ERICA LUNN	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS	OF EDUCATION
	Opinion No. 20-03
Appellee	

OPINION

INTRODUCTION

Erica Lunn (Appellant) appeals the decision of the Baltimore City Board of School Commissioners ("local board") which terminated her from her position as a Customer Support Specialist III for engaging in practices that were inconsistent with ordinary, reasonable, common sense rules of conduct. Appellant asserts in her Appeal that she was terminated because she was a "whistleblower." The local board filed a memorandum in response to the appeal. The Appellant responded and the local board replied.

FACTUAL BACKGROUND

Appellant began working for Baltimore City Public Schools ("BCPS") in March 2017, as a temporary employee at the Judy Center, located at Curtis Bay Elementary/Middle School ("Judy Center"). Appellant did not have any performance issues during her temporary assignment.[1]

When a permanent position became available, BCPS hired the Appellant as a Customer Support Specialist III on October 2, 2017. (T. 17-18). A Customer Support Specialist III is responsible for partnering with Title I parent liaisons, case management, coordination of services, communication with families, home visits, tracking progress of clients, maintaining documentation and ensuring the participation of all partners. (T. CEO Ex. 1). This was a non-certificated position that carried a one-year probationary period and was part of the Paraprofessional and School Related Personnel Union ("PSRP") (T. 19). Appellant was terminated on September 8, 2018 within her one-year probationary period.

Issues with the Appellant's performance began shortly after her hire, in November 2017. The concerns involved Appellant's attendance and failure to account for her whereabouts during the workday. Specifically, Sarah Bollard, the Judy Center Coordinator at the District Office

[1] For the first time in her Appeal Response (and not mentioned anywhere in the record), Appellant claims she reported to the Judy Center Principal, Mark Bongiovanni ("Mr. B."), an allegation of child abuse concerning Assistant Principal [redacted] ("AP [redacted]") and when the Principal took no action she informed the "legal department" on June 25, 2017. However, the Appellant presented no testimony or documentary evidence regarding this claim.

("Ms. Bollard"), began receiving reports as early as late October 2017 or early November 2017 that Appellant was claiming to be at meetings out of the office that she was not attending, and was leaving the building without signing in or out or otherwise communicating her whereabouts. She also received reports of concerns about personality conflicts and disagreements involving the Appellant. (T. 23; *see also* T. 69-71). Thereafter, Ms. Bollard continued to receive phone calls and concerns regarding Appellant' s conduct from a variety of people, both at the Judy Center and from outside partnerships that worked with the Judy Center. (T. 70-73).

On November 28, 2017 in response to these concerns, the Judy Center Principal, Mr. B., held a meeting to address the concerns, and to review roles and responsibilities in order to make a plan to move forward more efficiently. (T. 254-255; *see also* T., CEO Ex. 20). Present at the meeting were Appellant, Ms. Shalonda Howze, the Judy Center Coordinator ("Ms. Howze"), Assistant Principal [redacted] ("AP [redacted]"), Ms. Bollard, Ms. Betserai Johnson, the other Assistant Principal ("AP Johnson") and Mr. B. This meeting was postponed at Appellant's request because she indicated she wanted union representation present. (T. 264).

Thereafter, a second meeting was held on or about December 13, 2017. Appellant was present at this meeting, with a union representative. At this meeting, Appellant expressed concerns about AP [redacted] supervising her. Appellant claimed she did not like how AP [redacted] talked to her. (T. 269). According to Mr. B., earlier in the year, AP [redacted] had been Appellant's primary supervisor. However, after Appellant communicated to him at this meeting that she felt AP [redacted] was speaking inappropriately to her and could be aggressive towards her, it was decided that AP Johnson would supervise Appellant, and AP [redacted] was removed from his supervisory duties in regards to Appellant. (T. 272-273).

At the December 13, 2017 meeting, the administration also raised concerns about Appellant's behavior, including three instances of Appellant contacting parents outside of the school and sharing information inappropriately, as well as her attendance issues, including her failure to comply with the sign in and out procedures when she left the building. Appellant agreed that she would comply with the sign in and out procedures that all Judy Center staff utilized when leaving the building. (T. 274-276).

Another meeting was held on June 11, 2018, at Appellant's request. Concerns about Appellant's behavior, interactions with staff, community partnerships and the clients the Judy Center served were discussed. Appellant was informed that the next steps after the meeting would be the implementation of a Performance Improvement Plan ("PIP"). (Hearing Officer's Recommendation ¶¶ 18-20).

