RONALD BROWN,

Appellant

v.

QUEEN ANNE'S COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 14-11

OPINION

INTRODUCTION

The Appellant Ronald Brown requests that this Board reconsider its July 23, 2013 Opinion in *Brown v. Queen Anne's County Bd. of Educ.*, MSBE Op. No. 13-37 (2013). The Queen Anne's County Board of Education ("local board") filed a Memorandum in Opposition. Appellant filed a Memorandum in Support of his Motion and the local board replied.[1]

FACTUAL BACKGROUND

In *Brown v. Queen Anne's County Bd. of Educ.*, this Board affirmed Appellant's dismissal as a custodian for the Queen Anne's County Public School System. Appellant previously worked as both a custodian and a bus driver for the school system. On May 31, 2012, the bus contractor requested that Appellant take a random drug test. The test result was positive for marijuana. As a result, Appellant was prohibited from driving school buses. He also met with Daniel Lessard, Human Resources Officer, and Sidney Pinder, Supervisor of Facilities, concerning his custodian job. Appellant stated he attended a party over the Memorial Day weekend where he smoked marijuana. Appellant declined offers from school officials to be retested at his own expense. The school system's Drug-Free Work Policy provided two options for a first-time positive test result: (1) terminate the employee, or (2) place the employee on immediate leave without pay with the option to participate in a rehabilitation program. Lessard fired Appellant on June 11, 2012.

Appellant appealed to the Superintendent who affirmed the dismissal. In his appeal before the local board, Appellant denied smoking marijuana, but admitted he was at a party where people smoked marijuana and claimed a friend blew marijuana smoke in his face. The local board upheld the Superintendent's decision, citing the school system's "no tolerance" policy toward drug use.

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[1] Appellant seeks a hearing before the State Board on his request for reconsideration. The State Board may decide an appeal on the record without a hearing or oral argument. COMAR 13A.01.05.06.B. We shall do so here.

This Board upheld Appellant's termination. We concluded that Appellant was provided due process even if he did not have a formal hearing because there was no dispute of material fact in the case. We noted that the school system's Drug-Free Work Place Policy permitted firing Appellant after a first-positive drug test. We stated that Appellant's admission that he smoked marijuana, along with the positive test and Appellant's interaction with children at the school, was sufficient evidence to support the decision of the Superintendent and local board. As a result, we concluded that the Superintendent's decision to fire Appellant was not arbitrary, unreasonable, or illegal.

STANDARD OF REVIEW

A decision of the State Board may not be disturbed unless there is sufficient indication that (1) the decision resulted from a mistake or error of law, or (2) new facts material to the issues have been discovered or have occurred subsequent to the decision. COMAR 13A.01.05.10.D. The State Board may refuse to consider facts that the party could have produced while the appeal was pending. COMAR 13A.01.05.10.E. The State Board may, in its discretion, abrogate, change, or modify the original decision. COMAR 13A.01.05.10.G.

LEGAL ANALYSIS

In requesting reconsideration, Appellant argues that the local board violated its own policies and procedures by not allowing him the opportunity to respond to the Superintendent's memorandum prior to the local board reaching its decision in his case. *See Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 468-69 (2003) (holding that an administrative agency's decision may be overturned if a claimant can show the agency failed to follow its policies or procedures and the claimant was prejudiced as a result); *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). As a result, Appellant argues that the local board and the State Board did not have the benefit of a fully-developed record on which to decide the matter. Although Appellant previously raised this issue on appeal, we did not address this argument in our prior decision. We shall do so now.

The Queen Anne's County Board of Education Rules of Procedure in Appeals and Hearings provide that, within 10 days of an Appellant filing an Appeal Information Form, the Superintendent may submit to the local board additional documents or information in support of the decision. The Appellant is then given the chance to respond. *See* Queen Anne's County Rules of Procedure in Appeals and Hearings B.3(c)(1) ("Within five (5) business days after the Superintendent's submission is sent, the appellant(s) may submit additional documentation in support of the appeal and in response to that submitted by the Superintendent and shall provide a copy to the Superintendent.").

After the local board issued its decision, Appellant claimed he had not been allowed this opportunity to present additional documents or respond to the Superintendent's submission. Appellant stated his counsel was told by the school system's counsel to wait for permission before sending any additional documents or filings. The school system's counsel, in an affidavit presented by the local board, denies having made such a statement. The affidavit states that the school system's counsel spoke with Appellant's counsel by phone on October 18, 2012. The

school system's counsel states that she told Appellant's counsel that Appellant could submit whatever documentation he wished to be considered. She denies telling Appellant's counsel to delay or to wait for permission before sending documents. Appellant's counsel did not submit an affidavit but maintains that her statements about the October 18 phone call have remained consistent throughout the appeals process.

