

JOSEPHAT MUA,

Appellant

v.

PRINCE GEORGE'S COUNTY BOARD
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 13-34

OPINION

INTRODUCTION

The Appellant challenges the decision of the Prince George's County Board of Education (local board) terminating him for misconduct and incompetency. We transferred the case to the Office of Administrative Hearings (OAH) because the local board terminated Appellant under the provisions of §6-202 of the Education Article. The Administrative Law Judge (ALJ) issued a proposed decision recommending that the Appellant be reinstated to his position with full benefits and back pay. The local board has filed exceptions to the decision to which Appellant has responded.

FACTUAL BACKGROUND

School System Employment History

Appellant began his employment with Prince George's County Public Schools (PGCPS) in September 2001 as a substitute teacher. On February 26, 2003, Appellant entered into a Provisional Contract of employment with the local board because he only qualified at that time for a Conditional Certificate issued by the Maryland State Department of Education. On August 22, 2005, Appellant signed a Regular Contract of employment with the local board as a result of his qualifying for a Standard Professional Certificate and continued to serve as a teacher in the school system at Parkdale High School. (Troll Decision at 2-3; LB Resp. to Opp. to Exceptions, Whattam Affidavit).

In 2006, Appellant became an Information Technology (IT) Coordinator at Parkdale High School. At the end of the 2006-2007 school year, the school system eliminated the IT Coordinator positions system-wide. (Appeal, Ex.V). The Appellant applied for and was rehired as an IT Technician II assigned to Laurel High School in July 2007. (Appeal, Exs.W&X). As an IT Technician II, Appellant joined the American Federation of State, County, and Municipal Employees Union Local 2250 (ACE-AFSCME), the union for non-certificated support personnel. Appellant rescinded his membership in the Prince George's Education Association, which represents the local board's certificated personnel.

On September 17, 2008, Officer Deborah Toppins, an Investigator Counselor at Laurel High School, had a verbal altercation with Appellant regarding a report about a stolen laptop at

the school. (LB Mtn. Sum. Dec., Supt. Ex.3). Ms. Toppins reported that during the altercation, the Appellant approached her in a threatening manner, raised his voice and yelled profanity at her stating that Toppins “stole the f--king [computer] contract.” *Id.* Investigator Counselor Lanier witnessed the incident and corroborated Ms. Toppins’ account. (*Id.*, Ex.4). Appellant, however, maintained that Toppins was the aggressor and had a history of poor dealings with the Appellant. (Appeal, Exs.EE&GG).

On September 18, 2008, Johanna Herbert, Testing Coordinator at Laurel High School, reported a verbal altercation with Appellant during which he called her a “racist motherf--ker” during an angry conversation about a missing scanning machine that was needed for testing. (Tr. 22-25, 7/27/11; Troll Decision, p.4). Dwayne Jones, the principal of Laurel, met with the Appellant to discuss the matter, and the Appellant claimed that Ms. Herbert called him a “mother f--king n-gger.” (Appeal, Ex.GG, 5/22/08 email). Other staff at Largo had also raised concerns about the Appellant’s poor human relations skills. (T.284, 7/13/11). Mr. Jones requested the initiation of a special investigation and Appellant’s transfer to another assignment. (Troll Decision at 4-5; LB Mtn. Sum. Dec., Supt. Ex.5).

After these events occurred, on September 22, 2008, the Appellant provided the Director of Internal Audit and other school system officials with a document entitled “IT Concerns Report-Laurel High School.” (Appeal, Ex.GG). Appellant raised inventory concerns alleging theft or removal of equipment by school personnel. (*Id.*). The allegations were later found to be unsubstantiated by Internal Audit. (Troll Decision, p.5). Appellant also raised concerns about his treatment by Officer Toppins and Ms. Hebert. (Appeal, Ex.GG).

Appellant was removed from his position at Laurel High School and transferred to a Field IT Technician position. (Sup. Ex. 5, 21). As a Field IT Technician, Appellant was responsible for providing technical support to six elementary schools, including Columbia Park Elementary School (Columbia Park). (Troll Decision at 5).

On December 28, 2008, Appellant notified Mr. Richard Putney, Executive Director of ACE-AFSCME, that he wanted to grieve actions of Michele Tyler-Skinner (Ms. Skinner), principal of Columbia Park, because she was selling jewelry during school hours in violation of PGCPs policy. (Appeal, Ex.JJ). In March 2009, Ms. Skinner received a reprimand for the selling of items for personal profit. (Appeal, Ex.LL).

During the period of time Appellant serviced Columbia Park, Ms. Skinner reported various concerns about the Appellant’s technical competence as an IT Technician. In one instance, the Appellant did not have the school computers ready for MOD MSA testing, although the Appellant maintains to the contrary. The problem was not discovered until the students attempted to take the practice test. In another instance, there was an issue with files on Ms. Skinner’s computer that resulted in an unpleasant email exchange between the two in March 2009. (Local Bd. Mtn. Sum. Dec., Supt. Ex.11). Kenneth Holmes, the paraprofessional who helped manage the technology lab and use of the computers by the teachers, found that the Appellant was not very knowledgeable about IT matters and had resolved less than 12% of the IT problems referred to him from the school. (Troll Decision at 6).

