

ROBERT J. CONE',

Appellant

v.

CARROLL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 99-31

OPINION

This is an appeal of a ten day suspension without pay of a non-certificated custodial employee on the basis of gross misconduct as a result of a verbal altercation between the employee and a parent of two students at the school. Appellant asserts that: (1) he was unaware of his burden of proof at the local level hearing and would have presented further evidence if he had known that he had to demonstrate that the superintendent's decision was arbitrary, unreasonable, or illegal; (2) he was not interviewed as part of the investigation of the incident resulting in the suspension, therefore the superintendent did not have all of the facts before him to make a balanced decision; and (3) the testimony of various witnesses at the hearing before the local hearing examiner was inaccurate.¹ The local board has filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable or illegal.

BACKGROUND

Appellant was employed as a custodian with the Carroll County Public School System for approximately six years. At the time of the incident at issue he was assigned to Sandymount Elementary School.² In the fall of 1997, employees at Sandymount noticed a sharp change in Appellant's generally outgoing and friendly behavior. Several of the staff members expressed their concerns about Mr. Cone' to the principal, Ms. Mills, and requested that she ascertain if Appellant was bothered by anything. When Ms. Mills encountered Appellant at an evening event at the school, she invited him to her office and expressed the concerns of the staff. Appellant became extremely agitated, and requested that the staff members with inquiries address him directly. He also requested that Ms. Mills inform the staff that he wanted them to leave him alone and not speak to him. The Assistant Principal, Ms. Swam, was in the adjacent office when this

¹Other issues were addressed by the local level hearing examiner in his report; however, Appellant does not challenge all aspects of the decision.

²Appellant subsequently agreed to a voluntary transfer to Sykesville Middle School. We have been further advised that Appellant resigned from the Carroll County Public School System in April, 1999.

meeting took place. She indicated that she could hear how agitated Appellant had become and that she was concerned for Ms. Mills' safety.

In December, 1997, Ms. Mills received information from the head custodian, Mr. Parks, that an incident had occurred between Appellant and another custodian, Ms. Ford. On the evening of December 9, 1997, Ms. Ford had used the rest room facilities in Appellant's cleaning area in contravention of Appellant's previous requests that she not do so. Ms. Ford reported that Appellant approached her in the school parking lot later that evening, used loud and abusive language, and threatened to kill her if she did not get into the car and leave. These actions were verified by a witness at the school, and Appellant later admitted to losing his temper with Ms. Ford. Based on the investigation of the episode, Appellant was issued a letter of reprimand. He was advised that "[i]f any incidents of this nature occur in the future, it will be necessary to take further disciplinary actions including suspension or possible termination."

On March 4, 1998, a parent of two students at the school³ entered the school building to retrieve his children when he encountered Appellant. The two entered into a conversation which ultimately resulted in Appellant using profane language. As the hearing examiner noted:

At the time of the verbal altercation between Cone' and Farinholt, Patricia Spangler ('Spangler'), who was an Administrative Assistant at the School, left the building to move her vehicle. As she started to reenter the building she overheard a loud discussion between Cone' and Farinholt. She heard Cone' tell Farinholt to: 'Shut your f..... mouth' and other dialogue that she could not decipher. Spangler sought out others in the School with which to share her concerns.

Hearing Examiner's Report pp. 4-5. As a result of this incident, the school principal recommended that Appellant be suspended for ten days without pay, and that he be evaluated by the Employee Counseling Program. By letter dated March 6, 1998, after conducting his own review of the matter, the superintendent's designee advised Appellant of his suspension based on his "gross misconduct and lack of respect toward a member of the school community." In response to the letter, Cone' did not deny the use of expletives, but offered the explanation that his actions were a reaction to the behavior of the parent.

Appellant appealed the suspension decision to the local board. He also filed a complaint with the Maryland Human Relations Commission asserting that he was a target of sexual harassment by various school employees.⁴ A full evidentiary hearing⁵ on the suspension was

³This parent's wife was also a teacher at the school.

⁴With regard to the harassment claims, a full investigation was made into Appellant's allegations, including an interview of Appellant at a May 11, 1998 meeting, which was recorded and transcribed, where he presented the particulars of his claims. In brief, Appellant believed in retrospect that various actions by other employees at the school, dating as far back as 1996, were designed to harass him because the other employees were confused about his sexual orientation

conducted before a hearing examiner, who issued a decision recommending that the local board uphold the superintendent's decision to suspend Appellant.

