NORMAN L. NICHOLS,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
CAROLINE COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 03-26

OPINION

Appellant, a tenured music teacher with Caroline County Public Schools ("CCPS") for approximately 35 years, appeals the local superintendent's recommendation that he be terminated for willful neglect of duty, insubordination, and incompetence based on behavior and performance problems.

Procedural Background

At the local level, Appellant appealed the superintendent's recommendation for termination to the local board and a hearing was scheduled for August 1, 2002. At the hearing, Appellant's attorney presented minutes of a May 7, 2002 closed session meeting of the local board which Appellant believed suggested that the local board had already made a determination to uphold the superintendent's recommendation. In order to avoid a claim that the local board could not act impartially in hearing the appeal, the parties agreed to submit the appeal directly to the State Board for a *de novo* hearing before an Administrative Law Judge ("ALJ") without the local board first issuing a decision on the recommendation for termination.

Once received by the State Board, the appeal was transferred to the Office of Administrative Hearings where an ALJ conducted a full evidentiary hearing spanning several days.[1] Appellant represented himself at the hearing. The ALJ's proposed decision is attached as Exhibit 1 to this opinion.

ALJ Decision

Based on the record in this case, the ALJ determined that Appellant's performance and behavior warranted termination. In his proposed decision, the ALJ stated in part:

> During the 2000-2001 year, classroom observations were conducted of the Appellant. These observations noted that the Appellant needed improvement in several categories and he was ultimately rated unsatisfactory for the year. As a result, he was

[1]The transcript of the hearing before the ALJ is in excess of 1,000 pages.

> placed on the [Performance Improvement] Plan and the Principal, Ms. Fountain, recommended that the Appellant's certificate be placed on second class for 2001-2002. The Superintendent accepted this recommendation. This decision was upheld by the State Board and the Appellant did not seek review.
>
> Overall, the Appellant's work habits were not seen favorably. His teaching procedures and methodology needed improvement on many levels including instructional effectiveness, management skills and professional ethics/interpersonal relationships. His history also showed problems involving excessive disciplinary referrals of students, lack of control over classroom activities and imposition of his personal religious beliefs on his students despite repeated warnings from school officials and direction to cease such activities.
>
> Extensive testimony about his relations with co-workers and students was offered by the Board and the Appellant failed to refute this testimony and evidence. However, despite his over thirty years of teaching and somewhat satisfactory prior records, several consecutive years of unsatisfactory performance including 2000-2001 and 2001-2002 is sufficient justification for the Board to terminate him. The evidence established that he was given ample opportunity and resources to correct his problems, but he only responded in an incooperative (sic) and at times insubordinate manner.
>
> The Appellant's failure to improve his performance after being placed on second class status and his failure to adhere to and cooperate with the Performance Improvement Plan constitute "willful neglect of duty", "insubordination" and "incompetence" under the statute.

ALJ Proposed Decision at 27. The parties presented final oral argument to the State Board on June 24, 2003.

Objections to ALJ Decision

Appellant has submitted 15 objections to the ALJ's decision which we will address in turn.

1. Appellant objects to the ALJ's decision not to disqualify himself from hearing the appeal as requested in Appellant's Motion for Disqualification. Appellant's Motion was based on the ALJ's decision not to allow Appellant to revisit facts from the 2000-2001 school year

pertaining to the reclassification of Appellant's certificate to second class for the 2001-2002 school year.

In the proposed decision, the ALJ notes that Appellant fully litigated the issue of reclassification of his certificate before the State Board in *Norman Nichols v. Caroline County Board of Education*, MSBE Opinion No. 02-11 (March 27, 2002). ALJ Proposed Decision at 7. The State Board upheld the reclassification and later denied Appellant's request for reconsideration of the decision. Given that the State Board had already rendered a final decision on this issue and Appellant did not further appeal the matter to the Circuit Court, there was no basis for the ALJ to rehear matters relating to the reclassification. Appellant's contentions regarding the disqualification of the ALJ are therefore meritless.

2. Appellant objects to the ALJ's failure to include in the proposed decision "pertinent facts that should have had a major impact upon the ALJ's decision." The only facts referenced by Appellant consist of testimony from Appellant's witness, Elaine Stein, that some students indicated they were happy about going to Appellant's classes. Tr. 550. Appellant believes that this testimony demonstrates he was meeting the educational needs of some of the students.

It is Appellant's burden to identify those salient facts that he believes were improperly overlooked by the ALJ. Appellant has pointed to only one fact in the entire transcript of proceedings. A review of Ms. Stein's testimony in its entirety discloses that the same students to whom she was referring also expressed concerns about attending Appellant's classes. Tr. 550. It is the legal responsibility of the ALJ to weigh the evidence. We find it well within the discretion of the ALJ to find Ms. Stein's testimony not to have the same impact that Appellant believed it to have.

3 and 4. Appellant objects to the ALJ's failure to include in the proposed decision six opinions of the State Board of Education that Appellant listed in an exhibit, and which Appellant believes are germane to his case. The ALJ is under no obligation to consider, cite, or discuss particular cases. Moreover, although Appellant believes otherwise, many of the cases cited by him are either irrelevant to the matters at issue in this case or do not support Appellant's claims.

5. Appellant objects to the ALJ's failure to include in his proposed decision that the local board imposed "burdensome problems" on Appellant which interfered with his ability to effectively teach. To the contrary, the ALJ found insufficient evidence of undue stress imposed upon Appellant by the local board. *See* ALJ Proposed Decision at 20-21.

6. Appellant objects to the ALJ not allowing Appellant to make the circumstances surrounding the reclassification of his certificate a part of the record. Appellant also believes he failed to receive a fair hearing given that the attorney for the local board was permitted to reference a final decision in federal district court pertaining to Appellant's claims of race discrimination.

As mentioned above, the ALJ properly excluded evidence from the hearing relating to Appellant's reclassification of his certificate since the State Board had previously issued an opinion reviewing the facts and resolving the issues pertaining to the reclassification in MSBE Opinion No. 02-11. We find that references by the local board attorney to a ruling by United States District Court Judge Harvey dismissing Appellant's claims of race discrimination were appropriate given Appellant's contentions throughout the OAH hearing that his termination was based on unlawful race discrimination. Appellant's claims of an unfair hearing on this basis therefore lack merit.

7. Appellant objects to the ALJ's failure to cite to and apply *Talbot v. Janson*, 3 U.S. 133 (1795) to the instant case. Again, there is no requirement that the ALJ cite to or discuss specific cases. Moreover, *Talbot v. Janson* is a 208 year old decision of the United States Supreme Court involving principles of admiralty law that are irrelevant to the issues in this appeal.

8. Appellant objects to the ALJ's failure to include in the Findings of Fact that the local superintendent abruptly dismissed Appellant from his post on April 19, 2002, and that the local board illegally suspended Appellant on December 14, 2001. We find that the ALJ did not include such items in the factual findings because he did not find any record evidence to support these contentions.

9. Appellant objects to Finding of Fact #38 which states "On May 8, 2002, Mr. Lorton advised the Appellant that he was recommending that the Appellant be terminated on the grounds of incompetency, neglect of duty and/or insubordination." ALJ Proposed Decision at 10. It appears that Appellant is arguing that the termination recommendation was made and acted upon by the local board at a May 7, 2002 meeting without a hearing in violation of 6-202 of the Education Article, and that this information should have been included in the factual findings.

The ALJ's Finding of Fact #38 is accurate. By letter of May 8, 2002, the superintendent advised Appellant that he "was recommending that the Appellant be terminated on the grounds of incompetency, neglect of duty, and/or insubordination." It was not necessary for the ALJ to make any factual findings regarding what, if any, action the local board took on the superintendent's recommendation given that the parties agreed to submit the matter to the State Board for a *de novo* hearing in lieu of a formal decision on the termination by the local board. Based on this agreement, Appellant has waived his right to raise any claims concerning violations of § 6-202(a)(3) with regard to holding a hearing before the local board.

Moreover, any alleged procedural violations of § 6-202 was fully cured by the full evidentiary hearing before the ALJ. *See West & Bethea v. Board of Commissioners of Baltimore City*, 7 Op. MSBE 500 (1996) (failure to hold conference within ten days was cured by the *de novo* administrative hearing on merits before the local board); *Harrison v. Somerset County Board of Education*, 7 Op. MSBE 391 (1996) (failure to grant conference with superintendent or his representative in timely fashion was cured by local board's full evidentiary hearing on appeal).

10. Appellant objects to the ALJ's failure to include in the proposed decision the testimony of Principal Janet Fountain and supervisor John Perry regarding the fact that some of the component ratings contained in each of Appellant's 2001-2002 evaluations were not unsatisfactory. He also objects to the ALJ's failure to cite to certain State Board opinions.

