DALLAS GLOVER,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 15-25

OPINION

INTRODUCTION

Dallas Glover (Appellant) appeals the decision of the Baltimore City Board of School Commissioners (local board) upholding his termination as a custodial worker based on misconduct. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

Baltimore City Public Schools (BCPS) hired Appellant in 2006 as a custodial worker. In February 2012, Jerome Jones, manager of labor relations for BCPS, received a call from a building supervisor who was concerned that Appellant might be under the influence of alcohol while on the job. (T. 113). Mr. Jones instructed the supervisor to have Appellant report for alcohol testing at Mercy Medical Center. Appellant tested positive and entered into an employee assistance program. (T. 115). In order to return to work with BCPS, Appellant had to sign a condition of employment agreement that required him to undergo a drug/alcohol screening; complete a recommended substance abuse treatment plan; and consent to random testing. (T. 115-17; CEO Ex. 9). Appellant agreed that if he tested positive for drugs or alcohol within a five year period that it would be grounds for his termination. (CEO Ex. 9). Refusal to go for alcohol testing when ordered to after reasonable suspicion is treated by BCPS as a positive test. (T. 118).

After completing treatment, Appellant returned to work and was assigned to Franklin Square Elementary/Middle School. (T. 119). There were no complaints regarding Appellant during the 2012-13 school year. (T. 50-51; 119-20). At the start of the 2013 school year, however, Principal Terry Patton began to notice a change in Appellant's performance. (T. 51). The Interim CEO for BCPS conducted a school inspection on the weekend before the school was set to open and found the building in a dirty condition with furniture out of place, floors not properly cleaned, and restrooms in poor condition. (T. 51-52; CEO Ex. 1). Appellant received a three day suspension without pay as a result of the incident.

As the school year progressed, Appellant began to arrive late to work more frequently and could not be found in the building during the school day. (T. 53). Other custodians

informed Principal Patton that Appellant had been under the influence of alcohol during a meeting in her office and a teacher also reported similar suspicions of alcohol use while on the job. (T. 56-58; CEO Ex. 4).

Throughout the school year, Principal Patton documented several incidents of Appellant's poor job performance. On September 3, 2013, Appellant received a letter of reprimand after a student stepped on a nail left on the floor of a classroom. (CEO Ex. 1). On November 1, 2013, he was docked a day's pay after telling Principal Patton he would come in late one day and then failing to show up at all or make up the extra hours. (CEO Ex. 1). On December 16, 2013, Appellant was informed that he had been absent for more than 10 days, with only some of the absences being registered as sick days.[1] Principal Patton and other school employees would clean the school during the times he was absent. (T. 71-72). On January 24, 2014, school officials paged him four times over the course of an hour before he responded, a behavior that was repeated on other occasions. (T. 74-75; CEO Ex. 1). A few days later, Principal Patton planned to issue a written reprimand to Appellant after he failed to return a gas can to storage and instead left it in the school's café. (CEO Ex. 1). Appellant was terminated before the written reprimand could be issued. (T. 79-80).

The incident that prompted Appellant's termination occurred on January 28, 2014. Principal Patton was meeting with teachers and other school staff when Appellant appeared in the doorway of the room. Appellant told Principal Patton that he was sick and wanted to go home. He produced a note and asked her to sign it giving him permission to leave. Principal Patton smelled alcohol and accused Appellant of being drunk. She told Appellant he needed to go to Mercy Medical Center to be tested for alcohol. Appellant denied drinking and refused to go for testing. (T. 80-83). The school's assistant principal and two other employees who were present during the meeting confirmed Principal Patton's account of events. (CEO Ex. 3).

After Appellant left the room, Principal Patton attempted to have him return, but he had already driven away from the building. A school employee told Principal Patton that Appellant was "speeding" out of the parking lot. She called school police and asked them to watch out for his vehicle, but Appellant was no longer in the area. Principal Patton also called Appellant's phone twice and left a voice message reminding him to go to Mercy Medical Center. (T. 83). After a third try, Principal Patton reached Appellant on the phone. He told her that if she had wanted him to go to Mercy for testing, she should have told him in the room. When Principal Patton reminded Appellant that she had asked him to go for testing, Appellant told her he was home and would go to Mercy Medical Center the next day. (T. 85).

According to Appellant, he sought Principal Patton's permission to leave early because of an illness and she signed his leave slip without asking any questions. Only later did she call him to suggest he go to the hospital if he was not feeling well. (T. 9-11; 31). Appellant denied being asked to go for alcohol testing or having been under the influence of alcohol at school. (T. 27, 33, 44). Appellant did acknowledge, however, that he drank alcohol almost every day after work. (T. 33, 44). Shortly after this incident, Appellant entered an alcohol treatment program in

[1] At some point, Appellant qualified for the use of intermittent leave based on a medical condition under the Family and Medical Leave Act (FMLA) (T. 124-25). Appellant does not raise any issues regarding FMLA as a part of this appeal.

Nevada. (T. 18-20).

On March 27, 2014, Appellant was terminated for misconduct for violating the BCPS policy prohibiting alcohol use on school grounds or coming to work under the influence of alcohol. He timely appealed the decision and a hearing was held on October 3, 2014, before a local hearing examiner.

