

DANIELLE GREEN,

Appellant

v.

BALTIMORE CITY BOARD
OF SCHOOL COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-35

OPINION

INTRODUCTION

Danielle Green (Appellant) appeals the decision of the Baltimore City Board of School Commissioners (local board) denying her request for arbitration related to her termination as an assistant principal. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded and requested leave to amend her appeal in order to challenge her termination under Md. Code, Educ. §6-202. The local board replied, opposing the request to amend the appeal.

FACTUAL BACKGROUND

Appellant was an assistant principal for Baltimore City Public Schools (BCPSS) assigned to work at Leith Walk Elementary/Middle School. In the summer of 2011, BCPSS began investigating Appellant for misconduct and willful neglect of duty in connection with her previous service as principal of Diploma Plus High School. On August 13, 2012, a *Loudermill* hearing was conducted to allow Appellant to respond to the allegations against her.¹ Her union representative also attended the meeting. (Motion, Ex. 1).

On September 25, 2012, then-CEO Andres Alonso recommended to the local board that the Appellant be terminated. Appellant, through her current counsel, appealed the termination pursuant to Md. Code, Educ. §6-202. The local board assigned the matter to a hearing examiner and a hearing was scheduled for March 4, 2013. Appellant's counsel requested a postponement on March 1, 2013, stating that he was in the midst of settlement discussions with the local board. As a result, the hearing was postponed. (Motion, Exs. 2, 3).

The parties continued settlement discussions until April 2015. As of April 9, 2015, the two sides appeared to have agreed on many terms of a potential settlement. Counsel for BCPSSS requested from Appellant's counsel, via email, clarification on a few points of the settlement agreement. On April 9, 2015, Appellant's counsel responded, indicating that he would confirm the information requested by BCPSSS counsel. In addition, he asked BCPSSS counsel to send him a calculation of Appellant's remaining leave time. (Response to Motion, Ex.

¹ At a *Loudermill* conference, also known as a pre-termination hearing, employees are given notice of the charges against them and provided with an opportunity to respond. The conference is named for the Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Because the local board did not reach the merits of Appellant's termination, we need not relate here the details of the allegations against her.

1). BCPSSS counsel responded about an hour later with the leave hours. (Reply to Response, Ex. A).

On April 17, 2015, BCPSSS counsel sent a follow-up email to Appellant's counsel to ensure that he received the leave hours and to inquire about the status of the settlement. Appellant's counsel did not respond. On April 23, 2015, BCPSSS counsel sent another email stating that if the case was not settled by April 29, 2015, BCPSSS would request the matter be scheduled for a hearing. Appellant's counsel did not respond. (Reply to Motion, Ex. A; Motion, Ex. 4).

On May 12, 2015, BCPSSS counsel wrote to the local board's Special Assistant requesting that the local board set a new date for Appellant's hearing. In an affidavit filed in this appeal, the Special Assistant stated that she spoke with Appellant's counsel that same day and requested his available dates in June and July. According to the Special Assistant, Appellant's counsel did not follow-up on her request. (Reply to Response, Ex. C).

Sometime in September 2015, the Special Assistant called Appellant's counsel and left a message with a receptionist about scheduling a hearing. Appellant's counsel did not return the call. On September 16, 2015, the Special Assistant sent an email to Appellant's counsel inquiring about his availability on October 6, 7, and 8 for Appellant's hearing. Appellant's counsel did not respond to the email. (Reply to Response, Ex. C).

On October 2, 2015, the local board sent Appellant's counsel the following letter:

Your appeal of the CEO's recommendation to dismiss [Appellant] from her position was received by the School Board Office on October 12, 2012. A hearing was scheduled for March 4, 2013, but did not go forward. The next step of the process requires the School Board Office to contact you to reschedule the hearing on [Appellant's] appeal. Unfortunately, after repeated attempts we have been unsuccessful in contacting you.

We wish to provide you with an opportunity to voice your appeal on behalf of [the Appellant]; however, we cannot proceed without your active participation. Therefore, if you wish to continue with your request for an appeal, please contact the Board Office . . . to reschedule the hearing. However, if we do not hear from you in 10 business days **Friday October 16, 2015**, we will consider your request for an appeal withdrawn and will close this matter accordingly.

(Appeal, Ex. 3 – emphasis in original).

