

STANLEY STOUFFER,

Appellant

v.

WASHINGTON COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-37

OPINION

The Appellant, a high school teacher, contests the decision of the local board, which declined to consider the merits of the superintendent's affirmance of the principal's decision to place the Appellant on a Performance Improvement Plan ("PIP"). He also alleges that the PIP was imposed in retaliation for union activities. The local board submitted a motion to dismiss the retaliation claim because the issue was not raised below and a motion for summary affirmance of the board's refusal to review the matter because the matter was not an appealable issue. Appellant submitted a reply opposing the local board's motion in its entirety and seeking a remand to the local board for a decision on the matter. This Board heard oral argument on September 27, 2005.

FACTUAL BACKGROUND

The Appellant is a teacher at Williamsport High School in the Washington County Public Schools. ("WCPS") On March 10, 2003, he was informed in writing by his principal, John Davidson, that he had failed 73% and 75% of his students in two of his first semester courses. Overall he had failed 42.3% of all the students he taught in the first semester. The Appellant was one of ten teachers contacted by the principal about his concerns with their high failure rates. Principal Davidson addressed these high failure rates with all the teachers in a School Improvement Team meeting. He also held a one on one meeting with the Appellant. (Superintendent's Letter, 7/13/04).

The Appellant's failure rate declined in the second semester of the 2002 - 2003 school year. He failed only 9%, 27% and 58.8% of students in his classes. He had an overall failure rate of 29.5%, declining from the 42.3% of the first semester. (Superintendent's Letter, 7/13/04).

During the 2003-2004 school year, Appellant's rates of failure rose to 62% overall for the first semester. On February 2, 2004, the principal met with Boyd Michael, Executive Director of Secondary Education, to discuss the Appellant's and one other teacher's high failure rates. He explained that the Appellant had failed 18 out of 20 students in one class, 12 out of 25 in another, and 14 out of 27 in a third. His overall failure rate was 62.2%. Mr. Boyd recommended that the principal explore the need for a PIP for Appellant. (E-mail message, 2/4/04).

That same evening, the Appellant, serving as a representative of the Washington County Teachers' Association ("WCTU") on the Joint Evaluation Committee, became involved in an allegedly heated discussion with members of the WCPS staff concerning the union's opposition to the concept of a career ladder. (Appeal to State Board, p. 2, 12/23/04).

The principal and Clyde Harrell, Supervisor of Secondary Social Studies, met with the Appellant on February 4, 2004. They discussed the homework assignment policy, the grading policy, and the make-up work policy. They also discussed strategies for student improvement and offered to provide any assistance necessary. Subsequently, Mr. Harrell met or spoke with the Appellant on at least two other occasions to discuss his failure rate. (Superintendent's Letter, 7/13/04).

Instead of developing a PIP, as recommended by Mr. Michael, Principal Davidson issued a written reprimand to Appellant. The reprimand concluded as follows: "Please schedule a time when we can work together to develop a Professional[sic] Improvement Plan to address the problem [of high failure rates] by February 20, 2004."

A PIP was developed on February 25, 2004. The PIP identified areas targeted for improvement and indicated what actions Appellant should take to correct problem areas. (PIP, 2/27/04). The other teacher with high failure rates was not placed on a PIP. (*See* Letter of Tammy Turner, Esquire, counsel to WCPS, 9/28/04).

On March 10, 2004, Appellant filed a grievance, alleging the "the vehicle of discipline being chosen to address concerns over student failure rate, clearly a performance issue, is illogical and without Just Cause." (WCTA Grievance Form, 3/10/04). Principal Davidson upheld the grievance, agreeing that the issue was "performance based and therefore will be handled with the establishment of a performance improvement plan". The letter of reprimand was removed from Appellant's personnel file.

On March 12, 2004, Appellant appealed to Superintendent Betty Morgan, challenging his placement on a PIP. In that appeal, he noted ten specific reasons why his placement on a PIP was arbitrary and capricious. Among the reasons were:

- Of the 42 students who failed, 22 were on the first semester sports ineligibility list which means they had previously failed two or more subjects.
- Twelve of the 42 students were repeating the course for a 2nd or 3rd time.
- Students were excessively absent.

None of these ten reasons mentioned anything about union activity on Appellant's part.

On May 20, 2004, Superintendent Morgan held a hearing on the appropriateness of Appellant's placement on a PIP. After hearing from both parties, the superintendent found that the PIP was properly and fairly imposed. She found that the "PIP is an administrative tool used to assist employees and provide individualized instructional support to teachers...The PIP is non-disciplinary in nature."

