JONATHAN WRUBLEWSKI,

Appellant

v.

CHARLES COUNTY BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 18-13

OPINION

INTRODUCTION

This appeal is before the State Board on remand from the Circuit Court for Charles County after the Appellant filed a Petition for Judicial Review of MSBE Order No. OR15-11. The Circuit Court has directed the State Board to issue a decision on whether the Appellant's appeal to the local board was untimely.

FACTUAL BACKGROUND

In the initial case before the State Board, the Appellant challenged the decision of the Charles County Board of Education (local board) to terminate him from his teaching position for misconduct in office. The local Superintendent had advised the Appellant that she was suspending him without pay and recommending him for termination at the local board's June 10, 2014 board meeting, which she did. (Hill Letter, 5/15/14). The local board prepared a notice of the recommendation for termination, dated June 10, 2014. (Wise Letter, 6/10/14). The notice explained that the Appellant could file a request to appeal, so long as the request for an appeal hearing was "received within 10 days of the date of this letter." *Id*. The local board submitted an affidavit stating that it mailed the notice by both regular and certified mail to the Appellant pursuant to the local board's usual business practices and delivered them to the post office on June 11, 2014.

The letter sent by regular mail was not returned to the school system as undeliverable. The letter sent by certified mail by the United States Postal Service (USPS) was postmarked June 11, 2014. The USPS attempted delivery of the certified letter on June 12 and left notice for the Appellant that the certified letter was at the post office awaiting collection. Appellant signed for the certified letter at the post office on June 28.

Meanwhile, on June 26, 2014, after the 10 days had passed, Appellant's union representative requested a hearing before the local board. The letter stated that it was "in response to [the] letter of June 10, 2014 sent to Jonathon Wrublewski advising him of the Superintendent's recommendation to terminate his employment with the Charles County Public

Schools." (MacDonald Letter, 6/26/14). The letter indicated that legal counsel would be representing the Appellant. *Id*.

On November 5, 2014 the local Superintendent filed a Motion to Dismiss the appeal to the local board as untimely. (Motion to Dismiss). In response, the Appellant maintained that he did not receive the termination letter sent by regular mail and that he picked up the certified letter on June 28, 2014.[1] (Appellant's Opposition).

On December 15, 2014, the local board issued its decision dismissing the appeal as untimely and affirming the local Superintendent's termination recommendation because Appellant failed to request a hearing within 10 days of the June 10, 2014 letter. (Local Bd. Decision). The local board decision was based on the legal presumption that, in the absence of evidence to the contrary, a properly addressed, stamped, and mailed letter reaches its destination and is received by the person to whom it is addressed. *Id*. The presumption, therefore, was that the June 10, 2014 notice sent by the school system was received by the Appellant in the usual course of mail delivery.

Appellant filed an appeal with the State Board on January 5, 2015. We transferred the case pursuant to COMAR 13A.01.05.07 to the Office of Administrative Hearings (OAH) for review by an Administrative Law Judge (ALJ).[2] Finding no dispute of material fact, the ALJ issued a Proposed Order on Motion to Dismiss or for Summary Decision (Proposed Order) recommending that the State Board grant the local board's Motion to Dismiss or for Summary Decision because the Appellant failed to timely file an appeal of the local Superintendent's recommendation for termination. The ALJ explained that the Appellant had received the June 10, 2014 letter sent to him from the local board shortly after it was mailed, on or about June 12, 2014. The ALJ based this conclusion on the affidavit submitted by the local board and on the presumption in Maryland law that items properly mailed are delivered timely to the intended recipient, referred to as the "mailbox rule." *See Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996). The ALJ concluded, therefore, that the Appellant's appeal of his termination to the local board was untimely filed. (Proposed Order).

On August 25, 2015, the State Board heard oral argument on the Appellant's exceptions to the ALJ's Proposed Order. Although his legal counsel was present, the Appellant addressed the State Board at oral argument and stated that he never received the letter from the local board that was mailed by regular mail. He also stated that his apartment complex mailbox was accessible to others so that the notice of certified mail may have been misdelivered and put in his mailbox at a later time. The case file, however, was devoid of any affidavit or other evidence to support the statements.

During deliberations, only four of the six members in attendance voted to affirm the local board. The case was mistakenly announced as published at the August 25 meeting, but was

[1]Appellant maintained that Meg McDonald, the union representative at the time, filed the appeal prior to Appellant receiving notice of the termination. He explained that Ms. McDonald regularly receives formal and informal information regarding employee discipline cases and automatically files termination appeals in order to secure the right of appeal as a placeholder. (Appellant's Opposition).