Ms. Skinner also reported that she was uncomfortable around the Appellant because he would show up at her office after school hours and attempt to have discussions with her that were unrelated to work. The visits were not prompted by technology concerns and were witnessed by other staff. (Troll Decision at 7). Staff members had also reported to the principal that the Appellant inquired about her when she was not there and asked them for advice about how to approach her, such as by buying flowers or candy. (Apps. Opp. to Local Bd. Mtn., Ex.1; Troll Decision at 8). Mr. Holmes reported that Appellant had stated that Ms. Skinner “must not be happy in her marriage because she did not have any children”; “that she needed to have babies”; and “that he [Appellant] wanted to impregnate her.” *Id.* As a result of her discomfort, Ms. Skinner alerted school staff not to leave her alone with the Appellant. Pierre Dickson, Director of Technology Support Services and Appellant’s supervisor, spoke to the Appellant about this and advised him to focus on his work. (Troll Decision at 8).

Based on the concerns presented by Ms. Tyler regarding Appellant’s interactions with her at Columbia Park, in April 2009, the school system ceased having Appellant provide direct technology services to the school. (Appeal, Ex.LL).

In May 2009, Appellant filed a complaint with the union regarding his interaction with Dr. William Hite, Jr., local superintendent, at the Harlem Renaissance Festival. He alleged that Dr. Hite expressed displeasure with Appellant reporting matters to the union concerning alleged corruption and safety concerns. He also maintained in the complaint that his supervisor, Pierre Dickson, harassed him by referring to him as a “f--king Nigerian” on multiple occasions. (Appeal, Ex.MM). He filed another complaint on June 25, 2009 alleging a romantic relationship between Dickson and Shanita Anderson, presenting claims regarding their mistreatment of PGCPs personnel, and expressing concerns about a possible transfer to the Help Desk. (Appeal, Ex.PP).

In June 2009, the school system transferred the Appellant to the PGCPs Help Desk where he assisted teachers and other staff members with computer-related issues. Appellant engaged in combative interactions with his supervisor and co-workers. His supervisor notified him that he lacked certain technical qualifications and skills to perform his job. Mr. Dickson had to frequently communicate with Appellant regarding his adverse behavior and demeanor with staff, particularly with his actions toward his immediate supervisor at the help desk, Shanita Anderson. (Apps. Opp. to Local Bd. Mtn., Ex.1; Troll Decision at 10).

In November 2009, members of the Help Desk team requested an emergency meeting with Mr. Dickson to apprise him of Appellant’s explosive behavior and conduct. Every member of the Help Desk team reported that Appellant was negative, angry, outrageous and confrontational in his interactions with Ms. Anderson and other team members. (Troll Decision at 10). Some also complained that Appellant often gave incorrect information to customers and violated department policies and procedures, such as leaving the worksite without permission. Several meetings took place with Appellant and his union representatives in an attempt to resolve the situation, but nothing was resolved. (Apps. Opp. to Local Bd. Mtn., Exs.1&68C;).

On November 18, 2009, Appellant filed a discrimination or harassment incident report with the school system alleging discriminatory and harassing behavior by Shanita Anderson and

Pierre Dickson on numerous occasions. The behavior complained of included derogatory references to the Appellant. (Appeal, Ex.AAA).

On November 19, 2009, Ms. Anderson was meeting with Appellant in her office when he became irate and began yelling and screaming at her after she requested that he be cognizant of his tone when speaking with his peers. Other employees witnessed the behavior. Ms. Anderson issued to the Appellant a letter of reprimand the same day. She found Appellant's conduct to be inappropriate and insubordinate, stating that she had previously met with him on several prior occasions requesting that he adjust his tone when dealing with others. (Appeal, Ex.BBB). The Appellant believed Ms. Anderson was to blame for the incident stating that she was trying to "frustrate his efforts". (*Id.*).

On December 1, 2009, Ms. Anderson placed Appellant on a 45 day performance review plan. (Appeal, Ex.EEE).

That same day, Mr. Putney filed a grievance on Appellant's behalf, claiming that Appellant was being discriminated against and that management was setting him up for failure and termination. He stated that Appellant's "aggression is related to his national origin which has not been taken in[to] account"; that it causes him to "respond differently to job related issues", and that "he may raise his voice tone or over react to certain allegations aimed at him." (Appeal, Ex.DDD). Mr. Putney filed another grievance on February 2, 2010, regarding Appellant's placement on the 45 day performance plan, maintaining that management was unjustly harassing him and singling him out. (Appeal, Ex.HHH).

On March 4, 2010, Ms. Anderson completed her review of Appellant's 45 day performance plan. She rated him as "unacceptable" in quality of work, professionalism, reliability/initiative, teamwork, communication skills and adherence to rules and policies, and as "needs improvement" in productivity, technical job skills, and client relations skills. Appellant received an overall "unacceptable" rating. (Appeal, Ex.ZZZZZ).

On March 8, 2010, Appellant was involved in an incident in which Ms. Anderson felt physically threatened by the Appellant. Several employees contacted security because they were fearful that the Appellant was going to harm her. (Troll Decision at 11).

On March 16, 2010, Appellant filed a grievance stating his belief that he was being set up for failure under the guise of his supervisor and requested a reassignment. (Appeal, Ex.MMM).

Thereafter, Appellant was reassigned to the Bonnie F. Johns Media Center. (Troll Decision at 12).

