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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LORETTA FERREE,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF THE BENTON COMMUNITY SCHOOL DISTRICT and THE BENTON COMMUNITY SCHOOL DISTRICT,

Defendants-Appellees.

Filed April 8, 1983

2-452
2-68250

Appeal from Benton District Court - Paul J. Kilberg, Judge.

Petitioner-teacher appeals the respondent-school board's termination of petitioner alleging the record fails to establish just cause for termination. REVERSED AND REMANDED WITH DIRECTIONS.

James L. Sayre of Dreher, Wilson, Adams, Jensen, Sayre & Gribble, Des Moines, Iowa, for plaintiff-appellant.

Brian L. Gruhn, Cedar Rapids, Iowa, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Snell, Johnson and Schlegel, JJ.

JOHNSON, J.

The respondent, Board of Education of the Benton Community School District and the Benton Community School District, terminated the employment of the petitioner-teacher, Loretta Ferree. The school board's action was upheld by an adjudicator and also by the district court upon judicial review of the adjudicator's decision pursuant to Iowa Code section 279.18. Petitioner appeals the district court decision asserting the record does not establish just cause for termination of her employment. We reverse.

The school board terminated the petitioner's employment on the ground that a personnel reduction was required by declining enrollment and budgetary constraints. Petitioner was selected as one of the teachers to be dismissed because of her probationary status, which had resulted from unfavorable evaluations of her performance by the school principal who supervised her.

In challenging her dismissal, petitioner alleged that she was on probationary status, and therefore subject to priority dismissal in a time of staff reduction, only because of illegal discrimination based upon her epilepsy. The adjudicator and the trial court both concluded that petitioner had waived her right to complain about the grounds for her probationary status because she had never filed a grievance proceeding to challenge that probationary status. The adjudicator and the court then held that the school district's declining enrollment and budgetary constraints, combined with the petitioner's susceptibility to priority dismissal because of her unchallenged probationary status, constituted just cause for the termination of her employment. This appeal followed.

Petitioner contends that the record did not establish just cause for the termination of her employment. She reiterates her argument that she did not deserve to be on probationary status and therefore susceptible to priority dismissal; she asserts that the action of placing her on probationary status was discriminatory on the basis of an alleged disability, in violation of federal and

state statutes and constitutional provisions. The school district asserts that there was just cause for termination maintaining petitioner's probationary status was unrelated to her epilepsy but rather was a result of unfavorable evalutions reflecting poor classroom performance. The school district also reiterates its position that the petitioner had waived her right to complain about the grounds for her probationary status because she had never filed a grievance proceeding to challenge her probationary status.

I. Scope of Review. Since petitioner had been employed by the school district for more than two years, she was a nonprobationary teacher, as defined by law; therefore, the validity of her contract termination is governed by Iowa Code sections 279.15-279.18 (1981), and not by Iowa Code section 279.19 (1981). Review of an adjudicator's decision is set forth in section 279.18 which provides that the district court may grant appropriate relief if petitioner's rights have been harmed because the decision of the board or adjudicator is:

> 1. In violation of constitutional or statutory provisions; or
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> 2. In excess of the statutory authority of the board or the adjudicator; or
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> 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
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> 6. Unsupported by a preponderance of the competent evidence in the record made before the board and the adjudicator when that record is viewed as a whole; or
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> 7. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

The scope of our review of the district court's decision is governed by the principles stated by the court in Board of Education of Fort Madison Community School District v. Youel, 282 N.W.2d 677, 679-80 (Iowa 1979), where the court held that an appeal under section 279.18 is at law for the correction of errors under the

seven standards of that section. Consequently, our review is limited to those seven grounds; our task is to "make anew the determinations of the district court specified in section 279.18." Smith v. Board of Education of Fort Madison School District, 293 N.W.2d 221, 223 (Iowa 1980). "If our conclusion coincides with that of the district court, we affirm; if it does not, reversal may be in order." Fay v. Board of Directors of North-Linn Community School District, 298 N.W.2d 345, 347 (Iowa Ct. App. 1980) (citing Briggs v. Board of Directors of Hinton Community School District, 282 N.W.2d 740, 743 (Iowa 1979)). See also Von Krog v. Board of Education of Beaman-Conrad-Liscomb Community School District, 298 N.W.2d 339, 341 (Iowa Ct. App. 1980).

II. Presence of "Just Cause." The board stated the following reasons for petitioner's termination:

> . . . the number of sections of students will be reduced for the 1981-82 school year within the K-6 category.
>
> Furthermore, said reductions will be necessary for the following reasons: 1) decline in elementary school enrollment and 2) the District's personnel budgetory requirements necessitating such reductions.

