STATE BOARD OF EDUCATION
STATE OF GEORGIA

LAWRENCE W. BYNUM,	:	
	:	
Appellant,	:	
	:	
v.	:	**CASE NO. 2009-19**
	:	
COBB COUNTY BOARD OF EDUCATION,	:	**DECISION**
	:	
	:	
Appellee.	:	

This is an appeal by Lawrence W. Bynum from a decision by the Cobb County Board of Education ("Local Board") terminating his employment contract based upon allegations that he engaged in inappropriate sexual comments and retaliation. The Local Board concluded that Appellant's conduct constituted insubordination and willful neglect of duties under O.C.G.A. § 20-2-940(a)(2) and (3).

Appellant asserts five primary errors: (1) the Local Board erred because the Order of termination was not voted on by the Local Board, (2) the Local Board erred by not following the factual findings of the hearing tribunal, (3) the Local Board erred by relying upon hearsay evidence in its Order terminating him, (4) the Local Board erred by relying upon prior allegations in terminating him, and (5) the Local Board erred because the evidence does not support the conclusion that he engaged in insubordination and willful neglect of duties under O.C.G.A. § 20-2-940(a)(2) and (3). For the reasons set forth below, the decision of the Local Board is REVERSED and REMANDED.

I. FACTUAL BACKGROUND

In 1999, Appellant began his employment with the Local Board. From 2004 through 2008, Appellant was the Principal of Floyd Middle School ("Floyd"). During the fall of 2007, Appellant counseled a math teacher on several occasions regarding her attendance. On or about November 15, 2007, several students filed complaints against the math teacher for inappropriate sexual comments.[1]

[1] In February of 2008, the math teacher received a one-day suspension without pay because of these complaints.

On or about November 27, 2007, the math teacher filed a sexual harassment complaint against Appellant. From January through July of 2008, the Diversity and Equal Opportunity Manager for the Local Board conducted an investigation into the math teacher's complaint. This investigation into Appellant's conduct was expanded to interviews of approximately 107 current and former Floyd employees. The investigator issued a report (hereinafter referred to as the "EEO Report") and concluded that there was not sufficient evidence to support the sexual harassment and retaliation allegations. The Diversity and Equal Opportunity Manager recommended that a directive letter be issued to Appellant because he needed to be aware of the seriousness of these allegations. On July 17, 2008, the Superintendent, after reviewing the entire EEO Report, issued Appellant a last chance letter. The last chance letter directed Appellant to: "not engage in conduct that could be construed as sexual harassment," to "[d]emonstrate professional judgment," "[a]void inappropriate comments in the workplace," "[d]emonstrate professional respect towards others in the workplace," and "[r]efrain from talking to or about students or staff in a sexually suggestive manner."[2] On August 1, 2008, the Assistant Area Superintendent cautioned Appellant to be cognizant of what he said because anything he said could be misconstrued.

In June of 2008, during the investigation, the Superintendent recommended and the Local Board approved appointing Appellant as the Principal for North Cobb High School ("North Cobb") for the 2008-2009 school year. At the beginning of the 2008-2009 school year, Appellant inherited three administrative employees: an Assistant Principal, a male Assistant Administrator, and a female Assistant Administrator. Based upon his initial assessment, Appellant concluded his administrative staff had been emphasizing punishment instead of the business of teaching and learning. Appellant also concluded he needed to restructure the duties assigned to his administrators and began an ongoing process to do so. Thus, Appellant hired a new Assistant Principal (hereinafter "new Assistant Principal") whose teaching strategies, organization and staff development were consistent with his pedagogy.

On July 28, 2008, the Assistant Principal told Appellant that she was seeking to transfer to Barber Middle School. According to the Assistant Principal, Appellant told her not to cross him. She further testified that, later that day, Appellant substantially reduced her job duties. Appellant denies threatening the female Assistant Principal and changing her duties because she sought to transfer. Appellant testified that the job duty changes were part of the ongoing restructuring.

