

KENNETH HOVET,

Appellants

v.

HOWARD COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-27

OPINION

In this appeal Kenneth Hovet (“Appellant”) challenges the decision of the Howard County Board of Education (“local board”) concluding that the school system did not violate the terms of a settlement agreement, nor treat the Appellant in an unreasonable or arbitrary manner, through the Appellants’ extra-curricular assignments and teaching schedule. The local board has filed a Motion for Summary Affirmance arguing that the State Board lacks jurisdiction over the private settlement agreement, and that its decision was not otherwise arbitrary, unreasonable or illegal. The Appellant has filed a Response to the local board’s motion, to which the local board has filed a Reply.

FACTUAL BACKGROUND

During the 2004-2005 school year, the Appellant was publicly implicated in grade-changing incidents within the school system. Following a lawsuit filed by the Appellant related to the incidents, the Appellant and school system entered a Mutual Release and Settlement Agreement (“Settlement”). In the Settlement, among other things, the Appellant waived certain claims against the system in return for the school system’s promise to not retaliate against him or make any material changes to his job assignments based solely or partially upon any acts that predated the execution of the Settlement. The school system was required to notify key personnel of this requirement and impose personnel action against any personnel who knowingly violated this provision. (Appeal at 1-2; Exh. 4.)

At the start of the 2005-2006 school year, the Appellant transferred to Marriotts Ridge High School (MRHS) and worked as a social studies teacher, Athletic Director and Head Varsity Football Coach.

The following 2006-2007 school year, the school system eliminated the Athletic Director position countywide and replaced it with a new Athletics and Activities Manager (“AAM”). The AAM would be a full time position with more administrative and supervisory responsibilities over athletics and other school activities. Because of these increased responsibilities, the AAM would not be able to coach any sports or teach classes. (Saunderson Affidavit at ¶4.)

The Appellant considered applying for the AAM position, particularly because of the income he would lose by no longer serving as Athletic Director. However, the Appellant states that he was dissuaded from applying for the position by Patrick Saunderson, Marriotts Ridge Principal.

Specifically, the Appellant alleges that Mr. Saunderson induced him to not apply for the AAM position by promising that the Appellant would: (1) be named Head Varsity Boys Lacrosse Coach for the new varsity team; (2) be named an "Additional Athletic Director" with a stipend equivalent to a coaching position; (3) remain Head Varsity Football Coach; and (4) continue teaching social studies and weight training classes.¹ By holding these numerous positions, the Appellant believed that he would receive roughly the same salary he would have received as the AAM. (Appeal at 2.)

Over summer 2006, Mr. Saunderson included a message in the school's newsletter thanking the Appellant for his previous work as Athletic Director and noting that the Appellant would continue "heading up several important academic intervention initiatives while coaching football and lacrosse...". (Appeal, Exh. 5.) By the end of the summer, the Appellant was notified by Mr. Saunderson that the AAM position had been filled and that the previous head coach for the junior varsity lacrosse team would be the new head coach for the varsity team. The Appellant declined Mr. Saunderson's offer to serve as assistant head coach for the varsity team or head coach of the junior varsity team.

Several other events took place during spring 2007. First, the Appellant inquired about the assistant AAM or "additional athletic director" position. The Appellant was told that Mr. Saunderson gave the position to another individual, who the Appellant argues was less qualified than he was.

In addition, the Appellant was notified that his teaching schedule would change for the 2007-2008 school year. While the Appellant previously taught both social studies and weight training classes, in addition to his coaching and Athletic Director responsibilities, that school year the Appellant was assigned to teach a full schedule of social studies classes only. The weight training classes that the Appellant still desired to teach were assigned to another instructor.

During that time the Appellant also expressed an interest in an Instructional Team Leader for Physical Education/Health position if it became available. However, the position was filled without being announced as a vacancy with an individual the Appellant feels was less qualified than he was.

