

IN THE IOWA DISTRICT COURT IN AND FOR DUBUQUE COUNTY

ROGER POLING, Petitioner - Appellant, Vs. BOARD OF DIRECTORS OF THE DUBUQUE COMMUNITY SCHOOL DISTRICT, Respondent - Appellee.	Case No. 01311 CVCV115137 RULING ON JUDICIAL REVIEW
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This matter is before the Court pursuant to a Petition for Judicial Review filed on August 24, 2023. Appellant appeared with Attorney Charles Gribble. Appellee appeared through its counsel, Attorney Janice Thomas. The certified record was filed. The Court set a briefing schedule. Oral argument came before the Court and a record was made. The Court reviewed all of the materials submitted, including the briefs and responses, the record of the proceedings, and all exhibits including the surveillance videos and the cell phone videos.

ISSUES

This Petitioner, Roger Poling (“Poling”) seeks judicial review of the decision of the Dubuque Community School Board (“Board”) that terminated his employment contract as a teacher at Hempstead High School for the 2022 – 2023 school term and all future terms. The termination was based on the following grounds:

1. Making inappropriate and racially derogatory statements directed toward a student at school and in the presence of other students;
2. Engaging in unprofessional and unethical conduct in violation of Standard VI-6-25.3(6)(c)(d) of the Board of Educational Examiners Code of Professional Conduct and Ethics;
3. Violating Board Policy 1003, Cultural Proficiency Philosophy; and
4. Losing trust and confidence of the administration in employee’s ability to serve in a role model capacity for students and maintain effective relationships with students and staff.

Termination Notice pursuant to Iowa Code secs. 279.27 and 279.15.

Poling challenges the grounds and asserts that the Board lacks just cause for his termination pursuant to Iowa Code sec. 279.27(2). The decision of the Board was rendered July 25, 2023. The notice of appeal is therefore timely.

The challenges asserted by Poling include the following:

- A. The Board's decision violated Poling's '23-24 continuing employment contract which allowed for dismissal only for just cause;
- B. The Board's decision was in excess of the statutory authority granted to the Board;
- C. The Board's decision was made upon unlawful procedure;
- D. The Board's decision was unsupported by a preponderance of the competent evidence when the record is viewed as a whole;
- E. The Board's decision was unreasonable, arbitrary, and capricious and a clearly unwarranted exercise of discretion;
- F. The Board's decision was based on unlawful procedure with an assignment of the following errors:
 - 1. Failure to issue subpoenas;
 - 2. Permitting hearsay;
 - 3. Failure to permit cross-examination; and
 - 4. Insufficient evidence that would not be found by a neutral, detached and reasonable person.

BOARD'S DECISION

The Board's decision to terminate Poling was based on an incident that occurred on May 31, 2023, whereby Poling and an African American student had a verbal exchange on the campus of Hempstead High School. Poling testified that he was repeating a racial comment made to him by the student. Poling did not refer to the student as such, nor was that his intention. Poling attempted to emphasize how derogatory it was for a student to make a racial statement toward a member of the teaching staff.

On the same day as the hearing, the Board deliberated and voted in favor of the Motion for Termination. The decision did not address all four of the reasons set forth in the Notice of Termination served on him.

The Board's decision was based on exhibits and testimony that were admitted over Poling's objections to hearsay (sometimes double hearsay), relevancy and lack of personal knowledge. The Board did not hear from any students who directly witnessed or who were in the immediate vicinity of the entire incident. The Board's decision also relied on unsigned, unauthenticated written statements. Additionally, the Board relied on numerous facts that were contradicted, thereby diminishing the reliability and credibility of the speaker.

The Board found just cause pointedly on Poling's use of a racial slur and the perceived loss of trust as a result. Ultimately, the Board's decision ignores context. Poling demonstrated through his testimony that he was repeating the word back to the student to explain the student's misconduct. Repeating the word, especially to an African American student, is abhorrent; there

is no question. However, taking the totality of the facts and circumstances presented by the parties in the record, the Board's choice to ignore the context from which this verbal exchange arose diminishes the Board's finding of just cause. Magnifying the unfortunate circumstances was the involvement of social media. A student shared a momentary snap shot of the incident widely on social media that did not provide the entire factual scenario. This created clickbait throughout multiple social media platforms, which led to a wider community on social media becoming the prosecutors, judges, and jury. In turn, this caused a significant amount of pressure on the Board, faculty, students, and individuals involved and impacted.

A teachable moment was missed to rely on the DCSB Cultural Proficiency Philosophy. The student body and the teachers could have been instructed on the mutual respect that is required in any setting to ensure that there is a safe and inclusive environment within the school. School rules and policies could have been reinforced. Cultural and generational differences could have been discussed. Language skills for deescalating situations could have been enhanced. The need for honesty and taking full responsibility for one's conduct could have been the illuminating sentinel of the halls of Hempstead High School; but unfortunately the faculty and the Board made reactive, rather than initiative-taking, decisions on how to address the specter of perceived racially based conflict.

For the reasons stated herein, the Court finds that viewing the record as a whole, the Board did not render its decision based on the proper standard. The superintendent failed to establish by a preponderance of competent evidence that just cause existed to terminate Poling's employment contract with the Dubuque Community School District. Therefore the decision of the Board is **REVERSED**.

