2012 IL App (1st) 111530-U

SECOND DIVISION
April 17, 2012

No. 1-11-1530

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICIA ADKINS, Plaintiff-Appellant, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO; MARY RICHARDSON LOWRY, President; NORMAN BOBINS, TARIQ BUTT, PEGGY DAVIS, ROXANNE WARD, CLARE MUNANA, ALBERTO A. CARRERO, JR., Members; RON HUBERMAN, Chief Executive Officer; LAWRENCE COHEN, Hearing Officer, and ILLINOIS STATE BOARD OF EDUCATION, Defendants- Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 CH 23842 The Honorable Michael B. Hyman, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

Held: We affirm the Board's dismissal of Adkins because she used corporal punishment against Board policy and her prior record of using corporal punishment rendered her present misconduct irremediable.

¶ 1 Plaintiff, Patricia Adkins, appeals the judgment of the circuit court affirming defendant Board of Education of the City of Chicago's (Board) decision to terminate her employment as a teacher with the Chicago Public Schools (CPS). On appeal, Adkins contends the trial court erred in affirming her dismissal because (1) the Board's finding that she engaged in corporal punishment is against the manifest weight of the evidence; and (2) its finding that her conduct was irremediable is clearly erroneous. For the foregoing reasons, we affirm.

¶ 2 JURISDICTION

¶ 3 The trial court ruled in favor of defendant Board on April 25, 2011. On May 25, 2011, Adkins filed her notice of appeal. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 In the dismissal proceeding, the hearing officer found the following facts. Adkins had taught at public schools for 28 years and prior to that, at Catholic schools for six years. She began teaching at Parkside, part of the CPS system, in 1993. She worked as a lead literacy teacher who helped other teachers "using the standards and updated mandated curriculum of the Board." After the 2006-2007 school year, Adkins requested a classroom teaching position and at the start of the 2008-2009 school years, Ms. Thompson, principal of Parkside, assigned Adkins to seventh grade. Ms. Thompson eventually switched Adkins to a fourth grade classroom and finally, in November 2008, to a first grade classroom.

¶ 6 While at Parkside, Adkins received either superior or excellent evaluations from Ms. Thompson. However, she also had a disciplinary record. In 2004 Adkins served a three day suspension for improper reporting and insubordination. In September 2008, she faced discipline for infractions that included telling a student she would "beat his ass," poking her fingernail into the student, engaging in a verbal altercation with a 10 year old student, shouting at students for no reason, and failing to follow directives. Adkins appealed her 10-day suspension to the Board's office of labor and employee relations and the Board denied her appeal.

¶ 7 On November 6, 2008, near the end of the school day, Adkins was preparing papers for her first grade students to take home to their parents. While preparing the papers, Adkins sat in one of the students' little chairs. One of her students named E.M. "slapped a little girl and ran." E.M. had a record of multiple disciplinary write-ups given by Adkins and other teachers. The girl chased him and E.M. was laughing and "screaming to the top of his lungs." Adkins stated that "I reached up and grabbed his shirt. I did tug at his shirt. I just wanted him to sit on the floor until I got through putting those notes together. *** Ms. Thompson stepped in the room, and I did have him by the shirt. She told him, she said, she's pinching you, and E.M. is looking. And when she said [to E.M.], you come with me, he started crying." According to Adkins, E.M. did not cry when she grabbed his shirt. She believed E.M. started crying when Ms. Thompson told him to come with her because he thought he was in trouble.

¶ 8 Ms. Thompson testified that as she walked by Adkins' classroom on November 6, 2008, she heard loud screaming so she walked into the classroom. Ms. Thompson saw Adkins "with her hand on E.M.'s chest pinching him with his shirt. He was going down on the floor, and she pinched him

*** He cried out or screamed out. Then when I went over to him, the tears were coming down." Adkins told Ms. Thompson that E.M. was fighting, but she did not observe any fighting. Ms. Thompson "carried [E.M.] out of the room *** [and] noticed that [E.M.'s] shirt was twisted up [and] I saw a reddish mark on his chest."

¶ 9 Christopher Wilborn, a security officer at Parkside, took a photograph of E.M.'s chest but the image did not conclusively show that he suffered any injury. The officer stated, however, that he observed a "light red mark on his chest" the size of a quarter. He also saw that E.M. was "a tad bit shaken up I guess from whatever the incident was and was still crying a little bit." Ms. Thompson prepared an incident report to initiate a Board investigation, a policy report to begin a police investigation, and an Illinois Department of Children and Family Services (DCFS) report to begin a DCFS investigation.[1] During the Board investigation, Adkins told the Board investigator that she "did reach out and grab E.M. and she grabbed his shirt and if she grabbed his skin, it was by accident." Adkins did not receive a warning resolution.

