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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 11, 2023 Session

KIM BROWN v. SHELBY COUNTY SCHOOLS

Appeal from the Chancery Court for Shelby County
No. CH-14-0814 JoeDae L. Jenkins, Chancellor

No. W2022-00123-COA-R3-CV

This appeal involves the termination of a tenured teacher for the cause of inefficiency. After receiving a written charge recommending his dismissal, the teacher requested a tenure hearing before a hearing officer, who found that there was substantial evidence to support the charge of inefficiency and that there was just cause for termination. The teacher appealed, the board of education voted to sustain the decision of the hearing officer, and the teacher was terminated. The teacher petitioned for judicial review of the decision in the chancery court. The chancery court reversed and reinstated the teacher with back pay. The school system appeals. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY W. ARMSTRONG, J., joined.

Cheryl Rumage Estes, Laura L. Deakins, and Jamie Gibber, Memphis, Tennessee, for the appellant, Shelby County Schools.

Darrel J. O'Neal and Laura E. Smittick, Memphis, Tennessee, for the appellee, Kim Brown.

OPINION

I. FACTS & PROCEDURAL HISTORY

Background

This case arises out of the termination of Mr. Kim Brown as a tenured teacher by

the Shelby County Board of Education (“the Board”). In 2001, Mr. Brown was hired as a substitute teacher by Memphis City Schools (“MCS”), which is now Shelby County Schools (“SCS”).¹ He began working as a full-time teacher in 2002 and obtained tenure in 2006. He taught at several different schools during his time with MCS. He taught 4th grade at Treadwell Elementary School (“Treadwell”) during the 2011-12 school year. He then taught 2nd grade at Charjean Elementary School (“Charjean”) during the 2012-13 school year, which was the school year preceding his termination.

During the 2011-12 and 2012-13 school years, teachers were evaluated under an evaluation rubric known as the Teacher Effectiveness Measure (“TEM”) in accordance with Tennessee Code Annotated section 49-1-302. As part of this evaluation rubric, a teacher was evaluated based on the following weighted components: (1) Student Growth; (2) Student Achievement; (3) Observation of Practice; (4) Stakeholder Perceptions; and (5) Teacher Knowledge.² At the end of the school year, each teacher received a preliminary evaluation with a TEM score utilizing these components. However, the TEM score was subject to change based upon the Tennessee Value-Added Assessment System (“TVAAS”) data released during the summer after the school year, which affected the student growth component.³ After factoring in these changes based on the TVAAS data, each teacher received a final evaluation with a TEM score. For both the preliminary and final evaluations, the TEM score was applied to the Effectiveness Scale, and the teacher would be given one of the following ratings:

1. “Significantly below expectations”;
2. “Below expectations”;
3. “Meeting expectations”;
4. “Above expectations”; or
5. “Significantly above expectations.”

For the 2011-12 school year at Treadwell, Mr. Brown received a preliminary evaluation with a TEM score of 295.60, which was a 3 or “meeting expectations.” However, he received a final evaluation with a TEM score of 260.60, which was a 2 or “below

¹ On July 1, 2013, the MCS system merged with the SCS system, which is governed by the Board. See *Dallas v. Shelby Cnty. Bd. of Educ.*, 603 S.W.3d 32, 35 n.2 (Tenn. Ct. App. 2019); *Bell v. Shelby Cnty. Schs.*, No. 2:16-cv-02311-JTF-dkv, 2017 WL 9470633, at *1 n.1 (W.D. Tenn. July 5, 2017).

² As for the Observation of Practice component specifically, a tenured teacher was required to receive at least four formal observations during the school year consisting of two announced and two unannounced observations. Mr. Brown received four formal observations during the 2011-12 school year and five formal observations during the 2012-13 school year.

³ The type of TVAAS data used depended on whether a teacher taught a tested or non-tested grade. TVAAS measured student growth using data from standardized tests. A teacher who taught a tested grade, such as 3rd grade, 4th grade, or 5th grade, would receive his or her own individual scores based on his or her students’ Tennessee Comprehensive Assessment Program (“TCAP”) scores. However, a teacher who taught a non-tested grade, such as pre-kindergarten, 1st grade, or 2nd grade, would receive the school-wide scores.

expectations.” For the 2012-13 school year at Charjean, he received a preliminary evaluation with a TEM score of 300.20, which was a 3 or “meeting expectations.” However, he received a final evaluation with a TEM score of 181.50, which was a 1 or “significantly below expectations.”

Given that Mr. Brown received a 2 or “below expectations” on his final evaluation for the 2011-12 school year, many efforts were made to provide him support during the 2012-13 school year. Ms. Tameka Allen, who was Charjean’s principal, met with Mr. Brown before the school year to discuss what was expected of him. Mr. Brown was permitted to observe other teachers at Charjean, such as Ms. Brandy Murrell, in order to get ideas and strategies to use in his classroom. He received assistance from a mentor, who was a retired principal assigned to teachers that were having problems in the classroom. The mentor conducted informal observations of Mr. Brown in his classroom and provided feedback. In addition to the mentor, Mr. Brown received assistance from an instructional facilitator, Ms. Elaine Wherry, who also conducted informal observations of Mr. Brown in his classroom and provided feedback. In February 2013, he agreed to participate in the peer assistance review (“PAR”) program where he was offered additional support in hopes that his performance would improve. The PAR program was described as an “individualized support plan,” but it was also considered a last-ditch effort to save the teacher. As part of the PAR program, Mr. Brown received assistance from an instructional facilitator, Ms. Kecia Helminski, who provided him with informal observations, walkthroughs, collaborative meetings, and written resources and videos. Ms. Helminski worked with Mr. Brown from February 2013 to May 2013. During her time with Mr. Brown, she found that there were extreme needs, he did not act on the things they discussed, and there was no evidence of growth at all. At the end of the school year, she met with Ms. Allen, and both of them agreed that Mr. Brown should be “non-reelected.”

Administrative Proceedings

On May 10, 2013, Ms. Allen made her recommendation to the Superintendent that Mr. Brown be “non-reelected,” indicating incompetence, inefficiency, and neglect of duty as reasons for her recommendation. His final evaluation for the 2012-13 school year was not yet available when this recommendation was made. On June 11, 2013, Ms. Chantay Branch, who was a coordinator with the Office of Labor and Employee Relations, notified Mr. Brown that charges and a recommendation for dismissal would be made to the Board and that he would be placed on suspension without pay effective July 29, 2013. Thereafter, termination proceedings were initiated pursuant to the Board’s Dismissal Policy for tenured teachers and in accordance with the Teacher Tenure Act, codified at Tennessee Code Annotated section 49-5-501, *et seq.* On October 15, 2013, the Superintendent issued a written charge to the Board recommending Mr. Brown’s dismissal for the cause of inefficiency. As examples of actions to support the charge of inefficiency, the written charge included Mr. Brown’s TEM scores from his final evaluations for the 2011-12 and 2012-13 school years, which were both subpar. However, the written charge also provided

that examples of actions to support the charge of inefficiency were “not limited to” just the TEM scores. On October 28, 2013, the Board issued a decision finding that the charge warranted the dismissal of Mr. Brown as tenured teacher. The following day, the Superintendent notified Mr. Brown in writing of the Board’s decision recommending his dismissal and provided him with a copy of the charge and the form advising him of his legal duties, rights, and recourse.

