

KATHY TAMBURO,

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 18-17

OPINION

INTRODUCTION

Kathy Tamburo (Appellant) appeals the decision of the Baltimore County Board of Education (local board), which found that she was improperly terminated and awarded her back pay. Appellant agreed that she was wrongly terminated, but disagreed with the local board's relief. 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

Appellant began working for Baltimore County Public Schools (BCPS) in 1974. In 1988, she took approved maternity leave. Four years later, while still on approved leave, she resigned her teaching position. At the time she resigned, Appellant was vested with the Maryland State Retirement and Pension System. She was not, however, able to draw from her pension at that time because she had not yet reached retirement age or accrued enough years of service with the school system. (Motion, Ex. 4, Hearing Examiner Findings of Fact).

In November 2011, Appellant became eligible to receive a pension from the State and began receiving payments. Prior to the start of the 2015-16 school year, Appellant applied for a position with BCPS. BCPS hired her as a vocal teacher and assigned her to Glyndon Elementary School. Appellant did not inform BCPS that she was receiving pension payments, nor did she inform the State Retirement and Pension System about her BCPS employment. She signed the regular teacher's contract with BCPS on August 14, 2015. (Motion, Ex. 4, Hearing Examiner Findings of Fact). That was a mistake that colors the events in this case. Specifically, in Maryland, State Board regulation sets forth the type of contract that governs the employment of a retired rehired teacher. *See* COMAR 13A.07.02.05A(2).

There are differences between the regular teacher's contract and the rehired retired teacher's contract:

Regular Teacher's Contract

- Three year probationary period that

Rehired Retired Contract

- Contract may not exceed one year

leads to tenure¹ and continuous year-to-year employment

- Can be non-renewed for any reason only during the first three probationary years

- Dismissal during school year only for immorality, misconduct in office, insubordination, incompetency, or willful neglect of duty

- Appeal of termination under Md. Code, Educ. §6-202; burden on local board; *de novo* review by the State Board

but can be renewed if parties mutually agree; no tenure

- Can be non-renewed at the end of every year for any reason

- Dismissal during school year for failure to perform duties or unsatisfactory performance

- Appeal of termination under Md. Code, Educ. §4-205(c); deferential review by the State Board

As the school year progressed, BCPS learned that (1) Appellant received pension payments; (2) the State placed a limit on the amount of money she could earn from BCPS without having her pension payments reduced (referred to as an “earnings limitation”), (3) Appellant exceeded that earnings limitation; and (4) the State temporarily reduced her pension payments as a result. In February 2016, a human resources officer contacted Appellant and told her that she should have signed a “rehired retired” teacher’s contract because she received a pension. (Motion, Ex. 4, Hearing Examiner Findings of Fact).

At the start of the 2016-17 school year, on September 2, 2016, BCPS terminated Appellant because she exceeded the earnings limitation set by the State. Appellant appealed her termination to the local superintendent, who upheld the school system’s actions. (Motion, Ex. 4, Hearing Examiner Findings of Fact; Motion, Ex. 9, Supt. Designee Decision).

Appellant appealed to the local board, which referred the matter to a hearing examiner. On August 30, 2017, the hearing examiner issued his decision upholding Appellant’s termination, but for different reasons than those offered by the superintendent’s designee. (Motion, Ex. 4, Hearing Examiner Decision; Motion, Ex. 6).

Appellant challenged the hearing examiner’s decision before the local board. The local board heard oral argument and issued its decision on January 23, 2018 based on an independent review of the record. Although the local board adopted all but one of the hearing examiner’s findings of fact, it did not reach the same legal conclusions. The local board concluded that Appellant’s September 2 termination was arbitrary and unreasonable because there was no statutory prohibition against an individual working for the school system while still drawing pension payments, even if the person exceeds an earnings limitation. As a result, the board

