

DOUGLAS A. KUKUCKA,

Appellant

v.

HARFORD COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 03-32

OPINION

In this appeal, Appellant, a noncertificated employee, challenges his termination for insubordination and creating a hostile work environment. Following a five-day evidentiary hearing at which Appellant was represented by counsel, the local board upheld the superintendent's termination decision. Among other things the board found that Appellant failed to follow the reasonable requests of his supervisor who was the Director of Facilities for the school system, wilfully undermined the authority of his supervisor, and engaged in a pattern of behavior that created a tense office atmosphere and sense of distrust and suspicion that permeated the work place.

The local board has submitted a Motion to Dismiss and/or for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant has submitted a reply opposing the local board's Motion.

FACTUAL BACKGROUND

Appellant began his employment with Harford County Public Schools ("HCPS") in April 2001, as an Assistant Supervisor in the Facilities Management Department. Appellant had the responsibility for overseeing employees in the heating, ventilating, air conditioning, plumbing, electric, and other mechanical trades. Appellant and the other assistant supervisors reported to Jeffrey Ayers, the Director of the Facilities Management Department.

Approximately one month after Appellant assumed his position with HCPS, an issue arose regarding his personal use of the cell phone that was issued to him by the school system for work related purposes. On May 24, 2001, Appellant met with Ayers, his immediate supervisor, and Joseph P. Licata, Assistant Superintendent for Operations and Ayers' supervisor, to discuss Appellant's improper cell phone use. The proper use of a school system issued vehicle was also discussed. At the meeting, Appellant became distressed and said, "You are not going to do this to me. You people won't persecute me like this." (Tr. Vol.1, pp. 108-110).

Additionally, during the meeting Appellant gave Licata a handwritten statement contending that he had received derogatory and inflammatory comments about his religion and had been verbally harassed because he had tried to deal with an over-pressurization safety

problem at Edgewood Elementary School. Appellant demanded that Licata sign the statement which contained an apology from the Facilities Department. Licata refused to sign the apology and advised Appellant that the meeting was not convened to address the contents of Appellant's statement. (Tr. Vol. 1, pp. 111-114).

Thereafter, in July 2001, Appellant made an unscheduled visit to the HCPS Risk Management Officer, Melanie Wernig, to inquire about the phrase "Do Not Disturb" as it relates to asbestos insulation contained in some of the older HCPS school buildings. Wernig contacted Ayers to advise him that the meeting had taken place and to advise that some of the questions posed by the Appellant should have been directed to the Facilities Department. (Tr. Vol. 1, pp. 40; 122-123).

In response, Licata instructed Appellant to provide him with information regarding Appellant's safety concerns. (Tr. Vol. 1, p. 118); *See* 8/8/01 memorandum from Licata to Kukucka. Appellant responded to the request, indicating safety concerns about asbestos at Aberdeen High School and the over-pressurization system at Edgewood Elementary School.¹ Among other things, Appellant also took the opportunity to reiterate his demands for an apology from the Facilities Department; to contend that Wernig improperly reported their meeting to Ayers with "malicious intent"; and to request a copy of all note taking during meetings with Ayers, Wernig, and Patti Jo Beard, Assistant Supervisor of Planning and Construction. *See* 8/9/01 memorandum from Kukucka to Licata.

Appellant's safety concerns were fully investigated and found to be meritless.² With regard to Appellant's concerns about the handling of asbestos at Aberdeen High School, the school system and its facilities managers were aware of the asbestos and had employees trained to deal with the situation in strict accordance with established procedures and asbestos guidelines. Testimony at the hearing before the local board indicated that there was never any attempt to cover up any safety or asbestos issue at Aberdeen. (Tr. Vol. 1, pp. 36-37; 124-126). Additionally, with regard to Appellant's concerns about the over-pressurization system at Edgewood, testimony disclosed that there was never any safety threat at any time regarding the system. Moreover, the operation of the over-pressurization system was coordinated with the federal government and with the Emergency Manager for the Harford County government. (Tr. Vol. 2, pp. 44; 47-51; 104-105; 108-111).

