

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 28, 2023 Session

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**FRED WHITLEY, JR. v. METROPOLITAN NASHVILLE BOARD OF
EDUCATION**

**Appeal from the Chancery Court for Davidson County
No. 19-1433-I Patricia Head Moskal, Chancellor**

No. M2022-01079-COA-R3-CV

Appellant, a tenured teacher employed by Metropolitan Nashville Public Schools, was involved in an altercation with students at an alternative high school. Subsequently, Appellee Metropolitan Nashville Board of Education (the “Board”) terminated Appellant’s employment. After exhausting his administrative remedies, Appellant filed an action with the trial court arguing that the Board exceeded its authority under the Teachers’ Tenure Act. The trial court vacated the Board’s decision on the ground that the Board violated the Open Meetings Act. We affirm the trial court’s decision on different grounds, *i.e.*, that the Board committed a clear error of law when it conducted a third hearing concerning the termination of Appellant’s employment. We also conclude that Appellant is entitled to reinstatement and back pay. There is nothing further for the Board to do; accordingly, we reverse the trial court’s order of remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed in Part; Reversed in Part; and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and J. STEVEN STAFFORD, P.J., W.S., joined.

Richard L. Colbert and C. Joseph Hubbard, Nashville, Tennessee, for the appellant, Fred Whitley, Jr.

Wallace W. Dietz, Metropolitan Director of Law, Jeff Campbell, Assistant Metropolitan Attorney, Nashville, Tennessee, for the appellee, Metropolitan Nashville Board of Education.

OPINION

I. Background

At the time of the incident giving rise to this appeal, Appellant Fred Whitley, Jr. was a tenured teacher with Metropolitan Nashville Public Schools (“MNPS”). Mr. Whitley taught at an “alternative school” for students who had been removed from traditional schools primarily for behavioral reasons. On October 11, 2018, a group of students entered Mr. Whitley’s classroom and refused to leave. An altercation ensued when the students blocked Mr. Whitley from leaving the classroom, knocked the classroom telephone from Mr. Whitley’s hand, and made profanity-laced threats. One of the students threw a book at Mr. Whitley. Mr. Whitley pulled at his belt and verbally threatened the students stating that he was not the only person who would get hurt. Mr. Whitley also used profanity.

On November 13, 2018, Dr. Shawn Joseph, the Director of Schools for MNPS, charged Mr. Whitley with unprofessional conduct, inefficiency, insubordination, and neglect of duty stemming from the October 11 incident. Mr. Whitley was suspended without pay pending final disposition of the matter. On November 27, 2018, Dr. Joseph presented the charges against Mr. Whitley to the Board, which voted that the charges against Mr. Whitley, if true, would warrant his dismissal.

On December 7, 2018, Mr. Whitley requested a hearing before an impartial hearing officer as provided in Tennessee Code Annotated section 49-5-512(a)(1), discussed further *infra*. Dr. Joseph selected Stephen W. Elliott as the hearing officer. On February 19 and 20, 2019, Mr. Elliott conducted the dismissal hearing. On April 8, 2019, Mr. Elliott found Mr. Whitley guilty of ineffectiveness,¹ insubordination, neglect of duty, and unprofessional conduct; Mr. Elliott further concluded that the evidence supported Mr. Whitley’s dismissal. Under Tennessee Code Annotated section 49-5-512(c)(1), discussed further *infra*, Mr. Whitley appealed Mr. Elliott’s decision to the Board.

On May 14, 2019, the Board met in regular session. Although the agenda for the Board’s meeting did not list Mr. Whitley’s appeal, the Board considered it, and a motion was made to terminate Mr. Whitley’s employment. The motion failed, and the Board requested a second hearing before Mr. Elliott to ascertain proof concerning what, if any, training Mr. Whitley received regarding engagement with difficult students. On July 30, 2019, Mr. Elliott conducted a second hearing and again concluded that termination of Mr. Whitley’s employment was warranted. Mr. Whitley appealed to the Board.

¹ We note that Mr. Whitley was charged with “inefficiency” and not “ineffectiveness.” A teacher may not be dismissed or suspended for “ineffectiveness.” Rather, “[t]he causes for which a teacher may be dismissed or suspended are: incompetence, inefficiency, neglect of duty, unprofessional conduct, and insubordination[.]” Tenn. Code Ann. § 49-5-511(a)(2).

