

GREGORY MADDALONE,

APPELLANT

v.

MARYLAND DEPARTMENT OF
TRANSPORTATION, SECRETARY'S
OFFICE

* BEFORE SUSAN A. SINROD,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
* OAH NO.: THRS-MDOT-09-07-04353
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DECISION

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STATEMENT OF THE CASE

On January 22, 2007, the Secretary's Office of the Maryland Department of Transportation ("MDOT") notified Gregory Maddalone ("Employee") that he was being terminated from his position as Administrator VI, an Executive Service position. The notice of termination also advised him of his appeal rights, as required by the Code of Maryland Regulations ("COMAR") 11.02.08.08B. On January 26, 2007, the Appellant requested a hearing to appeal his termination pursuant to Md. Code Ann., Trans. § 2-103.4 (d)(6)(iii) (Supp. 2006) and COMAR 11.02.08.09.

On February 23, 2007, a telephone prehearing conference was conducted to clarify the basis for the appeal and to resolve discovery disputes. On April 27, 2007, a hearing on the

merits was conducted by Susan A. Sinrod, an Administrative Law Judge (“ALJ”) with the Maryland Office of Administrative Hearings (“OAH”), at the MDOT Headquarters, 7201 Corporate Center Drive, Hanover, Maryland, pursuant to 11.02.08.10C. Judith Finn Plymyer, Assistant Attorney General, represented MDOT. Debra Cruz, Esquire, represented the Employee.

The contested case provisions of the Administrative Procedure Act, the Disciplinary Procedures of the Transportation Service Human Resources System (“THRS”), and the Rules of Procedure of the Office of Administrative Hearings (“OAH”) govern procedure in this case. Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2004 & Supp. 2006); COMAR 11.02.08; COMAR 28.02.01.

ISSUE

The issue is whether the basis for the Appellant’s termination was illegal or unconstitutional.

SUMMARY OF THE EVIDENCE

Exhibits

The Employee submitted the following documents which were admitted into evidence:¹

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|--------------|---|
| Emp. Ex. #1- | Employee Performance Appraisal for 2005. |
| Emp. Ex. #2- | Employee Performance Appraisal for 2006. |
| Emp. Ex. #3- | CD-ROM from the Department of Legislative Services, Office of Policy Analysis, Senate Finance Committee Hearings on January 23, 2007. |
| Emp. Ex. #4- | Printout of internet website, “whoisbobehrlich.com,” undated. |
| Emp. Ex. #5- | Internet news articles of varying dates. |

¹ The Employee’s exhibits were pre-marked as “Petitioner’s” exhibits. I have renamed and relabeled these exhibits as “Employee’s” exhibits for consistency in this decision.

The MDOT submitted the following documents which were admitted into evidence:

- MDOT Ex. #1- Organizational Charts, one of the Office of Engineering, Procurement and Emergency Services, undated, and one of the MDOT Secretary's Office, dated February 2007.
- MDOT Ex. #2- Letter from George Casey, Director, Office of Human Resources of the Transportation Service Human Resource System to the Employee, dated October 24, 2003.
- MDOT Ex. #3- Memorandum from John D. Porcari, Acting Secretary, to the Employee, dated January 22, 2007.
- MDOT Ex. #4- Position Identification Number ("PIN") History, printed February 21, 2007.

Testimony:

The Employee testified on his own behalf and did not present the testimony of any additional witnesses.

The MDOT presented the testimony of:

1. Beverly K. Swaim-Staley, Deputy Secretary.
2. John D. Porcari, Secretary.
3. Judy Slater, Director of Human Resources.

FINDINGS OF FACT

The parties having stipulated, the following facts are established by a preponderance of the evidence:

1. The Employee was employed by the MDOT at its Headquarters from June 30, 2005 through January 23, 2007.
2. Throughout the duration of his employment at the MDOT Headquarters, the Employee was an Executive Service employee.

3. The Employee's performance evaluation for 2005 had an overall rating of "Far Exceeds Standards," and for 2006 had an overall rating of "Exceeds Standards."
4. John Porcari, Secretary of the MDOT, has been the appointing authority since January 17, 2007.

