

IN THE MATTER OF
LAWRENCE MINTON
7320 Waldman Avenue
Baltimore, MD 21219

RE: ERS Denial of service retirement

* BEFORE THE
* BOARD OF APPEALS
* FOR
* BALTIMORE COUNTY
* Case No. CBA-12-019

* * * * *

MAJORITY OPINION

This matter comes before the Board of Appeals as an appeal of the October 11, 2011 notification from Keith Dorsey, Director of Budget and Finance for Baltimore County of the decision of the Baltimore County Employee Retirement System's (ERS) to deny Appellant's application for retirement benefits accumulated during his service with the Baltimore County School System (BCSPS) based on its determination that the service was not "honorable and faithful" service.

BACKGROUND

The Appellant, Lawrence Minton was employed as a Facilities Inspector in the Baltimore County Public Schools from 1986 until his resignation in August of 2011. As a Facilities Inspector, Appellant supervised projects for the Baltimore County Public School System at multiple job sites, and was required, from time to time, to visit more than one job site per work day.

Appellant was required to complete an Inspector's Daily Report (IDR) for each site he visited along with preparing a mileage log detailing the mileage between authorized work sites. The mileage logs were submitted by the Appellant to his supervisor for review and approval. Upon approval of the mileage figures presented in the mileage logs, the Appellant would receive a check in reimbursement of the mileage expenses as provided under the BCPS rules and procedures.

On or about July 21, 2011, Appellant received a letter from Michael Ryan, the Chief Inspector at the Office of Engineering and Construction by which Appellant was advised that he was being placed on Administrative Leave pending the results of an on-going internal investigation by the Office of Internal audit of the BCPS.

A letter dated August 5, 2011 was sent to the Appellant by Merrill Plait, Assistant Administrator of the Office of Engineering and Construction for BCPS informing Appellant that his office had received a Fraud Examination Report from the Internal Audit Team at the BCPS and, based on the results of that report, Mr. Plait recommended the termination of Appellant's employment.

Thereafter Appellant received a letter dated August 8, 2011 from Michael G. Sines, the Executive Director of Facilities for BCPS informing him that Mr. Sines had received a recommendation to terminate his employment with BCPS on the grounds of Appellant's alleged gross misconduct, and that a meeting was scheduled for August 15, 2011 to provide Appellant the opportunity to respond to the recommendation. The scheduled meeting was never held. Instead on August 11, 2011, Appellant chose to complete the forms necessary to resign from his position. Upon completion and presentation of his resignation the Appellant received a letter acknowledging the employer's receipt of his resignation request.

On October 11, 2011, Appellant received a letter from Keith Dorsey, Director of the Office of Budget and Finance, stating that the Board of Trustees of the Employee Retirement System had voted to deny his request for a service retirement based on their determination that his service as an employee of the BCPS was not honorable and faithful, and therefore not creditable toward a service retirement.

HEARING BEFORE THE BOARD

The Board of Appeals held a hearing on March 29, 2012 at which the BCPS was represented by the Baltimore County Office of Law and the Appellant by the Law Offices of Bodie, Dolina, Hobbs, Friddell & Grenzer,

At the outset of the hearing a discussion was had between the Board and the respective counsel as to whether the Appellant's resignation from his position with BCPS was by operation of law an admission of guilt regarding the allegation of fraud placed against him. The BCPS took the position that the Appellant was offered an administrative hearing on the issue of gross misconduct on his part and that he choose, instead, to resign his position with the BCPS. The position of the BCPS as articulated by counsel was that the Board of Appeals was not the proper forum at which to litigate an employment matter which

could have been addressed at a hearing below. Further counsel for BCPS indicated that there were other factors beyond the fraud allegation which in the opinion of the BCPS amounted to gross misconduct.

Counsel for the Appellant countered that it is the Board's responsibility to determine whether appellant's service with the BCPS was "honorable and faithful" and it was incumbent upon the Board to examine the facts underlying the charge of gross misconduct. Counsel further stated that the Appellant had a due process right in both his employment and ostensibly in his receipt of a pension from Baltimore County. The Appellant's counsel argued that there has never been an adjudication of the charges laid against the Appellant and that there was no agreement that his retirement would be in lieu of termination.

