RENDERED: AUGUST 27, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001358-MR

BRUCE RALEY — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 07-CI-00207

OHIO COUNTY SCHOOLS;
DR. BARBARA ERWIN, IN HER OFFICIAL CAPACITY AS KENTUCKY COMMISSIONER OF EDUCATION; KEVIN NOLAND, IN HIS OFFICIAL CAPACITY AS INTERIM KENTUCKY COMMISSIONER OF EDUCATION;
BETH DILLINGHAM, WILLIAM PEARSON, AND SUSAN VAUGHN, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE HEARING TRIBUNAL — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

COMBS, JUDGE: Bruce Raley appeals from an order of the Ohio Circuit Court

upholding a decision of a three-member tribunal that recommended his termination as a classroom teacher. The tribunal was convened in accordance with the provisions of Kentucky Revised Statute(s) KRS 161.790(4). This statute provides for an administrative hearing to review a supervisor's decision to terminate the contract of a public school teacher. The tribunal has exclusive control over whether to terminate a teacher's contract. *Fankhauser v. Cobb,* 163 S.W.3d 389 (Ky. 2005). After carefully reviewing the relevant portions of the evidentiary record, we conclude that it does not contain the requisite substantive evidence to support the action taken. Therefore, we reverse and remand to the trial court for entry of an order consistent with this opinion.

Raley began working in the Ohio County school system in 1979 as an assistant football coach and health education teacher. During his tenure at Ohio County High School, he taught physical education, health, and driver's education. Following an allegedly physical altercation with a student on October 27, 2006, the superintendent of the Ohio County Schools suspended Raley and instituted termination proceedings against him based on charges of insubordination and conduct unbecoming a teacher. Raley filed a timely notice to the superintendent and to the commissioner of education of his intention to answer the charges. *See Sajko v. Jefferson Co. Bd. of Ed.,* 2010 WL 2470869 (Ky. 2010). As a result, a three-member administrative tribunal was convened in May 2007 to hear evidence underlying the charges and Raley's response.

The administrative hearing lasted for several days. The tribunal heard testimony from school administrators, staff, and coaches -- as well as from students at Ohio County High School. Following a period of deliberation, the tribunal issued its written findings of fact, conclusions of law, and final order. It found that Raley had violated the terms of a written directive issued on December 12, 2005. In that directive, Raley had been instructed to exhibit professional and appropriate behavior and to make only professional comments to students. He was advised not to touch students and not to accumulate incidents (that could be substantiated) indicating that he had promoted a student's negative self-image.

Next, the tribunal found that Raley had flown into a rage and had initiated aggressive physical contact with a student during an otherwise innocent encounter before school on the morning of October 27, 2006. Additionally, it found that Raley had misrepresented the nature of the incident to the superintendent immediately following the altercation. Finally, the tribunal found that Raley had violated the teachers' professional code of ethics by failing to take reasonable measures to protect the health, safety, and emotional well-being of a student and that he had lied to the Education Professional Standards Board.

The tribunal concluded that there was no justification for Raley's "violent" reaction to the student and that Raley's actions had jeopardized the student's safety. It concluded that Raley had been insubordinate and had engaged in conduct unbecoming a teacher in violation of KRS 161.790(1)(b). Finally, the tribunal concluded that termination of his teaching contract was the appropriate

sanction. Pursuant to the provisions of KRS 161.790(9), Raley appealed to the circuit court.

In his appeal to the Ohio Circuit Court, Raley contended that the tribunal's findings were not supported by substantial evidence and that its order was arbitrary and capricious. Raley challenged the hearing officer's decisions with respect to the admission of evidence and with his instructions to the three-member panel regarding the insubordination charge. Finally, Raley contended that the tribunal's failure to render its decision on a timely basis rendered the decision void. The circuit court reviewed the administrative record compiled before the tribunal and concluded that its decision was based upon substantial evidence and that it had been timely entered. The circuit court rejected the remaining claims of error and issued an order upholding the tribunal's decision in all respects. This appeal followed.

On appeal, Raley argues that the circuit court erred by upholding the tribunal's decision. He contends that the court erred by concluding that the decision was supported by substantial evidence. He also contends that the hearing officer's erroneous evidentiary rulings and instructions to the panel merited reversal of the tribunal's decision.

