IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rox-Ann Reifer, Petitioner	:	
v.	:	No. 1984 C.D. 2007
	:	Argued: April 8, 2008
Williamsport Area School District, Respondent	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: May 12, 2008

Rox-Ann Reifer (Reifer) petitions for review of the September 27, 2007, order of the Secretary of the Department of Education (Secretary), which affirmed the decision of the Board of School Directors (Board) of the Williamsport Area School District (District) to dismiss Reifer from her employment pursuant to section 1122(a) of the Public School Code of 1949 (School Code).[1] We also affirm.

In June 2005, Reifer applied for a teaching position with the District. The employment application (Application) included the following question

[1] Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §11-1122(a). This section provides in relevant part: "[t]he only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality … on the part of the professional employe…." 24 P.S. §11-1122(a).

(termination question): "Within the last ten years, have you been fired from any job for any reason?" The instructions on the Application indicated that if an applicant answered "yes" to the termination question, the applicant should provide a detailed explanation, including dates. Reifer answered "no"; additionally, she indicated that she left her employment with her previous employer, the Colonial Intermediate Unit #20 (IU), in August 2004 because she "Relocated to Bloomsburg, PA." The District hired Reifer, and Reifer began work on August 16, 2005. (Secretary's Findings of Fact, Nos. 14-17, 19; R.R. at 1a-4a.)

In December 2006, a District employee inadvertently discovered on the Internet a Memorandum and Order issued by the United States District Court, Middle District of Pennsylvania (Federal Case), indicating that Reifer had been terminated from her employment with the IU. After obtaining this information, the District informed Reifer that, as of December 18, 2006, she was suspended without pay based on suspicion that she provided false information on the Application. Following her suspension, Reifer applied for unemployment compensation (UC) benefits, which a UC referee ultimately granted. (Secretary's Findings of Fact, No. 24.)

On or about January 22, 2007, the District issued a Statement of Charges and Notice of Hearing, charging Reifer with "immorality" based on her allegedly false answers on the Application. The Board held hearings at which Reifer and the District presented evidence establishing the following facts concerning Reifer's employment with the IU. (Secretary's Findings of Fact, Nos. 20-23, 27.)

From August 2001 until August 2004, Reifer was employed by the IU. In September 2003, Reifer sustained a work-related injury, did not return to work and filed a Workers' Compensation (WC) claim. By letter dated February 25, 2004, the IU notified Reifer that the IU Board of School Directors (IU Board) would be holding a hearing to determine whether to terminate Reifer's employment. Reifer hired Donald Russo, Esq. (Russo) to represent her at the IU hearing; however, Russo informed the IU Board that neither he nor Reifer would attend the hearing and that Reifer intended to file the Federal Case, a discrimination claim against the IU. Following the hearing, the IU Board terminated Reifer's employment and notified Reifer that her professional contract with the IU was terminated effective August 25, 2004. In May 2005, Reifer settled her WC claim against the IU, and, at the insistence of the IU's insurance carrier, Reifer signed a resignation letter, agreeing to resign from her employment with the IU and give up her rights for re-employment with the IU. (Secretary's Findings of Fact, Nos. 1-6, 9-13.)

Based on these findings, the Board concluded, *inter alia*, that: (1) Reifer had been terminated from her employment at the IU; (2) the answers on her Application regarding her separation from her employment at the IU were false and misleading; and (3) such conduct constituted "immorality" under the School Code. Accordingly, the Board voted to dismiss Reifer. (Board's Conclusions of Law, Nos. 1-5; Secretary's Findings of Fact, No. 28.) Reifer appealed to the Secretary, and an appointed hearing officer held a hearing on the matter. (Secretary's Findings of Fact, No. 30.)

At the hearing, Reifer argued that the District did not have cause to dismiss her for "immorality" because she did not intend to deceive the District, and, thus, she did not lie on her Application. According to Reifer, because she was confused as to whether she was terminated by the IU or had resigned from her position there, she relied on the advice of her attorney to answer "no" to the termination question. Reifer further argued that the Secretary should be bound by the determination of the UC Referee that because the District did not prove that Reifer had a deliberate intent to mislead the District, it did not establish that Reifer committed willful misconduct in connection with her employment with the District. (Secretary's Findings of Fact, Nos. 24-26, 29-30.)

After performing a *de novo* review of the record, the Secretary rejected each of Reifer's arguments. First, the Secretary rejected Reifer's assertion that she was confused because of the May 2005 resignation letter, observing that if Reifer had not understood that she was fired in August 2004, she would not have indicated on the Application that her employment with the IU ended in *August 2004*. Further, the Secretary stated that Reifer's intent to deceive the District could reasonably be inferred from her answers on the Application, particularly Reifer's explanation that she left the IU because she had relocated to Bloomsburg.[2] The Secretary also discounted Reifer's assertion that she merely relied on Russo's

[2] The Secretary noted that, while it was true that Reifer relocated to Bloomsburg, her relocation to Bloomsburg was not her reason for leaving the IU because Reifer testified that she and her family moved to Bloomsburg in *May 2004* due to her husband's employment and *her employment with the IU*. (Secretary's Findings of Fact, No. 18.) This move occurred three months before Reifer's termination and one year before Reifer signed the resignation letter.

advice, by crediting Russo's testimony that he provided no such advice.[3] Finally, the Secretary rejected Reifer's argument that he should be bound by the UC referee's determination, noting that the School Code and the Unemployment Compensation Law[4] (UC Law) are distinct and advance different polices and that the UC referee did not hear the same testimony as the Secretary.

