

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

MARK BADERTSCHER,

PLAINTIFF-APPELLEE,

CASE NO. 5-14-27

v.

LIBERTY-BENTON SCHOOL DISTRICT
BOARD OF EDUCATION,

OPINION

DEFENDANT-APPELLANT.

Appeal from Hancock County Common Pleas Court
Trial Court No. 2013-CV-67

Judgment Affirmed

Date of Decision: April 13, 2015

APPEARANCES:

Jessica K. Philemond and Derek L. Towster for Appellant

John M. Roca for Appellee

SHAW, J.

{¶1} Defendant-appellant, Liberty-Benton School District Board of Education (the “Board”), appeals the July 17, 2014 judgment of the Hancock County Court of Common Pleas reversing the Board’s order of termination of the teaching contract of plaintiff-appellee, Mark Badertscher (“Badertscher”). Prior to issuing the order of termination, the Board rejected a referee’s report finding that it failed to prove good and just cause to terminate Badertscher’s employment contract under R.C. 3319.16.

{¶2} Badertscher has been a licensed teacher since 1987 teaching primarily in the area of Vocational Agriculture. Badertscher became employed by the Board in 1991 and continued to teach various courses related to Vocational Agriculture for 21 years. The area in Liberty-Benton High School where Badertscher taught his courses consisted of two rooms. The classroom measured approximately 15 by 20 feet and contained desks and other equipment for classroom instruction. The other room is a workshop located next to the classroom which measured 40 by 60 feet and contained heavy machinery and other tools. All of the Vocational Agricultural courses taught by Badertscher at the high school had both a classroom and shop component.

The May 23, 2012 Incident

{¶3} On May 23, 2012, during senior exam week, three senior classmen unexpectedly appeared at the beginning of Badertscher's fourth period class and requested to take their exams early. Even though Badertscher had previously arranged for the seniors to take their exams during fifth period, he decided to accommodate their request and proceeded to set up the laptop computers required to take the exam on the workbenches in the workshop where there was available space. This required Badertscher to leave his fourth period students unattended in the classroom for approximately six minutes while he assisted the seniors in the workshop with logging into the exam website.

{¶4} While Badertscher was occupied with the seniors in the workshop, C.K., a student in Badertscher's fourth period class, applied a chokehold or "sleeper hold" to two other students in the classroom. The first chokehold lasted a few seconds and the student, J.E., did not appear to be adversely affected. C.K. applied the second chokehold to T.B., a special needs student. This chokehold lasted for thirty-seven seconds and resulted in T.B. losing consciousness for a matter of five to ten seconds before recovering. When Badertscher finished assisting the seniors with their exam set-up in the workshop, he returned to the classroom to begin the lesson he had planned for the day. He was unaware that

either chokehold took place and none of the students in the classroom alerted him to the incident.¹ The remainder of the class period proceeded without issue.

{¶5} Later that day, during sixth period, some of the students from Badertscher's fourth period class were concerned for T.B.'s health and informed a teacher's aide of C.K.'s chokehold on T.B. The teacher's aide reported the incident to Principal Brenda Frankart, who spoke with T.B., and together with Vice Principal Ben Gerken, reviewed the surveillance video from Badertscher's classroom. Principal Frankart then called Badertscher to her office. Badertscher was surprised to hear of the incident and maintained that he did not see either chokehold take place. With Vice Principal Gerken present, Principal Frankart proceeded to show Badertscher the surveillance video and articulated her concerns with Badertscher's inattention to the activity and student misconduct in the classroom. After his discussion with Principal Frankart, Badertscher returned to his classroom.

{¶6} Shortly thereafter, Superintendent James Kanable arrived at the High School and reviewed the video footage. Superintendent Kanable then proceeded to Badertscher's classroom, along with Principal Frankart and Vice Principal Gerken, to inform Badertscher that he would be dismissed from his position until further notice and that he would not be permitted on school grounds until an

¹ The classroom was monitored by a surveillance camera. Footage from the camera revealed that Badertscher was in the classroom during C.K.'s first short chokehold on J.E., but did not notice the incident. However, Badertscher was not in the classroom when C.K. applied the second longer chokehold to T.B.

investigation of the incident was completed. Superintendent Kanable also advised Badertscher to contact his union representative regarding the initiation of termination proceedings.

The May 24, 2012 Notice of Investigatory Hearing

{¶7} The following day, on May 24, 2012, Superintendent Kanable sent Badertscher a letter entitled “Due Process Notice of Investigatory Hearing Scheduled for Tuesday May 29, 2012 at 10:00 a.m.” In this letter, Superintendent Kanable specified that the following items would be addressed at the investigatory hearing:

- 1. We will be reviewing and thoroughly discussing *the events that transpired during the school day yesterday, Wednesday, May 23, 2012, that led to the serious physical altercation between students in your classroom during 4th period.* We will be working into this discussion a full review of any and all applicable Liberty-Benton Local School District Board of Education Policy, Liberty-Benton Administrative Guideline, legal, contractual (Liberty-Benton Teachers’ Association Agreement or otherwise) and Licensure Code of Professional Conduct for Ohio Educators) violations;**
- 2. *Please bring with you to this hearing any written, signed statement of your description of the events that transpired in your classroom during the school day yesterday, should you wish for me to consider same in regards to this matter;***
- 3. Please be advised that matters discussed during this hearing can have possible negative consequences to you both legally as well as professionally with respect to your current teaching license(s) as well as your current contract status with the District. Thus, you are entitled to bring representation with you to this hearing. Representation may include the Liberty-Benton**

Teachers' Association, the Ohio Federation of Teachers, legal counsel, and/or another official representative designated by you;

4. Please also be prepared to fully discuss any extended days actually worked to-date during the 2011-2012 school year.

(Emphasis added.) (Joint Ex. 20).

The May 29, 2012 Investigatory Hearing

{¶8} At the investigatory hearing, Badertscher read a written statement detailing his recollection of what had transpired in his classroom during fourth period on May 23, 2012, as directed in the May 24, 2012 Notice from Superintendent Kanable set forth above. In his statement, Badertscher reaffirmed that he did not know what C.K. had done in the classroom until he was called into Principal Frankart's office and explained that he was assisting the seniors with their exams in the workshop at the time the chokehold on T.B. occurred.