Counsel for BCPS suggested that the hearing be continued to allow her to secure the attendance at the hearing of the Auditor who prepared the report detailing Appellant's alleged fraud. After a brief recess to consider counsel's request the Board determined that the hearing would go forward with the proviso that the hearing would be continued to another date if counsel determined that the Auditor's attendance before Board would be necessary as a part of the rebuttal case of the BCPS.

APPELLANT'S TESTIMONY

The hearing began with the appellant appearing as the first witness. The Appellant, Mr. Minton testified that he began his employment with BCPS in 1986 in position of roof inspector. His duties consisted of performing roof inspections at various designated properties owned by his employer. The job by its nature required travel from location to location as instructed by the employer. Thereafter he was promoted to the position of Facilities Inspector and in that position was still required to travel on behalf of him employer from school property to school property.

The Appellant claimed that he had an unblemished work record until the events that gave rise to the instant case occurred.

The Appellant testified that for the period covered by the allegations in this case he was supervised by a Mr. Michael Ryan of the BCPS who was, according to the Appellant, charged with the responsibility of reviewing and approving or rejecting the daily mileage reports prepared by him. The procedure according to the Appellant occurred on a daily basis. Mr. Minton testified that he used his

odometer readings and mileage estimates based upon his years of experience in determining the mileage figures placed in his daily reports. According to Mr. Minton he was never advised by his administrative superiors that there was any specific route that he must follow when reporting to his assigned locations. Mr. Minton also testified that he had never received a written reprimand relative to his mileage calculations as reported on his daily report form until the events of 2011.

CROSS EXAMINATION OF APPELLANT

Counsel for the ERS question Mr. Minton relative to his July 14, 2011 meeting with the Board of Education's Internal Audit Team. Mr. Minton stated that he told the audit team members that his mileage reports were based upon his estimates of the distances traveled between assigned locations and that these estimates were generated based upon his many years of traveling to the same locations. According to Mr. Minton he kept a calendar book in which he recorded his daily mileage. Mr. Minton testified that the audit team requested the calendar book and he initially refused to provide the team with the book. Thereafter at a second meeting with the Audit Team, according to Mr. Minton, the calendar book was offered to the Audit Team at a second meeting at which he was accompanied by his union representative. The calendar book was never placed in the possession of the audit team.

Counsel questioned Mr. Minton concerning his placement on administrative leave from his position. Mr. Minton testified that on or about July 21, 2011 he was called to the office of his supervisor, Mr. Mike Ryan, and advised that he had been placed on administrative leave based upon a report generated by the Audit Team. Shortly thereafter on August 8, 2011 Mr. Minton testified that he received a letter from Michael Sines, Executive Director of Facilities for the BCPS (Appellant's Exhibit #2) which notified him that a recommendation for his termination from his position for gross misconduct had been received from Mr. Merrill Plait, Assistant Administrator of the Office of Engineering and Construction for the BCPS. Mr. Sines' letter stated that a hearing on this matter would be held before him as the hearing officer for the BCPS on August 15, 2011. The letter went on to include the following statement:

"If you fail to confirm your acceptance of the opportunity to respond to the recommendation for termination, I will consider a non-response as an acceptance of the termination and consider the matter closed."

Mr. Minton testified in response to counsel's query that he responded Mr. Sines' letter by tendering his resignation from his position on August 11, 2011. Mr. Minton testified that he never issued a formal response to notice of hearing contained in Mr. Sines' letter.

A second line of cross examination concerned the effect of Mr. Minton's resignation from his position with the BCPS. Counsel referred to a letter dated August 11, 2011 to Mr. Minton authored by Michael Sines, Executive Director of Physical Facilities for BCPS (Appellant's Exhibit #6). The letter, in part, stated:

"I am willing to accept your letter of resignation in lieu of proceeding with the recommendation for termination of your employment for gross misconduct."

