

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Latavia Brown-Venning,)
)
Appellant,)
)
v.)
)
Charleston County School District,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.: 2013-CP-10-7310

RECEIVED

NOV 06 2014

ORDER

SC Court of Appeals

OCT 22 PM 2:37
JULIE L. ARMSTRONG
CLERK OF COURT
BY _____

PROCEDURAL BACKGROUND

By order dated November 19, 2013, the Charleston County School District Board of Trustees ("the Board") formally notified Appellant Latavia Brown-Venning of its decision to not renew her employment as a continuing-contract teacher with the Charleston County School District ("CCSD") On December 18, 2013, Ms. Brown-Venning timely filed her Notice of Appeal with this court. Respondent CCSD filed an Answer and Return dated January 10, 2014. The parties each filed memoranda and appeared for oral argument on September 15, 2014. Having considered the positions advanced by the parties, for the following reasons, the decision not to renew Ms. Brown Venning's continuing contract of employment is reversed.

STATEMENT OF THE CASE

Latavia Brown-Venning was employed as a fifth grade teacher during the 2012-2013 school year under a continuing-contract with CCSD. She taught at the District's Sanders Clyde Creative Arts School for 2 years prior to the 2012-2013 school year, teaching fourth grade. For the 2012-13 school year, she was reassigned to teach fifth grade. On April 6, 2012, Ms. Brown-Venning received a letter from her principal placing her on formal evaluation for the upcoming 2012-2013 school year due to perceived concerns with her teaching performance. The principal's

gan

letter identified performance concerns in Domain 1 -Planning and Domain 2 – Instruction. These two Domains encompass APS 1-7. Ms. Brown-Venning was formally evaluated during the 2012-2013 school year under “SAFE-T” by a three-person team, one of whom was her principal. Under the SAFE-T instrument, teachers are judged “Met” or “Not Met” in 10 areas (APS 1-APS 10).

In early October 2012, at the outset of her evaluation, Ms. Brown-Venning began to suffer from debilitating and chronic migraine headaches. On October 2, 2012, while driving to school, she began to lose vision. She pulled over and called her family for help. She was rushed to the emergency room for treatment and evaluation. She was provided medication, but the headaches continued. Later in October, Ms. Brown-Venning began to experience excruciating back pain caused by a herniated disc pinching a nerve. The back pain was treated with epidural nerve blocks every Thursday. One of the prescribed pain medications caused drowsiness, interfering with her ability to work in the evenings at home, such as grading papers and preparing lesson plans. On October 17, 2012, Ms. Brown-Venning had an acute episode of stabbing back pain at work causing the school nurse to call EMS for transport to the hospital. At the hospital, she was diagnosed with an ovarian cyst and free fluid in the pelvis. Her headaches and back pain persisted. On March 11, 2013, Ms. Brown-Venning was diagnosed with an ectopic pregnancy requiring surgery two days later. As a result of these medical issues, Ms. Brown-Venning was on approved sick leave October 2 and 3; November 8, 9, 29, and 30; and March 13, 14, 15, and 18. Other days she took medication in an effort to perform her job duties.

On October 17, 2012, Ms. Brown-Venning received a professional growth and development plan identifying APS 2, 5, 6, and 7 consistent with the evaluation notice provided in April 2012. However, APS 8 was added without prior notice. During the fall 2012 preliminary

period, the evaluation team judged Ms. Brown-Venning as “Not Met” in Domains 1, 2 and 3, with a “Met” only for Domain 4, APS 10. On December 19, 2012, the principal and another member of the evaluation team advised her that she was judged “Not Met” in three areas not previously identified: APS 3, 4, and 9. The only professional growth and development plan in the record does not reflect the additional areas.

On March 27, 2013, Ms. Brown-Venning received the evaluation team’s overall judgment of “Not Met” for the final review period. By letter dated April 11, 2013, the District’s associate superintendent informed Ms. Brown-Venning that, based on the principal’s recommendation, her contract would not be renewed because she “did not complete the requirements of [the formal evaluation] process to a satisfactory level and subsequently failed the evaluation.”

Ms. Brown-Venning timely requested an appeal of the non-renewal recommendation. A subsequent letter dated May 13, 2013, demanded a hearing in accordance with the provisions of S.C. Code Ann. §59-25-470, and agreed to extend the statutory hearing deadline until June 15, 2013, unless by further agreement. Despite this deadline, the Board convened Ms. Brown-Venning’s hearing on November 12, 2013.

