

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.

JUDGE

**NEW CASTLE COUNTY COURTHOUSE
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**Re: Michael Shepherd v. Board of Education of the Red Clay
Consolidated School District and Red Clay Consolidated
School District
C.A. No. 09A-05-003 JAP**

Submitted: September 23, 2009
Decided: October 14, 2009

On Appeal from a Decision of the Board of Education
of Red Clay Consolidated School District
AFFIRMED.

Dear Counsel:

Michael Shepherd, a special education teacher, appeals a decision of the Board of Education of the Red Clay Consolidated School District (the “Board”) to terminate his employment for misconduct and incompetence. Because the Board’s decision was supported by substantial evidence, including evidence that Mr. Shepherd kicked a student and that his classroom was generally “chaotic,” the decision of the Board is **AFFIRMED**.

I. FACTUAL AND PROCEDURAL HISTORY

Michael Shepherd was a special education teacher at McKean High School in the Red Clay Consolidated School District (the “District”) for four years. On May 15, 2008, the District informed Shepherd of its intention to terminate his employment for misconduct and incompetence.¹ A Hearing Officer presided at a hearing on January 20, 2009,² during which Mr.

¹ 14 *Del. C.* § 1413(a) (“In the event that any board desires to dispense with the services of any teacher, such board shall give notice in writing to such teacher on or before May 15 of any year of its intention to terminate said teacher’s services at the end of such school year.”); *id.* at § 1411 (“Termination at the end of the school year shall be for 1 or more of the following reasons: Immorality, misconduct in office, incompetency”)

² *See id.* at § 1413(a) (“In the event that a teacher so notified shall within 10 days after the receipt of written notice of intention to terminate services request in writing an opportunity to be heard by the terminating board, the board shall set a time for such hearing to be held”); *id.* at § 1413(b) (“Any provision of this chapter to the contrary notwithstanding, the board may designate a hearing officer to conduct the hearing

Shepherd had an opportunity to present evidence on his behalf and to contest the evidence against him. The evidence presented at that hearing is summarized below.

The April 24 incident

On April 24, 2008, an incident occurred in Mr. Shepherd's special education math class. The following is Mr. Shepherd's version of what occurred that day: At the beginning of class, Mr. Shepherd asked one of his students to remove his hat, which resulted in a brief verbal skirmish, but the student eventually removed his hat. A few moments later, when Mr. Shepherd walked past that student's desk, the student "took a book and jammed it in [Mr. Shepherd's] leg."³ That same student then threw a book at Mr. Shepherd, but missed hitting him. When Mr. Shepherd walked over to the student, the student attempted to throw another book and Mr. Shepherd raised his leg "to protect [himself] from the book hitting [him]."⁴ Mr. Shepherd then told the student to go in school suspension. The student became agitated and alleged that Mr. Shepherd had kicked him.

Mr. Shepherd's version of these events was contradicted by Lorraine Peterson, a paraprofessional present in the classroom that day. Ms. Peterson

prescribed by subsection (a) of this section under rules and regulations promulgated by the board.").

³ Tr. at 136.

⁴ *Id.* at 140.

was two or three feet away from Mr. Shepherd and the student at the time of the incident. She testified that she saw Mr. Shepherd turn towards the student and kick him. She described the kick as “hard” and one that would leave a bruise.⁵ In fact, the school nurse testified that she examined the student immediately after the incident and observed a pink mark and a red streak on his leg.⁶

Diane Dunmon, the District’s Deputy Superintendent, interviewed all of the students that were Mr. Shepherd’s classroom that day. Several of the students reported seeing Mr. Shepherd kick the student.⁷ None of the students testified before the Hearing Officer, but Ms. Dunmon’s testified about the interviews, and the notes she took while conducting the interviews were admitted into evidence.⁸

Classroom management

Because of concerns about Mr. Shepherd’s classroom management, Assistant Principal Steven Schmidt met with Mr. Shepherd in March 2008 to discuss some classroom management strategies. On April 4, 2008, Mr. Schmidt conducted an unannounced observation of Mr. Shepherd’s class. Mr. Schmidt characterized the classroom situation as the “by far the worst”

⁵ *Id.* at 12.

⁶ *Id.* at 111.

⁷ *Id.* at 57-59.

⁸ District Ex. 1.

he had ever seen.⁹ Mr. Shepherd had not implemented any of Mr. Schmidt's suggestions. Mr. Schmidt observed that "there was very little respect shown to Mr. Shepherd during the period" and noted "the disrespectful manner in which the students and teacher communicated with each other."¹⁰

Ms. Peterson, the paraprofessional, described the classroom as "chaotic."¹¹ She further testified that it was "the most out of control class that we had to go into."¹² Ms. Dunmon stated that based on her interviews with Mr. Shepherd's students her "general observation was that the classroom was basically out of control."¹³ For example, several students reported that things such as paper balls and books frequently being thrown around the classroom.