On August 1, 2008, before the start of the school year, the Assistant Principal told the Area Superintendent that Appellant gave her bad vibes and that she wanted to transfer. The Assistant Principal further testified that she had previously been assigned the curriculum, instruction, and professional development duties, but now was being required to share the duties with the new Assistant Principal. The Assistant Principal further testified she was told by Appellant that the new Assistant Principal would be second in charge and that she would answer to her.

[2] The last chance letter had other directives which are not pertinent to this appeal.

According to the male Assistant Administrator, he, the Assistant Principal, and female Assistant Administrator discussed the hiring of the new Assistant Principal. He describes their discussions about her hiring causing a hostile work environment because she just came in one day and she was empowered. He further testified it was an uncomfortable situation, there was a lack of trust in her, and a perception the new Assistant Principal was being groomed to take over. The male Assistant Administrator also testified that the female Assistant Administrator's duties were also changed.

During August, according to the Assistant Principal, she noticed that the male Assistant Administrator appeared stressed. The Assistant Principal talked to him, and he told her that he was ill and sick to his stomach because of several sexually inappropriate comments made by Appellant. According to the male Assistant Administrator, Appellant referred to another employee as having "big titties," stating she must be doing serious tricks in the bedroom, and she must be good at polishing the chrome (referencing oral sex). Appellant denies making these statements. There are no witnesses to these statements.

On August 5, 2008, Appellant, along with a group of faculty, had a meeting in which attendance protocol was discussed. Based upon this meeting, Appellant instructed the Social Worker to speak at the faculty meeting. The Social Worker told Appellant that she was nervous and uncomfortable when speaking in public. Appellant made a comment to her to wear a dress and stilettos. The Social Worker felt the comment was inappropriate and confided in her coworker who also attended the meeting. The coworker agreed the comment was inappropriate and that she should report the comment. The Social Worker reported the comment to her supervisor. Appellant admits making this statement, but denies that it was made with any sexual connotation. According to Appellant, he believes in dressing for success and that he only meant for the Social Worker to dress for success to build her confidence. At least one other employee present in the meeting considered the context of the comment to be inappropriate.

The Assistant Principal is married to the Employee Relations Director for the Human Resources Department for the Local Board. In August of 2008, she told her husband about the incidents with the Social Worker and with the male Assistant Administrator. On August 7, 2008, the Local Board began an investigation. A former retired employee of the Local Board was hired to conduct the investigation. After interviewing the relevant witnesses, the investigator concluded that Appellant's comments to the Social Worker and to the male Assistant Administrator were in violation of policy and the last chance letter.

II. PROCEDURAL BACKGROUND

On or about August 25, 2008, the Superintendent timely notified Appellant that he was being proposed for a twenty (20) day suspension without pay and a demotion to a teacher position based upon his inappropriate comments to the Social Worker and male Assistant Administrator. On or about September 17, 2008, the Superintendent timely notified Appellant of a third charge based upon his retaliatory acts against the Assistant Principal after she informed him of her desire to transfer from North Cobb.

Pursuant to O.C.G.A. § 20-2-940(e)(1), instead of conducting a hearing before the Local Board, the Local Board elected to designate a tribunal of three "impartial persons possessing academic expertise to conduct the hearing and submit its findings and recommendations to the [L]ocal [B]oard." A tribunal for the Local Board was convened at which Appellant was provided the opportunity to present evidence and to subpoena witnesses. From October 14, 2008 to October 16, 2008, the three-member tribunal heard evidence regarding the Superintendent's reasons for the proposed disciplinary actions. On October 20, 2008, the tribunal issued its written findings and recommendations. The tribunal unanimously concluded that "after full review of the evidence" that Appellant did not engage in insubordination, but did engage in willful neglect of duties in violation of O.C.G.A. § 20-2-940(a)(3). The tribunal found that Appellant had made the inappropriate comment to the Social Worker. The tribunal did not find that Appellant had engaged in any of the other allegations he had been charged with by the Superintendent. The tribunal accepted the Superintendent's recommendation that Appellant be suspended for twenty (20) days, but rejected the Superintendent's recommendation that Appellant be demoted to a teacher.

