

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001538-MR

ANITA DRISKILL

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 02-CI-00444

STEVE KNIGHT, Superintendent
of MARSHALL COUNTY SCHOOLS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

COMBS, CHIEF JUDGE: Anita Driskill appeals from the order of the Marshall Circuit Court which affirmed a decision of a three-member tribunal of the Marshall County school system. The tribunal was convened in accordance with KRS¹ 161.790. It determined that the appellee, Superintendent Steve Knight, had acted appropriately in terminating Driskill's teaching contract with the Marshall County Board of Education. Driskill argues

¹ Kentucky Revised Statutes.

that the circuit court erred in finding that there was substantial evidence to support the tribunal's findings. She also contends that her rights to due process were violated by the manner in which the administrative hearing was conducted, alleging that one of the members of the tribunal was biased against her. After a careful review of the lengthy evidentiary record compiled during the administrative proceeding, we are unable to find any error in the decision of the circuit court. Thus, we affirm.

Driskill had enjoyed a long and unblemished career as a schoolteacher and administrator in Marshall County when she was promoted in the late 1980's to the position of District Technology Coordinator (DTC). Since 1999, Driskill had a continuing contract for 240 days per school year (185 days plus 55 extended days). She also received a stipend (\$5,800 in 1999, which had increased to \$7,300 for the 2001-02 school year) to compensate her for the extra work related to her position as DTC. In addition to her base salary, extended day salary, and stipend, Driskill submitted numerous forms requesting extra pay for providing technology training to other district employees.

In February of 2002, an investigation was undertaken as to Driskill's requests for additional pay -- an inquiry which ultimately led to the decision of the superintendent to terminate her contract. Driskill's assistant, Connie McManus,

testified that she suspected that Driskill had been obtaining money from grants for providing technology training that was actually conducted by others. On February 13, 2002, those suspicions were confirmed when Driskill provided McManus with an extra pay form authorizing McManus to receive extra pay for work which she had not performed. McManus told Driskill that neither she nor Driskill had performed any work on that day that would justify a request for extra pay and that she would not submit the form prepared by Driskill. Nevertheless, Driskill submitted an extra service pay form for herself, requesting three hours of pay at \$30 per hour. Although no training had actually occurred on that day, she identified the service for which she was billing as "training."

McManus reported the incident to Superintendent Knight. He then began an inquiry into Driskill's extra pay requests dating back to 1999. He discovered that Driskill had made numerous requests for extra pay for training sessions that had actually been conducted by others. The investigation also uncovered evidence of other improprieties. She had used the Board's tax exempt identification number to avoid paying sales tax when purchasing items for her personal use -- including a computer for her daughter. She also caused the Board to incur substantial unjustified expenses in arranging for herself and three other teachers to leave a day early (in order to shop) for

a conference in San Antonio, Texas, during the period February 15-19, 2002.

After completing his investigation, Superintendent Knight confronted Driskill with the information which he had gathered. He gave her a letter listing multiple instances of misconduct, including thirty-seven separate requests for payment either for work which she had not performed or for work for which she had already been compensated by the stipend associated with her position as the DTC. The superintendent gave Driskill five days to provide an explanation to rebut the charges. Although Driskill met with the superintendent, she failed to offer a satisfactory explanation for her multiple billings. On March 23, 2002, the superintendent notified Driskill that he was terminating her contract based on charges of insubordination and conduct unbecoming that of a teacher.

A hearing before the tribunal was convened on May 6, 2002. At the close of the Board's proof, the hearing officer dismissed the charge of insubordination. On the third day of testimony, the parties informed the hearing officer that they had made progress in reaching a settlement of the matter. They jointly requested a suspension of the hearing in order to pursue an amicable resolution of the disciplinary matter.

However, when the parties were unable to resolve their differences, the hearing resumed on July 26. It was not

completed on that day. Yet another significant delay in the proceedings occurred due to vacation plans of Driskill's attorney. On August 21, 2002, the tribunal reconvened, heard closing arguments, and concluded its deliberations.

In its Findings of Fact, Conclusions of Law, and Final Order, the tribunal found Driskill guilty of conduct unbecoming a teacher as follows:

On numerous occasions between July 1999 and February 2002, Anita Driskill submitted forms for reimbursement for work she did not perform. In making this finding the tribunal did not find Ms. Driskill's testimony concerning time required for facilitation of training programs a credible explanation for her submission of reimbursement forms for training sessions she did not conduct and which did not require significant preparation or set up on her part.

On numerous occasions between July 1999 and February 2002, Anita Driskill submitted reimbursement forms for work which she knew or should have known she was not entitled to receive extra compensation. In making this finding the tribunal notes that Ms. Driskill was able to draft her own job description without assistance when requested to do so by Superintendent Knight. Therefore, she knew her job duties and turned in reimbursement forms for work which clearly fell into that description as well as the category of work for which she received a substantial additional stipend. Further, it was found the explanation that many of the days worked were "comp" for which she was entitled to extra pay is not only inconsistent with school board policy, but is also not supported by Ms. Driskill's personal calendar which shows that she had

not designated many of the days in question as "comp" days.

The tribunal also found that Driskill obtained extra pay at a rate which she knew was excessive and that she violated school board policy "by purchasing items free of sales tax for her personal use or benefit." However, it found no impropriety or violation as to the San Antonio trip. The tribunal concluded that Driskill's overall pattern of dishonest behavior constituted conduct unbecoming a teacher and that the appropriate sanction was the termination of her teaching contract.

