

2017

**Russel Augustus, Petitioner v. Vernal City and Vernal City
Appeals Board, Respondent**

Utah Court of Appeals

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39003

No. 20160634-CA

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

RUSSEL AUGUSTUS,
Petitioner,

v.

**VERNAL CITY AND
VERNAL CITY APPEALS BOARD,**
Respondent.

OPENING BRIEF OF PETITIONER

On petition for review from the Vernal City Appeals Board

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ORAL ARGUMENT REQUESTED

FILED
UTAH APPELLATE COURTS
FEB 15 2017

Date _____

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Case No. 20160634-CA

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CONTENT REQUIREMENTS - IN ORDER STATED

List of all parties

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Jurisdictional Statement

This Court has jurisdiction pursuant to Section 78A-4-103(2)(a)(i)(A) of the Utah Code, and Section 10-3-1106(6), which provides that the Court of Appeals may review the final action or order of a municipal personnel appeals board.

Statement of the Issues

This case involves the following issues:

Issue 1: Whether the Appeals Board erred in concluding that Petitioner's supervisor acted within his authority by ordering Petitioner to stay in a meeting on January 25, 2016.

Preservation: This issue is preserved. (R.702-13, Tr. 316:3-327:13; R.749, Tr. 363:10-18.)

Standard of Review: When reviewing a municipal employee appeal board's application of general law, appellate courts use a correction of error standard. *See Taylorsville City v. Taylorsville City Emp. Appeal Board*, 2013 UT App 69, ¶ 16, 116 P.3d 973.

Issue 2: Whether the Appeals Board erred in considering matters that were outside the scope of the March 21, 2016 Notice of Disciplinary Action.

Preservation: This issue is preserved. (R.406-07, Tr. 20:21:3; R.428-29, Tr. 42:1-43:10; R.759, Tr. 373:21-25.)

Standard of Review: Appellate courts are authorized by statute to review the decision of a municipal employee appeal board to determine if it abused its discretion or abused its authority. U.C.A. § 10-3-1106(6)(c)(ii). An abuse of discretion will be found where the board's decision "exceeds the bounds of reasonableness and rationality." *Rosen v. Saratoga Springs City*, 2012 UT App 291, ¶ 8, 288 P.3d 606.

Determinative Provisions

The following provisions are set forth at Addendum C:

U.C.A. § 10-3-1106 Discharge, suspension without pay, or involuntary transfer -
Appeals - Board – Procedure
Vernal City Personnel Manual § 5.01.010 Annual Vacation Leave – Purpose
Vernal City Personnel Manual § 5.01.040 Annual Vacation Leave – Accumulation
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Vernal City Personnel Manual § 12.05.050 Discipline – Pre-Disciplinary Hearing
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Vernal City Personnel Manual § 12.05.065 Discipline – Types of Disciplinary
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Statement of the Case

1. Nature of the Case and Course of Proceedings

Petitioner Russel Augustus was terminated from his position as an Equipment Operator II for Vernal City on March 21, 2016 by a Notice of Disciplinary Action issued by City Manager Ken Bassett. Thereafter, pursuant to

Section 10-3-1106 of the Utah Code and Section 12.06.010 of the Vernal City Personnel Manual, Petitioner appealed his termination to the Vernal City Appeals Board.

A hearing was held before the Appeals Board on May 3, 2016, wherein testimony and evidence were received. Oral argument was heard, and the Appeals Board granted the parties leave to file additional written argument on specific subjects. After deliberating, the Appeals Board decided to affirm Petitioner's termination, and issued its Findings of Fact, Conclusions of Law, and Order Re: Termination Appeal on June 29, 2016.

Petitioner has timely petitioned for review.

2. Statement of Facts

Petitioner ("Mr. Augustus") was employed by Vernal City (the "City") for approximately five years, as an Equipment Operator II. (R.415, Tr. 29:1-7.) Mr. Augustus reported to Glade Allred (Mr. Allred), who was the Superintendent of the City's Streets Department. (R.414, Tr. 28:18-25.) Mr. Allred viewed Mr. Augustus as a good, capable worker, and gave him above average performance evaluations for the last two years of his employment. (R.309-12; R.314-19; R.417, Tr. 31:1-5; R.664-65, Tr. 278:20-279:19; R.666-67, Tr. 280:10-281:5)

The events material to this appeal began on January 25, 2016, when Mr. Allred met separately with Mr. Augustus and his co-worker, Michael Leigh ("Mr.

Leigh")¹, regarding an incident that had occurred on January 21, 2016. (R.192-217; R.462-63, Tr. 76:24-77:9; R.469-70, Tr. 83:23-84:3; R.553, Tr. 167:8-11; R.554, Tr. 168:3-9.) The morning of January 21, Mr. Allred had instructed Mr. Leigh to go with Mr. Augustus and hang banners "on the west end" of the city. (R.418, Tr. 32:15-25.)

Mr. Augustus and Mr. Leigh did start working on the west end as instructed, but at some point decided to take the City bucket truck and drive to the east end, to check on some banners on the east side of town that Mr. Leigh had previously put up backwards. (R.538-39, Tr. 152:19-153:2; R.545-46, Tr. 159:21-160:7; R.570, Tr. 184:9-14; R.572, Tr. 186:13-25.) On the way to fix the banners, they went by the City's "1500 East yard," to observe a co-worker, BJ Partridge ("Mr. Partridge"), who was there operating City equipment. (R.546, Tr. 160:8-11.) Once at the 1500 East yard, they stopped while Mr. Augustus took video of Mr. Partridge's activities, before continuing on. (R.550, Tr. 164:16-24; R.574, Tr. 188:8-15.)

Mr. Allred learned that Mr. Augustus and Mr. Leigh had been at the 1500 East yard taking video, from Mr. Partridge. (R.421-22, Tr. 35:23-36:12.) This report is what led Mr. Allred to meet with both employees on January 25. (R.675-76, Tr. 289:17-290:10.)

¹ Although his name is spelled "Lee" throughout the transcript, the name is spelled "Leigh" and pronounced the same as "Lee."

Mr. Allred first met with Mr. Leigh, in the morning of January 25. In his testimony, Mr. Leigh described a meeting in which he perceived that he was being accused of doing something wrong by doing anything on January 21 other than putting up banners. (R.554-55, Tr. 168:14-169:9.) At the conclusion of the meeting, Mr. Allred directed Mr. Leigh to leave work and call Mr. Allred the next morning to find out if he should come back to work or not. (R.555, Tr. 169:10-12.) Mr. Allred called Michael Leigh shortly afterward, however, and directed him to “stay home for the rest of the week.” (R.555, Tr. 169:15-21.)

After meeting with Mr. Leigh, Mr. Allred tried three times to reach Mr. Augustus, unsuccessfully, first by radio and then two more times by phone. (R.422-26, Tr. 36:23-40:4.) Finally, about 11:30am that morning, Mr. Allred encountered Mr. Augustus at the City’s Public Works yard, and told him that they needed to meet. (R.426, Tr. 40:5-21.) Mr. Augustus, however, suddenly had to leave to attend to a sick daughter. (R.426-27, Tr. 40:21-41:6.) Mr. Allred told Mr. Augustus that he had been trying to reach him on his phone, and Mr. Augustus replied, “I haven’t had my cell phone.” (R.426, Tr. 40:16-25.)

Mr. Allred and Mr. Augustus were able to meet at about 3:30pm on January 25. (R.427, Tr. 41:7-9.) First, Mr. Allred addressed his earlier inability to reach Mr. Augustus, and the latter again explained, “My phone’s been off all day,” and “I haven’t had my phone.” (R.192.)

Later, it was discovered that Mr. Augustus had used his phone three times that morning. First, at 9:00am he received a call and excused himself from a morning meeting. (R.466, TR. 80:15-21.) Then, between 9:26am and 10:02am, Mr. Augustus exchanged text messages with city employee Sherry Montgomery. (R.167, R.411, Tr. 25:12-22; R.466, Tr. 80:3-14.) Mr. Augustus testified in detail that he pulled to the side of the road and took a break during this exchange, and then returned to clearing snow.² (R.578, Tr. 192:3-17.) Finally, Mr. Augustus called his wife at about 11:15am, after returning to the yard, because their daughter was having a medical emergency. R467.

Following that, Mr. Allred proceeded into a series of questions about Mr. Augustus' activities on January 21. (R.201.) At times during the conversation, Mr. Augustus admitted to going by the 1500 East yard, saying, "At some point...we went down past 1500 East yard and went down to check the banners," and "We went to check to see if those banners were upside down or backwards or something over [by] [t]he east end, by Top Stop." (R.201; R.209-13; R.581, Tr. 195:12-25.) At other times, he said that he did not know, or did not remember. (R.209-13.)

Mr. Allred described Mr. Augustus' answers as "very elusive and very vague." (R.443, Tr. 57:17-20.) For his part, however, Mr. Augustus testified that he was confused because they had worked on banners multiple days that week,

² The two calls from Mr. Allred took place at 10:15am and 10:29am, respectively. (R.173.)

and because Mr. Allred's questions themselves were vague, rapid-fire and not chronological. (R.470, Tr. 84:2-9; R.474, Tr. 88:1-23; R.503, Tr. 117:9-14; R.505-06, Tr. 119:14-120:11; R.507, Tr. 121:21-24; R.582, Tr. 196:1-23; R.583, Tr. 197:17-21.) He also testified that he was affected by fatigue as a result of having worked 14 hours the previous day, and pain from a neck injury that affected his sleep the previous night. R504-05, Tr. 118:13-119:13. Additionally, he was emotionally upset as a result of his daughter's medical emergency earlier that day. R505, Tr. 119:5-13.

Mr. Augustus also became concerned over the course of the meeting that what was happening might not be appropriate. (R.586, Tr. 200:9-13.) He asked Mr. Allred, at various times, if he was "on trial," or "under investigation." (R.195; R.211.) Also, Mr. Allred was recording the entire meeting, but when Mr. Augustus asked if he was, Mr. Allred tried to mislead him by saying, "Here, I'll turn the recorder on right now. I got one right down here. Let me turn it on. Okay, I am recording this meeting." (R.195-97; R.687-88, Tr. 301:18-302:23.)

At approximately 4:00pm, Mr. Augustus indicated to Mr. Allred that he was going to leave, as it was the end of his shift. (R.216-17; R.431, Tr. 45:2-7.) Mr. Allred directed Mr. Augustus to stay for the duration of the meeting, and Mr. Augustus refused. (R.216-17; R.431, Tr. 45:2-10.) Mr. Augustus explained in his testimony that he had become very upset, and decided to leave in order to avoid a "fight" with Mr. Allred. (R.493-94, Tr. 107:22-108:20; R.590, Tr. 204:6-13.) He

also had the distinct feeling that he was facing some kind of punishment or discipline, and that it was not being handled through the appropriate process. (R587-89, Tr. 201:5-203:2.)

As Mr. Augustus was leaving the room, Mr. Allred informed him that if he chose to leave, it would be considered insubordination and would place him at risk of termination. (R.217; R431, Tr. 45:7-9.) Mr. Augustus responded, "Have fun with that." (R217; R431, Tr. 45:10.)

Mr. Augustus believed that he was entitled to leave, in part, because he knew that there was a right to receive notice and a hearing before being disciplined. (R.588-89, Tr. 202:14-203:6.) No such notice had been given. (R.506, Tr. 120:12-14.)

As Mr. Augustus went to find someone in human resources, he encountered Assistant City Manager Alan Parker, and explained what had happened. (R.590-91, Tr. 204:16-7.) Mr. Augustus asked if he had done the wrong thing, and Mr. Parker responded, "No...the right thing to do was come and talk to me." (R.591, Tr. 205:8-17.) By speaking to Mr. Parker, Mr. Augustus believed that he was exercising his right to make an informal grievance, pursuant to city policy. (R.591-92, Tr. 205:19-206:5.)

After Mr. Augustus left the January 25 meeting, Mr. Allred decided to place him off duty. (R.697, Tr. 311:1-7.) Prior to this, Mr. Allred had prepared typewritten notes to reference in the meeting. (R.332-38; R.676, Tr. 290:11-18.) The typewritten notes include a notation that reads, "No paid time contact...call

before coming in.” (R.338.) Mr. Allred testified that this reflected typical options, in case he had to “go there.” (R.698-99, Tr. 312:6-313:1.) Mr. Allred also testified that, over 31 years with the City, he and Mr. Bassett had developed an understanding that, “when you run into these kinds of situations, that that is one of the tools you have available, is that the vacation is given.” (R.704-05, Tr. 318:18-319:9.)

In an email sent by Mr. Allred to Mr. Bassett on the evening of January 25, 2016, Mr. Allred stated that he had “pondered the situation,” and became “concerned...about having either of these two employees back here before the first of the week.” (R.340.) He went on, “I want to protect Vernal City’s interest and have therefore sent a text to both individuals,” directing them to take the rest of the week off. (R.340; R.702-03, Tr. 316:23-317:7.) Mr. Augustus remained off duty on these terms until City Manager Ken Bassett formally placed him on administrative leave on January 29, 2016. (R.3.)

Mr. Allred acknowledged being aware that the policy of the City was to use vacation for rest and relaxation, but then testified that imposing mandatory vacation could be for that purpose, or for some other purpose, depending “on what you’re doing.” (R.705-06, Tr. 319:22-320:6.) Then, asked “[I]sn’t it at your discretion to provide the employee rest and relaxation,” Mr. Allred responded that he “felt it was in the best interest of Vernal City that they take some time and that they—they take a few days off.” (R.709, Tr. 323:2-19.)

That interest, Mr. Allred testified, was to give himself “time to try to figure out what was going on and why.” (R.711, Tr. 325:21-25.) While Mr. Allred did testify that he thought that Mr. Augustus got “very, very angry,” and “needed to get away from the situation,” he also admitted that Mr. Leigh did not become “overly heated” in his meeting with him, but he still placed Mr. Leigh off duty – or “on vacation” – as well. (R.555, Tr. 169:10-12; R.709, Tr. 323:20-22; R.712, Tr. 326:8-21.)

On March 21, 2016, following a pre-disciplinary hearing, Ken Bassett issued a Notice of Disciplinary Action to Mr. Augustus, terminating his employment and outlining the reasons for the termination. (R.177-84, R449-50, Tr. 63:12-17.) The Notice of Disciplinary Action indicated that Mr. Augustus was being terminated for the following misconduct:

- A. Incident #1: 12.05.030 (D) Inefficiency or inability to satisfactorily perform assigned duties (failing to satisfactorily perform his duties when he decided to instead go to the 1500 East yard and take photos of Mr. Partridge); (M) Misusing, destroying or damaging any City property or the property of any employee (using the City’s bucket truck for a purpose unrelated to his job duties); and (N) Deliberately restricting output (taking Mr. Leigh away from his duties)
- B. Incident #2: 12.05.030 (W) Act of Dishonesty related to job performance (telling Mr. Allred that he couldn’t remember going to the 1500 East yard or taking photographs or videos, when in fact he could remember.)

- C. Incident #3: 12.05.030 (AA) Displaying insubordinate behavior (leaving the January 25 meeting after being told to stay, and after being informed that leaving would constitute insubordination and grounds for discipline.)
- D. Incident #4: 12.05.030 (A) A violation of any of the City Personnel Policies or Procedures or any other administrative policies as adopted by resolution of the Vernal City Council (not having his cell phone available as required by the cell phone use agreement dated April 22, 2013 and cell phone policy of the City, and choosing not to answer Mr. Allred's phone calls), and 12.05.030 (W) Act of dishonesty related to job performance (stating twice "I haven't had my cell phone," and "my phone has been off all day").

In addition to the reasons stated in the Notice of Disciplinary Action, the Appeals Board expressly found as follows:

- B. Regarding the charge of "dishonesty related to job performance":
1. Appellant was dishonest in his statements and explanations concerning his activities on January 21, 2015, including the reason for taking the city bucket truck and another city employee to 1500 East and in his stated reasons for videoing Mr. Partridge.
 2. The Appellant stated that he would provide a copy of the video when he finally acknowledged that he had it, which he failed to do.

4. The Appellant falsely stated that his concern was the safety of an employee or equipment which, as outlined above, lacks any credibility.

C. Regarding the charge of "insubordination":

1. The Board has reviewed the transcript and listened to the recording of the meeting between the Appellant and his department head Mr. Allred on January 25, 2016, and finds that there is more than substantial evidence to show that the Appellant was insubordinate throughout the meeting with his supervisor.
2. The Appellant's general tone of voice, attitude, tapping of a marker on the table, and refusal and failure to answer questions honestly and directly demonstrated a lack of respect for his supervisor.
3. The Appellant was evasive, refused to answer questions, was disrespectful, ordered the supervisor to "move on" after evading questions, [and] cursed.
4. The Appellant's disrespectful retort as he left the meeting "good luck with that" further illustrates a series of disrespectful and insubordinate statements and conduct by the Appellant during that meeting toward his supervisor, which is illustrated to some degree by the transcript but more forcefully by the audio recording of the meeting.

5. The Board is convinced that the purpose of the Appellant's video on the east side of the city on January 21, when he was assigned to work on the west side of the city, was not motivated by a safety concern but rather was an effort to undermine and get information to damage his department head.
6. The Appellant's attitude during the meeting with Mr. Allred was insubordinate, confrontational, dishonest, and disrespectful.
7. At no time following that meeting did the Appellant make any effort to apologize to his supervisor or to demonstrate any willingness or desire to work cooperatively with his supervisor or make any effort to resolve any concerns or differences.
8. Had the Appellant's attitude following that meeting up to and through the hearing before the Board been different or more cooperative or upfront and honest the result might well have been different. Instead the Appellant has remained defiant, aggressive and dishonest.
9. In the meeting with Mr. Allred, the Appellant was requested at least twice to provide a copy of the video that he took while driving the city truck, yet he did not provide that until played for the first time at the hearing before the Appeals Board.
10. Mr. Augustus's actions have been targeted towards undermining his supervisor so that he could take over the Department.

11. Mr. Augustus's statements about his not having his phone available when his supervisor was attempting to contact him are untruthful and also insubordinate. It is clear that he had his telephone available since he made use of it, yet he failed to answer calls from his supervisor or to return calls that had been made to him.
12. The Appellant was untruthful in claiming that his texts with Sherri Montgomery were during his break since the time line of those texts demonstrates a period in excess of a normal break.
13. The Appellant is dishonest and insubordinate in refusing to admit his activities, lying about his activities, and failing to acknowledge his fault and misconduct when he made a mistake. His attitude throughout has been to cast blame on others but not to take any responsibility himself.
14. The lack of respect for his supervisor is not only demonstrated by the transcripts and recordings prior to the hearing, but the Board notes, his facial expressions, demeanor and behavior at the hearing when answering questions regarding the events and during the testimony of Mr. Allred including smirking, rolling his eyes and other conduct and expressions further confirms a lack of respect and an insubordinate attitude.
15. A continuing attitude of insubordination and disrespect was also demonstrated and observed by the Board during the hearing. During

the testimony of Mr. Bassett, Mr. Augustus was observed to glare at the witness and rolled his eyes, and acted in a hostile and disrespectful manner.

16. The actions of Mr. Augustus show that he is not amenable to supervision and cannot work there under the direction of the department head, Mr. Allred. This results in part from his insubordination and his dishonesty in dealing with his department head and with others and from the fact that he has not made any effort to resolve the issues or acknowledge his misconduct. Even at the hearing it was apparent that he retains a defiant, disrespectful attitude, and has no willingness to acknowledge his own errors. Any discipline less than termination would not bring about needed change. The Appellant's return to the road department would be detrimental to the morale, productivity, and operation of the department, and would undermine the ability of Mr. Allred to manage the employees.

R.370-73.

Furthermore, the Appeals Board made the following findings over and above the reasoning reflected in the Notice of Disciplinary Action:

3. Insubordination

- a. The Board finds that Mr. Augustus behavior, statements, and actions demonstrate that when he ignored the directions to help finish installing

banners on the west side of the city and instead drove the city bucket truck and another city employee to the east side of the city and passed the yard while taking video with his city subsidized phone, his intent was to undermine his department head, Mr. Allred. The video that he took of another employee operating the city equipment, which was provided for the first time at the hearing before the Appeals Board demonstrates that he was unsafely operating the city bucket truck by videoing while driving, and it appears that he had planned in advance to take the video and had manipulated his phone while driving and prior to reaching the yard.

- b. The claims made by the Appellant that the purpose of videoing was to address a safety concern is entirely contradicted by his failure to provide that video to anyone in the city or to report his concerns to his supervisor or other city officials.
- c. In fact, Mr. Augustus went out of his way to avoid admitting that he had taken the video during his meeting with his supervisor and failed and refused in spite of repeated requests to provide the video taken on the city subsidized cell phone. In so doing he violated city policy and contradicted any argument that he undertook that activity for a legitimate purpose.
- d. During the interview with Mr. Allred, the Appellant was evasive and defensive and aggressive when questioned on those matters.

- e. During his testimony before the hearing Board when questioned by opposing counsel about those matters he once again reacted in an evasive, confrontational manner.
- g. The events from January 21, 2016, and the attitude and behavior of the Appellant from that time through the conclusion of the evidentiary hearing demonstrate more interest in undermining his supervisor and no evidence whatsoever of any effort or desire to work cooperatively within the Department structure or chain of command.
- h. The Appellant's attitude, nonverbal displays, and facial expressions during the hearing on the stand were disturbing and pronounced and reflect an attitude, disrespect, and a disregard for truth.
- i. The Appellant's statement as he left the meeting with his supervisor in blatant disregard of the instruction that he remain at the meeting - the comment "good luck with that" – is consistent with the attitude and actions displayed at the evidentiary hearing before the Board. The "good luck with that" attitude which remains unchanged shows that he cannot work effectively under the supervision of the road department head, and that his continuing presence there and insolent attitude would be disruptive to the good order and efficient operation of the entire department.
- j. Had the Appellant at any time prior to the pre-disciplinary hearing or even during the evidentiary hearing demonstrated through his words and demeanor and behavior any change of attitude, recognition of his

misconduct, any desire to mend fences and work cooperatively with his supervisor and within the structure of the department as a positive productive employee the outcome might well be different.

R.374-76.

Finally, the Appeals Board made the following new conclusions:

Q. The conduct of Mr. Augustus in the meeting with his department head on January 21, 2016 was insubordinate. The capstone was his defiant refusal to remain in the meeting when specifically and directly instructed twice to do so by his supervisor even when he was told that refusal to remain would be insubordination and may result in his termination, the comment as he walked out the door was "good luck with that". That was not, by any means, the only insubordination during that meeting however. Listening to the recording of the meeting along with the transcript shows that the Appellant repeatedly refused to answer questions, was evasive, omitted facts, was dishonest about facts and circumstances, demonstrated a defiant and hostile attitude towards his supervisor, refused to provide the video when requested to do so after finally acknowledging its existence, and constantly and loudly tapped his pen on the desk during the conversation. Throughout that process the Department Head remained calm and did not raise his voice while the Appellant became hostile and agitated after being informed and with full knowledge that he was being recorded. Mr. Augustus never

acknowledged any personal responsibility or fault or error on his part and continued to place all of the blame on Mr. Allred consistent with his apparent intentional design to undermine the authority of his department head.

R.380.

Summary of the Argument

Petitioner seeks to have the decision of the Appeals Board, sustaining the termination of his employment with Vernal City, set aside on multiple grounds. This petition for review does not challenge the factual findings, but solely the Appeals Board's exercise of its discretion.

First, the Appeals Board erroneously concluded that it was within the authority of Mr. Augustus' department head to require his presence in a meeting. The board could only have reached that conclusion by accepting the City's theory that imposing mandatory vacation in a disciplinary fashion was a permissible exercise of authority under its own policies. Mr. Augustus takes the Court through those policies so as to show that a plain language reading would never permit such an interpretation. Lacking the authority to act in so arbitrary a fashion, the department head's actions could only be described as formal discipline, requiring formal procedures that were not observed.

Second, the Appeals Board flagrantly exceeded its authority when it conducting a full review of Mr. Augustus' conduct, with no regard for his due

process right to notice. Many of the instances of misconduct relied upon by the Appeals Board had simply never been brought up before, which impeaches the fairness of the whole process.

By reason of these errors, Mr. Augustus was deprived of a full and fair hearing, and is entitled to have the resulting decision set aside. If the insubordination charge is also dropped, it may be appropriate to immediately order the Appeals Board to reinstate Mr. Augustus with all of the remedies that entails. But if the Court sees fit to permit reconsideration on remand, that reconsideration should be narrowly focused.

Argument

The Appeals Board in Mr. Augustus' case conducted a far-ranging, searching examination of Mr. Augustus' conduct, without any regard for its This Court's undertaking on this review is to determine "if the appeal board or hearing officer abused its discretion or exceeded its authority." U.C.A. § 10-3-1106. The egregiousness of the Appeals Board's abuses in this case should make the Court's job straightforward, if not simple.

1. THE APPEALS BOARD COMMITTED REVERSIBLE ERROR WHEN IT CONCLUDED THAT PETITIONER'S SUPERVISOR ACTED WITHIN HIS AUTHORITY BY ORDERING PETITIONER TO STAY IN THE JANUARY 25 MEETING.

Petitioner raised an argument before the Appeals Board that, if Mr. Allred lacked lawful authority to demand Mr. Augustus stay in the January 25 meeting, then Mr. Augustus could not have committed the offense of insubordination,

because lawful authority is a necessary element of insubordination. The Appeals Board disagreed, reasoning that “a meeting to discuss possible misconduct or a direction to take paid vacation time does not constitute formal discipline requiring approval of the City Manager for a predisciplinary hearing.” (R.380.) It also concluded that the practice of a department head imposing mandatory vacation to allow an employee a chance to “cool off or settle down” represented a proper application of the City’s vacation policies. These holdings reflected incorrect interpretations of the law, as will be explained below.

1.1 A department head’s authority to impose mandatory vacation is qualified by the express purpose of the vacation policy.

As pointed out by the Appeals Board, Section 5.01.060 of the Personnel Manual adopted by the City Council does state that “As he [or she] deems necessary, a Department Head may require an employee to use any accrued vacation leave.” But reading an ordinance in isolation like that violates the rules of statutory construction, which dictate that the plain language of a statute must be construed “with every other part or section so as to produce a harmonious whole.” *Summit Operating, LLC v. Utah State Tax Com'n*, 2012 UT 91, ¶¶ 11-14, 293 P.3d 369 (rejecting a party’s proposed interpretation when contrary to legislative intent drawn from the whole statute).

The City Council, when it adopted the overall vacation scheme, also adopted Section 5.01.010, which stated their intent as requiring the use of annual

vacation to ensure that employees have time to “mentally and physically refresh themselves,” and come back to work better able to do their jobs.

Harmonizing the two provisions, the only plausible interpretation is that a department head, in ordering an employee to take vacation, must exercise that authority in furtherance of the stated legislative intent – ensuring a productive, healthy workforce. There may be other, tangential purposes consistent with that primary purpose, but use of vacation as a disciplinary tool is not one of them. Without any ambiguity, it is not necessary to examine the City’s common practice to interpret the plain language of the policy.

A proper example might be such as that contemplated in Section 5.01.040 of the Personnel Manual, which acknowledges the possibility that management may want to mandate the use of vacation to avoid forfeiture. The secondary purpose mentioned here of managing staffing levels is consistent with the primary purpose of making sure employees get their rest and relaxation time in.

In fact, Mr. Allred explained in his testimony that he made the decision to place Mr. Augustus off duty to protect the interests of the City, which were to conduct a full investigation and analysis. The mere presence of this purpose is enough to take the decision outside the boundaries of the vacation policy. Even if one of Mr. Allred’s reasons was to allow Mr. Augustus time to cool off, that testimony was obviously self-serving and contradictory, given that he gave the same consequence to Mr. Leigh, who did not get “overly heated.”

1.2 Mr. Allred's decision to place Mr. Augustus on leave was a disciplinary decision, not a vacation policy decision.

Eliminating the possibility, as a matter of law, that Mr. Allred had the authority to impose mandatory vacation outside of the purposes of the vacation policy, then his decision must have been something else.

It could not have been a decision to place Mr. Augustus on administrative leave, pursuant to Section 5.06.030 of the Personnel Manual, because that section explicitly requires the approval of the City Manager. Mr. Allred stated that Mr. Bassett gave him input on possible options, but that is not the same as approval. It is clear from the entirety of Mr. Allred's testimony that he and he alone made the decision.