On June 12, 2018, Appellant received a Performance Evaluation with an overall rating of "Effective." (Local Bd. Response to Appeal, Ex. B). An "Effective" rating is a mid-range rating out of "Developing", "Effective" and "Highly Effective." *Id.* Although Appellant received an overall rating of "Effective" her Performance Evaluation included scores for "Developing" in the Professionalism and Teamwork categories. It also included a notation that "Ms. Lunn has all the attributes and skills to be an outstanding liaison. She develops caring relationships with families. Ms. Lunn has had challenges maintaining positive relationships with staff and documenting time and work responsibilities when traveling out of the building." *Id.*

On June 18, 2018, a PIP was developed to address Appellant's performance issues. There were three targeted areas for improvement: 1) to develop the ability to lead a Judy Center program as a Family Service Coordinator; 2) to improve in professionalism by accurately documenting her time in and out of the building; and 3) to improve in teamwork by cooperating

with co-workers and stakeholders to achieve school goals. (T. 280; *see also* CEO Ex. 22). The PIP listed actions that Appellant should take to correct her performance issues to include accurately recording her time, submitting weekly work logs, keeping confidential information confidential, and taking the initiative to work with teammates to resolve barriers and conflicts to accomplish goals and tasks. *Id.*

After the implementation of the PIP, Appellant's job performance did not improve. Appellant also continued to fail to turn in her weekly work logs. (T. 282-284). Mr. B considered these failures to be insubordination and neglect of duty. (T. 281-284). Mr. B issued Appellant a letter of reprimand for these failures on June 20, 2018. (T. 281; *see also* CEO Ex. 23).

Subsequently, on July 11, 2018, Appellant arrived late for a mandatory training. On July 13, 2018, Appellant failed to appear for an all Judy Center staff training. (T. 95).

Administration held another meeting with Appellant on August 14, 2018 to discuss letters of concern from community providers. On August 8, 2018, Ms. Bollard received a complaint from Kimberly Johnson ("Ms. K. Johnson"), the owner of Building Blocks Child Care Center, a community partner. Ms. K. Johnson was concerned that the Appellant was making negative comments about employees within the Judy Center. Ms. K. Johnson indicated she was not comfortable continuing the partnership with the Judy Center if Appellant remained with the program. On August 9, 2018, Ms. Bollard received a complaint from Ms. Shabazz from Smart Steps Child Care, another community partner. Ms. Shabazz indicated that Appellant spoke in a hostile and negative tone about Judy Center employees and she talked about the Judy Center in a negative way. (T. 174-180; *see also* CEO Ex. 15). Mr. B. was "deeply concerned" about these allegations because it put the Judy Center in a negative light and would put the programming for the children at risk. (T. 287-288). According to Mr. B., during the last year of Appellant's employment, he devoted approximately 50 hours addressing concerns from stakeholders and having follow-up meetings about Appellant's performance issues. (T. 292-293).

Appellant was placed on administrative leave, with pay, on Friday August 31, 2018, due to the fact that "serious allegations have been made in connection" with her duties at the Judy Center (T. Joint Ex. 4). The letter placing Appellant on leave directed her to not "have any contact, whether in person, by phone, email, or any other electronic means of communication, with any students or their parents, staff or community partners of the Judy Center or Curtis Bay…" *Id.* Despite this directive, Appellant continued to contact staff at the Judy Center via phone and text, and in person; she also contacted employees at other Judy Centers, reportedly making threatening statements. (T. 188-195; *see also* CEO Ex. 18).

Jerome Jones, the Director of Labor Relations, received and reviewed a recommendation to release the Appellant from probation and terminate her employment. On September 7, 2018, Appellant was issued notice of termination, effective September 8, 2018, based on an unsatisfactory probationary period by engaging in practices that are inconsistent with ordinary, reasonable, common sense rules of conduct. (T. Joint Ex. 3).

On or about September 18, 2018, Appellant appealed her termination to the local board. The local board assigned the matter to a hearing examiner for review. The hearing examiner conducted an evidentiary hearing on April 4, 2019, which also continued on May 6, 2019.

According to Appellant, she was wrongfully terminated because she began to notice things going on at the school that were "not normal" and against "state rules and compliance." She asserted that her termination was retaliation for being a "whistleblower." Appellant's

testimony at the evidentiary hearing primarily focused on her explanations for her whereabouts and her performance, her Performance Plan, and her PIP. In regards to her retaliation claim at the evidentiary hearing on this matter, Appellant testified that she believed "Ms. Johnson, Mr. B., and other employees started treating [her] different because [she] wasn't agreeing, or . . . [she] wasn't quiet about what [she] saw or the things that [she] saw." (T. 359). Appellant testified that she never received any formal discipline before she reported AP [redacted] for child abuse.[2] Appellant's testimony is void of when she reported this or to whom, and it does not contain any information or documentation that she reported it to any of the administration at the school.

