

P [REDACTED] A [REDACTED],

Appellant

v.

HOWARD COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-20

### OPINION

This is an appeal of a 45 day suspension of Appellant from Folly Quarter Middle School and exclusion from extracurricular activities for the rest of the semester and the following semester for distributing alcohol to another student on a school bus. The local board has filed a motion for summary affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant has filed a response to the motion claiming that local board's decision was illegal because the local school system violated its own rules as well as his due process rights and the evidence was not sufficient to show that Appellant gave the student alcohol on the school bus.

### FACTUAL BACKGROUND

In the spring of 2004, Appellant was an eighth grade student at Folly Quarter Middle School ("FQMS") in the Howard County Public School System ("HCPS"). In August of 2003, Appellant had signed a memorandum acknowledging that he understood the rules and policies of certain conduct in school. One of those policies concerns alcohol, other drugs, non-controlled substances, and inhalants. HCPS policy No. 3451-PR dictates that the minimum punishment for the first offense of distribution of alcohol, other drugs, non-controlled substances, and inhalants is a suspension from school for 45 days.

On May 11, 2004, an eighth grade student ("Student A") became very ill in class shortly after getting off the school bus. He was transported to Howard County General Hospital where it was determined that he had consumed an excessive amount of alcohol. Two days later when Student A returned to school he was questioned by the Principal Carl Perkins about the incident. Student A told Mr. Perkins that P [REDACTED] A [REDACTED] had bet him that he could not drink a water bottle filled halfway with alcohol. (Witness Statement #1).<sup>1</sup> Student A also told the Principal that P [REDACTED] gave him the alcohol on the bus. (Tr. 68-69). Mr. Perkins obtained a written statement from Student A. However, that statement did not mention the source of the alcohol. The Principal called Student A's mother to speak with Student A. Since Student A was at his father's house, the Principal then spoke with both Student A's father and Student A. The

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<sup>1</sup>In his transmittal accompanying the notice of appeal, Appellant affirmatively waived any rights to confidentiality in the proceedings. Thus, his full name is referenced in this opinion.

Principal explained that he needed a written statement as to who gave Student A the alcohol. (Tr. 69-70). Student A faxed the Principal a second written statement stating that P████ had given him “the alcohol that had to do with what happened on the bus”. (Witness Statement #2, Tr. 144). Student A was suspended from school for 10 days.

Principal Perkins also received a written statement from another student, Student C, who voluntarily came forward about the incident. In a very detailed statement, she noted that she observed Student A passing a bottle of Dasani water to P████ and receiving it back again. She stated that the water smelled “kind of different”, that another student said it was vodka, and that she saw Student A “chug” it. Once in school, Student C noticed Student A throwing the bottle into a green recycling bin. Finally, Student C said that P████ approached her and asked that she not tell anyone what he had done because he “could get arrested”. (Witness Statement # 4). Other school personnel also reported seeing Student A deposit the bottle in the bin. The bottle was retrieved, had the distinct scent of alcohol, and was given to Principal Perkins. (Tr. 74-5).

The Principal interviewed P████. P████ vehemently denied supplying the alcohol to Student A. The Principal knew that P████ had a medical condition that permitted him to carry water at all times, even on the school bus. The Principal requested that P████ retrieve his current bottle of water from his locker. The Principal compared the serial numbers and found that P████’s current Dasani water bottle and the one retrieved from the recycling bin were very close in number. (Tr. 76).

Principal Perkins also interviewed the bus driver and another student, Student D. The Principal testified that neither the bus driver nor Student D could testify to anything about the incident. (Tr. 157-161).

Based upon Student A’s statement, Student C’s statement, and the evidence concerning the water bottle, the Principal suspended P████ for 10 days with a request for a long term suspension. The Principal called Ms. A████’s office to inform her of the suspension. (Tr. 359). She then phoned Student A’s father who told her that Student A had stated that P████ had provided the alcohol to Student A. (Tr. 359-360).