The only remaining conclusion is that Mr. Allred placed Mr. Augustus on a disciplinary suspension. In fact, it perfectly fits the language of the policy – "The department head, or designee, after consultation with the City Manager, and in accordance with the provisions of this Chapter pertaining to formal disciplinary procedures, may suspend employees with or without pay." Personnel Manual § 12.05.065. Mr. Allred "consulted" with the City Manager, and he suspended Mr. Augustus with pay – albeit in the form of vacation pay.

1.3 Mr. Allred unlawfully imposed a disciplinary suspension without due process.

It is axiomatic that the policies adopted by a governmental entity define the process that is due. The version of Section 12.05.050 of the Personnel Manual that was in force at the time of Mr. Augustus' suspension stated that,

“[w]henver formal disciplinary measures are anticipated, excepting placement of the employee on probationary status, a pre-disciplinary hearing must be held prior to imposing disciplinary action.”³ Not only did the City’s policy require that a hearing be held, but also that the employee be given detailed notice.

The undisputed evidence at the hearing showed that Mr. Allred anticipated the possibility of putting Mr. Augustus on leave. He admitted that he alone prepared the notes that he used in the January 25 meeting, and that he wrote the words, “No paid time contact...call before coming in.” He is the one who placed Mr. Leigh on leave for no cause other than that of the alleged misconduct on January 21. His sloppy method of requiring the use of vacation time during a suspension cannot save the City from the conclusion that Mr. Allred imposed formal discipline in ignorance or contempt for the duly adopted disciplinary procedure.

1.4 Petitioner was not guilty of insubordination because Mr. Allred’s order was not given with lawful authority.

The proper definition of insubordination leads inevitable to the conclusion that Mr. Augustus did not engage in insubordination by walking out of the January 25 meeting and immediately taking a grievance to the Assistant City Manager.

³ It is remarkable that the City adopted a new, updated version of Section 12.05.050 after Mr. Augustus’ appeal, and that the language adopted appears designed to prevent the application of the prior language urged here. See attached addendum.

Section 12.05.030 of the Personnel Manual states that “insubordinate behavior” is a cause for discipline, but it offers no definition. Utah’s case law does not offer much of a definition either, other than the dissent authored by Justice Maughn in *Elwell v. Board of Ed. of Park City*: “constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.” 626 P.2d 460, 469 (Utah 1981) (quoting *Board of Trustees v. Holso*, 584 P.2d 1009, 1016 (Wyo. 1978)). This definition is consistent with a number of decisions outside the state. See, e.g., *Jackson v. Hazlehurst Mun. Separate School Dist.*, 427 So.2d 134 (Miss. 1983) (quoting *Ray v. Minneapolis Board of Ed.*, 202 N.W.2d 375 (Minn. 1972)) (“constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority”); *N. Clackamas Sch. Dist. v. Fair Dis. App. Bd.*, 567 P.2d 1091, 1092 (Or. 1977) (“an intentional and wilful refusal to obey, or disobedience of, an order or directive which a school board is authorized to give and entitled to have obeyed”); *Porter v. Pepsi-Cola Bottling Co.*, 147 S.E.2d 620, 622 (S.C. 1966) (“a wilful or intentional disregard of the lawful and reasonable instructions of the employer”); *Shockley v. Board of Educ.*, 149 A.2d 331, 334 (Dcl. Super. Ct. 1959) (reversed on other grounds, 155 A.2d 323 (Del. 1959)) (“A[n]...intentional refusal to obcy a direct or implied order, reasonable in nature, and given by and with proper authority.”); *State ex rel. Steele v. Board of Ed. of Fairfield*, 40 So.2d, 689, 695 (Ala. 1949)

("insubordination" ...unquestionably...includes the willful refusal...to obey [] reasonable rules and regulations"); *see also* Black's Law Dictionary 870 (9th ed. 2009) (defining insubordination as "[a] willful disregard of an employer's instructions" or "[a]n act of disobedience to proper authority").

The cited definitions differ in whether or not they require a continued course of conduct, but they are consistent in that they require that a superior's direction be given reasonably and with lawful authority. As discussed in the sections above, Mr. Allred held an illegal pre-disciplinary hearing and was neither reasonable nor authorized to do so.

2. THE APPEALS BOARD COMMITTED REVERSIBLE ERROR WHEN IT EXPRESSLY CONSIDERED MATTERS WELL OUTSIDE THE SCOPE OF THE NOTICE OF DISCIPLINARY ACTION.

The other, and possibly more egregious error, committed by the Appeals Board, was how it reached to all corners of the hearing testimony to find reasons to justify Mr. Augustus' termination. That is not how the statutory scheme works.

2.1 The Appeals Board was required to constrain its review to the reasons given in the notice.

An appeal board is given only limited authority in an appeal of discipline. It may only examine the evidence to determine if the reasons given in the Notice of Disciplinary Action were supported by substantial evidence, and if the imposition was within the proper discretion of the City Manager. *See Fierro v.*

Park City Muni. Corp., 2012 UT App 304, ¶¶ 25-28, 295 P.3d 696 (holding that appeal board’s decision must be set aside where it “engaged in a...free-wheeling review” rather than considering only the exact actions precisely defined in the termination memo”).

The Court of Appeals in *Fierro* made clear that the specific actions identified by the terminating official are what must be considered – not the entire episode. See *id.* at ¶ 5. That protection is necessary for an employee to have the proper benefit of his or her statutory rights. See *id.* at ¶¶ 13-16. The requirement of detailed notice is rooted in principles of due process. See *id.* at ¶ 18.

Like the termination letter in *Fierro*, the Notice of Disciplinary Action issued to Mr. Augustus conveyed “precision, formality, and finality.” *Id.* at ¶ 23. It was reasonable for Mr. Augustus to see the notice as “an official and complete accounting” of the City’s complaints against him. *Id.* The City should not have been allowed to then turn and justify Mr. Augustus’ termination on similar, but not identical violations. See *Salt Lake City v. Gallegos*, 2016 UT App 122, ¶¶ 12-13. Mr. Augustus was entitled to rely on the notice in preparing his defense.

2.2 The reasons relied on by the Appeals Board were outside the scope of the notice.

Referring to the outline given above of the conduct raised in the Notice of Disciplinary Action, as compared to the conduct identified in the Appeals Board’s decision, there are many, many more instances of misconduct identified there. While Mr. Augustus might have divined that even some of those instances might

be at issue, that is not enough to satisfy the rule established under *Fierro* and related cases. Mr. Augustus was given no notice of the great majority of them.

2.3 Mr. Augustus was harmed by the Board's error.

By holding Mr. Augustus responsible for a wide array of misbehavior that was never even considered by the City Manager, the Appeals Board deprived Mr. Augustus of a fair hearing. The entire process was biased against him, and as a result his termination was upheld.

Conclusion

Two grave mistakes were made in this case by the Appeals Board. One was technical in nature, with regard to their misunderstanding of the concept of lawful authority. The other was a blatant abuse of discretion and overstep of authority.

The decision of the Appeals Board should be set aside. If the Court sees fit to remand the case back to the Appeals Board for further consideration, then it should be with instructions to determine if Mr. Augustus' termination was warranted in the absence of the extraneous charges, and in the absence of insubordination.

DATED this 8th day of February, 2017.


Christian A. Kesselring
Attorney for Petitioner

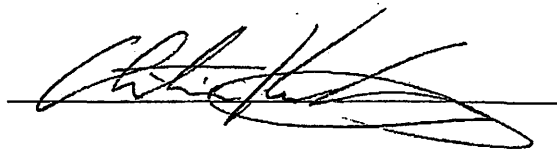
Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,089 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13-point Georgia.

DATED this 8th day of February, 2017.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be a cursive or semi-cursive script.

Certificate of Service

This is to certify that on the 8th day of February, 2017, I caused two true and correct copies of the Opening Brief of Petitioner to be served on the following via email:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format will be filed with the Court and served on Respondents, and in accordance with Utah Supreme Court Standing Order No. 11, paper copies of the brief will be filed with the Court and served on Respondents within 7 days hereof.



ADDENDUM A



MEMORANDUM

TO: Russell Augustus

FROM: Ken Bassett, City Manager

DATE: March 21, 2016

RE: *Notice of Disciplinary Action*

Dear Mr. Augustus,

On Friday, March 4, 2016, at 9:00 a.m. a pre-disciplinary hearing was held at the Vernal City office at 374 East Main regarding alleged violations of the Vernal City policies and procedures manual. This pre-disciplinary hearing was scheduled to allow you the opportunity to respond to allegations that you violated provisions of this manual, specifically:

1. 12.05.030 (D) Inefficiency or inability to satisfactorily perform assigned duties; (M) Misusing, destroying or damaging any City property or the property of any employee; and (N) Deliberately restricting output;
2. 12.05.030 (W) Act of Dishonesty related to job performance.
3. 12.05.030 (AA) Displaying insubordinate behavior;
4. 12.05.030 (A) A violation of any of the City Personnel Policies or Procedures or any other administrative policies as adopted by resolution of the Vernal City Council (not having your cell phone available as required by the cell phone use agreement dated April 22, 2013 and cell phone policy of the City, and 12.05.030 (W) Act of dishonesty related to job performance.

Notice of Decision:

Incident #1 / Violation #1. January 21, 2016: In the pre-disciplinary hearing notice, it was alleged that on the afternoon of January 21, 2016 both you (driving) and Michael Leigh, (passenger), were observed traveling on 1500 East adjacent to the City yard (Sumpsons) in the City bucket truck. At this particular time, however, you had been given previous direction that your task to be performed was located on the west end of the City on Highway 40 associated with the banners. Also, at this time as you were on 1500 East adjacent to the City yard it was observed that you were either taking photographs or video of an employee who was at that time located in that yard, specifically BJ Partridge. There had been no direction given to you be in that area of the City while, in fact, you should have been working on your job duties assigned with the banners on west Highway 40.

Mr. Augustus, based on the information from the pre-disciplinary hearing, the transcription of the interview which you had with Mr. Allred on January 25th, your work time sheets specifically for January 24th and your job description for the position of Street Equipment Operator II, I have determined that the allegations so stated in incident #1 and Violation #1 are substantiated.

Your work assignment, working with Mr. Michael Leigh on January 21st, was that of putting up banners on Main Street and Highway 40 working with Jeff Gardner, who was supervising that project. You had been working on the west end of Highway 40 that morning. The bucket truck which you were using had some operation problems, and you and Mr. Leigh returned the bucket truck to Motor Pool for repairs. Later in the day after lunch, you and Mr. Leigh took the bucket truck, after it had been repaired, fueled it, and immediately proceeded to go to the 1500 East yard, (Sumpsons) at which time you stopped and purposely took pictures of BJ Partridge who was operating the loader at that site.

In the pre-disciplinary hearing, it was noted that during the interview which you had with Mr. Allred on January 25th, you could not remember whether or not you had gone to the 1500 East yard or whether you had, at that time, taken photographs / video of Mr. Partridge working at that site. At the pre-disciplinary hearing held on March 4th, however, you did remember that you did make that trip in the bucket truck with Mr. Leigh for the purpose of taking pictures of Mr. Partridge working there at the 1500 East yard. It was represented during the pre-disciplinary hearing on March 4th that you were tired, and that you had worked many hours the day before, and that possibly was the reason why you could not remember going to 1500 East. I determined, however, that on the evening of January 24, 2016 you finished the snow plowing responsibilities that you had and left work at approximately 7:30 p.m. after having worked 14 hours snow plowing. I have concluded that this was certainly ample time to get the sleep that you needed before you came to work the next morning on January 25th. I do not accept your reasoning that you could not remember going to the 1500 East yard or remember that you took photographs / video simply because you were fatigued because of the hours that you had worked the day before.

It was further represented during the pre-disciplinary hearing on March 4th that your reasoning for going to the 1500 East yard in the afternoon, after lunch, in the bucket truck for the purpose of observing Mr. Partridge operating the loader was consistent with your job description assignments as "a supervisor". The Vernal City job description for a Streets Equipment Operator II indicates "acts as lead worker or supervisor as required during construction and maintenance projects or in the absence of the street superintendent". Specifically, regarding you going to the 1500 East yard

and taking pictures / video, these were not required supervisory activities for that day, the street superintendent was not absent that day, nor had anyone asked or required you to supervise any aspect of your job assignment for that particular day. Your assigned duties dealing with the banners and working with Mr. Gardner had been given at the beginning of the work day; however, it was your decision to go to the 1500 East yard simply to take pictures of Mr. Partridge operating the loader. In doing so, you took Mr. Leigh away from his assigned duties, as well as operating a piece of Vernal City equipment (the bucket truck) for a purpose that was not part of your work duties that particular day.

Mr. Augustus, I therefore find that you were not satisfactorily performing your assigned job duties, that you were misusing City equipment (the bucket truck) for a purpose that was not part of your assigned duties, and that you were also restricting the output of a fellow employee, Michael Leigh, by not performing your assigned duties.

Incident #2 / Violation #2. *On Monday, January 25th at approximately 3:15 pm you were asked to be in a meeting with your supervisor Glade Allred. You attended that meeting at which time Mr. Allred proceeded to ask you several questions regarding previous incidents which had occurred as part of your performance, one of which included you driving in the bucket truck on Thursday, January 21st with Michael Leigh in the vehicle with you. During the meeting Mr. Allred asked you specifically if you had, in fact, driven the bucket truck to the 1500 East lot in the afternoon. You indicated to him that you could not remember, when in fact, witness statements from two individuals indicated that you had indeed driven along 1500 East by the City yard (Sumpions) taking pictures or videos.*

I will state as I stated above, in Incident #1, Violation #1:

In the pre-disciplinary hearing it was noted that during the interview which you had with Mr. Allred on January 25th you could not remember whether or not you had gone to the 1500 East yard or whether you had, at that time, taken photographs / video of Mr. Partridge working at that site. At the pre-disciplinary hearing held on March 4th, however, you did remember that you made that trip in the bucket truck with Mr. Leigh for the purpose of taking pictures of Mr. Partridge working there at the 1500 East yard. It was represented during the pre-disciplinary hearing that you were tired and that you had worked many hours the day before and that possibly was the reason that you could not remember going to 1500 East. I determined that on the evening of January 24, 2016 you finished the snow plowing responsibilities that you had and left work at approximately 7:00 pm – 7:30 pm after having worked 14 hours snow plowing. I have concluded that this was ample time to get the sleep that you needed before you came to work the next morning on January 25th. I do not accept your reasoning that you could not remember going to the 1500 East yard, or remember that you took photographs / video simply because you were fatigued because of the hours that you had worked the day before.

Mr. Augustus, based on the information from the pre-disciplinary hearing, the transcription of the interview which you had with Mr. Allred on January 25th, your work time sheets specifically for January 25th, I have determined that the allegations so stated in Incident #2 / Violation #2 are substantiated.

Incident #3 / Violation #3. *On January 25, 2016 you were asked to attend a meeting in Glade Allred's office, your supervisor. You attended that meeting, however, during the course of that meeting you indicated that you were going to leave. Mr. Allred asked you to stay because the meeting was not yet completed, but you left anyway. Mr. Allred indicated to you that leaving the meeting could constitute cause for disciplinary action up to and including termination of your employment.*

After reviewing both the information from the pre-disciplinary hearing as well as the transcription of the interview which you had with Mr. Allred on January 25th, I have determined the allegations in Incident #3 and Violation #3 are substantiated.

Mr. Allred had indicated to you during the interview that although you communicated your intent to leave prior to the interview being completed, he said you should not leave until he said that you were allowed to leave. Further, the transcription indicates that Mr. Allred indicated that if you did leave, your action of leaving without being invited to leave would be an act of insubordination that would be followed up with disciplinary action up to and including termination of your employment. Although the transcription of the tape shows that you and Mr. Allred were talking over each other during this part of the discussion, the tape does indicate Mr. Allred's comment "up to and including termination". You indicated during the pre-disciplinary hearing that you did not hear that, although in the transcription of the tape, you responded to Mr. Allred after he had asked you to stay with the statement "have fun with that". I conclude that you did receive warning from Mr. Allred that disciplinary action would be taken up to and including termination of your employment. I find that your statement that you were not aware of Mr. Allred's directive not to leave his office is directly contrary to your following statement "have fun with that", indicating to me that you were not being honest in your answers given in the pre-disciplinary hearing.

Incident #4 / Violation #4. *On January 25, 2016 Mr. Glade Allred attempted to call you on your cell phone. Later in the morning you appeared in Mr. Allred's office who indicated to you that he had been trying to get a hold of you on your cell phone. You indicated to him that "I haven't had my cell phone". However, it has been documented that you texted Sherri Montgomery that same morning at 9:26 am, and several texts through 10:01 am on that very morning on your cell phone showing that you did, in fact, have your cell phone with you.*

The personnel manual of the City regarding the cell phone policy is as follows:

9.05.040 – Employee responsibilities. Any employee of the City receiving either a cell phone allowance or a City issued cell phone will sign the City cell phone use / and or allowance request form thereby certifying that he or she will provide their phone number within five days of activation and will be available for calls (in possession of the phone and have it turned on) when it may be required to be available for City business. If not available to receive calls or transmit calls, the employee shall so notify his department head.

The Vernal City cell phone allowance and use agreement which you signed on April 22, 2013 indicates that you agreed to abide by all regulations in the Vernal City personnel policies and procedures manual pertaining to the use of the cell phone.

Specifically, regarding incident #4 on January 25th, you indicated to Mr. Allred in the meeting with him that "I haven't had my cell phone." Further, during the interview with Mr. Allred, you indicated "my phone has been off all day."

During the pre-disciplinary hearing, you did acknowledge that you had texted Sherri Montgomery and she had texted you the morning of January 25th. In fact, Ms. Montgomery indicated during the pre-disciplinary hearing that that had occurred between 9:26 am and 10:01 am.

During the pre-disciplinary hearing, you had submitted a phone log from January 25th produced by Strata Networks showing that you had not received a phone call from Mr. Allred or any texts from Ms. Montgomery. During the pre-disciplinary hearing the record shows that you were asked to produce a more complete phone log from Strata Networks. The City did receive an e-mail from Mr. Kesselring, your attorney, indicating that you were having difficulty getting that record from Strata. Mr. Harrington responded to Mr. Kesselring indicating to him specific directions as to how you might obtain that record and if you couldn't to further give Mr. Harrington a call and he would see if he could follow through with the request. Mr. Kesselring did respond indicating that no further detail of your phone log could be obtained without providing a subpoena. I do have evidence, however, showing that Mr. Allred did try to get a hold of you the morning of January 25th, and also that Ms. Montgomery did text you and you texted her back on January 25th. I conclude, therefore, that you did have your phone during the morning of January 25th and that you had been using your phone during the morning of January 25th. However, it was your choice not to answer the phone call from Mr. Allred during the morning of January 25th.

After reviewing the information from the pre-disciplinary hearing, the transcription of the interview which you had with Mr. Allred on January 25th, the phone records of Mr. Allred and Ms. Montgomery, and your own phone logs submitted at the hearing, I have determined that the allegations in Incident #4 and Violation #4 are substantiated.

Decision for Disciplinary Action: Based on the substantiation of the violations of Vernal City personnel policies and procedures manual as noted above and after considering your responses to the above allegations during the pre-disciplinary hearing, I have determined that the allegations as listed above are, in fact, substantiated and as a result of this substantiation of these violations it is my decision to terminate your employment with Vernal City effective immediately.

In accordance with Utah State law and Vernal City policy, you have the right to file a formal appeal of your termination of employment to the Vernal City Council who serves as the Appeals Board of the City following the exhaustion of the grievance procedures as established by Vernal City personnel policies Chapter 16. Such appeals shall be filed with the City Recorder within ten (10) days after completing the grievance procedure. Please contact me or Roxanne Behunin if there are any questions regarding the process to file an appeal of this decision. Enclosed for your reference is a copy of the Utah State code 10-3-1106 and Vernal City Code 2.80.020 - 2.80.025 which more specifically outlines the appeals process.

In processing your termination of employment, several documents will need to be provided. We will make these available to you. The prompt execution of these documents would be appreciated. Please note that health and dental benefits will continue through March 31, 2016. Your final paycheck will be issued within 72 hours of you submitting a final time sheet.

Ken Bassett
Ken Bassett, City Manager

3/21/16
Date

Signature of Russell Augustus
Receipt of Disciplinary Notice

Date

cc: personnel file

ADDENDUM B

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BEFORE THE PERSONNEL APPEALS BOARD
VERNAL CITY COUNCIL, VERNAL CITY
UINTAH COUNTY, STATE OF UTAH

IN THE APPEAL OF RUSSEL AUGUSTUS	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE: TERMINATION APPEAL
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Background:

Russell Augustus, the Appellant, appealed the decision of the City Manager, which was issued following a pre-disciplinary hearing held March 4, 2016 in the Vernal City administrative conference room.

The Appellant was given notice of the pre-disciplinary hearing on January 29, 2016.

The Appellant was present at the pre-disciplinary hearing along with his attorney, Christian Kesselring. The City was represented by Mike Harrington.

Witnesses were called and testified at that pre-disciplinary hearing and the Appellant had an opportunity to present his response to the issues raised by the pre-disciplinary hearing notice.

The reasons for potential disciplinary action were outlined in the notice of the hearing and were reviewed again at the beginning of the pre-disciplinary hearing by the hearing officer Kenneth Bassett.

A written decision and notice of disciplinary action was issued by Ken Bassett following the hearing, in which he reviewed each of the charges, and outlined briefly the findings, and found that each of the allegations were substantiated.

The employee/Appellant, was advised by a written Notice of Disciplinary Action dated March 21, 2016 that based upon the substantiated violations, his employment with Vernal City was terminated effective immediately.

Mr. Augustus, the Appellant, through his attorney, filed a Notice of Appeal dated March 30, 2016.

By stipulation the parties agreed that the hearing before the Appeal Board would be held beginning at 4:30 PM on May 3, 2016 in the Vernal City Council Chambers.

The Appellant was present, represented by his attorney Christian Kesselring, the City was represented by Michael Harrington. The Board was assisted by its legal advisor Dennis L. Judd.

Each of the parties identified the witnesses they intended to call and those witnesses were sworn and the Hearing Board invoked the exclusionary rule.

The following witnesses were called and examined:

Called by the City:

Glade Allred
Ken Bassett
BJ Partridge
Leon Morris
Rick Green
Sherri Montgomery
Russell Augustus

Called by Appellant:

Michael Leigh
Russell Augustus
Clay Simmons
Rick Green
~~Ryan Blackburn~~
~~Joseph Harrison~~
Ken Bassett
Glade Allred

The parties stipulated to the admission of a packet of exhibits from each party.

Near the end of the hearing counsel for the parties requested an opportunity to submit a brief on several legal issues which the Hearing Board agreed to allow with the briefs to be submitted by May 10, 2016. Those briefs were submitted and were considered by the Board prior to voting and making its decision.

At the conclusion of the hearing the Board met briefly to deliberate but, due to the lateness of the hour, adjourned the meeting and deliberations and agreed to resume deliberations on May 9th, 2016 at 8:00 PM to allow the Board an opportunity to review all of the exhibits and carefully consider the testimony and evidence presented.

The Board met on May 9, 2016 but had not yet received the briefs from the parties and after deliberating and discussing the evidence further, adjourned the meeting until May 16, 2016, at 6:00 PM to allow opportunity to consider the briefs before making a final decision.

Each of the Board members has carefully considered the testimony and evidence presented at the hearing, as well as the exhibits submitted by the parties by stipulation, and has listened to the recording of the meeting between the Appellant and his department head Glade Allred on January 25, 2016, the pre-disciplinary hearing transcript, and has considered not only the words spoken but the demeanor and tone of voice of the Appellant and other witnesses from the hearing before the Board and the meeting on January 25, 2016.

The Board has considered the briefs submitted by each of the parties.

The Board considered the proposed ballot and the comments made by counsel for each party regarding the ballot and adopted the ballot prepared by the legal counsel for the Board, a copy of which is attached.

The standard of review used by the Board in considering the actions and decision of the City Manager to terminate the Appellant is abuse of discretion with the evidentiary standard of substantial evidence being required to support the basis of the decision.

Four (4) reasons or policy violations were noted in the Notice of Pre-Disciplinary Hearing and in the Notice of Disciplinary Action. They were:

1. Inefficiency or inability to satisfactorily perform assigned duties; misusing, destroying, or damaging any city property, or the property of any employee; deliberately restricting output;
2. Dishonesty related to job performance;
3. Insubordination; and
4. Violation of city personnel policies or procedures, including the cell phone policy.

Having considered the documents filed with the Board, the evidence and the arguments, and now being fully informed,

The Board Finds That:

A. Regarding the charge of "inefficiency or inability to satisfactorily perform assigned duties; misusing, destroying, or damaging any city property, or the property of any employee; deliberately restricting output";

1. On January 21, 2016 the Appellant was assigned to place

banners on poles on the west side of the city under the direction of Jeff Gardner, who was the designated supervisor of that project. Mr. Augustus was operating a bucket truck owned by the city.

2. Later in the morning, the bucket truck experienced mechanical problems and was returned to motor pool for repairs. While the bucket truck was being repaired, the Appellant drove a city pickup truck to the 1500 East Yard, reportedly to check on the repair of a water line leak, and, as he was driving away from that location with Mr. Leigh as a passenger, had a conversation with his supervisor Mr. Allred.

3. After lunch the Appellant took the bucket truck with Mr. Michael Leigh, another city equipment operator, as a passenger, fueled the truck, and then proceeded down 500 North, turning South on 1500 East to pass by the 1500 East Yard. The Appellant claims that his purpose in taking that route was to fix banners on the east side of town that Mr. Leigh had earlier installed incorrectly. There is no evidence that Mr. Gardner or Mr. Allred approved diverting equipment and personnel from the west side of town to the east side of town.

4. The Board finds that the real reason for the diversion was that the Appellant desired to drive by the 1500 East Yard to video another city employee, BJ Partridge, who was testing a piece of city equipment at that yard, as assigned by Mr. Allred.

5. The video was taken using the Appellant's cell phone, which is a city subsidized cell phone, and as such is subject to city cell phone policy.

6. It appears from the video that the Appellant introduced at the hearing, that the Appellant was driving the city bucket truck while videoing with his cell phone, which is an unsafe and illegal practice. During the meeting between Mr. Augustus and Mr. Allred on January 25, Mr. Augustus refused to answer questions about where he took the bucket truck after lunch and claimed several times that he returned to the west side of the city to work on banners as he had been assigned. In subsequent proceedings, the Appellant admitted that that was not true.

7. The Appellant later claimed that the purpose of the video was safety concerns, however the Board finds that the video was never provided to his department head in spite of a request that he do so, nor was it provided to anyone else in the city administration until the hearing before the Appeals Board. The Board finds that the Appellants statements regarding the video are false.

8. The Board notes that when questioned by his supervisor, Glade Allred, several days after the incident the Appellant was very evasive and was not truthful about the purpose of his going by the 1500 East Yard.

9. Mr. Augustus's claims about the reason for his taking the video lack credibility for at least the following reasons:

a. If he was concerned about safety of persons or equipment he should have immediately provided the video to Mr. Allred or to Allen Parker or Ken Bassett, which he did not do and in fact refused to provide the video;

b. He was evasive and untruthful about having taken the video, and the purposes of the video; it appears from the video that was provided that he was driving by the yard while taking the video rather than stopping in a safe manner to take the video and reporting his concerns immediately to appropriate city officials;

c. He failed and refused to provide the video to his supervisor when directly requested to do so, and claimed during the meeting that he did not have his cell phone and did not know where it was, which is a violation of city policy.

10. The charges in Count one are established by substantial evidence.

11. The Appellant was operating a large piece of city equipment in an area where he should not have been, occupying the time of that equipment and the time of himself and another city employee, engaging in activity which he apparently felt uncomfortable in reporting or admitting to his supervisor when questioned, at a time when he had been assigned to work at the opposite end of the city.

12. The Appellant's conduct wasted city resources and placed the city at risk and was contrary to his assigned work area.

