

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Darrell Hykes

Court of Appeals No. H-12-003

Appellant

Trial Court No. CVF 2010 0047

v.

The Board of Education of the
Bellevue City School District

DECISION AND JUDGMENT

Appellee

Decided: December 21, 2012

* * * * *

Dennis L. Pergram, for appellant.

Matthew John Markling, Patrick Vrobel, Sean Koran, and
Kenneth S. Stumphauzer, for appellee.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Darrell Hykes, appeals the judgment of the Huron County Court of Common Pleas affirming the order of termination issued by appellee, the Board of

Education of the Bellevue City School District (“Board”). For the reasons set forth below, we affirm.

A. Facts and Procedural Background

{¶ 2} On August 1, 2008, the Board hired Hykes as an assistant to the superintendent under a three-year contract. However, the Board suspended Hykes without pay on July 16, 2009, pending termination proceedings. The Board subsequently issued a resolution of intent to consider termination due to gross inefficiency, willful and persistent violations of reasonable Board policies, and other good and just cause. Specifically, Hykes was accused of having violated several Board policies concerning harassment.

{¶ 3} Upon receipt of the Board’s resolution, Hykes invoked his right pursuant to R.C. 3319.16 to obtain an impartial hearing in front of a referee. Harry H. Taich was appointed as referee and a hearing was held. The evidence obtained at the hearing was substantial. The referee’s report reveals that, on numerous occasions, Hykes used the phrase “mother f---er” when talking to other employees, in order to describe his boss and other school district employees. Further, several of the school district’s employees were made to feel threatened by Hykes and testified that Hykes’ presence resulted in a hostile work environment. The superintendent testified that the performance review he gave Hykes was the second worst review for the 2008-2009 school year.

{¶ 4} The report also details how Hykes approached several female employees and asked them if they would participate in a wet t-shirt contest during a bike week in

Sandusky, Ohio. Additionally, Hykes showed several female employees a provocative picture of his girlfriend wearing a low-cut top with her breasts hanging out and a cigar stuck between her breasts symbolizing a penis. Finally, Hykes openly discussed an encounter he had with a female masseuse and explained how he gave the masseuse a massage and was able to determine she had breast implants.

{¶ 5} As a result of Hykes' comments, one female employee was so disturbed that she became physically ill and was not able to focus on her work. Other female employees testified that they were appalled, sickened, demeaned, and felt they were sexually harassed. Upon consideration of the evidence presented during the four-day hearing, the referee issued a lengthy decision in which he recommended termination based on Hykes' willful and persistent violations of Board policies and other good and just cause.

{¶ 6} The Board agreed with the referee's recommendations and terminated Hykes' employment. Thereafter, Hykes appealed the Board's decision to the Huron County Court of Common Pleas. The trial court examined the record along with the referee's decision and determined that the Board lawfully terminated Hykes.

{¶ 7} In making its decision to affirm the Board's termination of Hykes, the trial court specifically pointed out that the referee's findings of fact were supported by the record and the Board's decision to follow the referee's recommendations was proper.

{¶ 8} The trial court overruled Hykes' argument that the Board erroneously terminated his contract without first considering his employment record or giving him an

opportunity to correct his behavior. While Hykes cited several cases that allegedly supported his argument, the trial court found the cited authority to be factually distinguishable. Ultimately, the trial court held that the Board “got it right” when it followed the referee’s recommendations. Accordingly, the trial court dismissed Hykes’ complaint. It is from this dismissal that Hykes now appeals.

B. Assignments of Error

{¶ 9} On appeal, Hykes assigns the following errors for our review:

1. The trial court abused its discretion in affirming the Board of Education’s order of termination because the Board of Education did not consider Mr. Hykes’ employment record prior to terminating his contract.
2. The trial court abused its discretion in affirming the Board of Education’s order of termination because the Board of Education did not give Mr. Hykes an opportunity to change his alleged conduct.
3. The trial court abused its discretion in affirming the Board of Education’s order of termination because the Board of Education order of termination was not supported by a preponderance of substantial reliable and probative evidence, was against the manifest weight of the evidence and was contrary to law and was procedurally flawed.
4. The trial court abused its discretion by not awarding attorney’s fees to Mr. Hykes.

