2019 IL App (1st) 190548-U
Order filed: October 18, 2019

FIRST DISTRICT
FIFTH DIVISION

No. 1-19-0548

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| MARLON CONWAY, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 16 CH 15358 |
| | ) | |
| THE BOARD OF EDUCATION OF HARVEY | ) | |
| SCHOOL DISTRICT NUMBER 152, | ) | Honorable |
| | ) | Anna H. Demacopoulos, |
| Defendant-Appellant. | ) | Judge, presiding. |

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JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: We reverse the order of the circuit court vacating the school board's decision to terminate plaintiff from his employment as a tenured teacher and affirm the school board's decision, where plaintiff did not establish that the board erred in finding that plaintiff engaged in damaging, immoral behavior.

¶ 2 In this administrative review action, defendant-appellant, the Board of Education (Board) of Harvey School District Number 152 (District), appeals from an order of the circuit court

which vacated its decision to terminate plaintiff-appellee, Marlon Conway, from his employment as a tenured teacher for the District, and entered a remedial award. For the following reasons, we reverse the order of the circuit court vacating the Board's decision and entering a remedial award, and affirm the Board's decision to terminate plaintiff from his employment.

¶ 3 I. BACKGROUND[1]

¶ 4 Plaintiff had been a tenured teacher at Gwendolyn Brooks Middle School in the District since the fall of 2011, and in the fall semester of 2015 he taught eighth-grade social studies.

¶ 5 On October 27, 2015, plaintiff was given written notice from the District's superintendent that he was being placed on administrative leave, without pay. The notice also required plaintiff to meet with the superintendent on Thursday, October 29, 2015.

¶ 6 After that meeting with the superintendent, and others including the school principal, plaintiff was provided the following written notice from the superintendent:

> "I have completed my investigation into the allegations that, on October 26, 2015, you were in possession of a steak knife in your classroom which you waved around in the presence of your students and stated that the reason you had the knife was 'for the students/kids;' and that, on October 26, 2015, you made inappropriate remarks to your students including statements concerning a woman's breast, male genitalia, child rape, and same-sex marriage. Because I have concluded the allegations are true, I will be recommending to the Board of Education that it impose disciplinary sanctions on you including the possibility of suspension or termination."

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[1] Portions of this order have been taken from a prior decision issued by this court in this matter.

¶ 7 As was his right, plaintiff requested a hearing before the Board, and such a meeting was scheduled for November 9, 2015. On that date, and prior to the meeting, the District's superintendent provided plaintiff with another written notice, which in relevant part indicated:

> "As you know, the Board of Education will meet on November 9, 2015 at 5:15 pm to consider the imposition of discipline on you. At that time, I will be recommending to the Board that you be terminated for violating Board Policy 4:170 (Safety); Board Policy 5:120 (Ethics and Conduct); Board Policy 5:20 (Workplace Harassment Prohibited); and Board Policy 7:20 (Harassment of Students Prohibited)."

The written notice went on to detail the factual predicate and reasoning behind the superintendent's conclusion that plaintiff had violated District policy and the recommendation that plaintiff be terminated, and concluded by noting "[y]ou will be given an opportunity to address these policy violations and my recommendation with the Board in closed session on November 9, 2015."

¶ 8 Immediately following the conclusion of the November 9, 2015, meeting, the Board adopted a resolution, along with a bill of particulars, terminating plaintiff from his position, due to the Board's conclusion that he had "engaged in irremediable conduct which constitutes grounds for dismissal pursuant to the terms and provisions of Section 10-22.4 and Section 24-12 of the Illinois School Code" (School Code). The bill of particulars alleged six specific allegations of improper conduct, and concluded that plaintiff had engaged in a course of conduct which was: (1) contrary to the best interests of the District, (2) unprofessional, immoral, cruel, insubordinate,

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See *Conway v The Board of Education of Harvey School District No. 152*, 2018 IL App (1st) 180311-U.

and irremediable, and (3) justified plaintiff's dismissal.

¶ 9 Plaintiff requested an administrative hearing to challenge the Board's resolution before an independent hearing officer, pursuant to section 24-12(d)(1) of School Code. 105 ILCS 5/24-12(d)(1) (West 2016). Prior to the hearing, the Board issued an amended notice of charges and bill of particulars with respect to plaintiff, which specifically alleged as follows:

> "1. On or about October 23, 2015, during his 5th period Social Studies class, he had a steak knife sitting on his desk which was accessible to his students. When they asked him why he had it, he picked it up, waved it in the proximity of his students and said that he had it 'to use on kids.' This made the students so apprehensive that they asked him to put the knife down because he might hurt one of them.
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> 2. On or about October 23, 2015, during his 5th period Social studies class, he told his students that he saw a woman in a bank with her cleavage exposed and that he could not look away. This made the students uncomfortable.
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> 3. In September 2015, a student commented on a Jr. Scholastic article that Mr. Conway gave the class to read which included a picture of male genitalia. When one of the students in the class said that the picture was 'nasty' and that he should not be showing it to them, Mr. Conway laughed and said, 'What, do you want me to show you a real one?' The student who heard Mr. Conway's comment cannot recall the exact date in September 2015 that Mr. Conway made it, the lesson that was being discussed, or what, if anything, the article had to do with the lesson.
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> 4. In October 2015, while Mr. Conway gave the class an essay assignment, some

students asked how to get him a copy of their essays. Mr. Conway responded that his email address is online but that he did not want them sending 'any naked pictures or pictures of a dildo.' When the students responded, 'Why would we do anything like that?' or words to that effect, Mr. Conway said don't send him any 'spooky' pictures and 'I'm just saying that people do that.' The students cannot recall the topic that they were told to write about. Nor can the students remember the exact day in October 2015 that this incident took place.

