

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1594

DR. CALVIN NICHOLAS

VERSUS

EAST BATON ROUGE PARISH SCHOOL SYSTEM

JUDGMENT RENDERED: JUN 22 2018

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Appealed from the  
19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 643,925 | Section 23

Honorable William A. Morvant, Judge Presiding

\* \* \* \* \*

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**BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.**

*Theriot, J. agrees and provides additional reasons*

**WELCH, J.**

The East Baton Rouge Parish School Board/System (“the School Board”) appeals a judgment of the district court on judicial review that reversed the termination of tenured public high school principal, Dr. Calvin Nicholas, following a public hearing before the School Board. For the following reasons, we affirm the district court’s judgment on judicial review, which reversed the termination of Dr. Nicholas, ordered him immediately reinstated as the principal of Scotlandville Magnet High School, with full back pay, emoluments of office, and benefits restored, retroactive to his date of termination.

**FACTS AND PROCEDURAL HISTORY**

The facts that led to the termination of Dr. Nicholas are not in dispute. At all relevant times, Dr. Nicholas was employed by the School Board as a tenured public school principal at Scotlandville Magnet High School. On August 31, 2015, during a physical altercation that initially occurred between two students but had escalated as other students became involved in the fight, Dr. Nicholas struck one of the students on the backside with a wooden dowel wrapped in electrical tape while attempting to break up the fight.

Thereafter, Superintendent of Schools for the School Board, H. Warren Drake, Jr., issued a letter to Dr. Nicholas, advising that he was “contemplating the termination” of Dr. Nicholas’s employment, based on the following charges:

- (1) On August 31, 2015, you struck a student while attempting to break up a fight on your campus.
- (2) On or about September 1, 2015, you admitted to Mrs. Millie L. Williams, Chief Officer for Human Resources that you did hit a student with a stick while attempting to break up a fight on your campus.
- (3) On September 1, 2015, it was reported by a student ... that,  
“Tarik asked Mac was he one of the people that crowded him Friday and Mac said do you wanna fight and Tarik asked him again

and Mac said again do you wanna fight so Tarik punched Mac and they started fighting and Mac ended up on top of Tarik and the principal ran up and hit Mac with a wooden stick and the principal [*sic*] pushed Tarik face and was holding Tarik shirt and they walked in the office but the principal let Mac go home and Tarik got three days.”

(4) On September 2, 2015, it was reported by a student ... that,

“We was on the way to the bus and the boy said you took my booksack and we started to fight then Dr. Nicholas hit me with a stick on my butt like on the bone while we were fighting this happen around 2:27 Dr. Nicholas told me to leave out at 2:40 to catch the bus but It [*sic*] was gone.”

The letter, dated September 4, 2015, but not received by Dr. Nicholas until September 8, 2015, stated that the charges against Dr. Nicholas constituted “allegations of incompetence,” a “violation of school board policy GAMC,”<sup>1</sup> and were possibly “criminal in nature.” The letter advised Dr. Nicholas that he had ten calendar days to respond to the allegations, and that upon receipt of his response, Superintendent Drake would “decide whether to terminate [Dr. Nicholas’s] employment or whether some form of lesser discipline, if any at all” would be more appropriate.

Dr. Nicholas responded to the allegations in a letter dated September 18, 2015. Therein, he admitted that he used a “flagstick” to tap a student on the behind in an attempt to gain the student’s attention in order to break up the fight in question. Dr. Nicholas further stated that following the incident, he began an investigation, which included questioning the students involved, obtaining video evidence of the fight, contacting the parents of the students involved, and

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<sup>1</sup> The School Board policy referenced as “GAMC” is entitled “Investigations” and contains subheadings for “General Investigations,” “Public Announcement of Employee Discipline,” “Impermissible Corporal Punishment or Moral Offenses,” and “Reporting Procedures.” The record on appeal contains no definition for the acronym, GAMC.

informing the Human Resources Office and the School Board of what had transpired. The letter contended:

Dr. Nicholas did not violate any policy of the EBR School Board and, as set forth above, acted, at all times, in conformity with EBR policy. Dr. Nicholas quelled an extremely dangerous situation which was likely to cause further injuries and harm to several students. The fact that he did so, quickly and decisively, does not serve as any basis for discipline. Rather, Dr. Nicholas took necessary actions in an emergency situation and likely prevented serious bodily injuries.