The termination procedure

After post-hearing briefing, the Hearing Officer found that Ms. Peterson's testimony that Mr. Shepherd kicked the student "hard" was credible and supported by evidence of physical injury.¹⁴ He further found that Mr. Shepherd's testimony was "either confusing or not credible."¹⁵ In addition, he found that the evidence did not support the conclusion Mr.

⁹ Tr. at 107.

¹⁰ District Ex. 2.

¹¹ Tr. at 11.

¹² *Id.* at 12.

¹³ *Id.* at 40.

¹⁴ Hearing Officer's decision ("Decision") at 3.

¹⁵ *Id.*

Shepherd was “simply trying to deflect a book or otherwise act with some genuine sense of self-protection which might help explain his actions.”¹⁶ As to Mr. Shepherd’s incompetence, the Hearing Officer found that “the evidence submitted concerning the chaotic nature of the classroom, and Mr. Shepherd’s inability to control and correct that situation, supports the District’s decision to move for Shepherd’s termination.”¹⁷ The Hearing Officer therefore concluded there was sufficient cause for the termination of Mr. Shepherd and recommended to the Board his immediate termination.¹⁸

The Board accepted the Hearing Officer’s recommendation and voted to terminate Mr. Shepherd’s employment. Mr. Shepherd then appealed to this Court.¹⁹

II. STANDARD OF REVIEW

On appeal from a decision of a board of education, this Court must determine whether substantial evidence supports that decision.²⁰ Substantial evidence means “such relevant evidence as a reasonable mind might accept

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 14 *Del. C.* § 1414 (“A decision of the board shall be final and conclusive unless, within 10 days after a copy thereof has been received by the teacher, the teacher appeals to the Superior Court for the county in which the teacher was employed.”).

²⁰ *Id.* (“The Court shall decide all relevant questions of law and all other matters involved, and shall sustain any board action, findings and conclusions supported by substantial evidence.”).

as adequate to support a conclusion.”²¹ It is the Board’s duty to weigh evidence, determine credibility, and make factual findings.²² If substantial evidence supports the Board’s findings, this Court “cannot substitute its judgment for the judgment of the school authorities.”²³

III. DISCUSSION

The Hearing Officer recommended the termination of Mr. Shepherd for his misconduct and for his incompetence. Mr. Shepherd contends that the Hearing Officer’s findings were not supported by substantial evidence.

This Court has previously defined “misconduct” as a “transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior willful in character, improper or wrong behavior.”²⁴ Ms. Peterson testified that from a few feet away she witnessed Mr. Shepherd kick a student in his class “hard.” The Hearing Officer found that her testimony was credible and unbiased—a determination that this Court will not second guess. There was also evidence that the student had

²¹ *Bd. of Educ. v. Shockley*, 155 A.2d 323, 327 (Del.1959); *see also Lehto v. Bd. of Educ.*, 962 A.2d 222, 225 (Del. 2008) (applying the standard of review set forth in *Shockley* to an appeal from a school board’s decision).

²² *Shockley*, 155 A.2d at 327.

²³ *Id.* at 327-28 (noting that as a matter of public policy courts should be “should be reluctant to set aside findings of a Board of Education after public hearing unless the record clearly contains no substantial evidence supporting findings of the Board”).

²⁴ *Mulstay v. Bd. of Educ.*, 2003 WL 23219646, at *8 (Del. Super.).

pink mark and a red streak on his leg after the incident. “It is expected that teachers shall conduct themselves professionally, be a good role model, and above all else protect the mental and physical safety of their students.”²⁵ There was clearly substantial evidence in the record for the Hearing Officer to find that Mr. Shepherd’s actions demonstrated misconduct justifying his termination.²⁶

There was also sufficient evidence to support the Hearing Officer’s determination that Mr. Shepherd demonstrated incompetence in running his classroom. Ms. Peterson testified that Mr. Shepherd’s class was “the most out of control class that we had to go into.”²⁷ Mr. Schmidt testified at length about his “completely unsatisfactory” observation of Mr. Shepherd’s classroom and stated that it was “by far the worst observation [he] had ever had.”²⁸ Ms. Dunmon’s testimony about her student interviews further bolstered the testimony of Ms. Peterson and Mr. Schmidt. Therefore, a review of the record in this case clearly supports the Hearing Officer’s

²⁵ *Id.* at *9.