FINDINGS OF FACT

Background Facts

The Dubuque Community School District (DCSD) was founded in 1886. It is the seventh largest school district in the State of Iowa. It serves 18 schools in northeastern Iowa with a population of over 10,500 students. Its mission is to prepare world class learners and citizens of character in a safe and inclusive learning environment. The governing body, the Board, is comprised of seven elected members from the community who serve on a volunteer basis. The current superintendent of the DCSD is Amy Hawkins.¹

There are two public high schools in the district, Dubuque Senior High School, and Hempstead High School. Hempstead was built in 1970 and named after former Iowa Governor Stephen Hempstead. It is located in an area referred to as the West End on Pennsylvania Avenue. Presently it has a student body of approximately 1,600, which includes students

¹ Dubuque Community School <<https://www.dbqschools.org/school-board>> . Last accessed December 9, 2024

between the 9th and 12th grades. At the time of the incident which brought the matter before the Court, its principal was Lee Kolker. Julia Jorgenson succeeded him on July 1, 2023.

Dubuque officials undertook a redistricting process that took effect for the 2009-2010 school year for Hempstead and Senior High Schools. The changes made were primarily driven by an imbalance in the number of students at each school, according to the district leaders. The process also undertook to even out the demographic difference between the schools, which have primarily equal percentages of students who are minorities as well as students who qualify for free or reduced-price lunch.²

The DCSD Handbook prohibits offensive or abusive language. “Threatening, intimidating, or using abusive and profane language by school district employees towards others, including derogatory slurs, will not be tolerated. Violation will incur discipline, up to and including termination.”³ The Cultural Proficiency Philosophy of DCSD is spelled out in Exhibit 38 of the record. It stands for the proposition that the learning environment will, through leadership, improve the environment for all protected classes in the schools. Ways to achieve this include professional learning opportunities for staff centered around cultures and cultural proficiency and use of appropriate language that respects all cultures.

Roger Poling has been a teacher at Hempstead High School since 2004.⁴ He has a Bachelor of Science Degree in Business Administration, with a minor in computer science conferred by North Central College of Naperville, Illinois. After college he was employed by Enterprise Rent-a-Car and Hewitt Associates. He attended Emmaus Bible College in Dubuque upon moving here with his spouse and obtained a Continuing Education Certificate. He was employed by Cigna Retirement Investment Services and while in their employ he completed a Master of Business Administration with a finance concentration through University of Dubuque. He attended Clarke College (now Clarke University) and obtained a Master of Arts in Teaching with secondary education (5-12) endorsements in business education, math, and coaching. His desire to become a teacher stemmed from frustration within the field of a lack of basic business understanding. He saw an opportunity to work with students to give them a better understanding in the arena. His mission statement is to teach, train and coach others toward the best version of themselves and help them become educated, independent, and productive members of current and future communities.⁵

During his long tenure at Hempstead High School, Poling has instructed over 30 subjects. He taught where he was needed due to his diverse educational background. He has obtained multiple certificates and endorsements adding to his teaching credentials. He has coached the

² Hinga, Allie. “Dubuque school board not inclined to pursue redistricting, question impacts.” Telegraph Herald, February 10, 2019, www.telegraphherald.com/news/tri-state/article-htlm. Last accessed December 15, 2024.

³ Exhibit 40

⁴ The DCSD laid off teachers in 2010 due to budget issues. Poling was laid off but recalled the following term.

⁵ Transcript pgs. 281, ln. 23-25 and 219 ln. 1-4.

bowling team and received numerous accolades for his performance with the students, including being named the Mississippi Valley Conference Coach of the Year in six different (6) seasons. The team has had considerable success under his tutelage including two team state championships, and three individual titles.

Poling has undergone evaluations since beginning his employment with DCSD. The evaluations include a review of his lesson plans, in classroom observation and debriefing post observation to discuss expectations. Poling has never had a negative or adverse evaluation in 20 years.⁶ Poling is a member of the Crew Link and has garnered a positive character reputation amongst the student body for his role in this inclusivity program.⁷ One fellow teacher indicated that, “Roger has built strong relationships with some of our most challenging students. It does not matter a student’s ethnicity. He tries to get to know the student and help them in any way he can.”⁸

May 31 Incident

Individuals who are pertinent for discussion herein include the following:

Staff in May of 2023

- Karla Schwaegler: Assistant Principal
- Brian Kuhle: HR Director
- Rebecca Fellenzer: Assistant Principal
- Amy Hawkins: Superintendent of DCSD
- Janie Hessong: IJAG teacher
- Katie Houselog: Librarian
- Kerry Federonich: Security Paraprofessional

Students

- Tiana Hayes: 9th grader – filmed event from corner of lower-level corridor
- Kwame Carter: male wearing black sweatshirt in surveillance videos and Exhibit 9
- ZeRiah Walker: female wearing white tie-dyed hoodie in surveillance videos
- Steffonte Jones: male wearing white T-shirt in surveillance videos;
- Dom King: male wearing black hoodie in surveillance videos

May 31, 2023, was the penultimate day before the end of the school year. Poling was in his ninth period, multi-media studies. His students were finishing their final projects which included website application and video, artifacts, and formatting requirements. His classroom is at the corner of the B and C wings of the school building where the math and science rooms are

⁶ Transcript Pg. 222 lines 2-4

⁷ Transcript Pg. 74 line 3-6

⁸ Exhibit H

located on the C200 level. The B wing leads to the administrative offices of the building. It has surveillance cameras mounted in the corner without audio capability. Poling's classroom is C205, which is next to the library.

