BRUCE VENTER,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
HOWARD COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 05-22

OPINION

In this appeal, Appellant challenges the former superintendent's decision to terminate him from his position as Chief Business Officer for the Howard County Public School System (HCPSS). Appellant argues that (1) as Chief Business Officer he was a professional employee entitled to the procedural protections of § 6-202 of the Education Article which the school system failed to follow; (2) Mark Blom, Esquire served as both General Counsel to HCPSS and as Chief of Staff to the Superintendent resulting in a conflict of interest which adversely affected Appellant; (3) Appellant is entitled to legal fees and expenses incurred as a result his termination; and (4) Appellant was entitled to have open proceedings before the local hearing officer rather than a closed evidentiary hearing.

The local board has submitted a Motion for Summary Affirmance maintaining that Appellant was not entitled to the procedures set forth in § 6-202 of the Education Article; there was no conflict of interest which adversely affected Appellant; Appellant was not entitled to legal fees; and Appellant was not entitled to an open hearing before the local hearing examiner. Appellant has submitted an opposition to the local board's motion.[1]

FACTUAL BACKGROUND[2]

Dr. Bruce Venter began his employment as the Chief Business Officer (CBO) of the Howard County Public School System on October 5, 2001. As CBO, Dr. Venter exercised significant responsibility over a broad range of administrative areas critical to the operation of the school system, specifically in the areas of finance, facilities/construction, transportation, and food service.

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[1]Appellant has subsequently submitted a Motion for Summary Reinstatement and a Motion for Summary Affirmance of the Local Board's Independent Judgment and supporting memoranda. The local board attorney has moved to strike these submissions. Appellant opposes the local board's Motion to Strike and has moved for sanctions against legal counsel for the local board.

[2]A more detailed description of the facts of this case are set forth in the Hearing Officer's Decision at pp. 1 – 15, which is incorporated by reference in this opinion.

The CBO job description includes the following list of essential duties:

- Directs the financial affairs and operations of the school system.
- Develops and prepares the annual Operating Budget and the Capital Budget and the Capital Improvement Program for the school system in accordance with the laws, regulations, and policies.
- Establishes the budget development process that provides for the involvement of service areas/managers, division heads and building administrators in determining program needs and in translating general education proposals.
- Assigns and controls the allocation of funds as provided for in the budget approved by the Board of Education and the County Council and supervises the maintenance of a proper system of accounts for all programs, including the provision of periodic audits of all accounts as necessary.
- Explains and interprets the school system's financial affairs to the School Board, the County Council, the public and other necessary parties.
- Develops and maintains a comprehensive facilities plan to meet the growth needs of the school system and to ensure maintenance of existing facilities.
- Directs school system support services including transportation, food services, maintenance and operations, budget office, purchasing, school construction and financial services.
- Coordinates negotiation activities with various employee groups.
- Carries out other duties as assigned.

The qualifications for the position do not require a certificated individual. *See* CBO Job Description.[3] The CBO reports directly to the Deputy Superintendent. It is a twelve-month position under the Administrative/Technical Management pay scale.

New school construction was within Dr. Venter's area of responsibility as CBO. One of the projects being developed at the time of Dr. Venter's employment was the construction of the 12th High School (Northern High School). There were several impediments to the 12th High School project. Some community groups opposed construction of the school because of its location. The opposition manifested itself through an appeal to challenge the Maryland

[3]The CBO position was a newly created position. The job description was developed by the Howard County Superintendent, Deputy Superintendent, and Director of Human Resources.

Department of Environment's (MDE) issuance of a septic system discharge permit. Other issues involved the need for completion of the construction by August 2005, in time for the 2005-2006 school year. In addition, there was a need to place the project within the Howard County FY2004 capital budget. *See* Hearing Officer Decision at pp. 4-5.

In an April 3, 2003 memorandum to the local board, Appellant advised that James N. Robey, County Executive for Howard County, proposed a $32.7 million dollar reduction of the local board's approved CIP Budget, including a $21 million dollar reduction in the 12th High School facility. With regard to the 12th High School, Appellant advised the local board:

> The $21 million reduction in the Northern High School's allocation only allows the school system to move forward with the site work, estimated to cost $4,456,000. This change will push completion of the new high school back to August 2006. The result will be that the remaining high schools will be overcrowded by 1206 students starting in August 2005. The most affected high schools will be Centennial, Mt. Hebron, and River Hill.

Appellant further stated that "[f]ull funding of this capital plan is essential to meeting the educational, programmatic and capacity goals of the Howard County Public School System." *See* 4/3/03 memorandum from Venter to local board. Ultimately, the capital budget was amended to include sufficient funding for the construction to keep it on track for its August 2005 opening date.

