JOSEPH GWIN

Appellaent
v.

BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-19

OPINION

INTRODUCTION

In this appeal, Appellant challenges the decision of the Baltimore City Board of School Commissioners (local board) to terminate him from his teaching position at Baltimore Community High School for misconduct and insubordination.

We transferred the case pursuant to COMAR 13A.01.05.07 to the Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ). The ALJ issued a decision proposing that the State Board affirm the local board's termination decision.

The Appellant filed exceptions to the ALJ's proposed decision and the local board responded. Oral argument on the exceptions was held before the State Board on April 24, 2012.

FACTUAL BACKGROUND

Appellant has been employed as a certified teacher with the Baltimore City Public School System (BCPSS) since 1987.[1] At the start of the 2009-2010 school year, he began teaching math at Baltimore Community High School. Over the course of his teaching career he had served at various other schools.

The record shows that Appellant had a history of satisfactory and above performance in the classroom throughout his years of teaching. It appears that Appellant was a dedicated teacher to his students. Examples of comments contained in the classroom observations and evaluations in his personnel record note that students are actively involved in his classes, that classroom

[1] Appellant had a break in service from BCPSS when he taught in Baltimore County for the 2002-2003 school year and then took a year off to pursue other interests. He returned to BCPSS in August 2004. (T.158).

activities are suitable to the students and support the instructional goals, that efforts were made to relate math to real life experiences, and that the Appellant demonstrated exceptional knowledge and skill in his field. (Respondent #1). Principal Jones himself noted in an October 1, 2009 classroom evaluation that Appellant used a great game technique to help students understand math and to measure their achievement, that his students were receptive to him and that he displayed a genuine care for them. (Respondent #2). He also wrote Appellant a note to thank him for his support and generosity with the kids. In that note Jones tells Appellant he is "truly a gift to [the] school." (Respondent #5).

Appellant was also involved in the Baltimore Chapter of the National Technical Association to help expose African-American students to fields involving math and the sciences. Over the past several years he was actively involved in the Association's 3T Mentoring Program annual math competition. He was also nominated in 2000 and 2009 for the Association's Teacher of the Year Award. (T.113). Appellant helped organize and paid for student field trips to places such as the BWI-Marshall air traffic controller's tower, Morgan State University's computer science and engineering department, the air and space museum, and the zoo. (T.119, 125). In 2010, Appellant conducted free tutorials to help students to prepare for the HSA, SAT and GED tests. (T.115-117; Respondent's #13).

This case arose because of events that occurred on December 1, 2009 and December 15, 2009. Yet, prior to that time, there were other incidents that are relevant to the case.

Personnel Record

Overall, Appellant received performance evaluation ratings in the good/satisfactory range throughout his career. It appears that he has generally been a dedicated teacher, using good classroom strategies to involve and motivate his students, even taking them on special field trips at his own expense. At various times throughout his employment history, however, there have been notations regarding inappropriate behavior regarding the Appellant's interactions with others. Here is a summary of what is in the record in this case.

- On Appellant's May 13, 1994 Teacher Evaluation he received a needs improvement rating in the category for "Show[ing] respect for colleagues, students, parents, and other community members." The principal recommended the Appellant for transfer to another school because of his "unwillingness to work in harmony with other staff members." (CEO #10).

- On Appellant's 1994-1995 Annual Evaluation at school #139 he received a rating of "Does Not Meet Expectations" in the category "Maintenance of standards of professional conduct" with the comments that "some verbal comments to staff and students should show better professional judgment" and "restraint should be worked on to avoid problematic situations with other staff members and students." (CEO #11).

- On November 9, 1995, Appellant received a Letter of Reprimand for misconduct based on his unprofessional demeanor toward a student. He was warned that verbal abuse of a student was unacceptable and that further misconduct would result in additional disciplinary action. (CEO #12).

- On May 4, 1999, the principal of Southern High School (school #70), Darline Lyles, issued Appellant a Letter of Reprimand for exhibiting unprofessional behavior toward the principal, school staff, and students. Four students arrived late for class. Appellant believed they had kicked the door to his classroom and he did not let them in. The students sought the assistance of another staff member who gave the students a pass explaining that the students were late, were not the ones who kicked the door, and that Appellant should let them in per school policy. Appellant yelled at the students when they returned with the passes and he would not let them in. He told them to tell the staff member who helped them that "if she wanted to teach the class she should come up to [his] room and do it." When the students returned with the school staff member, Appellant abruptly walked out of his class without saying anything. He went to the principal and told her he was leaving to see the CEO without making arrangements for classroom coverage. When Appellant returned to school an hour later, the principal told him to leave the school. Appellant went to get his belongings and was asked by a student where he was going. Appellant pointed at the principal and said "ask her" and then told the principal to call him when she wanted him to return to school.

