

JOHN ANKER,

Appellants

v.

HARFORD COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-17

OPINION

INTRODUCTION

The Appellant, John Anker, a teacher in Harford County Public Schools (HCPS), appealed his year end evaluation and the non-renewal of his probationary contract. The Harford County Board of Education filed a Motion to Dismiss or For Summary Affirmance. The Appellant filed an Opposition to the Motion, and the local board filed a Reply.

FACTUAL BACKGROUND

Mr. Anker was a third-year probationary teacher in HCPS.¹ At the end of his third year, the principal evaluated him as unsatisfactory and recommended that his probationary contract not be renewed. Mr. Anker appealed both his unsatisfactory evaluation and the non-renewal of his contract.

Set forth here are the undisputed facts concerning Mr. Anker's conduct and judgment as a teacher. The Appellant was hired to teach English at C. Milton Wright High School (CMW) in November 2006. Prior to Harford County, Appellant taught for one year in Illinois. During the 2006-2007 school year, the Principal, Ms. Molter, observed the Appellant. The Instructional Facilitator, Ms. VanWinkle, also observed him. The Appellant was rated as "Meeting Initial Expectations." During this school year, the Appellant became an advisor to the Video Club.

In the 2007-2008 school year, the principal gave the Appellant permission to conduct an independent study in Video with three students. One of those students ultimately submitted a film entitled "A Bard's Tale" to the Maryland High School Theater Festival. (Sup. Exs. 6-9

¹ At the time this case arose, the probationary contract lasted for two years, but it could be extended for a third year in certain circumstances.

describe the Festival). He won first place. The Bard's Tale, as the Appellant describes it in his appeal, was "edgy."

"A Bard's Tale" was patterned after Saturday Night Live. It contained among other things, a continuing refrain "nay, you're gay". There was also a segment that referred to a large, black man speaking from a burning bush telling the boys to become bards. There were scenes in which the bards talked about knocking old people out of wheelchairs. At the end of the film, two students gave the bards the finger. The founder, coordinator, and co-sponsor of the Festival submitted a letter on behalf of Mr. Anker and the film stating that it was not offensive. He explained, "In fact, we awarded a First Place Honor for the submission, "A Bard's Tale" for its boldness as a reflection of current high school sentiments towards a variety of topics." (Appellant's Ex. 4).

The Hearing Officer described the Appellant's testimony about the film:

Appellant was questioned about some of the scenes in the movie especially knocking old people out of wheelchairs. He stated that it did not cause him great concern because he did not think it would be taken seriously.

Appellant responded that there was a line where one of the bards responds with the words "she was asking for it," referring to a woman and Appellant responded he did know that those words could be offensive to women. (T27-18; 9/9/09). Appellant when questioned about one of the bard's saying that, "How does the Administration make you feel?" and the other bard responds, "I want to spit acid in their eyes." (T30-13; 9/9/09). Appellant responded that he did not think anyone would reasonably assume they were advocating that type of behavior. (T31-1; 9/9/09).

(Hearing Officer Decision at 30).

The Appellant approached the administration about showing "A Bard's Tale" as a fundraiser for Video Club. (Appellant's Ex. 3) After viewing the film, the principal felt that it was inappropriate and insulting; and therefore, she would not permit the film to be shown in the school. Moreover, she was upset that it referenced the school in the credits although it was not submitted to her for approval prior to submission.

Thereafter, the principal observed the Appellant's class on March 7, 2008, marking him "successful" but expressing concern that the materials he was using were not part of the English 12 curriculum. (Joint Ex. 12). In April 2008, the principal informed the Appellant by letter that he was late in submitting weekly monitoring sheets and entering grades on the Ed Line system. (Joint Ex. 22). In the year-end evaluation, the principal and the Instructional Facilitator rated

Appellant's performance as "causing concern." (Joint Ex. 14). He was not recommended for tenure but was offered a third probationary year.

