

MELISSA POWELL,

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 23-11

OPINION

INTRODUCTION

Melissa Powell appealed her ineffective evaluation and non-renewal of her contract as a social worker for Baltimore County Public Schools (“BCPS”) pursuant to Educ. Art. § 4-205. The local board answered the appeal and moved for summary affirmance.

FACTUAL BACKGROUND

Ms. Powell accepted a position as a school social worker with BCPS in school year 2020-2021. She was a non-tenured school social worker and in the first year of her employment. She signed a certificated professional employee’s contract as set out in COMAR 13A.07.02.01B. Under the agreement, “[e]ither of the parties to this contract may terminate it at the end of the first, second, or third school year or on the first, second, or third anniversary date of employment in regard to employees hired after January 1 following the commencement of a school year by giving notice in writing to the other, as of the following dates: (i) In the case of employees employed before January 1 following the commencement of a school year, not later than May 1 ...”

For much of the 2020-2021 school year, instruction was online. In September 2020, the BCPS computer system was subject to a ransomware attack. For Ms. Powell, this presented significant challenges since she was not computer proficient nor was she familiar with BCPS’s computer system. Although BCPS offered work-arounds, Ms. Powell had trouble accessing the system and several of the essential system programs such as “Pulse” and Schoology. (Tr. 72-80). The ransomware disruption lasted until December 2020. In January 2021, Ms. Powell’s Evaluation indicated areas of ineffectiveness.

From January 11 through February 8, 2021, Ms. Powell was on leave for health conditions. On February 5, 2021, Ms. Powell requested to work a 20 hour per week schedule through February 19, 2021. BCPS granted the request. (Ex. A7).

BPSS observed Ms. Powell on February 12 and advised her that major improvements were necessary. (Supt. Ex. 8). Afterwards, she was on extended leave from February 21, 2021 to

March 8, 2021, to care for a family member. (Tr. 113-116). A subsequent observation in March yielded an ineffective rating due to persistent problems with follow-up for school referrals, inability to assess student needs and failure to record information in the Student Planning System. BCPS took into account her leave when it conducted its observations, but found Ms. Powell had ongoing difficulties with adhering to timelines, obtaining informed consent, completing documentation related to students' IEPs, collaborating with staff, providing documentation to the administration upon request, and maintaining service records for students. (R.E. 1e, Joint Ex. 1, 3-7 and Supt. Ex. 1).

On March 11, 2021, Ms. Powell appealed the process used for conducting her observations, her placement on an assistance plan, and her mid-year evaluation. The local superintendent referred the matter to Dr. Jennifer Mullenax, then Executive Director, School Support Elementary, East Zone, for review. Dr. Mullenax issued a decision on April 14, 2021, which upheld the process implemented. (Joint Ex. 8).

Meanwhile, in mid-March 2021, Ms. Powell submitted an Americans with Disabilities Act ("ADA") request. She sought several accommodations including continuance of remote working, access to printed materials, provision of a printer and desktop computer, elimination of home visits, and the ability to see doctors and therapists. (Ex. A2; Local Board Memorandum). BCPS granted her requested accommodations for remote working, and doctor and therapist appointments. (Ex. A3).

On April 8, 2021, the superintendent informed Ms. Powell that he was recommending that the local board not renew her contract. BCPS sent her a certified letter on or about April 21, 2021, informing her that the board had approved the superintendent's recommendation not to renew her contract. (Joint Ex. 9). The U.S. Postal Service attempted delivery, but no authorized recipient was available. Ms. Powell did not claim the letter after the delivery attempt. She received notice of the non-renewal and the contents of the letter in a meeting with her school principal on April 21, 2021. (Supt. Ex. 5).

On May 3, 2021, Ms. Powell appealed the non-renewal of her contract to the local superintendent, and on May 5, 2021, she appealed Dr. Mullenax's April 14 decision regarding the observation, assistance plan, and mid-year evaluation process. On May 7, 2021, the local superintendent referred both appeals to Allyson Huey, Manager, Employee and Student Appeals, acting as the superintendent's designee for a hearing. Ms. Huey conducted a remote hearing of both appeals on July 13, 2021. Ms. Powell was represented by Sheila Harte-Dmitriev, Uniserve Director, TABCO. Ms. Huey issued a decision on August 27, 2021, affirming the evaluation and the non-renewal of Ms. Powell's contract. She notified Ms. Powell of her right to appeal to the local board. (Joint Ex. 8).

Ms. Powell timely appealed Ms. Huey's decisions to the local board. The local board referred the matter to independent hearing examiner Roger Thomas Esq. for a full hearing. Appellant and two additional witnesses testified on her behalf. Four witnesses testified on behalf of BCPS. In the June 1, 2022, 40-page decision, Mr. Thomas recommended that the local board uphold the ineffective rating as well as the local superintendent's decision not to renew Ms. Powell's contract. (Joint Ex. 9). Mr. Thomas noted that the issues regarding technology problems and Appellant's absences were taken into consideration during the evaluation process,

that Appellant's assertions regarding lack of training were not supported by the record, and that there was an abundance of evidence documenting Appellant's performance deficiencies. *Id.* After oral argument before the local board, on August 31, 2022, the board was unable to attain a majority decision to either accept or reject the local superintendent's decision. Thus, the local superintendent's decision to affirm the evaluation and contract non-renewal stood as final.

