

TERRY HARTMAN,

Appellant

v.

WASHINGTON COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 99-27

OPINION

This is an appeal of the dismissal of a non-certificated employee for continued unsatisfactory work performance in breach of his conditional employment agreement. The local board has filed a Motion to Dismiss maintaining that the contents of Appellant's appeal do not satisfy the filing requirements. Alternatively, the local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal.

BACKGROUND

Appellant was employed as a custodian with the Washington County Public School System for 14 years. On November 19, 1996, Appellant was suspended from his position without pay based on his continued unsatisfactory work performance. Appellant met with the superintendent of the Washington County Public School System, who discussed Appellant's overall unsatisfactory work performance including his failure to secure the school building at night, and alerted Appellant that failure to improve could result in his dismissal. Appellant had already received reprimands in June and October of the same year regarding his unsatisfactory performance, and he had received extensive feedback from prior performance evaluations indicating that he needed improvement in various aspects of his job.

At the time of Appellant's suspension, his work history revealed the following:

- May 11, 1990 letter concerning Appellant's problems completing work assignments, including his cleaning duties and securing the building.
- 1992 performance appraisal indicating "needs improvement" in attendance, acceptance of constructive criticism, and diagnosing critical problems and quickly providing an effective solution. Comments referenced Appellant's deficiency in securing the building, and problems with his cleaning.
- 1993 performance appraisal indicating "needs improvement" for understanding of assignments, diagnosing critical problems and quickly

providing an effective solution, facilitating proper procedures and quickly providing an effective solution, and effectively providing on the job training for new employees.

- 1994 performance appraisal indicating “needs improvement” in attendance, understanding of assignments, diagnosing critical problems and quickly providing an effective solution, and facilitating proper procedures and quickly providing an effective solution.
- 1995 performance appraisal indicating “needs improvement” in attitude and understanding of assignments. Comments reminded Appellant to secure the building and follow through on basic assignments.
- February 28, 1996 verbal reprimand regarding failure to secure the school building.
- 1996 performance appraisal indicating “needs improvement” in attitude, quality of work, understanding of assignments, completion of tasks and acceptance of criticism. Comments mentioned Appellant’s failure to secure the building and failure to follow through on basic cleaning assignments.
- June 11, 1996 written reprimand for failure to secure the building.
- August 2, 1996 letter outlining the school system’s concerns with Appellant’s continuing poor performance.
- September 30, 1996 follow up evaluation indicating “needs improvement” in work commitment, quality of work and completion of tasks. Comments noted Appellant’s failure to secure the building and to perform certain cleaning assignments.
- October 9, 1996 written reprimand for continued unsatisfactory work performance.
- November 8, 1996 letter regarding neglect of duty for leaving work early without permission.

Thereafter, the principal of the school issued a letter of reprimand to Appellant for his failure to secure the school building on December 12, 1996, January 14, 1997 and February 4, 1997. Appellant’s employment was then terminated effective February 14, 1997 based on his continued unsatisfactory work performance.

Appellant appealed the termination, and was reinstated on probation to his position on April 1, 1997. The superintendent agreed to the reinstatement contingent on Appellant's attending mandatory counseling¹ and maintaining a satisfactory performance on the job.

In September 1997, Appellant was terminated from his position for breach of his conditional employment with the school system. By letter dated September 10, 1997, the interim superintendent informed Appellant of his failure to demonstrate that he was an acceptable employee. She stated:

On September 2, your Head Custodian issued you a letter for failing to report to work. On August 28, you called and said you would be late, but you never reported to work. On August 29, you came to work to pick up your paycheck and told the Head Custodian you would report to work for your shift. However, you never reported to work, nor did you call to say you would not be in. You did not report to work on September 3, 4, or 5, indicating you had car trouble. Your actions in these instances resulted in the school being understaffed and caused a burden on the custodial crew.

Ms. Cannon met with you on August 26 and indicated it was essential that you report to work and perform your job satisfactorily. She indicated to you that failure to do so would result in termination. Failure to report to work and failing to call in is unacceptable performance which cannot be tolerated. You indicated you were having car trouble, yet you found a way to get to work to receive your paycheck.

Appellant requested and the interim superintendent agreed to reconsider her termination decision. After conducting a hearing at Appellant's request, the interim superintendent declined to reinstate Appellant to his position.

On further appeal, the local board held a hearing on September 1, 1998. Appellant testified on his own behalf, and submitted only one item into evidence consisting of a letter of recommendation from the head custodian of the Marshall Street Center, stating that he had a

¹The counseling requirement was based on Appellant's apparent alcohol problem. *See* Gerson letter of 3/19/97. Appellant signed a return to work agreement in which he recognized his alcohol abuse, and agreed to certain conditions, including cooperation with the treatment plan devised by the Employee Assistance Program. *See* Return to Work Agreement dated 3/21/97.

favorable work experience with Appellant for two months in 1997.² The local board upheld Appellant's discharge.

ANALYSIS

The local board has filed a Motion to Dismiss claiming that Appellant has failed to submit materials in compliance with COMAR 13A.01.01.03(B)(2)(b), (c), and (d). These provisions require that an appeal to the State Board designate the decision or order of the county board for which review is requested, contain a statement of facts necessary to an understanding of the appeal, and contain the issues or charges for which the appeal is being taken.

Appellant filed a letter with the State Board, dated September 15, 1998, requesting that the Board reconsider Appellant's employment with the Washington County Board of Education as a custodian from October, 1984 to September 11, 1997. The State Board received further correspondence from Appellant on October 15, 1998. In that submission, Appellant included a letter which indicated that he was advised of his termination by letter dated October 27, 1997. On February 3, 1999, the State Board received correspondence from Appellant containing a copy of the local board decision that is the basis of his appeal.³ We find that the items submitted by Appellant are sufficient to comply with the requirements of COMAR 13A.01.01.03B. Appellant has clarified that this is an appeal of the local board's September 9, 1998 decision concerning his termination from employment.

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)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).

The record in this case consists of overwhelming and unrefuted evidence of Appellant's continued deficiencies in his job performance. Although Appellant claims that he performed his

²The record discloses, however, that Appellant had worked at the Marshall Street Center for two months when he was initially employed in 1983.

³Appellant was initially advised that his appeal was untimely based on the information contained in his first two letters to the State Board. His appeal was finally processed after receipt of the third letter which included the local board's opinion, indicating that the appeal had been timely filed.

⁴This provision has been recodified verbatim as § 4-205(c)(3) of the Education Article (1997 Repl. Vol. & 1998 Supp.).

job duties satisfactorily, his inadequacies persisted, spanning a period of years beginning in 1990 until the time of his termination. Appellant was apprised of his poor performance several times and was given numerous opportunities to improve, including a probationary reinstatement following an initial termination.

With regard to Appellant's unscheduled absences from work on August 28 and 29, 1998 and September 3, 4, and 5, 1998, Appellant testified that he had transportation problems on those days. It is not the employer's responsibility, however, to ensure that an employee has a means to get to work. Appellant failed to report to work without proper notice and authorization. Given Appellant's poor employment history and numerous opportunities to improve, we find that the local board's decision in this case is not arbitrary, unreasonable, or illegal.

CONCLUSION

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

Walter Sondheim, Jr.
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May 26, 1999