

FIRST DIVISION  
March 12, 2012

No. 1-10-2127

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CHARLES DRAPER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	08 CH 15882
THE BOARD OF EDUCATION OF THE CITY OF	)	
CHICAGO,	)	Honorable
	)	Richard J. Billik,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

**ORDER**

¶ 1 *HELD:* The Chicago public school's manual did not create a protectable property right to continued employment for an at-will employee, who could be terminated with or without cause or notice.

¶ 2 Defendant Board of Education of the City of Chicago (the Board) appeals from orders of the Circuit Court of Cook County. In those orders, the court reversed the Board's

decision to terminate the employment of plaintiff Charles Draper, and awarded him 19 months of back pay.

¶ 3 The following issues are presented for our review: (1) whether the circuit court erred when it found that the policy manual discipline provisions were binding on the Board; (2) whether the termination of plaintiff Draper was against the manifest weight of the evidence; and (3) whether the award of 19 months back pay constituted an improper windfall to plaintiff Draper. We do not reach the second and third issues since we agree with the Board that plaintiff Draper's employment was properly terminated.

¶ 4 **BACKGROUND**

¶ 5 In 2003, the Board hired plaintiff Draper to work as senior finance director for After School Matters, Inc. (ASM), an Illinois not-for-profit corporation affiliated with the Board. For several years, plaintiff Draper's supervisors found his work consistently outstanding, and he received corresponding merit raises.

¶ 6 In February 2007, plaintiff Draper's supervisor, David Sinski, reassigned responsibility for ASM's budget from plaintiff Draper to a new associate director of ASM, Arlene Ortiz. In April 2007, while plaintiff Draper received materials summarizing the projected budget only an hour before the finance committee meeting, Ms. Ortiz directed him to present the budget to the committee. The budget projected a deficit of \$3,700,000 for the year. By the time of the following budget meeting, plaintiff Draper reported a projected deficit of \$2,400,000 for the year, and he told the finance committee that he hoped to lower the projected deficit even further. In July 2007, Mr. Sinski gave plaintiff

Draper a performance evaluation that plaintiff Draper described as "less than stellar."

¶ 7 For July and part of August 2007, at Mr. Sinski's instigation, plaintiff Draper acted as associate director of ASM, while Ms. Ortiz assumed the job of senior finance director. Ms. Ortiz resigned from ASM on August 10, 2007. For some time thereafter, plaintiff Draper worked as both the associate director and the senior finance director. On October 29, 2007, plaintiff Draper sent Mr. Sinski a budget projection showing a deficit of \$3,700,000 for the year. On November 4, 2007, plaintiff Draper sent a revision showing a deficit of less than \$2,000,000. Mr. Sinski instructed plaintiff Draper not to make the finance report at the ASM board meeting on November 7, 2007. Plaintiff Draper then discovered that ASM had received a grant of \$7,000,000 that the finance team had failed to record. By the time of the board meeting in November 2007, plaintiff Draper had revised the budget to reflect the added income, and he projected that ASM would have a budget surplus of \$6,100,000.

¶ 8 RELEVANT PROVISIONS OF THE POLICY MANUAL

¶ 9 The introduction to policy manual states that it "applies to all employees of the Chicago Board of Education, except where specifically noted." The policy manual further provides that it "grants the Chief Executive Officer, principals, department heads, and others as delegated by the Board, the authority and responsibility to discipline, up to and including discharge, certain Board employees as specifically identified herein. Any limitation on their authority to discipline Board employees is specifically set forth in this Policy and state or federal law." The policy manual further provides in bold-face as

follows:

**"This Policy is a general statement of disciplinary procedures. These disciplinary procedures are not intended to limit or restrict in any way the Board's right to discharge any employee with or without cause or notice, subject to the requirements set forth in the Illinois School Code and related laws. Moreover, this Policy should not be construed as a contract. \*\*\* With respect to employees not covered by a collective bargaining agreement, the Board reserves the right to change the content of this Policy as it deems necessary with or without notice."** (Emphasis in original.)

