

LEE THOMASSEN,

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 18-44

OPINION

INTRODUCTION

Lee Thomassen (Appellant) appeals the decision of the Baltimore County Board of Education terminating him from his teaching position for insubordination. We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(2). The Administrative Law Judge (ALJ) issued a proposed decision recommending that the State Board uphold the local board's termination decision. Appellant filed exceptions to the ALJ's Proposed Decision and the local board responded. Oral Argument was heard on December 4, 2018.

FACTUAL BACKGROUND

Appellant worked for Baltimore County Public Schools for more than 26 years.¹ He most recently taught at Dumbarton Middle School ("Dumbarton") during the 2014-15 school year. BCPS considered Appellant to be an effective teacher. (ALJ Proposed Decision at 3; Hearing Examiner Record, Transcript at 25).

BCPS designated Dumbarton as a "lighthouse" middle school for the 2015-16 school year. A "lighthouse" school is one where there is an accelerated focus on technology and computers. In addition, school officials scheduled significant repairs and renovation for Dumbarton during that upcoming school year, including equipping the building with air conditioning. (ALJ Proposed Decision at 3).

Prior to February 2015, Appellant requested, and received, accommodations from BCPS under Section 504 of the Rehabilitation Act of 1973. His accommodation requests focused on environmental concerns in the building and in his classroom. In part because of environmental concerns during the anticipated construction at Dumbarton, BCPS decided to transfer Appellant to another school for the 2015-16 school year. (ALJ Proposed Decision at 3-4).

In February 2015, Appellant requested seven new accommodations from BCPS under Section 504. On March 25, 2015, the BCPS Equal Employment Opportunity Officer denied

¹ These facts are primarily taken from the ALJ's findings of fact in his proposed decision, with additional facts drawn from the record.

Appellant's request, finding that the proposed accommodations were unreasonable and not supported by medical documentation. Because Appellant would be transferring to a new school and some of his requests "raised concerns regarding [Appellant's] ability to safely perform the essential functions" of his job, with or without an accommodation, the EEO officer referred him to the BCPS Office of Risk Management "for an assessment of your physical capabilities as they pertain to your job." BCPS indicated it would ask an independent medical doctor for recommendations for any accommodations that might be necessary at his new school. (Hearing Examiner Record, Supt. Ex. 1).

On March 30, 2015, Dr. Penelope Martin-Knox, assistant superintendent for middle schools, directed Appellant to undergo an independent medical examination on April 21, 2015. BCPS Superintendent Rule 4006 permits BCPS to require employees to undergo such an examination, at the board's expense. The rule also states that an employee who fails to appear for a scheduled medical examination is responsible for "no-show" fees and may face disciplinary action, up to and including termination. BCPS ordered Appellant to be examined by Dr. Robert Toney, of Concentra Medical Advisory, who was approved by the county board to conduct employee physicals. The letter stated that "failure to abide by this directive will be considered insubordination and result in disciplinary action up to and including termination." (ALJ Proposed Decision, at 4-5; BCPS, Ex. 1; Superintendent Rule 4006; Hearing Examiner Record, Supt. Ex. 5).

Appellant communicated with the local board several times between March 30 and April 20, 2015, objecting to Dr. Toney performing the independent medical evaluation. He explained that Dr. Toney had previously evaluated him as part of prior exams and made incorrect diagnoses. Appellant argued that Dr. Toney would not understand his medical issues and would be biased against him. Instead, he suggested three out-of-state doctors who he believed would be familiar with his conditions. In response, Appellant received emails on April 14, 2015 and April 20, 2015 from the BCPS Office of Risk Management telling him they could not cancel his appointment and warning him that failure to attend the appointment without just cause could result in a recommendation for termination. (ALJ Proposed Decision, at 9-10; Hearing Examiner Record, Appellant Ex. 2).

Appellant did not appear for the April 21, 2015 appointment. On April 23, 2015, he told the local board that he had missed the appointment. Appellant later explained that he had a medical emergency that prompted his physical therapist to order that he attend a medical appointment on the same day as the scheduled physical with Dr. Toney. Dr. Toney charged the local board \$179.74 for the missed appointment. (ALJ Proposed Decision, at 9-10).

