

NORMAL TUNNELL,

Appellant

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 08-36

OPINION

INTRODUCTION

Appellant, an assistant principal at Albert Einstein High School in Montgomery County, contests his termination for misconduct in office for changing the grades of four students in order to make them eligible to participate on the football team.

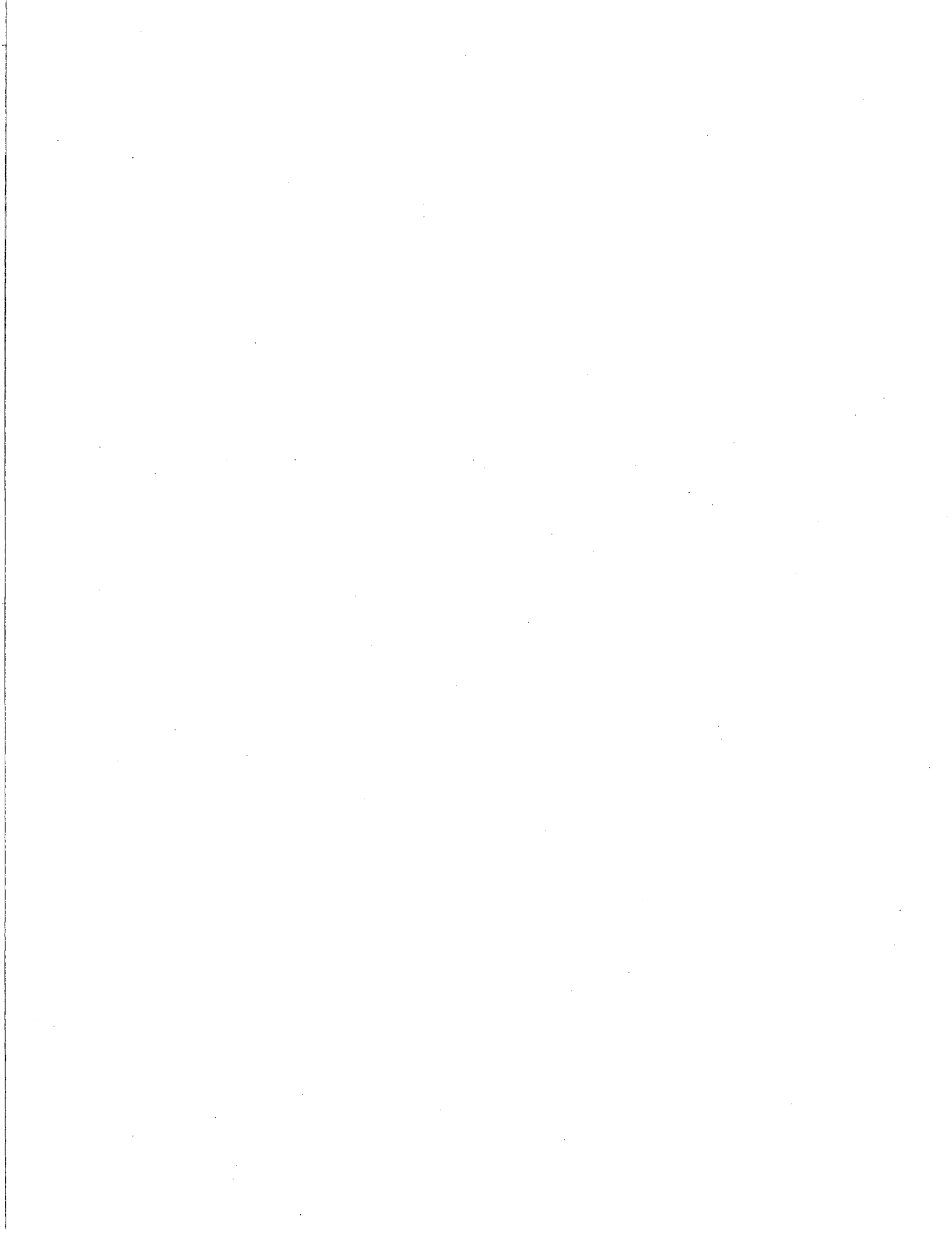
On November 6, 2006, the superintendent notified Appellant that he was recommending his dismissal for misconduct in office to the local board. Appellant appealed the recommendation. A hearing examiner appointed by the local board conducted a full evidentiary hearing. The hearing examiner proposed that the recommendation for dismissal by the superintendent be upheld. The local board heard oral argument on the hearing examiner's report and recommendation. On August 23, 2007, the local board unanimously adopted the factual findings and decision of the hearing officer and dismissed Appellant from his employment with Montgomery County Public Schools.

Appellant appealed the local board's decision to the State Board. Because the appeal involved the termination of a certificated employee, the State Board referred the case to the Office of Administrative Hearings for an evidentiary hearing before an Administrative Law Judge (ALJ). COMAR 13A.01.05.07. The parties agreed to submit the case on the record.

THE ALJ'S DECISION

The ALJ issued a proposed decision on April 30, 2008.¹ The comprehensive factual background for this case is set forth in the Findings of Fact on pages 2-14. Based on the record, the ALJ determined that Appellant changed grades on seven separate occasions in violation of


¹A copy of the ALJ's Proposed Decision is attached for your reference.




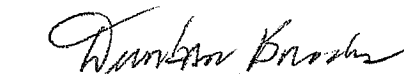
the local board's policy on grading and reporting, resulting in seven separate acts of misconduct. He proposed that the State Board uphold the termination, concluding that Appellant's extensive and extremely serious acts of misconduct undermined the educational mission of the school. ALJ Proposed Decision at 23. The parties have filed no exceptions to the ALJ's Proposed Decision.

