

GARY ROSENTHAL,

Appellant

v.

DORCHESTER COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 03-39

### OPINION

This is an appeal of the evaluation of a probationary principal and of the nonrenewal of his contract. Appellant maintains that the school officials of the Dorchester County Public School System (“DCPS”) failed to follow the system’s procedures in evaluating him and that the nonrenewal of his contract was arbitrary, unreasonable, and capricious. The local board has submitted a Motion for Summary Affirmance maintaining that the appeal of the evaluation should be dismissed as moot because the superintendent rescinded the unsatisfactory evaluation. As to the contract dispute, the board asserts that the nonrenewal should be affirmed because Appellant has failed to demonstrate that the nonrenewal was the result of unlawful discrimination or other illegality. Appellant has submitted an opposition to the local board’s motion; the local board has filed a reply; and Appellant has filed a sur-reply.

### FACTUAL BACKGROUND

Gary Rosenthal served as a non-tenured principal at Cambridge South Dorchester High School for the 2001-2002 and 2002-2003 school years.<sup>1</sup> At the end of his first year, he received a satisfactory performance appraisal.

In August, 2002, Mr. Randy Marcum was named Director of Student Achievement for DCPS and became Appellant’s immediate supervisor. At that time, Mr. Marcum met with all the principals of DCPS to discuss the goals for principals to accomplish in the school year. Among those goals was increased student achievement, especially among African-American males. Mr. Marcum, however, did not meet with Appellant specifically to set goals for Appellant’s performance with minority student achievement.

On December 13, 2002, Mr. Marcum and Superintendent John Reilly met with Appellant to discuss his performance to that date. Mr. Marcum and Superintendent Reilly raised several areas of concern with respect to Appellant’s performance:

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<sup>1</sup>Mr. Rosenthal previously held teaching and administrative positions in Virginia and in Maine. *See* Rosenthal’s Response.

- Appellant had not attained sufficient gains in student achievement, particularly within minority groups;
- Appellant had not followed appropriate procedures and/or acted without the Superintendent’s knowledge and/or approval:
  - overnight ski trip for students without academic purpose;
  - suspension of a custodian;
  - signing a preliminary contract with Verizon without prior approval; and
  - permitting IEP teams to meet without an administrator present;
- Appellant failed to keep appropriate attendance records and to properly enroll students;
- Appellant failed to hold personnel accountable and failed to reprimand personnel when appropriate:
  - librarian watching TV who closed library mid-day when told to turn the TV off; and
  - teacher inappropriately prepped student to challenge the local board
- Appellant exercised poor judgment:
  - charged inappropriate mileage and Internet expenses
  - e-mailed a joke that had racist overtones
  - was arrogant/abrupt with parents, and
  - made inappropriate references to the school as an “animal school” in a school newsletter.

These comments were discussed with Mr. Rosenthal but not put into writing. Appellant expressed his desire to meet with Mr. Marcum and Mr. Reilly within the next two months. Mr. Marcum met with Appellant on March, 28, 2003. They discussed the areas in which Mr. Marcum believed Appellant needed improvement. The areas included grant supervision, personnel issues, concerns from parents, special education issues, and issues with Appellant not following procedures. Mr. Marcum also indicated that Superintendent Reilly believed that Appellant was not the right person for the job of principal.

On April 9, 2003, Mr. Marcum presented Appellant with a performance evaluation in which he stated that for purposes of renewal of his contract, Appellant’s performance was unsatisfactory. (Performance Appraisal). Mr. Rosenthal appealed the evaluation to the Superintendent, arguing both the merits of his evaluation and that the evaluation was not given in a timely manner under County Board Policy 521.3, which requires, *inter alia*, a written follow-up to Appellant’s mid-year conference. (Letter of April 23, 2003). By letter dated April 23, 2003, Superintendent Reilly rescinded the unsatisfactory performance evaluation based upon procedural grounds. Mr. Rosenthal appealed this decision to the local board.<sup>2</sup>

On April 24, 2003, Mr. Reilly gave Appellant notice that the local board had voted not to renew his employment. Mr. Rosenthal appealed this decision as well. (Letter of April 24, 2003).