¹The over-pressurization system at Edgewood Elementary was designed as protection in the event of a mustard gas release from the nearby Aberdeen Proving Ground, Edgewood Area. The system is designed to increase pressure in the building to keep outside air from coming in.

²Appellant also contends in his appeal letter that he has the support of "MOSH," presumably the Maryland Occupational Safety and Health Administration. However, there is no evidence in the record to support his assertion.

In the Fall of 2001, Ayers requested that Appellant attend the Educational Specifications Committee (“ESC”) meetings for two different projects. One of the meetings was in the evening. Appellant refused, maintaining that he could not attend in the evening due to personal reasons. He later stated that he had taken the job to work fewer hours and not be out every night. (Tr. Vol. 1, pp. 127-130). Ayers advised Appellant that his absence from the meeting was considered insubordination. *See* 10/11/01 memorandum from Ayers to Kukucka regarding ESC meeting.

In a memorandum to Ayers, Appellant questioned Ayers’ ability to manage the Department stating that Ayers’ “handling of this matter is unprofessional and inciting” and “[f]or you to respond in such a manner to an honest commitment is infuriating and frankly turns my stomach! Do you expect an employee to be happy and work hard for you when their (sic) slapped in the face with such disregard. What management seminar teaches such behavior?” Appellant closed the letter by stating the following:

Thus, you pursue insubordination if you must, but I will not stand by while you damage my professionalism and my morale that you apparently have with others. I would suggest you reconsider your demands, but that is entirely up to you. And, for the record, I do not fly anywhere should that be your next demand.

See 10/11/01 memorandum from Kukucka to Ayers regarding ESC meeting. Appellant was advised to contact Human Resources for an accommodation if he had a family health issue that prevented him from attending the meeting; however he never did so. (Tr. Vol. 5, pp. 72-73).

Another ESC meeting was eventually scheduled. Appellant initially told Ayers that he would not attend; however Appellant ultimately attended the meeting after Ayers advised that he was expected to be there.

In October 2001, Appellant filed an internal grievance alleging that Ayers took actions “without regard for Harford County Public Schools policies/procedures, labor laws, and contrary to professional employment behavior.”³ *See* 10/16/01 memorandum from Kukucka to Ayers. Licata investigated Appellant’s complaints and conducted a meeting at which both Appellant and Ayers were present. In addition, Licata met with various individuals with specific knowledge of the events that transpired during the incidents alleged in the grievance letter. During the meeting with Licata and Ayers, Appellant made statements such as, “You don’t know what I’m capable of,” “I don’t have to worry about the law,” and “I will take matters into my own hands.” (Tr. Vol. 1, pp. 145-147).

³The matter was not handled as a formal grievance as it did not constitute an alleged violation, misinterpretation, or misapplication of the terms of the negotiated agreement between the local board and the Association of Public School Administrators and Supervisors of Harford County. *See* 11/7/01 grievance response from Licata.

On November 7, 2001, Licata responded to Appellant's grievance finding no merit to Appellant's claims. In conclusion, Licata stated as follows:

After reviewing the numerous documents regarding these issues, and after our meeting and subsequent follow-up meetings with others involved, it appears that there is a great divide between you and Mr. Ayers. In my opinion, there is a mismatch between Mr. Ayers' leadership style and your perception of how he treats you as a subordinate within the organization. Lacking specificity with respect to your assertions leads me to believe that you simply don't like the way Mr. Ayers manages and leads the Facilities Management Department. The facts, as presented, do not lead one to the conclusion that any laws, policies, or procedures have been violated.

Consequently, I don't have any reason to believe that any substantial changes will be made in the management of the department. As a result, I am not confident that there will be any improvement in your relationship with Mr. Ayers. This greatly concerns me because of the impact this will have on his ability to lead the department as a whole; your ability to interact with Mr. Ayers; the relationships between you, Mr. Ayers, and the various other administrators; and the relationships between the administrators and the workers.

