

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

John Alden Bauer, III,

Appellant,

v.

Beaufort County School District,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-07-1343

FINAL ORDER

This matter came before the Court for a hearing on the merits of this appeal on March 4, 2016. The Appellant, John Alden Bauer, III, ("Bauer") appeared *pro se*.¹ The Respondent, Beaufort County School District, was represented by David T. Duff, Esquire, of Duff, White & Turner, LLC. Having considered the record filed on appeal, extensive written submissions by the parties, and the arguments made at the March 4 hearing,² the Court denies the appeal and upholds the decision of the Beaufort County Board of Education terminating the employment of Appellant Bauer as a teacher with the Beaufort County School District. The reasons for the Court's decision are as follows.

PROCEDURAL HISTORY

This appeal is pursuant to the S.C. Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-25-480, which provides, in pertinent part, that a decision by a school district board of trustees under the Employment and Dismissal Act shall be final unless within 30 days thereafter, an appeal is made to the court of common pleas of the county in which the district is

¹ Although Bauer appeared *pro se* at the hearing before the Court on March 4, at times prior to the hearing before the School Board and during the initial stage of this appeal, Bauer was represented by counsel.

² Bauer submitted extensive written material after the hearing in response to the proposed order submitted by Respondent's counsel. The Court has carefully considered this material. Most if not all of the material constitutes attempts to add factual matter, arguments, and rebuttals to evidence introduced during the School Board's hearing. The record before the Board has long been closed, as this Court has repeatedly reminded Bauer. Therefore, factual matter not contained in the record on appeal filed with this Court has not been considered.

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located. The written decision of the Beaufort County Board of Education is dated May 19, 2015. The initial appeal in this matter was filed by Bauer's then attorney on May 29, 2015. Subsequent to the filing of the initial notice of appeal, several amendments of the appeal notice were made so that only those issues which are proper in an appeal of this nature were presented for the Court's consideration. The appeal issues which are now properly before this Court are contained in Appellant's Notice of Second Amended Civil Appeal, filed on October 19, 2015. The Court will address below the seven issues presented in the second amended appeal.

It is clear from the record created at the School Board hearing, now filed with the Court, that Appellant Bauer chose not to testify on his own behalf at the Board hearing or put on any case in rebuttal, despite repeated efforts by the Board and its advice counsel to persuade him otherwise. It is not apparent from the record why Bauer chose not to testify, but it is clear he made that decision voluntarily and of his own free will. In declining the opportunity to testify, Bauer also relinquished the primary means by which he could seek to introduce documents which he believed supported his position. Consequently, the evidence which may have supported Bauer's defense at the hearing was limited to that testimony he believed was favorable to his position, which he obtained during his cross-examination of the administration's witnesses, and the few documents that were introduced without objection during that cross-examination.

Given the evidentiary posture of this case, as explained above, the Board made certain findings based on a record which contained evidence that was introduced in support of the administration's position, virtually without contradiction by evidence supporting Bauer's position.

STATEMENT OF FACTS; FINDINGS BY THE BOARD

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The facts determined by the Board, which are hereby upheld by the Court as supported by substantial evidence, are summarized below.

Bauer was employed by the District in 2002 as a physical education teacher at Hilton Head Island Elementary School ("HHIES" or "the School"). His performance as a teacher over the years was unremarkable, until the events of the 2013-2014 school year that lead to his dismissal.

The first such event occurred on November 1, 2013. On that occasion, a 4th grade teacher reported to Michelle Brockway, an assistant principal at HHIES, that she observed a child alone outside of the school's gym, where Bauer was teaching the class in which that child was supposed to be. When Brockway investigated the matter and spoke with Bauer about the situation, Bauer at first expressed unawareness of the fact that the child was alone outside the gym, but later stated that he was aware of the child's location and that there was no reason for concern. Brockway was surprised and puzzled by Bauer's later explanation of the occurrence since it would have been impossible for Bauer to monitor and supervise students both inside and outside the gym. Brockway was also concerned about Bauer's attitude during their conversation, which she described as "argumentative, agitated, and uncooperative." Further, Brockway stated Bauer seemed unable to understand that an unattended, unsupervised child outside the gym building was a safety concern.

Brockway prepared a contemporaneous write-up of the November 2013 events but did not discuss the incident with her supervisors until February 2014, following a second more serious failure by Bauer to properly care for or supervise a student in his care. That incident occurred on February 5 and lead ultimately to Bauer's dismissal.