Afterward, Mr. Brown requested a tenure hearing before an impartial hearing officer which was conducted by Ms. Tannera Gibson in January 2014.⁴ In addition to Mr. Brown, those who testified at the tenure hearing were Ms. Branch, Ms. Allen, Ms. Helminski, Ms. Wherry, and Ms. Murrell. Ms. Kenia Coleman, who was the principal at Treadwell during the 2011-12 school year, also provided testimony. In March 2014, the hearing officer issued a decision finding that there was “substantial evidence in the record to support the charge of ‘Inefficiency’ against Mr. Brown” and that “SCS carried its burden to prove that it had just cause to terminate [his] employment as a tenured teacher.” In her findings of fact and conclusions of law, the hearing officer set forth two bases supporting the termination of Mr. Brown’s employment: (1) two subpar evaluations; and (2) wanting in effective performance of duties. Mr. Brown appealed the hearing officer’s decision to the Board. However, he failed to appear at the hearing, and the Board conducted the hearing without him.⁵ On April 29, 2014, the Board voted to sustain the decision of the hearing officer. The Board notified Mr. Brown that it had reached a decision and that his employment had officially been terminated.

Chancery Court Proceedings

In May 2014, Mr. Brown, acting pro se at the time, filed a petition for judicial review with the chancery court. He filed proposed findings of fact and conclusions of law in which he requested reinstatement along with his full salary for the period he was suspended. SCS filed an answer to the petition requesting that the chancery court dismiss the petition with prejudice and affirm the decision to dismiss Mr. Brown as a tenured teacher on the basis of inefficiency.

In June 2015, Mr. Brown filed a motion for trial or hearing date in which he noted that he filed his petition over one year ago and no action had been taken to date. In August 2015, the chancery court held a hearing and apparently made an oral ruling that the case was to be remanded to the Board in order to determine Mr. Brown’s TEM scores under the current evaluation rubric used by SCS.⁶ However, it appears from the record that the court never entered an order and that no additional findings from the Board were ever entered

⁴ Mr. Brown was represented by counsel at the tenure hearing.

⁵ Mr. Brown later explained that he was ill on the day of his hearing and tried to reset the date of the hearing to no avail.

⁶ After the MCS system and the SCS system merged, the evaluation rubric was updated for the 2013-14 school year.

into the record. In September 2015, SCS filed a motion urging the court not to consider Mr. Brown's TEM scores under current evaluation rubric used by SCS.⁷ Mr. Brown filed opposition to SCS's motion. Thereafter, for reasons unknown, nothing happened in the case for almost two years.

In May 2017, Mr. Brown filed a motion for a status conference in which he noted that there had not been any activity on the case since 2015 and that a status conference was needed. He also filed a supplemental argument in which he asserted that he was never given an individual professional developmental plan prior to his dismissal. In support of this assertion, he cited to *Harrison v. Shelby Cnty. Bd. of Educ.*, No. W2015-01543-COA-R3-CV, 2016 WL 1250782, at *6 (Tenn. Ct. App. Mar. 30, 2016), in which this Court found that the Board did not abide by its own policies by failing to provide an individual professional development plan prior to terminating a tenured teacher's employment for inefficiency. SCS filed a motion to strike Mr. Brown's arguments in his motion for a status conference and in his supplemental argument, and Mr. Brown filed opposition to SCS's motion.

In June 2017, pursuant to Tennessee Supreme Court Rule 10B, Mr. Brown filed a motion for recusal based on the chancellor's disclosure that his brother was a principal.⁸ He also filed another motion for a status conference noting that there were no orders in the record although there had been numerous motions and multiple hearings in this matter. The chancery court entered an order granting SCS's motion to strike. The court found that the arguments raised by Mr. Brown, such as his argument regarding an individual professional development plan, were not contained in the administrative record, raised at the tenure hearing, or submitted to the Board. The court also entered an order addressing Mr. Brown's motion for a status conference. Mr. Brown subsequently filed a motion to set aside these orders. SCS filed opposition to Mr. Brown's motion for recusal. It argued that the chancellor's familial relationship with his brother was not a constitutionally or statutorily recognized ground for recusal. It explained that the chancellor's brother was not a party to the lawsuit nor was he involved with the lawsuit or its underlying facts in any way. Nevertheless, the chancellor entered an order recusing himself from hearing the case in August 2017, and the case was transferred to a different chancellor.

After the case was transferred, Mr. Brown filed a memorandum in support of his petition requesting that his termination be overturned and that he be reinstated with back pay. SCS filed a response arguing, among other things, that Mr. Brown was granted all

⁷ With its motion, SCS included the affidavit of Ms. Jennifer Shorter, who was a teacher and leadership effectiveness advisor employed by SCS, explaining the recent changes to the evaluation rubric used by SCS for calculating TEM scores and attempting to calculate Mr. Brown's TEM scores under the current evaluation rubric. Mr. Brown later filed a motion to remove the affidavit of Ms. Shorter from the record arguing that there was no order ever entered requiring said affidavit. The affidavit of Ms. Shorter was stricken from the record and not considered by the chancery court.

⁸ After filing this motion, Mr. Brown obtained counsel.

rights due under Tennessee law and the facts supported his termination. The chancery court held a hearing on the petition in November 2018 and entered its order in February 2019. The court adopted Mr. Brown's findings of fact and conclusions of law and reversed the termination of his employment. The court found that SCS initiated termination proceedings against Mr. Brown without sufficient grounds and that SCS failed to follow its own policies in terminating Mr. Brown. As such, the court held that Mr. Brown should be reinstated as a tenured teacher with back pay. However, the court did not determine the amount of back pay to be awarded. SCS filed a motion to alter or amend, which was denied by the court in May 2019.

SCS filed a notice of appeal in June 2019. Meanwhile, it filed a motion to certify the court's orders as final pursuant to Tennessee Rule of Civil Procedure 54.02, in order to seek appellate relief regarding Mr. Brown's reinstatement, and requested a stay of the proceedings and/or any attempts to calculate or collect back pay while an appeal was pending. Mr. Brown filed a response in opposition to SCS's motion requesting that the court compel SCS to abide by the court's order or, in the alternative, require SCS to pay a bond if the matter was stayed. In addition to his response, he filed a motion to compel compliance, for sanctions, and for attorney's fees. He asserted that SCS should be compelled to reinstate him with back pay and interest and be sanctioned for its willful failure to comply with the court's order. He also requested that the court hold SCS in contempt. In the alternative, he requested that the court order SCS to pay a bond while the matter was on appeal. SCS filed a response explaining that the court's order lacked guidance or specificity on the calculation of back pay and that the record contained no proof whatsoever concerning Mr. Brown's salary.

In August 2019, the chancery court entered an order certifying the matter as final and appealable pursuant to Tennessee Rule of Civil Procedure 54.02 under the circumstances but also ruled that the determination of the award of back pay should be remanded to the Board if necessary. The court found that the previously entered orders were not final judgments given that back pay was awarded to Mr. Brown but had not yet been determined; however, the court still agreed that an appeal could be sought at the time. The court reserved the determination as to whether attorney's fees were appropriate, but it denied Mr. Brown's requests to order and set a bond, to hold SCS in contempt, and to award him sanctions.

SCS filed an amended notice of appeal in August 2019. However, this Court entered an order finding that the chancery court's order "was improvidently certified as final." We explained that the entirety of the claim for back pay had not been fully adjudicated and therefore SCS appealed an order that was not final. As such, we directed SCS to obtain entry of a final judgment in the chancery court. In the chancery court, SCS filed a motion for determination of back pay and for entry of a final judgment pursuant to this Court's order. SCS also filed a response to this Court's order requesting an extension of time to obtain entry of a final judgment, which this Court granted. On February 20, 2020, the

chancery court entered an order holding that Mr. Brown was to be reinstated with back pay in accordance with Tennessee Code Annotated section 49-5-511(a)(3). The court explained that Mr. Brown was to be paid his full salary for the period he was suspended without offset. The court remanded the matter to the Board to calculate the exact amount of back pay to be awarded. However, back pay was not calculated at this time because SCS continued to pursue an appeal.