- On February 27, 2002, Appellant was transferred out of Southern High School for using inappropriate language when addressing the school principal, Thomas Stevens. While the Appellant was within earshot of students, he said, "I wrote it once and now I will say it. That's why you're a stupid principal." Appellant was advised that repetition of the behavior could result in additional disciplinary action. (CEO #14).

- On Appellant's January 15, 2009 Performance Review Report, the Principal commented that "[i]nterpersonal relationships among staff members can be an issue."

Prior Incidents Occurring During the 2009-2010 School Year

By letter dated October 14, 2009, Principal Jones[2] cautioned the Appellant to display respectful and professional behavior towards students at all times. (CEO Ex. #4). The letter stemmed from an incident with a student during a field trip to the Smithsonian on October 9.

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[2] Brian Jones was the principal of Baltimore Community High School during the 2009-2010 school year. During the prior year, he was the Resident Principal at National Academy Foundations in Baltimore City. Prior to coming to Baltimore City, he worked in the New York City Public School System for approximately eight years holding positions at various times as a teacher, assistant principal, and Dean of Students. (T.12-13).

The Appellant had paid for the field trip for the students. The student threatened a student from another school and used profanity toward Appellant and his assistant. The Appellant testified that a federal agent at the museum became involved in the situation and the student was in the agent's face arguing with him. The Appellant admitted that he called the student a "disrespectful ass child" when he spoke to her about her behavior. (T.120-121).

At the hearing held in this case, Principal Jones testified about the Appellant's behavior in a meeting they had with the BTU representative following this incident. He stated:

> [Appellant] became irate once again, started yelling, got up and walked out of the meeting. It took my assistant principal a while to calm him down to return to the table and just constantly negative comments towards me, my inexperience, I'm a first year principal, I'm too young, he can be my father, comments like that. Just it was very negative and very confrontational, his tone, his voice. (T.30).

Principal Jones had also testified that this was not the first time Appellant had exhibited inappropriate behavior towards him, explaining that Appellant had confronted him on several occasions when he walked into Appellant's classroom.

> "Several times when I walked in his classroom he tried to confront me, and then I always advised him that regardless, if there's a problems, step outside and we'll talk about it, but if he becomes irate and starts yelling in front of the kids, saying this is not right. This school is not right, this part's not right. Just yelling and complaining about certain situations. So I had to constantly remind him that lower your tone, you don't need to be yelling so everyone can hear what's going on." (T. 27).

On October 14, 2009, Appellant received a letter of reprimand for displaying disrespectful behavior toward Principal Jones in the presence of students. (CEO Ex. #5). The Principal reminded the Appellant in the classroom that morning to follow the school wide reading program that requires students to read for the first 30 minutes of class on Wednesdays. As the Principal was walking out of the classroom, he overheard the Appellant tell the students: "Pretend you are reading and I don't care if you are reading." The Principal re-entered the classroom and reminded the students that they needed to read for the school wide reading program and that he cared whether or not they were actually reading. The Principal testified that Appellant became very confrontational and began yelling at him in front of the students saying things such as "this is my classroom". He stated that he asked the Appellant to come outside to speak with him but that Appellant was yelling as he came out of the room. (T.28).

Principal Jones testified that in the meeting following the incident the Appellant again became irate and confrontational, making negative comments towards Principal Jones regarding his inexperience and that he was young enough to be the Appellant's son. (T.30).

December 1, 2009 Incident

On December 1, 2009, Appellant was involved in an incident with a student who did not pick up his calculator in order to solve a math problem when Appellant directed him to do so. (CEO Ex. #6).

1. December 1 -- Appellant's Version

The Appellant testified that when he told the student to pick up his calculator to do the problem, the student responded by saying "you're not my daddy" and "you can't tell me what to do." The Appellant retorted that he was glad he was not the student's father because the student comes to class late, talks and does not pay attention. With this, the other students began to laugh and the student started cursing at Appellant. Appellant called for the hall monitor, Mr. McMurray, who removed the student from class. (T.130-132).