{¶9} On May 30, 2012, Badertscher received a letter from Superintendent Kanable stating that a meeting would be held on June 1, 2012. The letter stated that "[t]he purpose of the meeting is to review the *summation of details* after completion of a full and fair investigation of matters so that the appropriate formal decisions can be made of *this investigation*." (Emphasis added.) (Joint Ex. 21). At this meeting, the record indicates that Superintendent Kanable discussed his findings from the investigatory hearing held on May 29, 2012. However, there are no further notes, minutes or transcripts of the June 1, 2012 meeting in the record.

The June 1, 2012 Notice of Intent to Terminate

{¶10} Following the meeting, in a letter dated June 1, 2012, Badertscher received formal notice from the Board's Treasurer of the Board's intent to consider initiating termination proceedings pursuant to R.C. 3319.16, which permits a board of education to terminate a teacher's employment contract for good and just cause. The Board's June 1, 2012 Notice to Badertscher stated the following in support of its decision to consider termination of Badertscher's employment contract.

The grounds for this intended action of the Board are for good and just cause, as specifically delineated below:

- 1. *Willful and persistent violations of the reasonable Policy 2105, Mission District, of Liberty-Benton Local School District Board of Education by failing to maintain an appropriate learning environment and education program for students that is free from physical, social, psychological and emotional abuse and harassment;***
- 2. *Willful and persistent violations of the reasonable Policy 2110, Statement of Philosophy, of the Liberty-Benton Local School District Board of Education by failing to provide an educational program that exists within an environment that is conducive to the maximum intellectual, physical, social, and emotional development of all youth and that continues and promotes the physical, mental, and emotional growth and development of youth through the maintenance of a personalized and appropriate educational program;***
- 3. *Willful and persistent violations of the reasonable Policy 3210, Staff Ethics, of the Liberty-Benton Local School District Board of Education by failing to exercise due care to supervise and protect the mental and physical safety of your students, thus***

jeopardizing not only your students, but also the integrity of the District;

4. *Willful and persistent violations* of the reasonable Policy 5500, Student Conduct, of the Liberty-Benton Local School District Board of Education by failing to be responsible for the conduct of students in your classroom in the Liberty-Benton High School Building;

5. *Willful and persistent violations* of the reasonable Policy 3213, Student Supervision and Welfare, of the Liberty-Benton Local School District Board of Education by failing to maintain a standard of care for supervision, control, and protection of students commensurate with your assigned duties and responsibilities that could result in liability to the District;

6. *Willful and persistent violations* of the reasonable Policy 3213, Student Supervision and Welfare, of the Liberty-Benton Local School District Board of Education by failing to immediately report to the building administrator any accident or safety hazards detected;

7. *Willful and persistent violations* of the reasonable Policy 5517.01, Bullying and Other Forms of Aggressive Behavior, of the Liberty-Benton Local School District Board of Education by contributing to and failing to report or investigate the harassment, intimidation, physical abuse and bullying of students in your care;

8. *Willful and persistent violations* of the reasonable Administrative Guideline 3213, Liability of Staff for Student Welfare, of the Liberty-Benton Local School District Board of Education by failing to be responsible for students under your supervision at all times; failing to accompany students wherever they are assigned and remain with them until supervision is assumed by another person; and failing to immediately report to the principal any accident or safety hazard you detect and any accident one or more of your students experience;

9. *Willful and persistent violations* of section 2g of the Licensure Code of Professional Conduct for Ohio Educators by failing to provide appropriate supervision of students, within the scope of your official capacity, which risks the health, safety, and welfare of students;

10. *Willful and persistent violation* of section 3e of the Licensure Code of Professional Conduct for Ohio Educators by failing to make a mandated report of any violation of state or federal law.

Mr. Badertscher, you have *repeatedly failed to provide appropriate supervision of students in your classroom* which has risked the health, safety and welfare of your students and others in the school community, with the most recent egregious incident occurring in your fourth period class on May 23, 2012, when two male students engaged in a serious physical altercation which left one of the students unconscious in a seizure-type state and led to the medical consultation by that student's family.

(Emphasis added.) (Joint Ex. 22 at 1-3).

{¶11} In a letter dated June 4, 2012, Badertscher responded to the Board's June 1, 2012 Notice. In this letter, Badertscher asserted that the Board's Notice "lacks a full specification of grounds for terminating [his] contract as required by Ohio Revised Code Section 3319.16" and advised the Board that he disagreed "with the grounds set forth in the written notice." (Joint Ex. 26). Badertscher closed his letter by demanding a hearing before an impartial referee pursuant to R.C. 3319.16 and R.C. 3319.161.

{¶12} On June 8, 2012, Superintendent Kanable faxed the Department of Education a report of "Educator Misconduct" as required by R.C. 3319.313. In this document, Superintendent Kanable stated the following:

This report is one that I think needs urgent attention. *The basis of this single incident from our investigation* involved two students who were choked in Mr. Badertscher's classroom. He was present for the entirety of the first and left the room while the second incident occurred. From the second incident, the student passed out. During the time these incidents occurred a chair was knocked over making a loud sound.² Still Mr. Badertscher never looked over or address [sic] the noise, let alone the choking.

We are pursuing termination on Mr. Badertscher, but having been through this process before, I know this can be lengthy and the outcome unknown. The student victim's parents have not filed charges on the student [C.K.] or Mr. Bodertscher [sic] at this time.

I feel that Mr. Badertscher has violated the Misconduct Code for Ohio. Furthermore, I do not feel comfortable putting students in his care nor any students in his care. (Emphasis added.)

{¶13} An unsigned "Addendum" attached to the report, located in the document *after* the date and signature of the Superintendent on the primary report, reiterates the wording of the "eleventh" paragraph from the June 1, 2012 Notice alleging that the May 23, 2012 incident was merely the most recent instance of numerous unspecified prior failures of Badertscher to provide appropriate supervision of his students. The Addendum also concludes with the allegation that Badertscher "had clearly been previously warned by school officials of the District's concern over his lack of student supervision." (Joint Ex. 25 at 2, 4).