In March 2020, SCS filed a second response to this Court's order and an application for an extraordinary appeal in which it requested that this Court waive the finality requirement. Mr. Brown filed a response in opposition to SCS's application for an extraordinary appeal and requested that this Court consider sanctions against SCS for filing a frivolous appeal. This Court entered an order denying SCS's application for an extraordinary appeal and denying Mr. Brown's request for sanctions. We further declined to waive the finality requirement and granted SCS another extension to obtain entry of a final judgment. SCS filed notice of withdrawal of its notice of appeal, which we interpreted as a motion and notice for voluntary dismissal pursuant to Tennessee Rule of Appellate Procedure 15(a). This Court granted SCS's motion and dismissed the appeal in July 2020.

In the chancery court, Mr. Brown filed a motion to compel compliance arguing that SCS had willfully disobeyed the court's order entered on February 20, 2020. Therefore, he requested that SCS be fined for each day it failed to provide the amount of back pay owed to him, which he characterized as "a simple ministerial task." SCS filed a response and a motion for clarification. On October 14, 2020, the chancery court entered an order granting in part Mr. Brown's motion to compel compliance and remanding to the Board again to provide the amount of back pay owed to Mr. Brown. The court reserved any ruling on the issue of contempt and sanctions. On October 15, 2020, the court also entered an order granting SCS's motion for clarification giving SCS direction on how to calculate Mr. Brown's back pay and provided the period for the calculation of back pay. The court found that back pay was mandated by the Teacher Tenure Act and that the burden of proof to provide evidence of Mr. Brown's salary was on SCS. On October 29, 2020, SCS filed a notice of compliance with the court's order on the issue of back pay. The notice of compliance provided a calculation of back pay for the period of April 29, 2014, to October 29, 2020, which was the period provided by the court. The notice of compliance also provided a separate calculation of back pay for the period of July 29, 2013, to April 29, 2014, which SCS argued was the actual period of Mr. Brown's suspension. Mr. Brown filed a renewed motion to require a bond.

Although the chancery court had not yet entered an order regarding the notice of compliance, SCS filed a notice of appeal again in November 2020. Mr. Brown filed a motion to dismiss the appeal for lack of subject matter jurisdiction because there were pending motions before the chancery court and the appeal was untimely. Meanwhile, in the chancery court, SCS filed a motion for entry of a final judgment recognizing that the court had not yet entered a final order. After receiving SCS's response to Mr. Brown's

motion to dismiss the appeal, this Court entered an order for SCS to obtain entry of a final judgment in the chancery court. SCS subsequently filed two responses to this Court's order requesting extensions of time to obtain entry of a final judgment, which this Court granted. On May 27, 2021, the chancery court entered an order remanding the matter to the Board again for a determination of back pay. The court found that SCS's notice of compliance did not comply with its order nor did it comply with this Court's order. The court concluded that SCS's actions represented a willful disobedience of the court's orders. As a result, the court found SCS in civil contempt and granted Mr. Brown's motion for attorney's fees as a sanction.⁹ Additionally, the court denied Mr. Brown's renewed motion for a bond. On June 3, 2021, SCS filed an affidavit from its payroll department which calculated the amount of back pay owed to Mr. Brown for the period of July 29, 2013, to May 3, 2021.

SCS filed an amended notice of appeal in June 2021. However, this Court determined that the issue of back pay remained to be addressed: "Thus, although amended notices of appeal have been filed, the same problem we took note of over a year ago persists." Therefore, we entered an order dismissing the appeal in December 2021. In January 2022, the chancery court entered a consent order approving the award of back pay. Upon reviewing the affidavit from SCS's payroll department, the court determined that Mr. Brown should be awarded \$475,072.64. Thereafter, SCS timely filed this appeal in February 2022.

II. ISSUES PRESENTED

SCS presents the following issues for review on appeal, which we have slightly restated:

1. Whether the standard of review on appeal requires an independent assessment of the administrative record with no deference to the findings of the chancery court;
2. Whether the chancery court erred in determining that there was insufficient evidence of inefficiency to sustain the action by the Board to terminate Mr. Brown;
3. Whether the chancery court erred in determining that Mr. Brown was terminated without two evaluations below expectations;
4. Whether the chancery court erred in determining that SCS did not provide Mr. Brown an individual professional development plan or any meaningful assistance to Mr. Brown prior to termination;
5. Whether any award of back pay can be sustained given Mr. Brown's failure to bring any evidence before the Board on this issue, or alternatively, whether the chancery

⁹ Mr. Brown had previously filed a motion for attorney's fees. After the chancery court's ruling, he subsequently filed a motion to approve attorney's fees, which the court granted. The court later entered an amended order approving attorney's fees and assessing costs to SCS. The court awarded \$12,247 in attorney's fees to Mr. Brown for the period of February 20, 2020, to May 7, 2021.

court erred in awarding back pay for a duration longer than Mr. Brown's suspension;
and

6. Whether the chancery court erred in awarding sanctions against SCS and/or holding it in contempt.

For the following reasons, we reverse the decision of the chancery court.

III. STANDARD OF REVIEW

Pursuant to Tennessee Code Annotated section 49-5-513, a tenured teacher whose employment has been terminated by a school board is afforded the right to judicial review of the school board's decision. *Emory v. Memphis City Schs. Bd. of Educ.*, 514 S.W.3d 129, 139-40 (Tenn. 2017). In *Emory*, the Tennessee Supreme Court set forth the standard of review for the chancery court in a Teacher Tenure Act case as follows:

[T]he 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 . . . 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. New evidence is only admissible to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.

Id. at 141-42 (internal citations and quotation marks omitted). If the chancery court's decision is appealed, this Court reviews the decision in accordance with Tennessee Rule of Appellate Procedure 13(d) "to determine whether the evidence preponderates in favor of the chancery court's findings of fact." *Id.* at 142 (citing *Ripley v. Anderson Co. Bd. of Educ.*, 293 S.W.3d 154, 156 (Tenn. Ct. App. 2008)). However, "[i]ssues of law, of course, are reviewed *de novo*, with no presumption of correctness in the chancery court's conclusions." *Id.* (citing *Ripley*, 293 S.W.3d at 156).

IV. DISCUSSION¹⁰

¹⁰ In footnote one of SCS's appellate brief, it describes Mr. Brown as "a frequent flyer in the courts." In support of this statement, it specifically cites to *Brown v. Burch, Porter & Johnson PLLC Law Firm*, No. 2:15-cv-2167-SHM-dkv, 2015 WL 5737795, at *12 (W.D. Tenn. June 29, 2015), in which a magistrate judge took judicial notice of what she characterized as Mr. Brown's "history of filing vexatious lawsuits" and, as examples, provided citations to numerous cases initiated by him. Nevertheless, SCS does not ask this Court to take judicial notice of Mr. Brown's legal history. Moreover, Mr. Brown's legal history is not

A. Issues Regarding the Standard of Review

i. Independent Assessment

SCS's first issue on appeal concerns whether the standard of review on appeal requires an independent assessment of the administrative record with no deference to the chancery court's findings. SCS suggests that "this Court must undertake its own independent review of the administrative record to form its own factual assessment, giving deference to no previous factual findings of the Chancery Court." We reiterate that our "review of the chancery court's decision is under the familiar Rule 13(d) of the Tennessee Rules of Appellate Procedure." *Id.* In accordance with Rule 13(d), our review is de novo on the record *with a presumption that the chancery court's factual findings are correct*, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d) (emphasis added). Therefore, to the extent that SCS is arguing that the chancery court's factual findings are not entitled to a presumption of correctness on appeal, it is mistaken.

