

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-12-648

WARREN SCHOOL DISTRICT
APPELLANT

V.

ROBERT A. AVERY
APPELLEE

Opinion Delivered JUNE 19, 2013

APPEAL FROM THE BRADLEY
COUNTY CIRCUIT COURT
[NO. CV-10-17-2]

HONORABLE SAM POPE, JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

Appellant Warren School District (the District) employed appellee, Colonel Robert Avery, (Avery) as an ROTC instructor from July 1, 2003, through January 28, 2010. S.C. was a sixteen-year-old female student enrolled in the ROTC program. The District's school board terminated Avery's teaching contract after Avery was charged with first-degree sexual assault of S.C. Avery appealed the school board's decision, and the Bradley County Circuit Court reversed. The circuit court found that the actions by the District were void because the school board was not a fair and impartial tribunal and because the school board considered evidence that went beyond the notice of termination provided to Avery. The District now appeals to this court, arguing that the circuit court erred in overturning the school board's decision. We affirm the circuit court.

This case is governed by the Teacher Fair Dismissal Act (TFDA), Arkansas Code Annotated sections 6-17-1501 et seq. (Repl. 2007). Pursuant to Arkansas Code Annotated



section 6-17-1509(a), a teacher who receives a notice of recommended termination may file a written request with the board of directors of the school board for a hearing. Arkansas Code Annotated section 6-17-1503(a)(1) provides that a teacher may be terminated for just and reasonable cause. A termination shall be void unless the school district substantially complies with all provisions of the TFDA and the school district's applicable personnel policies. Ark. Code Ann. § 6-17-1503(c). The exclusive remedy for a nonprobationary teacher aggrieved by a decision of the board of directors is an appeal to circuit court. Additional testimony and evidence may be introduced on appeal to the circuit court to show facts and circumstances showing that the termination was lawful or unlawful. Ark. Code Ann. § 6-17-1510(d).

I. Chronology of Pertinent Events

- S.C. alleged in a subsequent handwritten letter that during the evening of Halloween, October 31, 2009, Avery drove her to his residence and sexually assaulted her on a couch in his garage while his wife was in the residence.
- On November 22, 2009, S.C. wrote a five-page handwritten letter detailing the alleged incident.
- On November 24, 2009, S.C. was interviewed by the Arkansas State Police.
- On November 24, 2009, the District superintendent, Andrew Tolbert, and high school principal, Gary Jackson, met with Avery to discuss the alleged incident. Superintendent Tolbert showed S.C.'s letter to Avery, and Avery denied the allegations of sexual assault. Superintendent Tolbert also asked Avery if he had given a cell phone to S.C. Avery denied knowing anything about a cell phone.



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- On November 26, 2009, Avery was videotaped at 6:45 p.m. carrying a large trash bag as he was leaving the building at the high school where his office was located.
- On November 27, 2009, Superintendent Tolbert advised Avery not to report to work the following Monday.
- On December 7, 2009, Superintendent Tolbert talked with Avery on the telephone. During that conversation, Avery contradicted his previous statement and admitted that he had given S.C. a cell phone. Also, during that conversation, Tolbert asked Avery whether he had deleted any photographs from his office computer on the evening of November 26th and whether he was the person carrying the trash bag depicted in the photos leaving the school building. Avery admitted that he was the person in the photos.
- On December 7, 2009, about one hour later, Avery called back Superintendent Tolbert and told Tolbert that he did, in fact, delete some photographs from his office computer. The deleted photographs included photographs of his family, a school prom, and a chain-of-command ceremony. Avery also advised that the trash bag he was carrying contained personal items such as a toothbrush, mouthwash, and regular trash.



- On December 11, 2009, Thomas D. Deen, Prosecuting Attorney, Tenth Judicial District, filed an Information in the Circuit Court of Drew County, Arkansas, charging Avery with one count of First Degree Sexual Assault.¹
- On December 17, 2009, Superintendent Tolbert sent Avery a notice by certified mail that stated that he was being suspended with pay immediately and that Tolbert was going to recommend that Avery's contract with the District be terminated. The notice stated: "The reason for this recommendation is as follows: 1. You have been charged with the offense of First Degree Sexual Assault of a minor, a felony. The charge states that you had sexual intercourse with a minor." The notice also contained information advising Avery of the hearing process.
- On January 28, 2010, a hearing was held before the Warren School Board wherein the Board voted unanimously to terminate Avery's contract of employment effective immediately. Avery appealed the decision to the circuit court.
- On October 6, 2011, Avery's appeal of the Warren School Board's action was tried before the Honorable Sam Pope, Circuit Court, in a nonjury trial. The circuit court reversed the decision of the Warren School Board.