In an April 18, 2003 memorandum, Dr. William Brown, Director of School Construction, advised Appellant of various trigger dates for school system performance. He anticipated a favorable outcome to the MDE hearing on the septic discharge permit but suggested that a mid-winter opening date would be more feasible. He also advised that community opposition to the issuance of the permit could result in delay. In his testimony, Dr. Brown indicated that the real issue with the project was getting the septic discharge permit so that construction could take place using available funding. *See* Hearing Officer Decision at p. 7.

On June 30, 2003, Appellant shared with the local board a letter from Anthony G. Gorski, the attorney handling the septic discharge determination permit on behalf of the local board. The letter sets forth various scenarios in the event that the community opponents appealed the MDE's notice of determination. Appellant's memorandum to the board advised:

> Basically Mr. Gorski feels that the opponents could hold the project up as much as 16 months. At best we will know in September 2003 where we stand in the permit process. Even the best case scenario puts tremendous pressure on the construction schedule based on information put together by the project's construction manager.

A series of communications to Appellant from John C. Jenkins, Construction Manager, raised serious concerns with regard to completion of the 12th High School project in time for the anticipated opening date. Items of concern included issuance of the permit and an award of the contract by the local board. In a May 2, 2003 letter to Appellant, Mr. Jenkins stated: "Given a requirement to complete by Fall of 05, we are more concerned with the permit availability to start in September, than the $10 million first year funding restriction." Another letter noted that "the September start date is not a certainty and will require some changes to the normal process and procedures to be realized." *See* 5/5/03 letter from Jenkins to Venter. On September 3, 2003, Mr. Jenkins advised the following:

> If HCPSS embarks on an effort to complete the project by 8/05, based upon the current situation, there would only be a 50% chance of success. A complex schedule will have to be developed, and terms and conditions established to promote performance. There is a potential to add 15% to the cost of the project. Everything must fall favorably to be successful. The right mix of contractors, the right weather, cooperation of agencies, and a minimum of unforseen conditions will have to fall into place. . . .
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> . . . HCPSS should not embark on the effort to be ready for fall 8/05 opening if they cannot tolerate the real potential for a late start of a month or two in the fall of 2005. If there is no tolerance for slippage, they should plan for a midterm completion.

In early September, 2003, Mark Blom, HCPSS General Counsel and Chief of Staff, learned that there was a problem with the construction schedule for the 12th High School. He also learned that the Superintendent and other members of the Senior Administrative Team had not been told of the dire nature of the situation. Upon learning the information, Mr. Blom initiated an investigation into the matter. Based on the results of the investigation, the Superintendent decided to meet with Appellant. *See* Hearing Officer Decision at pp. 10-11.

On September 5, 2003, former Superintendent John R. O'Rourke met with Appellant[4] who allegedly was unaware of the subject matter of the meeting and did not bring any materials with him. The Superintendent inquired about the lack of notice regarding the schedule for the 12th High School. Appellant maintained that he referred the Superintendent to his April 3, 2003 memorandum to the local board regarding the County Executive's FY2004 capital budget, his June 30, 2003 memorandum regarding the septic permit process, meetings with the Superintendent, and a June 24, 2003 memorandum to the Superintendent regarding community opposition. *See* Hearing Officer Decision at pp. 11-12.

[4]Mr. Blom and Dr. Statham, Appellant's immediate supervisor, were there as well.

The Superintendent advised Appellant that he was terminating his employment. The letter memorializing this decision states as follows:

> I base my decision in this matter on your inability to meet my expectations of providing consistent, sound leadership and judgement [sic] in effectuating your responsibilities in a cabinet level position.
>
> As specific examples, you demonstrated poor judgment when you did not brief the Board or me concerning critical information about the construction schedule of Northern High School that resulted in the Board making decisions without the benefit of complete and thorough information. Similarly, you misinformed me about the details of a power outage at Owen Brown Middle School and when questioned further by me, you became combative, unprofessional and took no responsibility for your actions. Finally, you have made decisions that contradict the expectation that you support the goals and objectives of the Board of Education. One example of this was when you failed to appropriately address the square footage requirement associated with the implementation of full-day kindergarten. When questioned why your office failed to present recommendations consistent with state requirements, you had no response and suggested that this information not be shared with the Board.

Appellant appealed his termination to the local board.[5] The local board referred the matter to a local hearing officer, Gregory A. Szoka, who conducted a full evidentiary hearing on February 10 and 17, March 8 and 10, April 1, and May 11, 2004.[6] The hearing officer determined that the matter should proceed as a § 4-205(c) appeal; that Appellant was accorded sufficient due process; and that Appellant failed to sustain his burden to show that the superintendent's decision was arbitrary, unreasonable or illegal.

