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NO. COA12-690-2

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

AMY DIAMOND,
Petitioner,

v.

Mecklenburg County
No. 11 CVA 19276

CHARLOTTE-MECKLENBURG COUNTY BOARD
OF EDUCATION, ERIC DAVIS, TIMOTHY
S. MORGAN, TOM TATE, JOYCE DAVIS,
& ALLEN MCELRATH, IN THEIR
INDIVIDUAL AND OFFICIAL
CAPACITIES,
Respondents.

Appeal by petitioner from an order entered 24 February 2012 by Judge A. Robinson Hassell in Mecklenburg County Superior Court. This matter was originally heard in the Court of Appeals 12 December 2012, and a published opinion was filed by this Court on 7 May 2013. Petitioner filed a petition for rehearing on 11 June 2013. An order granting the petition was entered on 2 July 2013. The following opinion supersedes and replaces the opinion filed 7 May 2013.

Tin Fulton Walker & Owen, PLLC, by John W. Gresham, for petitioner-appellant.

Parker Poe Adams & Bernstein, LLP, by Mary H. Crosby and Stacy K. Wood, for respondent-appellees.

BRYANT, Judge.

Where the trial court dismissed petitioner's petition for judicial review of a Charlotte-Mecklenburg County Board of Education's (School Board) decision to terminate her position after she used physical force on a student, we affirm the order of the trial court.

On 2 February 2011, the students of Bailey Middle School, where petitioner worked as an academic facilitator, were evacuated due to a bomb threat. During the evacuation, after students had been removed to the school's track and field area, one seventh grade student repeatedly disregarded teacher instructions. He refused to put away his soda, refused to sit down and responded to teacher requests to behave with various inappropriate verbal assaults, causing continuing disruption.

After unsuccessful attempts to change the student's behavior, the student's teacher approached petitioner for assistance. Petitioner first advised the teacher to try to ignore the student and to instruct the other students to do the same. After this approach proved unsuccessful, petitioner approached the student, told him he needed to cooperate, and

provided him with the option of either sitting down or relocating to a nearby fence, where he would be removed from the other students.

The student used offensive language in responding to petitioner, stating that he would not do "any f-----g thing she f-----g told him to do." Petitioner led the student to the fence by his arm, but the student continued to behave disruptively. Petitioner then slapped the student across his face.

The next day, 3 February 2011, petitioner was suspended with pay pending an investigation into the incident. After an investigation, in a letter dated 2 September 2011, the Superintendent recommended petitioner's dismissal to the School Board based on: (1) failure to abide by the North Carolina Code of Professional Practice and Conduct for North Carolina Educators, as required by the School Board, by committing an "abusive act" against a student, (2) failure to fulfill the duties and responsibilities imposed on teachers by the North Carolina statutes by failing to maintain order and discipline, and (3) insubordination.

Petitioner met with the Superintendent to respond to the recommendation of dismissal, at which time they discussed the charges and petitioner informed the Superintendent that she

believed her actions fell under an exception to the prohibition on the use of physical force, articulated in N.C.G.S. § 115C-391(a) (repealed 2011). The exception permits an educator to bypass the standard procedure for using physical force on a student, in limited circumstances. N.C. Gen. Stat. § 115C-391 (repealed 2011).

After the meeting, the Superintendent issued a letter notifying petitioner of his intent to recommend her dismissal to the School Board. Petitioner then requested review of her dismissal by an independent case manager, pursuant to N.C.G.S. § 115C-325(j2).

The case manager made findings of fact regarding petitioner, the student, and the incident¹:

FINDINGS OF FACT

[Petitioner] admitted to slapping a student across the face on February 2, 2011 in the presence of students, using her open hand, after a student used foul language towards her and refused to comply with her directives to sit down or move to another area. [Petitioner] recognized that in the past, the "discipline procedure is to call for assistance from our security guard [Officer D.R.] who has established a relationship with [the student] and has had

¹ The case manager made ten pages of findings of fact regarding the instant matter. We have included these specific portions of the findings in our opinion as we feel these particular findings are the most relevant to petitioner's arguments on appeal. The names of school personnel have been abbreviated to protect their identities.

some success in removing him from the situation." [Petitioner] deeply regretted her response to the student's behavior, and acknowledged that "[r]egardless of the provocation physical contact with a student is inappropriate."