13. Mr. Augustus's statements regarding the incident lack any credibility.

B. Regarding the charge of "dishonesty related to job performance":

1. The Board, having reviewed the transcript of the meeting between Mr. Augustus and his department head Mr. Allred, and having heard the tone of voice and the evasiveness evidenced in that interview, and based upon the hearing testimony and exhibits, finds that the Appellant was dishonest in his statements and explanations concerning his activities on January 21, 2015, including the reason for taking the city bucket truck and another city employee to 1500 East and in his stated reasons for videoing Mr. Partridge.

2. The Appellant refused to acknowledge videoing a fellow city employee operating a piece of city equipment, was evasive, and avoided or refused to answer direct questions concerning the incident.

3. The Appellant stated that he would provide a copy of the video when he finally acknowledged that he had it, which he failed to do.

4. The Appellant falsely stated that his concern was the safety of an employee or equipment which, as outlined above, lacks any credibility.

5. At the hearing before the Appeals Board, the Board observed Mr. Augustus, both while he was testifying and when he was not testifying, and finds that his answers to questions propounded by the attorney for the city were evasive, that his demeanor evidenced lack of truthfulness, and that based upon his actions and statements in the recorded conversation with his supervisor and his testimony at the hearing it is difficult to afford any degree of credibility to the statements made by the Appellant.

6. The Board finds that there is substantial evidence to support the finding that the Appellant was dishonest:

a. He stated that he could not remember or had not gone by the 1500 East Yard;

b. He claimed that he had returned to work putting up banners on the west side of the city, traveling along 100 North;

c. He claimed that he did not have his telephone when Mr. Allred attempted to contact him on January 25;

d. He stated that his purpose in going by the 1500 East yard was solely to fix banners on the East side of the city.

e. When questioned during his meeting with his supervisor and at the hearing about matters that he did not want to admit to or discuss, Mr. Augustus was deceptive and claimed he couldn't remember, yet on the same dates he appeared to have a very vivid recollection when it served his interests;

f. The Board finds the testimony of Ricky Green, who reported Mr. Augustus to be dishonest to be credible; and

g. Mr. Augustus changed his story repeatedly, and omitted facts and feigned lack of memory. Mr. Augustus also made misleading statements about his use of city equipment and about the video, and made dishonest statements about taking the video and about the purpose of the video.

C. Regarding the charge of "insubordination":

1. The Board has reviewed the transcript and listened to the recording of the meeting between the Appellant and his department head Mr. Allred on January 25, 2016, and finds that there is more than substantial evidence to show that the Appellant was

insubordinate throughout the meeting with his supervisor.

2. The Appellant's general tone of voice, attitude, tapping of a marker on the table, and refusal and failure to answer questions honestly and directly demonstrated a lack of respect for his supervisor.

3. The Appellant was evasive, refused to answer questions, was disrespectful, ordered the supervisor to "move on" after evading questions, cursed, and ultimately walked out of the meeting after being specifically and clearly directed by his supervisor to remain in the meeting. Moreover, he did walk out after being advised that refusal to remain in the meeting would be considered insubordination and may result in his termination.

4. The Appellant's disrespectful retort as he left the meeting "good luck with that" further illustrates a series of disrespectful and insubordinate statements and conduct by the Appellant during that meeting toward his supervisor, which is illustrated to some degree by the transcript but more forcefully by the audio recording of the meeting.

5. The Board is convinced that the purpose of the Appellant's video on the east side of the city on January 21, when he was assigned to work on the west side of the city, was not motivated by a safety concern but rather was an effort to undermine and get information to damage his department head.

6. The Appellant's attitude during the meeting with Mr. Allred was insubordinate, confrontational, dishonest, and disrespectful.

7. At no time following that meeting did the Appellant make any effort to apologize to his supervisor or to demonstrate any willingness or desire to work cooperatively with his supervisor or make any effort to resolve any concerns or differences.

8. Had the Appellant's attitude following that meeting up to and through the hearing before the Board been different or more cooperative or upfront and honest the result might well have been different. Instead the Appellant has remained defiant, aggressive and dishonest.

9. In the meeting with Mr. Allred, the Appellant was requested at least twice to provide a copy of the video that he took while driving the city truck, yet he did not provide that until played for the first time at the hearing before the Appeals Board. During his testimony before the Appeals Board he claimed no one asked for the video which is a clear act of dishonesty and false statement under oath before the Appeals Board, as shown by the audio recording and transcription of that meeting.

10. From all of the evidence, including the transcripts and recording of the interview with his supervisor through the

hearing before the Appeals Board, the Board finds that Mr. Augustus's actions have been targeted towards undermining his supervisor so that he could take over the Department.

11. Mr. Augustus's statements about his not having his phone available when his supervisor was attempting to contact him are untruthful and also insubordinate. It is clear that he had his telephone available since he made use of it, yet he failed to answer calls from his supervisor or to return calls that had been made to him.

12. The Appellant was untruthful in claiming that his texts with Sherri Montgomery were during his break since the time line of those texts demonstrates a period in excess of a normal break.

13. The Appellant is dishonest and insubordinate in refusing to admit his activities, lying about his activities, and failing to acknowledge his fault and misconduct when he made a mistake. His attitude throughout has been to cast blame on others but not to take any responsibility himself.

14. The lack of respect for his supervisor is not only demonstrated by the transcripts and recordings prior to the hearing, but the Board notes, his facial expressions, demeanor and behavior at the hearing when answering questions regarding the events and during the testimony of Mr. Allred including smirking, rolling his eyes and other conduct and expressions further confirms a lack of respect and an insubordinate attitude.

15. A continuing attitude of insubordination and disrespect was also demonstrated and observed by the Board during the hearing. During the testimony of Mr. Bassett, Mr. Augustus was observed to glare at the witness and rolled his eyes, and acted in a hostile and disrespectful manner.

16. The Vernal City Road Department is a fairly small department with a limited number of employees. The actions of Mr. Augustus show that he is not amenable to supervision and cannot work there under the direction of the department head, Mr. Allred. This results in part from his insubordination and his dishonesty in dealing with his department head and with others and from the fact that he has not made any effort to resolve the issues or acknowledge his misconduct. Even at the hearing it was apparent that he retains a defiant, disrespectful attitude, and has no willingness to acknowledge his own errors. Any discipline less than termination would not bring about needed change. The Appellant's return to the road department would be detrimental to the morale, productivity, and operation of the department, and would undermine the ability of Mr. Allred to manage the employees.

D. Regarding the charge of "violation of city personnel policies or procedures, including the cell phone policy":

1. There is substantial evidence that the Appellant violated the City's cell phone policies and procedures as indicated in the Notice of Disciplinary Action and as outlined in the findings set forth above. The City Manager did not abuse his discretion in finding violations of the personnel policies including cell phone policy.

E. Regarding issues raised in briefs:

1. A supervisor has the right and the responsibility to look into concerns that arise about an employee and to investigate. That investigation may include interviewing or questioning the employee or other witnesses. Such a meeting is part of the supervisory responsibility of the supervisor or department head, and is not a pre-discipline hearing, even if the supervisor has outlined a list of questions or issues of concern prior to the meeting. Meeting with the Appellant to give him an opportunity to explain what had transpired on January 21 was proper, and the fact that Mr. Allred had outlined some possible questions as part of his fact-finding pursuit does not undermine his credibility, as suggested by the Appellant's brief.

2. According to the Appellant's brief both Mr. Leigh and Mr. Augustus were questioned by their supervisor on January 25th about the same incidents and both were instructed to take some paid vacation time. Apparently Mr. Leigh responded differently to the meeting with his supervisor than Mr. Augustus such that he was not terminated. As outlined above, Mr. Augustus's attitude and behavior took him down an entirely different road.

3. Insubordination.

a. The Board finds that Mr. Augustus behavior, statements, and actions demonstrate that when he ignored the directions to help finish installing banners on the west side of the city and instead drove the city bucket truck and another city employee to the east side of the city and passed the yard while taking video with his city subsidized phone, his intent was to undermine his department head, Mr. Allred. The video that he took of another employee operating the city equipment, which was provided for the first time at the hearing before the Appeals Board demonstrates that he was unsafely operating the city bucket truck by videoing while driving, and it appears that he had planned in advance to take the video and had manipulated his phone while driving and prior to reaching the yard.

b. The claims made by the Appellant that the purpose of videoing was to address a safety concern is entirely contradicted by his failure to provide that video to anyone in the city or to report his concerns to his supervisor or other city officials.

c. In fact, Mr. Augustus went out of his way to avoid admitting that he had taken the video during his meeting with his supervisor and failed and refused in spite of repeated requests



to provide the video taken on the city subsidized cell phone. In so doing he violated city policy and contradicted any argument that he undertook that activity for a legitimate purpose. When interviewed several days later about the events on the day that Mr. Augustus took the video with his cell phone, he claimed no memory of that particular event but had good recall of the other events of that same day. If he had a legitimate concern about safety issues, it is not credible to believe that he would remember other insignificant events of the day but lack recall as to that matter.

d. During the interview with Mr. Allred, the Appellant was evasive and defensive and aggressive when questioned on those matters.

e. During his testimony before the hearing Board when questioned by opposing counsel about those matters he once again reacted in an evasive, confrontational manner.

f. During questioning by opposing counsel about matters discussed during the staff or safety meeting early in the day the Appellant admitted that he missed a portion of the meeting to take a personal phone call, yet insisted that he had a better knowledge of everything that was discussed during that meeting than his supervisor who was present for the entire meeting. Moreover, the Appellant became intransigent and his behavior and attitude on the stand was consistent with the tone of the recording of his interview with Mr. Allred and evidenced lack of credibility.

g. The events from January 21, 2016, and the attitude and behavior of the Appellant from that time through the conclusion of the evidentiary hearing demonstrate more interest in undermining his supervisor and no evidence whatsoever of any effort or desire to work cooperatively within the Department structure or chain of command.

h. The Appellant's attitude, nonverbal displays, and facial expressions during the hearing on the stand were disturbing and pronounced and reflect an attitude, disrespect, and a disregard for truth.

i. The Appellant's statement as he left the meeting with his supervisor in blatant disregard of the instruction that he remain at the meeting - the comment "good luck with that" - is consistent with the attitude and actions displayed at the evidentiary hearing before the Board. The "good luck with that" attitude which remains unchanged shows that he cannot work effectively under the supervision of the road department head, and that his continuing presence there and insolent attitude would be disruptive to the good order and efficient operation of the entire department.

j. Had the Appellant at any time prior to the

pre-disciplinary hearing or even during the evidentiary hearing demonstrated through his words and demeanor and behavior any change of attitude, recognition of his misconduct, any desire to mend fences and work cooperatively with his supervisor and within the structure of the department as a positive productive employee the outcome might well be different.

4. Authority to Issue Order.

a. The Appellant has not provided any substantial evidence that Mr. Allred did not have proper authority to direct him to remain at the meeting. It is within the inherent authority of a supervisor to inquire into issues of concern relating to an employee and to request information from the employee as part of that process. The nature of the work for which the Appellant is employed frequently requires work beyond a specific quitting time.

b. Even if the Appellant were on an eight (8) hour day schedule he had missed several hours that day for personal business, and the supervisor could require him to stay.

c. The Department head did not order Mr. Augustus to remain in the meeting for the purpose of providing "a foot massage" but rather in an attempt to pierce the intransigent refusal of the Appellant to honestly and directly answer questions propounded by his supervisor.

d. The Board believes that is a proper exercise of supervisory responsibility and authority.

5. Paid Vacation Time.

a. Testimony at the hearing shows that the policy and long-standing practice at the city has been that department heads may, under appropriate circumstances, require an employee to take several days of vacation. This may be to allow the employee to deal with personal issues, or it may be to allow an employee time to cool off or settle down. That is paid time off. The direction to Mr. Augustus to take vacation time was consistent with that policy and practice. In light of the behavior and attitude of the Appellant, Mr. Augustus, the direction to take some paid vacation time off was advisable, and was not an abuse of discretion nor did it exceed the authority of the supervisor.

b. The application and imposition of paid vacation time was allowed pursuant to city policies section 5.01.010 and action 5.01.060, including the provision that "as he deems necessary, a department head may require an employee to use any accrued vacation leave." The application and interpretation of that policy by the department head and the city manager is consistent with long-standing application and interpretation of that policy, and the Appellant did not present any substantial evidence to the contrary.

F. Regarding ballot issues:

1. Pre-Disciplinary Procedures.

a. Prior to imposing any discipline involving a suspension without pay for more than two (2) days, termination, transfer to a position of lesser pay for disciplinary reasons etc. as defined by state statute, a notice of a pre-disciplinary hearing including at least a brief outline of the charges or allegations against the employee is required. A sufficient notice of pre-disciplinary hearing was provided to the Appellant and he was given notice or an outline of the allegations against him and ample opportunity to prepare for that hearing. A hearing was conducted at which he was represented by counsel and had an opportunity to present his response to the allegations as well as to question witnesses against him. No discipline which is subject to the provisions of Utah Code Ann. Section 10-3-1105 and 1106 was imposed prior to notice and the pre-disciplinary hearing. Paid leave or vacation does not require a pre-disciplinary hearing.

b. It is noted that Mr. Augustus repeatedly claimed during the hearing that he was a supervisor or second-in-command under the Department Head in the road department. Pursuant to Utah Code Annotated section 10-3-1105 (2)(c) (vi) and (vii), a person in that position, i.e. a deputy head of a municipal department or division or a superintendent, may be an at will employee not entitled to the procedural protections outlined in the statute and the city ordinance.

2. Disparity of Discipline.

a. At the evidentiary hearing the defendant asked questions about several other non-road department employees whose discipline was less than termination. The evidence shows that each of those other employees demonstrated an entirely different attitude when confronted with their mistakes and were willing to acknowledge that they needed to change and committed to improved behavior or performance. None of the other situations presented demonstrated a continuing defiance and disrespectful attitude and for that reason among others none of those cases are comparable to the present case of Mr. Augustus.

b. The Appellant failed to present any substantial evidence that he has been treated disparately and he has failed to meet his burden in that regard.

3. Proportionality.

a. The Appellant has failed to present any evidence that his discipline is disproportionate to the violations of policy which the Board finds he committed. The Board unanimously finds that the City Manager did not abuse his discretion in imposing the discipline of termination in light of all of the

facts and circumstances. The Board is overwhelmingly convinced based upon its observations of Mr. Augustus during the hearing, his testimony at the hearing, and his attitude and statements during his meeting with his supervisor and his inconsistent statements arising from the pre-disciplinary hearing that he lacks credibility, that he is dishonest, and that he was and remains insubordinate. In general Mr. Augustus was the most compelling witness against himself.

G. The Board unanimously finds that the facts support the charges made against the Appellant.

H. The Board unanimously finds that the charges warrant the sanction imposed and that the disciplinary action of termination should be sustained and that the City Manager did not abuse his discretion in imposing the sanction of termination. In connection therewith, the Board has considered as requested by the Appellant whether the sanction imposed was proportionate to the offense and whether or not the sanction is consistent with sanctions imposed against other employees for similar conduct.

I. The Board makes the determination and finding that in light of the particularly serious violations of dishonesty and insubordination combined with the other violations including inefficiency, misusing city property, deliberately restricting output, violation of the cell phone policy that the sanction of termination is not an abuse of discretion.

J. The Appellant has not demonstrated that the sanction of termination is inconsistent with sanctions imposed against other employees for similar conduct.

The Board Concludes That:

A. The claims of the Appellant that he is a supervisor or second-in-command in the road Department may render him an at will employee pursuant to Utah Code Ann. Section 10-31105(2) (vi) and (iiv).

B. Notwithstanding that claim, the Appellant has been afforded full due process consistent with the case law of the United States Supreme Court and the appellate courts of the State of Utah and State statute and city ordinance.

C. The Appellant was given notice of a pre-disciplinary hearing which sufficiently outlined the alleged misconduct and violations of Vernal City personnel policies and procedures.

D. The Appellant was given more than a month to prepare for the pre-disciplinary hearing, which was held on March 4, 2016.

E. At that hearing, the Appellant was represented by capable counsel, and he had an opportunity to present testimony and evidence in response to those allegations and to question

witnesses against him.

F. The City Manager conducted the hearing and made his determination in light of the facts and information presented and the applicable policies and standards of the city. The standard of review of that decision is abuse of discretion.

G. Mr. Augustus timely filed his Notice of Appeal and alleged that the City Manager's findings were not supported by the evidence and that the decision to impose the penalty of termination for the misconduct was arbitrary and capricious and denied Mr. Augustus due process rights.

H. The Board has reviewed the decision of the City Manager first to determine if the findings are supported by the evidence. The findings are each supported by substantial evidence.

I. The Board has reviewed the decision of the City Manager to determine if there was an abuse of discretion and if the City Manager acted in an arbitrary and capricious manner, thereby denying Mr. Augustus his due process rights. The Board finds that the City Manager (1) did not abuse his discretion, (2) did not act in an arbitrary and capricious manner, and (3) did not deny Mr. Augustus's due process rights under state and federal law.

J. Both substantive and procedural due process was afforded to the Appellant throughout the proceedings.

K. Mr. Augustus was provided with adequate notice, prior to termination or any loss of income, was provided with ample opportunity to prepare, and was afforded a pre-disciplinary hearing where he was represented by counsel.

L. The Appellant was afforded an appeal at a time he stipulated to and during which he was ably represented by capable and effective legal counsel and was allowed to call all of the witnesses that he wished and to cross examine all of the witnesses called by the city.

M. The Appellant was afforded the opportunity to submit any exhibits that he wished for consideration by the Hearing Board and to submit a brief on certain issues, which was carefully considered by the Board.

N. From the evidence presented the Board has found a violation by the Appellant of the policies outlined in the notices and in the notice of termination.

O. The meeting between Mr. Allred and Mr. Augustus was an appropriate exercise of supervisory responsibility by Mr. Allred and did not require the formalities appropriate for a predisciplinary hearing.

P. The application and imposition of paid vacation time was

allowed pursuant to city policies section 5.01.010 and action 5.01.060.

Q. The conduct of Mr. Augustus at the meeting with his department head on January 21, 2016 was insubordinate. The capstone was his defiant refusal to remain in the meeting when specifically and directly instructed twice to do so by his supervisor even when he was told that refusal to remain would be insubordination and may result in his termination, the comment as he walked out the door was "good luck with that". That was not, by any means, the only insubordination during that meeting however. Listening to the recording of the meeting along with the transcript shows that the Appellant repeatedly refused to answer questions, was evasive, omitted facts, was dishonest about facts and circumstances, demonstrated a defiant and hostile attitude towards his supervisor, refused to provide the video when requested to do so after finally acknowledging its existence, and constantly and loudly tapped his pen on the desk during the conversation. Throughout that process the Department Head remained calm and did not raise his voice while the Appellant became hostile and agitated after being informed and with full knowledge that he was being recorded. Mr. Augustus never acknowledged any personal responsibility or fault or error on his part and continued to place all of the blame on Mr. Allred consistent with his apparent intentional design to undermine the authority of his department head.

R. The facts do not support a claim by the Appellant that he believed in good faith that he was entitled to leave the meeting.

S. Consistent with state law and city policy, the only disciplinary actions which invoke due process protections are: dismissal, demotion or reduction in pay, suspension of over two days without pay, or transfer to a position with less remuneration for disciplinary purposes. A meeting with the Department Head to discuss possible misconduct or a direction to take paid vacation time does not constitute formal discipline requiring approval of the City Manager for a predisciplinary hearing.

T. The Board is not constrained strictly by the rules of evidence and procedure required in judicial proceedings and was intentionally very liberal in allowing the presentation of evidence, including belaboring certain issues and lines of questioning, so as to, within reason, allow the parties to present whatever evidence they wished. Based upon the stipulation of the parties the Hearing Board also carefully studied all of the exhibits including the audio files provided and video clip in formulating its findings of fact in reaching its decision.

Decision of the Appeals Board

A. After hours of testimony at the hearing, additional hours of study of exhibits, and hours of deliberation, the Board

members each separately cast their ballots in secret. The ballots were delivered to the Deputy City Recorder/Clerk of the Hearing who opened the envelopes in the presence of the Board and counted ballots.

B. Ballot question number 1: Do the facts support the charges made by the Department head?

Five (5) ballots were marked YES
Zero (0) ballots were marked NO.

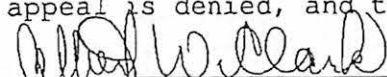
C. Ballot question number 2: If you find that the employee violated one or more of the Vernal City policies stated in the termination notice did the City Manager abuse his discretion or exceed his authority in terminating the employee?


Zero (0) ballots were marked YES
Five (5) ballots were marked NO.

D. The ballot instructed the Hearing Board members to consider the following instruction which was added pursuant to a request of the Appellant:

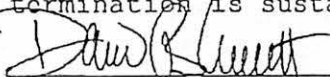
To decide if the Appellant's discipline was unwarranted, or if the City Manager abused his discretion or exceeded his authority, consider: (1) when the violations of city policy are viewed as a whole, in light of all the circumstances, is the punishment disproportionate to the offenses such that the sanction of termination is unwarranted, and (2) has the Appellant demonstrated or shown that the sanction of termination is wholly inconsistent with sanctions imposed against other employees for similar misconduct?

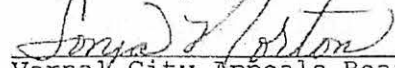
E. The unanimous decision of the Hearing Board is that the termination of the Appellant, Russell Augustus, is warranted. The appeal is denied, and the order of termination is sustained.


Vernal City Appeals Board

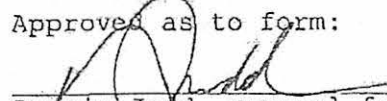

Vernal City Appeals Board

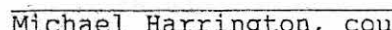

Vernal City Appeals Board

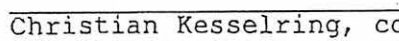

Vernal City Appeals Board


Vernal City Appeals Board

Approved as to form:


Dennis Judd, counsel for the
Appeals Board


Michael Harrington, counsel
for Vernal City


Christian Kesselring, counsel
for Appellant Russell Augustus

ADDENDUM C

§ 10-3-1106. Discharge, suspension without pay, or involuntary transfer - Appeals - Board - Procedure.

Utah Statutes

Title 10. Utah Municipal Code

Chapter 3. Municipal Government

Current through Chapter 2, 2016 Fourth Special Session

§ 10-3-1106. Discharge, suspension without pay, or involuntary transfer - Appeals - Board - Procedure

- (1) An employee to which Section 10-3-1105 applies may not be discharged, suspended without pay, or involuntarily transferred to a position with less remuneration:
 - (a) because of the employee's politics or religious belief; or
 - (b) incident to, or through changes, either in the elective officers, governing body, or heads of departments.
- (2)
 - (a) If an employee other than an employee described in Subsection 10-3-1105(2) is discharged, suspended for more than two days without pay, or involuntarily transferred from one position to another with less remuneration for any disciplinary reason, the employee may, subject to Subsection (2)(b), appeal the final decision to discharge, suspend without pay, or involuntarily transfer to an appeal board or hearing officer established under Subsection (7).
 - (b) If the municipality provides an internal grievance procedure, the employee shall exhaust the employee's rights under that grievance procedure before appealing to the appeal board or hearing officer.
- (3)
 - (a) Each appeal under Subsection (2) shall be taken by filing written notice of the appeal with the municipal recorder in accordance with procedures established by a municipality within 10 calendar days after:
 - (i) if the municipality provides an internal grievance procedure, the employee receives notice of the final disposition of the municipality's internal grievance procedure; or
 - (ii) if the municipality does not provide an internal grievance procedure, the discharge, suspension, or involuntary transfer.
 - (b)
 - (i) Upon the filing of an appeal under Subsection (3)(a), the municipal recorder

shall refer a copy of a properly filed appeal to the appeal board or hearing officer described in Subsection (7).

- (ii) Upon receipt of the referral from the municipal recorder, the appeal board or hearing officer shall schedule a hearing to take and receive evidence and fully hear and determine the matter which relates to the reason for the discharge, suspension, or transfer.

- (4) (a) An employee who is the subject of the discharge, suspension, or transfer may:
 - (i) appear in person and be represented by counsel;
 - (ii) have a hearing open to the public;
 - (iii) confront the witness whose testimony is to be considered; and
 - (iv) examine the evidence to be considered by the appeal board.
- (b) An employee or the municipality may request the hearing described in Subsection (4)(a)(ii).

- (5) (a)
 - (i) A decision of the appeal board shall be by secret ballot.
 - (ii) The appeal board or the hearing officer shall certify a decision by the appeal board or hearing officer, respectively, with the recorder no later than 15 days after the day on which the hearing is held, except as provided in Subsection (5)(a)(iii).
 - (iii) For good cause, the appeal board or hearing officer may extend the 15-day period under Subsection (5)(a)(ii) to a maximum of 60 calendar days, if the employee and municipality both consent.
- (b) If the appeal board or hearing officer finds in favor of the employee, the appeal board or hearing officer shall provide that the employee shall receive:
 - (i) the employee's salary for the period of time during which the employee is discharged or suspended without pay less any amounts the employee earned from other employment during this period of time; or
 - (ii) any deficiency in salary for the period during which the employee was transferred to a position of less remuneration.

- (6) (a) A final action or order of the appeal board or hearing officer may be reviewed by the Court of Appeals by filing with that court a petition for review.

- (b) A petition under Subsection (6)(a) shall be filed within 30 days after the issuance of the final action or order of the appeal board or hearing officer.
- (c) The Court of Appeals' review shall be:
 - (i) on the record of the appeal board or hearing officer; and
 - (ii) for the purpose of determining if the appeal board or hearing officer abused its discretion or exceeded its authority.
- (7)
 - (a) The method and manner of choosing a hearing officer or the members of the appeal board, the number of members, the designation of a hearing officer's or appeal board member's term of office, and the procedure for conducting an appeal and the standard of review shall be prescribed by the governing body of each municipality by ordinance.
 - (b) For a municipality operating under a form of government other than a council-mayor form under Chapter 3b, Part 2, Council-mayor Form of Municipal Government, an ordinance adopted under Subsection (7)(a) may provide that the governing body of the municipality shall serve as the appeal board.
- (8) This section does not apply to an employee:
 - (a) described in Subsection 10-3-1105(2); or
 - (b) discharged or transferred to a position with less remuneration if the discharge or transfer is the result of a layoff, reorganization, or other non-disciplinary reason.

Cite as Utah Code § 10-3-1106

History. Amended by Chapter 321, 2012 General Session , §3, eff. 5/8/2012.

Amended by Chapter 19, 2008 General Session

Amended by Chapter 115, 2008 General Session

Chapter 5.01 ANNUAL VACATION LEAVE

Section 5.01.010 Purpose.

The purpose of annual vacation leave is to allow an employee time to both mentally and physically refresh himself in order that he be better able to carry out the duties of his work. To achieve this goal, it is the intent of Vernal City to have the employees schedule annual vacation leave during the course of his employment. (Amended 11/03/2004, Res.2004-15)

Chapter 5.01 ANNUAL VACATION LEAVE

Section 5.01.040 Accumulation.

The maximum annual leave which can be accrued is thirty (30) days or 240 hours. Any accrued annual leave in excess of 30 days shall be forfeited on December 31st of each year.

The City Manager may approve up to a sixty (60) day extension period for the use of annual leave beyond December 31st when, in his opinion, the mandated use of such leave would create management concerns for any department of the City. (Amended 11/03/2004, Res.2004-15)

(Res. 2008-46, Amended, 12/17/2008, Prior Text)

Chapter 5.01 ANNUAL VACATION LEAVE

Section 5.01.060 Scheduling.

An employee's vacation shall be, as much as possible, scheduled for the employee's convenience. However, vacations must be scheduled through Department Heads so as not to interfere seriously with or impair departmental efficiency. All employees shall submit Request for Leave forms before taking any vacation. As he deems necessary, a Department Head may require an employee to use any accrued vacation leave. (Form in appendix pages) (Amended 11/03/2004, Res.2004-15)

Chapter 5.06 ADMINISTRATIVE LEAVE

Section 5.06.030 Administrative leave pending disciplinary action.

Any employee may be granted administrative leave with pay pending the outcome of an investigation undertaken to determine if disciplinary action against the employee is warranted. The City Manager must give approval of such leave. (Amended 11/03/2004, Res.2004-15)

Chapter 12.05 DISCIPLINE

Section 12.05.030 Causes for Disciplinary Action.

