

TYLIA WORTHINGTON

Appellants,

v.

BALTIMORE CITY BOARD
OF SCHOOL
COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 20-23

OPINION

INTRODUCTION

Tylia Worthington (“Appellant”) appeals the decision of the Baltimore City Board of School Commissioners (“local board”) denying her request to enter her second formal observation for the 2018-2019 school year into the Online Performance Management System (“OPMS”), and to recalculate her final year-end evaluation to include the results of her second formal evaluation. Appellant maintains that recalculation of the evaluation with the 2nd observation would result in Appellant receiving a “Highly Effective” rating for the school year, rather than the “Default Effective” rating she received, and would thereby result in Appellant advancing on the pay scale. The local board filed a Memorandum in Response to the Appeal maintaining that its decision is not arbitrary, unreasonable or illegal. The Appellant responded to the memorandum and the local board replied.

FACTUAL BACKGROUND

During the 2018-2019 academic year, Appellant was a special education teacher assigned to Augusta Fells Savage Institute of Visual Arts (“Augusta Fells”). The school administration is required to conduct at least two teacher observations during the school year. *See* COMAR 13A.07.04.02(A)(4). To effectuate the observations for the 2018-2019 school year, Tracy Hicks, Principal of Augusta Fells, and Gerard Allen, Assistant Principal (“AP Allen”), developed a formal teacher observation schedule and disseminated it to the teachers during the 2018-2019 school year.

Baltimore City Public Schools (“BCPS”) follows its Teacher Effectiveness Evaluation (“TEE”) process for completing teacher evaluations. The TEE process requires specific action items to be completed by a set due date as follows:

- Initial Planning Conference and Individual Development Plan – October 15th
- Submit Student Learning Objective (“SLO”) Target or SLO Exemption Request – October 29th
- SLO Approval – November 16th

- 1st Formal Observation – December 1st
- Mid-Year Performance Review – January 15th
- Submit SLO student data for scoring verification – March 29th
- 2nd Formal Observation – April 1st
- Professional Expectations – April 5th
- SLO will be scored based on student data – April 12th
- Annual Evaluation – One week before last day of school – notification by May 1st if rating is ineffective

(Response, Ex. 4). The deadlines outlined in the TEE process for the 1st Formal Observation, 2nd Formal Observation, Annual Evaluation and several others action items mirror the deadline in the TEE’s predecessor, the Performance Based Evaluation System (“PBES”).¹ (Response, Ex. 5).

Appellant’s 1st formal observation was completed and entered into the OPMS. She received an average indicator score of 3.22, which was reflected in her 2018-2019 year-end evaluation document. (Appeal, Ex. C., Attach 1, p.4).

Appellant’s 2nd formal observation was initially scheduled for March 28, 2019, with a pre-observation conference scheduled for March 27, 2019. The pre-observation conference proceeded as scheduled. AP Allen rescheduled the 2nd observation, which was conducted on April 9, 2019, after the April 1, 2019 deadline. (See Local Bd. Reply, Ex. A). Appellant received 4s in each observation domain, which is the highest possible score. Because the 2nd formal observation took place after the deadline, Mr. Allen was unable to enter the information into the OPMS to be calculated as part of the Appellant’s 2018-2019 year-end annual evaluation rating.

On May 24, 2019, AP Allen submitted an Evaluation Update Request Form asking for approval to update the OPMS with the results of Appellant’s 2nd formal classroom observation. The Instructional Leadership Director (“ILED”), Jacque Hayden, signed the request form on July 15, 2019. (Response, Ex. 2). AP Allen provided information indicating that the second formal observation was rescheduled due to testing windows. Principal Hicks explained that the observation and testing schedules were made earlier in the year and there were no extenuating or unexpected circumstances that would have impacted AP Allen’s ability to meet the established and communicated April 1st deadline for conducting Appellant’s observation. (Response, Ex. 9).