After considering the evidence and the testimony presented, I find the following additional facts by a preponderance of the evidence:

5. The Employee has been employed with the State of Maryland since January 15, 2003, when he began an entry level position in the Office of the Governor. He worked in the IT Department doing web design and computer support in the office of Governor Robert Ehrlich.
6. In October 2003, the Employee accepted a position with the Maryland Transportation Authority as Chief of Staff of the General Manager. In October 2004, he was offered and accepted a position as a Legislative Liaison with the Maryland Port Administration. That position was subsequently abolished.
7. The Employee's position was of an Administrator VI at MDOT Headquarters, a mid-level, non-policy making position with the Office of Engineering, Procurement and Emergency Services ("OEPES").
8. The Employee does not have a college degree; he is four classes away from earning an Associate's degree.
9. The Employee is also a professional ice dancer, and has competed in that sport for many years.
10. In February 2005, the Employee's name began to become appear in the media. The Employee maintained a close friendship with Joseph Steffen, who also

worked at the Office of the Governor at the same time as the Employee. Joseph Steffen had been discovered to be the person who instigated reports of infidelity of then Mayor of Baltimore City, Martin O'Malley. He was also labeled in the media as a person who was targeting State employees for hiring and firing on behalf of Governor Ehrlich.

11. A legislative committee began to investigate Governor Ehrlich's practices regarding political hirings and firings, and the Employee was suspected to be one of the people that the Ehrlich Administration placed into State agencies to identify people for such hirings and firings.
12. News articles and reports appeared regarding these investigations and began to refer to the Employee as the "ice dancer" and questioned his qualifications for State employment.
13. On January 19, 2007, two days after he took office as the Acting Secretary of the MDOT, Secretary Porcari decided to terminate the Employee.
14. On January 23, 2007, Secretary Porcari terminated the Employee and his supervisor, John Gowland ("Gowland"). Gowland had been the employee's supervisor at the Maryland Transportation Authority as well.
15. When Secretary Porcari met with the Employee on January 23, 2007, he told the Employee that the dismissal was because he wanted to reorganize the OEPES, and as part of that reorganization he wanted to hire more qualified, professional people.
16. Secretary Porcari was unaware of the qualifications of the Employee at the time of the termination. He did not review the Employee's performance appraisals,

and the Employee had never been required to submit a resume or application. He did ask to review the Employee's personnel file, but there was only generic, general information in that file. The file did not contain the performance appraisals.

DISCUSSION

COMAR 11.02.01.02(16) defines an Executive Service employee as follows:

(16) "Executive Service employee" means an employee of the Transportation Service who:

- (a) Serves at the pleasure of the appointing authority; and
- (b) Is compensated on either the executive or standard salary schedules of the Department, and either:
 - (i) Staffs a significant policy role,
 - (ii) Staffs a position that requires expert, unique, or specialized training or qualifications to which the Career Service selection procedures set forth in COMAR 11.02.02.02 do not apply or are not practical, or
 - (iii) Provides direct staff support to the offices of the administrators.

COMAR 11.02.08.07 governs the termination of an executive service employee and provide as follows:

.07 Discipline or Termination of an Executive Service or Commission Plan Employee.

A. An appointing authority may recommend to the Secretary the discipline or termination of an Executive Service or Commission Plan employee. The Secretary shall review the request and, at the Secretary's discretion, approve or disapprove the recommended discipline or termination. Upon approval by the Secretary, the appointing authority shall send the employee written notice of the discipline or termination, and the appropriate appeal route, including the time frame for appeal to the Office of Administrative Hearings.

B. An Executive Service or Commission Plan employee may appeal the discipline or termination to the Office of Administrative Hearings within 5 work days of receipt of the discipline or termination notice. The hearing is limited to the legal and constitutional basis for the discipline or termination.

C. Appeal of Discipline or Termination. The procedures for appeal are the same as set forth in Regulation .10 of this chapter.