During ninth period, there was a group of students hanging out in the "C" hallway. The hallway is located near the library and classroom C205. The students were loud and the noise they were making became more disruptive. The students were seen by Katie Houselog, moving back and forth and up and down the hallway.

At 1:08 p.m. Ms. Houselog sent an email to Mandy Enke letting her know there was a group of students outside the library.⁹ Several minutes passed and security failed to appear. Ms. Houselog then heard either a loud yell or some sort of bang that caused her and Poling to enter the hallway at 1:12:35 to see what was occurring.¹⁰ The students scattered. Ms. Houselog and Poling remained in the hallway for a few seconds, looking around.

Poling testified that he attempted to urge the students¹¹ to return to their respective classrooms.¹² One student gave a "smart" response to him. Another student pretended he did not speak English.¹³ Poling heard more commotion on the stairwell and entered through the doors. While in the stairwell, Kwame turned and looked up¹⁴ at Poling. This is the moment, Poling asserts Kwame made the statement, "whattcha looking at n[-word]." Kwame then appears on surveillance video¹⁵ hurrying down the stairs, running away from the bottom of the stairwell, running down the corridor and into a classroom on the lower floor where Ms. Janie Hessong was conducting the IJAG class.

Security Paraprofessional, Kerry Federonich, was sitting in a chair in the corner of the lower level, by the bottom of the stairs. She was talking with a student, identified as Tiana. Ms. Federonich observed the students coming down the staircase and attempted to gain their attention to make them stop running and shouting.¹⁶ She heard Poling from the stairwell ask that a certain student be stopped. Ms. Federonich hurriedly proceeded down the corridor. Tiana watched as the students went down the hall and then saw Poling come to the bottom of the stairs. Ms. Federonich approached the IJAG room and opened the door. She stepped into the classroom and asked the student to come out.¹⁷ Dom followed her to the classroom and peered inside.¹⁸ He moved away from the doorway. Poling is now within the purview of the surveillance camera.¹⁹

⁹ Exhibit 24

¹⁰ Exhibit 24 and Exhibit 11: Surveillance video 1

¹¹ The group included Kwame, Dom, ZeRiah and Steffonte

¹² Exhibit 21

¹³ Exhibit 21

¹⁴ Exhibit 12: Surveillance video 2 at 1:13:02

¹⁵ Exhibit 13: Surveillance video 3 at 1:13:08 – 1:13:12

¹⁶ Exhibit 25

¹⁷ Exhibit 14: Surveillance video 4 at 1:13:28

¹⁸ Exhibit 14: Surveillance video 4 at 1:13:32

¹⁹ Exhibit 14: Surveillance video 4 at 1:13:37

He walked to the door but did not enter the classroom.²⁰ Poling moved away from the threshold of the door and stood beside it.²¹ Kwame appeared in the doorway.²² Poling addressed Kwame, turned away and started walking away from the doorway.²³ Kwame did not follow. Poling turned back toward Kwame and Kwame stepped back into the doorway.²⁴ The two exchanged comments, as Kwame straddled the threshold of the door and Poling remained in the breezeway, which included multiple questions of “what did I do, and / or what did I say” by Kwame.²⁵ The other students in the hallway were on their phones; ZeRiah appeared to be laughing.²⁶ Kwame stepped out of the IJAG room finally and Steffonte had his phone up as though he had begun recording.²⁷ Tiana was on her phone. When she finished a text message she began recording. She could not see all of what was going on. She indicated, “if she had the video she could see better.”²⁸

Kwame walked between Ms. Federonich and Poling and looked directly at Poling.²⁹ Kwame continued to argumentatively ask what he did.³⁰ Initially Poling indicated, “you know what you said.” He then told Kwame he was being loud. Then after more questioning by Kwame, Poling stated, “you said, ‘whattcha looking at n-word?’ ”³¹ Poling turned away from Kwame and said, “sorry about that” to the group in the breezeway.³²

The students are heard to yell; this can be seen on the surveillance videos and heard in Exhibits A and B. Kwame rushed off, and as he did, he is either laughing or smiling and walked backwards into the wall.³³ ZeRiah was laughing, Steffonte had his hand to his mouth, Dom raised his arm and pointed in the direction of the IJAG room, and a young lady on the floor looked up at the three students.³⁴ The door to the IJAG room was closed at this time on the surveillance video.³⁵

Ms. Hessong came into view and began to open the classroom door as Ms. Federonich tried to disperse the other students. Poling remained standing in the same spot by the door; Kwame was no longer in the camera view.³⁶ Ms. Hessong walked toward the corridor where

²⁰ Exhibit 14: Surveillance video 4 at 1:13:41

²¹ Exhibit 14: Surveillance video 4 at 1:13:45

²² Exhibit 14: Surveillance video 4 at 1:13:47

²³ Exhibit 14: Surveillance video 4 at 1:13:48

²⁴ Exhibit 14: Surveillance video 4 at 1:13:51

²⁵ Exhibit 14: Surveillance video 4 at 1:13:52 and Exhibits 23 & 25

²⁶ Exhibit 14: Surveillance video 4 at 1:13:56

²⁷ Exhibit 14: Surveillance video 4 at 1:13:59

²⁸ Transcript Pg. 109 lines 1-4

²⁹ Exhibit 14: Surveillance video 4 at 1:14:01

³⁰ Exhibit 25

³¹ Exhibit 14: Surveillance video 4 at 1:14:02; Exhibits 9 and 10

³² Exhibit 9

³³ Exhibit 14: Surveillance video 4 at 1:14:04

³⁴ Exhibit 14: Surveillance video 4 at 1:14:04-05

³⁵ Exhibit 14: Surveillance video 4 at 1:14:05

³⁶ Exhibit 14: Surveillance video 4 at 1:14:10-12

Kwame exited the breezeway and Poling followed her.³⁷ They were out of view of the surveillance camera by 1:14:20 on Exhibit 14.