An employee holding any position with Vernal City may be placed on probationary status, transferred, demoted, reduced in pay, suspended with or without pay, or terminated, for any of the following reasons including, but are not limited to the following:

- A. A violation of any of the City Personnel policies and procedures, or any other administrative policies, as adopted by resolution of the Vernal City Council;
- B. Neglect of duty;
- C. Refusal to obey a reasonable order by any supervisor, either written or verbal;
- D. Inefficiency or inability to satisfactorily perform assigned duties;
- E. An act hostile to public service;
- F. Falsification or unauthorized alteration of City records;
- G. Falsification of employment application;
- H. Knowingly marking the time sheet of another employee, authorizing one's time sheet to be marked by an unauthorized employee, or unauthorized alteration of a time sheet.
- I. Carelessness which affects the safety of personnel;
- J. Threatening, intimidating, coercing or interfering with fellow employees on the job, or the public.
- K. Theft or removal from the work area or premise without proper authorization of any City property or that of any employee.
- L. Gambling or engaging a lottery at any City work area.
- M. Misusing, destroying or damaging any City property or the property of any employee.
- N. Deliberately restricting output.
- O. Possessing or consuming any alcoholic beverage or unlawfully manufacturing, distributing, dispensing, possessing or using a controlled substance in the workplace of Vernal City.
- P. Intoxication, or being under the influence of alcohol or prohibitive drugs, during work hours or in the workplace of Vernal City.
- Q. Immoral conduct or indecency affecting job performance or job effectiveness.
- R. Sleeping on the job during work hours.
- S. Engaging in conduct that negatively impacts the employee's ability to perform essential functions of his job.
- T. Using, threatening or attempting to use personal or political influence in an effort to secure special consideration as a City employee.
- U. Failure to report to work without notification to the Department Head unless it is impossible to give such notice.
- V. Involvement in a vehicular accident involving a City vehicle, where negligence has been demonstrated by the employee.
- W. Act of dishonesty related to job performance.
- X. Misuse of disposed surplus property.
- Y. Sexual harassment of employees.
- Z. Using profane language.
- AA. Displaying insubordinate behavior.
- BB. Any other misconduct.
- CC. Possession of firearms, weapons or explosives on City owned property or at the work location without authorization of the City Manager unless specifically allowed by federal or State law.
- DD. Employment discrimination.
- EE. Moving traffic violation while operating a City vehicle.
- FF. Violation of the Information Technology Resources provisions of these policies and procedures.
- GG. Violation of local, State or Federal laws.

(Amended 11/03/2004, Res.2004-15)

(Res. 2015-03, Amended, 02/04/2015, Prior Text; Res. 2010-14, Amended, 07/08/2010, Prior Text; Res. 2009-28, Amended, 12/17/2009, Prior Text; Res. 2005-19, Amended, 11/02/2005, Prior Text)

Chapter 12.05 DISCIPLINE

Section 12.05.050 Pre-disciplinary hearing with employee.

Whenever formal disciplinary measures are anticipated, excepting placement of the employee on probationary status, and prior to any discharge, suspension over two (2) days without pay, or involuntary transfer to a position with less remuneration for any disciplinary reason, an employee that is not exempt pursuant to Utah Code Annotated 10-3-1105 (2) (a) shall be provided with an opportunity for a pre-disciplinary hearing. As provided in Section 3.03.030, termination of probationary employees, employees still in their initial probationary period shall not be entitled to a pre-disciplinary hearing. Requiring an employee to take paid vacation time or suspending an employee with pay or without pay for less than three (3) days shall not require a pre-disciplinary notice or hearing.

A. The employee shall be given prior notice of the pre-disciplinary hearing along with an explanation of charges, evidence, allegations, an explanation of the City's evidence, and reasons for considering disciplinary action and, where termination is being considered, notice that such a measure is being considered. The employee shall be advised that he or she will be given an opportunity to respond to the charges or allegations, and may bring any evidence or witnesses to the hearing which the employee believes are relevant to the hearing. Unless there are extenuating circumstances, written notice of the pre-disciplinary hearing containing the information outlined above shall be provided to the employee at least three (3) business days prior to the date of the hearing. The notice shall state the date, time, and place of the hearing and the name and title of the person that will be conducting the hearing. The employee shall be given reasonable time to prepare for the hearing.

B. The hearing shall be conducted by the City Manager or his designee, and shall be held for the purpose of allowing the employee to examine the reasons for discipline and present any information or evidence the employee believes is relevant to the decision. The employee may be represented by counsel at the employee's expense, however, such counsel may not be a participant in the pre-disciplinary hearing, but may advise client. If requested by either party, the City Manager or his designee, in its discretion, may continue the hearing, or recess the hearing to allow further review or investigation of the issues if the City Manager or his designee determined that to be necessary in the interest of justice and to more fully evaluate the facts and circumstances.

C. Requirement. The following items should be accomplished at the hearing:

1. Charges, evidence, allegations or reasons shall be given orally or in writing to the employee by the Department Head or other appointing authority.

2. The employee shall be given a full opportunity to respond and give an explanation of the evidence against him to the City Manager, verbally or in writing, or both.

3. An employee may be compelled, orally, in writing or by implied comment, to give statements under threat of disciplinary action up to and including termination, but those statements may not be used in the criminal prosecution of the employee. Before an employee can be disciplined for refusing to answer questions, the following must occur:

- i. the employee must be ordered to answer the questions under threat of disciplinary action;
- ii. the questions must be specifically, directly, and narrowly related to the employee's duties or the employee's fitness for duty; and
- iii. the employee must be advised that the answers will not be used against the employee in criminal proceedings.

D. The City will maintain a written record of the conduct of the hearing. The City may record the pre-disciplinary hearing and either party may, at its expense, have a transcript made from the City's recording of the hearing.

E. A decision as to the disciplinary action to be taken, if any, shall be made by the City Manager or his designee, and the employee shall be notified in writing within twenty (20) working days after the hearing. If formal disciplinary action is imposed, the City Manager or his designee shall provide the employee written notice of disciplinary action along with a written explanation of any employee rights for an appeal. (Amended 11/03/2004, Res.2004-15)

(Res. 2016-13, Amended, 11/16/2016, Prior Text; Res. 2012-10, Amended, 05/16/2012, Prior Text; Res. 2009-26, Amended, 12/03/2009, Prior Text; Res. 2005-22, Amended, 12/07/2005, Prior Text; Res. 2005-19, Amended, 11/02/2005, Prior Text)

Section 12.05.050 Pre-disciplinary hearing with employee.

Prior to the adoption of Res. 2016-13 on 11/16/2016, Section 12.05.050 read as follows.

Whenever formal disciplinary measures are anticipated, excepting placement of the employee on probationary status, and prior to any discharge, suspension over two (2) days without pay, or involuntary transfer to a position with less remuneration for any disciplinary reason, an employee that is not exempt pursuant to Utah Code Annotated 10-3-1105 (2) (a) shall be provided with an opportunity for a pre-disciplinary hearing. a pre-disciplinary hearing must be held prior to imposing disciplinary action. As provided in Section 3.03.030, termination of probationary employees, employees still in their initial probationary period shall not be entitled to a pre-disciplinary hearing. Requiring an employee to take paid vacation time or suspending an employee with pay or without pay for less than three (3) days shall not require a pre-disciplinary notice or hearing.

A. The employee shall be given prior notice of the pre-disciplinary hearing along with an explanation of charges, evidence, allegations, an explanation of the City's evidence, and reasons for considering disciplinary action and, where termination is being considered, notice that such a measure is being considered. The employee shall be advised that he or she will be given an opportunity to respond to the charges or allegations, and may bring any evidence or witnesses to the hearing which the employee believes are relevant to the hearing. Unless there are extenuating circumstances, written notice of the pre-disciplinary hearing containing the information outlined above shall be provided to the employee at least three (3) business days prior to the date of the hearing. The notice shall state the date, time, and place of the hearing and the name and title of the person that will be conducting the hearing. The employee shall be given reasonable time to prepare for the hearing.

B. The hearing shall be conducted by the City Manager or his designee, and shall be held for the purpose of allowing the employee to examine the reasons for discipline and present any information or evidence the employee believes is relevant to the decision. The employee may be represented by counsel at the employee's expense, however, such counsel may not be a participant in the pre-disciplinary hearing, but may advise client. If requested by either party, the City Manager or his designee, in its discretion, may continue the hearing, or recess the hearing to allow further review or investigation of the issues if the City Manager or his designee determined that to be necessary in the interest of justice and to more fully evaluate the facts and circumstances.

C. Requirement. The following items should be accomplished at the hearing:

1. Charges, evidence, allegations or reasons shall be given orally or in writing to the employee by the Department Head or other appointing authority.

2. The employee shall be given a full opportunity to respond and give an explanation of the evidence against him to the City Manager, verbally or in writing, or both.

3. An employee may be compelled, orally, in writing or by implied comment, to give statements under threat of disciplinary action up to and including termination, but those statements may not be used in the criminal prosecution of the employee. Before an employee can be disciplined for refusing to answer questions, the following must occur:

- i. the employee must be ordered to answer the questions under threat of disciplinary action;
- ii. the questions must be specifically, directly, and narrowly related to the employee's duties or the employee's fitness for duty; and
- iii. the employee must be advised that the answers will not be used against the employee in criminal proceedings.

D. The City will maintain a written record of the conduct of the hearing. The City may record the pre-disciplinary hearing and either party may, at its expense, have a transcript made from the City's recording of the hearing.

E. A decision as to the disciplinary action to be taken, if any, shall be made by the City Manager or his designee, and the employee shall be notified in writing within twenty (20) working days after the hearing. If formal disciplinary action is imposed, the City Manager or his designee shall provide the employee written notice of disciplinary action along with a written explanation of any employee rights for an appeal. (Amended 11/03/2004, Res.2004-15)

Chapter 12.05 DISCIPLINE

Section 12.05.065 Types of disciplinary action.

A. Informal disciplinary procedures can include the following:

1. **Oral warning.** Whenever grounds for disciplinary action exist, and the department head determines that more severe action is not immediately necessary, the deficiency demonstrated may be orally communicated to the employee.

a. A memorandum of the date and content of the oral warning shall be written by the department head, or designee.

b. This memorandum shall be placed in a separate verbal warning folder in the personnel department and is not part of the employee's personnel file.

2. **Written reprimand.** The department head, or designee, may reprimand employees for employment performance related reasons.

a. The department head, or designee, shall furnish the employee with an employee written reprimand notification setting for the reasons.

b. A copy of the employee written reprimand notification, signed by the department head, or designee, and the employee, shall be sent to the personnel department and be placed in the employee's personnel file. If the employee refuses to sign the form, the department head, or designee, will so state.

B. Formal disciplinary procedures can include the following:

1. **Placement on probation.** The department head, or his designee, after approval of the City Manager, may place an employee on a disciplinary probation status for a time period not to exceed a six (6) month period.

2. **Suspension.** The department head, or designee, after consultation with the City Manager, and in accordance with the provisions of this Chapter pertaining to formal disciplinary procedures, may suspend employees with or without pay.

3. **Demotion or reduction in pay in the same grade.** If in the best interest of both the employee and the City, the department head, or designee, after consultation with the City Manager and in accordance with the provisions of this Chapter pertaining to formal disciplinary procedures, may demote or reduce in the same grade, employees for employment performance related reasons.

4. **Transfer which may result in reduction in pay.** If in the best interest of both the employee and the City, the department head, or designee, after consultation with the City Manager, and in accordance with the provisions of this Chapter pertaining to formal disciplinary procedures, may transfer employees, except a probationary employee, by furnishing the employee with written employee transfer notification.

5. **Termination.** The department head, or designee, after consultation with the City Manager, and in accordance with the provisions of this Chapter pertaining to formal disciplinary procedures, may request to terminate an employee. Only the City Manager may approve the termination of an employee.

(Res. 2005-19, Add, 11/02/2005)

ADDENDUM D

584 P.2d 1009 (Wyo. 1978), 4807, Board of Trustees of Weston County School Dist. No. 1,
Weston County v. Holso /**/ div.c1 {text-align: center} /**/

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584 P.2d 1009 (Wyo. 1978)

**BOARD OF TRUSTEES OF WESTON COUNTY SCHOOL DISTRICT NO. 1, WESTON
COUNTY, Wyoming (John Ratigan, William Stearns, Ted Elliott, Robert Engle, Lyle Sylte,
Max Decker, Fred Ertman, Jerry Dixon, and James Griffin, in their official capacity)
Appellants (Some of defendants below),**

v.

David L. HOLSO, Appellee (Plaintiff below).

A. L. ALBERT, Individually, Appellant (One of defendants below),

v.

David L. HOLSO, Appellee (Plaintiff below).

Nos. 4807, 4808.

Supreme Court of Wyoming.

August 28, 1978

Rehearing Denied Nov. 21, 1978. See 587 P.2d 203.

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[Copyrighted Material Omitted]

Page 1011

Thomas L. Whitley, Newcastle and William A. Harding, Lincoln, Neb., for all appellants.

Patrick E. Hacker of Patrick E. Hacker & Associates, and Richard S. Rideout, Cheyenne, for
appellee.

Before GUTHRIE, C. J., and McCLINTOCK, RAPER, THOMAS and ROSE, JJ.

ROSE, Justice.

Defendants, members of the Board of Trustees of Weston County School District No. 1, in
their official capacity, and A. L. Albert, individually, appeal from the judgment of the Sixth Judicial
District Court, which reinstated the plaintiff as a teacher in the District with back pay and other
benefits, and awarded him compensatory damages and attorney's fees. In addition to his petition
for review of his termination, plaintiff asked damages in tort against the Board for malicious
interference with his opportunity to pursue his professional career, and damages pursuant to 42
U.S.C., § 1983, ^[1] against Albert, the Superintendent of the District, for attempting to deprive
plaintiff of his teaching career on the basis of constitutionally impermissible reasons. These
consolidated appeals concern the propriety of every aspect of the judgment below.

We will affirm the district court judgment, which reversed the School Board's decision
terminating the plaintiff, and which judgment also awarded damages and attorney's fees against
Albert under the applicable federal statutes. We will reverse the judgment against the Board.

When the issue of his termination arose, plaintiff, David L. Holso, was a continuing contract
teacher in his eighth year as an English teacher in the District. On March 12, 1975, the Board met
in regular session to discuss contract renewals, with plaintiff's principal, Glenn Gregson, who
presented a favorable evaluation of the plaintiff and recommended that he be retained. In spite of

this, the members of the School Board and Superintendent Albert questioned plaintiff's performance as a teacher, particularly in the areas of his classroom discipline, his student grading, and his personal health problems. The Board directed Gregson to make a further evaluation of plaintiff and certain other teachers. Gregson

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testified at the plaintiff's termination hearing and at trial that he had received the impression that the Board was "out to get" Mr. Holso. On the morning of March 13, Gregson conveyed this impression to Holso, explaining that the Board was upset with his relationship with a female teacher, as well as his classroom discipline, and was also concerned about Mr. Holso's personal health problems. Later that morning, plaintiff and Gregson met with Superintendent Albert to discuss the complaints and there is conflicting evidence concerning the substance of this discussion. Plaintiff testified that Albert specifically commented on plaintiff's relationship with another teacher, saying that he (Albert) had observed plaintiff's automobile parked overnight in front of the female teacher's home during the 1974 Christmas vacation. Plaintiff further testified that the conversation had to do with plaintiff's health, as well as his failure to turn in a requested course outline. All of these matters will be discussed in greater detail later in the opinion. Mr. Holso further testified that Albert said he wasn't interested in Holso's explanations, and if he insisted on a termination hearing there wouldn't be a school in the country that would offer him a teaching job after Albert got through with him. Albert denied that he discussed plaintiff's purported immorality, or that he threatened plaintiff. He insisted that the reason he pursued plaintiff's termination was because Gregson had changed his mind and was urging that Holso be fired. Gregson consistently denied this and testified that he had Never recommended plaintiff's termination.

On the afternoon of March 13, Albert and Gregson met with the attorney for the School Board, which meeting culminated in the mailing of a letter to plaintiff, the substance of which was that Albert was recommending plaintiff's termination to the Board for the following reasons:

"1. Your physical handicap and your neglect of the care of your health which results in (a) an unusual number of absences from the classroom; (b) an inability to work up to your potential after your return from absences and when your health is neglected.

"2. Insubordination including but not limited to (a) failure to follow directions in the preparation and coordination of outlines of course contents; (b) failure to hold meetings as directed; (c) failure to attend meetings or contribute to meetings when you do attend.

"3. Other conduct that constitutes good and just cause for termination."

Concerning the general allegation of other "good and just cause," Albert testified at the termination hearing that plaintiff's alleged immorality was included as one of the significant reasons for his recommendation. Also included as is disclosed by the Board's findings was an allegation that plaintiff's grading of students was questionable.

Due to the rumors which had circulated concerning the termination proceedings initiated against him, plaintiff, on April 3rd, spent portions of several class periods answering student's questions and explaining his understanding of the grounds for his termination. Although testimony at the hearing varied as to the amount of time spent in such discussions and on the question of whether plaintiff initiated the discourse, none of the students who testified thought plaintiff had

attempted to solicit student support. Superintendent Albert was notified of the class discussions by a board member. After investigation by the school attorney, Albert, on April 6, ordered plaintiff's suspension pending the outcome of the termination proceedings.

Subsequent to a hearing before the Board, commencing April 17, the suspension of April 6 was approved and plaintiff was terminated, based on the following Findings of Fact and Conclusions of Law:

"1 The illnesses of David E. Holso (diabetes and ileostomy) interfere with his professional responsibility in the classroom and cause him to be absent from classes for substantial periods of time. On the occasions of his absences, he has failed to notify the principal's office and

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the absences result in inattention to school work by the students. Mr. Holso has not carefully observed his diet and has on occasion not carefully controlled his diabetic condition. Mr. Holso failed to follow the direction of the principal that he notify the principal's office each time he found it necessary to leave his room during a class period.

"2 Mr. Holso failed to complete and hand in a specific assignment of work required by his superior, Mrs. Betty Shurley. He was reminded to do so on several occasions at meetings by Mrs. Shurley and by his principal, Glenn Gregson. The assignment was the preparation of a class outline or syllabus which was to be a significant part of a booklet designed to coordinate the curriculum of English classes from kindergarten through 12th grade in Newcastle schools. Mr. Holso did not complete or hand in this work until six days after his notice of termination was given and after the booklet was assembled without his work. Mr. Holso admitted that he failed to cooperate with the head of the English department and failed to hold a high school English teachers meeting that he was directed to hold. The failure to hold the meeting was not excused by any facts shown.

"3 Mr. Holso's grading is questionable and the record of the grades he has given shows an excessive number of D's and F's over the last seven years, all of which indicates that his teaching is inadequate.

"A teacher's right to grade any particular paper or student as the teacher sees fit to do should not be limited but Mr. Holso's grading, when studied over the last seven years, shows such an unusually excessive number of F's and D's that it indicates that he has been and is an inadequate teacher.

"4 On April 3, 1975, David E. Holso spent the major part of the 3rd, 4th, 5th and 6th period classes talking to his students in those classes about the specific grounds for his termination. The discussions were initiated by him and were not initiated by questions from the students. In his second period class he also initiated the discussion but spent less time talking about the matter. On April 3, 1975, although no specific charge of immorality had been made in the notice of termination, he injected that problem into the discussion he initiated with the students."

"CONCLUSIONS OF LAW

"1 Mr. Holso's illness and his failure properly to care for his health interfered with his performance in the classroom to the extent that it is good and sufficient cause for his termination.

"2 Mr. Holso, because of his failure to perform specific assignments of his superiors, his failure to cooperate and his failure to hold a meeting as directed by his superior and his failure to notify the

principal's office each time it was necessary for him to leave his classroom was insubordinate and such insubordination is sufficient cause for his termination.

"3 The record of the grades Mr. Holso has given over the last seven years shows an unusually excessive number of F's and D's and it indicates that he is and has been an inadequate teacher and that fact is good and sufficient cause for terminating his contract.

"4 Mr. Holso's actions in the classroom on April 3, 1975, constituted unprofessional conduct and were not necessary to control or teach his students. His actions were good and sufficient cause to remove him from the classroom and suspend him for the remainder of the year. To place him back in the classroom after his students have had to testify in his proceeding would, in this particular case, not be in the best interest of the students. We approve the suspension of David E. Holso that was made on April 6, 1975."

Confronted with the district court's judgment reversing the Board's decision, and awarding plaintiff damages, we will consider the following issues:

1. Whether the Board's decision to terminate and suspend plaintiff was supported by substantial evidence;

2. Whether the district court erred in finding tort liability on the part of the Board;

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3. Whether the district court erred in finding that Albert had violated 42 U.S.C. § 1983;

4. Whether the district court erred in assessing damages and attorney's fees against Albert.

"GOOD CAUSE" FOR TERMINATION

When contemplating appeals pertaining to the termination of a continuing contract teacher, this court is committed to the view that not only must there be "good cause" and substantial evidence in support of the charges, but, in addition, the facts to sustain such charges must bear reasonable relationship to the teacher's fitness or capacity to perform his duties in that position. *Powell v. Board of Trustees of Crook County School District No. 1, Wyo.*, 550 P.2d 1112, 1119. See, *Monahan v. Board of Trustees of Elementary School District No. 9, Wyo.*, 486 P.2d 235, 237; and *Roush v. Sweetwater County School District No. 1, Wyo.*, 497 P.2d 540, 542. In *Board of Trustees, Laramie County School District No. 1 v. Spiegel, Wyo.*, 549 P.2d 1161, we addressed a situation where the district court had reversed a school board's determination, and we held " . . . that the only direct items of evidence against him, all of which were admitted to, and corrected, by him, were so trivial and so remote from the date of the hearing that they did not justify termination, and that to base termination on those incidents would be oppressively harsh; . . . " 549 P.2d at 1177.

We set out the appropriate standards for reviewing such decisions in *Spiegel*, and they, therefore, need not be repeated here.

In the instant case, the district court entered the following findings:

"1. That the finding that Plaintiff's illnesses (diabetes and ileostomy) interfered with his professional responsibility in the classroom and caused him to be absent from his classes for substantial periods of time is not supported by substantial evidence.

"2. As to the finding that Plaintiff's actions in regard to Mrs. Shurley constitute insubordination, it is questionable whether the actions listed constitute insubordination, and in any event, the actions

listed are not such as to constitute good cause for termination of Plaintiff's continuing contract.

"3. That the finding that Plaintiff's grading was questionable is not supported by substantial evidence and to terminate his contract without further facts would be arbitrary.

"4. That in regard to the finding that Plaintiff discussed his termination with students on April 3, 1975, this was a difficult time for both Plaintiff and the School District and whether Plaintiff's statements were in response to questions from students or not, there is no evidence that his statements in any way harmed the students or damaged their education and under all of the circumstances, Plaintiff's actions do not constitute good cause to terminate or suspend him."

HEALTH

The testimony before the Board was that on only two occasions one, one and one-half years, and the other two and one-half years, prior to the hearing had plaintiff's health interfered with his classroom duties. The School District Rules provide that each year a teacher is granted ten days' sick leave, and plaintiff never exceeded this limit. The evidence was that plaintiff had left his classroom unattended for brief periods to take care of his ileostomy. Plaintiff's doctor testified that plaintiff's severe diabetic condition was under pretty good control. We must agree with the trial court that these trivial incidents do not establish cause for the termination and, therefore, do not support the finding of the Board. *Board of Trustees v. Spiegel, supra*.

GRADING

Exhibits compiled by Superintendent Albert disclosed that plaintiff historically gave more D and F grades than would appear on a normal probability curve. No

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grade analysis was made for the 1974-1975 school year which immediately preceded the non-renewal of plaintiff's contract. The school district has no formal grading policy, nor was the plaintiff ever told to grade "on the curve." Cause for termination cannot be established by proof of the violation of standards that do not exist. Again, we agree with the district court's conclusion. We will return to this area when discussing the § 1983 action against Superintendent Albert.

CLASS DISCUSSION

We have already set forth most of the evidence concerning this allegation. In addition to the circumstances that these discussions did take place, there was uncontradicted testimony before the Board, by the substitute who filled in for the plaintiff after his suspension, that no adverse impacts were observed in the plaintiff's classes. Furthermore, several other teachers testified that the plaintiff's approach in responding to rumors was not necessarily inappropriate. We must sustain the district court's finding. The incident is too trivial and detached from the teacher's ability and fitness to perform his duties. *Powell v. Board of Trustees, supra*; *Monahan v. Board of Trustees, supra*; *Roush v. Sweetwater County School District, Supra*; and *Board of Trustees v. Spiegel, supra*.

INSUBORDINATION

We have taken this allegation out of order because the Board places its greatest reliance to justify the termination on this charge. We are here concerned with essentially two incidents both involving the plaintiff's superior in the English Department, Mrs. Betty Shurley. The first, and most important, incident relates to plaintiff's failure to timely submit a class outline. All English teachers

were requested to turn in these outlines by October 25, 1974, but Mr. Holso failed to do so until March 19, 1975, and testified at the Board hearing that he had simply forgotten about the assignment. Mrs. Shurley testified that she was not too concerned about Mr. Holso's lack of attention to the problem until January, 1975, at which time she wished to compile the outlines into book form. Mrs. Shurley notified other teachers in January to turn in their outlines, but did not make this request of the plaintiff. She did, however, contact Gregson and Albert and they asked Mr. Holso to turn in the assignment.

The second incident involved a request by Mrs. Shurley of the plaintiff, asking that he call and hold an English meeting in November, 1974, at which time Mrs. Shurley planned to be away from the school. Plaintiff attempted to comply with this assignment but was unable to do so because of scheduling conflicts encountered by the other teachers.

Principal Gregson testified at the Board hearing that he was aware of a conflict between plaintiff and Mrs. Shurley, but felt it went back to a difference in educational philosophy. Mrs. Shurley and Mr. Holso were conscious of their differences, and, on March 11, 1975, they met with Gregson to discuss and attempt to resolve them. As a result of the meeting, Mrs. Shurley related at the Board hearing that even though the plaintiff had not fully cooperated with her, some progress had been made in establishing rapport, and she had not actively sought Mr. Holso's termination.

"Insubordination," as a ground for suspension, dismissal or termination under § 21-7-110, W.S.1977 (§ 21.1-160, W.S.1957, 1975 Cum.Supp.), is, as yet, an undefined term. [2] Other courts have embraced the following definition:

" . . . 'constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.' " *Ray v. Minneapolis Board of Education, Special School District No. 1*, 295 Minn. 13, 202 N.W.2d 375, 378,

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citing *Shockley v. Board of Education*, 51 Del. 537, 541, 149 A.2d 331, 334, reversed on other grounds, 52 Del. 237, 155 A.2d 323.

Certain jurisdictions have held that "insubordination" includes a willful refusal of a teacher to obey reasonable rules and regulations. *State Tenure Commission v. Madison County Board of Education*, 282 Ala. 658, 213 So.2d 823, 834. The better-reasoned decisions place emphasis on the presence of a persistent course of willful defiance. See, e. g., *Fernald v. City of Ellsworth Superintending School Committee, Me.*, 342 A.2d 704, 708; and *Johnson v. United School District Joint School Board*, 201 Pa.Super. 117, 191 A.2d 897, 901. See, generally, 78 A.L.R.3d 83, "Dismissal of Teachers 'Insubordination' " (1977). We embrace these definitions and concepts. To constitute insubordination as a cause for termination, it must be established that the teacher embarked upon a persistent course of willful defiance.

We agree with the district court that applying the accepted definitions of "insubordination" there is no substantial evidence of misconduct in this respect. We have before us two isolated incidents of a failure to carry out a superior's request, arising from at most a lack of communication which had improved by the time the Board held its hearing. There was no substantial evidence of a persistent course of conduct characterized by willful defiance.

The district court properly ordered plaintiff's reinstatement with back pay and benefits.

BOARD'S LIABILITY IN TORT

Plaintiff contends that he is entitled to compensatory and punitive damages because of the Board's malicious interference with his professional career. Liability, according to the plaintiff, arises from the Board's alleged action in seeking to carry out Albert's threat made when he told the plaintiff:

"When I get through with you there won't be a school in the country that will offer you a teaching job."