5. In late September or October 2015, one of the students reported that someone had written a comment on the boys' bathroom wall about a male student who allegedly engaged in fellatio. Mr. Conway responded to the effect that 'Men marrying men, and women marrying women, is what marriage is becoming in the United States.' In October 2015, one of [the] students asked Mr. Conway if he watched the television show 'Empire.' Mr. Conway responded that he did not watch the show because it had 'gay' scenes in it and that homosexuality is 'why America is messed up.' Also, in October 2015, Mr. Conway advised the class against getting involved in same-sex relationships. The student that reported Mr. Conway's remarks opposing same-sex relationships cannot recall the precise lesson the class were being taught at the time but is certain that the lesson had nothing to do with same-sex relationships,

6. In October 2015, Mr. Conway told the (5th period) class that he watched a movie (over a weekend) on Netflix that starred a well-known English actor (Idris Elba), and that the character the Mr. Elba portrayed had been accused of raping a little boy. The

students who reported this incident cannot recall the lesson that was being taught but do recall that the movie had nothing to do with what they were supposed to be studying.

7. On October 29, 2015, during a conference with the Superintendent concerning the allegations against him, he pounded his fist on the Superintendent's desk, yelled at her and pointed his finger at her instead of addressing the allegations.

8. On November 3 and 4, 2015, he approached students on the way to school, told them that people were lying about him and offered them candy and money in exchange for their support and information."

¶ 10 A hearing on these eight charges was held on June 15 and 16, 2016. On October 4, 2016, the hearing officer made a recommendation that plaintiff be reinstated to his position with the District and be "made whole."

¶ 11 On October 31, 2016, the Board issued a final written decision rejecting the hearing officer's recommendation of reinstatement, finding instead that plaintiff should be terminated. In that order, the Board concluded that many of the hearing officer's findings were against the manifest weight of the evidence. The Board went on to discuss those findings in detail and make supplemental factual findings of its own, and ultimately concluded as follows:

"1. The Board, not the Hearing Officer, is the final administrative authority concerning Conway's dismissal;

2. Conway engaged in the conduct alleged in Charge #1, #2, #3, #5, #6, #7, and # 8 of the Amended Notice of Charges except that it finds that Conway did not tell his class that "homosexuality is the reason that America is so messed up" as alleged in

Charge #5; that he did not have a discussion with his class concerning writing on a bathroom wall related to fellatio as alleged in Charge #5; and Conway did not pound his fist on the Superintendent's desk during the October 29, 2015 meeting as alleged in Charge #7[2];

3. The conduct that occurred as set forth in Finding #[2] of this Order violated Board Policy 4.170; 5:20; 5:120: and 7:20;

4. Conway's violation of the Board Policies set forth in Finding #2 and #3 of this Order caused damage to students and staff at Brooks Middle School, as well as Harvey School District 152's Administration;

5. Conway's conduct underlying the violation of the Board Policies set forth in Finding #2 and #3 of this Order was immoral;

6. Conway's conduct set forth in Finding #2 and #3 of this Order is irremediable;

7. Sufficient cause exists to terminate Conway.

Based on its findings and conclusions, the Board:

A. Rejects and reverses the conclusion of the Hearing Officer there was insufficient cause to terminate Marlon Conway;

B. Rejects and reverses the recommendation of the Hearing Officer that Marlon Conway be reinstated to his teaching position at Harvey School District 152, and made whole for lost wages and benefits.

C. Affirms its November 9, 2015, decision to dismiss Marlon Conway from the

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[2] The Board instead found that the evidence established that plaintiff pounded his fist on a

teaching staff of Harvey School District 152 for cause."

¶ 12 Thereafter, plaintiff filed a complaint in the circuit court for administrative review of the Board's final decision, pursuant to section 24-16 of the School Code (105 ILCS 5/24-16 (West 2016)) as well as the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2016)) (Review Law). Plaintiff's complaint asked the circuit court to enter an order finding that: (1) the Board's decision to terminate his employment be vacated; (2) he be reinstated as a tenured teacher; and (3) he be made "whole."

¶ 13 Plaintiff subsequently filed a motion to vacate the Board's decision, which sought the relief requested in his complaint. The circuit court granted plaintiff's motion to vacate in a written order entered on August 22, 2017. On September 1, 2017, the court entered an order amending its August 22, 2017, order, which—in relevant part—remanded this matter to the Board with directions to enter an order setting the amount of back pay, lost benefits, and costs.

