

HARRY SMITH,

Appellant

v.

SOMERSET COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-53

OPINION

In this appeal, a school psychologist for the Somerset County Public Schools challenged the local board's decision affirming a 5 day suspension without pay for misconduct. The matter was referred to the State Office of Administrative Hearings where, following a hearing on the appeal, the Administrative Law Judge ("ALJ") issued a proposed decision on August 28, 2000, a copy of which is attached to this opinion as Exhibit 1. The Appellant filed objections, and oral argument was heard by the State Board of Education on October 24, 2000.

Having reviewed the record in this matter including the ALJ's proposed decision and the objections of Appellant, and after considering the arguments of counsel, we adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge. For the reasons stated by the ALJ, we affirm the decision of the Board of Education of Somerset County suspending the Appellant for five days without pay for misconduct.

Philip S. Benzil
President

Marilyn D. Maultsby
Vice President

Raymond V. Bartlett

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Walter S. Levin, Esquire

Judith A. McHale

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

December 5, 2000

HARRY SMITH, APPELLANT v. BOARD OF EDUCATION OF SOMERSET COUNTY * * * * * *	* * * * * * * * *	<p style="text-align: center;"><u>EXHIBIT 1</u></p> BEFORE BRIAN ZLOTNICK, ADMINISTRATIVE LAW JUDGE, MARYLAND OFFICE OF ADMINISTRATIVE HEARINGS CASE No.: MSDE-BE-01-200000001 * * * * *
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PROPOSED DECISION

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FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On or about October 13, 1999, Harry Smith, ("Appellant"), school psychologist, received notification from Michael D. Thomas, Ed.D, Superintendent of the Somerset County Public Schools ("SCPS"), recommending a five day suspension without pay of the Appellant for the period of November 1st through 5th 1999. The Appellant appealed the recommendation to the Board of Education of Somerset County (the "Board"). The Board conducted a hearing on November 30, 1999, pursuant to Md. Code Ann., Educ. § 6-202(a)(3) (1999). In a decision issued on December 18, 1999, the Board upheld the five-day suspension. Pursuant to Md. Code Ann., Educ. § 6-202(a)(4) (1999), the Appellant appealed the Board's December 18th decision to the Maryland State Board of Education and the matter was scheduled before the Office of Administrative Hearings.

On May 10, 2000, the Appellant, his attorney Robin R. Cockey, Esq., and Fulton P. Jeffers, Esq., representing the Board participated in a prehearing telephonic conference conducted at the Office of Administrative Hearings before Brian Zlotnick, Administrative Law Judge. Pursuant to the Code of Maryland Regulations ("COMAR") 13A.01.01.03P(1), a hearing was conducted on July 13, 2000, before Brian Zlotnick, Administrative Law Judge, at the Wicomico County District Court Building, 201 Baptist Street, Salisbury, Maryland 21801. The Appellant was present and was represented by Robin R. Cockey, Esq. Fulton P. Jeffers, Esq. represented the Board.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999) and the Rules of Procedure of the Office of Administrative Hearings, COMAR 28.02.01. The parties stipulated that they would only provide arguments at the hearing as the record of the November 30, 1999 hearing before the Board would be considered as evidence. The parties additionally submitted stipulated findings of facts and also stipulated to the exhibits submitted at the November 30th hearing. Accordingly, those exhibits submitted at the November 30th hearing along with the transcript of that hearing shall be considered by me in my decision.

ISSUES

- (1) Was a five-day suspension proposed by the Somerset County Board of Education against Harry Smith proper?
- (2) If a suspension of Harry Smith is warranted, is five days an excessive or appropriate penalty?

SUMMARY OF THE EVIDENCE

A. Exhibits

The parties jointly submitted the record of the hearing before the Board, with exhibits, constituting 138 pages of transcript. Both parties stipulated to the following joint exhibits:

Joint Exhibit # 1 - June 17, 1999, letter from Herman G. Riggin, Jr. to the Appellant.

Joint Exhibit # 2 - August 24, 1999, memo from Herman G. Riggin, Jr. to the Appellant.

Joint Exhibit # 3 - October 13, 1999, letter from Superintendent Michael Thomas to the Appellant.

Joint Exhibit # 4 - Transcript from the November 30, 1999, hearing before the Board.

Joint Exhibit # 5 - December 18, 1999, decision by the Board.

Joint Exhibit # 6 - The Board's policy regarding 11 month employees.

Joint Exhibit # 7 - Agreement between the Board and the Teachers Association of Somerset County.

The following exhibits, in addition those exhibits already marked as joint exhibits, were also admitted during the November 30, 1999 Board hearing and as such will be considered as joint exhibits as well:

Joint Exhibit # 8 - Timeline of disciplinary actions against the Appellant.

Joint Exhibit # 9 - September 23, 1997 letter from Dr. Hazel G. Milbourne to the Appellant.

B. Testimony

No testimony was provided by either party as each party decided to rely on the testimony presented at the November 30, 1999 hearing before the Board. The attorneys for each party simply provided argument for their respective clients.