Finally, Dr. Nicholas requested a public hearing before the School Board prior to any imposition of discipline by the School Board.

Thereafter, Superintendent Drake transmitted a second letter to Dr. Nicholas, dated September 24, 2015, indicating that he had “decided to terminate [Dr. Nicholas’s] employment with the East Baton Rouge Parish School System” after finding “the charges to be valid, and being guided by applicable law, policy, and an obligation to protect the general health, safety, and welfare of our student population[.]” The letter advised Dr. Nicholas that he had ten calendar days from receipt of the letter to request a review hearing before a disciplinary hearing officer, and that upon failure to request review, the School Board’s decision to terminate his employment would become final.

By letter dated October 1, 2015, Dr. Nicholas again requested a public hearing before the School Board.

A public hearing regarding Dr. Nicholas’s termination was held on November 2, 2015, by mutual agreement of the parties. Following the public hearing, the disciplinary hearing officer issued a final determination in writing, concluding:

While there are discrepancies in the various accounts, certain facts survive this hearing:

Dr. Nicholas committed a battery upon a student. A battery is defined in Louisiana Revised Statute[s] 14:33

as "...the intentional use of force or violence upon the person of another..." A simple battery is a battery committed without the consent of the victim. (LA. R.S. 14:35). There is no reason to quote the Aggravated Battery statute because that would involve the use of a "dangerous weapon." The definition of "dangerous weapon" is found in Louisiana Revised Statute[s] 14:2 (3) which states that, "a dangerous weapon" includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated to produce death or great bodily harm. "In the manner used" clearly absolves Dr. Nicholas from the greater possible charge.

While this is not a criminal proceeding, we can use other laws to shine light upon the instant situation. Our case involves a use of force, however minimal, upon the person of another. There is a provision in the "handbook" that allows some use of force which under other circumstances might amount to a battery. What makes one right and another one wrong is "justification."

There is justifiable use of force under certain circumstances to end a fight between students. There is also a clear proscription against hitting with any instrument.

[...]

This writer has the burden of deciding not whether Warren Drake was overly harsh in his decision to terminate, which obviously carries potentially devastating consequences to Dr. Nicholas. The burden is to determine if Warren Drake and the School Board were "arbitrary and capricious" in their decision to terminate Dr. Nicholas.

This writer cannot conclude that the actions of Warren Drake, Superintendent of Schools for East Baton Rouge Parish, were "arbitrary and capricious."

Therefore, the decision of the Superintendent to terminate the employment of Dr. Calvin Nicholas is affirmed.

Thereafter, Dr. Nicholas sought judicial review of the disciplinary hearing officer's decision in accordance with La. R.S. 17:443. Following a hearing held on August 21, 2017, the district court overturned the disciplinary hearing officer's decision affirming the School Board's decision to terminate Dr. Nicholas's employment. The district court ruled:

[T]he decision to terminate [Dr. Nicholas] on the basis of incompetence for alleged violation of Section 20 of the Student Handbook as was affirmed by the hearing officer is clearly not supported or sustainable by the evidence that's in this record that I have reviewed. ... My review of the evidence, or the lack thereof, simply doesn't support a finding of incompetence. And I'm not going to get into the battery or the assault because we're only dealing with incompetence. It doesn't support it. So, I'm going to reverse the decision below terminating Dr. Nicholas, reinstating him back to the position that he held [...] [b]ack to the day of termination.

The district court signed a judgment in accordance with its ruling on September 19, 2017, reversing the School Board's termination of Dr. Nicholas, ordering Dr. Nicholas immediately reinstated as the principal of Scotlandville Magnet High School retroactive to his date of termination (September 24, 2015), with full back pay, emoluments of office, and benefits restored retroactive to his termination date.<sup>2</sup>

The School Board now appeals, contending that the district court, sitting in review of the disciplinary hearing officer's decision to terminate Dr. Nicholas, abused its discretion and substituted its judgment for that of the disciplinary hearing officer.

