STATE BOARD OF EDUCATION
STATE OF GEORGIA

MARIA BEAL-PARKER,	:	
	:	
Appellant,	:	
	:	
v.	:	**CASE NO. 2008-17**
	:	
DEKALB COUNTY BOARD OF EDUCATION,	:	**DECISION**
	:	
	:	
Appellee.	:	

This is an appeal by Maria Beal-Parker from a decision by the DeKalb County Board of Education ("Local Board") terminating her employment contract based upon allegations that she obtained and disseminated live/secure testing materials from a Georgia High School Graduation Test ("GHSGT"). The Local Board concluded that Appellant's conduct constituted insubordination, willful neglect of duties, and other good and sufficient cause under O.C.G.A. § 20-2-940(a)(2), (3) and (8).

Appellant asserts six primary errors: (1) the Local Board violated her due process rights by not allowing her to appeal the rulings of the hearing officer to the tribunal, (2) the Local Board violated her due process[1] rights by having the same tribunal rule on her case which had previous to her hearing ruled on the related case of Constance Victor v. DeKalb County Bd. of Educ., SBE Case No. 2008-18, (3) the Local Board erred by failing to adhere to the Best Evidence Rule, (4) the Local Board erred by admitting hearsay evidence, (5) the Local Board erred by admitting testimony on the "ultimate issue", and (6) the Local Board erred because the evidence does not support the conclusion that she engaged in insubordination, willful neglect of duties, and other good and sufficient cause under O.C.G.A. § 20-2-940(a)(2), (3) and (8). For the reasons set forth below, the decision of the Local Board is affirmed.

I. PROCEDURAL BACKGROUND

Appellant was employed as a teacher at Stephenson High School ("Stephenson"). On or about July 6, 2007, Appellant was timely notified that her annual contract for the 2007-2008 school-year was being proposed for termination. Appellant appealed her termination from employment. A tribunal for the Local Board was convened at which Appellant was provided the opportunity to present evidence and to subpoena witnesses. On August 27, 2007, the tribunal unanimously concluded that Appellant engaged in insubordination, willful neglect of duties, and

[1] Appellant also asserts that her due process rights were violated based upon the evidentiary rulings regarding hearsay, best evidence, and the ultimate issue. The Local Board's decision is supported by some evidence, and therefore her due process rights were not violated.

other good and sufficient cause in violation of O.C.G.A. § 20-2-940(a)(2), (3) and (8). The tribunal also unanimously concluded that Appellant violated Standards 7 and 10 of the Code of Ethics for Educators because she breached test security by copying live/secure test material and failing to report receipt of such materials. The tribunal further unanimously voted to suspend Appellant without pay for sixty (60) days. On September 21, 2007, the Local Board voted to terminate Appellant. Appellant has appealed the decision of the Local Board to the State Board of Education ("State Board").

II. FACTUAL BACKGROUND

Appellant was a teacher at Stephenson for approximately 10 years. In the early part of the 2007 school year, teachers in the Science Department at Stephenson began preparing students for the GHSGT. In doing so, Constance Victor, the Chair of the Science Department, requested Appellant to find materials that contained questions with pictures and/or graphs. According to Appellant, during February or March of 2007, she was approached by two individuals, one a former student at Stephenson and another who was not, who were seeking assistance in answering questions contained on some written materials. Appellant assisted the students, but cannot identify the students. Appellant obtained a copy of the material from the students because she believed the material contained good material with pictures, similar to the type that Victor had requested. Appellant then gave the material to Victor knowing that Victor intended to disseminate the material to students who were preparing for the GHSGT. Victor incorporated the materials provided by Appellant by cutting and pasting the information, and assembling it into a packet along with materials provided by other teachers. Victor also created transparencies from the materials.

On or about March 9, 2007, Tanya Mason, a teacher, in reviewing the materials became concerned that some of the materials looked like real GHSGT questions. Mason reported her concerns to Angela Pringle, the Principal. Pringle reported the concerns to central office, resulting into an investigation into the source of the materials by Anthony Eitel, the Executive Director for Assessment and Accountability. On or about March 17, 2007, Appellant was interviewed by Eitel. During the interview Appellant admitted that she was the source of the live/secure material, but not the original source.

Eitel testified that he compared the materials to a secure March 2007 GHSGT and concluded that approximately 10 questions were the same. The Local Board forwarded the materials at issue to the Georgia Department of Education ("GDOE"). Kay Rutledge, a Testing Specialist for GDOE, is responsible for the GHSGT. Rutledge is familiar with the live/secure test questions, and testified that based upon her familiarity with the GHSGT that some questions were the same as the questions contained in the material provided by Appellant to Victor. Rutledge also testified that she compared the materials to the November 2006 GHSGT examination and confirmed that 56 questions in the material matched live/secure questions from the November 2006 GHSGT.