The ALJ included in his proposed decision references to the testimony of Ms. Fountain and Mr. Perry, whom he deemed to be "inherently credible witnesses," and found support for the termination decision in their testimony. ALJ Proposed Decision at 23. A review of the transcript discloses that Ms. Fountain testified that significant areas of concern on the overall evaluation warranted an unsatisfactory rating, much of it being based on the fact that Appellant was not following the performance plan that had been instituted. Tr. 307-308. Additionally, Mr. Perry testified as to the reasons why despite receiving "needs improvement" or "satisfactory" ratings in some of the individual components of his evaluations, Appellant nonetheless received an overall "unsatisfactory" rating:

> The reason that we rated the overall evaluation as unsatisfactory was simply because there was not one area of the four [instructional effectiveness, scholarship/knowledge, management skills, and professional ethics/interpersonal relationships] that we rated as satisfactory. They were either "needs to improve" or "unsatisfactory" at the end of the year. And the overall evaluation scale, rating scale, indicates either a "satisfactory" or an "unsatisfactory." There is no middle choice. And since four of the four areas did not meet expectations we had no choice but to rate as "unsatisfactory."

Tr. 651. With regard to the ALJ not citing various State Board cases, as already stated above, the ALJ is under no obligation to consider, cite, or discuss particular cases.

11. Appellant objects to the ALJ not including among Appellant's list of exhibits Appellant's Exhibit 24 which is a May 30, 2001 letter from Dr. Lorton to the Appellant informing him of his placement on second class certificate status with an attached time line for performance review meetings between Appellant and his superiors. Appellant maintained at the hearing before the ALJ that the letter demonstrates collusion having taken place between the State Superintendent's Office and the Caroline County Board of Education because it appears to have been faxed from the State Superintendent's Office to either the local board or Dr. Lorton. We are confused by Appellant's claim here given the fact that Appellant's Exhibit 24 is listed in the proposed decision as being among those exhibits admitted on behalf of the Appellant. ALJ Proposed Decision at 5. While Appellant believes the item should have been specifically addressed with regard to his claims of collusion, the ALJ did not believe the fax notation on the document supported any such claims. We concur.

12. Appellant objects to the ALJ's failure to include in the proposed decision any reference to a discussion between Appellant and local board staff concerning a $2000 teacher incentive stipend which Appellant initially refused and later requested and received from the local board. Appellant maintains that this item should have played a significant role in the ALJ's assessment of the credibility of local board witnesses.[2]

At the OAH hearing, the parties adopted a stipulation indicating that Appellant initially rejected the stipend from the local board, but rescinded his rejection two years later. Appellant eventually received the money upon request after initially being advised by board staff that the money had been sent back to the State, a fact that turned out to be incorrect. Tr. 912-914. In any event, the misstatement of fact originated with local board staff members who did not testify at the hearing before the ALJ, thus this whole incident is irrelevant in assessing the credibility of the witnesses who did testify on behalf of the local board.

13. Appellant requests that the State Board refrain from making any final decision in this case and stay the matter until completion of proceedings in his federal lawsuit regarding employment discrimination. However, Appellant has not provided a sufficient basis for a stay of this matter by the State Board. In fact, Judge J. Frederick Motz of the United States District Court set longer scheduling deadlines in the federal case for the completion of discovery and the filing of dispositive motions in order to allow the hearing in the appeal before the State Board to go forward prior to resolution of the federal case. *See* 1/30/03 letter from Motz to Nichols and Stellman. Thus, Appellant's objection is disingenuous.

14. Appellant objects to the ALJ's failure to discuss in the proposed decision the implications of that part of the Performance Improvement Plan which required the Appellant to refrain from saying things that had religious overtones during instructional time. He maintains that this requirement is discriminatory and a violation of his rights. The ALJ, however, devoted attention to this issue in the proposed decision and found the imposition of the requirement in Appellant's PIP to be appropriate. The ALJ stated the following:

> The evidence established that the Appellant had a history of infusing his personal religious beliefs into his lessons and assignments that had little to no relation to music. In this particular instance, no relation between the assignment and music was

[2]The $2,000 stipend was mandated by § 6-306(b)(4) of the Education Article: "a classroom teacher who holds an advanced professional certificate and teaches in a public school identified by the State Board as a reconstitution school, a reconstitution-eligible school, or a challenge school shall receive a stipend from the State in the amount of $2,000 for each year that the teacher performs satisfactorily in the classroom."

> established by the Appellant.[3] Dr. Lorton testified that the Appellant was warned on several previous occasions to cease preaching to students or assigning work that was purely religious in nature with no connection to the course material. Dr. Lorton's warnings came after parents complained that the Appellant tended to preach to parents and students alike. . . .
>
> The Board in its argument cited *Wiley v. Franklin*, 468 F. Supp. 133, 151 (E.D. Tenn. 1979) where the court found that assigning the Bible as part of the public curriculum violated the Establishment Clause by "tending to advance the Christian religious faith" and "tend[ing] to inhibit other religious faiths." While the Appellant argued that religious music was in fact part of the music curriculum, the evidence presented clearly indicate[s] that his assignment had nothing to do with religious music and had everything to do with the Appellant advancing his own religious beliefs in the classroom. The Appellant failed to refute this charge by offering any evidence showing that his assignment had any rational connection with the music curriculum. Considering this in the wake of repeated warnings to keep religious instruction out of the classroom including the insertion of a provision in the Plan to this effect, I can only view the Appellant's actions to be a willful neglect of duty and an act of insubordination. As such, I cannot find his argument to have any merit.

ALJ Proposed Decision at pp. 23-25.

15. Appellant claims that the local superintendent unlawfully terminated his services again on April 24, 2003, and therefore objects to the State Board entering a final decision in this matter. The local board has explained that the superintendent placed Appellant in a central office position on temporary assignment pending the disposition of this appeal. This was done as a courtesy as there was no legal obligation for the school system to continue Appellant on a paid status following the termination decision. Appellant's payroll status was discontinued on April 24, 2003, following the issuance of the ALJ's proposed decision upholding the termination. Thus, Appellant's claims provide no basis to postpone the outcome of this appeal.

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[3]Appellant's Easter assignment in March 2002 required the students to prepare a written report explaining the purpose of the Easter holiday "and why we celebrate Jesus rising from the dead." Students were expected to describe their own family traditions for celebrating Easter and to cite Biblical passages. Tr. 351.

CONCLUSION

With the following clarification, we adopt the Finds of Fact and Conclusions of Law as set forth in the proposed decision of the ALJ. On pages 25 - 27 of the proposed decision, the ALJ refers to *Maryland State Retirement Agency v. Delambo*, 109 Md. App. 683 (1995), and the five factors enumerated therein that must be considered in determining whether termination is the appropriate sanction for an employee. We note that *Delambo* concerns State employees and is inapplicable here. Appellant was an employee of CCPS, not the State. Although permissible, it is not necessary to consider the five factors enumerated in *Delambo* prior to terminating Appellant.[4] *See Rachel Johnson v. New Board of School Commissioners of Baltimore City*, MSBE Opinion No. 01-35 (October 31, 2001).

For these reasons as well as those stated by the ALJ, we affirm the decision to terminate Appellant from employment with the Caroline County Public School System.

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Clarence A. Hawkins

RECUSED
Walter S. Levin, Esquire

Marilyn D. Maultsby

Karabelle Pizzigati

Edward L. Root

[4]This case is governed by §6-202 of the Education Article, Annotated Code of Maryland, suspension and dismissal of professional personnel.

John L. Wisthoff

Calvin Disney and Maria C. Torres-Queral are newly appointed members of the State Board of Education and did not participate in the deliberations of this appeal.

July 23, 2003

EXHIBIT 1

NORMAN NICHOLS	*	BEFORE MICHAEL J. WALLACE
APPELLANT	*	ADMINISTRATIVE LAW JUDGE,
v.	*	MARYLAND OFFICE OF
BOARD OF EDUCATION	*	ADMINISTRATIVE HEARINGS
OF CAROLINE COUNTY	*	OAH No.: MSDE-BE-01-200200005

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

PROPOSED DECISION

STATEMENT OF THE CASE

Prior to August 1, 2002, Norman L. Nichols ("Appellant"), a teacher employed by the Board of Education of Caroline County ("Board" or "CCPS"), received notification from the Board's superintendent that he was recommending to the Board that the Appellant be terminated for incompetence, misconduct in office and insubordination. The Appellant filed an appeal, and a hearing before a hearing examiner was scheduled for August 1, 2002 pursuant to Md. Code Ann., Educ. § 6-203 (1999 & Supp. 2002). On August 1, 2002, the parties agreed that this matter should proceed directly to the State Board of Education as a de novo appeal pursuant to the Code of Maryland Regulations (COMAR) 13A.01.01.03(d).

The appeal proceeded to the Maryland State Board of Education and the matter was scheduled for a de novo hearing before the Office of Administrative Hearings. Md. Code Ann., Educ. § 6-202(4) (1999).