When an executive service employee appeals his or her termination of employment, the former employee has the burden of proving, by a preponderance of the evidence, the illegal or unconstitutional reason for the termination. COMAR 11.02.08.10J(1) and (3)(e). For the reasons that follow, I conclude that the Appellant met his burden in this case.

The Employee testified as to his history of employment with the State of Maryland, which began in 2003 at the Office of the Governor, who at the time was Governor Robert Ehrlich. He also described the media atmosphere surrounding his affiliation with that office and with Joseph Steffen, and presented internet news articles to establish the political atmosphere throughout that period of time, specifically when a special legislative committee was investigating Governor Ehrlich's hiring and firing practices. Emp. Ex. #5. He said that he and Joseph Steffen are good friends. However, he denied ever having been part of a hiring and firing scheme, and said that he was fully cooperative with the legislative committee that was conducting the investigation.

Beverly K. Swaim-Staley ("Swaim-Staley"), Deputy Secretary of the MDOT, testified that Secretary Porcari did discuss with her his plans to reorganize the OEPES. She and Secretary Porcari both began on January 17, 2007, although they both had held their same respective positions from 1999 through 2003 as well, which ceased when Governor Ehrlich took office. She said that Secretary Porcari discussed his intent toward reorganization and personnel changes that might be necessary for the OEPES. Swaim-Staley explained that Secretary Porcari wanted to bring the OEPES, a department which is involved in Homeland Security, under his direct supervision, and hire people who he believed were qualified for a Homeland Security type of position. Swaim-Staley also stated that three of the people who worked in the OEPES were not terminated; two employees, the Employee and Gowland, were the only ones terminated from the

OEPES at the time. According to Swaim-Staley, those positions have not yet been filled.

Swaim-Staley conceded that she had previously read articles about the Employee, but stated that she had not formed any opinion or impression of the Employee as a result.

Secretary Porcari testified that he terminated the Employee because he wanted to reorganize the OEPES, to which he referred as Homeland Security, and have the OEPES report directly to him. He said that he is still in the process of that reorganization. Porcari explained that he wanted to recruit the best possible candidates with a combination of skills, hopefully people with federal experience in Homeland Security, and perhaps even with experience in intelligence or law enforcement. He conceded that he was unaware of the Employee's qualifications, as he never saw the Employee's personnel file, resume, application or performance appraisals. He also conceded that he was familiar with the Employee's name through news accounts and articles, and said that it did raise questions in his mind about the Employee. He insisted, however, that those accounts were not the basis for his decision to terminate the Employee. According to Secretary Porcari, he is looking for a very specific profile for individuals in this Homeland Security department.

Judy Slater, Director of Human Resources, also testified on behalf of the MDOT. She stated that Secretary Porcari asked her for the Employee's records. However when she found the file, it only contained generic information which consisted of three or four pieces of paper. She said that the performance appraisals were not in the file.

It has long been held that employment dismissals based on political patronage are violative of the First and Fourteenth Amendments to the United States Constitution. In *Elrod v. Burns*, 427 U.S. 347 (1976), the United States Supreme Court held that it was unconstitutional for non-civil service, mid and low level employees of the Cook County, Illinois Sheriff's office

to be discharged because they were Republicans when the new Republican Sheriff took office.

In that decision, the Supreme Court stated:

Our concern with the impact of patronage on political believe [sic] and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), by the influence of a teacher over students, "(i)f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id., 319 U.S., at 642, 63 S.Ct., at 1187. And, though freedom of belief is central, "(t)he First Amendme [sic] protects political association as well as political expression." Buckley v. Valeo, supra, 424 U.S. at 11, 96 S.Ct. at 632. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. [citations omitted]. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973).

Id. at 356-357.

The Court went on to qualify this general prohibition. It stated:

In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 362.

Based on that analysis, the United States Supreme Court held that political patronage dismissals must be limited to dismissals of those in "policymaking positions."

