2012 IL App (1st) 111195-U

FIRST DIVISION
FILED: MARCH 5, 2012

No. 1-11-1195

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VERONICA WALTON,	) APPEAL FROM THE
	) CIRCUIT COURT OF
Plaintiff-Appellant,	) COOK COUNTY
	)
v.	) No. 10 CH 19788
	)
BOARD OF EDUCATION OF THE CITY OF CHICAGO, MARY RICHARDSON LOWRY, President, NORMAN BOBINS, Member, TARIQ BUTT, Member, PEGGY DAVIS, Member, ROXANNE WARD, Member, CLARE MUNANA, Member, ALBERTO A. CARRERO, JR., Member, RON HUBERMAN, Chief Executive Officer, NEAL ROSENFELD, Hearing Officer, and ILLINOIS STATE BOARD OF EDUCATION,	)
	) HONORABLE
	) LEE PRESTON,
Defendants-Appellees.	) JUDGE, PRESIDING.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

Held: The plaintiff forfeited her argument that the Board of Education of the City of Chicago's hearing violated her due process rights. The Board did not err in finding that there was reasonable suspicion to order her to submit to a drug and alcohol test, nor did it err in determining that her conduct warranted her dismissal.

¶ 1 The plaintiff, Veronica Walton, appeals from the circuit court's judgment confirming the decision of the Board of Education of the City of Chicago (Board) to terminate her employment as a teacher based on her refusal to submit to a drug and alcohol test and her related insubordination. On appeal, the plaintiff argues that the Board's hearing violated her due process rights, that her superiors lacked the reasonable suspicion necessary to ask her to submit to the test, and that her conduct did not warrant the termination of her employment. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 Following a February 6, 2009, incident on school grounds, the plaintiff, a tenured high school teacher for Chicago Public Schools (CPS) was charged by CPS with being present on school property while under the influence of drugs or alcohol, violating school rules, and undertaking conduct unbecoming a CPS employee, all in relation to her allegedly erratic workplace behavior and subsequent refusal to submit to a drug and alcohol screening test. The matter proceeded to a hearing, which took place on November 12, 2009.

¶ 3 At the hearing, Dr. Karlen Lusbourgh, the plaintiff's former assistant principal, testified that, on the morning of February 6, 2009, she spoke with the plaintiff regarding a cabinet-space dispute the plaintiff was having with a teacher in a shared classroom. Lusbourgh recalled that the plaintiff refused to remove her items from the cabinet as Lusbourgh had requested, so Lusbourgh contacted the school's principal to resolve the dispute. According to Lusbourgh, the principal directed a clerk to call the plaintiff's classroom and summon the plaintiff and also paged her via the school's public address system. However, the plaintiff "refused to come down" because she "was doing a perm or had some chemicals in the child's hair or something like that." At that point, Lusbourgh and the

principal walked up to the plaintiff's classroom and asked her to speak with them in the hallway.

¶ 4 During the ensuing encounter, Lusbourgh recalled, the plaintiff and the principal "were talking back and forth" as the plaintiff walked around. The plaintiff called her union to ask for a union representative, then went to the bathroom and began "flushing the toilet[] and talking on the phone." Lusbourgh said that, during this period, the plaintiff's disposition was "all over the place." In later testimony as a rebuttal witness, Lusbourgh elaborated that, during the encounter, the plaintiff's "voice was elevated, she was distracted, she was very defensive, she started walking back and forth, she was up and down, and she was loud and boisterous with the principal." Lusbourgh agreed that the plaintiff's behavior could be characterized as "erratic."

¶ 5 According to Lusbourgh, when the plaintiff exited the bathroom after approximately 30 minutes, she received permission to re-enter her classroom to retrieve personal property. While inside, "she busted out and said, [']you all see what she doing to me, students?['] ". Lusbourgh then asked for the plaintiff's keys to the disputed cabinet. The plaintiff replied that the keys were at her home. However, Lusbourgh soon thereafter found the keys on the plaintiff's key ring, which was hanging from a classroom door.

