IN THE COURT OF APPEALS OF IOWA

No. 6-244 / 05-1150
Filed July 26, 2006

DOUGLAS LEE,
Petitioner-Appellant,

vs.

POCAHONTAS AREA COMMUNITY SCHOOL DISTRICT BOARD OF DIRECTORS,
Respondent-Appellee.

Appeal from the Iowa District Court for Pocahontas County, John S. Mackey, Judge.

Douglas Lee appeals from the ruling on judicial review in which the district court determined the Pocahontas Area Community School Board of Directors exhibited no bias in its decision to terminate his contract. **AFFIRMED.**

James C. Larew of Larew Law Office, Iowa City, for appellant.

Stephen G. Kersten of Kersten, Brownlee, Hendricks, L.L.P., Fort Dodge, for appellee.

Heard by Sackett, C.J., Vogel and Hecht, JJ, and Nelson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VOGEL, J.

Douglas Lee appeals from the district court ruling which found no disqualifying bias on the part of the Pocahontas Area Community School District Board of Directors in its decision to terminate Lee's employment as a teacher. We affirm.

Background Facts and Proceedings.

Lee was hired by district Superintendent Dennis Pierce as a science teacher and coach in the fall of 2001. Toward the end of 2002, Pierce and high school principal Roger Francis met several times to discuss concerns with Lee's coaching and teaching. In late-February Francis met with Lee and informed him his contract would not be renewed. At a meeting the following day, Superintendent Pierce met with Lee and informed him of his concerns over the direction of the basketball program and of certain parental complaints.

At the request of Lee, a closed session was held in March 2003 with the School Board and various district administrators where, among other things, they discussed Lee's "coaching philosophy." The following day, Lee informed Principal Francis that when he arrived home after the meeting he received two anonymous phone calls or messages in which the callers, whom he claimed to be Board members, purportedly informed Lee he had "presented [him]self well." Additionally, Lee informed Principal Francis that those callers indicated to him they would not vote against him if Superintendent Pierce later recommended termination. Francis in turn informed Superintendent Pierce about these purported phone calls. At the direction of Pierce, Board Vice President Steve Baade and President Jan Ricklefs contacted the other members of the School

Board to inquire as to the phone calls to Lee. All members indicated they had not called Lee.

On March 6, Lee met with Principal Francis again, and informed him that of the two phone calls, only one was a message but that he actually spoke with the second caller. Also on March 6, Superintendent Pierce met with Principal Francis again to discuss Lee's teaching and coaching contracts and to review his file. According to Pierce, after he discovered that Lee was apparently not truthful about the phone calls from School Board members, he made the decision to recommend termination of Lee's contracts.

On March 10 the next regularly-scheduled School Board meeting was held; on the agenda was the topic of "parental concern." During this portion of the agenda, a number of both supporters and detractors of Lee spoke. Local residents Carol Williams and her sister Kris Plantz strongly criticized Lee's job performance at this meeting. Upon Francis's recommendation, Lee had not attended the meeting. The following day, Principal Francis notified Lee that Superintendent Pierce would be recommending to the School Board that it terminate Lee's coaching and teaching contracts. Shortly thereafter, Lee received a formal notice to this effect.

Pursuant to the termination process, a closed, evidentiary School Board session was held on May 1. At this meeting, Lee's counsel, James Larew, invited the Board to ask themselves whether they had "already arrived at an opinion" as to whether Lee should be terminated, and if so, requested that they recuse themselves. With Superintendent Pierce presenting evidence on behalf of the school district, various witnesses aired concerns about Lee's coaching and

teaching. In his own testimony, Lee admitted that he did not know who had called him the evening of the first closed session and that his statement that both callers informed him of their support was untrue.

A subsequent closed session was held on May 19 to discuss the proposed termination. Although School Board Secretary Diane Pattee was assigned the task of tape recording this meeting, the tape actually did not record anything. Pattee did, however, take some hand-written notes. At this meeting, the Board voted to terminate Lee's contracts. The written ruling of the Board cited numerous reasons for termination, including that Lee had, "irretrievably broken the basic trust that must exist between an employer and an employee."

Upon his termination, Lee filed a petition for judicial review in the district court, pursuant to Iowa Code chapter 279 (2003) and section 17A.19, claiming the School Board violated his constitutionally protected procedural and substantive due process rights. After ordering additional record to be made concerning the School Board's impartiality, the district court concluded Lee had failed to show actual bias on the part of any member of the School Board. Lee appeals from this decision, contending the "district court erred when it failed to protect [his] due process rights to have his property interests in his coaching and teaching contracts determined by a fair and impartial tribunal."

