

KEVIN BROOKS,

Appellant

v.

BALTIMORE CITY BOARD
OF SCHOOL COMMISSIONERS,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Order No. OR14-12

ORDER

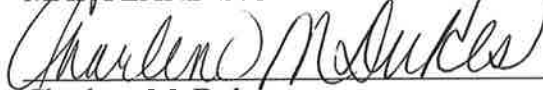
On June 30, 2014, Appellant filed this appeal challenging the May 27, 2014 decision of the Baltimore City Board of School Commissioners (local board) terminating Appellant from his position as principal of Forest Park High School due to willful neglect of duty and misconduct in office. Appellant, however, did not include in the transmittal all of the necessary information required by COMAR 13A.01.05.02. As is the State Board's customary practice, legal counsel advised Appellant in writing that he had until July 23, 2014 to submit the additional information in order to perfect the appeal. Counsel further advised that the 30 day appeal limitations period would be tolled during the clarification period in the event that the Appellant had timely filed his appeal to the State Board. The State Board received the additional information from Appellant on August 4, 2014.

As is required in certificated employee termination cases, the State Board referred this case to the Office of Administrative Hearings (OAH) for proposed findings of fact and conclusions of law by an Administrative Law Judge (ALJ). COMAR 13A.01.05.07A(2). The local board filed a Motion to Dismiss based on Appellant's failure to perfect the appeal by the July 23, 2014 deadline.¹ The Appellant did not respond to the motion. On October 1, 2014, the ALJ issued a decision proposing that the State Board dismiss the case because the Appellant failed to timely perfect the appeal. Although Appellant's initial appeal was timely filed, Appellant failed to submit the additional required information by the July 23, 2014 deadline.

The Appellant did not file exceptions to the ALJ's proposed decision. We concur with the ALJ that the case should be dismissed for failure to timely perfect the appeal and adopt the ALJ's proposed decision.

Therefore, it is this 11th day of December, 2014 by the Maryland State Board of Education,
ORDERED, that the appeal is dismissed.

MARYLAND STATE BOARD OF EDUCATION



Charlene M. Dukes
President

¹ The ALJ treated the Motion to Dismiss as a Motion for Summary Decision because it was supported by exhibits.

KEVIN BROOKS,
APPELLANT
v.
BALTIMORE CITY
BOARD OF SCHOOL
COMMISSIONERS,
RESPONDENT

*** BEFORE LOUIS N. HURWITZ,**
*** ADMINISTRATIVE LAW JUDGE**
*** MARYLAND OFFICE OF**
*** ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-BE-01-14-30008**

* * * * *

PROPOSED RULING ON MOTION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On an unknown date, Kevin Brooks (Appellant), a Principal assigned to Forest Park Senior High School (FPHS), was notified that Andres A. Alonzo, then Chief Executive Officer (CEO), Baltimore City Public Schools (BCPS), recommended that he be terminated from his employment with BCPS for willful neglect and misconduct in office. The Appellant appealed to the Baltimore City Board of School Commissioners (Respondent or Local Board). The matter was referred to Elise Jude Mason, Hearing Examiner. A hearing was held before Ms. Mason on March 4, 2013, September 11, 2013, October 1, 2013, and October 29, 2013. In a decision issued on or about May 2, 2014, Ms. Mason recommended that the CEO's proposed termination be upheld. On May 14, 2014, the Appellant filed exceptions to Ms. Mason's recommended decision and requested a hearing. In a letter dated May 30, 2014, the Local Board informed the Appellant that it voted to

accept the Hearing Examiner's recommendation to terminate the Appellant's employment with BCPS.

On June 30, 2014, the Maryland State Department of Education (MSDE) received an appeal from the Appellant via first-class mail. On August 4, 2014, the Appellant provided MSDE with additional information.