²⁶ *See Ballard v. Bd. of Educ.*, 1985 WL 188988 (Del. Super.) (holding that there was sufficient evidence to support a finding of misconduct where the teacher’s conduct was “consistently contrary to the standard of a teacher”).

²⁷ Tr. at 12.

²⁸ *Id.* at 67-78, 107.

conclusion that Mr. Shepherd's classroom was "chaotic" and that Mr. Shepherd had an "inability to control and correct that situation."²⁹

Mr. Shepherd next challenges the structure of the Hearing Officer's decision. He contends that the decision failed to identify which evidence supported his finding of misconduct and which evidence supported his finding of incompetence. Section 1411 of title 14 of the Delaware Code states that termination shall be for one or more of the following reasons: "Immorality, misconduct in office, incompetency"³⁰ The Hearing Officer found both misconduct and incompetence and those findings are supported by substantial evidence. Mr. Shepherd's criticism of the structure of the Hearing Officer's decision, therefore, does not justify setting aside the decision.³¹

Mr. Shepherd further contends that "the Hearing Officer should be required to submit findings and a recommendation that would be acceptable under the Delaware Administrative Procedures Act [the "APA"]."³² But, there is nothing in the teacher termination statute that dictates the form that Hearing Officer's decision or that requires a Hearing Officer to comply with

²⁹ Decision at 3.

³⁰ 14 *Del. C.* 1411.

³¹ *Leach v. Bd. of Educ.*, 295 A.2d 582, 583 (Del. Super. 1972) (stating that "as a matter of public policy, findings of the Board of Education after a public hearing should not be set aside unless the record clearly contains no substantial evidence supporting the Board's findings").

³² Appellant's Opening Brief, D.I. 7, at 7.

the APA. Indeed, the APA specifically excludes school districts.³³ The Court therefore need not, and will not, consider whether the Hearing Officer's findings would have been adequate under the APA.

Mr. Shepherd next argues that the Hearing Officer gave undue weight to the hearsay presented at the hearing—specifically the statements made by Mr. Shepherd's students to Ms. Dunmon. Hearsay statements are admissible in teacher termination proceedings,³⁴ although generally they should not provide the sole basis for a decision.³⁵ In his decision, the Hearing Officer specifically stated that “although the student statements, in a pure evidentiary sense, may be objectionable, the Hearing Examiner, in the consideration of this matter, has determined not to afford those statements significant weight.”³⁶ Even without the student statements, there was sufficient evidence to support the Hearing Officer's findings of misconduct and incompetence. Accordingly, the record demonstrates that the Hearing Officer did not give the hearsay statements undue weight.

³³ 29 *Del. C.* § 1012(1) (“Agency does not include . . . school districts . . .”).

³⁴ 14 *Del. C.* § 1413 (“Any evidence shall be admissible during the hearing which is adjudged by the board to be pertinent to the reasons contained in the written notice which the teacher received and which stated the reasons for dismissal.”).

³⁵ See *Larkin v. Gettier & Assocs.*, 1997 WL 717792, at *3 (Del. Super.) (“Although it is well-settled in Delaware that hearsay evidence is permissible in certain instances in administrative hearings, the administrative board may not rely upon such evidence as the sole basis for its decision.”).

³⁶ Decision at 2.

Finally, Mr. Shepherd contends that the Hearing Officer did not properly consider his self-defense theory. Mr. Shepherd testified that “put his leg up” in order to “protect [himself] from the book hitting [him].”³⁷ Pursuant to 14 *Del. C.* § 702 teachers may use “reasonable and necessary force for the purpose of self-defense or the defense of others.” Section 702 further provides that “deference shall be given to reasonable, good faith judgments made by the teacher.” Mr. Shepherd alleges that the Hearing Officer did not apply this “reasonable, good faith” standard. Although he did not parrot the words of the statute in his decision, the Hearing Officer found that Mr. Shepherd was not acting “with some genuine sense of self-protection.”³⁸ The only evidence presented to suggest that Mr. Shepherd was acting in self-defense was his own testimony, which the Hearing Officer found to be not credible and confusing. This Court will not re-determine questions of credibility. There was more than ample evidence, consequently, to show that Mr. Shepherd acted aggressively and that his actions were not a reasonable, good faith effort to defend himself. The Court cannot say, therefore, that the Hearing Officer failed to give proper deference to any “reasonable, good faith judgments by the teacher.”

³⁷ Tr. at 138-140.

³⁸ Decision at 3.

Accordingly, the Hearing Officer did not err by finding that Mr. Shepherd was not acting in self-defense.

IV. CONCLUSION

For the reasons set forth above, the decision of the Board of Education of the Red Clay Consolidated School District is **AFFIRMED**.

oc: Prothonotary