The gravamen of this cause of action as set out in plaintiff's brief is the "unlawful tortious interference By a third person with the right of another to dispose of his labor." (Emphasis supplied)

Appropriately labeled, plaintiff is seeking relief for "interference with prospective advantage," as opposed to "interference with contractual relations." Prosser, Law of Torts, §§ 129 and 130 (4th Ed. 1971). These separate causes of action tend to merge, except that the latter is aimed at the protection of the "probable expectancies" of life, such as future contractual relations. Prosser, supra, § 130, at 950. *The Court of Appeals of Washington, in Olson v. Scholes*, 17 Wash.App. 383, 563 P.2d 1275, 1279-1280, summarized the elements of such actions while at the same time implicitly indicating how the actions arise from common foundations as follows:

" . . . The theory advanced is that stated in Restatement of Torts § 766 (1939), as follows:

"(O)ne who, without a privilege to do so, induces or otherwise purposely causes a third person not to

- (a) perform a contract with another, or
 - (b) enter into or continue a business relation with another
- is liable to the other for the harm caused thereby.

The tort as defined in the Restatement is divided into two parts: (a) dealing with the cause of action arising when a third person induces a breach of contract, and (b) dealing with the cause of action which arises when a third person induces one person not to enter into a contract with another. The first subsection deals with present relationships, and the second with future relationships. The elements of the tort have been stated as:

- (1) the existence of a valid contractual relationship or business expectancy;
- (2) knowledge of the relationship or expectancy on the part of the interferor;

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- (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and

- (4) resultant damage to the party whose relationship or expectancy has been disrupted.

See *King v. Seattle*, 84 Wash.2d 239, 525 P.2d 228 (1974); *Scymanski v. Dufault*, 80 Wash.2d 77, 491 P.2d 1050 (1971); *Corinthian Corp. v. White & Bollard, Inc.*, 74 Wash.2d 50, 442 P.2d 950 (1968), and *Calbom v. Knudtson*, 65 Wash.2d 157, 396 P.2d 148 (1964), inter alia."

See, also, 45 Am.Jur.2d, Interference, §§ 50 and 51; and 86 C.J.S. Torts § 43.

These theories, however, do not apply to actions between parties to an existing contract they lie only against outsiders who interfere with the contractual expectancies of others. *Olson v.*

Scholes, *supra*. An employer-employee relationship existed at the time of the alleged tortious acts, and, therefore, no recovery against the Board can be based upon the tort theory of interference with prospective advantage. We hold that the district court erred in entering a judgment against the Board on the basis of this theory.

Indeed, we have said that a judgment will be affirmed on any legal ground appearing in the record. *P & M Cattle Co. v. Holler, Wyo.*, 559 P.2d 1019, 1024, *inter alia*. We are unable, however, to find any such grounds in this case. See, *Durst v. School District No. 2 of Niobrara County*, 39 Wyo. 442, 273 P. 675, which precludes recovery of damages to the business reputation or for mental suffering by a wrongfully discharged school teacher. See generally, 78 C.J.S. Schools and School Districts § 216. We reach no decision with respect to the propriety of a 42 U.S.C. § 1983 cause of action against the Board, since that issue was not raised below. [3]

ALBERT'S LIABILITY UNDER 42 U.S.C. § 1983

All parties apparently concede, and we agree, that the courts of this state have concurrent jurisdiction with federal courts over civil-rights actions filed pursuant to 42 U.S.C. § 1983. See *Endress v. Brookdale Community College*, 144 N.J.Super. 109, 364 A.2d 1080, 1092; and *McClanahan v. Cochise College*, 25 Ariz.App. 13, 540 P.2d 744, *reh. den.* 25 Ariz.App. 233, 542 P.2d 426. See, also *Brody v. Leamy*, 90 Misc.2d 1, 393 N.Y.S.2d 243, 247-257.

Albert contends, however, that since he had no statutory power to terminate the plaintiff, his conduct cannot come within the state action envisioned by 42 U.S.C. § 1983. At the root of Albert's argument is the belief that he is entitled to the defense, consisting of a qualified, good-faith immunity, announced in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214. Defendant Albert's contention is without merit to the extent that it emphasizes his statutory duties as definitive of the parameters of his liability. On the contrary, we find that § 1983 is concerned with the degree of participation in a deprivation of constitutional rights. An individual's status as a school superintendent does not, in itself, protect his or her activities in the context here considered. See, e. g., *Endress v. Brookdale Community College*, *supra*, at 1095; *Stoddard v. School District No. 1, Lincoln County, Wyoming, D.Wyo.*, 429 F.Supp. 890, 894; *Aumiller v. University of Delaware, D.Del.*, 434 F.Supp. 1273; and *Smith v. Losee*, 10 Cir., 485 F.2d 334, 344, *cert. den.* 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212.

We proceed, then, to the two pivotal issues with respect to the superintendent's liability under § 1983, which can be said to be:

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1. Whether Albert's recommendation of termination was predicated, at least in part, on constitutionally impermissible reasons?
2. Whether Albert was entitled to the qualified, good-faith immunity defense?

We hold that the district court correctly answered the first question in the affirmative. The record clearly discloses evidence to the effect that plaintiff's alleged immorality was a significant reason for Albert's recommendation. As stated in *Stoddard v. School District No. 1*, *supra*:
" . . . The right to be free from unwarranted governmental intrusions into one's privacy is a fundamental constitutional right, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), and such right of privacy embraces the right of an individual to attend church or not, to

determine his or her own physical proportions, and to determine with whom he or she will associate. . . . " 429 F.Supp., at 892.

The record is equally clear that the plaintiff's grading methods were seriously questioned by Albert, even though there was no grading policy or standards in the district. As succinctly stated by the district court:

" . . . Plaintiff could not constitutionally be terminated for use of a teaching method with which the superintendent disagreed, at least in the absence of clear prior warning that such a method was impermissible. *Keefe vs. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969); *Parducci vs. Ruckland*, (Rutland) 316 F.Supp. 352, 356 (Mid.Dis.Ala.1970); *Mailloux vs. Kiley*, 323 F.Supp. 1387 (D.Mass.1971), affirmed 448 F.2d 1242 (1st Cir. 1971); *Webb vs. Lake Mills Community School District*, 344 F.Supp. 791 (N.D.Iowa 1972); *Sterzing vs. Ft. Bend Independent School District*, 376 F.Supp. 657 (S.D.Tex.1972), affirmed 496 F.2d 92 (5th Cir. 1974); *Moore vs. Gaston County Board of Education*, 357 F.Supp. 1037, 1040 (W.D.North Carolina 1973)."

Turning to the so-called immorality issue, there is ample evidence in the record from which the court could have found that plaintiff's constitutionally protected conduct was a motivating factor in Albert's decision to recommend termination. Plaintiff, therefore, successfully carried his burden of showing that his conduct was constitutionally protected, and that such conduct was a "substantial factor" in Albert's recommendation. See, *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. Given the lack of other sustainable reasons for Albert's recommendation of termination, we fail to see how Albert has sustained His burden of showing by a preponderance of the evidence that he would have reached the same decision concerning Holso's termination in the absence of the protected conduct as required by the *Mt. Healthy* case. Even if such a showing had been made, it appears that only the scope of relief would have been affected^[4] and that aspect of the cause of action against Albert is not really a question.

Secondly, we find that the district court's implicit rejection of Albert's

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defense of qualified, good-faith immunity was also correct. In order to qualify for this defense, Albert must demonstrate by a preponderance of the evidence (1) that he acted without malicious intention to deprive the plaintiff of his constitutional rights or cause him to suffer other injury, and (2) that he did not know and reasonably need not have known that his conduct violated the constitutional rights of the party affected. *Aumiller v. University of Delaware*, supra, at 1307, and *Skehan v. Board of Trustees of Bloomsburg State College*, 3 Cir., 538 F.2d 53, 60-62. U.S. cert. den. The district court expressly found actual malice to have existed in Albert's conduct presumably based, at least in part, on his threat to the plaintiff. The record supports such a finding, thus precluding Albert's entitlement to the defense. See, *Smith v. Losee*, supra. Cf. *Vanderzanden v. Lowell School District No. 71*, D.Ore., 369 F.Supp. 67, 75. See, also, *Endress v. Brookdale Community College*, supra, at 1095. Albert knew, or should have known, that the action he took would cause a deprivation of plaintiff's constitutional right to privacy.

DAMAGES AND ATTORNEY'S FEES

Plaintiff had requested in his action against Albert compensatory damages for injury to his professional reputation and for pain and suffering as a result of defendant Albert's actions. There

is little question that once a constitutional violation is made out under § 1983, a plaintiff may recover damages for emotional distress, embarrassment and humiliation. *Aumiller v. University of Delaware*, supra, at 1310; *Endress v. Brookdale Community College*, supra, at 1097-1098; and *Stoddard v. School District No. 1*, supra, at 892. In appropriate cases, punitive damages are also recoverable. See, *Silver v. Cormier*, 10 Cir., 529 F.2d 161, 163-164; and *Smith v. Losee*, supra. In order to recover such damages, the plaintiff need only show (1) that he in fact suffered such damages; and (2) that defendant's actions proximately caused plaintiff's injury. *Aumiller v. University of Delaware*, supra. There is adequate evidence in the record to support plaintiff's allegations that his opportunities to pursue his career have been substantially reduced and his confidence and relationships with others within and without the school district have been affected by reason of Albert's actions. We hold that the district court's judgment against defendant Albert, in the amount of \$2,500.00, should be affirmed. Since we find no liability on the part of the Board, we reverse the judgment, in the amount of \$5,000.00, against its members in their official capacity.

Finally, plaintiff sought and recovered attorney's fees against Albert, pursuant to 42 U.S.C.A. § 1988, as amended ^[5], in the amount of \$2,172.55. The federal act, known as the Civil Rights Attorney's Fees Awards Act of 1976, makes the award of fees discretionary, and has been applied retroactively to § 1983 cases pending at the time of its enactment. See, e. g., *Rainey v. Jackson State College*, 5 Cir., 551 F.2d 672. The district court did not abuse its discretion in making this award particularly in light of the fact that the parties stipulated that a reasonable attorney's fee for the entire case would be \$4,345.10. We will, therefore, affirm the attorney's fee award against Albert. For the reasons previously stated herein, the award of attorney's fees as punitive damages against the Board is reversed.

Affirmed in part and reversed in part, and remanded to the trial court for entry of

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judgment which is consistent with this opinion.

RAPER, Justice, with whom THOMAS, Justice, joins, concurring in part and dissenting in part.

I concur in affirmance of the district court's judgment reinstating the plaintiff and awarding him back pay and fringe benefits lost. I also concur in reversal of the district court's finding of liability and judgment against the board of trustees, awarding damages of \$5,000.00 for a claimed tort along with attorney fees of \$2,172.55, as punitive damages. In the reversal aspect, I concur for different reasons than those set out in the major opinion, with which I disagree. I dissent as to the affirmance of the district court's finding of liability and award of \$2,500.00 compensatory damages, along with the attorney's fees of \$2,172.55 as punitive damages, against the school superintendent, Albert. I join in the dissent of Justice Thomas. Such a precedent set by the majority is insidious in its inequity of holding a school administrator solely and personally liable for grounds of discharge or termination of a school teacher when the school board is the only body having authority to discharge or terminate and it, after due process proceedings, made the decision of termination.

There is no need to apply any exception to relief under the tort rule with respect to "interference with prospective advantage" as ground for relieving the school board of liability that point should not be reached. The school board has total immunity under state law in the type

action filed against it. The board members, as the alter ego of the school district, have as a governing body, immunity when sued as here, in their official capacities and not individually. Section 1-35-102, W.S.1977, provides:

"The defense of governmental immunity shall be waived to the extent of the limits of liability insurance carried by the governmental entity. This section applies to any governmental body or agency in the state securing liability insurance coverage."

In this case there was no insurance covering the tort claimed. School districts have only been authorized to carry liability insurance on motor vehicles, § 21-3-126, W.S.1977, and against bodily injury or death in other cases, §§ 21-3-128 and 21-3-129, W.S.1977. Those statutory sections provide, either directly or indirectly, that if such insurance had not been obtained, the provisions were not intended to create any liability upon school districts. Such provisions are consistent with the rulings of this court in *Collins v. Memorial Hospital of Sheridan County, Wyo.*1974, 521 P.2d 1339, and *Fagan v. Summers, Wyo.*1972, 498 P.2d 1227, holding tort liability to exist only to the extent of insurance coverage.

I am satisfied that the decision of the court has taken away from the administration of schools in this state a necessary element of flexibility in the exercise of official discretion in management. By placing the entire burden of the plaintiff's termination on the superintendent of schools, Albert, and holding him personally liable, he and others similarly situated will, in all likelihood, no longer be able to fully serve the interests of the public. Under the pressure of risks of money judgments against them, personally, to be paid from their own pocketbooks, they will simply not recommend termination, regardless of their good faith belief that some persons should no longer be retained on a school faculty. I consider it significant that the trial judge found neither bad faith nor malice on the superintendent's part but did find that the board of trustees acted "knowingly, intentionally, and maliciously" in its discharge of the plaintiff. (I disagree with that finding as to the board because of the absence of any evidence to support it but we need not reach that point because of reversal of the judgment against the board.) Just as Judge Barrett said in his dissent in *Smith v. Losee*, 10 Cir. 1973, 485 F.2d 334, cert. den. 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212, a case involving school administrators who recommend a denial of tenure, "I simply cannot be a party to such a result."

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I find some of the thoughts just expressed echoed in *Wood v. Strickland*, 1975, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214, reh. den. 421 U.S. 921, 95 S.Ct. 1589, 43 L.Ed.2d 790, decided after *Smith v. Losee*, Supra, where it was claimed that school administrators acted unconstitutionally toward students in violation of § 1983. While I am convinced that the United States Supreme Court still left not clearly defined the exterior boundaries of official immunity, its pronouncements in that case protect the defendant, Albert, in this case. The Court acknowledged that strong public policy reasons dictate that school administrators should have some protection from tort liability. That case reasoned the liability for every action found subsequently to have been violative of constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith during the course of exercising discretion within the scope of his official duties. Denying a measure of immunity would

contribute not to principled and fearless decision making but to intimidation. The Court in Wood recognized that imposition of monetary costs for errors that were not unreasonable in the light of all circumstances would deter even the most conscientious decisionmaker from independently expressing his judgment forcefully, and in a manner best serving the long-term interests of the school and the students. As for the Wood Court's objective, its announced aim was to grant an immunity which school officials would understand; that good faith action, taken in the fulfillment of their responsibilities within the bounds of reason under the circumstances, will not be punished and they need not exercise their discretion with undue timidity. The Court then went on to quote from *Scheuer v. Rhodes*, 1974, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90:

" * * * Implicit in the idea that officials have some immunity absolute or qualified for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.' *Scheuer v. Rhodes*, 416 U.S. at 241-242, 94 S.Ct., at 1689 (40 L.Ed.2d 90) (footnote omitted)."

The Wood case then went on to establish a rather indistinct standard but one which nevertheless shields Albert. A school official must act sincerely with a belief he is doing right but at the same time his act cannot be justified by ignorance or disregard of settled indisputable constitutional rights or by the presence of actual malice.

The first so-called constitutional violation raised here does not in fact exist. The charges, signed by Albert, filed against the plaintiff, recommending dismissal, did not even allege immorality on the part of plaintiff as a ground. The board's order of termination did not recite that reason as a ground for termination though it was brought out during the course of the administrative hearing. The board's order in that regard was as follows:

"4 On April 3, 1975, David E. Holso spent the major part of the 3rd, 4th, 5th and 6th period classes talking to his students in those classes about the specific grounds for his termination. The discussions were initiated by him and were not initiated by questions from the students. In his second period class he also initiated the discussion but spent less time talking about the matter. On April 3, 1975, although no specific charge of immorality had been made in the notice of termination, he injected that problem into the discussion he initiated with the students."

My reconstruction of the record from both the administrative proceedings and the trial transcript leads me to the conclusion that any suggestion of immorality by Holso arose from within the board itself because of complaints from members of the public. At a board meeting prior to initiation of the termination proceedings, a member of the board of trustees asked the others, referring to the apparent close relationship between the plaintiff and a female teacher, "(H)ow do you explain to your daughter when she comes home and asks about a situation like this."

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The quoted part of the preceding paragraph was brought out during the voir dire of the board by plaintiff's counsel, before commencement of the administrative hearing. There is no evidence whatsoever that any question of Holso's immorality was initiated by the defendant Albert. He did testify at the administrative hearing that he had seen Holso's car parked overnight at the home of the female teacher. Prior to the hearing, he had never so advised the board. At the trial, the member of the school board first raising the question, testified more to the point:

"I said, if an unmarried female teacher and an unmarried male teacher are supposedly sleeping together, and your daughter asks about it, how do you explain it?"

Neither the students nor the public knew that Holso's behavior and association with Miss Brookover was in fact innocent; that they had stayed with a married couple on their trip. By his own admissions, his car was parked overnight at Miss Brookover's on quite a number of occasions. One student, called by Holso, said he told them, "Well, that they were just staying together or something." Defendant's counsel did not do too well straightening that out with his leading question that the witness did not mean that, the response being "Huh-uh."

Not one witness testified that the defendant Albert stirred up immorality as a ground for termination. Although there is no question but what he thought morality was an important professional attribute in a teacher's position and that any suggestion of immorality was damaging to a school, its educational standards and students. He was not mistaken in his view of significance. This court has said so, as had other authority.

In *Tracy v. School District No. 22, Sheridan County, Wyo.*, Wyo.1952, 70 Wyo. 1, 243 P.2d 932, reh. den. 247 P.2d 153, quoting from *Baird v. School Dist. No. 25, Fremont County, 1930*, 41 Wyo. 451, 472, 287 P. 308, 315, this court recognized the responsibility of a teacher: "It was said in *City of Crawfordsville v. Hays*, 42 Ind. 200, that a teacher agrees "by necessary implication, that while he continues in such employment, his moral conduct shall be in all respects exemplary and beyond just reproach. " And not merely good character, but also a good reputation is essential to the greatest usefulness in such a position. *Freeman v. Inhabitants of Bourne*, 170 Mass. 289, 49 N.E. 435, 39 L.R.A. 510. Intrusted as the teacher is with the education of the young, it becomes of primary importance that the principles of right living be by him instilled into them by his example and by his conduct.' "

That policy of this court was once again summarized in *Jergeson v. Board of Trustees of School District No. 7, Sheridan County, Wyo.*1970, 476 P.2d 481, 487, as follows:

"* * * (A) teacher agrees by necessary implication that while he continues in his employment his moral conduct shall be in all respects exemplary and beyond just reproach; that entrusted as the teacher is with the education of the young, it becomes of primary importance that the principles of right living be by him instilled into them by his example and by his conduct."

In the last cited case this court quoted favorably from Hamilton and Mort, *The Law and Public Education*, 1941, pp. 358-359:

"The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach. It is well settled, therefore, that a teacher may be dismissed for immorality or misconduct. The Court of Appeals of Kentucky has said that both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils, and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality. Even charges of or reputation for immorality, although not supported by full proof, might in some cases, be sufficient ground for removal.

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Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools. For example, the indictment of a superintendent of schools for adultery,

followed by conviction, is sufficient grounds for his dismissal even though the conviction is subsequently set aside. It requires no extended argument to convince one that a teacher upon whom rests a well grounded suspicion of immorality cannot be an effective teacher of public school pupils. The board is not bound to form a judgment as to the truth or falsity of the charges." (Footnotes omitted.) ^[1]

See also *Durst v. School District No. 2 of Niobrara County*, 1929, 39 Wyo. 442, 449, 273 P. 675, 678.

The majority has now abandoned those worthwhile concepts and relegated a teacher's conduct outside the schoolhouse to his own private business, when it sets out the holding of this court to be the following:

" 'The right to be free from unwarranted governmental intrusions into one's privacy is a fundamental constitutional right, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), and such right of privacy embraces the right of an individual to attend church or not, to determine his or her own physical proportions, and to determine with whom he or she will associate.' "

Stoddard v. School District No. 1, Lincoln County, Wyoming, U.S.D.C.Wyo.1977, 429 F.Supp. 890, from which the foregoing quotation was taken, did not involve a question of teacher immorality. *Stanley v. Georgia*, Cited within the quotation, involved the constitutionality of an obscenity statute in which the defendant, not a school teacher, was charged with the crime of possession of an obscene film and the court merely held that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.

I cannot see that plaintiff's conduct is constitutionally protected on the basis of any authority cited. I can find no law or case which holds that a school teacher has a constitutional right to be immoral or give the appearance of immorality. If there is such a right, it is in the case of a school teacher subordinate to the public interest.

Wishart v. McDonald, 1 Cir. 1972, 500 F.2d 1110, is illustrative of the usual court attitude toward the limits of privacy. In that § 1983 proceeding a school teacher had been discharged for conduct unbecoming a teacher. The conduct by a small-town teacher was carried on in public view on his property, located in the town where he taught. He took a mannequin he had constructed, draped in a negligee, into his front yard where in a lewd and suggestive manner he had dressed, undressed and caressed it. The teacher claimed the school committee was punishing him for constitutionally protected private conduct and that the reason was unrelated to the educational process or to the working relationship within the educational institution. The court disagreed and held that the conduct would serve as a role-model for young children and his image as a school teacher gravely jeopardized.

In *Sullivan v. Meade County Independent School District No. 101*, U.S.D.C., S.D.1975, 387 F.Supp. 1237, aff'd cause remanded for dismissal 530 F.2d 799, it was held that discharge of a teacher for her conduct in living with a boyfriend without benefit of matrimony was not unrelated to the educational process or to working relationships within the educational institution, where there was strong community reaction. The plaintiff claimed that her relationship with the boyfriend was constitutionally protected within the meaning of the right to privacy. The court held that such a right

of privacy

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is not present because a school board may legitimately inquire into the integrity of its teachers. Immoral conduct sets a bad example for the young, impressionable people being taught.

The federal courts have repeatedly held that a state has a vital concern in the integrity of its schools and school authorities have a right and duty to screen officials, teachers and employees as to their fitness to maintain the integrity of the schools. *Beilan v. Board of Public Education, School District of Philadelphia*, 1958, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414, cert. den. 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 91; *Adler v. Board of Education of City of New York*, 1952, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, 27 A.L.R.2d 472; *Jenkyns v. Board of Education of District of Columbia, D.C. Cir.* 1961, 111 U.S.App.D.C. 64, 294 F.2d 260; *James v. West Virginia Board of Regents, U.S.D.C., S.D.W.Va.* 1971, 322 F.Supp. 217, aff'd 448 F.2d 785.

In *Beilan* the Supreme Court of the United States approved the utterances of the *Supreme Court of Pennsylvania in Horosko v. Mt. Pleasant Twp. School District*, 1939, 335 Pa. 369, 6 A.2d 866, stated when speaking of immorality as inconsistent with moral rectitude:

"If the fact be that she 'now commands neither the respect nor the good will of the community' and if the record shows that effect to be the result of her conduct within the clause quoted, it will be conclusive evidence of incompetency. It has always been the recognized duty of the teacher to conduct himself in such way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance * * *."

The court in the case before us would now grant full freedom of immoral conduct to teachers and repeal, as to conduct off the school grounds, the immorality provision of § 21-7-110(a), W.S.1977:

"(a) The board may suspend or dismiss any teacher for incompetency, neglect of duty, Immorality, insubordination, or any other good or just cause. (Emphasis added.)

That Albert was in good faith is evidenced by his conference with the school attorney, whose opinion was sought before ever giving notice of termination. He was advised there were sufficient grounds to pursue termination. Counsel so testified at the trial. One who takes the advice of counsel before instituting a criminal prosecution, and who places before such counsel all the facts and who acts in good faith on the opinion of counsel, has probable cause, and is not liable in an action for malicious prosecution. *Boyer v. Bugher*, 1911, 19 Wyo. 463, 120 P. 171. Certainly if that is evidence of good faith when initiating a criminal prosecution, it ought to be in a civil case, as well. I consider good cause to be as defined in *Wood v. Strickland*, *Supra*.

The matter of morality here was taken up with counsel. Albert indicated there had been some complaints about Holso being seen as much as he was with Miss Brookover. Gregson, the school principal, said they had gone hunting together. Counsel advised that the evidence to support such ground was rather weak, so for that reason was never charged. It was therefore concluded, upon recommendation of counsel that the morality question would not be pursued and was not, other than in the finding and conclusion of the board that it was not a matter which a teacher should take

up with his students, on school time. Members of the board in their testimony at the trial stated that the plaintiff ought to be teaching and not use his time taking up her personal problems with his students, an action about which parents had complained to the board.

At trial, one of four members of the board of trustees, called by the plaintiff as a witness, testified that any question of the morality of the plaintiff played no part on the board's decision to terminate plaintiff. A study of the transcript of the administrative

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hearing and trial discloses that any question of plaintiff's morality originated within the board itself and not with the defendant-superintendent of schools. The overwhelming Evidence, with none to the contrary, is that immorality was not formally charged, not considered and not found to be any basis for the plaintiff's-teacher's termination. The plaintiff has dragged that question in as nothing more than a red herring, as some perfidious, secret reason for the plaintiff's termination.

With respect to plaintiff's harsh grading system, I find no case which considers grading in whatever method the teacher's whims and fancy lead him as a protected constitutional right. That is fallacious on its very face. Contrary to the statement of the majority that the plaintiff had no notice of any school standard, the evidence was that the probability curve was basic elementary instruction to all teachers and well known within the profession. In addition, every teacher in the Weston County school system was issued a standard "Class Record Book" published by School Form and Supply Company, received as an exhibit, which contained the following table of suggested marking systems:

MEANS OF EXPRESSING MARKS PERCENT OF PUPILS-----									
----- Letter Numerical Normal									
PossibleQuality	System	Value[*]	Percentage	Distribution	Variation	-----			

Excellent	A	5	94 to 100	7	0 to 15	Good	B	4	87 to 93
								24	15 to 30
Average	C	3	80 to 86	38	30 to 50	Pass	D	2	75 to 79
								24	15 to 30
Fail	F	1	Below 75	7	0	-----			

----- [*] For daily marks-----									

The only variation from the table appears in the school regulations fixing "Fail" at 70, rather than 75. The plaintiff's grading varied to a considerable extent in an inordinate number of "D's" and failures, causing many complaints to the school board by parents and students of Holso's classes, complaints not registered with respect to the classes of other teachers within the system.

The majority classifies the complete exemption from control in the area of grading as "academic freedom." That is an utter distortion of the term and its application. The term refers to the text and manner of teaching. Not one single case cited in the majority opinion dealt with grading as a protected constitutional right but related to subjects and methods covering vulgarity, literary garbage, the popular synonym for sexual intercourse, use of profanity and drinking in school plays, race and prejudice in interracial marriage and personal agnosticism. It will probably

come as a tremendous surprise to the teaching profession, lawyers, scholars, parents and children that teachers have a complete license to flunk students willy-nilly because the Constitution says they can. Members of the board testifying at trial stated that the most common complaint against Holso, heard for four or five years and upon which they received rumbles from parents, was on his grading system.

It must be realized that a board of trustees is elected by the people of the district to represent them in school matters. When there are complaints to be made or questions to be asked by parents and others, the trustees are contacted. At least three matters that were involved in this case arose within the board in that fashion. The plaintiff's grading system was the subject of the most complaints to the board from parents. The question of Holso's discussion of his personal problem, particularly his extracurricular association with a female teacher, arose by a conveying of that information by students to their parents and thence to the board. The child of one school board member was a student in one of the classes of Holso, in which the matter was discussed. The school board member arranged to have his child taken from the

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class because of any possible effect upon the proceedings. Finally, the matter of Holso's morality arose by contacts with the board, from students and the public, not from the school superintendent.

The Only testimony that places the blame for the plaintiff's troubles on the defendant Albert came from the plaintiff himself. The plaintiff testified he believed the superintendent was responsible for all his troubles because "I received the letter by the undersheriff, I believe the term is, and he said Mr. Albert had directed him to deliver the letter to me, and Mr. Albert's signature was on the letter." The superintendent serves only in a ministerial capacity when he initiates a proceeding for suspension, dismissal or termination of a teacher. Section 21.1-160(b), W.S.1957, 1975 Cum.Supp. (§ 21-7-110(b), W.S.1977), provides:

"(b) Written notice. Suspension or dismissal proceedings Shall be initiated by the superintendent or any member of the board delivering to the teacher a written notice thereof, together with written reasons therefor." (Emphasis added.)