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[5]Appellant also appealed directly to the State Board. Our office advised Appellant that his appeal was premature and that it must first be addressed by the local board.

[6]There was initially a dispute over Appellant's attempt to make an audio recording of the proceedings before the hearing officer. Appellant filed a complaint with the Open Meetings Compliance Board which found that the Open Meetings Act, Md. Code Ann., State Gov't § 10-501 *et seq*., did not apply to the proceedings because a hearing before a local hearing officer does not involve the meeting of a public body and, therefore, the Compliance Board lacked jurisdiction to consider the merits of the complaint.

Oral arguments were heard before the local board in closed session on November 29, 2004.[7] The local board's unanimous decision adopted the findings, conclusions and recommendations of the hearing officer, agreeing that (1) Appellant was not a "professional" employee for purposes of § 6-202; (2) Appellant was not denied due process; and (3) Appellant failed to present evidence that he informed either the Superintendent or the local board about the consequences of failing to meet critical construction deadlines for the 12th high school. The conclusion of the board decision reads as follows:

> The Board must conclude, based on the evidence presented, that a reasoning mind could have reasonably found, as the Superintendent did, that Dr. Venter breached his duty to provide all of the substantive information about the threats to the construction schedule to the Superintendent and Board at a critical time in the decision-making process for the 12th high school. While the Board would have taken different action in response to this breach, the Superintendent was within his statutory authority to terminate Dr. Venter's employment. We cannot conclude, based on the evidence presented, that the Superintendent's decision was without rationale or in disregard of the facts and circumstances so as to have been arbitrary, unreasonable or illegal.
>
> The Board upholds the Superintendent's decision in this case, as we believe we must given the facts and based on the applicable burden of proof. However, the Board acknowledges the skills Dr. Venter has and brought to his job as Chief Business Officer with HCPSS. In particular, as the record shows, Dr. Venter was an effective liaison to community groups and was responsive to questions from Board members. Also, as shown in the record, Dr. Venter had prior satisfactory performance evaluations. The Board does not condone the unacceptable manner in which the termination was carried out by the former Superintendent. Therefore, the Board asks the Superintendent to review the benefits provided to Dr. Venter to determine if he received all benefits normally accorded to an employee who separates from employment with HCPSS and to take appropriate action based on his review.

Local board opinion at 5-6.

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[7]Appellant also filed a complaint with the Open Meetings Compliance Board regarding the local board's decision to hold oral arguments in a closed session. Appellant later withdrew the complaint.

ANALYSIS

Preliminary Issues

1. *Conflict of Interest*

As a preliminary matter, Appellant maintains that Mark Blom's position within HCPSS, serving as General Counsel to the school system and Chief of Staff to Superintendent O'Rourke, created a conflict of interest which adversely affected Appellant in this case. Specifically, Appellant alleges that Mr. Blom did not communicate a settlement offer to the local board in September, 2003. We find that Appellant's argument lacks merit. In his Petition for Review/Notice of Appeal, Appellant indicates that Michael Molinaro, Esquire, sent a letter to counsel for Appellant on September 25, 2003, advising that he, and not Mr. Blom, served as counsel to the local board. *See* Petition at p. 5. Thereafter, counsel for Appellant communicated with Mr. Molinaro regarding settlement by letter dated October 21, 2003. *See* letter from Dyer to Molinaro. Based on these facts, we fail to see how Appellant was adversely affected here. Nevertheless, under well established legal principles, matters pertaining to settlement are not relevant to the State Board's review of the local board's decision on Appellant's termination.

2. *Request for Open Hearing*

Another preliminary matter is Appellant's argument that he was entitled to an open hearing before the board appointed hearing officer. Appellant maintains that the hearing officer failed to hold an open hearing despite Appellant's request to do so and despite Appellant's waiver of his right to keep personnel records confidential. Appellant asserts that he "has been adversely affected by the decision of the hearing officer" and "deprived of his right to an open proceeding and the extra protections that such a proceeding provides." *See* Notice of Appeal at pp. 2-3. Appellant provides no legal authority in support of his position.[8]

Based upon a review of the transcript, we find that Appellant failed to assert a right to an open hearing of the proceedings before the hearing officer. Appellant cites no specific transcript reference of this argument and we have found none upon review. At no time during the proceeding did Appellant ask the hearing officer to open the proceedings. Thus, we find that Appellant has waived his right to raise this argument on appeal to the State Board. *See Chase Craven v. Board of Education of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Earl 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).