On August 8, 2014, MSDE referred the case to the Office of Administrative Hearings (OAH) for proposed findings of fact, conclusions of law and recommendations. On August 18, 2014, the Respondent filed with the OAH a Motion to Dismiss Appeal (Motion), including Attachments 1-3, on the basis that the appeal was untimely filed by the Appellant. On August 28, 2014, the OAH issued a Notice of Telephone Prehearing Conference to the parties, scheduling a Telephone Prehearing Conference for October 6, 2014 at 9:30 a.m. Although a Certificate of Service indicates that a copy of the Motion to Dismiss was mailed to the Appellant on August 15, 2014, the Appellant has yet to respond to the Motion and clearly did not do so within 15 days of the Motion being filed with the OAH. COMAR 28.02.01.12B(3)(a). Consequently, I determined that no hearing is necessary to rule on the Motion. COMAR 28.02.01.12B(5).

In a letter dated September 9, 2014, which the OAH received on September 11, 2014, Lori Branch-Cooper, Esquire, entered her appearance as counsel for the Local Board. In a letter dated September 12, 2014, which the OAH received on September 15, 2014, Leslie R. Stellman, Esquire, withdrew his appearance as counsel to the Local Board. On September 16, 2014, the Appellant filed a Prehearing Conference Statement. On September 19, 2014, the Local Board filed its Prehearing Conference Statement.

The contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board, and the Rules of Procedure of the OAH govern

procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014); Code of Maryland Regulations (COMAR) 13A.01.05, 28.02.01.

ISSUE

Should the Appellant's appeal of the Local Board's decision be dismissed as untimely?

SUMMARY OF THE EVIDENCE

Exhibits

The Local Board's Motion to Dismiss was accompanied by the following exhibits, which I considered in making my ruling:

- | | |
|--------|--|
| LB # 1 | Order of the Local Board, dated May 30, 2014, upholding the CEO's recommendation to terminate the Appellant from employment with BCPS |
| LB # 2 | Letter from the Local Board to J. Wyndal Gordon, Esq. and Tisha Edwards, Interim CEO, BCPS |
| LB # 3 | Letter to J. Wyndal Gordon, Esq., from Jackie LaFiandra, MSDE Assistant Attorney General, dated July 9, 2014, acknowledging receipt of Appellant's appeal on June 30, 2014, and requiring additional information |

The Appellant did not submit a response to the Motion to Dismiss.

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. On May 27, 2014, the Local Board voted to accept the Hearing Examiner's proposed decision to "uphold the recommendation of the CEO dismissing Appellant from employment with BCPS."
2. On May 30, 2014, the Local Board rendered an Order terminating the Appellant's employment with the BCPS.
3. A letter dated May 30, 2014, notified the Appellant that he could appeal such Order so long as he did so within thirty days of the date of the Order.
4. There were no other orders or opinions terminating the Appellant's employment with the BCPS subsequent to the May 30, 2014 Order.

5. On June 30, 2014, MSDE received an appeal from the Appellant via first-class mail, challenging his termination from BCPS employment. The Appellant's letter of appeal included his name, the name of the school involved, the BCPS case number (12-95), and listed the issue as "Dismissal."
6. In a letter to Mr. Gordon, the Appellant's attorney, dated July 9, 2014, Jackie LaFiandra, the Assistant Attorney General representing MSDE, acknowledged receiving the Appellant's letter of appeal. The letter requested that the Appellant provide the following information pursuant to COMAR 13A.01.05.02A:
 - a. a statement of the facts and issues upon which the appeal is based; and
 - b. any supporting documentation, including a copy of the Local Board's decision.
7. Ms. LaFiandra's letter to Mr. Gordon informed him that the Appellant had until July 23, 2014, or thirty days from the date of the Local Board's decision, whichever is later, to complete his appeal by providing the required information. The letter also provided that, assuming the appeal to MSDE was filed in a timely manner, i.e., within thirty days of the Local Board's decision, "the limitations period for the appeal will be tolled during this period of clarification."
8. Submitted next on behalf of the Appellant was a document titled "Supplemental Appellate Brief (Request for Oral Argument)," which is accompanied by a Certificate of Service, dated July 23, 2014. The Certificate of Service, which refers to the document as "Closing Argument," certifies that the document was served upon "Leslie Stelman, Pessin Katz Law" and "Jackie LaFiandra, Office of the Attorney General, MSDE."
9. MSDE did not receive the "Supplemental Appellate Brief" until August 4, 2014, which was beyond the deadline set by the MSDE. The Supplemental Appellate Brief did not include the Local Board's May 27, 2014 Order adopting the Hearing Examiner's Recommendation.

