IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PAUL SMITH, Appellant	:	No. 18-0054
	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
MONTOURSVILLE AREA SCHOOL DISTRICT, Appellee	:	Local Agency Appeal

OPINION AND ORDER

Before the Court is the local agency appeal filed by Appellant on January 4, 2018. Argument on the appeal was heard May 30, 2018.

Since 1996, Appellant has been employed by Defendant School District ("the District") as an "Education Technology Coordinator". On August 25, 2017, Appellant was informed at a meeting with the Superintendent that he was being placed on paid administrative leave pending an investigation into IT-related matters. Subsequently, by letter dated September 11, 2017, Appellant was notified by the Superintendent that she planned to recommend to the School Board that he be dismissed based on eight enumerated allegations of misconduct, and also that he was being placed on unpaid leave until the determination by the Board. Following Appellant's appeal of that recommendation to the Board, hearings were held on October 16, 19 and November 15, 2017. By adjudication entered December 5, 2017, the Board did not accept the Superintendent's recommendation for dismissal, but instead ruled that Appellant would be reinstated and no longer subject to unpaid leave.[1] Appellant returned to work on December 7, 2017.

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[1] The District argues that by concluding that "[n]o further administrative leave for Paul Smith is warranted under the facts or law applicable to this matter", the Board was actually deciding that Appellant was not entitled to back pay and benefits.

In the instant appeal, Appellant seeks back pay and benefits on three grounds: (1) he was not afforded due process when he was not provided with a pre-deprivation (Loudermill) hearing; (2) the letter of September 11, 2017 was not in compliance with the dismissal procedures of 24 P.S. Section 514; and (3) the Board's failure to award back pay and benefits was arbitrary and capricious. The first two issues will be addressed seriatim; the third issue appears moot, as explained *infra*.

> In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the United States Supreme Court held that where an individual has a property right in employment, he may be suspended prior to a full due process removal hearing, but only after he has been afforded notice of the charges and an opportunity to respond. The very limited pretermination hearing "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. at 545–46. The process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story. Id. at 546; accord, Gilbert v. Homar, 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) (suspension without pay of policeman at East Stroudsburg University after arrest on felony drug charges).
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> Notice is sufficient, 1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under the particular circumstances of the case. Gniotek v. City of Philadelphia, 808 F.2d 241 (3rd Cir.1986).

Antonini v. W. Beaver Area School District, 874 A.2d 679, 686 (Pa. Commw. Ct. 2005). Here, Appellant contends that although he met with the Superintendent on August 25, 2017, at which time he was informed that he was being placed on paid administrative leave, he was not given notice of the charges and was not given an explanation of the Superintendent's evidence.

According to the testimony of the District Business Manager, Brandy Smith,[2] who attended the August 25, 2017 meeting with Appellant and the Superintendent, the Superintendent informed Appellant she was placing him on administrative leave and when he asked for "more detail", she asked him if "protocol was followed" with respect to a virus recently detected and if there were things "she should know",[3] and told him that there were "no daily updates", that it was "insubordination for him to make [the] decision" to have no technology for the in-service, that "he didn't get to decide about educational things", and that she found the email to the Board "kind of threatening her". The "tone of his emails" in general was mentioned and he was informed there was "no communication" or that "communication is not working". The Superintendent told Appellant she would contact him and also told him that she was "upset Scott was not called" within an hour of discovering the virus. Finally, she let Appellant know his co-worker, Ryan, was on administrative leave.

Appellant was charged with the following:[4]

1. Failure to keep the Superintendent personally informed of virus-related issues.
2. Allowing the server that houses the anti-virus systems to be turned off.
3. Failing to follow the proper chain of command and failing to communicate personally with the Superintendent with respect to hardware that was supposed to have been provided for an in-service.

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[2] See Exhibit 12, and Exhibit 20, N.T., October 19, 2017, at pages 140-145.
[3] The Court found Ms. Smith's testimony confusing, and believes it more likely that the Superintendent did not *ask* whether protocol was followed or whether there were things she should know but, rather, *told* Appellant that he did not follow protocol and offered him the opportunity to repsond.
[4] See Exhibit 1, and Page 2 of the Adjudication, where the Board notes "the Administration withdrew certain charges, acknowledging that Mr. Smith did not receive a pre-determination hearing as to those charges".

