GARRY JONES

Appellant

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-21

OPINION

INTRODUCTION

In this appeal, Appellant, Garry Jones challenges the decision of the Prince George's County Board of Education ("local board") upholding his termination as a Group Activity Assistant. The local board has filed a Motion for Summary Affirmance maintaining its decision is not arbitrary, unreasonable or illegal and should be upheld. The Appellant filed a Response and the local board filed a Reply.

FACTUAL BACKGROUND

Appellant was employed for approximately 5 years with the Prince George's County Public Schools ("PGCPS"). He began his employment as a Substitute Group Activity Assistant in February, 2004 at Overlook Elementary School. He was then recommended for a permanent position as a Group Activity Assistant in the Before and After Care Extended Learning Program ("Before and After Care Program") at Tulip Grove Elementary in early 2005. Appellant was transferred to Kenilworth Elementary in April 2009 in the same position and then to Yorktown Elementary in mid-October 2009 where he was eventually terminated in April 2010.

Concerns about Appellant's job performance started in December 2007 when Damon Graham, the Field Coordinator for the Before and After Care Program, received an email from Monique Smith, the Program Coordinator at Tulip Grove Elementary. Ms. Smith received a complaint from a parent who reported that Appellant addressed a child in an inappropriate manner using extreme verbal intimidation and invading the child's physical space. (Superintendent Ex. #1). After receiving the complaint, Mr. Graham scheduled a one-on-one meeting with Appellant to discuss proper procedures for communicating with a child and

students.[1] (Tr. 16-21).

Ms. Smith also discussed the incident with Appellant and issued a memorandum to Mr. Graham documenting the discussion. (Superintendent's #2). In her discussions with Appellant, Ms. Smith discussed procedures that Appellant should follow when dealing with a child who was not listening or following directions. Appellant advised Ms. Smith that he was dealing with some personal issues that could have affected his behavior, including the recent loss of his father. Ms. Smith decided that she would monitor Appellant's behavior closely, and Appellant agreed to apologize to the parent who witnessed the incident. *Id.* In addition, Ms. Smith issued to Appellant an "Employee Performance Discussion Record" regarding the incident. (Superintendent Ex. #3).

In September 2008, Ms. Smith sent Mr. Graham documentation of another incident involving Appellant using the incorrect procedure to call "out." Ms. Smith received a call from Ms. Buggs, her assistant, at 9:30 pm informing her that Ms. Buggs received a call from Appellant stating he would not report to work the following day. Ms. Smith called Appellant at home to confirm the information, and Appellant advised Ms. Smith that he was unable to report to work due to illness in his family. Ms. Smith offered her sympathy and explained to Appellant that the proper procedure was to call her directly if he was going to be absent. (Superintendent Ex. #4).

On October 6, 2008, Ms. Smith documented and sent to Mr. Graham another incident involving Appellant becoming agitated and angry at a woman who arrived at the school to pick up two children. Ms. Smith explained to the woman that because she was not on the authorized pickup list, she could not release the children to her. Ms. Smith called the parents on the spot to notify them of this. Afterwards, the woman became upset and Appellant, who apparently overheard the exchange, began raising his voice at the woman causing the conversation between the two to escalate. As a result, Ms. Smith asked Appellant to leave the school building for the rest of the day. She determined that his manner of communication to the woman in the presence of children was inappropriate. (Superintendent Ex. # 5).

On October 15, 2008, Ms. Smith documented additional concerns with Appellant's job performance. Ms. Smith stated she was in the hallway speaking with a parent when the grandfather of a child came to pick him up. The child eventually left with the grandfather. Ms. Smith then asked Appellant and another staff person on duty whether the grandfather was authorized to pick up the student. Neither Appellant nor the other staff person knew the identity of the person picking up the child nor whether he was authorized to pick up the student. Ms. Smith documented this and admonished staff that they must pay attention to who is coming in and out of the building and to verify the status and identity of persons picking up children. (Superintendent Ex. # 6).

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[1] All transcript references are citations to the transcript of the hearing before Hearing Officer Robin Shell on November 22, 2010.

The next day, on October 16, 2008, Ms. Smith documented in a memorandum that Appellant sent a text to Ms. Smith advising her that he would not report to work, despite Ms. Smith's specific instruction that staff must call her directly when they will not report to work and should not send text messages. (*See* Tr. 27-30 and Superintendent's Ex. # 6). In the same memorandum, Ms. Smith expressed concerns about Appellant's lack of patience and control over the children in his assigned group. She expressed concerns about that he was not a team player with his co-workers and is easily frustrated with the children in his group. Appellant was asked on several occasions to take a break from his students because when he is frustrated, he is prone to lash out at the students. *Id.*

In April 2009, Ms. Smith documented and sent to Mr. Graham a memo entitled, "Observations of Mr. Jones at Tulip Grove." Ms. Smith documented numerous concerns and job performance observations of Appellant while employed at Tulip Grove Elementary School, including that he became easily frustrated and angered and exhibited a lack of patience with the children. Appellant had had problems adjusting to changes in the program and became emotional on several occasions at school and disrupted staff meetings by raising his voice and storming out of meetings. (Superintendent Ex. # 7)

Appellant was then transferred from Tulip Grove Elementary School to a similar position in the Before and After Care Program at Kenilworth Elementary School. Mr. Graham was also the Field Coordinator for Kenilworth Elementary School and the Site Coordinator at that location is Laverne Bland. Even after Appellant was assigned to Kenilworth Elementary, Mr. Graham continued to receive complaints about his job performance.

