

MICHAEL MITCHELL,

Appellant

v.

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 14-07

OPINION

INTRODUCTION

Appellant challenges the decision of the Baltimore City Board of School Commissioners (local board) upholding his termination from his position as a paraprofessional for excessive absences and lateness. The local board filed a Motion to Dismiss for untimeliness. Alternatively, the local board filed a Motion for Summary Affirmance maintaining that its decision should be upheld because it is not arbitrary, unreasonable, or illegal. The Appellant did not respond.

FACTUAL BACKGROUND

Appellant began his employment with the Baltimore City Public Schools (BCPS) in 2008 as a Bus Aide. (T.44). In 2010, he became a paraprofessional and began working as a special education paraeducator at the William S. Baer School (Baer School). (T.44-46). Paraeducators at the Baer School are responsible for moving students through the school, pushing wheelchairs, changing diapers and feeding students. (T.13-14). Appellant received notice of the BCPS Attendance Reliability and Analysis Program (Attendance Policy) when he first started working there. (T.86-87).

Appellant was a 10 month employee with 190 days of required employee attendance. (T.35, 40). During the 2011-2012 school year, Appellant was absent 84 of the required 190 days. Appellant also reported late to work 19 times. (CEO #4, #5, #6 & #8; T.39). Most of Appellant's absences were related to medical issues for which he used Sick Leave. According to Appellant's testimony, his incidents of lateness were related to the distance he lived from work.¹ (T.55-56).

Appellant missed work from October 17 through December 2, 2011, due to surgery on his left hand. (BTU #1 & #2). Appellant then had some days of absence and lateness in February and March of 2012. On March 22, 2012, Patrick Crouse, Principal of the Baer School, spoke to the Appellant about his attendance problems and Appellant indicated that he would improve. (CEO #3 & #9).

¹ Appellant did request a transfer to a school closer to his home at some point after the middle of the school year, but no transfer was granted. (BTU #3; T.55-56).

Appellant again missed work and was late in April of 2012. On April 10, 2012, Mr. Crouse again spoke to the Appellant about his attendance issues, advising that he had not seen any improvement, and issued a written notice to him as well. (CEO #3 & #9). At this time, Mr. Crouse suggested the Appellant make a self-referral to the Employee Assistance Program (EAP).² (CEO #9). On April 14, 2012, Mr. Crouse spoke to the Appellant about his attendance problems and issued written notice telling the Appellant about the possibility of being disciplined should his attendance not improve. (CEO #3, #5 & #9).

On April 18, 2012, Appellant was again late to work. Employees reported that Appellant was belligerent and smelled of alcohol when he arrived. (CEO#2). That same day, Mr. Crouse issued another written notice to Appellant reminding him of their prior attendance discussions and stating that he needed to improve given the additional absences and lateness he had accrued since that time. (CEO #4). The notice further provided that additional absences could result in disciplinary action, up to and including discharge. *Id.* Mr. Crouse also reported to Roger Shaw, BCPS Executive Director, that he thought the Appellant was in crisis. (CEO# 2).

In May 2012, Appellant missed work for a period of time due to an injury to his ribs, and he was also late to work several times. (CEO #8; BTU #5). On May 9, 2012, Mr. Crouse spoke to the Appellant about his continued attendance problems. (CEO #3 & #9). Thereafter, the Appellant was out of work from the end of May and most of June 2012 for an injury to his right hand that required surgery. (BTU #6). On May 30, 2012, Mr. Crouse issued the Appellant a written notice stating that Appellant was previously made aware of his need to improve his attendance and had said he would improve, but had failed to do so. (CEO #3 & #5). Mr. Crouse stated that he was referring the matter to Mr. Shaw and Jerome Jones, BCPS Labor Relations Manager, because Appellant's attendance had not improved. *Id.*

Under the Attendance Policy, an employee should not have more than seven occurrences of unexcused absences. Because Appellant used Sick Leave and did not apply for Family and Medical Leave for the missed work time, his absences were not considered "excused absences" under the BCPS Attendance Policy. Sick Leave and Family and Medical Leave are two different types of leave. Absences attributable to Sick Leave are not excused, even though they are for medical reasons, whereas absences attributable to Family and Medical Leave are excused absences. (CEO #1-Policy, Appendix A, p.6). Family and Medical Leave entitles eligible employees to take job-protected, unpaid leave for up to 12 weeks for specified family and medical reasons, including for the employee's own serious health condition that makes the employee unable to perform the essential functions of the job. 29 USC §2601 *et seq.* Had Appellant applied for and been granted Family and Medical Leave, any qualifying absences would have been considered excused.