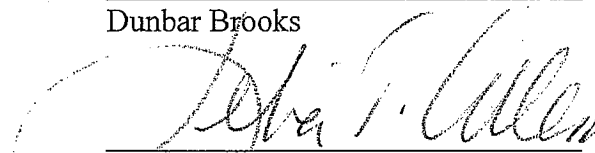
CONCLUSION

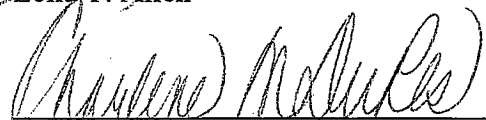
Based on our review of the record, we concur with the ALJ's Proposed Decision. We therefore adopt the ALJ's Proposed Decision and affirm the decision of the Montgomery County Board of Education terminating Appellant for misconduct in office.



James H. DeGraffenreidt, Jr.
President

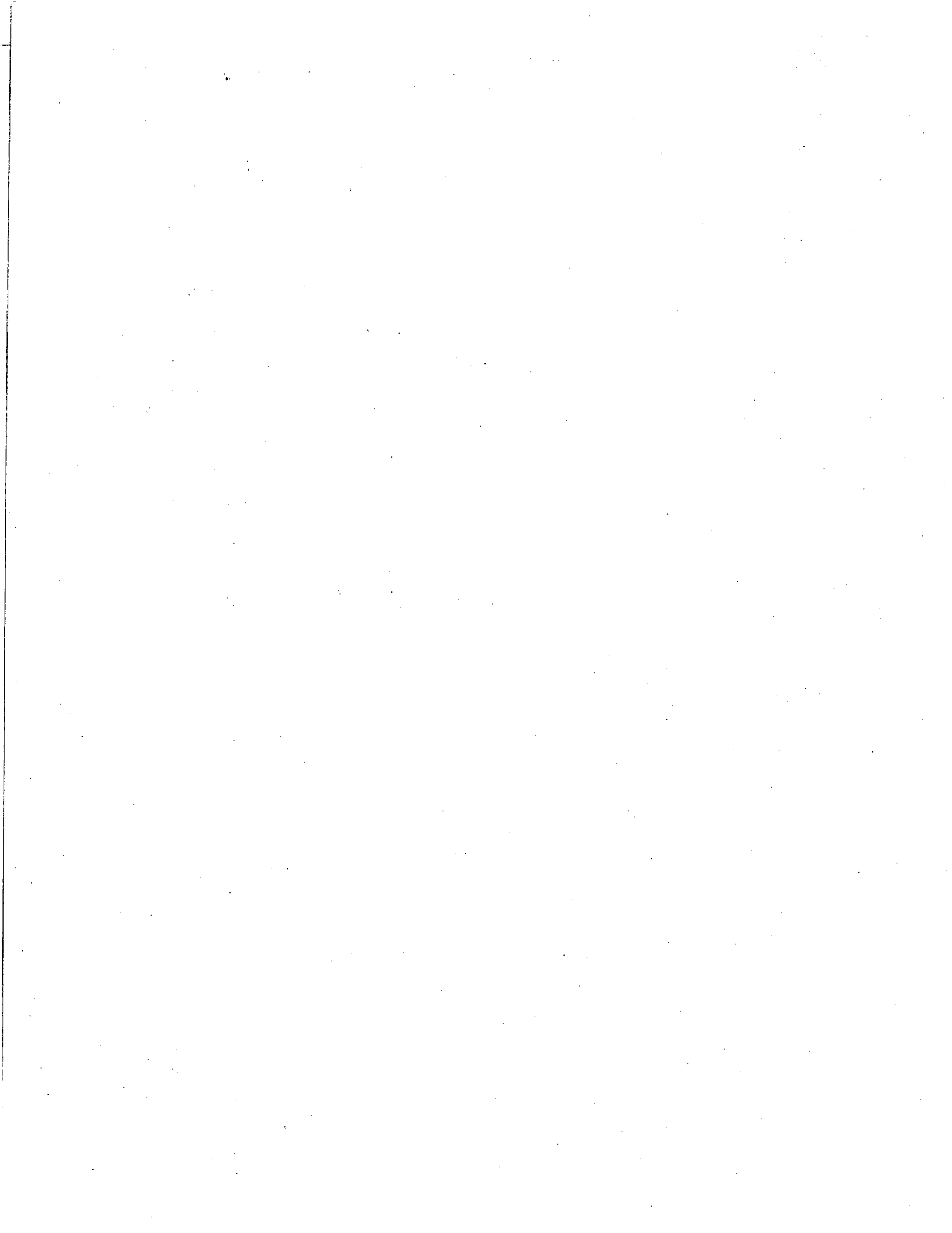

Blair G. Ewing
Vice President

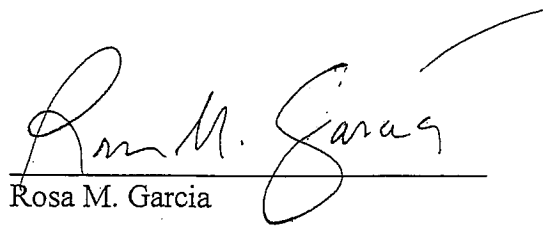

Dunbar Brooks

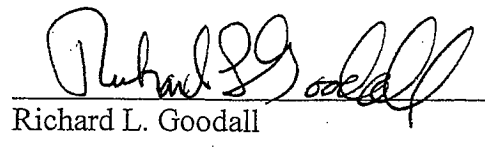

Lelia T. Allen

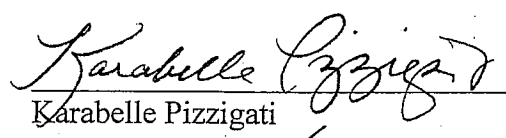

Charlene M. Dukes

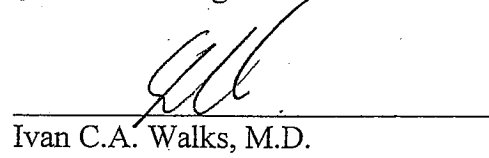

Mary Kay Finan

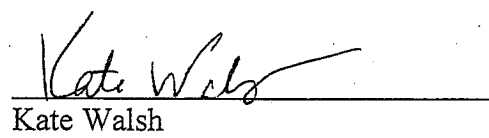



Rosa M. Garcia


Richard L. Goodall


Karabelle Pizzigati


Ivan C.A. Walks, M.D.