On September 16, 2009, Mr. Graham met with Appellant and Ms. Bland to discuss Appellant's insubordinate behavior in not following proper PGCPS communication protocol and contacting individuals other than his supervisor when calling in to say he was not going to report to work. On October 1, 2009, Ms. Bland reported to Mr. Graham that Appellant failed to attend a mandatory meeting on September 29, 2009 and did not call in. She requested guidance from Ms. Graham on how to respond to the matter. Mr. Graham advised her to write Appellant up as taking leave without pay. (Tr. 32-34, Superintendent's Ex. # 8).

On October 9, 2009, Appellant was disciplined for unsatisfactory performance, violation of administrative regulations and conduct which reflects unfavorably on the PGCPS as an employer when Appellant inappropriately disciplined a child by yelling at the child and then refusing to give the child a snack. In late November, 2009, Appellant was transferred to Yorktown Elementary. (Tr. 48, Superintendent Ex. #9)[2].

On December 14, 2009, JoAnne Berry, the Site Coordinator for Before and After School Care at Yorktown Elementary School, met with Appellant about an incident involving one child about to hit another child. When Appellant interceded, he stated to the child, "don't fucking try

[2] Superintendent's Ex. #9 is also a multi-page document dated March 16, 2010 prepared by Mr. Graham summarizing all incidents, complaints and disciplinary actions involving Appellant during his tenure with PGCPS.

it." Ms. Berry met with Appellant about the incident and Appellant acknowledged making the statement. Ms. Berry discussed with Appellant his unprofessional and inappropriate behavior in trying to resolve the issue and then she documented the behavior in a Discussion Performance Record. (Superintendent Ex. #11).

On January 14, 2010, Ms. Berry wrote up another Discussion Performance Record documenting another incident regarding Appellant's unprofessional and inappropriate behavior while interacting with students. (Superintendent Ex. 12). During this incident Mr. Jones indicated to a student that he did not like him. Again Ms. Berry met with Appellant, and again Appellant acknowledged his statement to the student. Ms. Berry then put in place a plan of action for Appellant that would better equip him with the ability to interact with the students in a positive manner.

On February 4, 2010, Ms. Berry met with Appellant again about his inappropriate and unprofessional behavior in stating to the student "to get out of my fucking face." Appellant again acknowledged the statement to the student and again Ms. Berry documented the incident and behavior in a Discussion Performance Record. (Superintendent Ex. #13)

The culmination of events that lead to Appellant's termination was an incident on March 4, 2010 involving Appellant's restraint of a student. The child that Appellant restrained, according to the testimony of Ms. Berry, was nine years old, weighed 75 pounds, was four foot five inches in height and was a fifth grade student at the school. (Tr. 59-60) Appellant restrained the child by placing his knee on the child's back, pinning him to the floor with his knees and arms, and then, pulling the child's arms behind him. The child was face down on the floor. (Tr. 56) Ms. Berry testified that when she saw this, she yelled at Appellant to get off of the child and he did. The child got up and Ms. Berry went over to the student to make sure he was alright. After determining that the student appeared alright, Ms. Berry ordered Appellant to the principal's office. Ms. Berry and the principal, Cheryl Hughes, spoke with Appellant about the incident and tried to understand why Appellant felt the need to use that kind of restraint on a student. (Tr. 57-58) After their discussions, Ms. Hughes and Ms. Berry concluded, that the manner of restraint used by Appellant was inappropriate and that the method of restraint could have caused harm to the child of his age and size.

Afterwards, Ms. Hughes, Ms. Berry and the student's mother wrote to Brenda Neal, the Program Supervisor about the incident. (Tr. 77-78, School Ex. 15) Ms. Neal alerted her supervisor and the Labor Relations Officer about the incident. (Tr. 78-79) Ms. Berry also received a copy of the Department of Security Services Report and an Investigation of the incident. (Tr. 78-79, School Ex. 16). On March 16, 2010 Brenda Neal wrote to Appellant to advise him that she was recommending his termination. The Superintendent of Schools for Prince George's County, Dr. William R. Hite, recommended Appellant's termination effective April 1, 2010.

Appellant appealed his termination to the local board, which transferred the case for a full evidentiary hearing before an assigned hearing officer. The hearing was conducted on November 22, 2010 and on February 17, 2011 the hearing officer issued her recommendation to

the Superintendent. The hearing officer concluded that the decision to terminate Appellant be upheld and affirmed. On February 24, 2011, the Superintendent concurred with, affirmed and adopted the Hearing Officer's recommendation. On March 4, 2011, Appellant filed exceptions to the Hearing Officer's recommendation, and oral arguments were presented to the local board on December 5, 2011. On January 4, 2012, the local board upheld the Superintendent's decision to recommend Appellant's termination.