Section 21.1-156(a), W.S.1957, 1975 Cum.Supp. (§ 21-7-106(a), W.S.1977), provides:

"(a) A continuing contract teacher shall be notified of a recommendation of termination by the superintendent or any member of the board by giving such teacher written notice thereof, together with written reasons therefor on or before March 15 of any year."

The fact that the superintendent or a board member signs a notice has no connotations of malice or bad faith any more than a prosecuting attorney signing a criminal complaint or criminal information or the foreman of a grand jury signing an indictment. One cannot just manufacture a constitutional violation and infer malice from the fact that the superintendent is required by statute to sign a notice of termination. If that is to be the law, then a superintendent is helpless to perform his duty.

The majority is placing the entire impact on its decision on a superintendent who had no authority to terminate Holso. Only the school board had the statutory authority to terminate the teacher. He was, in fact, terminated by the board, not the superintendent. Albert's signing of the

notice was not even a recommendation yet even if it was, it could not deprive the plaintiff of any right, privilege or immunity secured to him by the Constitution and laws of the United States. In a like case, it was held a teacher is not entitled to relief against the superintendent of the school district for that reason. *Vandersanden v. Lowell School District No. 71, U.S.D.C., D.Or.1973, 369 F.Supp. 67.*

When asked at the trial of the case before us on cross-examination why he thought the board was malicious, the plaintiff teacher replied:

"I believe the school board intended the school board and the superintendent intended to do me harm, because they were unhappy with my individualism as a man. They were unhappy with me as a person. And, they thought, we gave you an offer to quietly resign and get out, and you challenge us now we're going to put you in your place."

The majority points to the following testimony of the plaintiff to show bad faith and malice of the defendant: "he (Albert) made references to the fact that when this is completed, you won't be getting a job. You will be lucky if you get you will not get a job any place." In the first place, there is no corroboration of that statement, though it seems to have been purportedly made during a conference when Gregson, the school principal, was present; he did not remember. The defendant-superintendent Albert denies the statement. In the second place, I construe that to be more or less a statement of a fact of life. I rather suspect that a school board or school superintendent might be hesitant about a teacher who has been through a termination proceeding. Thirdly, there is no evidence that the superintendent or anyone else took any further action to blacklist the plaintiff at any place or time or under any circumstances. I will discuss this later as related to damages.

The first point I have made with respect to the two foregoing supposedly constitutional
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grounds (immorality and grades) is that there was board basis for its dissatisfaction with Holso in those areas. More than that, however, there was basis for the other grounds for termination and their cumulative effect points to a teacher that a school board could reasonably believe was inadequate and not in the best interests of the school district to retain. I want to briefly mention those other grounds.

The majority places its principal reliance upon the fact that plaintiff did not exceed his sick leave and anything else was trivial. That is an understatement of the facts. It is regrettable that Mr. Holso is afflicted as he is with a "severe" case of diabetes and the disabilities associated with a colnectomy.^[2] On at least two occasions during classroom periods, he had attacks of hypoglycemia, too low a blood sugar content, causing him to go into a coma. As a result, it was necessary that students run to the school office for help. As a matter of fact, the administrative hearing was delayed because Holso developed hypoglycemia and had to be taken to the hospital where he was admitted to the emergency room in a semicomatose state and beginning to have mild convulsive seizures.

With respect to the ileostomy, special attention must be given to body evacuation. According to plaintiff's own testimony, it is not a matter that can wait and he frequently must leave the classroom to dispose of waste. That may require anywhere from an average 5-10 minutes to 20

minutes. It was not that school authorities were intolerant or insensitive to Mr. Holso's health problems. He was assigned to a classroom very near the school office and instructed to notify someone there that his class was unattended, when necessary to relieve himself. That is what he failed to do. The finding of the board very well summarizes the difficulty and it has factual basis. [3]

In *Fisher v. Church of St. Mary, Wyo.* 1972, 497 P.2d 882, this court held that contracts to perform personal services are made on the implied condition that the party employed shall be capable of performing the contract, so that a disability caused by physical condition will operate as a discharge, termination of the contract or excuse for nonperformance. The court went on to hold that such a disability must be material and an illness of long duration, which renders an employee unable to substantially perform, thus permitting the employer to treat the agreement as terminated. The significant holding of this court, however, is that whether justification exists for termination of a contract under the facts and circumstances of a particular case is usually A question of fact for the fact finder.

In the Church of St. Mary case, this court held that a disability of long duration, causing serious inconvenience or injury to the church school was sufficient reason for termination of the teacher's contract. In the case before us, the fact finder is the school board created to find those facts and make that decision. While I might have a different view, reasonable minds can differ as to whether Holso's permanent physical condition materially interfered with the substantial performance of his contract. There was something more than a scintilla of evidence to support the board's decision and it was of such relevance that a reasonable mind might accept it as adequate to support a conclusion. That is all that is required. *Howard v. Lindmier*, 1950, 67 Wyo. 78, 87, 214 P.2d 737, 740. It is not the

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business of this court to substitute our judgment for that of the school board. *Shenefield v. Sheridan County School District No. 1, Wyo.* 1976, 544 P.2d 870, and the cases there collected. See also *Baird v. School Dist. No. 25, Fremont County*, supra.

There was also a factual basis within plaintiff's failure to perform work assigned by his superior:

"2 Mr. Holso failed to complete and hand in specific assignment of work required by his superior, Mrs. Betty Shurley. He was reminded to do so on several occasions at meetings by Mrs. Shurley and his principal, Glenn Gregson. The assignment was the preparation of a class outline or syllabus which was to be a significant part of a booklet designed to coordinate the curriculum of English classes from kindergarten through 12th grade in Newcastle schools. Mr. Holso did not complete or hand in this work until six days after his notice of termination was given and after the booklet was assembled without his work. Mr. Holso admitted that he failed to cooperate with the head of the English department and failed to hold a high school English teachers meeting that he was directed to hold. The failure to hold the meeting was not excused by any facts shown."

I have no argument with the majority's statement of the rule that in order to be a ground for discharge, insubordination must be of a continuing nature "a persistent course of willful defiance." However, in this case, it adds fuel to the fire of dissatisfaction of the school board with this

particular teacher. It adds credence and support to the board's participation in proceeding toward his removal for the good of the school system concerned.

Within the ambit of *Wood v. Strickland*, supra, the school board had good cause as did the superintendent to move toward the removal of Holson. In *Prebble v. Brodrick*, 10 Cir. 1976, 535 F.2d 605, a University of Wyoming teacher case, the court recognized *Wood* and summarized the rule of that case as follows:

" * * * The Court ruled that a school board member is not immune from damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student; a compensatory award is appropriate only if he acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith. *Id.* at 322, 95 S.Ct. at 1000-01, 43 L.Ed.2d at 225."

The Tenth Circuit then proceeded to apply it to a teacher case and affirmed the discharge. *Wood* applies to school authorities other than the board of trustees. There is in the case before us no impermissible motivation nor such clearly established constitutional rights that either the action of the board or the superintendent cannot reasonably be characterized as being in good faith.

The plaintiff in all three causes of the complaint as amended charged that the board of trustees and the superintendent acted "jointly and severally" in not only a constitutionally prohibited discharge under 42 U.S.C. § 1983 but also under the tort concept by which the majority relieves the board of trustees of liability. The trial judge in his form of judgment also held against the superintendent not only under § 1983 but also on the tort approach. It is my view that there is not only no § 1983 claim but also none for the tort, "malicious interference with opportunity to pursue his professional career", or "interference with prospective advantage" as labeled by the majority. If the court is going to apply that doctrine, then we must also examine it as to the defendant Albert. As pointed out previously, the trial judge in that phase found the school board malicious but failed to find the superintendent malicious. If the application of that rule is not discussed, there will be left the appearance of and tacit approval by this court of an inapplicable doctrine erroneously applied.

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As I see the majority opinion, the tort rule it applies is taken from § 766, p. 49, Restatement of the Law of Torts (1939):

"* * * (O)ne who, Without a privilege to do so, induces or otherwise purposely causes a third person not to

"(a) perform a contract with another, or

"(b) enter into or continue a business relation with another

"is liable to the other for the harm caused thereby."

The words, "without a privilege to do so" means that it applies to outsiders. Albert is not an outsider but one charged with an efficient operation of the district's school system. He is no more a stranger than the school board. It is within the scope of his duties to recommend termination of a

teacher's contract and he must be given some latitude in doing so. He falls within the privilege provisions of subsequent sections of the Restatement of the Law of Torts, §§ 770, pp. 81-82, and 772, pp. 85-87. In *Wartensleben v. Willey, Wyo.* 1966, 415 P.2d 613, this court recognized the element of privilege to purposely cause another not to perform a contract.

I have searched the available references and have not found where the tort theory advanced by the plaintiff and the trial court has been generally utilized in connection with the termination or discharge of public employees. There are literally hundreds and hundreds of reported cases on the subject of liability for procuring breach of contract. See the comprehensive annotation on the subject in 26 A.L.R.2d 1227 and equally imposing array of cited cases in the Later Case Service, with pocket supplement, to that annotation; supplements to Restatement of the Law of Torts; Torts, West's Digest System, Key No. 12.

I found four cases which could be identified by title or case notes applicable to school teachers and none are favorable to plaintiff. *Widger v. Central School District No. 1 of Towns of Ellicottville, Great Valley, East Otto, Franklinville, Humphrey and Mansfield, Cattaraugus County*, 1964, 20 A.D.2d 296, 247 N.Y.S.2d 364, dealt with a cause of action for tortious intervention with contract rights. The court stated the general rule to be that one acting within the scope of his employment, who induces a breach of contract, is not liable in damages to the other party to the contract. The court cited *Greyhound Corporation v. Commercial Casualty Ins. Co.*, 1940, 259 A.D. 317, 19 N.Y.S.2d 239, cited in the A.L.R.2d annotation, 26 A.L.R.2d 1270, as standing for the general rule that officers, directors or employees of a corporation are not liable for a breach of the corporation's contract on the theory that they induced such breach. It is noted in that annotation as a reason that it would be anomalous indeed to hold an agent liable for a tort committed within the scope of his authority when liability does not attach to the principal for the same tort committed on his behalf and presumably for his benefit.

Another case is *Caverno v. Fellows*, 1938, 300 Mass. 331, 15 N.E.2d 483. In that decision the teacher, as plaintiff, had difficulty with the school principal over failure to furnish school news material to the local newspaper. Her immediate teacher supervisor, the principal, was defendant. The principal became angry and said he would see to it that plaintiff would live in some other place, indicating discharge. The plaintiff testified further that the principal said to her, "I shall see whether Miss Harris and I, or you will remain longer in the Gloucester High School." The matter was reported to the superintendent, who recommended to the school committee (equivalent of a board of trustees) that because of that and the plaintiff's nervous condition, she be terminated.

The court in *Caverno* pointed out that when malice or malevolence is the only reason for the action and there is no other justifiable purpose, it must be answered for. However, the court pointed out that the evidence did not show that the malevolence, rather than a purpose to perform a duty, was the defendant's sole or even dominant purpose in the actions taken toward dismissal of the plaintiff. The court concluded that statements made to the plaintiff were

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not sufficient to show unlawful interference. Generally, the case holds the actions taken by the teacher's immediate supervisor, the principal or superintendent, were actuated by no more than a desire to promote the interests of the school and were not actuated by ill will or a purpose to harm

the teacher. I consider the superintendent's position in the case before us to be identical to the position of the superintendent in Caverno in which it was noted that the superintendent was following normal statutory provisions for proceedings against the teacher, leading to her dismissal, and that he was doing no more than performing his duty as superintendent to properly promote the interests of the school.

A third case found is *Bullock v. Joint Class "A" School District, No. 241, Idaho, Adams and Lewis Counties*, 75 Idaho 304, 272 P.2d 292. There the teacher refused to be transferred to another school so was discharged by the trustees, upon recommendation of the district superintendent. The plaintiff complained that the superintendent threatened to harm her teaching certificate and see that she never taught in the state again if she refused to accept a transfer. The court held there to be no cause of action in tort against the superintendent, in the absence of any acts or things done by him or the trustees to carry out the threat, with resulting injury to the plaintiff. The court further held that the superintendent was acting in his official capacity, within his authority and with full approval of the board, nor did he do any wrongful or illegal act in order to accomplish the termination of the contract. The threats were considered wholly extraneous matter.

The plaintiff's claim of tortious interference with his contract has been judicially considered yet more recently. In a similar case, *Perry v. Apache Junction Elementary School District, # 43*, 1973, 20 Ariz.App. 561, 514 P.2d 514, pet. rev. den. 111 Ariz. 1, 522 P.2d 761, a discharged school principal charged that members of the school board and superintendent had conspired to bring about the wrongful termination of her employment. Affirming dismissal of the claim on motion for summary judgment, the Arizona court said:

"We must now consider the conspiracy to procure appellant's breach of contract. A school board member is an agent of the school board, *Webster v. Heywood*, 21 Ariz. 550, 192 P. 1069 (1920), and the superintendent is obviously an employee of the board. It has been held that agents and employees of a corporation cannot conspire with their corporate principal or employer when acting in their official capacities on behalf of the corporation and not as individuals for their individual advantage. *Wise v. Southern Pacific Company*, 223 Cal.App.2d 50, 35 Cal.Rptr. 652 (1963). "We think the rule expressed by the California court is applicable here. Being in a confidential relationship with the board the actions of the members and the superintendent were privileged. *Wise v. Southern Pacific Company*, supra. We can find no facts alleged indicating that appellees were acting for their individual advantage."

The holdings of Caverno and Bullock are consistent with the holdings of this court with respect to malice as a motivating factor. The want of probable cause may not be inferred from malice. *Steadman v. Topham*, 1959, 80 Wyo. 63, 338 P.2d 820; *Henning v. Miller*, 1932, 44 Wyo. 114, 8 P.2d 825, reh. den. 44 Wyo. 114, 14 P.2d 437; *McIntosh v. Wales*, 1913, 21 Wyo. 397, 134 P. 274, Ann.Cas. 1916C 273; *Boyer v. Bugher*, supra. Even though used in malicious prosecution cases, that statement of reason and logic is applicable in the case before us where the plaintiff, with the approval of the majority, seeks to punish the defendant for giving him notice of termination.

Even assuming that Albert's statement to Holso that he would find some difficulty finding a job after these proceedings was a threat relied with indications of malice, which I disclaim to be the

case, probable cause existed for instituting the termination proceeding, as in this opinion demonstrated.

Since I find no basis for a holding favorable to plaintiff, I would allow no damages

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beyond those to restore him his lost salary and fringe benefits. Even if plaintiff were to be allowed recovery of something beyond that, it could be no more than nominal. He proved no actual damages for any asserted constitutional violations, other than the cost of 'phone calls made after termination by the board. There was no evidence whatsoever that any member of the board of the defendant Albert made any adverse report or recommendation to any prospective employer or that any prospective employer turned down the plaintiff because of his termination by the board. Nor is there any evidence that the defendant Albert circulated word to anybody that plaintiff should not be employed or that he made any active effort whatsoever to impugn the plaintiff. Plaintiff is still on the job; he can have no loss for any future employment disadvantage!

The holding of the court in this case establishes a system of rewards for the unsatisfactory teacher to be paid as a penalty personally by the school superintendent. If he attempts to upgrade the professional teaching staff of the school under his management and a court decides the evidence is insufficient, though present, he is at once charged with malice and a violation of the teacher's constitutional rights and malice, stripped of his discretionary authority and exposed to a personal money judgment. Courts do not hold an unsuccessful plaintiff liable for failing to prove his case, so I see no reason to do so where the eventual outcome of an administrative proceeding results in its reversal.

Words spoken during the course of judicial proceedings have historically been privileged. In *School District No. 11, Laramie County v. Donahue*, 1940, 55 Wyo. 220, 97 P.2d 663, the defendant sought damages against the plaintiff because in the pleadings it was alleged that the defendant was insolvent, and thus libeled. This court approved the following language:

" 'Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry.' "

By the Administrative Procedure Act, administrative proceedings have been given the dignity of at least quasi-judicial proceedings. There is little reason why Albert's testimony should not be protected from that point of view. The term "judicial proceeding" is not restricted to trials but includes every proceeding of a judicial nature before a court or official clothed with judicial or quasi-judicial power. *Richeson v. Kessler*, 1953, 73 Idaho 548, 255 P.2d 707; *Ramstead v. Morgan*, 1959, 219 Or. 383, 347 P.2d 594; for many other cases, see West's Digest System, Libel and Slander, kk38 and 39. The majority takes the view that Albert is liable because in the administrative proceeding, he expressed the view that Holso's conduct bore an important relationship to the function of education. If such an opinion is to be stifled and a liability affixed,

then the judicial function is being destroyed. The charges were relevant and pertinent to the subject of inquiry with respect to Holso's fitness as a teacher in a public school and the superintendent should not be condemned for them.

The proposition and reason for such a rule is excellently stated in *Petroni v. Board of Regents*, 1977, 115 Ariz. 562, 566 P.2d 1038, rev. den.:

"* * * Decisions on the granting of academic tenure necessarily have a long range effect on the character of the state's educational institutions. If the officials responsible for recommending whether a permanent position should be granted are exposed each time they make a negative evaluation to the possibility of a jury trial on their motives and the truthfulness of their statements or the

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accuracy of their opinions, the risk inherent in all but the most extreme cases would tend to deprive the governing body of the candor essential to an accurate appraisal of the applicant's qualifications. It is not for the protection of the public officer but for the protection of the public that absolute immunity is recognized in these circumstances. See *Hughes v. Bizzell*, 189 Okl. 472, 117 P.2d 763 (1941)."

Even if we apply only a qualified immunity, as apparently does the Supreme Court of the United States, the statements of Albert related to a professional distaste, well supported by the courts, for a teacher bringing disrepute upon the educational system, rather than any personal animosity.

However I look at it, I cannot accept what appears to me as an arbitrary view of the majority that since the administrative decision of termination has been reversed, a liability at once must be assessed against the superintendent. I would suggest that the trial judge may even have a different attitude if he could see that there was no official school board liability and the whole onerous burden is thrust upon the superintendent. While I consider the plaintiff's physical condition a burden upon the school system, at the same time, he has value as a teacher and it does not substantially interfere with his performance of duty, though presenting an extremely close question. The plaintiff's grading can be corrected. He made a serious mistake of judgment in discussing his personal problems, particularly the one he elected to talk about. There, again, it does not appear that it was a matter of habitual practice with him, as was his isolated instance of insubordination. Any question of morality was not a ground for termination, either charged or found.

The board had good cause, as did the superintendent to explore those variances from accepted teacher behavior as grounds for termination but should not be penalized for doing so. If every authorized legal action looking toward termination carries with it the risk of personal liability, the public and its schools will suffer, because those in charge will avoid the weeding process necessary to eliminate the unfit, the incompetent and discourage upgrading academic personnel.

I would only affirm the district court on its reversal of the termination and allow no other recovery.

THOMAS, Justice, concurring in part and dissenting in part, with whom RAPER, J., joins.

While I agree with the result reached in the majority opinion affirming the district court with

respect to Holso's termination and reversing the judgment against the School Board for damages, I must dissent from the conclusion of the Court to affirm the judgment against A. L. Albert. However much any of us may object to Albert's conduct in this matter, our response to his conduct is limited by the dual strictures of the law and reason.

The elements of a cause of action under title 42, U.S.C. § 1983 are:

1. That the "defendant act under color of" state or local law, and
2. That the plaintiff be subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Adickes v. S. H. Kress and Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Prebble v. Brodrick*, 535 F.2d 605 (10th Cir. 1976); *Smith v. Young Men's Christian Association of Montgomery, Inc.*, 462 F.2d 634 (5th Cir. 1972); *Sigler v. Lowrie*, 404 F.2d 659 (8th Cir. 1969); *Marland v. Heyse*, 315 F.2d 312 (10th Cir. 1963); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963); *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962); *Williams v. Hot Shoppes, Inc.*, 110 U.S.App.D.C. 358, 293 F.2d 835 (1961); *Baron v. Carson*, 410 F.Supp. 299 (N.D.Ill.1976); *Davidson v. Dixon*, 386 F.Supp. 482 (D.Del.1974); *Ames v. Vavreck*, 356 F.Supp. 931 (D.Minn.1973); *Flood v. Margis*, 322 F.Supp. 1086 (E.D.Wis.1971). See particularly *Lombard v. Board of Education of the City of New York*, 407 F.Supp. 1166 (E.D.N.Y.1976).

In setting forth these elements, and in the results which are reached, the cases, including those cited in the majority opinion,

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contemplate and encompass an actual deprivation of a constitutional right. This is a limitation upon the federal rule of liability which we are applying, and since it is a federal rule of liability a state court is not justified in extending the limits of the rule which the federal authorities announce.

The district court in this instance, and the majority of this Court, do not describe an actual deprivation of Holso's constitutional right of freedom of association. It must be noted that the majority describes what A. L. Albert did as "attempting to deprive plaintiff of his teaching career on the basis of constitutionally impermissible reasons." Several courts have pointed to the necessity for a causal relationship between the conduct of a defendant and the deprivation of the constitutionally protected right asserted by the plaintiff. *Hoffman v. Halden*, 268 F.2d 280, 296 (9th Cir. 1959); *Cuiksa v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Kenney v. Fox*, 232 F.2d 288 (6th Cir. 1956); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1953). The factual circumstances in these cases differ from this case, but the reasoning relating to the concept of proximate causation is quite apt.

The majority of the Court assumes that the focus of Holso's action is a complaint anent the deprivation of his right to freely associate with whom he pleases. In actuality his cause of action is related to his property right in his employment, and in demonstrating his right to recover under Title 42 U.S.C. § 1983 it is incumbent upon Holso to show that he lost his job because he exercised his constitutional right freely to associate. In fact that was not a ground which was relied upon by the School Board for his discharge, and the district court did not find that it was either an actual or concealed basis for his discharge. It follows that Albert did not succeed in causing Holso to be deprived of his job for that constitutionally impermissible reason, and the legal effect of that

circumstance is that the tort described in Title 42 U.S.C. § 1983, was not committed. Liability for damages does not follow when a tort is not committed.

I am dismayed by the effect of this decision because while the Court does not say that immorality is constitutionally protected conduct so far as a teacher is concerned the effect of the ruling may be substantially the same. Under this decision, whenever a school administrator is informed of circumstances which may manifest immoral conduct he investigates that situation and reports it to the school board at his peril. If he is wrong, he is subject to suit. If he is right, the teacher will be discharged. I hope that school administrators are blessed with the courage and commitment to pursue their responsibilities in the face of that peril, but I fear that not all will be possessed of that degree of courage and commitment. My witness is that the performance by school administrators of an appropriate aspect of their duties is chilled substantially by this extension of the federal tort to cover attempted conduct rather than consummated conduct.

With respect to the grading practices these were a ground for discharge by the Board. I cannot agree that a teacher's grading practices are constitutionally protected conduct. No case is cited in the majority opinion which so holds. Reason dictates that evaluation of students is something quite different from instruction of students. The rationale which the courts have structured relative to the concept of academic freedom is that it is a species of free speech which is protected by the *First Amendment*. E. g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Webb v. Lake Mills Community School District*, 344 F.Supp. 791 (N.D.Iowa 1972); *Mailloux v. Kiley*, 323 F.Supp. 1387 (D.Mass.1971); *Parducci v. Rutland*, 316 F.Supp. 352 (M.D.Ala.1970).

In developing this rationale the courts have emphasized the necessity of protecting the free communication of ideas in an academic

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setting. Grading or evaluation of students is not a function that involves the communication of ideas, and for that reason grading does not logically fit within the protection of the First Amendment. Every student under our system of public education has an interest in a grade which is at least equal if not paramount to the interest of the teacher in that grade. If the grade is to be challenged it likely must be done through the channel of administrative authority within the school. The student or the administrative authority must assume the burden of demonstrating that the grade was erroneous, but to foreclose relief by protecting the teacher's grading practice under the First Amendment is not fair.

Since I conclude that Holso's discharge by the School Board was not caused by Albert insofar as the protected right to freedom of association is concerned (see *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)), and since I conclude that the grading practice which was a ground for discharge is not constitutionally

protected conduct, I am convinced that Albert did not commit the tort described in Title 42 U.S.C. § 1983. Since the tort was not committed there is no basis for Albert's liability, and the judgment against Albert personally should be reversed. He has been punished without due process of law.

Notes:

[1] 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] Section 21-7-110, W.S.1977, provides in pertinent part that

"(a) The board may suspend or dismiss any teacher for incompetency, neglect of duty, immorality, insubordination or any other good or just cause."

[3] We would be remiss, however, in failing to note the recent United States Supreme Court's decision, which held that local government entities, including school boards, are "persons" under § 1983 and, therefore, not entitled to absolute immunity for actions, taken pursuant to an official policy, resulting in a constitutional tort. *Monell v. Department of Social Services of the City of New York*, — U.S. —, 98 S.Ct. 2018, 56 L.Ed.2d 611 (decided June 6, 1978).

[4] As stated in *Aumiller v. University of Delaware*, supra, at 1303:

"The existence of a collateral justification for defendants' actions possibly may be relevant to the Scope of relief afforded to Aumiller, particularly regarding the appropriateness of reinstatement as a remedy. In *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the Supreme Court recently indicated that once a plaintiff has shown that his conduct was constitutionally protected and was a motivating factor in the defendants' decision not to rehire him, then defendants can limit plaintiff's remedy by demonstrating by a preponderance of the evidence that they would have reached the same decision even in the absence of the violation of the protected right. If this burden is satisfied, the Supreme Court indicated that the plaintiff would not be entitled to reinstatement as a remedy. The purpose of the remedy in such a context is to restore the plaintiff to the position he would have been in but for the constitutional violation, but not to place him in a better position than if no violation had occurred."

We agree with this interpretation of the *Mt. Healthy* decision.

[5] 42 U.S.C. § 1988, as amended, provides in pertinent part:

" . . . In any action or proceeding to enforce a provision of sections 1977, 1978, 1980, and 1981 of the Revised Statutes (42 USCS §§ 1981-1983, 1985, 1986), title IX of Public Law 92-318 (20 USCS §§ 1681 et seq.), or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code (26 USCS §§ 1 et seq.), or title VI of the Civil Rights Act of 1964 (42 USCS §§ 2000d et seq.), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 USCS § 1988, 1977, Cum.Supp.

[1] One of the authors, Robert R. Hamilton, was Dean of the Law School, University of Wyoming,

for many years. He is a recognized authority on school law. The cited book came out as a Second Edition in 1959; the same statement appears at page 397 thereof. Dean Hamilton also authored Legal Rights and Remedies of Teachers, 1956; at pp. 46-47, the same theme is discussed and made clear that a higher standard of conduct is required of teachers than others.

[2] The entire colon is removed surgically and the small intestine is brought out through the abdomen in what is called an ileostomy. The latter procedure requires that a small plastic bag be attached to the skin in order to allow the patient to eliminate body waste.

[3] "1 The illnesses of David E. Holso (diabetes and ileostomy) interfere with his professional responsibility in the classroom and cause him to be absent from classes for substantial periods of time. On the occasions of his absences, he has failed to notify the principal's office and the absences result in inattention to school work by the students. Mr. Holso has not carefully observed his diet and has on occasion not carefully controlled his diabetic condition. Mr. Holso failed to follow the direction of the principal that he notify the principal's office each time he found it necessary to leave his room during a class period."

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427 So.2d 134 (Miss. 1983)

Tommy JACKSON

v.

HAZLEHURST MUNICIPAL SEPARATE SCHOOL DISTRICT.

No. 53613.

Supreme Court of Mississippi.

February 23, 1983

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Robert W. Sneed, Jackson, for appellant.

S.E. Allen, Jr., Hazlehurst, for appellee.

Before BROOM, ROY NOBLE LEE and PRATHER, JJ.

ROY NOBLE LEE, Justice, for the court:

Tommy Jackson has appealed from an adverse decision of the Hazlehurst Municipal Separate School District to renew his contract for employment as a science teacher in the school for the 1981-82 school year, which was affirmed by the Chancery Court of Copiah County, Honorable Mike Carr, presiding. He assigns three errors in the trial below, and they may be consolidated into one question containing three sub-questions:

The chancery court erred in affirming the Board of Trustees' decision not to renew appellant's contract because (a) irrelevant and prejudicial evidence concerning past incidents of insubordination was admitted, (b) the Board's decision is arbitrary, capricious and not supported by substantial evidence, and (c) the Board's decision for non-renewal of the contract resulted from appellant's membership in a labor union.