Kate Walsh

July 15, 2008

NORMAN T. TUNNELL,

APPELLANT

v.

BOARD OF EDUCATION

OF MONTGOMERY COUNTY

* BEFORE RICHARD F. ROTHENBURG,

* ADMINISTRATIVE LAW JUDGE,

* MARYLAND OFFICE OF

* ADMINISTRATIVE HEARINGS

* OAH No.: MSDE-BE-01-07-41274

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about November 6, 2006, the Montgomery County Superintendent of Schools (Superintendent) notified the Appellant, an assistant principal at Albert Einstein High School (EHS), that he was recommending to the Montgomery County Board of Education (County Board) that the Appellant be dismissed for misconduct in office. The Appellant appealed the recommendation to the County Board. After a hearing on March 6 & 7, 2007, a hearing examiner for the County Board concluded that the termination should be upheld. Md. Code Ann., Educ. § 6-203 (2006). Oral arguments on the hearing officer's report and recommendation were held before the County Board on July 26, 2007. By written Decision and Order, dated August 23, 2007, the County Board unanimously adopted the factual findings and decision recommended of the hearing officer and dismissed Appellant from his

employment with Montgomery County Public Schools (MCPS). On September 24, 2007, the Appellant appealed the County Board's decision to the Maryland State Department of Education (State Board), and the State Board referred the matter to the Office of Administrative Hearings (OAH) for further proceedings. Md. Code Ann., Educ. § 6-202(a)(4) (2006). As a result, I conducted a hearing on February 12, 2008, at the Office of Administrative Hearings, Wheaton Plaza, North Office Building, 2739 University Boulevard West, Suite 700, Wheaton, Maryland, to receive oral argument. Edythe A. Miller, Esq., represented the Appellant, who was not present. Judith S. Bresler, Esq., 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 (2004 & Supp. 2007); COMAR 13A.01.05.07; COMAR 28.02.01.

ISSUE

Was the termination proper?

SUMMARY OF THE EVIDENCE

The parties agreed to proceed on the record, which is attached and made a part of this decision.

FINDINGS OF FACT

After careful consideration of the record and oral argument, I find, by a preponderance of the evidence, the following facts:

1. In order to participate in extracurricular activities in MCPS a student must have a 2.0 grade average with no more than one E (a failing grade). T. 378, 379.¹
2. The Appellant was an Assistant Principal at EHS for three years and an employee with the MCPS for sixteen years.
3. Among the Appellant's specific duties were to supervise various departments such as special education, guidance, athletics, discipline, and he was a grade level administrator (11th grade).
4. As Assistant Principal he was also in charge of making the master schedule for the school, which gave him access to the EHS's main computer that contains the students' grades. T. 7.
5. As an Assistant Principal, the Appellant could unilaterally change a student's grades. While he was not required to consult with a teacher before he changed a grade, the principal assumed he would as a courtesy. T. 71
6. There is a County Board Grading and Reporting Policy (policy) which states in its purpose that the County Board is committed to maintaining rigorous performance and achievement standards for all students and to providing a fair process for evaluating and reporting student progress that is understandable to students and their parents and relevant for instructional purposes, and that grades are an essential way to communicate a student's progress.

¹ The reference is to the transcript of the hearing before a hearing examiner in the Appellant's appeal to the County Board heard on March 5 & 6, 2007. Hereafter referred to as T.

7. There is no County Board policy governing the changing of a student's grades. T. 57.
8. The football coach met with the Appellant after the fourth quarter report cards had been issued, in late June or early July 2006. The coach had copies of progress reports, reports that he distributed to teachers and had the teachers sign and return so he could check on the progress of the football players. T. 437. The coach was concerned with three students whom he said had discrepancies in the grade listed in their progress reports and the grade listed in their report card. The students were C.B., D.B., and P.S., and all three were in Spanish IIB, taught by Ms. J (Spanish teacher), who was a long term substitute. All three students had received an E for Spanish IIB in the fourth quarter marking period, which affected their eligibility in the next semester for football season.
9. The Appellant agreed to look into it, and he spoke to C.B., D.B. and P.S, who were still at the school working out in the weight room. The students told the him that they felt they had done what they needed to according to the teacher to pass the class, and that they had been treated unfairly. T. 439, 440 & 464.
10. The Appellant reviewed the discrepancy between the student's progress reports and the report cards, considered the statement of each student, and the history of what had been done at EHS when a long term substitute was in place so the students would not be punished for not having consistent

instructors throughout the year. The Appellant made a determination that the grades would be changed. T. 444.

11. The Appellant changed P.S.'s 4th quarter Spanish IIB grade from an E to a D. The Appellant did so because there was a discrepancy in the grade progress report that was distributed at the end of the year signed by the teacher and the report card. T. 102, 103.
12. The Appellant did not consult the Spanish teacher before he changed P.S.'s grade.
13. The Spanish teacher testified at the County Board hearing that while P.S. was a very capable student who picked up very fast, he failed to show up for the final exam. When he came in to tell the teacher he had not been there for the final exam, she arranged for a makeup, but he did not show for that exam either.
14. The Appellant also changed P.S.'s 4th quarter Physical Education (PE) grade from a C to an A.
15. The Appellant testified at the County Board hearing that he consulted the PE teacher who directed it be changed, but he could not recall the PE teacher's reason. T. 103, 448, 462.
16. The PE teacher submitted a statement in which he stated that he agreed that the grade "could" be changed, not "should" be changed. The PE teacher reiterated that P.S. still only earned a C for the course. SE Ex. 31 and 25.