FINDINGS OF FACT

The parties stipulated to the following facts:

1. The Appellant has been employed at all relevant times by the Somerset County Board of Education (“Board”) as a school psychologist.
2. Prior to 1997, the Appellant was a ten- (10) month employee.
3. In 1997, the Appellant became an eleven- (11) month employee.
4. In letters dated June 17, 1999 and August 24, 1999, Herman “Sonny” Riggin, the Board’s Associate Director of Pupil Services/Special Education, wrote the Appellant requesting dates that the Appellant worked during the summer of 1999.
5. On September 27, 1999, Michael D. Thomas, Ed.D., Superintendent of Somerset County Schools, met with the Appellant and informed him it had been determined that the Appellant had worked 11 days during the summer of 1999.
6. During that conference, the Superintendent further informed the Appellant that it was his position that the Appellant was required to work a total of 20 days during the summer of 1999, and that the Appellant was therefore obligated to reimburse the Board \$1,966.32, the Appellant’s estimated pay for 9 days.
7. At the conclusion of the September 27, 1999, meeting, the Appellant paid the Board the amount demanded, \$1,966.32.
8. By letter dated October 13, 1999, the Superintendent informed the Appellant that he had decided to suspend him for 5 days without pay for misconduct in office as penalty for working only 11 out of 20 days during the summer of 1999.
9. The Appellant appealed his suspension to the Board, which held a hearing concerning his appeal on November 30, 1999.

10. The Board issued a decision in this case on December 18, 1999.¹

After careful consideration of the record, I find, by a preponderance of the evidence, the following additional facts:

11. The Appellant is assigned to supervise the work of Ms. Eusebio, a psychometrist. This assignment requires the Appellant to spend 72 hours per year with Ms. Eusebio with those hours being beyond his normal work schedule.

12. The Appellant raised some concerns to his supervisors regarding the extra hours of work that he was spending with Ms. Eusebio. On September 23, 1997, Dr. Milbourne, Associate Director of Personnel, decided to promote the Appellant from a ten-month employee to an eleven-month employee to compensate the Appellant for the extra time spent with Ms. Eusebio.

13. All eleven month employees of the Somerset County Board of Education, including school psychologists, are required to work an additional 20 days beyond the Board of Education approved calendar. This policy has been in effect since July 16, 1985.

14. The Appellant complied with the requirements of being an eleven-month employee in 1998 by working an additional 20 days.

15. The Appellant failed to meet his twenty-day requirement in 1999 and only worked eleven additional days.

16. The Appellant has had the following disciplinary actions taken against him:

- May 23, 1991 - Letter from principal regarding use of strong language on the job.

¹ Stipulated facts 11 and 12 are not findings of fact as they merely describe exhibits entered into evidence. A finding of fact regarding the Board's policy regarding 11-month employees will be made after a review of the evidence.

- May 28, 1991 - Letter from Superintendent regarding May 23, 1991 letter.
- October 26, 1994 - Letter from supervisor regarding time management, leaving inservice.
- December 1, 1994 - Letter from supervisor regarding mutual cooperation
- March 14, 1996 - Letter from supervisor regarding time management.
- March 12, 1997 - Letter from personnel department regarding time management and failure to submit reports in a timely fashion.
- November 17, 1998 - Letter from principal regarding inappropriate comments.
- August 19, 1999 – Letter from Superintendent regarding inappropriate actions and comments. Two day suspension.

DISCUSSION

The Appellant in this case asserted that he is not required to work an additional 20 days per year as an eleven-month employee because of the additional 72 hours per year he spends supervising Ms. Eusebio. His main contention rests with the September 23, 1997 letter from Dr. Milbourne which promoted the Appellant from a ten-month employee to an eleven-month employee. The Appellant argued that he filed a grievance with the Somerset County School System regarding the additional time he had to work to supervise Ms. Eusebio without compensation. The Appellant contended that the promotion was a monetary settlement of his dispute with the school system and was made to specifically compensate him for the extra hours he works in order to supervise Ms. Eusebio. As such, the Appellant believed that the promotion to an eleven- month employee was made to compensate him for the extra hours spent supervising Ms. Eusebio. The Appellant contended that he is not subject to the policies requiring eleven-month employees to work an additional twenty days beyond the normal Board approved school

year.

I disagree with this assertion for the following reasons. First, Dr. Milbourne's September 23, 1997 letter merely stated that the Appellant was being promoted from a ten-month employee designation to an eleven-month employee designation. This letter does not state that the Appellant will be exempt from any of the requirements, notably the twenty-day requirement, that all other eleven-month employees of the Somerset County School System are subject to. Furthermore, the Appellant never raised this argument until the November 30, 1999 hearing. The Appellant, in fact, had met the twenty-day work requirement in the summer of 1998 and acknowledged to his supervisor and the Superintendent that he had failed to meet his twenty-day work requirement for 1999. The Appellant stated that he only worked an additional eleven days in 1999 thus leaving a balance of nine days. Additionally, when confronted with this discrepancy, the Appellant agreed to pay back the difference in pay that he received which totaled nine days of pay. Clearly, the Appellant was cognizant of the requirements of being an eleven-month employee. No evidence has been introduced to suggest that a special exception was made for the Appellant exempting him from working an additional 20 days per year while still receiving the salary of an eleven-month employee.