The record reflects that appellant had been employed as a science teacher at the Parrish Jr. High School in Hazlehurst, Mississippi, for nineteen years, and, on March 16, 1981, he received a formal written notice that his contract of employment would not be renewed for the ensuing 1981-82 school year. He was advised of his right to have a hearing before the school board under the School Employment Procedures Law of 1977, and of his right to a written explanation for non-renewal of the contract, if he requested same. Appellant asked for both procedures, and received the following written reasons for non-renewal:

1. Violations of Item 4, Page 2 of "Mississippi Public Schools Contract for Employment," specifically, insubordination.

a. Direct refusal to comply with an assignment of duty made by Principal Fred Gordy for the night of a Junior High School football game, on or about October 23, 1979. Mr. Jackson was directed to assist in supervision of the students at the game and was given a written assignment of the duty by Mr. Gordy. Mr. Jackson responded by crumpling the paper on which the assignment was written, throwing it on the floor and telling Mr. Gordy that he would not comply with the assignment; and Mr. Jackson did not comply with the assignment of duty.

b. Direct refusal to comply with the assignment of duty made by Principal Fred Gordy on or

about Wednesday, December 17, 1980, to observe student behavior on the Junior High campus during mid-morning break, during examinations. At the time of the refusal, Mr. Jackson was on probation for violation of the sick leave policy of the Hazlehurst Municipal Separate School District and for violation of Item 4, Page 2 of the teacher contract signed by him, and dated May 16, 1980.

The hearing before the school board was held on April 13, 1981, and both parties were present with their attorneys. Appellant's attorney moved the Board to strike and exclude all evidence pertaining to (1)(a) of the written notice, since such matter related to the year 1979 and did not involve the contract period 1981-82. The motion was overruled.

Without detailing the evidence reflected by the record, it is sufficient to state that proof of the reasons set forth in the letter of non-reemployment was made by the school district. Appellant introduced evidence claiming the incidents enumerated were unreasonable.

(a) Appellant contends that the school board erred in admitting the matters set forth in (1)(a) of the letter in that they were irrelevant and prejudicial concerning past incidents of insubordination.

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The intent of the School Employment Procedures Law of 1977 is expressed in Mississippi Code Annotated Sec. 37-9-101 (Supp.1982), effective from and after July 1, 1977:

It is the intent of the legislature to establish procedures for providing public school employees with notice of the reasons for not offering an employee a renewal of his contract, to provide an opportunity for the employee to present matters in extenuation or exculpation to enable the board to determine whether the recommendation of nonemployment is a proper employment decision and not contrary to law, and not to establish a system of tenure or require that all decisions of nonreemployment be based upon cause with respect to employment in the school district. (Emphasis added).

The thrust of appellant's brief is to the effect that he was terminated in his employment with the school board and most of the authorities he cites relates to the termination of an existing or continuing contract. Section 37-9-101, supra, specifically states that a teacher does not have tenure, viz, he does not have the absolute right for renewal of his contract where there is no fault on his part. This Court has so held in *Calhoun County Board of Education v. Hamblin*, 360 So.2d 1236 (Miss.1978); *Holliday v. West Point Mun. Sep. Sch. Dist.*, 401 So.2d 1296 (Miss.1981); and *Cox v. Thomas*, 403 So.2d 135 (Miss.1981). In *Calhoun County Board of Education*, quoting from *McCormick v. Attala County Board of Education*, 407 F.Supp. 586 (N.D.Miss.1976), the Court said:

In Mississippi, state law does not provide for a system of job tenure for public school teachers [citations omitted]. The defendants [Board of Education] had the lawful right not to rehire the plaintiff for any reason, or for no reason at all, upon expiration of the contract, so long as her constitutional rights were not violated [407 F.Supp. at 594].

The Court further said:

The burden of proof at the hearing is not on the superintendent or principal, as the case may be, as it would be in a tenure situation. *Lamar County School Board v. Saul*, 359 So.2d 350 (Miss.1978). Once the Superintendent has given a demonstrable reason for nonreemployment

(before the hearing), the burden at the hearing is upon the employee to prove affirmatively and conclusively that the reasons relied upon by the School Board have no basis in fact. [360 So.2d at 1240].

The 1979 Incident of Insubordination was not placed in appellant's personnel file. However, the proof is clear by the school board that the incident did occur and we are of the opinion that it was relevant to facts involving renewal of the contract, which the school board was not bound to tender unless impermissible constitutional reasons existed. In a hearing such as the one here, the school board is not bound by rules of evidence and procedure as in a trial court where an experienced judge presides over the hearing. Mississippi Code Annotated Sec. 37-9-111(5) (Supp.1982) provides:

(5) In conducting a hearing, the board or hearing officer shall not be bound by common law or by statutory rules of evidence or by technical or formal rules of procedure except as provided in sections 37-9-101 to 37-9-113, but may consider such hearing in such manner as best to ascertain the rights of the parties; provided, however, hearsay evidence, if admitted, shall not be the sole basis for the determination of facts by the board or hearing officer.

There was no error in admitting evidence of the 1979 incident.

(b) Appellant next contends that the Board's decision was arbitrary, capricious, and unsupported by substantial evidence.

The finding of the school board was stated in its order following:

1. Violations of Item 4, Page 2 of "Mississippi Public Schools Contract for Employment", specifically, insubordination.

a. Direct refusal to comply with an assignment of duty made by Principal Fred Gordy for the night of a Junior High School football game, on or
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about October 23, 1979. Mr. Jackson was directed to assist in supervision of the students at the game and was given a written assignment of the duty by Mr. Gordy. Mr. Jackson responded by crumpling the paper on which the assignment was written, throwing it on the floor and telling Mr. Gordy that he would not comply with the assignment; and Mr. Jackson did not comply with the assignment of duty.

b. Direct refusal to comply with the assignment of duty made by Principal Fred Gordy on or about Wednesday, December 17, 1980, to observe student behavior on the Junior High campus during mid-morning break, during examinations. At the time of the refusal, Mr. Jackson was on probation for violation of the sick leave policy of the Hazlehurst Municipal Separate School District and for violation of Item 4, Page 2 of the teacher contract signed by him, and dated May 16, 1980.

In *Sims v. Holly Springs Mun. Sep. Sch. Dist.*, 414 So.2d 431, 435 (Miss.1982), involving termination of a teacher's contract, the Court discussed insubordination in the following language:

We find no definition of insubordination in our cases under our statutes. Among the definitions we have found, and one which we approve, is contained in *Ray v. Minneapolis Board of Ed., Spec. Sch. District No. 1*, 295 Minn. 13, 202 N.W.2d 375 (1972), and is:

A "constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority."

We are further of the opinion and hold that insubordination as so defined is "other good cause" within the meaning of Mississippi Code Annotated section 37-9-59 (Supp.1981).

We are of the opinion that the school board's decision was not arbitrary, capricious and unsupported by substantial evidence, and that the lower court was bound by the finding of the school board.

(c) Appellant last contends that the decision of the school board was based principally on appellant's membership in a labor union. He had the constitutional right to join the American Federation of Teachers union, which was designated as a collective bargaining representative for teachers in the Hazlehurst Municipal Separate School District, and to engage in union activities. Refusal to renew appellant's contract for that reason would be an impermissible violation of his First Amendment constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The evidence indicates that five out of thirty teachers' contracts were not renewed by appellee for the 1981-82 school year. Four of the five contracts not renewed related to members of the AFT union. The officials of the school district positively testified that membership of the teachers in the union did not enter into the non-renewal of the contracts and that such memberships did not influence them in declining to renew the contracts. The burden was upon the appellant to prove that the predominant reason for non-renewal of his contract was due to membership in, or connection with, the labor union, and he wholly failed to meet that burden. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). ^[1]

There being no reversible error in the proceedings below, the judgment of the lower court is affirmed.

AFFIRMED.

PATTERSON, C.J., WALKER and BROOM, P.JJ., and BOWLING, HAWKINS, DAN M. LEE, PRATHER and ROBERTSON, JJ., concur.

Notes:

[1] The Court also noted that a non-tenured teacher could be dismissed by a school board for no reason, but that a teacher was entitled to reinstatement if he could prove that the decision not to rehire was based on the teacher's exercise of constitutional rights.

30 Or.App. 855 (Or.App. 1977), N. Clackamas Sch. Dist. Etc. v. Fair Dism. App. Bd. /**/ div.c1
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30 Or.App. 855 (Or.App. 1977)

567 P.2d 1091

NORTH CLACKAMAS SCHOOL DISTRICT NO. 12, CLACKAMAS COUNTY,

Oregon, Petitioner,

v.

The FAIR DISMISSAL APPEALS BOARD, and John P. Smith, Respondent.

Court of Appeals of Oregon.

August 29, 1977

Argued and Submitted July 22, 1977.

William D. McDonald, Milwaukie, argued the cause and filed the brief for petitioner.

Robert D. Durham, Eugene, argued the cause and filed the brief for respondent John P. Smith.

No appearance for respondent The Fair Dismissal Appeals Board.

Before SCHWAB, C. J., and THORNTON and JOHNSON, JJ.

[567 P.2d 1092]

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PER CURIAM.

Petitioner asserts on appeal that the final order of the Fair Dismissal Appeals Board is internally inconsistent and not supported by substantial evidence. We disagree.

Petitioner also objects to the admission of certain evidence on the ground that it is irrelevant. We find that the evidence may be relevant and in any event its admission was not prejudicial.

Affirmed.

THORNTON, Judge, specially concurring.

In my view the Fair Dismissal Appeals Board's order overturning the dismissal is internally inconsistent to some degree. However, I would affirm on the ground that the Board found that the school district failed to establish that the teacher was guilty of insubordination by wilfully and intentionally violating school district policy against the physical punishment of pupils, and there is substantial evidence, viz., the teacher's own testimony, which if believed would support this finding. This is essentially what the Board's order boils down to.

The operative facts were that teacher John Smith was dismissed by the school district for insubordination in that he allegedly disobeyed standing policy governing physical punishment of pupils. A total of six separate incidents was set forth in the letter of dismissal from the superintendent.

The Board found, inter alia, that the incidents involving the striking of students Brown and Lock in 1972

" * * * do not appear to have been serious violations of the school district's disciplinary policies. * *
* "

In its ultimate findings of fact the Board stated:

"John Smith may have violated school district policy with respect to student discipline in principle, with

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respect to the incidents charged in 1972. These incidents justified the warning given to the teacher on October 31, 1972."

However, in its conclusions of law the Board stated:

"The facts relied upon to support the recommendation of the district superintendent (for dismissal) are not true and substantiated and do not justify the statutory grounds cited for the dismissal. * * *

" I have difficulty in harmonizing these findings and conclusions. It seems to me that if the Board found, as quoted above, that the teacher struck students Brown and Lock, as charged, it could not subsequently conclude as a matter of law that "(t)he facts relied upon to support the recommendation of the district superintendent are not true and substantiated," and setting aside the school district's action on this ground. To me the above order suffers from the same infirmity as the orders issued by the public Employee Relations Board in *Phillips v. State Bd. of Higher Ed.*, 7 Or.App. 588, 490 P.2d 1005 (1971), Sup.Ct. review denied (1972), and *Thompson v. Secretary of State*, 19 Or.App. 74, 526 P.2d 621, Sup.Ct. review denied (1974). This court reversed and remanded in both of the above cases.

As to the merits, briefly stated my reasoning in affirming is as follows:

The term "insubordination" is not defined in the Fair Dismissal Law or elsewhere in our statutes, so far as I can find. In *Barnes v. Fair Dismissal Appeals Bd.*, 25 Or.App. 177, 548 P.2d 988, Sup.Ct. review denied (1976), although we were not called upon to define the term, we affirmed the order of the Board which in turn had upheld a charge by a school district that the teacher had "been insubordinate by continually and repeatedly refusing to adhere to district policy and administrative directives in the use of physical discipline with students * * *."

In other jurisdictions "insubordination" has been defined as including the wilful refusal of a teacher to obey the rules and regulations of his or her employing

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board of education. *State Tenure Com'n v. Madison County Board of Ed.*, 282 Ala. 658, 213 So.2d 823 (1968). It has also been held to imply a general course of defiant, mutinous, disrespectful or contumacious conduct as [567 P.2d 1093] distinguished from disobedience, which connotes a specific violation of an order or prohibition. *Coomes v. State Personnel Board*, 215 Cal.App.2d 770, 30 Cal.Rptr. 639 (1963).

As I see it, "insubordination" as used in ORS 342.865(1)(c) means an intentional and wilful refusal to obey, or disobedience of, an order or directive which a school board is authorized to give and entitled to have obeyed.

On this record, the two 1972 incidents, for which he was warned and which were the only ones proved according to the Board, standing alone, would not be sufficient to establish insubordination.

147 S.E.2d 620 (S.C. 1966), 18479, Porter v. Pepsi-Cola Bottling Co. of Columbia /**/ div.c1 {text-align: center} /**/

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147 S.E.2d 620 (S.C. 1966)

247 S.C. 370

Charles S. PORTER, Respondent,

v.

PEPSI-COLA BOTTLING COMPANY OF COLUMBIA, S.C., Citizens &

Southern National Bank of South Carolina and

Malcolm W. Platt, South Carolina

National Bank and Lawrence L.

Layman, Appellants.

No. 18479.

Supreme Court of South Carolina.

March 28, 1966

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[247 S.C. 371] Rogers, McDonald & Ross, Columbia, for appellants.

[247 S.C. 372] Claud N. Sapp, Henry Hammer, Columbia, for respondent.

LEWIS, Justice.

The plaintiff, sales manager of defendant Pepsi-Cola Bottling Company of Columbia, South Carolina, Inc., was [247 S.C. 373] discharged from his employment for alleged insubordination in failing to carry out instructions of his superiors with regard to union activities among employees of the company. This appeal involves a determination of the effect of the discharge of plaintiff for such reason upon his right to recover accrued benefits under a profit sharing plan established solely by the employer for its employees.

The defendant Pepsi-Cola Company entered into a profit sharing plan and trust agreement in 1958 providing for the payment of certain benefits to its eligible employees upon termination of their employment or retirement. It provided for contributions by the employer from its profits each year to a trust fund out of which benefits were payable. The plan further provided that if any employee is discharged by the employer 'because of such employee's insubordination, gross inefficiency proven dishonesty, commission of misdemeanor or felony or other misconduct' his benefits under the plan are forfeited and all rights thereunder terminated.

The plaintiff was employed by the defendant Pepsi-Cola Company for approximately 25 years. He was discharged on October 29, 1963 for alleged insubordination. At the time of his discharge the plaintiff was a member of the supervisory personnel of the company, occupying the position of sales manager.

After his discharge, plaintiff brought this action against the defendant Pepsi-Cola Company and the trustees of the profit sharing plan to recover accrued benefits thereunder. The defendants denied plaintiff's right to recover upon the ground that he had been discharged from his employment for insubordination and therefore forfeited all rights to benefits under the plan. The trial in the lower court resulted in a verdict in favor of the plaintiff.

At appropriate stages of the trial, defendants made motions for nonsuit, directed verdict, judgment notwithstanding the verdict or in the alternative for a new trial. The motions were denied, and the defendants have appealed from the rulings thereon.

[247 S.C. 374] While several questions have been raised by the exceptions, the only one which we need consider is whether the evidence conclusively showed that the action of the employer in terminating plaintiff's employment precluded his recovery of benefits under the profit sharing plan, so as to have required the direction of a verdict in favor of the defendants by the lower court.

It is conceded that the terms of the profit sharing agreement are binding on the parties, including the conditions stated therein relative to eligibility of employees to receive benefits; and that plaintiff, upon termination of his employment with defendant Pepsi-Cola Company, was eligible to receive benefits under the plan, unless his employment was properly terminated for one of the foregoing disqualifying reasons. Admittedly, plaintiff's discharge arose out of his activities in connection with efforts being made by the Teamsters Union to organize the employees of the defendant Pepsi-Cola Company. The material facts leading to his discharge are not in dispute. The company management opposed the efforts of the union to organize its employees and this fact was communicated to plaintiff. He was a part of the supervisory personnel, ineligible to become a member of the union, and was instructed by his superiors to keep them advised of any union activities. Although plaintiff had knowledge of the activities of the union in connection with the organization of the company's employees, he not only failed and

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refused to inform his superiors thereof but met with union representatives on several occasions and personally signed a union card. Upon learning of the plaintiff's actions in connection with the union and his failure to report any knowledge of union activities to his superiors, as he had been instructed to do, the company discharged the plaintiff for insubordination.

Insubordination is generally held to import a wilful or intentional disregard of the lawful and reasonable instructions of the employer. *Freeman v. King Pontiac*[247 S.C. 375] *Co.*, 236 S.C. 335, 114 S.E.2d 478. The following from 35 Am.Jur., Section 44, page 478, is quoted with approval in the cited case:

'Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer, and wilful or intentional disobedience thereof, as a general rule, justifies a rescission of the contract of service and the peremptory dismissal of the employee, whether the disobedience consists in a disregard of the express provisions of the contract, general rules or instructions, or particular commands. This rule is not restricted to employees in subordinate positions, but applies to those employed in executive or supervisory capacities, although with respect to the latter it is recognized that they are not bound to such strict adherence to directions as is one whose employment involves the exercise of less degree of responsibility and discretion. The fact that an employee holds a position of authority over others, involving the exercise of executory and supervisory powers, does not relieve him from the duty of obedience to orders of the superiors.'

The record conclusively shows that the plaintiff, in his supervisory position, was, in effect, a

part of management and ineligible to become a member of the union. He knew that management opposed the union. He had been instructed to report to his superiors any union activities which came to his knowledge. However, in direct opposition to the position of management, of which he was a part, upon a matter considered of vital importance to the company, the plaintiff secretly met with union representatives, signed a union card, and refused to report such activities to his superiors. The reason given by plaintiff for his actions was that he considered it best for the business. Such conduct on the part of the plaintiff constituted a wilful and intentional disobedience of the employer's instructions and constituted insubordination. His discharge for such reason amounted to a forfeiture of all benefits under the terms of the profit sharing plan.

[247 S.C. 376] The plaintiff contends, however, that the action by the employer, in discharging the plaintiff because of his activities in connection with the labor union, was illegal under our Right to Work Law and the Federal Taft-Hartley Act, and therefore could not operate to deprive the plaintiff of benefits due him under the profit sharing plan.

It must be kept in mind that we are not here dealing with the activities of an employee eligible to become a member of the labor union, but with a sales manager, ineligible to join, who was management's direct contact with the employees under him. The company's employees were not at the time organized by the union. The union was simply engaged in organizational efforts. The employer opposed the union, as it had a right to do. In so doing, the company's general manager had instructed his supervisory personnel, including the plaintiff, to keep him advised of any information coming to them about the union's efforts to organize the employees. This was not an inquiry into the manner in which the labor union conducted its internal affairs, nor was it prying into union affairs

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or spying on union membership. It was a legitimate inquiry by the employer, within permissible bounds, to proper persons, about a matter considered of importance to the company and with which the company had a right to expect its management personnel to comply.

As a part of the management of the company, ineligible to join the union, the plaintiff had no right to promote the organization of the union in direct opposition to the known policies of management which he represented. This was not a restraint upon plaintiff's right to join a union because he was ineligible to join. The fact that the plaintiff was discharged, in part, for his union activities could not deprive any other employee of his legitimate right to join a union or affect the exercise of any such right, because the support of management in efforts of the union to organize employees of the company is not one of the rights guaranteed by the law.

[247 S.C. 377] Since the evidence conclusively shows that the plaintiff was properly discharged because of insubordination, he was ineligible to receive benefits under the profit sharing plan, and the lower court should have directed a verdict in favor of the defendants.

We have carefully reviewed the authorities cited by plaintiff in support of his position, but find them inapplicable to the present factual situation.

Finally, the plaintiff contends that his discharge for alleged insubordination cannot operate as a forfeiture of his rights because there was no compliance with the provisions of the plan which required that any action of the company pursuant to the terms thereof shall be evidenced by a

certified resolution of the Board of Directors of the company and notice in writing by the administrative committee to the trustees.

The administration of the profit sharing plan herein is placed in an 'administrative committee' which is given the power to determine all questions which arise under the plan, including the eligibility of employees to participate therein. The agreement or plan provides that 'Any determination or action of the Company pursuant to the provisions of this Agreement shall be evidenced by a resolution of the Board of Directors of the Company certified to the Trustees by the Secretary or an Assistant Secretary under the corporate seal of the Company. * * * All notices, advices, directions and instructions to given by the Committee to the Trustees as provided in this Agreement shall be in writing and signed in the name of the Committee by a majority of the members of the Committee * * *.'

The agreement under which the profit sharing plan was set up clearly shows that the foregoing administrative procedures were designed solely to protect the trustees in the disbursement of funds entrusted to their care and to provide an orderly administration of the plan by requiring that action taken by the company and the administrative[247 S.C. 378] committee, upon which the Trustees were required to act, must be certified in writing by the proper officials. These provisions, requiring that written notice of the action of the company and the administrative committee be given to the trustees, were not intended to affect the merits of an employee's claim. It is undisputed in this case that the plaintiff was discharged for insubordination, that the administrative committee denied his claim for that reason, and that he had notice of such action. The fact that written notice was not given to the trustees of such action in no way prejudiced any right of the plaintiff.

The judgment herein is accordingly reversed and the cause remanded for entry of judgment in favor of the defendants.

MOSS, BUSSEY and BRAILSFORD, JJ., concur.

202 N.W.2d 375 (Minn. 1972), 43544, Ray v. Minneapolis Board of Ed., Spec. Sch. Dist. No. 1 /**/
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202 N.W.2d 375 (Minn. 1972)

295 Minn. 13

Glenn RAY, Appellant,

v.

MINNEAPOLIS BOARD OF EDUCATION, SPECIAL SCHOOL DISTRICT NO.

1, Respondent.

No. 43544.

Supreme Court of Minnesota.

November 17, 1972

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Syllabus

[295 Minn. 13] 1. The district court in reviewing the decision of a school board discharging a teacher for insubordination is limited to asking whether the determination was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without evidence to support it.

2. An examination of the record indicates the trial court's findings are sustained by the evidence.

[295 Minn. 14] Smith, Juster, Feikema, Haskvitz & Casserly, Minneapolis, for appellant.

Lindquist & Vennum and N. L. Newhall, Minneapolis, for respondent.

Heard before KNUTSON, C.J., and TODD, MacLAUGHLIN, and SCHULTZ, JJ.

HAROLD W. SCHULTZ, Justice. [*]

This is an appeal from an order of the Hennepin County District Court affirming a decision of the Minneapolis Board of Education discharging a teacher.

The issue presented is whether there is substantial evidence, considering the record as a whole, to sustain the school board's finding that appellant was guilty of insubordination.

On June 24, 1971, the school board, pursuant to Minn.St. 125.17, subd. 4, discharged Glenn Ray for insubordination. Section 125.17, subd. 4, provides in part:

'Causes for the discharge or demotion of a teacher either during or after the probationary period shall be:

'(1) Immoral character, conduct unbecoming a teacher, or insubordination.'

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The discharge followed a public hearing held at appellant's request and was expressly stated to be without prejudice to his application for employment for the 1971--1972 school year and to his reemployment as a new teacher at the step and lane to which he would otherwise have been entitled, but without tenure. Appellant then sought review of the school board's decision by certiorari. After a hearing, the district court affirmed the school board's decision, and this appeal followed.

Appellant is a well-qualified Minneapolis high school teacher. He entered that system in 1964

and taught Russian and social studies at Edison High School until the date of his discharge. His discharge was precipitated by the fact that the North Central [295 Minn. 15] Association of Colleges and Secondary Schools was conducting an evaluation of foreign languages and social studies departments in Minneapolis and St. Paul high schools. As part of this study, all teachers in each of those departments were required to fill out an 8-page form.

Appellant was first requested in the fall of 1970 to complete and return the forms. In January 1971, he was asked by Mr. Frank Janes, who was in charge of the North Central program for the Minneapolis district, to turn in his form for foreign languages. In filling out that form, appellant attacked Janes for requesting that the form be completed. In addition, appellant did not respond to all of the questions. He failed to answer questions regarding 'Teacher Load and Assigned Duties,' 'Preparation and Experience,' and 'Professional Activities.' In February 1971, appellant told the North Central evaluation team that if the team attended his class, he would leave the room. As a result, the team did not visit his class. When his principal asked him to complete the social studies form, he again did not fill it out completely, leaving some questions blank, answering some in an unresponsive fashion and in a way not useful to the evaluation. When requested, he refused to complete the form, asking his supervisor not to harass him again. Appellant was finally advised by Mr. Nathaniel Ober, associate superintendent of schools, that his failure to comply with the requirements would be regarded as an act of insubordination and dealt with accordingly. Subsequently, Dr. Harry N. Vakos, assistant superintendent, warned him that insubordination was one of the statutory grounds for dismissal. In April, appellant again refused to fill out and make available his social studies form. He was thereafter notified of his discharge. A public hearing by the school board followed, after which the board made findings of fact, conclusions of law, and its decision of discharge for insubordination.

Appellant does not challenge most of the findings of the board. He does not, however, agree that he was insubordinate within the meaning of Minn.St. 125.17, subd. 4. He contends that the [295 Minn. 16] administration did not have proper authority from the school board to issue directives in regard to the evaluation forms. He also contends that his rights under the First Amendment of the United States Constitution have been violated.

There does not appear to be any substance to the claim that appellant's constitutional rights have been violated. He was not discharged because of anything he said or wrote. He could have filled out the forms and made any criticism that he wanted to make. He could have used any other means to criticize North Central or the administration. He was discharged because he deliberately chose, in the face of repeated directives, not to cooperate in a program which was part of his responsibility as a teacher. We agree with the trial court that there is no issue here of freedom of speech.

The school board in its findings determined that the orders and directives issued to appellant were reasonable and that the school board had delegated to the administration

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the authority to issue such orders and directives in the interest of the school district. It further determined that the administration had acted properly and within its authority in ordering appellant to comply with the evaluation study, which is a part of the educational program of the Minneapolis

schools.

In reviewing the discharge, the district court is limited to asking whether the determination was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without evidence to support it. *State ex rel. Ging v. Board of Education*, 213 Minn. 550, 7 N.W.2d 544 (1942).

The trial court, having considered the transcript of the proceedings, the exhibits, the findings of fact, conclusions, and decision of the school board, and the arguments of counsel, did properly affirm the decision of the board. The issue here is not freedom of speech, or the qualifications of the teacher, Glenn Ray, or the value of the North Central evaluation study. The issue is whether there is substantial evidence, considering the [295 Minn. 17] record as a whole, to sustain the school board's finding of insubordination.

There is no statutory or common-law definition of insubordination in Minnesota. However, the parties have agreed that the following is a proper definition: Insubordination is a 'constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.' *Shockley v. Board of Education*, 51 Del. 537, 541, 149 A.2d 331, 334, reversed on other grounds, 52 Del. 237, 155 A.2d 323 (1959).

There is no question but that appellant had ample opportunity to fill out the evaluation forms and that his responses were purposely and intentionally incomplete, uncooperative, unresponsive, and argumentative. The decision of the school board and the concurrence of the trial court that such conduct was insubordination is a proper determination and must be affirmed.

Affirmed.

Notes:

[*] Acting as Justice of the Supreme Court by appointment pursuant to Minn.Const. art. 6, § 2, and Minn.St. 2.724, subd. 2.

149 A.2d 331 (Del.Super. 1959), Shockley v. Board of Educ., Laurel Special School Dist. /**/
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149 A.2d 331 (Del.Super. 1959)

51 Del. 537

Alonzo Hilton SHOCKLEY, Jr., Appellant,

v.

BOARD OF EDUCATION, LAUREL SPECIAL SCHOOL DISTRICT, Appellee.

Superior Court of Delaware, Sussex County.

March 16, 1959.

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[51 Del. 538] Joseph H. Geoghegan of Berl, Potter & Anderson, Wilmington, for appellant.
Robert W. Tunnell, Georgetown, for the School Board.

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STOREY, Judge.

The above matter is before me on appeal from the decision of the Board of Education of the Laurel Special School District [51 Del. 539] terminating the services of the appellant, Shockley, as of June 30, 1958, the end of the 1957-1958 school year.