¶ 14 After the court denied its motion to reconsider, the Board filed a prior appeal, which this court dismissed for a lack of appellate jurisdiction. *Conway*, 2018 IL App (1st) 180311-U, ¶12. In so doing, we reasoned that where the circuit court exercises its power to remand an agency's decision for further hearings or proceedings, jurisdiction remains with the circuit court until after disposition of such further matters, and such an order is not final and appealable. *Id.*

¶ 15 Following the dismissal of the Board's prior appeal, the Board adopted—under protest—an order reinstating plaintiff as a tenured teacher and awarding him back pay and other restitution on January 22, 2019. Thereafter, on March 11, 2019, the circuit court entered a

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conference table.

"Second Amended Final Judgment," in which it vacated the Board's October 16, 2016, order, terminating plaintiff, and entered a judgment granting the relief ordered by the Board in its January 22, 2019, order.

¶ 16 The Board timely appealed, and the circuit court granted the Board's motion to stay the March 11, 2019, order, pending the outcome of this appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, the Board argues that the circuit court erred in vacating its final administrative decision to dismiss plaintiff from his position. We agree.

A. Standard of Review

¶ 19 Section 24-16 of the School Code specifically adopts the Review Law for judicial review of final administrative decisions of the Board under section 24-12 of the School Code. 105 ILCS 5/24-16 (West 2016). While our review extends to all questions of law and fact presented by the record (735 ILCS 5/3-110 (West 2016)),"[i]n administrative cases, our role is to review the decision of the administrative agency, not the determination of the circuit court" (*Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006)). "The proper standard of review in cases involving administrative review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 50. The appropriate standards of review for such questions have been described as follows:

> "[A]n agency's factual findings are not to be reweighed by a reviewing court and are to be reversed only if they are against the manifest weight of the evidence. *** Questions of

law are reviewed under a *de novo* standard, and mixed questions of law and fact are reviewed under the clearly erroneous standard. [Citation.] A mixed question of fact and law examines the legal effect of a given set of facts. *** An administrative decision is clearly erroneous ' "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ' [Citation.]" *Id.*

¶ 20 With respect to the specific proceedings at issue here, our supreme court as recognized that:

"A school board's determination of cause to discharge is not *prima facie* true and correct; it is instead subject to reversal where it is arbitrary, unreasonable, or unrelated to the requirements of service. [Citation.] We apply the clearly erroneous standard of review to this mixed question of fact and law, *i.e.*, whether we are 'left with the definite and firm conviction that a mistake has been committed' when applying the established facts to the applicable legal standard for discharge." *Id.* ¶ 63.

¶ 21 B. Legal Framework

¶ 22 Section 10-22.4 of the School Code grants the Board the power to "dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause, to dismiss any teacher on the basis of performance and to dismiss any teacher whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Sections 24-10 to 24-16.5, inclusive." 105 ILCS 5/10-22.4 (West 2016). With respect to tenured teachers such as plaintiff, section 24-12(d)(1) of the School Code

provides that—ordinarily—"[b]efore setting a hearing on charges stemming from causes that are considered remediable, a board must give the teacher reasonable warning in writing, stating specifically the causes that, if not removed, may result in charges." 105 ILCS 5/24-12(d)(1) (West 2016).

¶ 23 Under this statutory scheme, "remediable" conduct is defined as conduct by a teacher which could ordinarily be remedied if called to his or her attention. *Ahmad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 163 (2006). "Because compliance with the procedures set forth in section 24-12 is jurisdictional, if a warning is not given with respect to a remediable cause, the Board lacks jurisdiction to dismiss the teacher." *Board of Education of Argo-Summit School District No. 104, Cook County v. Hunt*, 138 Ill. App. 3d 947, 950 (1985).

¶ 24 In contrast, in *Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622 of Tazewell County*, 67 Ill. 2d 143 (1977), our supreme court "set out the standard a school board must meet so that it may terminate a teacher without the procedural safeguards typically afforded to tenured teachers." *Ahmad*, 365 Ill. App. 3d at 161. "To dismiss a teacher without such safeguards, according to the *Gilliland* court, a board must demonstrate that a teacher's conduct is 'irremediable.' " *Id.* To do so, the Board must prove that: (1) the teacher's conduct caused damage to students, faculty, or the school; and (2) the teacher would not have corrected his conduct, even if he had been issued a written warning and afforded a period of time for remediation. *Gilliland*, 67 Ill. 2d at 153.

¶ 25 The first prong of the *Gilliland* test asks whether any damage has been done, not whether damage might occur in the future. *Morris v. Illinois State Board of Education*, 198 Ill. App. 3d

51, 57 (1990). While the traditional second prong of the *Gilliland* test involves determining whether a warning would have corrected the conduct, Illinois courts have held that criminal or immoral conduct is irremediable *per se*, thus fulfilling the second prong of the *Gilliland* test. *Younge v. Board of Education of City of Chicago*, 338 Ill. App. 3d 522, 532 (2003) (collecting cases).

