DONNA YOUNG	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
PRINCE GEORGE'S COUNTY BOARD OF EDUCATION (II)	OF EDUCATION
Appellee.	Opinion No. 17-39

OPINION

INTRODUCTION

Donna Young (Appellant) appeals the decision of the Prince George's County Board of Education (local board) affirming her termination as a senior buyer in the purchasing department. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded and the local board replied.

On February 28, 2017, the State Board remanded the case to the local board for the issuance of an amended decision explaining its rationale. On June 1, 2017, the local board issued its amended decision. Appellant filed a response to the amended decision.

FACTUAL BACKGROUND

We previously summarized the facts of this case in *Young v. Prince George's County Bd. of Educ.*, MSBE Op. No. 17-12 (2017) (*Young I*). We repeat the pertinent facts here, along with a summary of events that have occurred since our February 28, 2017 decision.

Appellant began working in the purchasing department of Prince George's County Public Schools (PGCPS) in June 2011. During her employment, internal audits revealed problems regarding two bids on which Appellant worked. Appellant was accused of altering prospective vendor scores, accepting products from a vendor for personal use, and being an advocate for one company in the procurement process. (Motion, Ex. A, L).

Following the accusations, PGCPS held a *Loudermill* hearing[1] for Appellant on October 31, 2013. On January 14, 2014, Appellant was terminated based on misconduct in office, insubordination, and willful neglect of duty. (Motion, Ex. A). Appellant appealed her termination to the school system CEO. Per PGCPS policy, the CEO assigned the matter to a hearing officer to conduct a hearing. (Motion, Ex. F). Starting in April 2014, counsel for PGCPS began coordinating with Appellant's union counsel to find an acceptable date for a hearing. After scheduling and rescheduling the hearing date to accommodate the Appellant, Appellant's counsel indicated they would not participate in a hearing and unsuccessfully sought

[1] At a *Loudermill* conference, also known as a pre-termination hearing, 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).

to have the appeal heard directly by the local board. (Motion, Ex. B, J, K).

On December 16, 2014, a hearing occurred in which PGCPS's counsel was the only participant. That same day, the hearing officer issued his decision recommending that Appellant's termination be upheld. On December 19, 2014, the CEO adopted the hearing officer's report. (Motion, Ex. L).

Appellant submitted a timely appeal to the local board. On June 25, 2015, the local board heard oral arguments from the parties and also reviewed the record below. During oral argument, Appellant's counsel referenced documents and other information that were not presented to the hearing officer. Counsel for PGCPS argued that Appellant had waived her right to present the materials and that the appeal should be dismissed because she failed to appear for the hearing. In an order issued July 27, 2015, the local board declined to dismiss the appeal, stating that "it is the preference of the Board to issue decisions regarding termination of employees on the merits rather than procedural grounds." The board allowed Appellant to submit any documents and affidavits she wished to have considered within 30 days, along with her legal argument, and provided PGCPS's counsel a chance to respond. (Motion, Ex. N).

Appellant's counsel initially submitted a legal memorandum, with supporting documents, to the board on Sept. 11, 2015. Five days later, Appellant's counsel withdrew from the case. On Sept. 24, 2015, Appellant submitted an amended memorandum that included approximately 57 exhibits. (Motion, Ex. O).

On July 5, 2016, the local board issued its decision in the form of an order. The order recounted the procedural history of the case and concluded with the following analysis: "After having reviewed all of the relevant documents submitted by the Appellant and giving consideration to any legal argument in support of the Appellant's position, as well as to the entire record herein, it is" ordered that further hearings of the appeal be denied and the CEO's decision be affirmed. (Motion, Ex. R).

Appellant appealed the local board's decision. On February 28, 2017, the State Board issued its decision remanding the case to the local board for the issuance of an amended decision explaining its rationale. *Young*, MSBE Op. No. 17-12.

The local board issued an amended order on June 1, 2017. In its decision, the board found that Appellant (1) compromised the integrity of the procurement process by unilaterally altering prospective vendor scorings; (2) admitted accepting fuel additive products from a vendor for personal use; and (3) communicated in writing to a prospective vendor that she was an advocate for the company in the procurement process. The local board concluded these actions constituted misconduct in office, willful neglect of duty, and engaging in conduct that reflects unfavorably on the school system. (Amended Order).

