

TYBOIA BROWN

Appellant

v.

WICOMICO COUNTY BOARD
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-44

OPINION

INTRODUCTION

This is an appeal of the local board's decision upholding the Appellant's termination as a Certified Nursing Assistant due to insubordination, violation of board policy regarding computer use and parental complaints. The local board has filed a Motion for Summary Affirmance, arguing that its decision was not arbitrary, unreasonable or illegal. The Appellant filed a Response to the local board's Motion, to which the local board has submitted a Reply.

FACTUAL BACKGROUND

At the start of the 2011-2012 school year, the Appellant was assigned to work as a Certified Nursing Assistant (CNA) at Glen Avenue Elementary School. On October 17, 2011, she posted an unapproved sign on the front school door stating that children with allergies were in the school. The sign was improperly written and had not been approved by the principal, Dr. Michael Collins. The principal advised the Appellant that she needed his approval before posting any signs in the school. (Local sup't affidavit.)

On October 20th, the principal received a complaint from a parent about the Appellant's response to her request to give particular attention to her son's allergies, especially when he is in the cafeteria eating with other students. The Appellant responded that she would do what she could to help, but that she would not babysit the son. The principal advised the Appellant about expectations of employees in meeting and speaking with parents. (*Id.*)

On November 16th, the principal advised the Appellant that her working schedule needed to be changed by fifteen minutes at the beginning and end of her shift to match the school's hours. The school was open from 8:30-4:00 p.m., but the Appellant worked from 8:15-3:45 p.m. The Appellant responded that she had a different understanding of the hours she was required to work and that she would not be able to change her schedule until after the winter break. (*Id.*, Exh. 1.)

On December 1st, Diane Pellegrino, Health Services Coordinator, sent an email to all CNAs and registered nurses at the school requesting that she be notified via phone call or email if a CNA needs time off or is out sick. The email was intended to clarify confusion about whether CNAs should notify the principal or school nurse in the event of a change to their working schedule and to ensure adequate coverage in the school health clinic. (Local Bd. Reply, Exh. 2.)

On December 2nd, the Appellant left school without giving notice to Ms. Pellegrino. While the Appellant's request for leave was approved on November 30th by the Assistant Principal, the Appellant did not notify Ms. Pellegrino regarding her schedule change. The principal reiterated the need to obtain approval from her supervisor prior to making any changes to her work schedule.

On December 5th, the Appellant sent an email to the assistant principal advising him that she received a summons for jury duty: "I've been summons [sic] for jury duty starting January 4th, I have documentation will get it to you. Thank you". (Notice of Appeal.) The assistant principal approved the Appellant's request for jury duty leave on December 14, 2011. The Appellant did not send her email or approved leave request to Ms. Pellegrino.

On December 12th, the principal and the assistant principal advised the Appellant that she needed to take lunch break after the busiest time of the day - 11:30 a.m. to 1:00 p.m. - in the school health clinic. The Appellant preferred to take her lunch break before 1 p.m. and believed that the school should have had back-up personnel trained to administer medication to students during that period. The principal directed the Appellant to take her break before 11:30 a.m. and her lunch at 1 p.m. in order to administer medication and provide adequate coverage in the clinic during that time. (Local sup't affidavit, Exh. 2.)

On December 13th, the Appellant sent an email to the principal stating that she would be leaving at 2:15 p.m. the following day to take lunch and attend a Board of Nursing meeting at 3 p.m. The principal responded by reiterating that the Appellant needed to adhere to the set break and lunch schedule that they discussed, and that she should request, not state, any change to her schedule. (*Id.*) The following day, Ms. Pellegrino notified the Director of Human Resources of concerns she and the principal had concerning the Appellant, noting that the Appellant was "creating a negative school climate". (Local sup't affidavit, Exh. 3.)

On December 15th, school administrators held a conference with the Appellant to address the need for improved communication with school administrators and parents. In attendance at the meeting were Dr. Collins, the principal, Ms. Pellegrino and Kim Finger, Director of Student and Family Services. They reviewed expectations regarding work hours (including lunch and break times), the Appellant's frequent absences and the process for notifying school administrators when she needed to modify her schedule or use her allotted leave. (Local sup't affidavit, Exh. 4.)