¶ 10 On November 10, 2008, the Board sent Adkins a letter informing her of her temporary reassignment to the Area 17 office pending the results of the investigation. Mr. Huberman, the Board's chief executive officer, approved the charges and specifications for dismissal. He charged Adkins with violating the Chicago Public Schools' Employee Discipline and Due Process Policy including (1) section 4-25 "that prohibits using corporal punishment that results in the deliberate use of physical force with a student"; (2) section 4-26 "that prohibits violation of School Rules, Board

[1]The police investigation did not lead to the filing of criminal charges, and DCFS subsequently found no basis for the substantial risk of harm allegation.

Rules, policies or procedures that result in behaviors that seriously disrupt the orderly educational process in the classroom"; (3) section 5-1 "that prohibits repeated or flagrant acts of Group 4 misconduct"; and (4) section 5-9 "that prohibits any cruel, immoral, negligent, or criminal conduct or communication to a student, which causes psychological or physical harm or injury to a student." The specifications alleged that despite prior suspensions and warnings for engaging in corporal punishment, or physical or verbal abuse of students in the past, Adkins grabbed 6 year old E.M. "by the shirt and chest and pinched him until he fell to the floor." E.M. "hollered out in pain" and "suffered a red bruise on his chest." Such actions "caused psychological and physical pain to E.M., and placed the CPS, Parkside Community Academy, and the staff and students in a bad light."

¶ 11 At the dismissal hearing, hearing officer Lawrence Cohen found that Adkins admitted she grabbed E.M.'s shirt and she did not deny she pinched him although she claimed the pinching was an accident. He found that Adkins inflicted corporal punishment in violation of Board policy. He also deemed her misconduct irremediable, noting that this incident was not the first time Adkins used corporal punishment against a student. Even if her misconduct on November 6, 2008, was insufficient to show irremediability, the act combined with her prior actions cumulatively prove irremediability. Since Adkins had faced a prior suspension for engaging in corporal punishment, she " 'was fully aware that corporal punishment was strictly prohibited and would result in severe discipline, up to and including dismissal.' " The hearing officer thus determined that Adkins had received a warning and she failed to remediate her conduct. He found no need for a warning resolution in this circumstance. Furthermore, since the November 6, 2008, incident occurred before a classroom of very young children, it "necessarily damaged the school. *** In light of E.M.'s

reaction and the necessity of subsequent multiple investigations, it['s] also reasonable to assume that E.M. was at least psychologically injured." The hearing officer concluded that the Board "met its burden of proof in establishing that its decision to terminate [Adkins] was for irremediable misconduct." He recommended that the Board uphold Adkins' dismissal.

¶ 12 The Board adopted the hearing officer's findings and recommendation on April 28, 2010, and discharged Adkins. On administrative review, the trial court affirmed the dismissal. Adkins filed this timely appeal.

¶ 13 ANALYSIS

¶ 14 Adkins contends that the trial court erred in affirming the Board's dismissal because the hearing officer's finding that she engaged in corporal punishment was against the manifest weight of the evidence, and furthermore her misconduct was remediable. Upon administrative review, this court reviews the decision of the Board, not the determination of the trial court. *Ahmad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 162 (2006). The Board's findings are considered *prima facie* true. *Board of Education of the City of Chicago v. Box*, 191 Ill. App. 3d 31, 37 (1989). Therefore, a reviewing court may not substitute its judgment for that of the Board, but must sustain the Board's findings unless they are against the manifest weight of the evidence. *Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622 of Tazewell County*, 67 Ill. 2d 143, 153 (1977). Findings are against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Ahmad*, 365 Ill. App. 3d at 162. However, this court may affirm the Board's decision on any basis supported by the record. *Younge v. Board of Education of the City of Chicago*, 338 Ill. App. 3d 522, 530 (2003).

¶ 15 The authority to dismiss a tenured teacher lies in section 34-85 of the Illinois School Code (105 ILCS 5/34-85 (West 2006)), which provides that no tenured teacher shall be removed except for cause, and a written warning must be issued unless the misconduct is irremediable. "Cause" is defined as "some substantial shortcoming which renders a teacher's continued employment detrimental to discipline and effectiveness." *Raitzik v. Board of Education of City of Chicago*, 356 Ill. App. 3d 813, 831 (2005). In a dismissal proceeding, the Board must prove by a preponderance of the evidence the existence of cause for the dismissal. *Box*, 191 Ill. App. 3d at 37. The Board's Employee Discipline and Due Process Policy, section 4-25, prohibits "[u]sing corporal punishment that results in the deliberate use of physical force with a student (e.g., slapping, hitting, pushing, shaking, twisting, pinching, choking, swatting, head banging, or other physical contact)." Use of corporal punishment can constitute cause for dismissal. See *Board of Education of City of Chicago v. State Board of Education*, 100 Ill. App. 3d 897, 900-01 (1981). Therefore, we first determine whether evidence supports the finding that Adkins engaged in corporal punishment.