Mr. Minton was asked by counsel if he ever responded to the August 11, 2011 letter from Mr. Sines. He responded that he did not but believed that his attorney had done so on his behalf. The attorney referred to by Mr. Minton is Mr. Dolina who is his counsel in the instant case. The response indicated by Mr. Minton was neither produced nor placed into evidence.

A third line of cross examination concerned the report issues by the BCPS Audit Team. Mr. Minton was asked if he ever offered to repay the mileage reimbursement deficiencies found by the audit. In response he stated that he would have repaid the deficiencies if he had made a mistake.

He went on to testify that he did not make repayment because, in his opinion, he was not guilty of anything.

TESTIMONY OF MICHAEL RYAN

Appellant's counsel next called as a witness Mr. Michael Ryan who testified that he was Mr. Minton's supervisor and had been so for the preceding three years. Mr. Ryan testified that he had never seen the Audit Team report but had been questioned by the team as a part of their investigation. In response to a question concerning the method by which he reviewed the mileage submittals of the inspectors including the Appellant Mr. Ryan stated:

"I received them from the individual inspectors, signed off that they testified to the information. I would do a map check, I would verify the sites, that they were what I felt I had assigned and make an evaluation from that check, or holidays or vacation days, if any of those were recorded, you know, discrepancies that were, and I do some random checks for a daily pass to see if mileage was within some type of normal limit."

As to the method of mileage calculation employed by him in his duties Mr. Ryan testified:

“Either use MapQuest, some of the schools I frequent so I knew about the mileage, if its nine miles or ten miles and I’d look for obvious discrepancies.”

Mr. Ryan testified that there was no BCPS policy which required the use of the computer assisted program known as MapQuest to determine the mileage traveled between various locations visited by Mr. Minton and the other inspector over which he has supervisory authority.

THE RESPONDENT’S CASE

The counsel for the ERS placed into evidence by agreement of the parties the “Audit Report” prepared by the auditors of the BCPS. An agreement was reached between the parties that the hearing would be continued to a later date if the auditor who authored the report was required to testify.

The audit report consisted of seven pages of finding along with numerous attachments marked into evidence as ERS Exhibits 1 – 6. The stated purpose of the audit was to determine if the Appellant’s mileage reimbursement requests were overstated. The report concluded that there was no documentation or evidence to validate certain miles claimed by the Appellant during the period from July 2010 to July 2011 and that the overstatement of mileage amount to \$2,900.00 in incorrect reimbursement to the Appellant. The report did not specifically review prior year’s mileage reimbursement request but found by “extrapolation” that there were likewise overpayments to the Appellant for the fiscal years 2007 – 2010.

The attachments to the audit report included a copy of the mileage reimbursement request prepared by the Appellant. The attachments are notable for the numerous deductions in mileage cited by the auditor for travel by the Appellant from his last school assignment to his home and appear to make up the majority of the discrepancies cited.

The ERS called to testify Mr. Merrill Plait the acting administrator of the BCPS Office of Engineering and Construction. Mr. Plait testified that he was the administrative superior of Mr. Michael Ryan. Mr. Plait also testified that he authored a new mileage reimburse protocol after the issuance of the audit report for Appellant’s FY 2011 mileage reimbursement requests. Mr. Plait additionally testified that

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during his four and one half years with the BCPS that there had been only one audit conducted of mileage reimbursement request that being the audit of the Appellant. The new mileage reimbursement policy according to Mr. Plait required that all travel be measured by and against a computed based program to determine the accuracy of the mileage requests.

ISSUE PRESENTED

DOES THE ALLEGED MISCALCULATION OF MILEAGE REIMBURSEMENT REQUEST AMOUNT TO CONDUCT DEMONSTRATING A LACK OF "HONORABLE AND FAITHFUL" SERVICE TO BALTIMORE COUNTY?

The Board concludes that the allegations against Mr. Minton do not demonstrate a lack of "good and faithful" service to Baltimore County so as to deny the Appellant his right of retirement from Baltimore County.

At the outset of the hearing in this matter the Board was advised by counsel for the ERS that Mr. Minton was guilty of fraud and therefore ineligible for retirement benefits as the result of that action. The Board questioned counsel as to whether any criminal or civil charges of fraud had been brought against Mr. Minton. The response was that no such action had been taken by the BCPS.

