

DONNA WASSER,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-08

OPINION

INTRODUCTION

The Appellant, who served as a counselor at Fallsmead Elementary School, challenges the decision of the Montgomery County Board of Education (local board) terminating her for incompetence.

We transferred the case pursuant to COMAR 13A.01.05.07 to the Office of Administrative Hearings (OAH) for review by an Administrative Law Judge (ALJ). On December 7, 2015, the ALJ issued a proposed decision recommending that the State Board uphold the decision terminating Appellant from her counselor position.

The Appellant did not file any exceptions to the ALJ's proposed decision.

FACTUAL BACKGROUND

The factual background in this case is set forth in the ALJ's proposed decision, Findings of Fact, pp.5-20.

STANDARD OF REVIEW

Because this appeal involves the 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.

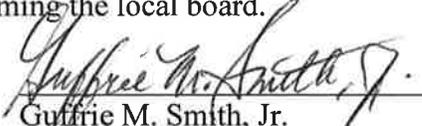
The State Board transferred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications 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).

ANALYSIS

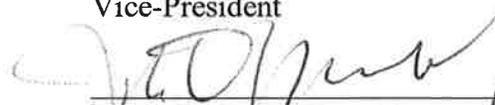
The ALJ found substantial evidence in the record to support the Appellant's termination based on incompetence. Even though the Appellant had prior years of satisfactory performance, beginning with the 2012-2013 school year she exhibited performance deficiencies which resulted in her being placed into the Peer Assistance and Review (PAR) Program. Some of the deficiencies included a lack of lesson planning for classroom sessions; problems collecting and utilizing student data; lack of preparedness for meetings, including IEP meetings; late arrival at scheduled counseling sessions; and failure to use a variety of teaching strategies to accommodate different learning styles. After being in the PAR Program for one year and showing no significant improvement in her performance, the PAR Panel recommended that the Appellant be terminated at the end of the 2013-2014 school year. The local superintendent, local hearing officer, the local board, and the ALJ each reviewed the Appellant's case and found that termination was warranted. We concur with the ALJ that the evaluation process was fair and impartial, that the Appellant had serious performance deficiencies, and that Appellant was provided adequate assistance to remedy the identified deficiencies yet she was unable to do so.

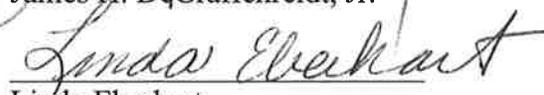
CONCLUSION

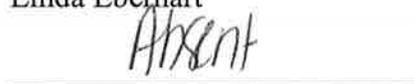
We agree with the ALJ's assessment that the record in this case supports the local board's termination of the Appellant from her counselor position on the ground of incompetency. We, therefore, adopt the ALJ's Proposed Decision affirming the local board.

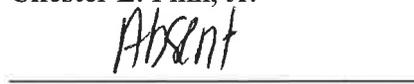

Guffrie M. Smith, Jr.
President

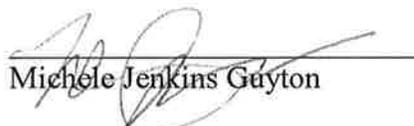

S. James Gates, Jr.
Vice-President

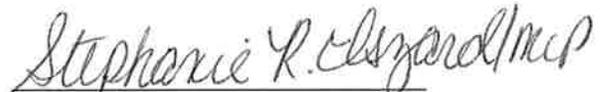

James H. DeGraffenreidt, Jr.


Linda Eberhart

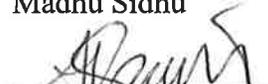

Absent
Chester E. Finn, Jr.


Absent
Larry Giammo


Michele Jenkins Guyton


Stephanie R. Iszard


Madhu Sidhu


Andrew R. Smarick


Laura Weeldreyer

March 22, 2016

DONNA WASSER,
APPELLANT
v.
MONTGOMERY COUNTY
BOARD OF EDUCATION

* BEFORE JOY L. PHILLIPS,
* ADMINISTRATIVE LAW JUDGE,
* MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-BE-01-15-23248

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSION OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On July 9, 2014, the superintendent of the Montgomery County Board of Education (County Board) notified the Appellant, a counselor at Fallsmead Elementary School (Fallsmead), that he was recommending her termination. The Appellant appealed the recommendation to the County Board. The County Board referred the matter to a hearing examiner, who conducted an evidentiary hearing on November 13 and 14, 2014 and December 1, 2014. On March 23, 2015, the hearing examiner recommended the Appellant's termination to the County Board. At the Appellant's request, oral argument was held before the County Board on May 6, 2015. On May 26, 2015, the County Board accepted the hearing examiner's recommendation and terminated the Appellant. Md. Code Ann., Educ. § 6-203 (2014).

The Appellant filed an appeal to the Maryland State Board of Education (State Board). On July 6, 2015, the State Board referred the matter to the Office of Administrative Hearings

(OAH) for a contested case hearing and a proposed decision. Md. Code Ann., Educ. § 6-202(a)(4) (Supp. 2015); Code of Maryland Regulations (COMAR) 13A.01.05.07A(2). I conducted a hearing on September 16, 2015 at the County Board building, Rockville, Maryland. The Appellant represented herself. Judith S. Bresler, Esquire, represented the County Board.

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 of Education, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; COMAR 28.02.01.

ISSUE

Was the Appellant's termination proper?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted into evidence the record submitted to the hearing examiner. It contained the following documents:

- A. Hearing Examiner's Report, March 23, 2015
- B. Administrative Record (Joint Exhibits)
 - 1. Superintendent's Recommendation for Dismissal, July 14, 2014, and letter from Dr. Kimberly A. Statham to the Appellant, July 9, 2014
 - 2. Letter from Suzann M. King to the Appellant, July 14, 2014
 - 3. Letter from the Appellant to Ms. King, July 20, 2014
 - 4. Letter from Ms. King to Andrew W. Nussbaum, Esquire, July 31, 2014
 - 5. Letter from Ms. King to Mr. Nussbaum, September 29, 2014
 - 6. Professional Growth System Final Evaluation Report, April 3, 2013
 - 7. Letter from Chris Lloyd, Peer Assistance and Review Panel (PAR) Co-Chair, and Gary Bartee, PAR Co-Chair, to the Appellant, June 6, 2013
 - 8. PAR Formal Observation Report #1, October 7, 2013
 - 9. PAR Formal Observation Report #2, December 3, 2013
 - 10. PAR Mid-Year Summary, December 3, 2015

11. PAR Formal Observation Report #3, April 1, 2014, with addendum, April 1, 2014
12. PAR Formal Observation Report #4, May 7, 2014
13. PAR Final Summative Report, May 6, 2014
14. Letter from Mr. Lloyd and Mr. Bartee to the Appellant, May 15, 2014
15. Letter from Mr. Lloyd and Mr. Bartee to the Appellant, May 29, 2014
16. Professional Observation and Response, Kate Bradley, November 1, 2013
17. Memorandum of Understanding, from Roni Silverstein, Principal, to the Appellant, March 12, 2014, with Informal Observations Feedback, March 7, 2014
18. School Counselor Performance Standards, January 30, 2003
19. Professional Growth System Handbook, 2013-2014
20. MCPS Regulation on School Counseling Programs and Services, IJA-RA, revised November 8, 2005

C. Superintendent's Exhibits

1. Letter from Jane Silbert to Ms. Silverstein, January 23, 2013
2. Fallsmead information, 2013-2014
3. Fallsmead Action Plan, September 30, 2013
4. Ethical Standards for School Counselors, last adopted 2010
5. Growth Plan, November 2013 – June 2014
6. E-mail from Kathryn D. Bradley to the Appellant, January 17, 2014
7. Page from County Board website, undated