² It is clear that Superintendent Kanable is referring to what he viewed on the surveillance video. However there was no audio accompanying the footage.

The June 18, 2012 Board Meeting & Vote to Initiate Termination

{¶14} On June 18, 2012, at a public meeting of the Board, Superintendent Kanable presented the factual basis supporting his determination that there is good and just cause to initiate the termination proceedings of Badertscher's employment contract. His determination was based upon his investigation into Badertscher's "alleged failure to supervise students under his direct care, with said lack of supervision resulting in one of Badertscher's students being bullied and physically assaulted in his absence, and also based on other good and just cause * * *." (Jun. 18, 2012 Resolution). Superintendent Kanable then recommended that the Board initiate contract termination proceedings against Badertscher and place him on unpaid suspension pending final action. The Board subsequently voted to approve Superintendent Kanable's recommendation.

The Referee Hearing

{¶15} On August 29 and 30, 2012, a hearing on the matter was held before the referee. The Board presented the testimony of ten witnesses and several hundred pages of exhibits, a number of which were jointly admitted. While the May 23, 2012 incident was one of the focal points at the hearing, the Board also attempted to prove that Badertscher had a history, spanning the course of several years, of being a poor disciplinarian lacking adequate classroom management skills and chronically failing to appropriately supervise the students under his care.

Badertscher testified on his own behalf and provided the testimony of a former student along with several exhibits in support of his position that the Board lacked good and just cause to terminate his employment contract.

The Referee's Report & Recommendation

{¶16} On November 30, 2012, the referee provided the parties with a twenty-six page report detailing his findings of fact and recommendations. After reviewing the evidence before him, the referee determined that “[t]he Board has established no record which could support the termination of Mr. Badertscher for good and just cause, as required by Ohio Revised Code Section 3319.16.” (Ref. Rpt. at 25).

{¶17} Specifically, the referee discussed the Board’s decision to specify in its June 1, 2012 Notice the grounds for termination using the terms “willful and persistent,” which were contained in a prior version of R.C. 3319.16.³ The referee acknowledged that the current version of the statute does not use the terms “willful and persistent,” but nevertheless found that “by having included those terms in each specification, the Board became bound to prove that each such specification

³ Under the current version, amended in 2009, R.C. 3319.16 states that “[t]he contract of any teacher employed by the board of education of any city, exempted village, local, county, or joint vocational school district may not be terminated except for good and just cause.” The prior version of the statute read as follows: “The contract of any teacher employed by the board of education of any city, exempted village, local, county, or joint vocational school district may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause.”

was indeed ‘willful and persistent’ as set forth in the formal notice to the teacher.” (Ref. Rpt. at 21).

{¶18} Upon reviewing the evidence put forth by the Board to support the grounds specified in its formal notice regarding Badertscher’s “willful and persistent” violations of board policies, the referee found that the Board failed to prove that “Badertscher was ever disciplined or even warned that his conduct or performance violated any of the specifications or underlying provisions cited therein or that he could face termination for anything he had done or not done.” (Ref. Rpt. at p. 21). As a result, the referee concluded that “[c]ertainly, as to each specification cited by the Treasurer, there is no evidence on the record of Mr. Badertscher’s ‘willful and persistent’ violation of any of the specifications.” (Id.).

{¶19} The referee also discussed the testimony regarding the May 23, 2012, incident and reviewed the video footage from the surveillance camera. With regard to C.K.’s first chokehold of J.E., the referee found that there was no evidence that Badertscher saw or heard anything as he continued to set up the seniors’ exams at the computer cart with his back to the class. As for C.K.’s second chokehold on T.B., the referee found that Badertscher was not in the classroom and could not have seen the incident occur. The referee further stated that he saw “nothing in the video that rose to a level of good and just cause for termination of Mr. Badertscher as required by the statute.” (Ref. Rpt. at 20).

{¶20} Based on his findings, the referee recommended that the Board reinstate Badertscher to his former teaching position “as soon as practicable, with full back pay and any lost benefits.” (Ref. Rpt. at 25). The referee also recommended that Badertscher, the teachers’ union, and the Board work towards completing a “fair and impartial” improvement plan for Badertscher.

The Board’s Rejection of the Referee Report

{¶21} On January 14, 2013, a public Board meeting was held where the Board voted 4 to 1 to pass a resolution rejecting the referee’s report. Specifically, the Board found that nearly all the referee’s factual findings were against the greater weight of the evidence specifically taking issue with the referee’s witness credibility determinations and his assessment of the weight to be accorded to evidence. The Board also rejected the referee’s report finding that the legal conclusions contained therein are contrary to law. The Board then determined that good and just cause existed to proceed with the termination of Badertscher’s contract on seven of the ten grounds enumerated in the June 1, 2012 notice. The Board also for the first time specifically enumerated the May 23, 2012 events as allegation “Number 11” from the June 1, 2012 Notice and specified it as an independent ground for seeking Badertscher’s termination.⁴ An order of termination of Badertscher’s contract was subsequently issued by the Board.

⁴ In its January 14, 2013 Resolution rejecting the referee’s report, the Board specified the following as ground 11: “Repeated failure to provide appropriate supervision of students in his classroom which has

The Common Pleas Court Proceedings

{¶22} On February 12, 2013, Badertscher filed a complaint initiating an original action in the Hancock County Court of Common Pleas pursuant to R.C. 3319.16 and seeking the trial court’s reversal of the Board’s order of termination of his contract. The transcript and exhibits from the referee’s hearing along with the minutes from the pertinent Board meetings and resolutions were filed with the trial court. The parties then filed briefs on the matter.

{¶23} On March 25, 2014, the trial court issued an order requesting the parties to brief whether the June 1, 2012 Notice adequately apprised Badertscher that the May 23, 2012 incident would be considered an independent ground for his termination. The parties subsequently filed additional briefs related to this issue.

