

JEFFREY SHULEVITZ

Appellant,

v.

BALTIMORE CITY BOARD  
OF SCHOOL  
COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-14

## OPINION

### INTRODUCTION

Jeffrey Shulevitz, (“Appellant”), appeals the decision of the Baltimore City Board of School Commissioners (“local board”) affirming the Chief Executive Officer’s (“CEO”) Designee’s non-renewal of Appellant’s non-tenured teaching contract. The local board found the non-renewal was not based on illegal or discriminatory reasons, but rather on Appellant’s poor teaching and classroom management skills. The local board filed a response to the State Board appeal maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant did not file a reply.

### FACTUAL BACKGROUND

Appellant began his employment at Hazelwood Elementary/Middle School (“Hazelwood”) at the start of the 2018-2019 school year as a non-tenured probationary teacher.<sup>1</sup> He was hired as a special education teacher and assigned to teach math. Appellant was hired under a provisional contract for holders of conditional certification. *See* COMAR 13A.07.02.01C; Local Board Response, Ex. 3A. The provisional contract is for a term of one year. It automatically terminates at the end of the school year and must be renewed again the following year. Md. Code Ann., Educ. §6-202(b).

During the 2018-2019 school year, Appellant received an “effective” annual rating on his teacher evaluation. (Local Board Response, Ex. 4). Hazelwood’s Principal, ██████████, avers that Appellant had poor management skills and his co-teacher, ██████████, had to help him manage his students. Appellant’s mentor in 2018 and Mr. ██████████ both informed the Principal that Appellant was not suited to teach and his mentor teacher reported he did not listen and follow feedback. (Local Board Response, Ex. 3C). His coworkers also averred that Appellant had several performance issues during the 2018-19 school year. (Local Board Response, Exs. 3Q & S).

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<sup>1</sup> The probationary period for new teachers in a school system lasts for three years. Md. Code Ann., Educ. §6-202(b).

Because of the concerns raised, the Principal did not assign Appellant to his own classroom for the 2019-20 school year but instead assigned him as a special education resource teacher going in and out of elementary classrooms. (Local Board Response, Ex. 3C). Classroom teachers began to complain about Appellant because he was giving money and food to students as incentives for them to listen to him in violation of local board Policy GBEBB –*Staff Conduct with Students*. (Local Board Response, Exs. 3C, D, H, N, & R). Classroom teachers also complained because Appellant was disrupting classes and the educational process. *Id.* Appellant received a “developing” rating on his teacher evaluation for the 2019-20 school year. (Local Board Response, Ex. 3V).

Recognizing Appellants’ need for support, the Principal asked the Assistant Principal to work with Appellant. (Local Board Response, Exs. 3C & I). The Assistant Principal conducted observations on October 2 & 7, 2019 and emailed her feedback to Appellant noting deficiencies in Appellant’s teaching and classroom management skills. (Local Board Response, Exs. 3I & I (1)). On October 17, 2019, the Principal emailed the team assisting Appellant (and other teachers) asking for notes on their visits with Appellant (and other teachers) in preparation for upcoming performance improvement plans and possible contract non-renewals. (Local Board Response, Ex. 3I). On October 18, 2019, the Assistant Principal sent an email to the special education liaison asking for support for Appellant (and one other teacher). *Id.*

In October 2019, the Principal transferred Appellant into a self-contained middle school classroom to provide him with additional support from a high-performing educator, Ms. [REDACTED]. (Local Board Response, Ex. 3C). Initially, Ms. [REDACTED] characterized Appellant as “trying” but she soon reported that Appellant was not teaching the math curriculum and she had to consistently help Appellant manage the classroom. She also reported that Appellant was attempting to regain control of the classroom by playing games, offering money to students and having parties in violation of Policy GBEBB. (Local Board Response, Exs. 3C, D & J).

