

KARL PHELPS,

Appellant,

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-44

OPINION

INTRODUCTION

Karl Phelps (“Appellant”) appeals the decision of the Anne Arundel County Board of Education (“local board”) upholding his one-day unpaid suspension for misconduct. Appellant alleges a lack of due process. The local board filed a motion to dismiss for lack of standing and failure to state a claim. The Appellant filed a response clarifying standing and reasserting his lack of due process allegations. The local board filed a reply maintaining Appellant was provided all due process required for a non-certified employee.

FACTUAL BACKGROUND

This appeal centers on whether the Appellant was entitled to a hearing before the local board for his appeal of a one-day unpaid suspension for misconduct, which included taking volunteer gifts from the main office of Crofton Woods Elementary School (“Crofton Woods”) and taking home school system property, a vacuum cleaner, without permission. The Appellant is employed by Anne Arundel County Public Schools (“AACPS”) in the position of Custodian I. (Motion, Record p. 2). He started his position in May 2014 and is classified as a Unit III employee under the negotiated agreement between his union, the American Federation of State, County, and Municipal Employees Local 1693 (“AFSCME”), and the local board. *Id.* at 5-6 & 28.

On May 1, 2019, AACPS investigator, Mark Mason, received a referral from a Facilities Human Resources specialist regarding the Appellant. *Id.* at 31. The referral summarized complaints about misconduct of the Appellant including taking unauthorized breaks, sleeping in a classroom during work hours, taking home a school system vacuum cleaner on a regular basis without permission, taking items from the school office and talking derogatorily about staff. *Id.*

Mr. Mason investigated the complaints and interviewed four school employees, including the Appellant, the Principal, the chief custodian and the night quality control manager, [REDACTED]. *Id.* at 31-43. Mr. Mason reviewed approximately 18 minutes of video tape, covering three different dates on which the Appellant was working. *Id.* at 36-38. Mr. Mason also reviewed the Appellant’s personnel record. *Id.* at 42-43.

On October 7, 2019, Mr. Mason interviewed the Appellant. Appellant's uncle, Godfrey Phelps, was present and provided an opening statement arguing a lack of due process because the Appellant was unable to confront his accuser. *Id.* at 34-35. During the interview, the Appellant confirmed his work hours at Crofton Woods were from 2:30 p.m. to 11:00 p.m. *Id.* He was shown his time sheet from April 17, 2019, on which he recorded his hours as 2:30 p.m. to 11:00 p.m. *Id.* When asked if it was his handwriting on his timesheet, he replied "I can't say that." *Id.* He was then shown video footage of him in the office on April 18, 2019, at 1:15 a.m. *Id.* Mr. Phelps said he was cleaning the area and lost track of time. *Id.* He was then shown video footage of him taking several handfuls of objects from a wire bin in the office and putting them in a plastic bag. *Id.* He said it was "volunteer gum" and that they did not have to ask to take it. *Id.* He also said there was not a sign explaining how many packs could be taken. *Id.* When he was asked how many packs of gum he took, he said "I don't have an answer." *Id.* When asked if he kept the gum, he said he kept one pack and gave the other packs to "others." *Id.*

During the interview, the Appellant was also shown video of himself and Mr. ██████ in a classroom and photographs taken by Mr. ██████ of him lying on the floor of that classroom with his eyes closed. *Id.* Appellant explained that he was not sleeping but that he suffers from vertigo and when his head starts to spin, he has to lie on the floor and close his eyes. *Id.* He said he told Mr. ██████ that he was not sleeping but that he was experiencing vertigo. *Id.* In response to questions about taking home the vacuum cleaner, the Appellant stated, "he was not sure of that." *Id.* He said "if" he took it home it was to "fix it" and only later did Mr. ██████ tell him not to take home the vacuum cleaner. *Id.* When the Appellant was asked if he ever asked permission to take it home, he said he did not know he was supposed to ask for permission. *Id.* When he was asked how many times he brought home the vacuum cleaner, he said "I don't have an answer." *Id.* at 36.

