

MONICA JONES,

Appellant

v.

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 15-05

OPINION

INTRODUCTION

Appellant has appealed the decision of the Baltimore City Board of School Commissioners (local board) upholding the nonrenewal of her teaching contract. Appellant maintains that the local board's action was a termination, not a nonrenewal, and that the local board could terminate her only for cause following the due process procedures set forth in the regular contract and §6-202 of the Education Article. The local board filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal because Appellant had a lapse in certification that forfeited her tenure and placed her back in a probationary teacher status, making her subject to nonrenewal. Appellant has opposed the local board's motion and the local board has responded.

FACTUAL BACKGROUND

The Appellant began teaching with Baltimore City Public Schools ("BCPS") in 2000. The parties agree that, at least initially, the Appellant was treated as having been employed under a regular teacher contract and that she had earned tenure in her teaching position. The regular teacher contract is set forth in COMAR 13A.07.02.01 and states that the "contract shall automatically terminate if the employee ceases to hold a professional certificate." *Id.*

Appellant held a Maryland Educator Advanced Professional Certificate. Advanced Professional Certificates must be renewed every five years. COMAR 13A.12.01.11(B)(5). As certificate holders, teachers are responsible for initiating the renewal of their certificates so that they do not expire. COMAR 13A.12.01.11(A). In order to renew, teachers have to submit the required documentation within 90 days of the expiration date listed on the certificate. *Id.* On June 30, 2010, Appellant's Advanced Professional Certificate expired.¹

¹ Appellant had previously gone through the renewal process in the early 2000's when she allowed her certification to lapse during a prior certification cycle. (See CEO 11 & 12).

Appellant continued to teach during the 2010-2011 school year.² On October 22, 2010, the BCPS Office of Licensure and Highly Qualified notified Appellant that she needed to submit official transcripts and/or an MSDE Credit Form for six credits, individual development plans, and three recent annual evaluations showing satisfactory progress in order to complete the certification renewal process. (Motion, Ex. B). The letter advised the Appellant to submit the missing documentation within 30 days of the date of the letter or risk disciplinary action or the loss of her employment with the school system. *Id.*

On February 15, 2011, BCPS again notified Appellant that she needed to submit the missing documentation in order to complete the certificate renewal process. (Motion, Ex. C). The email reiterated that failure to submit the documentation placed Appellant at risk of disciplinary action and/or termination of her employment. *Id.* Appellant did not submit the necessary documentation.

By letter dated March 29, 2011, Carla Simons, Manager of the Office of Licensure and Highly Qualified, advised Appellant that she needed to fulfill her certification requirements and submit all required credentials to the school system by May 3, 2011 or her employment would be in jeopardy. (Motion, CEO 4). In an effort to help Appellant remain in good standing and meet the certification requirements, Ms. Simons provided Appellant information on specialists to contact to seek assistance with regard to any certification questions. *Id.* She also advised that BCPS would consider an extension of the document submission deadline if Appellant were to submit a registration form for currently enrolled courses and tests which lead to certificate renewal by May 3, with official transcripts and test scores to be submitted by June 1. (*Id.*).

Appellant submitted the requested documentation on May 2, 2011.³ (Motion, CEO 5). Thereafter, in May 2011, Appellant was issued an Advanced Professional Certificate that was retroactively backdated to state that it was valid from July 1, 2010 through June 30, 2015. (Motion, CEO 6). The certificate was backdated because the Appellant's documentation showed that she had completed the required course work prior to June 30, 2010. (T.39).

Appellant began the 2012-2013 school year teaching at Lockerman Bundy. (T.89). In November 2012, Appellant took a position at Edgecomb Circle teaching 5th and 6th grade science because Lockerman Bundy had more staff than it needed. (T.89-90, 91). When Appellant agreed to take the position at Edgecomb Circle, she advised the principal that she did not have a good deal of science knowledge. (T.90). Appellant claims that while at Edgecomb Circle she experienced difficulties in terms of lack of teaching support, lack of technology and materials, and uncontrollable students. (T.95-96).

² COMAR 13A.12.01.11(A) permits school systems to request a conditional certificate for an employee who fails to meet the renewal requirements of the professional certificate. School systems can then employ that teacher under a provisional contract which is a one year contract. COMAR 13A.07.02.01C. Although the Appellant continued to teach for the school system, there is no evidence that the school system ever requested a conditional certificate for Appellant or entered into a signed provisional contract with her.