The Principal also requested that the mentor teacher, Ms. [REDACTED], continue to support Appellant. (Local Board Response, Exs. 3C & H). Ms. [REDACTED] provided instructional support to Appellant and as part of that Ms. [REDACTED] conducted informal observations with immediate feedback to Appellant on November 6, 19 and December 10, 2019. Ms. [REDACTED]’s observation notes describe Appellant as not following the match curriculum, not listening to feedback, and reporting that Appellant did not have control of the students. (Local Board Response, Exs. 3H, H(1) & H(2)).

The Principal also reported an egregious incident that happened under Appellant’s supervision. (Local Board Response, Ex. 3C). On December 5, 2019, a male student threatened a female student. (Local Board Response, Ex. 3). The incident happened when Ms. [REDACTED] was out of the building. (Local Board Response, Exs. 3I & J). According to Ms. [REDACTED], just before class was dismissed that day, Appellant stated in the presence of students that he was tired of the “bullshit” and that he was going to quit. *Id.* At the end of the school day on December 5, an aunt of one of the students came to see Ms. [REDACTED] and Appellant to discuss the incident. *Id.* According to Ms. [REDACTED], while speaking with the aunt, Ms. [REDACTED] did not agree with some of Appellant’s statements and when the aunt left, Appellant began yelling at Ms. [REDACTED]. Ms. [REDACTED] reported he “told me cash was king and I would see what he meant.” *Id.*

On December 5, 2019, Appellant called Child Protective Services (“CPS”) alleging that Ms. ██████ abused children in her classroom. (Local Board Response, Ex. 2). Appellant alleges he told the Assistant Principal about his call to CPS that day. *Id.*<sup>2</sup> After investigation, CPS “ruled out” abuse allegations against Ms. ██████ and school police also found no evidence of abuse by Ms. ██████ and reported “the incident never happened.” (Local Board Response, Ex. 3K).

On December 6, 2019, during a parent conference regarding the December 5 incident, the Assistant Principal learned that Appellant had taken pictures of the chaos going on in his classroom and that he did nothing to stop the disruptive behavior. (Local Board Response, Ex. 3 I). The Assistant Principal reached out to the Human Capital Office for assistance with Appellant because she was disturbed by his behavior and she wanted guidance on how to handle the situation. *Id.*

On December 7, 2019, the Principal emailed the site director for the Baltimore Teacher Residency Program (“BCTR”) stating that Appellant was “spiraling out of control” and requesting “support for him ASAP” and notifying BCTR that it would be good to have a coach assist for Appellant as they would soon be placing him on a Performance Improvement Plan (“PIP”). *Id.* On December 10, 2019, during Ms. ██████’s informal observation of Appellant, she documented that he lost control of the class and tried to regain control by offering raffle tickets to win money for following directions in violation of Policy GBEBB. (Ex. 3 H(1)). She also documented that Appellant gave up teaching and told the students “if you don’t want to learn, I don’t have to teach.” *Id.* On December 13, 2019, both Appellant and Ms. ██████ were addressed for arguing with one another in front of students. (Local Board Response, Exs. 3 & 3J).

On December 16, 2019, Appellant received a written reprimand from the Principal. The reprimand stated that Appellant was involved in “misconduct, disrespectful conduct with colleagues; not following administrative directives” on December 5, 2019 and December 13, 2019 and advised Appellant that his “continued failure to comply with City Schools policies, procedures, and standards of conduct may result in further disciplinary action.” (Local Board Response, Ex. 3L). The letter of reprimand further advised Appellant “not to use profanity in front of students, not to curse at colleagues... not to defame your colleagues name to others and to follow administrative directives.” *Id.* On December 16, 2019, the Vice Principal also placed Appellant on a Performance Improvement Plan (“PIP”) to improve classroom management and delivery of instruction. (Local Board Response, Ex. 3E). Appellant was angered by his placement on the PIP and left work early on December 16, 2019, prior to the winter break. (Local Board Response, Ex. 3C).