The incident occurred when Bauer was leading a swimming class at the Island Recreation Center ("rec center"), a building located across the street from HHIES and which is

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not affiliated with the school. At the conclusion of the class, Bauer led his class back to school, but he left one child behind. The child, a fifth-grader who was a gifted-identified student with a 504 behavioral plan, was left unattended at the rec center for approximately thirty minutes. An employee of the rec center ultimately returned the child to HHIES. Bauer has never disputed that he left the child at the rec center.

HHIES Assistant Principal Donald Clendaniel contacted Bauer about the incident after the student had been returned to the school. Bauer's emailed response to the news that he had left the child at the rec center was: "Thanks. It was pouring down raining and we were in a rush to get back." Clendaniel recalled being shocked by Bauer's apparent lack of remorse, concern, or acceptance of personal responsibility regarding his failure to supervise his students. Later that day, Clendaniel sent Bauer an email requesting he attend a meeting at 3:45 to discuss the incident, as well as parent concerns that children had been unsupervised and exposed to naked adults in the rec center's locker room the prior day. According to Clendaniel's contemporaneous write-up of the substance of that meeting, Bauer responded to the request for a meeting by calling Clendaniel and asking, "Isn't this something we can talk about on the phone? This is ridiculous. I have something after school today. . . This is absolutely ridiculous." Mr. Clendaniel insisted on the meeting. Bauer arrived at the meeting 15 minutes late, apparently after leaving campus to get a soda from a nearby convenience store. During the meeting, Bauer sat slumped in his chair, made no eye-contact, and continued to insist that the situation and the meeting about the matter were ridiculous because the incident was "a simple mistake." Mr. Clendaniel stated he believed Mr. Bauer's response to the incident was unprofessional. Bauer was called back to the School later that afternoon to meet with Clendaniel, HHIES principal, Jill McAden, and Alice Walton, the District's Chief Administrative and Human Resources Officer.

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Walton participated via conference call. Bauer admitted that he had left a child at the rec center but he continued to insist that the "concern" over the incident was "ridiculous," since the child returned unharmed. Bauer indicated to McAden that it was the student who was at fault, stating the child should have been written up for failing to follow directions. McAden was deeply concerned by Bauer's reaction and his overall demeanor because it indicated to her an inability or refusal on Bauer's part to understand the connection between his failure in supervising the child and the potential safety implications for the child. Walton placed Bauer on administrative leave with pay that day.

Principal McAden emailed Walton the next day indicating that she was shocked by Bauer's lackadaisical behavior, his defensive demeanor, and his failure to express remorse or accept responsibility for his omission. McAden noted that Brockway had witnessed a similar display of defensive behavior earlier that school year when she confronted Bauer about the student who was found hiding outside of the gym during one of Bauer's classes.

Walton met with Bauer, Clendaniel and Brockway on February 6, 2014. When Walton asked Bauer if he understood why she had placed him on administrative leave, she recalled that he responded, "I don't really see the big deal in all of this. The student got back to the building. He wasn't hurt. I really don't see why you are blowing this out of proportion." Walton testified at the School Board hearing she was concerned about Bauer's response because she did not get the sense that Bauer understood the gravity of leaving a student unattended off campus. Walton ultimately determined that Mr. Bauer had failed to comply with School Board Policy IS-2, which requires teachers to supervise their students at all times throughout the school day.

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On February 7, 2014, Walton wrote Bauer to memorialize the February 5 meeting, explaining her reasons for placing Bauer on administrative leave. She indicated the reasons for placing him on administrative leave were because of concerns over Bauer's negligent actions in leaving the student unattended at the rec center and unprofessional behavior toward the school administrative officials who investigated the incident.

On February 11, Walton met with Bauer in an attempt to work through the incident and reach a mutually acceptable resolution going forward. At the end of that meeting, Bauer again stated that he thought the situation was ridiculous. Bauer's continued apparent inability or unwillingness to grasp the seriousness of leaving a child unattended off campus prompted Walton to request that Bauer undergo a wellness check and have a physician certify that he was capable of carrying out the duties and responsibilities of his job. Walton required that Bauer submit the physician's certification to her on or before March 31, 2014, indicating whether the physician believed Bauer was "presently capable of performing the essential functions of [his] position" Walton testified that she has previously requested employees receive such assessments when, as in the case of Bauer, certain "red flags" exist, such as when an employee demonstrates an inability to recognize the seriousness of a situation or an employee refuses to accept responsibility for a matter.