In the beginning of the 2008-2009 school year, the principal observed the Appellant and rated him "causing concern" because a classroom exit was blocked with video equipment and a container of toxic glue. (Joint Ex. 16). In January 2009, he received an unsatisfactory evaluation rating. (Joint Ex. 17). In March 2009, the classroom observation reflected "causing concern" because of a lack of student participation, including two sleeping students. (Joint Ex. 19). On March 16, 2009, in his final evaluation, the Appellant was rated unsatisfactory and told his contract would not be renewed. (Joint Ex. 21).

Following that news, the Appellant did a variety of things. The Appellant assigned his students to prepare "roasts" of faculty members in the school. (Tr. Vol. III p. 151-154). Students were allowed to share their roasts with the class and read them aloud. (Tr. Vol. III p. 154). One such "roast" could be interpreted as including a sexist remark about a CMW teacher. (Sup. Ex. 13).

Appellant allowed students to use long wooden sticks to serve as his students restroom passes. (Tr. Vol. III p. 126-128). These passes contained graffiti painted messages including phrases such as "guys asses are sexy," "Once you go black, you never go back," "Give me some of that twin horse fetus and abort it." (Sup. Exs. 25-28).

Students in Appellant's class prepared a screenplay with sexually explicit language and some obscenities. The Appellant graded and returned the play with very limited feedback. (Superintendent's Ex. 14, p. 28-29; 34; 47-48). The Appellant conceded in his testimony the he failed to set boundaries for his students in making the assignment. (Tr. Vol. II p. 168).

Appellant also advised his students that he was going to have Ms. Molter served with a lawsuit during the graduation ceremony. (Tr. Vol III p. 151-152).

And, thus, the school year ended.

STANDARD OF REVIEW

The local board's decision involving an unsatisfactory evaluation is considered *prima facie correct* unless the Appellant meets his burden to show the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05(A). The local board's decision not to renew a probationary contract will be upheld unless the Appellant meets his burden to show that the decision is illegal or a result of unconstitutional discriminatory action. *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003); *Higgs v. Prince George's County Bd. of Educ.*, MSBE Op. No. 06-13 (2006).

LEGAL ANALYSIS

This case involves the non-renewal of a probationary contract. Probationary contracts terminate automatically at the end of the school year. Md. Educ. Code Ann. §6-202(b). At the time this case arose, a teacher usually worked for two years on a probationary contract before being offered tenure and a permanent contract. *Id.* Under Maryland law, a local board may decide not to renew the probationary contract of any teacher, no matter how satisfactory or unsatisfactory the teacher is, for any reason that is not illegal or discriminatory. *Parker v. Board of Education of Prince George's County*, 237 F. Supp. 222, 226 (1965)

In this case, because of continuing concerns about the Appellant's performance and professional judgment, but with the belief that the Appellant could improve, instead of non-renewing the Appellant's probationary contract at the end of year two, the principal recommended a third probationary year.

The law governing the third probationary year states:

If the probationary period of a certificated employee is extended . . . a mentor shall be assigned to the employee and the employee shall be evaluated at the end of the third year based on established performance evaluation criteria.

Md. Educ. Code Ann. §6-602(b).

The Appellant argues that the statutory requirements for an evaluation based on "established performance evaluation criteria" and for assignment of a mentor place a "greater burden on the school system as compared with to its unfettered right to non-renew at the end of the first or second year of employment for any or no reason." (Opposition at 20).

That argument, in our view, turns the law on its head. It attempts to strip a third year probationary contract of its automatic termination clause. It tries to impose a heightened burden on the school system when it exercises its right to not renew the contract, and it seeks to add procedural due process protections for third year probationary employees. For the reasons set forth below, we decline to extend the boundaries of the probationary contract in such ways.

The Appellant argues that the statute's requirement for an evaluation and a mentor for the third year probationary teacher were designed to "insure" successful performance of the teacher through the provision of "specific supports." (Opposition at 18). In describing the "specific supports" that the Appellant believes the law requires, he uses terms such as "specific guidance and instruction;" "intensive support;" "plan of assistance." Suffice it to say, the law does not require those things. It requires an evaluation based on performance evaluation criteria and the assignment of a mentor.