DISCUSSION

In a case transferred by MSDE to OAH, hearing procedures are in accordance with the Administrative Procedure Act and the OAH's Rules of Procedure, except as otherwise provided by MSDE regulations. COMAR 13A.01.05.07D. MSDE regulations do not contain procedures for motions; accordingly, the OAH Rules of Procedure apply. OAH Rules of Procedure provide for consideration of a motion to dismiss under COMAR 28.02.01.12C and for consideration of a motion for summary decision under COMAR 28.02.01.12D. Those regulations state:

- C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

- D. Motion for Summary Decision.
 - (1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.
 - (2) The response to a motion for summary decision shall identify the material facts that are disputed.
 - (3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.
 - (4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

In considering a motion to dismiss, an administrative law judge may not go beyond the "initial pleading," defined under COMAR 28.02.01.02B(7) as "a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person." In contrast, when ruling on a motion for summary decision, an administrative law judge may consider admissions, exhibits, affidavits, and sworn testimony for the purpose of determining whether a hearing on the merits is necessary. *See Davis v. DiPino*, 337 Md. 642, 648-49 (1995) (comparison of motions

to dismiss and for summary judgment). Because the Local Board has submitted exhibits for my consideration, I will treat the Local Board's motion as a Motion for Summary Decision, under COMAR 28.02.01.12D. In its Motion, the Local Board argues that it is entitled to judgment as a matter of law because material facts, about which there is no genuine dispute, establish that the Appellant failed to timely file his appeal.

From a review of the notices of agency action in this case and the Appellant's appeal of the agency action, the Appellant failed to file an appeal of the Local Board's termination Order within the required timeframe. I conclude, therefore, that the appeal is untimely and should be dismissed.

COMAR 13A.01.05.02A governs the contents of an appeal as follows:

A. Contents. The request for an appeal shall:

- (1) Specify the party or parties taking the appeal;
- (2) Designate the decision or order for which review is requested;
- (3) Contain a statement of the facts necessary to an understanding of the appeal;
- (4) Contain the issues or charges for which the appeal is being taken;
- (5) Contain reasons in support of the appeal;
- (6) Contain a statement of the relief sought;
- (7) Include any supporting documents, exhibits, and affidavits; and
- (8) Include, if possible, a copy of the order and opinion from which the appeal is sought.

Under the applicable MSDE regulations, an appeal of a local board action must be taken within 30 calendar days:

B. Deadlines

(1) Appeals.

(a) An appeal shall be taken within 30 calendar days of the decision of the local board or other individual or entity which issued the decision on appeal.

(b) The 30 days shall run from the later of the date of the order or the opinion reflecting the decision.

(2) The day of the decision of the local board may not be included in computing any period of time prescribed by these regulations.

(3) An appeal shall be deemed to have been transmitted within the 30 day period of time permitted under §B(1) of this regulation if, before the expiration of the time, it has been:

(a) Delivered to the State Board; or

(b) Deposited in the United States mail, as registered or certified mail.

(4) The last day of the period of time prescribed by this chapter shall be included, unless it is a Saturday, Sunday, or a State legal holiday, in which event the period ends on the next day which is not a Saturday, Sunday, or State legal holiday.

(5) Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after service upon the party of a notice or other paper and service is made by mail, 3 days shall be added to the prescribed period.

C. Acknowledgment. The State Board shall promptly acknowledge receipt of the appeal in writing and send a copy of an appeal involving a local school system to the local superintendent.

COMAR 13A.01.05.02B and C.

In the instant case, the Appellant transmitted an appeal of his termination by letter to MSDE, dated June 26, 2014, via first-class mail that was received by the MSDE on June 30, 2014. The Order terminating the Appellant's employment was issued May 30, 2014.¹ The appeal, however, failed to include the above-referenced requirements provided in COMAR 13A.01.05.02A. The Appellant did not include a statement of the facts and the issues supporting the appeal along with a copy of the Local Board's decision. In a letter to the Appellant's counsel, dated July 9, 2014, the Local Board acknowledged the filing and gave the Appellant