In her appeal in the Marshall Circuit Court, Driskill argued that her behavior did not rise to the level of conduct unbecoming a teacher as a matter of law. She contended that the tribunal's findings were not supported by substantial evidence and that its order was arbitrary and capricious. She also charged that Superintendent Knight had engaged in an *ex parte* conversation with one of the members of the tribunal so as to compromise her right to due process.

Contrary to the findings of the tribunal, the circuit court expressed its belief that Driskill had presented a credible defense to the charges of improper billing. Nevertheless, it refrained from substituting its own assessment of the evidence for that of the tribunal. According proper

deference to the tribunal's role as fact-finder and judge of Driskill's credibility, the court concluded that the evidence amply supported the tribunal's findings with respect to the issue of improper billings and tax avoidance.

The court also expressed displeasure with the lack of continuity of the hearing; *i.e.*, three days of testimony beginning in May 2002, an adjournment until July for a single day of testimony, and the passage of another month before arguments were presented to the panel. However, noting the reasons for the delays (the parties' mutual desire to pursue a negotiated settlement and her own attorney's vacation schedule), the court found that Driskill was not entitled to complain about the disjointed schedule. Therefore, it found no substantive or procedural grounds warranting a reversal of the tribunal's decision. This appeal followed.

Our standard of review is governed by the substantial evidence test, the same as that governing the review by the circuit court. Reis v. Campbell County Board of Education, Ky., 938 S.W.2d 880, 887 (1996).

Unless the action taken by the tribunal was supported by substantial evidence, it is arbitrary and must be set aside.

"Substantial evidence" is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. In its role as a finder of fact, an administrative agency is afforded great

latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact.

Gallatin County Board of Education v. Mann, Ky.App., 971 S.W.2d 295, 300 (1998)(citations omitted).

In this appeal, Driskill argues that the evidence of record does not sufficiently support the tribunal's findings. She claims that although she was negligent in completing the forms used to obtain extra pay, she had acted in good faith in seeking additional compensation. She points to evidence that her former superintendent had never questioned her requests for extra pay and that a former supervisor had encouraged her to submit such requests for the extra hours she was required to work. She also argues that there were no instructions to guide her in completing the forms; that she was owed "comp" time; and that there was no policy -- written or unwritten -- that her stipend was designed to cover all of the extra hours she spent on school-related work. Driskill argues that the evidence failed to establish her intent to obtain compensation to which she was not entitled and that in reality it illustrated "a mountain of misunderstandings on the issue of extra compensation pay for certified employees." (Appellant's brief, p. 7.)

Driskill's arguments represent one possible interpretation of the evidence. However, also at issue is the

problem of her credibility, which was clearly compromised by the testimony of several witnesses. Her lack of credibility was unquestionably a determinative factor in the tribunal's decision. Although the tribunal could have accepted her explanation for submitting requests for extra pay, it was equally entitled to disbelieve her testimony that she acted in good faith in completing the extra pay forms for work beyond that contemplated by her stipend. We find no error on this point.

Next, Driskill alleges that her constitutional right to equal protection was violated by the superintendent's termination of her contract because of her use of the Board's tax identification number and her use of an hourly rate of \$30 on some of her extra pay forms. Driskill testified that she was not the only employee to purchase a computer for personal use with the school's tax I.D. number, nor was she unique in seeking extra pay at the rate of \$30 per hour. However, she complained that she was the only person disciplined for these activities. The superintendent countered this contention by observing that all of the employees alleged to have made similar purchases are no longer employed by the school district and that no such purchases have been made during his tenure as superintendent.

The circuit court declined to find any equal protection violation. It concluded that the sales tax and rate

issues were not significant in the context of the proceeding as a whole. We agree with the court's reasoning. The primary charges against her and the main focus of the tribunal's inquiry concerned her receipt of money for work she did not perform or for work that she did perform that was covered by her stipend and salary. Even if the findings related to the tax and hourly rate issues were set aside, the remaining findings were more than sufficient to support the conclusion of the tribunal that Driskill engaged in conduct warranting the termination of her teaching contract.

Driskill has raised three additional concerns implicating her rights to due process. First, she contends that the hearing was not held in a meaningful time and in a meaningful manner. The trial court correctly determined that Driskill is not entitled to any consideration on this issue because the delays in the hearing were caused by Driskill herself.

Next, she cites the failure of the hearing officer to define "conduct unbecoming a teacher" for the tribunal. She contends that the phrase does not have a common usage and that without a definitional instruction, the tribunal was at liberty to "find conduct unbecoming for minor [in]discretions." (Appellant's brief, p. 22.) We agree with the appellee that the nuances of the phrase "conduct unbecoming" do not need to be

defined in the context of a disciplinary hearing. Driskill was not charged with trivial matters. Her nefarious conduct entailed the fraudulent receipt of school funds. The tribunal specifically found that she had engaged in a "pattern of dishonest behavior" that spanned many years. Thus, we find no due process violation resulting from the omission of a definition of "conduct unbecoming."

Finally, Driskill argues that she was denied a fair hearing based on the alleged bias of tribunal member Marsha Hunt. This allegation is based on a conversation which she overheard between Superintendent Knight and Hunt on the last day of the hearing concerning a recent golf outing attended by Knight and Hunt's superintendent, Harry Loy. In reviewing this issue, the circuit court concluded that Driskill failed to properly preserve this issue for appellate review when she neglected to bring the matter to the attention of the hearing officer prior to the tribunal's deliberations. It further reasoned that even if the issue had been preserved, the outcome of the hearing would not have been "affected by such communication." The court was correct in concluding that by raising the issue for the first time on appeal, Driskill failed to preserve it for appellate review. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

The judgment of the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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