D. Employee/Appellant's¹ Exhibits

1. Not admitted
2. Memo from the Appellant to Ms. Silverstein, October 4, 2012, and memo from Ms. Silverstein to the Appellant, September 24, 2012
3. Memo from Ann L. Bauman, Acting Director, Performance Evaluation and Compliance, to the Appellant, February 15, 2013
4. The Appellant's College Transcript, September 29, 2000 (date stamp)
5. The Appellant's Resume, undated
6. Counseling Lessons Monthly Calendar, March 1-24 (no year)
7. Rebuttal to Evaluation, April 2013
8. Letter from Scott A. Mirsky, Esquire, to Dr. Statham, June 30, 2014
9. Counselor Performance Standard I; E-mail from Jennifer M. Hitchcock to the Appellant, April 24, 2013; E-mail from Ms. Silverstein to the Appellant, October 25, 2013; Observation by Ms. Hitchcock, May 23, 2014; E-mail from the Appellant to Ms. Silverstein, undated; Fallsmead Elementary School Career Day hand out, May 30, 2014; Example of work with children, undated; E-mail from the Appellant to Deborah W. Ritter, February 4, 2014; Sample Lesson, undated; Counselor Performance Standard II; E-mail from Ms. Hitchcock to the Appellant, March 15, 2013; E-mail from Ms. Hitchcock to the Appellant, April 24, 2013; Student Report, 2013-2014; E-mail from Heather M. Eig to the Appellant, January 17, 2014; Letter from Elizabeth See to Ms. Bradley and Ms. Silverstein,

¹ The title "Employee" was used in the hearing below, but I have used the title "Appellant."

February 11, 2014; Counselor Performance Standard III; E-mail from Ms. Hitchcock to the Appellant, March 15, 2013; E-mail from Nicole A. Shantillo to the Appellant, February 4, 2014; Observation by Ms. Hitchcock, May 23, 2014 (duplicate); Letter from Inez R. Ernst to Whom It May Concern, January 2, 2014; Letter from Linda S. Silver, IDA, to Whom It May Concern, December 18, 2013; E-mail from Rebekah A. Finch to the Appellant, December 12, 2013; E-mail from Allison Morris to the Appellant, September 16, 2013; Letter from Tracy and Steve Clark to Philip Kauffman and the County Board, July 21, 2014; Letter from Amy Metcalf to the County Board, undated; Letter from Judith Cohen to Whom It May Concern, July 22, 2014; Letter to Fallsmead families from the Appellant, undated; Page 1 of the Falcon Flyer, undated; Fallsmead Elementary School Career Day hand out, May 30, 2014 (duplicate); Partial article from Gazette.Net, undated; Counselor Performance Standard IV; Summary Statement, by Ms. Hitchcock, March 25, 2014; Worksheets for Group Counseling, undated; Counselor Performance Standard V; Certification of Completion of Continuing Professional Development Course, July - October 1997; Qualifications for Continuing Education Contact Clock Hours, March 17, 1997, February 19, 1997, and February 6, 1997; E-mail from the Appellant to Daniella M. Stanton, February 26, 2014; Certificate of Participation, Responding to the Military Child with Exceptional Needs, October 2013; Continuing Education Unit Verifications, October 2012 and May 2013; E-mail from Laura Newton to School Counselors, undated; The Appellant's Professional Counselors and Therapists License, expiration January 31, 2016; E-mail from Anna Sullivan to the Appellant, January 22, 2014; CPI Blue Card, Training in Nonviolent Crisis Intervention, undated; Counselor Performance Standard VI; Form Letter from the Appellant to Mentee, undated.

10. Letter from Judith Bluefeld Amick to Philip Kauffman and Members of the County Board, dated July 15, 2013
- E. Post-Hearing Memorandum (Closing Argument) on behalf of the Superintendent, January 8, 2015
- F. Post-Hearing Memorandum (Closing Argument) on behalf of the Appellant, January 23, 2015
- G. Superintendent's Reply to the Appellant's Post-Hearing Memorandum (Closing Argument), February 2, 2015
- H. Transcript of hearing before hearing examiner, November 13, 2014 (with index)²
- I. Transcript of hearing before hearing examiner, November 14, 2014 (with index)

² Transcript references in this proposed decision are designated Tr. and refer to the transcript developed at the hearing before the hearing examiner.

J. Transcript of hearing before hearing examiner, December 1, 2014 (with index)

K. Decision and Order of the County Board, May 26, 2015³

Testimony

I considered the witness testimony presented before the hearing examiner, which included, as witnesses for the County Board: Roni Silverstein, Fallsmead Principal; Cortney Chao, Consulting Teacher; and Christopher Lloyd, PAR Panel Co-Chair; and as witnesses for the Appellant: the Appellant; Judith Amick, School Psychologist; Christina Tregoning, Teacher; Michele Kaplan, Parent; and Jennifer Jones, Ph.D., School Counselor.

No testimony was presented to me because the matter was argued on the record submitted to the hearing examiner.

FINDINGS OF FACT

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

The Appellant's Background

1. The Appellant has been a counselor with Montgomery County Public Schools (MCPS) since 1994. She worked at Wheaton Woods Elementary School for eleven years before moving to Fallsmead.

2. The Appellant has a Master's Degree from Johns Hopkins University in School Guidance and Counseling, from 1993, and a Certificate of Advanced Graduate Study in Clinical and Community Counseling. She is a nationally board certified counselor. She was a Mentor Counselor with the County Board for eleven years, until 2013.

3. Prior to her termination, the Appellant was a tenured employee with the MCPS.

Counseling Standards

³ The County Board's decision was not part of the record compiled by the hearing examiner, but I have included it as an exhibit pursuant to COMAR 13A.01.05.08A.

4. In 2002-2003, counseling standards were developed by the MCPS and Montgomery County Education Association (MCEA). Counselors were involved in the development of those standards. The Performance Standards for School Counselors (Counselor Standards) became effective January 30, 2003, and are as follows:

Standard I: Counselors are committed to students and their learning.

Performance Criteria:

- A. Counselors act on the belief that every student can learn with appropriate supports.
- B. Counselors recognize individual differences and advocate for equity of all students.
- C. Counselors share responsibility for student academic, career, personal, interpersonal, and health development.
- D. Counselors understand theories of child development and their implications for learning.

Standard II: Counselors know counseling theories and techniques and their application to student learning and development.

Performance Criteria:

- A. Counselors are knowledgeable about counseling theory and use appropriate skills and techniques in a variety of settings to support student learning.
- B. Counselors use a variety of forms of communication to support student learning.
- C. Counselors work from an understanding of cultural and learning style differences to support student learning.

Standard III: Counselors collaborate in the process of establishing and facilitating a positive learning environment to enhance student growth and achievement.

Performance Criteria:

- A. Counselors promote a positive learning environment in which students can develop skills for success.
- B. In collaboration with staff, counselors involved students in meaningful learning opportunities.

- C. Counselors establish and maintain respectful partnerships with families in support of a positive school environment.
- D. Counselors utilize community resources to support and enhance a positive learning environment.
- E. Counselors collaborate in the facilitation of continuous improvement of the learning environment.

Standard IV: Counselors collaborate to continually assess and analyze student needs in order to develop appropriate counseling and guidance interventions/programs.

Performance Criteria:

- A. Counselors use a variety of formal and informal techniques to assess student needs.
- B. Counselors implement counseling and guidance interventions/programs based on the analysis of data.
- C. Counselors monitor and evaluate counseling and guidance intervention/program effectiveness.

Standard V: Counselors are committed to continuous improvement and professional development.