Appellant stated that he told the students to write down their homework about 10 minutes before class ended. The class was quiet and Appellant was readying himself to write up the student incident when Principal Jones came into the classroom. Appellant testified:

> Brian Jones. Walked into my [classroom], what you doing? What you doing? I looked. Most of the kids were doing their work. They're writing down their homework, but he just bust in and start asking kids, what you doing? And, you know, I have a few kids in class that don't do anything, and so they weren't doing anything, and so he came – then when he finished parading around my class, around the class, he went, come here. I looked – (T.135).
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> . . . .
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> I said, [the student] was cursing at me in a loud manner and Mr. McMurray took him to the office, so you need to go in there and find out what, you know, what Mr. McMurray said. I turned around and walked away from him. He said, where do you think you're going? That caught me so off guard. I'm walking away to keep from arguing with someone, and here's this young man telling me, where do you think you're going? My answer is, I'm going away from you to keep an argument from starting. But I turned around and went back. That was a mistake I see now. I asked him. Who did he think he was talking to? I put the word "hell" in. (T.135-136).

Appellant maintains that Mr. Jones "started hollering" at him when he came back over to him and that Principal Jones "stepped in [his] face." Appellant claims that he raised his voice in response to Jones. (T.161). Appellant could not recall if he told Principal Jones to "be a man and do something" but admitted that he has a history of "speaking up." Appellant admitted to saying "hell" but not to cursing and also admitted to saying to Jones "that's a chump move"

when Jones told him to leave the building. Appellant got his things and left the building. (T.138-139).

2. December 1 -- Principal Jones' Version

Principal Jones gives a different account of what happened. He stated that the hall monitor approached him while he was still at his morning post to report that there had been a problem in Appellant's class which involved yelling and cursing going on between Mr. Gwin and a student. A few minutes later Mr. Jones went to the classroom to investigate the situation and asked Appellant to step outside so that the students would not hear their conversation. Mr. Jones testified to the following:

> A. The students were present, so I asked Mr. Gwin to step outside so that students could not hear our conversation. As he's walking out of the classroom he begins yelling again, saying that disrespectful boy, I will not tolerate it. You need to do something. You need to do your job. Mr. Gwin, just step outside. Come on out. I just wanted to find out what happened between you and [the student].
>
> **Q. When he was uttering those things was he still in the classroom with the students?**
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> A. And he walked and he continued yelling. He comes out saying I need to do my job. I'm not doing my job. This kid disrespected me. Okay, Mr. Gwin, lower your tone. You got to lower your tone. No. You need to do your job. You need to be a man. Act like a man and do your job. I responded, I am a man. And he said, well, you can do it. Be a man and do it. I said, Mr. Gwin, I don't need this conversation like this. I will deal with [the student] and he started yelling again. So I directed all the students, because they were coming out of the classroom overhearing it, everyone go to the library. All students just go to the library. The students get up. A few students lingered around. Once again he's constantly yelling and screaming. Calls me a chump in front of the students. Just negative comments. I asked him, okay, Mr. Gwin, this is it, can you please leave the building. (T.31-33).

The written summary of events drafted contemporaneously by Principal Jones reflects that testimony. (CEO #6).

The Appellant was placed on administrative leave with pay pending an investigation.

Appellant's Writings

On December 14, 2009, Appellant sent an e-mail to the Cassandra Millette, the Executive Director of Baltimore Community High School, expressing his feelings about Principal Jones. In the email he called Mr. Jones a "stupid", "evil", and "egotistical" principal and placed a "spiritual curse" on him and anyone with whom he has had a relationship. The e-mail also stated that Appellant "will never forgive [Jones] for messing up that educational trip" to the air traffic controller's tower at BWI and to the computer science and engineering departments at Morgan State University. Appellant closed the e-mail with the following: "Please remember; when you met me, you met someone who really care[s] about children, and not the ego of some stupid adult who became a principal!!!!!" (CEO Ex. #7).