On July 19, 2019, the BCPS Office of Human Capital denied the evaluation update request because the accompanying documentation established that the second formal observation was conducted after the April 1st deadline and no extenuating circumstances existed that would

¹ BCPS first implemented the TEE in SY 2013-2014. It is the evaluation tool used for members of the BTU who are classroom teachers. Prior to implementation of the TEE, BCPS utilized PBES as the evaluation tool for these BTU members starting in SY 2003-2004.

have impacted Mr. Allen’s ability to meet the deadline.² *Id.* Thus, the Appellant received a “Default Effective” rating on her 2018-2019 year-end evaluation.

Through the BTU, Appellant appealed her 2018-2019 year-end evaluation rating to the local board. (Local Board Response, Ex. 8). The local board referred the matter to hearing examiner Vivian Nunez for review and recommendation. On September 16, 2019, the hearing examiner issued her report recommending that the local board uphold the “Default Effective” rating. (Response, Ex. 9). She relied on Article 5.2C of the collective bargaining agreement between the local board and BTU which provides that “[f]ailure of Principal to Issue an Annual Evaluation within contractual time limits results in an Effective Rating.”³ She found the language of the provision to be “clear and unambiguous” and applicable to the circumstances of Appellant’s case.

On November 12, 2019, the local board adopted the hearing examiner’s Findings of Fact and Recommendation, affirming the denial of Appellant’s request for her 2nd formal observation for the 2018-2019 school year to be entered into OPMS to recalculate her final end of year evaluation rating. (Response, Ex. 10).

This appeal followed.⁴

²On September 24, 2019, the local board adopted policy GCO – Employee Evaluations and six accompanying personnel regulations GCO-RA, GCO-RB, GCO-RC, GCO-RD, GCO-RE and GCO-RF). (Response, Ex. 3). The policy and regulations are not controlling here because they were not in effect at the time of the Appellant’s evaluation, but they touch on various issues that arose in this appeal. For example, Regulation GCO-RF – Employee Evaluation Review and Update Requests states:

1. It is the supervisor, evaluator, and or qualified observer’s responsibility to ensure that performance information is entered accurately and with fidelity...3. The Office of Human Capital will review and confirm final approval status of requests to update performance data that was entered as part of an employee evaluation. 4. These requests are to update an evaluation component or evaluation that was submitted in the appropriate electronic evaluation system ***within communicated timeliness*** in accordance with the evaluation guidance maintained and communicated by the Office of Human Capital. (emphasis added).

Regulation GCO-RF further states that a “[r]equest received by the Office of Human Capital for updates to evaluation component data for employee evaluations is a ***time-bound process that must be adhered to.***”

³ New Regulation GCO-RA contains the following provision:

When an employee evaluation is not completed or there is insufficient performance data across the evaluation components to calculate an overall employee evaluation rating within the communicated timelines, the employee will receive an effective evaluation rating for that school year.

⁴ The State Board does not typically entertain appeals brought by teachers challenging satisfactory or effective ratings on their evaluations. See *Williams v. Prince George’s County Bd. of Educ.*, MSBE Op. No. 16-20 (2016); *Heaney v. New Board of Sch. Commss’rs of Baltimore*, MSBE Op. No. 99-17 (1999). This stems from our regulations, which specifically limit the ability to teachers to challenge a positive evaluation. See COMAR 13A.07.04.04 (describing the right of teachers to challenge an unsatisfactory evaluation). We review the Appellant’s challenge to her 2018-2019 year-end evaluation because the local board entertained the appeal and issued a decision on the merits.

STANDARD OF REVIEW

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

The Appellant alleges that the local board's decision upholding the "Default Effective rating" on Appellant's 2018-2019 year-end evaluation was arbitrary, unreasonable and illegal. We address the allegations below.

Illegal Decision

1. Collective Bargaining Agreement – Article 5.2C

Appellant argues that the local board's decision is illegal because its reliance on Article 5.2C of the collective bargaining agreement to support the default effective rating is misplaced. The local board maintains that Article 5.2C is applicable and was established to deal specifically with situations in which the principal fails to issue an evaluation, such as when an administrator fails to complete the annual evaluation form or conduct the minimum of two formal observations within the deadlines set forth in the evaluation process. (Response, p.5).

