

WARDELL HARMON,

Appellant

v.

BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 03-10

OPINION

Appellant, a tenured teacher at the Laurence G. Paquin Middle/Senior High School,¹ appeals the unsatisfactory rating he received on his 2000-01 annual evaluation, maintaining that there were procedural flaws concerning the time lines of his evaluation and observations that mandate reversal of the evaluation decision. The local board has submitted a Motion for Summary Affirmance, maintaining that its decision upholding Appellant's rating on his 2000-01 annual evaluation is not arbitrary, unreasonable, or illegal. Appellant has filed an opposition to the local board's motion.

FACTUAL BACKGROUND

During the 2000-01 school year, Appellant was absent from work due to various health problems: October 2 through October 17, 2000; October 23 through 24, 2000; and November 30, 2000 through April 16, 2001. Appellant was also suspended for five days beginning October 25, 2000.

Appellant's goal setting conference, which was to have occurred in October 2000, was rescheduled per Appellant's request and conducted on November 2, 2000. Additionally, per Appellant's request, his performance improvement plan conference which was scheduled to take place on November 2, 2000, was rescheduled and conducted on November 17, 2000. Thereafter, at a pre-observation conference on November 28, 2000, Appellant was advised that his classroom was going to be formally observed the following day. Based on a request from Appellant's BTU representative that Appellant be given additional time to prepare his materials for the formal observation, the observation was rescheduled for November 30, 2000.² However, that observation never took place because Appellant went out on extended leave beginning November 30, 2000.

¹Lawrence G. Paquin School is a Baltimore City public school for expectant and for young mothers.

²In the pre-observation conference, the special education coordinator told Appellant that she wanted to review his attendance record, grade book, anecdotal records, etc. These records were supposed to be maintained on a daily basis. There should have been no need to "prepare" these materials. See memo of Abernathy, 12/29/00.

By letter of December 4, 2000, Dr. Stith, the principal, advised Appellant as follows:

You were scheduled for your first formal observation on Thursday, November 30, 2000, second period (revised Focus Session Schedule). We were unable to conduct this observation because you called Ms. Gracie Dawkins, Assistant Principal, the morning of November 30th from the emergency room of a hospital because of chest pains.

Your formal observation will be scheduled for **the first day you return to work.**

Additionally, you are to bring or fax, as soon as possible, any and all documents which support your absences as of last **Thursday, November 30, 2000** up to, and including the date of your medical release to return to work.

Failure to respond and comply with this request will cause your absences to be considered unauthorized, and may result in disciplinary actions up to and including termination from the Baltimore City Public School System. (Emphasis in original).

After Appellant's return from absence on April 17, 2001, a pre-observation conference was held and observations of Appellant's classroom were conducted on May 16, 2001 and June 13, 2001. On June 15, 2001, Appellant received an unsatisfactory rating from his principal, Dr. Rosetta Stith, on his annual evaluation for the 2000-01 school year.

On June 15, 2001, Appellant filed a Uniform Grievance Report alleging that procedural flaws existed concerning the time lines of his observations and evaluation in violation of Article 9.1.C of the negotiated agreement between the Baltimore Teachers Union ("BTU") and the local board. The grievance was heard at Levels I, II, and III, and was denied at each level.

On appeal to Level IV, the matter was heard by hearing examiner, Elise Jude Mason, who also denied Appellant's grievance.³ In her report, Hearing Examiner Mason states, in part:

³The Level IV grievance hearing was originally convened before hearing examiner Benjamin L. Brown who heard testimony, admitted documentary evidence, and made a taped record of the proceedings. Mr. Brown passed away prior to preparing his written findings and recommendation. The parties agreed that another hearing examiner would review and consider the existing record and evidence, and prepare written findings and a recommendation to the local board.

