GREGORY MOBLEY,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 15-09

OPINION

INTRODUCTION

The Appellant, Gregory Mobley, filed exceptions to the Administrative Law Judge's (ALJ) Proposed Decision, recommending that the State Board uphold the Baltimore City Board of School Commissioners' (local board) decision to terminate Mr. Mobley from his teaching position. The local board filed a Response to the Exceptions. This Board heard oral argument on the Exceptions on February 24, 2015.

FACTUAL BACKGROUND

Mr. Mobley was a tenured teacher employed by Baltimore City Public Schools (BCPS) in 2000. In 2006, he was assigned to teach at Claremont High School, a school that serves students who are significantly cognitively delayed. His classes were small, about 8-10 students, but all of the students needed specialized and individualized instruction based on the extent and severity of their disabilities.

In October 2007, just one year after he began teaching at Claremont, Mr. Mobley was placed on a Performance Improvement Plan (PIP). Two more PIPs followed in November 2008 and December 2010, all of which addressed instruction planning issues.

In the 2011-2012 school year, instruction problems again arose. Among other things, his supervisors observed that he had inadequate or non-existent lesson plans, had difficulty transitioning students for instruction, or failed to specialize instructions to the students' needs. On one occasion, in December 2011, one of Mr. Mobley's students, a student who needed a high level of supervision because he was prone to running off, was observed unattended by an adult outside the school.

In January 2012, Mr. Mobley was again placed on a PIP due to unsatisfactory performance in areas related to timely completion of IEP paperwork, lesson plans, and proper supervision of students. Thereafter, Mr. Mobley's supervisors observed his class at least four times. Lesson plan issues were observed as well as lack of engagement by students and a classroom that was described as not orderly or productive.

On April 19, 2012, Mr. Mobley was rated unsatisfactory in planning, preparation, and instruction. On or about July 11, 2012, Jerome Jones from Employee and Labor Relations sent a

letter to Mr. Mobley briefly informing him that "A Loudermill hearing has been scheduled...[for August 1, 2012] with regard to your performance for the 2011-2012 school year." (CEO Ex. 26).

After the *Loudermill* hearing, his principal recommended that Mr. Mobley be dismissed. On or about September 6, 2012 the then Chief Executive Officer notified Mr. Mobley that he was recommending his termination for failure to perform his teaching duties and to properly attend to his students. Mr. Mobley was suspended without pay effective September 9, 2012. (CEO Ex. 28). Thereafter, in June and August 2013, a two-day hearing was held before a hearing examiner who recommended that Appellant's employment be terminated. On January 2, 2014, the local board issued its decision terminating his employment.

This appeal ensued. The case was referred to the Office of Administrative Hearings (OAH) which heard argument based on the record below. On August 25, 2014, the ALJ concluded that based on the evidence, the Appellant willfully neglected his duties, committed misconduct in office and was incompetent. The ALJ recommended in her Proposed Decision that the local board's decision be upheld.

The Appellant filed Exceptions to that decision and the local board responded.

STANDARD OF REVIEW

Because this appeal involves termination of a certificated employee pursuant to § 6-202 of the Education Article, 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) & (2). The State Board gives no deference to the local board's decision under this standard.

After it has considered the evidence *de novo*, 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 the reasons for any changes, modifications, or amendments to the Proposed Decision. Md. Code Ann., State Gov't § 10-216(b). In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor-based determinations of witness credibility, unless there are strong reasons to reject them. *See Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

Failure to Provide Due Process

The Appellant argues that his termination should be reversed because BCPS failed to provide him due process prior to his removal. He focuses all of his argument on defects in the notice of the "Loudermill hearing," which he states provided him no information about the subject matter for the hearing. The notice for that hearing states that the hearing will be about "your performance for the 2011-2012 school year." (*See* CEO, Ex. 26). Mr. Mobley argues that the notice of the hearing, to be constitutionally valid, needed to alert him specifically that his possible termination from employment was to be the topic of the hearing.

We note that the issue of whether Mr. Mobley was deprived of his due process rights was not litigated below at his evidentiary hearing before the BCPS hearing examiner nor was it addressed in argument before the ALJ. Although it is arguable that the constitutional claim should be dismissed because it was not raised below, we address it here to explain the *Loudermill* hearing requirements.

