DARRYL BACCUS,	BEFORE THE
Appellants,	MARYLAND
v.	STATE BOARD
PRINCE GEORGE'S COUNTY BOARD OF EDUCATION	OF EDUCATION
	Opinion No. 20-27
Appellee.	

OPINION

INTRODUCTION

Darryl Baccus ("Appellant") appeals the decision of the Prince George's County Board of Education ("local board") upholding his termination from his security assistant position for incompetence or similar unsatisfactory performance, violating administrative regulations or department rules, and for conducting himself in a way that reflects unfavorably on the school system as an employer. [1] The local board concluded that Appellant was justly terminated and was afforded due process. The local board filed a brief maintaining that its decision was not arbitrary, unreasonable or illegal and should be upheld. Appellant responded, and the local board replied.

FACTUAL BACKGROUND

Appellant was a security assistant with Prince George's County Public Schools ("PGCPS"). (T.270). During Appellant's six-year tenure with PGCPS, there were three relevant incidents of inappropriate misconduct by the Appellant that were reported to PGCPS staff and investigated accordingly. (R.252). The final incident prompted Appellant's termination. *Id.*

Incident One

On October 29, 2014, while stationed at Drew Freeman Middle School, a female student reported Appellant for making an inappropriate statement and initiating physical contact with her. Appellant came across the student who was at her locker and upset. In an attempt to console her, Appellant placed his arm around her and stated, "you are too pretty to be this upset." (R. 354,). Mr. Michael Meixsell, an investigator from PGCPS's Department of Security Services, investigated the incident. Appellant admitted to both making the comments and initiating the physical contact with the student. *Id.* The finding of Security Services at the time was that the allegation was unfounded, even though the investigator determined that Appellant acted unprofessionally when he made the inappropriate comment and inappropriately touched the

[1] It has been four years since the Appellant's termination. Hearing Examiner Price conducted the first hearing over a year after Appellant filed his first appeal. It was recognized during the hearing that Appellant requested two health related postponements. (R. 275-6). The other postponements are not explained in the record and the parties have proffered no other reason regarding the lengthy of the appeal process.

student. *Id.* Sgt. Wilson Collins, the supervisor of security for the Suitland cluster of schools and Appellant's direct supervisor, discussed the results of the investigation with Appellant and counseled him on how to interact with students. (R. 110).

Incident Two

On October 3, 2015 a student at Suitland High School reported to Security Officer Robert Thompson that Appellant was "a creep" and cited two comments made on two separate days by Appellant to the student. (R. 251). The student provided a written statement reporting that while she was obtaining a bus pass in the morning Appellant motioned to the student's breast and in reference to a tattoo on the student's chest, stated "nobody else is getting that but me". *Id*. On a second occasion while in the cafeteria during lunch the student stated that Appellant said, "one day I am going to see that whole tattoo on your chest." *Id.* Appellant denied making these statements. (R. 252). Sgt. Heatley, a Department of Security Investigator, found the student to be credible, but issued a "not-sustained" finding in the case. Sgt. Heatley then counseled Appellant about the seriousness of the investigation and remaining professional with students. *Id.*[2]

Incident Three

On February 12, 2016, at Suitland High School, a student complained to the school about inappropriate comments and physical contact initiated by Appellant. (R. 260-61). The student reported that Appellant said, "I know young ladies, they just have this birthmark, and then they end up giving birth." *Id.* Appellant admitted to making these comments. *Id.* The student also claimed that Appellant grabbed her bra strap after making the comments about the mark on her neck. *Id.* Appellant denied touching the student's bra strap. *Id.* The same student also reported that Appellant approached her when she was "messing around with a boy," noticed that she had bite marks on her neck and said that he would be "very upset, jealous, if [the student] messed up her life because she did not get [her] education." (R. 274). Appellant admitted to the comments. He said that his use of the term jealous was a poor choice and that he was attempting to steer the student in the right direction by using language that the student would understand. (R. 281).