¶ 6 Lusbourgh escorted the plaintiff to a conference room to meet with the principal and a union representative. In the meantime, the principal had contacted the school's human resources department and received paperwork to compel the plaintiff to undergo drug and alcohol testing based on a reasonable suspicion that she was under their influence. When the Board moved to place the completed reasonable suspicion form into evidence, the hearing officer asked the plaintiff's counsel if there was any objection to the admission of the report. Counsel responded that he had no

objection, even though on three separate occasions counsel later objected on hearsay grounds to the reading of other letters into evidence. The report, which was signed by both Lusbourgh and the principal, recited that the plaintiff had unusual eye movement in that her eyes were "constantly shifting." The report further stated that the plaintiff demonstrated lack of coordination in that she "could not remain stationary," and that she had "eyes [that] were red and she couldn't remain focused."

¶ 7 The plaintiff was informed that testing personnel were en route, and she was left alone in the room for approximately 15 to 20 minutes while Lusbrough oversaw the dismissal of the students for the day. When Lusbourgh returned to the room, the plaintiff had left. The plaintiff never submitted to testing. On cross-examination, Lusbourgh agreed that she did not smell alcohol or drugs on the plaintiff's breath.

¶ 8 Later Board witnesses testified that the plaintiff went to the human resources building that afternoon and told them she needed to take a fitness-for-duty examination, but then left before any test was administered. In rebuttal, the Board presented the testimony of a human resources employee who recalled that the plaintiff acted nervous when she came to the human resources office on February 6, 2009.

¶ 9 During her testimony, the plaintiff said that she had been told that she would meet with Lusbourgh regarding the cabinet dispute in the afternoon and that she had made arrangements to end her class early so that she could attend the meeting. She testified, however, that the principal's clerk called her over an hour before the scheduled meeting time. She explained that she could not leave her classroom when the clerk called or when she was paged over the public address system, because

her students were working with dangerous chemicals and required supervision. The plaintiff said that she told Lusbourgh and the principal as much when they arrived in her classroom but that the two administrators nonetheless ordered her to leave her classroom to speak with them. She recalled that, at that point, Lusbourgh noticed her key ring in a door and took the school keys off her key ring. According to the plaintiff, upon reaching the hallway, she began to feel sick and asked if she could use the bathroom, only to be refused permission. She said that she went to the bathroom anyway. While inside, in addition to using the facilities, she contacted her union as well as the principal's supervisor.

¶ 10 In the plaintiff's recollection, when she left the bathroom and went to the meeting with the principal, the principal informed her that she would never teach again. The principal then handed her a form directing her to submit to an immediate medical examination, and told her to leave the school. The plaintiff did so. As she left, however, she noticed the human resources letterhead on the form, and so she went to human resources to take the drug test she understood that she needed to take. On cross-examination, the plaintiff explained that she interpreted the form as directing her to travel to the company that administered the school's testing and submit to a drug and alcohol test.

¶ 11 The plaintiff explained why she left the human resources building and did not return that afternoon for testing. She said that she left the human resources office when she noticed that she had forgotten her cellular phone. While she was retrieving the phone from her car, her car was struck by a truck whose driver then attempted to flee. The plaintiff then drove to the police station to file a police report; she presented a copy of the report into evidence.

¶ 12 The plaintiff presented the testimony of two of her students who were in her classroom on

the morning of February 6, 2009. The first student testified that, in the 90 minutes prior to the encounter with school administration, the plaintiff was "regular Ms. Walton." The student said that the plaintiff was "calm" and did not smell of alcohol. She also said that the plaintiff did not have red eyes and was not stumbling. The second student testified that the plaintiff did not "act like she was drunk" on February 6, and in fact was acting "[l]ike she was just Ms. Walton." The second student said that the plaintiff's eyes were not bloodshot and that the plaintiff did not stumble or have difficulty speaking.

¶ 13 In his written decision following the hearing, the hearing officer noted that CPS policy allows administrators to order drug or alcohol testing if they develop reasonable suspicion of abuse. He found that the plaintiff was not a credible witness for several stated reasons, and he found Lusbourgh's description of events to be credible. He nonetheless found that administrators lacked reasonable suspicion to support a drug and alcohol test.

¶ 14 Because the drug and alcohol test was unwarranted, the hearing officer found that the plaintiff had not committed misconduct in need of remediation and thus should be reinstated to her teaching position.

¶ 15 In reviewing the hearing officer's recommendation, the Board noted that both Lusbourgh and the principal signed a report detailing indicia of the plaintiff's intoxication–a report the Board referred to as a "business record." The Board rejected any potential negative inference from the absence of the principal's testimony at the hearing. The Board found that administrators had a reasonable suspicion that the plaintiff was intoxicated. In so finding, the Board cited evidence that the plaintiff was "walking back and forth," could not stand still, was loud and defensive, behaved

erratically, and suspiciously stayed in the bathroom for an extended period. The Board also cited the report's indication that the plaintiff had reddish eyes and lacked focus, and the plaintiff's suspicious behavior after being asked to submit to alcohol and drug testing.

