

THOMAS MARSH,

Appellant

v.

ALLEGANY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 03-25

OPINION

In this appeal, Appellant contests the local board's November 12, 2002 decision to consolidate and reconfigure school districts in Allegany County based on shifts in population, physical condition of existing school buildings, and the other factors described in COMAR 13A.02.09.01(b) on school closing and consolidation. With the precondition that State and local funding would be available, the plan adopted by the local board is as follows:

1. Upon completion of the new or renovated high school in the western region, with a projected date of completion at the beginning of the 2007 – 2008 school year, that Beall High School and Westmar High Schools be closed with students reassigned to the new or renovated high school facility.
2. Upon completion of a new or renovated high school in the western region, with a projected date of completion at the beginning of the 2007 – 2008 school year, that Westmar Middle School be closed with students reassigned to the current Westmar High School building in Lonaconing.
3. Upon completion of the Frost Elementary renovation, with a projected date of completion at the beginning of the 2007 – 2008 school year, that Beall Elementary School be closed with students reassigned to Frost Elementary, George's Creek Elementary, and/or Mt. Savage Elementary/Middle Schools.
4. Upon completion of the Frost Elementary School renovation, with a projected date of completion at the beginning of the 2007 –2008 school year, that George's Creek Elementary School remain open with elementary students in the western region redistricted as recommended in the long range educational facilities plan.

On December 3, 2002, the local board issued a comprehensive rationale to support this decision. In its rationale the board indicated that:

The Board was provided information to reach its decisions by many sources. Those sources included input from the public hearing, School Community Committee reports, the performance audit of the Allegany County Public Schools which was performed by MGT of America, the facility utilization study performed by 3D International, input from the Superintendent and his staff, and public comment from the meetings in the months preceding the public hearing.

The sources of information provided to the Board contain many references to the factors delineated in COMAR that the Board should evaluate in making a decision on school consolidation. The support and evidence for the Board's actions is so overwhelming that it is almost impossible to specifically outline each and every piece of evidence mitigating in favor of the actions taken by the Board.

Nevertheless, the Board would make the following comments concerning the eight factors described in COMAR. These comments are not intended as the exclusive rationale for the decision of the Board, but are intended to draw attention to some of the more significant facts, observations, opinions, and recommendations in the sources of information described above.

Rationale at 2-3. The rationale then addressed each of the eight factors listed in COMAR with respect to the four components of the plan described above.

Appellant filed a 42 page appeal of the closing/consolidation decision and included in support more than 100 additional pages of excerpts from newspapers and other documents. In response, the local board filed three motions: a motion to dismiss, a motion for more definite statement, and a motion for summary affirmance. In accordance with State Board practice in school redistricting appeals, the appeal was transferred to the Office of Administrative Hearings for review by an Administrative Law Judge (ALJ). The ALJ convened a pre-hearing conference/motions hearing on April 9, 2003, where the ALJ considered the motions filed by the local board.¹

¹The pre-hearing conference/motions hearing was originally scheduled to take place on March 19, 2003. Appellant moved to postpone the conference because he was visiting his son in Colorado who was ill with pneumonia. The ALJ granted the postponement and the conference was rescheduled for April 9.

At that hearing, the Appellant indicated that his primary issue was whether the board decision to close/consolidate was arbitrary, unreasonable, or illegal, and agreed to the dismissal of his other issues. Appellant also requested that the ALJ consider what Appellant anticipated the local board would be deciding at its April 22, 2003 meeting – that consolidation would take place on an accelerated time frame prior to the construction of the new school. The ALJ denied this request because the issue was premature.²

In a comprehensive and well analyzed decision the ALJ recommended that the board's motion for summary affirmance be granted because the board's decision was not arbitrary, unreasonable, or illegal. Noting that the board had considered and addressed in detail in its rationale the eight criteria as required by COMAR 13A.02.09.01B, the ALJ found that Appellant failed to create a dispute of material fact concerning whether the local board decision was against sound educational policy or whether a reasoning mind could have reached the same decision as the local board. The ALJ noted, in particular, that the local board relied heavily on reports by outside consultants, including a facility utilization study performed by 3D International and a performance audit of the school system performed by MGT of America, and received input from the affected communities in making its decision.

With regard to Appellant's claims that the local board failed to follow proper procedure in reaching the decision, the ALJ concluded that the board followed the procedures required by COMAR 13A.02.09.01C related to school closings and consolidations and that no true dispute existed.³ The ALJ also determined that Appellant had demonstrated no other illegalities in the local board's decision. A copy of the ALJ's findings and recommendation is attached as Exhibit 1.

Objections to ALJ's Proposed Decision

Appellant has asserted various objections in writing and in oral argument which focus primarily on the ALJ's recommendation to grant the local board's motion for summary affirmance.⁴ Appellant maintains that the case should have proceeded to a full evidentiary hearing because the totality of his submissions created a dispute of material fact regarding the local board's decision and rationale.

²Appellant has now filed a separate appeal of the local board's April 24/30 decision.

³The board advertised in local newspapers that a public hearing was scheduled for November 12, 2002, at Beall High School on the Superintendent's recommendations for school closure and consolidation and described the procedures that would be followed and the time limits that would be imposed for submission of materials. Twenty-two speakers including the Appellant testified at the hearing.

⁴The parties presented oral argument to the State Board on June 24, 2003.

At the motions hearing the ALJ considered the requirements set forth in COMAR 13A.02.09.01B, which direct the local board to consider the impact of the proposed closing/consolidation on factors specified in the regulation. The ALJ determined that the board met its initial burden of demonstrating that it considered those factors based on information from reports by outside consultants, school facilities' experts, and public input from the communities.

