BARRY MCGILL,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 14-22

OPINION

INTRODUCTION

Barry McGill (Appellant) was a teacher at Barclay Elementary/Middle School. The Chief Executive Officer (CEO) of Baltimore City Public Schools recommended the Appellant for dismissal for misconduct. On January 23, 2013 and March 12, 2013, a Hearing Examiner conducted an evidentiary hearing on behalf of the local board and issued a decision on March 9, 2013 recommending that the local board affirm the CEO's decision to terminate the Appellant. On May 14, 2013, the local board affirmed the Hearing Examiner's recommendation. Appellant appealed the local board's decision to the State Board on June 10, 2013. We transferred the case to the Office of Administrative Hearings for a *de novo* hearing which was held on November 25, 2013. The Administrative Law Judge (ALJ) issued a proposed decision on February 24, 2014, concluding that the local board established that the Appellant violated state law and the policy of the local board by using corporal punishment and thereby committing misconduct for which termination was appropriate. The Appellant did not file any exceptions to that decision.

FACTUAL BACKGROUND

The facts in this case are set forth by the ALJ at pages 4-6 of the Proposed Decision. The material fact is that there was physical contact between the teacher and the student who was attempting to write on the chalkboard with a permanent marker. The ALJ found that the evidence established that the Appellant "grabbed student LW's hand and twisted the permanent marker out of her hand." (ALJ Proposed Decision at 10). Although the Appellant disputed this version of the events, claiming instead that it was the student who "grabbed his arm trying to get the marker back" after he "grabbed the marker out of her hand without touching her," the ALJ found Appellant's testimony not to be credible. *Id.* at 11. The ALJ concluded that Appellant committed misconduct because the touching of the student amounted to corporal punishment which is prohibited by State law and BCPS policy. *Id.* at 12. He found further that termination was the appropriate sanction in this instance. *Id.*

STANDARD OF REVIEW

The standard of review the State Board applies to the termination of a certificated employee pursuant to §6-202 of the Education Article is that the State Board exercises its

independent judgment on the record before it in determining whether to sustain the termination. COMAR 13A.01.05.05F(1) and F(3).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216. In reviewing the ALJ's proposed decision, the State Board must give deference to the ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

The Appellant has not filed any exceptions to the ALJ's proposed decision. We point out that this is not the usual type of case that conjures up notions of corporal punishment. The Baltimore City Board of School Commissioners in Policy JKA and JKA-RA defines corporal punishment as "any deliberate striking, paddling, application of an object or body part against the body of a student or any other physical punishment used as a correction or retaliating measure." It is our view that the Appellant's actions appear more like an effort to prevent the student from damaging school property, rather than a deliberate intent to impose "physical punishment." Nevertheless, his conduct fits a strict interpretation of the term corporal punishment because he applied a part of his body to the body of the student as a corrective measure. Appellant's conduct bears on his fitness to teach because it demonstrates his inability to respond appropriately and maintain control when student misbehavior occurs in the classroom.

While the decision to terminate seems harsh, we cannot conclude that it was an arbitrary or unreasonable sanction. The ALJ found that there were no factors that would mitigate the harsh sanction. The record reflects that the Appellant had previously been on a Performance Improvement Plan during the 2010-2011 school year, had received a Child Protective Services Complaint stemming from his throwing a book at a student, and was the subject of parental complaints that he threatened students with violence, spoke negatively towards them, slept in class, and failed to return homework.

CONCLUSION

For all these reasons, we adopt the ALJ's Proposed Decision as our Final Decision affirming the local board.

Charlene M. Dukes
President

Absent

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart

Absent

S. James Gates, Jr.

Absent

Larry Giammo

Luisa Montero-Diaz

abstained

Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffrie M. Smith, Jr.

May 20, 2014

BARRY MCGILL	* **BEFORE ZUBERI BAKARI WILLIAMS,**
APPELLANT	* **AN ADMINISTRATIVE LAW JUDGE**
v.	* **OF THE MARYLAND OFFICE**
BALTIMORE CITY BOARD OF	* **OF ADMINISTRATIVE HEARINGS**
SCHOOL COMMISSIONERS	* **OAH Case No.: MSDE-BE-01-13-25005**
	*

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

This case concerns the termination of Barry McGill (Appellant), a teacher at Barclay Elementary/Middle School (Barclay), for allegedly engaging in corporal punishment against a student. Specifically, the Baltimore City Public Schools (BCPS) alleged the Appellant grabbed a female student's wrist and forcibly took a pen out of her hand. BCPS further alleged the Appellant spoke to the student in a derogatory manner and called her a "lead paint baby."