Performance Criteria:

- A. Counselors continually reflect upon their practices in promoting student achievement, growth, and development.
- B. Counselors maintain awareness of current, effective counseling trends, practices, and materials.
- C. Counselors are members of learning communities.

Standard VI: Counselors exhibit a high degree of professionalism.

Performance Criteria:

- A. Counselors uphold the vision of the Montgomery County Public Schools.
- B. Counselors share responsibility for total school program and support school-wide goals.
- C. Counselors demonstrate the ethical standards of their profession.
- D. Counselors are knowledgeable and respectful of diverse cultural backgrounds of all individuals.
- E. Counselors conduct themselves in such a manner as to advance respect for the profession.

(Jt. Ex. 18.)

5. The County Board also has instituted a regulation to align its school counseling services with national and state standards. As to elementary school counselors, it provides that they will:

- a. Implement the MCPS Comprehensive School Counseling Program, including the following prevention and intervention services:
 - (1) Academic advocacy
 - (2) Classroom guidance lessons
 - (3) Responsive counseling
 - (4) Individual student planning
 - (5) Staff and parent consultation
 - (6) School-Wide support.
- b. Implement regularly scheduled classroom guidance lessons in the five areas of academic, career, health, interpersonal, and personal development as the primary prevention component.
- c. Design, implement, and manage a referral system that affords all students equitable access to a range of counseling services.
- d. Collect and analyze school counseling program data to monitor, evaluate, and continuously improve the effectiveness of the school counseling program.
- e. Collaborate with school staff to implement a systematic plan to address the articulation and class assignment progress and student transition needs.
- f. Collaborate with elementary and middle school staff to support students in their selection of a rigorous and appropriate academic program. Students traditionally underserved in rigorous programs will be specifically identified for recruitment and support.

(Jt. Ex. 20, p. 6.)

6. School counseling is comprised of several components, including conducting responsive counseling, which includes one-to-one counseling to address the immediate needs of students; responding to school emergencies; implementing a school-wide counseling program; leading classroom sessions; and leading small group sessions, such as a Lunch Bunch. The school counselor also acts as a parent liaison and a collaborative team member with teachers and administrators.

7. The following information is used to describe a school counselor's performance under the performance standards: counselor observations; evidence of contributions to overall school mission and climate; review of data collection and analysis from the Comprehensive Guidance and Counseling Program implementation report; review of student, staff and parent surveys; review of professional growth plans and implementation results; and any other documents collected by the evaluator and/or counselor during the full length of the cycle. Additional documents might include needs assessment data; sample classroom guidance lessons; counselor materials generated to support school-wide positive behavior or character education initiatives; plans from responsive counseling groups; counselor schedules, logs or calendars; guidance department communications; notes from students, parents, or teachers; counselor newsletters; documentation of teacher and/or parent consultation; and any other materials which demonstrate that standards have been met. (Super. Ex. 7.)

2011-2012 School Year

8. Roni Silverstein became the Principal at Fallsmead in 2011.

9. Ms. Silverstein and the Appellant had favorable interactions during the 2011-2012 school year.

10. Ms. Silverstein encouraged the Appellant to be more proactive in creating a comprehensive counseling program for the school and taking on more of a leadership role in the school.

2012-2013 School Year

11. The Appellant was subject to a formal evaluation during the 2012-2013 school year. As part of the evaluation process, Ms. Silverstein conducted numerous observations of the

Appellant in large classrooms, in small groups and in meetings. She gathered information from others at the school and received feedback from parents.

12. During the 2012-2013 school year, Ms. Silverstein began hearing complaints from other staff members about the Appellant and having her own concerns about the Appellant's work. She noticed a lack of consistency in the Appellant's work. The Appellant showed up late for scheduled lessons in classrooms or missed class time completely. Ms. Silverstein was concerned about an apparent lack of lesson planning, resulting in classroom instruction time being chaotic and unfocused. The Appellant showed up for meetings, such as those for an Individualized Education Plan (IEP) unprepared, sometimes making notes at the last minute.

13. Ms. Silverstein issued the Appellant a notice of reprimand on September 24, 2012, based on an apparent conflict of interest, when a student reported that he had been to the Appellant's home and that his mother had provided the Appellant with spray tanning services. The Appellant denied that she had engaged in any unprofessional activities.

14. On at least one occasion, the Appellant engaged in a counseling relationship with a student's family outside of school. The student's parent complained regarding some things the Appellant had said during counseling. She was placed on administrative leave for this relationship on or about January 28, 2013. Ultimately, no violation of an MCPS regulation or County Board policy was sustained, but the Appellant was directed to cease and desist from providing any services to Fallsmead students and their families outside of her job.

15. During the school year, Ms. Silverstein made numerous suggestions to the Appellant regarding how she expected her work to improve. As the year progressed, Ms. Silverstein did not see the improvement she hoped for. She did not see her suggestions being incorporated into the Appellant's work.

16. Ms. Silverstein wanted a more accurate, accessible calendar of the Appellant's week so that other staff members would be better able to plan around her schedule. This did not happen until the end of the following school year.

17. Ms. Silverstein's concern led her to contact Jennifer Hitchcock, the Supervisor for Counselors for MCPS. Ms. Hitchcock, who knew the Appellant and had observed her, approved Ms. Silverstein's suggestions and goals for the Appellant.

18. Ms. Silverstein created a Growth Plan for the Appellant, which was in effect from March 4, 2013 through June 17, 2013. The Growth Plan contained specifics on the Appellant's areas of weakness and performance goals to address those areas.

19. Ms. Hitchcock suggested that the Appellant implement the No Put Downs program at Fallsmead as a way to respond to Ms. Silverstein's desire for a school-wide initiative. The program was introduced to the Appellant, who incorporated it into her curriculum.

20. By March 25, 2013, Ms. Silverstein concluded that the Appellant was not meeting performance standards. This conclusion was based on her own observations, feedback from school employees and comments of parents. In her Final Evaluation Report, she detailed the Appellant's shortcomings as they related to each counseling standard. (Jt. Ex. 6.) The Appellant signed the report on April 2, 2013.

21. As a result of the below standards rating, the Appellant was referred to the MCPS Peer Assistance and Review (PAR) Process.

PAR Process

22. The PAR Process is part of the teacher and school professional employee growth program. The PAR Panel is composed of eight teachers and eight administrators and has two Co-Chairs. Each employee assigned to the PAR Process is assigned a consulting teacher (CT),

who meets with the employee throughout the school year, formally and informally, in an attempt to both observe the employee's practices and make suggestions for improvement. CTs are trained in a program called Observing and Analyzing Teaching (OAT I and OAT II) which teaches participants professional standards and a method of reporting observations. During the school year, the CT reports on formal observations, writes a mid-year report, and submits a Final Summative Report to the PAR Panel. PAR Pairs, composed of a Principal and a teacher, provide feedback to each CT as the year progresses. After receiving the Final Summative Report and reviewing all of the evidence and arguments submitted by the principal and the employee, the PAR Panel makes a recommendation to the Superintendent regarding whether the employee should remain in the PAR program a second year, be returned to employment, or terminated. The Superintendent may accept or reject the PAR Panel's recommendation.

23. Prior to being accepted into the PAR Process, a separate CT conducts an observation of the employee and recommends whether the employee should be accepted into the PAR program.

24. CTs are not assigned by professions; that is, CTs who are teachers may be assigned to counselors.

25. In the spring of 2013, following the below standards rating given by Ms. Silverstein, a CT observed the Appellant and recommended that she be accepted into the PAR program.

2013-2014 School Year

26. Courtney Chao was assigned to be the Appellant's CT during the 2013-2014 school year. Ms. Chao was in her third year of being a CT. She had been assigned as a CT to tenured and non-tenured teachers.

