

BEFORE THE ARKANSAS STATE BOARD OF EDUCATION

IN RE: JASON VAUGHN MARSHALL

PLSB CASE NO.: 14-066

FINAL ORDER

On March 12, 2015, during a regular meeting of the Arkansas State Board of Education (“State Board”), the State Board heard and considered Educator Jason Vaughn Marshall’s (“Educator Marshall”) appeal from the Professional Licensure Standards Board (“PLSB”) Ethics Subcommittee’s (“Ethics Subcommittee”) October 24, 2014 Evidentiary Hearing Determination and Recommendation (“Final Determination and Recommendation”). The PLSB was present by and through its attorney, Jennifer N. Liwo. Educator Marshall appeared, by and through his attorney, John D. Kennedy.

Upon consideration of the Educator’s Objections to Findings against Jason Marshall, the Educator’s Brief and Addendum, the PLSB’s Response to Educator’s Objections to Findings against Jason Marshall, the arguments of counsel, and all other matters properly before it, the State Board hereby finds and orders as follows:

I. Substantial Evidence Standard

Arkansas appellate courts recognize that administrative agencies, by virtue of their “specialization, insight through experience, and more flexible procedures than courts”, are well suited to make determinations on the evidence before them. *Lamar Co., LLC v. Ark. State Hwy. & Transp. Dept.*, 2011 Ark. App. 695, 5-6, 386 S.W.3d 670, 674 (2011). Administrative decisions are upheld “if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion.” *Collie v. Ark. State Med. Bd.*, 370 Ark. 180, 258 S.W.3d 367, 370 (2007). If there is substantial evidence to support the decision, it follows that the decision cannot be arbitrary or capricious. *Id.* 258 S.W.3d at 372.

When determining if a decision is supported by substantial evidence, the record is reviewed to “ascertain if the decision is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* 258 S.W.3d at 370. The evidence is given its “strongest most probative force in favor of the administrative agency.” *Id.* “The question is not whether the testimony would have supported a contrary finding, but whether it supports the finding that was made.” *Id.* Even though the evidence would support another conclusion, or even if the preponderance of the evidence would indicate a different result, the agency decision is still affirmed if reasonable minds could reach the conclusion reached by the agency. *Super. Improvement Co. v. Hignight*, 254 Ark. 328, 493 S.W.2d 424, 426-427 (1973).

II. The Code of Ethics for Arkansas Educators

An ethical violation is “an act or omission on the part of an educator when the educator knew or reasonably should have known that the act or omission was in violation of the code of ethics.” Ark. Code Ann. § 6-17-428(a)(3)(A).

Ethical violations do not include: (1) reasonable mistakes made in good faith; (2) acts or omissions undertaken in accordance with the reasonable instructions of a supervisor; or (3) acts or omissions under circumstances in which the educator had a reasonable belief that failure to follow the instructions of a supervisor would result in an adverse job action against the educator. Ark. Code Ann. § 6-17-428(a)(3)(B).

The Code of Ethics for Arkansas Educators (“Code of Ethics”) provides:

Standard 1: An educator maintains a professional relationship with each student, both in and outside the classroom.

“This standard goes to the core of a professional educator’s expected conduct and relationship with all students and transcends criminal behavior or other actions which violate law. The professional relationship with students is such behavior and action which promotes at all times the mental, emotional, and physical health and safety of students.” Ark. Dept. Ed.-Rules Governing the Code of Ethics for Arkansas Educators, Appendix C-Explanations and Guidelines to Clarify the Intent of the Code of Ethics.

III. Evidentiary Hearing Determination and Recommendation

Following an evidentiary hearing, the Ethics Subcommittee is tasked with determining whether an educator violated the Code of Ethics. Ark. Dept. Ed.-Rules Governing the Code of Ethics for Arkansas Educators, § 7.01.2. The determination must be made by a preponderance of the evidence. *Id.* As defined in Ark. Dept. Ed.-Rules Governing the Code of Ethics for Arkansas Educators, § 5.15:

Preponderance of the Evidence is the greater weight of the relevant evidence; superior evidentiary weight that, though sufficient to free the mind wholly from all reasonable doubt, is still sufficient to [induce] a fair and impartial mind to one side of the issue rather than the other. It is determined by considering all of the relevant evidence and deciding which evidence is more credible. A preponderance of the evidence is not necessarily determined by the greater number of witnesses or documents presented. If, on any allegation against an educator, it cannot be determined whether the allegation is more likely true than not true, the allegation cannot be considered to have been proved.

