

MARY CROOKSHANKS

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-41

OPINION

In this appeal, Appellant challenges the local board's decision to terminate her from her position as an instructional assistant at Parkville High School. The Baltimore 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 responded to the Motion.

FACTUAL BACKGROUND

Appellant was hired in 2001 as an instructional assistant with Baltimore County Public Schools (BCPS). (T.11).¹ She is a non-certificated support employee.

Appellant experienced health problems during the 2002-2003 school year. As a result of those health problems, Appellant took an unpaid leave of absence from her position from January 27, 2003 through March 2, 2003. That leave was counted against her annual Family Medical Leave Act (FMLA) leave entitlement. (Sup't. Ex. 21, Roney Letter, 1/29/03). Appellant also had intermittent absences during the 2005-2006 school year for various medical reasons. (Sup't. Ex. 5, Leave Documentation).

Appellant again had health problems at the beginning of the 2006-2007 school year. In late September 2006, Appellant was hospitalized which caused her to be out of work for three weeks. She returned to work in the middle of October, only to have to take medical leave intermittently during October and November 2006 for various serious health problems, including severe migraines, mononucleosis and gastrointestinal problems. (T.12).

In October of 2006, Michelle Prumo, Risk Manager, sent Appellant a letter advising her of her employment alternatives given that Appellant's depletion of her leave was going to place her in an unpaid employment status. (Sup't. Ex. 7, Prumo Letter, 10/11/06). Superintendent's Rule 4270 (2)(o) states that employees who remain on unpaid status for more than ten days have no employment status with the school system and are at risk for termination. (T.123). Ms.

¹All transcript citations in this memorandum refer to the transcript of the hearing before the local board's Hearing Officer.

Prumo advised Appellant that she could (1) return to her current assignment; (2) apply for and be granted service or medical retirement; (3) apply for and be granted an approved leave of absence; (4) resign; or (5) contact the sick leave bank to access usage. Ms. Prumo gave Appellant a deadline of October 26, 2006 by which to select an option. (Sup't. Ex. 7, Prumo Letter, 10/11/06).

Appellant did not respond to the letter. Instead, she returned to work one month later on November 27, 2006. Upon her return to work, Elaine Shaw, BCPS Nurse Case Manager, referred Appellant to an independent medical exam (IME) due to Appellant's excessive and frequent absences. (T.14-15, 125).

In December 2006, Dr. Robert H. Toney conducted the IME. At the time of the IME, Appellant was again out on medical leave as of November 30, 2006, and was expected to return to work sometime in the middle of December. Dr. Toney issued a medical report on December 15, 2006 that provided the following summary and recommendations:

It appears that [Appellant] has several chronic medical conditions at this time. She currently has abdominal pain of unknown etiology, has recently seen a gastroenterologist and is scheduled to have an EGD performed on December 12, 2006. She also has a reported long history of severe migraine headaches. She has been referred to a pain clinic and is currently seen intermittently for management of her migraine headaches. She also has a history of depression and has a long history significant for multiple previous abdominal surgeries.

It is my opinion at this time that [Appellant] is unable to perform the essential duties of her position and she is currently experiencing significant abdominal pain, nausea, vomiting, and diarrhea. If cleared by her treating gastroenterologist and primary care physician, she should be able to return to work as scheduled on December 13th or December 14th depending on the results of her EGD. Based on the fact that [Appellant] has several chronic conditions, I do not feel that she will be able to work consistently in the near future. The primary problem at this point seems to be her abdominal pain and she also has a reported history of multiple migraine headaches. Unless [Appellant] gets both of these conditions under optimal medical control, it is my opinion that she will likely continue to have occasional absences from work related to one or both of her medical conditions. (emphasis omitted).

(Union Ex. 2, Toney Report at 4). At the time of his evaluation, Dr. Toney based the medical history on information provided by Appellant. (*Id.* at 1). Dr. Toney updated his

recommendation on December 18 and 20, 2006 and January 26, 2007, as Appellant's various medical records became available to him. On each occasion, Dr. Toney stated that he had not changed his conclusions based on the additional medical records that were made available to him. (Sup't. Exs. 12-15, Workability Evaluation Updates). Following Dr. Toney's IME on December 8, Appellant maintains that the school system advised her that she was not permitted to return to work. (T.70).