The Common Pleas Court Decision

{¶24} On June 17, 2014, the trial court rendered its decision. The trial court addressed certain procedural and due process issues raised by the referee, but ultimately found that the Board’s June 1, 2012 Notice conformed with the due process requirements in the statute. However, the trial court called into question the “methodology used by the Board to identify the basis for its termination action” in its June 1, 2012 Notice. (Doc. No. 41 at 11).

risked the health, safety and welfare of students and others in the school community, with the most recent egregious incident occurring in fourth period class on May 23, 2012, when two male students engaged in a serious physical altercation which left one of the students unconscious in a seizure-type state and led to medical consultation by that student’s family.” (Jan. 14, 2013 Res. at 3). The language is almost identical to the paragraph following the ten enumerated grounds in the Board’s June 1, 2012 Notice.

{¶25} Specifically, the trial court found that the Board’s choice to “delineate” ten enumerated grounds “would lead a reasonable person to believe that there were *only* ten grounds supporting dismissal” asserted in its June 1, 2012 Notice. (Emphasis added) (Id. at 12). As a result, the trial court questioned the authenticity of the Board’s decision *after the completion of the hearing and the filing of the referee’s report*, to enumerate and specify for the first time the May 23, 2012 incident as an additional and independent “eleventh” ground for termination. The trial court remarked upon the significance of this timing by stating, “[c]uriously, the decision to add an eleventh enumerated ground came only after the Referee issued a Decision holding that the Board was obligated to show “willful and persistent” violations of school policies as alleged in the Notice of Termination.” (Doc. 41. at 12-13).

{¶26} The trial court further noted that the “Referee’s entire decision is based on the premise that the Board alleged ten reasons for termination and further asserts that policies were breached both willfully and persistently. The fact that the Board specifically provided ten grounds for termination and labeled them as such means that they are limited to seek termination on only those grounds.” (Id. at 13). Accordingly, the trial court determined that it would not consider the newly enumerated eleventh ground describing the May 23, 2012 incident as an independent ground for establishing good and just cause for termination, but stated

that the events of May 23, 2012 would be considered “in-so-much as they support the ten enumerated grounds for termination.” (Id.).

{¶27} The trial court then addressed the issues raised by Badertscher in his complaint and thoroughly analyzed each of the Board’s findings supporting its rejection of the referee’s report. The trial court then found that the vast majority of Board’s findings rejecting the referee’s decision were not supported by the evidence in the record and concluded that even when supported by the events of May 23, 2012, the Board failed to establish that good and just cause existed to terminate Badertscher’s employment contract based upon the ten enumerated grounds set forth in its June 1, 2012 Notice. Accordingly, the trial court reversed the Board’s decision to terminate Badertscher’s employment contract.

{¶28} On July 17, 2014, the trial court issued a judgment entry ordering the Board to immediately reinstate Badertscher’s employment contract and ordering the Board to pay Badertscher the salary and lost benefits owed to him under his teaching contract, retroactive to July 1, 2012.

{¶29} The Board subsequently filed this appeal, asserting the following assignments of error.

ASSIGNMENT OF ERROR NO. I

**THE COURT OF COMMON PLEAS ERRED IN REFUSING
TO CONSIDER THE MAY 23, 2012 INCIDENT AS GOOD
AND JUST CAUSE FOR TERMINATING BADERTSCHER.**

ASSIGNMENT OF ERROR NO. II

THE COURT OF COMMON PLEAS ERRED IN FAILING TO FIND BADERTSCHER'S WILLFUL AND PERSISTENT VIOLATIONS OF BOARD POLICIES AS GOOD AND JUST CAUSE FOR TERMINATION.

{¶30} For ease of discussion, we elect to discuss the assignments of error together.

Statutory Procedure and Applicable Standards of Review

{¶31} The Ohio Teacher Tenure Act, contained in R.C. Chapter 3319, governs the employment of public school teachers in Ohio. R.C. 3319.16 delineates the procedural requirements that must be followed before a teacher's contract may be terminated for disciplinary reasons. The statute specifies that "[t]he contract of any teacher employed by the board of education of any * * * school district may not be terminated except for good and just cause." R.C. 3319.16.

{¶32} Before terminating a contract, the employing board must furnish the teacher with a written notice of its intention to consider the termination of the teacher's contract "with full specification of the grounds for such consideration." R.C. 3319.16. The teacher may then file a written demand for a hearing "before the board or before a referee." *Id.* A board may suspend a teacher pending final action to terminate the teacher's contract if the board believes that the character of the charges warrants such an action. *Id.*

{¶33} If a hearing is conducted by a referee, the referee must file a report. “A referee’s report consists of both fact-findings and a recommendation. The referee’s primary duty is to ascertain facts. The board’s primary duty is to interpret the significance of the facts.” *Aldridge v. Huntington Local Sch. Dist. Bd. of Educ.*, 38 Ohio St. 3d 154, 158 (1988). After considering the referee’s report, “the board, by a majority vote, may accept or reject the referee’s recommendation on the termination of the teacher’s contract.” R.C. 3319.16. When the hearing has been conducted by a referee, a board must accept the referee’s findings of fact, unless they are against the greater weight, or preponderance, of the evidence. *Aldridge* at paragraph one of the syllabus. However, the school board has the discretion to accept or reject the referee’s recommendation, unless the school board’s decision is contrary to law. *Id.* at paragraph two of the syllabus. Due deference must be accorded to the findings and recommendation of the referee, especially where there exist evidentiary conflicts, because it is the referee who is best able to observe the demeanor of the witnesses and weigh their credibility. *Graziano v. Bd. of Educ. of Amherst Exempted Vill. Sch. Dist.*, 32 Ohio St. 3d 289, 293 (1987).

{¶34} A teacher whose contract has been terminated may appeal the board’s decision to the local court of common pleas by filing a complaint against the board, alleging the facts “upon which the teacher relies for a reversal or

modification of the order of termination of contract.” R.C. 3319.16. Although the common pleas court’s review of a board’s decision is not de novo, R.C. 3319.16 does empower the court to weigh the evidence, hold additional hearings if necessary, consider other evidence in addition to the transcript and record, and render factual determinations. *Graziano*, 32 Ohio St.3d at 292. “The trial court then engages in a hybrid exercise, encompassing ‘characteristics both of an original action with evidence presented and a review of an administrative agency’s decision based upon a submitted record.’ ” *Winland v. Strasburg-Franklin Local Sch. Dist. Bd. of Edn.*, 5th Dist. Tuscarawas No. 12 AP 10 0058, 2013-Ohio-4670, ¶ 28, quoting *Douglas v. Cincinnati Bd. of Edn.*, 80 Ohio App.3d 173, 177 (1st Dist.1992).

