J.B.

Appellant

v.

HARFORD COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 17-01

OPINION

INTRODUCTION

J.B. (Appellant) appeals the decision of the Harford County Board of Education (local board) affirming his termination from a summer jobs program. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded and the local board replied.

FACTUAL BACKGROUND

In the summer of 2016, Appellant, a 16-year-old rising junior attending Harford County Public Schools (HCPS), began a temporary, six-week-long job working for the school system as a summer maintenance employee. He was assigned to paint as part of a work crew at Harford Vocational Technical High School, which is the school he attends. Appellant was the youngest member of his work crew; all of the other members were 18 or older. Appellant started work on July 5, 2016. He worked for the school system for six days without incident. (Local Board Memorandum, Ex. 2).

On July 13, 2016, a dispute occurred with other members of his work crew while they were painting a classroom. Around 10 a.m. that morning, Appellant stopped painting and went to wash out his bucket. According to four other members of the work crew, Appellant did not explain why he had stopped working and he returned to the room without resuming painting. Several members of the work crew believed that Appellant was not pulling his weight. Appellant, meanwhile, complained that two of the crew members, who were dating, spent too much time talking to one another and not working. After Appellant stopped painting, one crew member, A.F., told Appellant to "stop his bitching" because there was plenty of work to do. Another crew member, A.I., told him to "stop being a bitch and get back to work." (Motion, Exhibit A-7).

Appellant provided his own statement of what occurred:

> I was painting until 10 a.m. and finished my part (cutting). I washed my bucket and waited for the others to finish. Another painter (W/M/Redhead) came up to me and said, "Stop being a bitch and get your ass back to work." Then I said, "Who are you talking to?"

> Then all the other painters ganged up on me so I walked into a different room to cool myself down before a fight started.
>
> Then [A.I.] walked in the room and started to try and give me a life lesson while saying afterwards "I'm done with your bitch ass, stay in here all you want." [E], the team leader saw everything and did nothing. I called my Mom to pick me up because I didn't want to be near these people. Then my Mom said no and told me to get back to work.

(Appeal, A-6).

Appellant concluded his statement by writing that "I felt very harassed and mistreated by this group of painters." At the end of the day, Appellant's mother contacted Diane Saylor, the site supervisor, and demanded that Appellant be moved to another site. According to Ms. Saylor, she told Appellant's mother to keep him home the next day while she investigated the complaint. Appellant's mother and Appellant deny that he was ever told to stay home. (Motion, A-6, A-7).

Appellant arrived to work the next day and was told to report to Ms. Saylor. She asked why Appellant had come in to work and Appellant told her he was unaware he was supposed to stay home. According to Ms. Saylor, she asked Appellant if he had refused to work the previous day and Appellant told her yes. He complained to her that no one else on the crew was working except for him. Ms. Saylor concluded that Appellant had a bad attitude and that he should not work with the same crew members. She offered to let him work at another location, starting at 6 a.m. rather than 7:30. After Appellant declined the offer, Ms. Saylor told him to call his mother to be picked up. The following Monday, July 18, 2016, Ms. Saylor told Appellant's mother that it would be best if he did not return to the program. (Motion, A-7).

On July 18, 2016, Appellant's mother wrote a letter to HCPS in which she complained about Ms. Saylor's response to her request to transfer Appellant to another work crew. According to Appellant's mother, Ms. Saylor stated she was "not a babysitter" and appeared to blame Appellant for the incident. According to Appellant's mother, Ms. Saylor initially did not provide a reason for terminating Appellant, but later said it was because he had stopped working. Appellant's mother complained that college-age youth acted as supervisors of work crews and that this created a bullying and harassing atmosphere. Appellant's mother alleged that Ms. Saylor had not taken her complaints of bullying and harassment seriously. She provided Appellant's written statement of what happened. Appellant's mother requested that Appellant be restored to his job and provided back pay for the time he missed. (Motion, A-5, A-6)

In response to the letter, HCPS assigned an investigator to conduct interviews and prepare a report. Ms. Saylor was present for the interviews. As a result of what she learned about the incident, Ms. Saylor counseled one of the work crew members against using profanity. The HCPS investigator summarized her own findings as follows:

> A few crew members did use the word bitch however they did not harass or bully [Appellant]. [Appellant] made the choice to walk off the job while the rest of the crew was working. No one said anything

> to him prior to him making this choice. [Appellant] then displayed an attitude and angry disposition when meeting with his supervisor Diane Saylor. Diane offered him alternative work in her office at Hickory Annex and [Appellant] declined.