Loudermill Hearing

On April 13, 2016, the Employee and Labor Relations Office held a *Loudermill* hearing with Appellant to discuss his behavior.[3] (R. 352). During the hearing, Appellant admitted to giving the student at Drew Freeman Middle School a side hug and stating that she was "too pretty to be this upset" in the first incident. (R. 354). Appellant also admitted to making an inappropriate comment to the student in the third incident regarding bite marks on the student's neck and his comments about being jealous. *Id.* Sgt. Heatley and Sgt. Collins both testified. Sgt. Heatley testified that he had counseled Appellant on two occasions prior to the third incident regarding Appellant's interactions with students. *Id.* Sgt. Heatley also stated that during annual

[2] The record also contains information about a March 12, 2015 incident in which Appellant responded to an altercation between two students at Suitland High School. (R.244-5). While Appellant was attempting to remove a female student, the student began to fight back and sustained injury. *Id.* The Department of Security Services found that Appellant had properly performed his duties during the incident. *Id.* Although the incident was noted in Appellant's termination letter, the local board did not rely on it in upholding the termination.

[3] A *Loudermill* conference, also known as a pre-termination hearing, is a conference where employees are given notice of the charges against them and provided with an opportunity to respond. The conference is named for the Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985).

training the Security Assistants were provided instructions on how to best handle situations that could result in student allegations of inappropriate behavior. *Id*. Sgt. Collins stated that he too counseled Appellant regarding student interaction. *Id*. Cesar Pacheco, Assistant Director of Security Services for PGCPS, testified that he was concerned that Appellant's actions demonstrated a pattern of behavior that could result in other allegations of inappropriate behavior being made against Appellant. *Id*.

Based on an evaluation of the incidents assessed during the *Loudermill* hearing, Mr. Robert Gaskin, Chief Human Resource Officer, found that Appellant violated PGCPS Regulations for Supporting Personnel, Disciplinary Action: Section (A) Incompetence or under similar unsatisfactory performance; (H) Violation of administrative regulations or department rules; and (K) Any conduct which reflects unfavorable on PGCPS as an employer. (R. 355). By letter dated May 3, 2016, Mr. Gaskin advised Appellant of his immediate termination. (R. 354-6).

Termination Appeal

Appellant appealed his termination to the Chief Executive Officer ("CEO"), Monica Goldson, who referred the matter to a hearing examiner for review. Hearing Examiner, Aaron E. Price, Sr. conducted the first hearing for this appeal on July 25, 2017 and the second hearing on November 16, 2017. (R. 004, 265). Before he could issue a recommended decision in the case, Mr. Price left the PGCPS Office of Appeals and no longer served as a hearing examiner. Hearing Examiner, Roger C. Thomas, was assigned to review the transcript and exhibits and prepare Findings of Fact, Conclusions of Law and Recommendation ("Recommended Decision"). He did not conduct an additional hearing. On January 25, 2019, Mr. Thomas, issued a Recommended Decision concluding that Appellant's termination should be upheld. (R. 481). On February 4, 2019, Dr. Goldson issued a Final Decision and Order upholding Appellant's termination. (R. 483).

On March 12, 2019, Appellant appealed Dr. Goldson's decision to the local board. On May 1, 2019, Appellant filed a brief with the local board to support his appeal. Appellant alleged that Mr. Thomas failed to summarize and/or consider certain testimony by three witnesses on behalf of the Appellant that was presented on the first day of the hearing.

Thereafter, to correct the omission, on June 6, 2019, Mr. Thomas issued a supplemental Findings of Fact, Conclusions of Law and Recommendation ("Supplemental Recommended Decision"), concluding again that the termination be upheld. (R. 492).

Mr. Thomas recommended that the local board uphold the termination based on Appellant's admission to initiating inappropriate comments and actions when interacting with students. During the investigations into incidents one and three conducted by PCGPS Department of Security Services, Appellant admitted to the inappropriate comments reported by students. (R. 357, 360). Appellant again admitted to making these comments at the *Loudermill* hearing and again during the hearing before Hearing Examiner Price. (R. 469-71). Appellant was counseled on at least two separate occasions about how to conduct himself professionally, especially with students. Sgt. Heatley stated he counseled Appellant twice previously about interactions with students. Additionally, Sgt. Collins, a second supervisor to Appellant, stated he too counseled Appellant about interactions with students. Due to Appellant being the subject of multiple security investigations during which he admitted inappropriate conduct with students on

more than one occasion, Hearing Examiner Thomas held that the Appellant failed to meet his burden of proof to demonstrate that PGCPS's decision to terminate his employment as a Security Assistant was arbitrary, unreasonable, or illegal. (R. 480).