Licata advised Appellant that he was expected to comply with the directions and assignments given by Ayers. *See* Licata's response to grievance at pp. 7-8.

Also in the Fall of 2001, Appellant filed an administrative complaint against Ayers making a number of allegations concerning Ayers' management of the Department. The HCPS Human Resources Department assigned the matter to be investigated by Robert Benedetto, Coordinator of Safety and Security. After conducting his investigation, Benedetto concluded that the majority of Appellant's allegations were unsubstantiated or unfounded, including Appellant's safety concerns about asbestos and the over-pressurization system. *See* Administrative Complaint Fact Sheet.

Additionally in November 2001, Appellant had a dispute with Ayers concerning the collection of money from employees for the annual holiday luncheon. (Tr. Vol. 1, pp. 139; 142-143); *See* 11/2/01 memorandum from Ayers to Kukucka regarding holiday party and Kukucka's 11/5/001 memorandum in response. At this time, Ayers indicated to Licata that Appellant was having "a very negative effect on [Ayers] and [Ayers'] staff and has done a great deal in undermining [Ayers'] authority within the department." *See* 11/7/01 memorandum from Ayers to Licata regarding holiday party.

In April 2002, another personnel issue arose involving Appellant. Ayers requested that Appellant be present at a disciplinary conference of an employee who had over utilized his cell phone plan and who was bordering on sick leave abuse. Ayers asked Appellant to be present as his assistant and because Appellant was the employee's direct supervisor. During the meeting, Appellant became confrontational, advocated on behalf of the employee, and was not supportive of management. Ayers believed that this undermined his authority in his attempt to enforce HCPS policies and procedures. (Tr. Vol. 1, p. 151); *see* 4/1/02 memorandum from Ayers to Harmon with attached e-mail.

On June 17, 2002, Ayers altered the Department policy regarding leave approval requests as a result of the conduct of an employee under Appellant's supervision. *See* 6/17/02 memorandum from Ayers to Kukucka regarding leave approvals and coverage. Although it was Appellant's responsibility to handle the situation, Ayers felt that Appellant had not handled it and believed it was necessary to intervene. (Tr. Vol. 2, p. 25). Appellant supported the employees against Ayers because he believed that the change in policy was unfair. (Tr. Vol. 1, p. 159). The employees organized a protest over the policy change by assembling at the Central Office to stage a work stoppage during their scheduled work day. (Tr. Vol. 2, pp. 68-70). Dr. Bernard Barnes, then Assistant Superintendent for Education Services, contacted Appellant to have him handle the situation. (Tr. Vol. 2, pp. 70-71). Barnes later advised Licata that Appellant was very contentious and highly disrespectful. (Tr. Vol. 2, p. 71).

Also in June 2002, a dispute arose over the contents of a performance evaluation conducted by a Plant Chief who reported to Appellant. Ayers had to become involved in the matter, which was Appellant's responsibility. Ayers instructed that information be added to the employee's evaluation which better reflected the employee's true performance and directed Appellant to resolve the situation. Despite being given two chances to complete the request, Appellant failed to comply and indicated his disagreement with Ayers on the issue. The Plant Chief ultimately made the change after meeting with Ayers. (Tr. Vol. 2, pp. 29-31); *See* 6/28/02 memorandum from Licata to Haas.

Shortly thereafter, Licata recommended to the Superintendent that Appellant be discharged from his position. Licata stated the following:

It is clear to me that this whole situation will not improve, as Mr. Kukucka has demonstrated on numerous occasions that he will not work with Mr. Ayers as part of the administrative team. In fact, he is on record as publicly denouncing Mr. Ayers' abilities as a manager.

See 6/28/02 memorandum from Licata to Haas regarding termination recommendation. On July 3, 2002, the Superintendent dismissed Appellant from his position as an Assistant Supervisor of Facilities due to incidents of insubordination and creating hostility in the work environment. *See* 7/3/02 termination letter from Haas to Kukucka.