(Motion, A-7).

On July 21, 2016, Jean Mantegna, Assistant Superintendent for Human Resources, sent Appellant's mother a letter responding to her complaint. In her letter, Ms. Mantegna stated she had read Appellant's statement, as well as the investigative report. "It is concluded that cursing occurred and has been acknowledged as inappropriate within a workplace. Internal controls have been reviewed and appropriate corrective actions taken at this time." Ms. Mantegna stated that Appellant had been offered an alternative position, which he declined. As a result, his employment ended as of July 18, 2016. Although the letter did not state it, Ms. Mantegna's letter served as the school system's final decision on the matter. Ms. Mantegna informed Appellant's mother by email that same day that she could appeal the decision to the local board. (Motion, Ex. A-2).

That same day, Appellant's mother wrote to the local superintendent complaining about the decision. On July 25, 2016, Appellant's mother followed up with the local superintendent by email. In response, the local superintendent wrote that the matter had been referred to the local board for review. (Motion, A-3; Appeal).

On August 22, 2016, a panel of five local board members met to review the parties' submissions and hear oral argument. By a vote of 4 to 1, the board agreed to uphold Ms. Mantegna's decision. The board concluded that the statements of Appellant's coworkers were consistent in relating that Appellant stopped working without explanation and that he declined an alternative position. The board determined that use of the word "bitch" or "bitching" in reference to Appellant was not "objectively severe or pervasive to create a hostile work environment." The board observed that the cursing occurred after Appellant stopped working, not before, and that there was insufficient evidence of any discrimination. (Local Board Memorandum, Ex. 2).

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. judgment for that of the local board "as to the wisdom of the administrative action." (citing *Weiner v. Maryland Insurance Administration*, 337 Md. 181, 190 (1995).

LEGAL ANALYSIS

At the outset, we must consider whether Appellant's appeal is effectively moot. Appellant challenges his dismissal from what was a temporary, six-week summer job and cannot be restored to that same position. Among the relief Appellant requests, however, is that he be considered to have performed "satisfactorily" during the summer of 2016 so that he could be rehired to the maintenance team for 2017. Because this relief is still within our power to grant, we will consider the merits of Appellant's argument.[1]

Dispute of material fact

Appellant argues that the Motion for Summary Affirmance should not be granted because there are disputes of material fact. He argues that nearly every point of disagreement between him and the local board constitutes a dispute of material fact. In our view, the disputes highlighted are a matter of law, rather than fact, and we shall therefore address the motion.

Defective appeals process

Appellant argues that he was denied procedural due process because the local superintendent never issued a decision on his appeal in violation of HCPS policies and procedures. Although Appellant does not cite specifically to the policy that was violated, it appears he is referencing *Student Rights and Responsibilities – Grievance*, HCPS Policy 02-0040-000. That policy allows for a student to direct a written appeal or grievance to "the appropriate director or assistant superintendent," and if unresolved at that level, to the local superintendent.

The *Accardi* doctrine requires that a government agency "scrupulously observe rules, regulations, or procedures which it has established." *Glover v. Baltimore City Bd. Of Sch. Comm'rs*, MSBE Op. No. 15-25 (2015) (citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). In order to strike down an agency's decision under *Accardi*, a complainant must show that he or she was prejudiced by the agency's failure to follow its rules, regulations, or procedures. *Id.* (citing *Pollack v. Patuxent*, 374 Md. 463, 504 (2003)).