Scope and Standards of Review.

In setting out our standard of review, it is important to note that we are not deciding whether there was "a preponderance of competent evidence" when the record is viewed as a whole to support the Board's findings to terminate Lee's contract. This is because the district court's sole conclusion of law in its May 16,

2005 ruling, following its remand to the Board, was, "that petitioner has failed to show actual bias on the part of respondent and its decision terminating petitioner should be and the same is hereby affirmed." Therefore, our review of the district court's decision is limited to the correction of errors at law. *Board of Ed. of Ft. Madison Cmty Sch. Dist. v. Youel,* 282 N.W.2d 677, 680 (Iowa 1979); *Larson v. Oakland Cmty. Sch. Dist.*, 416 N.W.2d 89, 94 (Iowa Ct. App. 1987) (reviewing for correction of errors at law the claim of a terminated *probationary* teacher that the school board was improperly biased in its decision). "The board's decision shall be final and binding unless the termination was based upon an alleged violation of a constitutionally guaranteed right of the teacher . . . ." Iowa Code § 279.19 (laying out the rights, upon termination, granted to teachers in their "probationary period").[1] In such case, the provisions of section 279.18 apply, when upon judicial review, the court may grant appropriate relief "if substantial rights of the petitioner have been prejudiced because the action is . . . [i]n violation of constitutional or statutory provisions."

Analysis.

Lee's appeal[2] raises an issue similar to one addressed by our supreme

[1] Although couched in constitutional terms, we reject Lee's invitation to review his claim de novo. Appeals from the termination of a non-probationary teacher under section 279.18(2)(a) clearly are reviewed at law. We believe that de novo review of this case, under section 279.19, would effectively provide probationary teachers a broader and more invasive scope of review than the Code provides for non-probationary teachers asserting constitutional violations under section 279.18. *See Bd. of Ed. of Ft. Madison Community School District v Youel*, 282 N.W.2d 677, 680 (Iowa 1979). We cannot envision that the legislature would have intended such inconsistency.

[2] Lee also argues on appeal that the district court erred by failing to conclude his due process rights were violated by the School Board's failure to create and preserve an electronic record of its closed-door session during which the decision to terminate was reached. We find this issue is not preserved for our review. *PEB Practice Sales, Inc. v. Wright,* 473 N.W.2d 624, 626 (Iowa Ct. App. 1991) (noting issues must ordinarily be

court in *Board of Directors of Fairfield Community School District. v. Justmann*, 476 N.W.2d 335 (Iowa 1991). In that case, the court noted "[t]he gravamen of [the terminated teacher's] two due process arguments is the existence of bias on the part of the Fairfield School Board." *Justman*, 476 N.W.2d at 338. We quote at length from the court's analysis in that case:

> It is clear that the termination of Justmann's teaching contract invokes the protection of the due process clause insofar as it is a deprivation of property. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972) . . . . Moreover, the dictates of due process do require a fair trial with an unbiased decision maker. *Withrow v. Larkin,* 421 U.S. 35, 46-7, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712, 723 (1975). However, an allegation of bias on the part of the administrative adjudicators
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> > must overcome a *presumption* of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness [the situation complained of] poses such a risk of *actual bias* or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
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> *Id.* (Emphasis added.)
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> The United States Supreme Court has held that this "presumption of objectivity" is not overcome merely by showing that the administrative adjudicator has participated in a nonadversary, investigatory hearing prior to the adjudicative hearing. *Id.* at 55, 95 S. Ct. at 1468, 43 L. Ed. 2d at 728. The Court noted that "the mere exposure to evidence presented in nonadversary, investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." *Id.* Similarly, the Court has held that the presumption is not rebutted by showing that school board members who voted to terminate the employment contracts of striking teachers also participated in the earlier

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presented to and passed upon by the trial court before they may be raised and decided upon appeal). Below, Lee attempted unsuccessfully to amend his petition for judicial review in order to raise this claim. Because the April 5, 2004 order limited the scope of the remand solely to an inquiry of the impartiality of the board members, the court correctly refused on Lee's motion pursuant to Iowa Rule of Civil Procedure 1.904(2), to reach the newly asserted issue, noting "[t]here is no determination made by this court, nor does there need to be, of any alleged deficit in the record by reason of the malfunctioning tape recorder."

> unsuccessful renegotiation of those contracts. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assoc.,* 426 U.S. 482, 497, 96 S. Ct. 2308, 2316, 49 L. Ed. 2d 1, 11-12 (1976). Again, the Court explained that "mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not ... disqualify a decision maker." *Id.* at 493, 96 S. Ct. at 2314, 49 L. Ed. 2d at 9.

