

IN THE SUPERIOR COURT
COUNTY OF FLOYD, STATE OF GEORGIA

FILED IN OFFICE

FLOYD COUNTY BOARD OF
EDUCATION a/k/a FLOYD COUNTY
SCHOOL DISTRICT

Appellant,

vs.

GILDA DAY,

Appellee,

JUN 17 2014

CLERK

CIVIL ACTION
FILE NO. 13-CV-02617-JFL002

ORDER

The within case comes as an appeal by the Floyd County Board of Education (hereafter FCBOE or Local Board) from a Decision of the State Board of Education (hereafter SBOE) dated November 7, 2013. The Court will review the Decision of the SBOE as to its factual determinations under the Any Evidence Rule; matters of law are reviewed de novo.

As found by SBOE in its Decision, in 2013 the FCBOE undertook to implement a reduction in force which would begin in the 2013-2014 school year. This was due to an anticipated reduction in funding of several million dollars.

Following a study of certain factors the FCBOE determined to be relevant to its implementing the RIF, which factors were applied to all employees of the FCBOE, a total of 11 school counselors, including this Appellee, were identified as persons to be

proposed for non-renewal of their employment contract. The FCBOE held a hearing at the request of Appellee, Ms. Day, to determine the legality of her termination. Initially, the Local Board had taken the position that Ms. Day was not entitled to a hearing as to the legality of the RIF because the FCBOE operates as a Charter System. The Local Board took the position that even though Ms. Day had been tenured prior to the adoption of the Charter System Agreement, once Floyd County Schools became a Charter System, her tenure rights were eliminated. However, having initially denied her a hearing the Local Board relented and granted the hearing request. At this hearing the FCBOE upheld the termination of her contract. Ms. Day then appealed to the SBOE. It is from the Decision of the SBOE that the FCBOE has appealed to Superior Court. Appellee, Ms. Day has not appealed or cross appealed from the significant portions of the Decision which were decided against her at the SBOE level. The only appeal before this Court is that of the FCBOE which contests the portions of the Decision reversal by the SBOE of the FCBOE decision which had upheld the termination of Ms. Day's contract.

As stated above, paragraph's III. A., B., and C. of the November 13 SBOE Decision have not been appealed by Ms. Day. In these sections of its Decision the SBOE has: (A) upheld the rights of Ms. Day, as a tenured employee, to a hearing before the Local Board pursuant to Georgia Fair Dismissal Act. (OCGA § 20-2-940, et seq.); (B) determined that the Local Board properly identified and utilized appropriate factors in implementation of the RIF; and (C) determined that the RIF was supported by appropriate evidence and the decision was not arbitrary or capricious.

Even though neither of these rulings was appealed by Ms. Day, the FCBOE has contended on appeal that the SBOE had no jurisdiction to entertain an appeal of the Decision. The FCBOE claims that because it is a Charter System it is exempt from all provision of Title 20 of the Code, OCGA § 20-2-2065(a), and therefore free from all provisions of the Fair Dismissal Act. The FCBOE contends that because Title 20 no longer applies to the RIF decision which was made, the SBOE and this Court have no jurisdiction to hear an appeal from the FCBOE decision. Ms. Day, to the contrary, asserts that her accrued rights as a tenured teacher cannot be taken from her by a mere change in legislative enactment. She asserts full rights to a Fair Dismissal Hearing, and, of course the right of Appeal. To decide the jurisdiction issue, the Court must decide if Ms. Day has tenure rights so that Fair Dismissal applies.

The Local Board, on appeal, continues to assert its legal position that Ms. Day's tenure rights were forfeited (they use the term "rescinded") by the legislative enactment of OCGA § 20-2-2065(a) which exempted Charter Schools (of which FCBOE is a charter school) from the provisions of all of Title 20, except as to existing rules relating to health, safety, insurance and civil rights. The SBOE found tenure to be a "civil right."

The Court finds that the State Board improperly decided that assertion of a claim of due process tenure rights by Ms. Day was a "civil right." That is an incorrect legal designation of rights of tenure. The right of a tenured teacher to a hearing under provisions of the Education Law of Georgia (OCGA § 20-2-940-47) is not defined as a civil right (a right to redress invidious discrimination directed against a group of persons). Instead, this case involves an assertion of her right to due process. The right

to due process is that right of notice and opportunity to be heard before an existing property right (the right to continued employment as a tenured teacher) is taken. See: Smith v. City of Atlanta, Supreme Court of Ga. No. A14A0034 (May 21, 2014)

In this case, there is no factual dispute that prior to the adoption and execution of the Charter System Agreement for Floyd County Schools, Ms. Day was a tenured teacher, entitled to the protection, before termination, of the Fair Dismissal Act. The Local Board cites West v. Dooly County School District, 316 Ga. App 330 (2012) for the proposition that the legislature may change the terms of a public employee's employment by it and that a law which fixes the term or tenure of a public employee creates no private contractual or vested rights. The Local Board takes the position that when the legislature authorized Charter Schools to be exempt from all provisions of Title 20, Ms. Day's tenure rights under Fair Dismissal were rescinded. Ms. Day, of course disagrees, but did not appeal from the ruling of the SBOE which held that in the hearing which was held before the Local Board her full due process rights under Fair Dismissal were granted. The SBOE found that the RIF instituted by the FCBOE was legal and necessary under the facts of this case, and found that Ms. Day was properly subject to termination by the RIF which was found to have complied with OCGA § 20-2-940(6).