Turning to Appellant's arguments, the ALJ understood that Appellant's appeal was an attempt to attack the local board decision and the supporting rationale. However, rather than demonstrating why the board's decision was arbitrary, unreasonable, or illegal, the ALJ found that Appellant focused on attacking individual paragraphs and individual sentences of the board's rationale. A typical section from Appellant's appeal is set forth *verbatim* in the ALJ's decision at 10-11.

As the ALJ noted:

In this "rebuttal" excerpt, the Appellant may be alleging that the BOE's decision is contrary to sound educational policy in contravention of COMAR 13A.01.01.03E(1)(b)(i). He also may be alleging that the BOE's decision with respect to the proposed elementary school redistricting constituted an abuse of the BOE's discretionary powers in contravention of 13A.01.01.03E(1)(c)(v). He does not state this with specificity. *Instead, it appears that the Appellant is merely attacking the BOE's decision because he disagrees with it.*

See ALJ Report, p. 11. (Emphasis added.)

Appellant had the burden of opposing the motion for summary affirmance with admissible evidence, such as affidavits, to advance his contention that the local board decision was not supportable. Despite the voluminous material submitted by Appellant in the appeal, the ALJ found no factual basis by way of admissible evidence to support Appellant's assertions:

[The local board] considered enrollment trends, the age or condition of school buildings, transportation, educational programs, racial composition of student body, financial considerations and student relocation, and the impact on community in the geographic attendance area for the school proposed to be closed and school, or schools, to which students will be relocating, in every instance. *The Appellant has made many accusations about how the BOE's rationale does not constitute sound educational policy, but nothing he has said is any more than opinion.*

ALJ Proposed Decision at 13.⁵ (Emphasis added.)

While the Appellant maintains that he would be able to prove that his allegations concerning the rationale were true if given the chance to go forward with a full evidentiary hearing, it was Appellant's burden to generate a genuine dispute of material fact in a manner which would require a full evidentiary hearing on the issues – through affidavits, business records, proffers of witness testimony. He simply failed to do this. It was insufficient for Appellant merely to argue that his perspective should prevail.

CONCLUSION

For these reasons, we adopt the Findings of Fact and Conclusions of Law as set forth in the proposed decision of the Administrative Law Judge. We therefore affirm the decision of the Board of Education of Allegany County.

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Clarence A. Hawkins

Walter S. Levin, Esquire

Marilyn D. Maultsby

Karabelle Pizzigati

Edward L. Root

John L. Wisthoff

⁵A review of the 3D/International Facility Utilization Study discloses that its recommendations are consistent with the local board decision. *See* Study at 19, 23, 26 - 27.

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

THOMAS R. MARSH

v.

BOARD OF EDUCATION

OF ALLEGANY COUNTY

* BEFORE THOMAS G. WELSHKO,
AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
CASE NO.: MSDE-BE-09-200300003
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**PROPOSED ORDERS ON THE BOARD OF EDUCATION'S
MOTIONS FOR A MORE DEFINITE STATEMENT,
TO DISMISS AND FOR SUMMARYAFFIRMANCE**

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STATEMENT OF THE CASE
ISSUE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW

PROPOSED ORDER

STATEMENT OF THE CASE

On December 3, 2002, the Allegany County Board of Education (the "BOE") issued a decision in which it decided to consolidate and reconfigure school districts, contingent upon the construction of a new high school (the "BOE Plan"). On December 20, 2002, Thomas R. Marsh, individually, and as spokesman for a citizens group known as Taxpayer's Alliance for Fair & Honest Government, along with the mayors of five affected towns, filed an appeal of that decision with the Maryland State Board of Education (the "State Board"). On February 3, 2003, the State Board transmitted these appeals to the Office of Administrative Hearings ("OAH"), to conduct a contested case hearing with respect to the Appellant(s)' appeal.

On January 28, 2003, in anticipation of this case's transfer to OAH, the BOE, through counsel, filed three separate motions: (1) a *Motion for a More Definite Statement*, (2) a *Motion to Dismiss*, and (3) a *Motion for Summary Affirmance*. The BOE requested that it be allowed to make oral argument in support of its motions. I granted this request in my letter to the parties dated February 14, 2003.

On April 9, 2003, I convened an in-person pre-hearing conference/motions hearing at the Office of Administrative Hearings in Hunt Valley, Maryland, pursuant to Code of Maryland Regulations ("COMAR") 28.02.01.13 and 28.02.01.16. Thomas R. Marsh represented himself.⁶ G. Gary Hanna, Attorney at Law, represented the BOE.

⁶ This case was originally captioned "*Thomas Marsh, Individually, and as Spokesman for the Taxpayers Alliance for Fair & Honest Government v. Board of Education of Allegany County.*" In my February 14, 2003, letter to the parties, I ruled that since the Taxpayers Alliance for Fair & Honest Government was an artificial entity, it had to be represented by legal counsel at all proceedings. That entity did not secure legal counsel for the April 9, 2003, pre-hearing conference. Consequently, I

At that conference, I addressed the BOE's motions, along with prospective discovery disputes, evidentiary matters and scheduling of the hearing on the merits (assuming such a hearing was necessary).

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings, and the COMAR regulations governing appeals to State Board. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2002); COMAR 28.02.01; and COMAR 13A.01.01.03.

concluded that it ceased to be a participant by default. (See COMAR 28.01.02.20A.) The mayors of the five towns, who also signed the original complaint and request for hearing, also failed to appear at the pre-hearing conference, so their further participation in this matter ceased as well. Mr. Marsh, however, decided to continue as the sole complainant/appellant.

