

ROBERT JOHNSTON,

Appellant

v.

HOWARD COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 10-30

OPINION

INTRODUCTION

Robert Johnston, a former teacher in the Howard County Public School System (HCPSS), appeals from a decision of the Howard County Board of Education (local board) terminating his employment and denying him the local health and other benefits he believes he is entitled to as a "retiree." The local board filed a Motion for Summary Affirmance to which the Appellant has filed an Opposition. The local board filed a Reply to the Appellant's Opposition.

FACTUAL BACKGROUND

In this case, there are no disputes of material fact. Robert Johnston was a certificated teacher in the HCPSS for over thirty years, during which he was consistently rated satisfactory. In December 2008, he was arrested and charged with sexual abuse of a minor because, for two years prior, Mr. Johnston had engaged in a sexual activity with a female student who was fifteen when the sexual activity started. As a result, on February 11, 2009 Superintendent Sidney Cousin notified Mr. Johnston that he was recommending dismissal for immorality, misconduct in office, and insubordination. On February 12, 2009, pursuant to Education Article §6-202, counsel for Mr. Johnston requested a hearing on the dismissal.

On February 17, 2009, while his request for hearing was pending, Mr. Johnston notified his principal that "effective immediately" he was retiring. The HCPSS Human Resources Specialist wrote to Mr. Johnston on March 11, 2009 advising him that, because his dismissal was pending, "there was no approved resignation or retirement. Accordingly, the criteria for 'separation of employment' has not been satisfied." (Local Board Motion, Ex. 11). Therefore, the Human Resources Specialist declined to submit Mr. Johnston's paperwork to the Maryland State Retirement and Pension System (MSRPS). Mr. Johnston must have submitted the paperwork, because, on March 23, 2009, the MSRPS notified Mr. Johnston that it approved his retirement effective March 1, 2009. (Appeal, Ex. 5).

On April 20, 2009, without explanation Mr. Johnston voluntarily surrendered his teaching certificate to the Maryland State Department of Education. (Appeal, Ex. 10).

On April 23, 2009, Mr. Johnston pleaded guilty to sexual abuse of a minor and on August 12, 2009 he was sentenced to 9 years in prison, 7 ½ of which were suspended. After serving his sentence, he is subject to 5 years supervised probation; he must register as a sex offender, and complete sex offender treatment. (Local Board Motion, Ex. 4).

On September 30, 2009, at the request of the local superintendent, after providing Mr. Johnston notice and an opportunity to be heard, the State Superintendent of Schools revoked Mr. Johnston's teaching certificate because he "resigned after notice of allegations of sexual child abuse," a reason for mandatory revocation under COMAR 13A.12.05.02(D)(2). (Appeal, Ex. 9).

On November 10, 2009, the local board heard oral argument on the specific issues that the Appellant's counsel raised concerning Mr. Johnston's pending dismissal. Before the local board, counsel argued that Mr. Johnston could not be dismissed because he had retired, no longer had a teaching certificate, and no longer had a contract with the local board on which a "termination of employment" could be based. Counsel also argued that because the State considered Mr. Johnston a "retiree," the local board must also do so and award him retiree health and other benefits.

On December 18, 2009, the local board issued its decision. (Appeal Ex. 11). On the issue of whether Mr. Johnston could be terminated, the local board determined that a notice of retirement alone does not, of itself, terminate a teacher's employment relationship with the board. Only board action could actually terminate that relationship. The board stated:

For fifty (50) years, the Board has taken public action, by making and passing a formal motion, to approve resignations and retirements. The Board also takes action on non-renewal of probationary teachers and even formally recognizes the death of employees. In other words, there is a long, and we believe, a strong precedent for concluding that it is the Board, not the employee, that determines the manner by which an employ terminates the employment relationship, at least for local purposes.

(Appeal Ex. 11, Decision at 5).

The Board concluded that Mr. Johnston's February 17, 2009 notice of immediate retirement did not terminate the employment relationship. It merely breached the Regular Teacher Contract which required the teacher to give 30 days notice prior to the beginning of the next school year before vacating his position, unless there were a finding of emergency by the local board. (*Id.* at 6-7).

The Board went on to find that the State Superintendent's revocation of Mr. Johnston's certificate activated the clause in the Regular Teacher Contract which calls for automatic

termination of the contract “if the employee ceases to hold a professional certificate.” *Id.* at 8; COMAR 13A.07.02.01. The Board, however, determined that that automatic termination of the contract did not, in this case, moot the legal proceedings for dismissal. The Board terminated Mr. Johnston from employment. (*Id.* at 8-9).

