IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00938 COA

MARION G. ODOM

APPELLANT

v.

BOARD OF EDUCATION OF THE YAZOO CITY SCHOOL DISTRICT

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EDWARD G. CORTRIGHT

COURT FROM WHICH APPEALED: YAZOO COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

GAIL D. NICHOLSON

ATTORNEY FOR APPELLEE:

M. JAMES CHANEY

NATURE OF THE CASE: SCHOOL RE-EMPLOYMENT

TRIAL COURT DISPOSITION: AFFIRMED SCHOOL BOARD'S DECISION NOT TO REHIRE ODOM

BEFORE FRAISER, C.J., COLEMAN, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

This appeal arises from a decision of the Yazoo County Chancery Court affirming the decision of the Board of Trustees of the Yazoo City School District (the Board) not to re-employ Marion Odom for

the 1994-1995 school year. Odom asserts that the Board's decision not to re-employ him is in error for the following reasons: (1) the issue is barred from relitigation by the doctrine of` collateral estoppel; (2) the Board's actions were arbitrary and capricious; (3) the Board failed to follow its reduction in force policy; (4) the hearing officer "giving directives to the board as opposed to merely conducting the hearing is violative of due process." The Yazoo County School District (the District) argues that Odom failed to timely perfect his appeal. We conclude, as did the Yazoo County Chancery Court in its well reasoned opinion, that there exists no basis under established legal principles upon which to disturb the action of the Board; therefore, we affirm.

FACTS

Prior to the spring of 1993, Odom was a certified fourth grade math and science instructor with Woolfolk Elementary School in the Yazoo City School District. On March 5, 1993, Odom's principal, Wardell Leach, informed the district superintendent, Dr. Kinnebrew, thatO dom should be placed on probation because of an incident involving Odom's alleged violence toward a student who was in a fight, at school, with Odom's son that he should be placed on probation. At the same time, he recommended that Odom be re-employed for the 1993-1994 school year but on a strict probationary status. Despite principal Leach's conditional recommendation, superintendent Kinnebrew sought non-renewal of Odom's contract for the 1993-1994 school year. Odom requested a non-renewal hearing. At the conclusion of the hearing, the hearing officer recommended to the Board that the Superintendent's decision not to re-employ Odom be overruled as an improper employment decision. The Board accepted the hearing officer's recommendation, and Mr. Odom was given a new contract for the year 1993-1994. However, neither the judgment of the Board nor the 1993-1994 contract was entered in the record.

In August of 1993, a new superintendent, Dr. Cartlidge, was employed by the District. At that time Odom had yet to be assigned any duties under his 1993-1994 contract. Principal Leach made it known to the superintendent that although he was willing to re-employ Odom for the 1993-1994 school year, he did not want him as a regular classroom teacher because of prior incidents and complaints he had received about Odom. In view of principal Leach's position, Dr. Cartlidge assigned Odom to a newly created position at Woolfolk Elementary School designated, "in-school suspension coordinator." Odom accepted the new position, which required him to supervise students with disciplinary problems. His duties consisted of giving instructional help to between five and fifteen students a day who, because of their behavior, were assigned to the in-school suspension program. According to Principal Leach, Odom did a satisfactory job in his new position and at the end of the 1993-1994 school year, he recommended to the superintendent that Odom's contract be renewed.

In preparing for the 1994-1995 school year, Dr. Cartlidge determined that he could reduce the cost to the school district by filling the in-school suspension coordinator position with a non-certified employee. In view of this determination by Dr. Cartlidge and principal Leach's opposition to having Odom occupying a teaching position, Dr. Cartlidge advised Odom that he would not be renewed for the 1994-1995 school year.

Upon receipt of the notice of non-renewal, Odom exercised his statutory right to a hearing and requested that reasons be assigned for his non-renewal. The reasons given were as follows:

(1) The superintendent determined that, for financial reasons, the school district should

not staff the In-School Suspension Coordinator position with personnel who are certified teachers;

(2) No elementary school principals wanted to have Mr. Odom in a classroom teaching position on their staff;

(3) The District believed it could have a better classroom teacher than Mr. Odom;

(4) Mr. Odom continued to have poor relations with parents and other staff members.