A hearing was conducted on January 31, February 4-6 and 20, 2003, before Michael J. Wallace, Administrative Law Judge ("ALJ"), at the Office of the Caroline County Board of Education in Denton, Md. The Appellant represented himself and Leslie Stellman, Esquire, represented the Board. Code of Maryland Regulations ("COMAR") 13A.01.01.03P.

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 (1999 & Supp. 2001); COMAR 13A.01.01.03P; COMAR 28.02.01.

At the close of the evidence, the parties requested the opportunity to submit their respective closing arguments in writing. The request was granted and the record in this matter was held open until March 21, 2003 for the submission of the arguments. The record was closed at that time.

ISSUE

The issue on appeal is whether the termination imposed upon the Appellant pursuant to Md. Code Ann., Educ. § 6-202(a) (1999 & Supp 2002) for incompetence, misconduct in office and insubordination was proper.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following exhibits were submitted on behalf of the Board:

Board Exhibit No. 1. Decision of U.S. District Court, dated November 28, 2000.
Board Exhibit No. 2. Decision of U.S. Court of Appeals for the Fourth Circuit, dated August 7, 2001.
Board Exhibit No. 3. EEOC's August 6, 1999 dismissal of discrimination charge.
Board Exhibit No. 4. Opinion of Maryland State Board of Education upholding Board's dismissal of Appellant's second class certificate appeal.
Board Exhibit No. 5. Notice of suspension for insubordination, dated December 14, 2001.
Board Exhibit No. 6. Performance Improvement Plan for 2001-2002, dated June 7, 2001.
Board Exhibit No. 7. Letter from Superintendent to Appellant, dated March 25, 2002.
Board Exhibit No. 8. Letter from Appellant to Superintendent, dated April 5, 2002.
Board Exhibit No. 9. Memorandum from Janet Fountain, Principal to Appellant, dated September 24, 2001.
Board Exhibit No. 10. Caroline County Public Schools Disciplinary Referral and Disposition Form.
Board Exhibit No. 11. Memorandum from Janet Fountain to Appellant, dated August 28, 201.
Board Exhibit No. 12. Memorandum from Janet Fountain to Appellant, dated August 30-31, 2001.
Board Exhibit No. 13. Memorandum from Janet Fountain to Appellant, dated February 28, 2002.
Board Exhibit No. 14. Memorandum from Janet Fountain to Appellant, dated February 28, 2002.
Board Exhibit No. 15. Memorandum from Janet Fountain to Appellant, dated March 12, 2002.
Board Exhibit No. 16. Letter of Reprimand from Janet Fountain to Appellant, dated March 19, 2002.
Board Exhibit No. 17. Curriculum Vitae of Richard R. Greenbaum.
Board Exhibit No. 18. Policy: Evaluation of Professionally Certified Personnel.
Board Exhibit No. 19. Excerpts from Caroline County Public Schools Policy Handbook.
Board Exhibit No. 20. Caroline County Public Schools Report of Classroom Observation, dated September 11, 2001.
Board Exhibit No. 21. Caroline County Public Schools Report of Classroom Observation, dated November 26, 2001.
Board Exhibit No. 22. Caroline County Public Schools Report of Classroom Observation, dated February 22, 2002.
Board Exhibit No. 23. Cronology from Appellant's Performance Improvement Plan.
Board Exhibit No. 24. Memorandum from Janet Fountain to Appellant, dated August 28, 2001.

Board Exhibit No. 25. Memorandum from Janet Fountain to Appellant, dated September 7, 2001.
Board Exhibit No. 26. Letter from Ruth Thomas to Janet Fountain, dated September 29, 2001.
Board Exhibit No. 27. Memorandum from Janet Fountain to Appellant, dated September 28, 2001.
Board Exhibit No. 28. Written Reprimand from Janet Fountain to Appellant, dated November 12, 2001.
Board Exhibit No. 29. Not accepted.
Board Exhibit No. 30. Agenda for November 30, 2001 meeting.
Board Exhibit No. 31. Memorandum from Janet Fountain to Appellant, dated November 30, 2001.
Board Exhibit No. 32. Agenda for December 14, 2001 meeting.
Board Exhibit No. 33. Memorandum from Janet Fountain to Appellant, dated December 17, 2001.
Board Exhibit No. 34. Memorandum from Appellant to Janet Fountain, dated December 17, 2001.
Board Exhibit No. 35. Teacher Evaluation Form re: Appellant, dated December 14, 2001.
Board Exhibit No. 36. Report of Classroom Observation of Appellant, dated September 25, 2001.
Board Exhibit No. 37. Referral Report by Teacher with Names, dated March 21, 2002.
Board Exhibit No. 38. Not accepted.
Board Exhibit No. 39. Memorandum from Janet Fountain to Appellant, dated March 25, 2002.
Board Exhibit No. 40. Letter from David Kin to Janet Fountain, dated April 3, 2002.
Board Exhibit No. 41. Memorandum from Janet Fountain to Appellant, dated April 3, 2002.
Board Exhibit No. 42. Teacher Evaluation Form re: Appellant, dated April 3, 2002.
Board Exhibit No. 43. Substitute Teacher's Report, dated January 24, 2002.
Board Exhibit No. 44. Report of Classroom Observation of Appellant, dated October 16, 2001.
Board Exhibit No. 45. Report of Classroom Observation of Appellant, dated December 11, 2001.
Board Exhibit No. 46. Report of Classroom Observation of Appellant, dated March 4, 2002.
Board Exhibit No. 47. Withdrawn by Board.
Board Exhibit No. 48. Letter from Larry Lorton to Appellant, dated May 8, 2002.
Board Exhibit No. 49. Transcript of Proceedings before the Caroline County Board of Education, dated August 1, 2002.

The following exhibits were admitted into evidence on behalf of the Appellant:

Appellant Exhibit N1 Teacher Evaluation Form Re: Appellant, datedApril 20, 1982.
Appellant Exhibit N2 Excerpt from Board of Education Policy Handbook, Section IV.40.40 – Employment – Fair Practices Employment.
Appellant Exhibit N3 Excerpt from Board of Education Policy Handbook, Section IV.40.51 – Employment – Professional Development Plans.

Appellant Exhibit N4	Letter from Appellant to Dr. Larry Lorton, dated December 14, 2001.
Appellant Exhibit N5	Letter from Larry Lorton to Appellant, dated January 28, 2002.
Appellant Exhibit N6	Teacher Evaluation form for Appellant, dated May 28, 1996.
Appellant Exhibit N7	Negotiated Agreement Between The Board of Education of Caroline County and the Caroline County Teacher's Association, 2002-2005.
Appellant Exhibit N8	Maryland State Department of Education Teacher's Certificate of the Appellant.
Appellant Exhibit N9	Chronology of Appellant's Carreer.
Appellant Exhibit N10	Names and Addresses of Middle School Teachers and Staff for school years 1979-80, 1980-81, 1999-2000, 2000-01 and 2001-02.
Appellant Exhibit N11	Affidavit of Ed Centofante.
Appellant Exhibit N12	Excerpt from Caroline County Handbook, 2002-03.
Appellant Exhibit N13	Copies of physician's notes, dated January 8, 2002 and February 4, 2002.
Appellant Exhibit N14	Leter from Larry Lorton the John A. Appiott, dated January 18, 2002.
Appellant Exhibit N15	Memorandum from Larry Lorton to Appellant, dated August 30, 2002.
Appellant Exhibit N16	Letter from Alexander Harvey, II, Senior U.S. District Judge to Appellant and Steven D. Frenkil, dated December 15, 2000.
Appellant Exhibit N17	Not Submitted.
Appellant Exhibit N18	Rating sheets for Riverview Middle School Glee Club, dated April 1981.
Appellant Exhibit N19	Not Submitted.
Appellant Exhibit N20	Teaching Contract Chronology of Appellant.
Appellant Exhibit N21	Memorandum from Larry Lorton to Appellant, dated October 1, 2002.
Appellant Exhibit N22	Letter from Appellant to Larry Lorton, dated October 3, 2002.
Appellant Exhibit N23	Not Submitted.
Appellant Exhibit N24	Letter from Larry Lorton to Appellant, dated May 30, 2001.
Appellant Exhibit N25	Copies of Medical reports regarding the Appellant from June 2000 and August 1973.
Appellant Exhibit N26	through Appellant Exhibit No 29 – Not Submitted.
Appellant Exhibit N30	Executive Session Record, dated May 7, 2002.
Appellant Exhibit N31	Excerpt from Music Essential Learner Outcomes, 2001-2002.
Appellant Exhibit N32	Caroline County Public Schools Music Curriculum.
Appellant Exhibit N33	Excerpt from Handbook for Teachers and Administrators of Caroline County Public Schools, 2002-2003 – Non-Discrimination Policy.
Appellant Exhibit N34	Not Submitted.
Appellant Exhibit N35	Excerpt from High School General Textbook (1994).
Appellant Exhibit N36	Excerpt from High School General Textbook Teachers Manual.

