

TRACEY JOHNSON,
Appellants

v.

HOWARD COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 09-28

OPINION

INTRODUCTION

Appellant challenges her termination from employment as a custodian with the Howard County Public School System (HCPSS). The Howard County Board of Education (local board) has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant has filed an opposition to the motion and the local board has filed a reply.

FACTUAL BACKGROUND

Appellant worked as a custodian for the HCPSS for nearly 27 years. (Opposition to Motion at 1). At the time of her termination, Appellant was a support services employee assigned as day building supervisor at the County Diagnostic Center (CDC). (Local Board Decision at 1).

Appellant has a lengthy employment history that includes numerous work performance problems. The history includes counseling and discipline for refusals to follow directives from supervisors and conflicts with building administrators. It also includes transfers Appellant received due to problems at the various assignments. Below is a summary of her employment history.

- 11/11/91- Memorandum from Assistant Principal at Patuxent Valley Middle School regarding insubordination;
- 12/91 – Transfer to Swansfield Elementary School, citing lack of cooperation with administrative staff;
- 3/29/93 - Swansfield Elementary School principal requests that Appellant be transferred, citing strained relationships with staff members;
- 7/22/93 – Three day suspension for insubordination;
- 11/16/93 – Memorandum regarding work performance;
- 7/18/95 – Transferred to Gateway School;

- 7/9/98 – Memorandum from Principal at Bollman Bridge Elementary School regarding altercation;
- 9/24/98 – Memorandum from Principal at Bollman Bridge Elementary School regarding performance;
- 10/5/98 – Involuntary transfer from Bollman Bridge Elementary School to Maintenance Department based on concerns about interpersonal relationships with staff;
- 4/20/99 – Letter regarding failure to attend mandatory training;
- 4/16/00 – Letter regarding failure to attend seminar on “Management Skills for the New Supervisor”;
- 6/12/01 – Suspension for two days without pay for insubordination for refusal to leave building;
- 6/13/01 – Violated terms of suspension;
- 11/14/02 – Letter regarding failure to follow appropriate procedures for use of leave;
- 8/25/04 – Oral warning for excessive lateness;
- 9/22/04 – Oral warning regarding mop issues, concerns, expectations;
- 2/15/06 – Memorandum regarding work performance;
- 3/1/05 – Memorandum concerning mop laundry duties;
- 2/15/06 – Memorandum from Nicholson, Claus, and Flanagan concerning work performance;
- 5/16/06 – Oral warning from Nicholson regarding excessive lateness;
- 5/23/06 – Oral warning from Flanagan regarding raising flags by 8:00 a.m.;
- 7/6/06 – Memorandum from Flanagan concerning work performance;
- 7/10/06 – Oral warning from Flanagan regarding failure to comply with directions;
- 7/19/06 – Oral warning from Nicholson on following requests and checking in at main office;
- 8/15/06 - Written warning from Nicholson regarding continued poor work performance;
- 9/13/06 – Meeting to discuss lack of communication with office staff;
- 11/3/06 - Written reprimand from Nicholson or failure to follow written or verbal instructions of a supervisor/administrator;
- 12/12/06 – Two day suspension for insubordination.

(Employment History Packet; Claus Letter, 3/10/08).

During Appellant’s mid-year review in January, 2007, Linda Flanagan, the Facilitator of Countywide Services and the administrator of the CDC building, advised Appellant that she needed to improve in several areas, including relationships with other staff, quality of work, communication, judgment, and attitude. (Flanagan Letter, 1/07). On January 22, 2007, Olivia Claus, Custodial Services Manager, advised Appellant that she needed to improve her communication with the administrators and staff in the building, and that it was expected that Appellant would conduct herself in a professional and courteous manner. (Claus Letter, 1/22/07). Ms. Claus advised, “Continuing problems regarding your inability to communicate and work cooperatively and effectively with administrators and staff will result in additional disciplinary action, up to and including a recommendation to terminate your employment with The Howard County Public School System. *Id.*

In August, 2007, Appellant received an overall "Needs Improvement" rating in her annual evaluation. Although she received a satisfactory rating in some areas, she received a "Needs Improvement" rating in the areas of relationships with staff, communication, initiative, judgment, and attitude. (2006-2007 Evaluation). Appellant was continued on an action plan for the following year. *Id.*

Although Appellant's work performance seemed to improve for a while, problems resurfaced near the end of 2007.