The Superintendent also stated that: "[T]here was no evidence that the imposition of the PIP was in any way connected to Mr. Stouffer's union activities". (Letter of July 13, 2004).

Appellant appealed the superintendent's decision to the local board. In that letter Appellant stated: "The grounds for this appeal are set forth in my letter of March 12, 2004, to Dr. Morgan, a copy of which is appended hereto." (Appeal letter to local board, 8/10/04.)

The local board, by a 5 to 2 vote, declined to hear the appeal on its merits. The local board stated that "the purpose of a Performance Improvement Plan is to improve the performance of a teacher, such as Mr. Stouffer...We do not find that a teacher is "injured" in any way by placing him or her on a PIP". (Letter of November 30, 2004.) The local board also found that "placing a teacher on a PIP does not constitute injury in fact necessary for the teacher to have standing to pursue an appeal. Not every professional disagreement constitutes an appealable controversy within the meaning of §4-205 of the Education Article." (Letter of November 30, 2004.)

This appeal followed.

Standard of Review

Under § 4-205(c) of the Education Article, each county superintendent must decide all "controversies and disputes" that involve (1) the rules and regulations of the county board; and (2) the proper administration of the county public school system. That superintendent's decision is appealable to the local board and ultimately to the State Board.

This appeal involves the interpretation of § 4-205 of the Education Article. Specifically, the question before the State Board is: Is the imposition of a Performance Improvement Plan a controversy or dispute appealable under § 4-205 of the Education Article?

When this Board interprets a statute or regulation, the standard of review is governed by COMAR 13A.01.05.05E:

The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.

ANALYSIS

The Appealability of a PIP

Central to the decision of this case is whether the imposition of a PIP by a superintendent is a “controversy or dispute”. The local board contends that, because there is no legally cognizable injury to the Appellant caused by the PIP, this case does not rise to the level of a “controversy or dispute.”

The local board contends that “[A] PIP, like a classroom observation, is a supervisory tool, its primary purpose is not to rate, but to counsel and assist.” The local board claims that a PIP is designed to benefit a teacher by providing feedback and direction to improve instruction. The local board argues that the PIP, like classroom observations, is designed to provide professional direction and assistance to the professional employee and is part of the statutory responsibility of the county superintendent.

The local board’s analogy to a classroom observation report provides one analytical structure for deciding this case. In a 1990 decision, the State Board ruled that a negative classroom report was appealable to the superintendent, but no further. The State Board stated:

We believe the classroom observation report is a school-based function, and its review should be limited. The efficient operation of the school system requires that disputes with classroom observations have a prompt resolution at the school level. We therefore hold that disputed classroom observation reports may be appealed only to the local superintendent whose decision on the matter is final.

Strother v. Board of Education, 5 Op. MSBE 671, 673 (1990).

However, the Court of Special Appeals disagreed with this Board and reversed the decision. In reversing, the Court of Special Appeals held that the superintendent’s decision to uphold negative classroom observation reports was appealable as a controversy or dispute to the local board and ultimately to the State Board under §4-205. The Court stated:

It is difficult, therefore, to conceive of a legitimate argument that the local superintendent’s action in an appeal from an unfavorable classroom observation report does not constitute a decision of a controversy or dispute involving the school law, the rules and regulations of the county board, or the proper administration of the county public school system.

Strother v. Board of Education of Howard County, 96 Md. App. 99, 115 (1993).

In implementing that decision, the State Board was mindful of the great number of classroom observations that take place each year in the public schools. Accordingly, the State Board promulgated regulations to address the issue. COMAR 13A.07.07B provides:

B. If an observation report is a component of an unsatisfactory evaluation, the observation report may be appealed along with the unsatisfactory evaluation.

That regulation was a compromise between the need for efficient school operations and the ability of a professional employee to challenge a report that results in an unsatisfactory evaluation. This procedure was followed in the case of *Sheila Lewis-Moore v. Baltimore City Board of School Commissioners*, MSBE Op. No. 04-03 (2004)

The Appellant presents a different analytical structure for decision making. The Appellant argues that the placement of a teacher on a PIP must be appealable because of the detrimental effect of its inclusion in the teacher's personnel file. In essence, he asserts that he has sustained a legally cognizable injury.

