2016 IL App (1st) 160821-U

THIRD DIVISION
December 28, 2016

No. 1-16-0821

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEITH BROOKSHIRE, Respondent-Appellant, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO, FOREST CLAYPOOL, Chief Executive Officer, ANN S. KENIS, Hearing Officer, and ILLINOIS STATE BOARD OF EDUCATION, Petitioners-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 0024 RS4

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The Board of Education of the City of Chicago did not have cause to terminate respondent from his position as a tenured teacher. We reverse and remand.

¶ 2 This appeal arises from a termination of respondent Keith Brookshire as a tenured teacher by petitioner the Board of Education of the City of Chicago (Board). On appeal, respondent

contends that the Board erred in concluding that respondent's action of grabbing a student by his backpack was negligent, and thus irremediable, under section 34-85(a) of the Illinois School Code (School Code). 105 ILCS 5/34-85(a) (West 2014). In addition, respondent contends that the Board erred in concluding that respondent engaged in immoral conduct by lying under oath at the dismissal hearing. *Id.* Further, respondent contends that the Board violated the mandate of the School Code by basing respondent's termination upon allegations not contained in the dismissal charges. See 105 ILCS 5/34-85(a)(1) (West 2014). We reverse and remand.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. During the school year of 2013-2014, respondent, a tenured teacher employed with the Board for 25 years, was assigned to John M. Harlan Community Academy High School (Harlan) as the in-school detention teacher and football coach. On December 19, 2014, the Board's Chief Executive Officer (CEO) approved charges against respondent for violating numerous Board polices and Illinois State Board of Education Rules and Regulations. Specifically, respondent was charged with using inappropriate language toward Harlan students, including but not limited to, seventeen-year-old student D.A. Further, on February 17, 2014, respondent allegedly grabbed freshman student D.C.'s backpack which caused D.C. to fall, hit his head on a desk, and bleed excessively. In addition, on February 26, 2014, respondent allegedly grabbed D.A. by the arm, pushed him in the back until they were both outside the in-school detention room, and chocked him until D.A. was tased by Chicago Police Department (CPD) officers. Furthermore, on the aforementioned dates, respondent allegedly forced D.C. and D.A. to stand for extended periods of time as punishment and failed to inform Harlan Principal Reginald Evans of both physical altercations.

¶ 5 At the dismissal hearing, Hearing Officer (HO) Ann Kenis presided over the matter. D.C. testified that he was placed in in-school detention because he did not have his school ID. He was standing in the corner of the room for approximately 30 minutes when respondent asked D.C. to move to the middle of the room. D.C. complied slowly. Respondent then ordered D.C. "to get out of the room" and "started pulling [D.C.'s] shirt." D.C. yanked back and respondent pulled on D.C.'s shirt again. Respondent then "yanked [D.C.] back harder" and he fell, hitting his head on the desk. D.C. admitted to saying threatening things to respondent out of anger. In the post-incident conference, D.C. recalled that respondent denied the incident, suggesting instead that D.C. tripped on something in the room. D.C. did not tell his side of the story because his father told him to be quiet. On cross-examination, D.C. agreed that respondent grabbed him by his backpack.

¶ 6 Several Harlan staff members testified to the following. Vahon Winton, respondent's co-teacher, testified that D.C. refused to sit down and was saying very disrespectful things to respondent. When respondent instructed D.C. to go to the dean's office, D.C. walked away toward the back of the classroom. Respondent then grabbed D.C. by his backpack and D.C., who was trying to break free, slipped and fell.

¶ 7 Sharon Abrom, a school clerk, testified that her desk was located outside the in-school detention room. She heard desks rumbling and a female student scream, "he's bleeding." When D.C. walked out, Abrom got paper towels and water to clean the blood off D.C.'s head, ear, neck, face and clothing. He told her that "he busted [his] head," pointing at respondent. Dean Tamarah Ellis testified that when she went to assist Abrom with D.C., Dean Ellis observed a deep laceration in D.C.'s head that needed stitches. She cleaned the cut and gave D.C. an ice pack to hold until his father arrived.

