

ANNIE FOSTER,

Appellant

v.

ANNE ARUNDEL COUNTY  
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 14-61

## OPINION

### INTRODUCTION

Annie Foster (Appellant) appeals the decision of the Anne Arundel County Board of Education (local board) to reassign her from a position as an assistant principal to that of a teacher. The local board submitted a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded to the motion and the local board replied.<sup>1</sup>

### FACTUAL BACKGROUND<sup>2</sup>

Appellant received a bachelor's degree from the D.C. Teacher's College in 1997 and an MBA in Finance from Atlanta University in 1980. After working in other school systems, Appellant joined Anne Arundel County Public Schools (AACPS) in 1997. From 2004 to 2006, she was the business education chair and a teacher at Arundel High School ("Arundel").

She transferred to the Center for Applied Technology – North ("CAT North") to serve as an assistant principal during the 2006-07 school year. CAT North is a vocational school that serves roughly 1,600 to 1,700 students. Appellant was one of two assistant principals at the school and spent five years in that role. (Findings of Fact at 121).

During her first year (2006-07), she received an overall rating of excellent. In her second year (2007-08), she received a rating of highly effective with a numeric score of 41 out of a possible total 55 points. She challenged all of her ratings in specific categories that were not deemed outstanding. During her third year (2008-09), she received an overall rating of highly effective with a numeric score of 48. In her fourth year (2009-10), she received an overall rating of highly effective with a numeric score of 48.

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<sup>1</sup> Appellant requests oral argument in this matter. The State Board may decide an appeal on the record without a hearing or oral argument. COMAR 13A.01.05.06.B. Given that an extensive record was developed below, we decline the request for oral argument.

<sup>2</sup> The hearing in this case resulted in more than 1,800 pages of transcript, 188 exhibits, and 133 pages of findings of fact, conclusions of law, and recommendations from the hearing examiner. Accordingly, this factual background highlights only the most relevant facts.

During the 2010-11 school year, Appellant, who is African American, filed a complaint with AACPS alleging that the principal was treating her differently based on her race. There was only one African American teacher and one other African American administrator at the school at the time. Appellant alleged that she was given assignments that were different from the school's other assistant principal, who was white. She alleged that she was told she had been placed in her job to "help African American students," and she claimed the environment was "hostile." The school's principal was interviewed as part of an AACPS investigation in March 2011 and denied that he treated Appellant differently because of her race. (Findings at 7-8, 121, 122).

In her fifth and final year (2010-11), Appellant received an overall rating of satisfactory, with a numeric total of 36 points. She rated as highly effective in four categories, satisfactory in six, and "needs improvement/marginal" in one: "provides a structural framework for the management and organization of an effective learning community." In explaining the low rating, the principal described how the Appellant missed planning meetings, challenged the principal in other meetings in front of staff, and told school staff that the school was not being run properly. During a weather emergency, the principal claimed the Appellant did not follow directions. In general, the principal described her as working too often in isolation and not collaboratively with other staff. He attributed this, in part, to the fact that Appellant's request for a transfer to another school had not been approved the prior year. The principal explained that Appellant's performance "resulted in a negative influence on the school community and an ineffective use of school resources." (Findings at 95-97, 122).

Appellant was reassigned as an assistant principal to Arundel for the 2011-12 school year, the first time she had been assigned as an administrator at a comprehensive school.<sup>3</sup> When Appellant started working at Arundel, she was the only African American administrator. The student population at Arundel is roughly 25 to 28 percent African American.

### *Assignment of Duties*

Arundel Principal Sharon Stratton held an informal retreat at her home in July 2011 with all of the administrators for the upcoming school year. During the meeting, the group discussed various assignments and duties and Appellant was made a co-chair of the task force to eliminate the student achievement gap, and was put in charge of Honor Roll Assemblies. Later, Appellant was assigned to a mentoring program aimed at male African American students. Appellant claimed that she was assigned to certain duties, in particular the mentorship program, based on her race and that she did not want to be viewed as an administrator for only the African American students. Principal Stratton explained that administrators were allowed to choose their assignments and she recalled that Appellant was hesitant in volunteering. She denied labeling Appellant as being the administrator only for African American students. (Findings at 69, 84, 123; App. Ex. 121).