The Appellant also argued that the policy requiring eleven-month employees to work an additional twenty days per year does not apply to him, as he is a school psychologist and not a teacher. The policy states that the rules, regulations and procedures shall be considered Policy of the Somerset County Board of Education regarding all administrators, teachers, instructional assistants and secretaries. The agreement between the Board of Education of Somerset County and the Teachers Association of Somerset County states that the term teachers refers to all

professional employees represented by the Association. Thus, I find that a reasonable inference could be drawn to conclude that a school psychologist is a professional employee, and as such is subject to the policies of the Somerset County Board of Education. Furthermore, Dr. Thomas, the Superintendent of the Somerset County School System, testified at the November 30th hearing that the Appellant is an eleven-month employee and as such is required to work an additional twenty days per year. Additionally, Sonny Riggan, Associate Director of Special Education and Pupil Services for Somerset County Schools, also acknowledged during the November 30th hearing that the Appellant became an eleven-month employee on September 23, 1997 and as such is required to work an additional twenty days per year. Further, Leo Lawson, Supervisor of Personnel, testified at the November 30th hearing that the Appellant received additional pay in 1999 and that such pay was representative of the Appellant's designation as an eleven-month employee. Mr. Lawson also stated that there are no exceptions in the Somerset County personnel policy for an eleven-month employee to not work an additional twenty days in August. Accordingly, it is clear that the Appellant is an eleven-month employee and is required to work an additional 20 days per year.

The Appellant also argued that he was under the impression that he could work those additional 20 days at any time during the calendar year. He stated that he believed it would be more useful for him to work an additional twenty days during the Christmas and Easter breaks. I find this argument to be hollow and self-serving. The Appellant never made this suggestion to Dr. Thomas when confronted with his 1999 deficiency of nine days. The Appellant simply admitted that he failed to meet his twenty-day requirement and proceeded to pay the school system for the additional pay he received. Furthermore, the policy states that an eleven-month employee is

required to work an additional 20 days beyond the Board of Education approved calendar. Since the school year ends in the summer and resumes in September, it is clear that the additional days would have to be worked during the summer months, after the conclusion of the school year. Additionally, Mr. Riggin, Jr., sent a letter to the Appellant on June 17, 1999 reminding him that as an eleven-month employee he needed to work an additional twenty days. Mr. Riggin, Jr., instructed the Appellant to submit a log of the days he works during the summer. Therefore, I find that the Appellant was required to work an additional twenty days during the summer before the beginning of the 1999/2000 school year.

The Appellant further argued that even if it is determined that he failed to fulfill his twenty day work requirement in 1999, such actions do not constitute misconduct in office. He asserted that he repaid any additional pay that he received as an eleven-month employee. He stated that since he worked an additional eleven days in 1999, he repaid the Board the nine days salary to make up for the nine additional days that he did not work and as such no harm resulted from his actions. I disagree.

The Board's action in this case is based upon Md. Code Ann. Educ. § 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:

* * *

(ii) Misconduct in office...

The Appellant's suggestion that there was no impact on the school as a result of the Appellant's behavior, misses the meaning of misconduct, and is also not true. The Appellant received pay without working the requisite days necessary to receive such pay. Accepting a salary for work

that was never performed is dishonest and impacts the school system as such actions affect the credibility and integrity of the school system. Accordingly, I find that the Appellant's actions constituted misconduct.

The Appellant further argued that a five-day suspension without pay is an unfair punishment for his actions. I find, however, that the Dr. Thomas' decision to suspend the Appellant for five days without pay was warranted. This is not the Appellant's first instance of discipline from the Somerset County School System. He received a series of reprimands dating from 1991 through 1997 regarding such issues as the use of strong language on the job to time management difficulties. On November 17, 1998, the Appellant received a letter from a principal regarding the use of inappropriate comments. This succession of reprimands culminated in a two-day suspension without pay in August 1999 for inappropriate comments and actions made by the Appellant in May 1999. Therefore, I find that the Superintendent's decision to suspend the Appellant for five days without pay is an appropriate use of progressive discipline considering the Appellant's disciplinary history. Accordingly, the Board's decision to suspend the Appellant for five days without pay is upheld.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Appellant is subject to a five-day suspension without pay under Md. Code Ann. Educ. §6-202(a)(ii) (1999).

PROPOSED ORDER

It is proposed that the decision of the Board of Education of Somerset County suspending the Appellant for five days without pay for misconduct be **UPHELD**.

Date: 8/28/00

Brian Zlotnick
Administrative Law Judge