In *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985), the Supreme Court ruled that the "essential requirements of due process" prior to termination of a tenured public employee were "notice and an opportunity to respond" at an informal hearing. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546 (1985). The notice may be "oral or in writing." *Id.*

At oral argument, Mr. Mobley pressed his point that written notice he received should have told him the purpose of a *Loudermill* hearing, contained a notice of charges against him, and alerted him to the ultimate penalty of termination. The notice Mr. Mobley received did none of those things. Thus, he asserts he was not prepared to defend himself fully at the *Loudermill* hearing.

In our view, the notice Mr. Mobley received was devoid of information about the process, the performance problems that would be addressed, and possible disciplinary recommendations that could result from the *Loudermill* process. In fairness to all participants in the *Loudermill* process, a notice containing such information would be a better practice for Baltimore City Board of School Commissioners to adopt. It would put employer and employee on somewhat equal footing going into the *Loudermill* hearing. It would herald a fair process.

Although a more robust and descriptive notice letter than the one here is a better practice, it is not a constitutional requirement, however. For example, in *Gniotek v. City of Philadelphia,* the Third Circuit Court of Appeals considered the propriety of a *Loudermill* hearing in which an employee received "no advance notice" of the charges or evidence against him but was instead notified of these matters at the hearing itself. *Gniotek v. City of Philadelphia,* 808 F.2d 241, 244 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987). According to the court, "[l]ack of advance notice...does not constitute a per se violation of due process." *Id.* at 244; *see also, Schmidt v. Creedon,* 639 F.3d 587,597 (3d Cir. 2011)("[a]n employee is generally not entitled to notice of the reasons for his discharge in advance of a [*Loudermill*-type] hearing."). Thus, even if the notice did not alert Mr. Mobley in advance to the possibility of termination, that does not lead to a finding of constitutional defect.

At the *Loudermill* hearing, the employer needs to provide "an explanation of the...evidence and [give] the employee an opportunity to present his side of the story." *Loudermill,* 470 U.S. at 546. It appears, even from the limited record here, that that occurred. Mr. Jerome Jones testified about the purpose of Mr. Mobley's *Loudermill* hearing:

> A. The purpose of the *Loudermill* hearing was to sit down with Mr. Mobley and his union representative, go through the various documents that we had, the charges that were - - that he was being faced with, and afford him an opportunity to answer those charges, provide any additional information he had with regard to those charges to determine if the CEO wanted to

> move forward with any recommendations to discipline and/or dismissal.

(T. 300-301).

Mr. Mobley testified he didn't know "that this process would come to this point" (T. 346) and that, in his view, the *Loudermill* hearing was the hearing on his grievance filed to challenge his unsatisfactory evaluation. (T.397). That subjective view does not establish a constitutional violation.

Even if there had been defective notice of the August 1, 2012 *Loudermill* hearing, the full evidentiary hearing before the local board's hearing examiner cured any procedural errors. *See Mayberry v. Board of Educ. of Anne Arundel County*, 131 Md. App. 686, 690-691 (2000); *Board of Sch. Comm'rs of Baltimore City v. James*, 96 Md. App. 401, 433-34 (1993); *Board of Educ. v. Crawford*, 284 Md. 245 (1979); *Amy L. v. Harford County Bd. of Educ.*, MSBE Op. No. 13-39 (2013); *Williamson v. Board of Educ. of Anne Arundel County*, 7 Op. MSBE 649 (1997).

Other Exceptions

Mr. Mobley's exceptions filed here repeat the exceptions he filed below to certain factual findings of the BCPS hearing examiner (Finding of Facts 3,4,5,6,7,8,10,11) and the Conclusions of Law that rest on those facts. The exceptions are, for the most part, conclusory assertions that the evidence and testimony was disputed. Every hearing addresses disputed facts, however. Every hearing examiner must sift through the evidence and testimony, consider the credibility of witnesses, and make findings of facts. The mere existence of contrary evidence or testimony does not lead to a conclusion that the findings of fact are erroneous.

The ALJ states in her Proposed Decision that she reviewed and considered "the entire record below as well as arguments of counsel." (Proposed Decision at 11). In doing so she addressed each of Mr. Mobley's exceptions to the BCPS Hearing Examiner's Decision. (Proposed Decision at 11-14). We concur with her reasoned analysis of the facts and law and with her conclusion that the local board's decision was supported by a preponderance of evidence. (Proposed Decision at 14).

CONCLUSION

For all the reasons stated herein, we adopt the ALJ's Proposed Decision as our final decision affirming the decision of the local board.