The essential facts do not appear to be in dispute: as a result of Grievant's absences due to illness during the school year beginning September, 2000, virtually all of the timelines mandated for "observations" could not be adhered to. Additionally, other timelines mandated by the performance based evaluation Handbook were not adhered to. The timelines for the goal setting conference and performance review were waived either because of Grievant's absence or his requests for additional time to prepare. Grievant did not grieve these timeline violations. Grievant returned to duty on April 17, 2001, following an extended absence due to illness; the extended period of absence began on November 30, 2000. Therefore, Grievant's initial "observation" could not occur by December 1, as required by the Handbook, and his second "observation" could not occur by April 1. When Grievant returned to duty on April 17, 2001, he resumed work two days beyond the deadline, in Article 9.1.C of the Agreement, which requires that tenured or non-tenured teachers are to be notified by April 15 of a year-end unsatisfactory performance evaluation. The provision also states that an unsatisfactory evaluation may not be issued after that date. Despite this, "observations" were conducted, which resulted in Grievant being evaluated and rated "unsatisfactory" for the 2000-2001 school year.

Hearing examiner Mason concluded that BCPSS made every effort to adhere to those timelines, but that adherence to those timelines was impossible based solely on Appellant's conduct that included Appellant's request for extensions of deadlines in October and November, 2000, as well as his extended absence from his employment. Thus, she concluded there was no procedural violation and Appellant's unsatisfactory rating on his 2000-01 annual evaluation should stand. The local board unanimously affirmed the recommendation of the hearing officer denying the grievance.

ANALYSIS

In this appeal, Appellant maintains that in upholding his unsatisfactory annual evaluation, the local board violated the negotiated agreement provision between BTU and the local board regarding time lines for issuance of an unsatisfactory evaluation. Article 9.1C of the negotiated agreement between BTU and the local board states that "[t]enured and non-tenured teachers shall be notified of a year-end unsatisfactory performance evaluation on or before April 15. No unsatisfactory performance evaluations may be issued after that date." Appellant therefore asserts that the evaluation which was issued on June 13, 2001, must be voided.

Appellant argues that this case is comparable to the circumstances set forth in *Bd. of Educ. of Baltimore County v. Ballard*, 67 Md. App. 235 (1986). *Ballard* concerned an officially promulgated personnel regulation of the local board entitled “Procedure for Penalizing or Terminating Teachers on Tenure Whose Work is not Satisfactory.” The applicable policies and procedures contained detailed provisions concerning matters such as classroom observations, notice, evaluation, and termination. The procedures also made clear that their purpose was to confer “important procedural benefits and safeguards” upon tenured teachers. *Id.* at 243. In *Ballard*, the school system made virtually no attempt to comply with any of the procedural requirements. Therefore, based on the *Accardi* doctrine, the Maryland Court of Special Appeals found that the local board’s action in violation of the regulation could not stand.⁴

We believe, however, that this case is governed by *Bd. of Sch. Comm’rs of Baltimore City v. James*, 96 Md. App. 401 (1992).⁵ *James* concerned two tenured Baltimore City teachers, each of whom was terminated by the school system for incompetence. Each teacher argued that the termination decision should be reversed because the local board violated its own procedures by failing to have a formal evaluation of each teacher conducted by a non-school based observer in accordance with the Baltimore City Public Schools Procedures for Evaluation of Teaching Staff (“Procedures”). The Court found that violation of the procedures did not automatically mandate reversal of the decision to terminate the teachers at the end of the school year because the primary purpose of the procedures was not to confer procedural benefits upon teachers. *Id.* at 425:

Thus the title, stated purpose, and effect of the Procedures and the finding by the State Board that their primary purpose was “not to confer procedural benefits,” as well as the fact that there is no evidence that they were officially promulgated, lead us to conclude the State Board was correct in finding that the violations of the Procedures in the 1988-89 year did not ‘automatically mandate

⁴The *Accardi* Doctrine provides that “[a]n agency of the government must scrupulously observe rules, regulations, or procedures which it has established.” *U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Administrative action may be subject to invalidation because of the agency’s “failure to exercise its own discretion contrary to existing valid regulations.” *Id.* at 268 (Emphasis in original). The *Accardi* doctrine applies to regulations that are intended to confer important procedural benefits upon an individual as opposed to regulations adopted to ensure the orderly transaction of business before the agency. *Singletary v. Maryland State Dept. of Public Safety and Correctional Services*, 87 Md. App. 405, 418-19 (1991). Thus, not every alleged violation of an agency’s internal procedural policy invokes the *Accardi* doctrine. Although the Maryland Court of Special Appeals has recognized or applied the *Accardi* doctrine in numerous opinions, only recently has the Maryland Court of Appeals confirmed that Maryland administrative law reflects a similar doctrine. *Maryland Transp. Auth. v. King*, 369 Md. 274, 285-286 (2002).