The hearing was conducted on May 9, 1994, before a hearing officer with only Dr. Cartlidge and principal Leach testifying on behalf of the District. Odom offered no witnesses on his behalf. On June 14, 1994, the hearing officer rendered a lengthy opinion and opined that the decision not to re-employ was sustained by the law and facts and recommended that Odom not be re-employed. The minutes of the Board reflect that it met on July 7, 1994, with Odom and his attorney present. After Odom's attorney addressed the Board, the Board announced that it had reviewed the transcript of the hearing conducted by the hearing officer and was of the opinion that the decision not to renew Odom's employment contract was a proper decision.

On July 28, 1994, Odom filed an appeal from the decision of the Board to the Yazoo County Chancery Court and served the attorney for the school district a copy thereof. At that time his counsel deposited his appeal bond with the clerk. However, Odom's counsel took no further action until March 20, 1995, when she filed Odom's chancery court appellant's brief. She mailed the Board's attorney a copy thereof on March 17, 1995. In the letter addressed to the clerk accompanying the appellant's brief, the attorney for Mr. Odom stated:

> To my knowledge, there has been no scheduling order entered nor has the case been assigned to a specific Chancellor. I would appreciate your attention to seeing that the appropriate Judge receives this Brief and I would like to be notified of the identity of the Judge and the scheduling order that will control the briefing schedule in this case.

On March 21, 1995, the attorney for the Board wrote the attorney for Odom that he thought Odom had determined not to prosecute his appeal because nothing had been done since the notice of appeal was filed. In this letter, the Board's attorney called attention to the fact that Odom even at that point had not filed the transcript of the hearing, the decision of the hearing officer, and the decision of the Board. On March 24, 1995, Odom proceeded to file these documents with the Board. At that time the matter was called to the attention of the chancery court, which on March 27, 1995, entered a scheduling order.

In the chancery court, the District argued Odom had not timely filed his appeal. The chancery court

agreed the appeal was not timely filed but out of an abundance of caution addressed the merits of Odom's claims. The chancery court affirmed the Board's findings concluding that the law and evidence supported the Board's decision not to renew Odom's contract.

DISCUSSION

The standard of review for a teacher's nonrenewal hearing is well established. This Court must limit its review to the record made before the school board. We will affirm the Board's determination unless its decision is contrary to the law, arbitrary and capricious, or not supported by the evidence. *Byrd v. Greene County Sch. Dist.*, 633 So. 2d 1018, 1022 (Miss. 1994). Further, "[u]nder our law, the school administration may refuse to rehire a teacher for good reason, for bad reason, or for no reason at all. The administration simply may not base its decision not to rehire upon legally impermissible considerations." *Mississippi Employment S ec. Comm'n. v. Philadelphia Mun. Separate Sch. Dist*., 437 So. 2d 388, 397 (Miss. 1983).

TIMELINESS OF ODOM'S APPEAL TO CHANCERY COURT

The District argues that Odom's appeal is procedurally barred because he did not timely perfect his appeal from the Board's ruling to chancery court. The evidence reflects that the Board verbally rendered its decision on July 7, 1994, and Odom filed his notice of appeal on July 26, 1994. The Mississippi Rules of Civil Procedure provide that the day of the "act, event, or default from which the designated period of time begins to run shall not be included" when counting days. M.R.C.P. 6 Further, the day from which we begin counting is not the day of the Board's decision but the day that Odom received written notice of the decision. Miss. Code Ann. § 37-9-113(2) (1972). The letter informing Odom of the decision of the board was dated July 8, 1994. Applying the above rule we count July 9, 1994 as the first day of the twenty days within which Odom had to perfect his appeal. Thus, Odom's appeal was timely perfected on July 28, 1994, nineteen days after the relevant time period began to run.

Additionally, the District argues that Odom's failure to file the record in the first eight months bars Odom's appeal. The District is incorrect. Odom's burden to perfect his appeal is not to file the record but to post a bond, which Odom did. Miss. Code Ann. § 37-9-113 (1972). The burden of filing the record falls on the District. *Id.*

Finally, the District argues that even if Odom's appeal was timely perfected he abandoned it by not filing his brief until March 20, 1995. However, the District cites no legal authority in support of this argument. Finding no authority in support of this argument ourselves, we reject the District's contention. Therefore, the chancery court erred in holding Odom's appeal to be untimely. Because the appeal was timely perfected, we now address Odom's allegations of error.

