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| JAMES CURTIS, | BEFORE THE |
| Appellant | MARYLAND |
| v. | STATE BOARD |
| PRINCE GEORGE'S COUNTY BOARD OF EDUCATION | OF EDUCATION |
| | Opinion No. 17-23 |
| Appellee. | |

OPINION

INTRODUCTION

James Curtis (Appellant) appeals the decision of the Prince George's County Board of Education (local board) affirming his termination as a building supervisor. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded to the Motion and the local board replied.

FACTUAL BACKGROUND

Appellant began working as a night cleaner for Prince George's County Public Schools (PGCPS) in 1989. He most recently worked as a building supervisor at Gwynn Park High School. In 2012, he received an "Outstanding Supporting Employees" Award after being nominated by Gwynn Park Principal Tracie Miller. He had only minor disciplinary infractions on his record, and none in the previous three years. (Motion, Ex. 1, T. 15; Ex. 2; Ex. 8).

On October 24, 2014, Appellant left work in his car during his lunch break. Prince George's County police officers, who had been surveilling Appellant as part of an investigation, followed him and pulled his car over. During the traffic stop, police searched Appellant and found cocaine. Appellant admitted that the cocaine had been in his car while it was parked at the school. Police arrested Appellant for cocaine possession. Although police originally estimated the weight of the drugs at 5.3 grams, a lab test later revealed he had 3.86 grams.[1] (Motion, Ex. 1, T. 20-21, 79, 124; Ex. 6; Ex. 16).

Appellant informed Principal Miller of his arrest on the following Monday. (Motion, Ex. 1, T. 21). Appellant later explained that he began using drugs after several close family members experienced serious medical problems. On November 3, 2014, Appellant voluntarily entered a 12-week-long drug and alcohol treatment program. He was discharged on January 27, 2015 with a "good" prognosis. (Motion, Ex. 1, T. 22-23; Ex. 4).

On April 1, 2015, Prince George's County police arrested Appellant on a warrant related to the earlier traffic stop. Prosecutors charged him with possession of a controlled dangerous substance with intent to distribute, possession of a controlled dangerous substance with the intent

[1] Police made other allegations against Appellant, but because the local board based its termination solely on Appellant's possession of cocaine on school grounds, we shall confine our analysis to those facts.

to distribute on school property, possession of a controlled dangerous substance other than marijuana, and possession of controlled dangerous substance paraphernalia. (Motion, Ex. 5). PGCPS placed Appellant on administrative leave that same day. Due to the seriousness of the charges, on April 20, 2015, PGCPS removed Appellant from administrative leave and required him to use his earned leave. Appellant's union representative did not object to this change. (Motion, Ex. 8). On May 26, 2015, prosecutors dropped the two felony charges of possession with intent to distribute and set a date in August 2015 to resolve the remaining charges. (Motion, Ex. 6, 10, 16).

After Appellant's arrest, PCGPS assigned Robert Foster, a special investigator, to examine the case and report his findings. Mr. Foster contacted Prince George's County police, obtained court records, and interviewed Appellant in the presence of Appellant's union counsel. Appellant denied taking cocaine into the school, but admitted that he kept cocaine in his car in the school parking lot. Mr. Foster concluded that the allegations against Appellant were true. (Motion, Ex. 1, T. 30-31, 97-102; Ex. 6).

On June 5, 2015, PGCPS conducted a Loudermill hearing with Appellant, two union representatives, and Appellant's supervisors, during which they reviewed the charges against him.[2] Appellant's supervisors praised his work and stated that they wanted to keep him as an employee. During the conference, Principal Miller confirmed that Appellant had reported his arrest to her, but she stated that he did not tell her he had possessed cocaine on school property. (Motion, Ex. 8).

On June 24, 2015, Robert Gaskin, Chief Human Resources Officer, terminated Appellant. As grounds, he cited the PGCPS Regulations for Supporting Personnel, which prohibit consumption or possession of alcohol or drugs on board property, including in vehicles, at any time; and "any conduct which reflects unfavorably on the [PGCPS] as an employer." Regulations, Disciplinary Action, Section VI, subsections J and K. The decision acknowledged Appellant's work performance and length of service, but concluded that the serious nature of the charges warranted termination. Mr. Gaskin stated that "parents must understand that school administration will not tolerate employees possessing cocaine on school property at any time." (Motion, Ex. 8, 15).