27. Ms. Chao conducted a formal observation of the Appellant on September 30, 2013, using the Counselor Standards. (Jt. Ex. 8.) The Appellant was conducting a group lesson to a third grade class using the No Put Downs curriculum. Ms. Chao noticed some disorganization in calling on the students, concluding that the Appellant failed to effectively incorporate equitable calling practices during the lesson. Some students appeared confused about the directions provided by the Appellant. Some students did not fully participate in the lesson. The Appellant did not effectively check that the students understood the lesson.

28. Ms. Chao discussed her observations with the Appellant on October 1, 2013, and suggested strategies for improving the delivery of the lesson.

29. On October 7, 2013, Kate Bradley, who was the Principal Intern at Fallsmead throughout the year, but acted as Acting Principal for a segment of the school year, conducted an observation of the Appellant teaching a third grade classroom using the No Put Downs curriculum. She wrote a report formalizing her observations in conjunction with the Counselor Standards and shared it with the Appellant on November 1, 2013. She concluded that the Appellant:

- Appropriately incorporated equitable practices of wait time, sticking with students, and calling sticks to engage students. As a result, students remained engaged and felt supported with opportunities of think time and knowing that their contributions were important. (Standard I)
- Used multiple strategies to engage the different learning styles of students. As a result, students had multiple opportunities to identify a consequence to a putdown. (Standard II)
- Missed an opportunity to maximize learning by providing students with unclear and confusing directions of activities and transitions. As a result, students were confused as to what they needed to know and do. (Standard III)
- Missed an opportunity to allocate time appropriately to maximize student learning and engagement in a given timeframe. As a result, students needed an extended lesson to show mastery in an atypical timeframe that they will not receive again. (Standard III)

- Assessed student learning by giving an exit card, but missed an opportunity to frame the extended assessment activity of self-monitoring that was aligned with the exit card. As a result, students were confused and unable to demonstrate their understanding of the impact of their behavior to the consequence they wrote on their exit card. (Standard IV)

(Jt. Ex. 16.)

30. Ms. Chao conducted a second formal observation of the Appellant on November 19, 2013, using the Counselor Standards. (Jt. Ex. 9.) This was an unannounced observation of the Appellant leading a second grade class in the No Put Downs Curriculum. Ms. Chao noted that the Appellant failed to adapt the materials to the developmental needs of the students. The Appellant used no written examples for the students to refer to, relying solely on verbal communication. Some students appeared confused about the material. The Appellant failed to collaborate with the second grade teacher by not having a specific lesson plan and not letting the teacher know she would be arriving late for the lesson. The Appellant failed to do an appropriate check that the students understood the lesson.

31. Ms. Chao discussed her observations with the Appellant on November 19, 2013. The Appellant conceded that she had not done any planning for the lesson and had not used any data from a previous lesson to assist in planning for this one. She said that she had it in her mind what she was going to do, but did not have time to write any plans because of a last minute meeting called by Ms. Silverstein just before the class period. She acknowledged her need to make written lesson plans.

32. On December 3, 2013, Ms. Chao provided the Appellant with a Mid-Year Summary, which included specifics about the Appellant's area of strength and areas of need. She concluded that the Appellant did not meet standards. (Jt. Ex. 10.)

33. On January 17, 2014, Ms. Bradley sent a follow-up e-mail to the Appellant summarizing a meeting that had taken place the previous day. In the e-mail, Ms. Bradley wrote

that the Appellant needed to maintain an accurate, updated schedule that she would upload to the shared computer program; inform teachers of which students were being pulled for small groups, the reason they were being pulled and their progress in the small groups; make up missed classes; ask team leaders for specific clarification of “plus/deltas” from teachers; and report to lessons on time. (Super. Ex. 6.)

34. On March 7, 2014, Ms. Silverstein formally observed the Appellant conduct a Lunch Bunch with a group of second grade students. On March 10, 2014, Ms. Silverstein, Ms. Bradley and the Appellant met to discuss the observation, the status of the PAR process, and suggestions for improving performance before the end of the school year. The Appellant received praise for certain elements of her performance, for example, for preparing age appropriate material, allowing students time to talk about their fears and pacing the lesson appropriately. Suggestions for improvement included creating new material for lessons so that old, marked, worn papers were not used; planning the lesson to anticipate which parts might not be age appropriate; quickly transitioning into the lesson; and reducing teacher talk during the lesson. Ms. Silverstein reiterated her desire for the Appellant to take on more of a leadership role in the school. A Memorandum of Understanding summarized the observations and discussion. (Jt. Ex. 17.)

35. On March 21, 2014, Ms. Chao conducted a formal observation of the Appellant in her office leading a small fifth-grade group on the topic of perseverance (or persistence) in achieving academic tasks. (Jt. Ex. 11.) Ms. Chao used the Counselor Standards. Much of the lesson time was spent getting the students into her office from the lunch room, discussing an interaction with a lunch aide, and engaging two students who were having a disagreement about something. The Appellant did not communicate the session objective to the students, making it

difficult for them to clearly connect the materials to an objective. She could have managed intrusions into the lesson time by students more productively. She failed to use student data to address students' needs.

36. On March 24, 2014, Ms. Chao discussed her observations with the Appellant. The Appellant took issue with Ms. Chao's observation that the Appellant failed to manage the two students who were engaged in a disagreement, responding that she tried to use it as a teachable moment for the students on resolving conflict.

37. On April 28, 2014, Ms. Chao conducted an unannounced formal observation of a lunch group of third grade students, formed to address friendship-making skills. (Jt. Ex. 12.) She used the Counselor Standards. The Appellant did well in addressing students' personal development needs. She related the materials to their home lives, but not to their school lives. All of the students were involved in the discussion. She used only verbal assessment methods and not a variety of forms of assessments.

38. On April 29, 2014, Ms. Chao discussed her observations with the Appellant.

39. On May 6, 2014, Ms. Chao issued her Final Summative Report, using Counselor Standards to assess the Appellant. Overall, she found that the Appellant was performing below standards. She provided specific examples for the following conclusions:

I. Counselors are committed to students and their learning.

The Appellant misses opportunities to effectively incorporate equitable practices during classroom lessons and group guidance sessions. As a result, students receive the message that they are not expected to actively participate throughout guidance lessons.

The Appellant does not consistently plan her classroom lessons to match the developmental needs of her students. As a result, students display difficulty describing lesson strategies, creating their own examples and scenarios, and applying new learning to their daily interactions with peers.

The Appellant presents small group counseling sessions to address individual student needs with mixed results. As a result, students' individual needs are not consistently met.

II. Counselors know counseling theories and techniques and their application to student learning and development.

The Appellant does not successfully use a variety of strategies to appeal to students with multiple learning styles. As a result, students do not have the opportunity to access the guidance material using multiple modalities, and many students are not given consistent opportunities to interact with the material.

The Appellant does not use a variety of forms of communication, including purposeful explanatory devices, to support student learning. She relies heavily on verbal delivery. As a result, students display confusion regarding guidance lessons and counseling sessions.

The Appellant misses opportunities to clearly frame classroom lessons and counseling sessions for participants. As a result, students are not able to make clear connections to counseling objectives, and session outcomes are often not met.

III. Counselors collaborate in the process of establishing and facilitating a positive learning environment to enhance student growth and achievement.

The Appellant does not effectively provision and pace her classroom lessons to maximize student engagement and understanding. She sometimes does not bring necessary materials to classroom lessons. As a result, students spend the majority of guidance lessons sitting on the carpet without the opportunity to engage in the guidance content.

The Appellant shows some evidence of collaboration with staff to create meaningful learning opportunities. However, her collaboration is inconsistent. As a result, students are not consistently provided with guidance content matched to their needs or designed for the continuous improvement of the learning environment.