As stated above, Article 5.2C of the collective bargaining agreement provides that the "[f]ailure of Principal to Issue an Annual Evaluation within contractual time limits results in an Effective Rating." Under Maryland law, unambiguous contract terms are given legal effect. *See Huggins v. Huggins & Harrison, Inc.*, 220 Md. App. 405 (2013). *See also Mayor & City Council of Baltimore v. Chase*, 360 Md. 121, 128 (2000); *Chesapeake and Potomac Tel. Co. of Md. v. Dir. of Fin. For Mayor and City Council of Baltimore*, 343 Md. 567, 578 (1996) (in construing the meaning of a statute, where words are clear and unambiguous, the inquiry ends). The parties do not dispute that the language of Article 5.2C is clear and unambiguous. We concur.

Given that the provision is clear and unambiguous, the issue is whether the provision is applicable to the scenario set forth in this appeal. Article 5.2C is triggered when the principal fails to issue an evaluation within contractual time limits. The only contractual time limit we can discern from the collective bargaining agreement with regard to evaluations is set forth in Article 9.1C which states that "[t]enured and nontenured teachers shall be notified of a year-end unsatisfactory performance evaluation on or before May 1. No unsatisfactory performance evaluations may be issued after that date." (Response, Ex. 11). Thus, in the scenario in which the teacher fails to receive notification of an unsatisfactory evaluation by May 1, Article 5.2C ensures that the teacher receives an Effective evaluation rating, instead of the unsatisfactory one. The collective bargaining agreement does not state a time limit for effective or highly effective performance evaluations.

The TEE (and its predecessor PBES) set forth deadlines for the completion of various tasks throughout the teacher evaluation cycle. This is the time bound process to which the local

board refers throughout the appeal. We find no evidence that these deadlines constitute “contractual time limits” under Article 5.2C. The local board maintains that the TEE and the PBES were developed with “input” from BTU. Developing something with input is not the equivalent of negotiating the deadlines and adopting those deadlines as part of the collective bargaining agreement.

Article 9.1B recognizes PBES and subsequent revisions to PBES as official policy of the local board.⁵ (Response, Ex. 11). It states:

The Board and Union agree that because it is official Board policy, the success of the current PBES and any subsequently revised PBES shall require all BCPS staff and administrators to faithfully undertake the roles and responsibilities that are described in the document, and all staff and administrators also must carefully follow each of the steps contained therein.

Id. Recognizing that the evaluation system is board policy and setting forth the expectation that staff and administrators adhere to the steps set forth therein does not make the evaluation system time frames contractual time limits. It simply recognizes that school system personnel are obligated to follow school system policy. This is consistent with the statement of Jessica Papia, Director of Employee Effectiveness, that there is an expectation that the time-bound process for teacher annual evaluations and related components be adhered to. (Response, Ex. B, Papia Affidavit).

2. Teacher Effectiveness Evaluation – 2nd Formal Observation Deadline

There is no dispute that the TEE procedures set forth an April 1st deadline for completion of a teacher’s 2nd formal classroom observation, or that AP Allen failed to comply with the deadline. The question is whether or not the failure to comply should result in reversal of the local board’s decision. As the court explained in *Pollack v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 504 (2003):

In the instances where an agency violates a rule or regulation subject to the *Accardi* doctrine, i.e., even a rule or regulation that “affects individual rights and obligation” or affords “important procedural benefits upon individuals,” the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down. In other instances where an exception to *Accardi* applies and where an agency fails to follow its “internal administrative procedures,” if the complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated.⁶

⁵ This includes the TEE which revised and replaced PBES.

⁶ This applies even if an agency rule does not have the force and effect of law, meaning even if it is interpretive, a statement of policy, or any other lesser rule of agency organization, procedure, or practice. *Pollack*, 374 Md. 483-484.