TESTIMONY OF WITNESSES REGARDING ACTIVITY ON
THE FIELD

[T]he atmosphere on the field was organized chaos and . . . everyone (students and teachers) was [sic] restless.

[STUDENT]

[Student] was a seventh grade student at Bailey during the 2010-2011 school term.

The notes and incidents report on [student] demonstrate that he was a student who continually resisted authority. Beginning in September of his seventh grade year, [student] regularly refused to obey teachers and cussed at teachers and fellow students. In late January, through the day of the evacuation, [student's] aggression and contempt for authority escalated. On February 1, 2011, an exchange of e-mails by four of his teachers indicated disruption of classes, escalating defiance, "combative" nature, and bullying other students. The teachers further indicated that the teachers had tried numerous "intervention" techniques to no avail. The teachers were also worried because the other students in these classes were upset and questioned why [student] was allowed to engage in his behaviors and apparently get away with them. Either on the day of the evacuation or the afternoon before, [student] had assaulted another student on the School bus. During the lockdown just before the evacuation, he told his teacher to "screw" herself because there was nothing she could do since she could not

throw him out because it was a lockdown.

[PETITIONER] INTERVIEW

During the evacuation, he refused to follow his at least three teachers' instructions and told the teachers [H., Sm. and St.] that they could "f---" or "screw" themselves or that he was not going to sit down or put away his orange soda.

During the evacuation, there were three administrators and one security officer on the field and track. One administrator, [T.], was on his first day on the job. Other than [petitioner], the remaining administrator was [Assistant Principal S.W.] and Officer [R.] who was on the path to the park restrooms, at or near the gate to the restrooms and up the light pole nearest the gate.

Shortly after 2:00 p.m., [teacher Sm.] found [petitioner] and asked if she would help with [student]. [Teacher Sm.] advised [petitioner] that [student] was cursing, would not sit down, and was speaking rudely to [teacher Sm.] as well as to other students.

[Petitioner] advised [teacher Sm.] to ignore [student] if she could and to speak to the other students and suggest that they also ignore him. [Petitioner] reminded [teacher Sm.] that it was difficult to intervene when [student] was in a defiant and disruptive mood.

After [teacher Sm.'s] request, [petitioner] spent several minutes looking for Security Officer [R.], who had had some success in dealing with [student]. She did not locate him and went back to her duties monitoring the students.

Ten to fifteen minutes after [teacher Sm.'s] request, [teacher St.] came to [petitioner] and advised that [petitioner] had to do something to assist the teachers with [student]. [Petitioner] responded that she did not work particularly well with him.

At that point, [petitioner] went to [student] and, using a quiet voice and tone, advised him that she needed him to cooperate.

[Petitioner] then gave [student] the option of sitting down or going to the chain link fence at the edge of the track and stand by himself.

She gave this option because in her experience as an educator and administrator it is a technique that can work with students with disciplinary problems in that it allowed them to make a choice and process of [sic] weighing the choice, [sic] at times will halt the negative conduct. [Petitioner] also understood that [student] at times did better when he had options.

The other advantage to the option of standing by the fence was that [sic] isolated [student] from the other students who were questioning [petitioner] about why [student] did not have to sit down and about his repeated abuse of the f-word.

As [petitioner] was giving [student] his options, he advised her that "she was the last f----- person he would listen to" and that he wasn't going to listen "to any f----- thing she f----- told him to do."

[Petitioner] told [student] that the evacuation was not the time where he got to act like this and took him by the arm to lead him to the fence and told him we are going over to the fence.

[Student] then began to flail his arms and exclaim, "F--- you, you're not going to touch me. You can't make me do anything. You can't make me do anything."

[Petitioner] was "at her wit's end" and "frustrated" and she slapped the student "to break the cycle of defiance" so that "he would then do what he was being asked to do."

[Petitioner] then, holding [student] by one arm, took and by the testimony of all of the witnesses with her other hand slapped him on the cheek.

Assistant Principal [S.W.] heard [petitioner] say as she slapped [student] that he "was not going to talk to her that way, especially not at a time like this." [Assistant Principal S.W.] understood that the "time like this" was the time in the midst of an emergency evacuation of the School. She did not hear [petitioner] say anything inappropriate to [student]. After [petitioner] had slapped [student], he was silent and walked away with [Assistant Principal S.W.].