B. Testimony

The Board called the Appellant to testify as well as the following witnesses:

(1) Dr. Richard Greenbaum, Psychologist who testified as an expert in the areas of Psychology, School Psychology, Behaviorialism, Behaviorial Psychology and Adolescent Psychology.

(2) Janet F. Fountain, Principal at Colonel Richardson Middle School ("CRMS").

(3) Cynthia Fletcher, Parent of Caroline County Student and Substitute Teacher.

(4) Elaine Stein, English Teacher at North Caroline High School. Formerly at CRMS.

(5) John Perry, Supervisor of Instruction, Caroline County Public Schools.

(6) Larry L. Lorton, Superintendent of Schools in Caroline County.

The Appellant also testified in his own behalf and called the following witnesses[5]:

(1) J. Patrick Barrett, Teacher at CRMS.

(2) Robert E. Smith, II, Assistant Principal at CRMS.

FINDINGS OF FACT

After careful consideration of the record and the additional testimony presented, I find, by a preponderance of the evidence, the following facts:

1. The Appellant is employed as a teacher at CRMS in Caroline County. He teaches music and health/nutrition classes.

2. He began his teaching career in 1967 in Caroline County.

3. He is certified in the areas of music for grades 7-12 and in supervision and administration.

[5] Prior to and during the course of the proceeding, the Appellant requested the issuance of an extraordinary number of subpoenas. When he was asked to provide a proffer of the expected testimony of these witnesses or their relevance to this proceeding, he was unable to state with any specificity what these witnessess would say or whether their testimony was relevant to the matters presented in this case. In many instances, he admitted that he had no idea what the witnesses would say because he had not spoken to them prior to the hearing to ascertain if they, in fact, had any relevant or probative information to offer. These requests for subpoenas were quashed.

4. During the 2000-2001 school year the principal and assistant principal of CRMS conducted several classroom observations of the Appellant and determined that the Appellant's performance needed improvement in several areas. He received an overall rating of unsatisfactory on his 2000-2001 evaluation and was placed on a Performance Evaluation Plan.

5. The Appellant's history through school year 2000-2001 reflected among other things, excessive disciplinary referrals of students, a lack of control over classroom activities and the inappropriate imposition of religious content into his lessons despite admonishment from school officials to cease this activity.

6. On May 25, 2001, the principal at CRMS recommended to the superintendent that the Appellant's teacher's certificate be placed on second class for the 2001-2002 school year because of unsatisfactory performance.

7. On May 30, 2001, the superintendent accepted the principal's recommendation to reclassify the Appellant's certificate to second class. The superintendent advised the Appellant of this fact and advised him that he needed to improve his performance to an acceptable level during the 2001-2002 school year in order to remove the second class designation and that failure to do so could result in the Appellant's termination.

8. The Appellant appealed this determination and on August 7, 2001, a hearing was held. On or about October 25, 2001, the local board unanimously affirmed the superintendent's decision.

9. The Appellant appealed this decision to the State Board of Education and on March 27, 2002 the State Board affirmed the local board's decision.

10. The Appellant did not appeal the State Board's decision.

11. In an attempt to remedy the Appellant's performance, a Performance Improvement Plan ("PIP" or "Plan") was drafted. The purpose of the Plan was to provide the Appellant with a written guide for him to use in order for him to improve in specific areas that were identified as needing improvement on his May 25, 2001 end of year evaluation. The Plan was divided into 4 distinct areas identified as Planning and Preparation; Instructional Effectiveness; Management Skills and Professional Ethics. The first 3 areas were divided into 3 sections; Teacher Responsibilities, Timeline and Indicators of Success. The last section, Professional Ethics was divided into Teacher Responsibility, Indicators of Success and Administrative Responsibilities sections.

12. The Appellant as well as Janet Fountain, Principal and Rosalyn Fradel, Instructional Supervisor at CRMS signed the Plan on June 7, 2001.

13. The Plan required among other things that the Appellant submit lesson plans to the Principal one week in advance by Thursday of the preceding week. The Plan also required the Appellant to prepare a tentative classroom plan for review and approval by August 28, 2001.

14. On August 27, 2001, the Appellant met with Ms. Fountain and Mr. Smith to discuss the Report of Classroom Observation form. The Appellant was to have a tentative classroom management plan prepared by August 28, 2001. The Appellant only wanted to discuss the validity of the Plan and whether it should be implemented at that time because of the pendancy of the appeal of the second grade certification status before the Caroline County Board of Education.

15. On August 28, 2001, the Appellant met with Mr. Perry and Ms. Fountain to discuss the Appellant's performance under the Plan. The discussion was to include the Appellant's lesson plans for the first 6 school days of the year, his submission of an outline for Music and Health, the administration's expectations of the Appellant's performance for the school year 2001-2002 and the Appellant's tentative classroom management plan for the year.

16. The Appellant did not have the lesson plans, a classroom management plan or outline prepared. He was also not willing to discuss the outline, the classroom management plan or the administration's expectations for the school year. The Appellant only spoke of his appeal of the second grade certification status and that the Plan should not be implemented at that time.

17. On August 30, 2001 Ms. Fountain reminded the Appellant that he needed to submit his grading policy for Music and Health by August 30, 2001.

18. Another meeting of Mr. Perry, Ms. Fountain and the Appellant was held on September 6, 2001. The Appellant again was not prepared for the meeting and was only willing to discuss the pendancy of his appeal.

19. The Appellant had classroom observations on September 11, 25, October 16, November 26 and December 11, 2001.

20. The September 25, 2001 observation was completely satisfactory and the December 11, 2001 observation had only one area that needed improvement (organization). The other observations, however, revealed many areas where the Appellant needed improvement. The September 11, 2001 observation done by Mr. Perry revealed 3 areas of unsatisfactory performance. (No lesson plan, no stated objectives for the lesson or summary).

21. On September 28, 2001, the Appellant met with Ms. Fountain and Mr. Perry to discuss the Appellant's progress under the Plan. Mr. Perry and Ms. Fountain raised several concerns over the Appellant's lesson plan for the week and discussed the Appellant's instructional progress and classroom management plan. The Appellant was not prepared or willing to discuss classroom management and discipline issues.

22. On November 12, 2001, the Appellant received a written reprimand after he refused to discuss progress under the Plan at a November 6, 2001 meeting and claimed that the Plan was designed only to intimidate and harass him.

23. On November 30, 2001, the Appellant met with Mr. Perry and Ms. Fountain to discuss progress under the Plan. Tha Appellant initially refused to discuss the Plan and only spoke of being harassed and intimidated. Attempts were made to redirect the Appellant's conversation to progress made under the Plan but the Appellant refused to cooperate. The meeting was adjourned.

24. Several minutes later, the Appellant indicated that he was willing to proceed with the meeting again. The meeting resumed and the Appellant discussed discipline issues in the classroom.

25. On December 19, 2001, the Appellant received a mid-year evaluation. His performance was rated needs improvement in 3 areas, Instructional Effectiveness, Scholarship/Knowledge and Professional Ethics/Interpersonal Relationships. His performance was rated meets or exceeds expectations in the area of Management Skills. The Appellant received an overall rating of unsatisfactory.

26. The Appellant had classroom observations on February 22 and March 4, 2002. On February 22, 2002, the observation was done by Ms. Fountain who identified 6 areas of unsatisfactory performance and 5 areas that needed improvement. The March 4, 2002 evaluation done by Mr. Perry was completely satisfactory.

27. The Appellant met with Ms. Fountain and Mr. Perry on February 28, 2002 to discuss progress under the Plan. The Appellant was not prepared for the meeting despite being provided with an agenda and a reminder of the meeting a day before. The Appellant only stated that he was unable to comply with the Plan because of his emotional distress over his perception of harassment and intimidation by the Board.

28. On February 28, 2002, Ms. Fountain reminded the Appellant that he had not been submitting his lesson plans one week in advance as required by the Plan.

29. The Appellant had not submitted his lesson plans one week in advance since the week of October 8-12, 2001.

30. On March 19, 2002, the Appellant was reprimanded by Ms. Fountain for his failure to submit his lesson plans one week in advance as required in the Plan. She also reminded the Appellant that he was to rescind an assignment that he gave his students in his Music class on or abourt March 13, 2002. The assignment required the students to use the Bible as a source to describe Jesus' crucifiction and resurrection, to give their interpretation of these events and to write the chapter, verse and name of the bible used.

31. On March 22, 2002, the Appellant met with Mr. Perry and Ms. Fountain to discuss progress under the Plan. They discussed the Appellant's poor lesson planning and also discussed the recent religious assignment that the Appellant had given his Music students.

32. Several parents complained to the school that the assignment was inappropriate.

33. At this same meeting, the Appellant stated to Ms. Fountain that she was unable to be impartial or objective with the Appellant because of a prior dating relationship they had.