The local board did not hear from Appellant's counsel by the deadline and considered the matter closed. According to Appellant's counsel, he first saw the October 2 letter on Saturday, October 17, 2015. The following Monday, October 19, he sent an email to BCPSSS counsel stating that his office "received a letter regarding a dismissal of [Appellant's] appeal while I was away." He stated in the letter that he had never received the calculation of leave hours and that the lack of those hours "has been the hold up on resolving this matter." BCPSSS counsel replied that she had sent Appellant's counsel the leave hours and that she never received a reply to her emails, phone calls, or voicemail messages. (Reply to Response, Ex. B).

On October 25, 2015, Appellant's counsel requested that the local board vacate the dismissal of the appeal. He explained that a "misunderstanding surrounding a related accounting material to the agreed upon settlement agreement" had "delayed the finalization of that agreement." Regarding the October 2, 2015 letter from the local board, he stated:

Although that letter was received at my office, I was out of the office on [a] long-term client matter and I did not actually receive the letter until Saturday October 17, 2015. The next business day, I contacted both the legal department and the Board office regarding this matter to address the timing of the letter and our response.

(Motion, Ex. 7).

On November 10, 2015, the local board denied the request to vacate the dismissal. The board's order stated that Appellant "failed to respond to the many attempts made by the Board Office and the CEO's representative to contact her in efforts to schedule a hearing or otherwise resolve the case. [Appellant] was also provided with two weeks, ample time, to respond to the notice of a procedural dismissal." (Appeal, Ex. 4). Appellant did not appeal this decision to the State Board.

On November 24, 2015, Appellant filed a "Notice to Submit to Arbitration" with the local board. The brief letter stated: "This [is] notice to submit to arbitration per the Board's Step 4 dismissal of this grievance." (Appeal, Ex. 5).

On February 8, 2016, the local board dismissed the request for arbitration. It found that Appellant's appeal to the board was filed as a §6-202 appeal and not as a grievance. Therefore, Appellant had no right to arbitration. (Appeal, Ex. 1). This appeal followed.

STANDARD OF REVIEW

In cases involving a local policy or a controversy and dispute regarding the rules and regulations of the local board, the local board's decision shall be considered prima facie correct. The State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Request for arbitration

Appellant filed this appeal contesting the local board's decision to dismiss her request for arbitration. The local board argued that the underlying issue of Appellant's termination was not subject to the employee grievance process that allows for arbitration, but instead was governed by the certified employee termination procedures of Md. Code, Educ. §6-202. In response, Appellant agreed and acknowledged that the request for arbitration was a mistake. Appellant has not withdrawn the appeal. Rather, she seeks leave to amend the current appeal to challenge the local board's separate October 2015 decision to dismiss the appeal of her termination. Because

Appellant no longer challenges the dismissal of her request for arbitration, we have no reason to consider the merits of the decision.

Request to amend the appeal

We turn, then, to Appellant's request to amend her appeal in order to challenge the local board's decision dismissing her §6-202 appeal. COMAR 13A.01.05.04A(2) permits a party to amend its appeal upon leave of the State Board or by consent of the other party. Typically, this occurs when a party wishes to expand upon an argument it has already made or include a new argument, or new evidence, that was not presented earlier. *See, e.g., Milstein v. Montgomery County Bd. of Educ.*, MSBE Op. No. 15-35 (2015). The local board opposes allowing Appellant to amend her appeal because it argues that such an appeal would be untimely and would circumvent our rules on late filing.

The local board dismissed the appeal on October 16, 2015. Appellant did not file this appeal until March 9, 2016, about five months from the date of the decision. An appeal to the State Board "shall be taken within 30 calendar days of the decision of the local board" and the "30 days shall run from the later of the date of the order or the opinion reflecting the decision." COMAR 13A.01.05.02B(1). Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice. *See Scott v. Board of Educ. of Prince George's County*, 3 Op. MSBE 139 (1983). Neither circumstance is alleged here.

Allowing Appellant to amend the appeal only so that it could be dismissed as untimely would be futile. Given these circumstances, we decline Appellant's request to amend her appeal.