On October 14, 2019, Mr. Mason completed the investigative report and concluded that there was sufficient evidence to conclude the following:

- On April 18, 2019, the Appellant removed an unknown quantity of volunteer gifts of packs of gum from the office,
- On April 18, 2019, the Appellant recorded inaccurate hours worked on his timesheet,
- On May 2, 2019, the Appellant was lying on the floor during work hours, and
- The Appellant took home an AACPS vacuum cleaner home without permission.

Id. at 41.

On October 25, 2019, the Appellant received written notice that a pre-discipline conference was rescheduled at his request to review the results of the investigation regarding allegations that he took volunteer gifts from the school office, that he took unauthorized breaks and was observed sleeping in a classroom, and that he used AACPS equipment outside of work without authorization. *Id.* at 45. He was further advised that he could have an attorney or association representative present with him during the conference. *Id.*

On November 4, 2019, a pre-disciplinary conference was held with the Appellant; his union representative, Roland Johnson; Alex Szachnowicz, Chief Operating Officer; and Sheila McEwan, Senior Manager of Strategic Initiatives. *Id.* at 46. By letter dated November 18, 2019, Deputy Superintendent Jackson informed the Appellant that he was being reprimanded and suspended without pay for three days in accordance with the Negotiated Agreement between his union¹ and the local board. *Id.* at 21-22. The letter specified the basis for the suspension as willful neglect of duty and misconduct and identified four infractions including: (1) stealing an unknown number of volunteer gifts, (2) failing to leave his assigned work location at the appropriate ending time and failing to enter accurate hours on his timesheet, (3) taking home without permission AACPS owned property (the vacuum cleaner), and (4) lying on the classroom floor with his eyes closed. *Id.*

The Appellant, through his union representative, Roland Johnson, appealed the suspension to the Superintendent in accordance with the established procedures. *Id.* at 16. On January 3, 2020, the Superintendent's designee, Melissa Rawles, AACPS Employee Relations Director, convened a hearing to meet with the Appellant and review his appeal. *Id.* at 23. The Appellant; his non-attorney/non-union representative and uncle, Godfrey Phelps; Mr. [REDACTED]; Mr. Mason; and Angie Auth, AACPS Employee Labor & Relations Specialist attended the hearing. *Id.*

On February 11, 2020, Ms. Rawles issued a written decision in which she found based on the preponderance of the evidence that the Appellant took handfuls of gum intended as volunteer appreciation gifts without permission and took an AACPS vacuum cleaner home without authorization. *Id.* at 24. She also concluded that the Appellant should not be disciplined for sleeping on the floor in the classroom because he had vertigo at the time of the incident and he subsequently submitted a physician's note stating he suffered from vertigo. *Id.* Ms. Rawles also concluded there was insufficient evidence that the Appellant failed to keep proper work hours and accurate time sheets and rescinded the discipline for that offense. *Id.* Ms. Rawles reduced the Appellant's suspension from three days to one day. *Id.*

¹ The procedures for discipline of a Unit III employee are set forth in the negotiated agreement between AFSCME and the board and provide the following:

- The board may suspend or discharge any permanent Unit III employee for immorality, misconduct, insubordination, incompetency, or willful neglect of duty.
- No Unit III employee shall be formally disciplined without first being provided the right, at his/her request, to have a shop steward present.
- The employee shall also be notified of his/her right to a hearing, with counsel, including a union representative, provided he/she makes a written request as required by the procedures and
- The employee may appeal any discipline or discharge with Union representation pursuant to Section 4-205(c) of the Education Article of the Annotated Code of Maryland.

Id. at 5-6.

On March 10, 2020, the Appellant, with the assistance of Godfrey Phelps, appealed Ms. Rawles' decision to the local board pursuant to Section 4-205(c)(3) of the Education Article. *Id.* at 58. The Appellant also filed a complaint with the Equal Employment Opportunity Commission ("EEOC") on or about February 27, 2020. *Id.* at 28-30. In his EEOC complaint, Appellant alleged that the discipline imposed by AACPS violated his due process rights under his collective bargaining agreement and violated his rights under the Americans with Disabilities Act ("ADA") and the Occupational Safety and Health Act ("OSHA"). *Id.* He also asserted allegations of discrimination based on race. *Id.* On October 16, 2020, the EEOC dismissed the Appellant's complaints determining the EEOC is "unable to conclude that the information obtained establishes violations of the statutes." *Id.* at 17.