Termination Proceedings

By letter dated March 24, 2010, Mr. Dickson advised the Appellant that he was recommending him for termination from the position of IT Technician II based on violation of the Regulations for Supporting Personnel due to incompetence or other similar unsatisfactory

performance, insubordination, violation of administrative regulations or department rules, and any conduct which reflects unfavorably on PGCPs as an employer. Mr. Dickson's letter outlined the many incidents precipitating the recommendation. (Appeal, Ex.OOO). Prior to his termination recommendation, Mr. Dickson had no knowledge that the Appellant had previously filed complaints within PGCPs alleging discrimination by him or other employees, or that Appellant had contacted any law enforcement agencies regarding allegation of corruption within PGCPs. (Appeal, Ex.SSSSS). At this time, Appellant was placed on leave without pay status pending action on the recommendation for termination as a non-certificated employee. (LB Resp. to Opp. to Exceptions, Whattam Affidavit).

By letter dated April 1, 2010, James E. Spears, Appellant's union representative, appealed Mr. Dickson's termination recommendation. (Appeal, Ex.SSS). Mr. Spears sent another letter on April 9, 2010. (Appeal, Ex.TTT). In the appeal, Appellant maintained that he was being terminated in retaliation for disclosing allegedly improper and possibly criminal activities of several school officials.¹ (*Id.*).

In a letter dated April 29, 2010, Synthia Shilling, then Acting Human Resources Officer, responded stating that there was a delay in scheduling a *Loudermill* conference on the termination recommendation because Appellant had been out on medical leave.² She offered Appellant the opportunity to submit written materials or to request an in-person meeting. (Appeal, Ex.K). Appellant relied on a May 12, 2010 written response submitted by his attorney at the time, Laurel Anchors, Esq. Ms. Anchor's letter alleged discrimination and harassment of the Appellant by PGCPs employees. (Appeal, Ex.J).

By letter dated June 18, 2010, Ms. Shilling, advised Ms. Anchors of the final decision on the recommendation for termination. She stated that Appellant was being terminated in accordance with the Regulations for Supporting Personnel for incompetence or other similar unsatisfactory performance, insubordination, violation of administrative regulations or department rules, and any conduct which reflects unfavorably on PGCPs. Ms. Shilling's letter also stated that the school system had investigated all of Appellant's allegations of discrimination and harassment, but had found the claims to be unfounded. She further stated that management had already placed the Appellant in three different work settings within a period of less than two years, but Appellant was unable to comply with the employment expectations and termination was, therefore, appropriate. (Appeal, Ex.GGGG).

Mr. Putney filed a demand for arbitration of the Appellant's termination on June 21, 2010. (Appeal, Ex.HHHH). Damon Felton, attorney for Appellant, later requested that the demand be held in abeyance. (Appeal, Ex.NNNN). On July 6, 2010, Mr. Putney directed an appeal of the termination to Dr. Hite. (Apps. Mtn. to Strike LB Reply, Ex.10).

¹ On April 20, 2010, the EEOC issued a notice of a charge of discrimination against PGCPs by the Appellant based on his national origin (African/Kenyan) and on retaliation. (Appeal, Ex.AAAA). The EEOC later issued a notice of right to sue letter. (Appeal, Ex.TTTT).

² Appellant went on medical leave on March 17, 2010. (Appeal, Ex.NNN).

By letter dated October 14, 2010, counsel for Appellant, Bruce Luchansky, demanded Appellant's reinstatement and reimbursement of all lost wages and benefits based on the school system's failure to schedule an appeal hearing within 30 days. (Appeal, Ex.PPPP).

On October 26, 2010, James R. Whattam, Director of Employee and Labor Relations, responded to Mr. Luchansky that a hearing on Appellant's appeal was scheduled on November 12, 2010, in accordance with the Regulations for Supporting Personnel. (Appeal, Ex.DDDDD). In an October 27, 2010 letter, Roger Thomas, counsel for the local board, reiterated the November hearing date. (*Id.*). He also stated that there had been a lack of clarity regarding Appellant's legal representation. He stated:

Throughout this process, Mr. Mua has been represented by numerous counsel including, Union attorney, Damon R. Felton, Esquire; Neil Lebowitz, Esquire; Laurel Anchors, Esquire, and now your office. At some point, Mr. Mua was represented by both Ms. Anchors and Mr. Felton. In August 2010, Ms. Roslyn Hawkins, Labor Relations Specialist with Prince George's County Public Schools, contacted Mr. Felton and asked for clarification regarding the representation for Mr. Mua to allow the school system to confirm the scheduling of a hearing date. It was not until August 11, 2010, that the school system received information from the Union through ACE-AFSCME representative, Mr. James Spears, that the Union would withdraw from its representation of Mr. Mua.

(*Id.*).

Thereafter, while processing the appeal, it was discovered that Appellant still held a valid professional teaching certificate and that he had never resigned from his employment under the Regular Contract. (LB Resp. to Opp. to Exceptions, Whattam Affidavit). By letter dated November 10, 2010, Dr. Hite advised the Appellant that he was altering the procedural posture of the termination and that the case would be proceeding under §6-202 of the Education Article because Appellant was still employed under the Regular Contract. He further advised that he was recommending his termination to the local board based on incompetence and misconduct in office as fully set forth in the June 18 termination letter from Ms. Shilling, and that his administrative leave without pay would continue pending action by the local board on the recommendation. He also advised that school system personnel would be in touch about scheduling a hearing. (Appeal, Ex.RRRR).

In response, Mr. Luchansky, counsel for Appellant, protested the handling of the case under §6-202, maintaining that it did not apply because the Appellant's certificated position was eliminated in 2007 and he was employed in a non-certificated position at the time of his termination.