¶ 8 Dean Theophilus Tines testified that he put D.C. in in-school detention because he did not arrive at school with a parent as requested by one of his teachers. Dean Tines called D.C.'s father in for a post-incident conference. Respondent relayed his side of the story and D.C. only commented that, "there wasn't anything different than what [respondent] said." Dean Tines, however, did not recall if D.C.'s father told D.C. to be quiet. Dean Tines instructed Abrom to document the incident. D.C.'s father did not think D.C. needed to go to the hospital for further medical attention.

¶ 9 D.A. then testified about his altercation with respondent. Dean Ellis placed D.A. in in-school detention because she suspected he pulled the fire alarm. Respondent made D.A. stand up "for some hours," and when he sat down at a desk, respondent told D.A. to "get [his] fat ass up out of the chair." D.A. then told respondent he was a "fat ass too." Respondent reacted by "pushing" D.A. out of the classroom into the connecting dean's office area and "squeezed" his upper arm. Respondent then charged D.A. like a "football player" into the filing cabinet and restrained him until security guards arrived.

¶ 10 Numerous Harlan staff members testified to the following. Donissa Gray testified that her desk was stationed outside the in-school detention room. She recalled respondent telling D.A. "to come out" of the classroom, "[y]ou need to go to Dean Tines. You're being disrespectful." D.A. came to the door and pushed respondent into Gray's desk saying, "I don't have to go no mother fucking where with you." Respondent then restrained D.A. up against a filing cabinet, while Gray went to notify Dean Tines about the situation.

¶ 11 Dave Jordan, a security officer, testified that he heard commotion and observed D.A. and respondent holding each other's clothing with D.A.'s back up against a file cabinet. Jordan intervened and held D.A. because he was trying to attack respondent. Another security officer

came to assist and D.A. pushed Jordan into a desk. Eventually Jordan was able to get D.A. into Dean Tines's office. D.A. continued to try and wrestle with Jordan until a CPD officer tased D.A. Deans Tines and Ellis also testified that when they arrived on the scene D.A. was wild and out of control. Afterward, Dean Tines instructed both respondent and Abrom to write-up an incident report.

¶ 12 Finally, respondent testified regarding the two occurrences. D.C. was being verbally disrespectful to respondent because D.C. did not want to stay in in-school detention. Respondent described the situation as "comical" because D.C. was "a nice kid," who respondent "never had a problem with before." But as D.C. started to get more disrespectful and use vulgar language, respondent told D.C. he needed to go to Dean Tines's office. When D.C. tried to walk away from the door, respondent grabbed the hook of D.C.'s backpack to stop him. Immediately D.C. tried to maneuver out of the backpack and fell. Respondent had no idea D.C. had hit his head on the desk because "[a]s soon as he fell down, he jumped up." Respondent never wrote up an incident report because Dean Tines told respondent to dictate it to Abrom. It was never respondent's intention to hurt D.C. or any other student. On cross-examination, respondent further testified that he regretted the incident and would have acted differently because teachers are not supposed to put their hands on students unless they are threatened.

¶ 13 In regards to D.A., respondent testified that when he came back from lunch, the in-school detention classroom was overcrowded with an extra 12 students, who were suspected of pulling the fire alarm. The only disorderly student was D.A., who said, "[f]uck that. I'm not standing on the wall." Respondent tried to reason with D.A. and they went back and forth for about 10 minutes until respondent suggested they go see Dean Tines. When they entered the outer office, D.A. pushed respondent into a desk. Respondent then restrained D.A. against a file cabinet until

security guards arrived. Respondent allegedly wrote an incident report documenting the occurrence, but it is unclear from his testimony what happened to it.

