BEFORE THE BOARD OF EDUCATION OF CARROLL COUNTY

IN THE MATTER OF *

*

* * * * * * * * * * * * *

DECISION AND ORDER

("Appellant") was a special education paraprofessional at worked at the school and for Carroll County Public Schools ("CCPS") for twelve (12) years prior to her termination on October 6, 2017. Superintendent of Schools Stephen H. Guthrie ("Superintendent) terminated for "interactions with a student," during which he found that used "excessive force . . . in the tone and volume" of voice, resulting in "a traumatic situation for the student." filed a timely appeal to the Board of Education ("Board") pursuant to §4-205(c) of the Education Article, Annotated Code of Maryland.

The Board appointed James R. Whattam, Esquire, as its hearing officer to conduct the appeal hearing, report his findings of fact and conclusions of law, and make a recommendation to the Board. Hearings were held on January 4, 2018, and February 2, 2018. Both parties were represented by counsel. The hearing officer issued a very detailed, 22-page report on March 13, 2018. The hearing officer recommended that the Superintendent's decision be affirmed.

The Board heard oral argument from the parties, through their respective counsel, on May 1, 2018, and deliberated in closed session following the arguments and again on May 30, 2018.

Decision

The Board reviewed the exhibits, read the transcripts of the two days of hearings and the hearing officer's report, and considered the oral arguments of the parties. For the reasons set forth below, the Board adopts the hearing officer's Findings of Fact and his Analysis, except to the extent that it conflicts with this Decision. The Board concludes, however, that terminating Appellant's employment is unreasonable in light of the entire record.

Standard of Review

The Board recognizes that the Superintendent has the legal authority to discipline and discharge of non-certificated employees, subject to appeal to the Board pursuant to §4-205(c) of the Education Article, Annotated Code of Maryland. Because the Superintendent has decision-making authority, the Board's role is to determine whether the Superintendent's decision was exercised in a lawful and reasonable manner or whether the decision was arbitrary and unreasonable or illegal. As the hearing officer found, Appellant did not assert that the decision was illegal; therefore, the issue before the Board was whether the decision to terminate employment with CCPS was arbitrary and unreasonable based on all of the facts in the record. The "arbitrary and unreasonable" standard of review is often formulated as the "reasoning mind" or "substantial evidence" standard. The Maryland State Board of Education articulated the standard, found in COMAR 13A.01.05.05, as follows:

> A decision may be arbitrary and unreasonable if . . . [a] reasoning mind could not have reasonably reached the conclusion the . . . local superintendent reached.

In *Bullock v. Pelham Wood Apartments*, 283 Md. 505, 512, 390 A.2d 1119 (1978), the Maryland Court of Appeals, quoting *Snowden v. Mayor & C.C. of Balto.*, 224 Md. 443, 448, 168 A.2d 390 (1961), described the "substantial evidence" test for reviewing factual findings as:

> . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . .

In *Pelham Wood, supra,* the Court of Appeals noted that the reasonableness or substantial evidence standard is "not limited to the facts themselves, but also includes inferences which can be reasonably drawn from the facts." "[W]hether the inference drawn is the right one or whether a different inference would be better supported" is not the issue. "The test is reasonableness, not rightness."

Explanation of Decision

The reason we have included a section devoted to the standard of review is because we, as a Board, struggled with the facts of this case. Was the bathroom door shut or was Appellant monitoring the student through the door opening? Could the classroom teacher see the door from her desk? Was Appellant screaming at the student or just speaking loudly to be heard over his protestations? Were the "accidents" the student had later the result of trauma related to the earlier incident in the bathroom or from his refusal to go to the bathroom? The testimony on all of these points and more was conflicting.

The hearing officer credited the testimony of the pre-school or "PREP" room teacher and her teaching assistant rather than that of Appellant and the teacher with whom worked. The hearing officer said he credited the testimony of the individuals in the PREP room after "careful assessment of all aspects of the demeanor of these witnesses . . . and consideration of the context of the testimony," although there was no explanation of what it was about the demeanor of the witnesses that led to his conclusion or how the context influenced his determination. Crediting that testimony, presumably, led the hearing officer to conclude that the student's later "accidents," which had never happened at school before, were the result of trauma caused by the bathroom incident in the PREP room.

When there is conflicting testimony, it is up to the fact-finder to determine whose testimony is to be credited and, unless it is clear that a witness has been untruthful, reasonable people might reasonably believe one version over the other. While it would have been helpful to have a more thorough explanation of why the hearing officer credit the PREP teacher and her teaching assistant, it is clear that when faced with contradictory, and, arguably, equally plausible testimony, a reasonable person could reasonably find that one was more credible that the other and we defer to the fact finder in this regard. Similarly, it is up to the fact finder to draw reasonable inferences from the facts and, therefore, we defer to the hearing officer's inference that the student's "accidents" resulted from the earlier PREP bathroom incident.

As the hearing officer recognized, the next question is whether it was reasonable to terminate Appellant's employment rather than impose some lesser discipline, such as suspension. It is here where we disagree with the hearing officer's conclusion and the Superintendent's decision.

Appellant had worked as a paraprofessional with special education students for twelve (12) years. "During the Appellant's employment with CCPS, received periodic performance evaluations, all of which assessed performance in every category as 'Very Good' or 'Effective,' which were the top ratings on the various evaluation forms in use at different times throughout career." Findings of Fact, #2. Appellant had never been the subject of any disciplinary action. Findings of Fact, #3. It strains credulity to conclude that Appellant suddenly acted in a mean and abusive manner toward one of students. The hearing officer stated that and Appellant's "misguided behavioral modification 'technique' was . . . entirely of their own design" and had "disastrous" consequences. Appellant, as a paraprofessional, acts at the direction of the classroom teacher; the paraprofessional does not possess co-equal

responsibility for delivery of educational services; assists the teacher and acts at the direction of the teacher.

While we defer to fact finder as to the conflicting testimony, in light of all of the facts in the record, we do not believe it was reasonable to terminate Appellant. Therefore, we reverse the Superintendent's decision to terminate Appellant and remand this matter to the Superintendent for the imposition of discipline other than termination.

Bob E. Lord, President

Donna M. Sivigny, Vice President

Marsha B. Herbert

DISSENT

I dissent. Based on the facts as found by the hearing officer, and credited by the Board majority, I believe the decision to terminate Appellant was not arbitrary and unreasonable.

Virginia R. Harrison

*Board member Devon M. Rothschild was absent did not participate in this decision.