The record shows that after Appellant was terminated, that action was appealed to Ms. Mantegna, Assistant Superintendent for Human Resources, who issued the final decision affirming the termination. Nowhere in her decision does Ms. Mantegna state that she is acting as the superintendent's designee. It can be inferred only because Ms. Mantegna directed Appellant to file an appeal of the decision directly with the local board. According to filings from the local board counsel, the local superintendent agreed with the decision and essentially adopted it as her own, even though no separate decision was issued. Without a separate opinion, or a clear indication that Ms. Mantegna was acting as the superintendent's designee, it appears that HCPS violated its policies.

[1] Appellant also requests that he be paid approximately $1,000 in back pay and $9,000 in attorney's fees. He is represented by his mother, who is an attorney. Appellant argues that he could be awarded attorney's fees if he presented his case in court. The State Board has no authority to order the payment of attorney's fees in an administrative appeal. *See Richard C and Kathy C. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 12-02 (2012).

Appellant has failed, however, to demonstrate any prejudice suffered as a result. The local superintendent knew of, and agreed with Ms. Mantegna's decision, and there is no indication that she would have issued a different decision. Appellant was properly informed of his appeal rights to the local board, as if Ms. Mantegna's decision was final. Without any prejudice to the Appellant, there was no *Accardi* violation.

Complaints regarding oral argument before the local board

a) Improper behavior of the local board attorney

Appellant argues that the local board attorney, Gregory Szoka, stepped outside of his role as advisor to the local board by participating in oral argument before the board. Appellant accuses him of being "large and in charge" during the hearing and "double teaming" with the school system's attorney, Patrick Spicer, against his attorney. Appellant also maintains that Mr. Szoka allowed Mr. Spicer to make "unethical arguments" which they knew were false.

The local board's policies state that "[t]he presiding officer of the Board, or the hearing examiner, may request legal counsel for the Board of Education to participate in any hearing as counsel for the Board or the hearing examiner as the case may be." *See Hearings Before the Board of Education of Harford County or the Hearing Examiner*, HCPS Policy 22-0018-000, 4(f)(7). To the extent that Mr. Szoka participated in the hearing, he was allowed to do so by the local board policies and there is no indication in the transcript that the local board members objected to his role.

In our view, Mr. Szoka acted professionally during what was a contentious oral argument. Appellant's counsel repeatedly interrupted Mr. Spicer during his argument, as well as local board members when they asked questions. By contrast, Mr. Szoka did not dominate the proceedings, but rather facilitated the argument, in particular by fielding an objection related to the admission of evidence (addressed below). As to the claim of unethical arguments, Mr. Spicer and Appellant's counsel argued their interpretation of the facts. Having reviewed the transcript of the hearing, we perceive no improprieties in Mr. Spicer's argument or any improper assistance from Mr. Szoka.

The Appellant complains that Mr. Szoka shared Appellant's brief with Mr. Spicer prior to oral argument. In our view, there was nothing unreasonable about this common courtesy. Additionally, Appellant argues that the local board members did not have his brief in advance of the argument. At the start of the oral argument, Mr. Szoka stated that the panel "has met previously to review the memoranda of law that was given to counsel and exhibits." (T. 2). Moreover, the questions asked by local board members showed their familiarity with the record. We find no merit to this argument.

b) Bias of local board members

Appellant argues that the local board was biased against him during oral argument because the members acted "biased, irritated, and bizarre," and they "attacked Appellant's counsel with inappropriate questions that displayed bias and no grasp of the basic facts." Appellant accuses one board member of being physically incapacitated and another of committing a criminal act. Having reviewed the transcript, we conclude that the board members'

questions were directly related to the issues in the appeal and do not show a bias towards one side or another. There is no requirement that both sides be asked an equal number of questions at oral argument, and asking more questions of one side does not equate to bias. Accordingly, there is no merit to this accusation.

c) Declining to admit evidence of "prior bad acts"

During the oral argument before the local board, Appellant's counsel sought to introduce a print-out of an electronic case summary related to a peace order filed against one of the work crew members, A.F., who allegedly bullied Appellant. In Maryland, a peace order is a civil order issued by a judge that commands one person to refrain from committing certain acts against another person. Peace orders are issued in cases where the two parties do not have a domestic relationship with one another.[2]

The case summary states that a temporary peace order was issued against A.F. on November 26, 2008, that a final order was issued on December 2, 2008, valid through June 2, 2009, and that the order was modified on January 29, 2009. There are no details about the incident that precipitated the peace order or why (or how) it was modified.[3] The case summary included the name and birthdate of an individual with the same name as A.F., but Appellant's counsel was unable to confirm that it was the same birthdate. Instead, she argued that the local board could pull human resources records to confirm the information. (T. 8). The board members adjourned to discuss the information and ultimately declined to accept the additional evidence, finding that it was not relevant. (T. 12).

