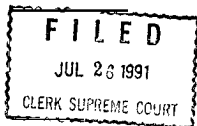


IN THE COURT OF APPEALS OF IOWA

No. 1-145 / 90-1466



BOARD OF DIRECTORS OF THE CENTERVILLE COMMUNITY SCHOOL
DISTRICT and the CENTERVILLE COMMUNITY SCHOOL DISTRICT,

1

Appellees,

vs.

FRANCIS W. THOM,

Appellant.

Appeal from the Iowa District Court for Appanoose
County, James D. Jenkins, Judge.

Thom appeals a district court ruling affirming the
school board and finding by a preponderance of the evidence
that the termination of his teaching contract was proper.
REVERSED AND REMANDED.

William R. Unger, Des Moines, for appellant.

David J. Hester of Johnson, Hester & Walter, Ottumwa,
for appellees.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

Francis W. Thom appeals a district court decision affirming the termination of his teaching contract with the Centerville Community School District. Mr. Thom requests on appeal that this court reverse on the grounds the facts relied on as just cause for terminating the contract are not proven by a preponderance of the evidence. He further alleges the school board admitted evidence which went beyond the scope of the notification of recommendation to terminate.

On December 7, 1989, Chad Butler, a twelve-year-old sixth grader, was misbehaving at the Lakeview Elementary School. He was attending a class then being taught by appellant, Francis W. Thom. Mr. Thom, age fifty-five, had taught for twenty-seven years and was tenured. As a music teacher, he was introducing the sixth graders to playing the guitar. This class was normally taught by Mr. Schwardtfeger.

Class began at 10:05 a.m. By 10:10, Mr. Thom asked Chad to leave the classroom and sit in the hall for the duration of the class. Chad left and closed the door. Mr. Thom then asked another student to turn out the lights so a filmstrip could be shown. Immediately after the film began, Mr. Thom noticed the door was partly open and Chad was partially in the doorway watching the film. Mr. Thom then walked over and with his foot pushed Chad out of the doorway.

The incident was reported to Chad's regular teacher, Mr. Schwardtfeger, the school principal, and Chad's mother. Chad's mother took him to a local hospital for an examination and x-rays. The examinations showed no evidence of injury, and Chad later returned to finish the school day.

The school principal prepared a report which revealed Mr. Thom apologized to Chad and his mother "for kicking Chad." School Superintendent Hoenshel reviewed the report and interviewed Chad on December 11, 1989. He then decided to recommend the termination of Mr. Thom's employment.

On December 13, 1989, Superintendent Hoenshel prepared a "Notice and Recommendation to Terminate Contract" which was served on Mr. Thom. The notice provided a recommendation to terminate Mr. Thom's contract for the reason that:

You inflicted corporal punishment upon a student on or about December 7, 1989, at Lakeview Elementary School and physically struck a student while imposing discipline when such contact was not reasonable or necessary.

The school board conducted a hearing, took the testimony of several witnesses, and heard the arguments of counsel on this matter. Part of the evidence presented related to prior problems Mr. Thom had when imposing discipline on students.

The board concluded Mr. Thom's conduct of intentionally kicking the student was unjustified and constituted just cause for his termination. Mr. Thom appealed to an

adjudicator, who believed Mr. Thom was not punishing Chad but was merely physically moving him with his foot in order to close the classroom door. The adjudicator reversed the termination and ordered the reinstatement of Mr. Thom's teaching contract. The board appealed to the district court which reversed the adjudicator. The district court found Mr. Thom had kicked the boy and just cause existed for terminating the teaching contract. Mr. Thom appeals.

I. Scope of Review. Our scope of review is limited by Iowa Code section 279.18. We review the case at law for the correction of errors under the seven standards set out in this statute. Leu v. Newton Community School Dist., 441 N.W.2d 408, 410 (Iowa App. 1989)(citations omitted). The district court is limited to the record made before the board. Id. We review this record, giving weight to the fact-findings of the board, especially when considering the credibility of the witnesses. Id. See Iowa Code § 279.18.

II. Evidentiary Objections. We address this issue first because we find it determinative. During the school board hearing, evidence was received with regard to past incidents of student discipline involving Mr. Thom. Timely objections were made; however, the evidence was admitted. In this respect, Iowa Code section 279.15 (1989) provides in relevant part:

2. Notification of recommendation of termination of a teachers' contract shall be in writing and shall be personally delivered to the teacher. The notification and the recommendation to terminate shall contain a short and plain statement of the reasons, which shall be for just cause, why the recommendation is being given to the board.