The Appellant misses opportunities to consistently manage intrusions to counseling sessions, although during one observation, she did successfully address a lesson intrusion. Her response to intrusions is inconsistent, however, thus not providing students with a consistent positive learning environment in which to develop skills for success.

IV. Counselors collaborate to continually assess and analyze student needs in order to develop appropriate counseling and guidance interventions/programs.

The Appellant does not effectively check for student understanding or maintain accurate records of student performance during classroom lessons. As a result, all students are not able to demonstrate their understanding, and subsequent lessons are not consistently matched to demonstrated areas of needs.

The Appellant misses opportunities to appropriately match assessments to the lesson content. Sometimes lessons are ended before all students have an opportunity to complete informal assessments or answer summarizing questions. As a result, students are not able to demonstrate their level of understanding of guidance material.

The Appellant inconsistently utilizes student data to address student needs. Toward the end of the school year, she did begin using a technique known as exit cards to capture student data, but she did not use the data in planning lessons. As a result, student needs were considered inconsistently during planning.

V. Counselors are committed to continuous improvement and professional development.

The Appellant does not effectively implement feedback from the CT during the year. She shows reluctance to utilizing a planning template the two had chosen. She talks to other counselors in an effort to obtain their feedback.

VI. Counselors exhibit a high degree of professionalism

By the end of the year, the Appellant posted her calendar on her door for others to track her schedule. She sometimes contacted her CT when she knew she was going to be absent, but eight times the CT appeared for an observation and the Appellant was either absent or not presenting material as her schedule indicated. She responded to the CT's e-mails in a timely manner.

(Jt. Ex. 13.)

40. During the school year, Ms. Chao and the Appellant had four formal observations, four post-observation conferences, seventeen informal observations, and nineteen informal meetings. In addition, the two communicated by telephone and e-mail. Ms. Chao also

communicated with Ms. Silverstein and Ms. Hitchcock to confirm that she was correctly interpreting and applying the Counselor Standards, and correctly communicating Ms. Silverstein's vision for how a school counselor should perform.

41. On May 7, 2014, Ms. Silverstein submitted the Principal's Response Form to the PAR Panel. She agreed with the CT's conclusion that the Appellant was not meeting standards and recommended that the Appellant be continued in the PAR program for a second year. She added this comment: "This was a difficult decision because I am not sure another year will make a difference, but I do feel [the Appellant] has been trying the last few months." (Jt. Ex. 13, p. 11.)

42. The PAR Panel met and heard from the Appellant and Ms. Silverstein on May 29, 2014. It considered a packet of information compiled by the Appellant to show that she met performance standards. (Apt. Ex. 9.) The Panel recommended that the Appellant be terminated. (Jt. Ex. 15.)

County Board Decision

43. On June 12, 2014, Kimberly A. Statham, Ph.D., deputy superintendent of teaching, learning and programs, notified the Appellant in writing that she was seriously considering recommending that the Appellant be dismissed for incompetency. On June 30, 2014, Dr. Statham met with the Appellant to permit the Appellant to raise anything she wished to be considered before a final recommendation was made.

44. On July 9, 2014, Joshua P. Starr, Ed. D., Superintendent of MCPS, recommended to the County Board that the Appellant be dismissed for incompetency based on the opinion of Dr. Statham and the recommendation of the PAR Panel.

45. On July 20, 2014, the Appellant requested a hearing before the County Board to challenge Dr. Starr's recommendation.

46. The County Board referred the matter to a hearing examiner, who conducted an evidentiary hearing on November 13 and 14, 2014 and December 1, 2014. On March 23, 2015, the hearing examiner recommended the Appellant's termination to the County Board. (Ex. A.)

47. At the Appellant's request, oral argument was held before the County Board on May 6, 2015. On May 26, 2015, the County Board accepted the hearing examiner's recommendation and terminated the Appellant. (Ex. K.)

48. On June 15, 2015, the Appellant appealed the decision of the County Board to the State Board.

49. On July 6, 2015, the State Board transmitted the matter to the OAH for hearing.

DISCUSSION

Applicable Law

The Education Article of the Maryland Annotated Code, section 6-202, provides the framework under which a teacher or other professional assistant may be dismissed. It provides:

(a)(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.

Md. Code Ann., Educ. § 6-202(a)(1) (Supp. 2015).

In this case, the Appellant was terminated for incompetency. The burden of proof in this matter is on the County Board by a preponderance of the evidence, as set forth in COMAR

13A.01.05.05F:

F. Certificated Employee Suspension or Dismissal pursuant to Education Article, §6-202, Annotated Code of Maryland.

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

In the State Board case of *Sammarco v. Board of Education of Prince George's County*, MSBE Op. No.: 15-01, page 5 (2015), the State Board set forth the criteria for dismissing a teacher, which would include a counselor, on the ground of incompetency:

The record must demonstrate that: 1) the evaluation process was fair and impartial; 2) the teacher had serious teaching deficiencies; and 3) the teacher was provided adequate assistance to remedy those deficiencies.

Review of Witness Testimony and Evidence

The Fallsmead Principal, Ms. Silverstein, testified on behalf of the County Board. When she came to Fallsmead in 2011, she intended to raise the professionalism of the counselor position. She encouraged the Appellant to be a leader in the school, and to collaborate with staff to develop a proactive, comprehensive counseling program. Although she initially had a favorable impression of the Appellant's work, she became concerned about her lack of consistency, her failure to regularly collaborate with other teachers at Fallsmead, her failure to use student data, and her failure to plan lessons and classroom time.

Ms. Silverstein's opinions of the Appellant's work were based on her own observations, but she also had feedback from other teachers, who complained that the Appellant was often

absent or late to class, failed to collaborate, and failed to provide a schedule that would let teachers know when to expect her. The Appellant did not respond to her suggestions for improvement in the areas of using data, planning lessons, and varying strategies and modalities across the grade levels. Two incidents from the 2012-2013 school year caused great concern for Ms. Silverstein: a student was reported to have been at the Appellant's home and the Appellant was reported to have received spray tanning services from the student's mother sometime in September 2012; and in approximately January 2013, the Appellant provided personal counseling services to a family and the mother complained about some things the Appellant had said. Ms. Silverstein was also concerned about the Appellant's lack of professionalism around the school, in that she was heard talking loudly about a student in the lounge and she had the reputation for having "loose lips." (Tr. 52-53.)

Ms. Silverstein developed a Growth Plan for the Appellant toward the end of the 2012-2013 school year, but did not see the hoped-for improvement. Ultimately, she decided the Appellant's total work, as opposed to just the responsive counseling that seemed to be the Appellant's strong suit, was below standards. The Appellant was then referred to the PAR Panel for supervision.

Cortney Chao was the Appellant's CT during the 2013-2014 school year. She had worked for MCPS since 2006 and had been an elementary school teacher. She was in her third year of being a CT for MCPS the year she worked with the Appellant. She testified that she did not read Ms. Silverstein's evaluation before beginning her work with the Appellant, but she had spoken with Ms. Silverstein and knew the areas of concern. She also spoke with Ms. Hitchcock to ensure that she was correctly interpreting and applying the Counselor Standards. I carefully read all of the reports written by Ms. Chao, as well as her transcribed testimony. I was

impressed with the number of encounters she had with the Appellant over the course of the school year, both formal and informal. (Jt. Ex. 13, p. 8.) There were some missed observations due to the Appellant's absence. The two communicated by e-mail regularly. Ms. Chao demonstrated an understanding of the Counselor Standards. Ms. Chao understood that an elementary school counselor has many roles beyond traditional responsive counseling. She testified about counselors leading small groups, being a part of school-wide programs, and presenting classroom lessons. (Tr. 124-128.)

