

BRUCE ELLENBERGER,

Appellant

v.

ANNE ARUNDEL COUNTY BOARD OF
EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 07-42

OPINION

INTRODUCTION

In this case, Appellant challenges the decision of the Acting Deputy Superintendent to rescind Appellant's teaching contract based on his falsification of information in his employment application. Appellant maintains that the Acting Deputy Superintendent's rescission of the teaching contract is tantamount to a recommendation for termination which invokes the procedures set forth in §6-202 of the Education Article, and that the school system denied him those due process rights.¹ The Local Board has filed a Motion to Dismiss maintaining that, despite the manner in which the case is categorized, the State Board should dismiss it based on Appellant's failure to exhaust his administrative remedies because Appellant failed to appeal the Acting Deputy Superintendent's decision to the Local Board. Instead, Appellant appealed directly to the State Board.

FACTUAL BACKGROUND

Appellant submitted an application for employment with Anne Arundel County Public Schools and was hired. He signed a Provisional Contract on August 11, 2006, which took effect on August 21, 2006. (See Provisional Contract for Conditional or Resident Teacher Certificate Holders). He reported for duty on or about August 21, 2006 at his school of assignment, Arundel High School.

¹Section 6-202 provides the grounds and procedure for suspension and dismissal of teachers, principals, and other professional personnel. It sets forth the five grounds for suspension or termination: (1) immorality; (2) misconduct in office; (3) insubordination; (4) incompetency; and (5) willful neglect of duty. §6-202(a)(1)(i – v). It also sets forth the due process procedures which include a full evidentiary hearing before the local board upon request. §6-202(a)(2) – (5).

On September 15, 2006, Arlen Liverman, Acting Deputy Superintendent and the Superintendent's Designee, placed Appellant on administrative leave with pay pending the results of an investigation regarding information Appellant provided on his employment application. (Liverman Letter, 9/15/06). As part of that investigation, Appellant met with Florence Bozella, Director of Human Resources, to discuss Appellant's failure to disclose on his employment application that he was discharged from employment with a school system in Pennsylvania. (Liverman Letter, 9/25/06). Specifically, Appellant responded "No" to the question "Have you been discharged from any position for any reason?" (Employment Application). Appellant conceded to Ms. Bozella that he had failed to disclose the discharge, but maintained that an arbitrator found in his favor when he challenged the decision. Nonetheless, as Ms. Bozella stated, following the arbitrator's decision, the court upheld the school district's action to terminate Appellant's employment.² (Liverman Letter, 9/25/06).

Based on the results of the investigation, Mr. Liverman advised Appellant that he was not eligible for employment with Anne Arundel County Public Schools because he failed to disclose his dismissal from another school system. He stated that Appellant's "provisional contract has been rescinded." (Liverman Letter, 9/25/06).

In response to Mr. Liverman's September 25 letter, counsel for Appellant sent Mr. Liverman a letter requesting a hearing before the Local Board pursuant to §6-202 of the Education Article. He stated as follows:

Based upon your letter, it is apparent that you are not aware of the provisions of Section 6-202 of the Education Article of the Annotated Code of Maryland, which sets forth the procedure for terminating the employment of a certificated teacher in Maryland. Since Mr. Ellenberger was in fact employed as a teacher in your county under one of the standard contract forms mandated by the Maryland State Board of Education, he is entitled to the full panoply of due process rights accorded such employees by Section 6-202. Therefore, I shall treat your recent letter as an indication of your intention, acting as the presumptive designee of the Superintendent of Schools for Anne Arundel County, to recommend to the Board of Education that Mr. Ellenberger be dismissed from his employment as a teacher in the Anne Arundel

²During that meeting, Ms. Bozella also expressed concern that Appellant's criminal background check disclosed an open warrant for him in Pennsylvania. Although Appellant told Ms. Bozella that he had taken care of the matter, he provided nothing to support his statement. (*Id.*)

County public school system. I shall also assume that your recommendation is based upon the allegation that Mr. Ellenberger should be terminated on the statutory ground of misconduct in office, predicated solely upon the factual assertions detailed in your recent letter.

(Whattam Letter, 9/27/06).