The Secretary found that the IU terminated Reifer's employment as of August 25, 2004, that Reifer knew her employment had been terminated as of that date and that, despite this knowledge, Reifer indicated on the Application that she had not been fired within the past ten years. Thus, the Secretary concluded that the District proved that the underlying acts claimed to constitute "immorality" actually occurred. The Secretary then concluded that lying by a professional employee to

[3] Reifer testified that she contacted Russo to discuss the Application questions with him. According to Reifer, Russo told her that she had been wrongfully discharged from her employment at the IU, a federal judge would reverse the IU's decision and reinstate her employment at the IU and, therefore, she could answer "no" to the termination question. (R.R. at 233a-34a, 237a-38a.) Reifer also presented the testimony of her husband, John Reifer, who testified that he advised Reifer to call Russo for advice on how to complete the Application. (R.R. at 197a-98a.) Reifer's mother, Nancy Knorr, also testified; she indicated that she was in the room when Reifer called Russo and understood that Russo told Reifer to answer "no" to the termination question. However, Knorr acknowledged that she could not hear what Russo was telling Reifer. (R.R. at 174-76a.)

Russo testified that he believed Reifer's termination from the IU was discriminatory and that if a federal judge made that determination, the judge could reinstate her to the position. However, Russo stated that: (1) he never discussed the termination question with Reifer or even heard that specific question before the hearing; (2) he did not advise Reifer on how to answer the question; and (3) he "would never tell a client what to put on an employment application for another entity for a third party. That's not part of my job." (Secretary's Findings of Fact, Nos. 7-8; R.R. 124a-25a.)

[4] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§751-914.

his or her employer offends the morals of the community and constitutes "immorality" under the School Code. Thus, the Secretary held that the District had valid cause to dismiss Reifer for "immorality" under the School Code.[5] Reifer now petitions for review of the Secretary's determination.[6]

Before this court, Reifer asserts that the District failed to prove that Reifer lied on her Application, and, therefore, the District was unable to satisfy its burden of proving "immorality."[7] Relying on *Haymarket Building and Loan*

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[5] Under section 1122 of the School Code, conduct constituting "immorality" is cause for termination of a tenured professional employee. 24 P.S. §11-1122. "Immorality" is not defined in the School Code; however, it has been defined by Pennsylvania courts as "a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate." *Zelno v. Lincoln Intermediate Unit No. 12 Board of Directors*, 786 A.2d 1022, 1024 (Pa. Cmwlth. 2001) (quoting *Horosko v. Mt. Pleasant Township School District*, 335 Pa. 369, 372, 6 A.2d 866, 868 (1939)), *appeal denied*, 569 Pa. 713, 805 A.2d 528 (2002). To demonstrate "immorality," a school district must establish that: (1) the conduct claimed to constitute "immorality" actually occurred; (2) such conduct offends the morals of the community; and (3) the conduct is a bad example to the youth whose ideals the teacher is supposed to foster and elevate. *Zelno.* Lying and making false statements have been held to constitute "immoral" conduct under the School Code. *See e.g., Riverview School District v. Riverview Education Association PSEA-NEA*, 639 A.2d 974 (Pa. Cmwlth. 1994), *appeal denied*, 540 Pa. 588, 655 A.2d 518 (1995); *Dohanic v. Department of Education*, 533 A.2d 812 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 632, 541 A.2d 1392 (1988); *Balog v. McKeesport Area School District*, 484 A.2d 198 (Pa. Cmwlth. 1984); *Appeal of Batrus*, 26 A.2d 121 (Pa. Super. 1942).

[6] Our scope of review when the Secretary has affirmed the dismissal of a teacher is limited to determining whether findings of fact are supported by substantial evidence, whether errors of law were committed or whether constitutional rights were violated. *Zelno*.

[7] In her Petition for Review, Reifer challenges the Secretary's conclusion that Reifer's conduct offended the morals of the community. However, because Reifer failed to include this issue in the Statement of Questions Involved portion of her brief or to otherwise develop an argument on this issue in her brief, this issue is waived. Pa. R.A.P. 2116(a) (stating that, ordinarily, no point will be considered which is not set forth in the statement of questions

(Footnote continued on next page…)

Association v. Smigelsky, 321 Pa. 337, 183 A. 802 (1936) (defining the essential element of "lying" as the intent to deceive), Reifer argues that to prevail the District had to establish that Reifer "intended to deceive" the District with her answers on the Application. Renewing the arguments made before the Secretary, Reifer contends that she had no intent to deceive the District because: (1) her reliance on Russo's advice legally excuses her actions; (2) she justifiably was confused as to the circumstances of her separation from the IU; and (3) the UC referee found that she did not intend to deceive the District. We are not persuaded.