As they reached the top of the staircase, Kwame let the door shut on Poling.³⁸ Poling indicated the action was inappropriate. Kwame threatened Poling with the statement, “Shut the f*** up. If Janie wasn’t here right now, I’d be treating the f*** out of you.” Ms. Hessong told Kwame to “keep his mouth shut” for fear he would escalate matters.³⁹ They proceeded to the AP’s office.

Poling immediately conveyed all the facts to AP Schwaegler, who indicated Poling was visibly upset. Poling asked to apologize to Kwame.⁴⁰ He did so, and Kwame refused to accept the second apology. The AP Schwaegler and Poling acknowledged that it was Kwame’s right to not accept the apology. Kwame was directed out of the office.

The short video, recorded by Steffonte, was pushed on social media. After Poling, Ms. Hessong and Kwame left the corridor where she was sitting, Tiana went to her adviser’s office. Tiana showed two faculty members what she recorded, which was slightly longer than the short version of the video,⁴¹ and included more of the words spoken by Poling. The video has little visual as it looks down the long corridor to the breezeway.

Kwame, Steffonte and Dom were sent into the same room⁴² to purportedly write their version of events. AP Schwaegler contacted Brian Kuhle. Mr. Kuhle interviewed Poling and obtained Poling’s written statement. It contained the same recitation of the facts as provided to the AP. Mr. Kuhle had Poling gather his things from his classroom. Mr. Kuhle escorted Poling out of the building.

AP Schwaegler eventually gathered the surveillance videos from the hallways and corridors. Interviews were conducted of those deemed to have been in the vicinity or involved in the incident.⁴³ The recommendation was for termination. The superintendent prepared the statement identifying the reason for the recommendation.

Poling received official notification that he was terminated by June 6, 2023. Mr. Kuhle and Ms. Hawkins personally delivered the notice of termination to Poling at his home. They also

³⁷ Exhibit 14: Surveillance video 4 at 1:14:16

³⁸ Exhibit 23

³⁹ Transcript Pg. 144 line 23 to Pg. 145 to line 3

⁴⁰ Exhibit 16

⁴¹ Exhibit 10 – Video B; The Court notes that Video B as produced for this appeal was not from Tiana; the video is from someone named Jenna Pillard with a screen name of “Rachet Hoes.”

⁴² Transcript Pg. 29 lines 21-23

⁴³ There was a student wearing a pink shirt with a backpack and blonde hair who appears in 3 of 4 surveillance videos but it is unclear if she was interviewed. It is also unclear if the student sitting on the ground by the IJAG room in the white sweatshirt was interviewed.

provided him with the notice of personnel record publication required under Iowa Code sec. 22.15.

CONCLUSIONS OF LAW

Standard of Review

Review of a school board's termination of a teacher's contract is for errors of law. *Board of Directors of Ames Comm. School Dist. v. Cullinan*, 745 N.W.2d 487, 493 (Iowa 2008). The termination of a teacher's contract is subject to the rules and requirements set forth in Iowa Code Chapter 279. A school board must find **just cause** for termination of a teacher's contract. Iowa Code sec. 279.15(2) (emphasis added).

Just cause is that which:

“directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, just cause cannot include reasons which are arbitrary, unfair, or generated out of some petty vendetta.”

Cullihan, 745 N.W.2d at 493 (citations omitted).

School board members are quasi-judicial officers when exercising their statutory duty to adjudicate teacher-termination proceedings. *In re Gianforte*, 773 N.W.2d 540, 549 (Iowa 2009) (citations omitted). Our law establishes a presumption that board members acting as adjudicators are objective. *Id.* The board must be mindful that the decision turns on its own finding of the presence or absence of qualifications and not on the recommendation of an administrator or prior employee – although these may of course be received and considered. *Id.* at 549-550.

“[T]he reviewing court shall grant appropriate relief if substantial rights of the petitioner or administrator have been prejudiced because the agency or board action is unsupported by substantial evidence in the record made before the agency or board when that record is reviewed as a whole.” *Briggs v. Bd. of Directors of Hinton Comm. School Dist.*, 282 N.W.2d 740, 743 (Iowa 1979).

“As in virtually every termination case, the controversy boils down to whether the record supports the board's conclusion that just cause exists to warrant [a teacher's] dismissal. That conclusion must be supported by more than just *substantial evidence*; a *preponderance*—or greater weight—of the competent proof is required.” *Walthart v. Board of Directors of Edgewood Colesburg Community School Dist.*, 694 N.W.2d 740, 744 (Iowa 2005).

“The district court shall not hear any further evidence, but shall hear the case on the certified record. In such judicial review, especially when considering credibility of witnesses, the court shall give weight to the decision of the board, but shall not be bound by it.” Iowa Code sec. 279.18(2).