¹ A tenured teacher’s contract automatically continues from year-to-year, while a probationary teacher in the first three years of employment can be non-renewed for any reason at the end of each of the first three school years in which she teaches. Appellant did not address the tenure issue in her briefs. We assume that is because she was not able to carry over any tenure she may have acquired in her past employment. County boards have authority to determine their own tenure policies, consistent with State law. Md. Code, Educ. §6-201. BCPS Rule 4302 requires a tenured teacher to maintain Maryland certification and continue to hold a standard or advanced professional certificate in order to retain tenure. Tenured teachers who join BCPS from another school system may only keep their tenure if the break in service between systems is no more than a year, their last evaluation rating was “satisfactory,” and they complete a year of probationary employment. BCPS Rule 4302.III. Given her resignation from BCPS and 23-year break in service, she would not have maintained her tenure.

concluded that Appellant should receive retroactive salary and benefits from September 2, 2016 through January 1, 2017. The local board found, however, that Appellant failed to mitigate her damages beyond that point because she was invited to reapply for a position in January 2017 but failed to do so. The local board declined to reinstate her to a teaching position. Instead, the board stated that Appellant may reapply for a teaching position and BCPS should consider her for rehire. (Motion, Ex 1, Local Board Decision).

This appeal followed.

STANDARD OF REVIEW

One of the disputes in this case is the standard of review that should apply. Appellant maintains that this case is governed by § 6-202 of the Education Article and that the State Board should review the case *de novo*, applying its independent judgment standard. See COMAR 13A.01.01.05F. The local board argues that, because this case involves a rehired retired educator, the standard under § 4-205 of the Education Article applies. Under that standard, 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.

In our view, the issues in this case concern the explanation and interpretation of the public school laws and State Board regulations governing rehired retired teachers and the regular teacher's contract. We exercise our independent judgment on those questions. See COMAR 13A.01.05.05E.

LEGAL ANALYSIS

Retired teachers in Maryland have options when they wish to return to teach in a public school. Under the State Personnel and Pensions Article § 23-407(b)-(c), they may return to a position offered to them subject to a reduction in their pension payments if they earn above a certain amount (often referred to as an "earnings limitation").² Or, they may return to accept a position teaching in areas of critical shortage, special education, or to students with limited English in public schools that are "in need of improvement," receive Title I funds, have more than 50 percent of students who receive free or reduced-price meals, or have an alternative education program. There is no reduction in pension payments no matter what salary the teacher receives if that latter path is followed. See Md. Code, State Pers. & Pens. § 23-407(c)(5).

In either case, however, the State Board regulations establish the type of contract that governs the employment of these rehired retired teachers. See COMAR 13A.07.02.05.

That regulation states:

.05 Employment Terms of Rehired Retired Teachers.

² This reduction in pension benefits is limited to five years. Md. Code, State Pers. & Pens. § 23-407(c)(4)(iii).

A. Definitions. In this regulation the following terms have the meanings indicated:

(1) "Contract" means an employment contract between a local school system and a rehired retired teacher.

(2) "Rehired retired teacher" means a retired certificated employee who is a member of the State Teachers' Retirement System or the State Teachers' Pension System and who is hired by a local school system under the provisions of State Personnel and Pensions Article, §§22-406 and 23-407, Annotated Code of Maryland.

B. The duties and responsibilities of a rehired retired teacher shall be set forth in a contract, the term of which may not exceed 1 year and which may be renewed annually upon the mutual written agreement of the local school system and the rehired retired teacher.

C. Beginning with the 2001—2002 school year, a rehired retired teacher shall receive the salaries and benefits and be subject to the working conditions that are mutually agreed upon in negotiations between the local board and the appropriate exclusive representative, under Education Article, §6-401 et seq., Annotated Code of Maryland.

D. All reports and data produced by a rehired retired teacher during the course and scope of employment under the contract shall be the property of the local board of education.

E. A local board of education may terminate a contract if a rehired retired teacher has not performed, or has performed unsatisfactorily, the duties and responsibilities set forth in the contract.

F. A controversy or dispute arising out of or relating to a contract or breach of contract shall be governed by the procedures set forth in Education Article, §4-205(c), Annotated Code of Maryland.