[8] An appeal hearing conducted pursuant to ED §4-205(c) involves a quasi-judicial function. Therefore, the Open Meetings Act does not apply. *See* 90 Op. Att'y Gen. 17, at 18.

In any event, an Opinion of the Maryland Attorney General, 90 Op. Att'y Gen. 17 (Jan. 5, 2005), indicates as follows:

> Although a defendant in a criminal proceeding has a constitutional and common law right to prevent a trial from being closed, we are aware of no Maryland case holding that a party in a contested administrative case has a general right to demand an open hearing. Nevertheless, if the employee waives confidentiality and requests an open hearing, the County Board should consider whether any other interests would justify a closed hearing. If it identifies such an interest relating to its own processes or other individuals (for example, protecting the privacy of employees not party to the proceeding), whether or not included among the exceptions in SG § 10-508, it may close the hearing. If it can identify none, it should open the hearing, to avoid a later claim of error (or even a due process violation) based on an arbitrary and unreasonable response. (Footnote omitted).

The local board asserts in its Motion for Summary Affirmance that there were other interests at stake in this case that justified a closed hearing. These interests were identified in the local board's response to the second of Appellant's Open Meetings Compliance Board complaints as follows:

> Local boards of education have no subpoena power; they rely on witnesses' voluntary agreement to testify at these proceedings. Information provided by them at hearings can, and frequently do, reveal private matters and sometimes in an attempt to undermine the testimony of particularly damaging witnesses, the reputation of individuals is questioned or impugned. There are instances of both in the record compiled in this case. For example, one witness was asked if he was currently on any medication and whether this medication was a psychoactive medication. There is no reason that such information should be made public or subject to public comment during oral argument. . . One witness was accused in pleadings of "demonstrated behavior" that, in the author's opinion, constituted "misconduct, insubordination, and willful neglect of duty." Witnesses are accused during the proceedings of slanting information, distorting relationships, and mis-characterizing documents. Credibility is often an issue in quasi-judicial proceedings and this kind of issue, by definition, is related to the reputation of individuals.

See 11/23/04 correspondence from Bresler to Varga. Based on the identified interests, we find that the local board has demonstrated a reasonable and rational basis for keeping the proceedings before the local hearing officer and oral argument before the local board closed in this matter.

Inapplicability of § 6-202 of the Education Article

Appellant maintains that his appeal is governed by the procedures described in § 6-202 of the Education Article which sets forth the grounds for suspension or dismissal of a certificated employee and affords the opportunity for a full evidentiary hearing prior to removal of the individual. Appellant maintains that § 6-202 governs because he currently holds a permanent certificate from the University of the State of New York in the areas of school district administrator, and school administrator and supervisor,[9] and a Division Superintendent License from the Commonwealth of Virginia.[10]

Section 6-202 applies to the suspension or dismissal of "a teacher, principal, supervisor, assistant superintendent, or *other professional assistant*." (Emphasis added). Section 6-201(e) requires a "professional assistant" to hold "an appropriate certificate from the State Superintendent issued in accordance with the rules and regulations of the State Board."

In *Walsh v. Montgomery County Board of Education*, MSBE Opinion No. 00-54, the State Board reviewed a factual situation similar to the one in the instant case. In *Walsh*, the Chief Information Technology Officer (CITO), a noncertificated employee, was responsible for the Student Information System. The CITO was terminated after the school system experienced problems with the system at the beginning of the school year and efforts to improve the system failed. The termination was based on the CITO's poor management, his lack of understanding of the urgency of the problem, and a lack of contingency planning.

The CITO appealed the termination based on the school system's failure to follow § 6-202. The State Board adopted the findings of the Hearing Examiner, who stated:

> "But, the law is clear that the appellate procedures of Section 6-202 apply only to the category of employees identified therein as 'professional personnel.' The law is equally clear that an individual must be certificated to be included in this category.
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> The Appellant was not certificated. Therefore, the Superintendent had the authority to dismiss Appellant directly.
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> The Appellant is not left without recourse. Although he

[9]Effective September 1, 1976.

[10]Effective July 1, 2001 to June 30, 2006.

> may not appeal his termination under the provisions of Section 6-202, he is entitled to appeal his termination under the provisions of Section 4-205 of the Education Article. (emphasis in original)."

Walsh at 5.