Because this central question was found against Ms. Day by the SBOE and because Ms. Day did not appeal this issue at all, ordinarily the Court would decline to rule inasmuch as a ruling on tenure rights would, again under ordinary circumstances, be dicta and not germane to the ultimate issue.

Here, however, a separate issue is raised as to the SBOE and the Court's jurisdiction to hear this appeal based on the Local Board's claim that Title 20, and

therefore hearing and appeal rights thereunder, do not apply, even if the local Board exercised its discretion to hold a hearing. The Local Board's position is that Ms. Day has the same rights as a non-tenured employee. But, review of the transcript of the hearing before the Local Board (T.11-12) shows that counsel for the Local Board stated "the law is very clear that the essential question here today will be whether or not a RIF was required... [and] was this RIF plan applied appropriately, and was Ms. Day a part of that plan?"

From this opening statement at the Local Board's hearing comes the SBOE finding that the Local Board consented to a Fair Dismissal Hearing. That is true, but it is also true that if the court's subject matter jurisdiction is questioned, the party's consent is irrelevant and not binding. Subject matter jurisdiction may be challenged at any stage of the action. If such jurisdiction is lacking, the Court must dismiss the action. OCGA § 9-11-12(h)(3).

The Court finds that the Local Board's reliance on West v. Dooly County Schools, supra, is misplaced. In that case, the Court found that a recently hired school administrator (previously a tenured teacher) did not timely acquire separate vested rights as a tenured administrator after an amendment to the Fair Dismissal Act (OCGA § 20-2-942). In West, the Court of Appeals pointed out that the amendment to the Act which removed administrator's tenure from the act contained a provision to protect the rights of any administrator who may have accrued vested rights before the act was amended. In West, though, the Court found that the administrator had never been tenured as an administrator. West clearly deals with a situation unlike that of Ms. Day who was stipulated to have been a tenured teacher before the Floyd County Schools

became a Charter System. The question then is whether or not her vested rights remain.

Paraphrasing the Court's holding in *West*, at 331: a party is entitled to due process where the governmental action involves a taking of that party's protectable interest in life, liberty or property. A court must look to state law to determine whether Ms. Day had a protected property interest in her job as of the date the Charter School Agreement was executed, prior to the date the RIF was to be implemented.

The Court finds that as a previously tenured employee, Ms. Day has a protected property interest which cannot be taken by mere legislative enactment. A taking of her tenure rights must have been accomplished by some form of due process action by her employer. Since her tenure rights are vested, execution of a Charter School Agreement to which she is not a party cannot take those rights from her.

But, here, as the SBOE found, she was provided her due process rights. The SBOE found she was subject to Fair Dismissal, that her rights were afforded to her and that the RIF was properly adopted by the Board. Therefore, SBOE and this Court have jurisdiction to hear the appeals in this case.

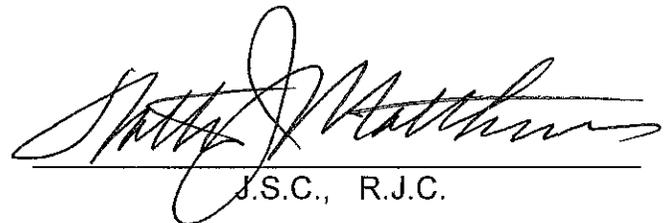
As to paragraph III. D. of the Decision, the SBOE was in error to use this hearing as a basis for determination of whether the Local Board correctly followed provisions of the Charter Agreement in implementation of the RIF. The SBOE has a specific procedure set forth in OCGA § 20-2-2068 for it to seek a determination whether or not a Local Board has complied with a Charter School Agreement. The SBOE, in its Decision, Paragraph III. D. ("The Charter System Agreement") exceeded its legal authority. The SBOE has no authority, and here has no jurisdiction to use the hearing

on one teacher's RIF claims as a vehicle to rule, without notice or hearing to the Local Board, on the questions of the validity of the Local Board's conduct under the Charter System Agreement.

The Court finds:

1. The challenge to the subject matter jurisdiction of the Court is DENIED;
2. The Decision of the SBOE in Paragraph III. D. is REVERSED;
3. The Decision of the SBOE in Paragraphs III A., B., and C. which holds that all of Ms. Day's Fair Dismissal Act due process rights were afforded to her is AFFIRMED;
4. The Decision of the SBOE in Paragraphs III. A., B., and C which finds that the Local Board properly terminated Ms. Day's contract pursuant to a reduction in force is AFFIRMED.

This 17th day of June, 2014.


J.S.C., R.J.C.

c: Mr. C King Askew
Ms. Julie Oinonen