

CHARLITA MAYHAND

Appellant

v.

PRINCE GEORGE'S COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 08-39

OPINION

In this appeal, Charlita Mayhand (Appellant) challenges the decision of the Prince George's County Board of Education (local board) upholding her termination as a food services manager. The local board has filed a Motion for Summary Affirmance arguing that its decision was not arbitrary, unreasonable or illegal. The Appellant has filed a Response to the local board's motion.

FACTUAL BACKGROUND

During the 2004-2005 school year, the Appellant worked at Fairmont Heights High School in Prince George's County Public Schools (PGCPS) as a food service manager.¹ The Appellant began her employment with PGCPS as a food services substitute on February 21, 2002. She was promoted to a food service satellite leader on March 14, 2002, acting food service manager on October 1, 2003, and then to permanent food services manager on December 13, 2004. (Union Exh. A.)

As food services manager, the Appellant was responsible for, among other things, ordering food and drinks that are sold to students; supervising cashiers; establishing and posting work schedules; reconciling cash registers at the end of each day; counting and reconciling final cash counts from cashiers; preparing daily cash deposits; and summarizing cash balances, including any overages or shortages, on a Daily Report of Activities. (Supt. Exh. 6.)

From December 2004 to February 2005, Yvonne Mganga, Area Supervisor, conducted routine observations of the kitchen facilities at Fairmont Heights and completed food service reports to summarize her findings. Daniel Townsend, Director of Food and Nutrition Services, also collected and reviewed the food service reports.

¹ During this same time, the Appellant also helped at two satellite schools in the county, but it is only the Appellant's work at Fairmont Heights that is at issue in this appeal.

Ms. Mganga's first observation was on December 9, 2004, four days before the Appellant was promoted to food services manager. In her food services report, she documented concerns in the following areas: time records and time sheets not being completed according to procedures; work schedules not being completed and posted according to procedures; food orders to the vendor not matching documents submitted to the Food Services Office; improper food handling; improper food holding temperatures; lack of temperature charts; production records not being completed; production records being manipulated after the fact; and the selling of Save-A-Lot carbonated sodas on the cafeteria's food line to students in violation of federal and state regulations and the requirements of school system policy. (Hearing Transcript ("Tr.") at 20; Supt. Exh. 1, 4.)

After reviewing this food service report, Mr. Townsend was concerned by Ms. Mganga's observations and decided to conduct a comparative analysis between Fairmont Heights and two other schools of like size. He noted that Fairmont Heights was purchasing a significantly higher volume of food from the school system vendors than the two other schools, but had a "dramatically less cash deposit" than the other schools. (Tr. at 23-24.) Consequently, Mr. Townsend requested that a security video camera to be placed in the kitchen manager's office at Fairmont Heights to view the process of counting cash. (Tr. at 24.) The camera was installed in mid-February 2005 and management continued to observe operations in person. (*Id.*)

Ms. Mganga conducted additional observations on January 10, 2005 and January 24, 2005. Her food service report noted additional concerns in the following areas: missing bank deposit slips for several dates; not following daily deposit procedures; items on the fast line not being recorded on production sheets; and work schedules not being posted. (Tr. at 25; Supt. Exh. 1.)

On February 10, 2005, Ms. Mganga conducted another observation. Her food service report documented some repeat concerns from the previous observations, including time records and time sheets not being completed according to procedures, which resulted in no leave being charged to staff who were out of the kitchen; and shortages on the cashier's report. (Tr. at 27; Supt. Exh. 3, 4.)

The Appellant received a copy of each food service report, but refuted some of the observations. Specifically, the Appellant maintained that her work schedules were posted, albeit in a different location from where Ms. Mganga looked, and that she did not sell the unauthorized soda to students, as Ms. Mganga reported. Further, the Appellant believed that some of the unsatisfactory areas were not fully her responsibility (Tr. at 88-90.) Mr. Townsend testified that he counseled the Appellant on the inappropriateness of the findings of each report. (Tr. at 23, 27, 30, 57.)

