

MARISABEL BARRET,

Appellant

v.

PRINCE GEORGE'S COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

Opinion No. 09-10

OPINION

INTRODUCTION

In this appeal, the Appellant challenges the decision of the Prince George's County Board of Education (local Board) to terminate her from her position as a math teacher. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant has not responded to the local board's Motion.

FACTUAL BACKGROUND

Appellant was a tenured and certified teacher employed by the local board for approximately eight years. She taught mathematics at Suitland High School. As a citizen of Aruba, Appellant was authorized to work in the United States based on a valid H-1B visa. An H-1B visa is a non-immigrant visa used by a legal alien who is employed in a specialty occupation in the United States. *See* 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. 215(h).

Sometime in the spring of 2007, Prince George's County Public Schools (PGCPS) filed an immigrant visa petition with underlying approved permanent labor certification on Appellant's behalf. (Letter of Appeal). PGCPS advised Appellant that this filing did not give her immediate employment authorization even though it might make her eligible for permanent resident status (green card) at some point in the future. (Frysinger Affidavit). The filing process for an immigrant visa petition is unrelated to the H-1B visa, however, if granted, it negates the need for the H-1B visa because the individual becomes a legal immigrant. As far as we are aware, to date Appellant's immigrant visa petition is still pending before the U.S. Citizenship and Immigration Services (USCIS).

In May 2007, Appellant went out on sick leave when she experienced complications with her pregnancy. Because she was out on leave for an extended period of time, PGCPS placed someone in Appellant's position. In December 2007, Appellant advised PGCPS that she planned to return from medical leave in February of 2008.

Appellant's H-1B visa status was due to expire, however, on January 12, 2008. Richard Frysinger, the program specialist for PGCPs Visa Services and Immigration Program Management, gave Appellant timely warnings and reminders of the impending deadline, and advised her that she needed to file for an extension of the visa since her employment authorization depended on a valid H-1B status.¹ (Frysinger Affidavit). Mr. Frysinger had at least three such conversations with the Appellant in November and December of 2007. (Deasy Letter, 3/14/08).

Nonimmigrant PGCPs employees, like Appellant, typically need PGCPs to sign certain USCIS forms and documents in order to maintain a lawful status in the United States. These forms serve the purpose of verifying to the government the nature, terms and conditions of the proposed employment in satisfaction of the various immigration laws and regulations. These employees are responsible for preparing the appropriate forms for PGCPs signature. Once PGCPs signs the forms, the employee is then responsible for attaching all supporting documentation that their visa category may require and for filing those papers with the appropriate federal agency. In order to continue their employment, employees must document to PGCPs that their extension request was timely filed on or before the date of expiration of their last valid status. (Frysinger Affidavit; Deasy Letter, 3/14/08).

Appellant did not provide PGCPs with the forms that were required for the timely filing of an extension before the expiration of her visa on January 12, 2008. By letter dated January 22, 2008, Randy L. Thornton, Director of Human Resources for PGCPs, advised Appellant that her employment was being terminated "based solely on [her] lack of U.S. employment authorization" as required by federal law. He also advised her that she could provide the school system with evidence of a valid visa and challenge the decision. (Thornton Letter, 1/22/08).

Thereafter, on January 31, 2008, PGCPs received Appellant's request for visa extension processing. Appellant did not accurately prepare the forms or include all of the required forms in her request. (Frysinger Affidavit).

Appellant, represented by the Maryland State Teachers Association, appealed the decision to the local superintendent. Appellant argued that, as a tenured teacher, she was entitled to the due process procedures provided by §6-202 of the Education Article, including notice of the charges against her and the opportunity for a hearing before the local board prior to removal from her position. Appellant also alleged that she was terminated based on false accusations of fraudulent sick leave use while she was on maternity leave. She further claimed that Mr. Frysinger did not inform her to submit visa extension documents, but rather he told her that PGCPs would not request an extension on her behalf. Appellant requested that the superintendent rescind the termination decision, award her back pay, and pursue the H-1B visa extension on her behalf. (Felton Letter, 2/1/08).

¹Mr. Frysinger is a technical advisor on visa and immigration related matters. (Deasy Letter, 3/14/08).

The superintendent denied the appeal. He stated:

The Federal Regulations for nonimmigrant employment quite clearly provide that employment authorization for H-1B workers is continued only when a request for extension has been "timely" filed with the USCIS, being received by them on or before the last date of status expiration. [Appellant] failed to ensure this, and thus her last date of authorized employment was January 12, 2008. She further failed to heed the reminders that she was provided in advance of her status expiration. Furthermore, she was not in any way discouraged from making a timely request for this extension.

(Deasy Letter, 3/14/08).

The local board heard oral arguments on appeal. In a unanimous decision, the local board upheld the superintendent's termination decision. (Local Board Order).

STANDARD OF REVIEW

This case involves the termination of a tenured teacher. Such cases normally arise under the provisions of §6-202 which provide the grounds and procedure for suspension and dismissal of teachers, principals, and other professional personnel. Section 6-202 sets forth the five grounds for suspension or termination: (1) immorality; (2) misconduct in office; (3) insubordination; (4) incompetency; and (5) willful neglect of duty. §6-202(a)(1)(I - v). In cases arising under §6-202, the State Board exercises its independent judgment on the record before it in determining whether to sustain the dismissal. 13A.01.05.05F. Appellant maintains that this is the appropriate standard in this case.