Subsequent to the October 24, 2014 evidentiary hearing, the Ethics Subcommittee entered its Final Determination and Recommendation in which it found that Educator Marshall violated Standard 1 of the Code of Ethics by taking video images of one of his daughters, naked in bed, and later showing the video images to two (2) female high school students.

The Ethics Subcommittee recommended that the State Board suspend Educator Marshall's license for twenty-four (24) months, from the State Board's final order; (ii) assess a one-hundred dollar (\$100.00) fine; and (iii) require Educator Marshall to obtain a written statement from a licensed mental health professional stating that he poses no threat to student by the end of the twenty-four (24) month suspension period (Educator Marshall to bear all associated costs).

IV. Findings

A. Ethics Subcommittee Issued Initial Determination and Presided Over Evidentiary Hearing

Educator Marshall contends that his due process rights were violated when the same Ethics Subcommittee members who issued the initial determination also presided over his evidentiary hearing. The PLSB responds that the Ethics Subcommittee members' prior familiarity with the case did not disqualify the members from also presiding over the evidentiary hearing.

“[T]he combination of investigative and adjudicative functions does not, without more, constitute a due-process violation.” *C.C.B. v. Ark. Dept. of Health & Human Servs.*, 368 Ark. 540, 247 S.W.3d 870, 874 (2007). “[A]n officer or board member is disqualified at any time there may be reasonable suspicion of unfairness.” *Id.* (citing *Wacaser v. Ins. Comm’r*, 321 Ark. 143, 149, 900 S.W.2d 191, 195 (1995)). “Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not [...] disqualify a decisionmaker.” *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 493 (1976). Furthermore, the Supreme Court of the United States has ruled that “a hearing examiner who has recommended findings of fact [is] not disqualified to preside at further hearings that were required [...]” *Withrow v. Larkin*, 421 U.S. 35, 49 (1975) (citing *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-237 (1947)). When attacking an administrative procedure on the basis of a denial of due process, the complainant has the burden of proving its invalidity. *C.C.B.*, 368 Ark. 540, 247 S.W.3d at 874.

Ark. Code Ann. § 6-17-428 authorizes the Ethics Subcommittee to engage in both investigative and adjudicative functions concerning allegations of ethical misconduct. These combined functions are not in contravention of the law. Furthermore, procedural bias is highly questionable in Educator Marshall’s case given that the Ethics Subcommittee amended its initial findings in a manner that conformed with the evidence presented at the evidentiary hearing. Educator Marshall has not met his burden of proving the invalidity of the procedures.

B. Ethics Subcommittee Briefed by PLSB Investigator

Educator Marshall next argues that his due process rights were violated when the Ethics Subcommittee was briefed by its own investigator prior to the hearing. As previously mentioned, the Ethics Subcommittee investigates allegations of unethical conduct. The Ethics Subcommittee authorizes PLSB staff investigators to conduct the investigations on its behalf. Investigation results are received by the Ethics Subcommittee through investigative reports and investigator briefings. Ark. Code Ann. § 6-17-428 does not limit the manner in which the Ethics Subcommittee may receive the results of the investigations.

Before making its initial determination, the Ethics Subcommittee considers the results of its investigation and the educator's response(s). "Due process requires at a minimum that a person be given notice and a reasonable opportunity for a hearing before he is deprived of property by state action." *Owings v. Econ. & Med. Servs.*, 302 Ark. 475, 790 S.W.2d 438, 439 (1990). Educator Marshall has failed to show how the current process was biased against him or violated his due process rights despite having been provided with: (1) all required notices; (2) opportunities to respond to the ethics complaint and final investigative report; and (3) an evidentiary hearing.