Ms. Chao had been trained using OAT I and II and applied the standardized language and strategies to her evaluations of the Appellant. Thus, she reported on her observations of the Appellant in each written evaluation and suggested specific strategies for improvement. She focused on the Appellant's areas of weakness, such as a lack of lesson planning, failure to use time wisely during sessions, failure to gather and use data from one lesson to another, failure to adapt lessons to the grade level and failure to collaborate with other teachers, to name a few. The Appellant criticized a few of Ms. Chao's observations, such as the Appellant's failure to use equitable calling sticks and exit cards, but in truth, Ms. Chao included many other observations and suggestions in her reports than those items.

Despite the numerous conversations and meetings Ms. Chao had with the Appellant, and the very specific suggestions made in each of her reports, Ms. Chao did not see significant improvement in the Appellant's performance. The Appellant did not seem to understand the importance of lesson planning for the large classroom lessons, or how or why she should collect data on her students. By the time the Final Summative Report was issued on May 7, 2014, the Appellant's performance under Counselor Standards I, II, III and IV was not noticeably or consistently improved from the earlier reports in the year. As to Standard V, Ms. Chao noted

that the Appellant was regular in her meetings with the CT, but that she did not implement the CT's suggestions for improvement, preferring to seek the advice of other counselors, instead. The Appellant did show increased consistency under Standard VI by maintaining a schedule that was available to the CT and others.

Christopher Lloyd, Co-Chair of the PAR Panel, established how the PAR Panel works and how the CTs operate within the PAR program. He testified that all CTs are trained under OAT I and II and are qualified to evaluate any other professional working for the County Board. He said that he met with the Appellant in October 2013 to talk about her PAR experience. Although the Appellant complained about Ms. Chao, the Appellant did not ask for a different CT. (Tr. 243-244.) He testified that the PAR Panel carefully considered the presentation made by the Appellant before making its recommendation that she be dismissed, but decided that she had not made significant growth toward meeting standards and that therefore, dismissal was warranted. (Tr. 232.)

MCPS Supervising Counselor Jennifer Hitchcock did not testify at the hearing, but was involved in the Appellant's supervision. Ms. Chao consulted with her during the Appellant's PAR year to ensure that she, the CT, was correctly interpreting and applying the Counselor Standards. Ms. Hitchcock also observed the Appellant's performance. As part of the packet the Appellant submitted to the PAR Panel, there are two e-mails from Ms. Hitchcock. One, dated March 15, 2013, was submitted to show the Appellant's adherence to Standards II and III. (Apt. Ex. 9, pp. 13 and 20.) It was complimentary in the Appellant's checking for understanding throughout the lesson; being flexible and improvising when necessary; and using numbered calling sticks. Ms. Hitchcock made some organizational suggestions. It did not refer specifically to the Counselor Standards. The other e-mail, which the Appellant submitted to show adherence

to Standards I and II, related to an observation Ms. Hitchcock conducted of the Appellant on April 24, 2013, in a fifth grade small group focused on social skills. (Apt. Ex. 9, pp. 3 and 14.) The page from the e-mail refers only to the first two Counselor Standards, with Ms. Hitchcock's observations. Thus, I am not privy to Ms. Hitchcock's opinion of the Appellant's performance under Counselor Standards IV, V and VI.

There is also a memorandum dated May 23, 2014, and signed by Ms. Hitchcock complimenting the Appellant's thirty-minute career lesson for a fifth grade class. (Apt. Ex. 9, pp. 5 and 22.) This document was submitted by the Appellant to show her adherence to Standards I and III, although it does not specifically refer to the Counselor Standards. Another memorandum, signed on March 25, 2014, appears to have been written by Ms. Hitchcock because that is the name that is signed at the bottom, but the signature is radically and clearly different from the previously identified signature. It also included a reference to going away "with some excellent ideas for the guidance program at my school." (Apt. Ex. 9, p. 36.) At the hearing, the hearing examiner raised the issue of the dissimilar signature and a long discussion ensued regarding the authenticity of that memorandum. (Tr. 439-449.) Also raised was the fact that Ms. Hitchcock did not run a guidance program at a school. The Appellant was unable to clear up the discrepancy during her testimony. Given the questionable authenticity of that document, I give these two memoranda no weight.

The Appellant testified to her long history as a school counselor and her many educational qualifications. (Tr. 259-271.) She has been a mentor to new counselors in MCPS for many years. She testified to the various roles fulfilled by an elementary school counselor. None of that is challenged by the County Board. Indeed, the County Board has acknowledged at each stage in these proceedings that the Appellant was a strong performer in what is considered

the more traditional aspects of counseling. The Appellant presented herself as an extremely knowledgeable, experienced counselor who was targeted by Ms. Silverstein after the disciplinary actions in September 2012 and January 2013 and was dismissed out of retaliatory motives.

The Appellant complained that Ms. Chao was not a counselor and thus, should not have been assigned to be her CT. A theme of the Appellant's testimony was that Ms. Chao was applying the Teacher Standards, not the Counselor Standards. The Appellant took issue with virtually all of the observations and critiques by Ms. Chao and testified to the flaws in the PAR process. Those arguments are addressed below. The Appellant testified about each item in Appellant Exhibit 9 that she had presented to the PAR Panel in her defense, pointing out how each item supported her compliance with a Counselor Standard. (Tr. 314-352, 439-476.) The packet contained some e-mails complimentary of the Appellant; observations from Ms. Hitchcock that are discussed above; suggested questions for Career Day on May 30, 2014; copies of calling sticks; a sample lesson; an e-mail from a kindergarten teacher asking for specific assistance; an example of a contribution to the school newspaper called The Counselor's Corner; proof of participation in some continuing education activities from 1997, 2012 and 2013; the Appellant's counselor's license; and a form letter from the Appellant to her mentee. According to Mr. Lloyd, these items were all reviewed by the PAR Panel and found not to be sufficient to show the Appellant's compliance with all of the Counselor Standards. (Tr. 225-229.)

The Appellant asserted that Ms. Silverstein's and Ms. Chao's suggestions either should not be performed by a school counselor or could not be performed by a school counselor due to time constraints or the nature of the job of counseling. However, Ms. Silverstein testified the counselor who replaced the Appellant in the 2014-2015 school year did all of the things Ms. Silverstein had asked the Appellant to do, proving that the suggestions were both within the

sphere of responsibilities for a counselor and possible to do in the time parameters of the position. (Tr. 107-108.)

The Appellant called Judith Amick, a school psychologist, to testify on her behalf. Ms. Amick shared an office with the Appellant on the days she was at Fallsmead. Ms. Amick testified very favorably on behalf of the Appellant, noting how much the children loved her and talking about an after school reading project the two had led together. She thought the Appellant is a competent counselor. (Tr. 359-61.) She believed the Appellant was evaluated under the Teacher Standards rather than Counselor Standards. (Tr. 388.) Ms. Amick had strong opinions about why Ms. Silverstein wanted the Appellant to be dismissed, but she admitted during cross-examination that she did not know anything about what investigation was conducted in response to the two parental complaints. She had not been trained in OAT I or II as a consulting teacher.

Christina Tregoning, a Fallsmead teacher, testified on behalf of the Appellant. The Appellant offered classroom lessons in Ms. Tregoning's class. Ms. Tregoning praised the Appellant's counseling skills, rapport with the students, and willingness to collaborate with her.

Michele Kaplan is the mother of two students who were assisted by the Appellant at Fallsmead seven and three years earlier. (Tr. 511.) She offered high praise for the work the Appellant did with her daughters during times they were having difficulties fitting in at school and then adjusting to a marital separation.