ISSUE

The issue presented is whether the BOE's *Motion for Summary Affirmance* should be granted because the Appellant has not framed the issues on appeal clearly, and because he has failed to raise any genuine dispute concerning any material fact.

FINDINGS OF FACT

Based on the information of record, I find the following facts by a preponderance of the evidence:

1. In the spring and summer of 2002, the BOE determined that it was necessary to consolidate and reconfigure school districts in Allegany County because of shifts in population. At the request of the BOE, the Superintendent of Schools for Allegany County ("Superintendent") formulated and presented recommendations for school consolidation/reconfiguration.

2. In accordance with Allegany County School Board policy, the BOE established School Community Committees at the sites affected by the proposed consolidation/reconfiguration. These committees were charged with studying the various recommendations made by the Superintendent and the BOE based on the eight factors delineated in COMAR 13A.02.09.01(b). Accordingly, the committees studied the Superintendent's recommendations, prepared reports, and submitted them to the BOE for review.

3. After receiving the School Community Committee reports, the BOE scheduled a public hearing to take place on November 11, 2002 at Beall High School in

Frostburg, Maryland for comment on the Superintendent's recommendations. The BOE advertised the public hearing in local newspapers; the advertisement described the procedures that would be followed at the public hearing and set time limits for submission of materials. (App. Exhibit "G")

4. On November 11, 2002, the BOE held its public hearing as scheduled at Beall High School in Frostburg, Maryland, in accordance with the provisions of COMAR 13A.02.09.01C(1) and (2). Twenty-two speakers appeared at the public hearing, including representatives of the School Community Committees for the affected schools.

5. On November 12, 2002, the BOE met and made a final decision concerning the consolidation/reconfiguration recommendations.

6. On December 3, 2003, the BOE issued its *Rationale for Consolidation/Reconfiguration of Schools*. With the precondition that State and local funding would be available, the BOE approved the following plan:

a. Upon completion of the new or renovated high school in the western region, with a projected date of completion at the beginning of the 2007 – 2008 school year, that Beall and Westmar High Schools be closed with students reassigned to the new or renovated high school facility.

b. Upon completion of a new or renovated high school in the western region, with a projected date of completion at the beginning of the 2007 – 2008 school year, that Westmar Middle School be closed with students reassigned to the current Westmar High School.

c. Upon completion of the Frost Elementary renovation, with a projected date of completion at the beginning of the 2007 – 2008 school year, that Beall Elementary School be closed with students reassigned to Frost Elementary, George's Creek Elementary and/or Mr. Savage Elementary/Middle Schools.

d. Upon completion of the Frost Elementary School renovation, with a projected date of completion at the beginning of the 2007 – 2008 school year, that George’s Creek Elementary School remain open with elementary students in the western region redistricted as recommended in the long range educational facilities plan.

7. The BOE considered input from a variety of sources in reaching its consolidation/reconfiguration plan decision. These sources included comments made by speakers at the public hearing, School Community Committee reports, the performance audit of Allegany County Public Schools performed by MGT of America, the facility utilization study performed by 3D International (“3DI”), recommendations of the Superintendent and his staff and public comment from the meetings in the months preceding the public hearing.

8. The sources of information considered by the BOE contained references to the factors that the BOE must evaluate with respect to school closings listed in COMAR 13A.02.09.01(b). The BOE considered these factors in formulating its plan.

Those factors are noted as follows:

- Student enrollment trends;
- Age or condition of school buildings;
- Transportation;
- Educational programs;
- Racial composition of student body;
- Financial considerations;
- Student relocation;
- Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.

9. On December 20, 2002, the Appellant, Thomas R. Marsh, filed a 42-page appeal with 42 attachments (labeled “A” through “PP”) with the Maryland State Board of Education.

10. On January 28, 2003, the BOE filed three separate motions in response to the Appellant’s appeal: (1) a *Motion for a More Definite Statement*, (2) a *Motion to Dismiss*, and (3) a *Motion for Summary Affirmance*.

11. The OAH originally scheduled a pre-hearing conference/motions hearing in this matter on March 19, 2003. The Appellant moved to postpone that conference because he was visiting his son in Denver, Colorado who was ill with pneumonia. I granted the postponement and rescheduled the pre-hearing conference/motions hearing to take place on April 9, 2003.

12. At the April 9, 2003, pre-hearing conference/motions hearing, the Appellant indicated that his primary issue in this case was whether the action and decision of the BOE to consolidate/reconfigure school districts is arbitrary, unreasonable or illegal; he allowed the dismissal of his other issues as sought by the BOE.

13. At the April 9, 2003, pre-hearing conference/motions hearing, the Appellant also requested that the OAH consider what he anticipated the BOE would decide at its April 22, 2003, meeting—specifically, that the BOE would propose that the consolidation actually take place before the new high school was constructed. That request was denied.

DISCUSSION

As noted, the BOE filed three separate motions. The first two motions are essentially moot. I do find, however, that the BOE has made its case for granting summary affirmance. I will address the BOE's motions in the order in which they were filed.

I. *Motion for a More Definite Statement and Motion to Dismiss.*

The BOE's first motion, a *Motion for a More Definite Statement*, is denied as moot since the Appellant agreed to limit his issues during the pre-hearing conference/motions hearing. The BOE's second motion, a *Motion to Dismiss*, is granted with respect to all issues other than whether the BOE's decision to consolidate/reconfigure school districts is arbitrary, unreasonable or illegal.⁷

Since I have disposed of the BOE's first two motions, I will now turn to its third, its *Motion for Summary Affirmance*.

