STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Westport Board of Education

Appearing on behalf of the Student:

Attorney Suzanne D'Orsi Koetsch
Harris & Harris
11 Belden Ave
Norwalk, CT 06850

Out of State Counsel:
Gary Mayerson
Mayerson & Associates
250 W. 57th Street, Suite 624
New York, New York 10107

Appearing on behalf of the Board of Education:

Attorney Marsha Moses
Bercham, Moses and
Devlin, P.C.
75 Broad Street
Milford, CT 06460

Appearing before:

Attorney Christine B. Spak, Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

1. Whether the Board failed to perform and supply services and supports called for by a May 19, 2001 mediation agreement.

2. Numerous other issues raised in the February 6, 2002 letter requesting the hearing. Attachment 1.

SUMMARY:

The request for hearing in this matter was received on February 6, 2002. The prehearing conference was conducted on February 19, 2002 and the Student's counsel did not participate. The Student attempted to withdraw the matter and the Board filed a Motion for Dismissal with Prejudice. The reason given for withdrawal was the Student's

counsels' unwillingness to accept "a unilateral recusal from Attorney Gail K. Mangs" so that the undersigned hearing officer may preside over the matter "without an acceptable explanation for the recusal [of hearing officer Mangs]." The parties were provided with notice in writing that the undersigned hearing officer would be deciding the Motion in this Final Order and Decision.

PROCEDURAL HISTORY AND FINDINGS OF FACT:

The request for hearing in this matter was dated February 6, 2002 and received by the Department on that date. It is three and one half pages in length, single spaced, and was filed by Attorney Gary Mayerson. Attachment 1. The matter was assigned to the undersigned hearing officer on February 13, 2002 after recusal by a another hearing officer, and notice of this assignment and the prehearing conference was faxed to the parties on the same date, scheduling the prehearing for February 19, 2002 with a Final Decision Mailing Date of March 25, 2002. Attachment 2. On the evening of February 18, 2002, after normal business hours, the Attorney D'Orsi Koetsch faxed the hearing officer advising that she had "just received" the notice of a pre-hearing conference and that neither she nor Attorney Mayerson would be available for the pre-hearing conference scheduled for 8:30 a.m. the following day. No reason was given. No alternate times were proposed. Rather, Attorney D'Orsi Koetsch advised that she would "consult with my clients and co-counsel in order to provide you with alternate dates." Attachment 3. No date by which this would be done was stated. In addition, she did not clarify the reason she did not receive a notice of prehearing that the Department faxed to the parties presumably each at the same time, five days before the date of her letter. Attachment 3. Given that the fax of February 18, 2002 was sent in an untimely manner by Attorney D'Orsi Koetsch, the hearing officer did not receive it prior to the prehearing and the prehearing was conducted as scheduled on February 19, 2002.

The Board's counsel participated in the prehearing conference and an attempt was made to include Attorney D'Orsi Koetsch. Attorney Charles Harris of her office answered the phone and tried briefly to reach her but ultimately indicated that Attorney D'Orsi Koetsch was not available. With the counsel for the Board participating, the prehearing was conducted. On February 19, 2002 a notice of hearing was faxed to the parties by the hearing officer, setting the hearing for March 12, 2002 and March 15, 2002. The notice further read "After business hours on February 18, 2002 the Student's counsel sent a letter informing the Hearing Officer that the Student's counsel was unavailable for this morning's telephone conference. The letter does not indicate the date on which the notice was received in the Student's counsel's office. On or before February 25, 2002 the Student's counsel is to enumerate their issues and the remedy requested for each and provide said writing to the Board's counsel and hearing officer." Attachment 4. Attorney D'Orsi Koetsch never clarified the date on which her office received the faxed notice of prehearing conference from the Department.

