

STATE BOARD OF EDUCATION

STATE OF GEORGIA

MILDRED WIMBERLY,

Appellant,

vs.

**DOUGHERTY COUNTY
BOARD OF EDUCATION,**

Appellee.

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CASE NO. 2002-15

DECISION

This is an appeal by Mildred Wimberly (Appellant) from a decision by the Dougherty County Board of Education (Local Board) to suspend her without pay for sixty days after finding her guilty of insubordination because she refused to submit to a psychological evaluation after being ordered to by the Local Superintendent. Appellant claims that the Local Superintendent's directive was improper because it violated her right to privacy. The Local Board's decision is reversed.

Before June 2001, Appellant filed a lawsuit in federal court against the Local Board. On June 20 and 21, 2001, the Local Board's attorney took Appellant's deposition without Appellant having an attorney present. After the deposition, the Local Board's attorney reported to the Local Superintendent that he believed Appellant was mentally unstable and presented a danger to students. On July 23, 2001, the Local Superintendent ordered Appellant to submit to a psychological examination to determine if she was competent to perform her duties. The Local Superintendent based the order on the language in Appellant's contract that provided:

The employee agrees to furnish to the employer in writing and under oath such information (including medical information) as the employer reasonably may request from time to time pertaining to the employee's competence and fitness to perform assigned duties. If special medical information is requested by the employer, the employee shall have the option to be examined by a physician of his/her own choice or a physician selected by the employer.

Appellant contended that the language contained in the contract did not address psychological information, but instead addressed physical health information such as when an employee asks for sick leave or workers compensation benefits. In other words, the provision serves as a check against employees taking unwarranted time off from work or making unfounded medical claims rather than as an instrument for keeping employees from working. We agree with Appellant's view of the contract language.

There was no evidence presented to the Local Board that showed that Appellant was in any way incompetent to carry out her duties. She received satisfactory ratings during her annual evaluation and was employed in a day care program during the summer. At the time of the hearing before the Local Board, Appellant was again teaching in the classroom for the Local Board. The only basis for the Local Superintendent's action was the Local Board attorney's testimony about Appellant's actions outside the school setting during an adversarial proceeding that Appellant did not want to attend and in which Appellant was not represented by an attorney. The Local Board argues that the Local Superintendent justifiably relied upon a trusted advisor in directing the examination. The advisor, however, was a trusted advisor of the law, not of psychiatry or psychology. In the area of psychiatry, the Local Board attorney was nothing but a layperson, no different than any other ordinary person off the street. We do not think that the language of the employment agreement can be read and understood by an employee to mean, "If someone off the street says your mentally unstable, we reserve the right to subject you to a psychiatric examination, regardless whether your teaching has been superlative."

The Local Board argues that there has never been any question about Appellant's competency and that Appellant's competency is not an issue that should even be considered.¹ Instead, the Local Board argues that the only question to be determined is whether Appellant followed the Local Superintendent's directive. But, the purpose of the evaluation is to determine whether Appellant is competent. The Local Board cannot have it both ways; Appellant's competency either is or is not the reason for the evaluation. If she has not demonstrated incompetence, then there is no reason for the evaluation. If she has demonstrated incompetence, then the hearing provisions of O.C.G.A. § 20-2-940 are applicable to establish that she is incompetent.

The Local Board's position overlooks the fact that employees have a right of privacy. Additionally, if the contract can be construed to allow psychiatric examinations, the contract establishes a reasonableness standard in asking for any medical information. Both of these elements serve to impose a requirement for some observable deficiency in a teacher's ability to teach before the teacher can be ordered to submit to a psychiatric evaluation.

The right to privacy has been recognized for almost 100 years, with its first expression in *Pavesich v. New England Life Ins.*, 122 Ga. 190, 50 S.E. 68 (1905). A psychiatric evaluation, which probes the very essence of an individual's privacy, i.e., how a person thinks and feels, is arguably more invasive than any other form of medical evaluation. It is not as simple as determining whether a leg is broken and will heal in three months, or whether an employee has the flu and needs to be absent from work for one or two weeks. A psychiatric examination represents a significant invasion of an employee's privacy, especially when the examination is an undirected, non-specific, open-ended examination where the employee has no knowledge of the reasons for the examination, or what conduct gave rise to the demand for an examination. Before such an invasion of privacy can be condoned, the government has to establish that there are

¹ Throughout the hearing before the Local Board, the Local Board continually thwarted the efforts of Appellant's attorney to inquire about her competency.

significant factors that call for an invasion of privacy.² The Local Board failed to establish that there were any significant factors that necessitate an invasion of privacy when the employee is not asking for any privileges. Additionally, the Local Board failed to show that there was any necessity for an invasion of privacy in this case. Appellant's principal had rated her satisfactory and a competent teacher and the Local Superintendent allowed her to return to the classroom to teach without placing another teacher or paraprofessional in the classroom with her.

The contract language also requires any examination request to be reasonable. In the instant case, the examination request was unreasonable because, as noted above, Appellant was not judged incompetent in any of her evaluations; she was around and taught students during the summer, and she was allowed to return to school in a teaching capacity without any assistance or reported deficiencies in her ability. If there was any real concern about her ability or whether she posed a threat to the students, it would have been negligence to allow her to teach without some form of strict supervision or assistance. Her offense in this case was that she may have become angry during an adversarial proceeding, which was unrelated to her teaching, and she raised her voice and refused to give the type of coherent answers the lawyer wanted to hear. Under such circumstances, the State Board of Education concludes that it was unreasonable to ask Appellant to submit to a psychiatric examination.

Based upon the foregoing, it is the opinion of the State Board of Education that Appellant was not insubordinate in refusing to obey an order to submit to a psychiatric evaluation. Accordingly, the Local Board's decision is REVERSED.

This _____ day of February 2002.

Bruce Jackson
Vice Chairman for Appeals

² These significant factors are identified as "special needs" in federal analysis. *See, Vernonia School District v. Acton*, 515 U.S. 646 (1995), *Earls v. Bd. of Educ. of Tecumseh Publish School Dist.*, 242 F.3d 1264 (10th Cir. 2001). Under this analysis, a special need has to exist before a government agency can establish a rule, regulation, or policy that permits an invasion of privacy. Thus, for the contract to be read as permitting an invasion of privacy, the Local Board would have to establish that there was a special need for such a provision.