On Friday, November 30, 2007, Linda Flanagan, e-mailed Appellant directing her to move a cart from the kitchen area in preparation for a luncheon that was being held at the facility. Ms. Flanagan wrote as follows:

On Friday, Joyce asked you to move the couch in the apartment and also to move the cart in the "apartment" kitchen area. After school, I noticed that you moved the couch, but the cart continues to be in front of the oven in the kitchen area. The CDC luncheon is on Monday and it is important they have access to the oven. Please move the cart and make sure that the oven is easily accessible. I am requesting that you have this done by 9:00 a.m. on Monday, December 3rd.

(Flanagan E-mail 11/30/07).

Appellant did not move the cart. Ms. Flanagan sent Appellant another e-mail stating:

Per our discussion, please have the rolling cart in the kitchen area moved out of that area by the end of the day Tuesday, December 4th, so that there is full access to the kitchen. Also, please keep that area free of furniture so there is easy access from the conference room and through the kitchen area.

(Flanagan E-mail, 12/3/07). Appellant refused to move the cart, responding to Ms. Flanagan that "the room [was] clear enough for anyone to get through" and that there was no need for Ms. Flanagan to "constantly keep contacting [her] about the one cart." (Appellant E-mail, 12/3/07). Ms. Flanagan responded, requesting that Appellant move the cart by the end of the day. She explained that there was no need to have it in the kitchen entryway even though there was room to get by it. She also offered Appellant assistance if she was unsure where the cart should go. (Flanagan E-mail, 12/4/07).

Appellant did not move the cart as requested by Ms. Flanagan. Ms. Flanagan summoned Appellant to a meeting to discuss why she had not moved the cart as directed. She explained to the Appellant that the issue was not whether Appellant thought the cart should be moved, but that Appellant had not done what she was directed to do. (Flanagan E-mail, 12/5/07).

Ms. Claus and Mr. Edward Nicholson, Sr., Assistant Manager of Custodial Services, conducted a meeting on December 20, 2007 to discuss the incident. Appellant received a written reprimand for her insubordination and willful neglect of duty. Ms. Claus advised Appellant as follows:

In the meeting, you were informed that your repeated refusal to perform your job at the request of your supervisors is insubordination and unacceptable in the workplace. You were also informed that it is imperative that employees follow the policies and procedures of [HCPSS]. Additionally, during the past school year, I spoke with you about improving communication, and about working cooperatively and effectively with the administration. You were asked to maintain positive working relationships for the duration of your employment with HCPSS. Your continued negative conduct creates an intimidating and negative work environment that has a direct impact on the quality of care of the facility.

(Reprimand Letter, 1/14/08). Ms. Claus further advised Appellant that if she violated any expectation or responsibility of her employment, it would result in a recommendation to terminate her employment. *Id.*

Meanwhile, another issue was brewing with regard to Appellant's flag duties. When Appellant was initially assigned to the County Diagnostic Center, she was the only custodian. As such, one of her duties was to take down the flags at the end of her shift, even though the business day had not yet ended, because there was no second shift custodian to perform that task. Eventually, a second shift custodian (Mike Booze) was assigned to the facility, and the duty of taking down the flags was assigned to that custodian so that the flags could remain displayed until the close of business. Appellant was only supposed to remove the flags during her shift if there was inclement weather. (Response to Opposition at 3).

Ms. Flanagan addressed the flag responsibilities with Appellant. On January 7, 2008, she advised Appellant that, now that they had a second shift custodian, Appellant would only be responsible for raising the flag in the morning and Mr. Booze would be responsible for taking them down in the afternoon. (Flanagan E-mail, 1/7/08). Appellant responded: "I'll be taking the flag down in the afternoons before I leave. Mike has other things to do he doesn't need to be concerned about the flag." (Appellant's E-mail, 1/7/08). Ms. Flanagan advised Appellant again that she should not take down the flags. She stated, "I do not want the flag taken down when you leave. Offices in the building are open beyond that time. I am asking that you do **not** take the flag down before you leave and that Mike be responsible for taking down the flag." (Flanagan E-mail, 1/7/09, emphasis included). The Appellant continued to take down the flags before 3:00 p.m. (*See Daily Log*). Mr. Nicholson reminded Appellant that the flags were not to come down except in cases of inclement weather. (Nicholson E-mail, 2/16/08).

