

CAROL PENCE,

Appellant

v.

HARFORD COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-24

OPINION

This is an appeal of the dismissal of a food service worker based on sick leave abuse. The local board has filed a Motion to Dismiss for untimeliness as well as for failure to state a claim. Alternatively, the local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Although invited to submit a reply to the board's motion, Appellant did not respond.

BACKGROUND

Appellant was employed as a food service worker with Harford County Public Schools for approximately 10 years. Beginning with the 1992-93 school year, she worked at Edgewood Middle School where her performance was generally deemed satisfactory to excellent. When the 1998-99 school year began, Appellant worked the first nine days, but did not report to work for the remainder of the school year allegedly due to illness.¹ Appellant was out on sick leave from September 18, 1998 through January 8, 1999, and received sick leave pay for this period of time.

During Appellant's absence from work, she provided her supervisor with health certifications from two different health care professionals indicating her inability to work for periods of time based on illness. Appellant did not deliver the notes to her employer during business hours, but would slip them under the office door over the weekend. Appellant also made it a practice not to speak with her supervisor or school administrators directly about her work status. (Tr. 110, 113). The following is a summary of the communications she submitted to the school system:

- Computer generated form signed by Dr. Marvin J. Rombro indicating that Appellant was under professional care for panic attack and high blood pressure; that she was unable to return to work from September 21, 1998 to October 4, 1998, but that she would be able to return to work on October 5, 1998 without

¹Appellant was employed as a 6-hour food and nutrition worker at Edgewood during the 1998-99 school year.

restrictions.

- Patient's health status form from Robert S. Pinkus, licensed clinical social worker, dated October 1, 1998, diagnosing Appellant with "depressive symptoms" and indicating "no work x 2 weeks" and return to work on October 19, 1998.
- Patient's health status form from Robert S. Pinkus dated October 15, 1998, diagnosing Appellant with "major depression" and indicating "no work until 11-2-98".
- Patient's health status form from Robert S. Pinkus dated October 30, 1998, diagnosing Appellant with "depression" and indicating "no work x 2 weeks (November 16, 1998)".
- Patient's health status form from Mr. Pinkus dated November 19, 1998, diagnosing Appellant with "major depression" and indicating that she "will return to work on November 30, 1998".
- Patient's health status form from Mr. Pinkus dated November 25, 1998, diagnosing Appellant with "major depression/moderate" and indicating that she will be "out of work until 1/4/99".

During the time Appellant was absent from work collecting sick leave pay, school administrators discovered that she had been working as a cashier at a Rite Aid Warehouse Food Service Department on Saturdays from 7:00 am until 2:30 p.m.² None of the Appellant's health certifications excusing her from work for illness mentioned anything about Appellant being able to perform any type of work for any reason, nor did the certifications mention her doing any type of work for therapeutic or rehabilitative reasons to prepare her for her return to work as a food service employee with the school system.

On November 9, 1998, Wally Oberender, Supervisor of Personnel, and Mr. Brenton, Assistant Supervisor for Safety and Security, met with Appellant to discuss her work status. Although Appellant did not initially admit that she had been working at Rite Aid while accepting sick leave pay from the school system, she did concede the fact when Mr. Brenton indicated that the school system was aware of her weekend employment.³ Appellant informed Mr. Oberender

²This fact was confirmed by Mr. Wallace Brenton, an investigator with the school system's Office of Safety and Security, who contacted Rite Aid. (Tr. 35).

³Mr. Brenton testified as follows:

After she advised me what she had been doing for the time she was off, I told her I had information she was working at the Rite Aid Pharmaceutical Warehouse in the food service department. She

and Mr. Brenton that she had permission from her social worker to work at Rite Aid during her illness. (Tr. 37). Following the meeting, on November 11, 1998, Appellant submitted a letter from the social worker, Robert S. Pinkus, stating the following:

I have been meeting with Mrs. Pence on a regularly scheduled basis in an effort to treat her symptoms of depression and resulting inability to work. It has been her intention from the beginning to work in food service for the Harford County Public Schools. I have both known and supported her working in any related occupation for only a few hours per week in an effort to ready her for her usual work responsibilities.