On April 1, Walton emailed Bauer to let him know that she had not received the requested physician certification. A week later, Walton did receive an evaluation letter, in which the physician, Dr. Rosenbaum-Bloom, opined in a very general statement that Bauer was capable of performing the essential functions of his job and could return to work.

On April 23, Walton's office contacted Bauer to schedule a meeting for April 25 to discuss the physician's letter. On the afternoon of April 24, Bauer contacted Walton advising that

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he could not attend the meeting because he had pink eye. He requested the meeting be rescheduled. Walton agreed to and rescheduled the meeting for April 29. On April 28, Bauer wrote Walton the following email:

Hello Ms. Walton[:]

My eye is just about better. I believe it's just a severe case of allergies with all the pollen in the air. If you would like to schedule a meeting for reinstatement I am available any time after today. If our meeting is for anything other than reinstatement you will need to contact my attorney.

Walton responded by informing Bauer that he was required to attend the meeting, as he was on administrative leave and thus subject to reasonable demands of his employer. Walton also forwarded the email chain to Superintendent Moss, who responded to Bauer via email stating:

Mr. Bauer,

Ms. Walton is correct in informing you that while you are on administrative leave, with pay, you are to report as requested. This is no different than if you were reporting to work at a school location. Ms. Walton has requested you attend a meeting with her and failure to do so without a valid reason could be considered insubordination.

This is our personnel policy and our administrative rule. The topic for the meeting is decided by Ms. Walton, not you. If you are requesting a change to your leave status please let me know, otherwise I can expect you to meet with Ms. Walton at the designated time.

Shortly thereafter, Walton emailed Bauer stating: "After reading Dr. Moss's email, can I expect you in my office at 9:00 AM in the morning?" Bauer replied: "Is this for reinstatement?" Walton responded, "No." Dr. Moss, who was copied on the emails, also responded to Bauer, stating:

As your employer and your status is paid leave, I expect you to appear tomorrow at 9:00 AM to meet with Ms. Walton. You may

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bring whoever you like. If you fail to appear I will consider your action as an act of insubordination.

Bauer replied:

I do not wish to be insubordinate, but I feel that I need my attorney George McMaster with me. He is currently in Rock Hill on a case and I will be contacting him directly. Please reschedule.

Dr. Moss responded:

Mr. Bauer,

It appears you are unwilling to meet at the time which has been scheduled for tomorrow at 9:00 AM. I will Direct Ms. Walton to email you the letter in which we were planning to meet on. I will expect you to follow the directive in the letter within the identified time. Failure to do so will be considered an act of insubordination.

Bauer did not appear for the meeting.

The next day, April 29, Walton sent a letter to Bauer, which directed Bauer to seek an examination by Dr. Mary St. John Gay, a mental health professional to whom the District refers employees for further evaluation. Walton's directive was made pursuant to Board policy HRS-16, which allows the District to choose the physician that will evaluate an employee. Walton's office facilitated the scheduling of Bauer's appointment, informed him the District would pay for the assessment, and requested Bauer submit Dr. St. John Gay's opinion by May 16. At the School Board hearing, when asked by Bauer why she rejected the initial evaluation and requested Bauer be evaluated further, Walton explained that she felt Bauer was still apparently unable to understand the severity of his actions and the District's level of concern, as demonstrated by his refusal to meet with her about the initial evaluation.

By Walton's deadline of May 16, Bauer had not submitted the requested report.

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On May 29, Walton wrote Bauer, reminding him of her directive that he submit Dr. St. John Gay's opinion by May 16. She further indicated that if Bauer did not appear at a meeting on Monday June 2, 2014, with Dr. St. John Gay's written report, Dr. Moss would proceed with a recommendation for termination. Dr. Moss also emailed Bauer that day, noting Bauer's continued refusal to cooperate with administration and comply with their meeting directives during his period of administrative leave. Dr. Moss warned Bauer that failure to comply with prior directives by Monday, June 2, 2014, would cause him (Moss) to proceed with a recommendation for termination. In that email, Moss laid out the grounds then existing for termination, citing Bauer's negligence in leaving a student unattended off campus on February 5 and Bauer's subsequent insubordination in refusing to cooperate with District officials in their attempt to bring resolution to the situation.

