

ANNE LIVINGSTONE,
Appellant

v.

TALBOT COUNTY BOARD OF
EDUCATION,
Appellee

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION
Opinion No. 08-22

OPINION

INTRODUCTION

Anne Livingstone, a teacher in Talbot County Public School System, filed an appeal from a decision to place her on probationary status during the third year of her employment. The Talbot County Board of Education has filed a Motion to Dismiss or for Summary Affirmance. Ms. Livingstone filed a Response to that Motion. After reviewing the Motion and Response, this Board requested that the parties file supplemental briefs on two issues, and we heard oral argument on those issues.

FACTUAL BACKGROUND

Anne Livingstone began her career in Anne Arundel County Public Schools where she taught for two years. After a move to the Eastern Shore, she was hired in June 2005 by the Talbot County Public Schools. Ms. Livingstone signed the “Regular Contract” (codified at COMAR 13A.07.02.01B) which provides that newly hired teachers are probationary employees during the first two years of employment. It also states that the “probationary period may be extended for a third year from the date of employment if the certificated employee does not qualify for tenure at the end of the second year based on established performance evaluation criteria, and the employee demonstrates a strong potential for improvement.” COMAR 13A.07.02.01 B(b).

Apparently, there is a policy in Talbot County Public School System that two full years of teaching and evaluations are necessary to be sure the individual is a good teacher and employee for Talbot County. If a teacher experiences extensive absences within her first two years, the policy is to keep her as a probationary employee in the third teaching year. (If the policy is a written one, it was not made part of the record).

During her first probationary teaching year, Ms. Livingstone became pregnant, and for

medical reasons, missed approximately 51 days of work. For that 2005-2006 school year, she was rated satisfactory on each of three observations and overall satisfactory on the end of the year evaluation. (*See* Response, Exhibit 3, pp. 1-7). Within the overall positive observation reports, there were, however, some negative comments about her teaching style and class control. (*See id.*; *see* also, Motion to Dismiss pp. 3-4 for a summary of the comments).

In March 2006, at the end of her first year of teaching, the principal recommended the renewal of Ms. Livingstone's contract. In a memo to the Superintendent, he wrote, in part:

. . . . Anne had to take an extended leave of absence from the classroom this year. Therefore, we are requesting that she be placed on a three-year plan for tenure. This request is not a reflection on her teaching, but provides additional time for observations which is more in line with Talbot County procedures.

We recommend her for your consideration without reservation. She is an asset to SMM/HS and Talbot County.

(Response, Ex. 2).

During the next school year (2006-2007), Ms. Livingstone was observed four times. Each observation report was essentially positive and she was rated satisfactory each time. (Response, Ex. 3 pp. 8-15). Again, however, the reports contained some criticism. (*See id.*; and Motion to Dismiss at 5 - - for a summary). At the end of the school year, the principal evaluated Ms. Livingstone as overall satisfactory. (Response, Ex. 3 pp. 16-17). He also recommended that Ms. Livingstone remain on "Continued Employment Intensive Rating," (*Id.* at 17), which meant that she would continue as a probationary employee for her third teaching year. She received the evaluation documents sometime in March 2007. She signed the Evaluation form but noted "indicates receipt only." (*Id.*).

Shortly thereafter, the principal sent a memo to the Superintendent, apparently copied to Ms. Livingstone, recommending that Ms. Livingstone's contract be renewed for the 2007-2008 school year. He stated, in part:

This is to recommend the renewal of the contract for the 2007-2008 school year for Anne Livingstone, English Teacher at Saint Michaels Middle/High School. Annie is on a three-year cycle for tenure due to her maternity leave in 2005-2006 school year.

. . . .

We recommend her for your consideration. Ms. Livingstone is

working conscientiously to improve in recommended areas. She will be successful because she values her work with and contributions to the success of her students.

(Response, Ex. 1).