During the winter break, Appellant began sending emails to the Principal, who characterized the emails as harassing and caused her to fear for her safety. (Local Board Response, Ex. 3M). Appellant also began calling a co-teacher, ██████, late at night and the co-teacher reported she was concerned Appellant was unstable and manic and she feared for her safety. (Local Board Response, Ex. 3N). The co-teacher also reported that Appellant told

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<sup>2</sup> The record is unclear when and if the Principal knew about the report to CPS. *See* Local Board Response, Exs. 3C & 3F(3).

her that he lied about Ms. [REDACTED] abusing children because he was angry with her for criticizing him. *Id.* Appellant sent a letter to the Baltimore Sun outlining the alleged abuse he witnessed by a co-teacher. (Local Board Response, Exs. 3 & 3P).

On January 14, 2020, Appellant failed to report to work. On January 15, 2020, he participated in a meeting with Jerome Jones, Director of Labor Relations for City Schools. (Local Board Response, Ex. 3). Appellant requested a transfer, which Mr. Jones denied. (Local Board Response, Exs. 3, 3F, & F(1)-(6)). On January 27, 2020, Appellant sent some texts asking to be fired or asking how he could resign and “offering to go out with a financial settlement.” (Local Board Response, Ex. 3F(2)). On January 28, 2020, the Assistant Principal sent Appellant an abandonment letter for his failure to return to work. (Local Board Response, Ex. 3G). The Principal also alerted Ms. Thomas from the Human Capital Office, who oversees Family and Medical Leave Act (“FMLA”) requests, to reach out to Appellant to help him with any potential leave request. (Local Board Response, Ex. 3F(4)). On February 18, 2019, Appellant returned to the school building and Appellant refused to discuss his PIP with the Assistant Principal. (Local Board Response, Ex. 3I).

On March 27, 2020, Appellant sent an email to the Principal stating, “I apologize for the craziness that transpired. I take full responsibility ... I wish I could go back in time to correct what happened.” (Local Board Response, Ex. 3O). On April 8, 2020, Appellant texted Ms. [REDACTED] stating, “I am sorry about how I acted. I hope you can find it in your heart to forgive me.” *Id.* On April 9, 2020, the Principal received an email from Ms. Thomas retroactively granting Appellant FMLA from December 18, 2019 through March 18, 2020. (Local Board Response, Ex. 3F(6)). Appellant failed to appear virtually for the last two weeks of the 2019-2020 school year. (Local Board Response, Ex. 3C). By correspondence dated June 11, 2020, the Chief Human Capital Officer informed Appellant, on behalf of the CEO, that Appellant’s provisional teaching contract would not be renewed for the 2020-2021 school year and his employment with the school system would cease effective June 30, 2020. (Local Board Response, Ex. 3B).

On July 9, 2020, Appellant appealed the non-renewal decision to the local board alleging that it was an act of retaliation against him for reporting child abuse by Ms. [REDACTED] to CPS. The CEO responded to the appeal stating Appellant was non-renewed due to his poor teaching and poor management skills and arguing that the decision to non-renew should be upheld because it was not arbitrary, unreasonable, or illegal. (Local Board Response, Ex. 3). Appellant replied to the CEO’s response. (Local Board Response, Ex. 4).

The local board appointed a hearing examiner (“Hearing Examiner”) to review the appeal and issue a recommended decision. On September 18, 2020, the Hearing Examiner issued a written recommendation finding that the Appellant failed to establish a *prima facie* case of retaliation and that the decision not to renew his employment was based on legitimate non-discriminatory reasons. (Local Board Response, Ex. 5). Appellant filed Exceptions to the Recommendation of the Hearing Examiner and the CEO responded. (Local Board Response, Exs. 6 & 7). On November 10, 2020, the local board adopted the Hearing Examiner’s recommendation upholding the non-renewal. (Local Board Response, Ex. 8). This appeal followed.

## STANDARD OF REVIEW

In cases involving a local board's policy, or a controversy or dispute regarding the local board's rules and regulations, the local board's decision is considered *prima facie* correct. The State Board may not substitute its judgment for that of the local board unless the decision was arbitrary, unreasonable or illegal. COMAR 13A.01.05.06A.