Charlene M. Dukes/MLP

Charlene M. Dukes
President

Mary Kay Finan

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart

S. James Gates, Jr.

Larry Giammo

Luisa Montero-Diaz

Absent

Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffrie M. Smith, Jr.

March 24, 2015

GREGORY MOBLEY,	*	**BEFORE DEBORAH H. BUIE,**
APPELLANT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
BALTIMORE CITY BOARD OF	*	**ADMINISTRATIVE HEARINGS**
SCHOOL COMMISSIONERS	*	**OAH CASE NO.: MSDE-BE-01-14-05235**

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

PROPOSED DECISION

STATEMENT OF THE CASE

On August 30, 2012, Andres A. Alonso, Chief Executive Officer (CEO) of the Baltimore City Public Schools (BCPS), pursuant to his authority under Md. Code Ann., Educ. § 6-202(a)(1) (2008), notified Gregory Mobley (Appellant), a teacher at Claremont High School (Claremont), that he was recommending that the Baltimore City Board of School Commissioners (BCBSC) terminate the Appellant's employment with BCPS due to misconduct in office, willful neglect of duty and incompetence. The basis for the recommended termination was the Appellant's alleged failure to perform duties which are regarded as general teaching responsibilities and his failure to properly attend to children in his special education classroom.

The Appellant requested a hearing and a hearing was held on June 27 and August 23, 2013, before Carolyn H. Thaler, Esquire, a hearing examiner appointed by the BCBSC. At the hearing,

the CEO was represented by Roger Thomas, Esquire, and the Appellant was represented by Keith J. Zimmerman, Esquire. On November 1, 2013, the Hearing Examiner recommended to the BCBSC that the Appellant's employment with BCPS be terminated. On January 2, 2014, the BCBSC issued its Order, accepting the Hearing Examiner's recommendation and terminating the Appellant's employment. Md. Code Ann., Educ. § 6-203 (2008).

The Appellant filed a timely appeal of the BCBSC's termination decision with the Maryland State Board of Education (State Board). The State Board referred the matter to the Office of Administrative Hearings (OAH), where it was received on February 12, 2014.

On April 9, 2014, I held a telephone prehearing conference at the OAH in which Roger Thomas, Esquire, appeared on behalf of the BCBSC. The Appellant participated and represented himself. I issued my Prehearing Conference Report and Scheduling Order on April 15, 2014. In that Order, I directed that on June 5, 2014, pursuant to the Code of Maryland Regulations (COMAR) 13A.01.05.05F(2), I would hear argument on the record below, but would not take any testimony or other evidence.

I conducted the hearing on June 5, 2014, at the OAH in Hunt Valley. Roger Thomas, Esquire, represented the BCBSC and 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 OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.01.05; COMAR 28.02.01.

ISSUE

The issue is whether the Appellant's termination was proper.

SUMMARY OF THE EVIDENCE

Exhibits

A copy of the exhibits presented during the hearing before Hearing Officer Thaler, as well as a transcript of that hearing were made a part of the record for the contested case hearing conducted by me. COMAR 13A.01.05.07B. The following is a list of the record which was created during the hearing before Hearing Officer Thaler. During the hearing before Hearing Officer Thaler, the Local Board's exhibits were referred to as "*CEO* Exhibits" and the Appellant's Exhibits were referred to as "*Appellant* Exhibits". For continuity purposes, when referencing the exhibits admitted by Hearing Officer Thaler, I have used the same terminology.

- Hearing Transcript, dated June 27, and August 23, 2013
- Local Board Exhibit, which included Hearing Officer Thaler's Decision and Recommendation and Appellant's Exceptions to Hearing Examiner's Report and Recommendations and, as well as the following CEO and Appellant Exhibits:

CEO Ex. 1 December 13, 2011 Lesson Plan Review

CEO Ex. 2 Life Skills Program, materials/instructions

CEO Ex. 3 December 15, 2011 Incident Report

CEO Ex. 4 December 15, 2011 "To Do Plan"

CEO Ex. 5 March 2012 BCPS Performance Based Evaluation

CEO Ex. 6 January – April 2012 BCPS Performance Improvement Plan (PIP)

CEO Ex. 7 February 16, 2012 E-mail from A. Schanbacher to Appellant

CEO Ex. 8 February 14, 2012 E-mail from A. Schanbacher to Appellant

CEO Ex. 9 February 16, 2012 E-mail from A. Schanbacher to Appellant (Observation Notes)