³ Appellant testified that she had financial issues and had difficulty paying for her class at Coppin State University which delayed her ability to obtain the necessary documentation, even though she completed the course in the spring of 2010. Appellant also testified that at some point she had explained this situation to an individual in the certification office. (T.103-104). In her appeal to the State Board, Appellant states that this occurred in February 2011. (Appeal).

In March 2013, Appellant wrote to John Casey, Baltimore Teachers Union representative, about the issues she was experiencing at Edgecomb Circle. (Appeal Attachment). That same month, she also met with Mr. Casey, along with several other Edgecomb Circle teachers, to discuss issues there. (T.108-109).

On April 11, 2013, Appellant attended a meeting with Mr. Casey; Ms. Parker-Brinkley, Principal; Ms. Spencer, Assistant Principal; and Mr. Conley, School Area Director. In a July 9, 2014 letter, Mr. Casey documented the meeting. (Appeal Attachment). He wrote that the meeting was called to discuss Appellant's concerns regarding teaching at the school, and that Mr. Conley determined that Appellant would sign up for the voluntary transfer fair and then be transferred at the end of the year. Mr. Casey also stated that Appellant was encouraged to use her sick time until the end of the year, if needed. *Id.*

Thereafter, by letter dated May 1, 2013, Kim Lewis, advised Appellant that her contract with BCPS would not be renewed for the 2013-2014 school year. It stated as follows:

Pursuant to your regular contract with City Schools, this letter serves as your official notice that your contract will not be renewed for the 2013-2014 school year. It is our understanding that you and your principal have met to discuss this matter and the rationale that led to this decision. If this is your first notice of this action, please move forward with scheduling a time to meet with your principal.

(Motion, CEO 8).

On May 21, 2013, Mr. Casey filed an appeal on Appellant's behalf challenging the decision to end her employment with BCPS. The appeal maintained that Appellant should be reinstated because BCPS did not inform her that she had been placed into a conditional or probational status, nor had her sign a contract to that effect, thus she remained under a regular contract with tenure status. (Motion, CEO 9).

By letter dated August 19, 2013, the Interim Chief Executive Officer, Lydia Henderson, denied the appeal, noting that the Appellant's certification lapsed on June 30, 2010 causing the automatic termination of her regular teacher's contract and the forfeiture of her tenure. She stated:

Per COMAR 13A.07.02.01, the right to tenure is guaranteed by the regular contract. Its terms require that a certificated employee complete a three year probationary period before tenure can be attained. When Ms. Jones' certification lapsed, not only did she become non-certificated, but her regular contract terminated, which meant she was no longer subject to its terms, including the right to tenure. Upon the termination of the regular contract, Ms. Jones was permitted to teach for the 2010-2011 school year based on the terms of a conditional provisional contract, which became

effective as of July 1, 2010. Per COMAR 13A.07.02.01, the terms of the provisional contract remain in effect until June 30th of the following year. Upon the reinstatement of Ms. Jones' certification in May 2011, she became subject to the terms of a new regular contract for the 2011-2012 school year, which as stated above, require the completion of the three year probationary period to achieve tenure. At the time of Ms. Jones' non-renewal, she had not completed those requirements; therefore City Schools had no duty to retain her as an employee.

(Motion, CEO 10). Ms. Henderson stated that it was inconsequential to the case whether or not BCPS "had informed [Appellant] of her transition to provisional status." *Id.*

By letter dated August 20, 2013, Mr. Casey filed Appellant's appeal to the local board. (Motion, Ex.C). In the attached Appeal Information form completed by the Appellant, the Appellant maintained that she was "terminated because of a concern over tenure," that she "never let her certificate lapse and has been in good standing with MSDE as it relates to certification," and that BCPS never notified her of losing tenure or had her sign a new contract thereby keeping her tenure intact. *Id.*

The CEO responded that because the Appellant forfeited her tenure when her certification lapsed and BCPS had no duty to retain her as an employee, the matter was an appeal of the nonrenewal of her teaching contract under §4-205, and not termination under §6-202 of the Education Article. *Id.*

The local board referred the matter to a hearing examiner for review and recommendation. The hearing examiner found that Appellant had been employed under a regular contract that ended by its own terms when Appellant ceased to hold a professional certificate after June 30, 2010, thereby causing her tenure to end as well. The hearing examiner also found that the retroactive dating of the teaching certificate had no bearing on the already terminated regular contract, even though Appellant continued to work for the school system. She recommended, therefore, that the local board uphold the action of ending Appellant's employment by nonrenewal rather than through termination proceedings. (Hearing Examiner Recommendation).