On October 23, 2008, the Local Board voted to terminate Appellant and directed its legal counsel to draft an Order terminating Appellant to be approved by the Board Chairperson. On October 27, 2008, the Board Chair signed an Order terminating Appellant. Appellant has appealed the Order of the Local Board to the State Board of Education ("State Board").

III. ERRORS ASSERTED ON APPEAL

A. Authority of the Local Board.

Appellant asserts that the Local Board erred because the records do not indicate that the Local Board voted to terminate him and because the Order terminating him was not voted on by the Local Board. The records show that the Local Board voted to terminate an employee, but do not indicate that the employee the Local Board voted to terminate is the Appellant. However, the minutes indicate that the Local Board voted to terminate an employee and directed legal counsel to draft an Order for approval and signature by the Board Chair. The Board Chair complied and signed the Order terminating Appellant. The Local Board has authority to terminate an employee. See O.C.G.A. § 20-2-57(a). The State Board is unaware of any legal authority that prohibits the Local Board from delegating the administrative function of preparing the written Order to legal counsel for approval by the Board Chair in order to effectuate its vote. Appellant

has failed to identify any statutory authority supporting his position. Therefore, this alleged error is without merit.

B. The Tribunal Decision.

Appellant asserts that the Local Board erred because it did not follow the factual findings of the tribunal. "It is the duty of the hearing tribunal to determine the veracity of the witnesses and the State Board of Education will not go behind such determination if there is any evidence to support the decision." Labi v. Fulton County Bd. of Educ., Case No. 2008-21 (Ga. SBE, Feb. 2008), quoting David L. v. DeKalb County Bd. of Educ., Case No. 1996-1 (Ga. SBE, Apr. 1996). Moreover, a local board "cannot determine any facts based upon an independent review of the record since it relinquished the fact-finding mission to the tribunal." Tookes v. Atlanta City Bd. of Educ., Case No. 2005-31 (Ga. SBE, May 2005).[3]

In this case, the tribunal heard approximately three days of testimony from the witnesses. The tribunal unanimously concluded that **"after full review of the evidence"** that Appellant did not engage in insubordination, but did engage in willful neglect of duties in violation of O.C.G.A. § 20-2-940(a)(3). The tribunal found that Appellant had made the inappropriate stiletto comment to the Social Worker. The tribunal did not find that Appellant had engaged in any of the other allegations he had been charged with by the Superintendent.[4] Thus, the tribunal clearly did not find that the Local Board met its burden of proof regarding the alleged sexual comments to the male Assistant Administrator and the alleged retaliatory acts toward the Assistant Principal.

The Local Board's Order does not limit itself to the stiletto comment to the Social Worker. Rather, the Local Board's Order relies on both the alleged sexual comments to the male Assistant Administrator and the alleged retaliatory acts towards the Assistant Principal. The tribunal clearly found that the Local Board's evidence was either not credible[5] or was not

[3] Under the Fair Dismissal Act, the local boards in Georgia have the authority to serve as the factfinders by having its elected board members hear the evidence and make factual findings. Alternatively, a local board may elect a hearing tribunal to conduct the hearing and make factual findings. In this case, the Local Board chose to elect a hearing tribunal instead of serving in this capacity itself. By doing so, the Local Board cannot ignore the factual findings of the hearing tribunal which it empowered. See O.C.G.A. § 20-2-940(e)(1).

[4] The absence of any findings of fact on the two other charges by the tribunal leads to the reasonable conclusion that the Local Board did not meet its burden of proof on these charges. In the future, the tribunal should make a written finding or non-finding on each factual charge.