17. Before he changed P.S.'s grades, his grade point average (GPA) was 1.71. Superintendent's Exhibit (SE) 17. As a result of the grade changes the Appellant made P.S.'s GPA was now 2.14, and he was eligible for football.
18. The Appellant changed C.B.'s 4th quarter Spanish IIB grade from E to a C. The Appellant explained that there were different grades on the progress report from the final grade. Since C.B. was a native speaker, the Appellant thought he may have been misplaced. T. 452. The Appellant did not consult with the Spanish teacher before he changed C.B.'s grade. T. 110-112.
19. As a result of the grade change C.B.'s GPA changed from 1.57 to 2.0. C.B.'s status changed to eligible for football. SE 19.
20. The Spanish teacher testified that she remembered C.B., and that he would come to class and sleep most of the time. C.B. was a Spanish speaker and the teacher felt that the work should not be difficult for him, but he didn't do the work and did not pay attention in class. T. 184.
21. The Appellant changed D.B.'s Spanish IIB grade from an E to a D because he noted a discrepancy between the progress report and the final grade. T. 114, 454. The basis for the grade change was that the student told the Appellant that "he had turned stuff in that he never received back." T.454. The Appellant also stated that there was a progress report that stated that he should have earned a C.
22. The Spanish teacher recalled D.B. because he did not show up for class a lot times and when he did, he misbehaved. The teacher spoke with D.B and his father, but he just would not do the work he needed to do. T. 185.

23. The Appellant did not consult with the Spanish IIB teacher before he changed D.B.'s grade. T. 117. When asked at the County Board hearing why he did not contact the Spanish teacher before he made any grade changes, the Appellant claimed he did not know where she was. T. 464.
24. The Appellant also changed D.B.'s African-American history grade from a C to an A. The Appellant stated that the teacher came to him and said that the grade should be changed because he had made an error. T. 113.
25. The African-American history teacher had submitted a grade correction form changing D.B.'s grade from a C to a B, not an A, citing a data entry error. SE 20A, page 1.
26. D.B.'s 4th quarter Modern World History grade was changed from a C to a B. The Appellant testified he could not recall making the change. T. 117. When asked if he could have changed the grade, the Appellant replied, "I suppose anything is possible." T. 500. The Modern World History teacher submitted a statement that he did not change D.B.'s quarter, semester or final grade. SE Ex. 20b; Statement of teacher, dated October 13, 2006.
27. As a result of the grade changes D.B.'s GPA changed from 1.57 to 2.28. D.B.'s status changed from ineligible to eligible for football. SE 20.
28. The Appellant changed I.R.'s SAT² Prep grade for the 4th quarter from a D to a C. The basis for the grade change was that I.R. told the Appellant that he felt that he should have received and the teacher said he should have gotten a higher grade. The student also told the Appellant that he turned in

² Scholastic Aptitude Test.

a final exam that was not graded. T 455. The Appellant did not talk to the teacher, but looked at the teacher's grade book which reflected that "he had not been given credit for turning in some of the grades." T. 105. The Appellant did not know if the student turned in the necessary material. T. 106, 133 & 162.

29. The Appellant calculated the mean for I.R.'s SAT prep, "because that's what all teachers do." T. 107. The Appellant came up with a different mean and a higher grade than what the teacher did. The Appellant then looked at the median since he had been told that the median was oftentimes a better determination of central tendency and he determined the median was significantly higher. T. 107, 455 & 456.

30. As a result of the grade change I.R.'s GPA changed from 1.85 to 2.0. I.R.'s status changed from ineligible to eligible for football. SE 18.

31. The SAT prep teacher testified at the County Board hearing that she remembered I.R. and that he did not do the assignments, or much of the work, did not take three quizzes or take the final exam. SE Ex. 38. Also, he had absences and I.R. did not pass the course. T. 128. The SAT prep teacher testified that she did not know of any legitimate basis for changing I.R.'s grade and she was shocked when she learned it had been changed without first being discussed with her. T. 133. The SAT prep teacher testified that grades are computer generated from information supplied by the teacher. The computer does the calculation T. 126.

32. The Spanish teacher testified that in an unrelated case she had entered the wrong grade for a student and to change it to the correct grade she filled out a form, took it to the registrar, and it went through the process. T. 201. The resource teacher had shown the Spanish teacher the form she needed to fill out to change the grade. T. 202.
33. The Appellant did not make any grade changes through the registrar, nor were the grade changes made on the form the registrar used. All the grade changes the Appellant made were made at the end of June or early July 2006. T. 117, 118.
34. In the fall of 2007, the field hockey coach contacted the SAT prep teacher about one of her player's grade in the SAT prep course. The player, A.P., was upset about being pulled off the field hockey team because she had two Es, one of which was for the SAT prep course. A.P. told her coach that the Appellant had changed grades for football players. The coach had spoken with the Appellant and he indicated that he was going to change AP's grade. The Appellant told the coach not to discuss the grade change with the SAT prep teacher. T. 309. Because the coach and the SAT prep teacher were friends, the coach informed the teacher of the Appellant's intent to change A.P.'s SAT prep grade.
35. A.P. failed the SAT prep because she rarely came to class, did not complete assignments and did not make up work she missed. At times when she was in class AP would put her head on her desk and sleep and she had to be reminded repeatedly to lift up her head.

36. The SAT prep teacher testified at the County Board hearing that she had changed a grade of a student after the student made up work he missed during an illness. The SAT prep teacher filled out a form, gave it to her resource teacher who forwarded it up the chain to the principal. The SAT prep teacher testified that she would expect to be involved if a grade she had given was to be changed. T. 150 & 163.
37. In September 2006, the head of the foreign language department at EHS reported to the principal of EHS that a teacher asked student PS why he was in Spanish III when the teacher believed that he had not passed Spanish IIB. PS said his grade had been changed by the Appellant.
38. The principal asked the Appellant about PS's grade change. The Appellant said that PS had told him that he had handed in some work and done some other things that indicated that his grade should be changed. The principal also learned that the Appellant changed PS's physical education (PE) grade to an A after PS told him the Appellant that he was supposed to get an A. The PE teacher confirmed by email that PS was supposed to get an A. T. 32. The PE teacher later clarified his position that PS "could" get an A, not "should" get an A. However, according to the PE teacher PS only earned a C.
39. A student who was ineligible for soccer told her resource teacher that there were football players who failed classes and were still playing. The student mentioned D.B. The resource teacher looked at D.B.'s report card which reflected two E's for the fourth quarter. She next looked at D.B.'s transcript

and noticed the transcript grades differed from the grades on the report card.