¶ 26 Finally, we note that "individual acts, separately remediable, may be irremediable when considered in totality." *Board of Education of City of Chicago v. Harris*, 218 Ill. App. 3d 1017, 1023 (1991).

¶ 27 C. Preliminary Issues

¶ 28 Before addressing the ultimate propriety of the Board's decision to terminate plaintiff's employment, we first address a number of preliminary issues that will narrow and focus the scope of our substantive discussion.

¶ 29 First, we address plaintiff's assertion that the Board could not rely upon its written policies to support its decision to dismiss plaintiff because: (1) the policies were not specifically cited in the bill of particulars or charges issued against plaintiff, and (2) the Board failed to show that it actually considered its written policies when it decided to dismiss plaintiff. We disagree.

¶ 30 It is true that the School Code requires that:

> "If a dismissal of a teacher in contractual continued service is sought for any reason or cause other than an honorable dismissal ***, the board must first approve a motion containing specific charges by a majority vote of all its members. Written notice of such charges, including a bill of particulars and the teacher's right to request a hearing,

must be mailed to the teacher." 105 ILCS 5/24-12(d)(1) (West 2016).

It is also true that neither the original nor the amended notice of charges and bills of particulars issued by the Board specifically referenced the written Board policies upon which the Board relied in its final decision to terminate plaintiff.

¶ 31 However, "[a]dministrative complaints are not required to state the charges with the same precision, refinements, or subtleties as pleadings in a judicial proceeding." *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 195 (2003). Indeed, "charges filed before an administrative agency 'need only be drawn sufficiently so that the alleged wrongdoer is reasonably apprised of the case against him to intelligently prepare his defense.' " *Id.* at 196 (quoting *Siddiqui v. Department of Professional Regulation*, 307 Ill. App. 3d 753, 757 (1999)). See also, *Wade v. Granite City Community Unit School District No. 9, Madison County*, 71 Ill. App. 2d 34, 36 (1966) (applying this standard in circumstances similar to those here). We find that the amended notice of charges and bill of particulars, upon which plaintiff was terminated, reasonably apprised plaintiff of the case against him so as to allow him to intelligently prepare his defense, despite the absence of specific reference to the Board's written policies.

¶ 32 Moreover, even if we were to find that the Board somehow improperly considered issues and evidence beyond the scope of the amended notice of charges and bill of particulars, the Review Law specifically provides: "Technical errors in the proceedings before the administrative agency *** shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2016).

¶ 33 Here, plaintiff was first notified of the specific written Board policies he was accused of violating in a letter provided to him by the superintendent just prior to the Board's November 8, 2015, adoption of the original resolution terminating plaintiff from his position, along with a bill of particulars. The written policies themselves were thereafter provided to plaintiff during pre-hearing discovery, were admitted into evidence at the administrative hearing, and were extensively discussed by the parties in post-hearing briefs filed with the hearing officer. On such a record, we cannot say that any possible technical pleading error materially affected the rights of plaintiff and resulted in substantial injustice to him. 735 ILCS 5/3-111(b) (West 2016).

¶ 34 For similar reasons, because the Board's written policies clearly played a central role in all of the underlying proceedings, we reject plaintiff's contention that the Board failed to show that it actually considered its written policies when it decided to dismiss plaintiff.

¶ 35 Second, we address how this court should view the hearing officer's findings and recommended decision *vis-à-vis* the Board's final administrative decision. Plaintiff contends that: (1) reviewing courts must consider the hearing officer's findings of fact and recommendations in addition to the Board's final administrative decision; (2) the Board only has discretion to reject the hearing officer's *factual* findings; and (3) the hearing officer should be viewed as a "neutral, experienced, professional arbitrator," while the Board should be viewed as "an interested party" that produced "highly partisan" findings and conclusions. We disagree.

¶ 36 Section 24-12(d)(7) of the School Code provides that the hearing officer must "report to the school board findings of fact and a recommendation as to whether or not the teacher shall be dismissed for cause and shall give a copy of the *** findings of fact and recommendation to both

the teacher and the school board." 105 ILCS 5/24-12(d)(7) (West 2016). The hearing officer's findings of fact and recommendation are to include discussion as to whether the conduct at issue occurred, whether it was remediable, and whether the proposed dismissal should be sustained. 105 ILCS 5/24-12(d)(8) (West 2016). The school board then issues a written order as to whether the teacher must be retained or dismissed. *Id.*

¶ 37 Section 24-12(d)(8) of the School Code then provides:

> "The school board's written order shall incorporate the hearing officer's findings of fact, except that the school board may modify or supplement the findings of fact if, in its opinion, the findings of fact are against the manifest weight of the evidence.
>
> If the school board dismisses the teacher notwithstanding the hearing officer's findings of fact and recommendation, the school board shall make a conclusion in its written order, giving its reasons therefor, and such conclusion and reasons must be included in its written order. *** The decision of the school board is final, unless reviewed as provided in [the Review Law]." 105 ILCS 5/24-12(d)(8) (West 2016).