Appellant argues that it was an error of law for the board not to admit the case summary based on "the evidence rule of prior bad acts" or as "evidence of proof of a prior bad act." In Maryland, evidence of "other crimes, wrongs, or acts including delinquent acts" is "not admissible to prove the character of a person in order to show action in conformity therewith." Md. Rule 5-404. It may, however, be introduced for other purposes, such as proof of motive, opportunity, or intent. *Id.* Even if relevant, such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Md. Rule 5-403. In short, Maryland law does not mandate that evidence of "prior bad acts" be admitted in all cases; rather, it states that such evidence generally will *not* be admitted except in certain circumstances. Appellant's counsel apparently wished to introduce the peace order to show that A.F. had a history of acting as a bully, in other words that he acted "in conformity" with his prior behavior when he worked on the paint crew. Maryland law prohibits, rather than requires, using evidence in such a manner.

Alternatively, Appellant maintains that the local board erred by concluding that the case summary had no probative value. The case summary indicates that the peace order was issued eight years earlier and the record contains no information about why it was issued, who

[2] *See* Peace and Protective Orders, http://mdcourts.gov/courtforms/joint/ccdcdvpo001br.pdf (last visited Jan. 10, 2017).

[3] Appellant stated that [A.F] had "a history of abusing people" and characterized the case summary as A.F.'s "prior record for bullying." There is no evidence in the record to support these statements given that the case summary contains no specific information about what A.F. was accused of doing.

requested it, and why it was later modified, assuming it was indeed the same individual who worked with Appellant. In our view, Appellant failed to demonstrate why the case summary had any relevance to whether or not he should have been terminated from his summer job. The local board committed no error by declining to consider the information in the case summary.

Termination of an at-will employee

We finally turn to the merits of Appellant's termination. Appellant was an at-will employee, which means that HCPS could "terminate an at-will relationship for any reason – good or bad, fair or unfair, and at anytime – so long as the motivation for the termination does not violate some clear mandate of public policy or some statutory prohibition against such termination." MARYLAND EMPLOYMENT LAW § 3.03 (2013). In short, as an at will employee, Appellant could be fired with or without cause so long as the reason for his termination was not illegal, discriminatory, or against Maryland public policy. *See Coleman v. Baltimore City Bd. of School Comm'rs*, MSBE Op. No. 11-25 (2011); *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 417-18 (2003). Accordingly, we must look to see whether Appellant's termination was based on any of these impermissible reasons. Appellant has offered several potential reasons for why the termination was illegal.

a) Failure to follow bullying procedures

Appellant argues that his termination was illegal because HCPS failed to follow its bullying procedures. Appellant does not cite any specific provision of the procedures, but argues generally that HCPS should have investigated the bullying complaint and completed a bullying form. HCPS argues that the bullying procedures did not apply to a student participating in a summer work program, and regardless, the school system did properly investigate the incident.

Bullying is defined by Maryland law as intentional conduct that "creates a hostile educational environment by substantially interfering with a student's educational benefits, opportunities, or performance, or with a student's physical or psychological well-being" and is either motivated by certain characteristics or threatening or seriously intimidating. Md. Code, Educ. § 7-424.1. It is questionable whether the summer work program was part of the "educational environment" for HCPS students. Assuming, for argument purposes only, that the summer work program was part of the "educational environment," and that Appellant's coworkers bullied him, the record shows that HCPS took the complaint seriously and conducted an investigation. This was consistent with the local board's *Bullying, Cyberbullying, Harassment or Intimidation Investigation Procedures*. HCPS concluded that the one-time incident did not meet the definition of bullying.