The facts show that the Appellant was indeed evaluated based on specific performance evaluation criteria. The observation forms contain the following performance criteria:

INSTRUCTIONAL PLANNING

This category includes the degree to which instructional planning relates to students needs; effects the goals, objectives, content, and other aspects of curriculum; causes materials to be utilized appropriately for various age and ability levels; includes a variety of activities which contribute to student achievement; and provides for reinforcement of concepts and evaluation of learning.

LESSON IMPLEMENTATION

The effective implementation of a lesson includes the sharing of objectives with students, motivation for learning, logical development of the lesson, activities which contribute to the achievement of the objectives, optimum pacing, differentiation of instruction, use of appropriate strategies and techniques, ongoing assessment of pupil progress, and meaningful closure.

PUPIL INVOLVEMENT

This category includes evidence of time-on-task behavior, the attainment of objectives, significant and meaningful activities, and the maintenance of student interest and participation.

MANAGEMENT AND ORGANIZATION

Factors to be considered in this category include routine classroom procedures, pupil control discipline, attention to the health and safety needs of pupils, seating and furniture arrangements, and the use and care of supplies and equipment.

PROFESSIONAL CHARACTERISTICS

Attributes to be considered include interpersonal relationships with students, communication, knowledge of content area, emotional control, response to constructive criticism, appropriate appearance, and the degree to which school policies and procedures are followed.

(Joint Exs. 3-19).

A teacher is rated as successful, causing concern, or unsatisfactory. Mr. Anker's ratings were for the most part "successful," except for a rating of causing concern in Management and Organization and in Pupil Involvement. (Joint Exs. 15-19). Each observation contains extensive

written explanations and recommendations. In our view, the performance evaluation requirement was met.

The Appellant, in his final year of probation, received an unsatisfactory rating. He argues that the rating is arbitrary and unreasonable. It is clear, however, from the formal observations and from the factual background of this case that there was a rational basis for the unsatisfactory rating. As the court in *Parker v. Prince George's County Bd. of Educ.* explained:

[T]he crucial test of [a teacher's] fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] . . . is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability.

Id. at 227, citing *Zimmerman v. Board of Educ. of Newark*, 183A.2d.25,29 (N.J. 1962).

Taking all the facts and circumstances into account, the principal concluded that Mr. Anker was not a teacher the school system wanted to retain. The local board, as was their prerogative, agreed not to renew Mr. Anker's contract. We emphasize, however, that even if Mr. Anker were rated "successful" on every performance criteria, the local board could decide not to renew his contract. Thus, although the final unsatisfactory evaluation rating is reasonable, it is also immaterial in this case.


The Appellant argues that his dismissal was illegal because the mentor assigned to him did not do her job. (Opposition at 20-23). He complains, among other things, that the mentor relied on him to "identify his own needs," which apparently he did not do. By his arguments, the Appellant attempts to turn this case into one about "effective mentoring." He would like to blame the mentor and the school system for his own failure to become a teacher the school system wished to retain. In our view, it was the Appellant's responsibility to work to become a teacher eligible for tenure. On his final evaluation the principal stated, "There have been multiple occasions in which Mr. Anker was required to meet with the teacher mentor and the required action was disregarded." (Joint Ex. 21). The record reflects the fact that Mr. Anker did not do the work necessary to become a tenured teacher.

We conclude that the local board's decision not to renew Mr. Anker's contract was not based on illegal grounds. In coming to this conclusion, we reaffirm that a local board may decline to renew any probationary teacher's contract for any non-discriminatory, legal reason. Second, we hold that the statute does not provide a basis to shift the burden to the school system to show that it did everything in its power to help the teacher improve. Finally, we point out that probationary

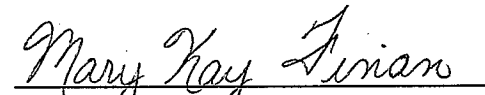
teachers have very limited procedural due process rights. In this case, Mr. Anker was provided a full evidentiary hearing. This is far beyond what the law requires. See *Parker v. Prince George's County Bd. of Educ.*, 237 F. Supp. at 228.


CONCLUSION


For all the reasons stated herein, we affirm the decision of the local board.



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April 26, 2011