Appellant submitted exceptions to the Hearing Examiner's Recommendation, to which the Interim Chief Executive Officer responded. Thereafter, by Order dated June 13, 2014, the local board, relying on the Hearing Examiner's Recommendation, affirmed the decision of the CEO to non-renew Appellant's employment with the school system.

This appeal to the State Board followed.

STANDARD OF REVIEW

In reviewing a local board's decision of its local policy, the decision of the local board is presumed to be *prima facie* correct. COMAR 13A.01.05.05A. 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. *Id.* The Appellant has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05D.

The State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.05E.

ANALYSIS

Contract/Tenure

The main issue here is whether or not the Appellant had tenure or was still in a probationary teaching status at the time that BCPS ended her employment with the school system. If the Appellant had tenure, BCPS could only terminate her for cause pursuant to the due process protections set forth in the regular contract and §6-202 of the Education Article. If the Appellant was in a probationary status, BCPS could notify the Appellant that her teaching contract was not being renewed, so long as the nonrenewal was not for illegal or discriminatory reasons.

The Appellant maintains that she was tenured at the time of the nonrenewal. She argues that the lapse in her certification on June 30, 2010 was cured when she was issued a new certificate in May 2011 with backdated validity dates of July 1, 2010 to June 30, 2015. Thus, constructively, she claims that there was no lapse in certification, no breach of contract and no forfeiture of tenure. Appellant reasons that given she had tenure in her teaching position at the time BCPS ended her employment, the local board's decision was illegal because she was terminated without cause and without appropriate due process. Appellant maintains that this appeal to the State Board should be treated as an appeal of a termination of a tenured teacher under §6-202 and that the State Board should transfer the case to the Office of Administrative Hearings for review and recommendation by an Administrative Law Judge subject to the *de novo* standard of review. *See* COMAR 13A.01.05.05F & .07A(2).

We do not agree with Appellant's reasoning. As stated above, the regular contract provides that the "contract shall automatically terminate if the employee ceases to hold a professional certificate." COMAR 13A.07.02.01. Appellant ceased to hold a professional certificate as of July 1, 2010 because she failed to complete the renewal process. At that point in time, as a matter of law, her regular contract with BCPS automatically terminated by its own terms. The contract's termination for lapse of certification was self-executing; it did not require that BCPS provide notice to the Appellant of the contract termination as she claims in her appeal. The terms of the contract itself are notice of the end of employment, and those terms are clearly set forth in the law. In essence, Appellant gave up her regular contract with BCPS when she let her certification lapse. The fact that approximately one year later Appellant satisfied the certification renewal requirements and received a backdated certificate does not retroactively revive a contract that has already terminated by its own terms. For such a thing to occur, it would have to be set forth in the contract itself. The regular contract contains no provisions to that effect. Nor did the notices sent to Appellant about renewing her certification extend the

regular contract. The notices simply advised Appellant that her employment with the school system could be in jeopardy if she did not complete the renewal process.

We now look to the effect of the lapse of Appellant's certification and the self-executing termination of the regular contract. Tenure is a creature of State law and is contained in the regular contract. *See* Md. Code Ann., Educ. §6-202; COMAR 13A.07.02.01. For certified teachers, there is a three year probationary period. For each of the three years, the school system can opt to renew the teaching contract or not. The teacher can also choose to terminate the contract, so long as notice is provided. COMAR 13A.07.02.01. During the three year probationary period, the teacher does not have tenure.

After the completion of the three year probationary period, a certified teacher is deemed to have tenure. Having tenure means that one has a property interest in the individual's employment and cannot be deprived of the employment without notice and the opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). In order to have a property interest in one's employment, an employee must have a reasonable expectation of continued employment in the position. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Board of Regents*, the Supreme Court noted the following:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

We recognize that the Appellant had tenure in her position prior to the lapse in her certification. Had BCPS chosen to terminate Appellant between the end of her probationary period and her lapse in certification, it could not have done so without cause and without following the due process procedures set forth in the regular contract and §6-202. After Appellant allowed her certification to lapse, however, her own actions, or lack thereof, altered the employment relationship by triggering the automatic termination clause. At that point in time, Appellant could have no reasonable expectation of continued employment with the school system or a legitimate claim of entitlement to her position because the regular contract securing that expectation no longer existed. She had notice of this by virtue of the contract language

ending the employment contract. As such, her property right in her employment ceased to exist. We note that BCPS took no action to trigger the termination provision and did not deprive the Appellant of any property interest. It was the Appellant who gave up the interest by not fulfilling her professional obligations regarding certification.