With that recommendation from the principal, the Superintendent sought the approval of the local board to keep Ms. Livingstone on a third probationary year. On April 18, 2007, the local board approved. The Superintendent met with Ms. Livingstone on May 2, 2007 to discuss the extension of the probationary period. Ms. Livingstone explained that she had not been aware that her 51 day absence in her first teaching year would require a third probationary year before tenure could be granted. (Motion, Ex. 3, E-mail from Livingstone to Dr. Salmon). She requested that tenure be granted now. The Superintendent declined to recommend her for tenure.

On May 11, 2007, the Superintendent apparently sent a letter to Ms. Livingstone formalizing the tenure decision. That letter is not in the record. Thereafter, Ms. Livingstone on June 4, 2007, sent an appeal letter to the Superintendent. The letter stated in part:

The decision to deny tenure at the end of the 2006-2007 school year to Mrs. Annie Livingstone and extend her probationary period for a third year is arbitrary, unreasonable and illegal, and the policy that initiated the action to make the decision to take said action is also arbitrary, unreasonable and illegal. Therefore, we are appealing the action and the policy upon which the action was based pursuant to Section 4-205(c) of the Education Article of the *Annotated Code of Maryland*.

Appeal, Attachment 2.

The Superintendent sent the appeal letter to the local board for resolution.

On August 22, 2007, the local board issued a decision stating, in part, that the appeal was untimely and should have been filed directly to the State Board. The local board stated:

The Board has examined the record of this case and determined the appeal was filed with the wrong agency. On May 11, 2007, Dr. Karen Salmon, Superintendent of the Talbot County Public Schools, notified Ms. Livingstone of the decision of the Board to renew her teaching contract for a third year and to place her on an intensive rating. Dr. Salmon further advised that the Board approved this personnel action at its April 18, 2007, meeting.

Since the final action was taken by the Board, the appeal of the Board's decision should have been taken on Ms. Livingstone's behalf to the Maryland State Board of Education, pursuant to Sections 4-205(c)(3), 6-201, and 6-202 of the Education Article of the Annotated Code of Maryland. Further, the appeal to the Maryland State Board of Education should have been taken within thirty (30) days after the decision of the Board. Therefore, even if the appeal had been filed on June 4, 2007, with the Maryland State Board of Education, it would have been untimely filed as the Board's decision was made on April 18, 2007.

(Appeal, Attachment 3).

From that decision, this appeal ensued.

STANDARD OF REVIEW

This case is appealed pursuant to § 4-205 of the Education Article. The decision of the local board is considered *prima facie* correct and will not be undone unless it is arbitrary, capricious or illegal. COMAR 13A.01.05.05 (A).

LEGAL ANALYSIS

This case appears procedurally simple on its surface. It is an appeal under § 4-205 of the Education Article. The usual § 4-205 appeal begins as an appeal from a decision of the local Superintendent. Usually, the decision of the Superintendent is a written one, and it is sent to the person adversely affected with an explanation that it can be appealed to the local board within 30 days. The local board's decision may then be appealed to the State Board. Md. Education Code Ann. § 4-205.

Personnel action cases like this one, however, do not follow that clearly delineated, procedurally simple process. Often, in personnel action cases like this one the Superintendent receives a recommendation from an administrator which she must first take to the local board for approval of the recommended action. At this juncture, the affected employee may or may not know that the Superintendent is making the recommendation or that the local board is going to act upon it. Thereafter, the employee will usually receive some notice from the Superintendent or the local board of the action taken.

This case followed that process. The Superintendent made a decision in April (here to recommend to the local board denial of tenure after the second contract year), but there is no written communication from the Superintendent to the employee of that decision because the local board first had to approve that decision.

On April 18, 2007, the local board approved the Superintendent's recommendation to deny tenure and approve a third probationary year. There is no indication in the record that Ms. Livingstone had notice that the local board would act on the Superintendent's recommendation on that date. This is not to say, however, that the Superintendent or local board acted improperly at this decision point. It is just that Ms. Livingstone received no formal notice that the local board would act.¹

The local board argues that the April 18, 2007 decision was a final decision of the local board that triggered Ms. Livingstone appeal rights to the State Board. That would be a valid argument, if Ms. Livingstone had no right to receive any type of process at the local level. We know, however, that § 4-205 of the Education Article provides any person, including an employee, with the right to challenge the validity of the Superintendent's decision through an appeal to the local board. At this juncture in this case, however, there was no notice to Ms. Livingstone that the Superintendent had decided to recommend a third probationary year. Nor was Ms. Livingstone informed that a decision on the Superintendent's recommendation about her tenure would be made on April 18, 2007 at the local board meeting. Thus, she had no opportunity to make a record, or to challenge to the Superintendent's recommendation, or to raise issues before the local board.

