

COLEAIN STEWART,

Appellant

v.

NEW BOARD OF SCHOOL  
COMMISSIONERS FOR BALTIMORE CITY,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 02-08

### OPINION

In this appeal, Appellant contests the decision of the local board to terminate her for failure to report to work. The local board initially submitted a motion to dismiss based on untimeliness, or alternatively, a motion for summary affirmance maintaining that its decision should be upheld. The motion to dismiss has been withdrawn and the motion for summary affirmance is still before the State Board. Appellant has submitted a memorandum and supplemental memorandum opposing the local board's motion.

### FACTUAL BACKGROUND

Appellant was employed for many years as a paraprofessional with the Baltimore City Public School System ("BCPSS") working in the Department of Special Education. At some point during her employment with BCPSS, Appellant became ill and was on extended medical leave. When Appellant sought to return to work in the late fall of 1998, after being out on leave for approximately two years, she was not immediately placed in a position.<sup>1</sup> When she was offered a position she failed to appear. After a lengthy chronology of events, Appellant was eventually terminated for abandonment of position.

To support her request to return to work, Appellant provided to the school system a series of letters from her doctors. The medical documentation from Appellant's doctors consists of the following: letter dated October 22, 1998, from Appellant's cardiologist, J. Douglas Clarke, indicating that Appellant could return to full time light duty work on November 2, 1998;<sup>2</sup> letter dated October 23, 1998, from Dr. John D. Milto, indicating that "Ms. Stewart is medically cleared to return to light duty November 2, 1998 for one month and then progress to full duties as tolerated"; letter dated October 23, 1998, from Dr. Christopher J. Newman, advising that

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<sup>1</sup>Appellant's employment status became one without pay or benefits while she was on leave during the two year period.

<sup>2</sup>The notification was followed up by letter dated December 9, 1998 in which Dr. Clarke stated that "[t]here is no other medical reason except for previously stated in our letter dated, October 22, 1998, as to why Mrs. Stewart was not fully fit to return to work on November 2, 1998."

Ms. Stewart can return to work on November 2, 1998 on light duty the first month or two of her return and to gradually resume normal work duties as she progresses. It is clear that the stress of the day to day work routine leads to the recurrence of worsening tremors and muscle spasms.

BCPSS policy requires that an employee who has been absent for more than 20 days must first be released from his or her doctor and then released by the Baltimore City Office of Occupational Medicine before returning to work. In order to be seen at the City Clinic, Appellant had to present an Incident Report from her last supervisor. Appellant's last supervisor was Leonard Smackum, in the Division of Food and Nutrition Services, Appellant's last assignment while out on medical leave. However, because Mr. Smackum was unfamiliar with Appellant, he refused to issue an Incident Report. The school system eventually provided one and Appellant was seen at the City Clinic on November 18, 1998. At that time, Dr. Joy Howard cleared Appellant to return to light duty work on November 30, 1998, and regular duty work on December 2, 1998. Despite the clearance from Dr. Howard, there was still confusion regarding Appellant's work status. *See* memorandum dated 1/11/99 to Kuyawa from Howard and letter of 1/25/99 to Banks from Howard.

Thereafter, on February 8, 1999, O. Albrie Love, Jr., Director of Personnel Services, requested that Appellant report to the Office of Employment and Placement on February 16 for placement instructions. On the morning of February 16, Appellant's daughter contacted Mr. Love and indicated that Appellant was unable to report for duty because she was still under a doctor's care. Appellant's daughter indicated at that time that Mr. Love would be receiving a medical update from Appellant's physician. Having received no update, on February 24, Mr. Love advised Appellant to forward to him a medical update from her physician within seven days of receipt of his letter. On February 25, 1999, the CEO's office received a letter dated February 7 in which Dr. Milto indicated that Appellant could resume part time, light duty work as of March 1, 1999.

On March 1, 1999, Appellant and her daughter met with Ken Kuyawa, Director of Employment and Placement, to discuss positions within BCPSS. Neil Ross, Appellant's representative from the Baltimore Teachers' Union, was also present. At that time, two potential positions were identified, but not specifically offered to Appellant. Tr. (5/6/99) 29, 35.