By letter dated October 24, 2006, Mr. Liverman responded that Appellant would “not be afforded rights pursuant to Section 6-202 of the Education Article because he is not entitled to them.” He advised Appellant to avail himself of the appeal process for controversies and disputes arising within the school system pursuant to §4-205 of the Education Article.³

Under §4-205, the Appellant would have received a hearing before the local board on the validity of the grounds for the rescission of his contract. That hearing, however, would not have been a full evidentiary hearing.

Rather than pursuing an appeal under §4-205, Appellant appealed directly to the State Board. He maintains that Mr. Liverman’s decision was tantamount to a termination, and was therefore arbitrary, unreasonable and illegal because the school system failed to follow the procedures set forth in the provisional contract and under §6-202 of the Education Article.

In response to the appeal, the Local Board maintains that the State Board should dismiss this case because Appellant bypassed the appeal to the Local Board and, therefore, failed to exhaust his administrative remedies. The Local Board also contends that the §6-202 procedures are inapplicable here because this is not a termination case.

ALJ’S PROPOSED DECISION

We referred this case to the Office of Administrative Hearings (OAH) for handling. The Administrative Law Judge (ALJ) conducted a hearing on the Local Board’s Motion to Dismiss. The ALJ issued a Proposed Decision on Motion to Dismiss and for Summary Decision which we find somewhat confusing. In a summary decision, the ALJ decided in a conclusory fashion that this was a termination case pursuant to §6-202 and that Appellant’s due process rights were violated. He recommended that the State Board dismiss the appeal and remand the case to the

³Section 4-205 provides that, subject to various provisions of the Education Article, each county superintendent shall decide all controversies and disputes that involve the rules and regulations of the county board and the proper administration of the county public school system. The superintendent’s decisions are appealable to the local board which will conduct a hearing on the matter, but not necessarily a full evidentiary hearing.

Local Board for a hearing. The ALJ failed to provide, however, any meaningful analysis regarding his conclusion, i.e., why he concluded that this case was a termination case and not a rescission case.

The Local Board has filed exceptions to the ALJ's Proposed Decision. The Local Board's primary claim is that the proposed decision avoids the threshold issue concerning whether this case deals with the rescission of a contract in which case the §4-205 appeal procedures would govern, or whether the case is a termination case invoking the procedures set forth in §6-202. The Local Board also takes issue with several of the ALJ's factual findings. Appellant disputes the exceptions.

STANDARD OF REVIEW

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the Proposed Decision. *See* Md. Code Ann., State Gov't § 10-216. In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor based witness credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

Before reaching the merits of the rescission v. termination issue, there is an initial procedural issue that we must address. The Local Board requests that the State Board dismiss the appeal based on Appellant's failure to exhaust his administrative remedies. Specifically, the Local Board argues that no matter how the case is categorized, whether it should have been pursued as a §4-205 appeal or a §6-202 hearing, the Appellant failed to file an appeal with the Local Board and the matter cannot be appealed directly to the State Board.

Here is the timeline of relevant events. On September 25, 2006, Mr. Liverman advised Appellant that his teaching contract was rescinded. In a September 27, 2006 letter addressed to Mr. Liverman, legal counsel for Appellant stated his position that Mr. Liverman's action was actually a recommendation for termination to which the due process procedures set forth in §6-202 apply. Based on this belief, counsel for Appellant requested from Mr. Liverman "a hearing before the Board of Education concerning [his] recommendation for [Appellant's] discharge." (Whattam Letter, 9/27/06). In response, by letter dated October 24, 2006, Mr. Liverman, advised Appellant that he would not be afforded a §6-202 hearing because he was not entitled to such hearing based on the circumstances in this case. He further advised that the §4-205 appeal

process was available to Appellant to challenge the grounds for the rescission of the contract.⁴ Counsel for Appellant then filed an appeal to the State Board seeking a ruling from the State Board directing the local board to hold a §6-202 evidentiary hearing in this case.

We note, however, that Mr. Liverman's October 24 letter announced a substantive decision that stripped Appellant of his rights under §6-202. That was not a decision of the Local Board as argued by Appellant. It was a decision of the Superintendent's Designee. The next step would have been for Appellant to note an appeal to the Local Board. In an appeal to the Local Board, Appellant could have presented the argument that Mr. Liverman's decision was wrong because it was in effect a recommendation for termination to which §6-202 applies. The Local Board would have rendered a decision which would then have been appealable to the State Board.