On February 20, 2002, Attorney Mayerson faxed Thomas Badway of the Due Process Unit of the Connecticut State Department of Education a letter. It states:

> "On February 13, 2002, we received notice that Attorney Gail K. Mangs recused herself from the above referenced matter. As a result, we have been notified that the case has been assigned to Attorney Christine B. Spak.
>
> Please be aware that we find it extremely suspicious that Attorney Spak, who is currently hearing two other cases with Attorney Mayerson, of Mayerson & Associates, and one of two attorneys from Harris & Harris, (Annemette Schmid or Suzanne D'Orsi Koetsch) has been assigned to the last two due process hearing requests made by the combined efforts of Harris & Harris and Mayerson & Associates.
>
> As the record in the previous two matters involving said parties will show, there had been a contentious relationship between Attorney Spak and the attorneys from these two firms. This is in large part due to the fact that the attorneys from Harris & Harris and Mayerson & Associates have challenged, from the beginning, the Connecticut hearing officers' authority to issue a controversial notice barring attorneys not admitted to practice in the state of Connecticut from assisting clients at special education due process hearings.
>
> We are not willing to accept a unilateral recusal from Attorney Gail K. Mangs so that Attorney Christine B. Spak may preside on yet another matter with Attorneys Schmid, Koetsch, and Mayerson, without an acceptable explanation for the recusal.
>
> Please accept this letter as notification that our clients are withdrawing their petition regarding the above reference matter without prejudice." Attachment 5.

No Motion to Recuse was filed. On February 21, 2002 the Board's counsel responded, in a letter addressed to the Hearing Officer:

"I am in receipt of a copy of Attorney Mayerson's letter to Tom Badway dated February 20, 2002 with respect to the above-captioned matter. While my client is not a party to the other matters alluded to in that letter and we obviously have no knowledge of the "contentious relationship" to which he refers, it is my understanding that hearings are assigned on a rotational basis; in fact, as you know, you have been assigned to three recent cases brought by parents against the Westport Public Schools. It is clear from his letter that Attorney Mayerson is seeking to withdraw the hearing solely because he objects to the assignment of this hearing to you. We do not believe that the regulations or the applicable law permit a parent to "hearing officer shop", i.e., withdraw the hearing when the

hearing officer assignment is unacceptable to them. If the parents believe that there is a reason to file a Motion for Recusal, then they should do so and the Board will respond in kind. In the meantime, in the face of the purported withdrawal of this matter, the board will be filing a Motion to Dismiss with Prejudice with an appropriate Memorandum of Law in support thereof. We would request that the attempted withdrawal not be accepted, and the hearing not be cancelled, pending your receipt, review and consideration of our Motion to Dismiss which we would anticipate filing within on week." Attachment 6.

On February 25, 2002 the hearing officer received a fax that was sent to the counsel for the Board and copied to the hearing officer. It was from Attorney Mayerson's office and was signed by Amanda L. Oren. Her title was not provided. It indicated that their office had received the February 21st letter from counsel for the Board and that "Mr. Mayerson will be in the office tomorrow and will respond in full at that time," and further asserted "[W]e contend that there is no statute that precludes a parent from withdrawing a request for due process without prejudice," and concludes that the undersigned hearing officer therefore has no jurisdiction to address this matter. Attachment 7.

At some point after February 26, 2002, the hearing officer received by fax an undated letter from Attorney Mayerson with no fax line. It informed the hearing officer and opposing counsel that "Ms. Koetsch's office [Harris & Harris] would soon be filing our opposition to this motion." Attachment 8.

On February 27, 2002 the Board's counsel faxed the hearing officer a copy of the Board's Memorandum of Law in Support of the Motion to Dismiss with Prejudice, and this was followed a few days later by a copy in the mail. On March 6, 2002, Attorney Mayerson faxed the hearing officer a copy of the Student's Opposition to Westport's Motion to Dismiss with Prejudice. In it he references appendages that he did not fax. At the time the hearing officer expected that the appendages would be sent by first class mail with a mailed copy of the Opposition, as is customary. On March 21, 2002 the hearing officer sent notice to the parties that the appendages had not been received and that the Final Decision and Order would be forwarded to the Department as soon as the record is complete. It was requested immediately and it was received the following day, March 22, 2002.

No Motion to Recuse was ever filed in this matter.

CONCLUSIONS OF LAW:

In support of their position that the hearing officer is without jurisdiction to dismiss this action, with or without prejudice, the Student's counsel rely on a Final Decision and Order that issued before the current State of Connecticut regulations were passed. Final Decision and Order 97-028. Current Connecticut Regulations provide for the dismissal of cases in certain circumstances. "(a) Any

party may move for, or the hearing officer may order, sua sponte, an entry of default in or dismissal of a hearing for failure of any party: … (2) to participate in a prehearing conference;…The hearing officer may grant the motion with or without prejudice." Section 10-76h-9(a) of the Regulations of Connecticut State Agencies. With the current regulations it is clear that a hearing officer has the authority to dismiss a case, with or without prejudice, rather than allow a withdrawal. Even if a Dismissal is without prejudice there are good public policy reasons for issuing a Dismissal rather than allowing a Withdrawal. One is to preserve a complete and organized record of the matter so that it is available to both parties in the event the matter is brought again, or reviewed in any forum including a subsequent due process proceeding.