Following these changes, the Appellant, through counsel at the Maryland State Teacher's Association, filed an administrative appeal on July 5, 2007 to the local superintendent, Dr. Sydney Cousin. The Appellant requested a determination of whether the changes by the school system breached its 2004 Settlement with the Appellant, or otherwise treated the Appellant in a manner that was arbitrary, unreasonable or contrary to sound educational policy. (Appeal at 3; Ex. 1.)

¹ In support of his argument regarding Mr. Saunderson's representations, the Appellant included numerous emails between the two in his appeal. However, the Appellant acknowledged before the local board that he did not have any contemporaneous email confirming his discussions with Mr. Saunderson. (Local Board Decision at 8.)

Following his review of the appeal, the local superintendent denied any breach of the parties' Settlement or otherwise arbitrary treatment of the Appellant. (Appeal, Ex. 2.) Specifically, Dr. Cousin found that:

- Head Varsity Boys Lacrosse Coach: the Appellant was never promised the position, but instead was involved in discussions with Mr. Saunderson about the possibility of being one of two "co-coaches" for the new varsity team, a model which was done successfully at the junior varsity level.
- Assistant Athletic Director: Mr. Saunderson lacked the authority to create such a position, but the Appellant never accepted the offer and said nothing more about it until this appeal.
- Instructional Team Leader Position: the Appellant was not qualified for the position because he lacked certification in the area of physical education/health.
- Settlement Agreement: Nothing in the parties' Settlement entitled the Appellant to any particular assignments at Mariotts Ridge High School, including a head football coach or any other athletic position, any stipend position, or any teaching schedule or class load.

(Appeal, Exh. 2.) Dr. Cousin concluded that it was the Appellant's responsibility to apply for the AAM position if he wanted it and that the Appellant did not present any evidence that he was induced by Mr. Saunderson to not apply or otherwise treated in a retaliatory manner.

Thereafter, the Appellant appealed the local superintendent's decision to the local board. The issue on appeal remained whether the school system breached its 2004 Settlement or otherwise treated the Appellant in a manner that was arbitrary, unreasonable or contrary to sound educational policy. In support of its position, the school system included an 11 page sworn affidavit from Mr. Saunderson, which refuted in detail the Appellant's allegations that he induced the Appellant to not apply for the AAM position through promises for other positions.

On September 2, 2008, the local board affirmed the local superintendent's decision. The local board found that the Appellant did not produce any evidence that the events about which he complained were designed to or motivated by a desire to retaliate against him for actions that occurred nearly four years ago. The board went on to conclude that:

[a]n objective reading of the record before us leads to the conclusion that, at best, there may have been misunderstandings and miscommunications. Regardless of whether the misunderstandings and miscommunications were the result simply of Mr. Hovet's perceptions or Mr. Saunderson's statements, we find no basis for concluding that Mr. Saunderson's actions were designed to induce Mr.

Hovet not to apply for the AAM position, no evidence of any reason why Mr. Saunderson would even want to induce Mr. Hovet not to apply for the position, and no evidence that any of the actions about which Mr. Hovet complains were motivated by retaliation for anything happening before November 29, 2004.

(Local Board Decision at 13-14.) This appeal to the State Board followed.

The Appellant argues the local board's decision is arbitrary and unreasonable because he has suffered a material change to his job assignments which can be attributed to publicity of the allegations that led to the Settlement and the fact that Mr. Saunderson does not want him in a leadership position at Marriotts Ridge. The Appellant contends that despite his credentials and outstanding past performance as an Athletic Director, head coach and teacher, his "battle to maintain the status quo began in earnest one year after signing" the Settlement, which, he maintains, supports his conclusion that the changes were retaliatory in nature. (Appellant's Response at 1.)

The Appellant also requests a hearing before the State Board and an order for the local board to:

(1) "compensate the Appellant for the stipends he would have received if he were given the promised positions at head coach of boys varsity lacrosse and assistant athletic director;

(2) "assign the Appellant to those positions for the 2009-2010 school year;

(3) "return the Appellant's teaching schedule for the 2009-2010 school year to both social studies and weight training classes; and

(4) "advise all administrative and supervisory employees to cease and desist from any further retribution or retaliation against the Appellant."

(Appeal at 4-5.)

