

ELIZABETH J. PENSYL,

Appellant

v.

CECIL COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-10

### OPINION

In this appeal, Appellant challenges the local board's decision accepting the Superintendent's recommendation to terminate Appellant from her teaching position for incompetence based on chronic absenteeism. The local board has submitted a motion to dismiss the appeal based on untimeliness, failure to perfect the appeal, and lack of jurisdiction. Appellant has not submitted a reply to the local board's motion.

### FACTUAL BACKGROUND

Appellant began her teaching career with the Cecil County Public School System on August 18, 1997, teaching English at North East High School. As a result of excessive absenteeism and various medical issues, Appellant was granted a leave of absence from November 10, 2003 through June 30, 2004.

By letter dated September 24, 2004, the Superintendent advised Appellant of his recommendation that she be charged with incompetence and dismissed from her teaching position. The recommendation was based on input from the Principal at Appellant's school and the Executive Director for Human Resources, as well as an investigation by the Associate Superintendent for Administrative Services and the Executive Director for Staff Relations. The Statement of Charges reads as follows:

Ms. Elizabeth Pensyl's lack of regular attendance has resulted in students in her class receiving inadequate instruction. On September 12, 2003, Ms. Pensyl was provided with a Professional Improvement Plan in an effort to improve her attendance. This action was taken following a year in which she was absent 52 days. The year before, she was also excessively absent and missed 45 days. Last year, Ms. Pensyl missed 39 days before being granted a leave of absence effective November 10, 2003. During the 2003-2004 school year, Ms. Pensyl did not comply with her Professional Improvement Plan, because beginning October 1, 2003, Ms. Pensyl failed to call an administrator to explain her absence for thirteen consecutive days as required by her plan. On October 3 and

October 7, 2003, Ms. Pensyl called Dr. Rosalie Humphrey, Principal, not to report her absence, but to ask about the status of her job. In fact, Ms. Pensyl advised Dr. Humphrey that she would be reporting to work, but then did not do so. On October 27, 2003, Dr. Humphrey submitted a recommendation endorsed by Dr. Barbara Wheeler, Associate Superintendent of Education Services, that Ms. Pensyl be dismissed for incompetence. In an arrangement between Ms. Pensyl who was represented by Ms. Kristy Anderson, MSTA Attorney, and the Board of Education, Ms. Pensyl was granted a leave of absence for the remainder of the 2003-2004 school year. It was agreed that Ms. Pensyl would return for the 2004-2005 school year prepared to maintain regular on time attendance.

In the 2004-2005 school year, Ms. Pensyl has been absent 22 out of 24 days including all student days. Ms. Pensyl's continued unacceptable pattern of attendance is a serious matter that has adversely affected her students and cannot be accommodated. She has exhausted all accrued leave for the 2004-2005 school year and is ineligible for leave pursuant to the Family and Medical Leave Act. Regular on time attendance is an essential function of her job, and Elizabeth Pensyl's continued absenteeism renders her unable to function effectively as a teacher, and constitutes incompetence.

Although the Superintendent in his September 24 letter advised Appellant of her right to request a hearing before the local board prior to the local board's action on the recommendation, Appellant did not request a hearing. On October 11, 2004, without objection from the Appellant, the local board accepted the Superintendent's recommendation and terminated Appellant from employment with the Cecil County Board of Education.

## ANALYSIS

### *Timeliness*

As a threshold matter, the local board argues that this appeal should be dismissed because it was untimely filed. State law and regulation require appeals of local board decisions to be filed with the State Board within thirty days of the local board decision. *See* Md. Code Ann. Educ. § 4-205 (c) and COMAR 13A.01.05.02B(1)(a). The 30 days run from the later of the date of the order or the opinion issued explaining the decision. COMAR 13A.01.05.02B(1)(b). An appeal is deemed transmitted within the limitations period if it has been delivered to the State Board or deposited in the United States mail, as registered or certified, before the expiration of the time period. COMAR 13A.01.05.02B(3). Further, COMAR 13A.01.05.04B(2) provides that the time for filing an appeal may not be extended.

Here, the local board made its decision to terminate Appellant at its regular session on October 11, 2004. Appellant was advised of the local board's decision in writing by letter dated October 12, 2004. The appeal should therefore have been filed with the State Board by November 12, 2004.<sup>1</sup>

Appellant's initial letter of appeal to the State Board was received by the State Board via first class mail on November 9, 2004, within the limitations period. While the letter is somewhat vague, it conveys that Appellant is appealing the decision of the Cecil County Board of Education to terminate her from a teaching position based on incompetence due to excessive absences. As with all *pro se* appeals in which more information would be helpful to fully understand the appeal being taken, counsel for the State Board requested that Appellant submit additional appeal information by the later of December 1, 2004 or 30 days from the date of the local board's decision.<sup>2</sup> Appellant's additional information, dated December 1, was received by the State Board via regular mail on December 7, 2004, postmarked December 6, 2004.

Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice. *See Scott v. Board of Education of Prince George's County*, 3 Op. MSBE 139 (1983); *see also* COMAR 13A.01.05.02B. The State Board has strictly applied this rule of law, and has dismissed appeals that have been filed a mere one day late based on untimeliness. *See Christine Schwalm v. Board of Education of Montgomery County*, 7 Op. MSBE 1326 (1998); *Marie Friedman v. Board of Education of Montgomery County*, 7 Op. MSBE 1260 (1998); *Eleanor Duckett v. Board of Education of Montgomery County*, 7 Op. MSBE 620 (1997).

Although given the benefit of an extended deadline of December 1 for perfecting the appeal, Appellant did not send the additional information until December 6. She has provided no reason for the failure to meet the December 1 deadline. We therefore dismiss the appeal as

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<sup>1</sup>The 30<sup>th</sup> calendar day was November 11, 2004 which was Veterans' Day, a State legal holiday. Pursuant to COMAR 13A.01.05.02B(4), the next day, which is not a Saturday, Sunday, or State legal holiday, is the last day of the prescribed limitations period.

<sup>2</sup>Typically, the appeals that lack complete information tend to be *pro se* appeals where the appellant is representing himself/herself. The procedure for sending out notice requesting more information on the appeals that appear to be lacking has its origins in civil court procedure. Civil procedure allows a defendant to file a motion for a more definite statement when the complaint is vague and ambiguous and the defendant cannot reasonably frame an answer. *See* Maryland Rule 2-322(d). The plaintiff in those situations is then given the opportunity to cure the defects by filing an amended complaint rather than having the case dismissed outright. For State Board appeals, the procedure of requesting the additional information from an Appellant has streamlined the process so that there is no need to wait for the local board to file a request for a more definite statement, as was previously occurring and causing delay to the resolution of some appeals.

untimely.

*Waiver through Failure to Request Hearing*

The local board further argues that the appeal is not properly before the State Board because Appellant failed to request a hearing before the local board on the Superintendent's termination recommendation prior to the local board's final action. A similar situation presented itself in *Diane Yarbrow Swift v. Montgomery County Board of Education*, MSBE Opinion No. 02-09 (February 26, 2002). In *Swift*, Appellant, a tenured teacher, had initially requested a hearing on the Superintendent's termination recommendation but later submitted a letter relinquishing her right to an appeal and, therefore, a hearing prior to the local board's decision on the recommendation. The State Board found that Appellant had waived her right to appeal the local board's termination decision and dismissed the appeal, citing *Williams v. Maryland Dep't of Human Resources, et al.*, 136 Md. App. 153 (2000). The appellant in *Williams* did not oppose the appellees' motion for summary judgment on an age discrimination claim, but then challenged the judgment of that claim. The Maryland Court of Special Appeals held, in part:

Maryland law is well settled that "[t]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal. *Osztreicher v. Juanteguy*, 338 Md. 528, 534, 659 A.2d 1278 (1995) (quoting *Rocks v. Brosius*, 241 Md. 612, 630, 217 A.2d 531 (1966)). Appellant's assertion on appeal is inconsistent with his acquiescence to summary judgment on the age discrimination claim before the circuit court. We hold, therefore, that appellant may not challenge the grant of summary judgment on the age discrimination claim.

*Williams*, 136 Md. App. at 176.

We find that Appellant's actions in this matter are much like the actions of the appellants in *Swift* and *Williams*. Here, Appellant failed to object to the Superintendent's termination recommendation and failed to request a hearing on the matter before the local board prior to its final termination decision despite repeated efforts by school officials advising Appellant of her right to request a hearing on the dismissal recommendation. We find Appellant thereby acquiesced in the Superintendent's recommendation to terminate her for incompetence. Pursuant to Maryland case law, Appellant cannot take inconsistent positions or actions by acquiescing in the termination decision before the local board, but contesting the termination before the State Board.

In addition, 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). Because Appellant failed to raise any issues regarding the recommendation for termination before the local board, we find that no issues have been preserved for appeal and Appellant has waived her right to raise them before the State Board.

### CONCLUSION

For all of these reasons, we dismiss the appeal for untimeliness and waiver of appeal issues. *See* COMAR 13A.01.05.03C.

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March 23, 2005