STATE BOARD OF EDUCATION
STATE OF GEORGIA

DIANE EVANS,	:	
	:	
Appellant,	:	
	:	
v.	:	**CASE NO. 2010-01**
	:	
JEFFERSON COUNTY BOARD OF EDUCATION,	:	**DECISION**
	:	
Appellee.	:	

This is an appeal by Diane Evans from a decision by the Jefferson County Board of Education ("Local Board") non-renewing her employment contract due to the elimination of her position pursuant to O.C.G.A. § 20-2-940(a)(6). The Local Board concluded that Appellant's employment contract was properly non-renewed pursuant to O.C.G.A. § 20-2-940(a)(6).

Appellant asserts four errors on appeal: (1) the Local Board erred because the State Board of Education ("State Board") did not have the authority to grant the Local Board a waiver under O.C.G.A. § 20-2-187(c)(2); (2) the Local Board erred because it does not have the statutory authority to eliminate Appellant's position; (3) the Local Board erred by denying her due process by failing to recuse itself from the proceedings; and (4) the Local Board erred by utilizing a hearing officer in contravention to O.C.G.A. § 20-2-940(e)(4). For the reasons set forth below, the decision of the Local Board is sustained.

I. PROCEDURAL BACKGROUND

Appellant was employed as a Nutrition Program Director for the Local Board. On or about April 15, 2009, Appellant was timely notified that her annual contract for the 2009-2010 school-year was not being renewed. Appellant appealed the non-renewal of her employment contract. The Local Board provided the Appellant a hearing with the opportunity to present evidence. After hearing the evidence, the Local Board non-renewed Appellant's employment contract. Appellant has appealed the decision of the Local Board to the State Board of Education ("State Board").

II. FACTUAL BACKGROUND

At the hearing, the Superintendent testified about the reasons for non-renewing the Appellant's employment contract. The Local Board eliminated Appellant's position due to financial difficulties. Over the last twelve (12) years, the school system had lost approximately 700 students. The Superintendent testified that the number of students had decreased so that the Local Board was no longer a base-size school. The Superintendent further testified that the

Local Board had more than four schools. Because the Local Board had more than four schools, the Local Board was required to employ a Nutrition Program Director. The Superintendent was looking for ways to reduce the budget due to financial reasons. The Superintendent determined that he could reduce costs if he could eliminate the Nutrition Program Director position and employ a Nutrition Manager/Supervisor. Consequently, in order to reduce costs, the Local Board passed a resolution to seek a waiver requiring the Nutrition Program Director position from the State Board. The Local Board applied for waiver to the State Board. This Board granted the Local Board a waiver for the requirement of employing a Nutrition Program Director.

III. ERRORS ASSERTED ON APPEAL

A. Authority of the State Board to grant the Local Board a waiver.

Appellant contends that the decision of the Local Board is in error because the State Board did not have the authority to grant the Local Board a waiver of the legal requirements contained in O.C.G.A. § 20-2-187. As an initial matter, the Local Board contends that Appellant failed to assert this argument before the Local Board. "The State Board of Education, as an appellate body, is not authorized to consider matters that have not been raised before the Local Board." Z.G. v. Henry Cnty. Bd. of Educ., Case No. 2007-05 (Ga. SBE, Jan. 2007) citing Sharpley v. Hall Cnty. Bd. of Educ., 251 Ga. 54 (1983). Thus, it is well established that this Board is not authorized to consider matters raised for the first time on appeal. Hutcheson v. DeKalb Cnty. Bd. of Educ., Case No. 1980-5 (Ga. SBE, May 1980).

Appellant contends that she raised this issue through questioning of witnesses. A review of the record shows that Appellant questioned the Superintendent regarding the waiver by the State Board. The record further contains hypothetical questions to the Superintendent regarding the consequences if the State Board's waiver was overturned by a higher court. However, the record is devoid of any explicit argument by Appellant to the Local Board that the State Board did not have authority to issue the Local Board a waiver. Therefore, this Board concludes that the waiver issue is not properly before this Board.

Even assuming the waiver issue was properly raised, the State Board finds that it does have the authority to issue the Local Board the waiver at issue in this case. Appellant contends that the State Board's grant of a waiver is in contravention to O.C.G.A. § 20-2-187. Official Code of Georgia Annotated § 20-2-187 states in pertinent part:

> The State Board of Education shall annually determine the amount of state funds needed to provide a state-wide school lunch program. The state board shall, **by regulation, provide for certifying and classifying school lunch supervisors and managers** and establish training programs for school lunch personnel.
>
> O.C.G.A. § 20-2-187 (a)(1) (emphasis added).