[5] Based upon a thorough review of the record, it is very likely the tribunal did not find the male Assistant Administrator credible. Specifically, the male Assistant Administrator denied making sexual comments regarding sexual matters with three of his former coworkers. All three of his former coworkers contradicted his testimony. The male Assistant Administrator further testified

sufficient to meet its burden of proof. Thus, the Local Board erred by ignoring the factual findings and recommendations of the tribunal.

C. Hearsay Evidence.

Appellant asserts that the tribunal erred by allowing and relying upon the hearsay evidence contained in the EEO Report.[6] 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). The Local Board has the burden of proof in offering admissible evidence in seeking to dismiss a teacher. O.C.G.A. § 20-2-940(e)(4). The EEO Report contains statements told to the Diversity and Equal Opportunity Manager during her interviews. These statements are out-of-court statements made by a person that was unavailable for cross-examination. See King v. Cobb County Bd. of Educ., Case No. 2008-70 (Ga. SBE, Sept. 2008), citing L.S. v. Carrolton City Bd. of Educ., Case No. 2007-58 (Ga. SBE, Oct. 2007).

In the case sub judice, the Order of the Local Board relies heavily upon the EEO Report in making its factual findings. The Local Board did not present testimony[7] from any of these witnesses to support the allegations contained in it. Moreover, Appellant was not charged with the underlying allegations in the EEO Report. These allegations had already been addressed which led to the last chance letter. Thus, the Local Board erred by relying upon this hearsay evidence to meet its burden of proof on the charges made against Appellant.

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that he became physically ill because of several sexual comments made by Appellant. All three of his former coworkers testified that he never appeared physically ill when talking about sexual matters. Furthermore, the record contains a great deal of evidence that the Assistant Principal and male Assistant Administrator were displeased when Appellant reorganized duties and the empowering of the new Assistant Principal. Whatever the reason, the tribunal clearly found that the Local Board did not meet its burden of proof showing that Appellant made the comments to the male Assistant Administrator and that he retaliated against the Assistant Principal.

[6] Ironically, Appellant moved to have the EEO Report entered into the record and now asserts it is hearsay. Nevertheless, the Local Board cannot rely upon hearsay evidence to meet its burden of proof. O.C.G.A. § 20-2-940(e)(4).

[7] The Local Board presented one witness who provided her speculative testimony that Appellant retaliated against her at Floyd after he learned she had an interracial marriage. The Local Board relied upon this testimony despite the tribunal rejecting the allegation that Appellant retaliated against the Assistant Principal. Moreover, the witness readily admitted that Appellant subsequently provided her a recommendation to be an administrator. In any event, this testimony relied upon by the Local Board is without probative value.

D. Prior Events.

Appellant contends that the Local Board erred by relying on events that had occurred during Appellant's prior contract year. Appellant relies upon Moulder v. Bartow County Bd. of Educ., 267 Ga. App. 339 (2004) in support of his position. In Moulder, the Georgia Court of Appeals held that a local board could not terminate an employee under the Fair Dismissal Act "based solely on events that occurred before the contract was issued." Id. at 343. Moulder further held that the prior incidents "can be presented for the purpose of establishing a course of conduct." Id. Thus, under Moulder, prior incidents cannot be used to support the decision of the Local Board, but can be presented to establish a course of conduct.

In this case, the tribunal properly limited its findings of fact to the allegations made against Appellant. The Local Board ignored these findings and relied upon the prior incidents and the allegations by the male Assistant Administrator and Assistant Principal. As set forth above, the Local Board erred by failing to follow the tribunal's findings regarding the allegations by the male Assistant Administrator and Assistant Principal. Thus, the Local Board's decision can only stand by reliance on the prior incidents[8], which is contrary to Moulder. Contrary to the Local Board's contention, the prior incident evidence was not used to show a course of conduct, but was actually used to support its decision. Thus, the Local Board erred by relying on the EEO Report.