Bauer never provided the requested evaluation by Dr. St. John Gay, and no evidence has ever been presented that he ever underwent such evaluation. Walton recommended to Superintendent Moss that Bauer's employment be terminated, citing the following reasons: Bauer's negligence in leaving a child at the recreation center on February 5; his inability to understand the severity of this act; and Bauer's multiple refusals to meet and provide the requested documentation.

On June 5, 2014, Dr. Moss recommended to the Board that Bauer be dismissed, subject to Bauer's right to an evidentiary hearing before the Board if requested. Dr. Moss informed Bauer of his decision by letter dated June 6, 2014, in which he cited his May 29, 2014, communication as containing the grounds upon which his recommendation was based.

At the hearing before the Board, Moss testified that he felt Bauer had been "extremely insubordinate," noting that in his 32 years of experience, this was his first time an

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employee refused to attend a meeting while on administrative leave. He also noted he gave Bauer multiple opportunities to satisfy the directives provided by Walton and, on several occasions, extended Bauer's deadline to comply with those directives. Moss stated the initial concerns he had about Bauer, which emerged during the investigation into Bauer's conduct on and just after the February 5 incident, coupled with Bauer's continual insubordination toward District officials, left him with no other choice but to recommend Bauer's employment with the District be terminated.

Bauer appeared *pro se* at the School Board's teacher dismissal hearing. At the hearing, Bauer made the critical error of choosing not to testify or otherwise present a case to the Board, despite being implored to do so by the Board and its advice counsel. Specifically, Bauer was warned that if he waived his right to testify, the only testimonial evidence in the record would be those concessions and the few documents the Board allowed him to admit during cross-examination. Bauer stated, "I understand and that is agreeable. Thank you." To the extent Bauer put forward any case at all, his effort to do so was limited to attempts to undercut the testimony of the Superintendent's witnesses. Bauer had compiled numerous documents, which were provided to the Board in several notebooks, but Bauer entered only a few of these documents into evidence during his cross-examination of witnesses for the administration. After Bauer informed the Board he would not testify, call witnesses, or make any statements under oath, counsel for the Superintendent moved to have all of Bauer's documents not admitted into the record during the hearing removed, and not considered by the Board. Bauer verbally agreed that the record would contain only those documents he successfully entered during his cross-examination of the Superintendent's witnesses and those entered into evidence by the Superintendent. Neither his cross-examinations nor the documents he entered into the record

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rebutted or undermined the testimony and other evidence supporting the Superintendent's allegations regarding Bauer's failure to supervise students and his acts of insubordination.

DECISION OF THE BOARD

On May 2, 2015, the Board voted unanimously to uphold the District Superintendent's recommendation that Bauer be dismissed from employment. The Board concluded that there were good and sufficient reasons for terminating Bauer because, by his conduct, he manifested an evident unfitness for teaching. See S.C. Code Ann. §§ 59-19-90(ii), 59-25-430. Those reasons were based upon Bauer's negligence in the supervision of students, particularly the incident of February 5, 2014, when he left a student unattended at the off-campus rec center, and on Bauer's continued insubordinate conduct subsequent to the incident on February 5, 2014. The Board issued a written Order dated May 19, 2015, setting forth in some detail the basis for its decision.

RELEVANT STATUTES; STANDARD OF REVIEW

The Teacher Employment and Dismissal Act ("the Act") governs the employment and dismissal of all public school teachers in South Carolina. Section 59-19-90(2) of the S.C. Code of Laws vests in the board of trustees the power and duty to employ and discharge teachers. Specifically, the statute states that the board shall "[e]mploy teachers and discharge them when good and sufficient reasons for so doing present themselves" S. C. Code Ann. § 59-19-90(2). "A school board has long had the power to discharge teachers 'when good and sufficient reasons for doing so present themselves.'" *Adams v. Clarendon Cnty. Sch. Dist. No. 2*, 270 S.C. 266, 272, 241 S.E.2d 897, 900 (1978). The

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Employment and Dismissal Act was not so much intended to limit this power as it was intended to prevent its abuse. *Id.*

The Act provides the procedures governing teacher dismissals, which meet the requirements of due process in providing a notice of the grounds for dismissal to the teacher as well as an opportunity for an evidentiary hearing before the school board. S.C. Code Ann. § 59-25-460. During the hearing, the teacher may be represented by counsel, cross examine the District's witnesses, and present his own testimony, witnesses, documents, and arguments in support of his case. § 59-25-460.

