agreement in Vizcarrondo contained similar language. However, this Board disagrees with the conclusion that a resignation can terminate the employment contract without acceptance by a local board. This conclusion is supported by the Allen decision. Based upon Allen, Appellant could have contacted the local board at any time prior to June 30, 2011, and withdrawn his resignation, and then been entitled to hearing. This would be an absurd result. Furthermore, while it is not clear whether O.C.G.A. § 45-5-1 applies to public school teachers, O.C.G.A. § 45-5-1(7) provides that a resignation by a public employee requires an acceptance.

and carried her like a bride, and placed his hands on the waists of female students. Thus, there is more than sufficient evidence in the record to support the decision of the Local Board.

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, **SUSTAINED**.

This _____ day of September 2011.

MARY SUE MURRAY
VICE CHAIR FOR APPEALS