**[Cite as *Kendall v. Coshocton Cty. Bd. of MRDD,* 2010-Ohio-4643.]**

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| HEATHER KENDALL | : | JUDGES: |
| | : | Hon. Julie A. Edwards, P.J. |
| Plaintiff-Appellant | : | Hon. Sheila G. Farmer, J. |
| | : | Hon. John W. Wise, J. |
| -vs- | : | |
| | : | |
| COSHOCTON COUNTY BOARD OF MRDD | : | Case No. 2009CA0023 |
| | : | |
| | : | |
| Defendant-Appellee | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Coshocton County Court of Common Pleas, Case No. 09-CI-0479 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | September 27, 2010 |

APPEARANCES:

| For Plaintiff-Appellant | For Defendant-Appellee |
|---|---|
| R. ALAN LEMONS<br>806 Sixth Street, Suite 200<br>P.O. Box 991<br>Portsmouth, OH 45662 | STEPHEN P. POSTALAKIS<br>300 West Wilson Bridge Road<br>Suite 100<br>Worthington, OH 43085 |

*Farmer, J.*

{¶1} Appellant, Heather Kendall, was employed by appellee, Coshocton County Board of MRDD, as the superintendent. On September 23, 2008, appellee placed appellant on administrative leave with pay. Appellee terminated appellant on January 29, 2009.

{¶2} Appellant appealed the decision and requested a hearing before a referee. Hearings were held on April 23 and 24, 2009. The referee issued findings on May 5, 2009 and recommended appellant's removal. Appellee adopted the findings and recommendation and terminated appellant's employment.

{¶3} On June 4, 2009, appellant filed an appeal and complaint with the Court of Common Pleas of Coshocton County, Ohio. Appellant alleged that appellee failed to properly conduct a pre-disciplinary conference, the findings and conclusions were in error, and the facts were insufficient to warrant termination. By judgment entry filed August 21, 2009, the trial court bifurcated the administrative appeal and the civil action, and dismissed appellant's administrative appeal, finding appellee's decision to be supported by a preponderance of reliable, probative, and substantial evidence in the record.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S APPEAL BECAUSE THE EVIDENCE PRESENTED TO THE TRIAL COURT SHOWS THAT THE BOARD FAILED TO CONDUCT A PRE-DISCIPLINARY CONFERENCE AS

MANDATED BY REVISED CODE 5126.23 AND FAILED TO PROVIDE HER WITH REASONS FOR HER DISMISSAL, ALL IN VIOLATION OF HER RIGHTS OF DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS."

II

{¶6} "THE TRIAL COURT ERRED IN DETERMINING THAT THE FINDINGS WERE PROPERLY SUPPORTED AND THAT THOSE FINDINGS WERE SUFFICIENT UNDER R.C. 5126.23(B) TO WARRANT REMOVAL."

I

{¶7} Appellant claims appellee failed to conduct a pre-disciplinary conference as mandated by R.C. 5126.23, failed to provide her reasons for her dismissal, and failed to afford her due process. We disagree.

{¶8} Although appellant concedes in her brief at 16 that "there were two supposed pre-disciplinary hearings," she argues not all the Board members were present at the first hearing and the "second was held outside all Board members' presence." In the alternative, appellant argues there was no designee appointed by appellee to conduct the hearings.

{¶9} R.C. 5126.23 governs disciplinary procedures for management employees. Subsection (C) states the following:

{¶10} "Prior to the removal, suspension, or demotion of an employee pursuant to this section, the employee shall be notified in writing of the charges against the employee. Except as otherwise provided in division (H) of this section, not later than thirty days after receiving such notification, a predisciplinary conference shall be held to provide the employee an opportunity to refute the charges against the employee. At

least seventy-two hours prior to the conference, the employee shall be given a copy of the charges against the employee.

{¶11} "If the removal, suspension, or demotion action is directed against a management employee, the conference shall be held by the superintendent or a person the superintendent designates, and the superintendent shall notify the management employee within fifteen days after the conference of the decision made with respect to the charges. If the removal, suspension, or demotion action is directed against a superintendent, the conference shall be held by the members of the board or their designees, and the board shall notify the superintendent within fifteen days after the conference of its decision with respect to the charges."

{¶12} Appellant argues the holding in *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 535, applies sub judice, despite the fact that appellant is not a classified employee as defined by R.C. Chapter 124. However the provisions of R.C. 5126.23(C) are compatible with the *Loudermill* opinion; therefore, these provisions determine our review of the two pre-disciplinary conferences in this case.

{¶13} Appellee argues appellant failed to address the complained of issues at the hearing level and therefore, has waived any challenge to the make-up and procedures of the pre-disciplinary conferences. We note in appellant's pretrial statement of issues filed March 31, 2009, appellant raised the issues of failure to follow proper procedures by failing to give her a list of charges, failure to afford her a pre-disciplinary conference before the Board or its designees, and failure to give her proper notice of her termination.

{¶14} By report and recommendation dated May 5, 2009, the referee found the following:

{¶15} "The parties had raised several issues prior to hearing including requests for disqualification of counsel, production of certain recordings, and the limitation of character testimony. Such issues had been resolved prior to the commencement of the hearing.