The local board unanimously upheld Appellant's termination, finding that the superintendent had a reasonable basis for dismissing Appellant from his position. As examples of Appellant's insubordination, the local board cited Appellant's refusal to attend the ESC meeting, his hostile attitude toward his supervisors, his lack of cooperation, his failure to follow the proper chain of command, and his undermining of Ayers' authority as Director of the Facilities Department. Decision at 8. The local board also found that Appellant was a disruptive force causing considerable friction and hostility in the Facilities Department and that he was the creator of the tense office atmosphere and sense of distrust and suspicion that permeated the work place. Decision at 9. Additionally the board found no merit to Appellant's claims that he was dismissed because he reported health and safety violations which the school staff did not want publicized. Decision at 11-12.

ANALYSIS

Preliminary Matters

As a preliminary matter, Appellant maintains that there were two conflicts of interest which prohibited him from receiving a reasonable and non-arbitrary decision from the local board. The first alleged conflict is the fact that the local board reviewed the Superintendent's decision to terminate Appellant even though the Superintendent serves as the Treasurer of the local board. The Superintendent, however, is charged with a variety of powers and responsibilities under the law including serving as treasurer to the local board. *See* Md. Code Ann., Educ. § 4-205. The superintendent is also statutorily authorized to appoint and to terminate noncertificated employees. *See* Md. Code Ann., Educ. § 6-201(c). We do not find that the fulfillment of these responsibilities creates a conflict of interest that would improperly influence the local board's decision in this case.

The second basis of alleged conflict is the fact that the local board attorney, Patrick P. Spicer, who Appellant maintains was appointed as attorney to the local board by the Superintendent, presided over three of the five hearings in this case before being replaced by another attorney, Michael S. Molinaro. We note that by statute the local board is responsible for hiring its own legal counsel. *See* Md. Code Ann., Educ. § 4-104. Further, Mr. Spicer has confirmed that he was hired by the local board. *See* Local Board Reply, ¶ 10. While we can find no reference in the transcript to explain the change of attorneys, Mr. Spicer has explained that he voluntarily recused himself after Appellant's counsel advised the board attorney that Appellant had concerns because the board attorney had been questioned by Mr. Benedetto, the HCPS Coordinator of Safety and Security. *Id.* Given that there is no objection in the record to Mr. Spicer's voluntary decision to recuse himself, we find the issue has been waived. Alternatively on the merits, we do not believe that Appellant has met his burden of demonstrating that the

alleged conflict improperly influenced the local board decision.⁴

Appellant also argues that hearsay was improperly considered in this case. The proceedings in this case consisted of a hearing before an administrative body which is not bound by the strict rules of evidence and in which hearsay evidence is admissible. *See, e.g., Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 408 (1996); *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721, 725 (1989); *Eichberg v. Maryland Bd. of Pharm.*, 50 Md. App. 189, 192-193 (1981). Thus, we do not find a violation of law on this basis.

Merits

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 non-certificated support employee is entitled to administrative review of a termination pursuant to § 4-205(c)(4) of the Education Article.⁵ 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).

Here, the local board upheld Appellant's termination based on insubordination and creating hostility in the work environment. Appellant claims that his dismissal was unlawful and in retaliation for his complaints about various Facilities Management Department practices which he alleged were illegal. However, our review of the lengthy record, including the transcript of the local board hearing and all of the documentary evidence, discloses that the superintendent had legitimate reasons for dismissing Appellant from his position.

⁴For guidance we look to Maryland case law concerning the recusal of judges from cases before them based on the appearance of impropriety. In order to overcome the presumption of impartiality, "the party requesting recusal must prove that the [decision maker] has a 'personal bias or prejudice' concerning him or 'personal knowledge of disputed evidentiary facts concerning the proceedings.'" *Jefferson-El v. State*, 330 Md. 99, 107 (1993). Thus, the mere appearance of impropriety or conflict of interest is insufficient to warrant recusal. *See Regan v. State Bd. of Chiropractic Exam'rs*, 355 Md. 397, 410 (1999) (Applying generally the "appearance of impropriety" standard set forth in cases involving judges to the participation of members of Maryland administrative agencies performing quasi-judicial or adjudicatory functions).

