

NADINE R.,

Appellant

v.

BALTIMORE CITY BOARD OF SCHOOL
COMMISSIONERS,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-49

OPINION

INTRODUCTION

Nadine R., the Appellant, appeals the decision of the Baltimore City Board of School Commissioners (local board) to expel her granddaughter, Jordan R. The local board filed a Motion for Summary Affirmance.

FACTUAL BACKGROUND

On March 3, 2011 there were four fires set at Rising Star Academy. Three involved paper posters set afire on the hallway walls. The fourth involved the edge of a door to a classroom. Because she was seen in the vicinity of the fourth fire, Jordan R. became the center of the investigation. She was sent to the principal's office where apparently the principal spoke to her about the fire incident. There is no documentation in the record about this meeting. The principal suspended Jordan for 10 days pending a decision on long-term suspension/expulsion. At that time, Jordan was given a form to sign that stated that she was informed of the reasons for the proposed long-term suspension/expulsion and was given an opportunity to present her version of the incident. Jordan refused to sign the form. (Motion, Attachment 7, CEO Ex. 7).

The events of the day are set forth in four reports written by school staff. Specifically, the principal, Ms. Shaw, wrote a report about the fourth fire. It states, in part:

On March 3, 2011, I was standing near the back entrance and exit door. We I [sic] heard this running of a person down the steps. It was Jordan . . . and she was coughing. Mind you no one else was on the stairs or in the halls. Jordan quietly said that it was a fire upstairs and she could not breathe. I said to her to stand out side and take deep breathes of air. She stepped outside for about two seconds and then came quickly back into the building but still saying that she could not breathe. At that point, I called

for Officer Hicks and Mr. Whitehead because I was concerned about what I had just heard from Jordan. However, I did not smell any smoke at this time. Officer Hicks quickly ran upstairs and informed me that indeed it was a fire that had been set around a door in the back hall. I had staff evacuate the building immediately. As I started up the stairs to investigate, I looked on the floor where Jordan was standing and found a book of matches. I picked them up and proceeded upstairs when I found the guidance counselor, Mr. Jackson, holding a fire extinguisher because he had just put out the fire. Hence, the fire department was at the scene within a few minutes.

After investigating the entire incident, I found out that Mr. Jackson, guidance counselor, and Mr. Brown, hall monitor, saw Jordan . . . in the area seconds before the fire started. Both gentlemen stated that NO one was in the hall except Jordan . . . She is the young lady who is completely out of control. She won't listen and she disregards authority. She listens to no one.

(Motion, Attachment 7, CEO Ex. 5).

Mr. Jackson, the guidance counselor, filed a brief report stating:

As I was standing at the media-center doorway and stairwell B, I was writing the names of anyone I saw in the hallway since Ms. Shaw had just called for a hall-sweep. Jordan had just come out of the media center and continued down the hallway towards my office. About a minute and a half later, I heard Ms. Henson saying there was a fire. I ran down the hallway and found the edge of Ms. Henson's door on fire. I grabbed my fire extinguisher in my office directly across the hallway and put the fire out.

(Motion, Attachment 7, CEO Ex. 2).

Mr. Whitehead, the Assistant Principal, filed a report:

On the day of the incident, Thursday, March 4, 2011¹ at approximately 1:45 PM, I was conferencing a student in my office, when Mrs. Shaw (Principal) called me informing me that our school building was on fire, and we needed to evacuate immediately. However, the fire was contained to a classroom door, outside of room 211. The fire was immediately extinguished by Mr. Jackson (School Counselor). Jordan was seen by Mrs. Shaw (School Principal), leaving the area within second [sic] after the fire. Also, she was seen by Mr. Jackson (School Counselor), and Mr. James Brown (Hall Monitor), leaving the area, where the fire was noticed.

¹ The correct date is March 3, 2011.

School Police/Baltimore City Fire Department were called and informed of the incident, and when our students returned to the building, Jordan was sent to the main office, where she was placed on a long-term suspension.

(*Id.*, CEO Ex. 3)

Mr. Whitehead also wrote in his report that Jordan had been “a constant disruption since the start of school.” He recommended that she be placed in another school that had a “therapeutic element.” (*Id.*)

Mr. Brown, the hall monitor, said in his report filed:

On Thursday March 3, 2011, I was stationed in the main hallway by room 208. I saw Jordan R. in the hallway prior to the fire. She was facing the direction of Mr. Dehnam’s room on the second floor. When I saw her she was standing right by Mr. Jackson’s office. Mr. Jackson also saw Jordan in the hallway. I told Jordan to go to class. She went down stairs toward the first floor and immediately I smelled smoke coming from the direction she had just left. When I went down the hallway to investigate, I found Ms. Henson’s door on fire (This room is directly across from Mr. Jackson’s office).

