

IN THE COURT OF APPEALS 03/26/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-01111 COA

YVONNE G. POWELL

APPELLANT

v.

DEPARTMENT OF HUMAN SERVICES

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. R. I. PRICHARD III

COURT FROM WHICH APPEALED: MARION COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MICHAEL ADELMAN

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: STANLEY ALEXANDER

NATURE OF THE CASE: TERMINATION OF EMPLOYMENT

TRIAL COURT DISPOSITION: AFFIRMED THE DECISION OF THE MISSISSIPPI
EMPLOYEE APPEALS BOARD TO TERMINATE EMPLOYMENT

BEFORE BRIDGES, P.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Yvonne Powell was discharged from her employment with the Mississippi Department of Human Services, (DHS), in November of 1993 based on allegations that she verbally abused students in her charge at the Columbia Training School. Powell appealed her termination to the Mississippi Employee Appeals Board, (MEAB), as provided by section 25-9-131 of the Mississippi Code. In January of 1994, MEAB Chief Hearing Officer, William H. Smith III, opined that Powell had failed to meet her burden to show that DHS's actions were extreme or without merit. Officer Smith affirmed the termination of employment based upon the magnitude of reports from both students and faculty alleging verbal abuse and ordered that Powell's appeal be dismissed and all relief sought by her be denied. From this opinion and order, Powell requested a review of her case by the full MEAB. The full board granted Powell's request for review but found that the order entered by Officer Smith was proper and correct and ordered that it be affirmed in all respects. In June, 1994, Powell petitioned the Circuit Court of Marion County for judicial review from the order of the MEAB. On October 21, 1994, the Circuit Court of Marion County affirmed the decision of the MEAB in a thirteen-page opinion of considerable analysis and review. Feeling aggrieved by this decision, Powell raises the following issues on appeal:

I. WHETHER POWELL WAS DENIED DUE PROCESS AT THE ADMINISTRATIVE HEARING

II. WHETHER THE TERMINATION NOTICE IN THIS MATTER WAS CONSISTENT WITH DUE PROCESS AND THE EVIDENCE ADDUCED AT THE HEARING

III. WHETHER THE ALLEGATIONS AGAINST POWELL WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

Finding no error in the decision of the trial court, we affirm.

FACTS

Powell was employed by the Division of Youth Services of DHS as a Counselor's Aide III at its Columbia Training School, established by the State for the rehabilitation of juvenile offenders. The Columbia campus houses the State's younger juvenile offenders and serves children from the ages of ten through fifteen. Powell had been employed there since 1979. Her duties were to supervise students, maintain the population count, bring children to church, supervise during lunch, and to observe the students at all times and be responsible for their whereabouts.

The termination notice essentially charged as a basis for Powell's termination a "pattern of abusive, intimidating and harassing behavior toward the students under her care and supervision," and specifically alleged evidence of the following: (1) excessive profanity; (2) making disparaging

remarks about the students' mothers; (3) ridiculing a student; (4) showing favoritism toward certain students; (5) using gang hand symbols in an effort to create confusion and disruptive behavior; (6) making sexual remarks; (7) misusing the disciplinary process; (8) accusing students of "always running to the white folks"; and (9) sleeping on the job. Powell, however, was terminated specifically for being verbally abusive to the students.

Inquiries by DHS indicated that since 1986, Powell displayed a pattern of conduct indicative of abuse toward the children in her care. In 1989, DHS, Division of Social Services, found evidence of child abuse by Powell of a child in her care and suspected abuse of another. Powell was again suspected of child abuse in 1990 and again in 1992.

In 1993, the Administration of Youth Services was under the direction of Colonel Donald Taylor. It was at this time that several students in Powell's care complained to the school counselor, Ms. Lillie Dwight, that they were being mistreated by Powell. Because of the number and consistency of the allegations from the children, Dwight reported the allegations to her supervisor, Dr. Martha D'Ilio, who served as the school psychologist. D'Ilio then reported the complaints to the school administrator, Mr. Aubrey Mitchell. During this period, Mitchell also received a report from Marilyn Dixon alleging Powell's mistreatment of the students.

Mitchell reported the situation to Colonel Taylor, who then requested an internal investigation by the Office of Crisis Intervention, an arm of DHS which is independent from the Youth Services Division. The Office of Crisis Intervention was charged with conducting investigations for DHS. The findings of that investigation led to Powell's termination.