¶ 16 The Board concluded that the plaintiff was subject to dismissal from her teaching position, because she knew she was subject to discharge if she did not submit to testing, yet left school grounds anyway, and because her refusal was "immoral and disrupted the orderly education process." The Board also found that the plaintiff's misconduct "caused harm to *** students and faculty, and damaged the reputation of [CPS]."

¶ 17 The plaintiff appealed the Board's decision to the Circuit Court of Cook County, which confirmed the Board's ruling, and the plaintiff filed this timely appeal.

¶ 18 The plaintiff's first argument on appeal is that the Board's hearing procedure deprived her of her right to due process, in two ways. First, the plaintiff asserts that the Board deprived her of a meaningful opportunity to cross-examine witnesses when it accepted into evidence the statements the principal wrote in a written report even though the principal was not present to testify. However, as the Board observes in its brief, the report that forms the basis of the plaintiff's argument was admitted only after counsel for plaintiff expressly disavowed any objection to it. The plaintiff has therefore waived or forfeited any objection to the Board's consideration of the substance of this report. See Board of Education, Joliet Township High School District No. 204, 231 Ill. 2d 184, 205, 897 N.E.2d 756 (2008).

¶ 19 The second manner in which the plaintiff claims the Board deprived her of due process is its incorporation in its ruling of the reasons why the principal was unable to testify at the hearing.

However, we agree with the Board that, to the extent the Board relied on extra-evidentiary information to determine the reasons that the principal did not testify, such an error must be considered harmless. As the Board states in its brief, the Board was not obligated to provide a reason for the principal's absence at the hearing. Further, the principal's testimony was not necessary where the plaintiff offered no objection to the admission of a report containing the principal's recollection of events and the plaintiff made no attempt on the record to call her as a witness.

¶ 20 The plaintiff's second argument on appeal is that the Board erred in concluding that there was reasonable suspicion to support a demand that she submit to drug and alcohol testing. As the parties observe in their briefs, the Board's ruling here is an administrative decision subject to the dictates of the Administrative Review Law (735 ILCS 5/3-101 et seq. (West 2008)). See 105 ILCS 5/34-85 (West 2008). On administrative review, the subject of our review is the agency's final determination, not that of the circuit court (Vincent v. Department of Human Services, 392 Ill. App. 3d 88, 93, 910 N.E.2d 723 (2009)), and our review extends to all questions of law and fact presented in the administrative record (735 ILCS 5/3–110 (West 2008)). For any given issue, our standard of review, which embodies the level of deference we afford the agency on that issue, depends on whether the issue is one of fact, one of law, or a mixed question of law and fact within the agency's area of expertise. AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill.2d 380, 390, 763 N.E.2d 272 (2001). A reviewing court affords to an agency no deference on questions of law, and it will therefore consider de novo any legal issues raised in an administrative appeal. City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 205, 692 N.E.2d 295 (1998). An administrative agency's findings of fact, on the other hand, are deemed to be prima facie true and

correct and will not be upset unless they are against the manifest weight of the evidence. City of Belvidere, 181 Ill. 2d at 204, 229 Ill.Dec. 522, 692 N.E.2d 295 (citing 735 ILCS 5/3–110 (West 1994)). An agency's resolutions of mixed questions of law and fact—those issues for which the historical facts are established and the rule of law undisputed, so that the only question is whether the facts satisfy a statutory standard or whether as applied to the facts the rule of law is violated—will not be overturned on review unless clearly erroneous. AFM Messenger, 198 Ill. 2d at 391, 763 N.E.2d 272. The supreme court adopted this "clearly erroneous" standard of review, and this "mixed question of law and fact" category, in order to allow deference to agencies on matters within their expertise when review otherwise would have been de novo. See City of Belvidere, 181 Ill.2d at 205, 692 N.E.2d 295 ("we find that the applicable standard of review should be between a manifest weight of the evidence standard and a de novo standard so as to provide some deference to the Board's experience and expertise"). The plaintiff now asks us to review the Board's conclusion that the evidence supported a finding of "reasonable suspicion." This is a challenge to the Board's application of a specialized definition to the facts at hand, and we review such a mixed question for clear error.