[2] While the Appellant initially filed the case before the State Board *pro se*, legal counsel represented him during the OAH proceedings.

recalled the following day because it required an affirmative vote of six members of the Board to take action on the appeal and there were insufficient votes. *See* Md. Educ. Art. §2-204(e).

The State Board deliberated on the case again at its September 22 and October 27, 2015 meetings. On November 5, 2015, the State Board issued Order No. OR15-11, explaining that it was unable to muster a majority vote to either accept or reject the ALJ's proposed decision and thereby allowed the local board's decision dismissing the Appellant's appeal as untimely to stand.

Appellant filed a Petition for Judicial Review of MSBE Order No. OR15-11 in the Circuit Court for Charles County. The Circuit Court remanded the case directing the State Board to render a decision. The Circuit Court stated that the "only issue before the State Board [is] whether to accept or reject the ALJ's proposed order recommending dismissal of the case due to Petitioner failing to timely file an appeal with the Local Board." Thus, we will review the case again.

STANDARD OF REVIEW

Because this appeal involves the termination of a certificated employee pursuant to §6-202 of the Education Article, the State Board exercises its independent judgment on the record. COMAR 13A.01.05.05(F)(1) and (2). The local board has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(F)(3).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the proposed decision. *See* Md. Code Ann., Stat Gov't §10-216.

LEGAL ANALYSIS

In this case, because the termination of a teacher is the final result, we will exercise our independent judgment on the law that is applicable here and on our view of the facts. The question before us is a mixed question of law and fact. As to the law, we agree with the local board that the "mailbox rule" is generally applicable in cases in which the timely filing of an appeal is an issue.

"Under Maryland law, a presumption of delivery and receipt of mail arises when material is properly mailed . . . . Evidence of ordinary business practices concerning the mailing of notices is sufficient to create the presumption of both sending and receiving." *Benner v. Nationwide Mut. Ins. Co*., 93 F.3d at 1234 (citations omitted). *See also Tague v. Charles County Bd. of Educ*., MSBE Op. No. 12-32 (2012)("the letter sent via regular mail was not returned and the presumption is, therefore, that he received the notice.").

As to the facts, we consider whether application of the mailbox rule is appropriate here. There was evidence that the notice was properly mailed. The local board submitted an affidavit indicating that on June 11, 2014, the notice of termination recommendation was mailed via regular mail according to the local board's usual business practices and was not returned as

undeliverable. There was also evidence that the local post office delivered the notice of certified mail on June 12, 2014.

We have considered the assertions that Appellant's counsel set forth in his Motion in Opposition to the local board's motion and in Appellant's Exceptions. In those motions, counsel states that the Appellant had no actual notice of the time for filing an appeal until June 28, 2014 when he picked up the certified letter. He presented no affidavit to support those statements, however.

In a case invoking the mailbox rule, the presumption of delivery and receipt is properly rebutted by direct testimony or by affidavit.

> While the presumption may be rebutted so as to create a question of fact, testimony by the addressee that he did not receive, or does not remember receiving, the material is not conclusive . . . . The trier of fact should consider that proof along with all of the other evidence offered in the case to determine whether the item was mailed and received.

Benner, 93 F.3d at 1234 (citations omitted).

If either direct testimony or an affidavit is presented properly, the issue of whether the Appellant received the letter timely becomes a disputed issue of fact and summary judgment on the issue of timely receipt would not be appropriate. Although he had the opportunity to do so, Appellant presented neither direct testimony at a hearing before the ALJ nor an affidavit attached to any motion attempting to rebut the presumption that he received the letter.

The Appellant asserted during oral argument that he did not receive timely notice from the local board. For Appellant's statements to be sufficient to overcome the legal presumption that he received the notice, they must be given some evidentiary weight. Under the law of evidence, direct testimony is entitled to weight, in great part, because the witness testifies under oath and is subject to cross-examination. Accepting an appellant's statements at oral argument as true and credible, without their being under oath, without their being subject to cross-examination, is not only a serious departure from the law of evidence, but opens up oral argument as a place to present "testimony." That is not the role of oral argument on appeal. Indeed, the place for the appellant to present testimony was during the proceedings at OAH.

CONCLUSION

Based on the law and the evidence, we adopt the ALJ's Proposed Order and affirm the local board's decision that the appeal was untimely filed.

Signatures on File:

_____

Andrew R. Smarick
President

_____
Chester E. Finn, Jr.
Vice-President

_____
Justin M. Hartings

_____
Stephanie R. Iszard

_____
Michael Phillips

_____
David Steiner

DISSENT:

Signatures on File:

_____
Michele Jenkins Guyton

_____
Rose Maria Li

March 20, 2018