¶ 14 Based on the contradictory evidence presented at the hearing, HO Kenis recommended that respondent's dismissal be converted to a 30-day suspension without pay, and he should be reinstated with back pay. HO Kenis noted that

> "the evidence here failed to establish that respondent engaged in corporal punishment or verbal and physical abuse to students. The Board did, however, prove that respondent negligently made contact with D.C.'s backpack and that this action ultimately caused injury to the student when he fell against a desk in the classroom. In addition, the Board showed that respondent failed to inform his principal of the two altercations that occurred on February 17 and 26, 2014 by submitting the appropriate incident reports."

Subsequently, the Board accepted HO Kenis's findings and also observed that respondent lied under oath about dictating a report to Abrom and submitting a report for D.A., which constituted "immoral conduct" under the School Code. See 105 ILCS 5/34-85(a) (West 2014) Accordingly, the Board terminated respondent's service as a tenured teacher.

¶ 15 ANALYSIS

¶ 16 Respondent contends that the Board erred in concluding that his action of grabbing student D.C. by his backpack was negligent, and thus irremediable, under section 34-85(a) of the School Code. 105 ILCS 5/34-85(a) (West 2014). In administrative review cases, "the hearing officer acts as the fact finder and, in that capacity, hears the testimony of witnesses, determines their credibility, the weight to be given their statements, and draws reasonable inferences from all evidence produced in support of the charges against the accused." *Jackson v. Board of Education of City of Chicago*, 2016 IL App (1st) 141388, ¶ 26. We do not review the decision of

the hearing officer, rather, we review the final decision of the school board. *Ahmad v. Board of Education of City of Chicago*, 365 Ill. App. 3d 155, 162, (2006). Our standard of review depends on whether the issue presented is a question of fact, question of law, or a mixed question of law and fact. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200, 210 (2008). An agency's findings of fact are considered *prima facie* true and correct, and we will reverse an agency's findings only where they are against the manifest weight of the evidence. *Honzik v. Department of State Police*, 2013 IL App (3d) 120103, ¶ 11. A finding is against the manifest weight of the evidence "when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Vancura v. Katris*, 238 Ill. 2d 352, 385-86 (2010). An administrative agency's findings on a question of law, however, are reviewed *de novo*. *City of Belvidere v. Illinois State Labor Relations Board.*, 181 Ill. 2d 191, 205 (1998). Where the administrative agency's decision involves a mixed question of fact and law, we will apply a clearly erroneous standard of review. *Board of Trustees of University of Illinois v. Illinois Education Labor Relations Board*, 224 Ill. 2d 88, 97 (2007).

¶ 17 Under section 10-22.4 of the School Code, a tenured school teacher may be removed from employment only for cause. 105 ILCS 5/10-22.4 (West 2014). Further, "no written warning shall be required for conduct on the part of a teacher or principal that is cruel, immoral, negligent, or criminal or which in any way causes psychological or physical harm or injury to a student as that conduct is deemed to be irremediable." 105 ILCS 5/34-85(a) (West 2014); *Younge v. Board of Education of City of Chicago*, 338 Ill. App. 3d 522, 534 (2003). We do not apply the elements for the tort of negligence in a disciplinary action for negligent acts under the School Code. *Ball v. Board of Education of City of Chicago*, 2013 IL App (1st) 120136, ¶ 34.

Whether conduct is irremediable is a question of fact, not of law, and the determination lies within the discretion of the fact finder. *Prato v. Vallas*, 331 Ill. App. 3d 852, 864 (2002).