During this time, Ms. Pellegrino received several complaints from two nurses who worked in the health clinic with the Appellant. One complaint was that the Appellant

monopolized the computer, which did not allow the nurse to look up student information for parent communication. Nurses and students also complained that the Appellant was always on the computer and not doing her work. A subsequent review of the Appellant's computer use at school verified that she used the computer for several hours for personal, non-work related reasons. (Local board reply, Exh. 3.)

On December 19th, the principal spoke to the Appellant regarding a parent's complaint that she did not administer medication to a student because the medication labels didn't match. Even after being informed by her supervisor, Ms. Pellegrino, that she could administer the medication, the Appellant refused to do so and the student missed his usual lunch period. Similarly, on December 21st, the Appellant refused to administer medication for another student, even after being advised by Ms. Pellegrino that it was appropriate to do so. Eventually, another school health services staff member provided the medication for both students.

On January 3, 2012, the Appellant sent a reminder email to the assistant principal regarding jury duty, for which she received approved leave for January 4th. In her email, she wrote:

"I am not certain the days I will be out for jury duty until I call in the evening but I do not [sic] in advance that I will not be here for January 4th and January 11th. I will submit those days for leave if I am not called for jury duty. Thanks"

(Notice of appeal.) The Appellant did not copy Ms. Pellegrino on her email or notify her of the schedule change.

The same day, the Appellant submitted a request to the Circuit Court to be excused from jury duty on January 4th to attend a job interview at the detention center. On January 4th, the Appellant went to the Circuit Court and was informed that her number had not been called for that day and that her request to be excused had been granted. After her job interview, the Appellant returned to the Circuit Court and attempted to obtain an excuse from work due to jury duty. (Local Bd. Reply, Exh. 3.)

On January 4th, the principal issued a formal letter of reprimand to the Appellant for not following the directive to notify Ms. Pellegrino that she would be out of the building that morning. The Appellant stated she received approval from the assistant principal to be absent for jury duty. The principal later confirmed with the Court's Jury Clerk that the Appellant was not required to report for jury duty on January 4th. (Local sup't affidavit, Exh. 6; Local sup't Supp. Memo.)

On January 6th, the principal spoke with the Appellant about a parent's complaint that the Appellant was "harassing" her and her son. The child had a chronic medical condition, which, if he did not present a fever, only required placing a call to the mother. The Appellant called the mother and required her to come retrieve the child from school. The principal expressed concern about the Appellant's conduct and "substantial overreaction" to the situation.

On January 9th, the principal again spoke with the Appellant about another parent complaint. The parent said that the Appellant called the student's doctor and questioned the student's illness. The principal advised that the Appellant should have spoken with a supervisor before making such a call, but the Appellant believed her job duties authorized to do so.

On January 10th, the Appellant felt ill and received verbal approval from the principal to leave work early. Prior to leaving, the Appellant did not notify Ms. Pellegrino of the change to her schedule.

When the Appellant returned to work on January 13, 2012, she met with the principal regarding his concerns of the expectations that were shared during meetings on December 15th and January 4th. Other staff present at the meeting were the assistant principal, Ms. Pellegrino, Ms. Finger and Dr. Terry Greenwood, Acting Coordinator of Employee Relations. The principal recommended that Appellant be placed on paid administrative leave pending further determination by Dr. John E. Fredericksen, the local superintendent. (Local bd. motion, Exh. 7.)

Following his investigation, Dr. Fredericksen concluded that the Appellant's conduct warranted termination because she: was insubordinate by repeatedly failing to follow directives from her supervisor; violated board policy regarding personal use of computers; misled supervisors about jury duty; and was the subject of several parent complaints. (Local bd. motion, Exh. 8.)

The Appellant appealed the termination to the local board of education. In a decision dated April 8, 2012, the local board upheld the termination.

This appeal to the State Board followed.