On October 22, 2019, the Board met in regular session. As in the first appeal, although the agenda for the Board's meeting did not list Mr. Whitley's appeal, the Board considered it. After presentation of the appeal, a motion was made to dismiss Mr. Whitley, but that motion failed. Unlike the first meeting, the Board did not send the case back to the hearing officer for additional findings. On October 30, 2019, the Board met and considered Mr. Whitley's dismissal for a third time. As with the previous meetings, the agenda for the Board's meeting did not mention Mr. Whitley's appeal. The makeup of the quorum for the third hearing before the Board was comprised of individuals who were not part of the quorum for the previous two meetings. During the third hearing, a motion was made to dismiss Mr. Whitley, and this time it passed.

On November 26, 2019, Mr. Whitley filed a complaint and petition for *writ of certiorari* in the Chancery Court for Davidson County (the "trial court"). Therein, Mr. Whitley challenged his dismissal on the merits and also alleged that: (1) the Board exceeded its authority and acted arbitrarily and capriciously and in violation of Tennessee Code Annotated section 49-5-512(c)(3) when it conducted additional votes after the original motion to dismiss him failed; (2) the Board's published agendas for its May 14, 2019 and October 22, 2019 meetings did not provide sufficient notice under Tennessee Code Annotated section 8-44-103; (3) the Board also failed to give sufficient notice of its October 30, 2019 meeting; and (4) the Board did not maintain adequate minutes of its May 14, October 22, and October 30, 2019 meetings. Mr. Whitley sought reversal of the Board's decision to terminate his employment, reinstatement of his employment, and an award of back pay. On February 7, 2020, the Board filed an answer.

On October 5, 2021, the trial court heard Mr. Whitley's petition. On June 8, 2022, the trial court entered a memorandum and final judgment. The trial court found that Mr. Whitley failed to raise the issue of whether the Board acted arbitrarily and capriciously when it conducted additional votes after the original motion to terminate his employment failed. Specifically, the trial court found that Mr. Whitley not only failed to raise the issue, but he also acquiesced in the Board's remand and second hearing before Mr. Elliott. However, the trial court found that: (1) the Board violated the Open Meetings Act because it failed to provide adequate public notice of the special meeting on October 30, 2019;² and (2) because the Board violated the Open Meetings Act at the October 30, 2019 meeting, the Board's decision to terminate Mr. Whitley from employment was "void and of no effect" under Tennessee Code Annotated section 8-44-105. Although Mr. Whitley requested reversal of the Board's decision and reinstatement of his employment with back pay, the trial court found that such relief was not available for violations of the Open Meetings Act. Because the trial court concluded that the Board's October 30, 2019

² The trial court also found that "[w]hile the Board separately violated the requirements of the Open Meetings Act as to all three meetings on May 14, October 22 and October 30, 2019 for failure to keep minutes or other written record of the Board members present, motions offered, or votes taken, the failure to record minutes after the meetings does not render 'void' the action take at those meetings, but other consequences are imposed under the Act."

decision was “void and of no effect,” it also concluded that it was precluded from reviewing the merits of the Board’s decision. Accordingly, the trial court vacated the Board’s decision and remanded the case “for a ‘new and substantial consideration’ of these issues involved in accordance with the Open Meetings Act.”

On July 5, 2022, Mr. Whitley filed a motion to alter or amend asking the trial court to change its decision to remand the case. Mr. Whitley again asked the trial court to reinstate him with full back pay. Mr. Whitley also lodged an objection to the trial court’s remand so that he would not be “regarded as having waived his claim that yet another reconsideration of his dismissal is arbitrary.” On July 26, 2022, the trial court entered an order granting Mr. Whitley’s motion in part and denying it in part. The trial court denied Mr. Whitley’s request for reinstatement and back pay, but it granted Mr. Whitley’s motion by removing any specific remand instructions to the Board. In short, the trial court simply vacated Mr. Whitley’s dismissal and remanded the case to the Board. On August 9, 2022, Mr. Whitley timely appealed to this Court. We note that, on November 22, 2022, the Board reconsidered the matter and unanimously voted to uphold termination of Mr. Whitley’s employment.

II. Issues

Mr. Whitley raises two issues for review, as stated in his brief:

1. Did the Chancellor err by not ordering the Board to reinstate Mr. Whitley and to pay him the full salary for the period since his unlawful dismissal?
2. Did the Chancellor err by concluding that Mr. Whitley [] waived his contention that a third reconsideration of his dismissal by the Board was arbitrary?