In support of her argument, Appellant's counsel contends that the affidavit is inconsistent with a previous statement made by the school system's counsel in December 2012. After the local board issued its decision on December 5, 2012, Appellant's counsel sent a letter in which she described the October 18 phone call as having been about whether Appellant would receive a hearing before the local board and if he would be allowed to respond to the Superintendent's filing. The school system's counsel responded in a December 26, 2012 letter in which she recalled counsel's request "to present testimony with witnesses." The school system's counsel stated that the decision on whether to hold a hearing or proceed on the filings was a decision of the local board. Appellant's counsel claims the affidavit and the December 26 letter are inconsistent because the affidavit states that the school system's counsel told Appellant's counsel she could submit whatever she wanted, while the letter makes no mention of this statement. Appellant's counsel claims that this is evidence that the school system's counsel has changed her story. We disagree. Nothing in the December 26 letter contradicts the affidavit. The fact that the affidavit includes an additional piece of information not mentioned in the letter does not mean that the affidavit is contradictory.[2]

The Maryland Lawyers' Rules of Professional Conduct require candor before adjudicative bodies. *See* MLRPC Rule 3.3 ("Candor Toward the Tribunal"). Appellant's counsel did not submit an affidavit, but her filings have been under her signature and we do not doubt that she is sincere in her recollection of the conversation with the school system's counsel. There is no evidence that either attorney is lying about her recollections of the October 18 phone call. In reviewing the available evidence, we conclude that a misunderstanding likely occurred between the two attorneys. According to Appellant's counsel, she sought a hearing before the local board *and* the opportunity to respond in writing to the Superintendent's filings. The school system's counsel recalls a conversation only about the request for a hearing. The most reasonable explanation is that the school system's counsel thought they were only talking about a request for a hearing while Appellant's counsel thought they were discussing both the request for a hearing and the ability to respond to the Superintendent's filing. We believe it is more likely that the parties misunderstood one another than that one of the attorneys lied to gain an advantage in this appeal.

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[2] Appellant's counsel raises an additional argument that was not previously presented to the State Board. She argues that her belief that Appellant would receive a hearing before the local board was consistent with a position taken by the Maryland Association for Boards of Education ("MABE"). As evidence, Appellant's counsel cites a 2009 position statement written by MABE concerning a pending Senate bill. In the statement, MABE writes that non-certificated employees are provided "substantial due process rights" including the right to appeal to a local board of education. There is no mention of hearings. Even if we were to consider this new evidence, it does not support Appellant's argument.

The blame for this misunderstanding, though, falls upon Appellant's counsel. The local board's rules clearly state that an Appellant has five days to respond to the Superintendent's filings. Appellant's counsel acknowledges in her December 11 letter that the ability to respond to the Superintendent's filing would have been "consistent with past practice." In other words, Appellant's counsel was aware that she had the opportunity to respond in writing within five days to the Superintendent's filing. Instead, she apparently agreed to wait while the school system's counsel conferred with the local board on whether Appellant would be allowed to exercise a right that was explicitly laid out in the local board's rules. Appellant did not attempt to have the school system's counsel memorialize this conversation in writing. Nor did she follow the rules and file the Appellant's response within five days in an abundance of caution. In fact, approximately six weeks passed between the October 18 phone call and the day the local board issued its decision. The longer Appellant's counsel went without hearing back from the school system's counsel, the more she should have questioned whether a misunderstanding had occurred.

The State Board has consistently held that the Appellant bears the burden of supporting allegations of illegality with factual evidence. *See Breedon v. Prince George's County Bd. of Educ.*, MSBE Op. No. 08-34 (2008). Appellant has not met his burden to demonstrate that the local board violated its policies and procedures. Our analysis on this point does not change our conclusions in MSBE Op. No. 13-37.[3] Appellant provides no other claim of mistake or error of law on the State Board's part and does not offer new facts that would alter our original decision.

CONCLUSION

We modify our decision in MSBE Op. No. 13-37 to incorporate the above analysis. We otherwise deny Appellant's request for reconsideration.

Charlene M. Dukes MCP
Charlene M. Dukes
President

Mary Kay Finan
Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart
Linda Eberhart

[3] Because we conclude there was no violation of due process, it is unnecessary for us to consider any additional evidence Appellant might have presented to the local board. We note, however, that the substance of the additional information Appellant states he would have presented was already before the local board.

Absent

S. James Gates, Jr.

Absent

Larry Giammo

Absent

Luisa Montero-Diaz

Absent

Sayed M. Naved

Madhu Sidhu

Madhu Sidhu

Donna Hill Staton

Donna Hill Staton

Guffrie M. Smith, Jr.

Guffrie M. Smith, Jr.

March 25, 2014