The Act also affords a dismissed teacher the right to appeal the Board's decision. S.C. Code § 59-25-480. South Carolina courts have long recognized that the scope of judicial review in such appeals must be limited to an examination of the record of the evidentiary hearing to determine whether there is substantial evidence to support the Board's decision. See *Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978); *Kizer v. Dorchester Cnty. Voc. Educ. Bd. Of Trustees*, 287 S.C. 545, 548, 340 S.E.2d 144, 146 (1986); *Hendrickson v. Spartanburg Cnty. Sch. Dist. Five*, 307 S.C. 108, 110, 413 S.E.2d 871, 873 (Ct. App. 1992); *Felder v. Charleston Cnty. Sch. Dist.*, 327 S.C. 21, 25, 489 S.E.2d 191, 193 (1997). Specifically, this Court's review of the School Board's decision is limited to addressing the question of "whether the grounds given for termination of the [teacher's] employment are supported by substantial evidence." *Laws*, 243 S.E.2d at 193. Consequently, this Court is only concerned with the existence of such evidence, not its weight. *Barrett v. Charleston Cnty. Sch. Dist.*, 348 S.C. 426, 434, 559 S.E.2d 365, 369 (Ct. App. 2001).

Substantial evidence is that, which "considering the record as a whole, would allow reasonable minds to reach the conclusion the [school board] must have reached in order

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to justify its action." *Hendrickson*, 307 S.C. at 110-11, 413 S.E.2d at 873. If substantial evidence exists, this Court may not substitute its judgment for that of the Board, and the decision must be upheld. *Id.* This scope of review is intended to preserve the "powers, functions, and discretion which must necessarily be vested in educational authorities if they are to execute the duties imposed upon them." *Laws*, 270 S.C. at 495, 243 S.E.2d at 193.

ISSUES ON APPEAL

As indicated, the issues on appeal are those set forth in Appellant's Notice of Second Amended Civil Appeal, filed on October 19, 2015. Those issues, as framed in the second amended appeal, are;

1. Bauer was improperly accused and/or terminated under § 59-25-430 and § 440.
2. The Board improperly found that good and sufficient reasons existed to discharge Bauer as provided under § 59-19-90(2).
3. The District repeatedly violated due process that is required in §§ 59-25-450, 460, and 470.
4. The Board improperly found that Bauer manifested an evident unfitness for teaching under § 59-25-430.
5. The Board improperly upheld objections to limit the testimony of witnesses.
6. The Board improperly considered the fact that Bauer did not testify on his own behalf during the evidentiary hearing.
7. Bauer was never properly charged.

DECISION

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A. Substantial Evidence Supports the School Board's Determination That There Were Good and Sufficient Reasons for Terminating Bauer's Employment.³

In addition to empowering local school boards with the broad authority to discharge teachers when "good and sufficient reasons" become apparent, the Act provides that a district may terminate the teacher's employment for behavior that demonstrates the teacher's evident unfitness for teaching. § 59-19-90(2); § 59-25-430; see *Hall v. Board of Trustees of Sumter Cnty. Sch. Dist. No. 2*, 330 S.C. 402, 406, 499 S.E.2d 216, 218 (Ct. App. 1998). "Evident unfitness for teaching may be manifested by conduct such as, but not limited to, the following: persistent neglect of duty, willful violation of rules and regulations of the district board of trustees, drunkenness, conviction of a violation of the law of this State or the United States, gross immorality, dishonesty, illegal use, sale, or possession of drugs or narcotics." § 59-25-430 (emphasis added). Section 430, therefore, provides a non-exhaustive list of the reasons a teacher in South Carolina can be dismissed.

In the present case, the Board's decision upholding Bauer's dismissal was based on a) the instances when Bauer failed to properly supervise students, coupled with his apparent failure to understand and appreciate the seriousness and potential consequences of those actions, and b) Bauer's willful refusal to follow the directives of his superiors.

There is substantial evidence in the record supporting at least two instances in which Bauer failed to supervise his students as required by Board Policy IS-2 and seemed unconcerned about the child's wellbeing in both situations. Brockway testified that Bauer was unaware that a child, who was supposed to be in his gym class, was actually seen wandering alone and unsupervised outside the gym building. She also stated it was not possible for Bauer

³ Section A addresses the first, second and fourth grounds listed in Bauer's Notice of Second Amended Civil Appeal.

to have monitored students both inside and outside the gym at the same time, and that Bauer seemed unable to appreciate the safety concerns involved. The Board also heard testimony from Brockway and Clendaniel about the more serious incident where Bauer left a child unattended off campus at the rec center. According to Clendaniel's testimony, the discovery that the child was missing only occurred after an employee from the rec center returned the child to the School, establishing that Bauer remained unaware of the missing student until he was returned to the School some 30 minutes after the class returned. Clendaniel stated Bauer's apparent lack of concern or acceptance of personal responsibility was shocking. According to McAden and Walton, Bauer continued to exhibit a similar dismissive attitude throughout the investigation of the incident, which they too found shocking and worthy of considerable concern.