Other problems developed as well. Ms. Flanagan directed Appellant to revise the cleaning schedule to make some adjustments. She asked that the vacuuming and bathroom cleaning be done after business hours because the staff was finding it disruptive. She also asked that the garbage cans be emptied at the end of the work day so that trash was not remaining in the cans until the next work day. She asked Appellant to work with Mr. Booze to make the changes and develop a new schedule by January 21, 2008. (Flanagan E-mail, 1/16/08). On February 15, 2008, Mr. Nicholson, asked Appellant for her work schedule. (Nicholson E-mail, 2/15/08).

Appellant responded to Mr. Nicholson with a cleaning schedule. The schedule did not shift work to the evenings as she had been instructed to do. (Appellant's E-mail, 2/19/08). Ms. Flanagan and Mr. Nicholson continued to ask Appellant for a revised schedule shifting the duties to the evening custodian as requested. (See Flanagan E-mail, 2/19/08; Nicholson E-mail, 2/26/08). Appellant failed to do so.

There was also an issue with regard to Appellant's responsibilities at the CDC main office. Appellant was required to check in at the CDC main office at least once in the mornings and once in the afternoons to see if the office staff there needed anything to be done for them. Ms. Flanagan explained this responsibility to the Appellant, stating that it was not sufficient for her to just "walk by the office or even come into the office to move packages or dump the trash." Rather, the expectation was that Appellant would speak to an individual and ask that person if there was anything that needed to be done. (Flanagan E-mail, 1/22/08). Appellant failed to check in on several occasions between January 23, 2008 and February 29, 2008. (See Log Sheet).

Appellant's supervisors met with her on March 7, 2008 to discuss the instances of insubordination and her overall job performance. The specific instances of Appellant's failure to follow directives centered on taking down the flags at the end of Appellant's shift, failure to revise the cleaning schedule so that there is less disruption to staff and visitors, and checking in at the main office. (Termination Letter, 3/10/08). Thereafter, on March 10, 2008 Ms. Claus recommended that the local board terminate Appellant's employment. Ms. Claus stated that Appellant's pattern of behavior was a direct violation of local board policies 7030-R (Employee Discipline) and 1000 (Civility), and that Appellant had committed insubordination, willful neglect of duty, and incompetence. *Id.* Ms. Claus stated the following in her letter:

The school system has provided you with every opportunity to help you meet the desired expectation and goals of your job. You have been transferred to different locations, and provided with support and training. Despite these efforts, your behavior has not improved. As in previous meetings held, we discussed how your refusal to perform your job at the request of your supervisors is unacceptable and goes against school policies. We also discussed how important it is for employees to comply with the policies and procedures of [HCPSS].

Thomas Kierzkowski, Director of the Department of School Facilities, approved Appellant's termination, effective March 14, 2008. *Id.*

Appellant appealed Mr. Kierzkowski's termination decision. Raymond H. Brown, Chief Operating Officer (COO), conducted an appeal hearing at which Appellant's union representatives were present. (Brown Letter, 4/4/08). Mr. Brown upheld the decision, finding that Appellant's termination was reasonable and based on sufficient justification. *Id.* On further appeal, the superintendent affirmed the termination. (Cousin Letter, 5/14/08).

Appellant appealed her termination to the local board. On July 30, 2008, the local board reviewed the appeal on the papers submitted. The local board affirmed the decision to terminate Appellant for insubordination and willful neglect of duty, finding the Appellant's "frequent and repeated refusals to follow the directives of her supervisors and the building administrator point to an intentional disregard of valid directives from persons in authority." (Local Board Decision at 7). The local board recognized Appellant's pattern of problematic behavior:

Appellant has a long history of refusing to follow directives from her supervisors and of conflicts with the building administrators where she served. Ms. Johnson began having serious disciplinary issues back to 1991, as she was frequently cited for resisting order and being disrespectful to supervisors and administrators. She was transferred to five different buildings between 1991 and 1998. She failed to cooperate with staff workers and often caused strained interpersonal relationships.

Id. The local board further found that termination was appropriate in this case and that the superintendent and his administrators had imposed progressive discipline over the years. *Id.*

This appeal to the State Board ensued.

STANDARD OF REVIEW

In *Livers v. Charles County Board of Education*, 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 its decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

ANALYSIS

Alleged Material Factual Disputes

Appellant maintains that the State Board should deny the local board's Motion for Summary Affirmance because there are material facts in dispute. We address each point below.