ANALYSIS

Substantial Evidence

In assessing substantial evidence, the Court considers all the evidence together. *Hy-Vee, Inc. v. Emp’t Appeal Bd.*, 710 N.W.2d 1, 3 (Iowa 2005). Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if the Court might draw a contrary inference. *Iowa Code* § 17A.19 (10)(f)(1) (defining “substantial evidence” as “the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance”); *Walthart*, 694 N.W.2d at 744 (citation omitted); *Sellers v. Emp’t Appeal Bd.*, 531 N.W.2d 645, 647 (Iowa App. 1995); *Titan Tire Corp. v. Emp’t Appeal Bd.*, 641 N.W.2d 752, 755 (Iowa 2002); *Aluminum Co. of Am. v. Emp’t Appeal Bd.*, 449 N.W.2d 391, 394 (Iowa 1989).

The Board’s decision is deficient in finding that the evidence was of the quantity and quality to allow a neutral and detached fact finder to establish substantial evidence to support the termination. The Board’s decision consists of three pages, containing five noticeably short paragraphs, which describe the incident in the breezeway. The decision contains a short recitation of the standard of review from two appellate court decisions, with no analysis of the case law applied to the facts. There is also no analysis of the whole record or any credibility determinations. The remaining findings of the decision focus on what happened once the short video went viral on the internet.

The decision only addresses two of the four reasons for termination put to it by the superintendent. The decision finds that:

“Mr. Poling made an inappropriate and racially derogatory statement directed to a student in the presence of students and adults, resulting in the loss of trust and confidence in Mr. Poling to serve in a role model capacity for all students and diminishing his ability to maintain effective relationships with students and staff.”

The superintendent failed to establish any violations of the second and third allegations of the termination notice. The Board did not address the grounds, and based on the record, they do not stand alone for purposes of finding substantial evidence to support termination.

Paragraph 7 of the decision does acknowledge Poling's testimony. It does not acknowledge that Poling was forthright with AP Schwaegler and Mr. Kuhle about the words used and why. It does not acknowledge that Poling never changed the facts. It does not acknowledge that Poling did not create a new narrative.

The Board relied almost exclusively on AP Schwaegler's testimony, which is riddled with hearsay, and hearsay within hearsay, that all students with knowledge of the incident were interviewed and none of them stated the Kwame used the n-word. This is not substantial evidence required by the code or *Walthart* as previously recited herein.

Hearsay Evidence

The substantial evidence of the record viewed as a whole, however, shows Poling was repeating Kwame's statement. The Board's finding that Poling directed the statement to Kwame unprovoked is not substantiated because it was based on impermissibly remote hearsay testimony. It is clear via case law that "[h]earsay is admissible in board hearings." *Walthart*, 694 N.W.2d at 744; Iowa Code sec. 279.16(1999). "The more pertinent question is how much weight should the board or reviewing court accord hearsay testimony." *Id.* The proper weight to be given depends on a myriad of factors –

- the circumstances of the case,
- the credibility of the witness,
- the credibility of the declarant,
- the circumstances in which the statement was made,
- the consistency of the statement with other corroborating evidence, and
- other factors as well, including the indicia of reliability.

Walthart at 745.

AP Schwaegler testified that Kwame did not make the statement, "whattcha looking at n[-word]" to Poling. She also testified that none of the other students heard any statement by Kwame. This testimony is classic hearsay (and hearsay within hearsay) as it is an out of court statement offered to prove the truth of the matter asserted. Iowa Rule of Evidence 5.801(c). The law, as set forth by the *Walthart* court, requires the Board to give lesser weight and value to the hearsay statements offered by the superintendent from AP Schwaegler that the student indicated he did not say the word first. Additionally, based on an examination of the methods used to gather information, and a detailed review of the surveillance video, the forgoing factors of *Walthart* mandate a finding that the hearsay is not reliable and therefore should not have been used to support a finding of just cause to terminate.

The circumstances herein regarding credibility of hearsay testimony are similar to what the court faced on *Babe v. Iowa Bd. of Educ. Examiners*, 2018 WL 1098923, (Iowa App. 2018), 913 N.W.2d 275 (Table). The student in *Babe* did not testify at the hearing. Any statements

about alleged injuries caused by the teacher came from his mother (who the court found to not be a disinterested party), a teacher, and a nurse. The Court noted:

“The fact that there are only two people, [the student] and Babe, who know the truth is both troubling and difficult, particularly because [the student] did not testify. The district court acknowledged hearsay was heavily relied upon in this case and the evidence was ‘filled with hearsay statements from [the student].’ Here neither the ALJ nor the Board personally observed [the student] testify, and any credibility determination in his favor suffers from the absence of any demeanor evidence. We also noted the hearsay statements [came] through the filter’ of a parent—[the child’s] mother” who “cannot be described as a disinterested witness” and “[w]hat we do know is that [the child] does not always tell the truth.”

*Babe at *8.*

The circumstances of May 31, 2023, show a disruption in the hallways that resulted in two faculty leaving their rooms. According to AP Schwaegler, the surveillance video viewed by the Board does not include the entirety of the students’ conduct in the hallway.⁴⁴ Therefore the record of this chaotic, important preamble is incomplete. The record lacks context as to how the students came to be in the hallway and not in their assigned classrooms. There is no credible evidence that Poling made an entrance into the stairwell without valid reason. The surveillance video corroborates his version of events. It is patently unfair and unsupported by the record to conclude that Poling asked the security paraprofessional to stop a student, who was running down a corridor and into a classroom where he was not registered to be, only so that Poling could thrust a racial slur at the student without context.