In response, the local board argues that the sole issue that should be considered by the State Board is whether the local board's decision is arbitrary and capricious or illegal. The local board asserts that the State Board has no jurisdiction to determine whether the Settlement was breached because the Settlement is a private agreement between the parties and any dispute regarding the formation, interpretation or performance of the Settlement is subject to final, binding and confidential arbitration before a designated arbiter. (Settlement, at ¶11.)

On the merits, the local board contends that the school system has provided reasonable explanations for each of the personnel decisions challenged by the Appellant. The board asserts that the Appellant has no legal claim to any particular extra-curricular position, to a lighter work load than other teachers, or to teach particular subjects as long as his assignment conforms with State law.

STANDARD OF REVIEW

This appeal involves a decision of the local board involving a local policy, and therefore, the local board's decision is considered prima facie correct. The State Board may not substitute its judgment for that of the local board unless the Appellant demonstrates by a preponderance of the evidence that the decision is arbitrary, unreasonable or illegal. A decision may be arbitrary or unreasonable if it is contrary to sound educational policy, or a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached. COMAR 13A.01.05.05; *Pamela M. v. Montgomery County Bd. of Ed.*, MSBE Op. No. 08-04 (Jan. 30, 2008).

ANALYSIS

The two issues considered by the local board were whether the changes to the Appellant's teaching schedule and extracurricular opportunities amounted to (1) a violation of the 2004 Settlement, or (2) were arbitrary or unreasonable treatment by the school system.

2004 Settlement

As noted above, the parties' 2004 Settlement required the school system to refrain from retaliating against the Appellant or making any material changes to his job assignments that were motivated in any way by the allegations that predated the Settlement. (*Id.* at ¶7, Nondisparagement.) The Appellant argues that the material changes Mr. Saunderson made to his job assignments started one year after the Settlement, which indicates a retaliatory motive to keep him out of leadership positions at Marriotts Ridge. The Appellant contends that Mr. Saunderson had to know about the allegations due to the publicity in local media and the memo that the school system was required to disseminate under the Settlement.

Mr. Saunderson affirmed in his sworn affidavit that he did not have knowledge of the events that led to the Appellant's Settlement with the school system, or otherwise have any motivation to keep the Appellant out of leadership. To the contrary, Mr. Saunderson explained that he worked with the Appellant to explore options for replacing the loss of income the Appellant previously received as Athletic Director. Mr. Saunderson stated that he did not make any promises to the Appellant about specific positions or induce him not to apply for AAM position.

The local board argues that the State Board lacks jurisdiction over the Settlement because it is a private agreement between the parties that includes a process for addressing disputes. Under Paragraph 11. Arbitration, the Settlement provides in relevant part:

The parties agree that any dispute arising from or relating to this Agreement, or the subject matter thereof, or its formation, **interpretation or performance**, shall be submitted to final, binding

and confidential arbitration...

(emphasis added).

Based on the clear terms of the Settlement Agreement, we agree with the local board that the State Board lacks jurisdiction over the issue of whether Mr. Saunderson's changes to the Appellant's class schedule and extracurricular activities amounts to a violation of the agreement. That issue may only be determined through the final, binding and confidential arbitration process agreed to by the parties.

The State Board retains jurisdiction, however, over the local board's decision. Therefore, for each of the Appellant's remaining issues, we consider whether the local board's decision was arbitrary, unreasonable or illegal.

Varsity Lacrosse Head Coach

The Appellant argued that Mr. Saunderson promised him the position of varsity lacrosse head coach and that he was more qualified than the individual selected. The Appellant also asserts that he served successfully as head coach for lacrosse, football and Athletic Director at another school and, in light of his qualifications and experience, Mr. Saunderson's decision to deny him the head varsity coaching lacrosse position was arbitrary.

The local board found the Appellant did not produce any evidence proving Mr. Saunderson promised him the head coach position. We agree with the local board that the record supports this conclusion.