BCPS relies on the TEE procedures to complete performance reviews in a timely manner to ensure that all of the necessary evaluation data is collected and entered into the OPMS for calculation of teacher end of year evaluations. It is axiomatic that the TEE deadline for the classroom observations protects teachers by ensuring that they are part of the year-end evaluation calculation, which can impact a teacher's salary. In many cases, failure to conduct the observation by the deadline, or at all, does not prejudice the teacher because BCPS has a practice of giving teachers an "Effective" rating when this occurs. In this case, however, AP Allen conducted the 2nd formal observation which gave Appellant the highest possible ratings in each of the observed domains, but the observation was not calculated into the evaluation because it was late. Thus, AP Allen's failure to conduct the observation by the April 1st deadline prejudiced Appellant because it resulted in her receiving an effective rating instead of a "Highly Effective" rating, which in turn prevented her from advancing on the salary scale in the same way she would have with the highly effective rating.⁷

The local board suggests that the Appellant was somehow responsible for the late observation because the Appellant was aware of the deadline and requested that the observation be rescheduled so that she could complete student testing.⁸ Whether or not the Appellant requested that the observation be rescheduled, it was AP Allen's responsibility to either grant or deny that request based on the requirements set forth in the BCPS procedures. Further, even if Appellant was familiar with the deadline, there is no evidence that she understood the implications of the observation taking place after the deadline. As the administrator, AP Allen should have been aware of the deadline and the consequences of failure to meet it. Moreover, there is no evidence in the record that the Appellant had any control over the date of the rescheduled meeting. Thus, based on the principles set forth in *Pollack, supra*, we find that the Appellant was prejudiced by AP Allen's failure to adhere to the deadline and the local board's decision should be reversed.

Arbitrary and Unreasonable Decision

The Appellant argues that the local board's decision was arbitrary and unreasonable because it was "patently unfair" not to include the 2nd formal observation in the calculation of the evaluation. The local board maintains that its decision is not arbitrary or unreasonable because the rules of the evaluation process were clear and strictly applied to all teachers.

In *Bingham v. Baltimore City Bd. of Sch. Commiss'rs*, Op. No. 17-33 (2017), the State Board recognized that "when a decision . . . results from an evaluation process in which rules are clear and applied strictly across the board to all teachers, such a decision could be found to be reasonable - - that is, not arbitrary or capricious or a violation of sound education policy. In *Bingham*, however, the Board reversed the local board's decision upholding the appellant's ineffective rating because it found the local board's decision to be arbitrary. *Id.* The Board

⁷ We accept this assertion by Appellant as true because the local board does not dispute it.

⁸ This information is set forth in a July 24, 2019 email by Principal Hicks which was not a part of the record in this case. The State Board may accept additional evidence if it is material and there were good reasons for failure to offer the evidence in the local board proceeding. COMAR 13A.01.05.04(C). We find the additional evidence to be material to the issues in this case and responsive to Appellant's claim that she had no choice in the date of the rescheduled observation (Appeal, p.5), an argument that does not appear to have been advanced before the local board.

stated that one of the factors of arbitrariness is when the rules are “not fully explained or understood by those who apply them or are affected by them.” *Id.*

In this case, we can only infer from the facts that AP Allen did not fully understand the consequences of rescheduling Appellant’s evaluation for a date after the April 1st deadline. Otherwise, he would have known that he could not enter the observation data into the OPMS and would not have rescheduled the observation after April 1st. There is also no evidence in the record that AP Allen explained the consequences of rescheduling the observation to the Appellant before doing so. Nor can we find any evidence that the consequences of discounting the observation are set forth in the TEE (or PBES) documents that are part of the record in this case. In addition, it seems that AP Allen did not understand how the evaluation update process worked because he submitted the update request despite the fact that BCPS does not use the update process when the observations occur after the deadline. We find that there was confusion here. The procedures were not fully understood or explained by the administrator applying them, or understood by the Appellant. Thus, we find the local board’s decision to be arbitrary and unreasonable.

CONCLUSION

For the reasons stated above, we find that the decision of the local board was arbitrary, unreasonable and illegal. We therefore reverse the decision and direct the local board to recalculate the Appellant’s 2018-2019 year-end evaluation using the results of her 2nd formal evaluation.

Signatures on File:

Warner I. Sumpter
President

Jean C. Halle
Vice-President

Gail H. Bates

Clarence C. Crawford

Charles R. Dashiell, Jr.

Vermelle D. Greene

Justin M. Hartings

Rose Maria Li

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Michael Phillips

David Steiner

May 27, 2020