At the outset and conclusion of the hearing, counsel for Ms. Brown-Venning asserted that the Board had not provided the timely hearing required by statute. Counsel also argued that the evaluation, identified as the only basis for non-renewal, should not be considered valid. At the conclusion of the hearing, the Board accepted the recommendation of non-renewal by a vote of 3-2. The Board issued a written order of this decision on November 19, 2013.

STANDARD OF REVIEW

On appeal from termination of a continuing-contract to teach, the circuit court has the authority and duty to correct errors of law. Lexington County School District one Board of Trustees v. Bost, 282 S.C. 32, 316 S.E. 2d 677 (1984) The court may reverse or modify a decision if it is affected by an error of law or is arbitrary or capricious. S.C. Code Ann. § 1-23-380(5)(d), (f). Additionally, the circuit court has the authority to reverse an agency decision “made upon unlawful procedure” or in excess of “statutory authority.” Adamson v. Richland County School District One, 332 S.C. 121, 128, 503 S.E. 2d 752, 755-56 (Ct. App. 1998)

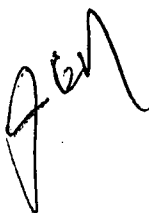
The relevant statute in this case is the Teacher Employment and Dismissal Act (“TEDA”), S.C. Code Ann. § 59-25-410 et seq. Sections 59-25-460 and 470 of the Act require that a continuing contract teacher be provided substantive and procedural due process within the specifically delineated time frames. On appeal, the court has the responsibility of enforcing the TEDA and ensuring that teachers are afforded the full process required by law.

Because school boards are delegated the responsibility to see and hear witnesses called to testify, review of the factual issues on appeal from teacher dismissals is governed by the substantial evidence doctrine. Barr v. Bd. Of Trs. Of Clarendon County Sch. Dist. No. 2, 319 S.C. 522, 462 S.E.2d 316 (Ct. App. 1995) Substantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Laws v. Richland County School District 1, 270 S.C. 492, 243 S.E.2d 192 (1978) The court must reverse an adverse decision that is clearly erroneous in view of the reliable, probative, and substantial evidence on

the whole record. S.C. Code Ann. § 1-23-380(A)(6)(e); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981)

GOVERNING LAW

The South Carolina Constitution guarantees all citizens the right to due process of law. S.C. Const. art. I, § 3. Additionally, the Constitution states that no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency except on due process and an opportunity to be heard. S.C. Const. art. I, § 22. This same section provides that no person shall be deprived of liberty or property “unless by a mode of procedure prescribed by the General Assembly.” Id.

 The General Assembly established the mode of procedure to be used in the dismissal of public school teachers in Title 59, Chapter 25, Article 5 of the Code of Laws. See, S.C. Code Ann. §§ 59-25-410 through 59-25-860. These statutes provide continuing contract teachers certain specific rights, including:

1. Written notice of reasons for dismissal from the School Board (§ 59-25-460);
2. The right to a hearing. (§ 59-25-460); and
3. Procedural due process, including the right to be heard within 15 days (§ 59-25-470).

Despite the clear language of the State Constitution and TEDA, the Board did not honor Ms. Brown-Venning’s right to a timely hearing. Additionally, the Board failed to recognize the invalidity of her evaluation.

This appeal is governed by TEDA. Accordingly, due process requirements contained in that Act control. The “primary rule of statutory construction is that the Court must ascertain the intention of the legislature.” Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002) Where the terms of the statute are clear, the court must apply those terms according to their

literal meaning without resort to subtle or forced construction to limit or expand the statute's operation. Moody v. Dairyland Ins. Co., 354 S.C. 28, 30-31, 579 S.E.2d 527, 529 (Ct. App. 2003) If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000) Further, it is manifest error to look beyond the literal wording of the statute itself when the language is clear and plain. Paschal v. State Election Commission, 317 S.C. 434, 454 S.E.2d. 890 (1995) This court need look no further than the plain language of the TEDA to determine that Ms. Brown-Venning was not provided the full due process to which she was entitled.