As for credibility assessments, however, it is well-settled that "we must afford strict deference only to the trial court's credibility assessments of the witnesses it actually observed, and not to its findings with regard to the administrative record it considered, of which we may make our own independent review." *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 784 (Tenn. 1999). There are differences between credibility determinations made after observing live testimony versus credibility determinations based on a reading of the cold record and documentation:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.

part of the administrative record nor was it a reason for his dismissal as a tenured teacher. Mr. Brown believes that his legal history was included for the sole purpose of disparaging him. As such, he briefly states that SCS "should be sanctioned for such inappropriate conduct." To the extent that Mr. Brown is asking this Court to award sanctions, we decline to do so. He does not cite to any statutory authority or other basis for such an award. *See Kholghi v. Aliabadi*, No. M2019-01793-COA-R3-CV, 2020 WL 5607816, at * 27 (Tenn. Ct. App. Sept. 18, 2020) (denying the appellee's request for attorney's fees on appeal for failing to provide any authority). However, we agree with Mr. Brown that his legal history is not relevant to the matter before us. Pursuant to the Teacher Tenure Act, Mr. Brown was well within his statutory rights to demand a full and complete tenure hearing on the charge against him before an impartial hearing officer, to appeal the hearing officer's decision to the Board, and to appeal to the chancery court by petitioning for judicial review. *See* Tenn. Code Ann. §§ 49-5-512 and 49-5-513. Again, we emphasize that his legal history is not part of the administrative record nor was it a reason for his dismissal as a tenured teacher.

In contrast, appellate review of documentary proof, such as depositions or other forms of testimony presented to the trial court in a “cold” record, differs considerably. When reviewing documentary proof, all impressions of weight and credibility are drawn from the contents of the evidence, and not from the appearance of witnesses and oral testimony at trial. As a result, appellate courts may make an independent assessment of the credibility of the documentary proof it reviews, without affording deference to the trial court’s findings.

Finney v. Franklin Special Sch. Dist. Bd. of Educ., 576 S.W.3d 663, 680-81 (Tenn. Ct. App. 2018) (quoting *Wells*, 9 S.W.3d at 783-84).

Given that the chancery court’s review is limited to the administrative record in a Teacher Tenure Act case, it does not hear any witnesses or consider any evidence outside of the administrative record. See Tenn. Code Ann. § 49-5-513(g) (providing that the chancery court’s review is “limited to the written record of the hearing before the board and any evidence and exhibits submitted at the hearing”).¹¹ Still, the chancery court could make its own credibility determinations based on the record. See *Finney*, 576 S.W.3d at 680 (finding that the chancellor could still make his own credibility determinations based on the record, which included the transcript of the evidence, video recordings of the tenured teacher’s interactions with students, and exhibits for which the chancellor had the same ability to observe as did the hearing officer). This Court is “in just as good a position as the trial court to judge the credibility of witnesses who provided the proof.” *Wells*, 9 S.W.3d at 784; see *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992). Therefore, “we are not required to give strict deference to the [chancery court’s] assessment of the testimony contained in a ‘cold’ record.” *Id.* at 785. With that being said, SCS does not point to any credibility assessments made by the chancery court. Accordingly, the holdings from *Wells* and *Finney* regarding our review of credibility assessments of documentary proof made by the chancery court are not applicable in this case.

ii. The Chancery Court’s Application of the Standard of Review

SCS presents a separate argument in which it contends that the chancery court erred in its application of the standard of review set forth by the Teacher Tenure Act. As previously discussed, the chancery court’s standard of review is set forth in the Teacher Tenure act, which provides as follows:

The cause shall stand for trial and shall be heard and determined at the earliest

¹¹ While the chancery court’s review is limited to the administrative record, it is permitted to admit additional evidence or testimony, but only “to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.” Tenn. Code Ann. § 49-5-513(g).

practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue. The review of the court shall be limited to the written record of the hearing before the board and any evidence or exhibits submitted at the hearing. Additional evidence or testimony shall not be admitted except as to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.

Tenn. Code Ann. § 49-5-513(g). In sum, SCS argues that the chancery court failed to adhere to this standard of review by failing to consider the multiple grounds of inefficiency and in awarding back pay. While this specific argument was not designated as an issue in SCS's appellate brief, it is merely a preface to SCS's remaining issues presented for our review on appeal. We will address each of these remaining issues and consider, if necessary, whether the chancery court applied the appropriate standard of review.

B. Inefficiency

SCS's second and third issues essentially concern whether the chancery court erred in determining that the Board lacked just cause to terminate Mr. Brown for the cause of inefficiency. "A teacher may only be dismissed or suspended on the basis of incompetence, *inefficiency*, neglect of duty, unprofessional conduct, or insubordination." *Elmi v. Cheatham Cnty. Bd. of Educ.*, 546 S.W.3d 630, 644 (Tenn. Ct. App. 2017) (citing Tenn. Code Ann. § 49-5-511(a)(2)). The term "inefficiency" is defined in the Teacher Tenure Act as follows:

"Inefficiency" means being below the standards of efficiency maintained by others currently employed by the board for similar work, or habitually tardy, inaccurate or wanting in effective performance of duties. The definition of inefficiency includes, *but is not limited to*, having evaluations demonstrating an overall performance effectiveness level that is "below expectations" or "significantly below expectations" as provided in the evaluation guidelines adopted by the state board of education pursuant to § 49-1-302[.]

Tenn. Code Ann. § 49-5-501(6) (emphasis added). This definition "uses the plural term 'evaluations' rather than the singular 'evaluation.'" *Harrison*, 2016 WL 1250782, at *4. Therefore, it "indicate[s] that evidence of more than one unsatisfactory evaluation is *one* way to show that a teacher is inefficient." *Harper v. Shelby Cnty. Schs.*, No. W2018-01100-COA-R3-CV, 2019 WL 1453092, at *6 n.9 (Tenn. Ct. App. Apr. 1, 2019). However, "[a]s is apparent from the definition and as this Court has noted, '[t]he definition is not exclusively limited to having poor evaluations[.]'" *Id.* at *4 (quoting *Harrison*, 2016 WL 1250782, at *4).

i. Evaluations

SCS presents an issue regarding whether the chancery court erred in determining that Mr. Brown was terminated without two evaluations below expectations. SCS argues, “[t]he administrative record was filled with evidence, including the actual TEM scores themselves, to support the contention that Mr. Brown had two final TEM scores that were below expectations prior to a termination charge and decision by the Board on October 29, 2013.” Mr. Brown argues that it is undisputed SCS decided to non-reelect him and initiate termination proceedings against him before he received his final evaluation for the 2012-13 school year. The crux of this issue is whether the termination proceedings against Mr. Brown were premature.

The hearing officer found that “Mr. Brown’s final TEM scores for two consecutive school years were a TEM 1 and a TEM 2, and thus satisfies the plural ‘evaluations’ requirement set forth in the statute.” Mr. Brown sought judicial review of the decision in the chancery court. The chancery court disagreed with the hearing officer and found as follows:

SCS provided no evidence that Mr. Brown had more than one eligible subpar performance evaluation prior to the 2012-2013 school year. Nevertheless, SCS decided to non-reelect Mr. Brown and initiate termination proceedings against Mr. Brown on May 10, 2013 based upon his final TEM score of 2011-2012, a “1”, and the preliminary TEM score for the 2012-13 year which was a “3” along with classroom observations for 2012-13. To terminate him for inefficiency at this point was against the SCS policy.