Oral argument took place before the local board. The local board issued a decision dated February 10, 1999, adopting, with minor corrections, the findings of fact and conclusions of law of the hearing examiner, thereby upholding the suspension decision.

ANALYSIS

The standard of review in an appeal concerning the suspension of non-certificated staff is set forth in COMAR 13A.01.01.03E (1). In such cases, the local board's decision is considered prima facie correct and the State Board will not substitute its judgment for that of the local board unless its decision is arbitrary, unreasonable, or illegal. See *Thomas E. Ervin v. Anne Arundel County Board of Education*, MSBE Opinion No. 99-15 (March 30, 1999); *James Ferguson v. Prince George's County Board of Education*, MSBE Opinion No. 98-35 (June 24, 1998); *Livers v. Charles County Board of Education*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied*, 336 Md. 594 (1994).

As a preliminary matter, Appellant claims that he was unaware of the standard of proof at the local level hearing. It is noteworthy that at Appellant's choice, he was represented at the hearing by a union representative who conducted Appellant's case. At no time during the hearing did Appellant indicate that he was unaware of the procedures or uncomfortable with his representation, even when the attorney for the superintendent specifically referenced the standard of proof in his closing argument. Tr. at 176. Therefore, because Appellant failed to raise this issue below, we find that he has waived his right to raise the issue for the first time before the State Board. See *Chase Craven v. Board of Education of Montgomery County*, MSBE Opinion No. 97-43 (October 29, 1997)(failure to challenge suspension before local board constituted waiver); *Earl Hart v. Board of Education of St. Mary's County*, MSBE Opinion No 97-37 (September 25, 1996)(failure to raise issue of age discrimination below constituted waiver on appeal).

Appellant also contends that he was not interviewed as part of the investigation of the incident which resulted in his suspension. He claims that because of this failure, the superintendent's decision was not supported by appropriate facts. While we believe the better procedure would have been to question Appellant concerning this incident before the suspension was initiated, we find that the record contains sufficient independent evidence through the statements of a witness who corroborated the parent's report of the altercation.

after he performed in a school Christmas show. Appellant's charges were ruled as unsubstantiated because there was no evidence to confirm that the harassment took place.

⁵Appellant was represented by his union representative.

Furthermore, any errors that may have occurred during the investigation by the principal or by the superintendent's designee were cured by the full evidentiary hearing on appeal to the local board, where Appellant testified on his own behalf, and had the opportunity to present evidence and examine witnesses. *See Cory Williamson v. Board of Education of Anne Arundel County*, MSBE Opinion No. 97-20 (April 30, 1997) (failure to give prompt notice would be cured by local board's full evidentiary hearing on appeal); *West & Bethel v. Board of Commissioners of Baltimore City*, MSBE Opinion No. 96-47 (December 10, 1996) (failure to hold conference within ten days was cured by the de novo administrative hearing on merits before the local board); *Harrison v. Somerset County Board of Education*, MSBE Opinion No. 96-28 (July 30, 1996) (failure to grant conference with superintendent or his representative in timely fashion was cured by local board's full evidentiary hearing on appeal).

Appellant further challenges the decision in this case because he questions the credibility of various witnesses who testified at the local level hearing concerning events surrounding his suspension and the alleged harassment. As the record reflects, the local board considered the entire record in making its decision to uphold the suspension.⁶ Part of the board's deliberative process included making credibility decisions concerning the witnesses and their testimony. As stated above, the decision of the local board is considered prima facie correct. Appellant must demonstrate that the local board acted arbitrarily, unreasonably or illegally. Based upon our review of the record in this case, we find sufficient evidence to support the conclusion that the suspension was warranted and that there was no harassment or retaliation tainting the suspension decision. Nor do we find the decision arbitrary or otherwise illegal.

CONCLUSION

For these reasons, we affirm the decision of the Board of Education of Carroll County.

Walter Sondheim, Jr.
President

Edward Andrews
Vice President

Raymond V. Bartlett

JoAnn T. Bell

Philip S. Benzil

⁶The local board even noted items from the hearing examiner's report that required correction.

George W. Fisher, Sr.

Morris Jones

Marilyn D. Maulsby

Judith McHale

Adrienne L. Ottaviani

John Wisthoff

June 30, 1999