Appellant filed a response to the amended order. The local board elected not to provide an additional response and instead relied on the reasoning in its amended order.[2]

[2] This case has had a long procedural history, with some of the delay attributable to the Appellant and some of it attributable to the local board. The State Board granted extensions of time to both sides throughout this appeal.

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, 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.01.05.05A

LEGAL ANALYSIS

Appellant raises several arguments against her termination, which we shall address in turn.

Lack of a rationale for the decision

Appellant argues that the local board failed to comply with the State Board's February decision (*Young I*) by submitting an amended order that did not provide a rationale for its decision. The local board submitted an amended order that includes findings of fact, conclusions of law, and a discussion of the local board's reasoning. In our view, the board has adequately explained its rationale, even if Appellant might not agree with the board's conclusions.

Reasons for the termination

Appellant's principal argument is that the local board's decision to terminate her was arbitrary, unreasonable, and illegal because the board failed to show that she violated any school system policies or otherwise acted inappropriately. Appellant argues at various points that the local board has failed to "disprove" the evidence presented by her through this appeal. As our standard of review makes clear, however, the local board's decision is considered *prima facie* correct and the Appellant bears the burden to show that the decision was arbitrary, unreasonable, or illegal. Applying this standard of review, we turn to the reasons for Appellant's termination.[3]

Bid 063-13

PGCPS terminated Appellant for misconduct in office, insubordination, and willful neglect of duty. This followed the results of two internal audit investigations that found Appellant violated PGCPS policies. One audit began after a request from the CFO, who was told that Appellant had allegedly changed the score on bid documents associated with Bid 063-13. (Motion, Ex. A10).

According to the audit, Appellant changed scores in three sections of the evaluation worksheets without consulting her supervisors or receiving their approval. Appellant's response was that she followed the Federal Acquisition Regulation (FAR) and that she was permitted to

[3] Appellant argues at length that various officials within PGCPS committed procurement violations and other wrongdoing. Our review focuses on the basis for Appellant's termination, not whether personnel action was warranted against other PGCPS employees.

change scores if she included clear documentation for the changes. Appellant made the changes because she believed that some vendors had improperly been given additional points for being a minority business enterprise. She also decided that some evaluators provided inconsistent scores. The audit found, however, that Appellant provided no documentation at the time she changed the scores. The audit determined that Appellant unilaterally changed scores without collaborating with other evaluation team members or seeking a supervisor's input. (Motion, Ex. A10).

Appellant does not deny changing the scores, but maintains that she was within her rights to do so. The board found that Appellant was under the mistaken impression that the FAR controlled her actions, rather than state or local law. Those federal regulations establish policies and procedures for "acquisition by all executive agencies" defined as agencies within the federal government. FAR §§1.101, 1.104, 2.101. Even after being advised that the FAR did not apply to PGCPS procurements, Appellant continued to rely on them. She failed to present any law or policy that would permit her to change the scores on her own. In our view, it was not arbitrary, unreasonable, or illegal for the local board to rely on Appellant's actions in connection with the bid as part of its termination decision.

Bid 049-13

A second internal audit occurred at the request of the CFO in connection with Bid 049-13, which related to fuel additives for the PGCPS school bus fleet. The audit found numerous problems with how PGCPS conducted the bid. Related to the investigation, auditors learned that Appellant accepted a sample fuel additive for her personal vehicle prior to the release of the invitation for bid. The audit determined that it was the role of the transportation department, not purchasing, to test products and that Appellant violated the Purchasing and Supply Services Manual by accepting a gift from a potential vendor. The audit also found that Appellant's emails gave "the appearance of being an advocate on behalf of the vendor without considering the best interest of the BOE." The audit determined that she engaged in inappropriate communications with the bidder in a way that impaired the bid process. The audit recommended referring the matter to Labor Relations. (Motion, Ex. A7).

Appellant argues that she wasn't the senior buyer assigned to the matter, that she was testing the product rather than accepting it as a gift, that other employees accepted the fuel additive, and that there was no policy against doing so. In addition, she maintains that PGCPS policy requires buyers to be advocates on behalf of minority business enterprises. Under the gift policy, Appellant argues that accepting items with a value of under $20 is acceptable and that the fuel additive she received cost approximately $2.34.