Iowa Code section 279.16 (1989), which outlines the hearing procedures, provides in part:

The evidence at the private hearing shall be limited to the specific reasons stated in the superintendent's notice of recommendation of termination.

Mr. Thom contends the school board erred in admitting into evidence that he had experienced a confrontational situation with Chad on another occasion. Additionally, he objected to the testimony of a mother whose child also had a problem with Mr. Thom.

Iowa Code section 279.16 clearly limits the evidence to be admitted at a private hearing to the specific reasons stated in the notice of recommendation for termination. It follows that our review is limited to the specific reasons stated in the superintendent's notice of recommendation of termination. Wilson v. Des Moines Indep. Comm. Sch. Dist., 389 N.W.2d 681, 684 (Iowa App. 1986). Thus, the sole determination for the board was whether the incident involving Mr. Thom and Chad on December 7, 1989, constituted "just cause" for termination of Mr. Thom's teaching contract.

In its brief, the board contends the evidence Mr. Thom argues should not have been admitted did not formulate the basis for the board's decision. Further, the board argues the evidence was considered only to ascertain the state of mind of Mr. Thom when the incident occurred. Lastly, the board asserts Thom must show actual prejudice resulting

from the admission of the evidence, citing to Lynch v. City of Des Moines, 454 N.W.2d 827 (Iowa 1990).

Iowa Code section 279.18 states in part:

The court shall reverse, modify, or grant any other appropriate relief from the board decision or the adjudicator's decision equitable or legal and including declaratory relief if substantial rights of the petitioner have been prejudiced because the action is;

1. In violation of constitutional or statutory provisions; or
2. In excess of the statutory authority of the board of the adjudicator; or
3. In violation of a board rule or policy or contract; or
4. Made upon unlawful procedure; or
5. Affected by other error of law; or
6. Unsupported by a preponderance of the competent evidence in the record made before the board and the adjudicator when that record is reviewed as a whole; or
7. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

An aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final judgment of the district court by appeal to the supreme court.

The evidence of alleged acts involving Mr. Thom which occurred two to three years before the December 7, 1989, incident went beyond the limitation imposed by section 297.16. The evidence clearly went beyond the "specific reasons stated in the superintendent's notice of recommendation of termination." This violation of the statutory requirement that the evidence be limited to the reasons stated in the superintendent's notice requires we reverse the trial court's decision and remand this case for a hearing conducted in accordance with the statutory mandates of Iowa Code chapter 279.

We need not reach the other issues raised in this appeal in light of our decision above.

REVERSED AND REMANDED.

Hayden, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. The school board held that Mr. Thom's conduct of intentionally kicking the student was unjustified and constituted just cause for his termination. The district court agreed and upheld the action of the board. When I apply the established principles of law in this area to the record before us, I reach the same conclusion as the trial court. Thus, I would affirm.

I. Evidentiary Objections. The majority has ordered a reversal and remand because the board received evidence which it is claimed went beyond the reasons stated in the superintendent's notice of recommendation of termination. In reaching its decision, the majority reasoned that the acts involving Mr. Thom and Chad prior to the December 7, 1989, incident went beyond the limitations imposed by section 279.16 of the Iowa Code.

I am not convinced the board erred in receiving the testimony as it relates to Chad for even if the evidence objected to was improperly received, the same testimony came into the record without objections from counsel. Be that as it may, the board should not have received the testimony from the mother of the child who also had problems with Mr. Thom. Although the statute merely requires "a short and plain statement of the reason" for termination, section 279.16 provides that the evidence at the private hearing is limited to the specific reasons

stated in the superintendent's notice of recommendation of termination. Thus, I agree with the majority that this testimony should not have been received.

However, I am unable to agree with the majority that the receiving of this testimony rises to that level of error requiring a reversal. Amplifying this statement, even if it is assumed, *arguendo*, that both pieces of evidence should not have been received, reversal and remand is not required for when I review the board's written decision, I am unable to find that any reliance was placed thereon. A review of the entire record reveals there is substantial competent evidence other than the objected testimony to support the decision of the board.