On January 5, 2021, the Appellant with the assistance of Godfrey Phelps, submitted a letter setting forth his reasons for his appeal to the local board. *Id.* at 12-14. The Appellant alleged due process violations during the disciplinary process, violations of the ADA and retaliation for complaining about OSHA violations due to storing water buckets in an electrical closet. *Id.* at 12-14. Staff counsel for AACPS submitted a response to the local board arguing that the imposition of the one-day suspension was imposed due to the Appellant's misconduct and detailing the due process rights he was afforded and exercised throughout the process. *Id.* at 15-63.

The board conducted a paper review of the appeal and reviewed the parties' position statements, and exhibits and other documents in the record, including the video recordings and witness statements. *Id.* at 9-10. The board also considered the laws, regulations, and local policies and procedures applicable to the appeal. *Id.* On March 17, 2021, the local board issued its opinion, affirming the Superintendent's designee's decision. *Id.* at 2-11. The local board concluded that the school system provided the Appellant with his due process protections at each step of the disciplinary process. *Id.* at 6. The local board also concluded that the Appellant failed to demonstrate any ADA violations as Ms. Rawles rescinded the allegation of sleeping during the workday and no discipline sanction was imposed in relation to his medical condition. *Id.* at 9. The local board also concluded that the Appellant failed to establish that the one-day suspension was imposed to cover up alleged violation of OSHA. *Id.* The local board stated:

The Appellant has not demonstrated by a preponderance of the evidence that the Superintendent's February 11, 2020, decision to find that he committed certain offenses (but not others) and to modify the Appellant's three-day suspension for alleged misconduct in April and May of 2019, to a one-day suspension, was arbitrary, unreasonable, illegal or in violation of Board policy. In the final analysis, the Board agrees with the Superintendent that the standards and expectations for AACPS employees' behavior require demonstration of personal integrity, and displaying absolute honesty toward fellow employees, students, parents, and the community, and that the Appellant's conduct did not adhere to that standard.

Id. at 10.

On April 12, 2021, Godfrey Phelps, filed a notice of Appeal with the State Board of Appellant's one-day suspension. (Appeal dated 4/12/21). By letter dated May 4, 2021, the State Board advised Godfrey Phelps that the appeal must comply with requirements of COMAR 13A.01.05.02A and include a copy of the local board decision, a statement of facts and issues in the case. The letter stated that the 30-day filing deadline would be tolled until May 18, 2021. On May 17, 2021, Godfrey Phelps submitted another appeal letter clarifying he was filing the appeal on behalf of the Appellant and included an attachment and the local board decision. (Appeal dated 5/17/21 and Attachments). On June 22, 2021, the local board moved to dismiss arguing that Godfrey Phelps lacks standing to appeal the local board's decision concerning the Appellant, and alternatively, that the April 12 and May 17, 2021, letters fail to state a claim. On July 7, 2021, the Appellant filed a response, to which the local board replied on July 16, 2021.

STANDARD OF REVIEW

A non-certificated employee is entitled to administrative review of disciplinary action 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). 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.

The State Board may dismiss an appeal under COMAR 13A.01.05.03B. The Board exercises its independent judgment on the record before it in the explanation and interpretation of its own regulations. COMAR 13A.01.05.06E.

LEGAL ANALYSIS

Standing

The local board argues that the Appellant's appeal should be dismissed because Godfrey Phelps lacks standing to appeal the decision of the local board upholding the Appellant's one-day suspension. We have held that the general rule on standing is that "for an individual to have standing... he must show some direct interest or 'injury in fact, economic or otherwise.'" *S.R. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 20-18 (2020) quoting *Adams, et al. v. Montgomery County Bd. of Educ.*, 3 Op. MSBE 143, 149 (1983). This requires the individual to be personally and specifically affected in a way different from the public generally and is, therefore, aggrieved by the final decision of the administrative agency. *See Bryniarski v. Montgomery County Bd. of Educ.*, 247 Md. 137, 144 (1967); *see also Lockwood v. Howard County Bd. of Educ.*, MSBE OR No. 17-12 (2017).