¶ 18 Based on the record before us, the Board did not have cause to terminate respondent's employment. HO Kenis concluded that D.C.'s version of events, for the most part, was not substantiated by the record. No evidence at the hearing demonstrated that respondent used vulgar language, punished D.C. by forcing him to stand in the corner, or yanked D.C. by his backpack three times. See *Board of Education of Community Consolidated School District. No. 54 v. Spangler*, 328 Ill. App. 3d 747, 757 (2002) (the hearing officer acts as the fact finder and "has the responsibility to hear the testimony of witnesses, to determine their credibility and the weight to be given to the testimony of each witness and then to draw reasonable inferences from all evidence produced in support of the charges against the accused"). Respondent and co-teacher Winton both testified that D.C. was being disrespectful and refused to follow respondent's directions. The record also suggests that respondent grabbed D.C.'s backpack to stop D.C. from walking away after respondent instructed D.C. to go to Dean Tines's office. It was entirely unintentional that D.C. fell and hit his head. Respondent even testified that he regretted the incident and would have behaved differently. Further, D.C. did not sustain any significant injury that required substantial medical attention. See *Prato*, 331 Ill. App. 3d at 862 (in order for "conduct to be considered irremediable, the damage caused by that conduct must have been significant").

¶ 19 Furthermore, in regards to the incident involving D.A., HO Kenis concluded that respondent was protecting himself when he momentarily restrained D.A. until the security guards arrived. All of the occurrence witnesses corroborated respondent's testimony that D.A., who was out of control, used vulgar language and pushed respondent into a desk. As the in-school

detention teacher respondent is tasked with instructing the most disorderly students on a daily basis and he was trying to diffuse a difficult situation on both occasions. Respondent has no prior record of misconduct in a career spanning 25 years and also serves as a football coach. While we appreciate that respondent may not have used the best judgment when he grabbed D.C. by the backpack, this isolated incident did not rise to the requisite level of negligence required to terminate a tenured teacher's employment under the School Code and was not irremediable per se. See *Raitzik v. Board of Education of City of Chicago*, 356 Ill. App. 3d 813, 831 (2005) (to show cause the Board must prove that the alleged conduct displays "some substantial shortcoming which renders a teacher's continued employment detrimental to discipline and effectiveness"); See e.g. *Ball*, 2013 IL App (1st) 120136 at ¶¶ 31-32 (teacher engaged in negligent conduct deemed irremediable per se where she failed to supervise special needs students enabling students to engage in sexual activity on school property).

¶ 20 Moreover, we need not consider whether respondent's actions constituted irremediable conduct under *Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622*, 67 Ill.2d 143 (1977), as it was superseded by section 34-85 of the School Code. See *Younge*, 338 Ill. App. 3d at 533-34 ("pursuant to section 34-85 of the School Code *** it is unnecessary to employ the *Gilliland* test to cases involving cruel, immoral, negligent, or criminal conduct because the statute now makes this conduct irremediable per se"). Consequently, we conclude that the Board's finding of negligence was against the manifest weight of the evidence.

¶ 21 Additionally, although HO Kenis determined that respondent's testimony as to whether respondent completed an incident report or otherwise informed Harlan Principal Evans about respondent's altercations with D.C. and D.A. "was not convincing," this alone is not a cause for respondent's termination. Both Deans Ellis and Tines were called in to intervene in both

incidents. Thus, the Harlan administration was well informed. Even if respondent was untruthful at the hearing, this was not immoral conduct deemed irremediable per se under the School Code. There is also no evidence in the record suggesting that respondent behaved immorally in conjunction with his employment. See *Jones v. Board of Education of the City of Chicago*, 2013 IL App (1st) 122437, ¶ 19 (teacher engaged in immoral conduct deemed irremediable per se where she fraudulently enrolled her nonresident children in city school so they could receive tuition-free educations.); *Younge*, 338 Ill. App. 3d at 534 (teachers who reported to work under the influence of marijuana, an illegal drug, engaged in criminal and immoral conduct deemed irremediable per se).

¶ 22 Finally, based on our determination that the Board did not have cause to terminate respondent's employment, we need not consider whether the Board violated the mandate of the School Code basing respondent's termination upon allegations not contained in the dismissal charges. Accordingly, we remand the case to the Board and suggest it adopt HO Kenis's recommendation that respondent's dismissal be converted into a 30-day suspension without pay, and respondent be reinstated with back pay.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we reverse the judgment of the Board of Education of the City of Chicago and remand to reconsider respondent's dismissal in accordance with this order.

¶ 25 Reverse and remanded.