On May 1, 2015, Appellant received a notice rescheduling his appointment for May 22, 2015. The notice again stated that "failure to abide by this directive will be considered insubordination and result in disciplinary action up to and including termination." The letter also denied his "just cause" arguments for why Dr. Toney should not perform the examination. The letter informed Appellant that he could be evaluated by other physicians at his own expense and have the results forwarded to the local board. Appellant communicated with the local board multiple times before May 22, 2015, indicating his continued objections to Dr. Toney and the independent medical examination. He sent an email to Dr. Martin-Knox at 9:38 p.m. on the day before the scheduled examination explaining his objections, but did not mention any potential conflicts with the appointment. Appellant did not attend the May 22, 2015 appointment. He

later explained that he already had a long-standing doctor's appointment for that date. Appellant claimed that he forgot about the doctor's appointment until a few days before the scheduled physical and that he had been unable to reschedule his doctor's appointment. Dr. Toney issued a missed appointment fee to the county board of \$116.73.² (ALJ Proposed Decision, at 11-12; Hearing Examiner Record, Supt. Ex. 7).

On May 28, 2015, Appellant received a notice to attend an independent medical examination scheduled for June 8, 2015. The notice again informed him that failing to attend would be insubordination and could result in his termination. At the appointment, Appellant presented Dr. Toney with a letter alleging civil rights violations and requesting a postponement. Appellant left before Dr. Toney could conduct the examination. After Appellant left, Dr. Toney issued the local board a \$179.74 missed appointment fee. Appellant claimed he left because Dr. Toney's office manager told him he needed to bring additional paperwork from the Office of Risk Management. The ALJ did not find this explanation credible. The ALJ found that Appellant never intended to participate in the examination, as evidenced by his letter, and that Dr. Toney would not have issued a missed appointment fee if his office agreed to reschedule the appointment. (ALJ Proposed Decision, at 12-13).

On July 14, 2015, BCPS recommended Appellant for termination. Appellant appealed. On March 9, 2016, a hearing examiner conducted a hearing on Appellant's termination. Multiple BCPS witnesses testified at the hearing, as did Appellant, who was represented by legal counsel. On September 29, 2016, the hearing examiner issued a decision recommending that the local board uphold Appellant's termination. On May 18, 2017, the local board heard oral argument in the case. On May 23, 2017, the local board adopted the hearing examiner's decision and terminated Appellant. (ALJ Proposed Decision, at 1).

On June 21, 2017, Appellant filed an appeal with the State Board. Appellant informed the State Board that he had filed discrimination claims against the local board with the U.S. Department of Education Office of Civil Rights and the Equal Employment Opportunity Commission. Appellant alleged that he had been fired based on disability discrimination and retaliation. Appellant requested that the State Board stay any decision pending a decision from those bodies. The State Board denied the request for a stay, concluding that the overriding question for the State Board was whether a preponderance of the evidence supported termination based on insubordination. That question remained solely within the State Board's jurisdiction and did not depend on the conclusions of any federal administrative agencies. *See Thomassen v. Baltimore County Bd. of Educ.*, MSBE Op. No. 17-13 (2017). The State Board later denied a request for reconsideration. *See Thomassen v. Baltimore County Board of Educ.*, MSBE Op. No. 17-18 (2017).

Pursuant to COMAR 13A.01.05.07A(2), the State Board transferred Appellant's case for a hearing before an ALJ. The ALJ conducted two telephone prehearing conferences on December 4, 2017 and January 9, 2018. On Feb. 5, 2018, the ALJ denied Appellant's Motion for Discovery, Discovery Related Motions, and Motion to Dismiss. The hearing occurred on April 10 and 11, 2018. (ALJ's Proposed Decision, at 1-2).

On July 10, 2018, the ALJ issued his findings of fact, conclusions of law, and proposed

² The record is not clear on why the amount charged by Dr. Toney for a missed appointment varied between visits.

recommendation affirming Appellant's termination. The ALJ concluded that Appellant provided no valid justification or excuse for missing the independent medical examinations. The ALJ determined that Appellant's accommodation requests and other complaints did not change the fact that BCPS gave Appellant three lawful directives, which Appellant ignored. Accordingly, the ALJ found that Appellant's termination was proper. (ALJ Proposed Decision, at 12-13).

On August 3, 2018, Appellant filed 41 single-spaced pages of exceptions to the ALJ's proposed decision. On August 17, 2018, the local board responded to the exceptions. The State Board heard oral argument at its December 4, 2018 meeting.

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., State Gov't §10-216.