[Petitioner] and the student were standing "pretty close to each other face to face" and [petitioner] appeared "angry." [Assistant Principal S.W.] assisted [petitioner] in leading [student] closer to the fence. It was at this location that [petitioner] repeated something to the effect of "[y]ou're not going to speak to me that way" and slapped the student. At the time of the slap, [Assistant Principal S.W.] was approximately two (2) feet away. Immediately after the slap, [Assistant Principal S.W.] placed her hand on the student's chest and told [petitioner] to "walk away" and "don't lose your job."

Security Resource Officer [R.], who worked well with [student], was some distance away from [petitioner] when Assistant Principal [S.W.] brought the student to him shortly after the altercation. [Petitioner] acknowledged not looking for Officer [R.] when she was attempting to address the student's misconduct.

[Petitioner] acknowledged that her slap to the student's face did not result in the student sitting down. In addition, her slap to the face did not stop the student from cursing. [Petitioner] admitted that her actions seemed inappropriate, and she was aware she could be terminated from employment as a result of slapping a student in the face.

Prior to observing [petitioner] slap the student, [Assistant Principal S.W.] observed some "verbal disagreement going on" with the student and [petitioner].

Teacher [L.F.] was standing approximately 20 to 25 feet away when she observed [petitioner] slap the student in the face. After the altercation, [petitioner] seemed pretty "upset" and stated that she thought she was going to "lose [her] job."

[Teachers St. and L.F.] were both shocked by [petitioner's] actions.

At the time the incident occurred, teachers and students had been waiting out on the field for a period of time; students were sitting on the track "kind of relaxing" and "sitting down, talking, waiting."

[ULTIMATE FINDING OF THE CASE MANAGER]

I do not find however that [petitioner's] actions on February 2, 2011 to be in accord with subsection (5), in that her uncontested action of slapping [student] was not reasonably calculated to "maintain order." While admittedly extremely profane and highly annoying, [student] was not threatening any other student, staff member, or himself with any physical harm or injury, nor was he attempting to flee the area in which the students were located or inciting others to any possible misconduct during the evacuation. There was no evidence of increasing unrest or possible safety issues in the immediate area where the incident occurred arising from his language or his conduct. I find therefore that her termination is warranted under all of the evidence presented.

Petitioner requested a hearing before the School Board to further challenge the dismissal recommendation. After the presentation of oral and written testimony, the School Board unanimously upheld the dismissal recommendation on 15 September 2011.

Petitioner then filed a Petition for Judicial Review pursuant to N.C.G.S. § 115C-325(n). In response, on 28 November 2011, respondents, the School Board and the individually named School Board members, filed a Motion to Dismiss. Judge A. Robinson Hassell heard the Petition for Judicial Review on 9 February 2011 and granted respondents' motion to dismiss in an order dated 24 February 2012. In the order, he concluded that the termination decision was not based on an error of law and

that evidence existed to support the School Board's decision under either a de novo or a whole record standard of review.

Petitioner appeals.

On appeal, petitioner raises the following issues: whether the trial court erred in concluding that the School Board's decision was (I) supported by substantial evidence and thus was not arbitrary and capricious, and (II) not based on an error of law regarding the School Board's application of N.C.G.S. § 115C-391 to petitioner's use of physical force.

I

Petitioner first argues that the trial court incorrectly concluded that the School Board's decision was supported by substantial evidence. We disagree.

North Carolina General Statutes, section 150B-51, governs judicial review of a school board's actions. It permits reversal or modification of a school board decision when the substantial rights of a petitioner "may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . [u]nsupported by substantial evidence . . . in view of the entire record as submitted[.]" N.C. Gen. Stat. § 150B-51(b) (5) (2011).

A court reviews the final decision of the School Board for lack of evidence under N.C.G.S. § 150B-51 pursuant to a whole record standard of review, basing its findings on the final decision of the School Board and the official record. N.C.G.S. § 150B-51(c). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Rather, the whole record test requires that the court consider both the evidence justifying the School Board's decision and any contradictory evidence to determine whether the School Board's decision was supported by substantial evidence. *Id.* In other words, "review is limited to determining whether the superior court correctly decided that the Board's decision to dismiss plaintiff . . . was supported by substantial evidence in light of the whole record." *Crump v. Bd. of Educ.*, 79 N.C. App. 372, 373, 339 S.E.2d 483, 484 (1986) (citation omitted). Substantial evidence exists when "a reasonable mind might accept [the evidence] as adequate to support a conclusion." *Thompson*, 292 N.C. at 414, 233 S.E.2d at 544 (citations omitted).