As to the issue of Mr. Johnston’s eligibility for health and other benefits, the local board determined that entitlement to local benefits is not tied to the State’s determination of entitlement to the State retirement benefit. *Id.* at 4. The local board pointed out that to be eligible for local benefits the employee must “retire from employment with Howard County Public School System” which they concluded could only occur upon local board motion recognizing the retirement. *Id.* at 5-6.

The local board had not recognized the retirement by motion and refused to do so. The local board stated:

We believe that the circumstances of this case are unprecedented in that the Board has not faced a situation in the past where an employee is recommended for dismissal for having a two-year sexual relationship with a student, gives notice of retirement in the middle of the school year (February 17), and then asks that the retirement be recognized locally for purposes of collecting the local health benefit. While there may not be an explicit requirement that an employee sever employment “honorably” to receive the local health benefit, Johnston’s actions are so egregious, so destructive of the position of trust that the community and the Board expect must exist between teacher and pupil, that it would be a travesty to take an action that recognizes Johnston’s termination from employment with HCPSS as a “retirement” and approve a motion that qualifies him for receipt of the local health benefit. We decline to take such an action.

Id. at 6.

After the local board issued its decision, this appeal to the State Board ensued.

STANDARD OF REVIEW

The standard of review in every case depends on the type of dispute presented. In this case, there are two types of disputes.

This case involves interpretation of certain public school laws, particularly the regulations governing the revocation of a teaching certificate, the regulation setting forth the Regular Teacher Contract and the law governing teacher dismissal . When the State Board explains the true intent and meaning of State education laws, it uses its independent judgment on the record

before it. COMAR 13A.01.05.05(E).

This case also involves a dispute about the interpretation of rules and regulations of the local board concerning eligibility for the local retirement benefits. On this issue, the local board's decision is considered *prima facie* correct and the State Board will not substitute its judgement for that of the local board unless the Appellant meets his burden to show that the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

In its decision, the local board accepted the local superintendent's recommendation and dismissed Mr. Johnston from employment. (Appeal, Ex. 11, Decision at 9). The Appellant challenges that termination on several grounds presenting us with an opportunity to consider the effect of a notice of retirement and the effect of an automatic termination of the Regular Teacher Contract on pending termination proceedings. Each is a separate legal issue involving interpretation of the State education law and regulations for which we apply our independent judgment standard of review.

(1) Effect of Notice of Retirement

When a teacher wishes to vacate his position, the Regular Teacher Contract requires the teacher to provide thirty days notice in writing to the local board by July 15 prior to the beginning of the new school year. COMAR 13A.07.02.01. The thirty day notice provision can be waived if the local board finds that there is an emergency. (*Id.*)

Mr. Johnson sent his principal a notice of immediate retirement in the middle of the school year. Given the terms of the Regular Teacher Contract, the local board concluded that the notice of retirement did not terminate his employment. It stated:

On February 17, 2009, Johnston gave his notice [of his intention to retire] "effective immediately." The Board made no finding that there was an "emergency." Therefore, the employment contract was not terminated as the result of notice, under the contract, and the Superintendent's recommendation [for dismissal] is not moot.

(Appeal, Ex. 11, Decision at 6-7)

The Board further explained that absent a finding of an emergency, Mr. Johnston was in breach of the Regular Contract for failure to give 30 days notice as the contract required. The local board concluded that the breach of contract did not terminate the employment relationship. (*Id.* at 7).

The State Board reached that same conclusion in 1985 in *Henson v. Montgomery County*

Board of Education, 4 MSBE Op. 275 (1985). In that case the teacher left his job without providing 30 days notice in writing prior to the beginning of the next school year. The State Board ruled:

. . . [A]ssuming there was a breach of the contract, the contract provides a remedy.

Namely, the contract states:

If any of the conditions of this contract shall be violated by the certificated employee name herein, salary already accrued will be forfeited, in the discretion of the County Board of Education.

-- The contract also provides that a county board may suspend or dismiss an employee at any time pursuant to §6-202 of the Education Article. Thus, if a county board believed a breach was so serious that the forfeiture of accrued salary was not a sufficient penalty, a county board does have the right to suspend or dismiss the teacher - as long as the county board acts pursuant to §6-202.

Id. at 276.

In *Henson*, when the State Board directed the county board to act "pursuant to §6-202," it was merely reiterating that a teacher who breaches a contract cannot be terminated for cause unless he/she receives the constitutional due process rights embodied in Maryland education law under §6-202 which states:

(a) *Grounds and procedure for suspension or dismissal.* – (1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:

- (i) Immorality;
- (ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;
- (iii) Insubordination;
- (iv) Incompetency; or
- (v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.

(3) If the individual requests a hearing within the 10-day period:

- (i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
 - (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.
- (4) The individual may appeal from the decision of the county board to the State Board.