Subsequently, by letter of March 13, 1999, Mr. Love advised Appellant of an available job assignment. The letter states:

An educational assistant assignment has been identified in the Division of Management Information Systems. This position is full time and is available until July 1, 1999. If you accept this assignment you should report to Mr. Larnell Johnson, 200 E. North Ave., Room 001 on Wednesday, March 17, 1999. If you have any questions you can reach me at 410-396-8880.

After Appellant did not report for duty, by letter dated April 22, 1999, Mr. Love notified Appellant that because she failed to accept the position or appear for work as an educational assistant in the Division of Management Information Systems, her employment with BCPSS was terminated.<sup>3</sup>

Meanwhile, Neil Ross, Appellant's Union Representative, had requested a hearing to address Appellant's employment status and her desire to be placed in a position within the school system. *See* letter of 1/5/99 from Ross to Mayer, Director of Office of Labor Relations. A hearing that was originally scheduled for March 25, 1999, was continued until May 6, 1999. Appellant's termination occurred during the period of time in which the case was continued. The appeal was heard before Alan W. Harris, Administrative Support Officer. During that hearing, Appellant sought placement on active payroll status retroactive to November 30, 1998, with full benefits and seniority. In a decision issued May 18, 1999, Mr. Harris denied the relief sought by Appellant concluding that Appellant was provided the opportunity to return to active employment status once the school system received medical clearance, but that Appellant failed to act upon that opportunity.

Appellant appealed the decision of Mr. Harris to the local board. The matter was referred to Hearing Examiner, James S. Ruckle, Jr. who recommended that the local board adopt the decision of Alan Harris. Hearing Examiner Ruckle specifically noted in his decision that Appellant never presented any evidence explaining why she failed to report to work in accordance with Mr. Love's March 13, 1999 letter. On September 12, 2000, the local board affirmed the recommendation of the CEO to terminate Appellant as a paraprofessional with the Baltimore City Public School System for failure to return to work.<sup>4</sup>

During the course of the appeal process, Appellant retired from employment with the City of Baltimore, effective January 15, 2000. *See* memorandum of 4/27/00 from Pascoe to Moses. Appellant does not seek reinstatement to a position with BCPSS. Rather, Appellant seeks placement on payroll status with benefits and back pay from the time that she was cleared to return to work until the time of her retirement. (November, 1998 to January 15, 2000).

## 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

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<sup>3</sup>Appellant claims that she never received the termination letter, but there is no testimony to that effect. BCPSS indicated that the letter was sent by both certified mail and regular mail to Appellant's last known address of record. Tr. (5/6/99) 26.

<sup>4</sup>The local board issued its order on October 26, 2000.

judgment for that of the local board unless its decision is arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.01.03E(1).

### Due Process Issues

As a preliminary matter, Appellant claims that she was denied due process under the local board's own policy because she was not given the opportunity to address the full membership of the local board and she was not advised of the public board meeting on October 10, 2000, at which the local board affirmed the recommendations of the hearing officer. In support of this position, Appellant references the local board policy entitled "Appeals Procedures," asserting that these procedures require that she be afforded the above stated opportunities.

Based upon our review of the referenced policy, we believe it is inapplicable in this case. The policy states as follows:

- I. This policy applies to the following individuals whose substantial interests are affected by proposed recommendations of the Chief Executive Officer (CEO):
  - A. Suspension or dismissal of tenured professional personnel below the level of Area Executive Officer or any non-tenured professional employee;
  - B. Suspensions of students which exceed 10 school days;
  - C. Expulsion of students, i.e. removal from attending any school in Baltimore City for the balance of the school year; and
  - D. Award of contracts for goods, services or construction.

Appellant is not a professional employee and does not fall into any of these categories. Thus these appeal procedures do not apply to her case.

Nevertheless, Appellant was afforded substantial due process through the opportunity for a full evidentiary hearing before a hearing examiner for the local board. Per agreement of the parties, Hearing Examiner Ruckle reviewed the case *de novo* based on the record of proceedings before Alan Harris, consisting of testimonial and documentary evidence, the submission of additional documentation, and a summary by the attorneys. The recommendation of Hearing Examiner Ruckle was then reviewed by the local board. Thus, we do not find any due process violations in this record.