It is well settled that an appellant must first pursue and exhaust statutorily prescribed administrative remedies in the appropriate manner. *Wilkins v. Prince George's County Board of Education*, MSBE Opinion No. 06-10 (2006); *Kemp v. Montgomery County Board of Education*, MSBE Opinion No. 01-14 (2001); *Stewart v. Prince George's County Board of Education*, 7 Op. MSBE 1358 (1998); *Jackson-Nesmith v. Charles County Board of Education*, 7 Op. MSBE 1320 (1998). The process for appealing a decision of a local superintendent is set forth in §4-205. A decision of a county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent. The decision may be further appealed to the State Board if taken in writing within 30 days of the decision of the county board. Md. Code Ann., Educ. §4-205(c)(3). This is the process applicable to Appellant's case. For whatever reason, counsel for Appellant chose a different route and appealed directly to the State Board.

Appellant argues that §2-205 provides a direct appeal route to the State Board because it states that the State Board "shall decide all controversies and disputes under [the provisions of the Education Article and State Board regulations]." That provision, however, does not provide an end-around the requirement that the appeal must be from a decision of the local board.⁵

⁴There was another letter from counsel for Appellant dated October 18, 2006 to Mr. Liverman requesting a response to the September 27 letter. This letter is not a part of the record but was discussed during the OAH hearing and is referenced in Mr. Liverman's October 24 letter. (Tr. 19-20).

⁵A litigant may choose either avenue of appeal in cases requiring an explanation of the "true intent and meaning" of the school laws or State Board bylaws. In such cases, the litigant may appeal directly to the State Board pursuant to §2-205, or the litigant may appeal first to the local superintendent and then to the State Board pursuant to §4-205. *See Board of Educ. of Garrett County v. Lendo*, 295 Md. 55, 65-66 (1982). This case does not come under that category.

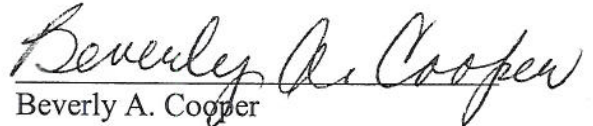
Indeed, the State Board regulations make clear that, as to “cases and controversies”, the appeal is from a decision of the local board. *See, e.g.*, COMAR 13A.01.05.05(A); .06(A); and .09(D).

CONCLUSION

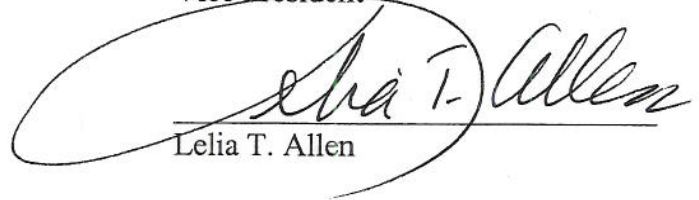
For these reasons, we do not reach the substantive issue in this case. We reverse the ALJ’s decision and dismiss this appeal for all the reasons stated herein.



Dunbar Brooks
President



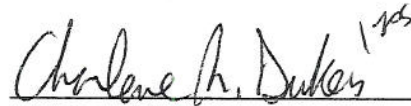
Beverly A. Cooper
Vice President



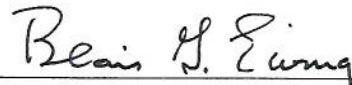
Lelia T. Allen



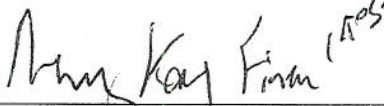
J. Henry Butta



Charlene M. Dukes



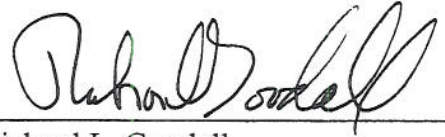
Blair G. Ewing



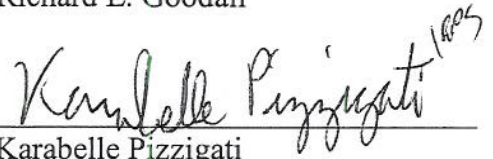
Mary Kay Finan



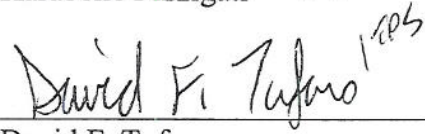
Rosa M. Garcia



Richard L. Goodall



Karabelle Pizzigati



David F. Tufano

December 12, 2007