Appellant's lack of tenure after the certification lapse means that she then became either an at-will employee or a probationary employee. Appellant could be considered an at-will employee because both parties agree that the Appellant never signed a contract, either provisional or regular, for the period of time after the certification lapse. If Appellant were an at-will employee after her certification lapse, she would not be entitled to the enhanced due process protections afforded to tenured teachers and could be terminated at any time for any reason, so long as the reason was not illegal or discriminatory. See *Dozier v. Department of Human Services*, 164 Md. App. 526, 238 (2005).

The local board argues that, despite the lack of a signed contract, it treated the Appellant as having a provisional contract in place for the 2010-2011 school year, until such time that her certification was renewed in May 2011, and that it thereafter treated her as though she was employed under a regular contract.

The provisional contract states as follows in pertinent part:

[I]f the employee is provided a Professional Certificate during the school year for which this contract is in effect, the employee's employment shall continue to be governed by the terms of this contract until its June 30th termination date. If the local board employer determines to offer the employee for the subsequent school year a regular contract then in force according to the regulations as promulgated by the State Board of Education, the employee shall be given credit toward tenure for years served as a conditional or resident teacher employee.

COMAR 13A.07.02.01C. This means that the time served by an employee under a provisional contract can be used towards credit for tenure if the employee receives a professional certificate during the provisional contract year and the employer offers the employee a regular contract for the subsequent school year. Despite Appellant's claims, the plain language of this provision does not suggest a retroactive application such that it resurrects a regular contract that has already terminated and tenure that has already been forfeited by the employee.

Therefore, assuming Appellant had a probationary contract for the 2010 – 2011 school year that was followed by a regular contract for the 2011-2012 and 2012-2013 school years, the time she served under the probationary contract counts towards the three year probationary period for achieving tenure. Thus, when BCPS issued Appellant a letter of nonrenewal on May 1, 2013, prior to the completion of her third year of employment from the point of her certification lapse, Appellant had not yet again achieved tenure with the school system. The effect of this is that BCPS could end Appellant's employment by mere nonrenewal of the contract.

Although a local board need not establish cause when it non-renews the contract of a teacher in probationary status, the decision not to renew cannot be based on illegal or discriminatory reasons. It is the Appellant's burden to prove illegality "with factual assertions, under oath, based on personal knowledge." *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003). Here, Appellant claims that the nonrenewal was in retaliation for Appellant raising claims with the school system regarding problems at Edgecomb Circle. Within approximately three weeks after the meeting with her union representative and school officials, Appellant received the nonrenewal notice.

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). The school system may then rebut the prima facie case by showing that there was a legitimate non-retaliatory 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.

Appellant raised the issue of retaliation during the hearing before the local board and testified regarding her meeting with school officials, the union, the issues she experienced at Edgecomb Circle, and the proximity of that meeting to the nonrenewal notice. Unfortunately, neither the hearing examiner nor the local board addressed Appellant's claim of retaliation in its decision, despite the fact that it is a crucial issue in this case.

Accardi Doctrine

The Appellant argues that the *Accardi* doctrine requires that the local board's decision be reversed because the local board violated COMAR 13A.07.02.01A by failing to have written employment contracts in place with the Appellant. COMAR 13A.07.02.01A requires "[a]ll contracts with certificated professional employees to be in writing and on contract forms prescribed by the State Board of Education."

The *Accardi* doctrine is the oft cited case-created rule of administrative law that an administrative decision is subject to invalidation when an agency fails to follow its own procedures or regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). The Court of Appeals adopted its own version of the *Accardi* doctrine holding that it is applicable to administrative agency proceedings in Maryland. See *Pollack v. Patuxent Inst. Bd. of Rev.*, 374 Md. 463, 503 (2003)("[A]n agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded."). In *Pollack*, the Court cites numerous cases concerning the consequence of an agency's violation of its own rules and procedures.