The Superintendent’s designee for long-term suspensions and expulsion, Dr. Craig Cummings, talked with the Principal and received documentation from him concerning his investigation and findings. Dr. Cummings then held a suspension conference on May 24, 2004 with P████, his parents, and his attorney. During their 90 minute conference, Dr. Cummings read Student A’s and Student C’s statements to the A████s. (Tr. 322). The A████s produced two witness statements at that conference. Student B’s statement noted that he sat next to P████ on the bus and that nothing had happened between Student A and P████. Student B also accused Student A of being a liar. In his statement, Student E, while having no knowledge of the incident, stated that Student A had in the past asked him to get alcohol for him (Student A). (See Witness Statements). Mr. and Mr. A████ also provided a lengthy written statement in which they discussed the absence of alcohol from their home, how they could account for all

their Dasani bottles, and other information concerning P■■■■'s behavior. Based upon that meeting, Dr. Cummings decided to investigate further as he had conflicting information about the incident on May 11<sup>th</sup>. (Memo of 5/24/04 - Office of School Administration, Suspension Hearings).

Dr. Cummings met at length with Principal Perkins and Assistant Principal Julie Rout about how they had come to their conclusions. They noted that P■■■■ and Student A were "almost inseparable" at school and questioned why Student A would implicate his friend unless it was the truth. (Investigative notes of Dr. Craig Cummings). Dr. Cummings was still unsure about where and when the alcohol was given to Student A. Thus, he called Student A's father to ask permission to speak with Student A again. The father gave permission and the phone number where Student A could be reached. Dr. Cummings asked Student A if he would speak to him about the incident and assured him that he would not force Student A to answer any question about which he was uncomfortable. Dr. Cummings asked Student A who had given him the alcohol and Student A confirmed it was P■■■■. Dr. Cummings asked directly where P■■■■ had given Student A the alcohol and Student A replied that P■■■■ had given it to him on the school bus that morning. (Memo of 5/24/04 - Office of School Administration, Suspension Hearings, Tr. 191-198).

Based upon his investigation, on May 26, 2004, Dr. Cummings suspended P■■■■ for 45 days, the minimum punishment for this infraction, with a mandatory prohibition from extracurricular activities. P■■■■ was referred to Evening School.

On June 1, 2004, Appellant filed an appeal to which he attached a written signed statement from Student A that recanted Student A's previous statements. The new statement indicated that Student A implicated P■■■■ because he was mad at him. Student A stated that in reality he "got it from an 18 year old at giant selling water bottles of it for \$10." (Witness Statement). Appellant also offered a hard copy of an Instant Message ("IM") conversation between Student A and P■■■■. Without any heading or lead-in, the IM begins with Student A saying "p■■■■ i know u didn't give me the alcohol" and reiterates that Student A got the alcohol "from some kid at my mom's giant." (Witness Statement).

Based upon these recantations, Dr. Cummings investigated further. He called Student A's father and asked for a meeting with Student A and a parent. Student A's father was surprised when Dr. Cummings informed him that Student A had recanted his version of the incident. (Memo re Meeting with Student A and Student A's mother, 6/30/04.) His father indicated that Student A was living with his mother for the summer and provided her telephone number. Student A's mother brought Student A to the meeting.

As a result of the meeting, Dr. Cummings noted that both parents stated that they had no knowledge of Student A recanting his original statement until Cummings' phone call. Both parents stated that they questioned their son and he said that his earlier versions of the incident were the truth. They reported that he recanted the statements because he was getting ostracized

by his friends. (Memo re Meeting with Student A and Student A's mother, 6/30/04).

Dr. Cummings asked Student A why he had recanted his original statement. Student A stated that when he returned from suspension, several students criticized him for identifying P████. Student A indicated that he talked to P████ and P████ suggested that he recant his original statement. Student A did so, gave the statement to Student B, who in turn gave it to P████. (Memo re Meeting with Student A and Student A's mother, 6/30/04).

