DALE CONLAN,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 01-25

OPINION

In this appeal, a former employee at the Mark Twain Secondary School contests the local board's decision not to implement an advisory arbitration award concerning his employment and alleged off duty misconduct involving two 17-year-old former students. The local board has submitted a response maintaining that the termination decision is not arbitrary, unreasonable or illegal. Appellant has submitted a reply reiterating opposition to the local board's decision.

FACTUAL BACKGROUND

Appellant held the position as User Support Specialist I at the Mark Twain Secondary School in Montgomery County.[1] At the time of his discharge, Appellant had been an employee of the Montgomery County Public School System ("MCPS") for over 29 years and was months shy of being eligible for full retirement benefits.

Around July 19, 1999, Appellant took two 17-year-old former MCPS students on a trip to his beach house trailer in Virginia.[2] Appellant bought vodka en route, with beer already in the trailer. At some point during their stay at the beach house, the two former students consumed alcohol and became inebriated.[3] One of the former students claimed that Appellant molested him during the trip. Although Appellant denied the claim, criminal charges were brought against Appellant in Virginia for sexual battery and contributing to the delinquency of a minor. A jury ultimately acquitted Appellant of these charges in February, 2000.

As a result of his actions, Appellant was placed on administrative leave with pay on September 3, 1999 while the Department of Personnel Services for MCPS conducted an investigation into Appellant's alleged off duty misconduct. A staff member interviewed the two

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[1]Mark Twain is a public secondary school for emotionally disturbed students. Appellant's job responsibilities included monitoring and maintaining the school's computer system.

[2]It appears that the boys lacked parental consent for the trip.

[3]One of the boys had been a student at Mark Twain; the other student had dropped out of Walter Johnson High School.

former students who disclosed that Appellant drove them to his house trailer in Virginia, purchasing a half gallon of vodka en route. At the trailer the two former students consumed vodka and beer. The father of one of the former students indicated that his son called him from the beach on the morning of July 19 and told him that when he awoke he discovered "someone was pulling down his zipper and fondling his genitals." The father drove to Virginia and retrieved both boys that afternoon. *See* 10/13/99 termination letter from Seleznow to Conlan.

Appellant was discharged effective October 13, 1999, as a result of his "off duty misconduct involving two 17-year-old former MCPS students." *See* 10/13/99 termination letter from Seleznow. The termination letter states:

> I am concerned to hear that despite warnings from your principal, you have maintained a relationship with certain students that has at some point involved them visiting you in your home. That individuals who are no longer MCPS students, but nonetheless minors, have engaged in imbibing alcoholic beverages with you and with your consent is shocking. Your invitation to these minors to visit you overnight and subsequent actions occurring within your home has led to your facing serious criminal charges. I am aware that a trial has been scheduled for early next year. I have reviewed documentation submitted by several parties to this incident and am convinced by the corroboration of the allegations that your conduct was inappropriate and not that expected of an MCPS employee. I cannot in good faith retain your services with MCPS.

Appellant appealed the termination decision. Pursuant to policy GJD-RB, Discipline or Discharge of Supporting Services Employees, Appellant filed an appeal through the grievance/arbitration route. *See* GJD-RB at V.A. The arbitrator, Robert J. Ables, conducted a hearing and found that although Appellant did not commit a dischargeable offense, substantial discipline was nonetheless justified. In his advisory opinion, Arbitrator Ables set forth his recommended remedy:[4]

> On the assumption that the grievant has pension entitlement of 29 years and four months with the employer, as he represents: for one year, from October 13, 1999, or until and including October 12, 2000, he shall be considered to have been reinstated with back pay (less outside earnings, as the grievant declares, upon

[4]The arbitrator's opinion was issued October 20, 2000. Pursuant to Policy GJD-RB, the arbitrator's decision is an advisory opinion provided to the local superintendent. *See* Policy GJD-RB at V.B.1.

> affidavit) with all contract benefits, on condition that he resign from all MCPS employment within 45 days from the date of this opinion, or to and including December 4, 2000, the time after October 12, 2000 to be considered employment without pay and benefits.
>
> If the grievant does not so resign, he shall be reinstated as of December 4, 2000, all time from discharge to such reinstatement to be considered as a disciplinary suspension, without pay and benefits.
>
> If such assumption is materially incorrect, the remedy prescribed shall be null and void. In such case, the arbitrator, who reserves jurisdiction of this dispute until December 12, 2000, will, upon new submissions of the parties, consider an alternative remedy.

Arbitrator Decision at 10.