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.

LEGAL ANALYSIS

In his appeal to this Board, the Appellant presents essentially two issues for review: (1) whether there was sufficient evidence based on the proceedings and the record before the local board to support his termination; and (2) whether his due process rights were violated.

Was there sufficient evidence to support Appellant's Termination.

Most of the Appellants arguments before this Board focus on the grounds for termination listed in the March 16, 2010 termination letter and the summary attached to it listing Appellant's job performance infractions during his work history with the PGCPS. Appellant contends that the documents and testimony regarding the list of infractions and the reasons for his termination were not substantiated during the hearing and should not have been admitted by the hearing officer. We can find no valid basis to exclude the testimony or the documents.

At the full evidentiary hearing held before the hearing officer, the Appellant had the opportunity to challenge the evidence presented. We need not review the admissibility of each piece of evidence. We agree with the hearing officer that there was sufficient evidence to uphold Appellant's termination. Specifically, the hearing officer found that there was sufficient testimony and documentary evidence to conclude that Appellant's manner of restraint on March 4, 2010, by forcibly taking a child to the ground with his knee in the child's back and the child's arms pulled up behind him, was inappropriate; a violation of program policy and procedure; and could have caused a child of that age and size serious harm. (Hearing Officer Report at 11-14) In our view, the evidence of that act alone was sufficient to support the termination.

Furthermore, the hearing officer concluded that the testimony and documents regarding Appellant's job performance were sufficient to show his problematic job history and uphold his termination. We agree. There was testimony regarding Appellant's use of inappropriate and extreme language when communicating with children when he worked at Tulip Grove

Elementary School. There was testimony of Appellant's "highly inappropriate and unacceptable behavior". Appellant was described as becoming "easily frustrated and angered" and exhibiting a "lack of patience with children." In addition to communication concerns with children, the hearing officer concluded that the testimony and documents revealed that Appellant failed to follow requirements for use of leave and failed to verify authorization status of adults who came to school to pick up children. Appellant received counseling, warnings, and Employee Performance Discussion Records from supervisory staff for these infractions while assigned to Tulip Grove Elementary. (Hearing Officer Report at 2-4)

Based on a review of the record, it is our view that that the local board's decision to uphold the findings of the hearing officer was reasonable.

Due Process

Appellant also maintains that his due process rights were violated because the appeal hearing was not scheduled until November 22, 2010, approximately 7 months from the date he appealed the termination decision.

The local board regulations provide that in the event of an appeal of a disciplinary action, "the Superintendent of Schools shall arrange for a hearing to be held not less than five (5) or more than thirty (30) working days after the receipt of the request." Regulations for Supporting Personnel at 8.

The "Accardi doctrine" is the often cited case-created rule of administrative law that states that an administrative decision is subject to invalidation when an agency fails to follow its own procedures or regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). The Maryland Court of Appeals has adopted the "Accardi doctrine" and held that it is applicable in administrative hearings. In order for the agency decision to be reversed, however, the complainant must show that he was prejudiced by the agency violation. *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463 (2003). *See also Cory Williamson v. Bd. of Educ. of Anne Arundel County*, 7 Op. MSBE 649 (1997)(failure to give prompt notice would be cured by local board's full evidentiary hearing on appeal); *West & Bethel v. Board of Commissioners of Baltimore City*, 7 Op. MSBE 500 (1996)(failure to hold conference within ten days was cured by the de novo administrative hearing on merits before the local board).

Furthermore, in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (985), the Supreme Court recognized that the core requirement of due process is that an individual be given notice of the intended action and an opportunity to present the individual's response before being deprived of any significant property interest. As to post termination delays, the Court in *Loudermill* recognized that a nine month adjudication was not unconstitutionally lengthy per se, and that such a delay would not necessarily create a constitutional claim. *Id.* at 547

There is no dispute on the record here, that the matter was not considered by the superintendent within the thirty (30) day time frame. There is also no explanation in the appeal

materials regarding the reason for the delay. However, Appellant presented no testimony or documentary evidence to show that he was somehow prejudiced by the delay.

While it would have been better for this matter to have been heard within the thirty (30) day time frame set forth in the local board regulations, we concur with the hearing officer's conclusion that "Prince George's County Public Schools afforded Appellant appropriate due process in connection with the termination, and the decision to terminate Appellant was not arbitrary, capricious, or illegal, and was supported by testimony and documentary evidence presented at the hearing…" Hearing Officer's Report at 16.

CONCLUSION

For all these reasons, we affirm the decision of the Prince George's County Board of Education terminating Appellant from his employment with the school system based on insubordination, violation of rules, unauthorized absences and conduct which reflected unfavorably on the school system.

James H. DeGraffenreidt, Jr.
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July 24, 2012