With regard to the cart incident, Appellant claims, in her affidavit response to the termination letter, that there is a material factual dispute regarding Ms. Flanagan's directive to move the cart because Ms. Flanagan did not give her a deadline for completing the task. Ms. Flanagan's November 30 e-mail, however, clearly states that she wanted the cart moved by 9:00a.m. on December 3, 2007. There is no ambiguity about that request. When the task was not completed by the deadline, Ms. Flanagan repeated the request and gave a new deadline of December 4, 2008. (Flanagan E-mail, 12/3/07). Appellant's response acknowledges Ms. Flanagan's repeated requests. Instead of agreeing to perform the task, Appellant's response indicated that she had no intention of moving the cart. (Appellant's E-mail, 12/4/07).

Appellant also argues that there is a material factual dispute regarding Ms. Flanagan's directive to leave the flags up. Appellant claims that she left the flags up at the end of her shift and removed them only when there was inclement weather. Appellant's own communications with Ms. Flanagan, however, do not support this assertion. In response to Ms. Flanagan's directive that Appellant leave the flags up for Mr. Booze to take down during his shift, Appellant told her that Mr. Booze has other things to do and she would be taking the flags down. (Appellant's E-mail, 1/7/08). In addition, the Daily Log between January 8, 2008 and February 29, 2008 shows that there were instances in which Appellant took down the flags when the weather was fine.¹ (See Daily Log).

With regard to the directive to revise the cleaning schedule, Appellant maintains that she completed that task by submitting a schedule to Mr. Nicholson. Appellant did not, however, provide a cleaning schedule upon Ms. Flanagan's first request to submit it by January 21, 2008. (Flanagan E-mail, 1/16/08). Nor did she do so appropriately after a second request. (Nicholson E-mail, 2/15/08). Appellant responded to this e-mail on February 19, but the schedule that she included in her response did not address all of the modifications that were requested. (Appellant's E-mail, 1/19/08). Thus, she may have ultimately submitted something, but it was not submitted by the initial deadline and it did not reflect the directive she was given.

Appellant also maintains that there is a material factual dispute over whether she failed to check in at the main office in either the morning or afternoon. The issue here appears to be the manner in which this task was being performed. Ms. Flanagan advised Appellant that she had to speak to an individual in the office during the times that she checked in to see if there was anything that needed to be done. (Flanagan E-mail, 1/22/08). The daily log shows several instances of non-compliance with regard to checking in the office in the afternoons.

An opposing party must demonstrate that there is a material factual dispute "by producing factual assertions, under oath, based on personal knowledge." *Ewing v. Cecil County Board of Educ.*, 6 Ops. MSBE 818 (1995). Those assertions, however, must be factually accurate and credible. The Appellant's are not.

¹ The log also shows that Appellant was not penalized for taking the flag down for inclement weather. (See Daily Log).

Insubordination and Willful Neglect of Duty

The Master Agreement between the local board and the American Federation of State, County, and Municipal Employees states that “no employee will be discharged without cause.” (Article 22). Willful neglect of duty and/or insubordination are just cause. Therefore, we address whether Appellant’s actions constitute insubordination and willful neglect of duty. Under HCPSS Policy, insubordination is the failure to follow a valid directive from a person in a position of authority such as a supervisor or administrator. Policy 1408-R (I.C). Examples of insubordination are the failure to perform all work and duties assigned by a supervisor or administrator in charge and the failure to follow the written or verbal instruction of a supervisor or administrator. Policy 1408-R (V.C). The Policy defines willful neglect of duty as the failure to follow a requirement of the Public School Law, Regulations of the Department of Education, policies and procedures of the school system, directives or job requirements known to the employee.” Policy 1408-R (I.E).

Given facts set forth in this memorandum, there is overwhelming evidence of insubordination and willful neglect of duty.

Progressive Discipline

Appellant argues that the local board failed to follow the model of progressive discipline. She believes that once the local board found her guilty of insubordination and willful neglect of duty, it should have demoted her rather than terminated her.

The HCPSS policy on employee discipline states that “every attempt will be made to follow the progressive forms of discipline where appropriate. Policy 1408-PR (I). The policy leaves it to the discretion of the superintendent or the superintendent’s designee, however, to determine the specific form of discipline to be imposed on an employee in any given case. *Id.* The available forms of discipline listed in the policy are oral warning, written warning, letter of reprimand, suspension, demotion, and termination. Policy 1408-R (IV). The measures are to be used in order of progression whenever possible, but supervisors are permitted to use them in any order based on the severity of the violation. (Custodial Services Employee Training Manual at 1-11).

The record reflects that the school system followed a model of progressive discipline here.