Appellant, Shockley, had been continuously employed by the Laurel Special School District since September 1, 1950, as a certified professional employee, and had acquired teacher tenure status under the provisions of Section 1403, 14 Delaware Code 1953.

On April 22, 1958, appellant was recommended for renewal of his contract of employment for the school year 1958-1959 by Superintendent Elder of the Laurel Special School District. The Board of Education of said District, on April 24, 1958, refused to accept Superintendent Elder's recommendation for renewal of appellant's contract of employment for the following school year.

After the Board meeting on April 24, 1958, Superintendent Elder, for reason or reasons best known to himself, changed his mind and at the meeting of the Board held the next day, on April 25th, 1958, recommended the termination of the appellant's services as of June 30, 1958.

Under date of April 28, 1958, appellant received a registered letter from said Board of Education notifying him of the decision of the Board to terminate his services as of June 30, 1958, for the reason of 'willful and persistent insubordination'.

Appellant requested hearing on the charges, and the hearing was held on May 20 and 21, 1958 at the North Elementary School.

The decision of the said Board of Education, after a hearing, was that appellant, Shockley, had been guilty of 'willful and persistent insubordination', within the meaning of Section 1411, 14 Delaware Code, 1953, and that his services were terminated as of June 30, 1958.

The questions presented for consideration are as follows:

[51 Del. 540] 1. Is the Board's decision to terminate appellant's services 'supported by substantial evidence' of 'willful and persistent insubordination' within the meaning of the teacher tenure law?

2. Did the Board deny appellant a substantial right by excluding 'pertinent' testimony at the

hearing?

3. Did the Board's refusal to permit appellant to make and to continue to make an offer of proof deny appellant a substantial right?

Question No. 1 presented above will first be considered.

Section 1414 of 14 Delaware Code of 1953 provides that on appeal the Court shall sustain any Board action, findings and conclusions supported by substantial evidence.

Is the action, finding and conclusion of the Board in the instant case supported by substantial evidence? The Delaware statute does not define the words 'willful and persistent insubordination'. The following are considered proper definitions for the purposes of this case:

The word 'willful' has various meanings and is used to denote the quality of an act or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. Words and Phrases, Willful, Vol. 45.

The word 'persistent' has been defined to mean 'continuing or constant'. *Horosko v. Mount Pleasant Tp. School Dist.*, 135 Pa.Super. 102, 4 A.2d 601.

'Insubordination' was defined in *State ex rel. Richardson v. Board of Regents of University of Nevada*, 70 Nev. 347, 269 P.2d 265, 276, in the following language:

'From the many definitions found in the cases we may say without

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greater elaboration that 'insubordination' imports a willful disregard of express or implied directions, or such a defiant attitude as to be equivalent thereto. 'Rebellious', 'mutinous', [51 Del. 541] and 'disobedient' are often quoted as definitions or synonyms of 'insubordinate'.

In *State ex rel. Steele v. Board of Education*, 252 Ala. 254, 40 So.2d 689, 695, the Court had this to say:

'The term 'insubordination' is not defined in the statute, but unquestionably it includes the willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education.'

As stated above, our Delaware statute does not define the words 'willful and persistent insubordination', but after an examination of the cases, I am persuaded that a fair and reasonable definition is as follows:

'A constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature, and given by and with proper authority.'

Necessity does not require that I recite any substantial part of the record, which is both long and conflicting. Suffice it to say, Superintendent Elder knew that appellant had not been teaching during the school year 1957-1958. There were several conversations and discussions at various places in the school between Superintendent Elder and the appellant relating to appellant's duties and teaching assignments. According to the record, however, there were no instructions to appellant that reasonably could be construed as an order to teach at any time, either express or implied.

Revisions were made in certain teaching schedules which were unsatisfactory to both Superintendent Elder and to appellant and there was the suggestion in the memorandum of February 10, 1958, the pertinent part of which stated 'just one thing which seems to require

improvement'—that appellant take over Parker's Ninth Grade Social Studies Class and another class, for a total of two classes. No stated time for doing so was suggested to appellant, and shortly after the February 10th memorandum, [51 Del. 542] Superintendent Elder granted appellant permission to attend a conference of the National Association of Secondary School Principals in Indianapolis, Indiana, from which he returned on February 19, 1958.

Furthermore, on appellant's return from Indianapolis, he was directed by Superintendent Elder to conduct certain teacher tests in the school, and apparently nothing of any consequence was done or said about the teaching until after the tests had been concluded about April 15th.

On April 18th, Superintendent Elder addressed a registered letter to the appellant, the pertinent part of which is as follows: 'Any reasons for your inability or unwillingness to carry out this assignment should now become a matter of record'.

The letter of April 18th was not answered by appellant in writing, but its contents were discussed with Superintendent Elder on April 24th, at which time Superintendent Elder inquired whether appellant had started to teach, and appellant replied that it would be impractical with only twenty-seven school days remaining in the school year.

Even in the conversation of April 24th, Superintendent Elder did not order the appellant to teach.

At the Board meeting of April 22nd, two days before, Superintendent Elder had recommended that appellant's contract be renewed for another year. On April 25th, Superintendent Elder reversed himself and recommended that appellant's services be terminated as of June 30, 1958.

According to the record, Superintendent Elder admits that he never gave a direct order to the appellant to teach, and the record does not disclose, therefore, that the appellant disobeyed an order to teach.

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A fair reading of the record indicates that it was not until the April 24th meeting of the Board of Education of the Laurel Special School District that the decision was reached to charge the appellant with 'willful and persistent insubordination'.

[51 Del. 543] Superintendent Elder testified as to the reasons for the charge as follows: 'First, his failure to answer the registered communication of April 18th.

'Second, his conversation with me of April 24th in which he stated that he was not teaching classes.

'Third, that it was impractical for him to do so.'

From the standpoint of the school children, it is obvious that it would be impractical to change teachers with only twenty-seven school days remaining, when such change was not required by an emergency, such as death, automobile accident, or something of that nature. Even if Superintendent Elder had ordered the appellant to teach the remaining twenty-seven days, (and according to the record, Superintendent Elder admits that he did not give a direct order to the appellant to teach), it would manifestly have been unfair to the school children in the classes involved, and, therefore, under the circumstances, an unreasonable order. Failure to obey an unreasonable order would not sustain a charge of 'insubordination'. *Kostanzer v. State ex rel.*

Ramsey, 205 Ind. 536, 187 N.E. 337.

If the decision of the Board of Education of the Laurel Special School District is supported by substantial evidence, the decision must be affirmed.

A leading Supreme Court case in point. *LeTourneau v. Consolidated Fisheries Company*, 4 Terry 540, 51 A.2d 862, 867, defines the Delaware law on the subject. Judge Speakman, in speaking for the Court said:

'In those cases, such as the instant one, in which the civil law procedure is followed, this Court ordinarily, upon appeal, will not disturb a finding on the facts by a lower court, in this instance The Industrial Accident Board, if it appears from the record that there was evidence to support the finding. The reason for the rule generally observed by reviewing courts, is that [51 Del. 544] the trial court sees and hears the witnesses, and is, therefore, the better able to determine the credit and weight to be given their testimony.'

Both counsel for the appellant and the appellee cite with approval the case of *Morton v. Mooney*, 97 Mont. 1, 33 P.2d 262, 265, which states the rules as follows:

'Substantial evidence is such as will convince reasonable men and on which such reasonable men may not reasonably differ as to whether it establishes the plaintiff's case, and, if all reasonable men must conclude that the evidence does not establish such case, then it is not substantial evidence.'

The rule of law set forth in the Morton-Mooney case is entirely consistent with that enunciated in the LeTourneau-Consolidated Fisheries Company case, and, therefore, may be properly cited in support of the substantial evidence rule as laid down by the decisional law of this State.

As heretofore pointed out, there were conversations, discussions and suggestions; a memorandum and a letter. In no instance was there a direct order given to the appellant. The memorandum of February 10th merely contained a suggestion of improvement and the letter of April 18th suggested that if there were reasons for not teaching, that he make them a matter of record. Even if it could be considered that the inquiry on April 24th as to whether he had begun to teach was an implied order to teach, it was, in the opinion of the Court as previously pointed out, unreasonable for the reasons stated, and non-compliance therewith would not have constituted an insubordinate act.

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The appellant's status as a school principal and teacher was never too clearly defined, but it is apparent from the record that appellant could have been more cooperative in this regard. The record indicates that Superintendent Elder was aware of this fact. Under the circumstances, it was the duty of the Superintendent, as the duly constituted representative of the Laurel [51 Del. 545] Board of Education, to properly clarify the appellant's status, and issue to him as occasions required, directions and orders in such language that there could be no doubt but that the failure to obey them would subject the appellant to a sustainable charge of 'willful and persistent insubordination'. This, according to the record, Superintendent Elder failed to do.

The burden in this case is upon the Board of Education, and that burden is accentuated by the fact that the said Board is not only the complainant and the prosecutor, but the judge as well. In such situations, the substantial evidence rule is to be zealously guarded and protected. *In re*

Larsen, 17 N.J.Super. 564, 86 A.2d 430, 436.

Superior Court Judge William J. Brennan, Jr., now Associate Justice of the United States Supreme Court, had this to say, in the case of *In re Larsen*, supra:

'Are we precluded when applying the substantial evidence test from taking into account the implications of the merger of functions, merely because the Legislature has combined the functions in the Director? I think not. The measure of our duty is to set aside any administrative decision when we 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, * * *. 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'

Decisions of administrative boards of such character require a careful study and consideration of the whole record, with all its inferences and implications, to make sure that there is substantial evidence or evidence on which 'men may not reasonably differ' to support the Board's decision.

The Court well stated in *State ex rel. Steele v. Board of Education of Fairfield*, supra [252 Ala. 254, 40 So.2d 695], as follows:

[51 Del. 546] 'The anomaly in procedure which permits the board of education, an administrative body, to serve in the triple capacity of complainant, prosecutor, and judge makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with the view to protecting the fundamental rights of the parties * * *.'

After a careful consideration of all the evidence, and applying the definition of 'willful and persistent insubordination' adopted herein, I have reached the conclusion that the said Board of Education has not met the burden of proving its case against the appellant with such substantial evidence as will convince reasonable men and on which such men may not reasonably differ.

The action of the said Board of Education must, therefore, be reversed.

Necessity does not require that the Court pass upon appellant's reasons Nos. 2 and 3.

The decision of the Board of Education of Laurel Special School District is reversed and the Board of Education of said District is directed to fully reinstate appellant, and to pay to him all salary lost as a result of his temporary dismissal.

Order on presentation.

40 So.2d 689 (Ala. 1949), 6 Div. 732, State ex rel. Steele v. Board of Ed. of Fairfield /**/ div.c1
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40 So.2d 689 (Ala. 1949)

252 Ala. 254

STATE ex rel. STEELE

v.

BOARD OF EDUCATION OF FAIRFIELD et al.

6 Div. 732.

Supreme Court of Alabama

February 17, 1949

Rehearing Denied May 19, 1949.

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[252 Ala. 256]

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Arthur, D. Shores and Peter A. Hall, both of Birmingham, and David Hood, Jr., of Bessemer, for appellant.

Harvey Deramus, of Birmingham, and G. P. Benton, of Fairfield, for appellees.

LAWSON, Justice.

The appellant Maenetta Steele was a tenure school teacher, that is, she had attained a continuing service status. § 352, Title 52, Code 1940. After a hearing, as required by § 357, Title 52, Code 1940, the Board of Education of Fairfield, her employing board of education, cancelled her contract of employment on a charge of insubordination.

She began this action of mandamus in the court below to require appellees to reinstate her as a school teacher under the provisions of § 358, Title 52, Code 1940, as amended, which section is as follows: 'The action of the employing board of education, if made in compliance with the provisions of this chapter, and unless arbitrarily unjust, shall be final and conclusive. Whether such action complies with the provisions of this chapter, and whether such action is arbitrarily unjust, may be reviewed by petition for mandamus filed in the county where said school system is located. No action at law shall lie for the recovery of damages for the breach of any employment contract of a teacher in the public schools.'

The trial court denied the peremptory writ of mandamus. Motion for new trial having been overruled, Maenetta Steele has appealed to this court.

Submission was on brief, hence we will consider only those insistences made in appellant's brief. Those assignments of error not insisted on in appellant's brief are treated as waived.

Louisville & Nashville R. Co. v. Holland, 173 Ala. 675, 55 So. 1001.

Appellant's first insistence is that the order or resolution cancelling her contract of employment is void and of no effect for the reason that she was not notified of such action until June 2, 1947, and that under the provisions of § 360, Title 52, Code 1940, as amended, she was entitled to notice of such cancellation not later than the first day of May, 1947.

§ 360, Title 52, Code 1940, as originally written read as follows: 'Any teacher in the public

schools, whether in continuing service status or not, shall be deemed re-employed for the succeeding school year at the same salary, unless the employing board of education shall cause notice in writing to be given said teacher on or before the last day of the term of the school in which the teacher is employed; provided, however, that in no case shall such notice be given the teacher later than the first day of May of the termination of such employment, and such teacher shall be presumed to have accepted such employment unless he or she shall

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notify the employing board of education in writing to the contrary on or before the first day of June.'

Section 360, Title 52, Code 1940, was amended in 1945, General Acts, 1945, p. 646, by adding thereto the following: 'The employing board of education shall not cancel the contract of any teacher in continuing service status, nor cause notice of non-employment to be given to any teacher whether in continuing service status or not except by a vote of majority of its members evidenced by the minute entries of said board made prior to or at the time of any such action.'

In treating this first contention of appellant, we are not concerned directly with the 1945 amendment, so when mention is made hereinafter of § 360, Title 52, Code 1940, we have reference to the provisions contained in said section as originally enacted unless specific reference is made to the amendatory provisions.

We are called upon here to determine whether the provisions of § 360, Title 52, [252 Ala. 258] Code 1940, to the effect that a teacher is deemed re-employed for the ensuing year unless the employing board of education gives written notice to the teacher of the termination of his or her employment on or before the last day of the term of the school and in no event later than the first day of May, were intended to apply when the employing board of education cancels the contract of a teacher in continuing service status in accordance with the procedural requirements of § 357, Title 52, Code 1940.

As a result of the enactment of the Teacher Tenure Law, two classes of teachers have been created: those who have attained a continuing service status and who may be referred to hereinafter as tenure teachers, and those who have not attained that status and who may be referred to hereinafter as probationary teachers.

The contract of a tenure teacher by virtue of the statute, § 353, Title 52, Code 1940, remains in full force and effect until the parties enter into a new contract or the existing contract is cancelled because of the existence of one of the grounds set out in § 356, Title 52, and in strict compliance with the procedural requirements provided in § 357, Title 52, Code 1940. In other words, an employing board of education, by virtue of the Teacher Tenure Law, is without authority to summarily terminate the employment of a tenure teacher at the end of a school year.

But an employing board of education does have the authority to summarily terminate the employment of a probationary teacher at the expiration of the period covered by the contract, usually a year. *Whittington v. Barbour County Board of Education*, 250 Ala. 692, 36 So.2d 83.

We are of the opinion that § 357, Title 52, Code 1940, governs exclusively in so far as notice and other procedural requirements are concerned in the cancellation of a contract of a tenure teacher, and that § 360, Title 52, Code 1940, controls as to the termination of employment of a probationary teacher.

We think it clear that the provisions of § 360, Title 52, Code 1940, were incorporated into the Teacher Tenure Law for the purpose of requiring employing boards of education who were not going to reemploy probationary teachers to give such teachers sufficient notice of that fact that they might have time to seek employment elsewhere. But, as before indicated, employing boards of education are without authority to summarily terminate the employment of a tenure teacher, hence such notice as is provided for in § 360, Title 52, Code 1940, would be abortive as to such a teacher.

It is true that § 360, Title 52, Code 1940, contains language susceptible of the construction that its requirements as to notice, etc., apply to all teachers, for it says 'any teacher in the public schools, whether in continuing service status or not * * *.' But we think it clear that in using that language the legislature intended merely to emphasize the fact that the provisions of that section applied to those teachers who were not in continuing service status, for with one or possibly

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two exceptions all the preceding sections of the Tenure Law relate exclusively to tenure teachers.

Termination of employment and cancellation of an existing contract are entirely different matters. The latter can be done only for cause and that cause may arise at any time. Certainly the legislature did not intend to limit the right of an employing board of education to cancel the contract of a teacher for cause to any specific time during the year, and yet such would be the result if § 360, Title 52, Code 1940, is given the construction as contended for by counsel for appellant.

We hold, therefore, that the provisions of § 360, Title 52, Code 1940, as originally written, apply only to probationary teachers and have no application to tenure teachers, hence there is no merit in appellant's contention that the order or resolution of her employing board of education cancelling her contract, under date of May 27, 1947, and of which she had notice on June 2, 1947, is void and of no effect because not taken prior to May 1, 1947.

[252 Ala. 259] In reaching this conclusion we have given consideration to the case of *Holcombe v. County Board of Education of Marion County et al.*, 242 Ala. 20, 4 So.2d 503, and to the case of *Brown v. Board of Education of Blount County*, 242 Ala. 154, 5 So.2d 629. But what was said in those cases as to the effect of § 360, Title 52, Code 1940, must be considered in the light of the issues there presented. Both of those cases involved the question as to whether or not the employment of probationary teachers had been correctly terminated.

Appellant insists that due process of law was not observed in the hearing and that the hearing was not held in accordance with the requirements of § 357, Title 52, supra, in that she was not permitted to present evidence bearing upon the reasons for the proposed cancellation of her contract and that, therefore, the order or resolution cancelling her contract was void and of no effect and, hence, the trial court erred in not granting the peremptory writ of mandamus.

The appellant was charged with insubordination upon the ground that she refused twice to take a mental ability test which was required by a rule or regulation of the employing board of education.

At the hearing the following undisputed facts were made to appear: That the employing board of education on or about February 27, 1947, adopted and entered on its minutes a rule requiring all classroom teachers to take a mental ability test; that this test was presented to the

teachers of the various schools under the jurisdiction of the board on or about March 25, 1947, without any notice having been given them that they were to take the test; that on that date some of the teachers took the test, others refused, and still others merely signed their names to the papers on which the questions appeared and returned the papers without answering the questions; that Maenetta Steele was in the latter group and that she was the only teacher at her school who did not take the test.

The Superintendent of Education testified that he gave all the teachers who did not take the test when it was first presented an opportunity to take it at a later date; that at the time of the hearing all the teachers had taken the test except Maenetta Steele, but that she refused to avail herself of that opportunity when it was given her. As to his refusal to permit Maenetta Steele to take the test at a later date, he stated: 'Maybe a week later after I had given her the second and third chance she came back to my office and wanted to know if I would give her another chance to take the test, and I said 'No, you have had two chances already and have refused, and you will not be given another chance.' He was corroborated in his statement that Maenetta Steele refused a second time to take a test by a Mrs. Gregory who, it appears, was the Superintendent's secretary.

Maenetta Steele, testifying in her own behalf, admitted that she did not answer the questions when they were presented to her on March 25, 1947, but she denied that she was ever given another opportunity to take the test at a latter date. As to the event which transpired subsequent to March 25, 1947, in connection with the test, she stated: That on the following morning, March 26th,

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the Superintendent asked her why she didn't take the test, but did not offer to give her another opportunity to do so; that on April 11, 1947, she was summoned to the office of the Superintendent, who told her that she had not told him she was 'head of a union' (She was at that time temporary president of the teachers' union.) and at that time the Superintendent also told her that she was 'guilty of insubordination and the board felt that I would do better work under better circumstances' and asked her to resign; that on April 17, 1947, she requested an opportunity to take the test, but her request was denied, although on that day other teachers who had not taken the test on March 25 were given a chance to take it. Maenetta Steele also stated that prior to this incident there had never been any complaint about her work or any charge that she had not complied with the rules and regulations of the board and the orders of her superiors, although she had been in the school system of the city of Fairfield for five years.

Maenetta Steele was permitted to show, by the testimony of Alfreda Gray, who [252 Ala. 260] was also a teacher in the Fairfield schools, that the latter had not taken the test on March 25, 1947, and that she had been permitted to take it on April 16, 1947. A statement of two other teachers to the same effect was let into the record.

A probationary teacher testified that she was a member of the 'union' and that she had been notified that her contract of employment was terminated; that in the conversation with the Superintendent he stated that an example would have to be made of some of the teachers.

The Superintendent thereafter stated that the union had nothing to do with the giving of the tests.

As we understand the brief filed here on her behalf, appellant's insistence that the hearing was not conducted in accordance with the provisions of § 357, Title 52, supra, and that, therefore, the order or resolution cancelling her contract was void, was based on the following circumstances:

(1) The refusal of the Superintendent of Education to answer questions propounded to him by her counsel seeking to show that the Superintendent did not approve of the teachers' unions.

(2) The refusal of the Superintendent of Education to answer questions propounded to him by counsel for appellant seeking to show that although he had refused to grant appellant's request to take the test, he had permitted other teachers to do so although they had not taken the test when it was first submitted to them on March 25, 1947.

(3) The action of the board of education in refusing to permit the introduction into evidence of the minutes of the board of education showing the rule or regulation of February 27, 1947, requiring teachers to take the mental ability test.

As before indicated, under the provisions of § 358, Title 52, Code 1940, as amended, the trial court's right to review the action of the employing board of education was limited to two considerations, first, whether such action was taken in accordance with the requirements of the Teacher Tenure Law, and, second, whether such action was arbitrarily unjust. If either of those conditions existed then due process was not observed. Where, as here, a purported hearing was held after notice, the circuit court's review is limited to the proceedings before the board of education. In such a case the hearing of the mandamus proceeding is not a trial de novo. *Gainer v. Board of Education of Jefferson County et al.*, 250 Ala. 256, 33 So.2d 880.

The question is, did the trial court err in refusing to grant the peremptory writ of mandamus under its limited review because of the circumstances above enumerated, when those circumstances are considered in connection with the other proceedings at the hearing?

The answer to the question here presented requires a consideration of the nature, functions, and modus operandi of boards of education, and some of the distinctions between administrative tribunals and judicial tribunals.

A board of education is a part of the executive department, but in the operation of our public school system it exercises not only purely administrative functions, but others of a legislative character,

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and still others of a quasi-judicial character. Of the administrative type are the hiring of teachers, their assignment in the school system, and the management and control of school property. Of the legislative type are the making of rules and regulations and the determination of policies governing the hiring and assignment of teachers, and the use of school property. Of the quasi-judicial type is the power to hear and determine proceedings for the cancellation of contracts of tenure teachers.

Although a board of education in the exercise of such powers of cancellation acts as a quasi-judicial body, it does not thereby lose its identity as an administrative body and become a court to the extent that the regularity of its action is to be tested by strict legal rules prevailing in court proceedings.

While no particular form of procedure is prescribed for such hearings, due process must be

observed. Such is the rule generally as to hearings provided for by statute before administrative agencies. *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; *Alabama Electric Cooperative, Inc., et al. v. Alabama Power Co.*, *Ala.Sup.*, 36 So.2d 523; *Alabama Power Co. v. City of Fort Payne*, 237 Ala. 459, 187 So. 632, 123 A.L.R. 1337.

The anomaly in procedure which permits the board of education, an administrative body, to serve in the triple capacity of complainant, prosecutor, and judge makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with the view to protecting the fundamental rights of the parties, lest the rule against arbitrariness and oppressiveness become a mere shibboleth. An appeal not being provided for, the review by mandamus must not be permitted to degenerate into a mock ceremony. The least that the courts can do is to hold high the torch of 'fair play' which the highest court of our land has made the guiding light of administrative justice. *Morgan v. United States*, *supra*.

On the other hand, courts cannot, under the guise of existing judicial power, usurp merely administrative functions by setting aside an order of an administrative agency made within the scope of the power delegated to it, upon the ground that such power was inexpediently exercised. *Interstate Commerce Commission v. Illinois Central Ry. Co.*, 215 U.S. 452, 470, 30 S.Ct. 155, 160, 54 L.Ed. 280; *Greco v. Roper*, 145 Ohio St. 243, 61 N.E.2d 307.

One of the statutory grounds for the cancellation of a contract of a tenure teacher is 'insubordination.' § 356, Title 52, Code 1940. The term 'insubordination' is not defined in the statute, but unquestionably it includes the willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education.

The City Board of Education of Fairfield had the statutory authority to prescribe rules and regulations for the conduct of the teachers in schools under its jurisdiction. § 167, Title 52, Code 1940. There is no contention made here that the rule adopted by the Fairfield Board of Education on February 27, 1947, and with which we are here concerned, was unreasonable. We think it shows on its face that it is a reasonable rule.

Members of the board of education are not expected to devote their entire time to school affairs. From necessity, they act to a large degree upon the advice and recommendations of their chief executive officer, the Superintendent of Education. Having adopted the rule that all classroom teachers must take a mental ability test, the board looked to the Superintendent for the enforcement of this rule. The members of the board did not give the test and hence, any information which they received as to the conduct of Maenetta Steele in relation to the test must have come from the Superintendent and it was, no doubt, upon his advice and recommendation that the board adopted a resolution on April 25, 1947, to the effect that consideration would be given on May 27, 1947, to the cancellation of her contract on the ground of insubordination. In passing such a resolution the

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board acted in an administrative capacity and not as a judicial tribunal. Such resolution was not a finding that Maenetta Steele was guilty of the conduct charged. Such a finding could not be made until May 27, 1947, and until a hearing had been held if requested by Maenetta Steele.

As above pointed out, such a hearing was requested and held. Although at this hearing Maenetta Steele was entitled to present evidence tending to refute the charge made against her, such hearing was not solely for the benefit of the teacher. It also served the purpose of enabling the board of education to hear both sides of the case for, as before pointed out, their prior action could only have resulted from information furnished them by the Superintendent.

Maenetta Steele admitted that she did not take the test when it was first presented to her on March 25, 1947, and although she denied that she was ever given another opportunity to do so, there is ample evidence to support a finding that she had been given that chance.

On the other hand, the Superintendent admitted that Maenetta Steele requested that she be permitted to take the test [252 Ala. 262] sometime prior to the date on which the board instituted these proceedings, but that he refused to permit her to do so. It also appears from statements of other teachers that they were given that chance on or about the very day that Maenetta Steele's request was refused.

The teacher, Maenetta Steele, sought to show that the reason why the Superintendent permitted other teachers to subsequently take the test and refused her that privilege was because he had a personal dislike for her due to her activity in the union. Although the Superintendent made the statement that the union had nothing to do with the test, yet he refused to answer questions propounded to him by counsel for Maenetta Steele as to whether he approved of teachers organizing into a teachers' union. Likewise he refused to answer questions as to whether he had permitted other teachers to take the test who had either refused or failed to do so when it was first given on March 25th.

We think that, in view of the nature of the other evidence presented at the hearing, Maenetta Steele was entitled to have the Superintendent answer these questions. His answers thereto could have materially affected the final decision of the board of education. We cannot say that the board of education would have cancelled Maenetta Steele's contract if the Superintendent of Education had admitted that he had subsequently permitted other teachers to take the test and that he did disapprove of teachers organizing into teachers' unions, since the board might have found that his refusal to grant Maenetta Steele's request to take the test was based on her union activities. She was not charged with having violated any rule or regulation of the board of education purporting to prohibit teachers engaging in union activities. The charge was insubordination. We think the record tends to show that Maenetta Steele was treated differently from other teachers and therefore we feel that while Maenetta Steele was permitted to give evidence at the hearing, she was prevented from presenting evidence tending to show that the proceedings to cancel her contract were motivated by personal reasons. Section 356, Title 52, Code 1940, expressly provides that the cancellation of a teacher's contract may not be made for political or personal reasons.

The judgment of the trial court is reversed and the cause is remanded to that court, with directions to issue a peremptory writ of mandamus ordering the employing board of education to vacate the order cancelling the contract of Maenetta Steele and to reinstate her as a teacher in the school system of the City of Fairfield as of the beginning of the school year 1947-1948, subject to the result of another hearing under § 357, Title 52, Code of 1940. *State ex rel. Ging v. Board of*

Education of City of Duluth, 213 Minn. 550, 7 N.W.2d 544; *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 374, 59 S.Ct. 301, 307, 83 L.Ed. 221.

Reversed and remanded with directions.

BROWN, FOSTER, and STAKELY, JJ., concur.