4. Failing to follow the proper chain of command by emailing the board directly about an "hours worked" issue.

With respect to each of these charges, the Board found as follows:

1. [T[he Board cannot find that Smith neglected his duty or conducted himself improperly in failing to provide additional information to Superintendent Bason under the circumstances.
2. [T]he Board cannot find that Paul Smith conducted himself improperly or neglected to perform his duties in the manner in which he interacted with the Intermediate Unit or in failing to recognize that the anti-virus server was not operating prior to the virus outbreak of August 2017.
3. The Board does not find that Paul Smith was being deliberately insubordinate in the hurriedly made decision on the morning of August 24. Rather the Board believes that Smith made a judgment call on a technology issue with little time to deliberate and, with the understanding that all of the other decision makers were involved in the process as part of the email chain. For this reason, the Board does not believe that Paul Smith conducted himself improperly so as to warrant removal from his position pursuant to Section 5-54.
4. Again, the Board does not believe that Paul Smith's action was deliberately insubordinate. … Smith's action was clearly inappropriate and had the impact of undermining the Superintendent's position on the issue. Nevertheless, it was an isolated incident that appears to have been a result of a misunderstanding rather than intentional insubordination. With respect to the fourth charge, the Board does not find that Paul Smith engaged in improper conduct meriting his removal.

As the first two charges were found by the Board to have no merit, any error in those respects would be harmless. Thus, even though it does not appear that charge number 2 was mentioned at all during the August 25 meeting, such cannot serve as a basis to grant relief.

The District argues the Board's findings on the latter two charges should be interpreted to mean that the Board found the suspension without pay to have been appropriate punishment, however. Consequently, to uphold that decision, the Court must find that the August 25th meeting apprised Appellant of the nature of those charges and general evidence against him. While the two issues were mentioned as prompting the suspension, it appears that only general accusations were made and clearly the specific charges themselves were not identified. Moreover, the record is devoid of any evidence that the general evidence against Appellant was mentioned at all; the Superintendent did not apprise Appellant of what email or text message exchanges would be presented, what witnesses would provide testimony or what policies and procedures would be implicated. Thus, the requirements of Loudermill were not fully met.

With respect to the second issue, that the letter of September 11, 2017 was not in compliance with the dismissal procedures of 24 P.S. Section 514, the Court first notes that "nonprofessional public school employees have a property right in their expectation of continued employment, as defined in Section 514,[5] and the Board must comply with procedural due process safeguards when dismissing them for cause." Lewis v. School District of Philadelphia, 690 A.2d 814, 817 (Pa. Commw. 1997)(footnote added). Moreover, Section 514 has been held to

[5] Section 514 of the Public School Code provides that: "The board of school directors ... shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its ...

require that the "due notice" of proposed removal from employment must come from the Board itself. Swartley v. Norristown Area School District, 414 A.2d 153, 155 (1980). There, in rejecting the effectiveness to provide notice of a principal's letter to Mr. Swartley,[6] the Commonwealth Court held: "While there is no doubt that the principal's letter contained adequate detail regarding appellant's questioned conduct, it simply did not constitute notice of school board action. *Indeed it did not purport to be from the school board. The principal's letter was no more than notice of prospective action on his part, "a recommendation will be made."* Id. at 155 (emphasis added).

In the instant matter, the letter of September 11, 2017 was sent by the Superintendent, not the Board.[7] The Superintendent stated "I will recommend that the Montoursville Area School Board of Directors dismiss you from employment" and that [t]he Board will hear this recommendation for your dismissal at its regularly scheduled meeting on October 10, 2017." Like the letter in Swartley, *supra*, the letter contained adequate detail regarding Appellant's questioned conduct, but was "no more than notice of prospective action on [her] part", rather than "notice of school board action". Thus, the Board did not comply with the procedural due process safeguards required by Section 514.

Finally, as noted in the beginning, the issue of whether the Board's (assumed) action in denying Appellant back pay and benefits was arbitrary and

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employees ... for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct." 24 P.S. § 5–514.

[6] Mr. Swartley received a letter from the principal of Norristown Area High School dated April 12, 1978 informing him that as of April 14, 1978 his employment as Assistant Facilities Manager at the high school was suspended without pay. The letter also indicated that a recommendation would be made to the Board of School Directors for termination of his employment because of insubordination. Swartley v. Norristown Area School District, 414 A.2d 153 (1980).

[7] See Exhibit 1.

capricious has been rendered moot by this Court's findings that Appellant was deprived of a fully compliant Loudermill hearing and the benefits of Section 514's requirement that notice come from the Board. This is so inasmuch as "the procedure indicated [by Section 514] is mandatory and the failure of the board to comply with that provision of the school law nullifie(s) their action." Swartley, *supra* at 155, quoting Hetkowski v. Dickson City School District, 15 A.2d 470, 471 (1940). Indeed, the District agreed at argument that if Appellant's due process rights were violated, the remedy is back pay & benefits.

Therefore, the Court enters the following:

ORDER

AND NOW, this day of June 2018, for the foregoing reasons, the appeal in this matter is GRANTED. The Montoursville Area School District is directed to provide Appellant with back pay and benefits for the period of his administrative leave, September 11, 2017 through December 6, 2017.

BY THE COURT,

Eric R. Linhardt, Judge

cc: Thomas Breth, Esq., 128 West Cunningham Street, Butler, PA 16001
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