The court has recognized that "the term (just cause) must now include legitimate reasons relating to the district's personnel and budgetary requirements." Briggs, 282 N.W.2d at 742. Inextricably intertwined with this proposition is petitioner's claim that, assuming arguendo, just cause does exist, the board failed to comply with the staff reduction provisions in the master contract and the board's defense that petitioner's claim was waived due to her failure to file a grievance on the issue of her administrative probation.[1]

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[1] Reference to probation or administrative probation in this opinion refers to probation other than that defined in Iowa Code § 279.19 (1981).

III. Necessity of Filing a Grievance. Petitioner asserts that the administration (principal) did not have the power to place her on administrative probation either under the master contract or by any delegated power of the school board and that she therefore was not subject to prioritized termination due to any probationary status. As noted above, the adjudicator and the district court found that petitioner waived her right to challenge her placement on probation due to her failure to grieve the issue. We must determine the propriety of these conclusions.

The superintendent is "the executive officer of the board and [has] such powers as may be prescribed by rules adopted by the board or by the law." Iowa Code § 279.20 (1981). Section 279.21 defines the duties of a principal and provides in part that: "The principal shall perform such other duties as may be assigned by the superintendent." No party cites nor are we aware of any statutory provision regarding administrative probation.

Article XIII of the master contract, under which petitioner was terminated, refers to probation only with regard to staff reductions. Specifically, Article XIII provides in part:

> ARTICLE XIII
> REDUCTION OR REALIGNMENT OF STAFF
>
> 1. For the purpose of this contract, reduction shall be defined as less than the current contract.
>
> 2. Whenever a reduction in employees is deemed necessary by the Board the procedure set forth in this Article shall be under the procedures specified below:
>
> 3. The order of reduction within each category shall be under the procedures specified below:
>
> Step 1. Normal attrition resulting from employee's retiring, resigning, or voluntary reduction will be relied upon to the extent it is administratively feasible.
>
> Step 2. The remaining employees to be reduced will be selected by the Board. The Board shall take into account the following facts in making its decision:

> 1. Staff members with emergency and/or temporary certification shall be reduced first, unless needed to maintain a program.
>
> 2. Staff members currently on probation, or who were held on the same step of the salary schedule the previous year may be reduced next.
>
> 3. Employees within their first year of service in the district will be reduced next, unless needed to maintain a program.
>
> 4. The remaining employees to be reduced will be determined within the categories hereafter enumerated unless needed to maintain a program. . .

(emphasis added). The board claims that Step 2(2) of the contract gives rise to the principal's authority to place a teacher on probation. The master contract makes no other reference to probation. There is no definition of probation, no procedure for placing a teacher on probation, no statement as to who may place a teacher on probation and no statement with regard to what kind of teacher activities or inactivities may lead to probation. Additionally, there is no written board policy setting any standards or definition of probation.

Under the superintendent's job description he or she has the ability, inter alia, to "[r]ecommend the appointment, assignment, transfer, promotion, demotion, discharge and/or suspension of all employees to the Board." Additionally, he or she is to "[i]mplement negotiated contracts which have been agreed upon by the Board and the employee unit. . . ." The superintendent testified that the power to define probation and the authority to place a teacher on probation was his under these provisions and that board action was not required in probation matters.[2] He testified ". . . I am responsible, as Superintendent, to implement the contract, that would give me the power to determine probation."

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[2] The board asserts that this power and authority could be delegated to the principal by the superintendent.

Appendix at 47. Additionally, the negotiator for the teachers for the master contract covering the academic year 1976-77 testified that the administration could place teachers on probation under the contract and the term probation was not limited to the definition of section 279.19. The negotiator in response to the question of whether probation "was something more than 'I don't like the color of your coat today, you are on probation,' right?", stated, "I would hope it would be more than that, yes." Appendix at 82 (emphasis added). The negotiator also felt that the superintendent's determination on probation might not necessarily bind the board. Appendix at 80, 81. The superintendent stated that he believed he had the authority not only to define probation but also to determine, without board approval, what acts constituted reasons for probation.

In essence, the board argues that, where the statutes and master contract are silent as to the standards regarding probation, the void can be filled with unwritten subjective criteria supplied by the superintendent. The acceptance of such an argument would vest the superintendent, and those to whom he or she delegated power, with untrammeled discretion. We cannot read such an expansive power into this contract based merely upon a single reference to probation in Article XIII. We emphasize that this case does not require us to address the power of superintendents in general to place teachers on administrative probation. We limit our focus to the master contract presently before us.

In support of our position, we find Ar-We-Va Community School District v. Long, 292 N.W.2d 402 (Iowa 1980), to be instructive. That case involved the construction of the term "qualified" as used in the staff reduction provisions of a master contract.