¶ 21 Section 34-85 of the Illinois School Code provides that tenured teachers may be dismissed only "for cause" pursuant to applicable procedures set forth by statute or through collective bargaining. 105 ILCS 5/34-85 (West 2008). The parties do not dispute that the CPS policy manual, which was admitted into evidence in pertinent part at the plaintiff's hearing, sets forth the relevant standards in this case. That policy manual provides that "[a]ny employee *** for whom there is a reasonable suspicion that the employee has used drugs or alcohol or is under the influence of drugs

or alcohol while on Board property *** shall be required to submit to drug and alcohol testing." It further states that any positive tests, or any refusals to submit to testing, will result in the employee's becoming "subject to dismissal." The policy defines the phrase "under the influence" as "any mental, emotional, sensory or physical impairment due to the use of drugs or alcohol." The policy defines "reasonable suspicion" as "a belief that an employee may be under the influence of drugs or alcohol." The definition continues:

> "Such a belief must be based on objective criteria, which may include, but is not limited to *** erratic or unusual behavior *** [such as] noticeable imbalance, incoherence and disorientation ***; observation of possible ingestion of alcohol or use of drugs; *** excessively aggressive behavior; or other circumstances which could lead a reasonable person to believe that the use of drugs or alcohol may have been involved."

¶ 22 CPS personnel rules also require that employees be drug and alcohol free at work, and they warn that a violation of this policy will lead to dismissal.

¶ 23 Aside from her arguments, rejected above, that the Board considered improper evidence in reaching its decision, the plaintiff relies on several pieces of evidence to support her contention that the administrators lacked reasonable suspicion to order that she be tested. For example, she notes that her students said she was not acting strangely, that nobody detected any suspicious odors emanating from her, that she did not slur her speech, and that she had a long employment record with CPS. However, Lusbourgh testified that the plaintiff was acting erratically and boisterously, and she described the plaintiff's unusual behavior of hiding in the bathroom and misstating the location of her keys. The Board also had evidence, in the form of the written report to which the plaintiff

offered no timely objection, that the plaintiff was having difficulty focusing and had red eyes. This evidence matches closely with much of the verbiage of the above-quoted "reasonable suspicion" standard, which cites both erratic behavior and overly aggressive behavior as indicia of the influence of alcohol or drugs. Based on this evidence, then, we cannot say that the Board's determination that these observations met the "reasonable suspicion" standard was clearly erroneous.

¶ 24 The plaintiff's final argument on appeal is that the Board erred in finding her conduct to be irremediable, so that she could be dismissed from her position without warning. As the parties observe, the Illinois School Code provides that a teacher may be dismissed immediately for irremediable conduct, but must receive a written warning to cease remediable conduct. 105 ILCS 5/34-85 (West 2008); Younge v. Board of Education of the City of Chicago, 338 Ill. App. 3d 522, 531, 788 N.E.2d 1153 (2003). Irremediable conduct includes conduct that is "cruel, immoral, negligent, or criminal or which in any way causes psychological or physical harm or injury to a student." 105 ILCS 5/34-85 (West 2008). The plaintiff does not argue that a teacher's appearing at school in a state of intoxication falls short of this standard; instead, she argues that she was never found to have been intoxicated but instead was dismissed for refusing to submit to testing. She argues that this conduct was not irremediable. Again, the parties ask us to apply the facts to a statutory standard within the purview of the Board, so we review the Board's ruling on this point for clear error.

¶ 25 We conclude that the Board did not clearly err in finding the plaintiff's misconduct irremediable. Even if we were to agree with the plaintiff that her misconduct did not include intoxication during the school day, it nevertheless did include her: refusal to submit to drug and

alcohol testing despite written policies that such a refusal would lead to termination, disrupting a class to chastise the administration, arguing loudly with her superiors, refusing orders from her superiors, and fleeing the premises in the face of a demand that she submit to testing. Pursuant to the Illinois School Code, the Board found, among other things, that this conduct was irremediable in that it was harmful to students and the school. We discern no grounds for holding this conclusion to be clear error. The plaintiff's misconduct severely undermined the school's drug-testing policy, a policy that was no doubt put in place for students' protection. It also disrupted the organizational hierarchy upon which school administration depends. For these reasons, we reject the plaintiff's argument that the Board erred in finding her conduct irremediable.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court, which confirmed the decision of the Board.

¶ 26 Affirmed.