STATE BOARD OF EDUCATION

STATE OF GEORGIA

SCOTT WHITE,	:	
	:	
Appellant,	:	
	:	**CASE NO. 1996-42**
vs.	:	
	:	**DECISION**
EFFINGHAM COUNTY	:	
BOARD OF EDUCATION,	:	
	:	
Appellee.	:	

This is an appeal by Scott White (Appellant) from a decision by the Effingham County Board of Education (Local Board) not to renew his teaching contract based on its finding that he willfully neglected his duties and exhibited unprofessional conduct because he did not modify his classes to account for the special needs of his students, which resulted in large failure rates. The decision of the Local Board is sustained.

Appellant has been a teacher for fourteen years. During the past seven years, he taught Georgia History to eighth grade students in the Effingham County Middle School. During the 1994-1995 school year, the principal became concerned about the high failure rate in Appellant's classes and prepared a professional development plan for Appellant. During the 1994-1995 school year, Appellant had an overall failure rate of fifty percent in his classes.

During the 1995-1996 school year, Appellant had a failure rate in excess of thirty percent. All of the special education students and students functioning with support team guidance who were assigned to his class failed.[1] The Local Superintendent recommended against renewing Appellant's teaching contract on the grounds that Appellant was incompetent, willfully neglected his duties, and acted unprofessionally.

Under the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. Secs. 1400 *et seq.*, (the "Act"), students in need of special education services can receive those services in a regular education class. The Act also provides for student support teams (SST) to evaluate students who have problems in school to determine whether they should be tested for special education eligibility.

The Local Board conducted a hearing on June 12-13, 1996. Evidence was presented that an acceptable failure rate is approximately ten percent and should not exceed twenty percent. There were other teachers who had high failure rates and one teacher had a failure rate higher than Appellant's. In addition, the Local Board does not have a grading policy; the assignment of grades is the responsibility of the teachers. The Local Superintendent's expert witness testified that a high failure rate does not, by itself, establish incompetence because any number of factors can influence a failure rate.

On June 20, 1996, the Local Board issued a decision to accept the Local Superintendent's recommendation not to renew Appellant's teaching contract after finding him guilty of willful neglect of duty and unprofessional conduct. Appellant then appealed to the State Board of Education.

Appellant claims on appeal that there was no evidence of either willful neglect of duty or unprofessional conduct, and that the Local Board exceeded its authority because a teacher cannot be dismissed under the provisions of O.C.G.A. § 20-2-940(a) for not changing grades. The Local Board claims that under the "any evidence" rule, there was support for its decision.

The "any evidence" rule provides that, "The standard for review by the State Board of Education is that if there is any evidence to support the decision of the local board of education, then the local board's decision will stand unless there has been an abuse of discretion or the decision is so arbitrary and capricious as to be illegal. *See, Ransum v. Chattooga County Bd. of Educ.*, 144 Ga. App. 783, 242 S.E.2d 374 (1978); *Antone v. Greene County Bd. of Educ.*, Case No. 1976-11 (Ga. SBE, Sep. 8, 1976)." *Roderick J. v. Hart Cnty. Bd. of Educ.*, Case No. 1991-14 (Ga. SBE, Aug. 8, 1991).

Appellant's defense in this case is that he should not give grades to students if they have not earned the grade. He has cast the case as one that involves his being asked by the administration to change students' grades so more of them will pass, and that his non-renewal is the result of his refusal to change grades, which is in violation of O.C.G.A. § 20-2-940(a).

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

> A teacher ... shall not have [a] contract terminated ... for refusal to alter a grade or grade report if the request to alter a grade or grade report was made without good and sufficient cause."

The issue, however, is not whether Appellant should change any grades and give grades to students if they have not earned the grades. Instead, the issue is whether Appellant has been effective in teaching so that ninety percent of his students can pass.

Under Appellant's model, a teacher should be able to instruct in any manner, test the students in any manner, and assign the resulting grades to the students. Under this model, it is satisfactory if a university professor, who lectures about history at the university level, presents the same material, using the same methods and the same questions, without modification, to a sixth or seventh grade class that has never studied history and only have one percent of the students pass the course. This model may be efficient for the teacher, but it is not effective for the students.

To be effective for the students, the instructor has to consider the functional level of the students and make adjustments in the way the material is presented. Appellant was not asked to make any changes in grades or grade reports. Instead, he was asked to change his teaching methods so more students would pass. The fact that the failure rate in Appellant's classes exceeded thirty percent is evidence that supports the Local Board's decision that Appellant failed to carry out his responsibility as a teacher.