ANALYSIS

According to section 25-9-132 of the Mississippi Code, the circuit court's scope of review on appeal is limited to a review of the record made before the MEAB. The examination of the record was to "determine if the action of the employee appeals board is unlawful for the reason that it was: (a) Not supported by substantial evidence; (b) Arbitrary or capricious; or (c) In violation of some statutory or constitutional right of the employee." Miss. Code. Ann. § 25-9-132(2) (1972). Further, pursuant to section 25-9-127 of the Mississippi Code, the employee "shall, on hearing and on any appeal of any decision made in such action, be required to furnish evidence that the reasons stated in the notice of dismissal . . . are not true or are not sufficient grounds for the action taken . . ." Miss. Code Ann. § 25-9-127 (Rev.1994). It is, therefore, Powell who bears the burden of proof on appeal that there was not a sufficient basis to support the action of the DHS.

After reviewing that record, the circuit court found that the MEAB's decision was supported by substantial evidence and that Powell did not meet her burden of proof on the following issues, which are essentially the same issues before us.

I. WHETHER POWELL WAS DENIED DUE PROCESS AT THE ADMINISTRATIVE HEARING.

Powell argues that she was denied due process at the administrative hearing, because DHS did not provide her with copies of certain documents it intended to rely upon at the hearing. Powell asserts that although the records were not required to be produced as a matter of discovery, they were required as a matter of fundamental fairness according to *Bowman v. Ferrell*, 627 So. 2d 335, 338 (Miss. 1993). We find *Bowman* inapposite to the case at bar because the employee in *Bowman*, relying on misrepresentations by the Board, prematurely rested her case without concluding her proof. Consequently, her opportunity to be heard had been abridged.

It is undisputed that because Powell had a legitimate property interest in her state employment, she was entitled to procedural due process. When the action of an administrative body impacts this interest, procedural due process requires, at a minimum, notice and an opportunity to be heard. *Booth v. Mississippi Employment Sec. Comm'n*, 588 So. 2d 422, 428 (Miss. 1991). Powell received both. The Mississippi Supreme Court has held that there is no right to discovery in an administrative proceeding where the rules and regulations of the administrative body do not provide for discovery. *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So. 2d 312, 317-18 (Miss. 1992), *cert. denied*, 113 S. Ct 976 (1993). In this case, the administrative rules of the MEAB do not provide for discovery. Thus, Powell had no right to receive the documents, and DHS had no duty to provide them prior to the hearing.

II. WHETHER THE TERMINATION NOTICE IN THIS MATTER WAS CONSISTENT WITH DUE PROCESS AND THE EVIDENCE ADDUCED AT THE HEARING.

Powell's termination notice charged her with verbal abuse as well as physical abuse and other various occurrences of misfeasance or malfeasance. Powell complains that there was conflicting evidence as to the charge of verbal abuse and the other charges were largely unsubstantiated at the hearing. Powell further asserts that the hearing officer erred in allowing into evidence certain documents which tend to substantiate the charges of physical abuse because the alleged victims involved did not testify at the hearing. The circuit court concluded that the "decision of the Board was predicated solely upon the charges of verbal or emotional abuse" and "[b]ecause the Board did not rely upon the allegations of physical abuse to support its decision, the introduction of this evidence into the record in no way prejudiced [Powell]" We agree. Furthermore, the trial judge was correct in determining that because the termination notice contained allegations of physical abuse, the hearing officer was permitted to consider evidence pertaining to this issue.

III. WHETHER THE ALLEGATIONS AGAINST POWELL WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The evidence of verbal abuse in this record is plentiful. There were numerous statements from students as well as other faculty members that Powell consistently used profanity in her dealings with the students. While we acknowledge that Powell denied these charges and presented several witnesses in her defense, we must conclude that, given the conflicting testimony, the hearing officer based his decision upon his assessment of the credibility of the witnesses.

Additionally, Powell complains that much of the testimony admitted against her was in the form of hearsay statements. An in-depth analysis as to whether this is so and further analysis as to whether any of the hearsay exceptions would apply is not warranted here. We find that as an administrative

agency, the MEAB was not bound by strict rules of evidence. We further find that the administrative rules of the MEAB allow the hearing officer to admit into the record any evidence he deems probative and trustworthy. *See New South Communications Inc. v. Answer Iowa, Inc.*, 490 So. 2d 1225, 1227 (Miss. 1986).

Given the deferential standard of review in these circumstances, we cannot find that merely because there is conflicting testimony as to whether Powell was verbally abusive, the decision to terminate her employment was not supported by substantial evidence. Therefore, we must affirm.

THE DECISION OF THE MARION COUNTY CIRCUIT COURT AFFIRMING THE DECISION OF THE MISSISSIPPI EMPLOYEE APPEALS BOARD DATED JUNE 24, 1994 IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.