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<sup>3</sup> An associate superintendent for AACPS testified that Appellant specifically mentioned Arundel as a possible transfer location, a claim that the Appellant denies. (Findings at 116, 119).

### *Professional Growth Plan*

Around the start of the school year, Principal Stratton informed the Appellant that she would be placed on a professional growth plan in order to address her “needs improvement” rating from her prior year-end evaluation at CAT North. Appellant testified at the hearing that she was shocked by this news and claimed that Principal Stratton never discussed the plan with her. Principal Stratton, meanwhile, expected Appellant to take the initiative on developing ideas for future growth and sent invitations to meet through the Outlook email program, invitations that Appellant did not accept. The Appellant later explained that she did not receive Outlook invitations because of a problem with her computer, but IT staff found nothing wrong with the computer. (App. Ex. 65, Findings at 12, 46, 72-73, 77, 123).

### *Missed Meeting*

Near the start of the 2011-12 school year, Appellant and another assistant principal, G.D., were assigned to meet with a new teacher. G.D. did not appear for the meeting. She later explained that she had been on the phone with Principal Stratton at the time and the call lasted longer than she expected. By the time G.D. arrived for the meeting, it was already over. Appellant felt “disrespected” by G.D.’s actions and complained to Principal Stratton that she believed G.D.’s actions were motivated by race because both Appellant and the teacher were African American. (Findings, 69-70, 123).

On September 8, 2011, Principal Stratton called a meeting between G.D. and Appellant to discuss the matter. G.D. agreed that she should have asked permission to place Principal Stratton on hold so that G.D. could let the Appellant know that she would not be able to attend the meeting. Principal Stratton cautioned Appellant against immediately accusing other staff members of racial animus because it could create a divisive school environment. (Findings, 69-70).

### *Assignment of Substitute Teachers*

Administrators at Arundel shared the duty of scheduling substitute teachers on a rotating basis. Appellant was originally assigned to begin the task starting in late April 2012, but she was later moved up in the rotation and assigned to start the task at the end of October 2011. Appellant contends that she was moved up in the rotation as a means of setting her up to fail. After Appellant assumed substitute duty, Principal Stratton received numerous complaints from teachers and substitutes about problems with scheduling. Principal Stratton herself documented one instance where a classroom was not covered with a substitute. (Appeal at 15, Findings at 74-75, 81-82, 104-07, 112, 124).

When confronted about the scheduling problems, Appellant blamed other teachers. Although Principal Stratton confirmed that some teachers were not following the proper protocol for requesting substitutes, she also concluded that Appellant was having trouble using the electronic scheduling system. She suggested Appellant draft a memo to remind the teachers about proper substitute requesting procedures. Appellant declined to do so because she did not feel it was part of her job. (Appeal at 15, Findings at 74-75, 81-82, 104-07, 112, 124).

During the fall, an incident occurred where a school secretary accidentally texted the wrong room number assignment to a substitute. Appellant accused the secretary of trying to sabotage her and alleged that there was “a lot of racism going on.” (Findings at 81, 104-06). An investigator from AACPS’s central office conducted interviews into the incident as a result of Appellant’s complaint. Principal Stratton later held a counseling session with the Appellant regarding complaints about substitutes. (Findings at 124).

#### *Plan of Action for Improvement*

After Principal Stratton felt that Appellant was “not getting anywhere with the professional development plan,” she created a Plan of Action for Improvement, in consultation with Appellant. Appellant’s plan of action was focused on the single deficient area from her prior evaluation, “provide a structural framework for the management and organization of an effective learning community.” AACPS policy allows for the possibility of an employee to be terminated for failure to complete the plan of action. (Findings at 32, 73).

