

THOMAS E. ERVIN,

Appellant

v.

ANNE ARUNDEL COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 99-15

### OPINION

This is an appeal of the dismissal of a non-certificated employee for misconduct and violation of the local board's drug and alcohol free workplace policy. Appellant argues that the local board's decision was arbitrary, unreasonable and illegal. Briefs supporting their respective positions have been filed by both parties.

### BACKGROUND

Appellant was employed as a Maintenance Painter III with the Anne Arundel County Public School System. On January 31, 1997, the Anne Arundel County Police executed a search and seizure warrant at the Appellant's residence. As a result of that search, the police seized marijuana, smoking devices, a scale, plastic baggies and cash. In response to questioning by the police, the Appellant admitted possession of marijuana and acknowledged that he had sold marijuana to others. The Appellant told the police that he had no more than four customers. Appellant was arrested and charged with possession of marijuana with intent to distribute. Appellant was suspended without pay from his position as a painter on February 5, 1997, based on "possession of drugs."

On April 21, 1997, Appellant pled guilty in the Circuit Court for Anne Arundel County to possession of marijuana with intent to distribute. Appellant was sentenced to one year imprisonment with all but thirty days of the sentence suspended. On August 8, 1997, Appellant's sentence was modified; the guilty plea was stricken and Appellant was given probation before judgment ("PBJ") pursuant to Md. Ann. Code art. 27, § 641.

An employment termination hearing was held on August 12, 1997. On September 16, 1997, the Director of Human Resources, David D. Lombardo, advised Appellant of his termination. He stated:

A review of the case transcript clearly shows that you admitted to possession of a CDS with intent to distribute. Although your guilty plea was later replaced with a PBJ, which in the criminal justice system does not equate to a conviction, this does not eliminate the

fact that you admitted to illegal drug use.  
You were in violation of Board Policy Code 800.03.  
Administrative Regulation 800.03, paragraph II.B.10 states:  
“Employees convicted of drug and alcohol offenses are in violation  
of Board Policy 800.03.” The Board has a zero tolerance for illegal  
use of drugs. As stated in Policy Code 800.03.II, this is because:

“The spirit and intent of this policy rests on two  
principles. The first principle recognizes above all  
else the importance of maintaining exemplary  
standards for all Board employees where the safety  
and welfare of students are concerned. The second  
principle recognizes that the Board has the  
responsibility, as an agency working with children  
and youth, and a special obligation to reinforce the  
values inherent in its curriculum and instructional  
objectives through appropriate attitude and  
behavior.”

Appellant appealed the termination decision to the local board. A hearing was held before a local hearing examiner who found that Appellant had engaged in misconduct and had violated Board Policy 800.03. However, the hearing officer recommended that the sanction be suspension without pay as the appropriate disciplinary action in this case, and that the board offer Appellant the treatment options for substance dependency enumerated in board policy 800.03, as well as offer Appellant a return to work contract with certain conditions related to Appellant’s substance abuse problem.

The local board adopted the findings of fact and conclusions of law of the hearing examiner, but rejected the hearing examiner’s recommendation for suspension, and upheld the discharge.

## ANALYSIS

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

Appellant argues that he did not receive proper notification of the reasons the local board now claims were the basis of his termination. He insists that based on correspondence dated September 16, 1997 from David D. Lombardo, Director of Human Resources, his termination

was based only on paragraph (II)(B)(10) of Administrative Regulation 800.03 and his conviction on drug charges prior to receiving the PBJ.

From our review of the record, we find that the Director of Human Resources sufficiently apprised Appellant of the reasons for his termination. He indicated that Appellant was being discharged for his illegal drug use and possession of a controlled dangerous substance with intent to distribute, and referenced local board policy 800.03 as well as the corresponding implementing administrative regulation.<sup>1</sup> Furthermore, in his opening arguments before the local hearing examiner, the attorney for the board stated that “Mr. Ervin was terminated from his employment . . . for alleged violation of Board of Education Policy and Regulation 800.03,” and that “Mr. Ervin violated [the board’s drug] policy by using marijuana and possessing marijuana with intent to distribute.” Tr. at 7-8. Appellant was thus provided with clear and sufficient notice of the reasons for his termination, as well as an opportunity to be heard. The fact that a specific paragraph number within the regulation was also listed in Appellant’s termination letter does not discount the entirety of the information that was conveyed regarding the basis of Appellant’s discharge, which was clearly not limited solely to the fact of Appellant’s conviction.