The standard of review of the tribunal's decision in this case is whether the decision was arbitrary. KRS 13B.150; *Gallatin Co. Bd. of Ed. v. Mann,* 971 S.W.2d 295 (Ky. App. 1998). Administrative action, such as that of the tribunal, is arbitrary if it is not supported by substantial evidence. *American*

Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning, 379 S.W.2d 450 (Ky. 1964). "'Substantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Fankhauser,* 163 S.W.3d at 401, citing *Owens-Corning Fiberglass Corp. v. Golightly,* 976 S.W.2d 409, 415 (Ky. 1998). The court may not substitute its judgment for that of the tribunal as to the weight of the evidence on questions of fact. KRS 13B.150. We must defer to the tribunal's findings even where there is evidence to support a contrary finding. *Kentucky Commission on Human Rights v. Fraser,* 625 S.W.3d 852 (Ky. 1981).

Raley argues that the evidence of record does not sufficiently support the tribunal's findings. He claims that the charge of insubordination was not supported by a proper written record of his performance as required by statute. Raley contends that before his termination, he had never been shown his personnel file; had never been notified of any alleged deficiencies as policy requires; had never been provided a reasonably specific directive as to expected behavior; and had never been confronted with an allegation that he had lost his temper with a student. He also alleges that the tribunal's findings were based entirely upon the inconsistent statements of administrators and the testimony of witnesses whose motives were questionable.

KRS 161.790(1)(a) provides that a teacher's contract can be terminated for insubordination, including but not limited to the following:

> violation of the school laws of the state or administrative regulations adopted by the Kentucky Board of Education, the Education Professional Standards Board, or lawful rules and regulations established by the local board of education for the operation of schools, or refusal to recognize or obey the authority of the superintendent, principal, or any other supervisory personnel of the board in the performance of their duties.

KRS 161.790(2) provides that charges under subsection (1)(a) "shall be supported by a written record of teacher performance by the superintendent, principal, or other supervisory personnel of the district. . . ."[1] In *James v. Sevre-Duszynska,* 173 S.W.3d 250, 259 (Ky. App. 2005), we held that the "written record of teacher performance" cannot be based solely on statutes, regulations, local Board policies, or teacher contract, but "must be specific to the individual teacher and the circumstances leading up to the charge." This written record does not need to appear in the teacher's personnel file. *Carter v. Craig,* 574 S.W.2d 352 (Ky. App. 1978).

The particular incident that directly precipitated Raley's termination occurred on October 27, 2006. The "banana incident" involved a student who took bananas from Raley's lunch. Raley twice told him to put the banana down. The student disobeyed and proceeded to peel and eat the banana in his teacher's presence. Raley responded by knocking the banana out of the student's hand.

Raley had been ordered previously (in December 2005) to develop "an individual professional growth plan." A teacher who has received a negative

[1] Charges of immoral character and conduct unbecoming a teacher are not required to be supported by a written record of teacher performance.

evaluation must state "enrichment criteria" under the supervision of the school administration and must have a target date for completion of the growth plan.

With respect to the complaints that precipitated the directives given to Raley on December 12, 2005, contradictory testimony and mistaken evidence were clearly involved. A student who allegedly complained about Raley actually (admitted by Superintendent Soretta Ralph) had not been enrolled in any of Raley's classes but had been in middle school at the time of the alleged incident. Regardless of the contradictions, Raley had completed the December 2005 "growth plan" prior to the banana incident.

The record reveals numerous failures or omissions on the part of the school administration to follow its own written policies and procedures. There was no document signed by Raley in his personnel file to indicate that he had received notice of the previous events about which testimony was given before the tribunal.

The charge arising from the banana incident in October 2006 was that Raley inappropriately touched a student. There was absolutely no evidence presented that Raley touched anything but the banana – his own banana, as a matter of fact, that had been taken by the student. At the time of this occurrence, Raley was no longer subject to the terms of the December 2005 growth plan but was by now (as of August 2006) on a new growth plan, "an enrichment plan." The appellant's brief correctly notes that Raley was no longer subject to the plan formulated in December 2005. (Appellant brief, p. 7)

The record is clearly lacking in written notices of complaints and incidents allegedly conveyed to Raley. The December 2005 growth plan required that **substantiated** complaints be reported to Raley, and there is no written evidence in the record that the administration complied with the procedure requiring **written** notification.