This case, however, is not a §6-202 termination case. The local board did not terminate the Appellant for any of the bases set forth in the statute. Rather, the local board terminated the employee because, as a matter of law, it could no longer legally employ her based on her invalid H-1B visa. The local board argues, therefore, that the appropriate standard of review is the one used in cases appealed under §4-205 of the Education Article. In such cases, 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 its decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A. As explained below, we believe this is the correct standard to apply in this case.

ANALYSIS

The Immigration and Nationality Act makes it unlawful for an employer to continue to employ an alien in the United States knowing that the alien has become an unauthorized alien with respect to the employment. 8 U.S.C. 1324a(a)(2). That is what happened in this case. PGCPs became aware that Appellant's H-1B visa lapsed on January 12, 2008. (Frysinger

Affidavit). At that point, PGCPS was precluded by federal law from continuing to employ the Appellant.

Appellant claims that she was entitled to the due process provided by §6-202 and as set forth in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), which includes notice of the reasons for the termination and an opportunity to be heard prior to the termination. Due process for tenured employees presumes a property interest in the employment. To have a property interest, one must have an expectation of continued employment or a legitimate claim to entitlement to the position. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In this case, Appellant could have no realistic expectation of continued employment or entitlement to the position because she ceased to be legally employable in the United States. It would serve no purpose to engage in the type of due process set forth in §6-202 when, as a matter of law, the school system could not legally continue to employ the Appellant under federal law.

We note that the school system provided Appellant with some due process. Mr. Thornton's letter provided Appellant notice of the grounds for the termination and the reasons for the school system's inability to employ her. He also advised Appellant of her appeal rights and that she could still provide PGCPS with documentation evidencing her continued eligibility for U.S. employment. (Thornton Letter, 1/22/08). Appellant challenged her termination through a §4-205 appeal. The case was reviewed by the local superintendent and local board with both upholding the termination.

Unlike termination cases that arise under §6-202, in this case the superintendent and local board had no discretion to decide otherwise – the termination was required as a matter of law. We believe that PGCPS followed the correct process and that the standard of review used in §4-205 appeals is appropriate in this case.

We point out that Appellant makes various allegations that the termination was arbitrary, unreasonable or illegal. None of Appellant's arguments, however, are supported in the record. While Appellant claims that Mr. Frysinger advised her that PGCPS would not sign off on an extension of her visa, the uncontradicted affidavit of Mr. Frysinger makes clear that he made no such representations to Appellant. Although Appellant places the blame on PGCPS for her failure to timely apply for an extension, the record demonstrates that Mr. Frysinger advised Appellant of the upcoming expiration of her visa, and that Appellant was responsible for getting the appropriate renewal forms to PGCPS for signature and for filing those forms. (Frysinger Affidavit). Unfortunately Appellant failed to get the appropriate forms to PGCPS in a timely manner.

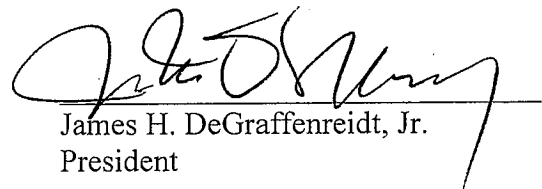
Appellant also alleges that the school system failed to pursue the extension on her behalf because it believed that she was fraudulently using her private insurance while she was on sick leave. To support this argument, Appellant has submitted a copy of an e-mail to Mr. Frysinger,

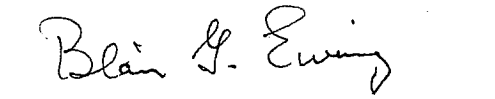
dated December 26, 2007, which mentions the alleged "fraud" claim.² We do not find that this e-mail sufficiently evidences that there was a fraud claim against the Appellant. Moreover, there is no basis to conclude, even if the claim existed, this it was the basis for Appellant's termination when she lacked a valid visa. During oral argument before the local board, counsel for the superintendent explained that the fraud issue to which Appellant refers likely had to do with Appellant's use of the sick leave bank while also attempting to access disability insurance. The various disability carriers have different limitations and it could be perceived as fraud to apply for disability benefits while receiving full pay. (T.20-21).


Appellant also claims that the school system had planned to terminate her prior to her visa expiration by virtue of the fact that her job as a math teacher was no longer vacant. The local board has explained that because Appellant was out on leave for an extended period of time, it had to place someone in the position to teach the class. This did not mean that the school system planned to terminate her. It merely meant that the school system would have to find the appropriate placement for Appellant upon her return. (T. 30).

CONCLUSION

For all of these reasons, we find that the applicable standard of review in this case is that which is used in §4-205 appeals as set forth in COMAR 13A.01.05.05A. Furthermore, we find that the local board's decision was not arbitrary, unreasonable or illegal. Accordingly we affirm the local board's decision terminating Appellant from her position for failing to have a valid work visa.


James H. DeGraffenreidt, Jr.
President


Blair G. Ewing
Vice President


Dunbar Brooks

²Mr. Frysinger never received this e-mail, however, as it was not properly addressed to him. (Deasy Letter, 3/14/08).

Charlene M. Dukes

Charlene M. Dukes

Mary Kay Finan

Mary Kay Finan

Rosa M. Garcia ^{TPS}

Rosa M. Garcia

Richard L. Goodall

Richard L. Goodall

Karabelle Pizzigati

Karabelle Pizzigati

Ivan C.A. Walks ^{TPS}

Ivan C.A. Walks

Kate Walsh

Kate Walsh

March 24, 2009