### LAW & DISCUSSION

The issue before us is whether the School Board was justified in terminating Dr. Nicholas's employment. Both the district court and the court of appeal sit as an appellate court in reviewing decisions of the School Board. La. R.S. 17:443; **Wise v. Bossier Par. Sch. Bd.**, 2002-1525 (La. 6/27/03), 851 So.2d 1090, 1095 n.5. The appellate standard of review was discussed in **Bernard v. Avoyelles Par. Sch. Bd.**, 93-534 (La. App. 3<sup>rd</sup> Cir. 2/16/94), 640 So.2d 321, 324, as follows:

Where an administrative agency or hearing body is  
the trier of fact, the reviewing court will not review the

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<sup>2</sup> The district court granted a motion filed by the School Board for written findings of fact and reasons for judgment in an order signed on October 2, 2017; however, the record on appeal does not contain a copy of any written findings of fact or reasons for judgment issued by the district court.

evidence before such a body except for the following purposes: (1) to determine if the hearing was conducted in accordance with the authority and formalities of the statute; (2) to determine whether or not the fact findings of the body were supported by substantial evidence; and, (3) to determine whether or not the hearing body's conclusions from these factual findings were arbitrary or constituted an abuse of the hearing body's discretion.

The criterion for judicial review of a school board's action is **whether there is a rational basis for the board's determination which is supported by substantial evidence**. The reviewing court must neither substitute its judgment for the judgment of the school board nor interfere with the board's good faith exercise of discretion. Thus, the court's inquiry must be limited to a determination of **whether the action of the school board was in accordance with the authority and formalities of the tenure law, was supported by substantial evidence, or, conversely, was an arbitrary decision and therefore, an abuse of discretion**. [Citations omitted; emphasis added.]

"Substantial evidence" has been defined as evidence of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions. In conducting such an examination, the district court must give great deference to the school board's findings of fact and credibility. Reasons for dismissal are largely in the sound discretion of the school board. Thus, the school board's judgment should not be reversed in the absence of a clear showing of abuse of discretion. Generally, an abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof. A conclusion is "capricious" when there is no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. **Wise v. Bossier Par. Sch. Bd.**, 851 So.2d at 1094.

The Teacher Tenure Law ("TTL"), La. R.S. 17:441-445, defines the status of Louisiana's public school teachers and outlines the procedures a school board must follow to discharge them. The TTL gives to Louisiana's public school system teachers tenure in office and arms these permanent teachers with a shield

protecting them against discharge, suspension or demotion for causes other than those provided by statute. The motivation of the TTL is the protection of teachers against political vengeance and reprisals. Its provisions are liberally construed by Louisiana courts in favor of teachers, as they are its intended beneficiaries. **Rousselle v. Plaquemines Par. Sch. Bd.**, 93-1916 (La. 2/28/94), 633 So.2d 1235, 1241-42. Under the TTL, the term “teacher” includes principals who hold a teacher’s certificate and whose legal employment requires such teacher’s certificate. See La. R.S. 17:441(1)(a); **Rousselle**, 633 So.2d at 1242.

Louisiana Revised Statutes 17:443(B) governs the dismissal of tenured employees of local public school boards and provides, in pertinent part:

(1) A teacher with tenure shall not be disciplined except upon written and signed charges by the superintendent or his designee of poor performance, willful neglect of duty, incompetency, dishonesty, immorality, or of being a member of or contributing to any group, organization, movement, or corporation that is by law or injunction prohibited from operating in the state of Louisiana, and then only if furnished with a copy of such written charges and given the opportunity to respond. The teacher shall have ten calendar days from written notice of the charges to respond, in person or in writing. Following review of the teacher’s response, the superintendent may take interim disciplinary action, which may include placing the teacher on administrative leave. ... Within ten calendar days after written notice of the interim disciplinary action or within ten calendar days after receipt of the teacher’s response if no interim disciplinary action is taken, a teacher may request a hearing before a disciplinary hearing officer. If the teacher fails to timely request a hearing, the disciplinary action becomes final.