LEGAL ANALYSIS

The local board terminated Appellant for insubordination. We have previously defined insubordination as "a refusal to obey the directions of an employer/supervisor." *Gwin v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 12-19 (2012). It includes "disobedience to constituted authority" and "refusal to obey some order which a superior officer is entitled to give and have obeyed." *Id.* Insubordination connotes "willful and intentional disregard of the lawful and reasonable instructions of the employer." *Id.*

Appellant filed 44 exceptions to the ALJ's Decision, which we have renumbered and grouped together in particular categories.

Exception 1 – Local Board Hearing Examiner Decision

Appellant challenges the factual findings reached by the local board's hearing examiner because he claims that the hearing examiner had a stroke prior to issuing his decision and that this medical issue caused the hearing examiner to reach incorrect factual and legal conclusions. The local board argues that Appellant waived this objection by failing to raise it before the local board. We agree.

In addition, as part of his appeal to the State Board, Appellant was provided a new hearing before an ALJ. The ALJ was not bound by any conclusions reached by the local board's hearing examiner. We have previously held that a subsequent hearing cures any legal errors that might have occurred at an earlier hearing (not that we conclude there were any in this case). *See, e.g., Mobley v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-09 (2015).

Exception 2 – ALJ Improperly Excluded Exhibits

Appellant argues that the ALJ improperly excluded exhibits that he wanted to offer as evidence during the hearing. New evidence may be introduced before an ALJ if it is material and there were good reasons for the failure to offer the evidence before the local board. COMAR 13A.01.05.04C. The ALJ found that some of Appellant’s proposed exhibits were already included in the record and others were immaterial to the issues in the case. Appellant fails to explain how the excluded exhibits were material to the specific issues on appeal and not duplicative of other records. In our view, the ALJ did not commit any legal error regarding the admission of exhibits.

Exceptions 3, 20, 42 – Failure to Include Certain Facts in ALJ Decision

Appellant objects to the ALJ’s omission of numerous other details from his biography. Summarizing the evidence briefly, however, does not mean that the ALJ failed to consider all of the evidence in a particular case. *See Sullivan*, MSBE Op. No. 14-51. Moreover, Appellant fails to demonstrate why biographical information is relevant when his termination focused on specific instances of insubordination rather than the overall quality of his teaching.

In addition, Appellant objects that the ALJ quoted from a letter ordering him to attend the independent medical examinations but did not include the portions of the letters that allowed one to miss an appointment for “just cause.” The ALJ considered Appellant’s “just cause” explanation as part of his decision. We find no prejudice or legal error by failing to include the full text of the letters in the decision.

Finally, Appellant objects to the ALJ not including all of his testimony and evidence as part of the proposed decision. He believes that the State Board will not consider information that is not in the proposed decision. Appellant overlooks the fact that the full record on appeal accompanies the ALJ’s proposed decision on review to the State Board. In addition, the State Board has the benefit of Appellant’s voluminous exceptions. His arguments and views on the evidence are clear, regardless of whether all of his evidence was in the proposed decision.

Exceptions 4, 6-14 – Accommodation requests and related information should be excluded from decision

The local board terminated Appellant for insubordination based on his refusal to attend independent medical examinations related to a 504 accommodation request. Appellant argues it was improper for his specific accommodation requests to be revealed (or summarized) and also objects to any mention of his medical or genetic information. Appellant suggests that the State Board has compelled him to provide sensitive medical information against his will. We have requested no such information. While Appellant has divulged a great deal of personal medical information during his hearings, again revealed that information in oral argument before the State Board, and placed many of these issues front and center in his exceptions, we agree that it is not necessary to describe the specifics of his accommodations or his medical or genetic information in order to issue a decision in this case. Accordingly, we do not include those details in our published decision and have redacted them from the public version of the ALJ’s decision.

Exception 5 – The local board cited an incorrect standard regarding accommodations

Appellant objects that the local board used an incorrect standard regarding whether to grant an accommodations request under Section 504. We agree with the local board that this exception is irrelevant to the ALJ's decision, which focused on whether Appellant committed insubordination.