The information contained in Dr. Toney's report prompted Ms. Prumo to direct the Office of Support Services Personnel to hold an options conference. (Ex. 19, Hamlet Letter, 12/19/06). During an options conference, the employee is presented with the employment options that are available to them given their medical constraints. (T.127). Dr. Toney had opined that Appellant could no longer perform the essential functions of her job due to her medical conditions. (*Id.*).

On January 11, 2007, Appellant attended the "options conference." Ms. Mary Roney, Personnel Analyst, provided Appellant with the following three options:

1. Apply for a transfer to an open position within BCPS for which she is qualified and able to perform. In order to take advantage of the option, Appellant had to apply for a vacant position and be selected for the job following completion of the interview process;
2. Apply for and be granted service or medical retirement by the State Retirement and Pension System; or
3. Resign.

Ms. Roney provided the Appellant with the necessary contact information regarding each option and advised Appellant that it was her responsibility to initiate and follow through with whatever choice she made. Ms. Roney gave Appellant a February 9, 2007 deadline by which she had to exercise one of the options. She advised the Appellant that failure to meet the deadline could result in a recommendation for termination of her employment with BCPS. The options conference was summarized and reviewed in a letter from Ms. Roney to the Appellant. (Sup't. Ex.4, Roney Letter, 1/12/07).

A few minutes after the meeting, the Appellant called Ms. Roney and inquired why extended medical leave was not offered as an option. Ms. Roney told Appellant to contact Ms. Prumo. Appellant did so but was ultimately put back in touch with Ms. Roney who said that she would look into the medical leave issue. (T.22-24). The Appellant contacted Ms. Roney the following week after not getting a response from her. At that point, Ms. Roney requested that the Appellant submit medical documentation to support the request for leave. Appellant submitted the medical documentation by leaving it with the secretary in Ms. Roney's office on January 26, 2007. (T.25). The sole medical documentation that the Appellant submitted consisted of a letter dated January 26, 2007, from Amy Moss, the Physician's Assistant at Appellant's doctor's

office, stating as follows:

[Appellant] is a patient at Medical Health Group @ Bel Air and is seen regularly here. She has been diagnosed with gastroparesis and gastroenteritis. She has been under my care since November 30, 2006 and continues to be unable to work. Her anticipated return to work date is March 1, 2007.

(Sup't. Ex.17, Moss Letter).

At the hearing in this case, the Appellant testified that she did not hear from Ms. Roney regarding the medical leave issue so she contacted Ms. Roney on February 5, 2007. She testified that Ms. Roney stated that she had lost the medical documentation that Appellant had submitted but that she would keep looking for it and call Appellant back. (T.26). Appellant again did not hear from Ms. Roney so the Appellant testified that she called Ms. Roney on February 6 and left a message. She called Ms. Roney again on February 7 and was advised by someone in the office that Ms. Roney would be out of work the rest of the week. (T.26-27). This meant that she would not return before the options deadline of February 9. The Appellant testified that someone in the office advised her to wait for Ms. Roney's return to discuss the medical leave issue and the deadline. (T.27)

Appellant contacted Ms. Roney on February 12, 2007. According to the Appellant, neither one of them mentioned the February 9 options deadline. (T.29-30). Rather, Ms. Roney requested that Appellant resubmit the lost medical documentation from January. Appellant hand delivered a copy of her medical information to Ms. Roney that week. (T.29-30). The Appellant testified that Ms. Roney did not thereafter contact her regarding the medical leave inquiry.² (T.31).

The next communication that Appellant received from the school system was a letter dated March 22, 2007, from Cynthia Hamlet, Personnel Officer. Ms. Hamlet stated,

You submitted additional documents to this office on February 15, 2007. Our physicians have advised that these documents will have no impact on your status. Accordingly, since you have not complied with the deadline of February 9, 2007, nor have you returned the resignation form, by copy of this letter, a recommendation will be sent to Mr. Dan Capozzi, Manager, Office of Staff Relations, to terminate your employment with the

²The description of Appellant's attempts to contact Ms. Roney and their actual communications is based on Appellant's testimony alone as Ms. Roney did not testify at the hearing before Mr. Austin. Appellant's testimony is uncontroverted and there is no basis to question her credibility.

Baltimore County Public Schools. Mr. Capozzi will schedule a termination hearing with you. You will be able to present any new information to Mr. Capozzi at the hearing.