Meanwhile, on September 18, 2015, Appellant entered a guilty plea to a misdemeanor charge of possession of cocaine and the judge sentenced him to drug court, with the remaining charges dismissed. The plea deal stated that Appellant would receive probation before judgment if he successfully completed drug court. On November 12, 2015, Appellant received a four-year sentence, with all but one day suspended, and the court placed him on supervised probation for five years.[3] (Motion, Ex. 16).

Appellant appealed his termination to the CEO. The matter was referred to a hearing officer for findings of fact, conclusions of law, and a recommendation. The hearing occurred on November 11, 2015. Appellant admitted that he had cocaine in his car on school grounds, but

[2] At a *Loudermill* conference, also known as a pre-termination hearing, employees are given notice of the charges against them and provided with an opportunity to respond. The conference is named for the Supreme Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

[3] On September 29, 2016, as part of the plea deal, Appellant received probation before judgment. The court struck his guilty plea and ended Appellant's probation.

again argued that he never possessed cocaine while in the school building. He also argued that other employees were not disciplined for similar misconduct and that he should not be disciplined either. (Motion, Ex. 9; Ex. 16).

The hearing officer issued his decision on February 1, 2016, recommending that Appellant's termination be upheld. The hearing officer found that Appellant received the required due process and that the evidence was sufficient to show he violated PGCPS regulations by possessing cocaine on school grounds. The hearing officer declined to accept Appellant's argument that the parking lot was not part of the school grounds. That same day, the CEO adopted the hearing officer's recommendation. (Motion, Ex. 16).

Appellant appealed to the local board. The board held oral argument on November 15, 2016. On February 1, 2017, the local board upheld Appellant's termination. The board found that Appellant possessed cocaine in the school parking lot and agreed with the CEO that this was a valid reason for termination. Although Appellant disputed the total amount of cocaine, the board stated that the exact amount had no bearing on its final decision. (Motion, Ex. 19).

This appeal followed.

## 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

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

### *Evidence about other PGCPS employees*

Appellant argues that his termination was unreasonable and illegal because it "reflected a departure from past practice." He maintains that there was "unrefuted evidence" in the record that there were PGCPS employees who were charged with similar conduct who were not terminated. Relatedly, he argues that the hearing officer misconstrued the law by not allowing him to present evidence of "comparators" to support his argument. Appellant contends this amounted to an abuse of discretion.

Comparator evidence refers to evidence where "a 'similarly situated' individual with 'sufficient commonalities on the key variables between the plaintiff and the would-be comparator [presents evidence] to allow the type of comparison that, taken together with the other prima facie evidence, [allows] a jury to reach an inference of discrimination.'" *Taylor v. Giant of Maryland*, 423 Md. 628, 632 n.2 (2011) (quoting *Eaton v. Ind. Dep't of Corrections*, 657 F.3d 551, 556 (7th Cir. 2011)). In *Taylor*, a female truck driver used comparator evidence to argue that her employer discriminated against her when it treated her differently from her male colleagues based on her gender. *Id.* at 652.

Appellant has not claimed that PGCPS treated him differently based on a protected status, such as race or gender. Therefore, it does not appear that comparator evidence would be relevant. Assuming for the sake of argument that comparator evidence could have been relevant to Appellant's claim, the evidence Appellant sought to introduce at the hearing did not provide sufficient commonalities between Appellant and other employees from which the hearing officer could draw an inference that Appellant was singled out.

During the hearing, Appellant attempted to introduce a spreadsheet that contained a list of PGCPS employees, their job titles, and their criminal history. The criminal history information came through the Maryland judiciary's online case search website and the information about job titles and current status of the employees came through Appellant. When pressed on his knowledge about PGCPS employees, Appellant admitted that his information came from the "rumor mill." The spreadsheet contains about 30 names. The hearing officer declined to admit the evidence, explaining that it was (1) unreliable hearsay in that it was produced by Appellant in anticipation of litigation; (2) it did not identify the individuals who were similarly situated because the documents would not indicate where an individual possessed drugs or the amount of drugs possessed; and (3) it would not identify the actual type of discipline an employee received.[4] (Motion, Ex. 1, T. 64-74).