Ms. Mganga issued a letter of warning to the Appellant on February 16, 2005. Ms. Mganga summarized the results of the four observations and identified five areas in which the Appellant was failing to follow instructions: banking; production records; signing in and out on the sign in sheet; posting work schedules; and serving appropriate foods. Ms. Mganga indicated

that the Appellant's failure to make corrections in these areas could lead to disciplinary action against her. (Supt. Exh. 9.)

Shortly thereafter, on February 22, 2005, the security video that was installed in the kitchen manager's office captured footage of the Appellant recounting cash given to her by one of the cashiers, and placing a certain amount of cash from the cash drawer into her shirt pocket. (Tr. at 37.) After reviewing this footage, Mr. Townsend recommended the Appellant's termination.

The Appellant participated in pre-termination meetings with school officials on March 1, 2005 and early April 2005. (Tr. at 40, 104.) Subsequently, on April 13, 2005, the Appellant was notified in writing by John Robinson, Director of Labor Relations and Personnel Operations, that she was terminated for the following reasons:

1. Incompetence and unsatisfactory performance;
2. Theft of Prince George's County Public Schools' property;
3. Knowingly giving false statements to supervisors or the public;
4. Violation of administrative regulations or department rules; and
5. Conduct which reflects unfavorably on the Prince George's County Public Schools as an employer.

(Appellant's Att. #1.)

The Appellant appealed the termination to the local superintendent, Dr. John Deasy. A hearing was held before the local superintendent's designated Hearing Officer, Dorothy B. Stubbs, on February 13, 2007. The Appellant was represented by Damon Felton, Esq., legal counsel at the Maryland State Teachers' Association. In addition to the Appellant, Susan Lesser, the field representative for Local 2250, testified on the Appellant's behalf. Mr. Townsend testified on behalf of the school system.

On March 27, 2007, the hearing officer issued a decision that recommended upholding the Appellant's termination. Among other things, the hearing officer noted that several of the concerns noted on Ms. Mganga's food service reports from December 2004 to February 2005 were repeat violations. (Hearing Officer Report at 8.) The Appellant was well aware of policies and procedures in each of the areas, and generally acknowledged that the ongoing concerns of each observation were shared with her. (*Id.* at 8-9.) In addition, the Hearing Officer found that the February 22, 2005 video recording did show the Appellant placing cash in her pocket and that act, while it may not have been theft, was unauthorized and in direct violation of school policies and procedures governing the handling of cash. (*Id.* at 9, 11.) Thus, the Hearing Officer concluded that the Appellant's violation of the cash handling policy, combined with the other concerns noted in the food service reports, was sufficient for the administration to conclude the Appellant could not be entrusted with managing a kitchen operation on behalf of the school system. (*Id.* at 12.)

On April 11, 2007, the local superintendent adopted the hearing officer's findings and issued a final order upholding termination. The Appellant appealed the local superintendent's decision to the local board. After reviewing the exceptions filed by the Appellant, the local superintendent's response, and hearing oral argument from both parties, the local board issued a decision on September 20, 2007 affirming the local superintendent's decision. This appeal to the State Board followed.

STANDARD OF REVIEW

The State Board has held that a non-certificated support employee is entitled to administrative review of a termination pursuant to §4-205(c)(3) of the Education Article. See *Livers v. Charles County Bd. of Ed.*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md.App. 160, *cert. denied* 336 Md. 594 (1994). The standard of review that the State Board applies to such a termination is that the local board's decision is considered prima facie correct and the State Board will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A; *Whittington v. Prince George's County Bd. of Ed.*, MSBE Op. No. 07-33 (Aug. 29, 2007).

The Appellant maintains the burden of proof of demonstrating by a preponderance of the evidence that the local board's decision is arbitrary, unreasonable, or illegal. A decision may be arbitrary or unreasonable if it is contrary to sound educational policy, or a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached. In addition, a decision may be illegal if it is one or more of the following:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

COMAR 13A.01.05.05B-D.

ANALYSIS

In her appeal to this Board, the Appellant presents four issues for review: (1) whether, based on the proceedings and record before the local superintendent and local board, there is a sufficient basis for her termination; (2) whether she should have been provided with progressive discipline, instead of termination, and given adequate time to make necessary improvements; (3) whether the local board properly heard her §4-205 appeal; and (4) whether the local board inappropriately excluded evidence and/or arguments in considering her appeal.