¶ 38 Upon any such review, section 24-12(d)(9) provides that:

> "If the school board's decision to dismiss for cause is contrary to the hearing officer's recommendation, the court on review shall give consideration to the school board's decision and its supplemental findings of fact, if applicable, and the hearing officer's findings of fact and recommendation in making its decision." 105 ILCS 5/24-12(d)(9) (West 2016).

¶ 39 Our supreme court has previously rejected each of the arguments raised by plaintiff (see

¶ 36, *supra*) with respect to these issues.

¶ 40 In *Beggs*, 2016 IL 120236, ¶ 57, the court concluded that "the plain statutory language of section 24-12 provides that the decision of the school board is the final decision for purposes of administrative review." The court reasoned that "[t]he legislature is presumed to know of the traditional standards governing administrative review, and if it had desired a different result, it would have made clear that the hearing officer's findings are entitled to deference." *Id.* The Court went on to note that "[t]t is certainly true that subsection 24-12(d)(8) of the School Code requires the Board to incorporate the hearing officer's findings of fact. However, that subsection specifically allows the Board to supplement or modify those findings if, in the Board's *opinion*, it believes they are against the manifest weight of the evidence." (Emphasis in original.) *Id.* ¶ 59.

¶ 41 The court also specifically recognized that, while the hearing officer and the hearing officer's findings and conclusions play an important part of the process, "the most natural and plain interpretation of [section 24-12(d)(9)] is that section 24-12(d)(9) simply reinforces the existing statutory and case law requirement that the court on administrative review should consider the entire record." *Id.* ¶¶ 60-61. Thus, "on administrative review the court still only reviews the agency's findings of fact under the manifest weight of the evidence standard, not the hearing officer's recommendation and factual findings." *Id.* ¶ 61.

¶ 42 Finally, the court found any contention that a school board, as opposed to an appointed hearing officer, is a "partisan entity" to be "both incorrect and an improper basis for departing from the traditional standard of review of agency decisions." *Id.* ¶ 62.

¶ 43 Thus, under the provisions of the School Code and in light of the decision in *Beggs*, we

are to "review the Board's supplemental factual findings, as well as the factual findings of the hearing officer that were incorporated unmodified into the Board's decision, to determine whether those findings were against the manifest weight of the evidence." *Id.* ¶ 63. We are then to determine whether the findings of fact provide a sufficient basis for the *Board's* conclusion that cause for discharge does or does not exist, determining whether the *Board's* decision was arbitrary, unreasonable, or unrelated to the requirements of service under a clearly erroneous standard. *Id.*

¶ 44 Having set out the general scope of our review, we may now narrow that scope in light of specific concessions made by plaintiff and the Board on appeal. Plaintiff has specifically conceded that he "is not challenging the School Board's factual findings. *** Therefore, the manifest weight of the evidence standard is not applicable to this case." As such, for purposes of this appeal, plaintiff has conceded that the evidence supported the Board's *factual findings* with respect to his conduct.

¶ 45 For its part, the Board concedes that plaintiff was not provided with "reasonable warning in writing, stating specifically the causes that, if not removed, may result in charges" (105 ILCS 5/24-12(d)(1) (West 2016)), and that plaintiff could therefore only be properly dismissed from his employment if his conduct was correctly found to be "irremediable." However, the Board does not assert that the evidence established the traditional second prong of the *Gilliland* test, which involves determining if plaintiff would not have corrected his conduct, even if he had been issued a written warning and afforded a period of time for remediation. *Gilliland*, 67 Ill. 2d at 153. Rather, the Board contends that it properly concluded that plaintiff's conduct was

"immoral," such that it was correctly considered to be irremediable *per se*, thus fulfilling the second prong of the *Gilliland* test. *Younge*, 338 Ill. App. 3d at 532.

¶ 46 In light of these concessions, the only remaining issue on appeal is whether the Board's unchallenged factual conclusions support the Board's conclusion that plaintiff's conduct was irremediable, in that it: (1) caused damage to students, faculty, or the school and (2) was immoral. *Gilliland*, 67 Ill. 2d at 153; *Younge*, 338 Ill. App. 3d at 532.

¶ 47 In so ruling, we specifically reject the Board's argument that it actually did not even need to establish the first prong of the *Gilliland* test, because section 34-85(a) of the School Code—which the Board claims applies here—rendered that requirement irrelevant with respect to "immoral" conduct. That section does provide that "[n]o written warning shall be required for conduct on the part of a teacher or principal that is cruel, immoral, negligent, or criminal or that in any way causes psychological or physical harm or injury to a student, as that conduct is deemed to be irremediable." 105 ILCS 5/34-85(a) (West 2016). Courts have interpreted this provision to mean that "[n]ot only is no warning required for this type of conduct, but it is also unnecessary for [a school board] to show that this type of conduct caused damage." *Younge*, 338 Ill. App. 3d at 534; *M.F. Booker v. Board of Education of City of Chicago*, 2016 IL App (1st) 151151, ¶ 86. However, while plaintiff was terminated under article 24 of the School Code, section 34-85(a) is contained in article 34, which specifically "applies only to cities having a population exceeding 500,000." 105 ILCS 5/34-1 (West 2016). As courts have recognized, section 34-85(a) therefore only applies to the public schools in Chicago. See, *e.g.*, *Crawley v. Board of Education of City of Chicago*, 2019 IL App (1st) 181367, ¶ 19; *Younge*, 338 Ill. App.