On June 13, 2019, the hearing examiner recommended that the local board uphold and affirm the decision of the CEO to terminate Appellant. By letter dated June 25, 2019, Appellant filed Exceptions to the Hearing Examiner's Recommendation. After briefings, on July 23, 2019, the local board voted to affirm the Hearing Examiner's recommendation. Thereafter, on or about August 24, 2019, Appellant filed this instant appeal with the State Board.

STANDARD OF REVIEW

Because this appeal involves the termination of a non-certificated employee pursuant to §4-205 of the Education Article, the decision of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.06A.

The Appellant maintains the burden of proof in demonstrating that the decision of the local board was in fact arbitrary, illegal or unreasonable. COMAR 13A.01.05.06 defines the terms "arbitrary" and "unreasonable." A decision may be arbitrary or unreasonable if it is: 1) contrary to sound educational policy; or 2) a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached. A decision may be illegal if it is: 1) unconstitutional; 2) exceeds the statutory authority or jurisdiction of the local board; 3) misconstrues the law; 4) results from an unlawful procedure; 5) is an abuse of discretionary powers; or 6) is affected by any other error of law.

LEGAL ANALYSIS

Appellant argues that 1) it was a conflict of interest for the local board to allow her cousin Shalonda Howze to testify against her; 2) that when the local board's decision was made "he never placed my documents in the file nor did make mention of my testimony that I had given in his report" [sic]; and 3) the termination was unlawful because it was in retaliation for Appellant being a "whistle blower." We address these arguments below.

Conflict of Interest

Appellant claims it was a conflict of interest to allow her cousin Shalonda Howze to testify against her. Appellant does not provide any legal basis for this claim. Further, the record demonstrates that Appellant did not raise this issue before the local board, therefore, she has waived this issue on appeal. *See Murphy v. Prince George's County Bd. of Educ*., MSBE Op. No. 16-19 (2016) (declining to reach issues not first raised before the local board).

[2] Appellant presented no testimony or documentary evidence regarding her alleged report during the hearing or to the local board.

Even if the issue was not waived, the record indicates Ms. Howze was an employee of the Judy Center, and as such, was familiar with the facts and circumstances surrounding Appellant's employment. We are not aware of any legal basis for a witness to be excluded based on a family relationship, particularly one so extended. Further, if anything, the fact that Appellant and Ms. Howze were potentially related would only serve to provide more credibility to Ms. Howze's testimony.

Process of the Hearing

Appellant claims that "when the board's decision was made he never placed documents in the file nor did make mention of my testimony that I had given in his report." [sic] (Appeal, pg. 2). Although this claim is far from clear, we believe that Appellant is arguing that the hearing examiner should have given more or less weight to certain evidence.

"Hearing officers are not required to give equal weight to all of the evidence." *Hoover v. Montgomery County Bd. of Educ*., MSBE Op. No. 19-03 (*citing Karp v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-39 (2015)). As the fact finder, it is the hearing examiner's job to sort through the evidence and reach factual conclusions based on the weight the hearing examiner assigns to that evidence. It is also not necessary for a hearing examiner to cite to every piece of evidence or testimony given in a case. *Id*.

In this case, the hearing examiner found this was not a typical "he said; she said" case, as many termination cases are. The hearing examiner found that the school system witnesses, all of whom had personal knowledge of the Appellant's conduct and behavior were remarkably consistent and credible. (Hearing Examiner's Recommendation, pgs. 17-18). It is the Hearing Examiner's duty to weigh all of the evidence and issue a decision based upon the evidence the Hearing Examiner finds to be credible and relevant." *Komolafe v. Board of Educ. of Prince George's County*, MSBE Op. No. 14-47 (2014). In our view, we find nothing arbitrary, unreasonable or illegal in the local board relying on the hearing examiner's findings, which gave more weight to the testimony of the local school's witnesses. And to the extent that Appellant may be claiming that the hearing examiner did not place certain documents in the record, Appellant has not provided sufficient specificity for us to consider such an argument.

Protected Status as a Whistleblower

Appellant argues that she was terminated because she was a whistleblower and "questioned things that shouldn't have been done." (Appeal, pg. 2). Appellant believes the administration "set employees up to be fired" and that she has been treated the same way for doing what she thought was right. *Id.* Appellant claims that her termination was in retaliation for reporting an incident that she observed between a student and AP [redacted]. (Appeal, pg. 1). She claims she observed this incident in May 2017 and reported the incident to the legal department on June 25, 2017. *Id.* Appellant also claims that none of the formal discipline was implemented until she reported the allegations of abuse by AP [redacted] to the office of Legal Counsel and Labor Relations. (Response, pg. 4). It is noteworthy that Appellant claims in her Appeal that she advised the legal department on June 25, 2017, which was four months **before** she was formally hired on October 3, 2017. (*See generally* Appeal and Response) (emphasis added).