¹ The thirtieth day after May 30, 2014 was June 29, 2014, a Sunday. The Appellant sent the appeal by first-class mail. The Local Board has not asserted that the June 30, 2014 filing is not timely, only that it was not perfected.

until July 23, 2014, or thirty days from the date of the Local Board's decision, whichever is later, to complete the appeal. The later date is July 23, 2014. MSDE did not receive the submission, titled "Supplemental Appellate Brief" until August 4, 2014, twelve days beyond the deadline the MSDE established for the Appellant to perfect his appeal. Pursuant to COMAR 13A.01.05.02B(3), an appeal is deemed transmitted within the limitations period if it has been delivered to MSDE or deposited in the U.S. mail, as registered or certified, before the expiration of the time period. Although the Appellant's Certificate of Service is dated July 23, 2014, there is no indication the additional submission was sent by any means other than first-class mail.

In addition, the Appellant submitted the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation with his Supplemental Appellate Brief, but he failed to include the Local Board's May 27, 2014 Order adopting the Hearing Examiner's decision. I note that the Appellant has not responded to the Local Board's Motion. For the reasons stated above, the Appellant's appeal cannot be considered timely.

It is well-settled that timeliness is jurisdictional. If an appeal is not filed within the required time, no jurisdiction is acquired and the appeal must be dismissed. *Walbert v. Walbert*, 310 Md. 657, 662 (1987), and cases cited therein. The reasons for holding timeliness to be jurisdictional were articulated by the Court of Appeals in *Murphy v. Merzbacher*, 346 Md. 525, 531-32 (1997), as follows:

As the United States Supreme Court acknowledged over fifty years ago: 'Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Internal citation omitted). They are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.' *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628, 1635

(1945). Thus, when plaintiffs imprudently prolong their decision to bring an action, these statutes act as a complete bar to their claims, relieving potential defendants from the pending burden. (Internal citation omitted).

Since timeliness is a jurisdictional issue it cannot be waived. *Dabrowski v. Dabrowski*, 320 Md. 392 (1990). If the OAH lacks jurisdiction to hear a matter, it must dismiss the case as a matter of law. COMAR 28.02.01.12.

As there is no genuine dispute of material fact regarding when the Local Board issued its Order terminating the Appellant's employment and notified him of its action, and there is no genuine issue of fact as to when he initially filed his appeal, the time of which was extended by MSDE in order for the Appellant to meet the requirements of COMAR 13A.01.05.02A, the Local Board is entitled to judgment in its favor as a matter of law under COMAR 13A.01.05.02A and B.

Given that the Appellant attempted to perfect his appeal of the order terminating his employment after the deadline established in MSDE's letter of July 9, 2014,² such appeal is untimely. COMAR 13A.01.05.02A and B. Accordingly, the Local Department's Motion for Summary Decision should be granted. COMAR 13A.01.05.03C(1)(e).

CONCLUSIONS OF LAW

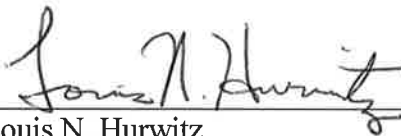
Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Appellant has failed to timely perfect his appeal of the Local Board's Order of May 30, 2014 terminating his employment, and the Local Board is therefore entitled to dismissal of the appeal. COMAR 13A.01.05.02A and B; COMAR 28.02.01.12D; *Walbert v. Walbert*, 310 Md. 657 (1987).

² I also note the late appeal document ultimately failed to include the Local Board's Order adopting the Hearing Examiner's recommendation.

PROPOSED ORDER

I **PROPOSE** that the Baltimore City Board of School Commissioners' Motion for Summary Decision be **GRANTED** and that the Appellant's appeal be **DISMISSED** and that the Telephone Prehearing Conference scheduled for October 6, 2014 be **CANCELED**.

October 1, 2014
Date Decision Mailed


Louis N. Hurwitz
Administrative Law Judge

LNH/dlm
151827

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file written objections within fifteen days of receipt of the decision; parties may file written responses to the objections within fifteen days of receipt of the objections. Both the objections and the responses shall be filed with the Maryland State Department of Education, c/o Jackie LaFiandra, Maryland State Board of Education, 200 St. Paul Place, 19th Fl., Baltimore, Maryland 21202, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

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