To conclude that the April 18, 2007 decision of the local board, of which Ms. Livingstone received no notice, no opportunity to be heard, and no written opinion afterward, was a final decision would circumvent the § 4-205 appeal process. Therefore, it is our view that the decision of the local board on April 18, 2007 to approve the Superintendent's recommendation, in the context of a § 4-205 appeal, did not trigger appeal rights to this Board. In terms of process and fairness, something more must happen at the local level. And something more did happen at the local level in this case.

On May 2, 2007, at a meeting with Ms. Livingstone, the Superintendent explained to Ms. Livingstone the decision to impose the third probationary year. (*See*, Ex. B attached to Motion, e-mail of Livingstone to Talbot). It appears to us that Ms. Livingstone received actual notice on that date of the Superintendent's decision. It was not until May 11, 2007, however, that the Superintendent apparently sent a letter to Ms. Livingstone setting forth the third probationary year decision - - either her own decision or the local board's. Although that letter is not in the record, both parties refer to it. It is our view that it was that May 11, 2007 letter that gave Ms. Livingstone formal notice of the decision made in her case. She appealed to the Superintendent on June 4, 2007.

¹ At oral argument, counsel for the local board explained that, each year at the April meeting of the local board, tenure decisions were discussed and voted on in open session. There is no indication that Ms. Livingstone was aware of this tradition, nor did counsel so argue.

Ms. Livingstone argues that her June 4, 2007 appeal letter was intended to initiate a § 4-205 appeal to the Superintendent of the Superintendent's own decision to impose a third probationary year. It is true that the letter is addressed to Dr. Salmon and is captioned a § 4-205 appeal, but its request for relief includes, not only the request for tenure, but the demand that the local board "rescind its policy that extends the probationary period for a third year to females who take maternity leave . . ." (Appeal, attachment 2, p. 2). In short, the appeal letter is ambiguous as to whom the appeal has been lodged - - the Superintendent or the local board. Such ambiguity is understandable, however, since both the Superintendent and the local board had made decisions in this matter.

The Superintendent apparently concluded that the § 4-205 appeal should have been filed with the local board. Therefore, she sent the appeal letter to the local board for resolution.

In doing so, the Superintendent followed the procedure set forth in *Bricker v. Frederick County Board of Education*, 3 Opinion MSBE 42 (1982). In that case, the Superintendent had recommended to the local board the non-renewal of a probationary contract, and the local board approved the recommendation. One day later, the teacher was notified of that decision. The teacher filed an appeal with the Superintendent. In that case, the Superintendent sent the appeal directly to the local board. The State Board approved of that procedure stating, "The statute [§ 4-205] appears to contemplate a resolution of a dispute or controversy by county superintendent which is then appealed to the County Board for resolution at that level. It is apparent . . . that the Superintendent may waive this step, *particularly if he has no authority to overturn a board decision . . .* [A]t the time the County Board decided to non-renew . . . there was not a dispute or controversy before it, nor had the recommendation of the Superintendent been formally challenged." *Id.* at 45-46.

Thus, it appears that in *Bricker* the State Board understood that the actual dispute or controversy involved in a § 4-205 appeal would not arise until the Appellant actually challenged the Superintendent's decision by filing a § 4-205 appeal with the Superintendent and that the Superintendent could direct that appeal to the local board without issuing another decision in the matter.

It is our view, based on that precedent, that Ms. Livingstone's § 4-205 appeal was initiated when it was sent to the Superintendent on June 4, 2007. At that juncture, the Superintendent properly referred the appeal to the local board to resolve the controversy or dispute because the Superintendent could not overturn the local board's decision of April 18, 2007.