The local board proceeded according to §6-202. It initially referred the matter to Hearing Examiner Terri Bell on February 4, 2011. (Appeal, Ex.EEEEE). Ms. Bell provided notice that

she was unable to conduct the hearing so the local board transferred the matter to Hearing Examiner, Robert Troll, Jr. on February 14, 2011. (Appeal, Ex.K, Jacobs 2/14/11 Letter). A hearing was scheduled for May 2-3, 2011. Appellant's counsel was unable to attend due to a family medical emergency. (Appeal, Ex.FFFFF). Hearing Examiner Troll then conducted a hearing on the Superintendent's termination recommendation on July 12, 13, and 27, 2011; August 2, 2011; and October 26, 2011. Mr. Troll scheduled those hearing dates for the convenience of counsel for the Appellant, counsel for the Superintendent, and for himself. (Troll Decision).³

On January 19, 2012, Mr. Troll issued a proposed decision recommending that the local board terminate the Appellant for misconduct, insubordination and incompetency. Mr. Troll concluded that the Appellant engaged in outrageous behavior and abusive conduct towards his supervisor at the Help Desk and numerous other employees at the office, failed to heed the directives of his supervisors and demonstrated incompetence in the performance of his duties as an IT Technician. (Troll Decision). Mr. Troll also found that the delay in the hearing did not deprive Appellant of due process.

On July 11, 2012, the local board affirmed the Superintendent's decision to terminate the Appellant. The local board stated, in part:

[T]he record clearly establishes that the Appellant was not successful in working in three different environments within PGCPs over a period of almost three (3) years. The Appellant was aggressive, abusive, and unprofessional in dealing with supervisors and co-workers. The Appellant's conduct was disruptive to school and office settings. In addition, the Appellant demonstrated a lack of competence in providing IT services required by his position. Finally, the Appellant does not present any witness or evidence to corroborate his allegations of retaliation and/or discrimination.

(Local Bd. Order at 5). In reaching its decision, the local board gave deference to the hearing officer's credibility determinations, noting that Mr. Troll did not find Appellant to be a credible witness in responding to the charges against him. (*Id.*). The local board further found no due process violation as a result of the delayed hearing before Mr. Troll. (*Id.* at 1).

Appeal to State Board

Appellant appealed the termination decision to the State Board. We referred the matter to OAH because the case involved a local board termination under §6-202 of the Education Article.

In addition to a variety of pre-hearing motions, the Appellant filed an "Emergency Request for Motion to Clarify an Important Point" requesting that the appeal proceed as a

³ Meanwhile, Appellant filed several actions against the local board in the Circuit Court for Prince George's County alleging defamation, false light, breach of contract, discrimination and retaliation. (Appeal, Ex.K).

termination under §4-205(c) of the Education Article, instead of under §6-202, because he held a non-certificated position at the time of his termination. The local board consented to Appellant's request conditioned on it maintaining its position that the §6-202 termination process was applicable because the Appellant held certification and was still employed under the Regular Contract.

The ALJ granted the Appellant's request and issued a Proposed Ruling on Motion for Summary Decision addressing only the alleged procedural violation. The ALJ determined that, at the time of the Appellant's termination, he was employed as a support staff employee and not a certified teacher, thus the authority to terminate him was controlled by §4-205(c) of the Education Article, not §6-202. (ALJ Decision at 7). The ALJ then concluded that OAH lacked jurisdiction to hear the appeal because the local board failed to conduct an appeal termination hearing within the 30 day deadline set forth in the PGCPs Regulations for Supporting Personnel. He analogized the local board's hearing delay to a party's failure to file a case prior to the expiration of a statute of limitations, which deprives the reviewing tribunal of jurisdiction to hear the case. (ALJ Decision at 8). After concluding OAH lacked jurisdiction to hear the case, he recommended that the State Board rescind Appellant's termination and reinstate him with all back pay and benefits lost as a result of the local board's action.

The local board filed exceptions to the ALJ's proposed decision. On May 21, 2013, we heard oral argument on those exceptions from legal counsel for the local board and Mr. Mua.

STANDARD OF REVIEW

One of the issues in this case concerns whether the matter should have proceeded under §6-202 or §4-205 of the Education Article. 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.

The standard of review applied to a case depends on which provision pertains. In appeals involving the termination of a certificated employee pursuant to §6-202, the State Board exercises its independent judgment on the record before it in determining whether to sustain the termination. COMAR 13A.01.05.05(F)(1) & (2). In these types of appeals the State Board is not reviewing the decision of the local board or the local hearing examiner to determine if the decisions are legally supportable. The State Board is engaging in a *de novo* review in which it takes a fresh look at the evidence in the record in making its decision whether or not to sustain the termination. In termination cases such as this one, the local board has the burden to prove by a preponderance of the evidence that the termination should be sustained. COMAR 13A.01.05.05F(3).

When a local board terminates under §6-202, the State Board refers the case to OAH for proposed findings of fact and conclusions of law by an ALJ. COMAR 13A.01.05.07A(2). In such cases, after considering the evidence *de novo*, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision.

In appeals involving the termination of a non-certificated employee under 4-205(c), the local board's decision is considered prima facie correct and the State Board will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A. In such cases, the appellant has the burden to prove by a preponderance of the evidence that the termination should not be sustained. COMAR 13A.01.05.05D.