A local board does not have to demonstrate cause as a basis for its decision not to renew a probationary teacher's contract. *Zarrilli v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 21-04 (2021). However, a local board's decision to non-renew cannot be based on illegal or discriminatory reasons. It is the Appellant's burden to prove illegality "with factual assertions, under oath, based on personal knowledge." *Greenan v. Worcester County Bd. of Educ.*, MSBE Op. No. 10-51 (2010); *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003).

## LEGAL ANALYSIS

Under Maryland wrongful discharge law, a local board may choose not to renew a conditional teacher contract for any reason, or no reason at all, as long as it is not an illegal one that contravenes a clear mandate of public policy. *See Miller-Phoenix v. Baltimore City Bd. of School Comm.*, 246 Md. App. 286, 305 (2020). The State Board of Education has held that "school systems have a large degree of flexibility in deciding not to renew a probationary teacher's contract so long as the reason for the nonrenewal is not illegal or discriminatory." *Torres v. Balt. City Bd. of Sch. Comm'rs*, MSBE Op. 18-04, at p. 3 (2018). The local board does not have to establish any cause or reason for its decision not to renew. *Ewing v. Cecil County Bd. of Educ.*, 6 Op. MSBE 818 (1995). In fact, the State Board has held that a local board may non-renew a probationary teacher's contract despite satisfactory evaluations. *See Bricker v. Frederick County Bd. of Educ.*, 3 Op. MSBE 99 (1982).

### *Retaliation Claim Wrongful Discharge*

Appellant asserts that his non-renewal was based on illegal and arbitrary reasons in violation of Maryland wrongful discharge law. Appellant maintains that the local board's non-renewal decision should be reversed because it is based solely on his report of his co-teacher's suspected abuse to CPS. Appellant argues that as a mandatory reporter under Md. Code Ann., Family Law §5-704, he should be protected from retaliation for making a report of suspected child abuse.

The State Board of Education has recognized retaliation as an illegal reason for terminating an employee if it is done in response to an employee engaging in the protected activity of reporting illegal activity. *See Dorsey v. Carroll County Bd. of Educ.*, Op. No. 19-35 (2019), citing *Young v. Prince George's County Bd. of Educ.*, MSBE Op. No. 17-39 (2017). 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; and (3) that a causal connection existed between the protected activity and the materially adverse action. *Young v. Prince George's County Bd. of Educ.*, MSBE Op. No. 17-39 (2017) (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 legitimate non-discriminatory reason for the adverse action. The burden then shifts back to the Appellant to show that the reasons given by the school system are pretextual. *Id.*

There is no dispute that making a child abuse report under Md. Code Ann., Family Law §5-704 is a protected activity. The local board's Hearing Examiner found that the Appellant did not meet his burden of making a *prima facie* case of retaliation because Appellant failed to prove a causal connection between his report to CPS and the non-renewal of his contract. Appellant pointed to the proximity between his making the CPS report and being given a reprimand and being placed on a PIP to demonstrate the nexus. The Hearing Examiner recognized that "a short length of time between a protected activity and an adverse employment action provides strong evidence of a nexus between the two events." *Kelly v. Emerge, Inc.*, 2018 WL 4913864 (D. Md. 2018). However, the Hearing Examiner concluded that the adverse employment action on appeal was the Appellant's non-renewal, which occurred over six months after the CPS report.