The GDOE does not release the GHSGT. The Local Board is required to maintain the GHSGT in a secure location and does not maintain the GHSGT after it is administered. According to Eitel, the Local Board maintains its GHSGT in a secure warehouse location at the Sam Moss Service Center. Thus, at the time of the hearing, Eitel had already returned the March 2007 GHSGT to the GDOE. After the GHSGT is administered, the booklets used by the students are shredded.

III. ERRORS ASSERTED ON APPEAL

A. Due Process - appealing to the tribunal.

Appellant asserts that the Local Board violated her due process rights by violating her right to appeal the hearing officer's rulings on her objections in violation of O.C.G.A. § 20-2-940(e)(4). For the reasons set forth below, Appellant's contention is without merit.

O.C.G.A. § 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.

In this case, Appellant was aware that a hearing officer was ruling on evidentiary matters at the time she participated in the pre-hearing conference at which evidentiary issues were ruled on. Again, at the beginning of the hearing, the hearing officer specifically stated that he was present to rule on evidentiary matters. Appellant did not object or state that she was not stipulating to the hearing officer. Thus, this issue was not raised at the hearing and cannot be raised for the first time on appeal. Belser v. Atlanta City Bd. of Educ., Case No. 1991-02 (Ga. SBE, March 14, 1991). Moreover, "the failure to do so constitutes a waiver of such objections." Id. citing Woods v. Atlanta Bd. of Educ., Case No. 1977-11 (Ga. SBE, Oct. 18, 1977).

Appellant relies upon Belser and Plummer v. Dublin City Bd. of Educ., Case No. 1999-61 (Ga. SBE, Feb. 10, 2000). However, neither of these decisions supports Appellant's contention that she did not agree to the hearing officer ruling on evidentiary matters. Therefore, this alleged error is without merit.

B. Due Process - same tribunal from the Constance Victor case.

Appellant asserts that her due process rights were violated because the same tribunal considered her case that had already ruled against Victor. Appellant contends that because the evidence and issues were similar that the tribunal could not be impartial. Appellant's argument is compelling because it is reasonable to conclude that the tribunal had already prejudged Appellant since it had already considered the related evidence and found against Victor on August 15, 2007. However, as set forth below, the legal authority does not support Appellant's position.

The issue of a tribunal hearing two similar cases has not been addressed by any binding precedent. However, the United States Supreme Court addressed similar issues in Withrow v. Larkin, 431 U.S. 35 (1975) and Hortonville Joint School Dist. v. Hortonville Education Assoc., 426 U.S. 482 (1976).[2] In Hortonville, the Supreme Court stated that "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." Hortonville, 426 U.S. at 493 citing Withrow, 421 U.S. at 47 and FTC v. Cement Institute, 333 U.S. 683, 700-703 (1948). Furthermore, "[n]or is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" Hortonville, 426 U.S. at 493 quoting United States v. Morgan, 313 U.S. 409, 421 (1941). Thus, "the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing . . . is [not] enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing." Withrow, 421 U.S. at 50, n. 16 quoting Pangburn v. CAB, 311 F.2d 349, 358 (1st Cir. 1962). "[M]ore is required." Id; see also Holley v. Seminole County Sch. Dist., 755 F.2d 1492, 1497 (11th Cir. 1985) (holding due process rights are not violated without a showing of actual bias).

In the case sub judice, Appellant has failed to show that the tribunal was not capable of judging the controversy fairly or that it was actually biased against her. To the contrary, Appellant questioned each tribunal member regarding their ability to be impartial. Each indicated that he or she could be impartial. Moreover, the Local Board had the authority to serve as the factfinder in each case and doing so would not have violated due process. Therefore, the Local Board did not err by using the same tribunal as was used in the Victor case.

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[2] 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 physican. 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.

C. Best Evidence Rule.

Appellant asserts that the tribunal erred by allowing and relying upon evidence that violates the best evidence rule. O.C.G.A. § 24-5-4(a) requires that "[t]he best evidence which exists of a writing sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for." Under the Fair Dismissal Act, the Local Board has the burden of proof in seeking to dismiss a teacher. O.C.G.A. § 20-2-940(e)(4). Thus, the Local Board was required to provide evidence that the questions disseminated by Appellant were live/secure questions from the GHSGT.

In the case sub judice, the Local Board offered evidence from Eitel and Rutledge, who both testified about the contents of the March 2007 and November 2006 GHSGT. However, the actual GHSGT which Eitel and Rutledge compared to the materials at issue was not offered into evidence. The Local Board contends that the actual tests were unavailable at the time of the hearing because it did not possess the GHSGT.

Georgia courts have recognized that the writing sought to be proved does not have to be produced if the absence is satisfactorily accounted for. In Hodges v. Vara, 268 Ga. App. 815, 821-22 (2004), the Georgia Court of Appeals held secondary evidence is permissible when it was proven that the original evidence had been destroyed. In this case, the evidence from the Local Board regarding the March 2007 GHSGT would have been returned to the GDOE or shredded. Furthermore, the absence of the GHSGT evidence maintained by the SBOE is satisfactorily accounted for based upon the necessity of not disseminating the contents of the GHSGT. The need to protect the dissemination of the highly sensitive nature of the GHSGT is the reason for Appellant's termination. Moreover, as set forth below, Rutledge testified regarding the GHSGT questions based upon her first hand knowledge. Thus, even in the absence of the actual GHSGT, admissible evidence exists to support the decision of the Local Board.