Exceptions 15, 22-25, 34-37, 39-41, 43 – The ALJ reached improper factual conclusions and drew improper inferences

Many of the exceptions can be categorized together as an objection that the ALJ reached improper conclusions from the facts, failed to credit Appellant's version of the facts, or otherwise did not credit evidence presented by Appellant. We summarize some of these objections as follows:

- ALJ should not have concluded that Appellant's transfer was "due to BCPS's limited ability to control environmental concerns during the period of construction." (Exception 15)
- ALJ should have found that Appellant properly notified BCPS that he would not attend the April 21, 2015 independent medical evaluation (Exception 22)
- ALJ should have found there was no missed appointment fee issued. (Exception 23)
- ALJ should have found there was no medical evaluation scheduled for May 22, 2015 (Exception 24)
- ALJ should have found he was sent away, rather than voluntarily left, the June medical evaluation appointment (Exception 25)
- ALJ should have found Appellant had a credible explanation for his missed April 21, 2015 medical evaluation (Exceptions 34-36)
- ALJ should have found Appellant had a credible explanation for leaving the June 22, 2015 appointment (Exception 37, 39-41)
- ALJ should have concluded the termination was illegal because Appellant had good cause to miss the three medical appointments (Exception 43)

Appellant vehemently disagrees with these factual findings made by the ALJ. He also challenges the ALJ's conclusion that his testimony was simply not credible. In a case such as this, we defer to the ALJ's demeanor-based credibility findings unless there are strong reasons presented that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 302-303 (1994). The State Board gives great deference to an ALJ's credibility determinations because he or she has had an opportunity to see, hear, and judge the witnesses' truthfulness as the witness testifies. *Gwin v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 12-19, 12-13 (2012). When evaluating facts, ALJs are not required to give equal

weight to all of the evidence and their failure to agree with an Appellant's view of the evidence does not mean their decisions are arbitrary, unreasonable, or illegal. *See Karp v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-39 (2015).

We find no reason to reject the ALJ's credibility determinations about Appellant. The ALJ heard Appellant testify and found his explanations lacked credibility and were not supported by evidence. Appellant did not wish to undergo an independent medical evaluation from Dr. Toney and the ALJ found his excuses for missing the appointments were not believable. The record supports these factual conclusions.

Exception 16 – Appellant's genetic medical condition should not have been referred to as a health condition

Appellant objects that his genetic medical condition was referred to as a health condition. In our view, this appears to be a distinction without a difference. Appellant acknowledges in his exceptions that his 504 accommodations request stemmed from a genetic condition. Referring to the genetic condition as a health condition, even if it was in error, does not appear to have had any impact on the ALJ's conclusions.

Exceptions 17-19, 21, 33 – The ALJ should have concluded that the independent medical examination was illegal

Appellant argues that requiring an independent medical examination in connection with his accommodations request violated federal civil rights law and local board policies. Although he cites generally throughout his exceptions to the ADA, Section 504, and other laws, he does not offer a specific provision of federal law that barred BCPS's actions, nor are we aware of one.

As to BCPS policy, Appellant maintains that an independent medical examination is permissible only for a work-related injury. He cites to Superintendent's Rule 4006 as support for his position. That rule states, however, that an evaluation may be required for "determination of the employee's ability to perform the essential functions of the position with or without reasonable accommodations." The rule also permits one of three BCPS offices to require an independent medical evaluation. (Hearing Examiner Record, Ex. 2B).

Appellant also argues that the independent medical examination was an impermissible "act of treatment" because it was related to his request for accommodations. Although Appellant claims this violated BCPS policy, he fails to quote any specific language that would prohibit the practice. Indeed, the policy includes evaluations related to accommodation requests. Some of Appellant's argument is based on his belief that Dr. Toney would be "writing" the accommodations for BCPS. The record indicates, however, that Dr. Toney was to make recommendations that would inform BCPS's decisions, not make final decisions regarding the accommodations himself.

Relatedly, Appellant argues that the order to undergo an independent medical evaluation was illegal because it was based on bias and discrimination. He maintains it was improper to threaten his termination if he did not comply. Appellant appears to argue that his act of filing a discrimination complaint with the U.S. Department of Education Office of Civil Rights somehow barred BCPS from requiring an independent medical evaluation related to his accommodations

request. The ALJ found no support for Appellant's argument that the medical evaluation was a form of discrimination or retaliation.

To establish a prima facie case of discrimination based on retaliation, an employee must produce evidence that he engaged in a protected activity, the employer took an adverse action against him, and the employer's adverse action was causally connected to his protected activity. *Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 504 (2016). If the employee meets his initial burden, the burden shifts to the employer to offer a non-retaliatory reason for the adverse employment action. *Id.* 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)).