After reviewing the arbitrator's advisory opinion and award, the local superintendent, Jerry D. Weast, advised Appellant that he was rejecting the arbitrator's recommendation and upholding Appellant's discharge. Dr. Weast highlighted the fact that Appellant had purchased the alcohol for the two minor boys and that the school principal and school psychologist had previously counseled Appellant against associating with students in unsanctioned, out-of-school activities. *See* November 30, 2000 letter from Weast to Appellant which states in part:

> I must reject Arbitrator Ables' assessment of the seriousness of your misconduct. I believe that you were guilty of gross misconduct even without consideration of the molestation charges, and that there is no place in Montgomery County Public Schools for an employee who exercises such inappropriate judgment with regard to students or former students. Judge James Chapin of the Circuit Court for Montgomery County reinforces this belief in his finding that you were guilty of gross misconduct associated with your work when he denied your unemployment compensation appeal.

Appellant appealed to the local board. In a decision rendered February 27, 2001, the local board determined that Appellant was guilty of misconduct warranting his dismissal, thus upholding the superintendent's decision.

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 support 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). This same standards applies to termination of professional noncertificated employees.

In this case, the local board concurred with the superintendent that Appellant engaged in misconduct. As stated in the local board's decision:

> A review of the undisputed facts in this case reveals that Mr. Conlan was guilty of misconduct warranting dismissal. Disregarding any allegations of sexual molestation, the fact that Mr. Conlan transported two boys to his vacation home trailer against the express directives of his employer and that these boys consumed alcohol while there to the point of becoming extremely inebriated renders Mr. Conlan guilty of misconduct warranting his dismissal.

Appellant claims that the local board's decision was unduly influenced by the molestation charges. We note that, to the contrary, the local board decision discounts the molestation charges for which Appellant was ultimately acquitted by a jury. Additionally, Dr. Weast's termination decision states that it was made without regard to the molestation charges.

Appellant also claims that the school system presented no evidence during the arbitration hearing that a written school policy prohibited employees from socializing with former students or that he was warned by his employer against socializing with former students. However, the record discloses that at the arbitration hearing, the former principal and the psychologist from Mark Twain testified regarding an unwritten school policy against socializing with students and explained that this policy is verbally disseminated during staff meetings at the beginning of the school year.[5] They also testified that Appellant was advised against being alone with students. Tr. 60-66; 73-74; 93-98; 100-103.

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[5]We recommend that the school memorialize policies of this nature in writing and formally disseminate them to avoid any ambiguity. As the arbitrator noted: "A written policy setting guidelines on conduct would help in judging limits on acceptable and unacceptable behavior, but the need for subjectivity in making that judgment does not extend to excusing the grievant's conduct in this case." *See* arbitrator's opinion at 6.

While it appears that Appellant is correct in his assertion that there was no written school policy prohibiting socializing with current or former MCPS students, we do not believe that this factor renders the local board's decision invalid. It is undisputed that Appellant took two underage former MCPS students out of state and purchased alcohol that was later consumed by two 17-year-olds in Appellant's trailer home. These actions constitute more than mere fraternization with former students.[6]

We concur with the following determination of the local board:

> The Board recognizes that the arbitrator's opinion in this case was rendered in an attempt to preserve Mr. Conlan's full pension.[7] However, the Board believes that when an employee has engaged in activities involving serious misconduct such as those activities of the extreme nature that are at issue in this case, the employee should not be shielded from any sanctions in order to preserve certain employment benefits. This holds true particularly when the well being and safety of children have been seriously jeopardized.

CONCLUSION

Based upon our review of the record, we find that Appellant has not met his burden of proving that the local board acted arbitrarily, unreasonably, or illegally in this matter. We therefore affirm the termination decision of the Montgomery County Board of Education.

Raymond V. Bartlett

JoAnn T. Bell

Philip S. Benzil

Reginald L. Dunn

ABSTAIN*

Clarence A. Hawkins

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[6]We note that if Appellant were certificated, he would not only have faced termination, but his certificate would also have been subject to suspension or revocation for misconduct involving minors. *See* COMAR 13A.12.05.02C(5).

[7]The record discloses that Appellant's retirement is reduced by $218.04 per month because of the termination.

Walter S. Levin, Esquire

Marilyn D. Maultsby

ABSTAIN*

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

DISSENT

John L. Wisthoff

* Clarence Hawkins and Karabelle Pizzigati, newly appointed members of the State Board of Education, did not participate in the deliberation of this appeal.

July 25, 2001