On January 7, 2010, Appellant presented a letter to Jerome Jones, Labor Relations Associate, at a hearing to discuss Appellant's actions. (T.74-76). The letter explained Appellant's version of the incidents with Principal Jones, maintaining that the Principal provoked Appellant, that the Principal was the one harassing Appellant, and that the Principal tried to ruin Appellant's career. In that letter he called the Principal a "revolting person", a "pompous mannequin", and his "enemy". He stated:

> My history with Brian Jones shows me that he is a condescending egotistical mean person. I do not say this just because I find him repulsive. I say this because this is true!!!! It took me 60 years to loathe a black man! I am going to God almost daily to ask for help with this repulsion. I do not detest him because he is an egotistical odious person. I find him odious because his actions show that he hates children. (CEO Ex. #9).

December 15, 2009 Incident

While he was on administrative leave, Appellant wanted to come back to the school to retrieve some personal belongings. Through Appellant's union representative, the school system offered to have Appellant come to school on either December 22nd or 23rd to get his belongings. Appellant was unable to do so because he had a conflict. The school system offered December 21st as an alternative date, but it does not appear that this was communicated to Appellant by his union representative. (T. 72-73, 170). On December 15, 2009, Appellant entered the school building in the morning to retrieve his belongings from his old classroom. (CEO Ex. #8).

1. December 15 -- *Appellant's Version*

Appellant testified that he went to school on December 15 to get his belongings because he had been contacted by students who told him that his things were being torn off the wall. He stated that he wrote Dr. Alonso, the school's Executive Director – Ms. Millette, and the school's Academic Dean of Instruction -- Tammy Mays to tell them he was coming to the school. (T.142-144; 170). He did not receive a response or any permission from anyone to come in.

Appellant testified that he came to school around 7:15, prior to the start of the school day and waved at the secretary as he passed by the office. He asked the custodian for a pushcart which he took to the classroom to load his things. When he got to the classroom he stated that he asked the teacher, Ms. Dunn, for permission to enter and load his things, and that she had agreed because her first class had not started and her first class consisted of only one person. He explained that when kids heard he was in the building, they began to stop by to say hello prior to going to their homeroom classes. (T.146-148). He testified that at some point Mr. Jones came to the classroom to tell him he was not allowed in the building and that he was supposed to come on a different day. Principal Jones then called the police who asked Appellant to leave, which he did. Appellant maintains that he had four boxes packed up by the time Mr. Jones came to the classroom and the police helped him put them in his car. (T.195).

Appellant claims that by the time Mr. Jones came to the classroom, there were only a few kids in the hallway who left and went to their classes. (T.175). He denied calling Mr. Jones a "bitch", a "punk ass man", or a boy. (T.149). He denied running into the hallway and telling the students to call the superintendent to report "this Boy" meaning Mr. Jones. He denied yelling at Mr. Jones to "leave me the fuck alone, you bitch" and he denied dancing down the hallway on his way out of the building. (T. 150-153).

2. December 15 -- *Principal Jones' Version*

Principal Jones testified that it was his understanding that Appellant was to come to the school on December 21 to retrieve his belongings at a time when students would not be present. (T.38). Jerome Jones, Labor Relations Specialist, clarified that December 21 was the date that was offered to the Appellant when the first set of dates did not work out. (T.73). Principal Jones testified that Appellant did not have permission to enter the school on December 15. He stated that he knew Appellant came to school around 8:00 because he had received the radio call from the school secretary when he was still at his hallway post waiting for kids to enter the building. At 7:15 the Principal would still have been in his office and not at his post. The Principal also stated that first period begins at 7:50 and that there were approximately 10-12 students in the classroom when he got there. (T. 186).

Principal Jones testified as follows:

> **Q. And can you describe exactly what you saw?**
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> A. He was taking things off the wall. The kids were standing up. The other teacher, Ms. Dunn, looked confused and didn't know what was going on. I asked Ms. Dunn to please escort the children out [of] the classroom, and then I asked Mr. Gwin, can you please leave, you're not supposed to be here during school time when the kids are taking class. He began to yell, curse, till the point where other students in other classes started to look out and the teacher came out to ask is everything ok? He continued to curse at me, calling me "bitch", "punk ass", yelling it throughout the hall, to the

point where I had to call school police to escort him out of the building.

Q. What other kinds of things? You said he was yelling. What other kinds of things was he saying?
A. You "punk ass", "leave me alone", "you bitch". "I'm getting my shit". "You shouldn't have told anybody to take it down". Just irate comments. Cursing continues, yelling to everyone.