On June 19, 2019, Dr. Goldson issued a Supplemental Final Decision and Order upholding Appellant's termination. Both parties filed briefs and the local board heard oral argument on November 19, 2019.

On January 21, 2020, the local board issued a decision upholding Appellant's termination. The local board stated:

> We cannot speak to Mr. Baccus' intentions, but, based even on the comments he admits making, it is not unreasonable for the administration and the CEO to have been concerned about the personal nature of the comments to students. It is understandable and appropriate that the administration and the CEO insist that interactions between employees and students remain strictly professional. Even after being counseled not to get personally involved in the personal lives of the students, he engaged in such conversations or made personal comments, even involving a student's sex life. This is simply not appropriate and serves as a reasonable basis for the decision to terminate his employment with PGCPS.

(Appeal, Ex. 4).

This appeal followed.

STANDARD OF REVIEW

A non-certificated employee is entitled to administrative review of a termination pursuant to §4-205(c)(3) of the Education Article. *See Goines v. Prince George's County Bd. of Educ*., MSBE Op. No. 17-16 (2017). Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct. 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.

LEGAL ANALYSIS

Substitution of the Hearing Examiner Between the Evidentiary Hearing and Issuance of Recommended Decision

Appellant makes various arguments regarding the substitution of hearing examiner Thomas for Price between the evidentiary hearing and the issuance of the Recommended Decision. His arguments essentially boil down to the issue of the legality of doing so. Appellant argues that the substitution was illegal because Mr. Thomas did not preside over the hearing and did not have the opportunity to observe witness behavior. To support this proposition, Appellant relies on *Md. Bd. of Physicians* v. *Elliott*, 170 Md. App. 369, 384 (2006) in which the Court of Special Appeals recognized the importance of the fact finder being able to observe the demeanor of a witness to determine the witness's truthfulness.

Appellant's reliance on *Md. Bd. of Physicians* is misplaced. The case did not involve substitution of administrative or judicial officers between hearings. That case involved an agency decision that reversed the decision of an administrative law judge ("ALJ") at the Maryland Office of Administrative Hearings ("OAH") who had taken witness testimony. Although the court stated that observing witness demeanor is important, the "substantial evidence test remains the ultimate and absolutely controlling consideration on judicial review, it does not matter that the agency may have ignored the findings and the proposed decision of the ALJ, even without having had any rational basis for doing so, just so long as there still exists some other basis for the agency's decision that would be enough, in and of itself, to satisfy the substantial evidence test." 170 Md. App. At 386.

First, we note that there is nothing fundamentally illegal or unfair about substituting a hearing examiner between the evidentiary hearing and issuing the recommended decision. Indeed the Maryland Administrative Procedure Act contains a provision that deals with such circumstances at the OAH when an ALJ is unable to continue presiding over a pending proceeding. The provision allows substitution of an ALJ who "may use the existing record and conduct such further proceedings as are necessary and proper." COMAR 28.02.01.11(C)(3).

Second, we find the decision by the Maryland Court of Special Appeals in *Citizens for Rewastico Creek v. Commissioners of Hebron*, 67 Md. App. 466 (1986) instructive here on whether the substitution of hearing examiners was improper in this case. The Court addressed the substitution of hearing examiners in the context of the Maryland Administrative Procedure Act and was guided by the test used by the U.S. District Court of Maryland, as set forth in *Van Teslaar v. Bender*, 365 F. Supp. 1007 (D. Md. 1973). That test provides that substitution of hearing examiners without a *de novo* proceeding is allowable only where the original examiner is unavailable and either: (1) the case is not one in which the resolution of conflicting testimony requires a determination of the credibility of the witnesses; or (2) if it is a case in which credibility is involved, the parties agree to proceed without a *de novo* administrative proceeding. *Citizens for Rewastico Creek v. Commissioners of Hebron*, 67 Md. App. 480-481. *Rewastico* also points out that the hearing examiner is only making a recommendation to an administrative entity who reviews the recommendation and is not obligated to accept it if it is not supported by the evidence. *Id.*