The PGCPS Purchasing & Supply Services Manual requires employees to "decline personal gifts or gratuities" and prohibits "personal gifts or gratuities in connection with a purchasing function." (Appellant, Ex. 31, p.11, 40). The policy adds that "[a]ccepting inexpensive gifts of nominal value, such as advertising items of general distribution, i.e., pens, calendars and the like are acceptable under this policy." PGCPS policy prohibits officials from knowingly accepting gifts from people who are doing business with PGCPS, but does allow for "[u]nsolicited gifts of nominal value that do not exceed $20 in costs or trivial items of informational value." PGCPS Board Policy 0107.

The local board dismissed Appellant's argument that she accepted the product for testing, pointing out that the vendor provided the product for testing purposes for the PGCPS school bus fleet, not personal vehicles. The board also found that, even if other employees accepted the products for personal use, it did not excuse Appellant's improper behavior. The board further dismissed Appellant's argument that the fuel additive qualified as a gift of nominal value under PGCPS policies. The examples provided for what constitute acceptable gifts for purchasing employees (marketing items such as pens and calendars) are not analogous to the type of gift that Appellant accepted (a sample of the vendor's product for her personal use). Given that purchasing employees are generally barred from accepting gifts, and there is the clear potential for the gift to have been seen as an improper inducement to award the contract, it was not unreasonable for PGCPS to find that Appellant's actions violated PGCPS policies.

The board also found that Appellant acted inappropriately by emphasizing her positive experience with the fuel additive, requesting (and receiving) additional samples from the vendor, and essentially "selling the product" to PGCPS as if on behalf of the vendor. Appellant maintains that the vendor was a minority business enterprise and that purchasing officials are permitted to be advocates on behalf of those companies. There is a clear difference, however, between advocating generally for participation by minority business enterprises and advocating specifically on behalf of a particular vendor. Based on the record, it was not unreasonable for the local board to conclude that Appellant crossed the line in her advocacy.

With both bids, Appellant argues that the audits were "clearly flawed" and that the auditors "deliberately misrepresented" findings and failed to include other witness testimony and evidence. She also faults the local board for ignoring the evidence she presented. The local board in its amended order specifically discussed several pieces of evidence presented by Appellant, but concluded that her evidence did not alter its termination decision. Fact finders are not required to give equal weight to all of the evidence presented to them and their failure to agree with an Appellant's view of the evidence does not mean that a decision is arbitrary, unreasonable, or illegal. *See Goines*, MSBE Op. No. 17-16. Here, the local board based its decision on the internal audits and other supporting documentation. Although Appellant may disagree with the conclusions reached by the local board and the weight it gave some evidence, that does not render the board's decision illegal.

Retaliation

Appellant argues that her termination occurred as a result of retaliation after she reported illegal activities to PGCPS. She also characterizes this claim as violating her rights as a whistleblower.[4] In order to establish a *prima facie* case of retaliation, an Appellant must show that (1) he or she engaged in a protected activity; (2) that the school system took a materially adverse action against him or her; and (3) that a causal connection existed between the protected activity and the materially adverse action. *See Jones v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-33 (2015) (citing *Burling N. & Santa Fe. Ry. Co. v. White*, 584 U.S. 53, 68 (2006)). The school system may then rebut the *prima facie* case by showing that there was a

[4] Prior to October 1, 2017, public school employees were not protected under the State's Whistleblower Protection Act. *See Montgomery County Public Schools v. Donlon*, 2017 WL 3725711 (Md. Ct. Sp. App. Aug. 30, 2017). There could not, therefore, have been a violation of that Act at the time of Appellant's termination.

legitimate and legal reason for the adverse action. *Id.* The burden then shifts back to the Appellant to show that the reasons given by the school system are pretextual. *Id.*[5]

In her appeal materials, Appellant states vaguely that she raised internal concerns about fraud within PGCPS but that her efforts to report wrongdoing were stymied because the Director of Purchasing, CFO, COO, General Counsel, Internal Audit office, and her union were all a part of the scheme. It is unclear when she made these reports or to whom she made them. The record is clear that on October 24, 2013, Appellant sent an email to Dr. Kevin Maxwell, CEO for PGCPS, alleging illegal activity by other employees in the school system. Dr. Maxwell sent a response the following day indicating that it would be inappropriate for him to meet with her because her case was under review by the Department of Labor Relations. Despite this, the CEO indicated that Appellant could "submit any documentation regarding illegal processes to the Internal Audit Department for review and investigation." On October 25, 2013, Appellant states that she sent information about illegal activities to the FBI. Appellant's *Loudermill* hearing took place on October 31, 2013. Appellant argues that this proximity in time shows that her termination must have been based on illegal retaliation. (Motion, Ex. O; Appellant, Ex. 3, 4).