The surveillance video further corroborates Poling’s version of events and cuts the credibility of the hearsay presented to the Board. He made statements in response to Kwame’s repeated arguing and questioning of why Poling wanted Kwame to go to the AP’s office. It is clear in the surveillance video that at one point by the IJAG classroom entrance Poling thought Kwame was following him as Poling walked away from the room. When Kwame failed to follow, Poling turned and exhibited apparent frustration, as perceived by Ms. Hessong. Poling finally responded to Kwame, and this interchange was captured on Exhibits A and B. It was not professional or acceptable for Poling to use the word. Poling apologized immediately to the students in the hallway, that included Kwame. In the presence of the assistant principal he again apologized to Kwame as he came to the realization of the weight of his choice. He did not call the student a racial slur. He used it, as he indicated, to express the inappropriateness of what

⁴⁴ Transcript Pgs. 83 – 84: Pg. 85, ln. 13 - 25

Kwame said to an adult, a teacher and in response to a direction to report to a classroom and then to the AP offices. The greater weight of evidence supports the finding of consistency and credibility in Poling's recitation of events. The students did not appear and therefore could not be assessed for demeanor, bias or credibility.

"The Court should not reassess the weight of evidence; weight of evidence is within the board's exclusive domain." *Hy-Vee, Inc.*, 710 N.W.2d at 3; *Titan Tire Corp.*, 641 N.W.2d at 755. "The Court evaluates whether there is substantial evidence to support the finding actually made by the board, not a different finding that could have been made by the board." *Aluminum Co. of Am.*, 449 N.W.2d at 394; *City of Des Moines v. Emp't Appeal Bd.*, 722 N.W.2d 183, 195 (Iowa 2006). The Court is not re-weighing the evidence here; the extensive review of the record has been made to attempt to create findings the Board did not make.

Focusing on the testimony at the hearing considered by the Board, the superintendent established that Ms. Federonich and Ms. Hessong both heard the following exchange between Poling and Kwame:

Poling: You need to come with me to the AP

Kwame: For what, what did I say

Poling: For what you said

Kwame: What'd I say

Poling: You know what you said

Kwame: What'd I say

Poling: Whatchu lookin at n[-word]

AP Schwaegler, nor anyone else, asked Kwame about this exchange. There is no challenge to the fact the exchange occurred. AP Schwaegler never reviewed Ms. Hessong's statement⁴⁵ until the Board hearing. Ms. Hessong was at her desk inside the classroom and testified she was able to hear most of the exchange. She was a witness to only *some* of what occurred at the classroom door. She did not exit her room right away as can be seen in the surveillance video. She offered no assistance nor made any inquiry as to why a teacher and a security paraprofessional were asking for Kwame, who was not one of her students. Instead, as Kwame burst into her room, she joked about him running "from the feds." Her written statement was provided to the AP the day *after* the incident. She was not experiencing the exhilarating emotions as she perceived the event the day before; instead, she had the ability to reflect. Her

⁴⁵ Transcript Pg. 92 ln. 13 - 25

testimony does not align with the surveillance video or that of Ms. Federonich. As a returning teacher, there was a great deal of pressure on her at the hearing.

Poling objected profusely and repeatedly to hearsay evidence presented by the superintendent from the students in the hallway. Hearsay statements of students have been deemed as credible under certain circumstances when, as in *Cullinan*, “[t]he statements were made by adolescent teens just days after the tragedy.” *Cullinan*, 745 N.W.2d at 494, citing *Walthart*, 694 N.W.2d at 744-45. The *Cullinan* court went on to state that the statements by the athletes “were made to trusted individuals, i.e. their parents; and they carried a consistent message – the players expressed the view that the coach was threatening and intimidating toward them.” The facts evaluated in *Cullinan* to assess the credibility of the hearsay testimony can be distinguished from the case at bar. First, the basketball players in *Cullinan* were all identified in the letters submitted for review. Second, the letters were signed, and the writers were identified. Therefore, all could be called to testify if the accuracy of the contents were questioned.

In contrast the foregoing with what the Board received from the superintendent. The written statements identified as exhibits 17, 18, 19 and 20 were not signed and therefore less credible than what was presented in *Cullinan*. The written statements were not authored by declarants. The written statements were mostly summaries and not the actual words or impressions of the declarants. Then, consider the manner of creation of the statement that was offered as one prepared by Kwame, Dom and Steffonte. Neither the AP nor the superintendent knew who authored the document. The document did not provide all the context or details of the entire event. The manner of its creation makes it impossible for the Board to have extricated any finding of credibility. Absent from the record is testimony to authenticate the contents.

Additionally, as in *Babe*, the superintendent failed to provide the Board with an opportunity to weigh Kwame’s or the other students’ credibility through observation of demeanor, manner of speaking, or body language. It is unknown if any had any positive or negative impressions of Poling. The Board did not know Kwame’s age or intellectual maturity.⁴⁶ Poling was not afforded an opportunity to cross-examine to ascertain Kwame’s mind set, i.e., would telling the truth subject him to being reprimanded for all his actions. The Board had no knowledge of the students’ history of veracity and truthfulness. Poling was not able to address credibility in any manner. He was not afforded an opportunity to ensure accuracy and integrity of the written statements presented. The statements do not demonstrate an indicia of reliability and credibility is questionable.