Appellant appears to be claiming that she was terminated in retaliation for engaging in a protected activity, which would be illegal. The State Board has recognized retaliation as an illegal reason for terminating an employee if it is done in response to the employee engaging in

the protected activity of reporting illegal activity. *See Young v. Prince George's County Bd. of Educ. (Young II*), MSBE Op. No. 17-39 (2017). In order to establish a *prima facie* case of discrimination based on retaliation, an employee must produce evidence that she engaged in a protected activity, the employer took an adverse action against her, and the employer's adverse action was causally connected to her protected activity. *Id*. (citing *Burling. N. & Santa Fe. Ry. Co. v. White,* 584 U.S. 53, 69 (2006)). If the employee meets her initial burden, the burden shifts to the employer to offer a non-retaliatory reason for the adverse employment action. *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 504 (2016). If the employer meets that burden, the burden shifts back to the employee to show that the proffered reasons for the employment action were mere pretext. *Id.* To prove this, an employee must prove "both that the reason was false and that discrimination was the real reason for the challenged conduct." *Id.* (quoting *Nerenberg v. RICA of S. Md.,* 131 Md. App. 646, 675 (2000).

As an initial matter, after review of the record, we find it devoid of support for Appellant's allegations that she was terminated based on retaliation. Appellant did not offer any testimony or documentary evidence regarding these claims. The only exhibits proffered by Appellant at the hearing were Joint Exhibits 1-4 which were the Baltimore Teachers Union agreement for the PSRP Chapter, an MOU extension of the agreement, the September 7, 2018 letter of termination and the August 31, 2018 letter placing Appellant on administrative leave, which are not relevant to this claim of retaliation for reporting the alleged misconduct of AP [redacted]. Although she testified that she believed Mr. B and AP Johnson treated her differently after she made "the report" regarding AP [redacted], she failed to provide any details as to what the report included, to whom it was made, or when. (T. 359-361). The record does not establish that any of the school administrators were even aware that Appellant had made such a report regarding AP [redacted]. Rather, the record establishes that Appellant was treated positively, and hired as a Customer Support Specialist on October 2, 2017, after she purportedly reported the alleged incident regarding AP [redacted] to the "legal department" over three months prior on June 25, 2017. The record also establishes that during the December 13, 2017 meeting to discuss concerns with Appellant's job performance, Appellant claimed that she did not like the way AP [redacted] spoke to her, without any mention of AP [redacted]'s misconduct in May 2017, and in response, Mr. B removed AP [redacted] as her supervisor. (T. 272-273). There is no evidence in the record to support that any other allegations regarding AP [redacted] were discussed or brought up by the Appellant to administration during the December 13, 2017 meeting, or at any other time. Moreover, the record is replete with evidence that Appellant failed to follow the local school system's policies and directives, even after being placed on a PIP. Thus, the Appellant has not met her burden of proof regarding the retaliation claim.

Summary

In our view, there is sufficient evidence in the record to support the termination of Appellant. The Appellant was a non-certificated employee who was terminated during her probationary period, and therefore, Appellant had no reasonable expectation of continued employment. This Board has previously found that a "probationary employee" is "subject to termination at any time during the probationary period." *McKelvie v. Prince George's County Bd. of Educ.,* MSBE Op. No. 11-03 at 2 (2011). Therefore, since the decision to terminate Appellant's employment was during her period of probation, it is not necessary for the local board to have demonstrated "just cause."

Notwithstanding, in this matter, the Hearing Examiner found that there was, in fact, more than sufficient "just cause" to terminate the Appellant's employment. (Hearing Examiner's

Recommendation, pg. 17). We agree with the Hearing Examiner's findings, and the local board's reliance on them. Further, the evidence supports the conclusion that Appellant's termination was not illegal or in retaliation for her participating in protected activity.

CONCLUSION

For the reasons stated above, we affirm the decision of the local board because it was not arbitrary, unreasonable, or illegal.

Signatures on File:

_____
Jean C. Halle
Vice-President

_____
Gail H. Bates

_____
Clarence C. Crawford

_____
Charles R. Dashiell, Jr.

_____
Vermelle D. Greene

_____
Justin M. Hartings

_____
Rose Maria Li

_____
Joan Mele-McCarthy

_____
Michael Phillips

_____
David Steiner

Absent:
Warner I. Sumpter
President

January 28, 2020