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. 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. *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). 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 law, a local board may choose not to renew a probationary teaching contract for any reason, or no reason at all, if the reason is not an illegal one. *See Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003). *See also, Hudson v. Prince George's Co. Bd. of Ed.*, MSBE17-16 (2007) (a non-tenured staff contract can be non-renewed for any reason or for no reason, as long as it is not an illegal reason). Further, under COMAR 13A.07.02.01(B), the regular teacher's contract for probationary employees is subject to non-renewal at the end of each probationary year. Therefore, as a probationary employee, Ms. Powell could have no expectation of continued employment during the probationary period of her contract.

In fact, the State Board has held that a local board may even non-renew a probationary teacher's contract despite satisfactory evaluations. *See Bricker v. Frederick County Bd. of Educ.*, 3 Op. MSBE 99 (1982). Thus, the only question in these cases is whether the local board non-renewed Appellant's probationary contract based on illegal or discriminatory reasons. *See Zarrilli v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 21-04 (2021).

Because the State Board has held that even a satisfactory evaluation does not guarantee that a probationary contract will not be renewed, Appellant's disagreement with her evaluation rating does not demonstrate an illegal basis for the non-renewal.

Appellant has argued that she did not receive adequate training and that her performance was hindered by the virtual learning environment and the November 2020 ransomware attack. (R.E. 1e, Tr. 71-77). The local board's hearing examiner determined that Appellant's argument

regarding her perceived lack of training was not supported by the evidence. He wrote that there was “an abundance and myriad of training opportunities made available to Appellant during the 2020-2021 school year.” (R.E. 1b). The hearing examiner highlighted the following:

- Appellant had three mentors;
- Appellant had an assistance plan;
- Professional learning included the Professional Learning Communities, access to course work from the New Employee Orientation training, and access to training documents and manuals. (R.E. 1, Supt. Exs. 10-13).

It may be that the difficulties inherent in the virtual learning environment compounded by the ransomware attack contributed to the Appellant’s ineffective performance, but that does not mean that the decision not to renew her contract was illegal. Nor does it render the observation and evaluation process arbitrary or unreasonable. Specifically, the hearing examiner noted that the technology problems complained of by Appellant were not unique to her and other employees were able to compensate and make adjustments.

The State Board of Education has recognized retaliation as an illegal reason for non-renewing a contract if it is done in response to an employee engaging in protected activity. *See Dorsey v. Carroll County Bd. of Educ.*, MSBE Op. No. 19-35 (2019), citing *Young v. Prince George’s County Bd. of Educ.*, MSBE Op. no. 17-39 (2017). The Appellant has alleged retaliation based on alleged violation her rights under the ADA.

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 or her; 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 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 are pretextual. *Id.*

In the instant case, BCPS acknowledges that the Appellant sought and received accommodations under the ADA and used accrued leave. The Appellant asserts that these actions were the reason for non-renewal. The non-renewal of her contract is undeniably a materially adverse action taken by the local superintendent. However, there must be evidence establishing a causal connection between her request for accommodations and use of accrued leave and the non-renewal of her employment contract.

We agree with the school system that Appellant failed to present sufficient evidence to demonstrate that the decision to non-renew her contract was illegal. (R.E. 1b). We note particularly that the filing for ADA accommodations in March 2021 postdated the concerns in Appellant’s January, February, and March evaluations. (R.E. 1b). The Appellant has not demonstrated the requisite causal connection but, even if she had done so, the Appellant’s consistent ineffective performances over the course of the school year provided a legitimate non-

discriminatory reason for the adverse action. *See, Young v. Prince George's County Bd. of Educ.*, MSBE Op. No. 17-39 (2017).

We address one final matter. In her statement of issues, Appellant argues that the failure of the local board to reach a majority decision renders the decision arbitrary, unreasonable, or illegal. (R.E 4). The State Board ruled on this very issue in *Wayne Fields v. Baltimore County Bd. of Educ.*, MSBE Op. No. 16-05 (2016). The State Board noted:

Courts when faced with a lack of majority, recognize that “a conscious non-decision is a form, albeit a rare one, of deciding.” *Lee v. State*, 69 Md. App. 302, 312 (1986), *aff'd* 312 Md. 642 (1988). The court in *Lee v. State* explained the effect of the failure to obtain sufficient votes for reversal:

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for nor order can be made. The judgment of the court below, therefore stands in full force....

The decision is that the trial court judgment will not be reversed because the appellant has failed to persuade a majority of the reviewing court that it merits reversal. There is no lack of decisive impact on the case at hand. What is lacking is an agreed *ration decidendi* which can serve as binding precedential authority for future decisions.

Id. at 313-314 (citing *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868)).

Appellant was the moving party before the local board and it was her burden to show that the superintendent's decision was arbitrary, unreasonable, or illegal. By failing to convince a majority of the board that such was the case, the superintendent's decision rightly stands.

CONCLUSION

For all the reasons stated, we affirm the decision of the local superintendent.

Signatures on File:

Clarence C. Crawford
President

Susan J. Getty
Vice-President

Gail H. Bates

Chuen-Chin Bianca Chang

Charles R. Dashiell, Jr.

Joan Mele-McCarthy

Joshua Michael

Lori Morrow

Warner I. Sumpter

Absent:

Shawn D. Bartley
Rachel McCusker
Holly Wilcox

Abstained:

Jean Halle

April 26, 2023