We will address each of the Appellant's issues below.

(1) Did the Record Contain Sufficient Evidence to Support the Termination?

Most of the Appellant's arguments in her appeal before this Board revolve around the grounds for termination listed in the April 13, 2005 termination letter. The Appellant contends that the reasons for termination were not substantiated at the termination hearing. She emphasizes that Mr. Townsend testified that the main reason the Appellant was terminated was for her suspected theft of cash at Fairmont Heights (Tr. at 65.); because there was no proof, however, that the Appellant stole money from the school, the decision to terminate her should have been overturned.

The State Board's review in this appeal is of the local board's decision, not the grounds for termination initially provided to the Appellant. The local board upheld the decision of local superintendent, who adopted the findings and recommendations of the hearing officer.

At the full evidentiary hearing held before the hearing officer, the Appellant had the opportunity to prove that she should not have been terminated for the causes listed in the April 13, 2005 letter. After hearing all of the testimony, making necessary credibility determinations and giving due weight to the evidence, the hearing officer concluded that insufficient evidence was presented regarding theft, and she would not make any definitive finding that the Appellant's pocketing of money that was captured on the video constituted theft. (Hearing Officer Report at 9-12.)

However, the hearing officer ultimately concluded that, notwithstanding the failure to prove the alleged theft, the school system presented sufficient evidence to support a finding of incompetence. Specifically, the hearing officer found that the Appellant knew of the various concerns raised in the food service reports and was counseled about them on more than one occasion. (*Id.* at 11.) Further, the hearing officer concluded:

[T]here is no question [the Appellant] was in violation of policies and procedures governing the handling of cash. Even accepting Appellant's argument that she was simply reimbursing herself for money she had "loaned" the cash register that day, the Hearing Officer finds that she was not authorized to do so. If she had concerns about the sufficiency of the change fund at the school, she should have pursued the appropriate correction for that problem with her supervisor. The very reason procedures exist to prevent employees from co-mingling their own monies with school system funds is to prevent any perception of ill intent. The Appellant, as a manager, should have set a clear example for her staff that such conduct, or even the perception of such conduct, is not acceptable. Moreover, Appellant knew or should have known that her selling

of Save-A-Lot carbonated sodas to students violated federal and state regulations and school system policy. . . .

This, taken together with the several other concerns noted in the Food Service Reports, is sufficient to support the Administration's decision in this matter. The Hearing Officer finds it reasonable that the Administration has determined that the Appellant cannot be entrusted with managing a kitchen operation on behalf of the school system.

(*Id.* at 11-12.)

Based on a review of the record, it is our view that the local board's decision, upholding the findings of the hearing examiner was not arbitrary, unreasonable or illegal.

(2) Did the Appellant's Performance Warrant Progressive Discipline?

The Appellant also argues that her alleged performance did not warrant termination, but progressive discipline instead. She argues that she should have been given more time to improve the areas of concern, or at the very least, have been demoted or reassigned to another position. The Appellant states that it is inherently arbitrary, unreasonable and illegal not to provide progressive discipline to an employee who was promoted four times in three years, the most recent of which occurred three months before her termination.

In addition, the Appellant contends that her case is analogous to *Lum v. Washington County Board of Education*, MSBE Op. No. 84-9 (Mar. 28, 1984), and that the State Board should reach a similar result here. In *Lum*, the State Board overturned the decision of the local board terminating Ms. Lum for incompetence. Ms. Lum was a veteran teacher of 20 years, had been given approximately four months to respond to the several performance concerns raised in her evaluations and was shortly thereafter recommended for termination for her failure to address the performance concerns. The State Board determined that in light of the Appellant's "long tenure with the school system and her relatively satisfactory evaluations during this period", she should not have been dismissed for incompetence, but should be reinstated and given a full school year to respond to the noted deficiencies in her evaluations.

It is our view that the State Board's decision in *Lum* is not controlling here because of the standard articulated by the Court of Appeals in *Maryland Aviation Administration v. Noland*, 386 Md. 556 (2005). In *Noland*, the appellant was terminated from his position for one act of misconduct, despite over 10 years of a good work history with the agency. He argued that the agency should have implemented its progressive discipline policy instead of terminating him.