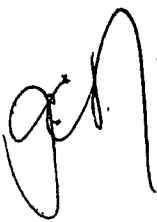
Our Supreme Court affirmed the right to be heard in a meaningful fashion in Brown v. S.C. Board of Education, 301 S.C. 326, 391 S.E. 2d 866 (1990), citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). The Court in Brown held "[t]he fourteenth amendment Due Process Clause requires procedural due process be afforded an individual deprived of a property or liberty interest by the State." In reversing the revocation of the teacher's certificate, the Court stated "the Board must comply with the statutes and regulations providing for the revocation of a teaching certificate *before* depriving [appellant] of her teaching certificate." Brown, 301 S.C. at 330, 391 S.E. 2d at 868. (Emphasis added)

Twenty years later, in Brown v. James, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010), the Court of Appeals held that the language of the TEDA is unambiguous regarding procedure and that "the observance of the procedural requirements of the Employment and Dismissal Act is **mandatory and not a matter of discretion.**" Id. at 53, 611 (Emphasis added) Only two years ago, our Supreme Court reversed a decision of the CCSD Board for violating teacher hearing

rights provided in TEDA. Young v. Charleston County School District, 397 S.C. 303, 725 S.E.2d 107 (2012)

CONCLUSIONS OF LAW

I. The Board failed to provide Ms. Brown-Venning due process as required by the South Carolina Constitution and S.C. Code Ann. § 59-25-470.



Ms. Brown-Venning had the statutory right to a hearing within 15 days of her request. The General Assembly recognized the importance of a quick hearing and included this 15-day requirement so that teachers not offered a contract for the next year have ample time to secure employment prior to the commencement of a new school year. This time frame for giving teachers notice of non-renewal is reflected in § 59-25-410 requiring school boards to notify teachers on or before April 15th of each year concerning their employment for the upcoming school year. If a board fails to notify a teacher of his or her employment status for the ensuing school year, the teacher “shall be deemed to be reemployed.”

Brown-Venning agreed to extend the 15-day time for the hearing on the express condition that the hearing be conducted no later than June 15, 2013. She did not provide any further extension. Nevertheless, her hearing was not held until November 12, 2013, five months after the deadline. This significantly prejudiced Ms. Brown-Venning because teaching jobs are ordinarily filled in July or August prior to the beginning of the school year. By the time Ms. Brown-Venning received the Board’s decision in November, the 2013-2014 school year was well underway. The Board’s failure to provide a timely hearing severely compromised her ability to obtain employment in another school district or educational setting for the 2013-2014 school year.

The District has argued that the lateness of the hearing was “harmless.” To suggest that Ms. Brown-Venning was required to seek and accept other employment due to the Board’s delay would lead to the absurd result of rewarding districts for violating statutory rights. Additionally, this argument ignores the mandatory nature of TEDA acknowledged by the Supreme Court in Johnson v. Spartanburg Co. School Dist. No. 7, 314 S.C. 340, 444 S.E.2d 501 (1994) and the Court of Appeals in Brown. The Board’s failure to meet the statutory requirements, renders its decision *per se* invalid. Young, supra.

The South Carolina Supreme Court and Court of Appeals have both ruled that failure to comply with mandatory hearing deadlines deprives an agency jurisdiction. South Carolina Dep’t. of Highways and Pub. Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986) and Starnes v. South Carolina Dep’t of Pub. Safety, 242 S.C. 216, 535 S.E.2d 665 (Ct. App. 2000) (holding failure to conduct a timely hearing deprived the DOT of jurisdiction). These decisions, in addition to the Brown holding that provisions of TEDA are mandatory, establish that when a statute uses mandatory language to impose a hearing deadline, failure to conduct the hearing within the period provided renders any adverse action invalid. Dickinson at 191, 135; Starnes at 221, 667. These decisions reject arguments that deadlines are “directory” rather than mandatory and refuse to look behind the express terms of legislation. The plain language of Section 59-25-470 stating that “[t]he hearing shall be held by the board not less than 10 nor more than 15 days after the request is served” is mandatory rather than directory and the failure to provide Ms. Brown-Venning a timely hearing requires her reinstatement. Shell v. Richland County School District One, 362 S.C. 408, 608 S.E.2d 428 (2005) (reversal of termination for failure to comply with TEDA requirements entitles the teacher to return to employment with back pay and reinstatement of benefits)