Mr. Capozzi, the Superintendent's Designee, conducted a termination hearing on April 5, 2007, at which Appellant testified and presented evidence. Mr. Capozzi supported Ms. Hamlet's recommendation that Appellant be terminated. Mr. Capozzi found that Appellant was appropriately referred for an options conference after Dr. Toney determined that she was unable to perform the functions of her position, and that Appellant failed to comply with the clearly stated deadline for selecting an option despite the directive that failure to do so could result in termination. (Sup't. Ex. 1, Capozzi Decision at 2-3).

Appellant appealed to the local board. The matter was referred to hearing Officer, John A. Austin, who conducted an evidentiary hearing.

At the hearing, counsel for the Appellant argued that the Appellant should have been granted FMLA leave which would have precluded the school system from convening the options conference that ultimately led to her termination. The Hearing Officer found that it was incumbent on Appellant, not the school system, to initiate the request for FMLA and to have it supported by appropriate and adequate medical documentation. (Motion Ex. 1, Austin Decision at 15). We note that the letter recommending the Appellant's termination states that BCPS "physicians have advised us that [the documents you submitted on February 15, 2009 – the letter from Amy Moss, Physician's Assistant] will have no impact on your status."

Mr. Austin also found that Appellant was under the mistaken assumption that her request for a medical leave of absence was being considered and that she was, therefore, exempted from responding to the options deadline. He found that a reasonable person would have requested an extension of time to exercise the options until the leave request was either approved or disapproved. Moreover, he found that because a final determination was not made until several weeks after the February 9, 2009 deadline, Appellant could have, at any time, attempted to exercise her options, but she did not do so. (*Id.* at 16).

Mr. Austin also rejected Appellant's contention that Dr. Toney's report was not conclusive and therefore could not serve as the basis for an options conference. He found that at no time did Appellant submit sufficient medical documentation to contradict Dr. Toney's conclusion that she was unable to perform the functions of her job. Mr. Austin points to the letter submitted by the Appellant from Amy Moss, the Physician's Assistant at Medical Health Group, which indicates that Appellant was unable to work and that her anticipated return was March 1, 2007. In Mr. Austin's view, that letter confirmed the medical opinion of Dr. Toney that Appellant was unable to sufficiently recover so that she could return to work. If Appellant wanted to refute Dr. Toney's report, Mr. Austin concluded that it was incumbent upon her to present that information from her treating physicians. In the absence of documentation to the contrary, Mr. Austin found that Dr. Toney's report appropriately served as the basis for an

options conference. Appellant did not submit medical documentation sufficient to show that there was a change in her medical condition. (*Id.* at 17-19).

Mr. Austin concluded that the termination for failure to select an option by the deadline was proper and recommended that the local board affirm the decision of the Superintendent's Designee. (*Id.* at 20).

On February 25, 2009, the local board adopted Mr. Austin's decision and upheld Appellant's termination. This appeal to the State Board followed.

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

Appellant's Failure to Select an Option by the Deadline

Appellant maintains that her termination for failing to select one of the options presented to her by the February 9, 2007 deadline was arbitrary and unreasonable in light of the fact that she had been communicating with Ms. Roney regarding a medical leave of absence and those communications led her to believe that the school system was considering the leave as a possible option at the time that she received the letter recommending her termination.

We express our concern that the local school system staff did not respond timely or fully to the Appellant's request for medical leave. It seems that the Appellant was under the impression that her request for medical leave extended her time for selecting an option by the February 9 deadline. While the school staff should have been more responsive, in our view it was not reasonable for Appellant to conclude that BCPS automatically granted her an extension of time to choose an option just because another possibility was being explored. A leave of absence was clearly not one of the options presented to Appellant, and Appellant had no guarantee that BCPS would grant the request. Appellant did not ask for an extension of the deadline, nor did she make any inquiries to confirm whether or not she still had to comply with the deadline given her leave of absence inquiry. Neither Ms. Roney nor anyone else at BCPS advised Appellant that she could ignore the deadline. Rather, at her own peril, Appellant proceeded under the assumption that she did not have to select an option by February 9.

Dr. Toney's IME Report

Appellant also argues that Dr. Toney's IME report was insufficient to trigger the options conference which led to her termination because the report did not conclude that she was permanently unable to perform the functions of her job.