CEO Ex.10 February 21, 2012 E-mail from A. Schanbacher to Appellant (Task Analysis)

CEO Ex. 11 February 22, 2012 E-mail from A. Schanbacher to Appellant (Lesson Plan feedback)

CEO Ex. 12 March 6, 2012 E-mail from A. Schanbacher to Appellant (Upcoming Visit)

CEO Ex. 13 A. Schanbacher notes for discussion about planning

CEO Ex. 14 March 15, 2012 Observation Report

CEO Ex. 15 October 19, 2011 Interoffice memo (Supervision of students)

CEO Ex. 16 November 21, 2011 BCPS Performance Based Evaluation Report[1]

CEO Ex. 17 January 12, 2012 Performance Review Report

CEO Ex. 18 February 9, 2012 BCPS Informal Observation Report

CEO Ex. 19 March 15, 2012 BCPS Formal Observation Report

CEO Ex. 20 March 30, 2012 Reprimand letter from Dr. J. Butt to Appellant

CEO Ex. 21 April 19, 2012 Letter of Caution from BCPS to Appellant (Attendance Reliability)

CEO Ex. 22 August 2011 – April 2012 BCPS Annual Evaluation

CEO Ex. 23 April 19, 2012 BCPS Request for Dismissal

CEO Ex. 24 January 16, 2008 and December 21, 2010 PIP for Appellant

CEO Ex. 25 August 30, 2012 Statement of Charges by Andres Alonso

CEO Ex. 26 July 11, 2012 Letter from Jerome Jones to Appellant

CEO Ex. 27 Appeal form

CEO Ex. 28 September 6, 2012 letter from Kim Lewis to Appellant, with attachments

- Appellant Exhibits:[2]

App. Ex. 1 March 23, 2011 E-mails between Appellant and Z. Sockwell

App. Ex. 2 Class Schedule

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[1] This exhibit is missing from the case record; however, it is referenced in the testimony.
[2] Once again for continuity purposes, I have maintained the exhibit numbering provided in the record, eliminating the need to re-number documents already identified and admitted.

App. Ex. 3	December 12, 2011 E-mail from A. Schanbacher to John Butt et al (Training tomorrow)
App. Ex. 4	December 12, 2011 E-mail from A. Schanbacher to John Butt et al (Materials for tomorrow, with attached document)
App. Ex. 5	January 23, 2012 series of E-mails between A. Schanbacher and J. Butt (Classroom Support)
App. Ex. 6	January 9, 2012 E-mail from A. Schanbacher to J. Butt et al (Tuesday visit)
App. Ex. 7	February 3, 2012 E-mail from A. Schanbacher to J. Butt, et al, Behavior Intervention Plan (BIP) data collection sheet
App. Ex. 8	March 7, 2012 E-mail from A. Schanbacher to W. Yang, et al, (Task Analysis Tool)
App. Ex. 9	March 14, 2012 E-mail from A. Schanbacher to Appellant, et al, (Meeting tomorrow)
App. Ex. 10	September 21, 2011 Initial Planning Conference Form
App. Ex. 11	Lesson Plan re: Appellant (undated)
App. Ex. 12	October 2003 BCPS Performance Based Evaluation Handbook
App. Ex. 13	BCPS Attendance Reliability and Analysis Program
App Ex. 14	July 10, 2013 Letter of Recommendation for Appellant
App. Ex. 15	BCPS Memo from CPT Team to all staff (CPI Procedures)
App. Ex. 16	April 1, 2010 Claremont Newsletter
App. Ex. 17	Booklet/Pamphlet by the Appellant entitled "Behavior Management" (undated)
App. Ex. 18	August 20, 2012 Letter to A. Hoag from Jerome Jones Re: Grievance
App. Ex. 19	August 8, 2012 Letter of Recommendation for the Appellant from S. Hayes
App. Ex. 20	June 23, 2011 Letter to J. Casey from Jerome Jones Re: Grievance
App. Ex. 21	January 11, 2011BCPS Performance Review Report for Appellant
App. Ex. 22	March 15, 2012 Lesson Plan for Functional Reading

App. Ex. 23 Work Performance Data Sheet for multiple students

App. Ex. 24 January 27, 2012 Lesson Plan for Math

App. Ex. 25 June 8, 2010 BCPS BIP for student Chad

App. Ex. 26 IEP Goals Progress Chart for multiple students

App. Ex. 27 May 15, 2012 IEP progress report for student Arthur

App. Ex. 28 November 10, 2011 IEP Progress report for student Andre

App. Ex. 29 October 4, 20011 IEP Progress report for student Brandy

App. Ex. 30 March 20, 2012 IEP Progress report for student Chad

App. Ex. 31 November 22, 2011 IEP Progress report for student Jesse

App. Ex. 32 December 6, 2011 IEP Progress report for student Tevin

App. Ex. 33 May 5 – June 11, 2012 BCPS Evaluation for Paraprofessional R.S.