ANALYSIS

Is the Appellant's Termination Governed By Education Article §4-205 or §6-202?

The Appellant has maintained throughout his appeal that the termination was governed by §4-205(c), which sets forth the administrative review procedures for noncertificated support personnel, because he was not employed in a position requiring teaching certification at the time of his termination. On the other hand, the local board has maintained that it properly applied the §6-202 procedures to the Appellant's termination because, at the time of his termination, the Appellant held a valid Maryland teaching certificate and continued to be employed under the Regular Contract with the local board.

On this issue, without providing a full legal analysis, the ALJ made the following findings and conclusion in his Proposed Ruling on Motion for Summary Decision:

In this matter, it is undisputed that the Appellant was no longer a teacher when he was terminated from employment by GBCPS in 2010. The local board argued that the Appellant also maintained a Maryland Teacher's Certificate and was still under a Regular Teacher's Contract at the time of his termination. I disagree with the local board's assertion. I find that at the time of the Appellant's termination he was employed as a support staff employee and not a certified teacher, thus the authority to terminate him from employment is controlled by Md. Code Ann., Educ. §4-205(c)(2008 & Supp. 2012).

(Proposed Decision at 7). We disagree with the ALJ's determination on this issue as explained below.

Section 6-201 of the Education Article provides as follows:

(b)(1) The county superintendent shall nominate for appointment by the county board:

- (i) All professional assistants of the office of county superintendent; and
- (ii) All principals, teachers, and other certificated personnel.

- (2) As to these personnel, the county superintendent shall:
 - (i) Assign them to their positions in the schools;

- (ii) Transfer them as the needs of the schools require;
- (iii) Recommend them for promotion; and
- (iv) **Suspend them for cause and recommend them for dismissal in accordance with §6-202 of this subtitle.**

(Emphasis added).

Section 6-202 is entitled “suspension or dismissal of teachers, principals and other professional personnel”. The statute sets forth the grounds and procedures for the suspension and dismissal of “a teacher, principal, supervisor, assistant superintendent, or other professional assistant.” It affords those specified individuals the opportunity for an evidentiary hearing prior to removal by a local board. Teachers, administrators, supervisors, professional assistants, and assistant superintendents must all hold appropriate certification from the State Superintendent issued in accordance with the rules and regulations of the State Board. Md. Code Ann., Educ. §6-201(e); COMAR 13A.12.01.03.

At the time of his termination, the Appellant was not a teacher, principal, supervisor, assistant superintendent, or other professional assistant. He was employed as an IT Technician, a position that required no certification from the Maryland State Department of Education. The fact that an individual might hold teaching certification or have held a prior position as a teacher in the school system would not automatically require applicability of §6-202 to the employee’s termination when the employee is no longer employed in that capacity. In the usual case, a termination appeal of an individual employed in a position that does not require certification would come under §4-205(c) because whether §4-205 or §6-202 applies is driven by the position held by the employee at the time of termination and the requirements of that position.

This case is complicated, however, by the fact that neither the Appellant nor the local board ever terminated the Appellant’s Regular Contract, which continues from year to year unless terminated by one of the parties or the employee ceases to hold a professional certificate. Neither of these circumstances occurred here and the Regular Contract remained in effect. The Regular Contract, set forth in COMAR 13A.07.02.01, references the applicability of §6-202 to suspension and dismissal. After reviewing Appellant’s case and realizing he was still under the Regular Contract, the school system determined that Appellant’s termination was subject to the §6-202 process. Given the unusual facts of this case, we find that the local board did not err in proceeding in this fashion.

Further, we note that the §6-202 termination procedures entitled the Appellant to more process than that afforded under §4-205(c), and placed the burden of proof on the school system to uphold the termination rather than on the Appellant to prove the termination should not be upheld. Thus, it is generally considered more advantageous for an appellant to proceed under the §6-202 appeal process.

Regulations for Supporting Personnel/Due Process

Appellant argues that as a member of the ACE-AFSCME, his employment was subject to the negotiated agreement between the union and the local board, and that the local board had a

contractual duty to follow the Regulations for Supporting Personnel as set forth in that agreement. He also argues that despite ACE-AFSCME Local 2250 agreement, the local board was obligated to follow its own regulations. The Regulations for Supporting Personnel require that a hearing be held “not less than five (5) or more than thirty (30) working days after the receipt of the request” for a hearing on the termination. (Appeal, Ex.F, Regulations at 8). Appellant maintains that he was prejudiced by the fact that the hearing on his termination appeal did not take place until approximately one year from the date he appealed the termination decision, and that under the *Accardi* doctrine the local board’s decision should be reversed.⁴

Belying the Appellant’s argument is the issue of whether the Regulations for Supporting Personnel apply to his termination. The local board maintains that they are not applicable because Appellant was a certificated employee under the Regular Contract and his termination is governed by §6-202, not the Regulations for Supporting Personnel and §4-205(c). Following our reasoning above, the Regulations for Supporting Personnel would not apply because Appellant was employed under the Regular Contract for certificated employees. Nonetheless, whether the 30 day hearing requirement in those Regulations applied or not, under either appeal termination process, the Appellant was entitled to a hearing on his termination and his claim of unreasonable delay must be addressed on due process grounds.