Id. at 372. In Branti v. Finkel, 445 U.S. 507 (1980), the Court, which discussed and followed Elrod, held that it was unconstitutional for a newly appointed Public Defender, a Democrat, to terminate two Assistant Public Defenders who had served from 1971 through 1975, because they were Republicans. The Court stated:

Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. Id., at 366, 96 S.Ct., at 2686. In *Elrod*, it was clear that the duties of the employees—the chief deputy of the process division of the sheriff's office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County—were not of that character, for they were, as Mr. Justice STEWART stated, “nonpolicymaking, nonconfidential” employees. Id., at 375, 96 S.Ct., at 2690.

Id. at 517.

In this case, the facts are largely undisputed, with the exception of Secretary Porcari's reasoning and motivation in terminating the Employee. As set forth in COMAR 11.02.08.07B, the only issue on appeal of a termination of an Executive Service employee is the illegality or unconstitutionality of the termination. On January 17, 2007, just after Governor Martin O'Malley's administration took office, Secretary Porcari was appointed to be Acting Secretary of the MDOT. On January 19, 2007 Secretary Porcari decided to terminate the Employee. Since the Employee was on sick leave that day, Secretary Porcari terminated the Employee on January 23, 2007. Secretary Porcari admitted that he had heard of the employee through news accounts and it did raise question in his mind. He conceded that he had never met the Employee previously, and he was unfamiliar with his qualifications for his position with the OEPES. Secretary Porcari did not review any of the Employee's personnel information and did not review his performance appraisals. Had he looked at the Employee's performance appraisals, he would have seen that for the two years that the Employee was an Administrator VI with the OEPES, he received overall ratings of “Far Exceeds Standards” in 2005, and “Exceeds Standards” in 2006.

Secretary Porcari testified that he terminated the Employee because he wanted to reorganize the OEPES and bring in more qualified people, perhaps those with federal intelligence and/or Homeland Security experience. However, he terminated the Employee without having the slightest knowledge of whether the Employee's qualifications could possibly fit the mold of the reorganization that he sought. He made the decision to terminate the Employee two days after he became the Acting Secretary. By Secretary Porcari's own admission, the *only* knowledge that he had of the Employee were news accounts that questioned whether he was commissioned by the Ehrlich Administration to target people in State agencies for hiring and firing, and questioned his qualifications for any State employment because he is an ice dancer. Secretary Porcari's credibility regarding the Employee's termination is therefore severely undermined, because he could not possibly have known whether or not the Employee fit within the framework of his reorganization. Thus, it stands to reason, and I conclude, that the Employee has established that the only knowledge that Secretary Porcari had of the Employee was through politics and the media, and the Employee's politics were clearly conflicting to Secretary Porcari and that of the new Governor's administration. The Employee was in a mid-level, non-policy making position, and based on the applicable case law, it was unconstitutional for Secretary Porcari to terminate him for that reason. As there could be no other reason for the termination, I must conclude that the termination was unconstitutional, and the Employee was improperly terminated. Therefore, the Employee must be reinstated to his position as Administrator VI, effective January 23, 2007.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Appellant has established that his termination was for political reasons, violative of the

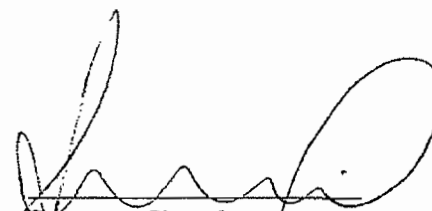
First and Fourteenth Amendments to the United States Constitution. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); COMAR 11.02.08.07.

ORDER

I hereby **ORDER** that the Maryland Department of Transportation's decision to terminate the Employee is **REVERSED**; and I further.

ORDER, that the Employee be reinstated to his position as Administrator VI, with full back pay and benefits effective January 23, 2007.

June 11, 2007
Date Decision Mailed



Susan A. Sinrod
Administrative Law Judge

SAS/ch
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REVIEW RIGHTS

Any party aggrieved by this final administrative decision may file a petition for judicial review with the circuit court for the county where any party resides or has a principal place of business within thirty (30) days of the date of the decision. Md. Code Ann., State Gov't § 10-222 (Supp. 2006); Md. Rules 7-201 through 7-210. The Office of Administrative Hearings is not a party to the review process.

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