As the Appellant noted in his Response and in oral argument, placement on a PIP is usually the culmination of the observation and evaluation process and typically occurs after an employee has been evaluated as unsatisfactory. But, even if it is used as a preemptive measure to prevent an employee from ultimately receiving an unsatisfactory rating and is intended as assistance to the employee, the Appellant argued that placement of the PIP in his/her file permanently has negative connotations with respect to performance. It follows, he argues, that an employee would not be placed on an *improvement* plan if the employee's performance were satisfactory. As with a negative observation report, the PIP remains in the employee's personnel file.¹

The Appellant also argued that, in this case, the utilization of the PIP was in lieu of the entire normal observation and evaluation process and as such is more closely aligned to an unsatisfactory evaluation.² It should be noted that the Negotiated Agreement between the local board and the union describes the use of a PIP in Article 9, entitled "Unit Member Evaluation". It states:

9.7 B. The appropriate administrator and the unit member will develop a specific written plan ("PIP") for improvement of the noted deficiencies....

¹The employee may place a reply to the PIP in his/her personnel file if he/she disagrees with the PIP. Negotiated Agreement ¶ 9.7G.

²According to WCPS procedures, tenured teachers are formally evaluated a minimum of two years during the term of their certificate or within a five-year time period with a minimum of two observations and one evaluation each year in which an evaluation is done. The 2003-2004 school year was not a regular evaluation year for the Appellant.

E. It is the responsibility of the unit member to work to improve the noted deficiencies.

The Appellant contends that, just as an unsatisfactory evaluation is properly subject to the appeal process, the use of a PIP in this manner is a matter for appeal under §4-205. He seeks, therefore, a remand to the local board for a decision on the merits of his case.

To summarize both positions, on the one hand the local board argues that the imposition of a PIP is never appealable because it is a valid administrative tool designed to help employees, not to impact them in a negative way. Therefore, it cannot create a controversy or dispute. On the other hand, the Appellant argues that a PIP always has a negative impact because it is like an unsatisfactory evaluation, remains in the employee's personnel file, and thus is an appealable controversy or dispute.

It is the opinion of this Board that neither position, in the absolute, is correct. We start with the proposition that the imposition of a PIP is not, *a priori*, a negative event. It is certainly possible that a PIP can be a positive event providing the teacher with instructional support as a way to avoid a negative evaluation.

This Board agrees that a PIP is a valuable tool that school systems use to assist an employee to improve instructional strategies and to improve performance. In that regard, it is much like a written classroom observation in which a principal comments on and offers advice to the teacher on improving classroom instruction. Indeed, a PIP usually results from the evaluation and observation process. Thus, like a classroom observation, when a PIP results from the evaluation and observation process but is not coupled with an unsatisfactory evaluation, it is our opinion that the PIP itself is not appealable. We so hold because the PIP itself is not an inherently negative event,³ even if it becomes a part of the employee's personnel record.

In this case, however, the PIP was not a part of the usual evaluation and observation process. It is our opinion that when a PIP is not a part of that evaluation/observation process, we will look to the facts of the case to determine whether it is a negative event that results in an appealable controversy or dispute.

This PIP was initially imposed along with a reprimand. It focused on high failure rates without a meaningful explanation as to why the grades that the Appellant issued were unfair, inappropriate or undeserved. And, finally, out of the ten teachers who had high failure rates in the 2002-2003 school year, only the Appellant was ultimately placed on a PIP. Indeed, in the 2003-2004 school year, another teacher with high failure rates was not placed on a PIP. All of those facts raise doubts in the mind of this Board that the imposition of a PIP was solely for performance improvement.

³If a PIP is coupled with an unsatisfactory evaluation, it is, of course, appealable.

We want to emphasize here that we encourage the use of PIPs to improve performance and to maintain teacher accountability and nothing in this decision is intended to discourage school administrators from the constructive imposition of a performance improvement plan both within the usual observation and evaluation process and outside of that process to address immediate performance issues. But, when a PIP occurs outside of the observation and evaluation process, we will scrutinize the circumstances. Thus, although in almost all circumstances, the imposition of a PIP will not rise to the level of a controversy or dispute, in this narrow class of cases in which a PIP is imposed outside the usual observation and evaluation process, without adequate explanation, and for what appears to be disciplinary purposes, the matter rises to the level of a controversy or dispute and is appealable.

The Motion to Dismiss

The local board moved to dismiss Appellant's claim that his placement on a PIP was in retaliation for his union activities on the basis that Appellant did not raise the issue before the local board and thus has waived the issue. Appellant argues that while the letter of appeal did not expressly allege that the action complained of was in retaliation for Appellant's union activities, the issue was clearly argued before the superintendent. This is evidenced by the notation in her decision: "There is no evidence that the imposition of the PIP was in any way connected to Mr. Stouffer's union activities". A copy of the superintendent's ruling was appended to the appeal to the local board. Thus, we disagree that this issue was not raised before the local board. The motion to dismiss is denied.

CONCLUSION

Therefore, we remand this case to the local board for a hearing on the merits.

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October 26, 2005