{¶16} "Since no other procedural issues were raised the parties waived any procedural defects. *Shie v. Bd. of Educ. Of Hamilton City School Dist.* (1981), Butler Co. App. No. 79-04-0041, 1981 WL 6776."

{¶17} A review of the transcripts of the proceedings before the referee indicates no mention of the issues. In her complaint, appellant specifically challenged the lack of Board members or designees at her pre-disciplinary hearings. See, Complaint filed June 4, 2009 at ¶15 and 17.

{¶18} We conclude appellant did not waive the complained of issues.

{¶19} We will address the issues as delineated in appellant complaint. In her complaint, appellant conceded she was properly noticed of the pre-disciplinary conference and the charges. Id. at ¶13, 14; April 23, 2009 T. at 82-85. The sole issue is whether a pre-disciplinary conference was held pursuant to statute. In other words, was a pre-disciplinary conference held by the members of the Board or their designee?

{¶20} Appellant argues Attorneys Batchelor and Postalakis were not appellee's designees. On January 20, 2009, a "Notice of Pre-Disciplinary Conference" was authored by appellee and directed to appellant. Also, a hand-delivered notice of non-

renewal and the results of the pre-disciplinary conference dated January 30, 2009 contained a summary of investigation which included the following specific language:

{¶21} "The Board authorized the Coshocton County prosecuting Attorney Robert Batchelor and Stephen P. Postalakis, of Blaugrund, Herbert and Martin, to take any action necessary to investigate the complaints by employees. Prosecuting Attorney Batchelor and Mr. Postalakis interviewed management staff, and reviewed records of the Board. Additionally, the Board met with Heather Kendall during an executive session on January 8, 2009. During the investigation, the Board directed Heather Kendall to appear for two pre-disciplinary conferences for purposes of responding to charges alleged against her. Ms. Kendall personally received copies of the notices of pre-disciplinary conferences and was represented by counsel throughout the investigation."

{¶22} Appellant filed two motions to remove Attorneys Batchelor and Postalakis. See, Nos. 12 and 13 of the Transcript of Original Papers filed June 26, 2009. In these motions, appellant argued the attorneys as authorized by appellee conducted the pre-disciplinary conferences.

{¶23} We find a thorough reading of the record establishes that Attorneys Batchelor and Postalakis were appellee's designees per statute.

{¶24} Assignment of Error I is denied.

II

{¶25} Appellant claims the trial court erred in upholding appellee's decision. We disagree.

{¶26} As this court stated in *Benincasa v. Stark County Board of MRDD,* Stark App. No. 2003CA00350, 2004-Ohio-4941, ¶18-19:

{¶27} "The appeal of the MRDD Board's decision is governed by R.C. 5126.23(G). In an appeal to the court of common pleas, the court must determine if a preponderance of reliable, probative and substantial evidence exists, and, if so, it must affirm the decision. The common pleas court may consider the entire record, including the credibility of the witnesses and the weight and probative character of the evidence. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. The common pleas court may not substitute its judgment for that of the agency. Instead, if a preponderance of reliable, probative and substantial evidence exists, the court must affirm the agency's decision. *Dudukovich v. Lorain Metro. Housing Auth.* (1979), 58 Ohio St.2d 202, 207.

{¶28} "On appeal to the court of appeals, we do not re-weigh the evidence. Rather, our review is limited to a question of whether the trial court abused its discretion in finding a preponderance of reliable, probative and substantial evidence exists to support the decision of the Board. Id. at 207. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent an abuse of discretion, we must affirm the judgment of the trial court. *Doll v. Stark County Board of MRDD,* Stark App.No.2001CA00255, 2001-Ohio-7052, citing *Unit. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 344."

{¶29} Pursuant to R.C. 5126.23(B), "[a]n employee may be removed, suspended, or demoted in accordance with this section for violation of written rules set

forth by the board or for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or other acts of misfeasance, malfeasance, or nonfeasance."

{¶30} Appellant argues the conduct and issues found to be reasons for her dismissal did not warrant removal.

{¶31} Pursuant to the hand-delivered notice dated January 30, 2009, appellee believed the following facts warranted removal:

{¶32} "Heather Kendall instructed staff to deny service and support administration services to individuals with mental retardation and developmental disabilities despite the fact that they were eligible for such services. Despite being told of the Board's responsibility to provide these mandatory services, Heather Kendall decided to refuse to provide the requested services. Denial of such services is in contravention of the Board's own rules and Ohio law. The fact that no family complained of the denial of service is not a mitigating factor in the Board's review. Rather, these are mandated services and are part of the mission of the Board.

{¶33} "Heather Kendall violated the Board policy that prohibits employees from mocking, belittling, ridiculing or deriding other employees. Specifically, the Board finds that Heather Kendall stated one employee looked like a '***' and commented regarding another employee that she (Heather Kendall) could not wait until she retired so she could tell that '*** what a worthless piece of human flesh she is.' The fact that such comments were not made to the employees directly does not render such conduct any less reprehensible.