Bauer's conduct, which was described as defensive and unprofessional, continued during the investigation and culminated in his apparent refusal to meet and comply with directives from District officials on three occasions. Bauer refused to attend the meeting scheduled with Walton for April 29, indicating that he would only come to the meeting if it were being held to reinstate him. Rather than taking steps to immediately recommend Bauer's termination based on his insubordination, Dr. Moss directed Bauer to comply with certain directives from Walton. The letter required a second evaluation before a decision would be made on reinstatement, which was to have been submitted by May 16, 2014. Bauer failed to provide a second report on May 16 as instructed. In a letter from Dr. Moss on May 29, 2014, Bauer was given an additional opportunity to comply with the District's directives and report for a meeting on June 2, 2014. Bauer never produced the second medical opinion and did not report for the June 2 meeting.

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Bauer was given numerous opportunities and several extensions to comply with the District's chosen process for resolving his suspension. Moreover, Bauer was warned repeatedly that his refusal to attend meetings and participate in the resolution of the matter would be considered insubordination. Despite these warnings, Bauer continued to refuse to cooperate with the District in resolving his suspension. Only after it became clear that Bauer refused to meet with District officials and comply with their directives, and by virtue of that fact, refused to engage in the process that could have led to a resolution and reinstatement, did Superintendent Moss recommend Bauer's employment with the District be terminated.

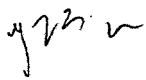
The Act expressly states that manifest unfitness for teaching is demonstrated by a willful violation of rules and regulations of district board of trustees. Here, Bauer willfully disobeyed orders from his superiors and in so doing, violated the District's rules requiring that employees act professionally.

Bauer's cross-examination of the Superintendent's witnesses and the few documents he entered into evidence do not contradict the facts that Bauer left a child unsupervised at the off-campus rec center and thereafter refused to comply with certain directives by his superiors. For these reasons, the Court finds substantial evidence supports the School Board's decision that there were good and sufficient reasons for terminating Bauer's employment because his conduct manifested an evident unfitness for teaching.

B. The District Complied With The Due Process Requirements in Sections 59-25-450, 460 and 470.⁴

The record establishes that the District complied with the due process requirements of the Act as set out in §§ 59-25-450, 460, and 470. The only claims of due process violations properly before this Court are those ruled upon by the Board in its May 19

⁴ Section B addresses the third and seventh ground listed in Bauer's Notice of Second Amended Civil Appeal.



Order. Those allegations are: 1) the hearing was not conducted within the statutory deadline specified in section 59-25-470, and 2) the "charges" or grounds for termination were not properly given to Bauer. The Board's opinion properly addressed both of these alleged due process violations and correctly concluded no such violations occurred. Any additional allegations of due process violations are not preserved for this Court's review because the Board's Order did not rule on them.

1. Bauer failed to support his contention that he never waived the 15 day requirement for conducting the hearing.

As noted in the Board's opinion, Bauer contacted the District through its advice counsel prior to the hearing to say that his attorney (George McMaster) never waived the statutory requirement that the teacher dismissal hearing be held within 15 days of the Superintendent's recommendation. Although Bauer, in his opening statement at the School Board hearing, remarked that he would demonstrate why no waiver had occurred, he failed during that hearing to produce any testimonial or documentary evidence in support of his contention. This failure, like others, was the result of Bauer's refusal to put up a case on any of his contentions. Therefore, in the absence of any record evidence on the issue, this Court must agree with the finding that a waiver of the statutory deadline occurred.

2. Bauer was aware of the bases for the Superintendent's reasons for seeking dismissal.

Bauer argues error in the manner in which he was informed of the reasons for the Superintendent's recommendation for termination. Bauer describes these reasons for his termination as "the charges" against him. In its May 19 Order, the Board correctly determined that the communications from Superintendent Moss to Bauer provided more than adequate written notice and an explanation of the reasons for his recommendation. The Board also correctly determined that the notice of the recommendation for dismissal was properly issued

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by the Superintendent, not the Board, as Bauer contends.

