MICHAEL S. BURTON,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
HARFORD COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 03-14

OPINION

Appellant challenges the local board's decision upholding in part and overturning in part his suspension from school for 25 days for violating the school policy on controlled dangerous substances, alcohol, inhalants, other intoxicants, or substances misrepresented to be such. The local board has filed a Motion to Dismiss and/or for Summary Affirmance maintaining that its decision, which upheld the policy violation but reduced the length of the suspension by five days, was not arbitrary, unreasonable, or illegal. Appellant filed a lengthy response in opposition to the Motion.

FACTUAL BACKGROUND

Appellant is an eighth grade student at Southampton Middle School in Harford County. On November 7, 2002, Appellant's physical education teacher, Mr. Feldscher, observed Appellant placing his face in his shirt during class. Mr. Feldscher asked Appellant whether he was okay and whether he needed to blow his nose, and Appellant responded in the negative. Within several minutes, Mr. Feldscher observed Appellant putting his face inside his shirt two more times. Mr. Feldscher had Appellant step out into the hallway. While in the hallway, Mr. Feldscher observed a black felt tip marker in Appellant's hand. Mr. Feldscher asked Appellant what he was doing with the marker and Appellant responded that he was smelling it. *See* Record of Behavior and Tr. 5-6. The marker had been altered so that the tip was even with the top of its casing making the marker unusable for writing. At the hearing before the local board, the principal testified that the purpose of pushing the marker down is that when it is sniffed, the ink tip does not touch the nose or face of the user, and it also intensifies the odor of the marker. Tr. 27.

The Assistant Principal, Kimberly Marine, conducted an investigation of the incident. While interviewing the Appellant, she inquired as to his reason for sniffing the marker. Appellant indicated that he "wanted to see what it would do."[1] *See* Report of Incident by

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[1]Appellant's testimony at the local board hearing was in contradiction to the testimony of Mr. Feldscher and Assistant Principal Marine. Appellant testified that Mr. Feldscher lied when he said he observed Appellant smelling the marker under his shirt at three different times. Tr. 49. Likewise, Appellant testified that Ms. Marine lied when she said Appellant told her he was

Kimberly Marine and her testimony at Tr. 15. Upon review of the entire incident, the Principal, Barbara Canavan, suspended Appellant on November 8, 2002, from the Harford County Public School System for ten days for violating Code 202 - Inhalants, and referred the matter to the local superintendent for further action.

Robert McCone, Assistant Supervisor for Student Service serving as the superintendent's designee, reviewed the case and held a suspension conference on November 12, 2002, at which Michael and his parents were present. At the conference, Appellant had the opportunity to present his version of what occurred. Mr. McCone offered to have Appellant partake in the Harford County Substance Abuse Program, however Michael and his parents declined. After reviewing the matter, the local superintendent imposed an additional 15 days suspension which was consistent with past practice for other students with similar offenses.[2] Tr. 36. During the hearing before the local board, there was testimony and argument that the suspension was based on violation of that portion of the policy concerning the possession or use of substances misrepresented to be a controlled dangerous substance. Tr. 37, 58.

Appellant appealed the decision of the local superintendent to the local board. A full evidentiary hearing was held in which Appellant had the opportunity to present testimony and evidence, and cross examine witnesses.[3] Based on the evidence before it, the local board upheld the superintendent's determination that Appellant had violated the local board policy, but found due to mitigating circumstances presented at the hearing that Appellant's suspension should be reduced by five school days.

ANALYSIS

A decision of a local board with respect to a student suspension or expulsion is considered final. Md. Code Ann., Educ. § 7-305. Therefore, the State Board's review is limited to determining whether the local board violated State or local law, policies, or procedures; whether the local board violated the due process rights of the student; or whether the local board acted in an otherwise unconstitutional manner. COMAR 13A.01.01.03(E)(4)(b).