Ultimately, however, the Court of Appeals held that an administrative agency's decision regarding what sanction to impose against an employee is a discretionary function that must not be modified or overturned on appeal except for the most egregious circumstances:

[W]hen the discretionary sanction imposed upon an employee by an adjudicatory administrative agency is lawful and authorized, the agency need not justify its exercise of discretion by findings of fact or reasons articulating why the agency decided upon that particular discipline. A reviewing court is not authorized to overturn a lawful and authorized sanction unless the disproportionately of the sanction or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary and capricious.

(*Id.* at 580-81, internal quotations and citations omitted.) Moreover, the Court distinguished between the findings of fact that an agency must present to substantiate its allegations of misconduct against an employee, which are required; and findings of fact to justify the sanction imposed, which are not. (*Id.* at 579-580.)

There are many parallels between the standard articulated for a reviewing court in *Noland* and the State Board's standard of review. The State Board sits in a quasi-judicial capacity in reviewing the local board's decision, considers the local board's decision to be prima facie correct, and will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. Applying the *Noland* standard to this appeal, it is the Appellant's burden to show by a preponderance of the evidence that the local board's act of terminating her, was so disproportionate to the misconduct or so "extreme and egregious" that the State Board should deem it arbitrary or unreasonable.

A review of the record indicates that the Appellant, as a manager, was aware of local policies and procedures regarding the handling of cash and failed to follow those policies, even when she supposedly knew her cash counting procedures were being taped by a security video. Moreover, as noted by the hearing officer, the Appellant was aware of the performance concerns detailed in the food service reports and counseled about them. In light of the record and the trust required of an employee in the Appellant's position, it is our view that she fails to demonstrate that the local board's decision to terminate her was arbitrary, unreasonable or illegal.

(3) Were Proper Appeal Procedures Followed?

The Appellant argues that the local board could not adopt the decision of the local superintendent's hearing examiner because the local board itself did not "appoint" the hearing examiner. However, based on a review of the record, it is our view that the local board's appeal procedure was in accordance with Maryland law. The Appellant in this case is a non-certificated employee, and the process that applies in this appeal is under Education Article §4-205(c). *See*

Livers, 6 Op. MSBE 407 (1992). There is no legal requirement under §4-205(c) that the local board appoint the hearing examiner before it can rely on the evidence considered by that individual.

(4) Were Arguments Improperly Excluded from the Local Board's Review?

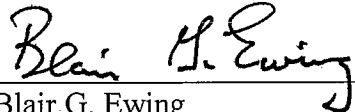
The Appellant finally challenges some aspects of the local board's review of her appeal. She takes issue with the local superintendent's motion that seven of the 12 exceptions she filed before the local board be stricken because they constituted testimony, not exceptions. In addition, the Appellant states she was "ambiguously informed that the appeal would be limited to the record below, without an explanation of exactly what could or could not be considered on this appeal..." (Appellant's Response, at 4-5; Appellant Att. #4.)

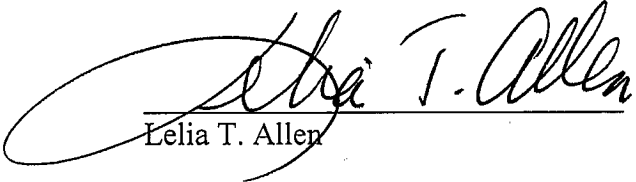
We see no issue with the objections the local superintendent made to some of the Appellant's exceptions, or the fact that the record in the case was limited to information that was considered prior to oral argument before the local board. The record indicates that each of the Appellant's exceptions related to testimony that was provided at the Appellant's termination hearing, a transcript of which was available for the local board's review. The local board maintains the discretion to weigh all appropriate evidence presented on appeal and to decide accordingly.

CONCLUSION

For these reasons, we affirm the local board's decision upholding the Appellant's termination as a food services manager.


James H. DeGraffenreidt, Jr.
President


Blair G. Ewing
Vice President


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Dunbar Brooks

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August 26, 2008