This case involves mistakes by both parties, which have led to a confusing state of affairs as to what contract was applicable and its terms.³ Appellant argues that once she signed the regular teacher's contract, it governed her employment and remains in effect. She maintains that she should be reinstated with back pay. That result depends on Appellant having legally executed an enforceable contract.

It is long settled in Maryland that a contract is illegal if "either the formation or the performance is prohibited" by law. *DeReggi Const. Co. v. Mate*, 130 Md. App. 648, 663-64

³ Appellant argues that there are disputes of material fact that necessitate a hearing, but fails to point to any specific facts. In reviewing the record, we find no material facts in dispute. In addition, the appeal includes a page of notes related to Appellant's pension payments. Because Appellant did not present this document to the local board, we decline to consider it. *See Robin H. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 16-44 (2016).

(2000) (quoting *Thorpe v. Carte*, 252 Md. 523, 529 (1969)); see also *Gannon & Son, Inc. v. Emerson*, 291 Md. 443, 452 (1981). Contracts that violate the law can be declared illegal, but that does not necessarily mean that the parties cannot still enforce the illegal contract. *Id.* When deciding whether a contract is not only illegal but also unenforceable, courts review whether the “the makers of [the law] meant that a contract in contravention of it should be void.” *Id.* (citing *Beard v. American Agency Life Ins. Co.*, 314 Md. 235, 255 (1988)). Thus, we look to the intent of the law at issue here.

The State Board regulation requires a specific contract for a rehired retired teacher. For instance, the contract may not exceed one year and may only be renewed upon the mutual agreement of the teacher and school system. COMAR 13A.07.02.05(B). Under this law, Appellant’s work for BCPS should have been governed by a rehired retired contract. Because the regulation establishes specific requirements for a rehired retired contract, executing the regular teacher’s contract with Appellant violated the law.

Even though executing the regular teacher’s contract contravened the law, the parties could still enforce it unless it is clear that the makers of the law meant that it should be unenforceable under these circumstances. See *DeReggi Const. Co.*, 130 Md. App. at 663-64. The State Personnel and Pensions Article allows the State Board to adopt regulations governing the hire of retired teachers. Md. Code, State Pers. & Pens. § 23-407(i). COMAR 13A.07.02.05 describes the terms of any employment contract with a rehired retired teacher. In our view, the State Board’s regulation is not a law that incidentally relates to educator employment; it instead directly explains the type of contract a rehired retired educator must sign. To allow teachers to sign employment contracts in contravention of the clear limits set by our regulation would render these requirements meaningless. Accordingly, signing a contract in contravention of our regulation— such as the regular teacher’s contract signed by Appellant in August 2015 – is illegal and leads to an unenforceable contract. See *DeReggi Const. Co.*, 130 Md. at 663-64.

The 2016-17 school year agreement

Having decided that executing the regular teacher’s contract between BCPS and Appellant was illegal and that the contract is unenforceable, we must decide what that means for both parties. Once BCPS discovered the error, it should have required Appellant to sign a rehired retired contract if it wished to continue employing her. Instead, Appellant began working at the start of the 2016-17 school year, apparently under the regular teacher’s contract, only for BCPS to terminate her on September 2, 2016 because her prior earnings had exceeded the earnings limitation set by the State.

Both parties agree that BCPS should not have terminated Appellant because of the earnings limitation. The local board concluded that the termination was “arbitrary and unreasonable” because there is no law that prohibits a person from working for a school system while receiving pension payments, even if the person has exceeded an earnings limitation. We agree.