Appellant arguably met his burden to show that he engaged in a protected activity (reporting discrimination by the local board) and faced adverse employment action (his termination). The burden then shifts to the local board, which provided a non-retaliatory reason for terminating Appellant – his continued failure to submit to an independent medical evaluation. The ALJ found that Appellant did not meet his burden to show that the local board's reason for termination was mere pretext. We agree. Appellants' arguments appear based on his speculative view that the local board wanted to access his genetic information for nefarious purposes related to a prior worker's compensation injury. We do not find support in the record for Appellant's claims of bias and discrimination. Instead, the record shows that BCPS believed an independent medical evaluation would be helpful in light of new medical issues raised by Appellant and BCPS's concern that he might not be able to perform his duties as a teacher, with or without accommodations.

Appellant also objected to undergoing an evaluation by Dr. Toney and instead offered the names of three doctors from New Mexico, California, and Illinois, whom he preferred. The local board indicated he could provide evaluations from any other doctor, but that the board would not pay for that expense and required its own independent medical evaluation. (Local Board Hearing Examiner Decision, at 15). In our view, the local board did not act illegally by requiring its own evaluation and allowing Appellant to provide additional medical evaluations from his preferred doctors at his own expense.

Exceptions 26-30, 38 – Appellant's disagreement with actions taken by Dr. Toney, Dr. Martin-Knox, and BCPS officials

The ALJ found that Dr. Toney issued a missed appointment letter and charged a missed appointment fee. (Exceptions 26, 27). Appellant does not actually challenge the accuracy of those facts; instead, he argues that it was improper for Dr. Toney to do so. The findings of fact in a proposed decision state what occurred in a case, not what an Appellant believes should have occurred. We find no error in the ALJ's factual finding regarding the appointment letter and charged fee.

Appellant raises similar arguments as to Dr. Martin-Knox's decision to terminate him, his discussions with BCPS about whether his accommodations carried over at his new school, the superintendent's designee upholding his termination, and the contents of an email he sent to

BCPS. (Exception 28, 29, 30, 38). All of these exceptions confuse findings of fact with legal conclusions drawn from those facts. Appellant believes many actions taken by BCPS and others were improper or illegal, but does not provide any evidence that the ALJ's factual findings about what occurred were actually wrong. From our review of the record, we find no error with the ALJ's factual findings cited by Appellant.

Exceptions 31, 32, 44 – ALJ failed to cite to all relevant laws and did not list all arguments raised by Appellant; local board improperly asked questions about genetic information or improperly sought genetic information

Appellant objects to the ALJ's failure to delve into his arguments regarding the ADA, Section 504, and the Genetic Information Nondiscrimination Act of 2008 (GINA). Appellant raised many of these same claims in a separate appeal filed with the State Board, which we dismissed based on lack of jurisdiction and untimeliness. We concluded that the Equal Employment Opportunity Commission had jurisdiction to consider Appellant's claims of violations of GINA and other related laws. *See Thomassen v. Baltimore County Bd. of Educ. (Thomassen II)*, MSBE Op. 18-02 (2018). It is our understanding that Appellant has filed a complaint with the EEOC, as well as the U.S. Department of Education Office of Civil Rights.

In our view, the ALJ correctly determined that the issue before him related to whether Appellant committed insubordination. Many of the arguments raised by Appellant, while tangentially related to the insubordination, were ultimately irrelevant to that claim and dealt more with the substance of his requested accommodations. Appellant apparently operated under the mistaken belief that once he filed a claim of discrimination, the local board could take no adverse employment action against him. (Local Board Response, at 8-10). The local board could certainly not terminate him based on discriminatory or retaliatory motives, but there is no indication of those motives in the record.

In short, while Appellant had the right to allege discrimination by BCPS and to fight for particular accommodations, he did not have the right to refuse the local board's request for an independent medical evaluation as part of that process. The local board requested that he attend the medical evaluation on three separate occasions, warning him each time that failing to go would be insubordinate and potentially lead to his termination. The local board's rules permitted such a request. In our view, the local board gave Appellant a lawful order, provided him multiple opportunities to obey it, and warned him of the consequences if he refused to obey. In our view, the board did not act with retaliatory or discriminatory intent. Accordingly, we adopt the ALJ's proposed decision and affirm the local board's termination.

CONCLUSION

We adopt the proposed decision of the ALJ, as modified and supplemented by this opinion, and affirm the local board's decision to terminate Appellant based on insubordination.

Signatures on File:

Justin M. Hartings
President

Stephanie R. Iszard
Vice-President

Chester E. Finn, Jr.

Vermelle D. Greene

Rose Maria Li

Joan Mele-McCarthy

Michael Phillips

Warner I. Sumpter

ABSTAIN:

Michele Jenkins Guyton
Jean C. Halle
David Steiner

December 4, 2018