On December 9, 2010, the Appellant was suspended with pay while BCPS investigated the incident. On March 23, 2012, the BCPS Chief Executive Officer filed a Statement of Charges recommending the Appellant's termination. The Appellant requested a hearing to appeal BCPS's recommendation. Hearing Examiner Robert Kessler conducted the hearing where the Appellant was represented by counsel. Hearing Examiner Kessler agreed with BCPS's recommendation and issued a written decision that the Appellant be terminated. On May 14, 2013, BCPS affirmed

the Hearing Examiner's recommendation and terminated the Appellant. On June 10, 2013, the Appellant appealed his termination.

On November 25, 2013, I held a hearing at the Maryland Office of Administrative Hearings, pursuant to section 13A.01.05.07 of the Code of Maryland Regulations (COMAR). Associate Counsel Lori Branch-Cooper appeared on behalf of BCPS. The Appellant represented himself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13.A.01.05; and COMAR 28.02.01.

ISSUES

1. Did the Appellant's actions amount to misconduct, as set forth in section 6-202 of the Maryland Annotated Code Education Article?

2. Did the BCPS err in choosing termination as the disciplinary remedy?

SUMMARY OF THE EVIDENCE

Exhibits

A copy of the exhibits presented during the hearing before Hearing Examiner Kessler, as well as a transcript of that hearing, were made a part of the record for the contested case hearing. COMAR 13A.01.05.07B(1).

The following list is the record that was created during the hearing before Hearing Examiner Kessler:

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CEO Ex. #19: BCPS Report of Alleged Maltreatment, dated October 1, 2008

I admitted the following exhibits on behalf of the BCPS:

BCPS Ex. #1: *John Resetar, Jr., v. State Board of Education of Maryland*, 284 Md. 537 (1979).

BCPS Ex. #2: *Sharon Brown v. Baltimore City Board of School Commissioners*, Opinion No. 09-31.

I admitted the following exhibits on behalf of the Appellant:

App. Ex. #1: Email from Appellant to Attorney Keith Zimmerman containing article on lead paint poisoning, dated October 1, 2012

App. Ex. #2: Seventh grade social studies lesson plan: "The Impact on Environment on Culture"

App. Ex. #3: Cause and Effect Chart

Testimony

BCPS did not present any witnesses and based its arguments on the record developed at the previous hearing before the Hearing Examiner.

The Appellant testified on his own behalf and presented the testimony of Peggy Gladden, Field Representative of the Baltimore Teacher's Union.

FINDINGS OF FACT

1. In 2005, the Appellant was hired as a certified teacher by BCPS and assigned to teach in a classroom.

2. By 2010, the Appellant's job performance was suffering and BCPS determined he needed improvement.

3. In August of 2010, BCPS transferred the Appellant to Barclay Elementary/Middle School and placed him on a Performance Improvement Plan (PIP).

4. The Appellant taught seventh grade social studies and Student LW was a student in his class.

5. Shortly after the Appellant began teaching at Barclay, the school received complaints about his teaching. Parents and students complained that the Appellant would fall asleep in class, failed to return homework, spoke negatively to the students, and threatened violence against them.

Lead Paint Baby Incidents

6. On or about October 15, 2010, the Appellant discussed lead paint poisoning with a group of students, including Student LW, before the class began. During that conversation, Student LW told the Appellant that she had been personally exposed to lead paint.

7. In front of other students, the Appellant asked Student LW, "Do you really have lead paint" poisoning?

8. Later in the conversation with the Appellant, Student LW stated, "I know I have lead poisoning but that has nothing to do why I don't like you." Hearing Tr. 109:20 – 110:03.

9. In November 2010, the Appellant got into another discussion about lead paint with Student LW. During that discussion, the in-classroom aide, Ms. Fatima Barnes, heard Appellant call Student LW a "lead paint baby from the projects."