We respectfully disagree with the chancery court’s analysis. First, we observe that Mr. Brown did not receive a 1 on his final evaluation for the 2011-12 school year; he received a 2. Regardless, this was still a subpar evaluation. Second, the date of May 10, 2013, was merely when Ms. Allen, the principal at Charjean, made her recommendation for non-reelection to the Superintendent. While termination proceedings eventually resulted from Ms. Allen’s recommendation made on May 10, 2013, SCS did not decide to non-reelect Mr. Brown on this date. As explained by Ms. Branch, the Office of Labor and Employee Relations, which was responsible for the review process as the Superintendent’s designee, conducted a review of the recommendation for non-reelection. After this review was completed, Mr. Brown was notified that charges and a recommendation for dismissal would be made to the Board and that he would be placed on suspension without pay effective July 29, 2013. On October 15, 2013, the Superintendent issued a written charge recommending Mr. Brown’s dismissal for the cause of inefficiency. The written charge indicated that examples of actions in support of the charge included, but were not limited to, his subpar final evaluations for the 2011-12 and 2012-13 school years:

- | | | |
|------------|----------------|---------|
| a. 2011-12 | TEM 2 (260.60) | Level 2 |
| b. 2012-13 | TEM 1 (181.50) | Level 1 |

Therefore, as the written charge indicates, Mr. Brown's final evaluation for the 2012-13 school year was available at this point. On October 28, 2013, the Board issued a decision finding that the charge warranted the dismissal of Mr. Brown as tenured teacher, and Mr. Brown was notified of the Board's decision the following day.

The chancery court further found that this Court has held a teacher must have more than one subpar evaluation for a finding of inefficiency. To support this finding, the court cited to our decisions in *Elmi* and *Harrison*. The court then found as follows:

It is undisputed that at the time SCS started termination proceedings against Mr. Brown, he did not have more than one subpar evaluation. . . . The Court of Appeals has found in *Harrison* and *Elmi* that more than one evaluation either below or significantly below expectations is required for a finding of inefficiency. Further, even if a teacher does have two TEM scores below expectations, a school district cannot begin termination proceedings *before* the final TEM scores are available. Additionally, using observations only as a basis to terminate a tenured teacher rather than TEM scores is "contrary to both the letter and the spirit of the Tenure Act" and any termination using this rationale should be reversed. *Elmi*[, 546 S.W.3d] at 646.

Again, we respectfully disagree with the chancery court's analysis.

We first note that, in addition to inefficiency, Ms. Allen's recommendation for non-re-election indicated incompetence and neglect of duty as reasons for her recommendation. As such, inefficiency was not the only potential course of action that could be pursued at the time Ms. Allen's recommendation was made. According to Ms. Branch, it was possible Mr. Brown would have been terminated regardless of his score on his final evaluation for the 2012-13 school year. She explained that another rationale could have been used, such as neglect of duty, because Mr. Brown failed to implement Ms. Helminski's suggestions. Ultimately, however, the only charge brought against Mr. Brown was for the cause of inefficiency.

The Teacher Tenure Act provides, "When charges are made to the board of education against a teacher, charging the teacher with offenses that would justify dismissal of the teacher under the terms of this part, the charges shall be made in writing, specifically stating the offenses that are charged" Tenn. Code Ann. § 49-5-511(a)(4). Thus, the decisive point occurred when the Superintendent issued the written charge to the Board on October 15, 2013, because the particular charge for the cause of inefficiency could not have been made without specifically stating the offenses that were charged. This is when termination proceedings were initiated against Mr. Brown. *See Emory*, 514 S.W.3d at 132-34 (stating that the Superintendent "initiated termination proceedings" when it issued a letter to the board of education setting forth the reasons for her recommendation). As explained by this Court, "[t]he first step is the presentation of written charges to the Board

of Education, ‘specifically stating the offenses charged.’” *Hubbard v. Claiborne Cnty. Bd. of Educ.*, No. E2020-00517-COA-R3-CV, 2021 WL 4775952, at *3 (Tenn. Ct. App. Oct. 13, 2021) (quoting Tenn. Code Ann. § 49-5-511(a)(4)); see *Thompson v. Memphis City Schs. Bd. of Educ.*, 395 S.W.3d 616, 623 (Tenn. 2012) (“First, written charges must be presented to the board of education specifically stating an offense that would amount to cause for the teacher’s dismissal . . .”). The written charge indicated Mr. Brown’s final evaluation for the 2012-13 school year was available at this point. As justification for the charge of inefficiency, it included Mr. Brown’s final evaluations for the 2011-12 and 2012-13 school years, which were both subpar. Accordingly, Mr. Brown had more than one subpar evaluation at the time termination proceedings were initiated against him.

Moreover, there does not necessarily need to be more than one subpar evaluation for a finding of inefficiency, nor any subpar evaluation for that matter, because inefficiency is not exclusively limited to having subpar evaluations. *Harper*, 2019 WL 1453092, at *4 (quoting *Harrison*, 2016 WL 1250782, at *4). “[E]vidence of more than one unsatisfactory evaluation is *one* way to show that a teacher is inefficient.” *Id.* at *6 n.9. As explained by Ms. Branch, Mr. Brown was recommended for dismissal despite receiving a 3 on his preliminary evaluation for the 2012-13 school year because of other performance issues, such as showing no improvement at all after participating in the PAR program. As the definition indicates, “[i]nefficiency’ means being below the standards of efficiency maintained by others currently employed by the board for similar work, or habitually tardy, inaccurate or wanting in effective performance of duties,” and it is not limited to just having subpar evaluations. Tenn. Code Ann. § 49-5-501(6). This comports with our decision in *Harper*, in which we affirmed the chancery court’s finding that there was sufficient evidence to sustain a tenured teacher’s dismissal on the basis of inefficiency for reasons other than subpar evaluations. *Harper*, 2019 WL 1453092, at *5. In *Harper*, we found that the teacher’s “lack of classroom management skills demonstrated a ‘wanting in effective performance of duties’ and ‘was below the standards of efficiency’ when compared to other teachers . . .” *Id.*

As previously stated, the written charge indicated that Mr. Brown’s final evaluation for the 2012-13 school year was available at the time the written charge was made. Mr. Brown received a TEM score of 181.50, which was a 1 or “significantly below expectations.” This was his second subpar evaluation because, for the 2011-12 school year, he received a TEM score of 260.60, which was a 2 or “below expectations.” As a result, the Board issued a decision finding that the charge warranted the dismissal of Mr. Brown as tenured teacher. Thus, we agree with the hearing officer in that SCS carried its burden to prove that it had just cause to terminate Mr. Brown’s employment as a tenured teacher. We conclude that the chancery court erred in determining that Mr. Brown was terminated without two evaluations below expectations. We therefore reverse the decision of the chancery court and reinstate the Board’s decision terminating Mr. Brown as a tenured teacher.

ii. Evidence of Inefficiency Notwithstanding Evaluations

SCS presents a separate issue regarding whether the chancery court erred in determining that there was insufficient evidence of inefficiency to sustain the action by the Board to terminate Mr. Brown. In addition to Mr. Brown's subpar evaluations, the hearing officer found that he was inefficient due to his performance issues because he was "wanting in effective performance of duties." Tenn. Code Ann. § 49-5-501(6). The hearing officer found that "Mr. Brown's refusal to accept criticism and implement suggestions, and his repeated excuses for his inability to perform, absolutely rises to the level of a teacher wanting in effective performance of duties."

