**STATE BOARD OF EDUCATION**
**STATE OF GEORGIA**

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| **NIGIL SMITH,** | : | |
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| **Appellant,** | : | |
| | : | |
| **v.** | : | **CASE NO. 2011-26** |
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| **ATLANTA PUBLIC SCHOOL SYSTEM,** | : | **DECISION** |
| | : | |
| | : | |
| **Appellee.** | : | |

This is an appeal by Nigil Smith from a decision by the Atlanta Public School System ("Local Board") non-renewing his employment contract for the 2010-2011 school year. On appeal, Appellant challenges the decision of the Local Board on the grounds that he was denied due process. For the reasons set forth below, the decision of the Local Board is **REVERSED and REMANDED**.

## I. BACKGROUND

Appellant was timely notified that his annual contract for the 2010-2011 school year was being recommended for non-renewal. Appellant appealed the non-renewal recommendation of his employment contract. The Local Board provided the Appellant with notice of the reasons for his non-renewal and a date for a hearing. Prior to the hearing, Appellant, through his counsel, requested a continuance. The hearing officer granted the continuance through a telephone conference with counsel for both parties. The telephone conference was not recorded by a court reporter or any other means. The Local Board did not send written notice confirming the rescheduled hearing date and location. The hearing officer did not issue a written order rescheduling the hearing.

According to the Local Board and the hearing officer, the parties agreed to reschedule the hearing on August 30, 2010. Counsel for Appellant contends that his understanding was that the hearing date was tentative and that the hearing officer requested his email address for the purpose of confirming the hearing date. The hearing officer did not send counsel for Appellant an email confirming the rescheduled date and location for the hearing.

On August 30, 2010, the hearing officer and counsel for the Local Board appeared at 9:00 a.m. at the location contained in the previous notice for Appellant's due process hearing. The Appellant and counsel for Appellant did not appear. The hearing officer waited until 9:30 a.m. Appellant and counsel for Appellant still did not appear. The hearing officer and counsel for the Local Board did not make any effort to contact counsel for the Appellant. Rather, the hearing

officer proceeded with the hearing. After the hearing, the tribunal and Local Board non-renewed Appellant's employment contract.

After receiving the Local Board's decision, counsel for Appellant contacted the hearing officer and moved for reconsideration and a new hearing. The hearing officer granted Appellant a telephone conference regarding his motion. The hearing officer had a court reporter record this telephone conference. Appellant asserted that his understanding was that the hearing date was tentative and that the hearing officer requested his email address for the purpose of confirming the hearing date. The hearing officer stated that her recollection was that the parties agreed to August 30th for the hearing. Counsel for Appellant stated that the parties agreed to August 30th for the rescheduled hearing date. However, the hearing officer did not deny that she had requested Appellant's email address. The hearing officer sent an email to the Local Board confirming the hearing date. The Local Board contends that this email was not sent to counsel for the Local Board. The Local Board contends that this email was only for the purpose of scheduling the conference room and court reporter. After hearing from Appellant, the hearing officer denied Appellant's motion for reconsideration and a new hearing. Appellant has appealed the decision of the Local Board to the State Board of Education ("State Board").

## II. ERROR ASSERTED ON APPEAL

### A. Due Process.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487 (1985) quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[T]he root requirement" of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" Loudermill, 470 U.S. at 542, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Thus, "[t]he fundamental idea of due process is notice and an opportunity to be heard." Swafford v. Dade County Bd. of Commissioners, 266 Ga. 646, 647 (1996).