Appellant's legal counsel

We ordinarily would end our analysis here. In reviewing the record, however, we observe that the procedural mistakes in this case were made not by Appellant herself but by her legal counsel, who continues to represent her in this appeal. Appellant's counsel committed the following errors: (1) he failed to respond to the local board's attempts to schedule a hearing; (2) he did not timely appeal to the State Board the local board's dismissal of the §6-202 appeal; and (3) he filed for arbitration instead of seeking to appeal the §6-202 dismissal in a timely manner. Before dismissing Appellant's appeal, we felt compelled to consider whether the performance of her attorney should in any way affect the outcome that we reach.

Any decision we reach must be grounded in our legal standard of review. We begin with the presumption that the local board's decision is prima facie correct. The State Board does not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.

The local board dismissed Appellant's §6-202 appeal because her legal counsel failed to respond to multiple attempts to schedule a hearing. Her attorney has not submitted any affidavit, but in his filings he denies having received any communications from the local board until the October 2, 2015 letter, which set a deadline for responding. Appellant's counsel acknowledges receiving this letter, but explains that he was away from the office on another matter and was not checking his mail. The October 2 letter provided Appellant's counsel with two full weeks in

which to respond. In our view, it was not unreasonable for the local board to set such a deadline and to reject Appellant's counsel's excuse that he was away from the office and not checking his mail.

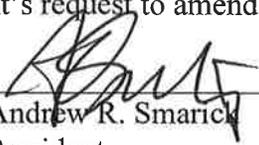
We observe that BCPSS counsel and the local board communicated directly with Appellant's counsel, rather than Appellant herself, in trying to set a hearing date. Although the local board could have copied Appellant on these communications, we do not conclude that they were legally obligated to do so. By communicating directly with Appellant's counsel, rather than Appellant, BCPSS counsel and the local board were complying with the Maryland Lawyers' Rules of Professional Conduct. Rule 4.2 requires that "a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so." Because Appellant was represented by legal counsel, BCPSS and the local board were ethically required to communicate about the appeal with her attorney. Were we to adopt a different standard, we could be forcing local board counsel to violate their ethical responsibilities not to communicate with represented parties without first contacting their attorneys. Based on these considerations, we cannot say that the local board's actions in emailing, calling, and writing to Appellant's counsel, without copying her, were arbitrary, unreasonable, or illegal.

Finally, we consider whether the local board should have examined the performance of Appellant's counsel before deciding to dismiss the appeal. In our view, it would have been arbitrary for the local board to consider the attorney's performance in this particular case. Were we to decide otherwise, we would be creating arbitrary distinctions between appellants who are represented and those who are not. The Court of Special Appeals has rejected similar attempts to apply an "inexperienced lawyer" standard to excuse a failure to follow the rules of the court. "We certainly would be on a slippery slope if we were to have one rule for experienced lawyers and another for inexperienced lawyers . . . We have made clear on many occasions our view that ignorance of the law is no excuse." *Hi Caliber Auto and Towing Inc. v. Rockwood Casualty Insurance Company*, 149 Md.App. 504, 508 (2003). Throughout our past cases, we have held all parties, whether represented by counsel or not, to the same rules.

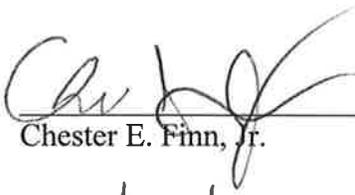
Ultimately, Appellant had the choice of whether to retain legal counsel and, once retained, the ability to choose to continue to have the same attorney represent her in this matter. Although it may be unfortunate that Appellant's appeal will be dismissed because of the actions of her legal counsel, we cannot conclude that the local board acted in an arbitrary, unreasonable, or illegal manner in handling this matter. Accordingly, we stand by our decision to affirm the local board's decision and deny Appellant's request to amend her appeal.

CONCLUSION

For all of the foregoing reasons, we affirm the decision of the local board to dismiss Appellant's request for arbitration and deny Appellant's request to amend her appeal.

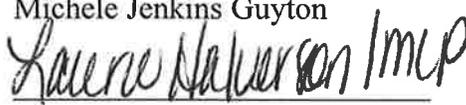


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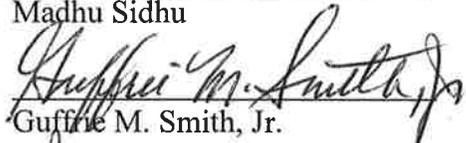
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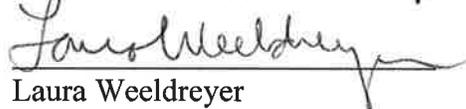
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August 23, 2016