The resource teacher gave the report card to the principal.

40. When the principal asked the Appellant why he changed DB's grades, he replied that it was the best thing for DB and there was a long term substitute teacher of the class and he didn't feel things went the way they should have.

T 46.

41. The EHS principal asked a MCPS curriculum instruction supervisor to evaluate the records of the long-term Spanish substitute. 33 of the students in the long term substitute's classes failed Spanish IIB. The head of the MCPS foreign language department evaluated the long term substitute's records and determined that she had done a fairly good job of following the curriculum. T. 50.

42. At some time during her time at EHS, the long term substitute had been observed by the head of EHS's foreign language department, who felt everything was fine. T. 51. The long term substitute had also been observed by the EHS resource teacher who also determined that she was doing an adequate job. T. 51.

43. The Appellant admitted that he did not observe the long-term substitute teaching. T. 498.

44. The principal next learned that the grades were changed for other students and he notified the Community Superintendent's office.

45. There was in place at EHS a form teachers used to change grades. The form would be submitted to the grade level administrator of which there were

four at EHS, one for each grade. T.37. The form provided for the old grade, the new grade, and reason for the change. Once the form is signed by the grade level administrator, the form is sent to the EHS registrar who makes the changes.

46. It was the intended procedure that the form be signed by the teacher and administrator T. 59. However, it was not uncommon for a teacher to tell the registrar that a student was given an incorrect grade and the registrar would make the change in due course.

47. EHS administrators had the authority to change grades without consulting with the classroom teacher. T39.

48. The principal placed the Appellant on administrative leave on September 28, 2006 for one day, and on the next day, the MCPS Chief Operating Officer placed the Appellant on administrative leave pending the outcome of an investigation.

49. The MCPS Office of Human Resources was tasked to conduct an investigation, beginning on September 29, 2006. The investigative team interviewed the teachers of the students whose grades were changed, EHS administrators, the football and hockey coaches, the principal, and the Appellant.

50. The investigative team found that the Appellant changed the grades of four students without knowledge of the teachers and without substantive reasons. The Appellant admitted to the investigative team that he changed the grades. All the grades changed were for students on the football team.

In a statement he provided the investigative team the Appellant admitted to not following proper procedures by not discussing the changes with the appropriate teachers.

51. The investigative team concluded that the Appellant's conduct demonstrated an attempt to hide the fact that he had changed the grades without authorization. In one case, the team noted that the Appellant asked the field hockey coach to not tell the player's teacher of this intention to change a player's grade.
52. The investigative team on October 13, 2006 recommended the Appellant be dismissed for misconduct in office.
53. On October 20, 2006, the Deputy Superintendent of Schools notified that Appellant that she was considering recommending his dismissal for misconduct in office. The Deputy told the Appellant that she was willing to meet with the Appellant to hear reasons why she should not recommend dismissal.
54. On November 6, 2006, the Appellant was notified by the Superintendent of Schools that he was recommending to the County Board that he be dismissed for misconduct in office.
55. The Appellant appealed and a hearing was conducted on March 5 & 6, 2007 before a hearing examiner appointed by the County Board.
56. On May 18, 2007 the hearing examiner recommended that the dismissal for misconduct in office be upheld.

57. Oral arguments on the hearing examiner's report and recommendation were held before the County Board on July 26, 2007.

58. On August 23, 2007, the County Board unanimously adopted the factual findings and decision recommended by the hearing officer and dismissed the Appellant from his employment with the MCPS.

59. The Appellant appealed to the State Board.

DISCUSSION

Md. Code Ann. Educ. §6-202 (2006).

(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:

(ii) Misconduct in office[.]

Md. Code Ann. Educ. § 4-205(c)(3) provides, in pertinent part, that a decision of the county superintendent may be appealed to the County Board and the decision may be further appealed to the State Board if taken in writing within 30 days of the decision of the County Board.

COMAR 13A.01.05.05F provides as follows:

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 and 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.

The County Board Policy for Grading and Reporting designated as IKA, provides as follows, in pertinent part;

A. Purpose

The Board of Education is committed to maintaining rigorous performance and achievement standards for all students and to providing a fair process for evaluating and reporting student progress that is understandable to students and their parents and relevant for instructional purposes.

B. Issue

Grades are an essential way to communicate to students progress, As such, grading and reporting practices must include the following:

1. Meaningful feedback on student achievement to students, parents, teachers, administrators and the school system.
- ...
4. Accurate reflection of student achievement compared to grade level or course expectations outlined in the curriculum as demonstrated on assessments and teacher designed tasks.
5. Fair representation of a student's performance on a variety of measures over time.
- ...
8. Summative assessments, which may include final exams end of unit tests, and cumulative projects, as reflections of a student's mastery of grade level or course material.
9. Opportunity for students to demonstrate mastery of grade level or course expectations outlined in the curriculum through a variety of methods.
- ...

D. Desired Outcomes

Grading and reporting practices will be fair and meaningful and support rigorous performance and achievement standards for all students. Grades will have consistent meaning throughout the school system and be based on grade level and course expectations as outlined in the curriculum.

In 2003 the County Board changed the existing Grading and Reporting Policy so that student's efforts and classroom behavior would not be reflected in grades. T 60.

Background

The Appellant is employed by the MCPS and has been as an assistant principal at EHS since 2004 and from 1999 to 2003 at Takoma Park Middle School. He was first employed by MCPS in 1990, first as a science teacher at two different high schools and then as a student support specialist at another high school. The Appellant educational background reflects that he was awarded a Bachelor of Arts degree by the University of Rhode Island in 1983, majoring in Secondary Education, General Science and Biology. In 1997 he was awarded a Master of Science degree by then Western Maryland College, majoring in Counselor Education. The Appellant holds a Maryland State Advanced Professional Certificates: Administrator II, Biology (6-12), General Science (6-12), and Guidance Counselor (K-12).