This is not a jury case where we are unable to determine whether improper testimony was considered by the jury in reaching its decision. We have before us, as the trial court did, a written ruling of the board of directors of the Centerville Community School District. That decision gave no strength to what is alleged as improper testimony.

It is clear under Iowa Rule of Evidence 103(a)(1) that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Since the board's ruling did not rest on the objected-to testimony, I am unable to find that a substantial right of Mr. Thom was affected. To require on remand a new hearing on the same evidence relied upon by

the board in reaching its decision (excluding, of course, the objectionable testimony) would serve little, if any, purpose. The facts are before us and we should consider this cause on the merits of the controversy. See Lynch v. City of Des Moines, 454 N.W.2d 827, 833 (Iowa 1990) (where the supreme court held, although admittedly under circumstances different than the issue before us, "to require an additional administrative proceeding on Rose's conduct would be to erect a needless procedural barrier to hearing the merits of Lynch's case"). I turn, then, to the merits of this controversy.

II. Preponderance of the Evidence. Mr. Thom's first assignment of error is that the district court erred in holding, in essence, the board's decision to terminate his contract was supported by a preponderance of the competent evidence in the record. As it relates to termination, Iowa Code section 279.27 (1989) states in relevant part: "A teacher may be discharged at any time during the contract year for just cause" A "just cause" for termination is one which

directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance, including leadership and role model effectiveness. It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, "just cause" cannot include reasons which are arbitrary, unfair, or generated out of some petty vendetta.

Wilson v. Des Moines Indep. Comm. Sch. Dist., 389 N.W.2d 681, 684 (Iowa App. 1986) (citations omitted).

The burden of proof of "just cause" is, of course, upon the superintendent. If the board concludes he has carried that burden, and adopts his recommendation, the teacher must then demonstrate, through an appeal to an adjudicator, section 279.17 or upon judicial review, section 279.18 that the board committed error in adopting the recommendation.

Id.

The majority has set out a substantial part of the facts the superintendent relied upon when submitting the recommendation for termination. I would but add that an objective review of the testimony reveals by a preponderance of the evidence that Mr. Thom did indeed kick twelve-year-old Chad.

It is true that at the hearing before the board Mr. Thom testified he only pushed the child with his foot to move him from the doorway. But, this directly conflicts with the admission he made immediately following the incident that he did kick the boy. In addition, the principal and Chad's mother testified he later apologized to them and to the boy for the kicking. Further, Chad also testified he was kicked, and his testimony was corroborated by two other students who were sitting in the back of the room and witnessed the incident.

The district court, in overruling the adjudicator, found the evidence overwhelmingly demonstrated Mr. Thom kicked the boy. In so finding, the court gave deference to

the fact findings of the board as they were able to observe the witnesses and determine their credibility. Like the trial court, I have examined the record as a whole and find the preponderance of the evidence supports the board's decision to terminate Mr. Thom's teaching contract.¹

III. Scope of Review. Our scope of review is limited by Iowa Code section 279.18. We review the case at law for the correction of errors under the seven standards set out in this statute. Leu v. Newton Community School Dist., 441 N.W.2d 408, 410 (Iowa App. 1989)(citations omitted). The district court is limited to the record made before the board. Id. We review this record, giving weight to the fact findings of the board, especially when considering the credibility of the witnesses. Id. See Iowa Code § 279.18.

The action of the board in terminating Mr. Thom's employment seems to me to be severe for a person who has given that many years to the teaching profession. But like most cases on appeal, we have but the cold record before us. We do not have the benefit of observing the witnesses first hand as the board does, nor are we able to judge their conduct and demeanor on the witness stand. In this respect, it is not our task to judge the wisdom of the

1. I note the adjudicator, in his opinion, recognized the conduct of Mr. Thom directly and negatively affected the educational goals of the district and found Mr. Thom used unjustifiable physical force in his discipline. The adjudicator noted this finding was supported by a preponderance of the competent evidence in the record made before the board. However, the adjudicator then proceeded to a conclusion contrary to these findings.

board's action, nor can we force the board to adopt a policy which we may think is preferable. We, like the district court, must leave policy decisions up to the board, subject to a teacher's constitutional, statutory, and contractual rights. Olds v. Board of Educ. of Nashua Comm. School Dist., 334 N.W.2d 765, 771 (Iowa App. 1983).

I would affirm.