The ALJ addressed the issue of delay by applying the Regulations for Supporting Personnel to Appellant’s case and comparing the local board’s failure to hold a hearing within 30 days to the failure of an individual to adhere to a statute of limitation in filing an appeal. (Proposed Decision at 6). The ALJ expressed that the rationale for strict application of statutes of limitation applies equally to the strict application of the thirty day hearing requirement in this case because the Appellant suffered the same due process violation as an agency would with a late appeal, in that evidence is lost, memories fade and witnesses could die or become unattainable. *Id.* While we do not disagree with some of the sentiment of the statutes of limitations jurisprudence, we reject the ALJ’s reasoning because we believe a different, although somewhat analogous, analysis is applicable here.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court recognized that the core requirement of due process in that an individual be given notice of the intended action and an opportunity to present the individual’s response before being deprived of any significant property interest. As to post termination delays, the Court in *Loudermill* recognized that a nine month adjudication was not unconstitutionally lengthy per se, and that such a delay would not necessarily create a constitutional claim. *Id.* at 547; *see also Jones v. Prince George’s County Bd. of Educ.*, MSBE Op. No. 12-21 (2012)(finding no due process violation as result of seven month delay between appeal notice and termination hearing); *Lowe-*

⁴ The *Accardi* doctrine is the oft cited case-created rule of administrative law that states 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). In Maryland, there is no *Accardi* violation when the agency allegedly fails to follow a procedural rule that was simply designed for the “orderly transaction of business.” *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463 (2003). But even if there is an *Accardi* violation, the appellant must show that he was prejudiced by the decision in order to have the agency decision reversed. *Id.*

Yates v. Prince George's County Bd. of Educ., MSBE Op. No. 03-21 (2003)(finding no due process violation as result of nine month delay).

The Maryland Court of Special Appeals has provided some guidance to aid in determining if there has been a due process violation in the face of an allegation of "unconstitutional delay" in the employee termination context. See *Desser v. Department of Health & Mental Hygiene*, 77 Md. App. 1 (1988). In *Desser*, the Court utilized a four prong balancing test to determine whether a seven month delay in the final resolution of the appellant's case on his suspension and removal from State service amounted to a due process violation. Under the test, consideration is given to the length of the delay, reason for the delay, appellant's assertion of his right, and prejudice to the appellant. *Id.* at 11(citing *U.S. v. Eight Thousand Eight Hundred & Fifty Dollars*, 461 U.S. 555(1983) and *Barker v. Wingo*, 407 U.S. 514 (1972), dealing with Fifth Amendment rights against deprivation of property without due process of law and Sixth Amendment rights to a speedy trial, respectively.). The Court ultimately found no due process violation because part of the delay was a result of appellant's request to submit additional documentation, there was an extensive record to review, the appellant did nothing to help expedite the case, and the appellant suffered no prejudice but rather benefitted from the delay. *Id.* at 11-14.

There is no dispute in the record here that the Appellant first asserted his right to a hearing several days after his termination, by letter dated July 6, 2010, from Appellant's union representative, Mr. Putney. There is also no dispute that there was approximately a one year delay between the time the Appellant requested an appeal of his termination and the date the appeal hearing began on July 12, 2011.

The basis for the delay, however, is somewhat convoluted. It appears that the school system was confused as to who was representing the Appellant for a short portion of the time constituting the delay. Prior to August 2010, Appellant had numerous legal representatives acting on his behalf on various issues. In addition, the originally scheduled November 12, 2010 hearing was rescheduled once the school system realized the case should have proceeded under §6-202 and needed to be assigned to a hearing examiner. The local board assigned the matter to Ms. Bell, who removed herself from the case. Within a few days, the local board assigned it to Mr. Troll and a hearing was set to begin on May 2, 2011. Counsel for Appellant was unable to attend the May 2nd hearing due to a family emergency, and Mr. Troll rescheduled the hearing for July 12, 2011. Mr. Troll indicated in his decision that the date was set for the convenience of the attorneys and for himself, suggesting that there was discussion amongst them regarding hearing date availability.

Given all of this history, it does not appear that the local board was solely responsible for the full year of delay. It appears that the hearing was set to take place on May 2, 2011, but that did not occur because Appellant's counsel could not attend that day. Thus, we think it is reasonable to attribute approximately ten months of the delay to the local board alone, from July 6, 2010 until May 2, 2011. The issue, therefore, is whether a ten month delay violated Appellant's due process rights.

The last element is whether the Appellant has been prejudiced by the delay. The central issue is “whether the delay has hampered the claimant in presenting a defense on the merits, though, for example, the loss of witnesses or other important evidence.” *Desser*, 77 Md. App. at 13. The Appellant argues that he was prejudiced by the delay because three witnesses died during the thirteen months between his June 2010 termination and the July 2011 start of his five day termination appeal hearing, and that a fourth witness died this year. He states:

These witnesses include Mr. Richard Putney, Executive Director of ACE-AFSCME Local 2250. Mr. Putney was a witness to grievance proceedings and false allegations made against Appellant by Mr. Pierre Dixon and Shanita Anderson. The second deceased witness is Mr. Reginald “Reggie” Harris. He would have testified that he was a witness to harassment and retaliation by Ms. Deborah Toppins. The third deceased witness is Mrs. Ida Wilson Pinkney. She would have testified that Mr. Mua was competent and was self-disciplined with strong work ethic who liked to give extra IT support service to senior citizens. The fourth deceased witness was a colleague to Mr. Mua and fellow IT Technician Mr. Claude Lee Bess, Jr. He would have testified about Mr. Mua’s competency and professionalism.

(Memorandum in Opp. To LB’s Exceptions).