The local board argued that it was not the proper venue for the appeal because it should not be reviewing its own decision of April 18, 2007. We do not agree. The April 18, 2007 decision was made in an uncontested environment. Ms. Livingstone had no notice or opportunity to challenge the Superintendent's recommendation before the board decided to approve it. The § 4-205 appeal that Ms. Livingstone filed in June is the vehicle to provide her with the opportunity

to present her arguments or evidence to the local board as to why the Superintendent's recommendation was wrong. That is what the local board will review in the § 4-205 appeal.

There remains one further issue involving the process in this case. It was not clear from the record that Ms. Livingstone was given notice that the Superintendent sent her appeal directly to the local board for resolution. Nor was it clear whether, in the Talbot County Public School System, a § 4-205 appeal requires some type of hearing before the local board decides the matter. (*See* Response at 6). In their supplemental briefs and in oral argument the parties addressed these issues.

As to the notice issue, nothing in the record reflects that any notice was given to Ms. Livingstone that her § 4-205 appeal letter had been sent to the local board for resolution. Under local board policy, there is a procedure that Board follows when it receives an appeal. Specifically:

- (1) Upon receipt of a notice of appeal for a matter falling under Code Section 4-205(c)(4), the Board shall send the appellant(s) a copy of the Board's Appeal Information Form. Within 10 days after the Appeal Information Form has been sent to the appellant(s), the appellant(s) shall file the completed Appeal Information Form with the Board, and shall also send a copy to the Superintendent. Failure to file the Appeal Information Form in a timely manner may result in the Board deciding the appeal without a hearing.
- (2) Within 10 days after the appellant(s) files the Appeal Information Form required by subsection (c)(1) of these Rules, the Superintendent may submit to the Board additional information or documentation in support of the decision which is the subject of the appeal. Copies of any information submitted by the Superintendent to the Board shall also be furnished to the appellant(s). Within 5 business days after the Superintendent's submission is sent, the appellant(s) may submit additional documentation in support of the appeal and in response to that submitted by the Superintendent and shall provide a copy to the Superintendent.

See Memorandum of Law Attachment #1.

Implementing that procedure was particularly important in this case because Ms. Livingstone was under the impression that her § 4-205 appeal resided with the Superintendent. According to the Appellant, however, she never received an Appeal Information Form or any

other correspondence from the local board about her right to submit documents in support of her appeal. (Memorandum of Law on Behalf of Ms. Anne Livingstone at 4). The local board does not controvert that assertion. Therefore, we must conclude that Ms. Livingstone received no notice that her appeal would be heard and decided by the local board at its meeting in August 2007.

Inherent in the concept of fair process is the element of notice. Without that essential notice, a party has no opportunity to present her full case either on paper or by evidentiary hearing to the local board. Local board policy creates just such an opportunity to be heard. The policy states:

On appeals that are subject to Code Section 4-205(c)(4), the Board may consider the appeal based solely upon the documents and arguments submitted by the parties in writing, without the holding of an evidentiary hearing or oral argument, unless:

- (1) the appeal involves a constitutionally protected liberty or property interest,
- (2) the appellant's written submission to the Board sets forth specific factual allegations of unlawful discrimination or arbitrariness, or
- (3) in such other cases where the Board, in its discretion, determines that an evidentiary hearing or oral argument is appropriate

See Memorandum of Law Attachment #1.

Certainly, local board policy presumes that an appellant in a § 4-205 case, at minimum, can present documents and argument in writing to the local board before it makes its final decision. If the written submission contains specific factual allegations of unlawful discrimination or if the appeal involves a constitutionally protected right, the local board's policy provides for an evidentiary hearing or oral argument.

In essence, therefore, the local board policy gives the appellant in a § 4-205 case an "opportunity to be heard" either by written submission, oral argument, or evidentiary hearing, depending on the type of case presented. Along with notice, the opportunity to be heard is part of the basic § 4-205 process in Talbot County Public School System. It is our conclusion that Ms. Livingstone received neither the notice nor the opportunity to be heard that Talbot County Board policy requires.