¶ 10 The policy manual addresses the use of "progressive discipline." While the Board encouraged the use of progressive discipline, **"the Board uses progressive discipline at its discretion and does not solely rely on this concept in every instance when taking disciplinary action."** (Emphasis in original.) After defining the terms supervisors,

managers and confidential employees, the policy manual provides as follows:

"Supervisors, Managers and Confidential employees are employed at-will and the Board may discharge those employees with or without cause and with or without notice. Nothing in this Policy is intended to or shall be construed as conferring on Supervisors \*\*\* a property interest in their Board employment or an expectation that their Board employment shall continue."

¶ 11 Plaintiff Draper was a supervisor and as such, an at-will employee. Section VII of the policy manual sets forth the discipline procedures applicable to supervisors. It also

reiterates that supervisors are at-will employees and may be discharged with or without cause and with or without notice and have no property interest in their employment or an expectation in continued employment. Subsection A sets forth the procedural steps to be taken prior to the issuance of discipline to a supervisor, which may be summarized as follows: (1) cautionary note must be issued to the employee warning of formal discipline if misconduct was not corrected; (2) a pre-discipline hearing is held before the Board representative at which time the employee is informed of the allegations against him, their basis and afforded an opportunity to respond to the allegations; (3) after the hearing, the CEO, Department Head, or their designee issues a decision as to the appropriate level of discipline. The CEO may discharge the employee from employment based on his own recommendation or that of the department head or general counsel; and (4) the employee may file a post-discharge appeal to the director of labor relations. However, the scope of the review is limited to a determination as to whether the discharge of the employee was sought for improper reasons and not whether the discharge was for just cause.

¶ 12 On November 16, 2007, Mr. Sinski notified plaintiff Draper by letter that a pre-discipline hearing was scheduled for November 19, 2007, to address his handling of the 2007 budget. There is no evidence that plaintiff Draper was issued a cautionary note prior to the notification to him of the scheduled hearing. In the letter, Mr. Sinski charged that plaintiff Draper committed the following acts of misconduct, as listed in the policy manual:

"2-10 Incompetently or inefficiently performing one's duties;

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3-1 Repeated or flagrant acts of Group 2 misconduct;

4-20 Fiscal mismanagement or waste of funds;

5-1 Repeated or flagrant acts of Group 4 misconduct."

Mr. Sinski cited only the varying budget projections presented between April and November 2007, as proof of the charges.

¶ 13 The Board's law department found that the November hearing did not comply with the Board's procedures as set forth in the policy manual because Mr. Sinski presided at the hearing. Greg Darneider, another director working for the Board, scheduled a second hearing on the same charges. Plaintiff Draper explained that the projected deficits derived from the failure to post to ASM's ledger a single grant of \$7 million. The Board relied solely on the variations in the budget projections between April and November 2007 as proof of all of the charged misconduct. Mr. Darneider found as follows:

"[Draper] did indicate that even though his role had changed from time to time, that it was always his responsibility to present the budget. He did not acknowledge his responsibility for reviewing the work of staff and assumed that their work was accurate. He did not have a system for reviewing the accuracy of staff members['] work, despite being suspect of certain staff abilities to perform their responsibilities."

¶ 14 Based on that evidence, and the inaccurate budget report plaintiff Draper prepared in November 2007, Mr. Darneider found that plaintiff Draper performed his work incompetently or inefficiently, and he committed repeated and flagrant acts of fiscal mismanagement. Mr. Darneider added:

"While I find that Mr. Draper violated 2-10, 4-20 and 5-1, there is no evidence to suggest that Mr. Draper committed any act of intentional malfeasance. Rather, the evidence indicates that Mr. Draper has been negligent in the performance of his duties. Mr. Draper failed to diagnose in a timely manner significant inaccuracies within data reports prepared for the Board and the Finance Committee. Mr. Draper has failed to put in place a system of checks and balances within the Finance Dept. to assure that all information was accurately posted to the appropriate fiscal reports. Despite knowing that certain staff might not be able to perform essential tasks, Mr. Draper failed to ensure that they were trained and supervised in their responsibilities. \*\*\* I am recommending that his employment be terminated."

¶ 15           The CEO accepted Mr. Darneider's recommendation, and on January 10, 2008, plaintiff Draper was notified of the CEO's decision terminating his employment. Plaintiff Draper requested that the CEO's decision be reviewed by the Board's labor relations director, Cheryl Colston. Ms. Colston found no evidence that Mr. Darneider sought plaintiff Draper's termination for improper reasons and denied his appeal. Plaintiff Draper sought review in the circuit court, asserting that his discharge violated the policy manual.