⁵James was consolidated with *Bd. of Sch. Comm’rs of Baltimore City v. Davis*.

reversal' of the decisions to termination Ms. James and Ms. Davis at the end of the 1989-90 year.

A review of the provisions in the Performance Based Teacher Evaluation Handbook for the Baltimore City Public School System demonstrates that the evaluation system is not designed primarily to confer procedural benefits on teachers. The Handbook indicates that “[t]he purpose of the New Performance-Based Teacher Evaluation System is to monitor teacher effectiveness and quality with the overall objectives of improving instruction, increasing student achievement, and encouraging professional growth.” Handbook at 7. See *Bd. of Educ. of Anne Arundel County v. Barbano*, 45 Md. App. 27 (1980) (Primary purpose of Guidelines for the Evaluation of Probationary Teachers prescribed by the State Board was to bestow upon students education by teachers of unquestionable competency and therefore absolute adherence to such guidelines was not required when determining not to renew a probationary teacher’s contract.); *Powell v. Bd. of Educ. of Montgomery County*, MSBE Opinion No. 01- 04 (January 31, 2001) (State Board found that the Teacher Evaluation System Handbook for Montgomery County Public Schools did not primarily confer important procedural benefits upon the appellant.).

Despite the April 15 deadline set forth in the negotiated agreement, we find from our review of the record in this case that compliance with that deadline was impossible through no fault of the school system. Appellant was absent from his job for health reasons for an extended period from November 30, 2000 through April 16, 2001. During Appellant’s absence, the school system could not perform classroom observations, nor could the school system produce an annual evaluation by April 15, given Appellant’s return date of April 17. Instead, in light of Appellant’s absence, the school system set forth a reasonable schedule for Appellant’s classroom observations and final evaluation upon his return to work. Moreover, by letter dated December 4, 2000, the principal had notified Appellant that he would be observed on the first day of his return to work. The make up observations occurred on May 16, 2001 and June 13, 2001, and the final evaluation was ultimately rendered on June 15, 2001. We find these timely under the circumstances.

Thus, we believe that Appellant’s prolonged absence from work constituted a constructive waiver of the April 15 deadline. We further believe that the local school officials acted promptly and efficiently under the circumstances. We therefore do not find that the local board’s decision is arbitrary, unreasonable, or illegal.

CONCLUSION

For these reasons, we affirm the decision of the Board of School Commissioners of Baltimore City upholding the unsatisfactory performance evaluation of Appellant.

Marilyn D. Maultsby
President

JoAnn T. Bell

Clarence A. Hawkins

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

Reginald L. Dunn participated in the deliberations on this appeal and voted to affirm the local board decision, but passed away prior to the issuance of this opinion.

DISSENT

We believe that the failure to comply with the April 15th deadline for the issuance of an unsatisfactory evaluation specified in the negotiated agreement between the BTU and the Baltimore City Board of School Commissioners is a violation of the Accardi Doctrine as set forth in U.S. ex rel *Accardi v. Shaughnessy*, 347 U.S. 3260 (1954); *accord, Bd. of Educ. of Baltimore County v. Ballard*, 67 Md. App. 235 (1986). In our view, the purpose of the April 15th deadline is to confer an important procedural benefit and safeguard for teachers.

For these reasons, we would reverse the unsatisfactory evaluation upheld by the Baltimore City Board of School Commissioners.

Philip S. Benzil

Dunbar Brooks

Walter S. Levin, Esquire

February 26, 2003