{¶35} On appeal, the common pleas court may reverse an order of termination where it finds that such order is not supported by or is against the weight of the evidence. *Oleske v. Hilliard City Sch. Dist. Bd. of Edn.*, 146 Ohio App.3d 57, 62 (10th Dist. 2001), citing *Hale v. Bd. of Edn.*, 13 Ohio St.2d 92, (1968), paragraph one of the syllabus. After the hearing, the trial court shall “grant or deny the relief prayed for in the complaint as may be proper in accordance with the evidence adduced in the hearing.” R.C. 3319.16. Either the teacher or the board may appeal from the court of common pleas’ decision. *Id.*

{¶36} Our appellate review of the trial court’s decision in this special proceeding is “extremely narrow” and “strictly limited to a determination of whether the common pleas court abused its discretion.” *See James v. Trumbull Cty. Bd. of Edn.*, 105 Ohio App.3d 392, 396 (11th Dist. 1995). “Absent an abuse of discretion, an appellate court may not engage in what amounts to a substitution of the judgment of the common pleas court.” *Id.* “Therefore, appellate courts must take great care in applying the abuse of discretion standard, making sure that a reversal occurs only where the trial court truly acted unreasonably or unconscionably.” *Johnson v. Edgewood City School Dist. Bd. of Edn.*, 12th Dist. Butler No. CA2008-09-215, 2009-Ohio-3827, ¶ 9. Most instances of abuse of discretion result from decisions which are “simply unreasonable,” having “no sound reasoning process that would support [the] decision.” *Id.* at ¶ 11, quoting *James* at 396.

Notice and Procedural Due Process Re: the May 23, 2012 Incident

{¶37} On appeal, the Board challenges the trial court’s determination that it failed to give Badertscher adequate notice and due process for termination of his teaching contract based solely on the May 23, 2012 events. The Board claims that both its June 1, 2012 Notice and the remaining record demonstrate that Badertscher was fully apprised that this incident was being independently alleged as good and just cause for termination.

{¶38} The essential requirements of due process are notice and an opportunity to respond. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 546 (1985). This Court has previously held that R.C. 3319.16 provides for the normal due process safeguards, giving the teacher notice and an opportunity for a hearing, and including a right to appeal the board's decision to the court of common pleas. *Elsass v. St. Marys City Sch. Dist. Bd. of Edn.*, 3d Dist. Auglaize No. 2-10-30, 2011-Ohio-1870, ¶ 58.

{¶39} The trial court was clearly disturbed by the fact that the Board only chose to enumerate the May 23, 2012 incident as an independent [eleventh] ground after the referee determined that the Board failed to establish good and just cause for termination based upon its claims that Badertscher *willfully and persistently* violated certain school policies. The primary factor relied upon by the trial court in reaching this conclusion was its belief that the referee did not consider the May 23, 2012 incident as an independent cause for termination due to the manner in which the Board chose to articulate the grounds of termination in its June 1, 2012 Notice. Accordingly, the trial court determined that the Board was estopped from asserting the May 23, 2012 incident as an independent basis for Badertscher's termination in its resolution rejecting the referee's report.

{¶40} However, our review of the record reveals that while the referee expressed concerns regarding the Board's preliminary letter of May 24, 2012

providing notice of the initial investigatory hearing, the referee did in fact consider whether the May 23, 2012 events alone constituted good and just cause for the termination of Badertscher's employment contract pursuant to the formal allegations of the Board's Notice of June 1, 2012. In fact, the referee devoted a significant amount of time to addressing the evidence presented by the parties at the hearing regarding the May 23, 2012 incident and the contents of the surveillance video footage which captured both chokeholds occurring in Badertscher's classroom during fourth period. After discussing this evidence at length, the referee specifically concluded that he saw "nothing in the video that rose to a level of good and just cause for termination of Mr. Badertscher as required by the statute." (Ref. Rpt. at 20).

{¶41} Moreover, we note that the record also establishes that Badertscher had sufficient notice that the events of May 23, 2012 were an independent ground for his termination. When Superintendent Kanable confronted Badertscher in his classroom hours after the chokeholds occurred he specifically admonished Badertscher for the incident and informed him that termination proceedings would be imminent. The Board's May 24, 2012 letter notifying Badertscher of the investigatory hearing focused entirely on what had transpired in Badertscher's classroom the day before on May 23, 2012. Badertscher's written response, which

he subsequently presented at the investigatory hearing, concentrated on his recollection of what took place during his fourth period class on May 23, 2012.

{¶42} Moreover, at the hearing before the referee a substantial amount of the evidence presented by both parties was pinpointed to this single incident, demonstrating that Badertscher’s defense in this respect was not hindered by the way the Board chose to formulate its formal written notice of termination. Thus, even though the Board failed to specifically number the “eleventh” paragraph describing the May 23, 2012 events in its June 1, 2012 Notice, the overall record from the outset overwhelmingly reflects that Badertscher was fully apprised at every stage of the proceedings that the May 23, 2012 incident was the primary—if not, the sole specified allegation of misconduct in this case and the record reflects that he had the opportunity to prepare a response and be heard on this incident at every stage, which comports with the essential requirements of due process.

Good and Just Cause

{¶43} Under the prior version of R.C. 3319.16, the Supreme Court of Ohio construed the term “good and just cause” to involve “a fairly serious matter.” *Hale v. Lancaster Bd. of Edn.*, 13 Ohio St.2d 92, 98-99 (1968).⁵ “What constitutes ‘good and just cause’ can depend on the context and the unique facts of each case.” *Lanzo v. Campbell City Sch. Dist. Bd. of Educ.*, 7th Dist. Mahoning No.

⁵ We have found nothing to suggest that the description by the Supreme Court in *Hale* of “good and just cause” as involving “a fairly serious matter” was affected by the 2009 amendments to R.C. 3319.16.