In July 2012, Mr. Jones held a pre-termination hearing with the Appellant and his union representative. (T.33-34). At the hearing, Mr. Jones reviewed Appellant's medical

² Although the Appellant did not avail himself of the EAP at that time, he later sought counseling services from a different health provider in May 2012. Appellant had his first counseling appointment near the end of the school year in June, 2012. (T.77-79).

documentation. (T.34). Mr. Jones advised Appellant that he was recommending his termination based on his excessive absences and lateness. (T.34-36). The Chief Executive Officer (CEO) accepted the recommendation and terminated Appellant from his position due to his excessive absences and lateness during the 2011-2012 school year.

Appellant appealed the CEO's decision to the local board. The local board referred the matter to a hearing examiner for review. Hearing Examiner, Robert J. Kessler, conducted a hearing in the case, during which Appellant was represented by his union representative. Based on the evidence and testimony presented, Mr. Kessler found that Appellant had been informed of the BCPS Attendance Policy at his time of hire. He also found that Appellant had been counseled about his attendance problems during the school year and was aware of Attendance Policy. He further found that despite Appellant's knowledge of the Attendance Policy, he did not apply for Family and Medical Leave. Mr. Kessler found just cause for Appellant's termination and recommended that the CEO's decision be upheld.³

On June 11, 2013, the local board affirmed Mr. Kessler's recommendation. The local board issued its order on June 14, 2013. This appeal 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 shown to be arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A. The Appellant has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05D.

LEGAL ANALYSIS

Motion to Dismiss

As a preliminary matter, we address the local board's Motion to Dismiss the Appeal based on untimeliness. COMAR 13A.01.05.02B(1) provides that an appeal to the State Board "shall be taken within 30 calendar days of the decision of the local board" and that the "30 days shall run from the later of the date of the order or the opinion reflecting the decision." An appeal is deemed transmitted within the limitations period if, before the expiration of the time period, it has been delivered to the State Board, deposited in the U.S. mail as registered, certified or Express, or deposited with a delivery service that provides verifiable tracking from the point of origin. COMAR 13A.01.05.02B(3).

The local board voted on the Appellant's appeal on June 11, 2013, but did not issue its Opinion upholding the termination until June 14, 2013. Thus, Appellant's appeal to the State

³ The local board's negotiated agreement with the Baltimore Teachers Union, Paraprofessional and School Related Personnel Chapter, places the burden on the CEO to establish that the termination was for just cause.

Board was due to be filed on Monday, July 15, 2013. Appellant transmitted his appeal to the State Board by certified mail postmarked July 12, 2013, which was within the appeal time frame.⁴ Appellant, however, did not include in the transmittal all of the necessary information. As is the State Board's customary practice, our legal counsel advised Appellant that he had until August 2, 2013 to submit the additional information in order to perfect the appeal. Our counsel further advised that the 30 day appeal limitations period would be tolled during the additional clarification period if Appellant had timely filed his appeal to the State Board in the first instance. Appellant submitted the additional information by priority mail postmarked July 31, 2012. Thus, Appellant filed both his initial appeal and the additional information in a timely manner. Accordingly, we deny the local board's Motion to Dismiss for untimeliness.

Merits of Case

Appellant was terminated from his position for excessive absences and lateness. Appellant does not contest that he was absent or late on the dates noted in his attendance record. Nor does he challenge the counseling procedures followed by the school system. Rather, Appellant's sole argument is that his absences should have been excused because he was out from work for medical reasons and was not aware of the Family and Medical Leave option.

The BCPS Attendance Policy defines absenteeism as "any failure to report for, or remain at, work as scheduled, regardless of the reason." (Policy, III, p.1). Absences do not count against the employee, however, if they are excused. The Attendance Policy sets forth the following types of leave that qualify as excused absences: Family and Medical Leave, Personal Leave, Personal Business (charged to sick leave), Jury Service, Court Witness, Civil Defense Emergency Training, Bereavement Leave, On-the-Job Injury, Military Leave, Educational Conference, Sabbatical Leave, and Religious Holiday Leave. (Policy, Appendix A, p.6). Use of Sick Leave for medical purposes is not on the list of excused absences. *See Id.* Thus, when an employee misses work for medical reasons, the absence counts as an unexcused absence if the employee uses Sick Leave as the basis for the missed work time. (T.12-13).

BCPS counts absences in terms of occasions, which are periods of continuous absence for the same reason. Thus, an absence for one day and an absence for five consecutive days for the same reason are both counted as one occasion. Cases in which an employee returns to work but is absent again due to a relapse or recurrence of a recent illness or injury may also be considered one occasion in certain circumstances. (Policy, IV, pp.1-2). Appellant's 84 days of absence equated to 12 periods of absence under the Attendance Policy.

Under the Attendance Policy, ten month employees, like the Appellant, should have no more than seven periods of absence in any school year. (Policy, X, p.3). After seven periods of absence, the principal is authorized to mete out discipline, up to and including dismissal. (Policy, X, pp.3-4).

⁴ Because the appeal period ended on a Sunday, Appellant had until the next business day to transmit his appeal to the State Board. *See* COMAR 13A.01.05.02(B)(4).