The question remains, however, what legal obligations BCPS owed to Appellant if the underlying contract the parties signed was unenforceable. In the absence of a valid employment contract, employment in Maryland is presumptively “at-will.” *Libit v. Baltimore City Bd. of Sch. Comm’rs*, 226 Md. App. 578, 590 (2016). “In the context of an at-will employment, absent a

contravening public policy, an employer may generally terminate an employee for any reason, even a reason that is arbitrary, capricious, or fundamentally unfair.” *Id.* (internal quotation and citation omitted). For example, terminating an at-will employee for discriminatory reasons would contravene the law and public policy. The Court of Special Appeals has recognized that the General Assembly “has articulated a contravening public policy” through statutes that govern the terms of teacher employment. *Id.* This public policy rationale prohibits local boards from relying on an unenforceable contract or the lack of a signed contract to deny benefits and protections to educators that they would otherwise be entitled to by law. *Id.* Those benefits exist through statute and regulations and signing a contract is merely the formal recognition of them. Because Appellant qualified for the rehired retired contract, its terms applied to her employment, regardless of whether she signed that type of contract with BCPS.

Under the rehired retired contract, Appellant could only be terminated during the school year for unsatisfactory performance or for failing to perform. COMAR 13A.07.02.05. Otherwise, her employment would continue through the full school year. *Id.* Any further employment beyond the school year would be contingent on both Appellant and the school system agreeing to continue the employment relationship. *Id.* Appellant was terminated in the early days of the 2016-17 school year. In our view, under the rehired retired contract, Appellant would have been entitled to a year’s worth of salary and benefits as a rehired retired teacher had the school system not improperly terminated her.

The local board’s remedy for the improper termination

The local board awarded back pay to Appellant from September 2, 2016 through January 2017, but concluded that Appellant failed to mitigate her damages by not re-applying to BCPS in January 2017.

In testimony before the board’s hearing examiner, Appellant explained that she did not reapply to BCPS because she was worried about the effect that reapplying would have on her wrongful termination appeal. Appellant tried unsuccessfully to obtain other teaching assignments outside of BCPS. (Motion, Ex. 6, Hearing Examiner Transcript at 27-28). BCPS did not offer any evidence to rebut Appellant’s claims or to show that her attempts were unreasonable.

The “mitigation of damages doctrine,” also known as the “avoidable consequences doctrine,” is a legal principle that requires “a plaintiff, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach.” Black’s Law Dictionary (10th Ed. 2014). If an employer can show that the employee failed to mitigate damages, the amount of money an employee can recover for lost pay may be reduced accordingly. For example, an employee who is wrongfully terminated but secures within a week new employment with the same level of salary and benefits may only be entitled to a week’s worth of lost pay.

Maryland recognizes the mitigation of damages doctrine. In wrongful termination cases, the “measure of damages . . . is prima facie the employee’s salary for the remainder of the period of employment.” *Volos, Ltd. v. Sotera*, 246 Md. 155, 174-75 (1972). But the employer may undertake to reduce the amount of the damages it must pay by showing that the employee has earned wages from other employment, or that he could have secured other employment by using proper effort. *Id.* Because this principle primarily benefits an employer, the burden is on the

employer, not the employee, to prove that the employee failed to use “all reasonable efforts to minimize the loss he or she sustained.” *Cave v. Elliott*, 190 Md. App. 65, 96 (2010).

The law presumes that Appellant’s damages are the remainder of her period of employment: one year. *See Volos, Ltd.*, 246 Md. at 174-75. Under the mitigation of damages doctrine, it was up to BCPS to prove that Appellant secured other employment or reasonably could have done so. BCPS relied solely on Appellant’s failure to reapply to BCPS as evidence that she did not make reasonable efforts to gain other employment. Appellant was not, however, required to reapply to BCPS. Indeed, she explained that she did not do so because she was pursuing this case. It was, in our view, reasonable for her to assume BCPS would not have hired her. She could, and apparently did, apply elsewhere. In our view, BCPS failed to meet its burden to show that her attempts to secure this other employment were not a reasonable effort to mitigate damages. Accordingly, the local board erred by reducing the amount of compensation owed to Appellant. The local board’s award should have allowed for back pay and benefits from September 2016 through the end of the 2016-17 school year.

CONCLUSION

We affirm the decision of the local board that Appellant’s termination was wrongful, but reverse the local board’s calculation of damages. Appellant should receive back pay and benefits from September 2016 through the end of the 2016-17 school year.

Signatures on File:

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President

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May 22, 2018