#### *Mid-year Evaluation*

On December 16, 2011, Appellant received a mid-year evaluation of “marginal” with a numerical score of 25. Principal Stratton acknowledged that she did not normally conduct midyear evaluations but explained that she felt it was important for Appellant “to see where she was doing well and where she needed to focus.” Appellant received four satisfactory ratings, six marginal ratings, and one rating that was “not met/ unsatisfactory” in the area of “using technology and multiple sources of data to improve classroom instruction.” The comments on the evaluation faulted Appellant for not participating in collaborative discussions during staff meetings; failing to properly document teacher observations and crafting observation reports that lacked data, coherence, and appropriate grammar; failing to be proactive with students and neglecting to follow-through on discipline; and struggling with multitasking. (Findings at 76-77, 124-25).

In addition, Principal Stratton explained that Appellant failed to prepare monthly reports for administrative meetings and did not always return emails or phone calls promptly. She reported that she received complaints from parents about the tone of voicemails left by Appellant. Further, discipline files handled by the Appellant were lacking documentation and were in disarray. Other staff members complained about having to pick up some of Appellant’s duties. (Findings at 73-74, 76-77, 82).

Appellant was upset by the rating because she did not believe her performance was deficient. She also maintained that the reason she had not met the goal of “using technology and multiple sources of data” was because Principal Stratton would not allow her to attend professional development sessions. (Findings at 124). Appellant filed a written rebuttal to the rating and sent copies of the rebuttal to the local and state branches of the NAACP and to the AACPS central office. (Findings at 125; App. Ex. 121a).

After the midyear evaluation, a support team was put into place to provide Appellant with additional guidance. The team met twice with Appellant and heard presentations from her

regarding the mentorship program and her effectiveness as an instructional leader. The regional assistant superintendent for AACPS shadowed Appellant in February 2012 as part of the improvement plan. On March 28, 2012, she was informed by letter from an associate superintendent that if she did not improve on her midyear evaluation that she would be reassigned to a teaching position. (Findings at 77-78, 124-25; App. Ex. 138).

In April 2012, the AACPS investigator again met with Appellant to follow-up on her earlier complaints of racial discrimination. According to the investigator, the Appellant appreciated the assistance she received from the support team. She told the investigator that she thought Principal Stratton was fair and that she no longer had concerns about race. The investigator determined that her racial discrimination complaint was “withdrawn” and concluded that there was no evidence of discrimination. Appellant denies having ever withdrawn her accusations. (Findings at 125, Appeal at 27-28).

### *Final Evaluation*

On May 29, 2012, Appellant received an overall unsatisfactory evaluation with a numeric score of 17. She received one satisfactory rating, four ratings of needs improvement/marginal, and six ratings of “standards not met/unsatisfactory.” The comments stated that Appellant had not met the goals for the mentorship program; had not worked within the school to help eliminate the achievement gap; did not use data to monitor the mentorship program’s effectiveness; lacked the ability to use technology to access data and did not use it as part of her assessments; provided no concrete feedback in her teacher observations; filed reports that contained grammatical errors; demonstrated a lack of understanding of effective instructional strategies and techniques; did not participate in planning or implementation of staff development; and was unable to multitask. Principal Stratton found that her performance failed to improve from the midyear evaluation. The one area of strength for Appellant was her community engagement. (Findings at 79-80).

On June 15, 2012, the superintendent reassigned Appellant from being an assistant principal to a classroom teacher. (App. Ex. 138). Appellant appealed and the local board referred the matter to a hearing examiner. A hearing was conducted over the course of seven days: April 30, 2013; May 7, 2013; May 8, 2013; June 7, 2013; June 10, 2013; September 17, 2013; and September 18, 2013. Appellant was represented by counsel during the hearing and testified on her own behalf. She also called several witnesses who attested to her dedication to the mentorship program and her strong character.