Assuming that Appellant has established a *prima facie* case, the local school system has rebutted Appellant's *prima facie* showing. The school system's audits and accompanying evidence provide support for its claim that Appellant violated school system policies by inappropriately accepting a sample from a vendor for personal use, advocating for a vendor, and altering prospective vendor scores. In our view, Appellant has failed to offer evidence showing that the reasons for the termination were a mere pretext.

Due Process violations

Appellant argues that her due process rights, and rights under worker's compensation law and the Family Medical Leave Act (FMLA), were violated by requiring her to attend a *Loudermill* hearing while she was on medical leave.[6]

According to records provided by Appellant, a *Loudermill* hearing was originally scheduled for October 29, 2013, but was rescheduled after Appellant failed to accept an invitation to the meeting. (Appellant, Ex. 9). On October 30, 2013, at 8:20 a.m., Appellant slipped and fell on water in a staff kitchen. (Appellant, Ex. 5, 21). Twenty minutes later, Appellant received an invitation to the rescheduled *Loudermill* hearing, now set for October 31, 2013. (Appellant, Ex. 6). Appellant reportedly went to the emergency room after her fall and, upon returning from the ER, saw the meeting notice. Appellant later saw a doctor for treatment on November 6, 2013. That doctor advised against prolonged sitting or standing and told her she could return to work on February 1, 2014. (Appellant, Ex. 5).

[5] Appellant cites to *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), to support her argument. The *Staub* case, however, dealt with an interpretation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the standard for establishing antimilitary animus sufficient to sustain a tort under that statute. It does not alter the analysis we cited in *Jones*, MSBE Op. No. 15-33.

[6] She also alleges generally that this action violated the Americans with Disabilities Act (ADA). This later argument was not presented to the local board and is therefore waived. Moreover, Appellant fails to explain how PGCPS violated the ADA.

There is no indication in the record that PGCPS officials were aware of Appellant's injury when they sent an invitation to the rescheduled *Loudermill* hearing. Even so, we are aware of no law that prohibits a local board from taking employment action against an employee who happens to be on medical leave, so long as the medical leave itself is not the basis for the termination. *See Snead v. Prince George's County Bd. of Educ.*, MSBE Op. No. 04-27 (2004) (affirming the termination of an employee while she was on medical leave, based on poor job performance prior to her taking leave). And in this case, Appellant attended the meeting with her union representative. Given that she had representation, was informed of the charges against her, and had an opportunity to respond, we conclude there was no violation of due process.

Finally, Appellant argues that her termination violated the Association of Supervisory and Administrative School Personnel (ASASP) bargaining agreement. Section 3.11 states that "[w]henever a formal complaint is lodged against a unit member, the appropriate school system official shall notify the member of the complaint, the complainant and the charge(s) in writing within ten (10) days of the receipt of the written complaint. . . . If such notice is not provided within ten (10) working days of the request, the complaint shall be dismissed." (Appellant, Ex. 7). Appellant appears to argue that PGCPS violated this requirement because it did not notify her within 10 days of her committing the inappropriate actions. The "formal complaint" in this case, however, was the internal audits. We do not find evidence in the record that PGCPS failed to timely notify her of this process. Instead, the record shows that Appellant was aware of, and participated in, the internal audits and responded to their findings.

CONCLUSION

For all of the foregoing reasons, we affirm the amended order of the local board because it is not arbitrary, unreasonable, or illegal.

Signatures on File:

_____
Andrew R. Smarick
President

_____
Chester E. Finn, Jr.
Vice-President

_____
Michele Jenkins Guyton

_____
Justin M. Hartings

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Michael Phillips

_____
David Steiner

Absent:
Irene M. Zoppi Rodriguez

October 24, 2017