Neither party submitted any supplemental exhibits during the contested case hearing at the OAH, thereby relying upon the exhibits already contained in the record.

Testimony

Because the hearing was conducted solely on the record below, no testimony was taken.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Appellant was a tenured teacher employed by BCPS since 2000 and assigned to Claremont since August 2006 as a special education teacher. Claremont is one of BCPS' specialized schools that serves students who are significantly cognitively delayed.
2. During the Appellant's tenure at Claremont, Performance Improvement Plans (PIP) were initiated in October 2007, November 2008 and December 2010, all addressing concerns with instruction and planning.

3. During the 2011-2012 school year, the Appellant encountered complaints from supervisors related to instructional issues; for example, inadequate or non-existent lesson plans, difficulty transitioning students for instruction and failure to adequately specialize instruction for his disabled students.
4. On November 21, 2011, Assistant Principal Tamara Edwards (Edwards) conducted an observation of the Appellant's classroom and observed students not engaged in instructional activity. When the Appellant began instruction, he was not on task with the lesson plan he had provided Edwards. (CEO Ex. 16)
5. On an earlier visit to the Appellant's classroom, on October 19, 2011, Edwards had observed two non-verbal students unsupervised. On that occasion, a warning memo was issued to the Appellant. (CEO Ex. 15)
6. In early December 2011, Michael Jones (M. Jones), an Educational Specialist in the Office of Special Education, provided a school wide training for all teachers at Claremont, including the Appellant, on the development of lesson plans for special education students. The training addressed how to adequately tailor lesson plans for each unique special education child, with a unique IEP.
7. On December 15, 2011, M. Jones and Andrea Schanbacher (Schanbacher), a Special Educator Liaison, conducted an informal observation of the Appellant's classroom. M. Jones requested to see the Appellant's lesson plan and the Appellant told M. Jones that he did not have a lesson plan. M. Jones also observed age inappropriate items posted on the classroom walls, which had been discussed in the earlier trainings.
8. On December 15, 2011, a special needs child in the Appellant's classroom, who required a high level of supervision because he was prone to run off, was observed unattended and

unsupervised by an adult outside the school building. M. Jones asked Schanbacher to remain with the student while he went to the principal, Dr. Butt, to report that the child was left unattended.

9. On the same day, December 15, 2011, M. Jones created a Next Steps Plan for the Appellant, intended to provide additional support to the Appellant related to both the lack of a lesson plan and failure to properly supervise a student as well as issues associated with the timely completion of IEP paperwork. (CEO Ex. 4)
10. On January 12, 2012, the Appellant was placed on a PIP based upon unsatisfactory performance in three critical areas related to timely completion of IEP paperwork, lesson plans, and proper supervision of students. (CEO Ex. 6)
11. On February 7, 2012[2], Dr. Butt conducted an informal observation of the Appellant's classroom. Lesson plans are required to be in a binder on the teacher's desk opened to the current day's plans. The only lesson plan available and provided to Dr. Butt had a January date. The Appellant was not in compliance with the January 2012 PIP. (CEO Ex. 18)
12. On March 15, 2012, Dr. Butt conducted a formal observation of the Appellant. There was no binder of lesson plans. There were many failures associated with appropriate documentation of individual student's performance (collection of data) and the classroom environment was not orderly or productive. (CEO Ex. 19)
13. On March 27, 2012, another formal observation was conducted by Zulema Sockwell-Moore, Assistant Principal at William S. Baer School. Ms. Sockwell-Moore noted that the classroom consisted of six students with severe and profound disabilities. The Appellant

[2] The documents indicate that the observation took place on February 7, 2012 but the report of the observation is dated February 9, 2012.