That leaves only Appellant's claim that HCPS did not fill out a bullying form, presumably referring to the *HCPS Bullying, Harassment, or Intimidation Incident School Investigation Form*. Parents may separately fill out a bullying or harassment reporting form if they wish to do so. Even assuming HCPS did not properly fill out such a form, Appellant has failed to demonstrate any link between the failure to file a form and his claim of wrongful termination. *See Glover*, MBSE Op. No. 15-25.

b) Racial discrimination

Appellant argues that HCPS acted illegally by either (1) not offering Appellant a transfer; or (2) offering him a transfer that was not equal to the transfer offered to a white female member of the work crew. Additionally, Appellant argues that another white co-worker was counseled for using profanity while he was terminated. Appellant is bi-racial and alleges that HCPS treated him differently based on his race.[4]

Claims of employment discrimination are analyzed under a "burden-shifting analysis" which requires an employee to provide a *prima facie* showing that (1) he belongs to a protected class and (2) has sufficient evidence to give rise to an inference of unlawful discrimination. *Yang v. Prince George's County Bd. of Educ.*, MSBE Op. No. 09-30 (2009) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). *See also Williams v. Maryland Dep't of Human Res.*, 136 Md. App. 153, 164-65 (2000). The burden then shifts to the employer to present evidence of a non-discriminatory reason for the termination. *Id.* If the employer meets the burden, the employee must then show that the stated reason was merely pretextual. *Id.*

Although Appellant is a member of a protected class, the evidence is sparse concerning an "inference of unlawful discrimination." Appellant points to the fact that a white male crew member received counseling for using profanity and that a white female crew member was transferred to another crew[5] as evidence that he was singled out based on his race. Even assuming that Appellant has met his burden to show a *prima facie* inference of unlawful discrimination, the school system had a clear non-discriminatory reason for Appellant's termination, which was based on his stopping work and declining a transfer to another position. HCPS had a valid rationale for treating Appellant differently from the other two white employees – neither of those employees was accused of stopping work. The white male employee was counseled for using profanity and the record is unclear as to whether the white female employee was even disciplined. Appellant has failed to provide any evidence that the school system's reason for his termination was merely a pretextual form of discrimination based on race.

c) Retaliation

Appellant argues that he was retaliated against because he reported that he was bullied to his supervisor. In order to establish a *prima facie* case of retaliation, Appellant must show that (1) he engaged in a protected activity; (2) that the school system took a materially adverse employment action against him; and (3) that a causal connection existed between the protected activity and the materially adverse action. *See Jones v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-33 (2015) (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. *Id.* The burden then shifts back to the Appellant to show that the reasons given by the school system are pretextual. *Id.*

[4] In Appellant's response to the Motion for Summary Affirmance, he also alleges discrimination based on sexual/gender orientation, but fails to elaborate on this argument. The record contains no evidence of discrimination based on sexual/gender orientation.

[5] There was no information in the record before the local board concerning the reason for this transfer. Appellant alleges the move occurred after he complained that the female crew member spent too much time talking to her boyfriend, who was part of the same work crew.

We shall assume that Appellant's report of bullying was a protected activity, and there is no dispute that the school system took an adverse action by terminating Appellant from his summer job. The proximity in time between the report of bullying and the adverse action demonstrates a causal connection between the two. The school system has, however, a non-discriminatory reason for the adverse action: Appellant stopped work and declined a transfer to another position. Appellant has provided no evidence that this was merely a pretextual decision. In the absence of any illegal action on the part of the school system, it was permitted to fire Appellant from his at-will summer job for any reason, such as stopping work on one occasion. Appellant has failed to meet his burden to show that the termination was illegal.

CONCLUSION

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

Signatures on File:

_____
Andrew R. Smarick
President

_____
Michele Jenkins Guyton

_____
Laurie Halverson

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Madhu Sidhu

_____
Laura Weeldreyer

Absent:
Chester E. Finn, Jr., Vice President
Jannette O'Neill González
Barbara J. Shreeve
Guffrie M. Smith, Jr.

January 24, 2017