(T. 40-41). The Principal's letter to Jerome Jones in the Labor Relations Office dated the same day as the incident states the same set of facts. (CEO #8). It also states that when the school police came to escort Appellant out, Appellant walked and danced down the hallway telling students to report "this boy" to the superintendent. *Id.*

Other Testimony -- December 1 and 15, 2009 Incidents

Jerome Jones, Labor Relations Specialist, also testified regarding the December 1 and 15 incidents. He indicated that he had conducted his own investigation which included speaking to Principal Jones and Ms. Millette, reviewing the statements of approximately six student witnesses,[3] conducting a *Loudermill* hearing at which Appellant and his union representative were present, and reviewing Appellant's personnel record. (T.96-97). Based on his investigation, J. Jones concluded that the Appellant had committed the behaviors alleged and recommended that Appellant be dismissed for misconduct and insubordination for his actions o December 1 and 15, 2009. (T. 89-90).

On January 28, 2010, the Chief Executive Officer (CEO) issued a Statement of Charges recommending that the Appellant be dismissed for misconduct and insubordination based on the following:

1. [Appellant] was involved in a verbal confrontation with a student on December 1, 2009.
2. Brian Jones, Principal, attempted to discuss the incident with [Appellant] by asking him to step out of the classroom.
3. [Appellant] became very loud and confrontational with Principal Jones referring to him in a derogatory manner and getting in his personal space.
4. [Appellant] was directed to leave the building and further instructed not to return to the building unless directed or approved by the Office of Labor Relations.
5. [Appellant] later requested that he be allowed to go to the school to pick up his personal belongings, a date of December 22-23 after the instructional day was established. [Appellant] requested a change of date

[3] The student statements were not submitted as evidence in this case and J. Jones did not testify regarding their substance.

due to personal business scheduled for that day, therefore he was given the date of December 21.

6. On Tuesday, December 15, 2009 at 8:05 am, during instructional time [Appellant] walked into the classroom [and] interrupted a lesson in progress by removing posters from the wall and talking to students.
7. Principal Jones went to the classroom and asked all the students to go to another classroom and [Appellant] began to curse him in front of the students saying things as "You Bitch" and "Punk Ass Man" and finally screaming in the hall "leave me the fuck alone, you bitch."
8. A *Loudermill* hearing was conducted on January 7, 2010 at 200 East North Avenue, City Schools Headquarters. [Appellant] was present along with his union representative. [Appellant] presented a written response to the charges against him, in the response he refers to Principal Jones numerous times in malicious, destructive and insubordinate terms.

(CEO #1).

Local Hearing Examiner and Local Board Decisions

This case was heard by a local Hearing Examiner who did not support the CEO's recommendation for termination. Rather, the Hearing Examiner recommended that the local board reinstate the Appellant and reassign him to another school with the requirement that he attend an anger management and sensitivity course. In reaching this decision, the Hearing Examiner noted that Appellant and Principal Jones both testified regarding the incidents that occurred on December 1, 2009 and December 15, 2009, both of which served as the primary reasons for the recommendation for termination in the CEO's Statement of Charges.

With regard to the testimony of the verbal altercation between Appellant and Principal Jones during the December 1st incident, The Hearing Examiner found "no supporting independent testimony and/or documentary evidence to contradict either's position," and therefore concluded that the "charge was not proven" by the local board as to that incident. With regard to the verbal altercation during the December 15th incident, the Hearing Examiner stated that the Appellant and Principal Jones presented "[t]wo directly opposing views", but "since there was no testimony nor documentary evidence presented by [the police officer, hall monitor Dunn or student witnesses] as to what actually took place, there was insufficient evidence to determine the validity of the statement." Thus, the Hearing Examiner concluded that the local board failed to prove the charges with regard to that incident as well. (Hearing Examiner Decision, pp.12-13).

The CEO filed exceptions to the Hearing Examiner's recommendation. The local board rejected the recommendation of the Hearing Officer and terminated the Appellant based on the reasons contained in the CEO's recommendation for termination. (Local Bd. Order).

Appellant appealed the termination to the State Board and we referred the matter to OAH.

ALJ's Decision

The ALJ concluded that the Appellant engaged in misconduct and insubordination and recommended that the State Board uphold the local board's termination of Appellant. The ALJ considered all of the evidence in the record – the incidents prior to December 1 and 15, as well as the Appellant's conduct on those days. The ALJ concluded that the local board had proven its case by the preponderance of the evidence.