Even assuming *arguendo* Appellant met his burden to establish a *prima facie* case of retaliation, the local board has more than satisfied the burden to articulate a legitimate, non-retaliatory reason for the decision to non-renew Appellant's employment. The Hearing Examiner found overwhelming and legitimate reasons in support of the non-renewal and stated, "the CEO provided abundant evidence that the decision to non-renew [Appellant's] employment was based on legitimate non-discriminatory, non-retaliatory reasons." (Local Board Response, Ex. 5). We agree. The record contains a wealth of documentation establishing numerous and serious deficiencies with Appellant's teaching and classroom management which were created and shared with Appellant prior to his report to CPS. On October 17, 2019, the Principal specifically emailed the team of teacher mentors working with Appellant (and other teachers) asking for their notes regarding Appellant (and other teachers) so she was prepared for upcoming "PIPs and possible non-renewals or other disciplinary steps that I must take....Please know this is a point of accountability and ensuring our students are getting a quality education." See Local Board Response, Ex. 3I. The record demonstrates that the Appellant was struggling with his teaching and the Appellant was aware of the school's personnel efforts to document his shortcomings prior to his report to CPS.

The burden then shifts back to the Appellant to prove the reasons are pretextual. It is his burden to produce factual assertions, under oath, based on personal knowledge; unsupported statements or conclusions are insufficient. See *Greenan v. Worcester County Bd. of Educ.*, MSBE Op. No. 10-51 (2010); *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003).

The Appellant claims that a text message he received from Ms. [REDACTED] on December 2, 2019, complimenting the progress he was making, coupled with his "effective" evaluation for the 2018-2019 and his "developing" evaluation for the 2019-2020 school year demonstrates that he "conducted himself competently and professionally" prior to the report. Appellant alleges that the Principal and Ms. [REDACTED] conspired to turn the students and other teachers against him stating "it was not Appellant's incompetence that led to the Appellant seemingly losing control of the classroom, but rather a manifestation of their hearts and minds having been corrupted by a third

party.” See Local Board Response, Ex. 4. He also submits a photograph of his lesson plan binder he alleges was slashed by students under Ms. [REDACTED]’s influence.

The record reflects Appellant had some positive outcomes in his first year of teaching but the overwhelming evidence in the record supports the fact that Appellant’s teaching performance was deficient during the 2019-2020 school year. As the Hearing Examiner stated:

Affidavits were submitted by a number of other individuals with whom Appellant worked who averred that the Appellant was a less than satisfactory teacher, whose skills at classroom management and delivery of instruction were highly deficient. In addition to the sworn testimony in the Affidavits, there is written evidence of concerns that pre-dated the Appellant’s CPS report in December, 2019... the Appellant’s conduct after December 2019, tends to support non-renewal, as well. He refused to discuss the PIP, for example, and in an email dated March 27, 2020, the Appellant apologized to the Principal] “for the craziness that transpired” and he took “full responsibility.” The Appellant felt “horrible about how I acted”...the only scenario in which *all* of the individuals who provided Affidavits in this case ([Principal], [REDACTED], [REDACTED], [Vice Principal], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]) were lying and committing perjury in order to retaliate against Appellant. The Appellant has presented no evidence to suggest the existence of such a vast conspiracy against him ...

(Local Board Response, Ex. 5). Examining all of the evidence in the record, we find the Appellant has failed to establish that the non-renewal was based on retaliation.

#### *New Evidence*

On appeal, Appellant seeks to introduce new evidence in the form of an email he sent to Ms. Thomas at the Office of Human Capital followed by an email sent to Dr. Santelises, CEO, claiming he received the PIP and the reprimand in retaliation for making a complaint of suspected child abuse. See Appeal at pp. 13-14. He also seeks to introduce the Principal’s request for a substitute teacher starting January 2, 2020 through April 17, 2020. See Appeal at pp. 14-16.

COMAR 13A.01.05.04C permits the State Board to consider the additional evidence if it is material and there is a good reason for the failure to offer the evidence in the proceedings before the local board. Appellant gives no reason for his failure to provide this evidence to the Hearing Examiner and the local board. Accordingly, we find there was not good cause for Appellant to fail to include the additional evidence in the local board proceedings and we decline to consider it as part of the appeal. See *Towle v. Carroll County Bd. of Educ.*, MSBE Op. No. 17-31 (2017) (declining to consider new evidence that could have, but was not, presented to the local board). We also find the emails documenting Appellant’s claim that he thought the PIP and the reprimand were retaliatory are not material because the record clearly establishes this is

Appellant's position without the need for additional evidence. Furthermore, the request for a substitute teacher for Appellant while he was on FMLA leave is not relevant to this appeal. We decline to consider the additional evidence.