II. Standard of Review

{¶ 10} R.C. Chapter 3319 governs the employment of public school teachers, principals, superintendents, and other school officials. R.C. 3319.16¹ outlines the circumstances under which a public school employee's employment contract may be terminated. The statute states: "The contract of any teacher * * * 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." R.C. 3319.16. The use of the word "teacher" in the statute is defined to include instructors, principals, supervisors, and superintendents. R.C. 3319.09.

{¶ 11} Before terminating a contract, the board must notify the teacher of its intention to terminate and state its grounds for termination. R.C. 3319.16. "Within ten days after receipt of the notice from the treasurer of the board, the teacher may file with the treasurer a written demand for a hearing before the board or before a referee." *Id.*

{¶ 12} If, as in this case, the teacher requests a referee, the referee has ten days from the conclusion of the hearing to file a report. *Id.* The board must accept the referee's findings of fact, unless they are against the greater weight or preponderance of the evidence. *Aldridge v. Huntington Local School Dist. Bd. of Edn.*, 38 Ohio St.3d 154, 527 N.E.2d 291 (1988), paragraph one of the syllabus. However, the school board has

¹ This statute was amended effective October 16, 2009, after the Board terminated Hykes. Since Hykes was terminated prior to the effective date of the amended statute, the prior version of the statute is used throughout this decision.

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.

{¶ 13} If the board terminates the teacher's contract, the teacher may appeal to the 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. After the common pleas court examines the transcript and record of the hearings, it "shall hold such additional hearings as it considers advisable, at which it may consider other evidence in addition to the transcript and record." *Id.*

{¶ 14} After considering all the evidence, the trial court must then "grant or deny the relief prayed for in the complaint as may be proper in accordance with the evidence adduced in the hearing." *Id.* The trial court's decision may be appealed by either the teacher or the board. *Id.*

{¶ 15} The standard of review applied by this court is "extremely narrow" and is "strictly limited to a determination of whether the common pleas court abused its discretion." *James v. Trumbull Cty. Bd. of Edn.*, 105 Ohio App.3d 392, 396, 663 N.E.2d 1361 (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.* An abuse of discretion is "more than an error of law or judgment" but a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Oleske v. Hilliard City School Dist. Bd. of Edn.*, 146 Ohio App.3d 57, 62, 764 N.E.2d 1110 (10th Dist.2001). An abuse of discretion implies "that the court's attitude is unreasonable, arbitrary or

unconscionable.” *Katz v. Maple Hts. City School Dist. Bd. of Edn.*, 87 Ohio App.3d 256, 261, 622 N.E.2d 1 (8th Dist.1993).

III. Analysis

A. The Board’s Decision Not to Consider Hykes’ Employment

Record Prior to its Termination Decision

{¶ 16} In Hykes’ first assignment of error, he argues that the trial court abused its discretion by affirming the Board’s decision to terminate his employment, because the Board should have considered his employment record prior to termination. Hykes points to two Ohio cases to support his argument. We have reviewed these cases and agree with the trial court that they are factually distinguishable and do not support Hykes’ position.

{¶ 17} The first case cited by Hykes is *Katz v. Maple Heights City School Dist. Bd. of Edn.*, 87 Ohio App.3d 256, 622 N.E.2d 1 (8th Dist.1993). In *Katz*, an elementary school music teacher was terminated after thirteen years of employment for misrepresenting the reason for his absence from school by stating that he was ill. *Id.* at 258-259. In fact, he was on a vacation in Florida. *Id.* Although the referee recommended sanctions short of termination, and in spite of the fact that Katz was an effective and competent teacher, the school board decided to terminate Katz’s employment. *Id.* at 258. Katz appealed, and the trial court affirmed the board’s decision.

{¶ 18} In reversing the decision of the trial court, the court of appeals pointed to the superintendent’s testimony that Katz’s stellar employment record had not been

considered prior to his recommendation of termination. *Id.* at 262. Accordingly, the court stated:

Where, as here, the relevant statutory provisions and the teaching contract itself provides for a range of possible sanctions for a particular offense, it is necessary that a superintendent take into account a teacher's employment record prior to recommending a particular sanction. Similarly, the board itself must consider a teacher's employment record prior to imposing a particular sanction. Moreover, the sanction imposed should be commensurate with the offense and the individual surrounding circumstances. *Id.* at 263.