On appeal, Appellant contends that his due process rights were violated because he was not provided notice of the rescheduled hearing. It is undisputed that Appellant has a property interest in his employment. The Local Board contends that the hearing was rescheduled at the request of Appellant, and that the date was confirmed for August 30th. Counsel for Appellant contends that August 30th was tentatively set, but that he understood the hearing officer would send an email confirmation.[1] The record does not contain any documentation unequivocally

[1] Appellant asserts that the Local Board received an email confirmation. The Local Board asserts that the email was only sent for confirmation of the conference room and court reporter for the August 30th date. The email is not in the record for consideration by this Board. However, based upon the transcript, counsel for the Local Board was clearly familiar with the email, as she discussed its content during the telephone conference.

showing that Appellant was provided notice that the hearing was rescheduled for August 30th. Under the Fair Dismissal Act, the Local Board is charged with the responsibility of ensuring that teachers are provided notice and an opportunity to be heard. O.C.G.A. § 20-2-940 et seq. Appellant's request for a continuance did not relieve the Local Board nor the hearing officer to ensure that proper notice of the hearing was provided to Appellant.

The Local Board contends, and Appellant does not dispute, that the Local Board properly served the initial notice pursuant to O.C.G.A. § 20-2-940(c). However, once the hearing was continued, absent written proof of a stipulation from Appellant to do otherwise, the Local Board was not relieved of its duty to properly serve any further notices in accordance with O.C.G.A. § 20-2-940(c). O.C.G.A. § 20-2-940(c) provides that "[a]ll notices required by this part . . . shall be served by certified mail or statutory overnight delivery." While this provision does not address circumstances in which a hearing is continued, its purpose is to ensure the existence of proof that written notice of the hearing date was sent to a teacher. Moreover, the Local Board is charged with maintaining a complete record of the transcript and proceedings and other matters relating to the appeal for filing with this Board. See O.C.G.A. § 20-2-1160(b).

In this case, the record is devoid of any documentation to show that counsel for Appellant received notice that the hearing was rescheduled for August 30th. The only record is the post-hearing transcript in which Appellant moved for reconsideration and a new hearing in which he disputed that the hearing was confirmed for August 30th. This transcript shows differing recollections of the prior telephone conference. Moreover, the hearing officer[2] did not deny that she asked for Appellant counsel's email, and stated that she "did not recall" stating she would send a confirmation email. Moreover, while the Local Board's counsel stated a phone call was made to Appellant's counsel on Friday, August 27th to discuss the hearing and a voice message was left, the record is devoid of the contents of the voicemail.

Furthermore, on August 30th, the hearing officer did not attempt to contact Appellant's counsel to ascertain why Appellant and his counsel were not present. While not required to do so, since the hearing was a statutory due process hearing, this Board would expect some measures to have been taken to attempt to contact Appellant before proceeding with a hearing.[3] This failure coupled with the lack of any written notice or record of the rescheduled hearing date, leads this Board to conclude that the Local Board did not provide Appellant due process. In doing so, this Board is not questioning the integrity and honesty of the hearing officer or counsel

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[2] The hearing officer also stated that it was not her responsibility to send a written confirmation for the rescheduled hearing. However, this Board disagrees. Either the hearing officer or the Local Board is responsible to ensure that due process requirements are met. Had the hearing officer or Local Board done so, the reversal of this case on this issue would have been avoided.

[3] This Board is also at a loss as to why the Local Board proceeded to present its evidence instead of moving to dismiss the appeal.

for the Local Board. Rather, this Board questions the wisdom[4] of the Local Board for not providing written notice of the rescheduled hearing. Based upon review of many other records before this Board, it is a common practice for a hearing to be rescheduled. It is also a common practice for the Local Board to issue written notice of the rescheduled hearing date. This practice is consistent with the requirements of O.C.G.A. § 20-2-940(c) and constitutional due process rights. Thus, this Board finds that the Local Board violated the Appellant's due process rights.

## IV. CONCLUSION

Based upon the reasons set forth above, it is the opinion of the State Board of Education that Appellant's due process rights were violated and, therefore, the decision of the Local Board is **REVERSED and REMANDED**.

This _____ day of January 2011.

MARY SUE MURRAY
VICE CHAIR FOR APPEALS

[4] This Board seriously questions the wisdom of Appellant's counsel for not following-up with the Local Board or hearing officer when he knew a tentative hearing date had been scheduled. However, this lack of wisdom does not affect the teacher's due process implications involved in this appeal.