#### *Retaliation Whistleblower Protection Act*

Appellant also asserts that the non-renewal of his contract was illegal and retaliatory under the Maryland Public School Whistleblower Protection Act ("WPA"), Md. Code Ann., Educ. §6-901 *et seq.* The WPA is substantially the same as the whistleblower law found in the Md. Code Ann., State Personnel and Pensions §5-305, and it is appropriate to apply interpretations of the State employee whistleblower statute to the WPA. *Hagerty v. Carroll County Bd. of Ed.*, Op. No. 20-16 (2020). Maryland's State whistleblower law requires the employee to prove a causal connection between the disclosure and the adverse personnel action. *Hooven-Lewis v. Caldera*, 249 F.3d 259, 276 (4th Cir. 2001). The causal connection under the State whistleblower law is common to all actions for retaliation and in essence is a requirement of causal connection. *Willis v. Dept. of Agriculture*, 141 F.3d 1139, 1142 (Fed. Cir. 1998).

In addition, it is a defense to the WPA that the school system's personnel action was based on grounds other than the employee's exercise of any rights protected under the WPA. Md. Code, Educ. § 6-906. The State whistleblower law does not prohibit a personnel action that would have been taken regardless of the protected disclosure. *Willis* at 1143. The evidentiary requirements of a whistleblower law utilize the same burden shifting paradigm applicable to other retaliation claims. *Id.* Accordingly, the analysis is the same as the wrongful discharge claim and as discussed *supra* we find the Appellant has failed to prove retaliation under the WPA.

#### *Evidentiary Hearing*

Appellant requests a hearing before the State Board. The State Board has held due process does not require a hearing on issues that do not involve a genuine dispute of material fact. *See Lessie B. v. Caroline County Bd. of Educ.* MSBE Op. No. 11-16 (2011), *citing*, *Hethman v. Prince George's County Bd. of Educ.*, 6 Ops. MSBE 646, 648-49 (1993). The State Board has held there also is no right to an evidentiary hearing when there is no constitutional or statutory basis to provide one. *Id.* The State Board has "consistently held that the Appellant bears the burden of supporting allegations of illegality with factual evidence." *See Brown v. Queen Anne's County Bd. of Educ.*, MSBE Op. No. 13-37 (2013), *citing*, *Breedon v. Prince George's County Bd. of Educ.*, MSBE Op. No. 08-34 (2008).

The record in this case does not support a constitutional or statutory basis for a hearing. In addition, there are no relevant material facts in dispute. The Appellant's sole basis for this appeal is based on his allegation that the non-renewal of his teaching contract was due to his report to CPS. As already discussed, the record is replete with valid reasons to support the CEO's decision not to renew Appellant's teaching contract. Therefore, based on the record in this case, it is our conclusion that an evidentiary hearing is unnecessary.

CONCLUSION

For all of these reasons, we find that the local board’s decision is not arbitrary, unreasonable or illegal. Accordingly, we affirm the local board’s decision upholding the non-renewal of Appellant’s teaching contract.

Signatures on File:

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Clarence C. Crawford  
President

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Jean C. Halle  
Vice-President

\_\_\_\_\_  
Shawn D. Bartley

\_\_\_\_\_  
Gail H. Bates

\_\_\_\_\_  
Charles R. Dashiell, Jr.

\_\_\_\_\_  
Susan J. Getty

\_\_\_\_\_  
Rose Maria Li

\_\_\_\_\_  
Rachel McCusker

\_\_\_\_\_  
Joan Mele-McCarthy

\_\_\_\_\_  
Lori Morrow

\_\_\_\_\_  
Warner I. Sumpter

Absent:  
Vermelle Greene  
Holly C. Wilcox

April 27, 2021