> The language in the staff reduction policy which is in controversy was placed there at the request of teachers. As did the trial court, we believe the purpose was for the teachers to obtain liberal recall rights. Moreover, we believe the parties desired an objective standard rather than one which would depend upon the subjective views of either the board or individual teacher. In light of these

> purposes, we conclude the word "qualified" as used in the recall policy means that the teacher must have whatever authority is necessary to be assigned to teach in the position which is offered. Here the only requirement imposed either by the state or board was certification and the general endorsement for teaching in the elementary grades. Because she was so certified and endorsed, plaintiff was qualified for the position within the meaning of the policy.
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> A different standard for determining employment qualifications had been established by the school board in Bishop v. Keystone Area Education Agency Number 1, 275 N.W.2d 744 (Iowa 1979), and interpretation of the word "qualified" in that case is distinguishable on that basis.

Id. at 404 (quoting Hagerty v. Dysart-Geneseo Community School District, 282 N.W.2d 92, 97 (Iowa 1979)). We believe that this analysis is applicable as well to the present case. Had the board desired to define probation and the standards of probation as the superintendent now does subjectively, it could have bargained for such provisions in the master contract and provided written board policies on the matter. We refuse to rewrite the master contract and insert such terms. Accordingly, we find that the principal was without either statutory or delegated authority to place petitioner on probation.

This finding, however, does not dispose of the matter as we must consider whether petitioner waived her claim by failing to file a grievance. The master contract defines grievance as follows: "A grievance shall mean only an allegation there has been a violation, misinterpretation, or misapplication of any specific provisions of this agreement." A grievance under the contract has to be filed within five days of the "date of the occurrence of the event giving rise to the grievance." In November 1980, petitioner was notified that she was on probation due to the principal's evaluation of her classroom performance. Article XV of the master contract covers employee evaluation procedure, see Appendix at 338, but there is no provision in Article XV stating that an unsatisfactory evaluation may result in probation. The sole reference to probation is contained in the staff reduction provisions. Contrary to the board's position that petitioner's claim

became grievable when she was placed on probation. We believe her claim became grievable only when her probationary status placed her in a priority position for staff reduction. We find no misapplication or violation of the contract until the superintendent resorted to the remedies of Article XIII [staff reduction], involving probation.

In summary, we find petitioner did not waive her rights to contest her probationary status and that she was not properly placed on probation. Since we have disposed of this controversy on the grounds stated, we find it unnecessary to address petitioner's other contentions.

We conclude that petitioner's contract was not validly terminated and that she must be reinstated. Therefore, we reverse the judgment of the district court and remand for action consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

All judges concur except Schlegel and Donielson, JJ., who dissent.

SCHLEGEL, J. (dissenting)

I dissent from the majority position reversing the board of education, the adjudicator and the trial court.

Justifiably, the majority has not turned its decision upon any claim of discrimination for there is no basis in the record for such a finding. The majority's reason for its ruling is, however, without merit. As I understand it, the majority holds that a principal, in the school system involved, cannot place a teacher on probation since such authority is not found in the statutes or the collective bargaining agreement covering this district. The negotiator for the teachers does not question the authority of the principal to carry out such a procedure; apparently, the only body to raise the question is the majority of this court. I cannot believe that this court really intends to establish that the only authority that a school administration has is that which is specifically and minutely defined by statute or collective bargaining agreements. There are many procedural matters that must be handled by a school system that are not covered by either source of authority. This is one of the reasons for the existence of grievance procedure in such contracts.

The majority reasons that "[h]ad the board desired to define probation and the standards of probation as the superintendent now does subjectively, it could have bargained for such provisions in the master contract and provided written board policies on the matter." This very same analysis can be applied to the teachers. They apparently understood the existence of the power to define probation standards and the plaintiff herein likewise understood it. Had the teachers needed a more definite expression of the administration's power to impose probation, they could have bargained for specific provisions in the collective bargaining agreement. We should not attempt to impose restrictions upon school administrations when those subjects have not been covered by such agreements.

Plaintiff was aware of her status on probation, by reason of being notified thereof. She knew, or should have known, that such status change subjected her to termination in the event of a need to reduce staff. If she felt the probation status was unfair, improper, or imposed without proper authority, she had the power to raise that issue, and to adjudicate it through grievance procedure. She elected to avoid that procedure, perhaps because she understood the reasons were valid and proper. To hold, as the majority does, that "her claim became grievable only when her probationary status placed her in a priority position for staff reduction," makes a mockery of the entire grievance procedure limits and filing times. Rather than contending that to allow a superintendent to supply the criteria or standards for imposing probation would vest him and those to whom he or she delegated power "with untrammeled discretion," we should direct these questions to the negotiators or to the grievance procedure.

Plaintiff did not pursue grievance procedure, and therefore, waived her right to contest the probationary status upon which she was placed. Accordingly, she was subject to discharge under Article XIII.

I would affirm the trial court.

Donielson, J., joins this dissent.