3d at 533; *Ahmad*, 365 Ill. App. 3d at 163. Section 34-85(a) of the School Code simply has no applicability to this dispute between plaintiff and the District.

¶ 48 Having addressed these preliminary issues and narrowed and focused the scope of our review, we now turn to a substantive discussion of the only remaining issue, as outlined above. *Supra*, ¶ 47.

¶ 49 D. Damage

¶ 50 As noted above, the Board had the burden of establishing that plaintiff's conduct caused harm, in that it caused damage to students, faculty, or the school. *Gilliland*, 67 Ill. 2d at 153.

¶ 51 The specific content of the Board's amended notice of charges and bill of particulars was laid out above. *Supra* ¶ 9. With respect to those charges, the Board made a number of factual conclusions, which are unchallenged on appeal. The Board specifically found that plaintiff:

> (1) waved a knife in the proximity of several students, putting at least three of his students in apprehension of physical injury;
>
> (2) discussed staring at a woman's cleavage, a topic unrelated to a discussion of the distinction between Muslim and Western attire, communicating his objectification of females to a classroom predominately made up of 13 and 14 year old girls, and making at least one female student, age 13 or 14, so uncomfortable that she went to the principal to report his behavior;
>
> (3) displayed an image of the male anatomy, which included a penis, when this image was not related to a lesson he was teaching, and plaintiff then remarked that he could show the students a real one; this conduct made at least one female student so

uncomfortable that she went to the principal to report his behavior;

(4) expressed his personal views regarding same-sex marriage and homosexuality, using his position as the authority figure in the classroom to indoctrinate his students with his personal prejudices and intolerance;

(5) discussed child-rape, as depicted in the movie *Daddy's Little Girls*, and offered no evidence that this movie and the topic of child-rape related to anything in any of his lesson plans;

(6) "lost control" during a conference with the superintendent concerning the allegations against him; specifically, plaintiff—who stands 6'3" and weighs 240 pounds, and while he was within two arms' lengths of the superintendent, a 5'3" woman—pounded on the table, raised his voice, and yelled at her, telling her that she could do nothing to him, leaving the school principal in fear for the superintendent's safety;

(7) failed to address the charges against him at the conference, but rather attempted to intimidate the superintendent and divert attention away from the charges against him; this conduct undermined the superintendent's authority as the chief executive officer in the presence of the school principal, one of the superintendent's direct supervisees; and

(8) offered candy and money to students in exchange for information concerning what other students said about him, and posted signs stating "Help a Teacher" and "Tell the Truth" directly across the street from Brooks Middle School, and thereby involved students with no personal knowledge of the events that took place in his

classroom in an attempt to pit students against each other to salvage his teaching career at District 152.

¶ 52 On the basis of these factual findings, the Board concluded that plaintiff had caused damage to students, faculty, or the school, in that his course of conduct:

(1) undermined the educational environment, by calling into question his judgment as an educator which eroded his authority in the classroom;

(2) disrupted the educational atmosphere, because it was an unnecessary distraction from legitimate teaching lessons;

(3) caused students that plaintiff himself characterized as "challenging" and "academically struggling" to lose valuable instruction time to report to and meet with the principal concerning plaintiff's behavior, and thereafter prepare written accounts;

(4) generally disrupted the operation of Brooks Middle School, as the principal had to take time away from other duties to investigate the allegations against plaintiff;

(5) included an attempt to intimidate the superintendent, causing the principal to be concerned for the physical safety of the superintendent, and resulting in the superintendent's authority as the chief executive officer being undermined;

(6) pitted students against each other in an effort to salvage his teaching career, thus undermining the educational environment; and

(7) implied that the District lacked integrity in its investigation and removal of plaintiff from the classroom, in an attempt to undermine the public's confidence in the

District's investigatory and disciplinary process.

¶ 53 With respect to these findings of damage to students, faculty, or the school, we reject plaintiff's contention that "[t]o establish irremediablility, school boards must establish significant or severe damage, through showing physical injury or through expert testimony of psychological injury." First, plaintiff is certainly correct that evidence of physical injury or expert testimony of psychological injury has been relied upon in the past to establish damage. However, we are not aware of any case law *requiring* such evidence. Indeed, at least one court specifically found sufficient damage to support a finding that the first prong of the *Gilliland* test was satisfied even where "no immediate medical or psychological treatment *** was necessitated by plaintiff's conduct." *Fadler v. Illinois State Board of Education*, 153 Ill. App. 3d 1024, 1028 (1987). In another case, the court recognized that expert testimony regarding the damaging nature of a teacher's conduct was unnecessary where the fact that such conduct had "profound harm on the students involved, the student body as a whole, and the very operation of the school's educational enterprise seems to us to be self-evident." *Board of Education of Sparta Community Unit School District No. 140 v. Illinois State Board of Education*, 217 Ill. App. 3d 720, 728 (1991). Moreover, any requirement for showing physical injury or psychological injury through expert testimony ignores the fact that both the statute itself and prior court decisions have recognized that the first prong of the *Gilliland* test can be met by a showing of harm to the faculty or school. *Fadler*, 153 Ill. App. 3d at 1028 (finding the first prong of the test met where conduct was "harmful to the reputation of and faith in the faculty and school"); *Sparta*, 217 Ill. App. 3d at 728 (finding sufficient damage where conduct caused "profound harm on *** the