III. Standard of Review

This appeal involves the Teachers’ Tenure Act (the “Tenure Act”). *See generally* Tenn. Code Ann. § 49-5-501, *et. seq.* As the Tennessee Supreme Court stated in *Emory v. Memphis City Schools Board of Education*,

it is apparent that the standard of review under the Tenure Act is not the standard applicable to a common law writ of certiorari. Instead, the standard of review specified in the statute is intended to permit the chancery court to address the intrinsic correctness of the school board’s decision. The appellate court in *Ripley [v. Anderson Co. Bd. of Educ.]*, 293 S.W.3d 154 (Tenn. Ct. App. 2008) aptly described this standard of review: “The chancery court’s review, as contemplated by [section 49-5-513], is a *de novo* review wherein the chancery court does not attach a presumption of correctness to the school board’s findings of fact, nor is it confined to

deciding whether the evidence preponderates in favor of the school board's determination." The teacher does not have the ability to present new evidence on the merits of the charges; the chancery court's *de novo* review is limited to the record of the school board proceedings.

Emory v. Memphis City Schools Bd. of Educ., 514 S.W.3d 129, 141-42 (Tenn. 2017) (internal citations omitted). The trial court is to review appeals under the Tenure Act pursuant to the standard of review as explained above in *Emory*. If an appeal is taken from the decision of the trial court to this Court, we review the trial court's decision under Tennessee Rule of Appellate Procedure 13(d). The trial court's findings of fact are reviewed *de novo* with a presumption of correctness unless the evidence preponderates otherwise. *Id.* at 142; Tenn. R. App. P. 13(d). Issues of law are reviewed *de novo*, with no presumption of correctness given to the trial court's conclusions. *Id.*

IV. Analysis

"The primary purpose of the Tenure Act is 'to protect school teachers from arbitrary demotions and dismissals.'" *Thompson v. Memphis City Sch. Bd. of Educ.*, 395 S.W.3d 616, 623 (Tenn. 2012) (quoting *Cooper v. Williamson Cnty. Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn. 1987)). Furthermore, the Act "affords 'a measure of job security to those educators who have attained tenure status.'" *Thompson*, 395 S.W.3d at 623 (quoting *Ryan v. Anderson*, 481 S.W.2d 371, 374 (Tenn. 1972)). The Tenure Act provides the procedure to be followed when a tenured teacher is charged with offenses that would justify dismissal under the Act. Under Tennessee Code Annotated section 49-5-512, a tenured teacher who is notified of charges under section 49-5-511, may demand, within 30 days of receipt of the notice, a full and complete hearing on the charges before an impartial hearing officer. Tenn. Code Ann § 49-5-512(a). After the hearing, the hearing officer shall "decide what disposition to make of the case and shall immediately thereafter give the [B]oard and the teacher written findings of fact, conclusions of law and a concise and explicit statement of the outcome of the decision." Tenn. Code Ann § 49-5-512(a)(9). If the tenured teacher is dissatisfied with the hearing officer's decision, "the teacher shall first exhaust the administrative remedy [by] appealing the decision to the [Board] within ten (10) working days of the hearing officer's delivery of the written findings of fact, conclusions and decision to the affected employee." Tenn. Code Ann. § 49-5-512(c)(1). Under section 49-5-512(c)(3), the Board is then required to hear the teacher's appeal on the evidence submitted to the hearing officer, with no new evidence being introduced. Tenn. Code Ann. § 49-5-512(c)(3). Under the Act, the teacher may

appear in person or by counsel and argue why the decision should be modified or reversed. *The [B]oard may sustain the decision, send the record back if additional evidence is necessary, revise the penalty or reverse the decision.* Before any findings and decision are sustained or punishment inflicted, a majority of the membership of the board shall concur in sustaining

the charges and decision. The board shall render its decision on the appeal within ten (10) working days after the conclusion of the hearing.

Tenn. Code Ann. § 49-5-512(c)(3) (emphasis added).