SCS argues that the chancery court based its reversal strictly on inefficiency with respect to the TEM scores. As a result, it contends that the court failed "to consider the remaining magnitude of evidence of 'inefficiency' adduced during the administrative proceedings related to Mr. Brown's numerous other failures as a teacher." Mr. Brown argues that SCS has waived this issue for failing to argue it in the chancery court. SCS made this same argument in its motion to alter or amend the chancery court's judgment. However, the court denied the motion to alter or amend finding that SCS failed to make this argument at the hearing on the petition.

There is already sufficient evidence to sustain Mr. Brown's termination on the basis of inefficiency due to his subpar evaluations. We therefore find this issue unnecessary to address. *See Harper*, 2019 WL 1453092, at *6 ("[W]e find it unnecessary to address this issue considering there is already sufficient independent evidence to sustain [the teacher's] dismissal on the basis of inefficiency."). Accordingly, this issue is pretermitted.

C. Individual Professional Development Plan

SCS's fourth issue concerns whether the chancery court erred in determining that SCS did not provide Mr. Brown an individual professional development plan or any meaningful assistance to Mr. Brown prior to termination. It argues that "[t]he record is replete with copious amounts of evidence adduced to the contrary, demonstrating that SCS spent overwhelming amounts of time, effort, and resources attempting to assist Mr. Brown." Mr. Brown argues that SCS has waived this issue for failing to argue it in the chancery court. Alternatively, he argues that SCS's argument still fails in light of this Court's holding in *Harrison*.

Interestingly, this issue concerning the individual professional development plan was raised by Mr. Brown for the first time in the chancery court when he filed a supplemental argument in May 2017. However, SCS filed a motion to strike Mr. Brown's supplemental argument asserting that it was premised upon evidence not contained in the administrative record, which the chancery court granted. The court found that Mr. Brown's supplemental argument was not contained in the administrative record, was not raised at

the tenure hearing, and was not submitted to the Board. The order granting the motion to strike was entered by the former chancellor presiding over the case before he recused himself in August 2017.¹² Afterward, the case was transferred to a different chancellor. Despite the order striking Mr. Brown's supplemental argument regarding the individual professional development plan due to the lack of evidence in the administrative record, the chancery court still addressed this issue in its order reversing Mr. Brown's termination. Relying on this Court's decisions in *Harper* and *Harrison*, the court concluded that SCS policy required an individual professional development plan to be provided to a teacher before termination. The court found that Mr. Brown voluntarily participated in the PAR program, but he never received an individual professional development plan. As such, the court held that SCS failed to follow its own policy and offer any meaningful assistance or an individual professional development plan to Mr. Brown before he was terminated.

There was considerable testimony regarding the assistance provided to Mr. Brown, which included support through the PAR program. As previously discussed, Mr. Brown was permitted to observe other teachers and received assistance from a mentor and an instructional facilitator. Before participating in the PAR program, Mr. Brown visited Ms. Branch at her office in January 2013 and requested an administrative transfer. Ms. Branch informed him that MCS was not allowing administrative transfers at the time. However, based on her review of his evaluation from the 2011-12 school year, she suggested that he follow MCS's "professional growth plan in order to improve [his] teaching strategies." In February 2013, he agreed to participate in the PAR program where he was offered additional support in hopes that his performance would improve. The PAR program was specifically described by Ms. Branch as an "individualized support plan." Ms. Branch explained that the PAR program was designed solely as a support mechanism and that the support was "individualized" and "prescriptive to the teacher." Therefore, the support given through the PAR program depended on the needs of the individual teacher. Throughout his participation in the PAR program, Mr. Brown received assistance from Ms. Helminski, who provided him with informal observations, walkthroughs, collaborative meetings, and written resources and videos. However, he testified that he had issues with the informal observations Ms. Helminski gave him:

[T]he total time period that Ms. Helminski came to my classroom was probably about 45 minutes. Out of all the time that she stated yesterday, she only came to my room about 45 minutes. And I testified to that. Each time she would come, she would stay about five minutes and just give me a little pink form here and then she would leave.

¹² After an order of recusal is entered, a judge is without jurisdiction to further adjudicate the matter. *Arrington v. Broyles*, No. E2016-00363-COA-R3-CV, 2017 WL 541536, at *4 (Tenn. Ct. App. Feb. 10, 2017). Orders on substantive matters entered *after* an order of recusal are void. *Id.* Therefore, the order granting the motion to strike in this case, which was entered prior to the entry of the order of recusal, was not void.

He further testified:

No one from the PAR -- Ms. Helminski was not coming, even though she said she was. She was not coming to see me. She never gave me any feedback except one time with her supervisor. She would just leave these pink sheets and she stopped coming totally at the end of April and never came again.

As such, according to Mr. Brown, Ms. Helminski did not come around and help, did not really observe him, and did not give him any feedback at all during the entire time in the PAR program. Contrary to Mr. Brown's testimony, Ms. Helminski's report indicated that she observed Mr. Brown nine times for a total of ten hours and that she held five teacher conferences with Mr. Brown for a total of four-and-a-half hours. In light of this evidence, the hearing officer found that Mr. Brown "was given substantial support in an attempt to remedy [his] issues." Similarly, we conclude that Mr. Brown received meaningful assistance in an attempt to improve his performance in the classroom.

As for the individual professional development plan, the hearing officer did not address this issue. We have reviewed the administrative record and found no evidence or testimony that indicates this specific issue was argued at the tenure hearing or submitted to the Board.¹³ Likewise, the chancery court found that this argument was not contained in the administrative record, raised at the tenure hearing, or submitted to the Board. For this reason, the court granted SCS's motion to strike Mr. Brown's supplement argument regarding this issue. Yet, in contravention of its order, the court still addressed this issue in its order reversing Mr. Brown's termination.

Thus, the chancery court contradicted its order granting the motion to strike the argument concerning this issue. We recognize that nonfinal orders are subject to modification. "An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do." *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997) (citing *Vineyard v. Vineyard*, 26 Tenn. App. 232, 241, 170 S.W.2d 917, 920 (1942)). Thus, "[u]ntil a judgment becomes final, it remains within the court's control and may be modified any time prior to the entry of a final judgment." *Id.* (citing *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 328 (Tenn. 1982)). Regardless, we find

¹³ Moreover, the record contains the Board's Dismissal Policy, but it does not contain the specific policy requiring the individual professional development plan. According to *Harper* and *Harrison*, the individual professional development plan was required by MCS's Professional Development Policy 5.8034. See *Harper*, 2019 WL 1453092, at *8; *Harrison*, 2016 WL 1250782, at *5. Notably, the teachers in both *Harper* and *Harrison* were terminated after the 2011-12 school year. In this case, however, Mr. Brown was terminated after the 2012-13 school year. Therefore, because this specific policy requiring the individual professional development plan is not in the record, this Court has no way of knowing if it remained the same for the 2012-13 school year, which was the year preceding Mr. Brown's termination.

that the court failed to apply the appropriate standard of review regarding this issue:

The review of the court shall be limited to the written record of the hearing before the board and any evidence or exhibits submitted at the hearing. Additional evidence or testimony shall not be admitted except as to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.

Tenn. Code Ann. § 49-5-513(g). As such, “[t]he 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*, 514 S.W. at 142. We conclude the chancery court erred in determining that SCS did not provide Mr. Brown an individual professional development plan or any meaningful assistance to Mr. Brown prior to termination. Accordingly, we reverse the chancery court’s decision as to this issue.

D. Back Pay

SCS’s fifth issue is whether any award of back pay can be sustained given Mr. Brown’s failure to bring any evidence before the Board on this issue, or, alternatively, whether the chancery court erred in awarding back pay for a duration longer than Mr. Brown’s suspension.