On March 24, 2014, the hearing examiner recommended that the local board affirm the superintendent’s decision to reassign Appellant to the position of classroom teacher. The hearing examiner concluded that Appellant’s reassignment was not based on race and that her poor evaluations and transfer were “grounded on legitimate and real performance-based concerns and issues.” (Recommendation at 133). The local board heard oral argument on April 22, 2014, and adopted the hearing examiner’s recommendation on May 21, 2014.

This appeal to the State Board followed.

## STANDARD OF REVIEW

A local board's decision to reassign a school administrator is presumed to be *prima facie* correct and the State Board will not substitute its judgment for that of the local board unless the decision is shown to be arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A; *see Cain v. Wicomico County Bd. of Educ.*, MSBE Op. No. 12-36 (2012).

## LEGAL ANALYSIS

In Maryland, a local superintendent has broad statutory authority to transfer personnel "as the needs of the system require." Md. Code, Educ. ' 6-201(b); *see Cain v. Wicomico County Bd. of Educ.*, MSBE Op. No. 12-36 (2012). The superintendent's broad discretion includes the ability to transfer personnel to a lateral position or one of lower rank. *See Hurl v. Bd. of Educ. of Baltimore County*, 107 Md. App. 286 (1995); *Cain*, MSBE Op. No. 12-36 (citing local board opinions). "No tenure attaches to administrative positions. Rather, employees in administrative positions acquire and maintain tenure in employment with the school system and not in any particular position." *Cain*, MSBE Op. No. 12-36 (citing *Cameron v. Bd. of Educ. of Baltimore County*, 6 Op. MSBE 814 (1995)).

Appellant acknowledges this broad discretion, but argues that the basis for her transfer was unreasonable and illegal because it was based on racial discrimination and on retaliation for her reporting of racial discrimination. Appellant contends that the hearing examiner improperly excluded certain facts from his findings, relied too heavily on the testimony of the AACPS investigator who she claims had an incentive to testify falsely, ignored circumstantial evidence that the Appellant was discriminated against based on her race, and did not sufficiently address Appellant's argument regarding retaliation. We shall address these allegations in turn.

### *Appellant's Counsel*

As a preliminary matter, the local board has raised a question concerning the ability of Appellant's counsel's to represent her in this appeal. Midway through the appeals process, Appellant substituted counsel. Her new counsel filed a single document on her behalf as part of this appeal: an Opposition and Response to the Motion for Summary Affirmance and an accompanying Memorandum. Letterhead and email signature lines from Appellant's counsel state that she is admitted to practice law in the District of Columbia and New York. She does not represent herself as being barred in Maryland. The local board highlights this issue for our consideration, but does not ask us to take any particular action.

COMAR 13A.01.05.04.D(1) provides that a party "may be accompanied, represented, and advised by counsel at all stages of an appeal." The regulation does not specifically state that counsel must be barred in Maryland. A review of the Rules Governing Admission to the Bar of Maryland indicates, however, that special admission is required for out-of-state attorneys to participate "in an action pending in any court of this State, or before an administrative agency of this State or any of its political subdivisions." Rule 14. In order for an out-of-state attorney to participate in an action, Rule 14 requires that an attorney barred in Maryland move for the admission of the out-of-state attorney in circuit court and serve as co-counsel in the proceeding.

In our view, that procedure should have been followed here. The filings are now complete, however. Accordingly, we will not prejudice the Appellant by striking the Response to the Motion for Summary Affirmance.

#### *Failure to Address Appellant's Evidence*

Appellant argues that the hearing examiner failed to consider the evidence she presented and relied too heavily on the evidence presented by AACPS's witnesses. Appellant points out that she has received numerous accolades from her supervisors, fellow teachers and staff, and parents during the course of her career. She provides more than four full pages of these examples as part of her appeal.