very operation of the school's educational enterprise"); *McCullough v. Illinois State Board of Education by Feuille*, 204 Ill. App. 3d 1082, 1089 (1990) (finding the first prong of the test met, where conduct "was detrimental not only to his relationship with the students, but also to the reputation of and faith in the faculty and school as a whole").

¶ 54 We also reject plaintiff's contention that any damage that the Board found resulting from his conduct was not significant or severe enough to justify his dismissal. As an initial matter, to the extent that this argument asks this court to reweigh the evidence or substitute our judgment for that of the Board, we decline to do so. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715 (2007).

¶ 55 Furthermore, in this case the Board determined that its students, faculty, Gwendolyn Brooks Middle School, and the District itself were sufficiently harmed to justify plaintiff's dismissal, where plaintiff's conduct: (1) called into question his judgment as an educator, eroding his authority in the classroom; (2) caused unnecessary distraction from and loss of legitimate teaching lessons for students plaintiff himself characterized as "challenging" and "academically struggling"; (3) included an attempt to intimidate the superintendent, causing the principal to be concerned for the physical safety of the superintendent, and undermining the superintendent's authority; (4) pitted students against each other; and (5) challenged the District's integrity with respect to its investigation of him, thereby attempting to undermine the public's confidence in the District. Again, "individual acts, separately remediable, may be irremediable when considered in totality." *Harris*, 218 Ill. App. 3d at 1023.

¶ 56 Based upon the totality of the evidence, we conclude that plaintiff has failed to show that

the Board's findings with respect to significance and sufficiency of the damage to students, faculty, the school, and the District resulting from plaintiff's conduct was arbitrary, unreasonable, or unrelated to the requirements of service, nor does the Board's conclusion that the first prong of the *Gilliland* test was established leave us with the definite and firm conviction that a mistake has been committed. *Beggs*, 2016 IL 120236 ¶ 63.

¶ 57 E. Immorality

¶ 58 Finally, we turn to plaintiff's contention that the Board did not establish that his conduct was immoral, and therefore irremediable *per se*, thus fulfilling the second prong of the *Gilliland* test.

¶ 59 Plaintiff first challenges the Board's definition of what constitutes "immoral" conduct under section 10-22.4 of the School Code. 105 ILCS 5/10-22.4 (West 2016).

¶ 60 Both plaintiff and the Board acknowledge that section 10-22.4 of the School Code does not specifically define the term "immoral." However, the School Code grants the Board broad authority to exercise those powers "that may be requisite or proper for the maintenance, operation, and development of any school or schools under the jurisdiction of the board." 105 ILCS 5/10-20 (West 2016). More generally, it is well recognized that "[w]here the legislature expressly or implicitly delegates to an agency the authority to clarify and define a specific statutory provision, administrative interpretations of such statutory provisions should be given substantial weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Church v. State*, 164 Ill. 2d 153, 161 (1995). As such, "[a] court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency

charged with the statute's administration." *Id.* at 162.

¶ 61 In its final written decision, the Board defined immoral conduct as " 'conduct [that] has no legitimate basis in school policy or society,' " quoting *Fadler*, 153 Ill. App. 3d at 1028-29, where the court relied upon this language in determining that a teacher's conduct was immoral, and therefore irremediable *per se*. This same language has been accepted as the definition of whether a teacher's conduct is immoral, and therefore irremediable *per se,* on numerous other prior occasions. *Younge*, 338 Ill. App. 3d at 532; *Board of Education of Joliet Township High School District No. 204 v. Illinois State Board of Education*, 331 Ill. App. 3d 131, 134 (2002); *Sparta*, 217 Ill. App. 3d at 729.

¶ 62 Nevertheless, on appeal plaintiff contends that the Board should instead have applied an alternative definition of "immoral" conduct, one utilized in *Ahmad*, 365 Ill. App. 3d at 165 (defining such conduct as shameless conduct showing moral indifference to the opinions of the good and respectable members of the community). As an initial matter, we note that in *Ahmad* the court adopted this definition with respect to section 34-85(a) of the School Code (*id.* at 164-65), which we have already determined is irrelevant to this matter. Moreover, we reiterate that our role is not to substitute our own construction of "immoral" conduct for a reasonable interpretation adopted by the Board, but rather to give that definition substantial weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *Supra* ¶ 66. We find the Board's decision to employ a definition that has been repeatedly utilized before to be reasonable, and we will not substitute any other definition for that reasonable interpretation on appeal.