It is a basic principle of administrative law that a governmental agency must comply with the rules and procedures which it has established. *See U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Under Maryland law, if a government agency fails to follow its own procedures, particularly those that confer important procedural benefits upon the individual, and

the Appellant shows that she was prejudiced by that failure, the agency action must be reversed and the matter remanded. *Pollock v. Patuxent Institution Board of Review*, 394 Md. 463, 503 (2003). In this case, the local board rules called for notice and an opportunity to be heard in a § 4-205 appeal. Ms. Livingstone was afforded neither and as such was completely denied an opportunity to present her case. We believe that she was prejudiced by that denial because none of her arguments against the denial of tenure was fully developed for the local board to consider. Thus, it is our view that the decision of the local board on August 22, 2007, based on that illegality, cannot stand.

The decision will be reversed and the case remanded to the local board to provide Ms. Livingstone with the opportunity to be heard required under local board policy. Whether that opportunity must be a full evidentiary hearing or written argument on the record, we leave to the local board to decide. Because we reverse the August 22, 2007 decision of the local board on procedural grounds, we do not decide the substantive issues the Appellant raised in this appeal. We leave those issues, appropriately, to be decided by the local board.


In conclusion, however, we recognize that cases such as these are procedurally confusing to all parties. In deciding this case, we set forth what we believe is the proper process for § 4-205 appeals of personnel actions if a local school system follows the process of taking a recommended adverse personnel action first to the local board for approval prior to notifying the employee of adverse personnel action - - that is: (1) only after the employee receives written notice of the adverse action recommended by the Superintendent and approved by the local board, does the § 4-205 appeal right arise; (2) the appeal should be filed with the Superintendent who, if she has no discretion to overturn the board approval, should refer the appeal to the local board; (3) the local board should provide notice to the employee of the receipt of the appeal and an explanation of hearing rights; (4) only after the local board decides the case, does an appeal right to the State Board arise.

CONCLUSION

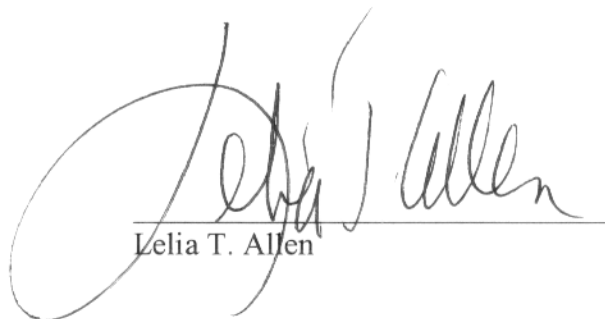
For all the reasons stated here, we reverse the August 22, 2007 decision of the local board and remand for further proceedings in accordance with this decision.



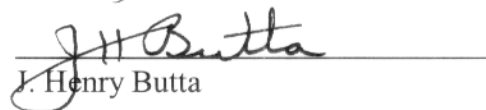
Dunbar Brooks
President



Beverly A. Cooper
Vice President



Lelia T. Allen

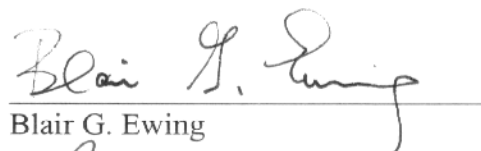


J. Henry Butta

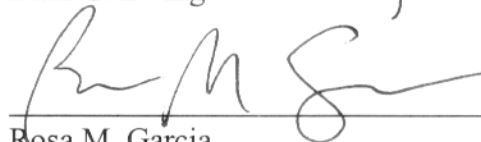
Charlene M. Dukes



Mary Kay Finan



Blair G. Ewing



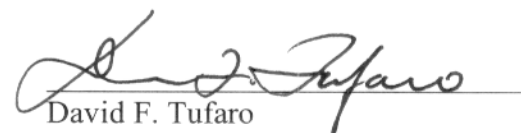
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April 30, 2008