Having determined that the Appellant's actions constituted misconduct and insubordination, the ALJ found that termination was the appropriate sanction. He stated:

> The Appellant has been warned, reprimanded, and even recommended for transfer as a result of his past inappropriate behavior. The effect of these repeated warnings, repeated episodes of errant behavior, inappropriate language, and the misconduct in this case all point toward the conclusion that the Appellant is unfit to teach and that termination of his employment is appropriate. Progressive discipline has simply not worked for Appellant. Accordingly, I find that termination of the Appellant's contract was proper.

The ALJ recommends that this Board affirm the local board's decision to terminate Appellant.

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.01.05.05(F)(1) & (2). In these types of appeals the State Board is not reviewing the decision of the local board or the local hearing examiner to determine if the decisions are legally supportable. The State Board is engaging in a *de novo* review in which it takes a fresh look at the evidence in the record in making its decision whether or not to sustain the termination.

As is required in §6-202 certificated employee termination cases, the State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. COMAR 13A.01.05.07A(2). In such cases, after considering the evidence *de novo*, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision.

LEGAL ANALYSIS

Burden of Persuasion -- Preponderance of the Evidence

In termination cases such as this one, the local board has the burden to prove by a preponderance of the evidence that the termination should be sustained. COMAR 13A.01.05.05F(3). This is known as the burden of persuasion – or the standard of proof

necessary to prevail in the case. *See generally, McLain, Maryland Evidence* §300. The Court of Appeals explains the burden this way:

> To prove by a preponderance of the evidence means to prove that something is more likely so than not so.
>
> . . . .
>
> If you believe that the evidence is evenly balanced on an issue, then your finding on that issue must be against the party who has the burden of proving it.

Coleman v. Anne Arundel County Police Dept., 369 Md. 108, 127 (2002) (quoting Maryland Pattern Jury Instruction 1:7 (3d ed. 2000). *See generally, Murphy, Maryland Evidence Handbook* §406.

In conducting a *de novo* review of the evidence, this Board will again look at the weight of the evidence on each side of the case.

Deference to Local Hearing Examiner

Before balancing the evidence, we must address Appellant's argument that the State Board owes deference to demeanor based credibility determinations that he believes the local Hearing Examiner made.[4]

> . . . [C]redibility is at issue in virtually every case, or at least in any case involving testimonial evidence. When [a trier of fact] decides, from the whole record, that one side has made the more persuasive argument, he is concluding that that party is more "credible.". . .
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> "Credibility has a much narrower meaning, however, if it is interpreted as synonymous to witness demeanor.

Shrieves v. Department of Health and Mental Hygiene, 100 Md. App. 283, 299 (1994).

In appellate review, great deference is given to demeanor credibility determinations because the trier of fact has had an opportunity to see, hear, and judge the witnesses' truthfulness as the witness testifies. *Id.* at 299-300.

Deference to demeanor based credibility findings is understandable when the agency has not had the opportunity to observe the live testimony.

> Weight is given the [trier of fact's] determinations of credibility for the obvious reason that he or she "sees the witnesses and hears

[4] The local hearing examiner heard the live testimony of the witnesses.

> them testify, while the Board and the reviewing court look only at cold records." All aspects of the witness's demeanor – including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication – may convince the observing [trier of fact] that the witness is testifying truthfully or falsely.

Id. at300 (citing *Penasquitas Village, Inc. v. National Labor Relations Board*, 565 F.2d 1074, 1078-79 (9th Cir. 1977)).

As to demeanor, we have read the Hearing Examiner's decision carefully. As to the testimony pertaining to the December 1 and December 15 incidents, the hearing examiner made no assessment of witness demeanor. The Hearing Examiner simply stated that there "was no supporting independent testimony and/or documentary evidence to contradict either's position" and that "there was insufficient evidence to determine the validity of the [witness] statements." In coming to these conclusions, the Hearing Examiner did not assess demeanor. What the Hearing Examiner found was that the evidence was perfectly balanced, or in "equipoise." Therefore, he concluded that the local board failed to meet its burden of proof. This Board owes no deference to that finding. It may weigh the evidence anew under *de novo* review.