II. *The School Board Hearing*

The school board hearing was held on January 28, 2010. S.C.'s accusatory five-page letter was admitted into evidence over Avery's objection that S.C. was not present and that

¹In the Criminal Information, the date of the alleged offense was changed from October 31, 2009, to October 24, 2009.



he was denied his right to confront his accuser. Superintendent Andrew Tolbert testified that he first learned of the alleged incident from the high school principal, Gary Jackson. Jackson testified that sometime before the charges were filed against Avery, S.C.'s mother brought him a cell phone that had been given to S.C. by Avery. Avery objected to any testimony about the cell phone because it was not a ground contained in the notice of termination. The attorney for the school board, W. Paul Blume, countered that since Avery gave inconsistent statements regarding the cell phone, the issue of the cell phone was relevant to Avery's credibility. The objection was overruled and testimony regarding the cell phone was allowed.

Superintendent Tolbert further testified that on November 24, 2009, he and Principal Jackson confronted Avery with the sexual-abuse allegations. Avery denied the allegations. Tolbert further testified that they asked Avery if he had given S.C. a cell phone. Avery denied knowing anything about a cell phone. Superintendent Tolbert testified that he again spoke with Avery on December 7, 2009, and that Avery admitted that he had given S.C. a cell phone, stating that he had collected some cell phones and given them away to different people.

Over Avery's objection, Superintendent Tolbert also testified that there were video pictures of Avery carrying a large trash bag while leaving the building at the high school where Avery's office was located on the evening of November 26, 2009. Also over Avery's objection, Superintendent Tolbert testified that S.C. had told the assistant principal that there were some inappropriate pictures on Avery's school computer.



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At the conclusion of the hearing, upon motion by board member Anne Smith, the school board unanimously voted to terminate Avery's employment. Avery appealed that decision to the Bradley County Circuit Court.

III. *The Circuit Court Hearing*

Avery's appeal to the circuit court was tried on October 6, 2011. During the intervening 20-month period between the date of his school-board-termination hearing on January 28, 2010, and the date of his circuit-court-appeal hearing, additional significant events occurred that were admitted into evidence at the circuit court hearing.

- On October 7, 2010, Avery was acquitted by a jury of the criminal sexual-assault charges.
- On April 14, 2011, in a case submitted to the Arkansas Department of Human Services for alleged maltreatment of a minor, S.C., an administrative law judge found insufficient evidence of any sexual abuse by Avery and dismissed the allegations.
- On May 13, 2011, the Arkansas Department of Education dismissed the school board's complaint to revoke Avery's teacher's license arising from this alleged incident.

The circuit court allowed additional testimony and evidence to be introduced. There was contradictory evidence regarding the reason for Avery's termination. Superintendent Tolbert testified that the reason he had recommended termination was because a criminal charge had been filed against Avery. On the other hand, Warren School Board President Jerry Daniels testified that the school board's termination of Avery had nothing to do with criminal matters, but that they terminated him for having a student in his



home inappropriately. Still another school board member, Anne Smith, who made the motion to terminate Avery and voted in favor of his termination, testified that the criminal charge was only a part of the reason for the termination. Smith stated that the other reasons included the cell phone issue, the computer issue, and Avery's presence on campus at odd times. Smith acknowledged that she had no evidence of whether Avery had committed a sexual assault, and she agreed that the school board "rubber-stamped" the superintendent's decision to terminate Avery.

Pertinent portions of the testimony from the criminal trial were also introduced at the circuit court hearing. S.C. testified at the earlier criminal trial. S.C. stated in her testimony that Avery had sex with her for an hour, that she was on her menstrual cycle, and that he ejaculated. However, a forensic serologist examined the couch cushions and S.C.'s clothing, and his testimony was that he found no evidence of any bodily fluids. S.C. admitted in her testimony that she lied to investigators during her interview with them and that she changed her story as to the date of the alleged assault. S.C. had claimed that Avery transmitted STDs to her, but the evidence at trial showed that S.C. had been diagnosed with STDs before the alleged assault, and a subsequent examination of Avery proved that he was free of any STDs. The examining physician's testimony was that if they had intercourse in the manner claimed by S.C., there would be a ninety-percent probability that she would have transferred the STDs to Avery. A medical examination of S.C. showed no evidence of a sexual assault. A digital analyst evaluated Avery's work computer and found no evidence of pornography or anything else inappropriate. Finally, the only communication from Avery to S.C.'s cell phone



was a single text message wherein Avery encouraged S.C. to study for the ASVAB test.² At the conclusion of the hearing, the circuit court took the matter under advisement.

On April 20, 2012, the circuit court entered an order reversing the school board's termination of Avery. The circuit court found that the Warren School Board was not a fair and impartial tribunal, citing evidence that Superintendent Tolbert had off-the-record discussions with board members prior to the hearing. The circuit court also found that the Warren School Board violated the provisions of the TFDA by considering evidence that went beyond the termination notice provided to Mr. Avery. The circuit court ruled that Avery remained employed and that the District should make the arrangements necessary for Avery to return to and resume the position of employment that he held with the District at the time of the attempted termination. The circuit court also awarded Avery backpay and associated benefits in the amount of \$201,965.92. The District appealed to this court.