STANDARD OF REVIEW

In *Livers v. Charles County Bd. of Educ.*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md.App. 160, *cert. denied*, 336 Md. 594 (1993), the State Board held that a non-certificated support employee is entitled to administrative review of a termination pursuant to §4-205(c)(4) of the Education Article. The standard of review that the State Board applies to such a termination is that the local board's decision is *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.

ANALYSIS

Preliminary Matters

Due Process

As a preliminary matter, the Appellant alleges that she was denied due process in the handling of her investigation and termination. She argues that she had a good work history prior

to her work at Glen Avenue and that she was entitled to progressive discipline or a transfer, as required by the local board's collective bargaining agreement.

The Appellant did not include, nor do we have, a copy of any portion of the collective bargaining agreement that requires the local board to refrain from terminating an employee if the facts warrant termination. In our view, while progressive discipline may be a worthwhile option, the local board's decision to not use it does not make its decision arbitrary, unreasonable or illegal.

The Appellant also argues that she was not given a chance to respond to the allegations against her in the meeting with school administrators on January 13th, nor did she receive the evidence supporting the local superintendent's charges against her prior to discharge. The local board responds, and we agree, that the record shows that the Appellant was given ample time to submit appropriate documentation and argument to the local board for its consideration, which the local board received on March 27th. The Appellant also received copy of the local superintendent's memorandum and supplemental memorandum in support of her termination. The record shows that the local board reviewed the information from the Appellant prior to rendering its decision.

Discrimination

The Appellant contends that the principal and other non African-American administrators discriminated against her because she was black. She alleges that Dr. Collins transferred a white female and a black male under facts similar to hers, and that she should have received a transfer in lieu of termination. The Appellant did not include affidavits from these individuals or other evidence to support her allegations. In addition, the local board responded that there has been no history of complaints against Dr. Collins for any alleged discriminatory treatment. Thus, we find no merit to the Appellant's claims of race discrimination.

The Appellant also argues that she notified the school system of her discrimination concerns in a January 9th email to the Human Resources Director in which she stated she felt she was in a "hostile work environment", but that school administrators failed to respond. The local board states that the Appellant never filed a discrimination claim with the board, the Title IX Coordinator or through the board's grievance process, as outlined in the personnel handbook.

The State Board has consistently declined to address issues that have not been reviewed initially by the local board. See *Jack & Pam T. v. Howard County Bd. of Educ.*, MSBE Op. No. 09-38 (2009); *K.W. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 07-20 (2007); *Miller v. Howard County Bd. of Educ.*, MSBE Op. No. 06-02 (2006); *Hart v. St. Mary's County Bd. of Educ.*, 7 Op. MSBE 740 (1997). Thus, we decline to review the Appellant's discrimination and hostile work environment claims.

Merits of the Local Board Decision

Regarding the grounds for her termination, the Appellant raises the following challenges.

Insubordination

The Appellant challenges the sufficiency of the local board's evidence and argues that she was confused by, and wrongly penalized for following, conflicting directives from school administrators regarding her work schedule and whom to notify if she needed to alter the schedule. The local board contends that the Appellant repeatedly and deliberately disregarded clear instructions from her supervisors.

The record shows that the Appellant was directed on December 1st to notify Ms. Pellegrino of any changes to her schedule so that adequate coverage would be provided in the school health clinic. The Appellant consistently did not notify Ms. Pellegrino of her approved leave on. In our view, the record supports the finding that the Appellant failed to follow clear instructions about notifying Ms. Pellegrino of changes to her work schedule.

The Appellant also argues that because she was advised in a December 15th memo and January 4th letter of reprimand that she could notify the principal or the assistant principal of any schedule change, she should not have been penalized for failing to notify Ms. Pellegrino. While we agree with the Appellant that she was given the option of including a notification to others of any change to her schedule, the fact remained that Ms. Pellegrino was her direct supervisor and the instruction to notify Ms. Pellegrino remained. In our view, nothing in the language of the December 15th or January 4th letters canceled out Ms. Pellegrino's reasonable request to be notified of schedule changes in order to provide adequate coverage in the school health clinic.