Appellant claims that a high failure rate does not establish that he willfully neglected his duties. In *Terry v. Houston Cnty. Bd. of Educ.*, 178 Ga. App. 296 (1986), the Court of Appeals defined willful neglect of duty as meaning,

> "a flagrant act or omission, an intentional violation of a known rule or policy, or a continuous course of reprehensible conduct, [both of which require] ... a showing of more than mere negligence."

Id. at 299. Appellant claims there was no evidence of a flagrant act, a flagrant omission, or a violation of a known rule or policy, or a continuous course of reprehensible conduct. There was, however, evidence that Appellant became aware that a special education student was assigned to his class, but he did not attempt to modify his methods of presenting the material or take the student's needs into consideration until three weeks later under explicit direction of the principal. His action went beyond mere negligence because he knew or should have known that modifications are necessary for special education students since he served in the position of student support team director in the previous year. Whether this constitutes a flagrant omission or only unprofessional conduct is immaterial; it is evidence that supports the Local Board's decision.

Appellant cites *Board of Chiropractic Examiners v. Ball*, 224 Ga. 85 (1968), to establish that there was no evidence of unprofessional conduct. *Ball* defined unprofessional conduct as conduct that is grossly immoral, dishonest, or disreputable, or conduct that shows that the accused is either intellectually or morally incompetent to practice the profession in question. Appellant claims that his conduct did not rise to the level of being grossly immoral, dishonest, or disreputable, and the Local Board specifically found that he was not

incompetent, so the Local Board could not find that he was guilty of unprofessional conduct. *Ball*, however, is not applicable in this case because it involved a license revocation. Conduct that can be deemed unprofessional for the purposes of not renewing a contract does not have to be as egregious as the conduct necessary to revoke a license. We conclude that Appellant's failure to change his teaching methods, after being directed to do so by his principal, so that his failure rate would fall within acceptable norms was evidence that permitted the Local Board to conclude that Appellant exhibited unprofessional conduct.

Appellant claims that err was committed by the Local Board in overruling his motion to dismiss on the grounds that his non-renewal violated his First Amendment rights to free speech. Appellant argues that he is the only teacher who has been vocal about not changing the grades of his students. He claims that other teachers are afraid of the administration and regularly change grades so they will not have a high failure rate. Appellant's claim, however, focuses on the wrong issues. As previously indicated, the issue is not whether Appellant refused to change grades, but whether he failed to change his teaching methods so that his students could learn. The State Board of Education concludes that Appellant's motion to dismiss was properly overruled by the Local Board.

Appellant next claims that the Local Board's decision should be declared null and void because it was issued more than five calendar days after the hearing. O.C.G.A. § 20-2-940(f) provides, in part, "The local board shall render its decision at the hearing or within five days thereafter." As pointed out by the Local Board, however, O.C.G.A. § 1-3-1(d)(3), which governs how statutes shall be construed, provides, "When the period of time prescribed [to discharge any duty] is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." The hearing in the instant case concluded on June 13, 1996, and the Local Board issued its decision on June 20, 1996, which was within five days after the hearing if the intervening Saturday and Sunday are excluded. The State Board of Education, therefore, concludes that the Local Board issued its decision in a timely manner.

Appellant next argues that the hearing should not have been held because the Local Superintendent included with the letter of charges an outdated version of O.C.G.A. § 20-2-940, which did not have the 1994 amendment concerning the inability to terminate or suspend a contract for refusal to change a grade. O.C.G.A. § 1-3-1© provides that,

> A substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient and no proceeding shall be declared void for want of such compliance, unless expressly so provided by law.

The State Board of Education concludes that there was substantial compliance with the requirement to include a copy of O.C.G.A. § 20-2-940 with the letter of charges and the Local Board did not commit any error in proceeding with the hearing.

Appellant finally claims that the members of the Local Board should have recused themselves because they had already made a decision concerning his employment before the hearing was held. Appellant, however, failed to show that the Local Board members could not make a decision based upon the evidence presented at the hearing. The State Board of Education concludes that the Local Board members did not need to recuse themselves. *See, Alderman v. Appling Cnty. Bd. of Educ.*, Case No. 1992-9 (Ga. SBE, July 9, 1992).

Based upon the foregoing, it is the opinion of the State Board of Education that there was evidence to support the Local Board's finding that Appellant willfully neglected his duties and exhibited unprofessional conduct. The Local Board's decision, therefore, is SUSTAINED.

This ____ day of November, 1996.

Robert M. Brinson
Vice Chairman for Appeals