was late arriving to the classroom and had not prepared his materials for the lesson. Ms. Sockwell-Moore noted failures in three critical areas. The lesson plan inadequately identified the type of curriculum or form and did not appear to be specialized for the particular lesson; the classroom was disorganized with poor utilization of the time allotted; and the instruction failed to reflect modifications for the special-needs students. (CEO Ex. 5)

14. On March 30, 2012, the Appellant was issued a reprimand citing the failure to have a lesson plan on March 15, 2012 as willful neglect of duty and insubordination. (CEO Ex. 20)
15. On April 17, 2012, Dr. Butt and Schanbacher visited the Appellant's classroom and requested to see a lesson plan. The Appellant indicated that he had no lesson plans for review. The students were not engaged in instruction. Disabled students were observed slumped over in their wheelchairs.
16. On April 19, 2012, the Appellant was issued a first letter of caution due to an accumulation of five periods of absence and five periods of lateness. (CEO Ex. 21)
17. On April 19, 2012, the Appellant was given his annual evaluation with a rating of unsatisfactory. Dr. Butt noted twelve instances of support provided to the Appellant related to his PIP. The Appellant was rated unsatisfactory in planning and preparation and instruction. (CEO Ex. 22)
18. Based upon the Unsatisfactory Annual Evaluation report, on April 19, 2012, Dr. Butt initiated the recommendation for the Appellant's dismissal. (CEO Ex. 23)
19. On July 11, 2012, BCPS notified the Appellant that a Loudermill[3] hearing was scheduled for August 1, 2012. (CEO Ex. 26)

[3] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) mandates that public employees be afforded due process by way of a pre-termination hearing.

20. On August 1, 2012, a Loudermill hearing was held. The Appellant's response to the charges was that he did not have an opportunity to participate in development of the PIP. He acknowledged, however, that he had not tried to contribute anything to the process.

DISCUSSION

The Applicable Law

Section 6-202 of the Education Article provides the framework under which a teacher may be suspended or dismissed. Section 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 the 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 the hearing; and
> (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.
>
> (4) The individual may appeal from the decision of the county board to the State Board.

In an appeal of a suspension or dismissal of a certificated employee pursuant to Education Article Section 6-202 and COMAR 13A.01.05.05F provide the following:

> (1) The standard of review for certificated employee suspension or dismissal actions shall be de novo as defined in 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; and

(4) The State Board, in its discretion, may modify a penalty.

Accordingly, on behalf of the State Board and on the record before me, I am exercising my independent judgment and discretion to determine whether the Local Board has established by a preponderance of the evidence that the Appellant committed acts of misconduct, willful neglect of duty, and incompetence in office and whether termination of his employment is an appropriate sanction.

Having carefully reviewed and considered the entire record below as well as the arguments of counsel, I find that the Local Board has met its burden by a preponderance of the evidence and I recommend the that the Appellant's dismissal as a tenured teacher for misconduct, willful neglect of duty and incompetence be upheld for the following reasons.

The Legal Meanings of Misconduct In Office and Willful Neglect of Duty

One of the bases for dismissal under Md. Code Ann., Educ. § 6-202(a)(1) is "misconduct in office." Here, the BSBSC alleges that, although that term is not defined in the statute, its meaning was considered by the Court of Appeals in *Resetar v. State Bd. Of Educ.*, 284 Md. 537, 560-61 (1979). In *Resetar,* a teacher used language that was derogatory and racially offensive after being warned numerous times not to do so. The Court held that the misconduct must bear on the teacher's fitness to teach and further stated:

> The word [misconduct] is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of

> conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.

Id.

Similarly, "willful neglect of duty" is not defined in the statute. The plain meaning of the phrase, however, is apparent. I take "willful neglect of duty" to mean an employee's intentional failure to perform some act or function that the employee knows is part of his or her job responsibilities. The interpretation is consistent with MSDE's past determination that "willful neglect of duty" is a "willful failure to discharge duties which are regarded as general teaching." *Margaret R. Crawford v. Bd. Of Educ. of Charles County*, 1 Op. MSBE (1976),

Was the Local Board's Decision Arbitrary and Unreasonable?

BCBSC alleges that the Appellant engaged in the willful neglect of duty by repeatedly failing to have adequate lesson plans for daily instruction. The evidence is overwhelming that lessons plans were not visible on the Appellant's desk, in a binder as required, during multiple observations. The Appellant's response was that he had, indeed, developed lesson plans but with other teachers. The Appellant also stated that the lesson plan present during the February 7, 2012 observation by Dr. Butt was dated January 27, 2012 because that was the date the plans were developed. However, based upon the testimony of M. Jones, Zulema-Moore, Schaunbacher, and Edwards along with the supporting documentation, the record supports the Hearing Examiner's findings. The Appellant did not produce evidence of additional lesson plans, kept in a binder, as required.