34. The Appellant and Ms. Fountain had a previous brief dating relationship in 1975.

35. On March 25, 2002 Mr. Lorton advised the Appellant that he was to refrain from giving assignments that interjected the Appellant's personal religious beliefs into the course material. Mr. Lorton requested an explanation from the Appellant by April 5, 2002.

36. On April 3, 2002 the Appellant received another evaluation. His performance was rated needs improvement in 3 areas, Instructional Effectiveness, Scholarship/Knowledge and Management Skills. His performance in the area of Professional Ethics/Interpersonal Relationships was rated unsatisfactory. The Appellant received an overall unsatisfactory rating.

37. On April 5, 2002, the Appellant responded to Mr. Lorton's request for an explanation regarding the March 13, 2002 assignment by invoking the 5th Amendment.

38. On May 8, 2002, Mr. Lorton advised the Appellant that he was recommending that the Appellant be terminated on the grounds of incompetency, neglect of duty and/or insubordination.

DISCUSSION

PRELIMINARY MATTERS

Preliminarily, the Appellant moved for summary judgement and to quash the proceedings. In his motion for summary judgement, in part, he asserted matters that occurred prior to 1973 claiming that he was wrongfully terminated/suspended and that he was wrongfully denied back pay as a result of wrongful disciplinary sanctions. The Appellant also asserted that the pattern of harassment continued in 1998 with disparate treatment by the local board in having him submit to a policy that allegedly no other teacher was subject to. After filing suit in federal court, he claimed that the local board retaliated by reducing his certificate to second class. In the Motion to Dismiss, the Appellant went on to allege that the local board imposed wrongful disciplinary sanctions in 2001 and 2002.

In his Motion to Quash the Proceedings, the Appellant asserted that the local board wrongfully reduced his certificate to second class and that this action was taken in a fraudulent manner and that the local board's actions otherwise denied the Appellant equal protection of the law.

In each instance alleged by the Appellant, any actions that he claimed were taken against him prior to school year 2001-2002 were appealable when the actions were taken. The Appellant was afforded the opportunity to present evidence and testimony to show that he was either wrongfully suspended or discharged or that he was wrongfully denied back pay or other benefits. As such, he had all opportunities to challange actions that were taken against him at the time that these sanctions were imposed and was thus afforded any process due to him at that time. There was no authority cited that would allow me to re-consider the matters that were already heard and decided or could have been heard and decided at that time. Accordingly, the Appellant's Motion to Quash the Proceedings is hereby denied. Similarly, his Motion to Dismiss with regard to the matters asserted that occurred prior to school year 2000-2001 as well as the matters surrounding the reduction of the Appellant's

certification to second class is denied. I will consider the Motion to Dismiss regarding matters raised by the Appellant that occurred after the circumstances regarding those affecting the second class recertification issue.

The Rules of Procedure for the Office of Administrative Hearings allow a judge to grant a summary decision if he finds that there are no genuine issues as to any material fact and that the moving party is entitled to prevail as a matter of law. COMAR 28.02.01.16C(2). This is essentially similar to the standard for summary judgment in Maryland Rule of Procedure 2-501, and the federal court rule for summary judgment. See Federal Rule of Civil Procedure 56, which provides guidance in interpreting the OAH rule.[6] A motion for summary judgment triggers a two step inquiry. First, has the moving party established that there is no genuine dispute as to a material fact and, second, has the party established that it is entitled to judgement as a matter of law. *Richman v. FWB Bank*, 122 Md. App. 110, 712 A.2d 41 (1998); *Bowen v. Smith*, 342 Md. 449, 677 A.2d 81 (1996). A material fact is defined as a fact, the resolution of which will somehow affect the outcome of the case. *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608 (1985); *Goodwich v. Sinai Hospital of Baltimore, Inc*. 343 Md. 185, 680 A.2d 1067 (1996). The applicable substantive law determines which facts are material, as only factual disputes which might affect the outcome of the case will preclude the entry of summary judgment. There is a genuine issue of fact if the evidence would allow a "reasonable jury… to return a verdict for the non-moving party". *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). When making these determinations, the judge must consider the facts, and draw all reasonable inferences, in the light most favorable to the non-moving party. *Dobbins v. WSSC,* 338 Md. 341, 658 A.2d 675 (1995). Although the non-movant

[6] The similarity is not surprising, as Md. Rule 2-501 is based upon Federal Rule of Civil Procedure 56. *Goodwich v. Sinai Hosp. of Baltimore Inc*., 343 Md. 185, 680 A.2d 1067, 1077, note 23 (1996).

does not bear any burden of proof at this stage of the proceeding, once the moving party has produced sufficient evidence in support of its motion to meet its initial burden, the non-movant must then demonstrate that there is a genuine dispute in order to prevent the entry of the summary decision. *Gross v. Sussex*, 332 Md. 247, 255, 630 A.2d 1156,1160 (1993).

In this case, I find that the generally, there was no dispute that the Board imposed several disciplinary sanctions during school year 2001-2002 and subsequent. As detailed below, however, the Board did raise several material factual disputes that needed to be resolved before a decision could be made as to whether it committed various procedural errors and as a result improperly sanctioned the Appellant in those instances and ultimately wrongfully decided to discharge the Appellant. For this reason, a summary decision in favor of the Appellant cannot be granted.

MERITS

The applicable law provides that a teacher may be suspended or dismissed, for cause, by a local board on the recommendation of the local superintendent, and that the teacher has a right to a hearing on such a dismissal or suspension. Md. Code Ann., Educ. § 6-202(a) (1999 & Supp. 2002) reads, in pertinent part, as follows:

> (a)(1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:
>
> (i) Immorality;
>
> (ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article'
>
> (iii) Insubordination;

(iv) Incompetency; or

(v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.

(3) If the individual requests a hearing within the 10-day period:

(i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and

(ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.

(4) The individual may appeal from the decision of county board to the State Board.

The standard of review in an appeal of a teacher dismissal case to the State Board is prescribed by COMAR 13A.01.01.03E. In pertinent part, COMAR 13A.01.01.01E provides:

(3) Teacher Dismissal and Suspension.

(a) The standard of review in teacher dismissal or suspension shall be de novo as defined in §E(3)(b).

(b) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain a disciplinary infraction.

(c) The county Board shall have the burden of proof.

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

Pursuant to COMAR section cited above, I have undertaken an extensive review of the evidence presented and the decisions rendered in this matter from all levels. As a result of my review, I must conclude that the evidence clearly established the reasonableness of the Board's decision to terminate the Appellant.

The Board seeks to terminate the Appellant for several reasons. It alleged that the Appellant should be terminated because of incompetency, willful neglect of duty and/or insubordination.

Incompetency

The Board presented evidence to show that on May 25, 2001 a recommendation was made to put the Appellant's teaching certificate on second class status for the 2001-2002 school year because of unsatisfactory performance. On May 30, 2001, the superintendent accepted the principal's recommendation to reclassify the Appellant's certificate to second class. The superintendent advised the Appellant of this fact and that he needed to improve his performance to an acceptable level during the 2001-2002 school year in order to remove the second class designation and that failure to do so could result in the Appellant's termination. The Appellant unsuccessfully appealed this determination and as a result of the reclassification, the Performance Improvement Plan was drafted. The purpose of the Plan was to provide the Appellant with a written guide for him to use in order for him to improve in specific areas that were identified as needing improvement on his May 25, 2001 end of year evaluation. The Plan was divided into 4 distinct areas identified as Planning and Preparation; Instructional Effectiveness; Management Skills and Professional Ethics. The first 3 areas were divided into 3 sections; Teacher Responsibilities, Timeline and Indicators of Success. The last section, Professional Ethics was divided into Teacher Responsibility, Indicators of Success and Administrative Responsibilities sections. The Appellant as well as Janet Fountain, Principal and Rosalyn Fradel, Instructional Supervisor at CRMS, signed the Plan on June 7, 2001. The Plan required among other things that the Appellant submit lesson plans to the Principal one week in advance by Thursday of the preceding week and that he state the objective for each lesson "in terms of what students will learn and be able to do." The Plan also required the Appellant to prepare a tentative classroom plan for review and approval by August 28, 2001 and that he modify the behavior of students and his discipline procedures to a more effective level. He was also offered the

opportunity to observe and model other music teachers in Caroline County or neighboring counties or to review tapes showing effective teaching techniques.