(*Id.*, CEO Ex. 4)

On March 14, 2011, the Office of Suspension Services held a conference with Nadine R. and Jordan R. The Proposed Long-Term Suspension or Expulsion Conference Report states:

According to the suspension report, on March 3, 2011, the principal, Patricia Shaw, was standing near the back entrance and exit door, when she heard someone running down the steps. The person was identified as Jordan . . . and she was coughing. Jordan told the principal that it was a fire upstairs and she could not breathe. She was directed to stand outside and take deep breaths. When she continued to have breathing problems Officer was called. There was no smell of smoke but Officer Hicks ran upstairs to investigate. He reported that there had been a fire set around a door in the back hall. The staff evacuated the building. The principal looked on the floor where Jordan was standing and found a book of matches. She picked them up and proceeded upstairs where she found the guidance counselor, Mr. Jackson (Guidance Counselor) holding a fire extinguisher putting out the fire. The fire department arrived at the scene within minutes.

(Motion, Attachment 7, CEO, Ex. 11).

At that conference, the Suspension Office recommended that Jordan be expelled for a

Code 501 violation, arson/fire. (*Id.*, CEO Ex. 12). There are no other notes or documents in the record about that conference. On March 23, 2011, Chief Executive Officer, Dr. Alonso, expelled Jordan from school. He explained in his letter that in September, 2011 her case would be reviewed for reinstatement in Baltimore City Schools. (*Id.*, CEO Ex. 13).

The Appellant appealed the CEO's decision and a hearing was held on April 12, 2011. The Appellant appeared *pro se*. Two witnesses testified for the school system - - the Assistant Principal, Mr. Whitehead, and the Guidance Counselor, Mr. Jackson.

Mr. Whitehead's testimony describes all of the fire events of the day.

It started maybe around 1:30 in the afternoon. I was in the main office on the first floor. My office is on the second floor where the fire was set.

The secretary, Ms. Brown, said, Mr. Whitehead, we have a fire set. Somebody set some posters on the (inaudible) board on fire. I come out of the main office, I rip the posters off the wall, stomp on them, and put the fire out. Then, I go around the hall around the first floor where our infants and toddlers center is and somebody lit some posters on that wall also on fire. I consequently pulled them down and put them out.

At the same time, someone called the main office and said, Ms. Shaw, it's a fire on the second floor. I said, fire on the second floor? So, I go up stairwell C and - can I see the (inaudible)?

A. Okay, I go up stairwell C which is in here, [CEO Exhibit 1] on the first floor to the second floor. The principal, Ms. Shaw, she was on this end of the building. She goes up stairwell A, also to the second floor. When I get to the top of the second floor, our eyes meet. She said, Mr. Whitehead, look down at the end of the hall. There's a fire around by the math room which is in this corner back up in here. A poster was on fire. I ripped that down and put that out.

She said, Mr. Whitehead, we're going to have to - we're going to do a hall sweep. Also, at the same time, a minute later, Mr. Whitehead, we have to evacuate the building immediately. So, the fire alarm is rang. So, all the students are exiting the building by stairwell A, B, and C.

Now, customarily when we have a fire drill, I sweep the building to make sure no one is left in the building. So, after everyone is outside from what I can see, I come back in stairwell C, I walk down the first floor hallway, down the main hallway and then I get another call. Mr. Whitehead, we have a fire upstairs. I said, a fire upstairs? I put the fires out.

So, I immediately come back in the building. First of all, I go to the front

door. I look outside. All the students, all the staff and teachers are outside the building. I come back in the front door, I come up stairwell B. The time I get to the top of the stairs, the room, the second floor is full of smoke.

So, I walk down the hallway. When get down the hallway where Mr. Jackson and Mr. Brown was, I saw Mr. Jackson, Ms. Shaw, Officer Hicks and – it was Jackson, Hicks, Mr. Brown and Ms. Shaw in the hallway right here. I saw the door ablaze. That's when I called the fire department. (T. 24-27)

Mr. Jackson, the Guidance Counselor, testified about the fourth fire only. He said in response to counsel's questions

I saw Jordan walking down the hall. The last person I saw walking down the hall in the direction the fire was started in. Ms. Shaw had called – the principal had just called for a hall sweep. So, I left my office and I posted at the position where there was the most activity going on. Where there's usually the most activity. With a paper and pencil, so the students can see me, that I'm taking names. I deliberately did that. Jordan . . . and Taquan –

Q. If we could keep the testimony to Ms. R.

A. All right. Jordan came out of the media center, walked past me and went down the hallway toward where my office is. Where my office is located. So, I wrote her name down and then I continued to stand there. She was the last person who went down the hallway or came back.

. . . .
About a minute to a minute and a half later, Ms. Henson stood at the corner hollering fire. So, that's when I ran down the hallway and I used my fire extinguisher because that was the closest. The fire was set right across the hallway from my office and I used my fire extinguisher to put out the fire.

(T. 14-15)

At the hearing, the Appellant attempted to question both witnesses but had difficulty framing questions. (*See, e.g.*, T. 19-22; 48-50; 56-59). During Mr. Whitehead's testimony, however, Appellant was successful, with the help of the Hearing Officer, in getting a copy of the police report. (T. 48-52). No student was named in the police report. (T.52).

The Appellant herself then testified about some of the events that occurred after she learned that her granddaughter was suspended:

I asked Ms. Shaw if she had any evidence, any witnesses, anything,

because it's outside. You know, matches could drop. She told me no. I asked her how could she just come up with arson for Jordan because she had no evidence. She told me because she could. Which made me – this is why I'm here. Because of her attitude.

(T.62).

At the end of the hearing, the Hearing Office asked Jordan if she wanted to say anything. She said no.

Hearing Officer: Okay. Let me ask one question . . . Jordan, were you given the opportunity to do a narrative statement?

Jordan R.: No.

Hearing Officer: Did you have matches on you?

Jordan R.: No.

Hearing Officer : Did you tell – you were accused of –

Jordan R.: I didn't even know no matches was found at my feet because I was all the way at the bottom where the ground is standing in front of Ms. Shaw.

Hearing Officer: All right. Counsel?

(T. 73-74).

The Hearing Officer found the testimony of Jackson and Whitehead and the reports entered in evidence to be "substantial testimony . . . to support the finding that the Respondent committed arson/setting a fire." (Motion, Attachment 7, H.O. Decision at 10). In his Findings of Fact Conclusions of Law, he summarized the evidence this way:

Jackson testified that he saw the Respondent travel to the fire area and then back from the area shortly after the fire was reported. Jackson testified that based on his positioning in the hallway, Respondent proceeded to walk toward the area where the fire subsequently occurred. Jackson testified that the Respondent was the only student in the fire area and hallway.

Whitehead testified that after clearing the students from the building due to the two (2) previous fires, he was contacted by a school staff person, that there was a third fire. Whitehead testified that he re-entered the building and saw a fire on the second floor. Whitehead further testified he was the responsible person to conduct an investigation. Whitehead testified that his investigation produced a narrative statement that the Respondent was the only student in the building near the fire; that the student had been ordered to evacuate the building; that the Respondent was caught in the building coughing from smoke inhalation; and that the Principal saw matches in the hallway near Respondent. Whitehead testified that school staff person Jackson saw the Respondent going pass (sic) him to the fire area and returning from the fire area shortly after the

fire had occurred.

(*Id.*, H.O. Decision at 6).

As to the Appellant's case, the Hearing Officer explained that the Appellant had "raised some interesting points that would carry substantial weight in a criminal proceeding." *Id.* at 10. They were:

1. That there were other fires in the building and there may have been other student(s) involved in the fires and . . . they were not disciplined.
2. That no one saw the Respondent set the fire.
3. That the Respondent was not searched and no matches were found on her.

Id.

On May 18, 2011, the Hearing Office recommended to the local board that the CEO's decision to expel Jordan be affirmed. On June 14, 2011, the local board considered the Hearing Officer's recommendation in executive session² and, in public session, announced its unanimous vote to approve the CEO's decision. (Motion, Attachment 4, Affidavit of Janet Johnson, Paragraph 6). The local board issued no written decision. Its decision is reflected in "Agenda Item Details" in the following way:

Agenda Item Details

Meeting Jun 14, 2011 – Public Board Meeting
Category 6. ACTION ITEMS
Subject 6.03 Appeals and Hearing – Case No. 1011-128460
Type Action (Consent)

Motion & Voting

to approve items as deliberated by the Board and as presented herein.
Motion by Anirban Basu, second by Jerelle Francois – Vice – Chair.
Final Resolution: Motion Carries
Yea: Neil E. Duke – Chair, Jerelle Francois – Vice Chair, Lisa Akchin
Anirban Basu, Tina Hike-Hubbard, David Stone

(Motion, Attachment 4, p.1 after Affidavit).

This appeal was filed on July 8, 2011 and, because it was a discipline case, the briefing schedule was expedited. We note that during her expulsion Jordan was assigned to Middle School Alternative Center. On July 26, 2011, she was reinstated in school and assigned to Edmondson/Westside High School to attend as of August 29, 2011. (Motion, Attachment 3, Affidavit of Christine Chican, Paragraph 3).

² There are no minutes in the record of the executive session.

STANDARD OF REVIEW

Pursuant to Section 7-305(c) of the Education Article of the Annotated Code of Maryland ("Ed. Art"), the decision of the a local board in a student suspension or expulsion matter is considered final, and this Board may not review the merits of a student suspension or expulsion decision. COMAR 13A.01.05.05G(2). However, the State Board shall accept an appeal if there are specific factual and legal allegations that 1) the local board has not followed State of local law, policies, or procedures; 2) the local board has violated the due process rights of a student; or 3) the local board has acted in an unconstitutional manner. COMAR 13A.01.05.05G(2).

The State Board may reverse or modify a suspension or expulsion decision if the aforementioned allegations are true, or if the local board's decision was otherwise illegal. COMAR 13A.01.05.05G(3). A local board decision may be illegal if it is: "(1) unconstitutional; (2) exceeds the statutory authority or jurisdiction if the local board; (3) misconstrue the law; (4) results from an unlawful procedure; (5) is an abuse of discretionary powers; or (6) is affected by any other error of law." COMAR 13A.01.05.05.C.

LEGAL ANALYSIS

As we noted in the factual background, the local board did not issue a written decision in this case. In the usual case, we would remand the case for a written decision, but for the reasons stated herein a remand is not appropriate. Therefore, we proceed with the substance of this matter.

We begin with three compelling points. Arson is an extremely serious offense; to be accused of arson is extremely serious; to expel a student from school is the most extreme disciplinary action a school can take. Because of the seriousness of the accusation, the offense, and the deprivation that occurred here, we believe that it is particularly important for the school system to have followed due process procedures and adhered to due process principles. "The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976). The opportunity to be heard is the "the fundamental requisite of due process" and it must be given "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

The local board explains in its Motion for Summary Affirmance that it followed all the local due process policies and procedures for suspending and expelling a student. (Motion 3-6; 8-10). We agree that all the procedural i's were dotted and t's were crossed. An investigation occurred, notices were sent, conferences were held, an evidentiary hearing was conducted, a recommended decision was sent to the local board and that decision was affirmed by the local board. All of that occurred in a timely manner. Yet, following procedures must result in decision that is legally supportable.

A legally supportable decision must be based on sufficient facts to uphold the legal conclusion reached. Thus, in the parlance of evidentiary burdens, at the suspension hearing, the

local board had the burden to prove by a preponderance of the evidence that Jordan set the fourth fire. That evidentiary standard required the local board ultimately to show that it was more likely than not that Jordan set that fire. *See, Denkins v. State*, 29 Md. App. 577, 581, n.5 (1976). Therefore, we turn to the evidence.

At the hearing, the local board proved three facts. First, both Mr. Jackson and Mr. Brown saw Jordan walking down the hallway towards the area in which the fourth fire was set. Second, the principal found a book of matches somewhere in the vicinity of where Jordan was standing when she came down the stairs. When Jordan exited the building, she was coughing and said there was a fire. The local board inferred from those facts that it was more likely than not that Jordan set the fourth fire. All the evidence, however, does not point in that direction.

As the hearing officer recognized, the Appellant raised some good points challenging the factual underpinnings of the decision. Specifically, there were other fires in the building; no one saw Jordan set any of the fires; no matches were found on Jordan's person because no one searched her.

In addition, we note that Mr. Jackson's testimony briefly refers to another student (Taquan) who was in second floor hallway when Mr. Jackson saw Jordan there. Counsel for the local board cut off any further testimony about Taquan by telling Mr. Jackson, "If we could keep the testimony to [Ms. R]" (T. 14). No one followed up on Taquan's presence on the second floor.

We also note that the facts that the Hearing Officer relied on to support the expulsion do not comport fully with the testimony. The Hearing Officer stated twice in his decision that Mr. Jackson saw Jordan go to the fire area and then back from the area shortly after the fire was reported. (H.O. Decision at 6). Yet, nowhere in Mr. Jackson's testimony is there any reference to Jordan walking back from the area of the fire toward him. The Hearing Officer also states that Jordan "was caught in the building coughing from smoke inhalation." *Id.* Yet, the record does not support that fact. The Principal's report states, that while standing near the back entrance and exit door, she heard someone running down the stairs. It was Jordan and she was coughing. "Jordan said quietly that it was a fire upstairs and she could not breathe." (Motion, Attachment 7, CEO Ex.5).

In addition, the testimony of Mr. Whitehead differs substantially from his report. The report states that he was with a student in his office when the Principal called him that the "building was on fire and we needed to evacuate immediately." (*Id.* CEO Ex. 3). Mr. Whitehead's office is on the second floor. (T.24). In his testimony, however, he describes initially putting two fires out on the first floor when the principal calls him about a third fire, this time on the second floor. He puts that fire out. (T. 25). He gets another call about the fourth fire when, as he testified, he is again on the first floor. He runs upstairs where he sees Ms. Shaw, among others. (T.26-27). But, Ms. Shaw's report says she was at the back entrance when that fourth fire occurred.

The factual discrepancies in the record concern us. Of greater concern, however, is

whether Jordan had meaningful opportunity to be heard in her defense.

In this regard, we point out that Jordan was represented by her grandmother, the Appellant. The Appellant was *pro se*. She had no knowledge of the legal process. For example, after the Hearing Officer suggested that if the Appellant had wanted the principal to testify she should have subpoenaed her, the Appellant said "Well, you know what? Nobody gave me any information of what I was supposed to do." (T. 22). Of course, the local board is not required to provide a primer for *pro se* Appellants. We expect, however, that the Hearing Officer will provide assistance to *pro se* Appellants. It is clear from the transcript that the Hearing Office gave Nadine R. little assistance in framing questions. (See, T. 21, 45, 54. 57-59 but see T. 48, 51). Nadine R. knew nothing about evidence, burdens, or objections. She was far out of her league. (See, T. 62-63; 70-72).

Moreover, from the day of the fires to the day of the expulsion hearing, Jordan herself is heard from only once in the whole expulsion record - - when the Hearing Officer asks her two questions - - were you given the opportunity to do a narrative and did you have matches? Jordan answered no to both questions. And that was it. No further inquiry.

In our view, the hearing process as a whole had an element of unfairness about it. In describing that sense of unfairness, we return to the basic tenets of due process. They are notice of the charges and an opportunity to be heard in your own defense. That opportunity to be heard must be a meaningful opportunity. While we find in the record plenty of notice and procedural correctness, we find little to support a conclusion that Jordan had a meaningful opportunity to be heard in her own defense. Specifically, Jordan's grandmother was the main voice in her defense, but in raising that defense she faced almost insurmountable barriers at the hearing. Jordan's own voice was heard only once in this voluminous record - - the short colloquy with the Hearing Officer in which she denied that she had the matches.

Although we recognize that the Appellant has the burden to prove that the local board's decision is illegal, we must consider that the Appellant is *pro se*. The appeal she filed reflects her inexperience with the legal process. In a case in which the factual underpinnings for the decision are discrepant and circumstantial, it would compound unfairness for us to use the Appellant's *pro se* status as an excuse to affirm the local board in a *pro forma* manner.

Although we are not passing judgment on the merits of the actual expulsion here, but because we find that there was a less than meaningful opportunity for Jordan to be heard, we must conclude that Jordan R. did not receive due process. The decision to expel Jordan violates the Constitution, is illegal, and must be reversed. For the reasons stated herein, we reverse the decision of the local board and direct that all documents related to the arson and the expulsion be expunged from Jordan's record.


James H. DeGraffenreidt, Jr.
President

absent

Charlene M. Dukes
Vice President

Mary Kay Finan

Mary Kay Finan

S. James Gates, Jr.

S. James Gates, Jr.

Luisa Montero-Diaz *EMK*

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Sayed M. Naved

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Kate Walsh

Kate Walsh

December 6, 2011