When the Appellant transferred to Marriotts Ridge in the 2005-2006 school year, there was no varsity boys lacrosse team, only junior varsity. The record does not contain any evidence that the Appellant was formally offered the position of varsity boys lacrosse head coach. Instead, the record shows that Mr. Saunderson discussed a "co-coaches" model with the Appellant and then-junior varsity lacrosse head coach; that Mr. Saunderson assumed the Appellant and the other coach would work out the details for that model; but that both coaches wanted Mr. Saunderson to choose one to serve as head varsity coach.

In his affidavit, Mr. Saunderson states that he selected the current junior varsity lacrosse coach over the Appellant based on that coach's prior successful varsity head coaching experience and assistant coaching experience at other schools, and his record leading the junior varsity team to the best record in Howard County. In an email to the Appellant, Mr. Saunderson also noted that he wanted to give the junior varsity coach "a shot" because the Appellant remained head coach for the football team. The Appellant declined Mr. Saunderson's alternative offers to be head coach for junior varsity lacrosse team, assistant head coach for the varsity team, coach a winter sport or act as site director for spring season. (Saunderson Affidavit at ¶5; Appeal, Ex. 4, 7/13/06 email.)

Based on this information, we find nothing arbitrary or illegal about Mr. Saunderson's decision not to select the Appellant as the head coach for the varsity lacrosse team. While the Appellant's experience made him a strong candidate for the job, he had no inherent right to that position.

Assistant Athletic Director

The Appellant argues that Mr. Saunderson promised him the position of Assistant Athletic Director, but filled the position with another individual who was less qualified.

The local board, on the other hand, argues that Mr. Saunderson lacked the authority to create such a position and that the position does not exist at the school. The board also states that Mr. Saunderson intended to fund the position with a team leader stipend, but Appellant never expressed interest in accepting the offer.

From our review of the record, the Appellant has not produced any evidence that Mr. Saunderson in fact created and filled this position with another individual.

Instructional Team Leader

The Appellant asserts that he expressed interest in becoming an Instructional Team Leader for Physical Education/Health ("ITL") if a position became available. When the position became available, however, the Appellant argues that Mr. Saunderson did not publicize the vacancy and filled it with someone who was less qualified than the Appellant. The Appellant maintains that he met the minimum qualifications for the position, which were:

- (1) minimum three years teaching experience at the appropriate level;
- (2) a standard professional certificate;
- (3) a full-time teaching assignment at one school only; and
- (4) minimum of one year of experience in the Howard County Public School System at the appropriate level.

(Appeal, Exh. 7 – "Job Description for a HCPSS High School Instructional Team Leader"). The Appellant further challenges the school's decision to waive the one year county teaching experience for the ITL selected.

The school system initially responded that the Appellant was not qualified to be ITL because he lacked certification in PE/Health, but later conceded that certification in PE/Health was not an explicit requirement for the ITL. The school system maintains, however, that all other ITLs held the subject matter certification and it was not unreasonable for them to view the Appellant as a less competitive candidate without the certification. Mr. Saunderson stated that the decision to waive the teaching requirement for the ITL selected was based on her outstanding experience and recommendations. (Saunderson Affidavit at ¶8.)

In our view, the Appellant has not met his burden of proving by a preponderance of the evidence that the decision to not select him as an ITL was arbitrary, unreasonable or illegal. While the Appellant's frustration at not being selected as an ITL is understandable, particularly because he views himself as more qualified for the position, Mr. Saunderson retained the discretion to compare the applicants' credentials and make a subjective decision about which applicant would be the best fit for the job. We do not view Mr. Saunderson's decision to waive one of the minimum requirements for the ITL with outstanding experience and recommendations as unreasonable or unlawful.

Class schedule

Last, the Appellant challenges the material changes to his class schedule. As explained earlier, the Appellant previously taught three classes in social studies and weight training, in addition to his responsibilities as head football coach and Athletic Director. The Appellant challenges his class schedule for the 2008-2009 school year because he was assigned to teach five social studies classes only. He explains that the weight training classes he desired to teach were assigned to a less senior teacher who lacked certification in weight training. Even though the Appellant also lacked certification in weight training, he contends this was an arbitrary decision because he had considerably more experience than the other teacher.