Hearing examiners are not required to give equal weight to all of the evidence. *See Amanda B. v. Bd. of Ed. of Baltimore County*, MSBE Op. No. 14-24 (2014). "It is the Hearing Examiner's duty to weigh all of the evidence and issue a decision based upon the evidence the Hearing Examiner finds to be credible and relevant." *Id.* A hearing examiner is "not obligated to rely upon information provided by the Appellant if the [Hearing Examiner] did not find it to be relevant or credible." *Id.*

The hearing examiner states in a footnote to his five-page findings of fact that the facts listed were those "relevant for the issues presented and do not necessarily reflect everything that was presented." (Findings at 121). Rather than ignoring Appellant's accolades, he acknowledged them as part of his findings. (Findings at 126). In addition, the hearing examiner summarized all of the testimony at the hearing across 120 pages. Approximately half of that testimony was from the Appellant. In our view, the hearing examiner properly considered all of the evidence in the case, including the evidence presented by Appellant.

#### *Racial Discrimination*

Appellant's claims of discrimination are closely intertwined with her claims of retaliation. Essentially, Appellant argues that she was illegally discriminated against based on her race and that she was illegally retaliated against (in the form of poor performance evaluations and a reassignment to teaching) for reporting her accusations.

Claims of employment discrimination are analyzed under a "burden-shifting analysis" which requires an employee to provide a *prima facie* showing that (1) she belongs to a protected class and (2) has sufficient evidence to give rise to an inference of unlawful discrimination. *Yang v. Prince George's County Bd. of Educ.*, MSBE Op. No. 09-30 (2009) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). *See also Williams v. Maryland Dep't of Human Res.*, 136 Md. App. 153, 164-65 (2000). The burden then shifts to the employer to present evidence of a non-discriminatory reason for the termination. *Id.* If the employer meets the burden, the employee must then show that the stated reason was merely pretextual. *Id.*

Appellant acknowledges that her accusations of racial discrimination are based on circumstantial evidence, but she argues that the evidence, taken together, fully supports her claim. She alleges the following:

- Principal Stratton reassigned an African American bus driver to another school after the bus driver had a verbal altercation with her. The bus driver sued AACPS for racial discrimination and eventually was reassigned back to Arundel. (Findings at 87).
- Principal Stratton has never had more than one African American administrator at a time in more than a decade at the school. (Findings at 84).
- Appellant was assigned to programs and projects related to African American students, particularly the mentorship program. (Findings at 17-18).
- Appellant was assigned to mentor a new African American teacher at the school. (Findings at 34, 57). Another assistant principal assigned to also mentor the teacher failed to show up for their first meeting.
- Principal Stratton did not attend school activities focused on African American students. (Findings at 23, 24, 26, 87).
- Principal Stratton told Appellant that the program to eliminate the achievement gap “gets on her [expletive] nerves.” (Findings at 111).
- Another African American administrative intern told Appellant at the start of her tenure that the school was racist and that she should be careful. (Findings 8-9, 36, 39).
- Another administrator who engaged in serious misconduct was reassigned as an assistant principal to another school, rather than disciplined more severely, because he was white. (Appeal at 24).
- Principal Stratton advised Appellant not to immediately turn issues into racial ones. She also testified that race had been an issue with Appellant throughout the school year. (Appeal at 25).
- Principal Stratton unfairly overburdened Appellant with assignments, including having her assign substitute teachers early in the school year, in an effort to have her fail. (Response to Motion at 9).
- Appellant received a midyear evaluation and end-of-year evaluation that were negative and not in line with her excellent performance. (Response to Motion at 8).
- One of Appellant’s witnesses, who assisted with the mentor program, felt that Principal Stratton was not sensitive to racial issues and did not provide Appellant with appropriate support. (Response to Motion at 9).

There is no dispute that Appellant, as an African American, was in a protected class. We also agree with Appellant that circumstantial evidence can provide support for a claim of discrimination. *See, e.g. Reeves v. Sanderson Products, Inc.*, 530 U.S. 133, 141, 147 (2000). In



reviewing her claim, it is our view that she has presented evidence, albeit circumstantial, sufficient to support an inference of discrimination.