Retaliation Allegations

Appellant argues that her termination was retaliation for her pursuit of an appeal to the State Board of a prior suspension.² See *Johnson v. Howard County Bd. of Educ.*, MSBE Opinion No. 07-35 (September 25, 2007). In order to establish a prima facie claim of retaliation, Appellant must show that (1) she engaged in a protected activity; (2) that the school system took an adverse employment action against her; and (3) that a causal connection existed between the protected activity and the adverse action. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994). The school system may then rebut

² The local board prevailed in the appeal before the State Board.

the prima facie case by showing that there was a legitimate non-retaliatory reason for the adverse action. *Id.* The burden then shifts back to Appellant to show that the reasons given by the school system for the adverse action are pretextual. *Id.*

We believe there is a question whether Appellant has established a prima facie case of retaliation here with regard to the causation prong. To show causation, Appellant relies on the temporal proximity between the appeal of her suspension to the State Board and the onset of the scrutiny from her supervisors that ultimately led to her termination.

Retaliation cases finding causation based on temporal proximity recognize that closeness in time between the protected activity and the adverse employment action generally establishes a causal connection sufficient to prove a prima facie case. *Williams v. Cerbonics, Inc.*, 871 F.2d 452, 457 (4th Cir.1989). These cases hold, however, that the temporal proximity between the protected activity and the adverse action must be very close. *Elries v. Denny's, Inc. et al.*, 179 F. Supp.2d 590 (D. MD 2002). If the temporal proximity between the two actions is not very close, but the employee can show that retaliatory conduct began shortly after the protected activity, then the causation prong is satisfied. *Id.* at 598.

In this case, Appellant engaged in a protected activity when she initiated an appeal of the local board's suspension decision to the State Board. Based on State Board records, of which we take judicial notice, the school system received notice of the appeal on or about June 7, 2007.³ The adverse employment action is Appellant's termination, about which Appellant was first informed on March 10, 2008. The time frame between the two actions is very far apart and fails, without more, to establish causation. Appellant argues, however, that the retaliatory conduct which led to her termination began sometime around the end of November 2007, when her supervisors began finding fault with her work performance. It is questionable whether the date of onset of this scrutiny is sufficiently close in time to the filing of the State Board appeal to satisfy the causation element. Compare *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992)(4 month period insufficient) and *Richmond v. ONEONK Inc.*, 120 F.3d 205, 209 (10th Cir 1997)(3 month period insufficient) with *Williams v. Cerberonics, Inc.*, 871 F.2d at 457 (4 month period sufficient); *Muehlhausen v. Bath Iron Works*, 911 F.Supp. 15, 20 (D.Me.1993) (6 month period sufficient).

Nevertheless assuming that Appellant has established a prima facie case, the school system has shown ample legitimate and non-retaliatory reasons for Appellant's termination. Appellant has not presented credible evidence that the school system's stated reasons are pretextual.

Evidentiary Hearing

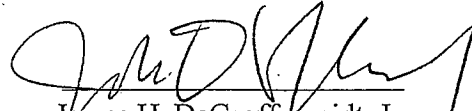
Appellant maintains that it was an abuse of the local board's discretion to fail to hold an evidentiary hearing in this matter, or to allow Appellant to be present during the "paper review" of the matter. We have determined above that there are no material facts in dispute. Due process does not require an evidentiary hearing on issues that do not involve a dispute of material fact. See *Hethmon v.*


³The employer's knowledge that the employee has engaged in protected conduct is subsumed in the requirement of a causal connection. *Id.* at 365, n.9.

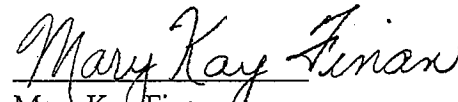
Prince George's County Bd. of Educ., 6 Ops. MSBE 646, 648-649 (1993). Appellant was provided the opportunity to argue her position and submit evidence in her case before the superintendent, his designee, and the local board.

CONCLUSION

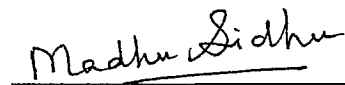
For the reasons set forth above, we do not find that the local board's decision was arbitrary, unreasonable or illegal. We therefore affirm the local board's decision in this case.

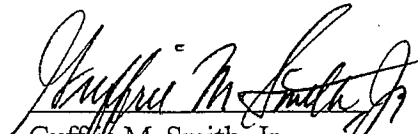

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Kate Walsh

August 25, 2009