¶ 16 Adkins stated that she grabbed E.M.'s shirt and tried to get him to sit on the floor while she finished her work. She did not deny that she pinched E.M.'s skin, but testified that if she did so "it was by accident." Ms. Thompson testified that when she entered the classroom, she observed Adkins "with her hand on E.M.'s chest pinching him with his shirt. He was going down on the floor, and she pinched him *** He cried out or screamed out. Then when I went over to him, the tears were coming down." She noticed that E.M.'s shirt was "twisted up" and he had a reddish mark on his chest. Wilborn, the security officer, took a photograph of E.M and although no marks appeared in the photograph, he stated that he observed a "light red mark on his chest" the size of a quarter.

He also saw that E.M. was "a tad bit shaken up I guess from whatever the incident was and was still crying a little bit." The Board's finding that Adkins engaged in corporal punishment is not against the manifest weight of the evidence.

¶ 17 Adkins disagrees, arguing that she grabbed E.M. by the shirt in order to regain order in the classroom, not as punishment. Punishment, however, is not only defined as an infliction of a penalty but also as "to deal with roughly or harshly." Webster's Third New International Dictionary 1843 (1981). In grabbing and twisting a six year old student's shirt, and pinching his skin in the process, we find that Adkins engaged in rough or harsh treatment within the definition of punishment.

¶ 18 However, since Adkins received no warning resolution following the incident with E.M., her dismissal will be upheld only if her misconduct was irremediable. See 105 ILCS 5/34-85 (West 2006). A cause for dismissal is irremediable if (1) damage was done to students, faculty, or the school; and (2) the conduct could not have been corrected even if the teacher had received a prior warning. *Gilliland*, 67 Ill. 2d at 153. Whether cause for dismissal is irremediable is a question of fact within the discretion of the factfinder. *Younge*, 338 Ill. App. 3d at 531; *Hegener v. Board of Education of the City of Chicago*, 208 Ill. App. 3d 701, 732 (1991). This court will not reverse the Board's determination unless it is against the manifest weight of the evidence, or the Board acted in an arbitrary or capricious manner. *Younge*, 338 Ill. App. 3d at 531; *Hegener*, 208 Ill. App. 3d at 732.[2]

[2]Although Adkins argues that the standard of review is whether the Board's decision was clearly erroneous, we follow *Younge* and *Hegener*, in which this court determined that we would uphold the Board's determination on the dismissal issue unless it was against the manifest weight of the evidence.

¶ 19 Adkins disagrees that the Board sufficiently proved the element of damage, contending that in order to dismiss her based on use of corporal punishment, the Board must present evidence of more serious misconduct than the grabbing and pinching alleged against her. As support, she cites *Swayne v. Board of Education of Rock Island School District*, 144 Ill. App. 3d 217 (1986), *Fender 22 v. School District No. 25*, 37 Ill. App. 3d 736 (1976), *Welch v. Board of Education*, 45 Ill. App. 3d 35 (1977), *Lowe v. Board of Education*, 76 Ill. App. 3d 348 (1979), *Roland v. School Directors*, 44 Ill. App. 3d 658 (1976), and *Board of Education of School District No. 131, Kane County v. State Board of Education*, 99 Ill. 2d 111 (1983). In these cases, however, Board policy explicitly authorized the use of corporal punishment thus requiring an analysis of the severity of the punishment. In *Roland*, although it was unclear whether corporal punishment was permitted, there was no evidence that corporal punishment was prohibited. Here, Board policy expressly prohibits the use of corporal punishment. In cases where school policy bans corporal punishment, it may be presumed "that when a student has been the victim of corporal punishment the damage to that student has been done." See *Board of Education of City of Chicago*, 100 Ill. App. 3d at 900.

¶ 20 This is also not a case where the damage done to E.M. was speculative, as was the situation in *Morris v. Illinois State Board of Education*, 198 Ill. App. 3d 51 (1990), a case cited by Adkins. In *Morris*, the teacher was charged with providing false credentials and whether the students suffered damage would only be known in the future when they had to put the knowledge learned in class to use. *Morris*, 198 Ill. App. 3d at 56-7. In contrast, evidence of physical harm to E.M. was presented here. Ms. Thompson testified that she heard E.M. scream and cry out, and

when she walked into Adkins' classroom, she found E.M. crying. Adkins was grabbing E.M. by the shirt and Ms. Thompson observed a red mark on E.M.'s chest. Wilborn testified that he also observed a light red mark on E.M.'s chest and that E.M. was "shaken up" by the incident. The finding that Adkins' conduct caused damage is not against the manifest weight of the evidence.