II. *Motion for Summary Affirmance.*

A. *The Law.*

COMAR 28.02.01.16C(1) states that a party to an administrative hearing before the Office of Administrative Hearings "may move for summary decision⁸ on any

⁷ The other issues distilled by the BOE from the Appellant's lengthy appeal were (1) that the rationale for [the BOE's] decision is saturated with gross untrue statements and misrepresentations, (2) that [the rationale] does not support the decision of the BOE and (3) the other intended actions of certain Board members is arbitrary, unreasonable and illegal. The Appellant agreed that the first two mentioned issues could be folded into the general issue of alleged arbitrary, unreasonable or illegal action. As noted, I dismissed the last issue because it involved future actions not included in the Appellant's original December 20, 2002, appeal.

⁸ The terms "summary affirmance" and "summary decision" are essentially equivalent and, therefore, interchangeable.

substantive issue in the case." An order for summary decision is appropriate under COMAR 28.02.02.16C(2) if "[a] judge finds that there is no genuine dispute as to any material fact and that the moving party is entitled to prevail as a matter of law."

The requirements for summary decision under COMAR 28.02.01.16C are virtually identical to those for summary judgment under Maryland Rule 2-501, which contemplates a "two-level inquiry":

The court must determine that no genuine dispute exists as to any material fact, and that one party is entitled to judgment as matter of law. In its review of the motion, the court must consider the facts in the light most favorable to the non-moving party. It must also construe all inferences reasonably drawn from those facts in favor of the non-movant.

To defeat a motion for summary judgment, the non-moving party must establish that a genuine dispute exists as to a material fact. A material fact is one that will somehow affect the outcome of the case. If a dispute exists as to a fact that is not material to the outcome of the case, the entry of summary judgment is not foreclosed.

Richman v. FWB Bank, 122 Md. App. 110, 146, 712 A. 2d 41, 58 (1998), *aff'd*, *FWB Bank v. Richman*, 354 Md. 472, 731 A.2d 916 (1999). Also see *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 72 – 73, 782 A.2d 807, 833 – 34 (2001); *Dobbins v. Washington Suburban Sanitary Comm'n*, 338 Md. 341, 345, 658 A.2d 675, 676 – 77 (1995).

Additionally, "the purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried. See *Goodwich*, 343 Md. at 205-06, 680 A.2d at 1077; *Coffey v. Derby Steel Co.*, 291 Md. 241, 247, 434 A.2d 564, 567-68 (1981); *Berkey v. Delia*, 287 Md. 302, 304, 413 A.2d 170, 171 (1980). Thus, once the moving party has provided the court with sufficient grounds for summary judgment, the nonmoving party must produce sufficient evidence to the trial court that a genuine

dispute to a material fact exists. See, e.g., *Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank*, 297 Md. 691, 712, 467 A.2d 758, 769 (1983).” *Grimes*, 366 Md. at 73, 782 A.2d at 834.

Applying the preceding to this case, COMAR 13A.01.01.03E, establishes the standard of review of decisions of county Boards of Education that involve local policy. That section states the following in its entirety:

E. Standard of Review.

(1) Decisions.

(a) Decisions of a county board involving a local policy or a controversy and dispute regarding the rules and regulations of the county board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the county board unless the decision is arbitrary, unreasonable, or illegal.

(b) A decision may be arbitrary or unreasonable if it is one or more of the following:

(i) It is contrary to sound educational policy;

(ii) A reasoning mind could not have reasonably reached the conclusion the county board reached.

(c) A decision may be illegal if it is one or more of the following:

(i) Unconstitutional;

(ii) Exceeds the statutory authority or jurisdiction of the county board;

(iii) Misconstrues the law;

(iv) Results from an unlawful procedure;

(v) Is an abuse of discretionary powers; or

(vi) Is affected by any other error of law.

(d) The appellant shall have the burden of proof.

B. Arguments of the Parties.

1. Appellant's Arguments.

In his December 20, 2002, appeal, the Appellant does not address the criteria cited in COMAR 13A.01.01.03E. Instead, he started with the BOE's *Rationale for Consolidation/Reconfiguration of Schools* and attacked individual paragraphs and sometimes individual sentences. A typical section from his appeal is set out *verbatim* below:

Page 2 #4 The rational states: Upon completion of the Frost Elementary School renovation, with a projected date of completion at the beginning of the 2007-2008 school year, that George's Creek Elementary School remain open with elementary students in the western region redistricted as recommended in the long range plan.

Rebuttal:

- ***In discussions of this motion at the Board meeting the...Board members seemed to be ignorant and unknowing of a recommendation to the Board that was contained in Dr. Guild's Educational Task Force report to the Board about "open space" schools. George's Creek Elementary is an "open space school" and the record will show that it is also overcrowded due to the past closing of Barton Elementary School. The recommendation contained in Dr. Guild's Educational Task Force report about open spaced schools is that, "The Board of Education recognize that open spaced"***

schools have not functioned as intended and that the open space concept should be abandoned in favor of flexible or closed space as appropriate in existing buildings.

Therefore...the Board was going to entertain closing, consolidation or reconfiguration in the George's Creek area...the prudent thing to do... would be to pay credence to the recommendation in the Educational Task Force Report concerning abandoning the open space concept where feasible! After all...it was just a few years ago that the Board closed Barton Elementary School...which was an "open space" school! The recommendation contained in the Educational Task Force Report also lends merit to our suggested plan for two operating K/12 schools...as contained in our suggested plan was the closing of the George's Creek Elementary "open space" school! Please see Educational Task Force recommendations about "open space" schools exhibit (H).