The Teacher Tenure Act “establishes the remedy for teachers who are suspended but later vindicated or reinstated.” *Thompson*, 395 S.W.3d at 628. Specifically, it provides that, “[i]f vindicated or reinstated, the teacher shall be paid the full salary for the period during which the teacher was suspended.” Tenn. Code Ann. § 49-5-511(a)(3). Thus, “a teacher who is reinstated after a suspension ‘is entitled to the pay that would have been forthcoming had the suspension never occurred.’” *Thompson*, 395 S.W.3d at 629 (quoting *Van Hooser v. Warren Cnty. Bd. of Educ.*, 807 S.W.3d 230, 241 (Tenn. 1991)).

Given that we have reversed the decision of the chancery court and found SCS had just cause to terminate Mr. Brown’s employment as a tenured teacher, the Board’s decision terminating Mr. Brown is reinstated. Mr. Brown is therefore not entitled to back pay. Accordingly, this issue is pretermitted.

E. Sanctions & Contempt

SCS’s final issue is whether the chancery court erred in awarding sanctions and holding it in contempt. SCS argues that neither sanctions nor contempt in the form of an award of attorney’s fees was warranted in this matter. Mr. Brown argues that the court correctly awarded attorney’s fees. This Court has set forth the standard of review for this issue as follows:

Contempt proceedings lie within the sound discretion of the trial court. *See, e.g., Herrera v. Herrera*, 944 S.W.2d 379, 393 (Tenn. Ct. App. 1996). Accordingly, a trial court's use of its contempt power is discretionary, *Robinson v. Air Draulics Eng'g Co.*, 214 Tenn. 30, 377 S.W.2d 908, 912 (1964), and an appellate court will review a trial court's contempt citation using the abuse of discretion standard. *Powell v. Powell*, 124 S.W.3d 100, 108 (Tenn. Ct. App. 2003). "A trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). Furthermore, the award of attorneys' fees based upon a finding of contempt is also reviewed under the less stringent abuse of discretion standard and we will not modify a punishment imposed for contempt unless the complaining party can show that the trial court abused its discretion. *See, e.g., Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995) (considering attorneys' fees); *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993) (considering punishment imposed for contempt).

Outdoor Mgmt., LLC v. Thomas, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007).

SCS asserts that it was simply attempting to abide by the plain language of the Teacher Tenure Act. It further asserts that it should not have been sanctioned for the confusion regarding the actions and lack of guidance provided by the chancery court, requiring it to unilaterally provide an amount of back pay for Mr. Brown, despite no proof of salary being contained in the administrative record or having been adduced by Mr. Brown. We do not reach the issue concerning the absence of proof of Mr. Brown's salary because the issue of back pay is pretermitted.

In order to further address this issue, we must reiterate the relevant procedural history which led the chancery court to award sanctions and hold SCS in contempt. The chancery court reversed the Board's decision in February 2019. The court ordered that Mr. Brown was to be reinstated as a tenured teacher with SCS with back pay, but it did not determine the amount of back pay to be awarded. Afterward, the calculation of back pay proved to be an arduous task. Consequently, there were multiple appeals filed, including an application for an extraordinary appeal, which added to the already labyrinthine record. Ultimately, a proper appeal was not filed until February 2022.

In SCS's first attempt to appeal this matter, SCS filed a notice of appeal in June 2019. Meanwhile, it filed a motion to certify the court's orders as final pursuant to Tennessee Rule of Civil Procedure 54.02, in order to seek appellate relief regarding Mr. Brown's reinstatement, and requested a stay of the proceedings and/or any attempts to calculate or collect back pay while an appeal was pending. Mr. Brown filed a response in

opposition to SCS's motion and a motion to compel compliance, for sanctions, and for attorney's fees, in which he requested that SCS be held in contempt. SCS filed a response to Mr. Brown's motion explaining that the court's order lacked guidance or specificity on the calculation of back pay and that the record contained no proof whatsoever concerning Mr. Brown's income. In August 2019, the chancery court entered an order certifying the matter pursuant to Tennessee Rule of Civil Procedure 54.02 under the circumstances but also ruled that the determination of the award of back pay should be remanded to the Board if necessary. The court found that the previously entered orders were not final judgments given that back pay was awarded to Mr. Brown but had not yet been determined; however, the court still agreed that an appeal could be sought at the time. The court reserved the determination as to whether attorney's fees were appropriate, but it denied Mr. Brown's requests to hold SCS in contempt and to award him sanctions.

SCS filed an amended notice of appeal in August 2019. However, this Court found the entirety of the claim for back pay had not been fully adjudicated, and we directed SCS to obtain entry of a final judgment in the chancery court. On February 20, 2020, the chancery court entered an order holding that Mr. Brown was to be reinstated with back pay in accordance with Tennessee Code Annotated section 49-5-511(a)(3) and remanding the matter to the Board to calculate the exact amount of back pay to be awarded. However, back pay was not calculated at this time because SCS continued to pursue an appeal. SCS filed an application for an extraordinary appeal in March 2020, which was denied by this Court. SCS then filed notice of withdrawal of its notice of appeal, which we interpreted as a motion and notice for voluntary dismissal pursuant to Tennessee Rule of Appellate Procedure 15(a). This Court granted SCS's motion and dismissed the appeal in July 2020.

In the chancery court, Mr. Brown filed a motion to compel compliance arguing that SCS had willfully disobeyed the court's order entered on February 20, 2020, and SCS filed a response and a motion for clarification. On October 14, 2020, the court entered an order granting in part Mr. Brown's motion to compel compliance and remanding to the Board again to provide the amount of back pay owed to Mr. Brown. The court reserved any ruling on the issue of contempt and sanctions. On October 15, 2020, the court also entered an order granting SCS's motion for clarification giving SCS direction on how to calculate Mr. Brown's back pay. The court found that back pay was mandated by the Teacher Tenure Act and that the burden of proof to provide evidence of Mr. Brown's salary was on SCS. The court's order provided:

In order to calculate the backpay ordered by this Court, SCS's payroll department, Human Resource department or the equivalent will have to provide salary and benefit information for which [Mr. Brown] has been denied since the date of suspension, April 29, 2014. This amount shall be calculated, showing detailed information and totaled through October 29, 2020. Additionally, SCS shall provide a daily per diem to add to the total, should [Mr. Brown] not be reinstated by October 29, 2020.

We observe that the court clearly provided the wrong date of Mr. Brown's suspension. On one page of the order, it states that April 29, 2014, was the date of Mr. Brown's suspension; on another page, it states that April 29, 2014, was the date of his termination. On October 29, 2020, pursuant to the court's order, SCS filed a notice of compliance on the issue of back pay. It attempted to abide by the court's order while also recognizing the error in the date of Mr. Brown's suspension provided by the court:

Subject to and without waiving the above objections, SCS, in order to comply with the Court's above referenced Orders and to avoid being held in contempt, respectfully presents a monetary amount of \$394,455.06, as representative of Mr. Brown's purported backpay, if accrued from April 29, 2014 to October 29, 2020. SCS also presents the amount of \$45,654.52 as representative of Mr. Brown's purported backpay if accrued during the actual period of suspension from July 29, 2013 to April 29, 2014. Finally, SCS provides a per diem amount of \$166.02, as ordered, given that as SCS will not to [sic] reinstate Mr. Brown at this time.

Although the court had not yet entered an order regarding the notice of compliance, SCS filed a notice of appeal again in November 2020. This Court entered an order for SCS to obtain entry of a final judgment in the chancery court.