Incompetency has been defined as occurring "when an employee is lacking in knowledge, skills, and ability or failing to adequately perform the duties of an assigned position." Mua v. Prince George's County Bd. of Educ., MSBE Op. 13-34 (2013). The significance of the absence of the lesson plans is inextricably linked to the issue of competency. Without the lesson plans,

observations of his classroom revealed a lack of appropriate modifications for student instruction and failure to timely complete required information for student IEPs.

After reviewing the record, I find no reason to doubt the testimony of the Board's witnesses and the consistent thread found within whereby the Appellant continually failed to have required lesson plans and failed to deliver instruction specialized for the special needs of his disabled students. Despite being provided considerable and regular support to improve in those areas, the Appellant seemingly refused to adopt the guidance and counseling.

During argument before me, the Appellant stated that Ms. Zulema-Moore's testified that there were lesson plans present during her observation. A review of the transcript, however, indicates that Zulema-Moore testified that on the one occasion that a lesson plan was present (on March 29, 2012), it appeared to have been whited out from an earlier lesson plan and did not include necessary instructional modifications.

The Appellant also asked that I consider that the Hearing Examiner unreasonably discounted the testimony of his two witnesses, who testified by telephone. Ms. Swain, an aide, testified that she was supervising the child outside the building on December 15, 2011and Mr. Sanders, another aide, stated that, in general, the Appellant never left children unattended. The Appellant contradicted the testimony of Ms. Swain because he stated that Mr. Sanders was the aide assigned to be with the child and not Ms. Swain. None of the three witnesses' testimony on the issue of the supervision of the child on December 15, 2011 was consistent. Hearing Examiner Thaler concluded, therefore, that the testimony of the two aides was not credible. Accordingly, she gave greater weight to the witnesses whose testimony was consistent about the events and was supported by documentary evidence.

Finally, the Appellant argued that BCBSC failed to comply with procedures mandated for individuals on a PIP; that is, a pre-observation conference, without which he maintained, observations relied on by BCBSC cannot be taken into consideration. The argument was considered and dismissed by the Hearing Examine r. The Appellant provided no authority for that proposition for my consideration.

The evidence shows the Appellant willfully refused to perform job duties in direct violation of orders by superiors. No reasonable explanation was provided. The Appellant produced one set of data sheets for March 2012 in response to the allegation of poor collection of data (App. Ex. 23). The charges here, however, involve multiple failures over the entire 2011- 2012 school year. As a special education teacher, the Appellant was charged with providing specialized instruction to severely disabled students and credible evidence was presented that, on multiple occasions during the 2011-2012 school year, the Appellant failed to utilize the tools necessary to perform those duties. I conclude, by a preponderance of the evidence that the Appellant engaged in a willful neglect of duty and misconduct. I further conclude that he exhibited incompetence.

Sanction

Under Section 6-202 of the Education Article, the BCBSC may either suspend or dismiss a teacher for various violations, including misconduct and willful neglect of duty. In this case, there can be no doubt that termination is a proper sanction, given both the Appellant's failure over a period of many months to use lesson plans daily, provide specialized instruction to special education students, and maintain adequate records related to the students' IEP.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Appellant willfully neglected his duties, committed misconduct in office, and was incompetent.

I further conclude, as a matter of law, that the Appellant's termination was proper. Md. Code Ann., Educ. § 6-202(a); COMAR 13A.01.05.05F.

PROPOSED ORDER

I **PROPOSE** that the decision of the Baltimore City Board of School Commissioners terminating the Appellant for willful neglect of duty, misconduct in office and incompetency be **UPHELD**.

August 25, 2014
Date Decision mailed

Deborah H. Buie
Administrative Law Judge

DHB/lh
150921

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file written objections within fifteen days of receipt of the decision; parties may file written responses to the objections within fifteen days of receipt of the objections. Both the objections 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:

Gregory Mobley
1920 Oakhills Drive
Hanover, PA 17331

Roger C. Thomas, Esquire
Law Office
7237 Hanover Parkway, Suite D
Greenbelt, MD 20770