Here, the CBO position did not require certification. *See* Job Description and application. Nor did Appellant hold Maryland certification. Even if we assume that an interstate agreement on qualifications of educational personnel existed between Maryland and New York or Virginia at the time in question pursuant to § 6-604 of the Education Article, the fact that Appellant held certifications from those other states may have only made him eligible for Maryland certification. However, in order to obtain a Maryland certificate, an application must be filed with the Maryland State Department of Education with the requisite information. *See* COMAR 13A.12.01.10. Appellant never did so. Thus, Appellant was not a certificated professional assistant for purposes of § 6-202.[11]

Due Process Claims

Appellant also makes generalized due process claims. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court has recognized that the core requirement of due process is that an individual be given notice of the intended action and an opportunity to present the individual's response before being deprived of any significant property interest.

Here, in a conference on September 5, 2003, Appellant was advised of the reasons for the Superintendent's termination decision and given the opportunity to respond. Additionally, Appellant was afforded a full evidentiary hearing where he was represented by counsel and had the opportunity to present evidence, testimony, and argument. The hearing officer made a recommendation and the matter was subsequently reviewed by the local board. The local board heard oral argument and rendered a decision. At each level, the termination was upheld. Now the case is again being reviewed, this time by the State Board. In accordance with the principles articulated in *Loudermill*, we do not find that Appellant has established any due process violations.[12]

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[11]Nevertheless, Appellant did receive a full evidentiary hearing before the hearing officer appointed by the local board who determined that Appellant's termination should be upheld.

[12]Any procedural errors in the proceedings before the superintendent were cured by Appellant's full evidentiary hearing before the local hearing officer and review by the local board. *See Harrison v. Somerset County Board of Education*, 7 Op. MSBE 391 (1996) (failure to grant conference with superintendent or his representative in timely fashion was cured by local board's full evidentiary hearing on appeal).

Merits of Termination Decision

In *Livers v. Charles County Board of Education*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied*, 336 Md. 594 (1994), the State Board held that a noncertificated support employee is entitled to administrative review of a termination pursuant to § 4-205(c)(4) of the Education Article.[13] 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. *See* COMAR 13A.01.01.03E(1). This same standard applies to termination of professional noncertificated employees. *See also Walsh v. Montgomery County Board of Education*, MSBE Opinion No. 00-54.

The record in this case is replete with communications to Appellant regarding the critical nature of the construction schedule and the projected inability to meet the opening date for the 12th High School that he failed to bring to the attention of the superintendent or the local board. As the board noted:

> Dr. Venter does not allege that he brought the details of these communications to the attention of the Superintendent or the Board. Instead, he points to two memoranda which he says adequately summarized the situation and were sufficient to put the Board on notice as to the risks associated with the construction schedule that were mounting against timely opening of the 12th high school. The first was a memorandum to the Board of Education, dated June 30, 2003, which contained a single sentence warning: "Even the best case scenario puts tremendous pressure on the construction schedule based on information put together by the project's construction manager." The second consisted of a handwritten notation, dated July 1, 2003, by Dr. Venter to the Superintendent in reply to his request for an update. Dr. Venter wrote that he thought the Superintendent was going to share an earlier June 24, 2003, memorandum with the Board. The June 24, 2003 memorandum described a meeting between Dr. Venter and Chuck Lacey, director of the Citizens for Adequate School Facilities (CASF), a major opponent of the 12th high school project.
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> The first memorandum, June 30, provides no concrete information. It fails to provide either the Superintendent or Board with adequate

[13]In the 2002 session, the Maryland General Assembly amended § 6-510 of the Education Article making negotiation of due process procedures for discipline and dismissal of noncertificated employees permissive topics of bargaining. The Howard County school system has not yet negotiated such procedures. Therefore, the *Livers*' decision is controlling here.

> information about the consequences of decisions to be made that summer about delaying or awarding construction bids. There were no written communications to the Board or Superintendent following the increasing alarm sounded by the construction manager on July 7 and July 31 of 2003. The second memorandum, dated June 24, 2003, contained no information about construction schedules or the possible consequences of failing to award the site work during the summer.

Local Board Decision at pp. 4-5. Based on our review of the record in this case and for the reasons described above including those articulated by the local hearing officer, we find that the local board's affirmance of Appellant's termination is not arbitrary, unreasonable, or illegal.[14]

CONCLUSION

For all of these reasons, we affirm the termination decision made by the Board of Education of Howard County.

Edward L. Root
President

Dunbar Brooks
Vice President

Lelia T. Allen

JoAnn T. Bell

J. Henry Butta

Beverly A. Cooper

Calvin D. Disney

[14]Because we affirm Appellant's termination, Appellant's request for attorney's fees and for sanctions against board counsel are moot. Moreover, the State Board has no authority to order attorney's fees or to impose sanctions against an attorney.

Clarence A. Hawkins

Karabelle Pizzigati

Maria C. Torres-Queral

David F. Tufaro

June 29, 2005