2010-Ohio-4779, ¶ 18. In *Bertolini v. Whitehall City School Dist. Bd. of Edu.*, the court reviewed the conduct substantiating “good and just cause” for termination under R.C. 3319.16 and noted that a common thread was “that the teacher’s behavior had or could have had a serious effect on the school system.” 139 Ohio App.3d 595, 608 (10th Dist. 2000)

{¶44} In this case, the Board claims that the trial court erred when it failed to affirm its decision to terminate Badertscher’s contract for good and just cause based upon Badertscher’s willful and persistent violations of several Board policies, beginning several years prior to and culminating in the May 23, 2012 incident. The Board maintains that Badertscher repeatedly disregarded the directives of school officials to adhere to certain Board policies and standards. These policies generally set forth the Board’s expectations for teachers to maintain an appropriate learning and educational environment and to employ a standard of care for the supervision of students. (Board Ex. 23).

{¶45} At the hearing before the referee, the Board presented the testimony of several witnesses to establish that Badertscher had a history of failing to adequately supervise and discipline his students and that he had ignored the Board’s explicit warnings that his conduct violated multiple Board policies. Many of the Board’s witnesses attempted to paint a picture demonstrating that the May

23, 2012 incident was simply the proverbial “pot finally boiling over” in Badertscher’s classroom.⁶

{¶46} Thus, although none of these incidents were mentioned in the June 1, 2012 Notice to Badertscher, Principle Frankart and others were permitted to testify to several incidents occurring in Badertscher’s classroom prior to May 23, 2012, which purportedly illustrated Badertscher’s poor disciplinary techniques and repeated violations of Board policies implementing teaching standards.

{¶47} One such incident occurred on November 5, 2008, when J.T., one of Badertscher’s students, was disciplined for making weapons in Badertscher’s class by sharpening pieces of wood. Badertscher was unaware that the student had made the weapons until Principal Frankart spoke to him about it. On cross-

⁶ The Board uses this image in numerous documents throughout the record. However, the only facts alleged in the Board’s written Notices and preliminary hearings of May 24, 2012, May 29, 2102 and June 1, 2012 or even the June 8, 2012 statutory report of the Superintendent to the Department of Education are those related to the single incident of May 23, 2012. We further note that this lack of specification was expressly addressed by Badertscher in his June 4, 2012 letter of response to the June 1, 2012 Notice.

As a result, we seriously question whether the lack of factual basis or particulars in the Board’s June 1, 2012 Notice regarding its allegations that Badertscher willfully and persistently violated board policies complies with the due process safeguards contained in R.C. 3319.16, which require the Board’s notice to contain “*full specification of the grounds*” for termination of the teacher’s contract. We find this especially troublesome given the fact that the Board alleges in its Notice that Badertscher’s violations were willful and persistent, which necessarily contemplates more than one incident and that on each occasion Badertscher knew he was violating the specified policy.

While we do not base our decision upon the issue of notice, the failure of the Board from the outset to include *any* factual specifications regarding the first ten allegations in the June 1, 2012 Notice until the evidentiary portion of the hearing before the referee, necessarily bears upon the credibility of the Board’s later claims before the referee, common pleas court or this Court that any of these incidents, alone or together, were ever considered serious enough by the Board to constitute good and just cause for termination.

examination, Principal Frankart recalled the action she took with respect to Badertscher's role in the incident.

Counsel: But you don't know—sitting here today you don't know for a fact whether you sat down with Mr. Badertscher and spoke to him about this.

Frankart: I do not have it documented on this paper.

Counsel: And we can agree that Mr. Badertscher wasn't written up for this, was he?

Frankart: No, he was not written up for that.

Counsel: He didn't receive a verbal warning, did he?

Frankart: No.

Counsel: Didn't receive any written warnings, right?

Frankart: No, he did not.

(Doc. No. 15 at 132-33).

{¶48} Another incident raised for the first time at the hearing before the Referee occurred in April of 2009 during a time when Principal Frankart was giving a tour of the building to community members. When the group arrived at Badertscher's area they discovered a student sleeping on one of the workshop tables just outside Badertscher's classroom. Badertscher reported that the student was suffering from an unbearable migraine headache so he allowed her to lie down in the workshop where it was dark and quiet. When asked on cross-

examination how she addressed the situation with Badertscher, Principal Frankart stated the following:

Counsel: And did Mr. Badertscher receive any discipline for that?

Frankart: Discipline, no.

* * *

Counsel: Did you sit down and have a talk with Mr. Badertscher after that event?

Frankart: Yes.

* * *

Counsel: And what was talked about at that time?

Frankart: Mr. Badertscher informed me that D.A. said she had a headache so he thought he would let her go out there in a dark area to rest.

Counsel: And you told him how inappropriate that was, right?

Frankart: Yes.

* * *

Counsel: Did you tell him I'm putting you on notice that I'm not going to tolerate this behavior on you part anymore?

Frankart: No.

Counsel: Why not? You were concerned, right? You were embarrassed and concerned.

Frankart: Yes.

Counsel: Not only that but this was following the November 5 matter involving J.T. and you still weren't concerned enough to give a strong warning to Mr. Badertscher that this was inappropriate and wrong?

Frankart: We discussed that was inappropriate and that was the extent mainly because, again, through my years up until that time never was discipline put on a teacher for those types of actions.

(Doc. No. 15 at 133-36).

{¶49} In the fall of 2009, another incident occurred when some of Badertscher's students were spray painting their school projects during class with the workshop garage door open for additional ventilation. Unbeknownst to Badertscher, the wind had carried some of the paint to staff members' vehicles which were parked in close proximity to the garage door. Principal Frankart discussed her conversation with Badertscher regarding the incident on cross-examination.

Counsel: Okay. Was this something you disciplined Mr. Badertscher for?

Frankart: I did not.

Counsel: Did you reprimand him in any way?

Frankart: We had a discussion.

Counsel: But did you reprimand him?

Frankart: I did not.

Counsel: Okay. But you had a discussion, correct?

Frankart: Yes.

Counsel: And what was the discussion?