Official Code of Georgia Annotated § 20-2-187 further states in pertinent part:

> The State Board of Education is **authorized to prescribe by appropriate rules and regulations** that there may be included as part of the program of every public school in this state a course of instruction in **nutrition**, hygiene, etiquette, and the social graces relating to the partaking of meals and is further authorized to allot funds, in a manner consistent with the funding for the other various components of the instructional program, to local units of administration for costs directly associated with this program.

O.C.G.A. § 20-2-187 (b) (emphasis added).

Thus, Georgia law authorizes the State Board to adopt rules for certifying and classifying school lunch supervisors and managers for local board programs, including the nutritional programs. Pursuant to this statutory authority, the State Board has adopted the following rule:

> Each base-size school system shall employ at least one full-time school nutrition program director to perform required system-level school nutrition program functions.
>
> (i) A school system of less than base size having five or more schools shall, at a minimum, employ a school nutrition program director-trainee on a part-time basis.
>
> (ii) A school system of less than base size having four or fewer schools shall, at a minimum, employ the services of a full-time classified nutrition manager/supervisor to perform required system-level school nutrition program functions.

Rule 160-5-1-.22(2)(a)(5).

Under Rule 160-5-1-.22(2)(a)(5), a base-size school system is required to employ a full-time Nutrition Program Director. A less than base-size school system with five or more schools shall employ a part-time Nutrition Program Director-Trainee. A less than base-size school system with four or fewer schools shall employ a full-time Nutrition Manager/Supervisor.

In this case, the Local Board is less than base-size[1] but had five schools. Thus, it was required to employ a Nutrition Program Director. However, due to financial reasons, the Local

[1] The State Board has defined a "Base-sized school system" as one having full-time equivalent ("FTE") student enrollment count of 3300. The Local Board provided evidence that its enrollment is less than base-size. Appellant does not dispute that the Local Board is less than base-size.

Board requested a waiver from the State Board of the five school requirement so that it could employ a full-time Nutrition Manager/Supervisor. It is this waiver that Appellant contends that the State Board is without authority. Contrary to Appellant's assertion, the Rules of the State Board allow for a waiver of its Rules. Specifically, a local board may apply for a waiver by submitting an application seeking a waiver of the State Board's Rules. See Rule 160-1-3-.02(1)(c) and Rule 160-1-3-.02(3)(a).

Thus, Appellant's assertion that the State Board does not have the authority to waive the requirement to employ a Nutrition Program Director is without merit. State law does not require the Local Board to employ a Nutrition Program Director. Georgia law requires the State Board to adopt rules governing nutrition for the local school systems.

The State Board has done so by establishing the positions of Nutrition Program Director and Nutrition Manager/Supervisor. These positions are determined by the base-size of a local board and the number of schools. Under this criterion, the Local Board was required to employee a Nutrition Program Director. However, the State Board Rules allow a local board to seek a waiver of its Rules. The Local Board did so by applying for a waiver so it could employ a Nutrition Manager/Supervisor instead of a Nutrition Program Director. The State Board granted the waiver. The State Board's decision to grant the waiver is not contrary to Georgia law. The State Board's Rules provide it with the authority to grant a waiver. Therefore, the Local Board properly had the authority not to employ a Nutrition Program Director, and thereby eliminate this position which led to the non-renewal of Appellant's employment contract.

B. Authority of the Local Board to eliminate Appellant's position.

Appellant contends that O.C.G.A. § 20-2-940(6) allows the Local Board to reduce staff due to an elimination of a program, but not to eliminate positions when the program is not cancelled. This assertion has previously been rejected by this Board and the Georgia Court of appeals, and therefore is without merit. First, in Roberson v. Cobb Cnty. Bd. of Educ., Case No. 1995-46 (Ga. SBE, Nov. 1995), the appellant made the same argument that O.C.G.A. § 20-2-940(6) was not followed because there was not a reduction of students or an elimination of programs. This Board upheld the elimination of the appellant's position.

In addition, the Local Board's decision is supported by Georgia Court of Appeals decision in Curry v. Dawson Cty. Bd. of Educ., 212 Ga. App. 827 (1994), in which the decision of this Board was affirmed. In Curry, the Court "rejected Curry's argument that the elimination of positions does not amount to the 'cancellation of programs.'" Curry, 212 Ga. App. at 920. The Court further found "the word 'programs' is not a term of art" and that a local board can make decisions in the positions it uses in order to determine the most efficient form of administration. Curry, 212 Ga. App. at 920-21. The Court concluded that "the underlying purpose for authority [O.C.G.A. § 20-2-940(6)] to terminate teachers due to the loss of students or cancellation of programs is precisely to economize." Curry, 212 Ga. App. at 921.