Student A also stated that he had fabricated the IM with P████ to exonerate him. Dr. Cummings asked Student A one last time which version of the events was accurate and Student A stated that the original statements reflected the truth. He recanted his story when ridiculed by other students upon his return to school. (Memo re Meeting with Student A and Student A's mother, 6/30/04). Based upon his conversations with Student A's father by phone, and Student A and his mother in person, Dr. Cummings determined that Student A's original statements were true. (Memo re Meeting with Student A and Student A's mother, 6/30/04).

The appeal was heard by Hearing Officer Sue Ann Mahaffey on August 8, 2004. According to her decision, there were two issues presented: (1) whether P████ was provided due process and the school board followed its policies and procedures; and (2) whether the evidence supported the superintendent's decision. After hearing testimony and receiving exhibits from both parties, the Hearing Officer issued her decision on September 8, 2004, in which she found that there were no due process violations and that the local board procedures and policies were followed. She further noted that even if due process violations had been found, those violations would have been "cured" by the full evidentiary hearing.

With respect to the sufficiency of evidence to uphold the suspension, the Hearing Officer was "troubled" by the school's failure to obtain written statements from the bus driver and Student D. Ultimately the Hearing Officer wrote that she could not:

find that the decision of involvement of the part of P████ A████ was supported overall by the evidence. In particular, in the initial investigation, no written statements were obtained from the school bus driver, or student D. It is not clear exactly what questions were asked and what their responses were. School administrators state that these individuals did not "see anything". Depending on how the question was asked, their negative responses may have meant that, in fact, they did not see anything one way or the other (as taken by Mr. Perkins and his staff) or may have meant that nothing happened. Student D certainly was in a position to have seen the events, if they had occurred as stated by Student A....According to the written statement submitted by Mrs. A████, the school bus driver, Mrs. Neel, asked Student D what had happened because she 'knew that she would tell the truth', and was told that Student D

had seen Student A drinking out of a water bottle that morning but that P [REDACTED] A [REDACTED] and Student A had no interaction with each other...<sup>2</sup>

Student B gave a written statement, and also testified, that he sat next to P [REDACTED] A [REDACTED] that morning and that both of them had headphones on, were listening to music and that P [REDACTED] had no interaction with Student A that morning.

(Hearing Officer Decision, p. 16). The Hearing Officer, on the other hand, found Student C's statement too reliant on what she heard from others. Rather than a neutral witness, the Hearing Officer found

Student C's statement, although detailed, to be heavily reliant of what she learned from unnamed others after the event, and for a neutral witness, overly eager to supply information from her many sources, as if very interested in being part of the process.

(Hearing Officer Decision, p. 16).<sup>3</sup>

The Hearing Officer also noted her concern with Student A's credibility: "His statements, viewed overall, do not impress the undersigned with his credibility, or reliability as a witness." (Hearing Officer Decision, p. 17).<sup>4</sup> Finally, the Hearing Officer noted: "Had each of the available witnesses testified in person, Student A, Mrs. Neel, Students C and D, no one can tell what the outcome would have been". The Hearing Officer found the evidence insufficient to uphold the superintendent's suspension decision.

The local board heard oral argument on November 29, 2004. Based upon that argument, a review of the transcript and exhibits from the hearing, and finding the written statements of Students A & C more credible than Appellant's denials, the local board, by a four to one vote, declined to adopt the recommendations of the hearing officer and upheld the 45 day suspension.

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<sup>2</sup>According to testimony, Student D got on the bus before P [REDACTED] and was sitting directly behind him the entire bus ride. (Tr. 314-315)

<sup>3</sup>Since Student C did not testify at the hearing, this conclusion as to Student C's credibility was not based upon Student C's demeanor, but rather the hearing officer's opinion of Student C's written statement.

<sup>4</sup>This opinion was also not demeanor-based, as Student A did not testify in person.