D. Hearsay Evidence.

Appellant asserts that the tribunal erred by allowing and relying upon hearsay evidence. Hearsay evidence has no probative value and cannot be used to establish any fact in an administrative hearing. See McGahee v. Yamaha Motor Mfg. Corp., 214 Ga. App. 473, 474 (1994). Thus, since the Local Board has the burden of proof in seeking to dismiss a teacher, hearsay evidence cannot be relied upon. O.C.G.A. § 20-2-940(e)(4).

In the case sub judice, the Local Board relied upon evidence that the test questions disseminated by Appellant were the same as the GHSGT live/secure questions. Appellant asserts error because the actual GHSGT questions were not offered into evidence, but were testified to by Eitel and Rutledge. However, Rutledge testified based upon her first hand knowledge of the contents of the GHSGT. Thus, since some admissible evidence exists, the Local Board did not err in its decision.

E. Ultimate Issue.

Appellant asserts that the Local Board erred by considering evidence by Rutledge and Eitel that went to the ultimate issue contrary to O.C.G.A. § 24-9-65. However, under Georgia law, "a witness may testify as to his opinion even though it purports to answer the ultimate question in the case." Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 170-71 (1980). A witness may draw an inference of fact from information observed by him. Only the drawing of an inference which requires a mixture of law and fact is improper evidence. Id.

In the case sub judice, Rutledge and Eitel testified only to facts based upon their knowledge and comparison between the materials compiled and used at Stephenson to the actual live/secure GHSGT. This testimony did not rely upon any law, much less, a mixture of law and fact. Thus, this testimony was proper because it did not answer the ultimate question.

F. Evidence supports the decision.

Appellant asserts that the evidence in the record does not support the Local Board's decision. The State Board is required to affirm the decision of the Local Board if there is any evidence to support the decision of the Local Board, unless there is abuse of discretion or the decision is arbitrary and capricious as to be illegal. See Ransum v. Chattooga County Bd. of Educ., 144 Ga. App. 783 (1978); Antone v. Greene County Bd. of Educ., Case No. 1976-11 (Ga. SBE, Sep. 8, 1976). For the reasons set forth below, the State Board finds that the record does contain legally sufficient evidence to support the decision of the Local Board.

1. Insubordination.

Insubordination requires the intentional or willful disregard of reasonable rules and regulations. Brawner v. Marietta City Bd. of Educ., 285 Ga. App. 10, 646 S.E.2d 89 (2007). Appellant offered evidence to show that Appellant knew or should have known that her actions violated Standards 7 and 10 of the Code of Ethics. Appellant admits that she was the source of the live/secure materials.

This case is virtually identical to this Board's decision in Clemmons v. Chattooga County Bd. of Educ., Case No. 1998-27 (Ga. SBE, Sep. 10, 1998). In Clemmons, this Board upheld the suspension without pay of a teacher who was charged with disseminating a copy of an ITBS. In Clemmons, this Board concluded that conflicting evidence existed as to whether the teacher knew she had an actual copy of the ITBS. Thus, Clemmons held that insubordination, willful neglect of duties, or other good and sufficient cause was met by what a teacher "should have known". Like Clemmons, the record in this case contains sufficient evidence from which the tribunal could conclude that Appellant knew or should have known she was disseminating live/secure materials. Another science teacher thought the materials contained test questions from the GHSGT and took her concerns to her principal. Thus, this error is without merit.

2. Willful Neglect of Duty.

A "willful neglect of duty" requires "a flagrant act or omission, an intentional violation of a known rule or policy, or a continuous course of reprehensible conduct. . . .'[W]illfulness' requires a showing of more than mere negligence." Terry v. Houston County Bd. of Educ., 178 Ga. App. 296, 342 S.E.2d 774 (1986). As set forth above, the record contains sufficient evidence from which the tribunal could conclude that Appellant knew she was disseminating live/secure materials.

3. Good and Sufficient Cause.

"Good and sufficient cause" under the Fair Dismissal Act has not been defined by any binding precedent. However, it is axiomatic that "good and sufficient cause" must be construed consistently with the other grounds for discipline contained in the Fair Dismissal Act. Thus, good and sufficient cause must also require intentional or willful misconduct, and more than negligence. Any other interpretation of good and sufficient cause would render the grounds for disciplinary action under the Fair Dismissal Act inconsistent with one another by providing a lower standard for disciplinary action. As set forth above, the decision of the Local Board must be upheld as the record contains evidence to support the decisions.

IV. CONCLUSION

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

This _____ day of February 2008.

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WILLIAM BRADLEY BRYANT
VICE CHAIRMAN FOR APPEALS