JAMES HAGERTY	BEFORE THE
Appellant,	MARYLAND
v.	STATE BOARD
CARROLL COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 20-16

OPINION

INTRODUCTION

James Hagerty ("Appellant") appeals the decision of the Carroll County Board of Education ("local board") finding that he was terminated from his part-time custodian position for insubordination and poor work performance. The local board concluded that Appellant was not a whistleblower under the Maryland Public School Employee Whistleblower Protection Act ("Act"), Education Article §6-901 *et. seq*., and was not subjected to a hostile work environment. The local board filed a Memorandum in Response to the Appeal maintaining that its decision is not arbitrary, unreasonable or illegal and should be upheld. Appellant responded, and the local board replied.

FACTUAL BACKGROUND

Taneytown Elementary School and Westminster High School

Appellant was a temporary, part-time custodian with Carroll County Public Schools ("CCPS"), a position known as an hourly floater custodian. (Board Memo at 1-2). During his training, Appellant was told to report anything he found wrong at schools to the school's maintenance supervisor. (Board Ex. 2 at 3-4; Board Ex. 3, T.48). Shortly after he began working, Appellant took note of conditions of equipment at the school that were not up to standards and needed to be fixed, and told his supervisors about his concerns. (Board Ex. 3, T.48-49, 59).

In June 2018, Appellant complained to Jocelyn Quinn-York, Human Resources Specialist for CCPS, that the principal of Taneytown Elementary school belittled him in front of other people. *Id.* at 8-9. Apparently, Appellant came to work earlier than he was expected, which upset another custodial employee who sought out the principal. (Board Ex. 3, T.69-70). Ms. Quinn-York investigated the incident. She found Appellant's allegations to be unfounded and that Appellant misrepresented what occurred. *Id.* After the investigation, Taneytown's principal asked that Appellant not be assigned to the school again. (Board Ex. 2 at 4; Board Ex. 3, T.70).

Appellant complained to CCPS about not being assigned to work at Taneytown. On July 13th and 17th 2018, CCPS Human Resources Director Chantress Baptist wrote Appellant letters

explaining that she wanted to discuss his concerns. (Board Ex. 4-K). On July 17, 2018, Appellant wrote to Ms. Baptist and Local Superintendent, Steven Lockard, stating:

> "[a]ll of my concerns have previously been presented to the Superintendent's Office in Electronic, detailed, messages. . .
>
> To be succinct, my outstanding issues now is against your Department's Policy of banishing me from open and fair employment, at my local Taneytown Elementary School which I regularly worked …" Only after having to report long standing major unaddressed reported safety, security and fire hazards to the Custodial Supervisor that went unaddressed for months did you after allowing me one more day to work there banish me under the guise of a cooling off period has not been almost 2 months and my assignments have placed me in middle and vo tech schools with much larger populations, requiring longer costly in time and money commutes.
>
> I was the messenger of your unaddressed life threatening hazards at Taneytown and now I have been banished, a Defactor [sic] punishment that adversely affected me alone.
>
> Given these facts, I have asked the Superintendent to reverse the Banishment immediately or I will lodge Federal, State and Local Whistle Blower complaints against the Commissioners and will go to local media to bring this sorted [sic] matter to the attention of the Public. . . .
>
> I await simply to see if the Superintendent now will overturn your Departments illegal banishment of me at Taneytown Elementary for reporting long term unaddressed health, safety and fire child endangerment hazards.

Id.

On July 19, 2018, Appellant again emailed Dr. Lockard complaining that not being assigned to work at Taneytown was reprisal for reporting nonspecific safety and fire violations left long unaddressed at Taneytown. Appellant continued that he may file a whistleblower complaint depending on Dr. Lockard's response. *Id.* On the same date, Ms. Baptist confirmed in an email to Appellant that he could continue to work at schools except for Taneytown Elementary. (Board Ex. 2. at 10). Ms. Baptist again wrote to Appellant on July 20, 2018, to discuss meeting with him to explore his concerns and review possible options. Appellant continued to work in other CCPS schools, except Taneytown. (Board Ex. 4-L).

The record does not show any further discord between Appellant and CCPS until February 2019. On February 7, 2019, Joseph Morningstar, Assistant Supervisor of Facilities, Maintenance and Operations, received a complaint about Appellant from David Mack, the maintenance supervisor at Westminster High School. (Board Ex. 2, at 5-7). Mr. Mack complained that Appellant was not in the area of the building he was assigned to clean. (Board

Ex. 3, T.49). He also failed to complete repair or safety issue forms correctly and give them to his supervisor. *Id.* In an email, Mr. Mack wrote that Appellant's work quality was inadequate. Mr. Mack told Appellant that he needed to be cleaning for 6.5 hour shifts and not inspecting. After the exchange, Appellant walked out on his work shift and returned his keys. Consequently, Mr. Mack asked that Appellant not to be assigned to the high school again. (Board Ex. 4-H). Appellant continued to work at the high school until March 28, 2019, when he was observed going around the school taking pictures on his phone instead of working at his assigned location. (Board Ex. 2 at 11; Board Ex. 3, T.53, 57-58).