This Board has previously determined that an employee who commits a crime while performing his assigned duties with Baltimore County is ineligible for retirement benefits under the requirement that the employee's service to the county must be good and faithful. Here we do not have such a case.

The concept and requirement of honorable and faithful service are codified in Section 5-1-201(o) of the Baltimore County Code (BCC) where it is stated that, in order to receive a pension, an employee must meet the criteria of honorable and faithful service. The statute did not establish a legal test for compliance with or divergence from the standard of honorable and faithful service. Absent and object test for the foregoing the decision as to which requirements are applicable to an employee was left, by implication, to the Employee Retirement Board and thereafter to the Board of Appeals.

The instant case presents a first of its kind situation in which the presumptively first mileage audit examination for the BCSP was conducted with the Appellant as its subject. The Board notes that according to the auditor's report Mr. Minton had told the auditor (ERS Exhibit 1 at page 5 of 7) that he would pay the disputed mileage reimbursement amount if he was found to be incorrect in his mileage

submissions. The Board notes also that the mileage reimbursement request were, apparently, reviewed and approved by his supervisor. No demand for repayment from the BCSP was noted during the hearing.

The letter dated August 5, 2011 from Mr. Plait to the Appellant cited an allegation of "gross misconduct" as the basis for his decision to recommend termination of Mr. Minton's employment with the County. The Board feels that absent there being a specific standard which addresses the fact situation in this case that there is no need to address the level of alleged misconduct in this matter as our decision rests upon other principals.

While a single breach of a criminal statute by a Baltimore County employee, irrespective of his/her number of years of service could result in that employee being ineligible for county retirement benefits, we are not now presented with that situation in this case. What is presented to this Board is an "allegation of improper record keeping" which, if found to be correct, resulted in improper compensation being paid to the preparer of the records. The evidence presented to the Board does not resolve the question of whether the alleged incorrect mileage entries are the result of criminal, or otherwise legally actionable fraud, or the result of a mistake by the employee. Any actions taken by the BCPS subsequent to this opinion must be addressed at the appropriate time.

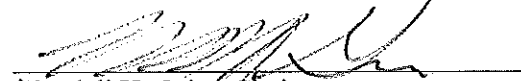
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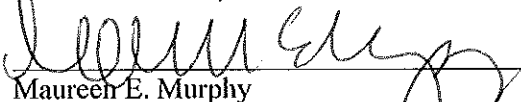
IT IS THEREFORE THIS 7th day of September, 2012, by the Board of Appeals of Baltimore County

ORDERED that the decision of the Board of Trustees of the Employees' Retirement System dated October 11, 2011, be and the same is hereby REVERSED.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

BOARD OF APPEALS
FOR BALTIMORE COUNTY


Wendell H. Grief, Chairman


Maureen E. Murphy

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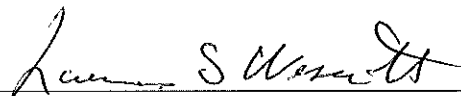
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CONCURRING OPINION

I agree with and concur with the Opinion of my colleagues in this matter that the decision of the Board of Trustees of the Employees' Retirement System dated October 11, 2011, be and the same is hereby REVERSED and that Mr. Minton should be granted his pension. I feel that his supervisor should have given Mr. Minton a written reprimand or some type of written disciplinary action if he determined that Mr. Minton was not accurately representing his mileage. The system for reimbursing mileage during Mr. Minton's employment with the Baltimore County School System (BSPS) was very casual and not according to a strict policy. I believe it's important to point out that I would find that Mr. Minton's supervisor was negligent in not being more strict in requiring the keeping of mileage records by employees to back up their mileage reimbursement forms.

While I would grant Mr. Minton his pension, I would find that he is not without fault. Therefore, I would deduct the amount of overage found by the Audit Team for the years 2007 through 2010 from Mr. Minton's pension on a monthly agreeable schedule until the amount of Eleven Thousand Thirty Six (\$11,036.00) Dollars is repaid to Baltimore County.



Lawrence S. Wescott

Date: September 7, 2012