Under § 59-25-460, teachers facing dismissal are entitled to "written notice specifying the cause of dismissal . . ." as well as the opportunity for an evidentiary hearing before the school board. This statute is meant to satisfy the requirements of procedural due process. However, the statute does not provide any heightened standard for notice, as Bauer argues; that is, there is no requirement that the causes be listed in a particular format, no prohibition on listing those causes in prose form, and no requirement that the causes be marked as "official."

As the Board determined, the communications from Superintendent Moss—specifically Dr. Moss's email to Bauer on May 29 and Dr. Moss's subsequent letter dated June 6—provided adequate and sufficient written notice and explanation that Bauer was recommended for dismissal because of a failure to supervise students and behavior that amounted to insubordination. The May 29 email listed Bauer's infractions, which began on February 5 when he left a child in his care unattended at an off-campus facility for some 30 minutes. The email continues with a listing of the various meetings Bauer refused to attend and the directives issued by Walton and Dr. Moss that Bauer refused to follow. Dr. Moss's letter to Bauer on June 6—the official notice of Moss's intent to seek Bauer's termination—stated: "The bases for the recommendation include the grounds provided to you in my email dated May 29, 2014." Therefore, Bauer cannot gainfully say that he was unaware of the infractions which led Moss to recommend dismissal. In addition to the clear, linear explanation of Bauer's infractions while on administrative leave, as contained in Moss's May 29 email, Moss and Bauer exchanged multiple written correspondences between April and June, in which Moss reiterated on several occasions that Bauer's refusal to attend meetings and follow Walton's instructions would constitute insubordination.

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Furthermore, the Court does not agree that the Board erred in considering Bauer's entire teaching record, including a prior instance of failing to supervise a student. This information was relevant to the question of Bauer's continued fitness as a teacher and necessary to explain the actions taken by Bauer's superiors. The fact that this and other incidents heard by the Board were not specifically referenced in Dr. Moss's email listing the reasons for Bauer's termination recommendation is inconsequential. It does not change the fact that Bauer was dismissed for the grounds listed in Moss's May 29 email and as referenced in the June 6 letter to Bauer—negligence and insubordination.

Finally, to the extent Bauer continues to believe that the recommendation for termination should have been issued by the Board, the Board's Order correctly states that the reasons for dismissal originate with the Superintendent. The Superintendent is the moving party in the case and presents its position to the Board, which sits as an impartial adjudicatory body. It does not make sense in terms of due process for the Board to be the body both bringing the charges against the teacher and the body hearing those charges.

3. Bauer's employment was not terminated prior to his evidentiary hearing before the Board.

Bauer maintains that he actually was terminated without the opportunity for a hearing, in violation of §§ 59-25-460 and 470, and contrary to the South Carolina Court of Appeals holding in *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010).⁵ Initially, this issue was not supported by Bauer at the School Board's hearing by evidence or argument and was not preserved for appeal because the School Board did not rule on it. Secondly, Bauer's

⁵ The *Brown* decision is inapposite. In *Brown*, there never was a hearing before the school board regarding the teacher's termination. The case involved unusual procedural facts, but in the final analysis, the court decided that the teacher's rights under the Employment and Dismissal Act, as well as under due process, had been violated because a termination action was finalized without the teacher being afforded a hearing under the Act. Such circumstances clearly are not the case here.

contention is without merit because his employment with the District clearly was not terminated until the Board unanimously voted to uphold the Superintendent's recommendation on May 2, 2015.

Bauer's belief that he was terminated before the hearing is based on a continuing misunderstanding about the meaning and impact of two documents. First, Bauer points to his contract renewal letter dated April 2, 2014. The letter states that the District is issuing him a contract for the 2014-2015 school year, but that the contract would be rescinded should the District determine the termination of his employment is warranted and make that recommendation to the board. Bauer believes, incorrectly, that this letter indicated Moss assumed the power to non-renew a contract prior to a hearing.

Bauer points to Moss's June 6 letter and testimony surrounding the Board's conditional acceptance of Moss's recommendation to the Board on June 5 to terminate Bauer. The June 6 letter informs Bauer that the Board "conditionally accepted" Moss's recommendation, subject to a hearing as required by § 59-25-470. The letter further clarifies: "Please understand that the Board has not at this time reviewed or considered the merits of the recommendation so this action is not a final decision of the Board."

