

THOMAS BRACKETT

Appellant

KEVIN SHUPE

Appellant

v.

ALLEGANY COUNTY BOARD  
OF EDUCATION

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 08-31

## OPINION

### INTRODUCTION

In these two appeals, the Appellants challenge the local board's decision not to renew their probationary teaching contracts.<sup>1</sup> Appellants present two issues for the State Board's review. First, they argue that the local board should have provided a rationale for not renewing their contracts. On this point, they ask the State Board to reconsider its prior holdings affirming a local board's right to non-renew a probationary teaching contract without providing a reason for doing so. Second, Appellants argue that the local board failed to follow the employee evaluation process, thus requiring the reversal of the non-renewal decision. The local board maintains that its decision is not arbitrary, unreasonable or illegal and should be upheld.

### FACTUAL BACKGROUND

#### *Thomas Brackett*

Mr. Brackett began his employment with Allegany County Public Schools in August, 2005 as a mathematics teacher at Westmar High School. He was employed as a probationary employee under the terms of the Regular Teacher's Contract.

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<sup>1</sup>We have consolidated these appeals because they concern identical issues with regard to a local board's decision not to renew a probationary teaching contract.

During the 2005-2006 school year, Mr. Brackett was observed and evaluated at the following times:

First Semester

- Classroom observation on October 27, 2005
- Evaluation conference on November 4, 2005

Second Semester

- Classroom observation on January 11, 2006
- Classroom observation on February 13, 2006
- Evaluation conference on February 21, 2006

Mr. Brackett received ratings of “competent” in all areas observed during the classroom observations. On his evaluations, he received ratings of “competent” in all evaluation areas and overall “competent” ratings. (Employee History Packet).

Mr. Brackett’s contract was renewed for the 2006-2007 school year, during which he was observed and evaluated at the following times:

First Semester

- Classroom observation on October 9, 2006
- Classroom observation on October 23, 2006
- Evaluation conference on November 17, 2006

Second Semester

- Classroom observation on January 31, 2007
- Classroom observation on February 21, 2007
- Evaluation conference on February 23, 2007

Again, Mr. Brackett received “competent” ratings on all areas observed during the classroom observations, ratings of “competent” in all areas of his evaluations, and overall “competent” ratings on his evaluations. (Employee History Packet).

By letter dated April 16, 2007, the Superintendent, William J. AuMiller, advised Mr. Brackett that his contract with Allegany County Public Schools would not be renewed. (AuMiller letter, 4/16/07). Mr. Brackett appealed the non-renewal decision. He argued that he should have been provided a rationale for the decision not to renew his contract given his ratings as “competent” on his classroom observations and evaluations. He also argued that §6-202 requires that a teacher be granted tenure if he meets the established evaluation criteria during the probationary period. (Benson letter, 5/10/07).

The Superintendent denied the appeal. He explained that the school system is not

required to demonstrate cause as a basis for deciding not to renew a probationary teacher's contract. He stated that Appellant was provided with the appropriate non-renewal notice before the May 1 deadline as required by COMAR 13A.07.02.01B. The Superintendent also disclaimed Appellant's argument that §6-202 requires that a teacher be granted tenure if he meets the established evaluation criteria. (AuMiller Letter 5/30/07).

On appeal to the local board, in addition to the previous arguments made to the Superintendent, Mr. Brackett argued that the school system failed to follow the proper evaluation process for probationary teachers. (Whattam letter, 7/26/07).

This appeal to the State Board ensued.

*Kevin Shupe*

Appellant was hired as a reading teacher at Fort Hill High School in August 2005. He held a Standard Professional Certificate and was employed as a probationary employee under the terms of the Regular Teacher's Contract.

During the first semester of the 2005-2006 school year, Appellant was observed and evaluated at the following times:

- Classroom observation on November 2, 2005
- Classroom observation on November 8, 2005
- Evaluation conference on November 9, 2005

During the second semester, Mr. Shupe was observed one time, on January 25, 2006. There was no second semester evaluation conference. Mr. Shupe received ratings of "competent" in all areas observed, ratings of "competent" in all evaluation areas, and an overall "competent" rating. (Employee History Packet).