Appeal at 6.

The method that the Appellant has chosen to frame his appeal, as illustrated by the above-cited excerpt, makes it difficult to address the criteria delineated in COMAR 13A.01.01.03E. In this "rebuttal" excerpt, the Appellant may be alleging that the BOE's decision is contrary to sound educational policy in contravention of COMAR 13A.01.01.03E(1)(b)(i). He also may be alleging that the BOE's decision with respect to

the proposed elementary school redistricting constituted an abuse of the BOE's discretionary powers in contravention of 13A.01.01.03E(1)(c)(v). He does not state this with specificity. Instead, it appears that the Appellant is merely attacking the BOE's decision because he disagrees with it.

Nevertheless, in analyzing whether summary affirmance is appropriate here, it is more realistic to examine the arguments that the Appellant made during the pre-hearing conference/motions hearing. For example, when the BOE asked the Appellant to identify why the BOE's consolidation/reconfiguration decision violated the precepts of COMAR, the Appellant replied that the BOE did not consider all of the communities involved. He noted that the BOE's focused on Frostburg, because it is the largest of all of the affected towns, but did not take into account how its plan would affect Barton, Lonaconing, Luke, Midland or Westernport. He also assailed the BOE's pronouncement that its plan would save money, asserting, "that's questionable." Moreover, the Appellant also contended that members of the BOE "made statements beforehand which indicated their minds were made up way in advance of the process." He further noted that it did not matter what the communities said—the BOE "did not listen."

2. *The BOE's Arguments.*

The BOE countered that the Appellant's contentions really do not address the issues pertaining to this case. According to the BOE, it does not matter if a board member's mind was made up; as long as the ultimate decision is rational—that is, not arbitrary—there is no violation of COMAR. Moreover, the BOE pointed out that the November 11, 2002, hearing was quasi-legislative in nature, not quasi-judicial.

Consequently, an “impartial trier of fact” is not necessary as it would be in a quasi-judicial contested case hearing under the Administrative Procedure Act. See *Bernstein v. Board of Education of Prince George’s County*, 245 Md. 464, 226 A.2d 243 (1967); *Elprin v. Howard County Bd. of Ed.*, 57 Md. App. 458, 470 A.2d 833 (1984).

C. *Analysis.*

I agree with the BOE’s views. The focus of this case is whether the BOE followed required procedures and whether its plan was not arbitrary, unreasonable or illegal. Reviewing the facts in the light most favorable to the Appellant, I conclude there is no genuine dispute and, therefore, summary affirmance is appropriate.⁹

For the sake of clarity, I will organize the remainder of my discussion based on the criteria listed under *Standards of Review* in COMAR 13A.01.01.03E. As noted previously, COMAR 13A.01.01.03E(1)(a) states that the decision of a county board of education involving a local policy or controversy is considered *prima facie* correct unless it can be show that the decision was arbitrary, unreasonable or illegal. COMAR 13A.01.01.03E(1)(b) states that a decision may be arbitrary or unreasonable if it is (i) contrary to sound educational policy or (ii) if a reasoning mind could not have reached the conclusion that the county board did.

1. *Whether the BOE Plan was Arbitrary or Unreasonable.*

a. *Whether the BOE Plan was “Against Sound Educational Policy.”*

With regard to the criterion related to the BOE’s plan being “against sound educational policy,” I conclude that the Appellant has failed to overcome the BOE’s

⁹ Again, I must emphasize that the way the Appellant has presented his appeal and his response to BOE’s motions, it is difficult to discern what “facts” he is actually asserting are true. Given that the Appellant bears the burden of generating a “genuine” dispute as to a material fact, any deficiency in presentation inures to the detriment of the Appellant.

contention that there is no dispute of material fact with regard to this issue. As another Administrative Law Judge once observed, “it is likely that in most instances ‘sound educational policy’ is in itself rather difficult to quantify, making the determination of what is contrary to sound educational policy somewhat elusive.” *Community United for Responsible Education v. Bd. of Educ. of Allegany County*, 6 MSBE 85, 99 (1991).

Nevertheless, the record reveals that the BOE followed the precepts of COMAR 13A.02.09.01(b) and addressed the eight required criteria in making each of its decisions. It considered student enrollment trends, the age or condition of school buildings, transportation, educational programs, racial composition of student body, financial considerations and student relocation, and the impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating, in every instance. The Appellant has made many accusations about how the BOE’s rationale does not constitute sound educational policy, but nothing he has said is any more than opinion. Moreover, when the parties discussed witnesses at the pre-hearing conference on April 9, 2003, the Appellant did not identify any independent experts who would testify concerning how the BOE’s *Rationale for Consolidation/Reconfiguration of Schools* would be contrary to sound educational policy. His prospective witnesses consisted of past and present Board members, BOE employees, politicians, parents and himself. Although he did identify Dr. Yale Stenzler as an expert regarding “the conditions of the school buildings in the community,” Dr. Stenzler was also a Board member and, therefore, not a detached, independent expert. Indeed, he was a participant in the process. Simply because “the information Dr. Stenzler submitted was ignored” (assuming this to be true), does not

mean the BOE's rationale as a whole was contrary to sound educational policy.

b. Whether a Reasoning Mind Could Have Reached BOE's Decision(s).