Furthermore, it is undisputed that the Local Board eliminated Appellant's position in order to find a more efficient way to administer its nutrition services. The reason for this decision was due to financial reasons and was caused in part by the loss of approximately 700 students over the last twelve (12) years. These reasons led the Local Board to seek the waiver from the State Board. A local board can non-renew or terminate an employee in order "[t]o reduce staff due to loss of students or cancellation of programs." O.C.G.A. § 20-2-940(6). While a nutrition program may still exist, the existence of a program with a Nutrition Program Director has been eliminated. Thus, the Local Board did not err by non-renewing Appellant's contract pursuant to O.C.G.A. § 20-2-940(6).

C. Due Process - Recusal of the Local Board.

Appellant asserts that her due process rights were violated because the Local Board heard her case when they also made the decision to eliminate her position. As set forth below, Appellant's due process rights were not violated. This Board has previously found that board members "sitting in judgment of an action they had previously taken as members of the full Board" did not violate due process. Roberson, Case No. 1995-46. In Roberson, this Board addressed a similar situation where a local board approved eliminating a director's position. The full local board appointed three members who had been involved in the decision to conduct the hearing and make a recommendation to the full local board. In Roberson, this Board concluded that Roberson's due process rights were not violated.

This conclusion is supported by the United States Supreme Court's decisions in Withrow v. Larkin, 431 U.S. 35 (1975) and Hortonville Joint School Dist. v. Hortonville Education Assoc., 426 U.S. 482 (1976). In Withrow, the Supreme Court held that a state examining board, with both the investigative power to take action against a physician and to later adjudicate the matter, did not violate the due process rights of the physician. Withrow, 421 U.S. at 58. In Hortonville, the Supreme Court held that a school board involved in the strike preceding the termination of teachers' employment and then later the decision to terminate was not sufficient to show impartiality for purposes of due process. Hortonville, 426 U.S. at 496-97. Moreover, due process rights are not violated without a showing of actual bias.[2] Holley v. Seminole Cnty. Sch. Dist., 755 F.2d 1492, 1497 (11th Cir. 1985).

In the case sub judice, the Local Board was statutorily authorized to conduct the hearing. Appellant has failed to show that the Local Board was not capable of judging the controversy fairly or that it was actually biased against her. Therefore, the Local Board did not err by failing to recuse itself.

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[2] Appellant contends that Johnson v. Pulaski Cnty. Bd. of Educ., 231 Ga. App. 576 (1998) supports her position that her due process rights were violated. However, Johnson involved a termination decision based upon the appellant's performance. The president of the school board had been personally involved in the criticism of the appellant's performance. Therefore, Johnson is distinguishable from this case.

D. Utilization of a Hearing Officer.

Appellant asserts that the Local Board erred by utilizing a hearing officer in violation of O.C.G.A. § 20-2-940(e)(4). Official Code of Georgia Annotated § 20-2-940(e)(4) states in pertinent part:

> All questions relating to admissibility of evidence or other legal matters shall be decided by the chairman or presiding officer, subject to the right of either party to appeal to the full local board or hearing tribunal, as the case may be; provided, however, the parties by agreement may stipulate that some disinterested member of the State Bar of Georgia shall decide all questions of evidence and other legal issues arising before the local board or tribunal.
>
> O.C.G.A. § 20-2-940(e)(4).

This provision allows for a hearing officer to decide and rule on evidentiary matters by stipulation of the parties. Appellant did not stipulate to the use of a hearing officer. In the absence to the parties stipulating to a hearing officer, this Board has recognized the use of a local board's attorney as a legal advisor. See Lewis v. Carroll Cnty. Bd. of Educ., Case No. 1980-5 (Ga. SBE, Nov. 1996). Under Lewis, a legal advisor can be used by a Local Board, but can only provide legal advice to the chairman who then makes the rulings.

In this case, Appellant objected to the use of the hearing officer. The hearing officer continued to serve as a hearing officer and did more than serve as a legal advisor. He made the rulings. He did not provide legal advice to the Chairman who then made rulings. Thus, it is clear that the Local Board erred by using a hearing officer. However, the State Board does not find any harm in the record from the Local Board's use of the hearing officer. Furthermore, Appellant has not identified any rulings in the record that prejudiced her right to a fair hearing. Thus, this Board finds that while the Local Board erred by using a hearing officer, any error was harmless.

IV. CONCLUSION

Based upon the reasons set forth above, it is the opinion of the State Board of Education that the evidence supports the decision of the Local Board, and it is, therefore, SUSTAINED.

This ________ day of October 2009.

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WILLIAM BRADLEY BRYANT
VICE CHAIRMAN FOR APPEALS