{¶34} "Heather Kendall threatened retaliation against staff for voicing complaints to the Board. During an executive session with the Board, Heather Kendall stated that, if she returned to work, she would discipline management employees for complaining to the Board, instead of dealing with her directly. Heather Kendall stated she instructed employees that if they had a problem, they were to talk to her, not approach the Board. Thus, in her view, by complaining to the Board, the management employees were insubordinate. This independent policy of the Superintendent is in contravention of the Board's own whistleblower policy.

{¶35} "Heather Kendall was less than honest during the investigation. By way of example, Heather Kendall denied threatening retaliation against staff, despite the fact that she did so in front of the Board. The Board does not draw a distinction between the charge of retaliation and Heather Kendall's claim that discipline would have been imposed for insubordination. Further, Heather Kendall stated that the Board President told her she would not have to pay back salary she was not eligible to earn during the two month period when her Superintendent certificate lapsed. The Board President denies that he made such statement, and the Board credits him on this issue.

{¶36} "On January 14, 2009, Heather Kendall stated that '[t]he Board has committed many errors in the operations of its programs' during her administrative leave. This statement was made in Kendall's written denial of alleged misconduct. The Board requested details of the 'errors' from Kendall in communications from counsel for the Board and Kendall's counsel. Kendall failed to respond to the request in the timeframe requested. On January 26, 2009, at a pre-disciplinary conference, Kendall was asked about the 'errors'. Kendall at first could not recall the 'errors', and then later

stated that the 'errors' were that 1) the Board hired employees without her authority; 2) the Board allowed two staff members to work without the proper supervision; and 3) failed to comply with Ohio Department of Education child count provisions. With respect to some of these issues, Kendall explained that she did not know of these matters directly, but had heard of them from 'various people', and assumed that the child count issue was not being handled correctly. Upon further questioning, Kendall modified her answer and stated that she had 'misspoke' and that she had heard of the errors from only one person. The Board finds that Kendall breached a duty to inform the Board of any errors that it may have committed, and that Kendall's answers during questioning were evasive and less than honest.

{¶37} "With respect to the contract with the Coshocton County Coordinated Transportation Agency ('CCCTA') by which the Board subcontracted specialized transportations services, Heather Kendall violated the Board's rules and Ohio law by not adequately ensuring that shuttle drivers were adequately trained and informed about the needs of individuals in accordance with Ohio law and Board policy. Although Heather Kendall indicated that she directed staff members to ensure the requirements of the contract were carried out, staff members claim Heather Kendall withheld the specifics of the contract until the very last minute and they were not able to complete the necessary training for all of CCCTA's drivers until September 12, 2008, approximately twenty-one (21) days after commencement of the transportation services by CCCTA. Two incidents occurred with respect to shuttles driven by CCCTA drivers; these incidents could have been avoided by proper training regarding individual service plans."

{¶38} From our review of the record, we find appellee's conclusions to be supported by the evidence presented.

{¶39} Denial of services to qualifying children under six was established by the testimony of parents and Robert Nicholson, appellee's Director of Service and Support Administration. April 23, 2009 T. at 110, 153-154, 157, 163, 171-172, 175, 178. Appellant denied any knowledge of the refusal. Id. at 35-36.

{¶40} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶41} Appellant was also found not to have properly prepared for the transition to a sub-contracted specialized transportation service. Despite negotiating the contract particulars for some three months, the transition occurred without providing appropriate training to the drivers. April 23, 2009 T. at 60-62, 71. At least two incidents occurred as a result of the lack of training. Id. at 120-121, 132, 139-146.

{¶42} Appellant admitted to the use of profanity and less than complimentary remarks about employees to other agency employees. Id. at 39-40. Appellant also admitted to planning disciplinary action against the employees who complained to the Board about her management style. Id. at 42. She retracted the threat and attempted to claim it would be a method to re-assert her control as superintendent. Id. at 42-48.

{¶43} During her suspension, appellant complained that appellee had made many errors in administration. Id. at 75. Subsequently, by her own admission, she could not substantiate the claims and admitted she "misspoke." Id. at 77-80.

{¶44} As the referee concluded, one single incident may not have been enough to warrant removal, but the cumulative atmosphere generated by appellant's management style and lack thereof did support the decision:

{¶45} "The Referee finds that the denial of services to three children who were clearly eligible for those services is the most serious misconduct charged by the Board and alone would support the removal of the Superintendent.

{¶46} "The Superintendent's failure to properly oversee implementation of the transportation contract, the threatened retaliation against employees for their complaints to the Board, and her evasiveness in dealing with the Board during the predisciplinary proceedings, each taken individually, may not support removal. However, cumulative incidents and a pattern of improper acts in the course of employment will support dismissal."

{¶47} We conclude the referee's decision was supported by reliable credible evidence and was not contrary to law.

{¶48} Assignment of Error II is denied.

{¶49} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Wise, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES

SGF/sg 805

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| HEATHER KENDALL | : | |
| Plaintiff-Appellant | : | |
| -vs- | : | JUDGMENT ENTRY |
| COSHOCTON COUNTY BOARD OF MRDD | : | |
| Defendant-Appellee | : | CASE NO. 2009CA0023 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Coshocton County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ John W. Wise_____

JUDGES