Physical Altercation

10. On December 7, 2010, Student LW was in the Appellant's class. The Appellant was performing a classroom exercise where students came to the front of the classroom and wrote on the board.

11. Student LW attempted to write on the board with an inappropriate writing utensil – a permanent marker. The Appellant grabbed her hand and twisted the utensil out of her hand. Two students left the classroom to report the incident to an adult.

12. Student LW left the classroom and reported the incident directly to Jenny Heinbaugh, the Principal.

13. Other students saw the incident and provided statements to BCPS.

14. The Appellant was placed on administrative leave pending an investigation of the physical altercation.

15. BCPS's investigators issued an investigative summary regarding the complaint against the Appellant. The investigation determined that the Appellant's actions constituted misconduct.

16. On January 31, 2012, a pre-termination hearing was held.

17. By letter dated March 23, 2012, the Chief Executive Officer (CEO) of City Schools issued a Statement of Charges to the Appellant alleging misconduct regarding the December 7, 2010 physical altercation and recommending that the Appellant be terminated. The Appellant requested a hearing to appeal the recommendation.

18. An appeal hearing was held before Hearing Examiner Kessler. He agreed with the recommendation and issued a written decision that the Appellant be terminated.

19. On May 14, 2013, BCPS affirmed the Hearing Examiner's recommendation and terminated the Appellant.

20. On June 10, 2013, the Appellant appealed his termination.

DISCUSSION

Maryland Annotated Code Education Article § 6-202 provides the framework for teacher dismissal. Specifically, § 6-202(a) states:

> (1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:
>
> (i) Immorality;

(ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;
(iii) Insubordination;
(iv) Incompetency; or
(v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.
(3) If the individual requests a hearing within a 10-day period:
(i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of hearing; and
(ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and bring witnesses to the hearing.
(4) The individual may appeal from the decision of the county board to the State Board.

Education Article § 6-202 and COMAR 13A.01.05.05F provides the following:

(1) The standard of review for certificated employee suspension or dismissal actions shall be de novo as defined by F(2) of this regulation.
(2) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of a certificated employee.
(3) The local board has the burden of proof by a preponderance of the evidence.
(4) The State Board, in its discretion, may modify a penalty.

A. Impact of Hearing Examiner Kessler's Determination

As stated above, I am not bound by Hearing Examiner Kessler's decision. COMAR 13A.01.05.05F. This is not an instance where I am searching for an error made by Hearing Examiner Kessler; rather I will make a de novo determination based on the record and evidence adduced before me.

However, in order to streamline this case and for judicial economy, BCPS elected to rely solely on the record adduced during the hearing before Hearing Examiner Kessler. At the prehearing conference, BCPS requested to proceed in such a fashion and argued it was

appropriate because at the hearing before Examiner Kessler the Appellant was represented by counsel and had the opportunity to cross-examine the witness on whose statements it would rely.[1] The Appellant did not object. I allowed BCPS to proceed in such a manner.

B. Lead Paint Baby Statements and Credibility of Appellant

Originally, BCPS stated that the Appellant was fired because he made derogatory comments to Student LW and engaged in a physical altercation with her on December 7, 2010. To help narrow the issues in this matter, I required the parties to file a joint statement of undisputed facts with the OAH Clerk's Office. In that statement, the reason for the Appellant's termination was truncated. Specifically, the parties stipulated that: "[t]he Appellant was dismissed by [BCPS] as a result of the December 7, 2010 incident with student LW." Jt. Stipulation of Undisputed Facts ¶ 12. As such, I find that any statements the Appellant made to Student LW regarding her being a "lead paint baby" are not directly relevant to his termination. Those statements simply do not tend to prove or disprove whether, or how, the events of December 7, 2010 occurred.

However, a short discussion of the Appellant's statements to Student LW regarding her being a "lead paint baby" is important because they convinced me that the Appellant's testimony is not wholly credible.

The Appellant testified that he never called Student LW a "lead paint baby." Instead, he testified that a discussion of lead paint came up in October 2010 because he intended to use an article about the settlement of a lead poisoning case in Baltimore as a current event is his social studies class. He further testified that before he was able to present the article to the class, a few students saw the article on his desk and asked him questions about it before class began. It was during this discussion that Student LW admitted to him that she herself had been affected by lead

[1] At the prehearing conference and merit hearing before me, the Appellant appeared without counsel.

paint. The Appellant testified that he simply asked her if she really had lead paint poisoning and she responded, "I know I have lead poisoning but that has nothing to do with why I don't like you."