After our review of the record, we are compelled to agree with the following observation contained in Raley's brief at p. 15:

> The mere unsubstantiated oral reports were insufficient to put Appellant on notice and there was no directive specific to any of the alleged incidents sufficient to constitute a bona fide written record.

Raley also alleges that improper use of hearsay testimony at the tribunal hearing deprived him of an adequate opportunity to cross-examine adverse witnesses. We agree. In addition, Raley was arbitrarily barred from entering into evidence a letter that allegedly explained an unsubstantiated incident about which hearsay evidence was admitted (*i.e.,* the comment concerning the Superintendent's daughter's braces.)

Next, Raley argues that the hearing officer erred by refusing to allow him to introduce several items into evidence: newspaper articles; evidence to show that a grand jury had declined to indict him with respect to the incident of October 27, 2006; evidence to indicate that the Cabinet for Families and Children had declined to investigate the school's report of the incident; and the disciplinary history, psychological profile, and terms of the individual education plan of the

subject student. Raley argues that the hearing officer's decisions to exclude this evidence meant that the tribunal's decision was not based on "the whole record" and that it must be reversed. The school system argues that evidence related to the student's school records was immaterial since no witness indicated that the student's actions could reasonably have precipitated or escalated the altercation with Raley. We agree with Raley that the evidence was material and relevant and that it was improperly excluded from the hearing.

Raley argues that the court erred by failing to reverse the tribunal's decision since the hearing officer clearly erred by limiting the number of character witnesses that Raley would be permitted to call at the hearing. We disagree. An administrative hearing officer is required to regulate the course of the proceedings in a manner that will promote the orderly and prompt conduct of the hearing. KRS 13B.080. Control of the proceedings is within his sound discretion. It is apparent from a review of the proceedings that the hearing officer believed that Raley's counsel ignored his rulings and that he became increasingly impatient with Raley's lengthy cross-examination of the witnesses and his direct examination The hearing officer did not abuse his discretion by limiting to five the number of character witnesses to be called by Raley rather than allowing the seven that he sought.

Raley also makes an argument about improper personal motives and personal animus on the part of the administrators – in particular, with respect to Superintendent Ralph. Also of interest is the alleged incident involving B.E., who

was supposed to be on disciplinary leave at that time. Nonetheless, the first person to report the banana incident was Paul Decker, the head basketball coach, who was arguably insubordinate himself by allowing B.E. to engage in basketball practice while suspended. Raley contends that Decker thus diverted attention from his own violation of policy by directing attention to Raley.

While surely indicative of the atmosphere of ill-feeling permeating the school, these allegations of personal bias do not rise to the level of relevancy sufficient to substantiate reversal.

It is also apparent from our review that the tribunal either lacked access to or neglected to review the entire record pertaining to Raley. More disturbing, however, is the failure of the record to contain written evidence of substance. "Substantial evidence" in the context of an administrative hearing is not merely the accumulation of an impressive mass of so-called evidence. It must be truly **substantive** – a matter of true **quality** rather than mere quantity. The lack of substantive evidence in this case severely vitiates and erodes what appears to be a quantum of testimony against Raley – regardless of his speculation as to possible personal motivation on the part of the school administration.

We conclude that the lack of substantial evidence, coupled with the failure of the school administration to follow its own procedures, resulted in an arbitrary proceeding and outcome. Therefore, we hold that the trial court erred in failing to reverse the tribunal.

We reverse the order of the Ohio Circuit Court and remand this case for entry of an order consistent with this opinion.

NICKELL, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

John Frith Stewart
Mary M. McGuire
Crestwood, Kentucky

NO ORAL ARGUMENT FOR APPELLANT.

BRIEF AND ORAL FOR APPELLEE OHIO COUNTY SCHOOLS:

A.V. Conway, II
Hartford, Kentucky