The Appellant called Dr. Jennifer Jones to testify. Dr. Jones is a counselor at another elementary school. She is familiar with the Counselor Standards and had, at the Appellant's request, reviewed Ms. Chao's Final Summative Report. She had taken the OAT I course and thus, was familiar with the evaluation process used by Ms. Chao. She is very experienced, as a teacher and as a counselor. (Tr. 520-529.)

Dr. Jones interpreted the Counselor Standards as “global” goals and not as technical as the Teacher Standards. (Tr. 549.) She strenuously objected to the language Ms. Chao used in her report, testifying that Ms. Chao must have used the Teacher Standards. For example, she disagreed with Ms. Chao’s opinion that counselors should use equitable practices such as calling sticks. She went through Ms. Chao’s report line by line and summed up by saying that Teacher Standards were used and that “I also can tell very clearly and obviously this person [(that is, Ms. Chao)] has very little understanding, knowledge, or experience with anything to do with counselor standards, let alone counselors in general in a school setting.” (Tr. 603.)

Despite Dr. Jones’ many complaints about the CT’s evaluations of the Appellant, Dr. Jones testified to doing many of the things Ms. Silverstein asked of the Appellant. For example, Ms. Silverstein wanted the Appellant to collaborate more with other teachers, something Dr. Jones said she routinely does. (Tr. 639.) Dr. Jones said she is rarely late to or misses a class and when that happens, for instance, due to a student emergency, she always lets teachers know. (Tr. 656.) She adjusts lesson plans according to age group. (Tr. 648.) She uses a variety of data to plan her lessons and sees herself as part of the teaching team. (Tr. 636-643.)

Overall, Dr. Jones was very critical of the PAR Panel process, Ms. Chao’s work as CT, Ms. Silverstein’s critique of the Appellant, and the Final Summative Report done by Ms. Chao. The Appellant relied heavily on Dr. Jones’ testimony to rebut the County Board’s evidence, but the evidence shows that Dr. Jones never performed an observation of the Appellant’s professional performance.

Appellant's Arguments

The Appellant asked that I address the arguments raised by her counsel in his letter of June 30, 2014 to Dr. Statham. (Apt. Ex. 8.) I have slightly rephrased those arguments here for clarity.

1. The Appellant's placement on PAR and the PAR Panel's review were procedurally defective.

The Appellant posited that the Teacher Professional Growth System Handbook (Handbook) (Jt. Ex. 19) required that Ms. Silverstein's evaluation in the spring of 2013 be submitted on or before March 31, 2013. Instead, her evaluation was dated by Ms. Silverstein on March 25, 2013, signed by the Appellant on April 2, 2013 and received by the Office of Human Resources and Development on April 3, 2013. She also argued that Ms. Chao's Final Summative Report was due on April 30, 2014, but was not issued until May 6, 2014. These errors require the dismissal to be deemed improper, she argued.

This argument has no merit. There is no indication that the deadlines included in the Handbook were designed to provide employees with a procedural benefit. Rather, the dates are in place to assist the PAR Panel in preparing the process for the following year. Additionally, pursuant to *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954), a complainant must also show prejudice to have the allegedly erroneous agency action invalidated. *Pollock v. Patuxent Institution Board of Review*, 374 Md. 463 (2003). Here, the Appellant has not shown that she suffered any prejudice by virtue of the inconsequential delay in the documents being submitted.

2. Ms. Silverstein's below standard rating in her April 5, 2013 evaluation was unjustified, unsupported and retaliatory.

At each level of the Appellant's journey through the termination process, the Appellant has alleged that Ms. Silverstein retaliated against the Appellant for disciplinary incidents in September 2012 and January 2013. I have carefully reviewed all of the testimony and evidence that was introduced at the evidentiary hearing before the hearing examiner and I considered all of the arguments made by the Appellant at the hearing before me. I found nothing in the record to support the allegation that the dismissal was in retaliation for something the Appellant had done. Rather, Ms. Silverstein's evaluation of April 5, 2013 was detailed and based on numerous observations, interactions, and conversations. She testified persuasively that she was not out to get the Appellant, but truly wanted her to improve and succeed. (Tr. 103-105.)

Additionally, the Principal Intern, Ms. Bradley, conducted an independent evaluation in which she noted both strengths and weaknesses in the Appellant's performance. Prior to being accepted into the PAR program, an independent CT observed the Appellant and recommended that she be accepted into the program. The following year, a second CT, Ms. Chao, exhaustively observed and communicated with the Appellant in an attempt to obtain a thorough, unbiased review of the Appellant's work. She rated the Appellant's performance as below standards, yet Ms. Silverstein initially recommended that the Appellant be kept on the PAR program a second year because she had shown some improvement by the end of the PAR year; she later conceded that a second PAR year would not result in improvement. The independent PAR Panel recommended dismissal, a recommendation that was adopted by Dr. Statham, Dr. Starr and the County Board. This argument has no merit and is wholly unsupported by the evidence.

3. The CT failed to use the appropriate standards and performance criteria.

The Appellant and Dr. Jones repeatedly asserted that Ms. Chao used the Teacher Standards rather than the Counselor Standards in evaluating the Appellant. I disagree. Ms. Chao

occasionally emphasized terms and strategies that some might find more relevant to teachers than to counselors, such as calling sticks and exit cards, although the Appellant and her main witness, Dr. Jones, conceded they used both in certain circumstances. In the packet of information she presented to the PAR Panel, the Appellant even included a copy of calling sticks she used during a lesson. The use of the word “scaffolding” was criticized even though it simply referred to building lessons on previously introduced information over time. Ms. Chao’s observations were specific to each standard being evaluated and aligned closely to what was being requested of the Appellant by Ms. Silverstein and recommended by the Supervising Counselor, Ms. Hitchcock.

MCPS regulation IJA-RA concerns School Counseling Programs and Services (Jt. Ex. 20). This regulation notes that a “growing body of research suggests that social and emotional learning delivered through a comprehensive, developmentally appropriate school counseling program has a positive impact on student academic performance.” (*Id.*, p. 1.) It provides that at the elementary school level, counselors are to implement the “MCPS Comprehensive School Counseling Program,” which includes classroom guidance lessons and school-wide support. It requires counselors to implement “regularly scheduled classroom guidance lessons,” “collect and analyze school counseling program data to monitor, evaluate, and continuously improve the effectiveness of the school counseling program,” and “collaborate with school staff to implement a systematic plan.” (*Id.*, p. 6.) Ms. Chao evaluated the Appellant on all of these aspects of her performance.

As noted by the County Board in its decision of May 26, 2015, the Counselor Standards have a significant instructional component. Instructional planning, organization, and delivery are important. Some teaching techniques might be applicable and helpful to a counselor presenting a

classroom lesson. The importance of planning and organizing lessons was evident in several observations where the Appellant's students left the class confused about the instructions or the materials or where some students were not involved in the lesson.

The evidence showed that the Appellant is successful at responsive or one-to-one counseling, where some teaching techniques might not apply. Responsive counseling is only one aspect of school counseling, however. In the context of being an elementary school counselor, the Appellant's role is far more diverse than being a private counselor. As reflected in the MCPS Counselor Standards set forth above, in the school context, the Appellant is an educator as well as a counselor; her teaching techniques must reflect that she understands that.