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<sup>2</sup>The factual background is derived from the extensive record submitted by the parties.

Upon the request of counsel for Appellant and to avoid the unnecessary redundancy of resubmitting written materials by the Appellant, the record in the nonrenewal was held open and consideration of that appeal postponed until the conclusion of Mr. Rosenthal's appeal of his 2002-2003 Performance Evaluation, the evidentiary hearing for which was conducted June 4 and 5, 2003, before the members of the Dorchester County Board of Education. The various exhibits submitted by Mr. Rosenthal at the hearing of the appraisal appeal were incorporated as part of the record considered in the board's opinion on the nonrenewal. *See* Opinion on nonrenewal, p. 3.

On June 16, 2003, the local board issued decisions on both appeals. With respect to the evaluation, the local board held that since the 2002-2003 evaluation had been rescinded, by operation of law Mr. Rosenthal's performance was considered satisfactory based upon his prior year's rating. With respect to the nonrenewal of his employment, the local board found that the superintendent established to the satisfaction of the board sufficient concerns about the performance of Appellant to conclude that the decision not to renew was neither arbitrary nor unreasonable. Mr. Rosenthal has appealed both decisions to the State Board.

### ANALYSIS

#### 1. The Evaluation - Mootness

Appellant argues that the evidence presented at the evidentiary hearing overwhelmingly supported a satisfactory rating and that the local board's procedures were violated in the evaluation process. However, the local board found that the Superintendent had already agreed that the local procedures were violated and on that basis rescinded the evaluation. Thus, there is no evaluation on record for the 2002-2003 school year.

COMAR 13A.07.04.02B provides:

If an individual holding an Advanced Professional Certificate receives an overall rating of satisfactory or better, subsequent annual performance shall be considered satisfactory in the absence of an annual evaluation.

Mr. Rosenthal holds an Advanced Professional Certificate and received a satisfactory rating in his 2001-2002 evaluation. He did not receive an evaluation for the 2002-2003 school year, as the Superintendent rescinded that evaluation. Therefore, pursuant to COMAR 13A.07.04.02B, in the absence of an annual evaluation, his rating for the 2002-2003 school year is deemed satisfactory based upon the previous year's evaluation.

It is well established that a question is moot when "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the courts (or agency) can provide." *In Re Michael B*, 345 Md. 232, 23 (1997); *See also Bonita Mallardi v. Carroll County Board of Education*, MSBE Opinion No. 00-07, (February 3, 2000); *Walter*

*Chappas v. Montgomery County Board of Education*, MSBE Opinion No. 98-16 (March 25, 1998). In this case, the local board ruled that Mr. Rosenthal's rating for the 2002-2003 school year was satisfactory by operation of law. Thus, there is no longer a controversy between the parties as to the rating and there is no relief that the State Board can provide. Accordingly, we find the issue moot.

## 2. The Nonrenewal

Appellant claims that the decision not to renew his employment was "without rational foundation, motivated by unstated improper considerations, such as Rosenthal's Semitic Heritage, in addition to being arbitrary, unreasonable and capricious." (Letter of Appeal, p. 4) He also contends that he was improperly denied a public evidentiary hearing before the local board on his nonrenewal.<sup>3</sup>

### (a) Due Process

It is well established that a local board does not have to demonstrate cause as a basis for deciding not to renew the contract of a probationary employee who holds a professional certificate. See *Etefia v. Montgomery County Board of Education*, MSBE Op. No. 03-03 (2003) (upholding nonrenewal of probationary employee despite claims of racial discrimination and conspiracy); *Powell v. Montgomery County Board of Education*, MSBE Op. No. 01-04 (2001) (nonrenewal of probationary employee upheld despite allegation that principal violated guideline in handbook); *Ewing v. Cecil County Board of Education*, 6 Op. MSBE 818 (1995) (affirming local board decision not to renew probationary teacher's contract despite unsubstantiated claims of retaliation); *Lockwood v. Howard County Board of Education*, MSBE Opinion No. 00-40 (September 26, 2000) (upholding non-renewal of probationary employee despite numerous unfounded allegations of retaliation). COMAR 13A.07.02.01B sets forth the terms of the regular contract and states in pertinent part:

(a) . . . either of the parties to this contract may terminate it at the end of the first and second school year or on the second anniversary date of employment in regard to employees hired after January 1 following the commencement of a school year by giving notice in writing to the other, as of the following dates:

(a)(i) In the case of employees employed before January 1 following the commencement of a school year, not later than May 1 of that year or of the second year;

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<sup>3</sup>In his Opposition, Appellant also raises due process concerns about the quality of the transcript. As previously noted, the evidentiary hearing occurred before the full board who heard the witnesses testify and observed their demeanor. Since the board did not have to rely on a transcript to make its decisions, any issue with respect to the quality of the transcript is moot.

Thus, under State law and regulation, as a probationary certificated employee, the only process due Appellant was written notice by May 1 of the decision not to renew the probationary contract. He is not entitled to a public evidentiary hearing. *See* Educ. § 6-202; *Etefia, supra*. (Only process due appellant was written notice by May 1 of decision not to renew contract.)

Appellant does not allege that he did not receive timely notice that his employment contract would not be renewed. Thus, the only legal basis for a reversal of the nonrenewal decision is if the decision were made for illegal or constitutionally discriminatory reasons. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court reviewed a decision not to rehire a non-tenured teacher for a second year. The Court held that the extent of the property interest in a teaching contract is the fulfillment of the one-year term of the contract. The Court stated that:

. . . the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578. Thus, absent a constitutional violation, there is no other process due a non-tenured teacher.<sup>4</sup> *See* 408 U.S. at 578-579. *See also Perry v. Sinderman*, 408 U.S. 593 (1992); *Stepper v. Board of Education of Anne Arundel County*, 7 Op. MSBE 324 (1996)(affirming non-renewal of probationary teacher's contract); *Jones v. Board of Education of Charles County*, 7 Op. MSBE 153 (1995)(affirming non-renewal decision where there were no specific factual allegations of a constitutional violation).

### Liberty Deprivation

Appellant raises for the first time in his Opposition that he was entitled to a full evidentiary hearing on his nonrenewal on the basis that he was deprived of liberty without due process of law. He maintains that he was stigmatized from the public disclosure of the facts concerning his nonrenewal. In *Board of Regents v. Roth*, 408 U.S. 564, 573-4 (1972), the Supreme Court held that in the public employment arena, a deprivation of a liberty interest occurs only when an employee's reputation, standing, honor, or integrity is publically stigmatized

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<sup>4</sup>A principal who lacks tenure is subject to non-renewal in the same manner as any other probationary employee. *Jackson-Nesmith v. Charles County Board of Education*, 1 Op. MSBE 719 (1978).

to the extent that it forecloses the employee's freedom to take advantage of other employment opportunities. The Court held that there was no deprivation of liberty when an individual is simply not rehired and remains free to seek another job. *Id.* at 575.

Similarly, in *Bishop v. Wood*, 426 U.S. 341 (1976), the Fourth Circuit upheld the termination of a police officer by the city manager without a hearing even though the police officer claimed that the termination was based upon allegedly false and stigmatizing accusations (as is claimed in this case). At the Supreme Court, the police officer claimed that he was denied a liberty interest without due process because the reasons given for his discharge were stigmatizing and damaged his reputation in the community and were in fact, false. The Supreme Court upheld the Fourth Circuit's decision and found that there was no liberty interest deprivation in the discharge of a public employee whose position is terminable at will of the employer when there is no public disclosure of the reasons for the discharge. *Id.* at 348. Because the explanation for the discharge was done in private, the Court determined that it did not even matter if the allegations were false. The Court concluded:

The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claims that his constitutionally protected interest in liberty has been impaired. A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake.

*Id.*

#### Stigmatizing Disclosures

Appellant claims that he was stigmatized by the reasons for his nonrenewal allegedly asserted by the local board. However, a review of the documentation proves otherwise. There are only two documents from the local board concerning the nonrenewal, the letter of April 24, 2003, informing Appellant that the local board was not renewing his contract and the local board opinion in response to Mr. Rosenthal's appeal. Neither document mentions any stigmatizing reasons for the nonrenewal.