Md. Educ. Code Ann. §6-202.

We reiterate that same principle today and conclude that the local board was correct as a matter of law that Mr. Johnston's notice of retirement did not conform to the requirements of contract. It breached the contract but did not legally end the employment relationship. Thus, even after receiving the notice of retirement, terminating the employment relationship pursuant to §6-202 remained a viable legal option for the local board. In short, the notice of retirement did not moot the termination case.

(2) Automatic Termination of the Teacher Contract

Although the retirement notice did not moot the termination case, we consider next whether triggering the automatic termination clause in the Regular Teacher Contract mooted the termination case.

When a teacher no longer holds a professional certificate (for whatever reason), the Regular Teacher Contract states that the contract "automatically terminates." COMAR 13A.07.02.01. On September 30, 2009, at the request of the local superintendent and after providing Mr. Johnston with notice and an opportunity to be heard, the State Superintendent revoked Mr. Johnston's teaching certificate.

Mr. Johnston now argues that, because the revocation triggered the automatic termination clause in the Regular Teacher Contract, his employment relationship with HCPSS automatically ended. Therefore, he could not be subject to termination proceedings under §6-202.

The local board's decision on this issue appears, at first reading, somewhat confusing. First, the local board states, "when a letter from Dr. Grasmick informed Johnston that his certificate was revoked effective September 30, 2009, that action automatically terminated Johnston's employment contract severing the employment relationship as of September 30, 2009. There seems to be little question that, as of September 30, 2009, Johnston was no longer an employee of HCPSS." (Appeal, Ex. 11 at 8).

The local board continues, however:

We do not believe that revocation of Johnston's teaching certificate and the resulting termination of his contract of employment necessarily renders the Superintendent's recommendation for dismissal moot. Mootness is a judicial doctrine applied by courts to dismiss cases where the circumstances have changed so that there is no longer any relief that can be granted by the court. For reasons of judicial economy or for constitutional reasons, the doctrine furthers the principle that courts do not give opinions on abstract questions of law. Dismissal, pursuant to Section 6-202, would terminate the employment relationship between Johnston and HCPSS. Since, as of September 30, 2009, there no longer is an employment relationship between Johnston and the Board, dismissal under Section 6-202 for the purpose of terminating the employment relationship is moot.

(Id.)

Finally, the local board explained that, in its view, there was a second purpose for dismissal proceedings under §6-202. It stated:

We agree with the Superintendent, however, that dismissal under Section 6-202 accomplishes a purpose other than simply terminating the employment relationship; it creates a personnel record that can be referenced later to describe reasons for termination of the employment relationship. It is true that the employment relationship terminated as a result of revocation of Johnston's teaching certificate by the State, but it is also true that Johnston breached his employment contract and breached the trust the community and the Board placed in him to exercise reasonable care to protect his students and to treat students in his charge with respect and professionalism. We, therefore, find that, based on uncontested facts, there is sufficient basis to dismiss Johnston for immorality, misconduct in office, and insubordination. We accept the Superintendent's recommendation and hereby, dismiss Johnston from employment for the grounds stated in the Superintendent's recommendation.

Id.

The local board argues in support of its decision that, despite the automatic termination of the contract, it retained the legal power, *ie.*, jurisdiction, to terminate Mr. Johnston for misconduct. Mr. Johnston argues that the automatic termination of his contract deprived the local board of any power to act. The question, as we see it, is whether there remained a legal basis, even after the contract automatically terminated, from which the local board could act to

terminate Mr. Johnston. We believe there was.

As explained by the local board, it retained the power to take a personnel action against Mr. Johnston in order to complete the personnel records to reflect accurately all the reasons for which Mr. Johnston's employment with HCPSS ended. Although there is much argument in the parties' briefs that the power to proceed to terminate Mr. Johnston could (or could not) legally arise under §6-202 or §4-205 of the Education Article, it is our view that the power of the local board to act here arises from its general powers to govern its school system. Under Md. Education Code Ann. §4-101, control over all local education matters resides in the local board.

In our view, the final disposition of a teacher's employment status is an educational matter over which the local board retains jurisdiction, even if an employee files a notice of retirement while termination proceedings are pending or whether the written Regular Teacher Contract terminates by operation of law when a certificate is revoked. Thus, the local board retained the power to act. Moreover, we agree with the local board that neither retirement nor automatic termination of the contract mooted the termination case against Mr. Johnston. As the local board asserts, "Mootness...is a matter of decision, not of jurisdiction." The Court of Appeals in *In Re Adoption No. 93321055*, 344 Md. 458, 488 (1997), made it clear that while the court had authority to address moot questions, it chose to exercise that authority [albeit] in rare circumstances...." (Motion For Summary Affirmance at 7).