Turning to the record and as discussed above, on April 8, 2019, the hearing officer concluded that Mr. Whitley was guilty of ineffectiveness, insubordination, neglect of duty, and unprofessional conduct, all of which supported his dismissal. Thereafter, under the procedure outlined above, Mr. Whitley appealed Mr. Elliott's decision to the Board. On May 14, 2019, the Board considered Mr. Whitley's appeal; a motion was made to dismiss Mr. Whitley, but the motion failed. Thereafter, the Board requested a second hearing before Mr. Elliott for proof concerning what training was provided to Mr. Whitley. The Board's decision to send the record back to the hearing officer for additional evidence was proper under Tennessee Code Annotated section 49-5-512(c)(3), *supra*. On July 30, 2019, Mr. Elliott conducted the second hearing; on September 9, 2019, Mr. Elliott again concluded that Mr. Whitley's employment should be terminated. Mr. Whitley appealed this second decision to the Board. On October 22, 2019, the Board met and considered Mr. Whitley's appeal for a second time. After the second hearing, a motion was made to dismiss Mr. Whitley, but the motion failed. The Board conducted a third hearing eight days later. The record shows that the Board considered the third hearing a "re-hearing" of Mr. Whitley's termination appeal that would be "redone in the same format as last time [.]". At the third hearing, the motion to terminate Mr. Whitley's employment passed.

On appeal, Mr. Whitley makes the same argument to this Court that he made to the trial court, *i.e.*, that the Board acted arbitrarily when it conducted the third hearing because there is no provision in the Tenure Act that allows for the third hearing. The trial court, relying on *Emory*, held that "Mr. Whitley waived the issue of arbitrariness based on the Board's allegedly defective motion procedures by failing to raise those issues in the first instance before the Board, and, further, by acquiescing in the Board's subsequent remand and appeal hearings without objection." Relevant here, *Emory* involved review of a board's failure to conduct a teacher's hearing within the thirty days required by the statute. *See* Tenn. Code Ann. § 49-5-512(a)(2); *Emory*, 514 S.W.3d at 145. The teacher failed to raise an objection to this procedural irregularity before the board and raised it for the first time in the trial court. *Id.* at 146. In its analysis, the Tennessee Supreme Court discussed that litigants must raise alleged *procedural* deficiencies before an administrative body before seeking judicial review of such deficiencies. *Id.* at 146-47. Specifically, the Court stated that its "reaffirmed insistence upon contemporaneous objections to agency errors should provide incentive for litigants to see that *all procedural deficiencies* are addressed before the administrative body completes its consideration of a dispute." *Id.* at 152 (emphasis added) (citing *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 55 (Tenn. Ct. App. 2004) (citing *McClellan v. Board of Regents*, 921 S.W.2d 684, 690 (Tenn. 1996))) ("Parties to administrative proceedings must raise all objections to procedural errors during the hearing in order to preserve these questions later for appellate

review.”). Accordingly, the Tennessee Supreme Court held that the teacher waived the “timeliness issue,” and that such issue was not properly before the Court. *Emory*, 514 S.W.3d at 152.

In this case, the distinction between substantive law and procedural law is important. Generally, substantive law “creates, defines, and regulates the rights, duties, and powers of parties” whereas procedural law concerns “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.” *Black’s Law Dictionary* (11th ed. 2019); see also *Willeford v. Klepper*, 597 S.W.3d 454, 475 n.5 (Tenn. 2020) (Kirby, J., concurring in part and dissenting in part) (citing 20 Am. Jur. 2d Courts § 47 (2018)); *Broussard v. St. Edward Mercy Health Sys., Inc.*, 386 S.W.3d 385, 389 (Ark. 2012)). In this regard, *Emory* is distinguishable from this case. *Emory* involved a board conducting a hearing outside the statutory procedural time constraints. As discussed below, in this case, the Board awarded itself a power, *i.e.*, a rehearing. The Board’s action goes directly to Mr. Whitley’s due process rights and, thus, involves a substantive law. Because the question of whether the Board acted arbitrarily when it held the third hearing invokes due process considerations, we conclude that Mr. Whitley did not waive the issue and reverse the trial court’s ruling in this regard.

Turning to the question of whether the Board erred in conducting a third hearing, at oral argument before this Court, the panel asked where the Board derived its authority to conduct that hearing. The Board’s counsel answered that the Board followed *Robert’s Rules of Order* for its meetings. Although *Robert’s Rules of Order* may provide authority for how to conduct the third hearing and vote, these parliamentary procedures cannot operate to grant the Board powers beyond those imparted by statute. Indeed, “[t]he powers of [an administrative agency] must be found in the statutes. If they are not there, they are non-existent.” *Tennessee-Carolina Transp., Inc. v. Pentecost*, 334 S.W.2d 950, 953 (Tenn. 1960). Furthermore, “[a]dministrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity.” *Gen. Portland, Inc. v. Chattanooga-Hamilton Cnty. Air Pollution Control Bd.*, 560 S.W.2d 910, 913 (Tenn. Ct. App. 1976) (internal citations omitted). Moreover, “[i]t is generally held that administrative and procedural rules and regulations promulgated under a grant of legislative authority may not be inconsistent with the purpose and the intent of the legislative [a]ct nor may they remove or limit substantive rights granted in the enabling [a]ct.” *Knox Cnty. ex rel. Kessel v. Knox Cnty. Pers. Bd.*, 753 S.W.2d 357, 360 (Tenn. Ct. App. 1988) (internal citation omitted). Accordingly, when applying a statute, a court’s duty is to ascertain and fully effectuate the “legislative intent [of the statute], taking care not to broaden [it] beyond its intended scope” *Womack v. Corr. Corp. of Am.*, 448 S.W.3d 362, 366 (Tenn. 2014) (citing *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 420 (Tenn. 2013); *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009)).