We do not believe that the *Accardi* doctrine applies here. Appellant has not alleged that the local board violated its own rules, regulations or procedures. Rather, Appellant alleges that the local board violated a COMAR provision, which is a regulation created and enacted by the

State Board of Education.

Appellant's claim here is essentially that the local board violated State law by not having Appellant sign a written employment contract after her certification lapsed. Because the local board treated the Appellant as though there were written contracts in place, we have analyzed this case based on that assumption. We find no violation of State law.⁴

New Evidence

Appellant has introduced a copy of Appellant's 2012-2013 annual evaluation and a provisional contract signed by the Appellant in 2000 as new evidence in the appeal to the State Board. Additional evidence may be considered if it is "shown to the satisfaction of the State Board that the additional evidence is material and that there were good reasons for the failure to offer the evidence in the proceedings before the local board. COMAR 13A.01.05.04C.

With regard to the evaluation, Appellant's counsel simply claims the evaluation was not in Appellant's possession at the time of the hearing. He also maintains that the evaluation is further proof that Appellant remained in a tenured status because it states her status as tenured at the top of the document.

Appellant provides no real explanation why the evaluation was unavailable to her at the time of the hearing. She had union representation at that time who could have helped her obtain whatever documents from her personnel record they deemed necessary to present her case. Moreover, we do not find that the fact that an evaluator wrote on the document that Appellant was tenured to be material to whether or not Appellant actually was tenured. Nor could it have influenced Appellant's view of her status given that the document was not in her possession. We decline to consider Appellant's 2012-2013 evaluation as additional evidence.

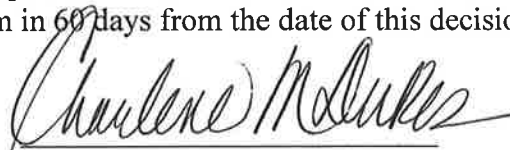
Likewise, with regard to the school year 2000-2001 provisional contract, there is no explanation as to its unavailability at the time of the hearing. In addition, Appellant introduces it to show that Appellant did not initially begin her employment with the school system under a regular contract, as stated by the hearing examiner. The hearing examiner made that determination because there was no evidence to the contrary. Neither party submitted an executed contract and the local board had presented testimony that Appellant had signed a regular contract when she began teaching in the school system. Moreover, we do not find the provisional contract to be material to the case given that both parties agree that the Appellant should be treated as though she was employed under the terms of a regular contract, at least until the time that her certification lapsed. *See* COMAR 13A.01.05.04C.

CONCLUSION

For the reasons stated above, we find that the Appellant was in a probationary teaching status at the time of her nonrenewal. We also find that she raised the issue of retaliation during

⁴ Even if there were an *Accardi* violation, Appellant would have to show that she was prejudiced by the action. *See Pollack*, 374 Md. at 503. Again, given that the local board treated the Appellant as though she was employed under fully executed contracts, there is no prejudice here.

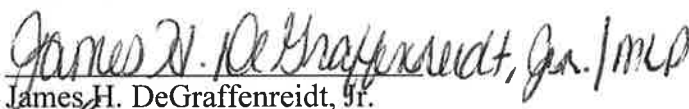
the local board hearing, but neither the hearing examiner nor the local board addressed the issue in its decision. Because there is nothing for the State Board to review on that critical issue, we remand the case to the local board for review of Appellant's retaliation claim. The local board shall issue a decision regarding the retaliation claim in 60 days from the date of this decision.



Charlene M. Dukes
President



Mary Kay Finan
Vice President



James H. DeGraffenreidt, Jr.



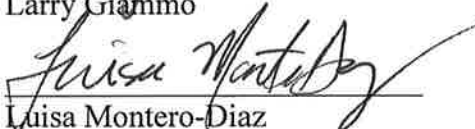
Linda Eberhart

Absent

S. James Gates, Jr.



Larry Giammo



Luisa Montero-Diaz

Absent

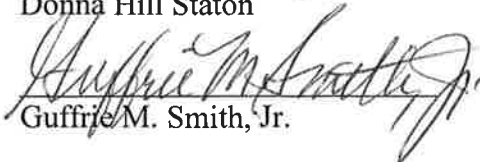
Sayed M. Naved



Madhu Sidhu



Donna Hill Staton



Guffrie M. Smith, Jr.

January 27, 2015