Grounds for Termination

Section 6-202 of the Education Article provides the grounds and procedure for suspension and dismissal of teachers, principals, and other professional personnel. It sets forth five grounds for suspension or termination: (1) immorality; (2) misconduct; (3) insubordination; (4) incompetency; (5) willful neglect of duty. §6-202(a)(1)(i--v). In this case, the local board terminated the Appellant based on two of these grounds -- misconduct and insubordination. Thus, this Board must decide whether Appellant's behavior on December 1 and 15 constituted misconduct and/or insubordination in order to determine whether the termination should be sustained.

Misconduct

What constitutes misconduct in Maryland is not defined in the statute at issue. We provided an in depth discussion of the parameters of misconduct in *McSwain v. Howard County Bd. of Educ.*, MSBE Op. No. 09-07 (2009), however, citing various cases within and outside of the educational area as guidance. We mention those cases here.

In *Public Service Commission v. Wilson*, 389 Md. 27 (2005), the Court of Appeals concluded that:

> The term "misconduct," . . . means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful

> conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises.

Id. at 77, citing Department of Labor, Licensing, and Regulations v. Hider, 349 Md. 71, 85 (1988).

In *Resetar v. State Bd. of Educ.*, 284 Md. 537, 560-561 (1979), the Maryland Court of Appeals looked to a variety of sources interpreted the term misconduct as applied to a teacher misconduct case as follows:

> The word 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.

The Court also noted that the teacher's conduct must bear on the teacher's fitness to teach in order to constitute misconduct. *Id.* at 561, *citing Wright v. Superintending Sch. Comm., City of Portland*, 331 A.2d 640 (ME. 1975). *See also Kinsey v. Montgomery County Bd. of Educ.*, 5 Op. MSBE 287, 288 (1989) (To constitute "misconduct in office" a teacher must engage in unprofessional conduct "which bears upon a teacher's fitness to teach" such that it "undermines his future classroom performance and overall impact on his students."

In *PSC v. Wilson*, the Court of Appeals made clear that the person's wrongful conduct need not be intentional. 389 Md. at 76-77. In *Bunte v. Mayor of Boston*, 278 N.E.2d 709, 711 (MA. 1972), the court examined the intent requirement, concluding that "misconduct in office can be found to exist even in the absence of evil motives, moral turpitude, corrupt or criminal conduct, or intentional wrongdoing." The court explained that "it would be a disservice to the public interest for us to hold that misconduct can be proved only in terms of intentional wrongdoing, for that would place . . . a burden in some respects equivalent to that of the prosecutor in a criminal prosecution. Public employees are, and must continue to be, held to a higher standard of stewardship than merely that of refraining from criminal actions while in office." *Id.* at 712.

With all of this in mind, we turn to whether the local board proved misconduct by a preponderance of the evidence - - whether it is more likely true than not true that Appellant engaged in misconduct.

On the one hand, the record contains the testimony of the Appellant that he did not commit acts that rise to the level of misconduct. Appellant's testimony identifies the Principal as the aggressor in the verbal confrontations on December 1 and 15 who initiated the interactions and caused them to escalate. In Appellant's version of events he was merely responding to the Principal who engaged him in these incidents. The Appellant denied cursing at Principal Jones

or referring to him as a "bitch", a "punk ass" or a "boy". (T. 149). He denied yelling and dancing down the hallway as he left the school building on the 15th. (T.150-153). He also denied causing an interruption in the classroom to get his belongings. (T. 146-148).

One the other hand, there is Principal Jones' testimony that identifies Appellant as the aggressor in the December 1 incident. The Principal entered the classroom to investigate a report of a disturbance. The Appellant began raising his voice in the classroom in front of students while speaking to the Principal and continued to do so when they moved out into the hallway. The Appellant spoke in a disrespectful and unprofessional manner, telling the principal to be a man and do his job and using the chump language. (T.31-33).

As to the December 15 incident, there was a dispute about whether Appellant was supposed to be in the school building at the time and Principal Jones responded to the report of Appellant's presence in school accordingly. Principal Jones again testified that it was the Appellant who was the aggressor in the scenario, escalating the interaction between the two by yelling, using profanity, calling the Principal inappropriate names, speaking to the Principal in a disrespectful manner, and yelling down the hallway. (T.40-41). The Principal testified that Appellant caused a disruption in school during this incident because the behavior was observed by students during school time. *Id.*

Against that backdrop, there is also evidence in the record of the Appellant's past conduct in other schools and other situations. Specifically, as set forth previously herein, in 1994, 1995, 1999, and 2002, the Appellant was reprimanded or evaluated negatively by other principals because of his aggressive, abusive, and unprofessional conduct and language. Moreover, the e-mail he sent on December 14, 2009 and the letter he gave to Jerome Jones, the Labor Relations Associate, on January 7, 2010 vitriolic. (CEO #7 & #9). All that is evidence too.