This court need not determine that substantial evidence existed for each of the stated reasons for petitioner's dismissal; it is sufficient that any one of the reasons for her dismissal is supported by substantial evidence, provided that she was notified of the reason. See *Crump*, 79 N.C. App. at 374, 339 S.E.2d at 485 (citation omitted).

In reaching its decision to recommend dismissal, the School Board accepted the case manager's findings of fact. In his ultimate finding of fact, the case manager stated that because petitioner's striking of the student was not justified to "maintain order," the termination of petitioner was "warranted under all of the evidence presented." We therefore consider whether petitioner's termination on the basis of "failure to fulfill the duties and responsibilities imposed upon teachers by the general statutes of this State by failing to maintain order and discipline . . ." is supported by substantial evidence. See N.C. Gen. Stat. § 115C-325(e)(1)(i) (2011) ("System of Employment of Public School Teachers").

According to North Carolina law, teachers have a duty, "when given authority over some part of the school program by the principal or supervising teacher, to maintain good order and discipline . . ." N.C. Gen. Stat. § 115C-307(a) (2011). In adopting the findings of fact of the case manager, the School

Board found that petitioner was given authority by the school's principal to oversee and implement the school evacuation. It was thus her duty as an educator to maintain order and discipline during that process. See N.C.G.S. § 115C-307(a).

Based on the Case Manager's factual findings, the School Board's determination that petitioner failed to maintain good order and discipline as a result of her use of physical force is supported by substantial evidence. The School Board found that although the student was misbehaving, petitioner's striking of the student was not justified under the circumstances. The case manager's findings emphasized that there was no threatened harm to the student himself or to any other persons and that his outbursts did not create a safety concern.

The School Board also found that while petitioner was aware that "she did not work particularly well with [the student], petitioner still confronted the student rather than seek the assistance of another administrator or the Security Resource Officer. These findings of fact, including that petitioner acknowledged her actions were inappropriate and did not stop the student's misbehavior², support the conclusion that petitioner

² We note for the record findings that present different views of the student's reaction: 1) "[a]fter [petitioner] had slapped [student], he was silent and walked away with [Assistant Principal S.W.];" and 2) "[petitioner] acknowledged that her slap to the student's face did not result in the

failed to maintain order during the school evacuation, in violation of N.C.G.S. § 115C-307(a).

While certain factual findings also indicate that the events of the day were somewhat chaotic and uncertain – an entire middle school had been relocated to a track and field area for two to three hours and students and staff understandably became restless – the confusion or chaos does not negate the evidence supporting the School Board's finding. In fact, a significant finding was that “[a]t the time the incident occurred, teachers and students had been waiting out on the field for a period of time; students were sitting on the track “kind of relaxing” and “sitting down, talking, waiting.”” Despite any additional stress created by the surrounding environment, sufficient evidence exists to support the conclusion that petitioner's unjustified use of physical force failed to maintain good order and discipline in the situation. Therefore, the School Board's decision to terminate plaintiff for her failure to fulfill the duties imposed by N.C.G.S. § 115C-307 is supported by substantial evidence.

Defendant also argues that the trial court failed to properly apply administrative procedures per *Farris v. Burke*

student sitting down. In addition, her slap to the face did not stop the student from cursing.”

Cnty. Bd. of Educ., 355 N.C. 225, 559 S.E.2d 774 (2002). We disagree.

In considering whether to terminate a career employee, “[t]he [school] board shall accept the case manager’s findings of fact unless a majority of the board determines that the findings of fact are not supported by substantial evidence when reviewing the record as a whole.” *Id.* at 237, 559 S.E.2d at 782. Petitioner argues that the School Board erred by not voting to determine whether the case manager’s findings of fact were supported by substantial evidence, and by not requesting the case manager to make additional findings on critical evidence. However, under *Farris* such procedures are not warranted unless a majority of the board disagrees with the case manager’s findings of fact.

Here, the transcript of the School Board’s hearing regarding the termination of petitioner does not indicate that any board member found the findings of fact issued by the case manager to be unsupported by substantial evidence. Moreover, the hearing transcript shows that the School Board was aware of the requirements of *Farris*, as the Board’s General Counsel began the hearing by stating the procedures to be followed: “the Board shall accept the Case Manager’s Findings of Fact unless the majority of the Board determines that the Findings of Fact were

not supported by substantial evidence when reviewing the record[] as a whole." This statement of hearing procedure clearly follows the requirements of *Farris*.