Assuming that Appellant's spreadsheet was accurate, there are significant differences between Appellant and the PGCPS employees listed on the spreadsheet. The bulk of employees are custodians, not supervisors, like the Appellant. It is not unreasonable to discipline a supervisor in a manner different from his or her subordinates. *See Lightner v. City of Wilmington*, 545 F.3d 260, 265 (4th Cir. 2008) (determining that the difference in positions between an officer and an acting division commander made a purported comparison "too loose."). In addition, Appellant includes individuals who later had charges dropped or were found not guilty of the offenses whereas he admitted his conduct and pleaded guilty. Although many of the employees were also charged with drug offenses, many of the individuals were charged with possessing marijuana, not cocaine, another significant difference.

In only one instance do records show that another PGCPS employee was accused of possessing drugs on school grounds. That case also involved a building supervisor, but his case was significantly different from Appellant's because prosecutors dropped all charges against him. Appellant, by contrast, pleaded guilty and admitted his conduct. As courts have recognized, "[t]he similarity between comparators and the seriousness of their respective offenses must be clearly established in order to be meaningful." *Lightner,* 545 F.3d at 265. The proffered evidence did not show that Appellant was treated differently from similarly situated employees because there were significant differences between Appellant's actions and the circumstances faced by other employees.

*The supervisor recommendations*

Appellant argues that his termination should not have occurred because it was inconsistent with the recommendations of his immediate supervisors. As the record shows, his

[4] In his response to the local board's motion, Appellant submitted two new documents that appear to contain PGCPS employee names, addresses, and work titles. These documents were not presented to the local board and Appellant has failed to show a good reason for not offering them sooner. Accordingly, we decline to consider them as part of this appeal. *See Shervon D. v. Howard County Bd. of Educ.*, MSBE Op. No. 17-10 (2017).

immediate supervisors were consulted about his termination and recommended that he not be fired. They did not, however, have final decision-making authority. Although the CEO and local board were free to consider the supervisors' recommendations, they were not required to defer to them. The head of human resources and the CEO explained the basis for termination and did not act illegally by failing to follow the recommendations of Appellant's supervisors.

*The amount of cocaine*

Appellant argues that his initial termination was based on an incorrect amount of cocaine. An initial police report described Appellant as having 5.3 grams of cocaine, but testing later confirmed that he possessed 3.86 grams.[5] The local board mistakenly referred to 5.3 grams in its final decision. As Appellant acknowledges, though, the local board stated in its opinion that the exact amount of drugs did not matter. Rather, the board focused on the fact that he possessed those drugs on school property, not the weight of the drugs. Accordingly, even though the local board erred in stating the total amount of cocaine, it had no impact on the final decision.

*Consideration of evidence outside the record*

Appellant argues that the hearing officer improperly considered the sentence he received on his cocaine possession charge, which was not a part of the record made before the hearing officer. The circuit court sentenced Appellant to supervised probation one day after the hearing in Appellant's termination appeal. In our view, the hearing officer was free to take judicial notice of Appellant's sentence. *See Abrishamian v. Washington Med. Grp. P.C.*, 216 Md. App. 386, 413 (2014) (explaining that many types of information, "most commonly public records such as court documents" fall under the umbrella of judicial notice). Even if the consideration of this evidence was improper, and we do not conclude it was, the local board made no mention of the sentence in its decision and Appellant has otherwise failed to articulate any prejudice he suffered as a result.

CONCLUSION

For all of these reasons, we affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.

Signatures on File:

_____
Andrew R. Smarick
President

_____
Chester E. Finn, Jr.
Vice-President

_____
Michele Jenkins Guyton

[5] Appellant incorrectly states that he had 3.83 grams of cocaine, which was the post-test amount of cocaine, not the pre-test amount. (Motion, Ex. 16).

_____
Justin Hartings

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Michael Phillips

_____
Madhu Sidhu

_____
Guffrie M. Smith, Jr.

_____
David Steiner

June 27, 2017