The local board argues that the Appellant's teaching schedule was changed at his request to give him a free period at the end of day to transition from teaching to coaching. (Appeal, Exh. 2; Saunderson affidavit at ¶9.) The local board asserts that it is not unreasonable to assign the Appellant a full load of classes following the elimination of the Athletic Director position. The Appellant was initially given four classes to help him transition back into a full time teacher position, and now teaches a full load of social studies classes to help meet the needs of the school. (Saunderson affidavit at ¶9.) Mr. Saunderson explained that he assigned the Appellant a full load of social studies classes because the Appellant is "certified in social studies, consistently teaches advanced placement and higher level social studies courses and has consistently produced good curricular and testing results." (*Id.*)

Finally, the local board argues that the Appellant did not raise the issue of certification before the local board. Consequently, the local board asserts that any argument regarding the certification of the new weight training teacher should be deemed waived.

Our review of the record leads us to agree with the local board. The Appellant has not provided any evidence that his assigned class schedule is unreasonable or unlawful. The Appellant is assigned to teach a subject area for which he holds certification and in which he has had noted success. The Appellant also has the same full time class load as other teachers in the school.

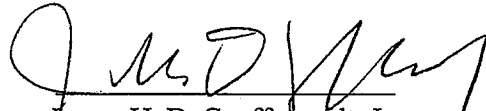
It appears that the gist of the Appellant's complaint is that he *also* wants to teach weight training, not just social studies. In essence, the Appellant wants his class schedule to remain just as it was when he began working at Marriotts Ridge for the 2005-2006 school year. The Appellant has no entitlement, however, to "maintain the status quo" as he wishes. Unlike the 2005-2006 school year, the Appellant no longer serves as Athletic Director, which leaves more time for him to teach classes.

In our view, it was reasonable for Mr. Saunderson to change the Appellant's teaching assignment based on the needs of the school and the Appellant's demonstrated strengths.

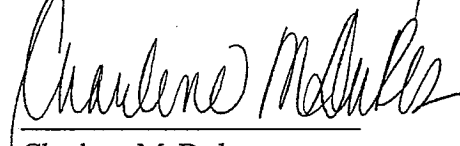
Finally, because the comparison of the certification status of the new weight training teacher and the Appellant was not raised before the local board, that argument should be deemed waived. The State Board has consistently declined to address issues that have not been reviewed initially by the local board. See *Miller v. Howard County Board of Education*, MSBE Op. No. 06-02 (2006); *Craven v. Board of Education of Montgomery County*, 7 Ops. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Hart v. Board of Education of St. Mary's County*, 7 Ops. MSBE 740 (1997) (failure to raise issue of age discrimination below constituted waiver on appeal). *McDaniel v. Montgomery County Board of Education*, MSBE Op. No 03-22 (2003)(complaints from public not raised before local board deemed waived).

CONCLUSION

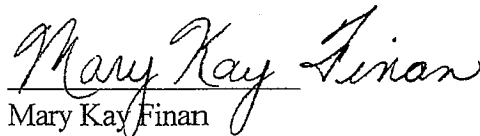
For these reasons, we affirm the decision of the Howard County Board of Education.



James H. DeGraffenreidt, Jr.
President



Charlene M. Dukes
Vice President



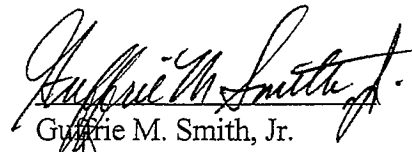
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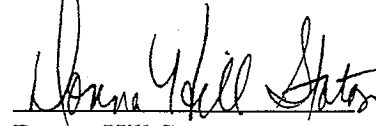
ABSENT

S. James Gates, Jr.

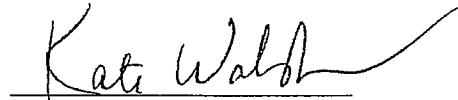


Madhu Sidhu


Guffie M. Smith, Jr.


Donna Hill Staton

ABSENT
Ivan C.A. Walks


Kate Walsh

August 25, 2009