Weighing all of the record evidence together, it is our view that the scale tips in favor of the local board. We infer from all the evidence presented, including Appellant's personnel history, that it is more likely than not that the Appellant committed misconduct. The type of conduct exhibited here bears upon Appellant's fitness to teach because it demonstrates that when he is angry he is unable to effectively communicate about school related issues and he is disruptive to the school setting.

Insubordination

Like the term misconduct, insubordination is not defined in statute. The ALJ in this case provided a good explanation of the term:

> Insubordination is a "[r]efusal to obey [the] directions" of an employer/supervisor. *Ballentine's Law Dictionary* 641 (3d ed. 1969). Insubordination is defined as the "state of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. [The term] imports a willful or intentional disregard

> of the lawful and reasonable instructions of the employer. *Black's Law Dictionary* 801 (6th ed. 1991), citing *Porter v. Pepsi-Cola Bottling Co. of Columbia*, 147 S.E.2d 620, 622, 247 S.C. 370, 371 (1966).

The local board argued that Appellant was insubordinate when he showed up at school on December 15, 2009 to retrieve his belongings from the classroom. There is no clear evidence that Appellant was specifically told by school personnel that he was prohibited from being on school grounds on December 15. He may not have received permission to be there, but that does not mean he had warning that he was not allowed. We acknowledge that there was some discussion of different dates for Appellant to come retrieve his belongings between school personnel and the Appellant's union representative, but it was not clear that the final date had been communicated to Appellant and that he had been told he could not enter the grounds at any other time. We cannot conclude that Appellant defied a directive of a superior and, thus, was insubordinate.

Modification of Penalty

The State Board's broad powers include the power to modify a penalty imposed on school system personnel by a local board of education. COMAR 13A.01.05.05F(4); *Board of Educ. of Howard County v. McCrumb,* 52 Md. App. 507, 514 (1982). It is within this Board's discretion to decide the appropriate penalty to impose here for misconduct considering all mitigating factors.

In terms of mitigation, the most substantial factor is the Appellant's history of satisfactory and above performance in the classroom throughout his years of teaching. Appellant was dedicated to his students and organized field trips to expose them to math and sciences, at times paying for the trips out of his own pocket. Appellant was involved in the National Technical Association, he received recognition for his involvement in planning the Association's 3-T Mentor Program annual math contest, and he was nominated to be the Association's teacher of the year on two occasions. He also provided outside tutoring to students in preparation of the HSA, SAT and GED in 2010.

Militating against mitigation, however, is Appellant's sporadic but lengthy history of inappropriate and unprofessional conduct, as documented through his personnel record. The incidents involving Principal Jones during the 2009-2010 school year were not the first incidents in which Appellant had acted unprofessionally towards staff and other supervisors. Such behavior goes back many years with different principals in different schools. The record shows that Appellant has vented his anger over the years at students, teachers, and principals.

The question is whether his good teaching outweighs his unprofessional conduct such that he should be given another chance. It is our view that Appellant has been given chances in the past to figure out how to control his anger. He was not able to do so, apparently.

We believe that the local board has shown by a preponderance of the evidence that the Appellant committed misconduct. It is our view that Appellant's history of unprofessional conduct supports his termination.

CONCLUSION

For all the reasons stated, we modify the ALJ's decision with the findings herein and uphold the Appellant's termination.

James H. DeGraffenreidt, Jr.
President

Abstain
Charlene M. Dukes
Vice President

EMR
Mary Kay Fingn

absent
S. James Gates, Jr.

Luisa Montero-Diaz

Madhu Sidhu
Madhu Sidhu

Guthrie M. Smith, Jr.

Abstain
Donna Hill Staton

Kate Walsh

DISSENT:

It is my view that the Appellant's history of good teaching should have mitigated the penalty of termination.

Ivan C.A. Walks

Sayed M. Naved

June 26, 2012