On the other hand, BCPS argued that the Appellant was heard calling Student LW a "lead paint baby" by another staff member and other students and that his testimony regarding this instance just does not make sense. I agree with BCPS. There was obviously more to this conversation than that to which the Appellant testified because Student LW's response to his statement would otherwise seem out of place and nonsensical. Based on the Appellant's own testimony, I find that there must have been additional conversation that led to her response regarding why she does not like him. That is not the kind of thing that a reasonable person says out-of-the-blue. I find that the Appellant conveniently left out that part of the story.

Additionally, in November 2010, the Appellant got into another discussion about lead paint with Student LW. During that discussion, the in-classroom aide, Ms. Fatima Barnes, was present. She provided a statement to the BCPS investigator stating that she heard the Appellant call Student LW a "lead paint baby from the projects."

The Appellant argued that Ms. Barnes's statement was unreliable because she only heard part of the conversation. I find that argument to be ridiculous. I am not sure in what context a person could get the statement you are a "lead paint baby from the projects" incorrect. A teacher telling that to a student is wholly inappropriate. I find Ms. Barnes's statement credible because she had no reason to lie and she had no axe to grind against the Appellant. She was an independent witness who overheard him making this statement to Student LW.

The Appellant has had a difficult time keeping his story straight regarding the lead paint discussion with Student LW. BCPS argued that his story has changed throughout his termination process and he has supplied several different versions. In one version, he testified that he was

actively teaching the current event in class. In another version, the article was simply on his desk and some students picked it up. In yet another version, the article was in the trash because he was not going to teach it and a student dug it out of the trash can. Hearing Tr. 59:5 – 60:18. Notably, the students' statements to the BCPS investigator about the lead paint statements did not change. They were consistent.

The Appellant argued that he does not remember clearly because it was a few years ago and that he did not pay the statements any mind at the time because they were insignificant and that the other students' statements were taken too long after the incident to be useful. I am not convinced. I watched and listened to the Appellant testify in-person. It seemed to me that he was making up a story during his testimony right in front of me and framing it to what he thought I wanted to hear. Additionally, the students' statements were taken as soon as practicable after the event. They were not so far away in time as to disrupt their credibility. As such, I found his testimony wholly not credible. I also find that his lack of credibility continued into his testimony regarding the physical altercation that took place on December 7, 2010.

C. Grabbing and Twisting Student LW's Arm

Unlike the facts regarding the "lead paint baby" statements, the parties are not far apart on the basic facts of the incident regarding Student LW's arm. The incident itself is simple. On December 7, 2010, Student LW was in the Appellant's class. The Appellant was performing a classroom exercise where students came to the front of the classroom and wrote on the board. Student LW attempted to write on the board with an inappropriate writing utensil – a permanent marker.

Where the parties disagree is what happened next. BCPS argued that the Appellant grabbed Student LW's hand and twisted the permanent marker out of her hand. In support of its argument, BCPS relied on several statements from the other students in the classroom who told

its investigators that the Appellant grabbed Student LW's wrist and twisted it. Additionally, Student LW left the classroom and immediately reported to Principal Jenny Heinbaugh what happened. Two other students left the classroom to report the incident to an adult authority figure.

The Appellant testified that he grabbed the marker out of her hand without touching her and that Student LW then grabbed his arm trying to get the marker back. The Appellant argued this is what the other students must have seen – her touching him.

I agree with BCPS's version of events for two reasons. First, as stated above, I do not find the Appellant credible. In this instance, the Appellant continued to embellish the facts by claiming that before she went to the board with the marker, Student LW was looking for trouble by: (1) taking a pencil out of a classmate's hand and (2) randomly writing on the arm of a special education student.

Second, the students' behavior after the incident support BCPS's view of what occurred. Specifically, Student LW went directly to the principal to tell her what happened and two other students were so disturbed by the Appellant's conduct that they went to get help from another adult. I find that this immediate "run and tell an adult right away" occurrence by three different students makes it more credible that the Appellant grabbed and twisted Student LW's wrist. It does not make sense to me that three kids would leave class seeking to tell an adult if Student LW was the one who grabbed the Appellant's wrist.