4. Ms. Chao was unqualified to evaluate the Appellant because she is not a counselor.

The Appellant cited no authority for the proposition that each professional employee being evaluated in the PAR program must be evaluated solely by a person in their own profession. Ms. Chao was trained in OAT I and II and had two years of experience prior to being assigned as the Appellant's CT. She consulted with Ms. Hitchcock and Ms. Silverstein to confirm that she was applying the Counselor Standards correctly. Her evaluations were thorough, factual, well written and based on personal observations. The observations she conducts as a CT do not require a counseling degree. For instance, the CT must determine whether a school counselor: utilizes a variety of information sources; consistently and proactively promotes equity for all students through words and actions; demonstrates the ability to use technology as a communication tool; uses needs assessment surveys and a variety of other data sources to gather information about student needs; designs interventions based on data analysis; and participates in school management activities. (Jt. Ex. 18.) The argument that Ms. Chao is unqualified to be the CT to a counselor has no merit.

5. The Final Summative Report was an unfair, inaccurate and incomplete review of the Appellant's performance as a counselor.

I found the Final Summative Report accurately reflected the evaluations conducted by Ms. Chao throughout the year and contained numerous examples to support her conclusion that the Appellant was still performing below standard work by May 2014. Ms. Chao found the Appellant deficient in five of the six areas. When read in conjunction with all of the other reports filed by Ms. Chao, the evaluation is quite specific and complete. In addition, I have the benefit of Ms. Silverstein's and other witnesses' testimony, Ms. Bradley's report, and numerous documents submitted by the Appellant. My recommendation is not based only on Ms. Chao's Summative Report, but on the evidence as a whole. This argument is not persuasive.

Discussion

As set forth above, the *Sammarco* decision guides our review of the Appellant's appeal. First, I conclude the record amply demonstrates that the evaluation process was fair and impartial. There were two incidents during the 2012-2013 school year that led to disciplinary action against the Appellant. Approximately two months later, her principal issued a review concluding that her performance was below standards and she was referred to the PAR program. The proximity in time of the PAR referral to the two disciplinary actions is not sufficient to show that the dismissal was retaliatory, as the Appellant argued. Ms. Silverstein testified that she had no personal vendetta against the Appellant and her actions corroborate that assertion. Ms. Silverstein provided the Appellant with suggestions and advice during the 2012-2013 school year, yet the Appellant did not sufficiently improve her performance. Once the Appellant was referred to the PAR program, Ms. Silverstein was not the primary evaluator or observer, because the CT took over that role. Ultimately, Ms. Silverstein wavered regarding whether the Appellant

should be given an opportunity to participate in a second PAR year because she acknowledged that the Appellant had shown some improvement toward the end of the 2013-2014 school year. This is not the response of a person who is bent on having the Appellant terminated for personal reasons.

Additionally, I do not conclude that the PAR process was unfair or impartial. Ms. Chao was properly trained as a CT and was supervised throughout the 2013-2014 school year. Her reports are full of factual observations and suggestions. She consulted with the Supervisor Counselor, Ms. Hitchcock, who, according to the e-mails submitted by the Appellant, had praise for the Appellant's work. Ms. Chao used the correct Counselor Standards to evaluate the Appellant. In addition, Ms. Bradley, the Principal Intern, evaluated the Appellant in October 2013, while she was acting as Principal, and again in January 2014. (Jt. Ex. 16; Super. Ex. 6.) This provided yet another impartial observation of the Appellant's work during the school year. Her comments mirrored many of the CT's observations. Once Ms. Chao's Final Summative Report was complete, it was reviewed by the PAR Panel, which permitted the Appellant to present her case along with supporting documentation. The Panel, having no personal knowledge of the Appellant, independently determined that the Appellant was performing below standards and should be dismissed.

The second criterion is that the Appellant had serious teaching deficiencies. Here, the Appellant understandably points to her long history as a school counselor, her many positive references she presented to the PAR Panel, and her numerous positive evaluations under past principals. The Appellant clearly has strengths as a counselor and, as I have noted previously, the County Board has acknowledged those strengths. Nevertheless, when the Counselor Standards were upgraded in 2003 and MCPS passed specific regulations to implement those

Standards a few years later, the job of school counselor was altered from the job the Appellant had previously known and done well. Lesson plans are required. Schedules must be posted, accessible, and accurate. Data must be gathered, reviewed, and used to prepare future lesson plans. School-wide curriculum is developed in conjunction with the other teachers. Counselors attend meetings and are expected to be a full participant in those meetings. Standardized teaching methods are used to impart counseling lessons to large classes. The Appellant was on notice that these standards were in place and was regularly directed by Ms. Silverstein to implement them in her work. Although the Appellant made some improvements, such as posting a schedule by May 2014, she did not attain the level of improvement one might expect in a person with her knowledge and experience.

Numerous professionals have reviewed the Appellant's performance and determined it to be seriously deficient. I also conclude that the evidence supports that determination, despite the Appellant's longevity with MCPS and her counseling strengths.

Finally, under *Sammarco*, the County Board must show that the Appellant was provided adequate assistance to remedy the identified deficiencies. Beginning with the 2012-2013 school year, Ms. Silverstein observed and instructed the Appellant in an effort to improve her performance and bring it up to standards. During the 2013-2014 school year, Ms. Chao provided regular supervision and coaching. Ms. Bradley also provided the Appellant with helpful feedback and specific ideas for improvement. All of these evaluators spent a great deal of time talking with the Appellant about the performance areas needing improvement; they then provided the Appellant with specific ideas for improvement. The Appellant received supervision from Ms. Hitchcock, as well. The evidence demonstrates that the Appellant was provided ample assistance to remedy the identified deficiencies before she was dismissed.

The County Board is permitted to set high performance standards for its employees and recommend dismissal of those employees not able to meet all of those standards. As the State Board noted in *Crump v. Board of Education of Montgomery County*, MSBE Op. No.:10-29, page 14 (2014), “MCPS seeks to provide a high quality education for every child by employing teachers who can accomplish the duties and responsibilities of their jobs at a high level of performance” and the “stated purpose of the PAR program is for ‘maintaining system wide quality control and ensuring that all MCPS teachers responsible for teaching students meet MCPS standards of performance.’” The County Board properly accepted the Appellant into the PAR program and through it, provided her with significant assistance in an attempt to ensure she would meet the standards of performance. Despite this assistance, her performance by the end of the 2013-2014 school year was below standards.

Longevity alone does not protect a teacher from being found not to be meeting standards. Again, in *Crump*, the State Board affirmed the termination of a teacher who had taught in MCPS for fourteen years without receiving a below standard rating. In *Kranz v. Montgomery County Board of Education*, MSBE Op. No.: 04-25 (2004), the State Board affirmed the termination of a teacher who had been teaching for approximately twenty-five years.

Having reviewed the evidence submitted and the arguments made by both sides, I must conclude that the County Board has produced evidence to support its dismissal of the Appellant for incompetency.

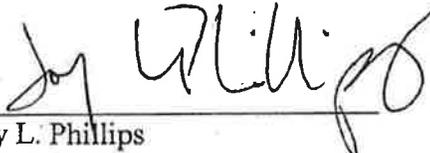
CONCLUSION OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the County Board has met its burden of proof that the Appellant’s dismissal for incompetence was proper. Md. Code Ann., Educ. §6-202 (Supp. 2015).

PROPOSED ORDER

I **PROPOSE** that the decision of the Montgomery County Board of Education to terminate the Appellant for incompetence be **UPHELD**.

December 7, 2015
Date Decision Mailed


Joy L. Phillips
Administrative Law Judge

JLP/da
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NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within 15 days of receipt of the decision; parties may file written responses to the exceptions within 15 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:

Donna Wasser
13824 Appaloosa Court
Gaithersburg, MD 20878

Judith S. Bresler, Esq.
Carney, Kelehan, Bresler, Bennett & Scherr, LLP
10715 Charter Dr.
Suite 200
Columbia, MD 21044

Michelle Phillips, Administrative Officer
Office of the Attorney General
Maryland State Department of Education
200 Saint Paul Pl. 19th Fl.
Baltimore, MD 21202