

PATRICK McSWAIN,
Appellants

v.

HOWARD COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 11-20

OPINION

INTRODUCTION

Appellant challenges the decision of the Howard County Board of Education (local board) regarding the rate at which his pay was withheld for a 15 day suspension for misconduct. The local board filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable or illegal. The Appellant opposed the Motion.

FACTUAL BACKGROUND

Appellant has been a long-time music teacher in Howard County Public Schools (HCPS). The incident that gave rise to his suspension occurred during the fall of the 2006-2007 school year while he was assigned to Harpers Choice Middle School. The local board adopted the recommendation of the Superintendent to impose a 15 day suspension without pay on August 30, 2007.

The Appellant appealed the suspension decision to the State Board on September 21, 2007. The local board held the suspension in abeyance pending conclusion of the State Board proceedings.

In accordance with State Board procedures, in October 2007 the case was transferred to the Office of Administrative Hearings (OAH) for review by an Administrative Law Judge (ALJ). The ALJ issued a proposed decision on June 23, 2008. The parties filed objections and replies to objections with the State Board in response to the recommended decision. The State Board heard argument on the recommended decision and the exceptions on January 28, 2009. The Board issued MSBE Op. No. 09-07 on February 24, 2009 upholding the local board's suspension decision.

Appellant filed a request for reconsideration of the State Board's decision, which the State Board denied in MSBE Op. No. 09-29 issued August 25, 2009.

HCPS has a long standing practice of holding the suspension of a professional employee in abeyance pending the outcome of any appeal to the State Board. When all State Board proceedings are complete, the school system imposes the suspension at the rate of pay in effect on the days the employee is excluded from school. Accordingly, in September 2009, after the conclusion of all State Board proceedings, the local board imposed the 15 day suspension without pay. At that time, Appellant's pay rate was higher than it was during the 2007-2008 school year when the local board had adopted the superintendent's recommendation for disciplinary action. The suspension resulted in a pay withholding in the amount of \$6,331.35. If the Appellant had been docked at the 2007-2008 pay rate, he would have had \$5,562.90 withheld. The difference between the two rates of pay for the suspension period is \$768.45.

The Superintendent denied the Appellant's request that the suspension withholding be calculated at the rate of pay for the 2007-2008 school year, finding that it was appropriate to withhold the Appellant's salary at the pay rate in effect on the days the Appellant was absent from work due to the suspension. The local board affirmed the Superintendent's decision.

This appeal followed.

STANDARD OF REVIEW

Because this appeal involves a decision of the local board involving a local policy, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

As a preliminary issue, the Appellant maintains that the local board's decision is conclusory and fails to provide a rational for its decision. We disagree. The decision details the arguments of both parties and then finds that the reasons advanced by the superintendent were more persuasive. The superintendent's reasons specify why the rate of pay withheld was appropriate.

The Appellant maintains that the local board's practice is arbitrary, unreasonable or illegal. Specifically, he argues that the practice unduly penalizes and retaliates against the employee for exercising the right of appeal. He argues this because the appeal of his suspension at the State Board level took 1 ½ years before a final decision was rendered by the State Board, and took another 5 months for a decision on the reconsideration request, what he believes is an unprecedented amount of time to resolve a personnel case. During that time, his pay rate increased such that when the suspension was imposed at the conclusion of the State Board's proceedings, Appellant's pay was reduced \$768.45 more than it would have been if the pay rate in effect at the time the local board rendered its decision on the suspension had been withheld. The Appellant requests leniency here given the amount of time the case took to process.

Appellant also argues that the practice in this case is not consistent with the purpose of a suspension which he believes is to rehabilitate an employee by deterring him from repeating past

conduct. Appellant believes that the purpose has already been served here because he has not been the subject of any further complaints in the intervening years since the incident occurred.

We do not find the local board's practice to be retaliatory. The local board could not have known ahead of time how long the appeal process would take and how the Appellant's pay rate would change during that time frame. It applied a long standing policy in a consistent manner. There is simply no evidence that the local board retaliated against the Appellant for exercising his right of appeal.

Moreover, the local board has explained that it has good reasons for the practice. First, cases involving the suspension of an employee are not accorded any deference by the State Board as its review of these cases is *de novo*. See COMAR 13A.01.05.05F. The State Board reviews the case as if it were the initial decision maker. Thus, the practice of waiting to impose the suspension gives the employee the benefit of the doubt on the disciplinary issue until the State Board concludes its review. This allows the employee to continue to receive the salary and have the financial benefit of the money during that period of time. The pay that is withheld from the employee at the conclusion of the review is the rate equal to the value of the employee's services at the time the suspension is served.