(2)(a) Upon request for a review hearing, the superintendent shall randomly appoint a hearing officer from a list of persons previously approved by the school board to serve as “disciplinary hearing officers” for the school board. ...

(b) Such hearing may be private or public, at the option of the teacher, and shall commence no sooner than ten calendar days nor later than thirty calendar days after receipt of the teacher’s request for such hearing. For purposes of this Section, the disciplinary hearing officer shall have the power to issue subpoenas. The school

board shall adopt and maintain procedures to govern the conduct of the hearing, which shall include, at a minimum, a method for the examination of witnesses and the introduction of evidence and for the presence of a court reporter and maintenance of the court reporter's record. The teacher shall have the right to appear before the disciplinary hearing officer with witnesses on his behalf and with counsel of his selection. The disciplinary hearing officer shall hold a hearing and review on whether the interim decision of the superintendent was arbitrary or capricious and shall either affirm or reverse the action of the superintendent. The disciplinary hearing officer shall notify the superintendent and the teacher of his final determination, with written reasons, within ten days from the date of the hearing. If the superintendent's disciplinary action is affirmed, it shall become effective upon the teacher's receipt of the decision of the disciplinary hearing officer. If the superintendent's disciplinary action is reversed, the teacher shall be restored to duty.

(3) Within sixty days from the postmarked date of written notification of the decision of the disciplinary hearing officer, the school board or the teacher may petition a court of competent jurisdiction to review the matter as a summary proceeding pursuant to Code of Civil Procedure Article 2592. The court shall determine, based on the record of the disciplinary review hearing, whether the disciplinary hearing officer abused his discretion in deciding whether the action of the superintendent was arbitrary or capricious. If the action of the superintendent is reversed by the court and the teacher is ordered reinstated and restored to duty, the teacher shall be entitled to full pay for any loss of time or salary he may have sustained by reason of the action of the superintendent.

The School Board alleged that Dr. Nicholas "struck a student while attempting to break" up a fight, but more specifically, that he "hit a student with a stick while attempting to break up a fight" on the Scotlandville Magnet High School Campus. The School Board argued that Dr. Nicholas's alleged action constituted a violation of the School Board's policy against corporal punishment, and amounted to incompetence, which under the TTL, is an infraction that gives the School Board the authority to discipline a tenured principal. See La. R.S. 17:443(B)(1).

The School Board argued it has a policy prohibiting corporal punishment, which is set forth in the School Board’s “Student Rights and Responsibilities Handbook:”<sup>3</sup>

SECTION TWENTY – CORPORAL PUNISHMENT PROHIBITED

There shall be no corporal punishment in the East Baton Rouge Parish School System. The School Board does not authorize[] or condone[] the use of corporal punishment as a means of maintaining order in the schools. However, it is recognized that reasonable use of physical force and restraint may be necessary to stop a disturbance threatening physical injury to others, to obtain possession of dangerous or contraband objects from students, [for] the purpose of self-defense, for the protection of persons or property, or similar actions.

While corporal punishment is generally associated with spanking or paddling, the intentional infliction of pains by other means is also ... prohibited.

[...]

[SECTION THIRTY-ONE – DEFINITIONS]

[...]

03) Battery: the use of force or violence upon a person if actual contact is made.

[...]

10) Corporal Punishment: Physical punishment of any kind inflicted on the body of a student, such as paddling or spanking, hitting with any instrument, or slapping, striking with a hand or foot. Corporal punishment is prohibited in the East Baton Rouge Parish School System.