Mr. Shupe's contract was renewed for the 2006-2007 school year and he was assigned to teach social studies at Beall High School. He was observed at the following times during the first semester:

- Classroom observation on October 26, 2006
- Classroom observation on November 2, 2006

Although Mr. Shupe received ratings of "competent" in all areas observed, comments from the October classroom observation cautioned him regarding his attendance. There was no first semester evaluation conference or report. (Employee History Packet).

During the second semester, Mr. Shupe's classroom was observed on February 22, 2007.

Based on that observation, Mr. Shupe received ratings of “competent” in all areas except for Professional Responsibilities - demonstrates dependability in performing professional duties, for which he was rated “unsatisfactory.” The comments on the classroom observation form did not elaborate on the rating. (*Id.*)

An evaluation conference was held on February 28, 2007. Mr. Shupe was rated as “competent” in all areas except Professional Responsibilities, for which he earned an “unsatisfactory” rating. The accompanying comments stated “[a]s mentioned in [Appellant’s] evaluation earlier in the year, there is concern about [Appellant’s] attendance. At this point in the school year [his] attendance is unacceptable.”<sup>2</sup> No overall rating was given. Mr. Shupe was not observed again after the February 22, 2007 date. (*Id.*)

By letter dated April 16, 2007, the Superintendent advised Appellant that his probationary contract would not be renewed. Appellant appealed that decision. Like Mr. Brackett, he maintained that the non-renewal was arbitrary and capricious because the local board provided no explanation for the non-renewal decision, and because Mr. Shupe met the established performance evaluation criteria and was rated as a competent teacher. He maintained that he should have been granted tenure. (Letter from Benson 5/1/07).

The Superintendent denied the appeal for the same reasons that he denied Mr. Brackett’s appeal. (AuMiller Letter 5/30/07). Like Mr. Brackett, on further appeal to the local board, Appellant argued that the school system failed to follow the proper evaluation process for probationary teachers. (Whattam letter, 7/26/07).

The local board upheld the Superintendent’s recommendation not to renew Appellant’s teaching contract. In doing so, the local board noted that the non-renewal notice was delivered to Appellant within the prescribed time limits, and that there is no requirement to demonstrate cause for a non-renewal of a teaching contract.

This appeal followed.

#### STANDARD OF REVIEW

Cases involving the non-renewal of a probationary teaching contract are appealable from a local board’s decision, pursuant to Md. Educ. Code Ann. § 4-205. In *Anderson v. Bd. of Educ. of Carroll County*, 2 Op. MSBE 40 (August 30, 1978), the State Board explained the standard of review to be applied in cases involving the non-renewal of a probationary teaching contract. This Board stated,

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<sup>2</sup>Mr. Shupe maintains that during the 2006-2007 school year, he was absent 14.5 days, all of which were approved days of absence covered by his sick leave. (Shupe Affidavit).

In *Wojtulewicz v. Board of Education of Baltimore County*, MSBE Op. 73-3, we decided that “we shall no longer hear appeals from the non-renewal of a probationary teacher’s contract in which the teacher alleges merely that the non-renewal was the result of arbitrary or capricious action.” We did go on to say, however, that “if a teacher presents to us a controversy arising under the public school law or under the Constitution,” we would grant a hearing. Furthermore, we emphasized that we expected local boards of education to institute a fair and impartial system of teacher evaluation. Subsequently, we accepted jurisdiction over and decided cases in which a probationary teacher whose contract had not been renewed would allege that the rules governing teacher evaluation had not been adhered to. (See *Eugene P. Macri v. Board of Education of Washington County*, MSBE Op. 76-11; *Gloria Summers v. Board of Education of Frederick County*, MSBE Op. 77-7; *Edward F. Barbano v. Board of Education of Anne Arundel County*, MSBE Op. 77-11).

### ANALYSIS

The issue before this Board is the legality of the local board’s decision not to renew these probationary teachers’ contracts. Appellants assert that the decision is illegal for two reasons:

- (1) The local board should not, as a matter of law, be able to non-renew the contracts of probationary teachers who have received satisfactory evaluations without providing the employee with a reason for the non-renewal; and
- (2) The local board failed to follow the correct evaluation procedures.