Appellant also claims that he was stigmatized by the reasons presented for his nonrenewal by the Superintendent to the local board. However, it is clear from a review of the extensive record provided in Appellant's Opposition, including a stack of newspaper clippings approximately 3/4 inch high, that neither the county board nor the superintendent initiated disclosure of any of the reasons for the nonrenewal to the public. To the contrary, a review of the newspaper clippings discloses that counsel for Appellant routinely disclosed items to the press, along with Appellant's specific responses apparently in order to rally support for his cause. *See, e.g.*, first in a series of articles in *The Daily Banner*, July 25, 2003, Exhibit 1 to Appellant's Opposition. Here, as in *Bishop*, when there has been no disclosure to the public initiated by the

employer, there has been no deprivation of a liberty interest.

(b) Other Illegalities

Appellant raises for the first time in this appeal an unsubstantiated allegation of illegal discrimination based upon ethnicity as well as a claim that his First Amendment speech rights were violated. However, Appellant did not raise either issue before the local board. The State Board has consistently declined to address issues that have not been reviewed initially by the local board. *See Craven v. Board of Education of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Hart v. Board of Education of St. Mary's County*, 7 Op. MSBE 740 (1997) (failure to raise issue of age discrimination below constituted waiver on appeal). Thus, Appellant has waived his right to raise these matters for the first time on appeal to the State Board.

Moreover, the State Board has consistently held that a probationary teacher challenging a nonrenewal decision must support allegations of illegality with factual evidence. *See Ewing v. Cecil County Board of Education*, 6 Op. MSBE 818 (1995); *Stepper v. Board of Education of Anne Arundel County*, 7 Op. MSBE 324 (1996). As the State Board articulated in *Ewing*:

. . . In order to defeat a motion the opposing party must demonstrate that there is a genuine dispute as to a material fact 'by producing factual assertions, under oath, based on personal knowledge.' Unsupported statements or conclusions are insufficient. 'It is never sufficient to defeat a motion for judgment that the opposing party allege in a general way that there is a dispute as to a material fact.' (Citations omitted).

6 Op. MSBE at 820. Thus, bald assertions are insufficient to overturn a nonrenewal decision or to require a hearing on the appeal. Like the appellant in *Ewing*, the Appellant in this case has not submitted any affidavit to support his allegations of ethnic prejudice or violation of Free Speech rights. Accordingly, in addition to having waived the issue, we believe Appellant has failed to meet his burden of demonstrating that the local board's decision was illegal.

As stated above, a superintendent may decide not to renew a probationary employee's contract without cause and despite the fact that the employee received satisfactory evaluations.<sup>5</sup> Nonetheless, the record before the local board, both in the evaluation proceeding and in its consideration of the parties' submissions on the nonrenewal, does demonstrate the strong belief

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<sup>5</sup>As the local board noted in its opinion, the record does not include and the parties appear to acknowledge that no employment contract was executed by Mr. Rosenthal for either the 2001-02 or the 2002-03 school years. We trust that the Dorchester County Public School System will take steps to ensure that the appropriate employment contracts are executed for all system employees each school year.

on both the part of Superintendent Reilly and Mr. Marcum that Mr. Rosenthal's performance needed improvement. As discussed above, there were many areas of concern that Mr. Marcum raised with Appellant. Mr. Marcum also testified that he had many oral conferences with Mr. Rosenthal concerning his performance and that he made it quite clear that Mr. Rosenthal needed to improve in several key areas. The superintendent had also lost confidence in Mr. Rosenthal and wanted to have administrators upon whom he could rely. Although Mr. Rosenthal clearly and vehemently disagrees with the assessments of his supervisors, it is still the prerogative of the Superintendent not to renew the employment of a non-tenured administrator about whom the superintendent has concerns.

### CONCLUSION

For all of these reasons, we do not find that the local board acted arbitrarily, unreasonably, or illegally in this matter. Accordingly, we affirm the nonrenewal decision made by the Board of Education of Dorchester County.

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December 3, 2003