COLLATERAL ESTOPPEL

Odom argues that the school board's decision not to re-employ him for the 1993-1994 school year is collaterally barred by the Board's decision to rehire him after a nonrenewal hearing for the 1992-1993 school year. Specifically, Odom argues that the evidence offered to support the superintendent's fourth reason for not re-employing him, Mr. Odom's continued poor relations with parents and other staff members, was identical to the evidence offered at the previous year's

nonrenewal proceeding. While collateral estoppel may be applicable in the context of a nonrenewal hearing, it is not appropriate in the case sub judice. Even if collateral estoppel were appropriate, Odom's assertion of error concerns only one of the reasons for the nonrenewal of his contract and could not alone constitute reversible error.

The doctrine of collateral estoppel is applicable in the teacher-contract nonrenewal context. *Philadelphia Mun. Separate Sch. Dist.*, 437 So. 2d at 396. "When collateral estoppel is applicable, the parties will be precluded from relitigating a specific issue actually litigated, determined by, and essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action." *Aetna Casualty and Sur. v. Berry,* 669 So. 2d 56, 67 (Miss. 1996).

Collateral estoppel is applicable to preclude parties from relitigating a specific issue if:

(1) there is an identity of the parties;

(2) the issue was actually litigated;

(3) the issue was determined in the former action; and

(4) the issue was essential to the judgment in the former action.

Hollis v. Hollis, 650 So. 2d 1371, 1377, 1378 (Miss. 1995). Prerequisite to all four elements of collateral estoppel is a valid final judgment. *Berry*, 669 So. 2d at 397. Odom failed to prove that there is a valid judgment to fulfill any of the four elements of collateral estoppel. In fact, Odom entered no evidence of the final decision of the Board following the 1992-1993 hearing; therefore, there is no proof in the record that any of the four elements of collateral estoppel were met. Odom did enter the record of the hearing held before the hearing officer; however, that is not conclusive as to the factual or legal conclusions of the Board. The hearing officer has no statutory authority to make conclusions of fact or law. *Id.* § 37-9-111(2). This function is vested exclusively in the school board. Miss. Code Ann. § 37-9-111(4) (1972). Because the school board alone is vested with authority to make a final judgment, evidence of the Board's decision is necessary to invoke the doctrine of collateral estoppel. Thus, Odom did not produce adequate proof at trial of a valid final judgment, of what facts were deemed to undergird it, of which issues were litigated, or of what the final conclusion of the Board was. The evidence which had been produced at Odom's first contract renewal hearing to prove that Odom had problems with other teachers, students, and parents was properly admitted into evidence.

THE BOARD'S DECISION

Odom alleges that the Board's decision is wholly unsupported by the evidence adduced in the hearing. Consequently, he claims the Board's decision is arbitrary and capricious and amounts to a violation of the Due Process Clause of the United States Constitution. *See Schware v. Board of Bar* Examiners, 353 U.S. 232, 247 (1957); *United States ex rel Viajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *Lucas v. Chapman*, 430 So. 2d 945, 948 (5th Cir. 1970). While Odom correctly states the law, he is incorrect in his assumption that the Board's decision is wholly unsupported by the record. The record sufficiently supports the decision of the board to avoid

constitutional entanglements.

As the United States Supreme Court stated in *United States ex rel Viajtauer v. Commissioner of Immigration*, "a want of due process is not established by showing merely that the decision is erroneous, or that incompetent evidence was received and considered." *United States ex rel Viajtauer*, 273 U.S. at 106 (citations omitted). "[I]t is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced." *Id.* The record reflects that there is sufficient evidence to support each of the four reasons given for not extending Odom a new contract. Of course, any of these reasons alone supported by the evidence would satisfy due process. First, the record supports the determination that the school district would be financially improved if it staffed the in-school suspension coordinator position with personnel who are not certified teachers. According to superintendent Cartlidge, the position of in-school suspension coordinator is not one that requires a valid certificate issued by the State Department of Education and Odom offered no evidence to the contrary. Further, the uncontroverted testimony is that a certified employee earns approximately $23,000.00 while an uncertified employee earns approximately $7,000.00. Certainly the school district would benefit financially by saving $16,000.00.