E. The Evidence and the Local Board's Decision.

1. Appellant's termination is not proper.

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. 1976). For the reasons set forth below, the State Board finds that the Local Board abused its discretion and acted arbitrarily and capriciously. Specifically, the State Board finds that the Local Board did so (1) by not following the factual findings of the hearing tribunal, (2) by relying upon hearsay evidence in its decision, and (3) by relying upon prior allegations in terminating Appellant.

In addition, this Board finds that the Local Board erred by terminating Appellant. The Local Board contends under Rabon v. Bryan County Bd. of Educ., 173 Ga. App. 507 (1985), that a local board has the authority to impose a penalty greater than that recommended by the

[8] The Local Board argues that Appellant had received letters of directives and prior sexual harassment complaints. However, the record does not contain any admissible evidence supporting these assertions, nor is it relevant to the facts the Local Board sought to prove against Appellant in this case.

tribunal. However, in Rabon the employee was provided notice that he was being proposed for termination. See Rabon v. Bryan County Bd. of Educ., Case No. 1982-7 (Ga., SBE Aug. 1982).

In this case, the Superintendent only charged and provided notice to Appellant that he was seeking a twenty (20) day suspension and a demotion to a teacher position. Thus, Appellant was notified of the taking of a smaller property right, then had a greater property right taken away without notice. Fundamental due process requires the Local Board to provide notice to Appellant that he would be terminated. Bd. of Regents v. Roth, 408 U.S. 564 (1972). Moreover, O.C.G.A. § 20-2-940(b) requires the Local Board to provide notice of the disciplinary action being proposed against Appellant. For all of these reasons, the State Board concludes that the Local Board abused its discretion and acted arbitrarily and capriciously by terminating Appellant.

2. The record supports the tribunal's fact finding.

Appellant argues that his one comment is not sufficient to constitute sexual harassment under Mendoza v. Borden, Inc., 195 F.3d 1238, 1244 (11th Cir. 1999). In Mendoza, the Eleventh Circuit addressed the issue of actionable sexual harassment by a plaintiff pursuant to 42 U.S.C. § 2000e et seq. (Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991). "The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women." Baskerville v. Culligan Intern. Co., 50 F.3d 428, 430 (7th Cir. 1995). "It is not designed to purge the workplace of vulgarity[ ]" or "the occasional vulgar banter, tinged with sexual innuendo, or coarse or boorish workers." Baskerville, 50 F.3d at 430; see also Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996). Thus, Appellant's one comment does not constitute sexual harassment.

However, the issue under the Fair Dismissal Act is not whether Appellant's conduct constitutes actionable sexual harassment under Title VII, but whether Appellant was insubordinate and willfully neglectful of his duties by making the inappropriate comment. This is a higher standard than actionable sexual harassment. 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).

In this case, Appellant was directed on July 17, 2008, to "[a]void inappropriate comments in the workplace" and to "[d]emonstrate professional respect towards others in the workplace." On August 1, 2008, the Assistant Area Superintendent cautioned Appellant to be cognizant of what he said because anything he said could be misconstrued. On August 5, 2008, four days later, Appellant made the stiletto comment to the Social Worker. The record contains admissible evidence supporting the tribunal's findings that this comment was inappropriate. Thus, the Local

Board did not err by concluding that comment to the Social Worker regarding wearing a dress and stilettos was in violation of a directive.[9]

Furthermore, 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). For these same reasons, the Local Board did not err by finding Appellant willfully neglected his duties by making an inappropriate comment in contradiction of the rules and the directive.

IV. CONCLUSION

Based upon the reasons set forth above, it is the opinion of the State Board of Education that the evidence does not support the decision of the Local Board, and it is, therefore, REVERSED and REMANDED with direction that the Local Board follow the factual findings of the tribunal, and render any discipline consistent with the notice provided Appellant.

This _____ day of March 2009.

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WILLIAM BRADLEY BRYANT
VICE CHAIRMAN FOR APPEALS

[9] The Order of Local Board in a footnote states that Appellant's dress and stiletto comment alone warrants termination. However, for the reasons stated above, the Local Board cannot terminate Appellant.