It is also our view, however, that the circumstantial evidence cited by Appellant fails to overcome the local board's rationale that she was reassigned because of poor performance. For instance, Appellant claims she was improperly assigned to activities involving African American students because of her race. The AACPS investigator concluded, however, that it was difficult to determine to what extent Appellant had volunteered for those duties, noting that Appellant "wanted the freedom to be able to work on such activities, but did not want to be required to do so because of her race." (Findings at 133). Much of the circumstantial evidence cited by Appellant further unravels under scrutiny.

The local board has presented ample evidence to demonstrate that its decision to reassign Appellant was not merely pre-textual but based on a history of performance issues. The record shows that Appellant was in her first year as an assistant principal at Arundel, the first time she had served in that role at a comprehensive high school. She acknowledges that she was tasked with many new responsibilities that she had not handled before, such as scheduling substitute teachers. We conclude that the school's desire to improve Appellant's performance through professional growth and improvement plans was the opposite of discriminatory: by alerting Appellant to shortcomings and offering ways to improve, the school demonstrated its investment in her future. The school provided her with a midyear evaluation and a support team, all in an effort to help her become successful. We do not doubt that Appellant worked hard. Despite these efforts, Principal Stratton testified at length about Appellant's various performance deficiencies, including complaints from teachers, administrators, and parents. It is unfortunate that Appellant was not able to succeed as an assistant principal, but the evidence does not support her claims that she was discriminated against based on her race.

### *Improper Retaliation*

Appellant argues that the local board's decision was flawed because the hearing examiner did not address her claims of retaliation. As previously noted, Appellant's claims of retaliation are directly related to her claims of racial discrimination. In short, she argues that she was retaliated against for reporting racial discrimination and that the retaliation is further evidence of racial discrimination. We conclude that the claims of discrimination and retaliation are sufficiently intertwined such that addressing one argument effectively dealt with the other. The hearing examiner addressed the substance of Appellant's complaints and concluded that the school system had non-discriminatory reasons for reassigning Appellant.<sup>4</sup>

In order to establish a *prima facie* claim of retaliation, the Appellant must show that (1) she engaged in a protected activity; (2) that the school system took a materially adverse employment action against her; and (3) that a causal connection existed between the protected activity and the materially adverse action. *Edgewood Management Corp. v. Jackson*, 212 Md. App. 177, 199 (2013). Similar to a claim of racial discrimination, the school system may then

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<sup>4</sup> Appellant raises her negative evaluation in 2010 from her principal at CAT-North and her reassignment to Arundel as an additional example of retaliation. Those actions are not a part of this current appeal, which focuses solely on her reassignment to teaching and her performance at Arundel.

rebut the *prima facie* case by showing that there was a legitimate non-discriminatory reason for the adverse action. *Id.* at 199-200. The burden then shifts back to the Appellant to show that the reasons given by the school system are pretextual. *Id.* at 200.

Even assuming that the Appellant has made out a *prima facie* case of retaliation, she cannot overcome the school system's showing of a legitimate non-discriminatory reason for reassigning her. *See Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493 (D.C. Cir. 2008) (stating that once an employer has asserted a legitimate, non-discriminatory reason for the adverse action, the question of whether an employee has made out a *prima facie* case is "no longer relevant"). Appellant received negative performance evaluations throughout her year as an assistant principal and Principal Stratton provided numerous instances of Appellant's shortcomings. These provided ample evidence of a legitimate non-discriminatory reason for the reassignment.

CONCLUSION

For all these reasons, we affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.

ABSENT

Charlene M. Dukes  
President

Mary Kay Finan

Mary Kay Finan  
Vice President

James H. DeGraffenreidt, Jr.

James H. DeGraffenreidt, Jr.

Linda Eberhart

Linda Eberhart

ABSTAIN

S. James Gates, Jr.

Larry Giammo

Larry Giammo

ABSENT

Luisa Montero-Diaz

ABSENT

Sayed M. Naved

Madhu Sidhu

Madhu Sidhu

*Donna Hill Staton/MLP*

Donna Hill Staton

*Guffie M. Smith, Jr.*

Guffie M. Smith, Jr.

October 28, 2014