{¶ 19} Our review of *Katz* and the record before us reveals numerous factual distinctions. First, the court in *Katz* was faced with reviewing whether the school board applied the proper level of deference to the referee's findings. As noted above in *Katz*, the board disagreed with the referee's recommendations. Here, the Board adopted the referee's factual findings. Further, the Board's termination of Hykes was consistent with the referee's recommendations.

{¶ 20} Second, unlike *Katz* who was employed for thirteen years with no incident, Hykes was in his first year of employment when the conduct giving rise to his termination occurred. In other words, there was no employment record to consider since Hykes was a relatively new employee.

{¶ 21} Third, the alleged misconduct is much different in *Katz* than in the case sub judice. In *Katz*, the board decided to terminate a tenured teacher over an isolated attendance issue that was escalated due to “severe emotional pressure” brought about as a result of Katz’s crumbling marriage. *Id.* at 263. Here, Hykes engaged in repeated use of profanity towards other school district employees. Further, he made inappropriate, sexually-charged comments to several female employees that left one employee sick and others feeling harassed and threatened. Therefore, *Katz* is inapposite.

{¶ 22} Just as in *Katz*, the second case cited by Hykes, *Johnson v. Edgewood City School Dist. Bd. of Edn.*, 12th Dist. No. CA2008-09-215, 2009-Ohio-3827, is factually distinguishable. *Johnson* also involved the termination of a teacher that had a long employment history and a nearly spotless employment record. In addition, the board rejected the referee’s report and recommendations. Rather than imposing a lighter sanction, the school board in *Johnson* terminated the teacher for one incident involving the assignment of a project that required students to speculate as to their classmates’ future lives. The assignment included public reading of the students’ papers in class, which resulted in the embarrassment of certain students. The type of misconduct in *Johnson* bears little resemblance to the profane behavior exhibited by Hykes.

{¶ 23} Upon our thorough review of the record, we conclude that the cases Hykes cites in support of his first assignment are factually distinguishable. Those cases require a school board to consider a teacher’s prior employment record before *deciding to reject a referee’s recommendations and terminate the teacher for a single, isolated incident*

when the teacher has held the position for a period of time sufficient to produce an employment record (i.e. at least several years). Since the Board in this case adopted the referee's recommendations to terminate Hykes, a relatively new school district employee, for a pattern of misconduct that spanned several months and violated numerous Board policies, the Board was not required to consider Hykes' prior employment record.

{¶ 24} Even if the cited authority were applicable to this case, we note that the Board did actually consider Hykes' employment record prior to making their decision. The referee's report goes into great detail about Hykes' employment record. The referee's report was expressly incorporated into the Board's order of termination. In addition, the Board's resolution adopting the referee's recommendations states that "each member of the Board has received a copy of the Referee's Report and Recommendation and has had an opportunity to fully read, review and consider the same." Accordingly, Hykes' first assignment is without merit.

**B. The Board's Decision Not to Give Hykes an Opportunity to Correct
his Behavior Prior to its Termination Decision**

{¶ 25} In his second assignment of error, Hykes argues that the Board should have given him an opportunity to correct his behavior prior to terminating his employment. Because the Board failed to do so, Hykes argues that the trial court abused its discretion when it affirmed the Board's order of termination.

{¶ 26} Upon our review of the record and the cases cited by both parties in their briefs, we conclude that Ohio law does not require a school board to provide a teacher

with an opportunity to correct his behavior prior to terminating the employee. For example, in *Florian v. Highland Local School Dist. Bd. of Edn.*, 24 Ohio App.3d 41, 493 N.E.2d 249 (9th Dist.1983), the court affirmed the school board's termination of a 15-year teacher and wrestling coach whose work was considered "commendable" because he instructed a student to weigh-in for another student in order to qualify the other student for a lighter weight class. In affirming the board's decision to terminate, the court pointed out the fact that the teacher's conduct was hostile to the school community.

{¶ 27} Although providing the teacher with an opportunity to improve his behavior may be advisable in some situations involving misconduct that does not place the school community's welfare in jeopardy, it defies common sense to require such an opportunity in all cases. See *Bertolini v. Whitehall City School Dist. Bd. of Edn.*, 139 Ohio App.3d 595, 744 N.E.2d 1245 (10th Dist.2000) (reversing trial court's decision to affirm board's termination of a teacher, noting that the board never gave the teacher an opportunity to change his conduct, but that "such an opportunity may not be required in all cases"). Rather, a school board must be permitted to expeditiously remove a potentially dangerous employee from the school community where that employee creates a hostile work environment.