“A finding shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.” *Gaskey v. Iowa Dep’t of Trans.*, 537 N.W.2d 695, 698 (Iowa 1995); See also *Briggs v. Bd. of Directors of Hinton Comm. School*

⁴⁶ Poling requested the production of the student’s records but was denied. Transcript Pgs. 9-11.

Dist., 282 N.W.2d 740, 743 (Iowa 1979) citing *City of Davenport v. Public Emp't. Relations Bd.*, 264 N.W.2d 307, 311 (Iowa 1978). A reasonable mind would not accept the evidence reviewed by the Board as adequate to reach the conclusion Kwame did not make any statement to Poling in the stairwell. The more remote the hearsay statement is, i.e., the more levels of hearsay a statement contains, the less reliable the statement is and therefore it is even less likely to be relied upon by a reasonable person.

Preponderance of the evidence is different from substantial and has been defined as “superiority in weight, influence, or force. The evidence may preponderate, and yet leave the mind in doubt as to the very truth. In such cases the evidence does not fairly set the question at rest, but merely preponderates in favor of that side whereon the doubts have less weight.” *Walthart*, 694 N.W.2d at 744, citing *Ball v. Marquis*, 92 N.W. 691, 692 (Iowa 1902) (not published in Iowa Reports). The students’ combined statement further leaves one with doubt as to the accuracy of what occurred in the stairwell. The preponderance of evidence, i.e., that Poling made the statement to explain to Kwame why he was being disciplined, in response to Kwame asking, “what did I do, what did I say.” That Mr. Poling just randomly called Kwame this repulsive word is not a conclusion supported by a preponderance of substantial evidence.

Just Cause

In assessing the decision, the Court reviews whether the board’s application of law is “irrational, illogical, or wholly unjustifiable.” *Iowa Code* § 17A.19(10)(m); *Powell v. Emp’t Appeal Bd.*, 861 N.W.2d 279, 281 (Iowa Ct. App. 2014). “The resolution of each case depends on its own circumstances, which necessitates [a] thorough review of the record.” *Bd. of Dir. v. Mroz*, 295 N.W.2d 447, 449 (Iowa 1980); see also *Bd. of Ed. v. Youel*, 282 N.W.2d 677, 682 (Iowa 1979). The Board not only failed to apply the law correctly, it failed to apply it at all. Its decision was wholly unjustifiable as it was based on sub-par evidence. Additionally, there was a less than thorough review of the entire record, evidenced in the final written decision that does not establish just cause for termination.

The Board failed to address a major issue of contention raised by the parties. In its brief, the Board argues extensively regarding the choice of the wording used in the notice of termination provided to Poling. The termination notice, inter alia, indicates that Poling was terminated for making inappropriate and racially derogatory statements “directed toward” a student. Each party defines these words differently and thereby how the definition impacts the finding of just cause.

First, the verb / past participle modifying the term toward is “directed,” which is defined as, “aim (something) in a particular direction or at a particular person.”⁴⁷ Second, the term

⁴⁷ <https://www.languages.oup.com/google-dictionary-en/directed>.

“toward” is defined as “in the direction of.”⁴⁸ The analysis cannot be only one of semantics. The word choice was made by the superintendent and adopted by the Board. The credible testimony and the entire record support that Poling did not aim the word at a particular person or in the direction of anyone, most importantly, Kwame. Poling **repeated** what Kwame said; it was not an original thought of Poling. This testimony is not challenged by credible evidence, but rather corroborated by the surveillance video, Tiana’s video, observations of the security paraprofessional and even Ms. Hessong’s testimony. Just saying the word is not a violation under the notice of termination and cannot establish just cause for termination under the current DCSB policies.

The parties, in their briefs and arguments, provided precedent defining just cause for teacher terminations based on the facts of each case. The Court has reviewed all cases and the rationale by the reviewing courts. The cases are all distinguishable from the facts of the case at bar.

The most poignant distinctions relate to the illegal conduct of the teachers whose contracts were terminated and the repeated patterns of inappropriate conduct and statements directed at students. In *Walthart*, the school board found just cause for termination where a teacher had permitted under age students to drink alcohol, which resulted in the death of four students. In *Davies*, there was just cause found where a teacher was charged with shop lifting. In *Simons*, a teacher was terminated for allowing the use and sale of illegal drugs in her home. A Nebraska Court found in *Clarke*,⁴⁹ that a teacher acted immorally as defined in Nebraska statute by repeatedly referring to Black student as “dumb n*****.” In *Fischer*, the superintendent established that a teacher lied during the investigative process of allegations of criminal harassment committed by her; just cause for termination affirmed. In *Sheldon Comm. Sch. Dist. Bd. of Dirs. v. Lundbald*, 528 N.W.2d 593 (Iowa 1995) just cause was clear where there was a documented pattern of inappropriate jokes and references made to students over the course of years by a teacher. In *Board of Dirs. of Fairfield Comm. Sch. Dist. v. Justmann*, 476 N.W.2d 335 (Iowa 1991) just cause for termination affirmed as a result of a sexual relationship between teacher and student. The teachers in these cases, without question, are not fit, and were properly terminated for cause.