The question of "whether a reasoning mind could not have reasonably reached the conclusion the county board reached," however, is far less nebulous. The BOE gave a detailed explanation in its rationale concerning each of the criteria mandated by COMAR. The BOE's explanations for each decision incorporated in its plan will be summarized below.

With respect to the closure of Beall and Westmar and reassignment of the students from those schools to a new or renovated facility, the BOE gave the following explanations for its decision:

a. Student Enrollment Trends. The BOE noted that the population of Westmar in Lonaconing has been shrinking, while the population of Beall in Frostburg has been growing. A new high school or renovated Beall High School in Frostburg would serve both populations and "allow for efficient use of all the county's school buildings to take place."

b. Age or Condition of the School Buildings. Both Beall and Westmar are relatively old, although Beall was renovated in 1985 – 86 and Westmar in 1995 – 96. Therefore, new construction or renovation is warranted.

c. Transportation. The BOE considered transportation costs and the need for students to travel greater distances and, overall deemed the costs and distances to be manageable.

d. Educational Programs. The BOE considered the Beall High School Community Committee Report, which concluded that educational programming at Beall must improve. That report further concluded that improved education programming could be achieved "with appropriate facilities" at a new school. The BOE determined that "a new facility would offer the highest quality of education for each of the students in Beall High School and Westmar High School."

e. Racial Composition of the Student Body. Although the BOE anticipated that racial composition would not be a major issue, primarily because the Westmar and Beall High School populations are mainly Caucasian, it did note that "the combination of the two high schools into a state of the art facility would enable more minority students to have access to other minority students, and would enable more Caucasian students to have the ability to interact with

non-Caucasian students, since more Caucasian students would be available.”

f. *Financial Considerations.* The BOE explained that a by-product of consolidation would enable Allegany County Public Schools “to retire several of its more cost ineffective buildings in poor physical condition.” Further, Westmar High School could be converted into a middle school. This would permit Allegany County Public Schools to cease using the current Westmar Middle School and Beall High School buildings as schools which, in turn, would result in cost savings because these older school buildings are more costly to operate.

g. *Student Relocation.* The BOE indicated that although it was difficult to determine the impact of student relocation, it did not anticipate any significant problems with relocating students since the new school would be located in the western region of Allegany County. It also noted that the communities involved supported the consolidation of the Westmar and Beall student populations into a new state-of-the-art facility.

h. *Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.* The BOE projected that the new high school would enhance the attractiveness of the Frostburg region, which is already a growth area in Allegany County. Moreover, it averred that such a facility would enhance the county as a whole. Additionally, the BOE also projected enhancement of the long-term partnership that the existing Beall High School has had with Frostburg University. More students would be able to avail themselves to Frostburg’s facilities because the new school would be in close proximity to the university.

Regarding the closure of Westmar Middle School and reassignment of the students from that school to the current Westmar High School building in Lonaconing, the BOE gave the following explanations for its decision:

a. *Student Enrollment Trends.* The BOE noted that the population of Westmar Middle School has been declining. It noted that there is not a projection for growth of the student population in the Westernport area, where the school is located.

b. *Age or Condition of the School Buildings.* The BOE noted that the current Westmar Middle School building is the oldest school facility in the Allegany County system. It is the only school in the county not wired for the Internet and is not entirely handicapped accessible. The current Westmar High School was recently renovated, "which would enable middle school students to enjoy a newly remodeled, state-of-the-art facility without any additional capital improvements."

c. *Transportation.* The BOE considered transportation costs and the need for students to travel greater distances and, overall deemed the costs and distances to be manageable, even though there would be a slight increase in the cost to transport students from Westernport to Lonaconing.

d. *Educational Programs.* The BOE noted that the facilities at the recently renovated Westmar High School building are superior to those in the current Westmar Middle School facility. As noted, the high school building has been wired for the Internet, while the middle school has not.

e. *Racial Composition of the Student Body.* The BOE anticipated that racial composition would not be changed by moving students from the current Westmar Middle School to Westmar High School.

f. *Financial Considerations.* The BOE indicated that the current Westmar Middle School has the highest operating costs in all of Allegany County. It further noted that as the student population declines, "it is imperative that the system better utilize existing facilities." The BOE also reasoned that since funding is based on the number of students, the money available to the system is reduced proportionately. This mandates reducing the number of buildings that the school system operates, where feasible.

g. *Student Relocation.* The BOE stated that since the entire student population of Westmar Middle School would be relocated to the current Westmar High School, the move will not have any impact how students interact with one another. It noted that students who live closer to Westernport will actually have a shorter commute. The BOE emphasized that its actions were designed to minimize student relocation while maximizing their educational opportunities.

h. *Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.* The BOE indicated that although it realized that “any school closure will inevitably bring some concern and stress to all communities involved,” the plan with its time line for implementation has received overwhelming endorsement of the affected communities.