Appellant's Termination, Whistleblower, and Hostile Work Environment Complaints

On May 3, 2019, Ms. Quinn-York sent Appellant his termination letter, which states in the entirety, "This letter serves as notification that your services, with Carroll County Public Schools, are no longer needed." (Board Ex. 4-J).

On June 17, 2019, six weeks after his termination, Appellant sent an email to the Carroll County Commissioners ("Commissioners"), titled Whistle Blower Complaint. (Board Ex. 4-A). In the complaint, Appellant stated that he previously sent copies of emails and photographs detailing "dangerous long standing safety and health hazards through many of the eight Carroll County Schools that [he] worked at as an hourly custodial floater employee." Appellant complained that he was terminated from CCPS as a result of disclosing the potential violations. *Id*. The record does not include emails and photographs detailing the disclosures, or that he shared them with CCPS maintenance supervisors. (Board Ex. 3, T.55).

On June 18, 2019, Dr. Lockard, advised Appellant that he received Appellant's complaint to the Commissioners and was treating it as an administrative appeal to the local board. (Board Ex. 4-B). At Dr. Lockard's request, Appellant submitted an Appeal Information Form and complaint to CCPS on June 29, 2019, and alleged he was terminated in reprisal for disclosing health and safety problems at the school he worked at. (Board Ex. 4-C). He also alleged he was subject to hostile work environment because on February 6, 2019, Mr. Mack yelled at him in front of his colleagues and told him to "stop inspecting his school and start cleaning it*." Id.* Appellant detailed the following health and safety issues. *Id*.

Taneytown Elementary

- Extension cords under carpets used by kindergartners up to 3rd grade;
- Small binder clamp in a door frame to override classroom door security locks on doors leading to the employee parking lot; and
- Overly clogged vacuum filters exposing students and himself to dust strewn while vacuuming;

Career Tech

- Fire exit warning signs in cafeteria/assembly room and commercial kitchen lacked minimum lighting;
- Fire exit sign in audio visual modular classroom was covered;

- High voltage marked electric cables encased in ductwork was in close proximity of high pressure water fire sprinkler heads;
- Air conditioner moisture discharge outlet pipe was jury rigged to exit 1 inch from water spout in fountain; and
- Window air conditioning unit had a dangling cord inches behind where children had to walk and were seated;

Westminster High School

- Large concentrations of wax filings on gym floor have to be swept up each evening that he was certain were kicked up by students and inhaled during exercise;
- Remaining steel door frames and middle supports of removed doors were impact hazards;
- High voltage marked electric cables encased in ductwork were in close proximity of high pressure water fire sprinkler heads; and
- Shower room off coach's office contains questionable power lines, switches, open metal funning conduit that appears under code near showers.

(Board Ex. 2. at 5-7).

Hearing

CCPS contacted Appellant and confirmed his availability for a hearing on August 19, 2019 at 9:00 am, and sent him a confirming email. (Board Ex. 2 at 1; Board Ex. 5). The hearing proceeded on August 19th, but Appellant did not attend or participate. (Board Ex. 2 at 3-5). Appellant's July 29, 2019, complaint with his disclosures was admitted into evidence. (Board Ex. 4-C). Raymond Prokop, CCPS Director of Facilities Management, Mr. Morningstar, Ms. Quinn-York, and Ms. Baptist testified under oath and numerous exhibits were admitted into evidence.

On September 26, 2019, the hearing officer issued his findings of fact, conclusions of law, and recommendations to the local board and Appellant. The hearing officer found that Appellant's list of safety and health violations were not disputed by CCPS witnesses. The only disagreement he found was whether Appellant's assertions constituted health and safety hazards that would entitle him to protection under the Act. (Board Ex. 2 at 12). Each issue Appellant identified was discussed in detail at the hearing; and except for a few issues raised about maintenance of equipment, the hearing officer found no validity to his main concerns. Evidence in the record demonstrated that the CCPS schools passed regular health and safety inspections by the Carroll County Health Department and the Maryland Association of Boards of Education. (Board Ex. 3, T.18-19; Board Exs. 4, 5, 6, and 7). The hearing officer concluded that Appellant's disclosures did not fall under the protections of the Act. (Board Ex. 2 at 13).