The Appellant has not proffered sufficiently detailed information regarding the testimony that these witnesses would have provided and how the testimony is relevant to the termination charges. For example, even if Mr. Putney was a witness to grievance proceedings filed by the Appellant and the allegations made against Appellant by school system personnel, his being a witness to those proceedings and allegations do not prove or disprove that the Appellant committed misconduct or incompetency. It only shows that he was engaged in the proceedings at Appellant’s behest.

As for the testimony of Mr. Harris, Appellant provides no specificity other than stating that he would have testified that he was a witness to harassment and retaliation by Ms. Toppins. The primary incident involving Ms. Toppins that is relevant to the termination was the verbal altercation between her and the Appellant over the stolen laptop report. Appellant has provided no information that Mr. Harris would have given testimony as a witness to that incident. Thus, the vague assertion of Mr. Harris’ testimony does not demonstrate that the Appellant was prejudiced by his inability to call him as a witness.

Appellant states that Ms. Pinkney would have testified regarding his overall competency in the IT arena, but Ms. Pinkney was not Appellant’s supervisor and would not have been able to testify about Appellant’s performance as an IT professional for the school system from the managerial perspective. The same is true of Mr. Bess’ testimony.

In addition to the deceased witnesses, Appellant identifies a litany of other witnesses who he claims were unavailable because they were either been laid off by PGCPs in a “suspicious

manner”, have retired, have moved away to other states, have been transferred by PGCPs and cannot be easily located, or have forgotten their testimony. He lists the following individuals as witnesses whose testimony he was not able to present: Judy T. Jefferson, Director of Internal Audit; Marilyn Moreno, Area 2 Performance Education Director; Principal Janet Reed; Principal Jeanne Washburn; Principal Brenda Foxx; Principal Helen Smith; Principal John Enkiri; Assistant Principal Joan Milliner; Assistant Principal Linda Funderburk; Assistant Principal Randolph Perry; Bill Brown, IT Supervisor; Mary E. Ward, IT Manager; Reginald Renwick; Cheryl Davis; Alice Green; Mandana Reed; Kimberly Ann Fizdale; Brenda Laverne Barnes; Charles W. Mackey; Carol Lynne Terry; Linda McCoy; Michael Davis, and others. (Memorandum in Opp. To LB’s Exceptions).

In order for us to evaluate whether potential witness testimony was lost or witnesses were unavailable as a result of the delay of the hearing before Mr. Troll, Appellant would have to identify the basis for each individual’s inability to testify with specificity rather than making a catchall statement pertaining to the group. The basis for unavailability matters. For example, a witness who had retired or had been laid off may very well be available to testify, but one who moved to another state in the intervening time frame might be unavailable. Appellant has not indicated which of the listed individuals he could not locate despite good faith efforts. Nor has he submitted any affidavit or other evidence attesting to the fact that, at the time of the hearing, any of these listed individuals specifically forgot testimony that might be relevant to the issues in this case due to the passage of time. Appellant has simply not shown that these individuals were unable to present testimony to advance his legal position as a result of delay. Indeed, a discussion between Mr. Troll and legal counsel for the Appellant and the school system demonstrates that some of the individuals Appellant wished to call as witnesses simply did not agree to testify or did not return phone calls to Appellant’s legal counsel. (T.7-8, 8/3/11). Without providing clarity as to which witnesses are now unavailable due to the delay of the hearing before Mr. Troll, we cannot find that the Appellant was prejudiced on this basis.⁵

We note that with regard to the issue of unreasonable delay, the local board argues that the evidentiary hearing held on appeal to the local board cured any procedural due process defect that may have existed by the local board’s failure to hold the hearing in a timely fashion. In support of this proposition, the local board relies on *Dickerson v. Wicomico County Bd. of Educ.*, MSBE Op. No. 05-06 (2005), *Williamson v. Board of Educ. of Anne Arundel County*, 7 Ops. MSBE 649 (1997), *West & Bethea v. Baltimore City Bd. of School Comm’rs*, 7 Ops. MSBE 500 (1996), *Harrison v. Board of Educ. of Somerset County*, 7 Ops. MSBE 391 (1996), which all found that the evidentiary hearing before the local board cured any procedural errors that may have occurred in the process prior to the appeal to the local board. The irregularities in those cases occurred at an earlier stage of the process than that alleged here. In this case, the fact that the local board appeal hearing took place cannot cure the delay of that same hearing.

⁵ Even if we had found that the Regulations for Supporting Personnel applied here and that the local board violated the requirement in those Regulations that a termination hearing be held within 30 days of the appeal request, Appellant has failed to show that he was prejudiced by the delay based on unavailability of witnesses. Thus, even if the *Accardi* Doctrine applied, without a showing of prejudice there is no basis to reverse the local board’s termination decision. As to the breach of contract allegation, Appellant has not specified the provision allegedly breached.

Merits of Appeal

Appellant was terminated for misconduct based on acts of aggressive and inappropriate behavior towards PGCPs staff, incompetence for failing to satisfactorily complete his work, and insubordination for failing to heed the directives of his supervisors. At this stage of the process, it appears that the local board is only pursuing termination based on misconduct and incompetency. (Resp. to Opp. to Exceptions). We address those two termination bases below.

Misconduct

What constitutes misconduct in the school employee context is not defined in statute or regulation. (1988). In *Resetar v. State Bd. of Educ.*, 284 Md. 537, 560-561 (1979), the Maryland Court of Appeals interpreted the term misconduct as follows:

The word is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.