As of today, I expect that she will return to her position and be able to manage her job responsibilities on November 23, 1998.⁴

On November 12, 1998, Karen R. Sarno, Supervisor of Food and Nutrition, recommended to the superintendent that Appellant be terminated from her position based on sick leave abuse for working another job while on sick leave from the school system. Thereafter, Appellant met with Dr. Kathleen M. Eng, Assistant Superintendent for Human Resources, Mr. Oberender, and Mr. Brenton. As a result of the meeting on December 31, 1998, the superintendent terminated Appellant from her position for sick leave abuse. The superintendent stated:

As you freely admitted that you could have worked part time for the Harford County Public School System and the fact that you did not seek a temporary reduction in hours or a different placement through avenues that were both available and known to you, I am supporting the recommendation of termination. Additionally, it must be noted that you did work one day a week for Rite-Aid during the time that you were paid for sick leave with the school system. (Haas letter of December 31, 1998).

hesitated. She got nervous and then she did come out with it and admitted she worked there on Saturdays as a cashier in the food service department. (Tr. 36-37).

During the hearing before the local board, Appellant claimed that her Saturday job was part of her therapy. (Tr. 94-95). She further testified that she initially failed to mention the Rite Aid job, not because she was being secretive, but because she did not believe it had anything to do with the situation. (Tr. 95).

⁴However, as noted above, after writing this November 11, 1998 letter, Mr. Pinkus signed two other health certifications excusing Appellant from work until January 4, 1999.

Appellant appealed her termination and the parties negotiated for a 6-month period in an attempt to settle the matter. The negotiations were unsuccessful.⁵

Thereafter, Appellant pursued her appeal to the local board, seeking restoration of her sick leave from January 1999 through the end of the 1998-99 school year. A full evidentiary hearing was held before the local board at which Appellant had the opportunity to present evidence and call witnesses. After full consideration of all of the evidence, the local board upheld the superintendent's decision to dismiss Appellant, noting primarily that (1) Appellant had begun work at Rite Aid prior to taking sick leave; (2) the cashier position at Rite Aid would have been as demanding, if not more demanding, than her position as food service worker; and (3) the health care notes provided by Appellant indicated that she was not to work at all, with no mention of rehabilitative work on Saturdays.

ANALYSIS

As a preliminary matter, the local board argues that this appeal should be dismissed because it was untimely filed. State law and regulation require appeals of local board decisions to be filed with the State Board within thirty days of the local board decision. *See* Md. Code Ann. Educ. § 4-205 (c) and COMAR 13A.01.01.03B (3). An appeal is deemed transmitted within the limitations period if it has been delivered to the State Board or deposited in the United States mail, as registered or certified, before the expiration of the time period. COMAR 13A.01.01.03B (3).

Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice. *See Scott v. Board of Education of Prince George's County*, 3 Op. MSBE 139 (1983); *See also* COMAR 13A.01.01.03G (2). The State Board has strictly applied this rule of law, and has dismissed appeals that have been filed a mere one day late based on untimeliness. *See Christine Schwalm v. Board of Education of Montgomery County*, 7 Op. MSBE 1326 (1998); *Marie Friedman v. Board of Education of Montgomery County*, 7 Op. MSBE 1260 (1998); *Eleanor Duckett v. Board of Education of Montgomery County*, 7 Op. MSBE 620 (1997).

Here, the local board decision was issued on January 5, 2000. The appeal to the State Board should have been filed with the State Board on or before February 4, 2000. However, the appeal was received on February 10, 2000, by certified mail postmarked February 9, 2000; five days beyond the limitation deadline. Appellant offers no reason for her failure to appeal in a timely manner. Nor does there appear to be any extraordinary circumstance that would merit an

⁵During negotiations, Appellant had accepted a position at Aberdeen Middle School. However, Appellant changed her mind and later resigned from the position. *See* Letter of Resignation dated August 15, 1999.

exception to the mandatory thirty day deadline. We accordingly dismiss the appeal as untimely.⁶