The Hearing Examiner, Mr. Kessler, heard all of the testimony and reviewed the evidence in the case. He found that BCPS advised Appellant of the Attendance Policy at his time of hire. He concluded that the Appellant knew about the Family and Medical Leave option, which was part of the Attendance Policy, but that he did not opt to apply for it during any of the time he missed work. We do not disagree with the Hearing Examiner's determination that Appellant was made aware of the Attendance Policy at his time of hire. Appellant testified to that fact. (T. 86-87). Nor do we disagree that the Attendance Policy makes clear that Sick Leave does not excuse occasions of absence, but that Family and Medical Leave does. Despite this, we take issue with the lack of notice provided by BCPS to the Appellant regarding Family and Medical Leave. We explain below.

The crux of Appellant's argument is that nobody at BCPS advised him of the Family and Medical Leave option at any point during the 2011-2012 school year when he was using large amounts of Sick Leave for his medical issues. Under the Family and Medical Leave Act (FMLA), 29 USC §2601 *et seq.*, once BCPS acquired knowledge that the Appellant was taking leave for potentially qualifying reasons under the FMLA, BCPS was required to notify the Appellant that he was potentially eligible for Family and Medical Leave. 29 CFR §825.300(b). The record supports the fact that Mr. Crouse was aware that some of Appellant's absences were for reasons that may have qualified for FMLA Leave. Yet there is no evidence that anyone at BCPS so advised the Appellant. In fact, the Appellant specifically testified that, during the 2011-2012 school year, nobody at BCPS mentioned anything to him about taking FMLA Leave for any of his missed work time. (T.80). While the record makes clear that Mr. Crouse counseled the Appellant numerous times regarding his attendance, there is no evidence that such counseling included the FMLA notice. Thus, there is nothing to controvert the Appellant's claim.

This Board may consider the impact of BCPS's failure to provide the Appellant the notice required under the law in evaluating whether the local board's decision was arbitrary, unreasonable or illegal. Had some or all of the leave taken by the Appellant qualified for Family and Medical Leave, it surely would have had an effect on the number of occasions of absence accrued by the Appellant during the school year.

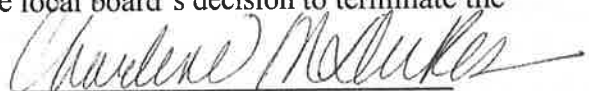
We would continue with the above analysis had absences been the only reason for Appellant's termination. Appellant's attendance record, however, also included 19 instances of lateness during the 2011-2012 school year. The Reporting Time Policy sets forth the BCPS policy and procedure on lateness. Employees are expected to report to work on time. A lateness occurs "whenever an employee reports to work after the scheduled start of the work day." (Policy, III & IV, p.4). Supervisors may permit an employee to have two occurrences of lateness per each half of the employee's contract year without consequence. (CEO #1-Policy, VI.C, p.5). It is expected, however, that an employee will not be late more than seven times in a recording period. (Policy, VI.D, p.5). When an employee is late for work more than 7 times in a recording period, the principal may recommend appropriate discipline, up to and including termination. (*Id.* pp.5-6).

Appellant does not dispute that he was late 19 times over the course of the school year. Nor does he dispute the procedures followed by the school system regarding his lateness.

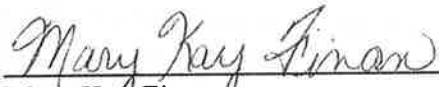
Appellant was counseled and warned throughout the second term of the school year that his attendance, including both absence and lateness, needed to improve or it would have an effect on his employment. There is no indication in the record that was before the local board that Appellant's lateness had anything to do with his medical issues. Although Appellant now states in his appeal, without any specificity, that some of his late days were a result of his medical problems, that is not what he stated at the hearing. Rather, Appellant testified that his lateness was linked to the distance he lived from work and his need to take two buses to get there. (T.55-56). Based on Appellant's excessive absences alone, BCPS was justified in terminating him. Thus, there is sufficient evidence in the record to uphold the local board's decision.

CONCLUSION

For the reasons stated above, we do not find the local board's decision to be arbitrary, unreasonable, or illegal. Accordingly, we affirm the local board's decision to terminate the Appellant.



Charlene M. Dukes
President



Mary Kay Finan
Vice President



James H. DeGraffenreidt, Jr.



Linda Eberhart

Absent

S. James Gates, Jr.

Absent

Larry Giammo

Absent

Luisa Montero-Diaz

Absent

Sayed M. Naved

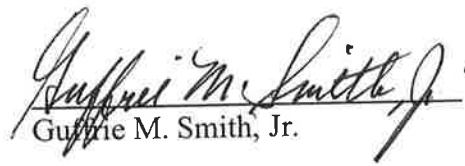


Madhu Sidhu



Donna Hill Staton

February 25, 2014


Guffie M. Smith, Jr.