⁵In its 2002 session, the Maryland General Assembly amended § 6-510 of the Education Article by providing that due process for discipline and discharge of noncertificated employees is a permissive subject of bargaining. Because Appellant's termination preceded the statutory change, the *Livers*' decision is controlling on his due process rights.

From very outset of Appellant's employment with the school system, Appellant's supervisors -- Jeffrey Ayers and Joseph Licata -- encountered problems with Appellant's actions and attitude. Among other things, Appellant failed to follow the established chain of command, failed to follow the reasonable directives of his supervisor, failed to support management, and created a hostile atmosphere through his unprofessional interactions with others. One example of Appellant's unprofessional interactions is evidenced by the contents of Appellant's written request for an apology from the Department management. *See* 5/24/01 handwritten letter. These types of behaviors continued regularly throughout Appellant's employment. Eventually Appellant's presence in the Department could no longer be tolerated given its impact on Ayers' ability to manage the Department and on the deterioration of office morale.

Testimony from school system employees described the atmosphere of tension and conflict created by Appellant. (Tr. Vol. 1, pp. 28-30; 33-36). The testimony included comments that Appellant attempted to get employees to take his side over Ayers (Tr. Vol. 1, pp. 33-34), that Appellant would side with employees rather than Ayers and try to undermine Ayers' authority (Tr. Vol. 1, pp. 75, 79), and that Appellant would disclose confidential information from meetings with Ayers to the staff (Tr. Vol. 1, p. 91). As stated by the local board:

[Kukucka] adopted a confrontational, challenging attitude toward Mr. Ayers and Mr. Licata from the very first conference called to discuss cell phone usage. In a demeaning, disrespectful manner, he had the audacity to demand a written apology from both Mr. Licata and Mr. Ayers, his superiors. He was openly critical of other school officials, such as Melanie Wernig and Patti Jo Beard, and accused them of having malicious intent. He admitted to circulating a petition among employees to express concern about asbestos, and supported the employees in opposing Mr. Ayers' change in leave approval policy. He openly criticized Mr. Ayers, spoke in a disparaging manner, and referred to him as incompetent, unprofessional, and guilty of illegal conduct. We find that Mr. Kukucka's actions and statements created a hostile work environment and undermined Mr. Ayers' ability to manage the Facilities Department.

Local board Decision at 12-13.

Management ultimately realized that Appellant could not effectively remain in his position as Assistant Manager in the Facilities Management Department and recommended his dismissal. The Superintendent also had serious concerns regarding Appellant's actions in relation to his management role and the impact Appellant's actions were having on the Superintendent's management of the everyday operations of the school system. As the Superintendent testified:

Eventually I arrived at an opinion that I wasn't going to get this turned around. That the tension between Mr. Ayers and Mr. Kukucka had reached a point that was drawing in more and more people, as Mr. Licata testified. We were hearing it from principals as well. At some point, you have to say it is time to take the big picture. Look to see clearly what is in the best interest of this school system.

It is my opinion Mr. Kukucka was not performing in a manner that provided leadership to his section of the trades. I didn't hear the same complaints in other trades. Seemed to be focused in this trade. Since he was the front-line manager, he is the person that seems to be involved in so many of these things. I made a decision it was in the best interest of the school system to terminate his employment and go from there.

(Tr. Vol. 2, pp. 130-131).

Based upon our review, we find that the evidence in this case overwhelmingly supports Appellant's termination. In contrast, there is nothing to support Appellant's allegations of retaliation. In fact, Appellant admitted that he had never been threatened with loss of his job for raising his safety concerns. (Tr. Vol 5, p. 84). Moreover, Appellant's safety concerns were investigated and found to be unsubstantiated.

CONCLUSION

For all of these reasons, we do not find that the local board's decision was arbitrary, unreasonable or illegal. Accordingly, we affirm Appellant's termination from employment with the Harford County Public School System.

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