Violation of Board Policy Regarding Personal Use of Computers

The Appellant denied violating the local board's policy regarding personal use of computers. However, in addition to complaints from students and staff regarding her computer use, the record includes a detailed, four page log from the local board's Department of Technology Services, which delineated the Appellant's internet browse time on multiple, non-work related websites for multiple hours. (Local bd. Reply, Exh. 3.) Thus, the record supports the local board's conclusion that the Appellant violated board policy regarding computer use.

Misrepresentation Regarding Use of Jury Duty Leave

The Appellant refutes the local board's argument that she misrepresented about her jury duty on January 4th. She maintains that she did not provide "inaccurate information" to the assistant principal. In our view, the record shows otherwise.

What the Appellant did not disclose to her supervisors was that she was excused from jury duty, per her request, to attend a job interview on January 4th. Even if she wanted to conceal the reason for her excusal, the bottom line is that the Appellant should have used another form of

leave on January 4th. Instead, she was excused from serving jury duty, attempted to obtain an work excusal from the Court's Jury Clerk, and still took the approved jury duty leave.

We note that in its investigation into the Appellant's request for unemployment benefits, the Maryland Department of Labor, Licensing and Regulation ("DLLR") found the Appellant ineligible for unemployment benefits due to her "gross misconduct" in deceitfully violating her employer's rules and using jury leave to which she was not entitled. (Local Bd. Reply, Exh. 2.) Thus, in our view, the record supports the local board's conclusion that the Appellant misrepresented her use of jury duty leave.

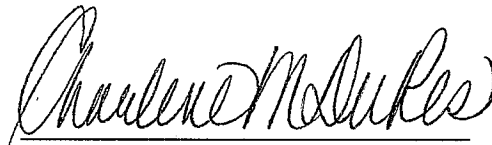
Parental Complaints

The Appellant defends her comments, reactions and professional judgment regarding the five complaints from parents. Based on our view of the record, it appears that the greater issue was not the minutiae of the parental complaints, but that the principal repeatedly had to advise the Appellant about expectations of employees in meeting and talking with parents. The Appellant's decision making, interpersonal skills and overreaction in situations remained a concern during her short tenure at the school.

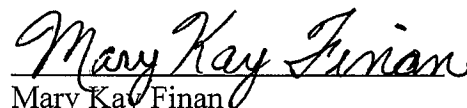
Thus, despite the Appellant's alternative view of the facts, our view is that the local board's inclusion of those complaints in its termination decision was not arbitrary, unreasonable or illegal.

CONCLUSION

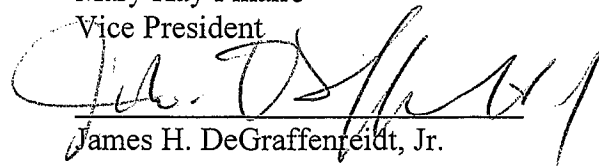
For these reasons, we affirm the decision of the Wicomico County Board of Education.



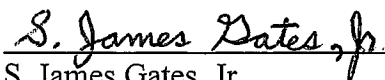
Charlene M. Dukes
President



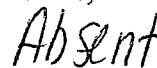
Mary Kay Finan
Vice President



James H. DeGraffenheidt, Jr.



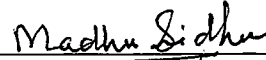
S. James Gates, Jr.



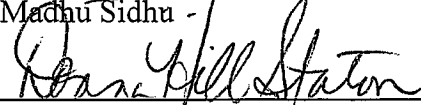
Luisa Montero-Diaz



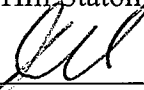
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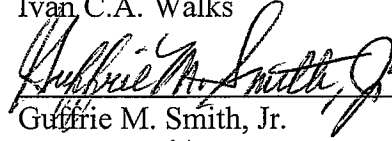
Madhu Sidhu



Donna Hill Staton



Ivan C.A. Walks



Guffie M. Smith, Jr.

Absent

Kate Walsh

October 31, 2012