Frankart: To let him know that had happened and to also let him know Ruth McGee in our kitchen was especially upset about the matter.

(Doc. No. 15 at 165-66).

{¶50} Principal Frankart also recalled an incident during the 2009-2010 school year when she overheard T.G., one of Badertscher's students, being loud and using inappropriate language in the cafeteria. Upon further investigation, she discovered that T.G. was participating in a Future Farmers of America meeting with a handful of Badertscher's students, all of whom were unsupervised. Principal Frankart escorted T.G. back to Badertscher's classroom and informed Badertscher of T.G.'s misconduct. Principle Frankart stated the following on cross-examination regarding her conversation with Badertscher after the incident:

Counsel: * * * And you met with Mr. Badertscher after this?

Frankart: I met with him at that time to let him know his students were out of the room and that's what they were doing out in the cafeteria area when we had a number of community members walking through there to get to their meeting in the library.

Counsel: And you reminded him about the number of times you had to call to his attention—that you called his attention to matters involving students during the 2008-2009 school year; I'm sure you did that, right?

Frankart: No, I did not.

* * *

Counsel: And, again, you did not write Mr. Badertscher up for that matter involving—involving T.G., right?

Frankart: Correct.

Counsel: You didn't give him a verbal warning, right?

Frankart: No, I did not.

(Doc. No. 15 at 141-43).

{¶51} This pattern of inaction by school officials continued even with regard to a potentially more serious instance of student misconduct occurring just a few weeks prior to the May 23, 2012 incident. Several students were standing outside near the workshop door for several minutes unsupervised and were throwing golf balls across the street at the house of a teacher's aide. The golf balls were part of a project for Badertscher's middle school students. Badertscher was not aware that the students in the workshop had obtained the golf balls and were engaging in the misconduct. Principal Frankart provided the following testimony on cross-examination regarding her discussion with Badertscher about the matter.

Counsel: What about Mr. Badertscher, did you speak with him?

Frankart: We talked with Mr. Badertscher in terms of what students were doing at the time that that happened.

Counsel: Who is we?

Frankart: Mr. Gerken and I, I'm sorry.

Counsel: Okay. And you both sat down and spoke with Mr. Badertscher?

Frankart: I believe that one was actually in the shop. I think we were down there to see what he was aware of and what students might have been involved.

Counsel: Okay. And how long did that discussion last.

Frankart: Just a few minutes.

Counsel: Again, did you read Mr. Badertscher the riot act that kids were throwing golf balls at someone's house?

Frankart: I did express that not only was it harmful to a staff member's home and inappropriate but that the matter could have been far more severe had the golf ball hit a passing vehicle.

Counsel: That's right. So I'm sure you told him, listen, this is the last time. I'm not going to tolerate this anymore. You told him that, right?

Frankart: No, not in those words.

Counsel: Well, what words did you use?

Frankart: The matter was discussed so that hopefully things like that did not continue.

(Doc. No. 15 at 150-51).

{¶52} These transcript excerpts are a few examples of many similar exchanges present in the record which serve to undermine the Board's position that Badertscher "willfully" violated Board policies. On the contrary, instances like the ones cited above support Badertscher's position that school officials never

explicitly communicated to him their purported belief that the number of student discipline issues in his class was the result of his poor classroom management or some other deficiency that he needed to improve upon. As a result, even if we were to accept the Board's oversimplified definition of willful as "after warned" that is asserted in its appellate brief, the record fails to establish that Badertscher was ever "warned" or even told by the administration that *his conduct* constituted a violation of a specific Board policy let alone that his job could be in jeopardy so that he ostensibly had the opportunity to willfully continue to disregard the policy or warning. In fact, the record demonstrates that Principal Frankart had observed Badertscher's class and completed two evaluations of Badertscher neither of which offered any criticism of Badertscher's teaching style.

{¶53} Badertscher also testified that when he spoke with the administration after each student disciplinary issue the conversations were framed in the context of assisting Badertscher with the difficulty of managing the classroom set-up—an issue unique to Badertscher's situation as observed by trial court in its opinion.

Badertscher's classroom atmosphere cannot be compared with that of a teacher in, for example, math class. Badertscher's "classroom" is composed of two areas—a classroom section and a much larger shop section. These two sections are separated with only a doorway connecting them. Due to the presence of several work stations in the shop area and the hands-on nature of Badertscher's instruction, Badertscher is forced to spend time at each individual station instructing students. In the meantime, there are workstations that are unavoidably left unsupervised.

(Doc. No. 41 at 32-33). Badertscher's testimony at the hearing, which is corroborated by classroom rosters admitted as exhibits, revealed that he typically taught a class that consisted of two combined courses with different curriculums and skill sets and which often required one group of students to be in the workshop while the others remained in the classroom for instruction.

{¶54} In sum, the lack of *any* documented corrective action taken against Badertscher when a student infraction occurred suggests that the administration did not consider *Badertscher's* conduct in any of the incidents prior to May 23, 2012, whether taken separately or cumulatively, to be serious enough at the time to be reprimanded let alone to constitute good and just cause for termination of his employment contract. As the trial court remarked, “[i]n the interests of fairness it seems to the Court that if the Board demands that the past incidents be considered, the lack of official consequences for these alleged breaches of policy is also relevant to determine if they were really perceived by the administration as a matter of a serious nature.” (Doc. No. 41 at 36). The trial court's sentiment in this regard is further supported by the fact that up until the events of May 23, 2012, Principal Frankart was working on the completion of a “Performance Improvement Plan” to assist Badertscher with classroom management issues for the 2012-2013 school year.⁷ The Board's decision to implement an improvement

⁷ The record indicates that Badertscher was not aware of the existence of this improvement plan.

plan to assist with Badertscher's unique situation directly contradicts its position that any of the incidents preceding May 23, 2012 either individually or collectively constituted good and just cause for termination.