In this case, the evidence demonstrates that the Appellant was unable to maintain positive relationships with his supervisors and coworkers in three different assignments. At Laurel High School, Appellant engaged in verbal altercations with Ms. Toppins and Ms. Hebert in which he was aggressive and used profane and inappropriate language. While serving in the Field IT position, Appellant initiated inappropriate interactions with Ms. Skinner, seeking her out after school hours for non-work related reasons and appearing to want to establish a personal relationship with her. While assigned to the IT Help Desk, Appellant had confrontations with Ms. Anderson and interacted inappropriately with other Help Desk team members, creating a negative work environment. One confrontation led to a call to security because Ms. Anderson and others present believed the Appellant was going to become physical. We find, therefore, a sufficient basis for Appellant's termination for misconduct.

Incompetence

Incompetence is when an employee is lacking in knowledge, skills, and ability or failing to adequately perform the duties of an assigned position. At Laurel High School, Appellant had difficulty working cooperatively and communicating appropriately with other employees. At Columbia Park, Appellant had issues dealing with the technical problems presented by the teachers and the principal. Ms. Skinner testified about multiple issues she had with the quality of the Appellant's work. Most notably, Appellant was unable to successfully prepare equipment necessary for students to take State assessments. In addition, while assigned to the Help Desk, he had performance deficiencies that resulted in a 45 day performance review. His March 4 assessment shows that he was unwilling or unable to make the changes necessary to successfully complete his job. We therefore find sufficient evidence to support the termination based on incompetence.

Discrimination/Harassment

We recognize that the Appellant claims he was terminated based on discriminatory or retaliatory motives. The local board has provided legitimate and non-discriminatory reasons for Appellant's termination. Appellant has presented his own accounting of the alleged retaliation and discrimination, without other independent evidence to support the claims. Hearing Examiner Troll found that the Appellant was not a credible witness. It is well established that determinations concerning witness credibility are within the province of the trier of fact. *See, e.g., Board of Trustees v. Novik*, 87 Md.App. 308, 312 (1991) *aff'd*, 326 Md. 450 (1992)(it is within the province of the trier of fact to resolve conflicting evidence; where conflicting inferences can be drawn from the same evidence, it is for the trier of fact to draw the inferences.) Accordingly, we defer to Mr. Troll's credibility determinations. Appellant has not shown that the reasons for the termination were pretextual.

Applicability of State Board of Education Opinions

The ALJ stated in his proposed decision that opinions of the Maryland State Board of Education are not controlling in OAH cases because the decisions are not reported cases. The State Board of Education opinions are reported opinions publicized on the Maryland State Department of Education website, with older opinions reported in bound volumes. To be clear, State Board of Education opinions serve as legal precedent and are controlling in all State Board of Education appeals, including those that we delegate to OAH. Although we delegate certain cases to OAH, the ALJ issues a proposed decision and this Board issues the final decision in the matter. It defies logic to find that our own opinions in appeal cases have no precedential effect on appeals before us.⁶

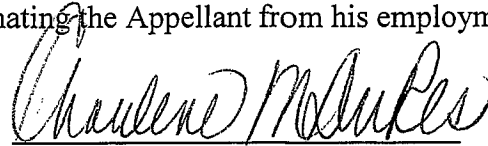
Motion for Disqualification

Appellant has filed a motion requesting that Dr. Charlene M. Dukes, President of the State Board, be disqualified from presiding over this matter or otherwise engaging in any decision making with regard to this case based on Dr. Dukes' service as member of the Prince George's County Board of Education during Appellant's employment and alleged affiliations with the Appellant in that capacity. Appellant believes Dr. Dukes' involvement with the local board, as well as her service on the Board of Prince George's County Harlem Remembrance Foundation with prior legal counsel to PGCPs, places under scrutiny her ability to be impartial in this matter and creates an appearance of impropriety. The mere fact that Dr. Dukes served on the local board and in other capacities while Appellant was employed by the school system, without more, does not require her to be disqualified from participation in this case.

⁶ We nevertheless agree that the proposition for which the particular State Board cases were cited is not applicable to the due process issue raised in this case.

CONCLUSION

For the reasons explained above, we reject the decision of the Administrative Law Judge and we affirm the decision of the local board terminating the Appellant from his employment.



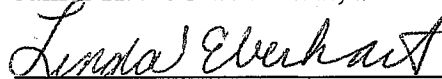
Charlene M. Dukes
President



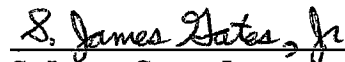
Mary Kay Finan
Vice President

Absent

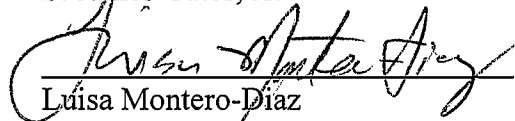
James H. DeGraffenreidt, Jr.



Linda Eberhart



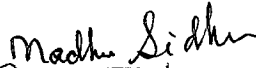
S. James Gates, Jr.



Luisa Montero-Diaz

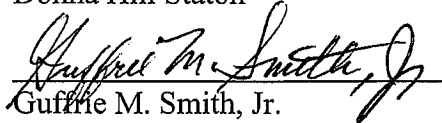


Sayed M. Naved



Madhu Sidhu

Donna Hill Staton



Guffie M. Smith, Jr.

June 25, 2013