The hearing officer found that the witness testimony established that Appellant was terminated because his supervisor assessed that Appellant was not doing the work he was hired to do, was not at his assigned work locations, and was insubordinate. (*Id.* at 11; Board Ex. 3, T.73-74, 87-89). The hearing officer concluded that there was no evidence that Appellant's "disclosures alone did anything at all that would have motivated an employer to discharge the

reporting employee." *Id.* at 13-14. Thus, the hearing officer recommended that the local board deny Appellant's whistleblower complaint. *Id*.

Concerning Appellant's hostile work environment claim, the hearing officer found that Mr. Mack, yelled at Appellant on February 6, 2019, in front of colleagues, to "stop inspecting his school and start cleaning it." *Id.* at 11-12. The hearing officer recommended the local board deny Appellant's hostile work environment complaint because Appellant did not allege that he is a member of any protected class, which is a precondition to protection under Maryland or federal hostile work environment laws, and that the single incident was insufficient to establish "severe or pervasive" conduct to create a hostile work environment. *Id.* at 14.

Appellant's Rebuttal and Oral Argument Request

On October 8 and 9, 2019, appellant wrote email rebuttals of the hearing officer's findings of fact, conclusions of law, and recommendations. In the October 8th rebuttal, Appellant broadly complained that the hearing officer did not thoroughly review his complaint or emails. He attempted to refute the witness' hearing testimony, and stated that his inspections were observations of obvious problems. In the October 9th rebuttal Appellant acknowledged that he began filing his complaints after he was fired. (Board Ex. 6). On October 17, 2019, the local board gave Appellant the opportunity to present oral argument to the board, which he declined. Instead, Appellant sent a written statement. (Board Ex. 8).

Local Board Decision

On December 4, 2019, the local board adopted the hearing examiner's findings of fact, conclusions of law, and recommendations. The local board concluded that Appellant failed to present evidence sufficient to support his whistleblower and workplace harassment complaints. The local board denied Appellant's appeal and upheld his termination. (Board Ex. 1).

This appeal followed.

STANDARD OF REVIEW

Because this appeal involves the termination of a non-certificated employee pursuant to §4-205 of the Education Article, the decision of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.06A.

LEGAL ANALYSIS

Maryland Public School Employee Whistleblower Protection Act Claims

Appellant claims that CCPS illegally terminated his employment because he was a whistleblower under the Act, Education Art. §6-901 *et. seq*,. The Act provides:

> [A] public school employer may not take or refuse to take any personnel action as reprisal against a public school employee because the employee:
>
> (1) Discloses or threatens to disclose to a supervisor an activity, a policy, or a practice of the employer that is in violation of a law, rule, or regulation;
>
> (2) Provides information to or testifies before any public body conducting an investigation, a hearing, or an inquiry into any violation of a law, rule, or regulation by the employer; or
>
> (3) Objects to or refuses to participate in any activity, policy, or practice in violation of a law, rule, or regulation.

Educ. Art. § 6-902.

> The protections under Educ. § 6-902 apply only if:
>
> (1) The public school employee has a reasonable, good faith belief that the public school employer has, or still is, engaged in an activity, a policy, or a practice that is in violation of a law, rule, or regulation;
>
> (2) The public school employee discloses information that the employee reasonably believes evidences:
>
> (i) An abuse of authority, gross mismanagement, or gross waste of money;
>
> (ii) A substantial and specific danger to public health or safety; or
>
> (iii) A violation of law; and
>
> (3) The public school employee has reported the activity, policy, or practice to a supervisor or an administrator of the public school employer in writing and afforded the employer a reasonable opportunity to correct the activity, policy, or practice.

Educ. Art. § 6-903.

Appellant must prove "that a reasonable person in his position would believe the disclosure evidence[d] a violation." However, Appellant does not need to prove that a violation actually occurred. *Montgomery v. E. Corr. Inst.*, 377 Md. 615, 641 (2003); *Lawson v. Bowie State Univ.*, 421 Md. 245, 259–60 (2011).[1] It is a defense that the school system's personnel action was based on grounds other than the employee's exercise of any rights protected under this subtitle. Md. Code Ann., Educ. § 6-906.

First, Appellant's July 2018 complaints to Ms. Quinn-York, Ms. Baptist, and Dr. Lockard do not set forth with any specificity the alleged health and safety problems he raised with Taneytown's Principal in June 2018 before being "banished" from working at the school.

[1] Educ. §6-901 *et. seq*. is substantially the same as the whistleblower law found in State Personnel and Pensions Art. §5-305, and it is appropriate to apply interpretations of the state employee whistleblower statute to the Act. *Montgomery v. E. Corr. Inst.*, 377 Md. at 629 (Federal whistleblower law interpretations were persuasive because the purpose and language of the federal whistleblower law were substantially the same as the State whistleblower law).