The local board found compelling circumstances justified its decision to take formal action on the local superintendent's recommendation for dismissal even though Mr. Johnston was by that time in jail and clearly never returning to teach in Howard County. The local board found that dismissal accomplished a purpose other than simply ending the employment relationship; it defined the manner of separation from employment and created a record of the termination of the employment relationship between the Appellant and the local board.

We conclude that the local board retained the power to address the merits of the matter and to adopt the Superintendent's recommendation to dismiss Mr. Johnston for immorality, misconduct-in-office, and insubordination.¹

¹ Although we have concluded that the local board acted legally here, when we step back and view the events in this case, they take on a certain metaphysical quality - a notice of retirement that does not result in an end of the employment relationship; an automatic contract termination that terminates the employment relationship but does not moot the termination case, a request from Ms. Johnston's counsel for a referral to OAH pursuant to §6-202, but subsequent argument from the same counsel that §6-202 due process does not apply here.

Like the parties, we struggled to place this case in its correct procedural posture. We believe the difficulty arose because the certificate revocation process preceded the termination process. If a local board wants to retain full control of the employee's termination, it should institute and complete the termination process before requesting that the State Superintendent

B. Entitlement to Local Retirement Benefits

The Appellant argues that because he is a retiree in the eyes of the State, he is entitled to local retirement benefits, which include, *inter alia*, health insurance. The local board disagrees.

The local board's employee retirement Handbook states:

Employees who retire from employment with Howard County Public School System are eligible for continued membership in the school system's medical plans....

(Appeal, Ex. 7 at 8).

In the eyes of the local board, Mr. Johnston did not "retire from employment" with HCPSS because the local board did not approve the retirement, but rather terminated Mr. Johnston.

The local board concluded that it was the board's prerogative to establish the type of separation from employment that occurred here. (Appeal, Ex. 11, Decision at 5). We agree with the local board. As it points out in its decision, for 50 years the Board has taken public action on resignations and retirements creating strong precedent that it is the local board, not the employee, that determines the manner by which an employment relationship ends, at least for local purposes. (Appeal, Ex. 11, Decision at 5).

The local board interpreted its own Handbook to de-link the State retirement benefit from the local retirement benefit. We concur with the local board's interpretation of its own Handbook. The local board explained:

Although there was no separate definition of retirement in the Handbook, "there is also no explicit adoption or official recognition of the State definition of "retire" for State retirement purposes as controlling for purposes of the local health benefit The local health benefit is in a separate section of the Handbook. The only reference in that section to the State Retirement System is the following: 'If an employee elects to continue medical insurance in retirement, a waiver must be signed authorizing the Maryland State Retirement Agency to deduct the premium from the pension check.'

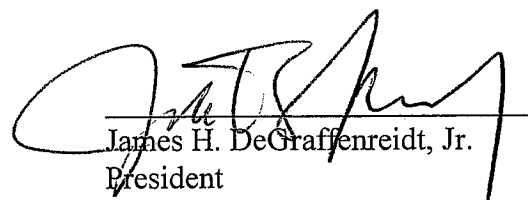
(Appeal, Ex. 11 at 5).


revoke the teacher's certificate (thus triggering an automatic termination of the contract which was the basis for the argument that the local board had nothing from which to terminate the employee).

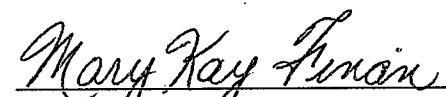
The local board's interpretation is neither arbitrary nor unreasonable. It is based on local board's authority to control and govern the operation of its school system. We find nothing definitive in the Handbook linking the receipt of the State retirement benefits to a mandate that the local board must provide local retirement benefits when it declines to recognize the retirement and ultimately terminates the employee.


CONCLUSION

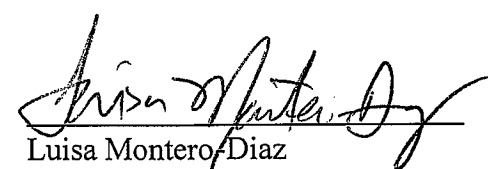
For all the reasons stated herein, we affirm the decision of the local board.



James H. DeGraffenreidt, Jr.
President


Charlene M. Dukes
Vice President


Mary Kay Finan


S. James Gates, Jr.


Luisa Montero Diaz


Sayed M. Naved

Madhu Sidhu
Madhu Sidhu

Guffie M. Smith, Jr.
Guffie M. Smith, Jr.

Donna Hill Staton
Donna Hill Staton

Ivan C.A. Walks
Ivan C.A. Walks

Kate Walsh
Kate Walsh

August 24, 2010