Further, in its Resolution terminating petitioner's employment, the School Board stated that "[t]he Board accepts the case manager's findings of fact," and that "[t]he Board determines that the reasons underlying the Board's decision to accept the Superintendent's recommendation to dismiss [petitioner] are supported by a preponderance of the evidence." Petitioner's argument that the decision of the School Board was arbitrary and capricious is therefore overruled.

In light of the fact that we uphold petitioner's termination based on her failure to fulfill the duties imposed by the North Carolina General Statutes, we need not determine whether the Superintendent's other stated reasons for dismissal were supported by substantial evidence based on the whole record. *Crump*, 79 N.C. App. at 374, 339 S.E.2d at 485.

II

Petitioner next argues that the trial court erred in concluding that the School Board's decision was not based on an error of law. This argument is based on petitioner's contention that the School Board failed to correctly apply N.C.G.S. § 115C-391.

The standard of review for this argument is likewise governed by N.C.G.S. § 150B-51, which permits reversal or modification of a school board decision when the substantial rights of a petitioner "may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . [a]ffected by other error of law[.]" N.C.G.S. § 150B-51(b)(4). The court shall review the matter, using the official record, under a *de novo* standard of review. N.C.G.S. § 150B-51(c). However, the School Board's decision "is presumed to be made in good faith and in accordance with governing law." *Richardson v. N.C. Dept. of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 223-24, 681 S.E.2d 479, 483 (2009). It is therefore the burden of the party asserting error to overcome this presumption with competent evidence. *Id.*

Petitioner asserts that her actions were permissible under N.C.G.S. § 115C-391, which, prior to its repeal, stated:

school personnel may use reasonable force, including corporal punishment, to control behavior or to remove a person from the scene in those situations when necessary:

- (1) To quell a disturbance threatening injury to others;
- (2) To obtain possession of weapons or other dangerous objects on the person, or within the control, of a student;
- (3) For self-defense;

(4) For the protection of persons or property; or

(5) To maintain order on school property, in the classroom, or at a school-related activity on or off school property.

N.C. Gen. Stat § 115C-391(a) (repealed 2011). Petitioner argues that she slapped the student to maintain order during the evacuation; therefore her action falls under the last articulated exception, and the trial court committed an error of law by failing to apply it to her case. We disagree.

N.C.G.S. § 115C-391 lists five particular circumstances in which the use of unregulated physical force against a student may be permitted: preventing injury to others, obtaining weapons or dangerous objects, self-defense, protecting people or property, and maintaining order. *Id.* The last exception, and the one under which petitioner claims to fall, using physical force to maintain order, is the broadest. However, this broad exception must be read in the context of the entire statute, which sets forth particular requirements for the use of physical force, and then articulates narrow exceptions to those requirements. *See id.*

The first four exceptions listed imply a level of emergency. *See id.* In each case there is some imminent danger to person or property, which is sufficient to override the

typical protections for the use of force against students. However, to permit an interpretation of the last exception, maintaining order, as petitioner contends, would effectively eliminate an exigency requirement. Such interpretation would serve to undermine the statute as a whole, which is intended to establish clear limits for the use of physical force against students.

In the case of petitioner, while there is some dispute as to the environment created by the bomb threat and the evacuation, the School Board's factual findings indicate that the behavior of the unruly student, while annoying and extremely disruptive, did not pose a threat to the safety or well-being of teachers or students, nor did his actions threaten to damage school or private property. Although the bomb threat and evacuation created a difficult situation that had the potential to threaten student safety, the unruly student's statements and refusal to comply with teacher instructions to sit down and put away his soda did not appear to create a situation of imminent danger simply because they occurred outside the normal school day routine. The School Board found that, at the time of the altercation, students had been relocated away from the school and were in no immediate danger; further, its findings indicated that the unruly student's actions did not create or magnify any

safety threat. The pertinent findings of the case manager, as adopted by the School Board, support the School Board's dismissal of petitioner. The presumption that the School Board's decision was made in good faith and in accordance with the applicable law remains. See *Richardson*, 199 N.C. App. at 223-24, 681 S.E.2d at 483.

Therefore, we hold that the trial court did not err in concluding that the School Board properly applied N.C.G.S. § 115C-391 in determining that the statutory exception did not apply to petitioner's use of physical force. Accordingly, we affirm the trial court order dismissing petitioner's petition for judicial review.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(f).