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No. 54

In the Matter of Jeffrey Baker,
Respondent,

v.

Poughkeepsie City School
District, et al.,
Appellants.

Beth L. Sims, for appellants.

Drita Nicaaj, for respondent.

New York State School Boards Association, amicus

curiae.

JONES, J.:

In this appeal, we are called upon to determine whether persons who have testified in a Civil Service Law § 75 disciplinary hearing are required to disqualify themselves from subsequently acting upon any of the charges related to that

hearing. We hold that, because the testimony of the testifying witnesses, concerning the charges levied pursuant to section 75, rendered them personally involved in the disciplinary process, disqualification is necessary.

In July 2007, pursuant to Civil Service Law § 75, the Superintendent of Schools of the Poughkeepsie City School District preferred eight charges of "misconduct and/or incompetence" against petitioner Jeffrey Baker, then Business Manager of respondent Poughkeepsie City School District. The charges alleged, among other things, that petitioner (1) made errors in calculating the former superintendent's gross pay and producing a preliminary budget document; (2) failed to make a required non-elective employer contribution and secure a disability insurance policy; and (3) failed to follow certain directives and competitive bidding procedures. Charge I specifically stated that Mr. Baker failed to follow prior directives from his supervisor when he spoke with Ellen Staino, the Board of Education President of the Poughkeepsie City School District, "in an attempt to gain her support for his candidate of choice for District Treasurer and for a restructuring of Business Office staff positions."

The Board of Education appointed a hearing officer to preside over the disciplinary action. During the hearing, Ellen Staino and another Board member, Raymond Duncan, testified. The School District called Ms. Staino to testify in support of the

first charge. Mr. Duncan, who discovered an error made by the petitioner in calculating the District's budget, testified about his personal knowledge concerning certain documents at issue during the hearing and information provided to him by petitioner's supervisor.

The hearing officer reported to the Board his findings and recommended that Mr. Baker be found guilty of the eight charges and that his services be terminated. The Board, including Ms. Staino and Mr. Duncan, adopted the findings and recommendations, and terminated Mr. Baker's employment. Mr. Baker, challenging the Board's determination, commenced this CPLR article 78 proceeding.

Upon transfer to the Appellate Division, the court "grant[ed] the petition, annul[led] the determination, and remit[ted] the matter to the Board, excluding the members of the Board who testified at the disciplinary hearing, for a review of the findings and recommendations of the hearing officer." This Court granted respondents School District and Board of Education leave to appeal from the Appellate Division order, and we now affirm.

Although "[i]nvolvement in the disciplinary process does not automatically require recusal," we recognize that individuals "who are personally or extensively involved in the disciplinary process should disqualify themselves from reviewing the recommendations of the hearing officer and from acting on the

charges" (Matter of Ernst v Saratoga County, 234 AD2d 764, 767 [3rd Dept 1996] [citations omitted]). Thus, where a witness is testifying during a disciplinary hearing concerning charges levied against an individual, disqualifying himself or herself from reviewing the recommendations of the hearing officer and rendering a final determination is appropriate (see Matter of Nicoletti v Meyer, 42 AD3d 722 [3rd Dept 2007]; see also Matter of Lowy v Carter, 210 AD2d 408, 409 [2nd Dept 1994] [a testifying witness reviewing recommendations and acting upon the charges permits that person to pass upon his or her "own credibility as a witness"]; Matter of Hicks v Fortier, 117 AD2d 930 [3rd Dept 1986]).

Not all testimony will require disqualification. It is only required where the testimony of the official directly supports or negates the establishment of the charges preferred. Such testimony renders the decision-maker personally involved in the disciplinary process and partial. Nevertheless, we observe that disqualification, in a section 75 proceeding, is inappropriate where such person is necessary to effectuate a decision (see McComb v Reasoner, 29 AD3d 795, 799 [2d Dept 2006] [the rule of necessity]; see generally Matter of General Motors Corp.-Delco Prods. Div. v Rosa, 82 NY2d 183 [1993]).

Here, Ms. Staino was extensively involved in the disciplinary process given that petitioner's communication with her was the basis for Charge I. Moreover, she was called to

testify for the purpose of sustaining that charge. Mr. Duncan brought to the attention of petitioner's supervisor a discrepancy in a budget prepared by petitioner, which subsequently was included in the charges preferred against petitioner. Likewise, Mr. Duncan's testimony concerning his knowledge of relevant documents that were at issue and certain communications with petitioner's supervisor regarding petitioner's performance demonstrated his personal involvement in the disciplinary process. Moreover, neither of their votes were needed to take disciplinary action. Thus, the Appellate Division properly granted the petition, annulling the determination and remitting the matter to be decided without the testifying board members.