This appeal followed.<sup>5</sup>

### ANALYSIS

The decision of a local board with respect to a student suspension or expulsion is considered final. Md. Educ. Code And. § 7-305. Therefore, the State Board's review is limited to determining whether the local board violated State or local law, policies, or procedures; whether the local board violated the due process rights of the student; or whether the local board acted in an otherwise unconstitutional manner. COMAR 13A.01.05.05.G(2). If any due process violations or other illegalities are found, the State Board may reverse or modify a student suspension or expulsion. COMAR 13A.01.05.05G.(3)

Appellant first asserts that the Superintendent's designee violated HCPS Policy 3431-PR III 2 c & d by "not properly conducting an independent investigation". (Appellant's Reply, p. 6). There is record evidence that the Superintendent's designee did in fact conduct an independent investigation by conferring with the principal and assistant principal, interviewing Student A, speaking with Student's A's father and mother and meeting with P [REDACTED] and his parents for 90 minutes. The designee further interviewed Student A and his parents after Student A recanted his earlier version of the incident. (Tr. 238-241, 209-213).

Moreover, even if there were procedural violations at the school level, the full evidentiary hearing before the hearing officer at which Appellant had the opportunity to present testimony, other evidence, and cross-examine witnesses cured any alleged procedural deficiency that may have existed. See *C [REDACTED] W [REDACTED] v. Board of Education of Anne Arundel County*, 7 Op. MSBE 649 (1997) (failure to give prompt notice would be cured by local board's full evidentiary hearing on appeal); *West & Bethea v. Board of Commissioners of Baltimore City*, 7 Op. MSBE 500 (1996) (failure to hold conference within ten days was cured by the *de novo* administrative hearing on merits before the local board); *Harrison v. Somerset County Board of Education*, 7 Op. MSBE 391 (1996) (failure to grant conference with superintendent or his representative in timely fashion was cured by local board's full evidentiary hearing on appeal). *Ralph Cruz and Angela Morales v. Howard County Board of Education*, MSBE Op. 02-56 (December 4, 2002).

Next, Appellant argues that his due process rights were violated by not being able to confront witnesses and by the admission of hearsay evidence. However, the State Board has held that in student discipline cases, hearsay and circumstantial evidence are admissible and that there is no right to confront student witnesses. See *Wynad v. Baltimore County Board of Education*, 7 Op. MSBE 586 (1997) (direct evidence not necessary and circumstantial evidence sufficient to uphold student discipline); *Wilson v. Baltimore County Board of Education*, 7 Op. MSBE 383

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<sup>5</sup>Appellant filed a request for reconsideration with the local board on December 10, 2004 which was denied by letter dated December 17, 2004. We note the suspension has been served and the only remedy now available would be expungement of P [REDACTED]'s records.

(1997) (no right to confront or cross-examine student accusers in student discipline cases).

Appellant also contends due process was violated because he was denied a copy of the hearing transcript under the Maryland Public Information Act. The local board indicates that Appellant was permitted to review the transcript on two separate occasions and obtained portions of the transcripts. Moreover, COMAR provides that the cost of transcribing the local proceedings is borne by the appellant. COMAR 13A.01.01.03C(3). It is therefore the appellant's choice whether to purchase a copy of that transcript. Finally, we note that the State Board does not have jurisdiction to hear claims under the Public Information Act. *See Schwalm v. Montgomery County Board of Education*, 7 Op MSBE 1326 (1998)(request for information under the Public Information Act must follow procedures of that act).

On the merits, Appellant claims that the local board erred when it declined to adopt the hearing officer's proposed decision. Appellant maintains that the board's "unexplainable" decision is not based on a weighing of the evidence; rather, that it seems to be based on a misguided, uncritical loyalty to their school system administrators. Further, Appellant asserts that he has vehemently denied continuously supplying alcohol to Student A. He also points to the assertion that the student seated next to Appellant on the day of the incident also testified under oath that Appellant did not give anything to Student A. Further, the driver of the school bus said that she did not see Appellant give anything to Student A. And, Appellant's mother testified under oath that Appellant does not drink alcohol and alcohol is not kept in their home. Appellant asks, "What more can a student do to prove his innocence?"