Over the summer, the Appellant had the opportunity to familiarize himself with the plan but when school year started, the Appellant made no substantial improvement during the course of the year. The evidence established that the Appellant was extremely resistant to the Plan and would often not cooperate with his supervisors who were charged with carrying out the provisions of the Plan. Mr. Perry testified that he observed the Appellant on numerous occasions during SY 2001-2002 mostly during music classes. Two observations were deemed to be unsatisfactory because the Appellant continuously failed to note the lesson objective on the board, failed to provide a written lesson plan and failed to summarize the lesson in order to reinforce the objectives. On another occasion, Mr. Perry stated that he observed the Appellant using class time to enter data into his computer while the students had no activities to do. Mr. Perry noted that the Appellant failed to utilize reading strategies taught by a consultant into his lesson despite the fact that the Board spent a significant amount of money on this resource. He also testified that the Appellant failed to teach a new skill or to further the students' understanding of the course subject matter. Ms. Fountain similarly testified that she observed the Appellant on numerous occasions during the school year as well and noted that when the Appellant did list objectives on the board, they would stay there for months and that the lessons appeared to be the same day after day for months at a time. She testified that students would spend hours copying words to songs instead of learning new material and that little significant instructional activity went on in the classroom.

Insubordination/Willful neglect of duty

From the outset in June 2001, the Appellant objected to the imposition of the Plan arguing that it was the product of improper observations and evaluations during SY 2000-2001 in subjects that were not in his area of certification (music). Among other things, the plan itself called for periodic meetings between the Appellant and his supervisors. At meetings in August through November 2001, the Appellant did not have specific items prepared for the meetings such as lesson plans or classroom management plans despite several reminders that he was to have these items available for discussion. During the course of many of these meetings, he refused to discuss his progress under the Plan and instead, would only discuss the pendancy of his appeal of the second class recertification determination. By November, the Appellant's supervisors issued a written reprimand for his failure to cooperate with the dictates of the Plan. During these months and December, the Appellant had classroom observations. The October, November and December observations showed several areas needing improvement including insufficient lesson plans and/or outlines and no objectives for the lesson. By December, the Appellant received his mid-year evaluation that indicated that his performance needed improvement in such areas as Instructional Effectiveness, Scholarship/Knowledge and Professional Ethics/Interpersonal Relationships. He received an overall rating of unsatisfactory. More classroom observations were performed in February and March 2002 with the February observation revealing more areas needing improvement. During a periodic meeting in February, the Appellant was again unprepared despite being provided with an agenda and written reminders of the meeting in the days leading up to the meeting. Again, the Appellant refused to discuss his progress under the Plan and would only refer to his perceived emotional distress over what he saw as a pattern of harassment at the hands of his supervisors. By

March, the Appellant received another reprimand for his continuous failure to submit his lesson plans one week in advance as required by the Plan. Both Ms. Fountain and Mr. Perry testified that the provisions of the Plan were not being carried out because of the Appellant's uncooperative nature and that their efforts to help the Appellant were frustrated on a regular basis. Both testified that the Appellant would usually show up for the meetings unprepared and would only state that the Plan was illegal, unwarranted or unnecessary. As a result, the agenda for each of these meetings was rarely followed. On other occasions, the Appellant was openly antagonistic toward Mr. Perry and Ms. Fountain. On November 30, 2001, the Appellant announced that he did not want to mention the Plan even though its discussion was the express purpuse of the meeting. He then went on to accuse Mr. Perry and Ms. Fountain of violating provisions of the teacher's union negotiated agreement. Ms. Fountain and Mr. Perry were not able to address the Plan at that meeting so the meeting was adjourned. Later the Apellant acquiesed and agreed to discuss student disciplinary issues.

Evidence also established that the Appellant's classroom management skills were deficient in that he would often send students that he felt were not behaving properly into the hallway of the school with no activities or supervision. Evidence established that these students would be in the hall for an entire 45-minute period. Evidence also established that the Appellant often came to class late causing a neighboring teacher to "cover" his class until the Appellant arrived. Elaine Stein testified and corroborated that the Appellant routinely sent students into the hall sometimes for entire periods without supervision or activities and that he would often arrive to class late. Evidence also established that the Appellant had one of the highest rates of student office referrals in the entire County school system and that he would often not allow the children back into the classroom without a meeting with the child's parent(s) despite the relatively minor nature of the infraction. Evidence

established that the Appellant tended to be condescending to parents. Ms. Fletcher, who had six children in the CCPS system at various times and who was a substitute teacher herself testified that on one occasion, the Appellant insulted her and her son at a parent teacher meeting. She also stated that he treated both her and her son in a disrespectful manner by suggesting that she was not carrying out her function as a parent adequately.

Other evidence suggested that the Appellant would sometimes place students on "classroom restrictions" where the students were allowed in the room but were made to just sit in their seats looking straight ahead with no activities or interaction with anyone else. This restriction was for minor infractions such as missing the trash can or picking up a pencil without being instructed to do so. Dr. Greembaum testified that this practice ruins any opportunity for effective instruction and only serves to make students "angry" and "resentful". Other instances included the Appellant sending a student who was not on medication to the office "until [her] medication kick[ed] in." In another instance, the Appellant failed a student on a test when the student merely took out a book that had nothing to do with the material tested and started quietly reading it after he finished the test. The evidence established that the student did this only to pass time until the end of the period. The student's parents complained and the Appellant discussed the matter with the student in a derogatory manner the next day in front of the other students.

One of the most serious contentions of the Board was the Appellant's insistence upon assigning students work that dealt with materials containing purely religious themes in violation of students' rights under the Establishment Clause of the First Amendment. On or abourt March 13, 2002, the Appellant assigned his class an Easter assignment that required the students to use the Bible as a source to describe Jesus' crucifiction and resurrection, to give their interpretation of these events

and to write the chapter, verse and name of the bible used. Many parents either called or wrote to complain about the assignment and the Appellant's supervisors including the Superintendent of Schools directed the Appellant to rescind the assignment. The evidence established that the Appellant had been warned about this type of activity in previous years and in fact, the Plan directed the Appellant to refrain from assigning religious themed assignments. At one point, the Superintendent asked the Appellant for an explanation of the rationale behind the assignment and why the assignment should not be considered willful neglect of duty and/or insubordination. The Appellant responded by "taking the 5th".

In an April 3, 2002 evaluation, the Appellant was rated needs improvement in 3 areas and unsatisfactory in one area. His performance was rated unsatisfactory overall.

Superintendant Lorton testified that it became apparent to him that the Appellant was resistant to any measures geared to helping him to improve his performance. He noted that the Appellant was offered the opportunity to visit other classrooms to observe other instructors who were felt to provide quality instruction but refused to do so. He also noted the Appellant's reluctance to change his classroom management techniques, to refrain from assigning religious based work that had nothing to do with the school curriculum in the subjects he was responsible for teaching or to refrain from acting in an insubordinate manner when meeting with either Ms. Fountain or Mr. Perry as required by the Plan. Dr. Lorton stated that "no amount of counseling, no amount of support, no amount of conferencing no amount of communications, nothing in the [Plan]....had gotten through to him."

The Appellant challanged the Board's position by arguing that its action is based on evidence that he considers to be not credible. In doing so, he repeatedly attempted to relitigate the manner in

which he was observed, evaluated and eventually placed on second class certification after the 2000-2001 school year despite constant reminders that that issue had already been litigated and upheld by the State Board and that the Appellant chose not to appeal that finding. As such, he was constantly reminded that the matter would not be reopened during the course of this hearing. The Appellant also argued that the Board's action was a "fraud" and a "set-up". As support, he argued that the Board used different procedures to observe and evaluate him in 2000-2001 and 2001-2002. Specifically, he asserted that in 2001-2002 he was observed primarily in his area of certification (music) while in 2000-2001, he was observed several times outside of his area of certification, (health and nutrition). The Appellant, however, cites no authority that would prohibit a school board's evaluation of a teacher outside of his area of certification, and in fact, none exists.

The Appellant was in fact observed in his area of certification 7 out of 8 times during 2001-2002 and Mr. Perry testified that the Appellant was capable of teaching effectively when he wanted to. The Appelant, on the other hand, admitted that every element in the Plan was achievable but he took no steps over the summer towards improving his performance. He testified during the hearing that he was not aware that his summer was to be taken up with school matters and that he thought that his summer was his to enjoy.

He further stated that he was not able to prepare for the 2001-2002 school year because of the undue stress that the school board placed on him. He argued that he was subjected to arbitrary measures including the imposition of the Plan and "unfair" evaluations. He argued that during the 2000-2001 year and thereafter, he was so involved with litigation that he needed to go on medication and had to use accumulated sick leave to help him cope with the stress and anxiety caused by the "illegal" actions of the Board. The Appellant only submitted one document in support of this

contention, a note from a physician dated January 8, 2002 stating that the Appellant was under the doctor's care since August 2001 for work related stress and that he may need to take occasional breaks or time off to manage his "disorder". There was no evidence presented, however, to show what this disorder was or that the Appellant was not capable of performing his job functions because of a stress related disorder.

The Appellant argued that he was not given adequate warning that his performance was not satisfactory over the years and that he was not presented with any assistance to correct his performance. Instead, he asserts that the Board waited for the problems to "pile up" before taking any action. He argued that prior to 2000-2001, he had not received an unsatisfactory end of the year evaluation but did receive several "needs improvement" ratings in various areas. He asserted that the Board did nothing to assist him at that time. He further asserted that another teacher, Mr. Barrett, was advised that he needed improvement in one area and was put on a performance improvement plan during 2002-2003. The Appellant claims that because this teacher was advised of his shortcomings and because the Appellant was not, this is evidence of racial discrimination because Mr. Barrett is White and the Appellant is African-American.