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<sup>3</sup> Although the School Board introduced a complete copy of its “Student Rights and Responsibilities Handbook and Disciplinary Policy from August 6, 2015” into evidence at the public hearing before the disciplinary hearing officer as Exhibit 2, that exhibit does not form a part of the record on appeal. In fact, none of the exhibits introduced by either party at the public hearing before the disciplinary hearing officer form a part of the record on appeal (except for two recorded videos of the incident that were supplemented to the appellate record via a joint motion filed by the parties). As the appellant, the School Board is charged with the responsibility of completeness of the record for appellate review, and the inadequacy of the record is imputable to them. As an appellate court, we have no jurisdiction to review evidence that is not in the record on appeal. **Moore v. Murphy Oil USA, Inc.**, 2015-0096 (La. App. 1<sup>st</sup> Cir. 12/23/15), 186 So.3d 135, 143, writ denied, 2016-00444 (La. 5/20/16), 191 So.3d 1066. Pursuant to La. C.C.P. art. 2164, an appellate court must render its judgment upon the record on appeal. The record on appeal is that which is sent by the district court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments and other rulings, unless otherwise designated. La. C.C.P. arts. 2127 and 2128; Official Revision Comment (d) for La. C.C.P. art. 2127.

The School Board also argued its GAMC policy pertaining to “INVESTIGATIONS” provides that if an employee is found to have violated the School Board’s policy prohibiting the use of corporal punishment on a student, the employee “shall be disciplined by such means as appropriate to the incident including reprimand, suspension, termination, and/or referral to the local child protection agency/law enforcement.”

The School Board prohibits the infliction of corporal punishment on a student, *i.e.*, physical punishment on the body of a student; however, in that same policy, the School Board *expressly allows* its educators and administrators to use “reasonable physical force and restraint” to stop a disturbance threatening physical injury to others, to obtain possession of dangerous or contraband objects from students, for the purpose of self-defense, or for the protection of persons or property. “Reasonable physical force and restraint” is not defined in the student handbook.

The record shows that Dr. Nicholas received no training from the School Board on how to break up a fight in accordance with the School Board’s policy prohibiting corporal punishment. Additionally, the School Board’s policy prohibiting corporal punishment is printed in a student handbook, which is arguably not applicable to educators and administrators.

Based on our review of the record, there is no rational basis for the School Board’s determination that Dr. Nicholas intended to inflict corporal punishment on a student, *i.e.*, physical punishment on the body of a student that is supported by substantial evidence. We conclude that the School Board’s decision to terminate Dr. Nicholas’s tenured employment with the East Baton Rouge Parish School System based on an alleged violation of the School Board’s policy prohibiting corporal punishment is not supported by substantial evidence and was an arbitrary

decision and therefore, an abuse of the School Board's discretion. See Bernard v. Avoyelles Par. Sch. Bd., 640 So.2d at 324.

**DECREE**

We affirm the September 19, 2017 judgment of the district court on judicial review, reversing the East Baton Rouge Parish School Board/System's termination of Dr. Calvin Nicholas, ordering Dr. Nicholas immediately reinstated as the principal of Scotlandville Magnet High School retroactive to his date of termination (September 24, 2015), with full back pay, emoluments of office, and benefits restored retroactive to his date of termination. All costs of this appeal, in the amount of \$4,266.00, are cast to the defendant/appellant, the East Baton Rouge Parish School Board/System.

**AFFIRMED.**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1594

DR. CALVIN NICHOLAS

VERSUS

EAST BATON ROUGE PARISH SCHOOL SYSTEM

*mt.*

**THERIOT, J., agreeing with additional reasons:**

I agree that the judgment to reinstate Dr. Nicholas should be affirmed, and write separately simply to emphasize the two videos introduced into the record. The videos reveal Dr. Nicholas making his way through a crowd of students en route to break up a fight between two students. Dr. Nicholas is carrying a stick and makes audible contact with one of the students participating in the fight. Upon being hit once by the stick on his rear-end, the student immediately rises to his feet and stops fighting. The videos clearly show Dr. Nicholas was making contact in an effort to break up a fight between two nearly adult-sized students. Dr. Nicholas's actions do not amount to corporal punishment as defined by the policy handbook. As the majority opinion stated, the policy handbook expressly allows administrators to use "reasonable physical force and restraint" to stop a disturbance threatening physical injury to others. The videos are the best evidence to illustrate that Dr. Nicholas used reasonable physical force to stop a disturbance threatening physical injury to others. Dr. Nicholas was clearly within his authority as outlined in the policy handbook.