Mr. Brown then filed a motion asserting that he was entitled to attorney's fees for two reasons: (1) SCS was in civil contempt; and (2) SCS violated his due process rights as contemplated by 42 U.S.C. § 1988. In May 2021, the chancery court held a hearing on the matter and stated the following:

And, at this juncture, we are provided with a document prepared by Counsel which is not, in this Court's opinion, in compliance with a remand.

The document consists mostly of argument as opposed to a calculation of the back pay and appears to incorrectly state the amount that The Court has requested, although The Court did insert an incorrect date for the suspension, but obvious on its face a matter -- an error that easily the Department of Payroll would have picked up on and corrected.

But it appears that there is some attempt to obfuscate and avoid compliance in this regard to complying with this Court's request for remand and calculation. The Court, therefore, believes that it's willful and, therefore, will hold the defendant in contempt of court and will sanction them accordingly.

And [Mr. Brown] has requested that there be an award of attorney fees as a

result of the contemptible behavior in failing to abide by this Court's Orders to remand the matter for the calculation of back pay.

The court then entered an order on May 27, 2021, remanding the matter to the Board again for a determination of back pay and provided the correct date of Mr. Brown's suspension. The court found that SCS's notice of compliance did not comply with its order nor did it comply with this Court's order, and the court described SCS's actions as "resistance," "recalcitrance," and "an attempt to obfuscate and avoid compliance." The court concluded that SCS's actions represented a willful disobedience of the court's orders. As a result, the court found SCS in civil contempt and granted Mr. Brown's motion for attorney's fees as a sanction. The court awarded \$12,247 in attorney's fees to Mr. Brown for the period of February 20, 2020, to May 7, 2021. On June 3, 2021, SCS filed an affidavit from its payroll department which calculated the amount of back pay owed to Mr. Brown for the period of July 29, 2013, to May 3, 2021.

SCS filed an amended notice of appeal in June 2021. However, this Court determined that the issue of back pay had not been addressed still. Therefore, we entered an order dismissing the appeal in December 2021. In January 2022, the chancery court entered a consent order approving the award of back pay. Thereafter, SCS filed this appeal in February 2022.

This procedural history in and of itself demonstrates the needless delay caused by issue of back pay, but SCS was not entirely to blame. SCS argues that the chancery court's order lacked clarity and was ambiguous and that the court acknowledged the order was flawed. Indeed, the chancery court provided the wrong date of Mr. Brown's suspension in its order on October 15, 2020. The correct date of Mr. Brown's suspension was July 29, 2013, and therefore the period for calculation of back pay should have been from July 29, 2013, to October 29, 2020.¹⁴ Instead, the court tasked SCS with calculating back pay for the period of April 29, 2014, to October 29, 2020. SCS provided a calculation of back pay for this period in compliance with the court's order. However, it also recognized the court's error and provided an additional and separate calculation of back pay for the period of July 29, 2013, to April 29, 2014. Nevertheless, even though the chancery court acknowledged its error, it still found that SCS's notice of compliance did not comply with the order and held SCS in civil contempt and awarded sanctions to Mr. Brown.

Without reaching SCS's specific argument concerning whether Mr. Brown actually filed a motion for contempt or for sanctions, we find that all of the elements necessary for a civil contempt finding were not met. The Tennessee Supreme Court has held that civil contempt claims based upon alleged disobedience of a court's order have four essential elements:

¹⁴ Although, SCS maintained that the accrual of the award of back pay should have been stayed on April 29, 2014, which was the date the Board voted to terminate Mr. Brown.

First, the order alleged to have been violated must be “lawful.” Second, the order alleged to have been violated must be clear, specific, and unambiguous. Third, the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order. Fourth, the person’s violation of the order must be “willful.”

Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 354-55 (Tenn. 2008) (internal footnotes omitted). As for the second element, “[a] person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden.” *Id.* at 355 (citations omitted). Therefore, the court’s order must “be clear, specific, and unambiguous.” *Id.* We find that the chancery court’s order was not clear and unambiguous because it stated that SCS was required to calculate back pay owed to Mr. Brown “since the date of his suspension, April 29, 2014.” This was not only incorrect, but it created ambiguity because the court’s order stated elsewhere that this was the date of Mr. Brown’s termination: “SCS . . . terminated him from his position on April 29, 2014.” At the hearing on this matter, counsel for SCS made the following statement regarding this discrepancy: “So that’s somewhat unclear, Your Honor, given that the date of suspension was July 29th, 2013, the date of termination was April 29th, 2014, though Your Honor, in his Order, actually said suspension of April 29, 2014. So that in and of itself is unclear.” Additionally, she explained that “[w]e based the date off of Your Honor’s Order, and then we provided an additional date to avoid any kind of confusion.” As such, she argued, “I don’t think you can hold us in contempt for violating an Order that’s obviously not clear if we’re doing exactly what The Order has alleged we do.” The court subsequently admitted that its order was flawed, stating that it “did insert an incorrect date for the suspension” which was “obvious on its face.”

For these reasons, the chancery court’s decision was against logic and reasoning and was an abuse of discretion. We conclude that the chancery court erred in awarding sanctions against SCS and holding it in contempt. Accordingly, the chancery court’s decision holding SCS in civil contempt and awarding of sanctions against it is reversed.

As an alternative argument, Mr. Brown asserts that he was entitled to attorney’s fees pursuant to 42 U.S.C. § 1988. That statute “provides that ‘[i]n any action or proceeding to enforce [the listed federal civil rights laws], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.’” *Brown v. Tenn. Dep’t of Safety and Homeland Sec.*, No. M2021-00422-COA-R3-CV, 2022 WL 1511748, at *5 (Tenn. Ct. App. May 13, 2022) (quoting 42 U.S.C. § 1988(b)). The chancery court briefly addressed this issue in its order, which provided as follows:

Based upon the authorities presented by the parties, this Court is persuaded that there is no requirement to plead a specific federal claim or plead a request

for fees under 42 U.S.C. § 1988 in order for this Court to have the authority to award attorney’s fees under 42 U.S.C. § 1988 for the violation of [Mr. Brown]’s due process rights. [Mr. Brown] is a prevailing party under § 1988. *See Farrar v. Hobby*, 506 U.S. 103, 111, [113 S.Ct. 566, 573] (1992); *see also Bloomingdale’s By Mail Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1992).

However, the chancery court’s analysis concluded there, and it failed to make a definitive ruling as to whether Mr. Brown should be awarded attorney’s fees on this basis. Instead, it awarded “attorney’s fees on the basis of sanctions for [SCS]’s willful failure” to follow its order. Although the chancery court did not make a definitive ruling as to whether Mr. Brown should be awarded attorney’s fees pursuant to section 1988, it is unnecessary to remand this issue to the chancery court. We have reversed the chancery court’s decision on the merits, and therefore Mr. Brown is no longer a prevailing party as required by section 1988. *See Tennesseans for Sensible Election Laws v. Slatery*, No. M2020-01292-COA-R3-CV, 2021 4621249, at *7 (Tenn. Ct. App. Oct. 7, 2021) (“Because we have reversed the trial court’s decision on the merits, Plaintiff is no longer a prevailing party” under section 1988.); *Consol. Waste Sys., LLC v. Metro. Gov’t of Nashville and Davidson Cnty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *47 (Tenn. Ct. App. June 30, 2005) (“[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim.”) (quoting *Farrar*, 506 U.S. at 111-12, 113 S.Ct. at 573).

V. CONCLUSION

For the aforementioned reasons, we reverse the decision of the chancery court. Costs of this appeal are taxed to the appellee, Kim Brown, for which execution may issue if necessary.

CARMA DENNIS MCGEE, JUDGE