Accordingly, the Appellate Division order should be affirmed, with costs.

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PIGOTT, J.(dissenting):

Because in my view Ms. Staino and Mr. Duncan were not required to disqualify themselves from rendering a determination on the hearing officer's recommendation, I respectfully dissent. Unlike the Appellate Division, the majority does not create a per se rule of disqualification, but given the breadth of its determination in light of the facts of this case, it may as well have done so, because there was no reason for the disqualification of these individuals given the substance of their respective testimony.

It is undisputed that Ms. Staino testified at the hearing relative to one of the pertinent counts, namely, whether Mr. Baker "failed to follow the verbal and/or written directives of his supervisor [school superintendent] Dr. Laval Wilson when he spoke with Board of Education President, Ellen Staino, in an attempt to gain support for his candidate of choice for District Treasurer and for a restructuring of Business Office Staff positions." The majority correctly states that Mr. Baker's communication with Ms. Staino was the basis for that charge (majority opinion, at 4), but neglects the salient fact that Mr. Baker conceded at the hearing that Ms. Staino's testimony that formed the basis

for that charge was true. Thus, unlike the situation in Matter of Lowry v Carter (210 AD2d 408 [2d Dept 1994]), Ms. Staino's credibility was never in doubt.

Nor can it reasonably be said that Ms. Staino was "personally or extensively involved" in the disciplinary process such that she should have disqualified herself from reviewing the hearing officer's recommendations (maj op, at 3, 4). The cases cited by the majority for that proposition involve situations where the individual testifying against the employee either actually preferred the charges (see Matter of Ernst v Saratoga County, 234 AD2d 764 [3d Dept 1996] [witness preferred the charges, appointed the hearing officer and voted to sustain hearing officer's findings of fact and recommendation]; Matter of Lowry, 210 AD2d 408 [witness preferred charges and testified]; Matter of Hicks v Fortier, 117 AD2d 930 [3d Dept 1986] [witness preferred the charges, testified at the hearing and rendered the final determination]) or issued the final determination finding the employee guilty of the misconduct (see Matter of Nicolletti v Meyer, 42 AD3d 722 [3d Dept 2007] [supervisor and wife testified against employee at hearing and, after hearing officer found employee guilty of three counts of misconduct, the supervisor "issued a final determination finding (employee) guilty of four charges of misconduct and terminat(ed) his employment"]).

Here, there was no such "personal and extensive involvement" on the part of Ms. Staino. The superintendent, not

Ms. Staino, preferred the charges against Mr. Baker, and Ms. Staino was not the sole arbiter of whether the hearing officer's determination should have been confirmed, nor was her testimony at all contradicted by Mr. Baker.

Less problematic is the testimony of Mr. Duncan, who was called as a witness by Mr. Baker. As the majority points out, Mr. Duncan did in fact uncover the budgetary errors that led to certain of the charges (maj op, at 5), i.e., the claim that Mr. Baker "produced a preliminary budget document with significant errors." However, the majority ignores the fact that Mr. Duncan did not offer any testimony on that issue, nor does it mention that Mr. Baker conceded at the hearing that the preliminary budget did, in fact, contain significant errors which were carried through to successive budgets. Mr. Duncan's testimony relative to the budget documents was limited to the fact that, as a board member, he often reviewed such documents in the ordinary course of his duties. So there was no reason for his disqualification, either, since Mr. Duncan's credibility was not an issue - there was no dispute that there were budgetary errors - and no indication that he was otherwise biased.

In response to the Appellate Division's directive that the matter be remitted for a decision without the participation of Ms. Staino and Mr. Duncan, the school board did that and voted to terminate Mr. Baker for cause. All our decision will mean is, notwithstanding the fact that Mr. Baker never challenged the

testimony proffered against him, Mr. Baker will nonetheless recover back pay to which, by all accounts, he is not entitled.

But the majority's opinion today has consequences that extend beyond this case. There is nothing to prevent industrious attorneys for employer and employee alike from subpoenaing pertinent members of the governing boards to proffer testimony on matters tangential to the issues, thereby obtaining disqualification of members who they expect to vote counter to the interests of their clients, or at the very least, engaging in a contest of this nature, buying valuable back pay considerations as the matter is litigated - precisely what Civil Service Law § 75 was designed to avoid. Therefore, I would reverse the order of the Appellate Division.

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Order affirmed, with costs. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick and Graffeo concur. Judge Pigott dissents and votes to reverse in an opinion in which Judges Read and Smith concur.

Decided March 22, 2012