Here again is the crucial portion of Dr. Toney's report:

It is my opinion at this time that [Appellant] is unable to perform the essential duties of her position and she is currently experiencing significant abdominal pain, nausea, vomiting, and diarrhea. If cleared by her treating gastroenterologist and primary care physician, she should be able to return to work as scheduled on December 13th or December 14th depending on the results of her EGD. Based on the fact that [Appellant] has several chronic conditions, I do not feel that she will be able to work consistently in the near future. The primary problem at this point seems to be her abdominal pain and she also has a reported history of multiple migraine headaches. Unless [Appellant] gets both of these conditions under optimal medical control, it is my opinion that she will likely continue to have occasional absences from work related to one or both of her medical conditions. (emphasis omitted).

(Union Ex. 2, Toney Report at 4).

The critical part of Dr. Toney's report is his opinion that Appellant was "unable to perform the essential duties of her position", and that she would not be able to work consistently in the future. Dr. Toney did not veer from his opinion after reviewing Appellant's medical records during the following month leading up to the options conference. In light of Appellant's long history of medical problems, her frequent absences for those medical issues, and Dr. Toney's opinion that Appellant was unable to perform her essential duties, BCPS properly convened the options conference. Appellant did not present medical documentation sufficient to contradict Dr. Toney's report or to medically clear her to return to work. Although Appellant initially presented medical documentation to Ms. Roney stating that Appellant could return to work in March 2007, that return to work date continued to change to April and June, until Appellant's release from the school system in September 2007. (Sup't. Ex.17, Moss Letter; Sup't. Ex. 6, Sick Leave Bank Claim Forms).

FMLA Leave

Appellant maintains that BCPS violated the Family Medical Leave Act, 29 U.S.C. §§2601 *et seq.*, by not offering and granting her FMLA leave after she requested a medical leave of absence from Ms. Roney on January 11, 2007. The FMLA is a federal law that grants

employees up to twelve weeks of unpaid, job-protected leave per year for serious health conditions. *Id.* Appellant claims that if BCPS had granted her FMLA leave at that time, she would not have been terminated for failure to respond to the February 9, 2007 options deadline.

An appeal to the State Board of Education is not the proper venue in which to raise claims that an employer has violated the provisions of the Family Medical Leave Act. The FMLA prescribes the sole enforcement mechanisms for such violations. It provides that the employee can either file a complaint with the Secretary of Labor who will investigate the matter and issue a decision. Or the employee can file a private lawsuit in a Federal or state court of competent jurisdiction to seek monetary and equitable damages. 29 U.S.C. §2617; 29 CFR §825.400. Those are the only options available to the Appellant to seek a remedy for any purported FMLA violation. Therefore, the State Board does not have jurisdiction over this issue and cannot consider the Appellant's FMLA claim.

CONCLUSION

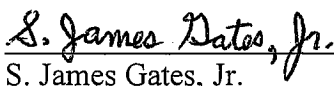
For these reasons, we do not find the local board's decision to be arbitrary, unreasonable or illegal. Accordingly, we affirm the local board's decision upholding Appellant's termination.

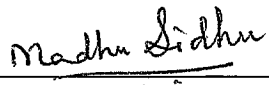

James H. DeGraffenreidt, Jr.
President

ABSENT

Charlene M. Dukes
Vice President


Mary Kay Finan


S. James Gates, Jr.

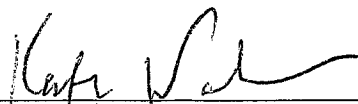

Madhu Sidhu

ABSENT

Guffrie M. Smith, Jr.

ABSENT

Ivan C.A. Walks



Kate Walsh

DISSENT

I believe that the local board's decision to terminate the Appellant for her failure to select an option by the deadline was arbitrary and unreasonable. The Appellant believed that the school system was considering her medical leave of absence request as a legitimate option based on her communications with Ms. Rooney and Ms. Rooney's request that the Appellant submit supportive medical documentation. At no time did Ms. Rooney clarify that the school system still expected the Appellant to select one of the three options presented at the options conference while the medical leave request was pending. It was reasonable, therefore, for the Appellant to assume that she did not have to select one of those options before resolution of the medical leave issue.



Donna Hill Staton

December 10, 2009