The hearing examiner issued a decision on December 4, 2014, recommending that Appellant's termination be upheld. The hearing examiner found that Principal Patton failed to properly follow BCPS's alcohol testing policy because she told Appellant to report for testing rather than personally escorting him to Mercy Medical Center, as the policy required. This failure to follow BCPS policy did not impact the hearing examiner's decision because he concluded that Appellant was aware that he was being asked to take an alcohol test, in part because he had previously been tested for alcohol by BCPS in 2012. In addition, Appellant was aware that under BCPS policies, a failure to take an alcohol test is considered a "positive" test and would violate his employment agreement. The hearing examiner concluded that BCPS provided "substantial documentation" to support the allegations that Appellant was using alcohol on January 28, 2014, and refused testing. (Hearing Examiner Decision at 21, 24-26).

On January 27, 2015, the local board adopted the hearing examiner's recommendation and affirmed Appellant's termination. This appeal followed.

STANDARD OF REVIEW

The decision of a local board concerning a local dispute or controversy is presumed to be *prima facie* correct and the State Board will not substitute its judgment for that of the local board unless the decision is shown to be arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Appellant challenges the local board's decision on several grounds, which we shall address in turn.

Failure to Follow BCPS Policies

Appellant argues that Principal Patton's failure to follow BCPS policy by not escorting him to Mercy Medical Center for alcohol testing warrants the reversal of his termination. The local board argues that this failure was immaterial because Appellant was aware that he was being asked to undertake an alcohol test and he refused.

Appellant appears to be invoking the *Accardi* doctrine, which requires that a government agency "scrupulously observe rules, regulations, or procedures which it has established." *Global Gardens,* MSBE Op. No. 11-01 (citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). It applies to regulations that "affect individual rights and obligations" or "confer important procedural benefits upon an individual." *Pollack v. Patuxent Institution Bd. of Rev.*, 274 Md. 463, 503 (2003). In order to strike down an agency's decision under *Accardi*, a complainant must show

that he or she was prejudiced by the agency's failure to follow its rules, regulations, or procedures. *Id.* at 504.

Assuming that Principal Patton did violate BCPS policy by telling Appellant to go to Mercy Medical Center (rather than escorting him there), Appellant has not demonstrated he was prejudiced by her actions. The hearing examiner found that Appellant was aware of the alcohol testing procedures because of his previous test in 2012. Three witnesses heard Principal Patton tell Appellant she suspected he was drinking and needed to go to Mercy Medical Center for testing. It was not unreasonable for the hearing examiner to conclude, based on this evidence, that Appellant was aware of what was being asked of him and that, even if Principal Patton had followed proper procedures, Appellant would have still declined the test. Accordingly, we find that Appellant has failed to meet his burden to demonstrate prejudice under *Accardi*.

Improper consideration of evidence

Appellant argues that, because he was terminated for failing to consent to an alcohol test, it was improper for the hearing examiner to consider evidence of his past job performance. "It is the Hearing Examiner's duty to weigh all of the evidence and issue a decision based upon the evidence the Hearing Examiner finds to be credible and relevant." *Komolafe v. Board of Educ. of Prince George's County*, MSBE Op. No. 14-47 (2014). Appellant, who had representation during his hearing, did not object to the admission of evidence concerning his past job performance. That evidence provided context for Principal Patton's suspicion on January 28, 2014, that Appellant was under the influence of alcohol. She had documented his deteriorating job performance during the year and was informed by Appellant's co-workers that he was drinking or under the influence of alcohol at work. It was not unreasonable for the hearing examiner to conclude that this evidence was relevant to support the allegations of alcohol use by Appellant.

Appellant also disputes Principal Patton's testimony that she told him she suspected he had been drinking. Hearing examiners are not required to give equal weight to all of the evidence and their failure to agree with an Appellant's view of the evidence does not mean their decisions are arbitrary, unreasonable, or illegal.

Acceptance of hearsay evidence

Appellant objects to the hearing examiner's acceptance of hearsay testimony that suggested Appellant was driving while intoxicated when he left the school. According to the record, a school employee told Principal Patton that Appellant was "speeding out of the parking lot" and he did not stop when she signaled to him. Hearsay evidence is admissible in an administrative proceeding if it has "sufficient reliability and probative value." *Travers v. Baltimore Police Department*, 115 Md. App. 395, 408, 411-12 (1996). The record reflects that Principal Patton believed Appellant was under the influence of alcohol and could pose a danger if he drove. In addition, a school employee told her Appellant was speeding out of the parking lot. From these statements, the hearing examiner concluded that Appellant was "driving recklessly under the influence of alcohol" and "put the students, staff, and [Appellant] at substantial risk of injury." In our view, that inference was not an unreasonable one based on the evidence.

Bias of hearing examiner

Finally, Appellant argues that the hearing examiner was biased because he concluded that Appellant avoided going to Mercy Medical Center because he feared testing positive for alcohol. As discussed previously, the hearing examiner was required to sort through conflicting evidence and draw factual conclusions. The hearing examiner's failure to credit Appellant's version of events does not constitute improper bias.

CONCLUSION

For all these reasons, we affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.

Guiffrie M. Smith, Jr.
President

S. James Gates, Jr.
Vice-President

James H. DeGraffenreidt, Jr.

Linda Eberhart

Chester E. Finn, Jr.
Absent

Larry Giammo

Michele Guyton

Luisa Montero-Diaz
Absent

Sayed M. Naved
Absent

Madhu Sidhu

Andrew R. Smarick

July 28, 2015