The local board, however, draws the following inferences from written statements and other evidence:

"The fact-finder is confronted with P [REDACTED] A [REDACTED], who denied any involvement in this unfortunate incident, and student A, who repeatedly identified P [REDACTED] as the source of the alcohol, recanted that identification in a written statement three weeks later and in an instant message a month later, and then reaffirmed his original statement in a subsequent conversation with Dr. Cummings.

Credibility, therefore, is obviously a critical issue.

The hearing officer was troubled 'in particular' by the failure to obtain a written statement from the bus driver or student D. We are not at all troubled by the 'failure' to obtain a written statement from the bus driver, who, it is uncontested, did not see any of the occurrences that are alleged to have happened at the back of the bus. We are not at all troubled by the 'failure' to obtain a written statement from student D, who is reported by the bus driver to have said four days after the incident that P [REDACTED] and student A did not talk to each other or interact that morning. It is quite possible that she did not see interaction. We are more interested, for purposes of determining credibility, in the statement of witnesses who did see something. The student who provided a written statement and observed the events on the bus was student C.

Even though this student is described by the hearing officer as a ‘neutral witness,’ the hearing officer dismisses the statement because student C is deemed by the hearing officer to be ‘overly eager to supply information from [the student’s] many sources, as if very interested in being part of the process.’ This subjective assessment is far too dismissive of the only neutral witness to provide information.

We believe that student C’s statement deserves weight for the following reasons. Student C has no apparent reason to tilt her story in any particular direction; the student is ‘neutral’ with nothing to gain or lose. This student gave a statement that was made close to the event and, therefore, student C is more likely to have a fresher and more accurate recollection of the events. The statement is detailed which, again, lends credibility to the description of events. The statement is corroborated in part by the fact that the water bottle that had contained the alcohol was found in the green, recycling trash can, just as student C reported. Furthermore, student C voluntarily reported what this student saw to a classroom teacher and then to administrators; the statement was not solicited by anyone advocating a particular position for or against P [REDACTED] A [REDACTED].

Student A’s written statement and instant message recanting his initial identification of P [REDACTED] as the source of the alcohol is disturbing. We credit student A’s initial statements for the following reasons. The statements identifying P [REDACTED] as the source of the alcohol were made close to the time of the event, before the specific consequences of such an identification were known to him or anyone else. It was only when the consequences were known and the opportunity for peer pressure to build that his story changed. We also find the sudden identification of a mysterious stranger, who student A happens to know is 18 years old, selling \$10 bottles of vodka at the local Giant to be preposterous. This conclusion is heightened by the obviously staged instant message between P [REDACTED] and student A.

Not only do we give credence to student A’s initial and repeated identification of P [REDACTED] as the source of the alcohol, we have doubts about P [REDACTED]’s credibility. He obviously has a motive to lie about his involvement. He also testified falsely at the hearing. According to P [REDACTED], (a) he was called to the office on May 13<sup>th</sup> without explanation; (b) he was allegedly told by the principal, ‘as soon as [he] walked into the office,’ to go back to his classroom to get his water bottle; (c) he was then asked by the principal, without further explanation, to write a statement about what happened on May 11<sup>th</sup> (and he somehow knew what to write about); (d) Mr. Perkins then took the written statement, had him wait until the end of the day, silently handed him a paper, and said go to your locker and go home; and (e) denied any face to face discussion or communication with the principal or any administrator about the events or even the purpose for his being called to the office (3 times), retrieving his water bottle, or being asked to write a statement. This version of events is completely at odds with the sworn testimony and is simply incredible.

We also give considerable weight to the credibility determinations made by the two experienced school administrators/educators who were involved in investigating this incident.



We find the investigation by Mr. Perkins and Dr. Cummings to have been conducted in accordance with standard procedures. Appellant attempted to cast doubt on Mr. Perkins' objectivity by alleging that the principal 'had it in' for P[REDACTED]. The record fails to support this bald assertion. Of the more than one dozen disciplinary referrals shown in the record, nearly all arose in the classroom, playground, or cafeteria resulting in staff reporting P[REDACTED] for discipline. The record shows that half of the disciplinary actions were instituted by the assistant principal and half by the principal. We find no basis for concluding that the principal had any particular bias against P[REDACTED]. Dr. Cummings demonstrated appropriate caution and thoroughness in his handling of this matter, taking the extra time and due diligence to re-interview student A after the recantation.