We address each issue

#### *Must Local Boards Provide a Rationale for Non-Renewal of Probationary Teaching Contracts Whenever The Probationary Teacher Has Received Satisfactory Evaluations?*

Appellants argue that the non-renewal decisions should be reversed because the local board failed to provide a reason for the decision. It is well established, however, based on State Board precedent that a local board does not have to demonstrate cause as a basis for deciding not to renew a probationary teacher’s contract. See *Ewing v. Cecil County Bd. of Educ.*, 6 Op. MSBE 818 (1995); *Lockwood v. Howard County Bd. of Educ.*, MSBE Opinion No. 00-40 (September 26, 2000).

Appellants recognize the State Board’s prior holdings but request that the State Board overrule them. Appellants ask that the State Board require local boards to provide a basis for

non-renewal decisions in cases where the employee has satisfactory or better performance evaluations. Appellants argue that it is essential in such circumstances for a local board to proffer a legitimate reason underlying the non-renewal in order to protect against improper action. Their argument for overruling past precedent is not based on any change in the legal landscape.

Appellants rely on the dissent in *Melton v. Talbot County Bd. of Educ.*, MSBE Opinion No. 00-38 (2000), in which several State Board members stated that they would have reversed the decision of the local board not to renew the probationary teacher contract based on a failure to provide an explanation for the decision. They believed that this failure to explain the decision could be considered arbitrary or unreasonable given that the teacher received uniformly satisfactory or better performance evaluations. They found that these high performance evaluations created a legitimate expectation of contract renewal. *Id.* at 4-5.

For many years, this Board has concluded that a probationary employee's satisfactory evaluation does not create a protected property interest in continued employment. *See Bricker v. Board of Education of Frederick County*, 3 Op. MSBE 99 (1983). As the United States District Court explained in *Parker v. Board of Education of Prince George's County*, 237 F. Supp. 222 (D. Md) *aff'd*, 348 F.2d 464 (4<sup>th</sup> Cir. 1965) *cert. denied* 382 U.S. 1030 (1966), "[A]lmost every case which has considered the question, supports the view that unless there is a statute to the contrary, probationary teacher's contracts may be determined by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without hearing." *Id.* at 227. This Board has specifically held that a "satisfactory evaluation during one's probationary period does not amount to the granting of tenure." *Bricker*, 3 Op. MSBE at 103.

Those legal conclusions are based on Supreme Court cases involving non-tenured teachers. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), for example, the Supreme Court reviewed a decision not to rehire a non-tenured teacher for a second year. The Court held that the extent of the property interest in a teaching contract is the fulfillment of the one-year term of the contract. The Court stated that:

... the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578.

In its rulings and consistent with *Roth*, this Board has recognized that there is no statute, local rule or policy that creates a protected property interest in continuation of a probationary contract even if the employee has been deemed satisfactory. Thus, this Board has concluded that a local board can decide to non-renew a probationary contract without providing any reason to the employee. Such an action is legally sufficient because the employee has no protected property interest in the continuation of his contract, has no right to demand tenure, and because there is no rule or policy that requires the local board to show good cause, or any cause at all, for its decision not to renew.

We have recognized that there may be many reasons why a local board decides not to renew a probationary contract. As we mentioned in *Anderson v. Board of Education of Carroll County*, 2 Op. MSBE at 41,

It might very well be that a teacher's performance during the probationary years was reasonably satisfactory. If, however, the local system, interested in upgrading the quality of instruction, is looking for superior performance, it should be left with the discretion of terminating a teacher whose performance does not measure up to the board's standards.

And as we stated in *Bricker*, the school system might also feel the need to terminate a probationary teacher because of fiscal restraints or lack of need of that particular teacher's area of expertise. *Bricker*, 3 Op. at 103.

It remains our view that a local board need not provide to the probationary employee its reasons for its non-renewal decision. This does not mean that a local board can decide to non-renew for reasons that are illegal. Nor does this mean that the local board's decision is not reviewable. As we pointed out earlier, this Board will review the local board's decision not to renew a probationary contract to determine if it was illegal. It is the Appellants' burden, however, to show that the local board's decision is so. The Appellants have not met their burden and shown why it would be illegal not to renew a probationary employees contract without giving a reason for the non-renewal, even if the employee has been rated satisfactory.