Second, the record supports the contention that no elementary school principals wanted to have Mr. Odom in a classroom teaching position on their staff. Superintendent Cartlidge testified to this fact as did principal Leach. Odom makes much of the fact that principal Leach was retiring at the time of the hearing and his replacement, who had not yet been hired, had not been asked if he would want Odom on his staff. Because the replacement had not yet been hired, we find Odom’s argument without merit. Clearly both principals presently employed had declined to have Odom on their staffs and Odom presented no evidence to indicate that the new principal would not follow Principal Leach’s conclusion in light of the fact that Leach had worked with Odom as a classroom teacher and in-school suspension coordinator.

Third, there is abundant evidence that the school district could have a better classroom teacher than Odom. Principal Leach testified that he could not recommend Odom for classroom service and would not accept him as a classroom teacher in his school.

Fourth, the record reflects that Odom had had poor relations with parents and other staff members. He failed to improve these relations; therefore there is sufficient proof in the record to discharge him on this ground.

Because there is ample evidence to support all four reasons for nonrenewal, any one of which would sustain the Board’s judgment, we affirm the chancery court’s affirmance of the Board’s finding.

REDUCTION IN FORCE POLICY

Next, Odom alleges that the Board failed to follow its reduction in force policy when it chose not to renew Odom’s contract, while simultaneously contracting with several junior teachers. The record is uncontradicted that the "Professional Personnel (Reduction in Force Policy)" is applicable only where a teacher is certified in a particular teaching area. Odom was certified to teach Math and Science. Such certification does not protect his position as in-school suspension monitor under this policy. Further, the policy is only used when personnel are declared "excess" by the Board. Nowhere in the record is there any determination by the Board that Odom fit this status. From the face of the

"Professional Personnel (Reduction in Force Policy)," it is apparent that the reduction in force policy is inapplicable to contract nonrenewals. The chancery court correctly ruled the reduction in force policy inapplicable to this case.

THE HEARING OFFICER'S RECOMMENDATION

Finally, Odom objects to the hearing officer giving "directives to the Board as opposed to merely conducting the hearing and allowing the Board to decide solely on the record as mandated by the state statute." Odom misrepresents the record when he claims the hearing officer gave "directives" to the board. The hearing officer made no directives but instead opined that "the decision not to re-employ Mr. Marion G. Odom is sustained by the facts and law, and the decision not to re-employ Mr. Odom is recommended to the Board."

Mississippi law provides the hearing officer, if one is appointed, with authority only to conduct the hearing "in such a manner as to afford the employee a fair and reasonable opportunity to present witnesses and other evidence pertinent to the issues in his behalf and to cross-examine witnesses against the employee." Miss. Code Ann. § 37-9-111(2) (1972). Further, the hearing officer has the power to determine the form in which testimony is submitted. *Id.* However, the hearing officer is afforded no authority, statutory or otherwise, to make findings of fact, conclusions of law, or to resolve the ultimate question of whether an employee should have a contract offered. These functions are reserved exclusively to the school board, and there are no statutory provisions which allow the school to delegate any of these functions to the hearing officer. *Id.* § 37-9-11(4).

The question before us is whether the hearing officer's recommendation that the Board not extend a contract to Odom amounts to reversible error. After a thorough review of the record, we conclude that it did not. While the hearing officer has no power to make binding conclusions or recommendations and it would be a far safer practice not to make either, in this case, that recommendation apparently did not affect the Board's judgment. The minutes of the Board meeting on July 17, 1994, reflect that the Board decided not to rehire Odom after a review of the transcript of the hearing and after Odom's attorney addressed the board. The Board's minutes do not mention the hearing officer's recommendations. Further, there is no apparent reliance by the Board on those findings. Therefore, we conclude that the statutory procedures were followed, and the hearing officer's recommendations at best constitute harmless error.

For all of the foregoing reasons, the judgment of the Chancery Court is affirmed.

THE JUDGMENT OF THE YAZOO COUNTY CHANCERY COURT AFFIRMING THE DECISION OF THE BOARD OF EDUCATION OF THE YAZOO CITY SCHOOL DISTRICT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., NOT PARTICIPATING.