¶ 16           The circuit court held that the manifest weight of the evidence established that plaintiff Draper was not guilty of fiscal mismanagement and reversed Mr. Darneider's findings that he committed the misconduct described in sections 4-20 and 5-1 of the policy manual. The court upheld the remaining findings of misconduct. Because those acts of misconduct did not list discharge as a possible sanction, the court remanded the case to the

Board for the imposition of sanctions other than discharge, as well as the reinstatement of plaintiff Draper and an award of back pay.

¶ 17 In May 2009, the Board informed plaintiff Draper that because the Board no longer employed ASM's staff, it would not reinstate him. On August 31, 2009, Ms. Colston awarded plaintiff Draper back pay from his termination date of January 13, 2008 to June 27, 2008, the date when the Board formally discharged all of its employees who staffed ASM. The Board chose not to impose any discipline for plaintiff Draper's misconduct.

¶ 18 Plaintiff Draper sought review of the decision. The circuit court upheld Ms. Colston's findings that (1) the Board lacked the authority to reinstate Draper to ASM, and (2) the Board had no comparable position immediately available. However, based on the Board's delay in hearing petitioner Draper's claims on remand, the court ruled that August 31, 2009, was the proper termination date for his back pay claim.

¶ 19 The Board appeals the orders of the circuit court. Plaintiff Draper filed a cross-appeal, but not within the time for filing established in Supreme Court Rule 303. Ill. S. Ct. R. 303 (eff. June 4, 2008). We granted the Board's motion to strike the cross-appeal as untimely.

¶ 20 ANALYSIS

¶ 21 The dispositive issue is whether the policy manual created a protectable property right for plaintiff Draper's continued employment.

¶ 22 I. Standard of Review



¶ 23 We review the Board's interpretation of the provisions of its policy manual *de novo*. *McTigue v. Personnel Board*, 299 Ill. App. 3d 579, 588 (1998). While we give considerable deference to an agency's interpretation of its rules, "the agency's interpretation is not binding if this court finds it to be erroneous." *McTigue*, 299 Ill. App. 3d at 588.

¶ 24 II. Discussion

¶ 25 "[A]n employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present." *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill. 2d 482, 490 (1987). Plaintiff Draper does not contest the circuit court's finding that he failed to establish that the policy manual created any enforceable contractual rights. He maintains, however, that even if the policy manual does not constitute a contract, it may still establish enforceable rights. See *Lawshe v. Simpson*, 16 F.3d 1475, 1480 (7th Cir.1994).

¶ 26 A rule or regulation must have " 'binding force' " in order to establish constitutionally protected property. *Hohmeier v. Leyden Community High Schools District 212*, 954 F.2d 461, 465 (7th Cir. 1992). In *Hohmeier*, the school board policy provided that an official supervisor could recommend that an employee be terminated for proper cause, but further provided that all cases of discharge were subject to the regular established grievance procedure. The plaintiff was terminated from her secretarial position and pursued the grievance procedure, but her termination was upheld. She then filed an action in federal court alleging that the school board policy conferred on her a property interest in continued

employment and that her discharge required "good cause." The district court granted summary judgment to the defendants, and the court of appeals affirmed. The court found that since there was no requirement under the school board policy that an administrator recommend discharge or that good cause exist in order for an employee to be discharged, the policy "lack[ed] the requisite mandatory language to confer on [the plaintiff] a property interest in continued employment." *Hohmeier*, 954 F.2d at 466.

¶ 27 Plaintiff Draper maintains that the progressive disciplinary procedures contained in the policy manual conferred on him a right to expect that any charges of misconduct would be adjudicated according to those procedures. We find *Miller v. Crystal Lake Park District*, 47 F.3d 865 (7th Cir. 1995), instructive in addressing plaintiff Draper's argument.