In this case, the law office representing the student, Harris & Harris, was forwarded notice six days before the prehearing. The notice was addressed to Attorney Suzanne D'Orsi Koetsch of that office. This was faxed directly from the Department, not from the hearing officer, to Attorney D'Orsi Koetsch on the same date as opposing counsel's office was faxed the same notice, all of which is in accord with long standing procedure at the Department of Education. Counsel for the Student, Attorney D'Orsi Koetsch, failed to participate in the prehearing conference. She failed to give an explanation as to why her office had not provided her with the notice, even when given a second opportunity to do so. Therefore, the grounds for dismissal arose on February 19, 2002 when Attorney D'Orsi Koetsch failed to participate in the prehearing conference on behalf of her client. This was prior to Attorney Mayerson's attempt to withdraw the Student's case. The withdrawal, having come after the grounds for dismissal arose, is untimely and is therefore without force and effect.

The Board argues that the dismissal should be with prejudice to prevent judge shopping and abuse of the administrative process. None of the cases cited in the Board's memorandum support the contention that judge shopping or abuse of the administrative process occurs merely by a withdrawal or attempted withdrawal of a case. U.S. v. Bayless, 201 F.3d 116 (2d Cir. 2000) (Judge did not err in failing to recuse himself in situation where he granted a motion to reconsider while under political and media scrutiny, considered more evidence, and reversed his earlier decision); Sullivan v. Conway, 157 F.3d 1092 (7th Cir. 1998) (Judge did not err in failing to recuse himself, particularly where actions of the moving party created the basis for the claim of recusal); Hernandez v. City of El Monte, 188 F.3d 893 (9th Cir. 1998) (Virtually identical cases had been filed simultaneously in state and federal courts), and a series of cases under Rule 41(b) of the Federal Rules of Civil Procedure (More than six years after institution of this diversity-of-citizenship action by petitioner in a Federal District Court and after two fixed trial dates had been postponed, the Court dismissed the matter essentially with prejudice after the attorney failed to show up for a scheduled a pretrial conference). For a party to be found to be judge shopping or abusing the administrative process, there must be more than an attempt to withdraw early in the proceeding. The claims of judge shopping or abuse of the administrative

process in the instant matter do not become ripe for consideration unless and until the Student attempts to refile and seeks a different hearing officer. It is only with the refiling, if that occurs, that the issue, be it hearing officer shopping and/or abuse of the administrative process becomes ripe to address. It is a common occurrence for due process cases to be dismissed or withdrawn and this occurs for a wide variety of reasons. While some of these cases are ultimately refiled, some are never refiled regardless of the claims that are made before the dismissal or withdrawal.

In the instant case, the Board argues, there is more because there is the Student's counsel's representation that they are withdrawing solely for the reason that they do not want the undersigned hearing officer assigned to another of their cases because of what they characterize as a "contentious" relationship between the Student's counsel and the hearing officer in two other matters. In the second of these matters, there was very little involvement between the Student's counsel and the hearing officer because it did not get past the prehearing conference stage. In the other case (G.L. v Wilton), which has been opened to the public by the Parents, the Student's counsel filed a lawsuit in which various untrue allegations were made involving the hearing officer. Upon receiving this and reading those various claims, including the claims of contentiousness, the hearing officer specifically asked the Student's counsel on March 5, 2002 whether they would be filing a Motion to Recuse (Attachment 9). This was responded to on March 7, 2002 by Attorney Annemette Schmid of Harris & Harris:

"In any event, as stated above, we are not now, and have not ever suggested that you recuse yourself from this case. We all look forward to seeing you on the next scheduled hearing date." Attachment 10.

So there is no claim of contentiousness in G.L. v. Wilton that requires the hearing officer not to hear that case, but rather that the alleged contentiousness somehow requires that the hearing officer not hear other of the student's counsels' matters, including the instant case. This inconsistency strains the credibility of the various aspects of the alleged contention and of the student's counsels' position about the undersigned hearing their cases, including the instant one.

FINAL DECISION AND ORDER:

The matter is **DISMISSED** without prejudice.