The Appellants must look to other bases to show that the decisions in their cases were illegal.

#### *Evaluation Procedures*

Appellants contend that the non-renewal decisions are illegal because the school system failed to follow proper evaluation procedures. Specifically, Appellants argue that the Guidelines for the Evaluation of Probationary Teachers, as set forth in the Maryland State Department of Education's Teacher Evaluation Handbook, require at least four classroom observations per year

and at least one formal evaluation conference each semester, neither of which occurred in these cases. Mr. Brackett had three observations his first year, and Mr. Shupe had three observations and one evaluation conference in each of his years teaching. Appellants believe that these procedural errors require the reversal of the non-renewal decision. The local board did not address this issue in its decision or in its filings with the State Board.<sup>3</sup>

The Guidelines for the Evaluation of Probationary Teachers (Guidelines) were adopted by the State Board on December 19, 1973, shortly after the Board decided in *Wojtulewicz v. Bd. of Educ. of Baltimore County*, 1 Op. MSBE 167, to limit its reviewing function in probationary teacher non-renewal cases. The Guidelines were adopted to promote a “fair and impartial system for the evaluation for probationary teachers” and to address a “concern over possible abuses of discretion at the local level.” *Barbano v. Bd. of Educ. of Anne Arundel County*, 1 Op. MSBE 666, 668 (1977). The intent was for the Guidelines to provide a degree of uniformity in guiding the local boards in negotiating annually evaluation procedures with the collective bargaining units representing teachers. *Bd. of Educ. of Anne Arundel County v. Barbano*, 45 Md. App. 27, 31-32 (1980).

The Guidelines were not enacted as a bylaw, rule or regulation, and do not have the force or effect of law. *Bd. of Educ. of Anne Arundel County v. Barbano*, 45 Md. App. 27, 31-32 (1980). Thus, strict adherence to the Guidelines is not required when determining not to renew a probationary teacher’s contract. Nevertheless, in *Barbano*, the State Board looked to whether there was substantial compliance with the Guidelines in determining that an abuse of discretion did not take place. *Barbano v. Bd. of Educ. of Anne Arundel County*, 1 Op. MSBE 666. In the cases at hand, the local board substantially complied with the Guidelines. Mr. Brackett had three classroom observations and two evaluations in his first year and four classroom observations and two evaluation conferences in his second year. Mr. Shupe had three classroom observations and one evaluation conference each year.

#### CONCLUSION

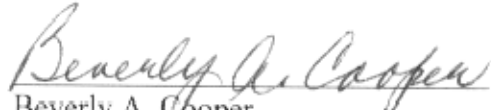
For all of these reasons, we affirm the decision of the local board.

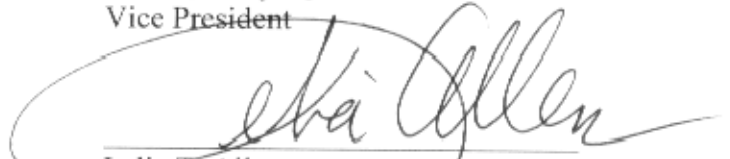
  
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Dunbar Brooks  
President

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<sup>3</sup>The local board states in its Memorandum that there were no allegations of illegality at the local board level and, therefore, the local board did not address the issue. Local Board’s Memorandum at 5. The issue was raised by both Appellants in their appeals to the local board. (Whattam letters, 7/26/07).



  
Beverly A. Cooper  
Vice President

  
Lelia T. Allen

*absent*  
J. Henry Butta

*absent*  
Charlene M. Dukes

  
Mary Kay Finan

  
Rosa M. Garcia

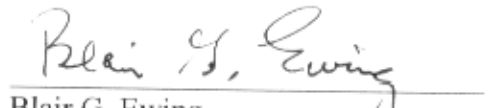
  
Richard L. Goodall

*abstains*  
Karabelle Pizzigati

  
David F. Tufaro

DISSENT

I dissent in the decision to affirm the local board. I would have required the local board to provide reasons for its decision not to renew the teaching contracts for Mr. Brackett and Mr. Shupe.

  
Blair G. Ewing

June 25, 2008