Moreover, even if the State Board were to consider this appeal, given the record in this case, we believe that the local board did not act arbitrarily, unreasonably, or illegally in reaching its conclusion. Although Appellant claims that her work at Rite Aid was part of her rehabilitation from her illness, Appellant began working at Rite Aid in the summer of 1998. This was prior to her being out from work on sick leave and prior to her sessions with Mr. Pinkus. (Tr. 37). The notes which Appellant submitted to the school system from Mr. Pinkus do not indicate that Appellant was able to perform some types of work but not others, or work only for certain periods of time for therapeutic purposes. This information came to light only after Appellant was confronted by her employer. Moreover, during a meeting with Dr. Kathleen Eng, Assistant Superintendent of Human Resources, Appellant admitted that she could have been working for the school system part-time during this period. (Tr. 65). Appellant, however, never actively pursued part time employment arrangements with the school system.⁷

The record also discloses that Appellant may have remained out on sick leave to avoid problems she was having with her supervisor, Linda Reynolds, and the change in her daily cashiering assignment. *See* Statement of Linda Reynolds; Statement of Wallace Brenton; (Tr. 96). Appellant herself admitted in her appeal to the State Board that she and Ms. Reynolds had confrontations prior to Appellant going out on sick leave which served as the basis for her failure

⁶As another preliminary matter, it is unclear in her appeal to the State Board whether Appellant claims that she was denied a meeting with the superintendent or the superintendent's representative regarding her dismissal pursuant to section 4.9 of the collective bargaining agreement. To the extent that she does raise this issue, we believe that any such claim lacks merit because procedures for dismissal of noncertificated employees are not subject to the collective bargaining process. *See Livers v. Charles County Bd. of Educ.*, 101 Md. App. 160 (1994). In any event, the full evidentiary hearing before the local board cured any alleged deficiency that occurred at the superintendent's level. *See Cory Williamson v. Board of Education of Anne Arundel County*, 7 Op. MSBE 649 (1997) (failure to give prompt notice would be cured by local board's full evidentiary hearing on appeal); *West & Bethea v. Board of Commissioners of Baltimore City*, 7 Op. MSBE 500 (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*, 7 Op. MSBE 391 (1996) (failure to grant conference with superintendent or his representative in timely fashion was cured by local board's full evidentiary hearing on appeal).

⁷Although Appellant did submit a letter dated October 31, 1998 to Linda Reynolds suggesting she could come back on a part time basis, that same letter indicated that she would be out of work for another five weeks, and Appellant continued to submit notes indicating her absence due to illness.

to return to work. *See* Appellant's Letter of Appeal to State Board.⁸

Finally, the record reveals that there is some question regarding Mr. Pinkus' credibility. It appears that he was not authorized to use the particular health status forms which he signed to excuse Appellant from work.⁹ (Tr. 40, 45, 47). Moreover, Dr. Eng testified that when she sought clarification from Mr. Pinkus on Appellant's working requirements and restrictions, he was not forthcoming in explaining his written documentation. (Tr. 64-65, 67). Despite these questions and concerns, Appellant did not have Mr. Pinkus testify on her behalf to clarify these matters.

CONCLUSION

For these reasons, we find that the local board did not act arbitrarily, unreasonably, or illegally in this matter. We therefore affirm the decision of the Board of Education of Harford County.

Edward Andrews
President

Philip S. Benzil
Vice President

Raymond V. Bartlett

JoAnn T. Bell

Reginald Dunn

George W. Fisher, Sr.

⁸Although Appellant claims for the first time on appeal to the State Board that Ms. Reynolds' behavior in early September was a form of harassment, she has failed to present any evidence to support this allegation. Furthermore, the State Board has consistently declined to address issues that have not been reviewed initially by the local board. *See Chase Craven v. Board of Education of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Earl Hart v. Board of Education of St. Mary's County*, 7 Op. MSBE Opinion 740 (1997) (failure to raise issue of age discrimination below constituted waiver on appeal). Because Appellant failed to raise this issue before the local board, she has waived her right to raise it before the State Board.

⁹Those forms belong to a practice called "Medical Health Group, P.A." where Mr. Pinkus leases office space but is not a member of the practice.

Marilyn D. Maultsby

Judith McHale

Edward Root

Walter Sondheim, Jr.

John Wisthoff

May 24, 2000