I am not convinced of the validity of the Appellant's argument. The wealth of the evidence established that the Appellant was put on notice of the deficiencies in his teaching performance and methods. At the end of the 2000-2001 year he was placed on the Plan after his performance was deemed to be inadequate. Specific goals and timelines were established to address specific problems including his handling of discipline matters, assignment of religious oriented course work and teaching techniques. A schedule of periodic progress meetings with the Appellant and his supervisors was also established putting in place a host of resources and aid to assist the Appellant in

correcting the deficiencies. Once the year began, however, the evidence showed that Ms. Fountain and Mr. Perry attempted to meet with the Appellant on a regular basis but that the Appellant was unwilling to the point of being uncooperative at best to accept any help or critical advice and was defiant as worst. He routinely failed to prepare himself for the meetings by not preparing lesson plans as required, by turning his grading plan in late and walking out of a November 2001 meeting. He refused offers to visit other classrooms, declined to take on additional coursework to improve his skills and failed to take any steps to change his method of administering discipline. Evidence also suggested that the Appellant was offered help in many areas in addition to the aforementioned. He was offered updated equipment i.e. keyboards for instruction but he declined and continued to use the guitar which was considered to be more difficult to learn. By doing so, he continued to utilize the same instruction techniques that he had unsuccessfully used over the past several years without considering any of the changes suggested.

The Appellant suggested that he was the target of racial discrimination inferring that other teachers were treated differently than he was. He referenced the scenario involving Mr. Barrett as discussed above but failed to demonstrate how this constituted racial discrimination especially after considering the above facts. He also asserted that his observations and evaluations were less than satisfactory only because he is African-American. Specifically, he stated that Ms. Fountain's evaluations were not favorable to the Appellant because of racial considerations but I find this argument to be without merit. Ms. Fountain herself is also African American. He further argued that Ms. Fountain's evaluations were less than satisfactory because she had a vendetta against the Appellant over a dating relationship that started and ended in 1975. Again, he provided no evidence in support of this assertion.

The Board presented the testimony of Ms. Fountain as well as Mr. Perry, who I found to be inherently credible witnesses. Both stated that they conducted several observations and attempted to have numerous meetings with the Appellant but that the Appellant failed to improve his performance to any appreciable degree during the course of the year. They also stated and the evidence supports the fact that the Appellant was, for the most part, uncooperative with their attempts to critique his performance and their offers of suggestions to help improve his performance. I cannot find that their evaluations were based on anything other than their respective objective observations of the Appellant's performance. As such, the Appellant's assertion that their observations and evaluations were arbitrary and capricious is without merit.

The Appellant further argued that ther Board was engaging in a pattern of religious discrimination by directing him not to make any statements in his classes that had a religious overtone. He claims that the Board infringed upon his civil and constitutional rights by doing so and asserted that no other teacher was subjected to such a restriction. He further stated that it is not illegal to provide instruction about religious music and in fact, the CCPS music curriculum and textbook discusses religious music. He asserts that other teachers who say the Pledge of Allegiance or quote religious figures such as Solomon would also violate this prohibition but that no one else who has done so has been sanctioned as a result. The Appellant, addressing the Easter assignment in March 2002 stated that the CCPS utilized an approved music curriculum that encouraged teachers to explore music behind the various religious holidays. As support for his assignment, he referenced the music textbook that is used in Caroline County. He asserted that the text discusses the music and tenets of various religions. He stated that his assignment was merely an attempt to delve into the diverse nature afforded by the various religions as it relates to music.

The teacher's version of the text, however, provides as follows:

> This chapter provides general background on each of the great world religions because the music should be viewed in that context. Understanding the music depends on grasping its religious message. **This does not mean you advocate any particular religious belief or viewpoint.** Students should understand that at school, religion, like any subject must be viewed objectively. The focus throughout this unit is musical. (Emphasis added.)

The evidence established that the Appellant had a history of infusing his personal religious beliefs into his lessons and assignments that had little to no relation to music. In this particular instance, no relation between the assignment and music was established by the Appellant. Dr. Lorton testified that the Appellant was warned on several previous occasions to cease preaching to students or assigning work that was purely religious in nature with no connection to the course material. Dr. Lorton's warnings came after parents complained that the Appellant tended to preach to parents and students alike. In an effort to correct this problem, a provision was inserted into the Plan for the Appellant to refrain from this type of behavior. In March 2002, however, the Appellant nonetheless gave an assignment to his students requiring them to discuss the death and resurrection of Jesus Christ including the requirement that students recite passages from the Bible and to identify the precise bible from which their passages were taken. It was only after parents complained about this assignment that it came to the attention of the Appellant's supervisors. On March 19, 2002, Ms. Fountain reprimanded the Appellant for his failure to submit his lesson plans one week in advance as required in the Plan. She also reminded the Appellant that he was to rescind the religious assignment. On March 22, 2002, the Appellant met with Mr. Perry and Ms. Fountain to discuss his progress under the Plan. They again admonished the Appellant for the religious assignment that he had given his music students. In April, Dr. Lorton asked the Appellant in writing to explain why he gave this assignment but the Appellant responded by invoking the 5th Amendment.

The Board in its argument cited *Wiley v. Franklin*, 468 F. Supp. 133, 151 (E.D. Tenn. 1979) where the court found that assigning the Bible as part of the public curriculum violated the Establishment Clause by "tending to advance the Christian religious faith" and "tend[ing] to inhibit other religious faiths." While the Appellant argued that religious music was in fact part of the music curriculum, the evidence presented clearly indicate that his assignment had nothing to do with religious music and had everything to do with the Appellant advancing his own religious beliefs in the classroom. The Appellant failed to refute this charge by offering any evidence showing that this assignment had any rational connection with the music curriculum. Considering this in the wake of repeated warnings to keep religious instruction out of the classroom including the insertion of a provision in the Plan to this effect, I can only view the Appellant's actions to be a wilful neglect of duty and an act of insubordination. As such, I cannot find his argument to have any merit.

Finally, the Appellant argued that because CCPS did not have a policy addressing professional improvement plans, the imposition of one was arbitrary. He argued that there was a policy concerning grading, evaluation of professional staff, absenteeism, disciplinary procedures etc., but no policy regarding the implementation of a PIP. He stated that without having a policy in place, the Board was not following its own regulations and as such, the imposition of the Plan was arbitrary. The Appellant failed to establish that the imposition was arbitrary or otherwise illegal in any respect.

While the Board has policies dealing with specific issues, there was no showing that the failure to have a specific policy for a particular action is per se illegal. Because the Appellant failed to establish that the imposition of the Plan was in any way illegal, I cannot grant any relief under this argument.

Finally, it is appropriate in any termination case to consider the factors enumerated in *Maryland State Retirement Agency v. Delambo*, 109 Md.App. 683, 675 A.2d 1018 (1995) that are to be considered in determining the appropriate sanction for an employee's misconduct. *Delambo* mandates an analysis based on five factors:

1. overall employment history in State service
2. attendance record during that period of time
3. disciplinary record at the present agency and at other State agencies as well
4. work habits, and
5. relations with fellow employees and supervisors.

Delambo, supra p. 691. It is apparent from the evidence presented in this case that all of the above criteria were considered.

Certainly the employees' history and attendance record was considered as a positive since he has been employed with Caroline County Public Schools since 1967 albeit with an eventful history during the course of his career. Due to events in 1971 and 1972, the Appellant was dismissed by CCPS for misconduct in office. The Appellant appealed this decision to the State Board which on March 22, 1972, ordered that his dismissal be reduced to a suspension and that he be reinstated as a teacher. In 1983, the Appellant filed suit in state court for damages for lost wages during the period of his suspension in 1971 and 1972 but the suit was dismissed. In 1998 and 1999 conflicts arose between the Appellant and the Principals and Assistant Principals at CRMS at that time. He alleged that he was the target of racially discriminatory actions by the CCPS and on June 21, 1999, filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a Right to Sue Letter on August 6, 1999 and on November 4, 1999, the Appellant filed suit in Federal Court. On November 28, 2000, the suit was dismissed. The Court ruled that the Appellant failed to establish a prima facie case of racial discrimination. The United States Court of Appeals affirmed this decision on August 7, 2001.

During the 2000-2001 year, classroom observations were conducted of the Appellant. These observations noted that the Appellant needed improvement in several categories and he was ultimately rated unsatisfactory for the year. As a result, he was placed on the Plan and the Principal, Ms. Fountain, recommended that the Appellant's certificate be placed on second class for 2001-2002. The Superintendant accepted this recommendation. This decision was upheld by the State Board and the Appellant did not seek review.