Concerning the closure of Beall Elementary School (after the completion of Frost Elementary School renovations), with reassignment of students to the Frost, George’s Creek and/or Mt. Savage Elementary Schools, the BOE gave the following explanation for its decision:

a. *Student Enrollment Trends.* The BOE indicated that student enrollment in the county is declining, except in the Frostburg area, suggesting that only one elementary school is needed in Frostburg.

b. *Age or Condition of the School Buildings.* The BOE considered the report of 3DI, which noted that Beall Elementary requires “significant physical improvements” and is located in the center of Frostburg. Frost Elementary, by contrast, is located on an 11.3 acre site near an extensively renovated recreation complex. It is located on the edge of town where future expansion and renovation would be more easily accomplished.

c. *Transportation.* The BOE determined that since the Beall and Frost Elementary Schools serve the same community, transportation issues involved with transferring students from Beall Elementary to Frost Elementary would be minimal. The BOE anticipated that students transferred from Beall Elementary to George’s Creek or Mt. Savage would be living closer to those schools, thus obviating any transportation difficulties.

d. *Educational Programs.* The BOE noted that the reassignment of students from Beall Elementary to Frost would give them greater educational opportunity since the Frost Elementary building has been recently renovated and a recreation facility is adjacent to the school.

e. *Racial Composition of the Student Body.* The BOE indicated that the racial composition of the student body would not be negatively affected by the consolidation/reconfiguration.

f. *Financial Considerations.* The BOE explained that closing Beall Elementary, after renovating Frost Elementary, would reduce expenditures since the closed school would no longer have to be maintained. The 3DI also estimated that it would cost significantly more to renovate Beall Elementary than it is costing to renovate Frost Elementary.

g. *Student Relocation.* The BOE referred back to its comments on transportation and indicated that the impact of relocation would be minimal.

h. *Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.* The BOE explained that since Beall Elementary and Frost Elementary are less than two miles apart, there would be no impact on the community as a result of the closure of Beall.

With respect to its fourth decision to reassign students to George's Creek Elementary School through redistricting, the BOE cross-referenced its rationale for closing Beall Elementary School. It also noted that since it was not closing George's Creek Elementary School, the criteria for "school closing" referred to in COMAR 13A.02.09.01(b) were inapplicable.

Given the reasoned approach by the BOE in formulating its rationale, combined with the detail it presented, the BOE has made a *prima facie* case to show that a reasoning mind could have reached the same conclusions as it did. I will also emphasize that the BOE relied heavily on reports by outside consultants, such as 3DI, and received input from the affected communities in making its decision(s).

The Appellant, however, criticized the BOE's rationale on many bases and many levels. He particularly dwelled on alleged "untrue facts" relied on by the BOE in reaching its decisions. For example, he asserted that it is patently false that the current Westmar Middle School is not Internet-ready. He noted that there are twenty-five Internet-ready computers in the library and twenty-five more in the school's second-floor computer lab. (Appeal at 34.) As support for this contention, he cites his own May 7, 2002, letter to the BOE in which he summarizes the observations he made on his tour of Westmar Middle School. (Appellant's Exhibit "BB") Yet, this reference by the Appellant to his own letter is obviously self-serving and cannot be deemed creditable

evidence to establish a factual dispute. Furthermore, the Appellant has not provided his credentials for assessing what is “Internet-ready.” It might be true that there are fifty Internet-ready computers in the school, but are they actually wired to the Internet? Even if they are connected to the Internet, are they wired through conventional telephone lines at slow speeds?

I will add, however, that even if the BOE’s fact-finding is not perfect in every respect, its big-picture approach to school-closing and consolidation is certainly rational on its face. The Appellant has presented no salient information to show the BOE’s decision-making process was irrational or arbitrary and, therefore, no real dispute exists. Based on the information that the BOE developed, its decision cannot be said to be arbitrary or unreasonable.

2. *Whether the BOE Plan was Illegal.*

COMAR 13A.01.01.03E(1)(c) states that a county board’s decision may be illegal if it is (1) unconstitutional, (2) exceeds the statutory authority or jurisdiction of the county board, (3) misconstrues the law, (4) results from an unlawful procedure, (5) is an abuse of discretionary powers; or (6) is affected by any other error of law.

The Appellant did not identify anything that the BOE did in reaching its decisions to consolidate/reconfigure schools that was unconstitutional. He did not, with any specificity, identify how the BOE exceeded its authority, nor did he suggest how the BOE misconstrued the law. Again, the Appellant did not follow COMAR in filing his appeal, so it has been difficult sorting through it to glean where he has made certain allegations. The Appellant, however, has charged the BOE with failing to follow required procedures.

The Appellant alleged that the newspaper advertisement for the November 11, 2002, public hearing did not comply with COMAR 13A.02.09.01C because it failed to inform the public of the procedures that would be observed at the hearing. He attached the newspaper advertisement as an exhibit. (Appellant's Exhibit "G")

In reviewing the BOE's *Rationale for Consolidation/Reconfiguration of Schools*, it is readily apparent that the BOE followed the procedures required by COMAR 13A.02.09.01C related to "school closing" and that no true dispute exists. That section states:

C. The procedures shall provide, at a minimum, for the following requirements:

(1) A public hearing to permit concerned citizens an opportunity to submit their views orally or to submit written testimony or data on a proposed school closing. This includes the following:

(a) The public hearing shall take place before any final decision by a local board of education to close a school;

(b) Time limits on the submission of oral or written testimony and data shall be clearly defined in the notification of the public meeting.

(2) Adequate notice to parents and guardians of students in attendance at all schools that are being considered for closure by the local board of education. The following apply:

(a) In addition to any regular means of notification used by a local school system, written notification of all schools that are

under consideration for closing shall be advertised in at least two newspapers having general circulation in the geographic attendance area for the school or schools proposed to be closed, and the school or schools to which students will be relocating;

(b) The newspaper notification shall include the procedures that will be followed by the local board of education in making its final decision;

(c) The newspaper notification shall appear at least 2 weeks in advance of any public hearings held by the local school system on a proposed school closing.