(Board Ex. 4-K). The local board acknowledges that Appellant disclosed to his Taneytown supervisor, conditions with equipment that needed to be fixed, but the record as of June 2018, is unclear about what violations Appellant disclosed. (Board Ex. 4-K). The record evidence fails to show that his July 2018 emails made any specific disclosure of problems or "hazards" that a reasonable person could objectively say would violate a law, rule or regulation. *Lawson v. Bowie State Univ*., 421 Md. at 259–60.

Even if we were to conclude that Appellant's July 2018 complaints claiming that he disclosed health and safety concerns at Taneytown Elementary were covered by the Act, Appellant was not terminated until May 3, 2019, almost 10 months later. The nearly year-long period between the events fails to establish a causal connection sufficient to protect him under the Act. *Williams v. Cerbonics, Inc*., 871 F.2d 452, 457 (4th Cir.1989)(The temporal proximity between the protected activity and the adverse action must be very close). His July 2018 emails and his May 2019 termination are very far apart and fail, without more, to establish causation. *Tracey Johnson v. Howard County Bd. of Educ.,* MSBE Op. No. 09-28 (2009).

After the July 2018 communications between Appellant and CCPS, the record is absent any disputes or personnel actions regarding Appellant and CCPS until the February 2019 exchange with Mr. Mack. Mr. Mack had to advise Appellant to stop inspecting the school building and to instead work in his assigned area. After the incident, Appellant walked out on his work shift and turned in his keys. Mr. Mack asked that Appellant not be assigned to the high school again. (Board Ex. 4-H). Thus, there is sufficient evidence in the record to demonstrate that the personnel action was based on grounds other than the Appellant's exercise of any right that may have been protected under the Act.

The record is also absent any specific health and safety violations disclosed by Appellant before his termination on May 3, 2019. Appellant states in his complaint that he previously sent copies of emails and photographs detailing "dangerous long standing safety and health hazards," but the record does not include details of safety and health hazards that a reasonable person would say were violations until June 17, 2019, six weeks after Appellant's termination. That is when Appellant sent his detailed whistleblower complaint to the Commissioners which arguably would be covered under the Act. (Board Ex. 4-A). Because the Appellant sent the complaint to the Commissioners after his termination, the complaint does not support his whistleblower claim.

Even if we assume that Appellant's June 17, 2019, complaint to the Commissioners was covered by the Act, it is a defense that CCPS terminated Appellant on grounds other than that disclosure. *Lawson*, 421 Md. at 257 (Once the employee is covered under the Act, the burden shifts to the employer to show that it would have taken the same personnel action in the absence of the protected disclosure). The undisputed testimony was that CCPS terminated Appellant because of insubordination, not being at his assigned work locations at Westminster High School, and not doing the cleaning he was hired to do. (Board Ex. 3, T. 73-74, 87-89). Our review of the record does not contradict the hearing officer's findings, which were adopted by the local board. Thus, we find that the local board's decision that Appellant failed to establish a violation of the Act is not arbitrary, unreasonable, or illegal.

Hostile work environment.

Appellant alleges that CCPS sustained a hostile work environment at Westminster High School. To establish a hostile work environment claim an employee must show that: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his protected status; (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment; and (5) some factual basis exists to impute liability for the harassment to the employer. *Strothers v. City of Laurel, Maryland,* 895 F.3d 317, 328 (4th Cir. 2018).

The basis for Appellant's complaint is a single interaction he had in February 2019 with Mr. Mack when he yelled at Appellant in front of fellow employees to stop inspecting the school and start cleaning it, and that his work was lacking in quality and quantity. (Board Ex. 2. at 5; Board Ex. 4-H). No other incident of hostile work environment is alleged. Appellant has not established a *prima facie* complaint of hostile work environment. He fails to allege that he is a member of any protected class, and this single incident does rise to the level of severity sufficient to establish "severe or pervasive" conduct. Accordingly, we agree with the local board that Appellant was not subjected to a hostile work environment.

CONCLUSION

For the forgoing reasons, the State Board affirms the decision of the local board because it is not arbitrary, unreasonable or illegal.

Signatures on File:

_____
Warner I. Sumpter
President

_____
Jean C. Halle
Vice-President

_____
Gail H. Bates

_____
Clarence C. Crawford

_____
Charles R. Dashiell, Jr.

_____
Vermelle D. Greene

_____
Justin M. Hartings

_____
Rose Maria Li

_____
Rachel McCusker

_____
Joan Mele-McCarthy

_____
Lori Morrow

_____
Michael Phillips

_____
David Steiner

April 28, 2020