

LEONARD EMERSON,

Appellant

v.

BALTIMORE CITY BOARD OF SCHOOL
COMMISSIONERS,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-35

OPINION

INTRODUCTION

Leonard Emerson, a former Staff Associate-Buyer in the Baltimore City Public School System's Procurement Department, appealed the denial of his Level IV grievance. The Baltimore City Board of School Commissioners (local board) responded by letter to the appeal seeking affirmance of its decision. Mr. Emerson replied by letter. The local board responded.

FACTUAL BACKGROUND

In 1996, Mr. Emerson began as a Staff Associate-Buyer with the Procurement Department, Baltimore City Public Schools (BCPS). At the time this case arose, there were six buyer positions in the Procurement Department. Two were titled "Staff Associate-Buyer"; four were titled "Buyer." By virtue of their position as "Staff Associates," they were members of the Baltimore Teachers Union (BTU) unit. The four "Buyer" positions were not eligible for membership in a BTU unit. All six positions performed the same duties and responsibilities. (Local Board Response Letter at 1). The Staff Associate positions had different evaluation criteria and somewhat different schedules from the ones the Buyers had.

On December 23, 2009, Mr. Emerson's manager, Jocelyn Hopkins, evaluated Mr. Emerson as "Does Not Meet Expectations." Because the evaluation was done six months into the evaluation cycle, Mr. Emerson, through BTU, filed a Step III grievance on January 13, 2010 for untimely receipt of the evaluation.

In February 2010, Mr. Emerson was advised that his position, along with another Staff-Associate-Buyer position, was being "reclassified" and that he could apply for the "reclassified" position. On March 4, 2010, through BTU, he filed Step IV grievance about the reclassification.

He did apply for the reclassified position, but he was not selected. He received a letter on or about April 22, 2010 stating:

As you are aware Baltimore City Public School (City Schools) Procurement Office is currently undergoing reorganization, the position of Staff Associate/12 month has been identified for elimination and will be replaced with the position of Buyer.

This letter is to inform you that your last official reporting date is April 21, 2010; you will be paid administrative leave until May 8, 2010 when your current position will be abolished and you will officially be placed in lay-off status.

(Ex. B to Local Board's Response Letter).

On April 29, 2010, Mr. Jerome Jones, the Manager of Labor Relations held a meeting/hearing on the untimely evaluation grievance and apparently decided not to rule on the grievance. (See Appeal at 2). Shortly thereafter, the date of Mr. Emerson's lay-off was extended from May 8, 2010 to June 30, 2010. (T. 91-93).

On October 1, 2010, the Level IV Grievance Hearing was held on the "reorganization/reclassification" grievance. The Uniform Grievance form that Mr. Emerson filed for this grievance stated that the school system had violated §6.3 of the Collective Bargaining Agreement. (CBA). Section 6-3 states:

6.3 Reduction In Force:

In any reduction of educational personnel necessitated as a result of budgetary actions or declining enrollment, educational personnel shall be laid off solely on the basis of certification in the subject field assignment, qualifications, and on system-wide seniority counted from the most recent date of employment. The employee with the least amount of seniority shall be identified for layoff. In addition, an individual employee's second endorsement shall apply if the employee has teaching experience in the area of second endorsement and the Board has a need in a specific second endorsement subject area. A violation of this procedure only, may be the subject of a grievance. Decisions to layoff by the Board are not subject to the grievance procedure. Systemwide seniority shall be defined as per Article 1, Section 1.5.

The grievance form further states:

Leonard Emerson was notified that his position as a Staff Associate (Buyer) was being eliminated. After investigating, it was determined that in fact, the position is being re-advertised. This action is a violation of the Reduction in Force Procedure.

BTU was never notified of the layoff. Mr. Emerson would have a right to recall for a two year period; BCPSS although is advertising the same position; therefore, he has a right to the position.

Relief Sought . . . that Mr. Emerson not be laid off or that he remain in the same position.

(Hearing, Joint Ex. 1).

The Hearing Officer determined that:

Grievant has failed to show, based on the preponderance of evidence, that he was entitled to layoff rights under 6.3 since this section would not apply because the administration reorganized/reclassified the procurement unit under one title specification, and since there was no reduction of force or budgetary basis related to educationally-certified personnel.

(Hearing Officer Recommendation at 7)

Mr. Emerson filed no opposition or exceptions to the Hearing Examiner's decision with the local board. On December 14, 2010, the local board accepted the Hearing Examiner's recommendation and denied the grievance. This appeal ensued.

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.01.05.03E(1).

LEGAL ANALYSIS

In this appeal, two things are abundantly clear. First, Mr. Emerson presented no arguments or exceptions to the Hearing Examiner's recommendation for the local board to consider prior to making its decision. Second, all the arguments Mr. Emerson presents on appeal raise new issues that were not considered below. Those issues are:

- (1) The hearing should not have been limited in scope solely to the issue of §6.3 of the CBA.
- (2) At the hearing, he was precluded from presenting evidence that the decisions made about his job were evidence of bad faith or retaliation for filing a grievance about his evaluation, for example,

that the reclassification/reorganization was a pretext to get rid of him.

(3) His due process rights were violated because he was dismissed without just cause in violation of the CBA and the City Charter.

(4) The school system's action to reclassify/reorganize was done to destroy his union benefits by overextending the power of appointment. If management wanted to end union representation of Staff-Associate Buyers, it should have renegotiated with the union about unit composition.