IV. *The Appeal*

Our standard of review in matters involving the TFDA is whether the circuit court's decision was clearly erroneous. *Timpani v. Lakeside Sch. Dist.*, 2011 Ark. App. 668, 386 S.W.3d 588. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court from the entire evidence is left with a firm conviction that an error has been committed. *Id.* The decision of whether a school district has complied with the TFDA, however, is a question of law. *Bismarck Sch. Dist. v. Sims*, 2012 Ark. App. 239, 406 S.W.3d

²The ASVAB is a multiple-aptitude test that measures developed abilities and helps predict future academic and occupational success in the military.



805. A circuit court's conclusions on a question of law will be given no weight on appeal.

Id. On appeal to this court, the District first argues that the circuit court erred in finding that Avery did not receive a fair and impartial hearing before the school board. The District relies on *Welch v. Barham*, 635 F.2d 1322 (8th Cir. 1980), where the federal appeals court held that in the absence of a claim of personal animosity, illegal prejudice, or a personal or financial stake in the outcome, school board members are entitled to a presumption of honesty and integrity with respect to their determination on personnel matters. The District also cites *Hortonville Joint Sch. Dist. v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), where the Supreme Court said that, absent a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances, a decisionmaker is not disqualified.

The District misses the mark. Here, the circuit court's finding that Avery did not receive a fair and impartial hearing was not based on any perceived lack of honesty or integrity of the school board members. Rather, the circuit court's finding was based on the facts that the school board heard evidence regarding the alleged incident through statements made by the superintendent outside of the termination hearing and that, at the hearing, the school board considered evidence regarding allegations not included in the notice of termination. School board member Anne Smith testified by deposition that "prior to Colonel Avery's termination hearing, Mr. Tolbert was providing us with information regarding the results of the investigation. Colonel Avery was not invited to those meetings, and the information was discussed in executive session. There is no record of those discussions." Further, as explained below, the school board considered evidence regarding allegations that were not contained



in the termination notice. Therefore, we cannot say the circuit court's finding that Avery did not have a fair and impartial hearing was clearly erroneous.

The District's second argument is that the circuit court erred in finding that the school board went beyond the reasons contained in the termination notice in making its decision. All school employees must receive due process, which requires that the TFDA procedures be substantially complied with in any termination or nonrenewal situation. *Greenwood Sch. Dist. v. Leonard*, 102 Ark. App. 324, 285 S.W.3d 284 (2008). Arkansas Code Annotated section 6-17-1507(c) provides that a notice-of-termination recommendation shall include a statement of the grounds for the recommendation of termination, setting forth the grounds in separately numbered paragraphs so that a reasonable teacher can prepare a defense. Pursuant to Arkansas Code Annotated section 6-17-1509(c)(5), the board of directors shall not consider at the hearing any new reasons that were not specified in the notices provided pursuant to this subchapter. As found by the circuit court, we agree that there was a lack of substantial compliance with these provisions.

In this case, the notice of termination provided by the District to Avery stated that the only reason his termination was being recommended was because he was charged with first-degree sexual assault of a minor. Avery was not put on notice that he would have to defend against any other allegations. Notwithstanding that fact, the District introduced evidence, over Avery's repeated objections, that Avery had given S.C. a cell phone, that he was seen on video leaving the school with a trash bag, and that he allegedly had inappropriate photos on his school computer. None of these three allegations were contained in the notice of



termination. The District argued, and we agree, that evidence regarding the cell phone was permissible in that it was relevant to Avery's credibility because he initially denied giving S.C. the phone. It was not permissible, however, as substantive evidence as a reason for termination. Further, the other two reasons, i.e., leaving the school building with a trash bag and allegedly having inappropriate photos on his school computer, did not go to Avery's credibility; rather, they were offered in support of his termination. Although the District submits that the sole reason for termination considered by the school board was the sexual-assault charge provided in the notice, the posthearing deposition evidence of school board members introduced to the circuit court reflected otherwise. School board president Jerry Daniels testified that "we were terminating Avery for having a student in his home inappropriately," and that Avery's dismissal had nothing to do with any criminal matters. School board member Anne Smith testified that the reasons for Avery's termination included the cell phone issue, the computer issue, and being on campus at odd times. This demonstrated that the school board considered reasons not contained in the notice in direct violation of the TFDA. That being so, we hold that the circuit court committed no error in declaring Avery's termination void and in reinstating his employment contract.

Affirmed.

HARRISON and BROWN, JJ., agree.

W. Paul Blume, for appellant.

Streetman, Meeks & Gibson, PLLC, by: Robert B. Gibson, III, and Gibson & Keith, PLLC, by: C. C. Gibson, III, for appellee.