In addition, if the local board were to impose the suspension immediately following its decision and the suspension was either reduced or overturned on appeal, the local board would be impacted twice financially. First, the local board would be out the money spent on a substitute teacher for the time the employee was out of school on suspension. Second, the local board would be obligated to refund the money withheld from the employee, essentially paying the employee for time off from work. Alternatively, if the local board were to impose the suspension at the conclusion of the State Board proceedings but dock the employee the pay rate in effect at the time the local board rendered its decision, the local board would be withholding an amount less than the value of the employee's services on the date work was missed. Yet the local board would still have to pay the current value of a substitute's services.

We note that appeals to the State Board of personnel cases involving the discipline of certificated employees of a school system have traditionally taken a somewhat lengthy period of time to resolve. This is primarily due to the type of process these cases are entitled to at the State Board level. These cases are transferred to OAH for review by an Administrative Law Judge who issues a proposed decision to the State Board. While at OAH, the State Board has no control over the length of time a case takes to be heard. Once the ALJ issues a proposed decision, the parties may submit objections to the ALJ's decision. After objections are filed, the State Board holds oral argument before deliberating on the case and issuing a final decision. All of this occurred in this case.

In addition to the amount of process these cases receive, there are many other reasons why, at any given time, it may take a particular amount of time for the State Board to reach a final decision in a case. For example, factors such as case volume, case complexity, extension requests from the parties, scheduling of oral argument, State Board agenda priorities, and staffing all impact the State Board's docket. There is simply no guarantee, and there never has been one,

that these types of appeals will take any particular amount or range of time to complete. There is no deadline within which the State Board must render a decision in personnel cases involving local board employees.

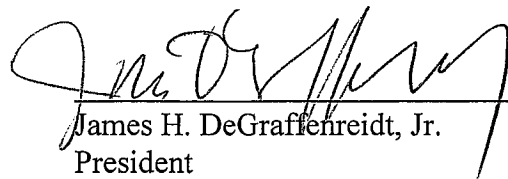
As with any decision to pursue legal recourse, one has to weigh the consequences of doing so in light of existing policy and practice. When an individual chooses to appeal to the State Board, he must weigh the advantages and disadvantages, including the length of time the process might take and its consequences. The same is true when an individual files any action in court or mounts any particular legal strategy.

The Appellant also argues that the local board's practice is inconsistent with the way in which the school system handles termination cases which are also subject to *de novo* review by the State Board. In termination cases, the local board severs the employment relationship as soon as it renders a decision rather than waiting until the State Board issues its decision. In our view, this comparison is apples to oranges. These are two different practices with different outcomes for different reasons.

Appellant argues further that the local board should not have waited until the resolution of the request for reconsideration to impose the suspension because such a request does not stay enforcement of the State Board's original decision. See COMAR 13A.01.05.10F. This would have resulted in Appellant being docked at the 2008-2009 pay rate. While the filing of a request for reconsideration of a State Board decision does not stay the enforcement of the decision, we do not believe in this case that it required the immediate imposition of the suspension given the local board's long standing practice.

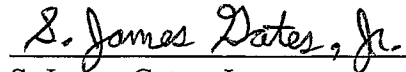
CONCLUSION


For all of these reasons, we do not find that the local board's decision to impose the suspension at the conclusion of the State Board proceedings and withhold pay at the rate in effect at the time the suspension was served was arbitrary, unreasonable or illegal. Accordingly, we affirm.



James H. DeGraffenreidt, Jr.
President

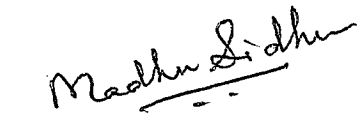
ABSENT
Charlene M. Dukes
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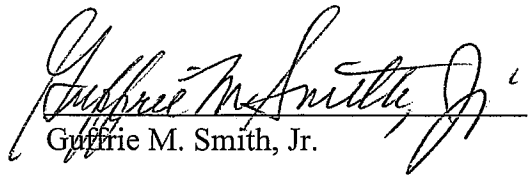

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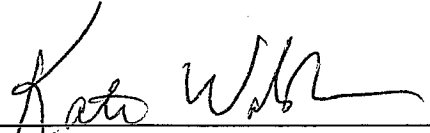

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April 26, 2011