The initial appeal letter dated April 13, 2021, is signed by Godfrey Phelps and mentions Karl Phelps only in the case caption on the letter. The second appeal letter dated May 15, 2021, states that Godfrey Phelps is representing Karl Phelps and includes an attachment addressed to Alex Szachnowicz and Sheila McEwan stating, "now comes Karl V. Phelps Jr. through his representative Godfrey Phelps" and also includes the local board decision. (Attachment to

Appeal dated 5/17/21). The response dated July 7, 2021, is signed and filed by the Appellant alone. It clarifies Appellant's intent to file the appeal on his own behalf.

We agree with the local board that Godfrey Phelps does not have standing to file the appeal of Appellant's suspension, even though he was assisting the Appellant at the local level proceedings. In this case, however, we find that the Appellant's response clarifies his intent to appeal his suspension in his own right and serves as sufficient notice to the local board of the "party . . . taking the appeal" as required by COMAR 13A.01.05.02A(1).

Failure to State a Claim

The local board also moves to dismiss the Appellant's claims arguing that the appeal documents fail to state a claim. The local board argues that the Appellant's submissions fail to meet the requirements of COMAR 13A.01.05.02A(4) & (5) which require an appeal before the State Board to "contain the issues or charges for which the appeal is being taken" and "contain reasons in support of the appeal."

Although the appeal letters are vague, we find the filings consistently allege a lack of due process because the Appellant was not able to cross examine numerous witnesses before the local board. Accordingly, we find the filings sufficient to satisfy the requirements of COMAR 13A.01.05.02A(4) & (5).

Due Process

The Appellant argues his due process rights were violated because he did not have an evidentiary hearing before the local board during which he could cross examine the school system's witnesses. The State Board has held that there is no right to an evidentiary hearing when there is no constitutional or statutory basis to provide one. *See Stafford v. Baltimore City Bd. of School Commissioners*, MSBE Op. 20-37 (2020). As a non-certified employee challenging his discipline, the Appellant did not have a right to an evidentiary hearing before the local board and he was entitled to an administrative review pursuant to Education Art. §4-205(c). *See Goines v. Prince George's County Bd. of Educ.*, MSBE Op. No. 17-16 (2017). The AACPS Rules of Procedure for Appeals and Hearings provide that all appeals to the board under Education Art. §4-205(c) "will be considered by the board based on the documents and arguments submitted in writing by the parties." *See*, Motion, Attachment 1 at 5.

The Appellant was entitled to an administrative "paper review" of his appeal. The record supports the conclusion that throughout every stage of the appeal, the Appellant was given notice of the charges against him and ample opportunity to be heard. During the administrative review process, the initial disciplinary findings were modified and the Appellant's suspension was reduced from three days to one day. The record supports the conclusion that the Appellant was afforded all due process required for his administrative review at the local level and before the local board. The evidence was not disputed that Appellant took items from the office and took home the school's vacuum cleaner. The imposition of discipline for this conduct was consistent with the collective bargaining agreement and the local school system's policies and procedures. Appellant's disagreement with the local board's decision does not render it arbitrary, unreasonable, or illegal.

Other Issues

Rather than dispute the factual basis for the imposition of the one-day suspension, the Appellant suggests several other issues in his appeal, including that the school system violated his union agreement, retaliated against him for raising issues regarding MOSH/OSHA, discriminated against him because of his race, was involved in racketeering and extortion, and violated his rights under the ADA. He fails to elaborate on any of these claims within his appeal. We have repeatedly stated that Appellants must support allegations of illegality with evidence. *See King v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 14-19 (2014).

CONCLUSION

For all of these reasons, we find that the local board's decision upholding the one-day suspension is not arbitrary, unreasonable or illegal.

Clarence C. Crawford
President

Shawn D. Bartley

Gail H. Bates

Chuen-Chin Bianca Chang

Charles R. Dashiell, Jr.

Susan J. Getty

Vermelle Greene

Jean C. Halle

Rachel McCusker

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Lori Morrow

Warner I. Sumpter

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August 24, 2021