The local hearing examiner also determined that Appellant had committed misconduct as set forth under Section 2 of Article 19 of the Negotiated Agreement between AFSCME and the local board which provides that “[t]he Board may suspend or discharge any permanent Unit III member for immorality, misconduct, insubordination, incompetency, or willful neglect of duty.” Appellant now argues that it was improper for the hearing examiner to consider the Negotiated Agreement as a basis for his termination and any argument in that regard should have been disallowed at the hearing.

Appellant, however, did not object at the hearing to counsel’s argument or to consideration of the causes for termination listed in the negotiated agreement. The transcript reveals, in fact, that when the portions of the document concerning discipline and discharge were offered, Appellant’s attorney specifically stated, “I have no objection.” Tr. at 9-10. The State Board has consistently declined to address issues that have not been reviewed initially by the local board. *See Chase Craven v. Board of Education of Montgomery County*, MSBE Opinion No. 97-43 (October 29, 1997)(failure to challenge suspension before local board constituted waiver); *Earl Hart v. Board of Education of St. Mary’s County*, MSBE Opinion No 97-37 (September 25, 1996)(failure to raise issue of age discrimination below constituted waiver on appeal). Accordingly, based upon Appellant’s failure to raise the issue before the local board, we find that Appellant’s objection to consideration of causes for termination listed in the negotiated agreement has been waived.

In its decision, the local board emphasized its responsibility of insuring a safe and healthful

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<sup>1</sup>The Supervisor of Operations provided Appellant with a copy of Administrative Regulation 800.03 in correspondence dated February 5, 1997, concerning Appellant’s chemical dependency, and advised Appellant that employees who violate the policy can be subject to disciplinary action.

learning environment for its students. The board indicated that violation of local board policy 800.03 was the significant infraction, and acknowledged that Appellant “has not maintained the exemplary conduct required of Board employees, particularly those who can come in contact with students.” The board based its decision on Appellant’s actions, and not on Appellant’s conviction prior to receiving the PBJ.<sup>2</sup>

Moreover, local board Administrative Regulation 800.03 (III)(B)(9) states:

Employees will report any arrest for the illegal use of drugs or alcohol abuse to their supervisor within five days of the arrest. The supervisor will report the incident to the appropriate assistant superintendent who will take appropriate action which may include written reprimand, suspension, or termination.

Appellant admitted to the illegal use of drugs and was arrested on January 31, 1997, for possession of marijuana with intent to distribute. Appellant was on notice that the drug incident was the basis for his termination. Clearly, the board’s decision is consistent with board policy and regulation 800.03.

Finally, Appellant argues that he should not have been terminated because board policy 800.03 is not a “zero tolerance” policy. While it does not appear that the policy and regulation require termination in each case of a violation, termination is one of the disciplinary action options made available to the supervisor or superintendent. Accordingly, we find that the local board did not act arbitrarily, unreasonably, or illegally in this matter.

## CONCLUSION

For these reasons, we affirm the decision of the Board of Education of Anne Arundel County.

Walter Sondheim, Jr.  
President

Edward Andrews  
Vice President

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<sup>2</sup>Md. Ann. Code art. 27, § 641 provides that discharge of a person by PBJ “shall be without judgment or conviction and is not a conviction for purposes of any disqualification or disability imposed by law because of conviction of a crime.” However, the Maryland Court of Special Appeals has ruled that “disqualification or disability imposed by law” means the denial of a legal right by operation of law, and further that the right to continued government/public employment is not a legally protected right. *See Curry v. Dept. of Public Safety*, 102 Md. App. 620, 628-635 (1994), *cert. dismissed* 340 Md. 175 (1995).

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March 30, 1999