It is a well-established legal principle that where the terms of a statute are clear, courts must apply those terms according to their literal meaning without resort to subtle or forced construction to limit or expand the statute's operation. Moody v. Dairyland Ins. Co., 354 S.C. 28, 30-31, 579 S.E.2d 527, 529 (Ct. App. 2003) The plain language of Section 470 states that "[t]he hearing [of a teacher appeal] **shall** be held by the board not less than ten nor more than fifteen days after the request is served." (Emphasis added) Regardless of the wisdom or folly of this mandate, this Court is barred from imposing another meaning to this provision. Hodges v. Rainey, 341 S.C. 79, 85, 454 S.E.2d 578, 582 (2000) This conclusion also conforms to controlling law affirming the mandatory nature of the requirements of TEDA. For example, in 2010, the Court of Appeals held that the language of TEDA is unambiguous and "the observance of the **procedural requirements** of the Employment and Dismissal Act is **mandatory** and not a matter of discretion." Brown v. James, 389 S.C. 14, 697 S.E.2d 604, 611 (Ct. App. 2010) (Emphasis added) Because there is controlling precedent affirming the mandatory nature of TEDA provisions, this Court is compelled to reverse the decision terminating Ms. Brown-Venning's employment and to order reinstatement of her continuing contract with the District.

II. There is not substantial evidence to support non-renewal.

The only basis asserted by the CCSD for recommending non-renewal was Ms. Brown-Venning's formal evaluation. As reflected by two Board member votes against non-renewal, that evaluation was affected by a substantive deficiency - the fact that Ms. Brown-Venning experienced extraordinary health issues during the school year. As addressed above, beginning in October 2012, she began to have debilitating migraine headaches, back pain from a herniated disc, a painful ovarian cyst, and a tubal pregnancy which required surgery. Both Ms. Brown-Venning and her principal testified that the school nurse called EMS because she was on the

ground in pain. They also testified that she lost vision while driving to school one day and had to be seen in the emergency room. While Ms. Brown-Venning may not have discussed the details of her private medical conditions with him, the principal's awareness of her serious health problems is reflected in his Professional Performance Reviews that she was "unable to commit to the level of work needed to be done for planning due to excessive absences that are either health, family or personally related."

The SAFE-T evaluation tool requires that a teacher be judged on her "typical" teaching performance. The results of an evaluation conducted under circumstances such as those present in this case where the teacher's performance is not "typical" are not reliable and do not reflect a teacher's true teaching ability. Ms. Brown-Venning testified that her 2012-2013 school year was a "horrible year for her physically" and was not a typical representation of her teaching abilities. She suffered from chronic pain and the medication she took for this caused excessive drowsiness to the point where she was unable to do school work at home at night. When the only basis for her non-renewal is the result of this evaluation, and the evaluation was conducted during a period of time not indicative of her "typical" teaching, there cannot be substantial evidence to support the Board's decision. Because the evaluation team did not observe "typical" teaching as required by the State Department of Education, there is not substantial evidence to sustain the recommended non-renewal of Ms. Brown-Venning's employment with CCSD.

III. Ms. Brown-Venning's non-renewal was unlawful because the District violated the requirements of S.C. Code Ann. §59-25-440.

S.C. Code Ann. § 59-25-440 mandates that whenever a supervisor finds it necessary to admonish a teacher for a reason that could be cited as a reason for dismissal, the supervisor must: "(1) bring the matter in writing to the attention of the teacher involved and make a reasonable

effort to assist the teacher to correct whatever appears to be the cause of potential dismissal or failure to be reemployed and, (2) ... allow reasonable time for improvement.” Additionally, 2 S.C. Reg. 43-205.1(V)(B) requires that continuing contract teachers who are recommended for formal evaluation for the upcoming school year be “notified in writing on or **before the date the school district issues the written offer of employment**. The written notification must include the reason(s) that a formal evaluation is recommended, as well as a description of the formal evaluation process.” (Emphasis added)

Ms. Brown-Venning’s principal provided the required written notice of perceived deficiencies by way of letter dated April 6, 2012. In this letter, he advises Ms. Brown-Venning of concerns about performance in the areas of Domains 1 (APS 1-3) and 2 (APS 4-7). The letter states that evaluators “will monitor your performance to determine whether necessary improvements are made during the process. Your failure to address **these concerns** could jeopardize your continued employment...” (Emphasis added) The October 2012 Professional Growth and Development Plan, however, addresses APS 2, 5, 6, 7, **and 8**. During the 2012 preliminary evaluation period, the evaluation team concluded that Ms. Brown-Venning did not meet the requirements for Domains 1, 2, **and 3**. The team’s conclusions were presented to Ms. Brown-Venning at a conference in December. This was the first time she was given any feedback from the evaluators regarding her teaching performance.