¶ 28 In *Miller*, the park district issued a manual that said, "[t]he contents of this manual \*\*\* should not be construed by any individual as being an employment contract," and " 'Department Heads, with the approval of the Director, may dismiss any employee for just cause.' " *Miller*, 47 F.3d at 866. When the park district fired Mr. Miller, he sued the park district in federal court for violating his right to due process, claiming that it lacked just cause for firing him. The district court dismissed the claim, and the court of appeals affirmed.

¶ 29 In affirming the district court, the court of appeals stated as follows:

"All of this may leave the reader wondering why the Park District would issue a manual with 'just cause' language only to take back the promise. Is it trying to fool prospective employees? \*\*\* The manual itself offers a better explanation. Recall the language:

'Department Heads, with the approval of the Director, may dismiss any employee for just cause.' The governing board of the Park District retains ultimate authority. It has delegated some managerial powers to Department Heads and the Director, and it wants to ensure that they use these powers for the good of the Park District. \*\*\* [T]he top managers (here, the political officials) may establish standards for their subordinates without constraining their own discretion. \*\*\* such systems do not create 'liberty' or 'property' interests, because the existence of discretion at the apex of the bureaucracy defeats any legitimate claim of entitlement. " *Miller*, 47 F.3d at 868.

¶ 30 The court found that Mr. Miller did not have a protectable property interest in the enforcement of the terms of the manual because the manual itself undercut any claim its provisions had to legal status. While the court noted that Mr. Miller had not used the four-step grievance procedure outlined in the manual, it did not suggest that, had he done so, the court would have reached a different conclusion. See *Miller*, 47 F.3d at 868.

¶ 31 Plaintiff Draper maintains that, according to the CEO's recommendations at the time the policy manual was adopted, the progressive discipline procedures were intended to afford some due process protection to at-will employees and to avoid the improper dismissal of the employees by allowing a limited right of appeal. Still, while providing for progressive discipline in the case of supervisors such as plaintiff Draper, the policy manual reiterates that nothing in the policy manual "shall be construed as conferring on Supervisors \*\*\* a property interest in their Board employment or an expectation that their Board employment shall continue." Plaintiff Draper could have no reasonable

expectation that the policy manual conferred on him any protectable right to the progressive disciplinary procedures.

¶ 32 Plaintiff Draper's reliance on *Wheeler v. Phoenix Co. of Chicago*, 276 Ill. App. 3d 156 (1995), *Long v. Tazewell/Pekin Consolidated Communication Center*, 215 Ill. App. 3d 134 (1991), and *Perman v. Arcventures, Inc.*, 196 Ill. App. 3d 758 (1990), is misplaced. In all three cases, the disclaimers were in inconspicuous places in the document or were ambiguous. In contrast, the policy manual sets forth in unambiguous language a disclaimer of any contractual relationship with the employee, and the Board's right to use progressive discipline at its discretion was set forth in the introduction to the policy manual, in a separate paragraph and in bold-face type.

¶ 33 Two other cases relied on by plaintiff Draper merit mention. In *McTigue*, the parties agreed that the regulations constituted an enforceable employment contract. In interpreting the personnel rule provision at issue, this court held that the employee could reasonably understand that he could not be discharged for a first-time violation of the provision. In the present case, there was no enforceable employment contract, and petitioner Draper could not have reasonably believed he had a protectable right to the progressive disciplinary procedures. In *King v. City of Chicago*, 324 Ill. App. 3d 856 (2001), a probationary Chicago Housing Authority officer contended that he had been improperly terminated because no investigation had been conducted as required by a Chicago Police Department general order. This court found that the officer's termination was not for a violation requiring an investigation. We further noted that requiring an

investigation "would eviscerate the superintendent's discretionary authority to discharge probationary officers at will." *King*, 324 Ill. App. 3d at 861. Likewise, in the present case, the Board and its designees had the authority to terminate an at-will employee's employment with or without cause or notice. Interpreting the policy manual to require the Board to use progressive disciplinary procedures ignores the policy manual language providing that the Board uses progressive disciplinary procedures at its discretion and, as in *King*, would eviscerate the Board's authority to terminate an at-will employee's employment with or without cause or notice.

¶ 34 CONCLUSION

¶ 35 We conclude that the policy manual did not create a protectable property right to continued employment for plaintiff Draper. Therefore, we reverse the order of the circuit court.

¶ 36 Reversed.