Although one incident can be sufficient for finding just cause to terminate, as in *Walthart*, the Board exceeded the discretion afforded it herein. The incident of May 31, 2023, was an isolated incident. The speaking of the word is very dissimilar to the conduct of the teachers in *Clarke* and *Lundbald*. Poling did not have a reputation, or a documented pattern of discriminatory behavior as is evident in his annual reviews. Poling did not consciously direct a racial slur toward any student. There was no evidence that he lied to the faculty who

⁴⁸ <https://www.merriam-webster.com/dictionary/toward> (2024)

⁴⁹ *Clarke v. Bd. of Ed. of School Dist. Of Omaha*, 338 N.W.2d 272 (Neb. 1983).

investigated the incident. Poling was forthright with AP Schwaegler and Mr. Kuhle about the words used and why. He never changed the facts. He did not create a new narrative.

The superintendent offered the testimony of AP Schwaegler and Counselor Fellenzer as evidence that Poling's act directly or indirectly significantly and adversely affects the goal of every school system to wit: high quality education and that he could no longer be a role model. Each witness testified that the halls of the school were somber after the incident. Their confidence in Poling was lost, and they all felt he could not continue as a teacher without severely impacting the cultural policy of the district. Each of these witnesses testified about the emotional reactions of the student body. The hearsay nature of this evidence does not have any indicia of credibility under the *Walthart* standard. As previously stated, the Board had no opportunity to observe the declarations. Poling was not given an opportunity to inquire as to the basis of the emotions the students were expressing. He was also not given an opportunity to inquire as to the full extent of the knowledge these students had pertaining to the entirety of the interaction between Poling and Kwame. As Poling points out, the superintendent was unable to show how the utterance of the n-word altered the conditions of the school environment so severely as to prevent Poling from being able to return to the campus. See *Smith v. Illinois Dep't of Transportation*, 936 F.3d 554, 561 (7th Cir. 2019).

There is an obligation on the teachers within our hallowed halls of education to act as models for students to emulate. The United State Supreme Court has written that public education must teach by example the shared values of civilized social order. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). The credible evidence of the record supports the conclusion Poling believed he was acting in conformance with these values by addressing the egregiousness of the statement he heard being directed at him.

The social media onslaught, followed by individuals who took it upon themselves to write to or otherwise contact Hempstead High School staff without knowing all of the facts to evaluate the full chaotic episode, cannot be a basis for superintendent's recommendation and the Board's adoption thereof to find just cause for termination.

CONCLUSION

As indicated previously herein, a teachable moment was lost in the reaction of the superintendent to terminate instead of addressing the incident restoratively. Members of the faculty need to show respect in addressing students. When a member of the faculty tells students to return to their classrooms, the direction should be followed, not ignored. No student should ever direct a rude, disrespectful, or confrontational retort to a member of the faculty. This is not civilized social order. Permitting this sends the wrong message to the larger student body population.

Poling should have abbreviated the n-word; he should have been the adult and the role model to show the students that such a statement is not acceptable. Poling acted in the heat of the moment; it was not established that this is a pattern in his character or a pattern evidencing a deep seeded racial animus. Poling acknowledged his role in the incident immediately. He acknowledged the severity of the word used. He attempted to apologize not once, but twice. Unfortunately, no quarter was given by anyone and the social media frenzy contributed heavily to the actions taken by the faculty and the superintendent.

The superintendent failed to establish a record based on substantial and competent evidence. The superintendent made her decision on the witnesses to present at the hearing; it appeared that quality of testimony was not the factor used to decide who to present. The witnesses offered a plethora of hearsay testimony that could not hurdle the necessary factors to establish the indicia of reliability and credibility under the circumstances; the corroborating evidence, i.e., the surveillance video, the testimony of the security paraprofessional and to some extent that of the IJAG teacher, provides a fuller picture for analysis.

The Board's decision was lacking in many manners. Most significantly the decision is not based on substantial evidence that preponderates to a conclusion to support just cause as is required under Iowa Code Chapter 279 and the case law recited herein, to terminate the contract of Poling after over 20 years of service in the field of educating students and attempting to "teach, train and coach others toward the best version of themselves and help them become educated, independent, and productive members of current and future communities." The Board's decision was irrational and arbitrary, weighing the entirety of the roughly five (5) minute encounter against Poling's past performance, and by relying on improperly admitted evidence to do so.

The decision rendered herein is not intended to comment on the cultural inclusivity policy of the Dubuque Community School Board. To the contrary, what is evident from what happened is that taking responsibility for one's actions is not being taught to or embraced by the school community. Additionally, members of society everywhere still have a way to go in forging anti-racist communities. Words can hurt despite the children's rhyme which attempts to profess they cannot.

ORDER OF REVERSAL

The decision of the Board of Directors of the Dubuque Community School District terminating the teaching contract of Roger Poling is hereby **REVERSED**. Mr. Poling is reinstated effective as of the date of notice of termination and afforded full rights of his benefits and salary, with interest.

Costs of this action are assessed to the Appellee.



State of Iowa Courts

Case Number
CVCV115137

Case Title
ROGER POLING VS DUBUQUE COMMUNITY SCHOOL
DISTRICT BOARD
Type: ORDER FOR JUDGMENT

So Ordered

Monica Zrinyi Ackley, District Court Judge
First Judicial District of Iowa

Electronically signed on 2024-12-16 12:27:14