Although Ms. Brown-Venning was successful in some areas, the evaluation team found that she did not meet **APS 8** (added by the principal in October 2012, six months after the April 2012 required notice) and added new areas – **APS 3, 4, and 9** - for improvement. The new areas for improvement were identified for the first time at the December 19, 2012, preliminary evaluation conference, immediately before the Christmas break.

The time provided for Ms. Brown-Venning to address areas identified **after** the contract date deadline established by regulation was clearly unreasonable. For example, her formal observations were conducted on January 9, 23, and 30; February 8, 13, and 27. The majority were conducted within five weeks. This short period cannot rise to the level of “reasonable time for improvement.”

The State Board of Education requires all school districts to provide continuing contract teachers written notice not later than the statutory contract date of April 15th if they are to be formally evaluated in the upcoming school year. This provision gives the teacher months to prepare and receive assistance on designated items before an assessment is performed on those matters. S.C. Reg. 43-205.1(V)(B) Fundamental fairness requires sufficient opportunity to address any additional or newly identified concerns for the final period of review. Because the District did not provide Ms. Brown-Venning a “reasonable time for improvement” as required by law, her non-renewal cannot be sustained under § 59-25-440.

IV. Ms. Brown-Venning’s termination was unlawful because it was in violation of the District’s own policies.

It is elementary that an administrative agency must follow its own rules promulgated by it. Hogsed v. Lancaster Area Schools Board of Trustees, 283 S.C 42, 320 S.E.2d 724, 727 (S.C. App. 1984), holds that policies adopted by a school board are contractual and binding upon the school district as well as employees. As the South Carolina Supreme Court emphasized in Triska v. DHEC, 292 S.C. 190, 355 S.E.2d 531 (1987), [an agency] “must also follow its own regulations and the provisions of the Administrative Procedures Act ... in carrying out the legitimate purposes of the agency.” 292 S.C. at 195. When a government agency does not follow its regulations or procedures, due process is violated and its action cannot stand. United States v.

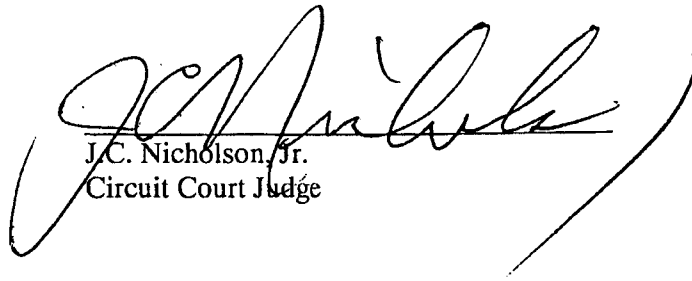
Heffner, 420 F.2d 809, 811-12 (4th Cir. 1969), citing the rule established in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954) that an agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

The District violated a number of its own policies in its actions leading up to Ms. Brown-Venning's non-renewal. First, District policy GCQF requires compliance with TEDA and specifically cites that the hearing is available to the teacher within 15 calendar days of receipt of the notice of dismissal. Second, District policy GCOA "Teacher Evaluation" requires that personnel be evaluated "fairly." The principal recommended formal evaluation in designated areas, but added new areas for review after the April 15 deadline. The addition of these areas, while arguably appropriate for purposes of assistance, cannot be used "fairly" for purposes of non-renewal.

gm
For all the reasons stated above, the order of non-renewal issued by the Charleston County School District Board of Trustees dated November 19, 2013 is hereby reversed. This reversal is required by violations of mandatory deadlines established in controlling law and regulation.¹ In addition to these violations, the District did not provide Ms. Brown-Venning notice of "evident unfitness" under § 59-25-430 and the record does not establish unfitness to teach. Accordingly, Ms. Brown-Venning is hereby reinstated to employment under a continuing contract and shall be entitled to back pay with benefits, less any appropriate mitigation, from the date of her discharge through the date of reinstatement.

¹ The express language of TEDA and controlling authority make clear that the procedures contained in TEDA are mandatory and not merely directory. While the deadline for providing a hearing contained in Section 470 appears to be unnecessarily short and to create scheduling problems, this Court has no authority to rule on the "wisdom or folly" of this statutory provision. Nevertheless, this case and others presented to this Court strongly suggest that it may be appropriate for the General Assembly to reconsider the necessity of the fifteen day deadline for scheduling and holding teacher hearings.

IT IS SO ORDERED.



J.C. Nicholson, Jr.
Circuit Court Judge

October 21, 2014
Charleston, South Carolina