C. Standard Applied at Evidentiary Hearing

Third, Educator Marshall asserts that the Ethics Subcommittee failed to apply the preponderance of the evidence standard at the evidentiary hearing. Educator Marshall points to the following language in the Ethics Subcommittee's Final Determination and Recommendation as support for his position:

1. The Ethics Subcommittee finds reasonable belief that Educator Marshall violated Standard 1 of the Code of Ethics for Arkansas Educators by failing to maintain a professional relationship with each student, both in and outside the classroom, when he:
 - a. took video images of one of his daughters, naked in bed, and later showed the video images to two female high school students.

The Ark. Dept. Ed.-Rules Governing the Code of Ethics for Arkansas Educators requires the preponderance of the evidence standard to be used at evidentiary hearings. The Ethics Subcommittee is not required to use the exact words "preponderance of the evidence" in its evidentiary hearing orders. The present case is devoid of unequivocal evidence that the Ethics Subcommittee failed to apply the correct standard at the evidentiary hearing.

D. Evidentiary Hearing Time Limits

Under his fourth objection, Educator Marshall argues that the evidentiary hearing time limits impeded his ability to meaningfully cross-examine witnesses and thereby violated his due process rights.

"Due process requires at a minimum that a person be given notice and a reasonable opportunity for a hearing before he is deprived of property by state action." *Owings v. Economic & Med. Servs.*, 302 Ark. 475, 790 S.W.2d 438, 439 (1990). "The hearing must be [held] 'at a meaningful time and in a

meaningful manner.” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). These principles require “timely and adequate notice [...], and an effective opportunity to defend by confronting any adverse witnesses and by presenting [...] arguments and evidence orally.” *Id.* at 268.

The time limits are imposed on both the educator and the PLSB. However, if either party believes it necessary, a request for additional time may be made by motion. Appendix A § 6 of the Ark. Dept. Ed.-Rules Governing the Code of Ethics for Arkansas Educators. As previously stated, Educator Marshall was provided with all required notices. On August 11, 2014, Educator Marshall was notified of the October 24, 2014 hearing date and the time limits. Educator Marshall had notice and sufficient time to adequately prepare for the evidentiary hearing. Furthermore, if Educator Marshall required additional time to present his case, he could and should have filed a timely motion with the Ethics Subcommittee; he did not.

E. Ethics Subcommittee’s Findings Supported by a Preponderance of the Evidence

The testimony and exhibits presented before the Ethics Subcommittee revealed that Educator Marshall took and showed a video of at least one of his daughters¹ naked (breasts, buttocks, and/or vaginal area) to two (2) high school students.

The high schools students felt shocked and uncomfortable watching the video and described Educator Marshall’s conduct as inappropriate. Superintendent Andrea Martin found Educator Marshall’s actions inappropriate. Educator Marshall never denied the content of the video or showing the video.

Educator Marshall emphasizes the fact that the DHS and criminal investigations resulted, respectively, in an unsubstantiated finding and the non-filing of criminal charges. As it did in this case, the Ethics Subcommittee may certainly consider the results of DHS and criminal investigations. However, given the differing objectives of the agencies, the Ethics Subcommittee is not bound by the results of such investigations.

The Ethics Subcommittee’s focus was not whether Educator Marshall’s conduct was criminal or an act of child maltreatment. Those concerns are within the purview of law enforcement and DHS. The

¹ Educator Marshall’s daughters were seven (7) and nine (9) years of age.

Ethics Subcommittee's goal was determining whether Educator Marshall failed to maintain a professional relationship with students. The State Board finds that the Ethics Subcommittee's evidentiary hearing findings are supported by a preponderance of the evidence.

V. Conclusion and Sanctions

The State Board upholds the Ethics Subcommittee's finding of a Standard 1 ethical violation committed by Educator Marshall. The State Board rejects the Ethics Subcommittee's recommended sanction of a twenty-four (24) month license suspension.

During the regular session, the State Board moved, seconded, and by a vote of 5-2, agreed to impose the following sanctions on Educator Marshall: (i) suspension of license for twelve (12) months; and (ii) payment of a one-hundred dollar (\$100.00) fine. Additionally, by the end of the suspension period, Educator Marshall is required to obtain a written statement from a licensed mental health professional stating that he is does not pose a threat to students.

IT IS SO ORDERED.



Samuel Ledbetter
Chairman Arkansas State Board of Education

4-9-2015
Date