Moss's April 2, 2014 contract renewal letter may suggest that Bauer's contract would not be renewed upon the Superintendent's recommendation to the Board, rather than the Board's actual decision on the merits following a hearing. However, Moss's June 6 letter makes it clear that Bauer's employment will only be terminated after a hearing and a final decision by the board concerning the 2013-2014 contract. Therefore, to the extent Bauer's contention is properly before the Court, it is without merit.

4. Bauer was not entitled to an improvement plan.

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Bauer believes he should have been provided an improvement plan pursuant to § 59-25-440. This issue is not preserved and therefore not properly before this Court, given that Bauer failed to offer any evidence or testimony on the matter and the Board did not rule on it. Furthermore, this contention is without merit. As the Board's written Order of May 19, 2015 makes clear, Bauer was dismissed under §59-25-430 of the Act for misconduct related to a serious (and repeated) failure to supervise students and behavior which amounted to insubordination in the aftermath of the precipitating incident. It is only in the case of termination for unsatisfactory performance that a teacher is entitled to what may be characterized as an "improvement plan" and an opportunity to improve poor teaching performance. See § 59-25-440 (where "a reason" exists "that may lead to . . . dismissal," the administration shall "bring the matter in writing to the attention of the teacher . . . and make a reasonable effort to assist the teacher . . . and allow reasonable time for improvement."). In short, this is a misconduct case under § 59-25-430, not an unsatisfactory performance case under § 59-25-440. An improvement plan was neither indicated nor required.

C. The Board Did Not Abuse Its Discretion in Ruling on the Parties Objections.

Bauer asserts that "[t]he Board improperly upheld objections to limit the testimony of witnesses." (Second Amended Notice of Appeal, fifth ground). Bauer does not explain which specific rulings by the Board he believes were erroneous, what exactly the errors were, or how those rulings were prejudicial to him. See *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) (stating the general rule that to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice). Additionally, Bauer's assertion that all objections by Complainant's attorneys were sustained is not sufficient to sustain this as an appeal issue. See

Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (stating where an issue is stated as only a short conclusory statement, it is abandoned on appeal); Rule 208, SCACR (requiring that each issue be addressed and followed by discussion and citation of authority). Therefore, the Court cannot consider these claims of error.

D. The Board's Consideration of Bauer's Failure to Testify Was Proper.

To the extent there is any alleged error on appeal regarding the Board's consideration of Bauer's refusal to testify, this issue is not preserved because that claim of error was never presented to the Board for consideration; nor was that concern specifically addressed in the Board's May 19 Order. At the conclusion of the hearing before the Board, one of the trustees asked what evidence the Board might consider on Bauer's behalf, given Bauer's decision not to offer testimony. Bauer raised no objection to this inquiry and instead claimed that he had presented a "strong" case through his cross examination and the few documents he presented. Although Bauer has offered various explanations for his decision not to testify, the fact remains that he freely and by his own decision chose not to present a case before the Board, leaving the record virtually devoid of any facts in support of his position.

Bauer asserts error in the Board's consideration of his decision not to testify. The Board's opinion references Bauer's failure to testify on several occasions, primarily to explain that his refusal to present testimonial evidence and the introduction of minimal documentary evidence through cross-examination prevented him from offering any significant rebuttal to the Superintendent's case against him.

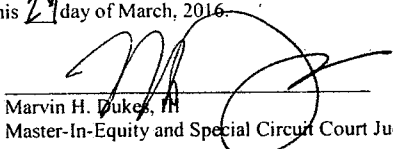
There is no indication the Board drew any adverse inference against Bauer as a result of his failure to testify, even though such inference would not have been improper. *Cf. Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (holding the Fifth Amendment does not

forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them). The Board simply had little, if any, evidence before it in support of Bauer's position, and none which successfully undermined the administration's case.

CONCLUSION

Based on the Court's review of the record and consideration of Appellant Bauer's contentions on appeal, the Court concludes that there is more than substantial evidence in the record supporting the Board's findings and its decision to terminate Bauer's employment because, by his conduct, Bauer manifested an evident unfitness for teaching. The Court determines that, considering the record as a whole, reasonable minds could conclude that Bauer's termination was justified. Accordingly, the Board properly concurred with the Superintendent's recommendation of dismissal, and the Court hereby upholds the Board's decision and dismisses this appeal.

AND IT IS SO ORDERED this 29 day of March, 2016


Marvin H. Duke, III
Master-In-Equity and Special Circuit Court Judge

Beaufort, South Carolina

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