Overall, the Appellant's work habits were not seen favorably. His teaching procedures and methodology needed improvement on many levels including instructional effectiveness, management skills and professional ethics/interpersonal relationships. His history also showed problems involving excessive disciplinary referrals of students, lack of control over classroom activities and imposition of his personal religious beliefs on his students despite repeated warnings from school officials and direction to cease such activities.

Extensive testimony about his relations with co-workers and students was offered by the Board and the Appellant failed to refute this testimony and evidence. However, despite his over thirty years of teaching and somewhat satisfactory prior records, several consecutive years of unsatisfactory performance including 2000-2001 and 2001-2002 is sufficient justification for the Board to terminate him. The evidence established that he was given ample opportunity and resources to correct his problems, but he only responded in an incooperative and at times an insubordinate manner.

The Appellant's failure to improve his performance after being placed on second class status and his failure to adhere to and cooperate with the Performance Improvement Plan constitute "willful

neglect of duty", "insubordination" and "incompetence" under the statute. Accordingly, the Board must prevail in this case and their action upheld.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Appellant, Norman Nichols, a teacher employed by the Board of Education of Caroline County was properly terminated because of willful neglect of duty. insubordination and incompetence. Md. Educ. Code Ann. §6-202(a).

PROPOSED ORDER

It is proposed that the decision of the Board of Education of Caroline County terminating the Appellant for willful neglect of duty, insubordination and incompetence be **UPHELD.**

Date: April 21, 2003

Michael J. Wallace
Administrative Law Judge

MJW
50109

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file written objections within ten (10) days of receipt of the decision; parties may file written responses to the objections within ten (10) 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.01.01.03P(4). The Office of Administrative Hearings is not a party to any review process.

NORMAN NICHOLS	*	**BEFORE MICHAEL J. WALLACE**
APPELLANT	*	**ADMINISTRATIVE LAW JUDGE,**
v.	*	**MARYLAND OFFICE OF**
BOARD OF EDUCATION	*	**ADMINISTRATIVE HEARINGS**
OF CAROLINE COUNTY	*	**OAH No.: MSDE-BE-01-200200005**

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

FILE EXHIBIT LIST

The following exhibits were admitted into evidence on behalf of the Appellant:

Appellant Exhibit N1	Teacher Evaluation Form Re: Appellant, dated April 20, 1982.
Appellant Exhibit N2	Excerpt from Board of Education Policy Handbook, Section IV.40.40 – Employment – Fair Practices Employment.
Appellant Exhibit N3	Excerpt from Board of Education Policy Handbook, Section IV.40.51 – Employment – Professional Development Plans.
Appellant Exhibit N4	Letter from Appellant to Dr. Larry Lorton, dated December 14, 2001.
Appellant Exhibit N5	Letter from Larry Lorton to Appellant, dated January 28, 2002.
Appellant Exhibit N6	Teacher Evaluation form for Appellant, dated May 28, 1996.
Appellant Exhibit N7	Negotiated Agreement Between The Board of Education of Caroline County and the Caroline County Teacher's Association, 2002-2005.
Appellant Exhibit N8	Maryland State Department of Education Teacher's Certificate of the Appellant.
Appellant Exhibit N9	Chronology of Appellant's Carreer.
Appellant Exhibit N10	Names and Addresses of Middle School Teachers and Staff for school years 1979-80, 1980-81, 1999-2000, 2000-01 and 2001-02.
Appellant Exhibit N11	Affidavit of Ed Centofante.
Appellant Exhibit N12	Excerpt from Caroline County Handbook, 2002-03.
Appellant Exhibit N13	Copies of physician's notes, dated January 8, 2002 and February 4, 2002.
Appellant Exhibit N14	Leter from Larry Lorton the John A. Appiott, dated January 18, 2002.
Appellant Exhibit N15	Memorandum from Larry Lorton to Appellant, dated August 30, 2002.

Appellant Exhibit N16	Letter from Alexander Harvey, II, Senior U.S. District Judge to Appellant and Steven D. Frenkil, dated December 15, 2000.
Appellant Exhibit N17	Not Submitted.
Appellant Exhibit N18	Rating sheets for Riverview Middle School Glee Club, dated April 1981.
Appellant Exhibit N19	Not Submitted.
Appellant Exhibit N20	Teaching Contract Chronology of Appellant.
Appellant Exhibit N21	Memorandum from Larry Lorton to Appellant, dated October 1, 2002.
Appellant Exhibit N22	Letter from Appellant to Larry Lorton, dated October 3, 2002.
Appellant Exhibit N23	Not Submitted.
Appellant Exhibit N24	Letter from Larry Lorton to Appellant, dated May 30, 2001.
Appellant Exhibit N25	Copies of Medical reports regarding the Appellant from June 2000 and August 1973.
Appellant Exhibit N26	through Appellant Exhibit No 29 – Not Submitted.
Appellant Exhibit N30	Executive Session Record, dated May 7, 2002.
Appellant Exhibit N31	Excerpt from Music Essential Learner Outcomes, 2001-2002.
Appellant Exhibit N32	Caroline County Public Schools Music Curriculum.
Appellant Exhibit N33	Excerpt from Handbook for Teachers and Administrators of Caroline County Public Schools, 2002-2003 – Non-Discrimination Policy.
Appellant Exhibit N34	Not Submitted.
Appellant Exhibit N35	Excerpt from High School General Textbook (1994).
Appellant Exhibit N36	Excerpt from High School General Textbook Teachers Manual.

The following exhibits were submitted on behalf of the Board:

1Decision of U.S. District Court, dated November 28, 2000.
2Decision of U.S. Court of Appeals for the Fourth Circuit, dated August 7, 2001.
3EEOC's August 6, 1999 dismissal of discrimination charge.
4Opinion of Maryland State Board of Education upholding Board's dismissal of Appellant's second class certificate appeal.
5Notice of suspension for insubordination, dated December 14, 2001.
6Performance Improvement Plan for 2001-2002, dated June 7, 2001.
7Letter from Superintendent to Appellant, dated March 25, 2002.
8Letter from Appellant to Superintendent, dated April 5, 2002.
9Memorandum from Janet Fountain, Principal to Appellant, dated September 24, 2001.
10Caroline County Public Schools Disciplinary Referral and Disposition Form.
11Memorandum from Janet Fountain to Appellant, dated August 28, 201.
12Memorandum from Janet Fountain to Appellant, dated August 30-31, 2001.
13Memorandum from Janet Fountain to Appellant, dated February 28, 2002.
14Memorandum from Janet Fountain to Appellant, dated February 28, 2002.
15Memorandum from Janet Fountain to Appellant, dated March 12, 2002.
16Letter of Reprimand from Janet Fountain to Appellant, dated March 19, 2002.

17Curriculum Vitae of Richard R. Greenbaum.
18Policy: Evaluation of Professionally Certified Personnel.
19Excerpts from Caroline County Public Schools Policy Handbook.
20Caroline County Public Schools Report of Classroom Observation, dated September 11, 2001.
21Caroline County Public Schools Report of Classroom Observation, dated November 26, 2001.
22Caroline County Public Schools Report of Classroom Observation, dated February 22, 2002.
23Cronology from Appellant's Performance Improvement Plan.
24Memorandum from Janet Fountain to Appellant, dated August 28, 2001.
25Memorandum from Janet Fountain to Appellant, dated September 7, 2001.
26Letter from Ruth Thomas to Janet Fountain, dated September 29, 2001.
27Memorandum from Janet Fountain to Appellant, dated September 28, 2001.
28Written Reprimand from Janet Fountain to Appellant, dated November 12, 2001.
29Not accepted.
30Agenda for November 30, 2001 meeting.
31Memorandum from Janet Fountain to Appellant, dated November 30, 2001.
32Agenda for December 14, 2001 meeting.
33Memorandum from Janet Fountain to Appellant, dated December 17, 2001.
34Memorandum from Appellant to Janet Fountain, dated December 17, 2001.
35Teacher Evaluation Form re: Appellant, dated December 14, 2001.
36Report of Classroom Observation of Appellant, dated September 25, 2001.
37Referral Report by Teacher with Names, dated March 21, 2002.
38Not accepted.
39Memorandum from Janet Fountain to Appellant, dated March 25, 2002.
40Letter from David Kin to Janet Fountain, dated April 3, 2002.
41Memorandum from Janet Fountain to Appellant, dated April 3, 2002.
42Teacher Evaluation Form re: Appellant, dated April 3, 2002.
43Substitute Teacher's Report, dated January 24, 2002.
44Report of Classroom Observation of Appellant, dated October 16, 2001.
45Report of Classroom Observation of Appellant, dated December 11, 2001.
46Report of Classroom Observation of Appellant, dated March 4, 2002.
47Withdrawn by Board.
48Letter from Larry Lorton to Appellant, dated May 8, 2002.
49Transcript of Proceedings before the Caroline County Board of Education, dated August 1, 2002.