Finally, we are struck by the fact that P[REDACTED] is never asked directly and never testifies directly under oath that he did not give the alcohol to student A that day." Local board opinion, at 3-7.

In this case, we note that the hearing officer specifically based her decision on her opinion that Student C's written statement and Student A's written statement were not credible. However, neither of these determinations was demeanor-based because neither of these students appeared before the hearing officer. Based upon the legal principles described below, we believe the local board could, as it did, infer a different scenario from the evidence.

The Maryland Court of Special Appeals has discussed the deference to be given to the various types of findings of an administrative law judge:

Anderson and *Universal Camera* teach that all of the ALJ's findings "are to be considered" by the agency. Generally, the ALJ's findings, however, "are not entitled to any special deference from the agency except insofar as [they] are based upon witness credibility determinations"..."Credibility" has a much narrower meaning, however, if it is interpreted as synonymous to witness demeanor (citation omitted). The prevailing view in the federal courts is that only the latter, *i.e.* demeanor-based determinations, are the sort of credibility determinations entitled to special deference.

*Department of Health and Mental Hygiene v. Shrieves*, 100 Md. App. 283, 298-299 (1994).

In *Gabaldoni v. Board of Physician Quality Assurance*, the Maryland Court of Special Appeals discussed when an agency can infer a different scenario from the facts presented:

Earlier in *Shrieves*, Judge Motz made it clear that there is an important distinction between demeanor-based findings and derivative inferences, *i.e.*, inferences drawn from the evidence

itself. *Id.* at 299 (citing *Kopack v. National Labor Relations Board*, 668 F. 2d 946, 953 (7<sup>th</sup> cir. 1982). In this regard, the *Shrieves* court, 100 Md. App. at 300, quoted *Penasquitos Village, Inc. v. National Labor Relations Board*, 564 F. 2d 1074 (9<sup>th</sup> Cir. 1997) with approval, as follows:

The [agency], therefore, is viewed as particularly capable of drawing inferences from the facts...Accordingly...a [reviewing court] must abide by the [agency's] derivative inferences, if drawn from not discredited testimony unless those inferences are "irrational"... "tenuous" or "unwarranted"...

*Id.* at 1079 (internal citations omitted).

141 Md. App. 259, 262 (2001). Here, the local board drew its inferences from credible testimony from HCPS administrators, the witness statements of Students A and C, and other evidence including the Dasani water bottles. The inferences were not from "discredited oral testimony". The local board decision analyzes all of the factual issues and legal arguments in detail, including a thorough examination and judgment on the issue of the "recantation" of Student A. The local board's inferences were therefore not "irrational, tenuous, or unwarranted".

It is evident, based on the local board's decision to uphold the suspension, that the local board found the school officials' statements and explanations of the statements from Student A and Student C more credible than P█████'s statement. *See, e.g., Board of Trustees v. Novik*, 87 Md. App. 308, 312 (1991), *aff'd*, 326 Md. 450 (1992) (within the board's province to resolve conflicting evidence; where conflicting inferences can be drawn from the same evidence, it is for the board to draw the inferences.) The State Board may not substitute its judgment for that of the local board unless there is independent evidence in the record to support the reversal of a credibility decision. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994). Based upon our review, we find that Appellant has provided no basis for reversing the evidentiary determinations made by the local board.

## CONCLUSION

Because we find no due process violations or other illegalities in the proceedings, we uphold the student discipline decision of the Howard County Board of Education.

Edward L. Root  
President

Dunbar Brooks  
Vice President

Lelia T. Allen

JoAnn T. Bell

J. Henry Butta

Beverly A. Cooper

Calvin D. Disney

Clarence A. Hawkins

Karabelle Pizzigati

Maria C. Torres-Queral

David F. Tufaro

May 25, 2005