We begin our analysis with the oft-quoted proposition that this Board will decline to address issues that were not initially reviewed by the local board. *See Lessie B. v. Caroline County Bd. of Educ.*, MSBE Op. 11-16 at 4 (citing cases). That proposition is based on a rule of appellate review. Maryland Rule 8-131 states that the Maryland courts of appeal will not "ordinarily" consider issues that have not been preserved for review. The purpose of that rule is to allow the lower court, usually the trial court, to consider the issue and correct any errors in the proceeding. *See Davis v. DiPano*, 337 Md. 642, 647 (1995). If a party fails to raise the issue below, a reviewing court will usually consider the issue waived. *See, e.g., Eckhart v. Ayers*, 240 Md. 153,159 (1965).

The appellate review rules are not absolute, however. By using the term "ordinarily," Rule 8-131 allows for exceptions so that appellate courts can decide issues not previously raised. *See, e.g., Yarema v. Exxon Corp.* 305 Md. 219, 231 n. 9 (1986). In the alternative, pursuant to Md. Rule 8-604, the appellate court may decide that the lower court is the more appropriate one to decide the issue. It may excuse a waived issue and remand the case to the lower court. *See, e.g., Simpkins v. Ford Motor Credit Co.*, 389 Md. 426, 439 (2005). The court does so when, *inter alia*, "justice will be served by permitting further proceedings." Md. Rule 8-604(d).

In the cases appealed to this Board, we do not ordinarily consider issues not presented to the local board because we do not want parties to circumvent the legal authority of the local board to review the case fully. If parties do so, we normally considered the newly raised issues to be waived. Yet, our rules, like the judicial appellate review rules, need not be immutable. With those principles in mind we turn to the case at hand.

This case presents a few factual and legal anomalies. Under one theory of the case, the local school system says it "reclassified" the position. Mr. Emerson argues that a reclassification usually occurs when, as a result of reassessment of an employee's duties and responsibilities, a supervisor decides to assign the employee a new classification or status. The reclassification may result in an increase or a reduction of the employee's salary. *Montgomery County Education Ass'n, Inc. v. Board of Educ. of Montgomery County*, 311 Md. 303, 305 n. 1 (1989).

Here, the qualifications of the position did not change. The only thing that changed was the position's affiliation as a member of the BTU. Interestingly, however, as this case proceeded, it appears that all the Buyer positions became designated members of the Union. (T.47).

Under another theory, the local school system says it "reorganized" the Procurement Office and identified the Staff Associate-Buyer position for "elimination" and replacement with the position of Buyer. (Letter of April 14, 2010 from Stokes to Emerson, attached to Appeal). The "reorganization" occurred to realign all Buyer positions to non-union status. When Mr. Emerson applied for the new position and was not hired, he was informed that his current position would be abolished and that he would officially be placed in "a lay-off status." *Id.* Mr. Emerson, however, was interviewed for the "eliminated" position and not selected to fill it.

Mr. Emerson argues here that:

If management desired to end union representation of these continuing positions, then one of two things should have happened. Either a) management should have sat down with the Union and renegotiated the unit description, most likely at the bimonthly Labor-Management Committee meetings expressly provided for in Article XXIV of the Agreement (certainly the better alternative), or b) the Union and its Agreement should have been recognized as continuing to apply to the PINs involved, even if other PINs in the same working unit with the same title were unaffected, at least until the time of the next round of collective bargaining (at which point, as we now know, *all* buyers became union-represented.)

(Appellants Response at 16).

In addition, Mr. Emerson argues that he was actually terminated in violation of the Just Cause provision of the CBA and that, at the hearing, the hearing officer made evidentiary rulings that incorrectly excluded evidence about bad faith decisions made about his job.

After considering the options for disposition available to this Board, in the interest of justice, we will remand this case to the local board to rule on the legal issues the Appellant raises here. Specifically:

(1) The hearing should not have been limited in scope solely to the issue of §6.3 of the CBA;

(2) At the hearing, he was precluded from presenting evidence that the decisions made about his job were evidence of bad faith or retaliation for filing a grievance about his evaluation, for example, that the reclassification/reorganization was a pretext to get rid of him;

(3) His due process rights were violated because he was dismissed without just cause in violation of the CBA and the City Charter; and

(4) The school system's action to reclassify/reorganize was done to destroy his union benefits by overextending the power of appointment. If management wanted to end union representation of Staff-Associate Buyers, it should have renegotiated with the union about unit composition.

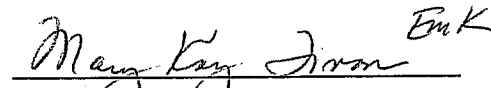
We take no position on those legal issues. But in remanding this case, we direct the local board not to approach this case as narrow in scope and limited by the Appellant's invocation of §6.3 section of the CBA in his grievance appeal filing.

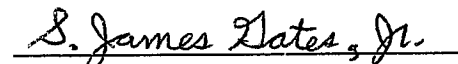
CONCLUSION

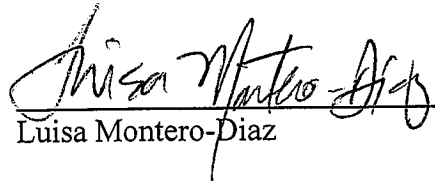
For all the reasons stated herein, we remand this case for further proceedings in compliance with this Opinion.


James H. DeGraffenheidt, Jr.
President

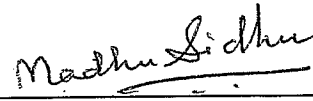
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August 30, 2011