The above test in *Rewastico* was satisfied in this case. At the time Mr. Thomas issued his Recommended Decision, Mr. Price, the original hearing officer who presided during the hearing, was no longer with the Office of Appeals. (R.468). Resolution of conflicting testimony was not required. Appellant admitted to the conduct alleged. The testimony of the Sgt. Heatley and Sgt. Collins was uncontroverted. Simply, witness credibility was not an issue in the hearing and Mr. Thomas did not have to rely on the truthfulness of one witness over another or intangibles – such as body language, lack of eye contact, or similar non-verbal body language – to make his Recommended Decision. In his Recommended Decision, Mr. Thomas stated that "this Hearing Examiner finds that the communications that [Appellant] admits to engaging in with students, as described above, were clearly inappropriate" and serve as a basis for finding that Appellant violated the regulations cited in the termination letter. (R. 480).

The local board affirmed the CEO's decision based on Appellant's admissions. We are unconvinced that Mr. Thomas' inability to witness the physical behavior and presentation of witnesses renders the local board's decision illegal. Moreover, and importantly, substantial evidence in the record supports the local board's decision.

Evidence to Support Termination

The Appellant argues that there was insufficient evidence to support his termination. Although there was only one incident in which PGCPS issued a sustained finding, Appellant's admitted conduct, despite at least two separate counseling sessions with supervisory security personnel, reflects on Appellant's overall lack of professionalism interacting with students. It is undisputed that in a short period of time, the Appellant was the subject of three investigations involving inappropriate conduct with female students. In incident one, Appellant admitted to giving a student a side hug and telling her "she is too pretty to be upset." During incident three, Appellant admitted to commenting on a student's body as well as making other inappropriate comments to the student. Testimony and documentation provided by Appellant's supervisors demonstrated that Appellant had been counseled about appropriate student interactions multiple times. The local board was clear that its decision was based only on the Appellant's admitted conduct. We find that the record supports the local board's termination decision.

Witness Testimony

Appellant asserts that the local board ignored the testimony of three witnesses he called who testified regarding his past performance in his position and his general character. Simply because the local board does not address every bit of testimony does not mean that it was ignored. Rather, the local board was clear that it relied on Appellant's admissions regarding his behavior to support its decision. The record shows that none of the witnesses was involved in the investigation of Appellant's conduct over the three incidents.[4]

Miscellaneous

Appellant again raises the issue that Mr. Thomas failed to include evidence from the first day of the hearing in his recommendation. Mr. Thomas issued a Supplemental Recommendation which corrected this omission. Appellant also argues that Mr. Thomas' findings of fact are only

[4] Sgt. Collins testified that he was not involved in the investigations of the Appellant, but he did counsel Appellant after Incident One based on the investigation and determination by Mr. Meixsell. (R. 110).

summaries of the testimony of witnesses taken from the transcripts. (App. Appeal and Brief at 7). Mr. Thomas set forth the facts of the case in a section of the Recommended Decisions entitled Summary of Testimony and Facts. This is a meritless argument. There is no legal doctrine that prohibits the CEO's hearing examiner from presenting factual findings in this way.

CONCLUSION

For the foregoing reasons, we find that the local board's decision is not arbitrary, unreasonable, or illegal. We, therefore, affirm Appellant's termination.

Signatures on File:

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Clarence C. Crawford
President

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Shawn D. Bartley

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Gail H. Bates

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Charles R. Dashiell, Jr.

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Susan J. Getty

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Vermelle D. Greene

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Rose Maria Li

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Joan Mele-McCarthy

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Lori Morrow

____
Warner I. Sumpter

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Holly C. Wilcox

Dissented:
Jean C. Halle, Vice-President

July 28, 2020