¶ 21 We note that in his ruling, the hearing officer also found that it was "reasonable to assume that E.M. was at least psychologically injured." However, we find no competent evidence in the record showing E.M. sustained psychological harm as a result of this incident. See *Box*, 191 Ill. App. 3d at 40 (psychological damage to students was shown through testimony that they experienced "nightmares, confusion, anxiety, and fear," and through the testimony of a clinical psychologist who stated that the girls she interviewed suffered adverse psychological effects). Accordingly, the finding that E.M. suffered psychological damage is against the manifest weight of the evidence. This determination does not affect our disposition of the issue, however, because as we discussed above the finding that E.M. suffered physical harm is not against the manifest weight of the evidence.

¶ 22 As to the issue of remediability, the hearing officer noted that the incident with E.M. was not the first time Adkins engaged in corporal punishment. In September 2008, Adkins faced suspension for infractions that included telling a student she would "beat his ass," poking her fingernail into a student, engaging in an verbal altercation with a 10 year old student, shouting at students for no reason, and failing to follow directives. These incidents should have served as a warning to her that such misconduct had serious ramifications, including dismissal. Adkins, however, did not heed that warning. The incident with E.M. occurred in November 2008. The

hearing officer found that the cumulative effect of the incidents rendered Adkins' conduct on November 6, 2008, irremediable. See *Gilliland*, 67 Ill. 2d at 153 ("[u]ncorrected causes for dismissal which originally were remediable in nature can become irremediable if continued over a long period of time"); see also *Rush v. Board of Education of Crete-Monee Community Unit School District No. 201-U*, 312 Ill. App. 3d 473, 476-77 (2000) (where the board policy explicitly prohibits the use of corporal punishment, and the teacher had been warned through a prior incident, the court found that a further warning "could not have corrected the damage"). The finding that the cause for Adkins' dismissal was irremediable is not against the manifest weight of the evidence.

¶ 23 Furthermore, Parkside is in the CPS system and the legislature amended section 34-85 of the School Code in 1998, making the amendment applicable only to Chicago public schools. See *Ahmad*, 365 Ill. App. 3d at 164. The amendment sought to address serious problems in the Chicago public school system. *Younge*, 338 Ill. App. 3d at 533. Accordingly, it added the following language to the statute: "No written warning shall be required for conduct on the part of a teacher or principal which is cruel, immoral, negligent, or criminal or which in any way causes psychological or physical harm or injury to a student as that conduct is deemed to be irremediable." 105 ILCS 34-85 (West 2006). Therefore, in cases involving such misconduct, "it is unnecessary to employ the *Gilliland* test *** because the statute now makes this conduct irremediable *per se*. Not only is no warning required for this type of conduct, but it is also unnecessary for the Board to show that this type of conduct caused damage." *Younge*, 338 Ill. App. 3d at 534. Although the hearing officer did not address whether Adkins' misconduct was

irremediable *per se*, he did find that the incident, having taken place in front of a classroom of six year olds, "necessarily damaged the school". Also, Adkins does not deny that she grabbed E.M.'s shirt and might have pinched his skin in the process, and two witnesses testified to observing a red mark on E.M.'s chest. Such conduct may be deemed irremediable *per se* pursuant to the amendment.[3]

¶ 24 Adkins, however, cites *Board of Education of City of Chicago v. Johnson*, 211 Ill. App. 3d 359 (1991) as a case where this court reversed the hearing officer's determination that a Chicago public school teacher's misconduct was irremediable. In *Johnson*, however, the Board failed to show that the teacher was the source of the injuries suffered by the student, and conflicting testimony of witnesses led to "serious doubts that [he] was the sole cause or even a contributory cause of the injury sustained." *Johnson*, 211 Ill. App. 3d at 364. The teacher in *Johnson* also had no prior record of misconduct and no evidence of prior use of corporal punishment in a career spanning more than 20 years. *Johnson*, 211 Ill. App. 3d at 366. Furthermore, the misconduct in *Johnson* occurred before the enactment of the School Code amendment. Here, the facts are undisputed that Adkins grabbed E.M. by the shirt and Adkins acknowledged that she may have accidentally pinched his skin in the process. Two witnesses testified to observing a red mark on E.M.'s chest following this incident. Adkins also had a prior record of misconduct, faced suspension, and was still unable to refrain from

[3]Adkins claims that this argument is waived because it was presented for the first time on appeal. However, it appears that the issue was raised at some point before the hearing officer because in his ruling he states "[i]n light of my findings above it is unnecessary to determine if Adkins' conduct was irremediable per se." We address the issue since this court may affirm an agency's decision on any basis appearing in the record, regardless of the agency's reasoning. *Rogy's New Generation, Inc. v. Department of Revenue*, 318 Ill. App. 3d 765, 771 (2000).

using corporal punishment. We are not persuaded that *Johnson* supports Adkins here. The Board's determination that Adkins' conduct was irremediable was not against the manifest weight of the evidence.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.