When the 2006-2007 school year began, the head of the EHS Language Department printed out a failure list from the year before which was given to teachers who were teaching level III. T234, 235. The Spanish III teacher approached PS in class and told him that he was misplaced because he failed Spanish IIB. PS's response in front of the class was that it was taken care of so he could play football. The Spanish III teacher went to her resource teacher who investigated the computer files and discovered that PS had in fact failed Spanish

2B and his grade had been changed to make it appear he passed. The resource teacher reported this to the EHS principal.

An ensuing investigation revealed that the Appellant had changed PS's Spanish IIB grade and also the Spanish IIB grades of DB and CB. Further, the Appellant also changed DB's PE grade. The investigation further revealed that the Appellant had changed CB's African-American History and IR's SAT Prep grade. All four students were on the football team and the grade changes the Appellant made changed their eligibility status from ineligible to eligible.

In essence, the facts about the Appellant's grade changes are not in dispute. The Appellant maintains that he was honest and forthright about his role in changing the grades of four students. In an attempt to justify changing the grades, the Appellant testified at the hearing that he was paid to make decisions. T. 443-444. It is also not in dispute that the Appellant had the authority to change grades and that MCPS did not have a policy, regulation or guideline that addressed grade changes.

In his submission accompanying his appeal, the Appellant presented three distinct arguments which I will address seriatim.

- I. There was no clearly defined and applicable policies or standards of acceptable practice in place at the time of the incident that gave rise to the instant case.

The essence of this argument is that student appeal of grades and the procedures for grade changes are a local school practice that is not consistently followed and that there were no county guidelines for student appeal of grades. The Appellant also challenged the concept that there was a presumption that

teachers should be consulted prior to a grade change. The Appellant maintains that the grading and reporting policy does not reference an appeal policy for changing grades.

The Appellant's assertion regarding the presumption that teachers should be consulted before a grade change contradicts what he said in the Personal Statement he provided to the investigators in which he said,

"I realize that I did not follow procedures in discussing these changes with all of the appropriate teachers. I did not believe it was necessary to contact the long term sub. In retrospect, I realize that the authorization process was not followed and that I erred in my decisions to change grades without consulting someone else or using the authorization grade change form."

At the County Board hearing, the Appellant admitted that the authority to change grades included the exercise of that authority with responsibility to have a solid basis for the changing the grades. T. 474. The Appellant also admitted that grading and reporting is based on the acquisition of specific skills, mastery of the subject that is determined by assessments. T. 483.

Furthermore, the fact that there is no grade changing policy extant in the county did not allow the Appellant to ignore the existent grading and reporting policy which references fairness and meaningfulness and supports rigorous performance and achievement standards to report student progress. Every grade changed by the Appellant bore no resemblance to classroom performance. On the other hand, the classroom performance of all three of the Spanish students and the SAT student demonstrated a clear disregard of the educational process. For example there was missed work, missed exams, missed re-scheduled exams, sleeping in class, and misbehavior in class. Not only did the Appellant ignore the

Grading and Reporting Policy, he undermined it. A field hockey and a soccer player were upset because they could not get their grades changed so they could be eligible. It is clear that news of the Appellant's grade changes had permeated at least the athletic department. Further, the Appellant attempted to cover-up what he did when he asked the field hockey coach not to inform the SAT teacher of his intention to change a field hockey player's grade.

The leadership standards articulated in the Appellant's evaluation address many ideas, among which are stewardship of a vision of teaching and learning, nurturing and sustaining a school culture of an instructional program conducive to student learning, and model professionalism. Clearly, the Appellant was required to follow MCPS policy. While there were no guidelines for changing grades, there were guidelines for awarding grades. If a grade was to be changed it had to be within the grading guidelines. This mandate is incorporated within the evaluation's leadership standards. Inherent within the Appellant's responsibility was to be the institutional policy enforcer.

- II. The Superintendent failed to prove that the Appellant's behavior was misconduct and subject to dismissal under section 202 of the Education Article.

The gist of the Appellant's argument is that section 6-202 does not define misconduct. In its decision, the County Board concluded that the grades the Appellant changed were for an improper purpose and concluded that his conduct constituted misconduct in office. As noted above, the Appellant blatantly failed to follow the County Board Grading and Reporting Policy in order to render eligible four football players whose grades made them ineligible. The Appellant grossly

abused the discretion entrusted to him as an Assistant Principle. That was misconduct.

The Appellant cited *Resetar v. State Board of Education*, 284 Md. 537, 399 A.2d 225 (1979) in which the court noted the definition of misconduct in Black's Law Dictionary (4th ed. 1968) to be as follows:

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness.

284 Md. 561; 399 A.2d 237.

Certainly, the Appellant's conduct in this case was not negligence or carelessness. On the other hand, it can easily be characterized as a dereliction of duty, improper or wrong behavior, misdeed, mismanagement, or impropriety. The court also noted the definition of misconduct found at 58 C.J.S. Misconduct (1948), which says of the term used as a noun:

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. (Id. at 818.)

284 Md 560; 399 A.2d 237.

The County Board found in its decision, the Appellant's "conduct falls well within the scope of misconduct so defined." I agree.

Again, the Appellant argued the lack of a policy changing rule and the lack of a requirement that he should have checked with teachers before he made the

changes³. And again as I noted above, the Appellant overlooks the County Board's Grading and Reporting Policy. The Appellant asserts there was no evidence offered by the Superintendent to show that the Appellant knew or was placed on constructive notice that his conduct was not appropriate and the consequences could result in disciplinary action. The Appellant acknowledged at the hearing that he was aware of the County Board Policy on Grading and Reporting (T. 430-431). And the Appellant acknowledged that his authority to change grades also included that he exercise that authority responsibly and have a solid basis for making grade changes. (T. 482-484). It is not persuasive after the fact to assert that you knew the rules, but did not know you faced disciplinary action if you blatantly disregarded them.