## Merits

Appellant maintains that BCPSS never offered her a position within the school system after she was cleared to return to work in November, 1998. Rather, she claims that positions were merely identified. Also, Appellant claims that she was passed over for a job as an educational assistant in the Division of Special Education in November, 1998, and that the job was offered to a non-contractual employee in violation of the collective bargaining agreement between the New Board of School Commissioners of Baltimore City and the Baltimore Teachers Union.

Contrary to Appellant's claim that she was not offered any positions, as evidenced by letter dated March 13, 1999, Mr. Love offered Appellant an educational assistant assignment which Appellant did not accept. While the record discloses that during Appellant's March 1, 1999 meeting with Mr. Kuyawa two positions were identified but not specifically offered, there is nothing in the record to contradict that the March 13, 1999 letter was an offer to assign Appellant to a position that existed at that time. In fact, Mr. Love testified that there was a position offered on March 13 and Mr. Kuyawa testified that of the two positions that were discussed during his March 1 meeting with Appellant, the educational assistant position was the only one that was available.<sup>5</sup> Tr. (5/6/99) 24, 30. Moreover, the record is deficient of any explanation as to why Appellant could not accept the position offered on March 13.<sup>6</sup>

Further, Appellant's claim that she was passed over for an educational assistant position in November, 1998, in violation of the collective bargaining agreement is a bare allegation. The burden of proof rests with the Appellant in this matter. While Appellant's counsel has argued this issue throughout several levels of this case, we can find no evidence in the record to support his argument. There is no testimony by school officials or other tangible evidence that an educational assistant position for which Appellant was qualified was actually available in November, 1998.<sup>7</sup> Moreover, Appellant at that time was represented by the Baltimore Teachers' Union which could have filed a grievance on this basis. However, neither the union nor Appellant did so.

In support of the termination decision, the local board claims that Appellant was not placed in a position in November, 1998, because there was still confusion as to whether or not

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<sup>5</sup>Appellant's counsel appears to construe the testimony of Mr. Love and Mr. Kuyawa as indicating that there were no positions available. Having reviewed the transcript, we do not agree with counsel's interpretation.

<sup>6</sup>The record contains a proffer by Appellant's counsel that Appellant did not receive the March 13, 1999 letter offering her an educational assistant position, but no testimony to that effect was ever presented. Tr. (5/6/99) at 13.

<sup>7</sup>Appellant's counsel has made these assertions without reference to transcript pages or specific documentary evidence.

she was fit to return to work. This confusion was rectified sometime in January, 1999. In early February, Appellant was asked to report to work, but she was unable to due to illness. According to Appellant's doctor, she was unable to resume her duties until March, 1999. At that point, Appellant was advised of a job assignment, but for some reason, she failed to report for duty. Regardless of the confusion in the November, 1998 through January, 1999 time frame, when a position was finally available and offered by the school system, Appellant did not report for duty and did not explain her failure to do so. Therefore, we find the termination decision reasonable on that basis.

Based on the above, Appellant's assertion that it was improper for the local board to terminate her during the pendency of a continued hearing lacks merit. The hearing originally scheduled for March 25, 1999, was continued until May 6, 1999. Had Appellant accepted the position offered on March 13 or provided an explanation as to why she was unable to accept it, the termination would not have occurred. In fact, the hearing provided her with the opportunity to remedy the situation but Appellant failed to do so. Under all of these circumstances, we do not believe that the local board acted arbitrarily, unreasonably or illegally.

CONCLUSION

For all of these reasons, we affirm the termination decision of the New Board of School Commissioners for Baltimore City.

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Marilyn D. Maultsby  
President

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JoAnn T. Bell

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Philip S. Benzil

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Reginald L. Dunn

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Clarence A. Hawkins

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Walter S. Levin, Esquire

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Karabelle Pizzigati

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Edward L. Root

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Walter Sondheim, Jr.

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John L. Wisthoff

February 26, 2002