Appellant essentially argues that there is insufficient evidence to support a finding that he violated the local board's policy regarding inhalants. Specifically he notes the fact that the marker was never produced during the appeal process and was not tested to determine whether it

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smelling the marker to see what it would do. Tr. 50-51.

[2]Appellant has been subject to other disciplinary actions prior to this suspension. *See* student record of disciplinary actions at Southampton Middle School.

[3]Appellant was represented by legal counsel at the hearing.

was toxic or contained inhalants.[4] He also notes that there is no evidence that he was intoxicated from smelling the marker or that he believed smelling the marker could produce a drug or inhalant-like euphoria.

The Southampton Middle School Parent - Student Handbook contains the school policy regarding the possession or use of controlled dangerous substances, alcohol, inhalants and other intoxicants stating:

> **A student who has been found** to be either in possession of or to be using a controlled dangerous substance, alcohol, and inhalant or other intoxicant, or **to be in possession of** paraphernalia or **a substance misrepresented to be a controlled dangerous substance** or alcohol, will be suspended for ten school days by the principal and referred to the Office of the Superintendent of Schools for further disciplinary action. If the Superintendent concurs with the findings of the principal, a long-term suspension/expulsion will be imposed after considering the nature and severity of the behavior and other factors related to the student's school record. In addition, the appropriate police agency will be notified promptly. (Emphasis added).

Handbook at 6.[5] The definition of a "Substance Misrepresented" is a "substance which a student misrepresents to be a controlled dangerous substance, or thinks to be a controlled dangerous substance, implies is a controlled dangerous substance, or will produce the effects of a controlled dangerous substance." Handbook at 8. Additionally, the definition of "Controlled Dangerous Substance" is as follows:

> Controlled dangerous substances include, but are not limited to, the substances listed in Article 27 of the Annotated Code of Maryland. In addition, **substances**, and this includes medicine not registered with the school nurse, **which are intended, implied, or are thought to produce the same or similar effects as substances listed in the Code are also regarded as controlled dangerous substances.** (Emphasis added).

Handbook at 7.

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[4]The marker had been turned over to the police and remained in police custody at the time of the suspension hearing. (Tr. 27-28).

[5]"Inhalant or Other Intoxicant" is defined as "[a]ny compound or substance (such as glue and solvents) which may cause a loss of self-control or inebriation." Handbook at 8.

Here, the suspension was not for possession or use of an inhalant. Rather, the superintendent suspended Appellant for behavior which constituted misrepresentation of a substance thought or implied to be a controlled dangerous substance in violation of local board policy. Thus, the fact that the marker could not be produced as evidence before the local board and could not be tested because it was in police custody does not pose a problem in this case. Appellant engaged in behavior consistent with using the marker for the purpose of mood alteration or inebriation. He was observed sniffing the marker on three separate occasions within a span of a few minutes and admitted to smelling the marker to see what effect it would have on him. Additionally, the marker was altered in a manner consistent with utilizing it for inhalation. Appellant's actions with respect to the altered magic marker create a reasonable inference that he thought the marker would alter his mood or result in some type of intoxication, implying that the marker could be a controlled dangerous substance.

The fact that Appellant's testimony at times contradicts the testimony of school officials is a credibility dispute left to the trier of fact. Based on the local board's decision, we believe it found the superintendent's witnesses to be more credible than Appellant. *See, e.g., Board of Trustees v. Novik*, 87 Md. App. 308, 312 (1991), *aff'd*, 326 Md. 450 (1992) ("It is within the Examiner's province to resolve conflicting evidence. Where conflicting inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences."). Where conflicting inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences"); *Board of Educ. v. Paynor*, 303 Md. 22, 36 (1985) ("[N]ot only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences").

CONCLUSION

For these reasons and based upon our review of the record, we find no due process violations or other illegalities in the proceedings. We therefore affirm the suspension decision of the Board of Education of Harford County.

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March 25, 2003