III. The sanction of dismissal for misconduct is unduly harsh and not an appropriate disciplinary action.

The Appellant had an excellent record of achievement as a teacher and administrator for 17 years. The Appellant points out that he cooperated with the investigation, and admitted that he changed the grades. Both the County Board and the hearing officer acknowledged his exemplary career. The Appellant asserts that dismissal is punishment for punishment sake and is an abuse of discretionary power and contrary to sound educational policy. I don't agree.

The Appellant again cites *Resetar*, where the court observed

"[t]hat leaves us with the question, however, of whether dismissal

³ I do note on this point that the Appellant admitted in his own words in the Personal Statement he signed on October 6, 2006 that he realized that he did not follow the procedures in discussing these changes with all of the appropriate teachers.

in this instance was action so harsh as to amount to arbitrary and capricious action on the part of the State Board. It is impossible to catalogue just what would or would not constitute arbitrary action on the part of an administrative agency such as the State Board in imposing sanctions, since each situation must be judged on its own facts. Certainly the agency is obliged to take the factual setting and circumstances of the misconduct into consideration. We can conceive of situations in which dismissal for a single act of misconduct by a teacher possessed of an otherwise clean record might be held upon judicial review to be arbitrary and capricious."

334 Md. at 562-563 ; 399 A.2d 338.

The County Board in its decision noted that the Appellant's misconduct goes to the fundamental educational mission of the schools. The County Board found that the Appellant betrayed not only the grading policy, but the athletic eligibility policy as well. A great deal of time had been expended to develop a policy to make grades more meaningful throughout and across the school system. The County Board concluded that the Appellant committed a substantive violation of grading policy and that termination was appropriate.

I do not find any extenuating and mitigating circumstances that favor the Appellant in this case. His position as an assistant principle placed him among the upper echelon of EHS with discretionary power to change grades. It is clear that he extensively abused that discretion. Every grade he changed was in blatant disregard of the grade awarded by the teacher according to the County Board Grading and Reporting Policy. That is to say the teacher's grade in each case reflected the student's performance in the classroom. Each teacher involved provided evidence to that effect. The Appellant changed all four

Spanish grades and one SAT Prep grade without any regard for the respective student's classroom performance. The Appellant consulted with the PE teacher and changed a C grade to an A, even though the PE teacher said the grade could be changed, not should be changed. The PE teacher's post script was that the student only earned a C. In another case, the teacher reported that he had made an error and the student had earned a B, but the Appellant changed it to an A. In the case of a World History grade, when asked if he had changed the grade, the Appellant could not recall, but stated anything is possible. The effect of the grade changing was to make ineligible football players eligible. Apparently, the Appellant did not consider the impact his grade changes could have wrought. Had the football season gone forward and then the ineligibility of the players discovered, the adverse publicity certainly could have been extensive and embarrassing to the MCPS. But the real losers would have been the players who maintained their grades. The Appellant's behavior could have placed the EHS football team season in peril.

The County Board's evidence established that the sum of the Appellant's grade changing was seven separate acts of misconduct. Seven acts in which the Appellant violated the County Board Policy on Grading and Reporting. I find this to be formidable. The Appellant violated the trust placed in him and undermined the educational mission of the school system. I conclude that dismissal in this case is not arbitrary and capricious, but based on the Appellant's extensive and extremely serious acts of misconduct.

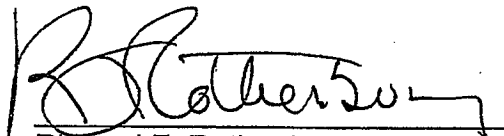
CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Appellant should be terminated for misconduct. Md. Code Ann., Educ. § 6-202(a)(1)(ii) (2006); COMAR 13A.01.05.05F.

PROPOSED ORDER

It is **PROPOSED** that the decision of the Board of Education of Montgomery County terminating the Appellant for misconduct be **UPHELD**.

April 30, 2008
Date Decision Mailed


Richard F. Rothenburg,
Administrative Law Judge

RFR/cm
95119

NOTICE OF RIGHT TO FILE OBJECTIONS

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

NORMAN T. TUNNELL,

APPELLANT

v.

BOARD OF EDUCATION

OF MONTGOMERY COUNTY

* BEFORE RICHARD F. ROTHENBURG,

* ADMINISTRATIVE LAW JUDGE,

* MARYLAND OFFICE OF

* ADMINISTRATIVE HEARINGS

* OAH No.: MSDE-BE-01-07-41274

* * * * *

Exhibits

By agreement of the parties, the matter was considered on the record, which consisted of the following:

I. For the Appellant - Request for Appeal, with 11 attachments as follows:

- Decision and Order, Board of Education of Montgomery County, dated August 29, 2007
- Appellant's evaluation, dated April 22, 2005
- Appellant's Personal Statement, dated October 10, 2006
- Memorandum from Larry Bowers to Dr. Jerry D. Weast, dated October 18, 2006
- Letter to Appellant from James G. Fernandez, dated September 27, 2007
- Letter to Appellant from Larry A. Bowers, dated September 29, 2007
- Letter to Appellant from Dr. Frieda K. Lacey, dated October 20, 2006
- Letter to Appellant from Dr. Jerry D. Weast, dated November 6, 2006
- Decision of Hearing Examiner, dated May 18, 2007
- Policy IKA, Grading and Reporting
- Superintendent's Closing Argument, filed April 24, 2007

II. For the County Board, Reply to the Appeal, with the following exhibits:

- Transcript of the Proceedings on March 5 and 6, 2007
- Appellant's evaluation, dated April 22, 2005
- Appellant's curriculum vitae
- Letter to Faculty from Mike Bonavia, undated, with attached blank progress report
- Confidential Memorandum from Ms. Susan F. Marks to Mr. Larry A. Bowers and Dr. Frieda K. Lacey
- Email from Raymond Frappolli to James G. Fernandez, dated September 27, 2006 (atch 1)⁴
- Email from Raymond Frappolli to Heath E. Morrison, dated September 27, 2006 (atch 1A)
- Letter to Appellant from James G. Fernandez, dated September 2, 2006 (atch 2)
- Email to Susan Marks from Heath E. Morrison, dated September 27, 2006 (atch 3)
- Memorandum from Susan F. Marks to Mr. Larry Bowers and Dr. Frieda Lacey, dated September 28, 2006 (atch 4)
- Letter to Appellant from Larry A. Bowers, dated September 29, 2006 (atch 5)
- To Whom It May Concern from Margaret Jenkins, Registrar, dated September 29, 2006, with blank form and handwritten notes (atch 6 & 7)
- Email from James Fernandez to Raymond Frappolli, dated September 28, 2006 (atch 8)
- Statement by Sara Salazar, Spanish teacher, undated (atch 9)

⁴ The County Board exhibits were designated as attachments to Superintendent's Exhibit 1 at the hearing and are hereinafter referred to as atch.