As discussed above, under Tennessee Code Annotated section 49-5-512(c)(3), the Board had four options after hearing Mr. Whitley’s appeal. It could: (1) sustain the hearing

officer's decision to terminate Mr. Whitley's employment; (2) send the record back for additional evidence; (3) revise the penalty against Mr. Whitley; or (4) reverse the decision to terminate his employment. Tenn. Code Ann. § 49-5-512(c)(3). After the first appeal hearing, the Board sent the record back for additional evidence, which was proper under the statute. After the second appeal hearing, the motion to terminate Mr. Whitley's employment failed. The failure of the motion necessarily resulted in the following: (1) the effective reinstatement of Mr. Whitley to his previous teaching position; and (2) the end of Mr. Whitley's appeal to the Board. After the motion to dismiss Mr. Whitley failed at the second Board hearing, the Board was limited to the options enumerated in section 49-5-512(c)(3). A rehearing is not one of the statutory options. Therefore, in conducting the third hearing, the Board ostensibly created a fifth option for how to proceed after a termination hearing. In so doing, the Board broadened the scope of the Tenure Act beyond what the Legislature intended and committed a clear error of law. See *Womack*, 448 S.W.3d at 366 (citing *Shore*, 411 S.W.3d at 420; *Carter*, 279 S.W.3d at 564). Having acted outside the scope of the Tenure Act in conducting a rehearing, the Board's decision from that rehearing, *i.e.*, to terminate Mr. Whitley's employment, is null, void and of no effect as a matter of law. *Gen. Portland, Inc.*, 560 S.W.2d at 913. Because the Board's actions in the third meeting have no legal effect, the Board's action in the second meeting, *i.e.*, reversal of Mr. Elliott's decision to terminate Mr. Whitley's employment, stands as the Board's final decision.³

Having concluded that Mr. Whitley is entitled to reinstatement with MNPS, we also conclude that he is entitled to back pay under the Tenure Act. The Tenure Act provides that a "vindicated or reinstated [] teacher shall be paid the full salary for the period during which the teacher was suspended." Tenn. Code Ann. § 49-5-511(a)(3). Although the Tenure Act does not define "vindicated" or "reinstated," the Tennessee Supreme Court has explained that "[r]einstatement implies restoration to a position from which a person has been removed." *Van Hooser v. Warren Cnty. Bd. of Educ.*, 807 S.W.2d 230, 238 (Tenn. 1991). Mr. Whitley is reinstated to his position and is entitled to back pay. *Id.* In view of our holding, the parties' arguments concerning the Open Meetings Act are pretermitted.

V. Conclusion

For the foregoing reasons, we vacate the Board's decision to terminate Appellant's employment. Appellant is entitled to reinstatement to his previous position with MNPS and to back pay. We reverse the trial court's order remanding the matter to the Board for

³ We note that the trial court also found, albeit for different reasons, that the Board's actions in the third meeting were void and of no effect. Specifically, the trial court found that the Board violated the Open Meetings Act in the third meeting. Thereafter, the trial court remanded this action to the Board for the Board "to determine what action, if any, is appropriate." The trial court's remand to the Board in this instance was error because, as discussed above, when the motion to dismiss Mr. Whitley from employment failed, the Board effectively reversed Mr. Elliott's termination of Mr. Whitley's employment, and the Board's review of Mr. Whitley's appeal ended. In short, there was nothing more for the Board to review.

further review. The case is remanded to the trial court for such further proceedings as are necessary and consistent with this opinion, including calculation of Mr. Whitley's back pay and entry of judgment on same. Costs of the appeal are assessed to the Appellee, Metropolitan Nashville Board of Education, for all of which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE