Circuit Court for Prince George's County
Case No. CAL1643370

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2199

September Term, 2017

RUTH JOHNSON

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION

Meredith,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

File: May 22, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2012, Dr. Ruth Johnson, appellant, was terminated as a tenured guidance counselor for the Prince George's County Public Schools ("PGCPS"). She filed an administrative appeal of her termination with the Board of Education of Prince George's County ("Local Board") and then with the Maryland State Board of Education ("State Board"), both of which upheld her termination. She sought judicial review of the State Board's decision in the Circuit Court for Prince George's County, which affirmed. She presents essentially two questions for our review, which we have rephrased as follows:

> I. Did the State Board err when it upheld the Local Board's determination that appellant was afforded sufficient pre-termination due process as provided in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)?
>
> II. Did the State Board err when it upheld the Local Board's decision to discharge appellant because she had willfully neglected her duty?

For the reasons that follow, we shall affirm.

FACTUAL BACKGROUND

Appellant was a certified and tenured guidance counselor for PGCPS. She worked for the school system from 1970 to 1978, and resumed employment as a school counselor in 2003. In August 2010, she was working at Bladensburg High School as a 9th grade guidance counselor.

On November 18, 2011, Bladensburg High School's Principal, Glynis Jordan, asked appellant to update a Section 504 Plan[1] for A.C., a ninth-grade student at the school. The student's 504 Plan was last reviewed on December 14, 2010. In response to the principal's request, appellant placed A.C.'s name on the agenda for an upcoming School Instructional Team ("SIT") meeting. A few days later, appellant attended the SIT meeting, along with five other school counselors, a school nurse, an English As A Second Language crisis coordinator, and a pupil personnel worker. A.C. was among several students discussed by the group. Neither A.C., his parents, nor any of his teachers were present at the meeting. After the SIT meeting, appellant prepared an updated 504 Plan for A.C., writing on the 504 Plan form the names of those who had attended the SIT meeting.

On February 2, 2012, Principal Jordan asked appellant to provide her with a copy of A.C.'s updated 504 Plan. Appellant told the principal that she was waiting to obtain a signature from A.C.'s parent. Four days later, A.C.'s mother signed the updated 504 Plan, and the Plan was forwarded to the principal.

Loudermill **Proceeding**

Two days later, on February 8, 2012, appellant received a calendar invitation through email to a meeting titled "*Loudermill* w/PGCEA Regarding 504 Plan." The

[1] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funding. Through the law, school systems are to ensure that qualified students with disabilities receive a free appropriate public education, which includes the provision of regular or special education instruction and related aids and services designed to meet the students' individual education needs in the same manner as nondisabled students.

meeting was scheduled for February 16. The office for Employee and Labor Relations for PGCPS sent an accompanying email stating that the "purpose of the meeting is to discuss an issue regarding a 504 Plan." Appellant emailed the director of that office, James Whattam, asking for additional information about the charges against her, documents supporting the charges, and a postponement. She also expressed discomfort with her assigned union representative, who was a defendant in a lawsuit in which she was a plaintiff. On February 12, Whattam advised appellant that: "The due process meeting is intended to address the legitimacy of a 504 plan you prepared dated 11/30/11 for student A.C. The details of our concerns about that document will be shared with you at the scheduled due process meeting, which will not be postponed." The next day, appellant thanked him by email for the information, did not request any further information, and again expressed concern about her union representation, stating that she would be bringing her own counsel. Whattam responded that day that she would need to address her union representation concern to her union, and that her legal counsel could attend the meeting but would not be allowed to participate.

At the February 16, 2012 *Loudermill* meeting, appellant's union representative was not present but her chosen legal counsel, who was not a member of the Maryland bar, was present. Principal Jordan; Traketa Wray, a representative for Whattam; and Elizabeth Faison[2], Instructional Supervisor of School Counselors for PGCPS, were present for the PGCPS system. At the meeting, appellant was advised that she was accused of failing to

[2] Ms. Faison is also known as Elizabeth Sessoms.

hold a 504 Plan meeting for A.C. and forging the 504 plan she submitted to Principal Jordan. Appellant chose not to provide a verbal response to the charges but submitted a written response within a week of the meeting. On March 21, 2012, about four weeks after the meeting, then Superintendent for PGCPS, Dr. William Hite, recommended that the Local Board terminate appellant's employment based on misconduct in office and willful neglect of duty due to the improprieties in creating A.C.'s 504 Plan. Appellant was placed on administrative leave without pay.

Subsequent Action

Appellant appealed the Superintendent's recommendation to the Local Board, which referred the matter to a hearing examiner. She also filed a motion to dismiss on procedural due process grounds, which the hearing examiner denied after considering the motions filed and oral arguments presented by both parties. An evidentiary hearing on the merits was held before the hearing examiner over the course of two days, June 25 and July 1, 2014.[3] Appellant was represented by counsel at the hearing and testified on her own behalf. Ms. Faison and Roslyn Hawkins, Employee and Labor Relations Advisor for PGCPS, testified on behalf of the Local Board. On September 28, 2014, the hearing examiner issued a memorandum recommending that appellant be terminated for willful neglect of duty because of her failure to perform a proper 504 Plan meeting as requested by her principal.[4]

[3] Apparently, the two-year delay in conducting the hearing was caused in part because the initially assigned hearing examiner retired prior to conducting the hearing and appellant obtained new counsel.

[4] The hearing examiner did not address the charge of misconduct in office.

On June 23, 2015, the Local Board held a hearing at which the parties presented oral arguments. Less than a month later, the Local Board issued an order upholding the hearing examiner's findings that appellant had received adequate pre-termination due process because she had been provided notice of the charges and an opportunity to be heard. The Local Board also upheld the hearing examiner's recommendation upholding the PGCPS Superintendent's recommendation to terminate appellant for willful neglect of duty for failing to schedule and update A.C.'s 504 Plan as requested by her supervisor.

Appellant appealed the Local Board's decision to the State Board, which referred the matter to the Office of Administrative Hearings. *See* COMAR 13A.01.05.07A(2). Appellant was permitted to supplement the record. On December 14, 2015, an administrative law judge ("ALJ") conducted a hearing at which appellant was represented by counsel. Three months later, the ALJ issued a written proposed recommendation upholding the Local Board's termination decision. The ALJ concluded that appellant was not denied due process at her pre-termination hearing because she was provided sufficient notice of the charges against her, had an opportunity to respond to those charges, and had significant post-termination protections available to her. As to the merits, the ALJ found that the Local Board had not proved by a preponderance that she had willfully falsified A.C.'s 504 plan, but had proved by a preponderance of the evidence that she had willfully neglected her duties by failing to schedule a 504 Plan meeting for A.C.

Appellant filed exceptions to the ALJ's proposed recommendation, arguing again she was denied due process at her pre-termination hearing, and she had not committed a willful neglect of duty. Oral argument before the State Board was held on October 25,

2016, after which the State Board issued a written order denying appellant's exceptions and affirming the ALJ's recommendation to uphold the Local Board's decision to terminate appellant.

Appellant appealed the State Board's recommendation to the Circuit Court for Prince George's County. A hearing was held on December 8, 2017, at which both parties were represented by counsel and their counsel presented arguments. The circuit court issued an oral ruling from the bench affirming the decision of the State Board.

DISCUSSION

Standard of Review

"In reviewing the decision of an administrative agency, we reevaluate the decision of the agency, not the decision of the lower court." *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 484 (quotation marks and citations omitted), *cert. denied*, 372 Md. 431 (2002). "The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made in accordance with the law or whether it is arbitrary, illegal, and capricious." *Sugarloaf Citizens Ass'n v. Frederick County Bd. Of Appeals*, 227 Md. App. 536, 546 (2016) (quotation marks and citation omitted). Moreover, "[w]e review the agency's decision in the light most favorable to the agency because it is prima facie correct and entitled to a presumption of validity." *Id.* (quotation marks and citation omitted).

"[T]he State Board generally has the last word on matters concerning the public school system." *Mayberry v. Bd. of Education of Anne Arundel County*, 131 Md. App. 686, 700 (2000) (citations omitted). In reviewing a State Board's decision we need only

determine: (1) whether the Board applied the correct legal principles, and (2) whether the Board's findings are supported by substantial evidence. *Id*. at 701 (citations omitted).

When applying the substantial evidence test, we determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bd. of School Com'rs of Baltimore City v. James*, 96 Md. App. 401, 418 (citations omitted), *cert. denied*, 332 Md. 382 (1993). We will not "substitute [our] judgment for the expertise of an agency, rather the test is a deferential one, requiring restrained and disciplined judicial judgment so as not to interfere with the [agency's] factual conclusions." *Id*. at 419 (quotation marks and citations omitted). Accordingly, "[i]f the agency's determination is reasonably supported by the evidence in the record, we must uphold the agency's determination although we may have come to a different result." *Mayberry*, 131 Md. App. at 701 (citations omitted). When reviewing an agency's conclusions of law, we may "substitute our judgment for that of the agency[.]" *Maryland Dept. of the Environment v. Ives*, 136 Md. App. 581, 585 (quotation marks and citation omitted), *cert. denied*, 364 Md. 462 (2001). We will nonetheless "ordinarily give considerable weight to an administrative agency's interpretation and application of the statute which the agency administers." *Montgomery County v. Rotwein*, 169 Md. App. 716, 727 (2006) (quotation marks and citation omitted).

With the above standard of review in mind, we turn to the questions presented in this case.

I.

Appellant argues that the State Board erred in finding that she was afforded proper pre-termination due process rights under *Loudermill*, 470 U.S. 532. She argues that her due process rights were violated because she was: 1) not given adequate notice of the specific charges prior to the meeting; 2) not given documentary evidence prior to the meeting; and 3) denied the assistance of counsel during the meeting. The appellee disagrees with each of her arguments, as do we. We shall address each argument in turn.

In *Loudermill*, the United States Supreme Court determined the pre-termination process that must be afforded before a public employee, who can only be discharged for cause, may be removed from her position.[5] *Loudermill*, 470 U.S. at 535. The Court explained:

> the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.
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> . . . [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

[5] No one disputes that appellant, a certified and tenured guidance counselor for PGCPS, had a constitutionally protected property interest in her continued employment with the PGCPS system, and that PGCPS could not deprive her of that interest without due process.

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Loudermill, 470 U.S. at 545-46 (internal citations omitted). The Court concluded that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures[.]" *Id*. at 547-48.

"The pretermination process need not resolve the propriety of the discharge." *Linton v. Frederick County Bd. Of County Com'rs*, 964 F.2d 1436, 1439 (4th Cir. 1992) (citations omitted). "Notice is sufficient, 1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under the particular circumstances of the case." *Id*. (quotation marks and citation omitted). "The pretermination hearing is merely the employee's chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted." *Powell v. Mikulecky,* 891 F.2d 1454, 1458 (10th Cir. 1989).

1. & 2.

Citing *Linton*, *supra*, appellant argues that the notice of the charges she was facing was woefully inadequate. Specifically, she claims that she was only informed of the "falsifying government documents" charge prior to the *Loudermill* hearing but was not informed of the charge of willful neglect of duty. She argues that without notice of the second charge, she could not address it at the *Loudermill* hearing. She also argues that the

documents provided to her prior to the pre-termination meeting were inadequate because they concerned only the falsifying documents charge and not the willful neglect of duty charge.

In *Linton*, the Chief of the Highway Operations Division for the Frederick County Highway Department for Maryland, Linton, was confronted by two supervisors on the day he returned from a two-week vacation. 964 F.2d at 1437. During the encounter, the supervisors asked Linton whether he had received a copy of a "site complaint" issued by the Maryland Department of Natural Resources. *Id*. Linton indicated that he had "heard something about it" and proceeded to explain why the citation "was not justified." *Id*. The supervisors then gave Linton a two-page notice of dismissal. When asked if he wanted to resign in lieu of termination, he indicated that he wanted to consider his options. The next day he refused to resign and was terminated.

Linton sued the county in federal district court, which entered a summary judgment in favor of the county officials. He then appealed to the Fourth Circuit, arguing that he was not given adequate pre-termination notice of the specific charges against him or an explanation of the evidence supporting the charges. The Fourth Circuit disagreed, stating that "[d]ue process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit Linton to identify the conduct giving rise to the dismissal and thereby to enable him to make a response." *Id*. at 1440 (citation omitted). The Court concluded that that surprise meeting after a two-week vacation where the only evidence presented to the employee was

a description of the complaint issued by the Maryland Department of Natural Resources was constitutionally sufficient. *Id*. at 1441.

Rather than supporting appellant's claim, the decision in *Linton* supports the conclusion that the notice given here was constitutionally sufficient. Here, four days prior to the *Loudermill* meeting appellant was advised that the meeting was "to address *the legitimacy* of a 504 plan you prepared dated 11/30/11 for student A.C." (emphasis added). Thus, several days before the hearing she was informed of the nature of the charges against her, the date of the infraction, and the student's initials. Moreover, we note that in her written response to the *Loudermill* hearing, she not only addressed the fraud concern but also addressed the charge that she improperly updated the 504 Plan, stating:

> Additionally, I did not convene a "Section 504 Team Meeting", nor did I indicate that I did so. The individuals listed on the Section 504 Accessibility Plan are those persons in attendance at the SIT Meeting on November 30, 2011, where the [student's] situation was discussed and decisions developed about his Section 504 Accessibility Plan.

Accordingly, we are persuaded that appellant had sufficient notice of the complaint against her to allow her to form an adequate response.

Appellant's argument about not having prior access to any supporting documents is likewise without merit. As stated in *Linton*, "[d]ue process does not mandate that all evidence on a charge *or even the documentary evidence be provided*, only that such descriptive explanation be afforded as to permit [appellant] to identify the conduct giving rise to the dismissal and thereby to enable him to make a response." 964 F.2d at 1440 (emphasis added).

3.

Appellant also argues that the State Board erred in determining that she was not entitled to counsel during the *Loudermill* hearing. Appellant cites no controlling authority for this argument but directs our attention to *Sites v. State*, 300 Md. 702, 711 (1984).

In *Sites*, the Court of Appeals was asked whether a person arrested for driving while intoxicated had a right to counsel before deciding whether to submit to a chemical test for sobriety. The Court held, in part, that the Sixth Amendment to the United States Constitution requires that a person under such circumstances be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test. *Id.* at 717-18. The Court based its holding on the grounds that a *criminal* charge is a "legal event that marks the starting point of the right to counsel under the *Sixth Amendment*." *Id.* at 712 (emphasis added).

Sites is a criminal case which relied on right to counsel guarantees specified in the United States Constitution. There is no such corresponding right to counsel for property-employment interests. Moreover, we find persuasive the reasoning of the Fourth Circuit in *Buschi v. Kirven*, 775 F.2d 1240, 1255-56 (4th Cir. 1985), where the Fourth Circuit held that employees do not have a right to counsel at a pre-termination *Loudermill* hearing.

In sum, we find no error by the State Board in concluding that appellant was adequately informed of the nature of the charges against her, and, afforded sufficient pre-termination due process.[6]

II.

Lastly, appellant argues that the State Board erred in affirming the decision of the Local Board that she had willfully failed to discharge her duties because, according to appellant, a 504 Plan could be updated by a SIT Team meeting. She supports her argument by further arguing that Principal Jordan asked her to update A.C.'s 504 plan by way of a SIT meeting, and that the culture at her school permitted updating 504 plans through a SIT meeting. The Local Board disagrees and responds that there was substantial evidence to support their determination that appellant willfully failed to execute her duties.