{¶55} We note that throughout these proceedings the Board has consistently misconstrued both the referee's and trial court's observations regarding its failure to warn Badertscher that he could face termination for his performance as imposing a requirement of progressive discipline on the Board which we agree is explicitly not included in Badertscher's employment contract and is therefore irrelevant to our decision. However, in making this argument the Board simply overlooks the fact that because the record is devoid of any evidence that it effectively communicated to Badertscher that *his conduct* in any of the disciplinary issues involving his students prior to May 23, 2012 violated Board policies, the Board is now completely unable to establish a willful or persistent intent on Badertscher's part to violate Board policy, which is the burden the Board imposed upon itself by framing the grounds for termination in the manner it did. Accordingly, we do not find that the trial court abused its discretion when it determined that the Board failed to demonstrate that Badertscher ever willfully and persistently violated Board policies to warrant good and just cause for termination of Badertscher's contract under R.C. 3319.16.

Good and Just Cause re: The May 23, 2012 Incident Alone

{¶56} Notwithstanding the determinations of the referee and the Common Pleas Court that the totality of the evidence is insufficient to establish willful and persistent violations of Board policy and is therefore insufficient to establish good and just cause for termination, the Board argues that the events of May 23, 2012 are alone sufficient to establish good and just cause for termination of Badertscher's contract under R.C. 3319.16.

{¶57} At the hearing before the referee, the footage from the video surveillance camera in Badertscher's classroom, which captured both chokeholds, was admitted as an exhibit. C.K., the student who applied the chokeholds to the two other students, and Badertscher both provided testimony regarding the incident. The evidence demonstrates that the three senior classmen appeared at the beginning of Badertscher's fourth period class before instruction began and requested to take their exams early. Badertscher testified that the reason he had originally scheduled for the seniors to take their exams at a later time was because the computer cart was not available until fifth period. However, Badertscher noticed that the computer cart was free at the time of the seniors' request and he made the decision to accommodate them thinking that the exam set-up would only take a couple of minutes.

{¶58} The evidence establishes that Badertscher began the exam set-up on a laptop in the classroom while he had his back to the class. This created the opportunity for C.K., who was seated on the other side of the classroom, to begin engaging in “horseplay” during which he knocked over a chair and began interacting with the two other students. There is no evidence from the video or the testimony at the hearing that Badertscher heard or saw any of C.K.’s antics. The video footage demonstrates that Badertscher was still in the room with his back turned to the class and did not notice when C.K. applied the first very brief chokehold to J.E.

{¶59} Badertscher testified that once he entered his teacher’s password into the exam website, he told the students in the classroom that he would be a couple minutes while he set up the seniors in the workshop to take their exams. One of the seniors had difficulty logging into the exam website which extended Badertscher’s absence from the classroom to approximately six minutes. It is during this time that C.K. applied the chokehold to T.B. for thirty-seven seconds eventually causing T.B. to momentarily lose consciousness. The record demonstrates that when Badertscher returned to the classroom he was unaware that either chokehold took place, or that T.B. had experienced any distress, and proceeded with his classroom instruction.

{¶60} At the outset, we note that nothing in the record suggests that Badertscher was engaging in activity inconsistent with his teaching responsibilities at the time C.K.'s misconduct occurred. Nevertheless, the Board argues that Badertscher is directly responsible for C.K.'s actions because he decided to allow the seniors to take their exams a period early which required Badertscher to leave his fourth period class unsupervised for several minutes. However, the master class schedule, which was admitted as an exhibit at the hearing, establishes that Badertscher also had a class during fifth period when the seniors were originally scheduled to take their exam, which suggests that he would also be required to leave some students unsupervised during that class while he set-up the seniors with the exam.

{¶61} Moreover, the record demonstrates that Badertscher was assigned to teach two courses during the fourth period class. This made it extremely difficult for Badertscher to supervise every student in one room while teaching two different curriculums and workshop skill levels. Badertscher recalled that there were 24 students in his fourth period class during which he taught Agricultural Science I and II.⁸ Badertscher testified that the State guidelines recommend limiting Agriculture classes to 15 students per class due to the hands on nature of the courses. We also find it noteworthy that one of the components of the

⁸ The master schedule actually indicates that during fourth period Badertscher was assigned to teach students in three different courses: "Ag. Sci." I, II, and III. See exhibit 2E.

proposed “Performance Improvement Plan” for the 2012-2013 school year created by Principal Frankart was to provide Badertscher with a teacher’s aide to help him better manage the students in his workspace. Each of these factors indicates that the Board was aware of the unusual circumstances of Badertscher’s courses making it a challenge to supervise all the students at the same time.

{¶62} The record also demonstrates that C.K. had a history of discipline issues in the two years he attended Liberty-Benton High School, many of which were reported to the administration by Badertscher. C.K. testified that Badertscher tried to motivate him to keep him occupied and out of trouble. When asked at the hearing why he appeared to be disciplined in Badertscher’s class more than in his other classes, C.K. stated “I think because since there was two classes in one class in Mr. B’s class that we would all feel more free to horseplay, and then we would get caught and get in trouble. So other than that I was probably sleeping in other classes.” (Doc. No 15 at 260). C.K. also testified that he would stay awake more in Badertscher’s class because of the hands-on nature of the coursework. He further explained that there were several students in the class who also engaged in horseplay and did not always listen to Badertscher’s reprimands. As a result, and in strict adherence to school policy, Badertscher wrote up several disciplinary referrals on the students in that class.

{¶63} It is apparent from our review of the record that there were a number of variables which contributed to the May 23, 2012 events that were not within Badertscher’s control. We simply fail to see how the decision of a teenage-student to take advantage of a small window of opportunity and engage in serious misconduct while the teacher is attending to other tasks directly related to his teaching responsibilities constitutes good and just cause for termination of the teacher’s contract. We concur with the referee and the trial court that C.K.’s actions during fourth period that day may very well have constituted “a fairly serious matter.” However, the Board has failed to put forth any proof of conduct attributable to Badertscher which rises to the level of good and just cause for termination under R.C. 3319.16.

{¶64} For all these reasons, we conclude that the trial court did not abuse its discretion when it upheld the decision of the Referee and determined that the Board failed to establish good and just cause for terminating Badertscher’s contract.

{¶65} Accordingly, we overrule the Board’s assignments of error and affirm the decision of the trial court.

Judgment Affirmed

ROGERS, P.J. and WILLAMOWSKI, J., concur.

/jlr