D. Appellant Engaged In Misconduct – Corporal Punishment.

I find that the Appellant's above actions amount to misconduct, as set forth in section 6-202 of the Maryland Annotated Code Education Article. The seminal teacher misconduct case is *Resetar v. State Board of Education*, 284 Md. 537 (1979). In *Resetar*, the court concluded that misconduct as a basis for termination includes misfeasance, malfeasance, and unprofessional

acts. Maryland law prohibits corporal punishment as a means to discipline students.[2] Likewise, BCPS prohibits corporal punishment. BCPS Board Policies and Regulations JKA-RA IIA defines corporal punishment as "any deliberate striking, paddling, application of an object or body part against the body of a student, or any other physical punishment used as corrective or retaliatory measure against a student."

Here, the Appellant engaged in corporal punishment when he grabbed Student LW's wrist and twisted the marker out of her hand. This is undoubtedly misconduct under section 6-202 of the Education Article.

E. Termination was Appropriate

It is within my discretion to determine whether BCPS erred by choosing termination as the disciplinary remedy. The State Board's broad powers include the modifications of a penalty imposed on school system personnel by a local board. *Board of Educ. of Howard County v. McCrumb*, 52 Md. App. 507, 514 (1982). In determining if termination was reasonable, I will weigh the Appellant's length of employment, quality of his teaching, and his value to the students against the incidents of misconduct leading to this hearing.

The Appellant began teaching for BCPS in August 2005. The Appellant transferred to Barclay at the beginning of the 2010 – 2011 school year. At the hearing, the Appellant argued that Hearing Examiner Kessler failed to take into account his previous commendations while teaching at Barclay before ruling that termination was appropriate. However, when pressed to provide detail of these commendations, the Appellant was unable to do so. Additionally, during the 2010 – 2011 school years, the Appellant was placed on a PIP because of his

[2] Corporal punishment prohibited. -- Notwithstanding any bylaw, rule, or regulation made or approved by the State Board, a principal, vice principal, or other employee may not administer corporal punishment to discipline a student in a public school in the State. Md. Code Ann., Educ. § 7-306(a).

underperformance in the classroom. This suggests to me that five years into his teaching career he was performing below BCPS standards.

Additionally, in 2008, the Appellant received a BCPS Child Protective Services complaint stemming from his throwing a book at a student. Principal Heinbaugh was unaware of these incidents prior to his transfer to Barclay. Shortly after the Appellant began teaching at Barclay, the school received complaints about his teaching. Parents and students complained that the Appellant would fall asleep in class, failed to return homework, spoke negatively to the students, and threatened violence against them.

Based on the above, I find that BCPS's decision to terminate the Appellant was appropriate.[3]

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the BCPS's decision to terminate the Appellant for misconduct on May 14, 2013, is supported by the preponderance of the evidence. Md. Code Ann., Educ. § 6-202(a)(ii), (iii) (2006); COMAR 13A.01.05.05F.

[3] Appellant also alleged that Barclay fired him because of his age and race. In a November 1, 2013 Order and Opinion, I granted BCPS's motion to exclude these additional issues because this is not an Equal Employment Opportunity Commission action and they were irrelevant to this determination. However, at the hearing, the Appellant testified about the race and age discrimination. The Appellant further testified that he had no proof that BCPS fired him because of his race or age, but that it was merely a hunch he had. In this argument, I found no merit.

PROPOSED ORDER

I **PROPOSE** that the decision of the Baltimore City Board of School Commissioners terminating the Appellant for misconduct be **UPHELD**.

February 24, 2014
Date Decision Mailed

Zuberi Bakari Williams
Administrative Law Judge

ZBW/emh
#147879

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen days of receipt of the decision; parties may file written responses to the exceptions within fifteen days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed To:

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Baltimore, MD 21223

Lori Branch-Cooper, Associate Counsel
Baltimore City Public Schools
200 East North Avenue
Baltimore, MD 21202

BARRY MCGILL	*	**BEFORE ZUBERI BAKARI WILLIAMS,**
APPELLANT	*	**AN ADMINISTRATIVE LAW JUDGE**
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