Md. Code Ann., Educ. Art., § 6-202 provides that "[o]n the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant" for reasons including "[w]ilful neglect of duty." Section 6-202(a)(1)(v). The applicable regulation for the administration of 504 Plans in Prince George's County is PGCPS Administrative Procedure 5146. It provides:

[6] Appellant makes a belated claim that she was not allowed to cross-examine her former supervisor, Principal Jordan. Principal Jordan was present at the *Loudermill* hearing so we assume that appellant is referring to the hearing before either the Local Board or the State Board. It does not appear, however, that she ever raised this argument below, and therefore, she has not preserved this argument for our review. *See* Md. Rule 8-131 ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

> IV.C. The Section 504 Team shall be comprised of individuals knowledgeable about the student, the condition, evaluation procedures, and placement options. The Section 504 Team shall include the school administrator or designee, parents, the student's teacher, guidance counselor, and the student, as appropriate.
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> * * * *
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> V. . . . The Section 504 Team shall determine the student's placement. In determining the placement, the Section 504 Team shall consider supplemental aids and services appropriate to enable the student to be educated in the general education environment. The Section 504 Team shall ensure that a student is educated as close to his/her home as possible if it is determined that the Section 504 Plan cannot be implemented at the student's boundary school.
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> A student's Section 504 Plan shall be reviewed and revised, as appropriate, at least annually, or sooner at the request of a parent or teacher. The parent shall be provided with written notification of the review meeting.

On February 22, 2011, about nine months before she was asked to update A.C.'s 504 Plan, she and all PGCPS counselors were sent a memorandum for "Monitoring and Management of Section 504 Plans." The memorandum stated:

> This memorandum serves as a reminder for all Professional School Counselors to closely monitor the implementation of Section 504 Plans for every student receiving Section 504 services. Section 504 plans, at a minimum must be reviewed annually. *All Section 504 team members must be involved in the annual review meeting and parents, in accordance with the law, must be strongly encouraged to attend*! If a parent cannot attend, after reasonable attempts have been made, the meeting should proceed. *Professional School Counselors must speak with each teacher, school nurse and any staff member involved with the student, to assess the progress of each student receiving Section 504 services. It is imperative that all staff involved with the student are informed of the Section 504 Plan and are currently implementing the services*.

(Emphasis added). Additionally, on June 6, 2011, about five months before she was asked to update A.C.'s 504 Plan, then Superintendent of PGCPS, Dr. Hite, sent a memorandum

to all school counselors regarding "Section 504 Procedures." Paragraph 4 of his memorandum provides: "A meeting must be held with the student's teachers and other staff (if relevant) at the beginning of each new school year to review the accommodation plan for each student receiving Section 504 services, to ensure that the student is receiving a Free and Appropriate Education (FAPE)." Given the above, it is clear that 504 Plans are to be reviewed annually at 504 Team meetings by 504 Team members, which are to include at the very least, the student's teacher(s). Accordingly, there was substantial evidence to support the State Board's affirmance of the Local Board's decision that appellant had willfully neglected her duties.

As to appellant's argument suggesting the interchangeability of 504 and SIT meetings, the record suggests otherwise. The hearing examiner, based on the testimony and evidence presented, made the following findings of fact regarding the different purposes of a SIT and a 504 meeting:

> [T]he requirements of a SIT meeting are to discuss many students at the same time concerning academic progress, behavioral problems and attendance regarding a group of students, the composition of a SIT meeting consists of guidance counselors together with other staff members not specifically knowledgeable or having contact with each student under discussion. A SIT meeting does not require the student's parents, teacher, administrator or the student's counselor to be present. A 504 meeting is for the purpose of individually outlining a plan specifically to aid a particular student. A.C.'s parents or teachers were obviously not invited to attend the SIT or 504 meeting and the parents were only invited to sign the document.

The ALJ, who's proposed decision was incorporated into the State Board's decision, found that appellant offered "confused" and "not credible" testimony on the issue of whether the student's teachers and parents are to be a part of a meeting to review a 504 Plan, given her

25 years of experience as a school counselor, her asserted familiarity with the procedures for 504 plans, Ms. Faison's testimony concerning the proper procedures for 504 plans, and the plain and clear language used by PGCPS in specifying that the annual review meeting for a 504 Plan must include the 504 Plan Team. *See Bd. of Education v. Paynter*, 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.") (citation omitted). We further note that when Principal Jordan asked all six members of the SIT Team meeting (whose names appellant wrote in on the 504 Plan form) whether they had attended a 504 Team meeting for A.C., *each* responded in the negative.

For the above reasons, we are persuaded that there was substantial evidence to support the State Board's affirmance of the Local Board's decision to terminate appellant's employment for willful neglect of duty.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.