- Statement Regarding Grade Changes at Einstein by Paula Pero, dated September 29, 2006 (atch 10)
- Email to Suzanne Murray and Brady Blade from the Appellant, dated September 27, 2006 (atch 11)
- Statement Regarding Grade Changes at Einstein by Suzanne Murray, undated, with handwritten notes (atch 11A & B)
- Handwritten notes of interview of Trayce Diskin (atch 12)
- Emails from Trayce Diskin to Brian Thomas and James Fernandez, dated September 22, 26 & 27, 2006 (atch 13)
- Handwritten notes of interview of Mildred Green and Statement of Occurrence by Mildred Charley-Greene, undated (atch 14)
- Email from James Fernandez to Raymond Frappolli, dated September 28, 2006 (atch 15)
- Partial statement by Martha Serensits, dated September 29, 2006 (atch 16, page 2 of 2 only)
- Report Card of P.S. for 2005-2006 school year, dated 6/17/06, front and back with 1.71 GPA for 4th marking period (atch 17, pages 1 & 3 of 4)
- Altered Report Card of P.S. for 2005-2006 school year, dated 7/7/06, front and back with 2.14 GPA for 4th marking period (atch 17, pages 2 & 4 of 4)
- Report Card of I.R. for 2005-2006 school year, dated 6/17/06, front and back with 1.85 GPA for 4th marking period (atch 18, pages 1 & 3 of 42)

- Altered Report Card of I.R. for 2005-2006 school year, dated 7/07/06, front and back with 2.00 GPA for 4th marking period (atch 18, pages 2 & 4 of 4)
- Report Card of C.B. for 2005-2006 school year, dated 6/17/06, front and back with 1.57 GPA for 4th marking period (atch 19, pages 1 & 3 of 4)
- Altered Report Card of C.B. for 2005-2006 school year, dated 7/07/06, front and back with 2.00 GPA for 4th marking period (atch 19, pages 2 & 4 of 4)
- Report Card of D.B. for 2005-2006 school year, dated 6/17/06, front and back with 1.57 GPA for 4th marking period (atch 20, pages 1 & 4 of 5)
- Altered Report Card of D.B. for 2005-2006 school year, dated 6/27/06, front only with 2.00 GPA for 4th marking period (atch 20, page 2 of 5)
- Altered Report Card of D.B. for 2005-2006 school year, dated 7/07/06, front and back with 2.28 GPA for 4th marking period (atch 2, pages 3 & 5 of 5)
- Report Card of D.B. for 2005-2006 school year, dated 6/17/06, front side only (atch 20A, page 2 of 2)
- Grade Correction Form for student D.B. (atch 20A, page 1 of 2)
- Statement of Patrick Belott regarding D.B., dated October 13, 2006 (atch 20B)
- Handwritten statement by Rebecca Perry (atch 21)
- Handwritten notes from interview with Michael Bonavia (atch 22)
- Email/statement by Michael Bonavia, undated (atch 23, 1 of 2 only)
- Appellant's attendance records from June 10, 2006 through June 23, 2006 (atch 24)
- Email from John Mangrum to James Fernandez, dated September 13, 2006 (atch 25)

- Email from the Appellant to James Fernandez, dated September 13, 2006 (atch 26)
- Email from Kevin Wyatt to Miles Alban, dated September 29, 2006 (atch 27)
- Statement of James G. Fernandez, dated September 28, 2006 (atch 28)
- Notes from interview of Silvia Juarez, substitute teacher, dated October 3, 2006 (atch 29)
- Handwritten statement of John Mangum, dated October 3, 2006 (atch 30)
- Email with handwritten notation, dated October 3, 2006 (atch 31)
- Handwritten statement, dated October 3, 2006, by John Mangrum, regarding D.B. (atch 32)
- Email from Silvia Juarez to Miles Alban, dated October 4, 2006 (atch 33)
- Confidentially Notice signed by the Appellant on October 5, 2006 (atch 34)
- Personal Statement by the Appellant, dated October 10, 2006 (atch 35)
- Letter to Mr. Frappolli from James G. Fernandez, dated October 11, 2006 (atch 36)
- Email from Trayce Diskin to Miles Alban, dated October 10, 2006 (atch 37)
- Email from Trayce Diskin to Miles Alban, dated October 11, 2006 (atch 37A)
- Memorandums to I.R. and A.P. with an explanation of their grades (atch 38 & 38A)
- Email from Paula Pero to Miles Alban, dated October 10, 2006 (atch 39)
- Handwritten statement by Margaret Jenkins, Registrar, undated (atch 40)
- Email from Ann Kamenstein to Raymond Frappolli and Miles Alban, dated October 12, 2006 (atch 40A)
- School Registrar attendance record and leave requests (atch 40B)
- Handwritten statement by Rebecca Perez (atch 41)
- Statement by Brian Thomas, dated October 11, 2006 (atch 42)

- Football roster 2006-2007 (not provided) (atch 43)
- Email from Suzanne Murray to Alban Miles, dated October 12, 2006 and Report card of A.P. dated 8/17/06, obverse only (atch 44)
- County Board Policy IKA Grading and Reporting (atch 45)
- County Board Policy IKA-RA Grading and Reporting (atch 46)
- Notice of termination to Appellant from Dr. Weast, dated November 6, 2006

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