¶ 63 Next, we address plaintiff's contention that—even if the Board employed the correct

definition of immoral conduct—it failed to establish that his conduct violated District policy. We disagree.

¶ 64 The Board concluded that plaintiff violated the following specific Board policies:

(1) Board Policy 4:170 (Safety), which in relevant part provides that: "[a]ll District operations, including the education program, shall be conducted in a manner that will promote the safety and security of everyone on District property or at a District event;"

(2) Board Policy 5:20 (Workplace Harassment Prohibited), which in relevant part provides that: "District employees shall not engage in harassment or abusive conduct on the basis of an individual's *** sex [or] sexual orientation;" "District employees shall not *** engage in any unwelcome conduct of a sexual nature when *** such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment;" "The terms intimidating, hostile, or offensive include, but are not limited to, conduct that has the effect of humiliation, embarrassment, or discomfort;" "Sexual harassment will be evaluated in light of all the circumstances;" and "[a] violation of this policy may result in discipline, up to and including discharge."

(3) Board Policy 5:120 (Ethics and Conduct), which in relevant part provides that: "All District employees are expected to maintain high standards in their school relationships, to demonstrate integrity and honesty, to be considerate and cooperative, and to maintain professional and appropriate relationships with students, parents, staff

members, and others. *** Any employee who sexually harasses a student or otherwise violates an employee conduct standard will be subject to discipline up to and including dismissal;" and

(4) Board Policy 7:20 (Harassment of Students Prohibited), which in relevant part provides that: "The District will not tolerate harassing, intimidating conduct, or bullying whether verbal, physical, sexual, or visual, that affects the tangible benefits of education, that unreasonably interferes with a student's educational performance, or that creates an intimidating, hostile, or offensive educational environment. Examples of prohibited conduct include name-calling, using derogatory slurs, stalking, sexual violence, causing psychological harm, threatening or causing physical harm, threatened or actual destruction of property, or wearing or possessing items depicting or implying hatred or prejudice" on the basis of sex or sexual orientation; "The terms 'intimidating,' 'hostile,' and 'offensive' include conduct that has the effect of humiliation, embarrassment, or discomfort. Examples of sexual harassment include touching, crude jokes or pictures, discussions of sexual experiences, teasing related to sexual characteristics, and spreading rumors related to a person's alleged sexual activities."

¶ 65 More specifically, the Board concluded as follows:

"Conway's conduct not only had no legitimate basis in school policy, it contravened school policy. *** First, by waving a steak knife in the proximity of his students, Conway violated Board Policy 4.170; 5:120; and 7:20 in that he deliberately acted in a manner

that could have potentially endangered the safety of his students; he failed to maintain appropriate relations with his students by 'joking' around with a knife; and he put students in fear of physical harm. His remarks concerning a woman's cleavage, showing his students a real penis, and same-sex marriage, and homosexuality violated Board Policy 5:20; 5:120; and 7:20 in that the expression of his personal dislike for same-sex marriage and homosexuality created a hostile atmosphere in the classroom and were inappropriate interaction with his students; his personal sexual interests was an inappropriate topics [*sic*] of discussion with his students, and he had no business offering to show students a real penis much less displaying an image of one. Conway also violated Board Policy 5:20 and 5:120 when he pounded on the table in the Superintendent's office, pointed at her, and yelled at her that she could do nothing to him in that he treated her with disrespect and failed to maintain an appropriate and professional relationship with her. Finally, Conway violated Board Policy 5:120 and 7:20 when he involved students in his attempt to keep his job by offering them money and candy in exchange for information concerning what other students said about him.

Because it finds that Conway's conduct was immoral, *** Conway's conduct was irremediable and just cause for his termination."

¶ 66 Thus, the Board identified a number of specific, serious violations of specific Board policies related to important interests involving student, faculty and other staff, and the District itself. On appeal, our role is to determine if the Board's conclusion—that this conduct violated these policies, such that plaintiff's conduct was immoral and thus irremediable *per se*—was

arbitrary, unreasonable, or unrelated to the requirements of service, leaving us with the definite and firm conviction that a mistake has been committed. *Beggs*, 2016 IL 120236 ¶ 63. On this record, we find no basis to conclude that any such error occurred.[3]

¶ 67 III. CONCLUSION

¶ 68 For the foregoing reasons, we reverse the circuit court's March 11, 2019, "Second Amended Final Judgment," reversing the Board's final order, as well as the order entered by the Board on January 22, 2019, which—under protest—reinstated plaintiff as a tenured teacher and awarded him back pay and other restitution. We affirm the Board's October 31, 2016, final administrative order terminating plaintiff's employment.

¶ 69 Circuit court judgment reversed.

¶ 70 Board decision affirmed.

[3] While plaintiff contends that the Board explicitly conceded that not all of these policy violations constituted immoral conduct during oral argument in the circuit court, we have reviewed the report of proceedings and find no such explicit concession. Moreover, we reiterate that on appeal we review the decision of the administrative proceedings, not the determination of the circuit court. *Marconi*, 225 Ill. 2d at 531.