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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000840-MR

BOARD OF EDUCATION OF FAYETTE
COUNTY, KENTUCKY; AND STU
SILBERMAN IN HIS OFFICIAL CAPACITY
AS SUPERINTENDENT OF THE FAYETTE
COUNTY PUBLIC SCHOOLS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 09-CI-05311

ROSALIND HURLEY-RICHARDS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

SHAKE, SENIOR JUDGE: The Fayette County Board of Education (“Board”) and Stu Silberman, in his official capacity as superintendant of the Fayette County Public Schools (“FCPS”), appeal from the Fayette Circuit Court’s April 20, 2010, order. That order reversed the administrative decision from a tribunal hearing regarding the discipline of teacher Rosalind Hurley-Richards (“Richards”).

Because we find no error with the trial court’s order, we affirm.

On February 3, 2009, Richards arrived at Cardinal Valley Elementary School, where she was a teacher. After seeing that there did not appear to be a hall monitor, she posted herself in the hallway as the hall monitor. Three sibling children, MK, a fifth-grader; ZK, a second-grader; and EK, a kindergarten student, were present in the hallway and ZK and EK were running. Richards instructed ZK and EK to go back up the hall and walk back down properly, without running. ZK ran down the hallway again. When Richards reprimanded him, he responded that she could not tell him what to do. Richards instructed MK and EK to go to breakfast so that she could speak with ZK. MK and ZK then began pulling EK in separate directions with ZK pulling EK’s hair. Richards, who had one arm full of school supplies, placed her other arm around ZK and proceeded to direct him toward the school’s office. ZK protested, and physically resisted being directed toward the office. At one point ZK remarked to Richards that she was choking him and Richards responded that she was not hurting him. The incident was witnessed by another employee, Sheri Hall, who testified that it appeared as though

Richards had ZK around the neck. Hall did not intervene. Upon entering the office, Richards reported the hallway incident to the Principal and left.

Later that afternoon, Richards was informed that her contract would be suspended without pay. On February 27, 2009, after meeting with Superintendent Silberman, Richards was served with a notice that her contract was terminated. An administrative tribunal was held in April and September of 2009, and Richards was charged with violating KRS 161.790(1)(b) for conduct unbecoming a teacher. The tribunal concluded, however, that Richards had no intent to harm ZK and did not harm him, but that she used poor judgment. The tribunal modified Richards' discipline from termination to a suspension of her contract until June 30, 2010.

Richards sought review of the hearing tribunal's final order by the Fayette Circuit Court. She requested retroactive reinstatement with lost wages and benefits. The trial court found that the conclusions of the tribunal's order were unsupported by substantial evidence on the whole record and reversed the tribunal's order. The case was remanded to the tribunal for further proceedings. This appeal followed.

On appeal to this Court, the Board argues that the trial court committed clear error by misinterpreting the tribunal's final order, by making findings of fact on issues not raised before the tribunal, and by substituting its judgment for that of the tribunal. We do not agree.

Tribunal decisions are reviewed for arbitrariness. *Gallatin County Bd. of Educ. v. Mann*, 971 S.W.2d 295, 300 (Ky. App. 1998)(citations omitted). A tribunal action that is unsupported by substantial evidence is arbitrary and must be set aside. *Id.* Substantial evidence is “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable persons.” *Id.* The tribunal is afforded great latitude in its evaluation of the evidence and the credibility of witnesses. *Id.*

The tribunal found the following to be the accurate facts of the incident:

As the student was being guided to the office, he resisted and turned to go back toward the cafeteria. At this point, Richards’ arm was across ZK’s front, sliding up and around the neck/shoulder area as she physically directed him toward the office. This may have been perceived as choking. She continued to speak loudly to the student.

The tribunal then concluded:

[t]hat Richards had no intent to harm the child and did not physically harm the child, but she demonstrated conduct unbecoming a teacher in using poor judgment in continuing to coerce ZK toward the office once he complained about choking.

In support of its decision, the tribunal stated that it found the testimony of Hall to be “particularly reliable and unbiased.” However, as the trial court noted:

[t]he Tribunal further concluded that the Plaintiff’s actions could be *perceived* as choking, but witnesses did not feel compelled to intervene, which suggests that her actions did not appear to endanger the child at the time.

(emphasis in original). The trial court continued:

[t]he Plaintiff's actions served to maintain order in the hallway at school. The child was insubordinate and unwilling to walk on his own to the office. Prior to escorting ZK to the office, the Plaintiff had to physically separate the child from his sibling, whom ZK was physically harming. The Plaintiff had reason to believe ZK posed a risk to those around him, which the defendants allow would be a reasonable reason for physical restraint.

The Court finds the factual conclusions of the Tribunal provide no evidentiary basis on which to support any suspension without pay, much less an 18-month suspension. Essentially, the Tribunal concluded the Plaintiff did not choke the child but suspended her anyway. The actions of the Plaintiff were reasonable given the circumstances and the conclusions made by the Tribunal are not based on the facts of the situation.

We agree with the analysis of the trial court. The tribunal concluded that Richards had engaged in “conduct unbecoming a teacher” pursuant to KRS 161.790. KRS 161.790(1) allows a teacher’s contract to be terminated for various causes, one of which is “[i]mmoral character or conduct unbecoming a teacher.” KRS 161.790(1)(b). The phrase “conduct unbecoming a teacher” has never been given a more expansive definition. However, when viewing the subsection as a whole, “conduct unbecoming a teacher” means something more than one incident of physically coercing an unruly child to the office. The grouping of “conduct unbecoming a teacher” in the same subsection as “immoral character” implies that “conduct unbecoming a teacher” is the type of conduct which has the appearance or suggestion of immorality or conduct equally egregious. In fact, prior teacher

disciplinary actions, based upon a finding of “conduct unbecoming a teacher,” have always involved some sort of dishonest or corrupt behavior. *See, e.g., Gallatin County Bd. of Educ. v. Mann*, 971 S.W.2d 295 (Ky. App. 1998) (teacher falsified employee time records); *Board of Educ. of Hopkins County v. Wood*, 717 S.W.2d 837 (Ky. 1986) (teachers smoked marijuana off campus with two 15-year-old students); *Board of Educ. of Laurel County v. McCollum*, 721 S.W.2d 703 (Ky. 1986) (teacher falsely called in sick in order to work another job); *Hutchison v. Kentucky Unemployment Ins. Com'n*, 329 S.W.3d 353 (Ky. App. 2010) (teacher’s behavior, leading to six violent and threatening criminal convictions, compromised her ability to be an example to the school community); *Dixon v. Clem*, 492 F.3d 665 (6th Cir. 2007) (teacher took photographs of female student while she was wearing no clothes above her waist). The factual findings provide no indication that Richards exhibited any such conduct.

As the trial court observed, there is a clear disconnect between the tribunal’s factual findings and its suspension of Richards. Such an outcome is arbitrary and was therefore properly reversed and remanded by the trial court. *Mann*, 971 S.W.2d 295. We therefore affirm the Fayette Circuit Court’s April 20, 2010, order.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, DISSENTS.

KELLER, JUDGE, DISSENTING: Respectfully, I dissent. I would reverse the trial court and reinstate the findings of fact, conclusions of law, and final order of the tribunal.

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