{¶ 28} Here, the record supports the referee's conclusion that Hykes' conduct was hostile and unacceptable in a public school setting. On numerous occasions, Hykes used the phrase "mother f---er" to describe his boss and other school district employees. Further, several of the school district's employees testified that Hykes' conduct created a

hostile work environment. In addition, Hykes approached several female employees and asked them if they would participate in a wet t-shirt contest. Hykes also showed several female employees a provocative picture of his girlfriend wearing a low-cut top with her breasts hanging out and a cigar stuck between her breasts symbolizing a penis.

{¶ 29} In light of the foregoing, we conclude that the Board was not required to provide Hykes with an opportunity to correct his behavior prior to terminating Hykes. Accordingly, Hykes' second assignment of error is not well-taken.

C. Sufficiency and Manifest Weight of the Evidence

{¶ 30} In his third assignment of error, Hykes argues that the trial court abused its discretion when it affirmed the Board's order of termination because the Board's order was not supported by the evidence, was against the manifest weight of the evidence, was contrary to law, and was procedurally flawed. In particular, Hykes argues that the evidence is insufficient to establish that he violated Board policy AC and Board policy ACAA.

{¶ 31} Hykes' employment contract specifically provides for termination for, inter alia, willful and persistent violations of reasonable Board policies. The Board's resolution alleged that Hykes violated several Board policies, including Board policy AC and Board policy ACAA.

{¶ 32} Board policy AC provides in relevant part:

The Board does not permit discriminatory practices and views harassment as a form of discrimination. Harassment is defined as

intimidation by threats of or actual physical violence; the creation, by whatever means, of a climate of hostility or intimidation; or, the use of language, conduct or symbols in such a manner as to be commonly understood to convey hatred, contempt or prejudice or to have the effect of insulting or stigmatizing an individual.

Employees or students who engage in discrimination/harassment of another employee or student shall be subject to disciplinary action.

In addition, Board policy ACAA provides in relevant part:

Any person who engages in sexual harassment while acting as a member of the school community is in violation of this policy.

* * *

Definition of Sexual Harassment: Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature may constitute sexual harassment. Such offensive behavior includes but is not limited to the following:

* * *

3. such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile or offensive environment.

{¶ 33} The Board listed several facts to support its position that Hykes violated these Board policies. The referee considered all the evidence and found that Hykes had

committed several of the acts alleged by the Board. In essence, the referee concluded that Hykes used profanity toward other district employees on numerous occasions, invited several female employees to join a wet t-shirt contest, asked district employees to look at a vacation picture depicting his girlfriend in a sexually inappropriate manner, and made other sexual comments to district employees concerning the size of his genitals.

{¶ 34} The Board has admitted in its brief that the record contains no testimony regarding Hykes' alleged comments regarding the size of his genitals. Notwithstanding the Board's admission, we conclude that the overwhelming evidenced produced during the hearing conducted by the referee supports the Board's decision to terminate Hykes' employment. Therefore, the trial court did not abuse its discretion when it affirmed the Board's order of termination. Accordingly, Hykes' third assignment of error is not well-taken.

D. Decision Denying Attorney's Fees

{¶ 35} In Hykes' fourth assignment of error, he argues that the trial court abused its discretion by not awarding attorney's fees. Hykes asserts that the Board acted in bad faith when it made allegations against him without offering evidence to support those allegations. Although R.C. 3319.16 does not provide for attorney's fees, Hykes asks us to apply a principle to termination proceedings that is applied in many tort contexts—namely, that attorney's fees are available to the prevailing party when the losing party acts in bad faith. Notably, the principle Hykes asks us to apply in this case actually rules out any attorney's fees award to Hykes since he is not the prevailing party.

{¶ 36} Further, our review of the record reveals abundant evidence that supports the Board's allegations regarding Hykes' conduct. We cannot say that the Board acted in bad faith in light of the evidence. Therefore, the trial court did not abuse its discretion by not awarding attorney's fees to Hykes. Accordingly, Hykes' fourth assignment of error is not well-taken.

IV. Conclusion

{¶ 37} Having found Hykes' assignments of error not well-taken, we hereby affirm the judgment of the Huron County Court of Common Pleas. Costs are assessed to Hykes in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