Reifer relies on *In re Lare's Estate*, 436 Pa. 1, 257 A.2d 556 (1969), for the proposition that a client's reliance upon the advice of counsel legally excuses the client's unjustifiable actions. However, *In re Lare's Estate* is inapplicable because, here, the Secretary credited *Russo's* testimony that he *never discussed* the termination question with Reifer, much less *advised* Reifer on how to answer it. The Secretary is the ultimate fact finder in cases of this nature, and with this status goes the power to determine credibility of witnesses, the weight of their testimony and the inferences to be drawn therefrom. *Belasco v. Board of Public Education School District of Pittsburgh*, 510 Pa. 504, 510 A.2d 337 (1986).

(continued…)

involved or suggested thereby); Pa. R.A.P. 2119(a) (stating that each part of the argument in a brief must contain a discussion and citation of authorities as are deemed pertinent); *Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998) (holding that arguments not properly developed in a brief will be deemed waived).

Moreover, despite Reifer's claims that she did not intend to deceive the District but simply was confused about the exact nature of her separation from the IU, we are satisfied that the record supports the Secretary's contrary conclusion.

As pointed out by the Secretary, Reifer indicated on the Application that her employment with the IU ended in *August 2004*, the month she received her *termination notice*, not May 2005, the month she "resigned" from the IU pursuant to the WC settlement. Moreover, on cross-examination, Reifer admitted that her employment with the IU had been terminated and that she had testified regarding that termination in the Federal Case. (R.R. at 265a, 268a-69a.) Finally, contrary to what she wrote on the Application, she certainly did not leave the IU because she relocated to Bloomsburg.

Finally, with regard to the UC referee's determination, Reifer acknowledges that the Secretary is not bound by that decision, but she nevertheless argues that it is both relevant and persuasive and should have been *instructive* to the Secretary on whether Reifer's conduct constituted "immorality" under the School Code.[8]

[8] Reifer's reliance on *Rite Aid Corporation v. Workmen's Compensation Appeal Board (Bupp)*, 535 A.2d 763 (Pa. Cmwlth. 1988), to support this position is misplaced. In *Rite Aid*, we held that a workers' compensation judge correctly admitted findings by other administrative proceedings, but *correctly refused to be bound* by the other proceedings because they involved different standards of proof and questions of both law and fact. Here, as in *Rite Aid*, the Secretary admitted the findings from the UC determination but refused to be bound by them.

However, the UC Law and the School Code are distinct acts; they each advance different policies, contain different burdens of proof and provide for different relief. Moreover, the Secretary heard testimony and considered evidence that was not a part of the record before the UC referee.[9] Therefore, the Secretary did not err in refusing to consider the UC referee's prior determination.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

[9] Only Reifer and the District's Director of Human Resources, Debbra Savage, testified before the UC referee. (Secretary's Findings of Fact, No. 26.)

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O R D E R

AND NOW, this 12th day of May, 2008, the order of the Secretary of the Department of Education, dated September 27, 2007, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge

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HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY FILED: May 12, 2008

I respectfully dissent. The facts clearly support the legal conclusion that Rox-Ann Reifer resigned from her employment with the Colonial Intermediate Unit #20 (IU); therefore, Reifer's actions did not constitute "immorality".

While the IU Board of School Directors officially terminated Reifer on August 25, 2004, the facts show that this act became a nullity when in May 2005 the IU's insurance carrier, acting on behalf of the IU, insisted that Reifer sign a resignation letter agreeing to resign from her employment with the IU as part of the settlement of her worker's compensation claim. As a result, Reifer was legally correct when she indicated on the employment application for the Williamsport Area School District (District) that she had not been fired.

Moreover, the fact that Reifer indicated that her employment with the IU ended in August 2004 actually supports a finding that Reifer did not intend to deceive the District. Reifer was being entirely truthful when she said her employment with IU ended in August 2004 as this is the date that the District initially terminated her contract. It is undisputed that Reifer did not actually return to the IU and perform any duties between August 2004 and May 2005, when the IU insisted she resign from her employment.

Finally, it is clearly plausible, notwithstanding the testimony of Reifer's former attorney, that Reifer, as a lay person, would have been confused as to her employment status with the IU. Reifer cannot be expected to be able to distinguish the legal concepts of "termination" versus "resignation". As far as Reifer knew, the last act which defined her employment with IU was a resignation not a termination and she answered the question on the employment application with the knowledge that she had ultimately resigned her employment at the insistence of the IU.

Accordingly, I believe the Secretary erroneously found there was support for the charge against Reifer of "immorality" based on her allegedly false answers on the employment application. As such, the District did not have cause to dismiss Reifer. Therefore, I would reverse the Secretary's decision and order that Reifer be reinstated by the District.

JAMES R. KELLEY, Senior Judge