Id. at 339.

Iowa has also adopted a presumption of objectivity in decision making among administrative adjudicators. *Keith v Cmty. Sch. Dist.*, 262 N.W.2d 249, 260 (Iowa 1978). This presumption was applied in *Justmann*, where the court noted, "short of the situation wherein the agency adjudicator serves as the sole vehicle for the prehearing investigation, the presumption of objectivity will typically be determinative of the bias issue." *Justmann*, 476 N.W.2d at 339 (citing *Larsen v. Oakland Cmty. Sch. Dist.,* 416 N.W.2d 89, 95 (Iowa Ct. App. 1987)). Moreover, a valid claim of lack of impartiality must result from a showing of actual, rather than potential bias. *Southeastern Cmty. College v. Krieger*, 535 N.W.2d 140, 144 (Iowa Ct. App. 1995) (citing *Larsen,* 416 N.W.2d at 95).

Lee maintains that "four, separate cascading events" caused unacceptable bias and partiality on the part of the School Board: first, that Superintendent Pierce directed Board members Baade and Ricklefs to investigate the alleged phone calls to Lee; second, that Pierce "arranged" for hostile parents to be on the March 10 Board agenda; third, that the March 10 Board meeting aired "damaging" and "tendentious" statements toward Lee that would later be the subject of the termination hearing; and fourth, that the Board members carried a "degree of bias" toward Lee.

Lee's first two complaints essentially claim a conflation of the investigative and quasi-judicial functions of the Board improperly occurred. In *Lamb v. Panhandle Community School District. No. 2*, 826 F.2d 526, 529 (7th Cir. 1987), which was cited favorably by our supreme court in *Justmann*, the Seventh Circuit held that the "combination of an advisory function with a hearing participant's prosecutorial or testimonial function does not create a *per se* facially unacceptable risk of bias." There, not only did the school board's attorney act as the prosecutor, but also as the advisor to the board during its deliberations. *Lamb*, 826 F. 2d at 529. In addition, both the principal of the school and the school superintendent testified against the teacher at the termination hearing and also advised the board during its closed deliberations sessions. *Id.* Here the School Board was neither the sole investigative vehicle nor the "prosecutor." The Board did not initiate the termination proceedings; Superintendent Pierce sought Lee's termination. *See Krieger*, 535 N.W.2d at 144 (rejecting a claim of bias, in part, because the termination was commenced on the college president's recommendations, not the college's board of directors, which made the ultimate decision to terminate). Finally, there is no indication that the actions of Board members Baade and Ricklefs in polling the other Board members about the purported phone calls to Lee unduly dominated or even played a significant part in their termination decision. Rather, the deposition testimony of the Board members indicates that nothing more than simple and direct phone calls from Baade and Ricklefs were placed, questioning whether each Board member had made any phone calls to Lee.

We also find guidance in *Larson v. Oakland Community School District*, another case in which a terminated teacher alleged a school board did not act as an impartial decision maker "because the board on a prior occasion had appointed a committee to observe Larsen's teaching and one member of the committee was also a member of the board." *Larsen*, 416 N.W.2d at 95. This court rejected the claim, concluding there was no evidence that a board member made a decision other than on the evidence presented at the hearing nor was there any evidence from which one could conclude the board was not fair and impartial. *Id.* Similarly, each member of the Board in this case testified that they based their decision to terminate Lee solely on the evidence presented at the termination hearing.

As to Lee's issue regarding the public comments at the March 10 Board meeting, no substantial evidence exists to support that Pierce arranged or conspired to taint the Board by placing those hostile to Lee on the agenda. Rather, the evidence reflects that while a number of Lee's detractors did voice concerns, a perhaps equal number of supporters of Lee also aired their opinions.

As noted previously, the district court remanded to the School Board in order for counsel to make a record with respect to the impartiality of each Board member. Following that remand, depositions were taken of each Board member. Universally, those Board members testified to having kept an open mind, holding no prejudice against Lee, listening to all the evidence presented at the May 1 termination hearing, and fairly and impartially deciding Lee's cumulative actions warranted the termination. While some members did testify to holding some personal knowledge of Lee's coaching and teaching, such cannot be considered

unusual, let alone disqualifying, given the fact that school board members live in the community they serve. Moreover, the transcript of the March 10 meeting was presented to the School Board by Lee, when the Board convened on May 1 for the evidentiary hearing. By republishing the very information Lee asserts prejudiced the Board, he has waived any error he now asserts.

Accordingly, substantial evidence supports the district court's finding of no actual bias on the part of the School Board. We therefore affirm the judgment of the district court.

AFFIRMED.