The newspaper advertisement cited by the Appellant lists the schools that will be affected by its decision(s) to consolidate and reconfigure. It gives six “guidelines” which persons wishing to testify at the public hearing must follow. There is a provision for written submissions and a deadline established for them. The number of copies of documents is specified and a time limit established for each presentation. It noted that the record would close after the November 11, 2002, public hearing and that the BOE would announce its decision about consolidation/reconfiguration the next day, November 12, 2002, at its regularly scheduled public meeting. Undoubtedly, the newspaper advertisement does describe the procedures to be followed. The detail of every possible scenario or how the voting process would take place did not need to be in the notice.¹⁰ Additionally, the record indicates that the public had a meaningful

¹⁰ Even if there were some slight flaw in the newspaper advertisement with regard to the description of procedures, it remains true that the community had an opportunity to attend the BOE’s

opportunity to participate in the process. The BOE convened the public hearing on November 11, 2002, as scheduled, where twenty-two (22) individuals gave their opinion about the BOE's proposed consolidation/reconfiguration plan, including the Appellant. The Appellant acknowledges all of this, but maintained that the BOE steadfastly refused to listen to him or anyone else who opposed its plan. He emphasized that the BOE would not even look at his alternative plan. It is the BOE's prerogative, however, to

public hearing on November 11, 2002 and provide comment to the BOE regarding its proposed consolidation/reconfiguration plan, and that is undisputed. Failure to adhere to all procedures strictly is not always grounds for reversing the action of an administrative agency. See e.g., *Motor Vehicle Administration v. Shrader*, 324 Md. 454, 597 A.2d 939 (1991); *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985); *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997); 898 F.2d 1186 (6th Cir. 1990); *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir.1990). There must be a showing of prejudice that stemmed from the alleged procedural violation, which the Appellant has failed to do here.

decline to review a competing plan. All that it is required is that the plan put forth by the BOE not be arbitrary, unreasonable or illegal.

Additionally, the Appellant has failed to explicitly identify any abuse of discretion by the BOE or any error of law committed by it. In summary, he has not shown any illegal act committed by the BOE that would be subject to a factual dispute at an administrative hearing.

Although I have determined that summary affirmance in favor of the BOE is warranted in this case, other matters arose during the pre-hearing conference that I will address briefly below.

IV. *Other Matters.*

A. *Consolidation with Future Actions of the BOE.*

During the pre-hearing conference, the Appellant noted that he knew of an upcoming BOE meeting, scheduled for April 22, 2003, in which he expected the BOE to recommend closing Westmar High School and transferring students to the existing Beall High School, before a new high school is built. He moved to consolidate his appeal of that prospective action with this appeal. The BOE opposed this motion. First, it noted that the BOE had not decided anything about the issue raised by the Appellant at the time of the pre-hearing conference. Additionally, even if the BOE would take such an action, that decision would have to be appealed separately. Adopting the BOE's rationale, I denied the Appellant's motion to consolidate.

B. *Appellant's April 17, 2003, Correspondence.*

On April 21, 2003, I received a *Memorandum for Clarification, Understanding and Reconsideration* from the Appellant, dated April 17, 2003. In that *Memorandum*,

the

Appellant asked that I reconsider my rulings concerning the exclusion of witnesses, which the current ruling makes moot. Nonetheless, the crux of the Appellant's *Memorandum* was that because he recently suffered a broken arm, he could not adequately prepare for the pre-hearing conference. He asserted that the BOE was far better prepared to respond to issues, such as discovery issues and witness proffers, than he was; he strongly contended that he was severely disadvantaged by virtue of his temporary disability.

I must reject the Appellant's assertions. As the Appellant indicated in his written material as well as during the pre-hearing conference, he has been preparing this appeal over many months. Moreover, he has submitted a box of exhibits (including newspaper clippings, photographs and video tapes) to counsel for the BOE and this administrative law judge as required by the pre-hearing order's disclosure requirements. Thus, by his own admission, the Appellant has asserted that he is knowledgeable about the issues pertaining to this appeal and had the obligation to have witness proffers and arguments ready at the pre-hearing conference. In addition, because the Appellant needed to attend to his son, who was ill out-of-state, I postponed the pre-hearing conference from March 19, 2003 to April 9, 2003, approximately three weeks. He also has had the instructions for the pre-hearing conference in his possession since February 2003. In summary, I conclude that the Appellant had ample opportunity to prepare for the pre-hearing conference and was not disadvantaged by the process.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the BOE has shown that summary affirmance is appropriate in this case because there is no genuine dispute as to any material fact and that the BOE is entitled to prevail as a matter of law. COMAR 28.02.02.16C(2); COMAR 13A.01.01.03E.

PROPOSED ORDER

I **PROPOSE** that the *Motion for Summary Affirmance* filed by the Board of Education of Allegany County be **GRANTED** by the State Board, and that the hearing on the merits scheduled for June 9 through 11, 2003 in Cumberland, Maryland be cancelled; and I further,

PROPOSE that the decision(s) of the Board of Education of Allegany County contained in its *Rationale for Consolidation/Reconfiguration of Schools*, dated December 3, 2002 (i.e., the BOE plan), be **UPHELD** by the State Board.

Date: May 2, 2003

Thomas G. Welshko
Administrative Law Judge

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file objections with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, within ten (10) days of receipt of the Proposed Decision. COMAR 13A.01.01.03P(4). The Office of Administrative Hearings is not a party to any review process.

THOMAS R. MARSH

v.

BOARD OF EDUCATION

OF ALLEGANY COUNTY

* BEFORE THOMAS G. WELSHKO,
AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
CASE NO.: MSDE-BE-09-200300003
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FILE EXHIBIT LIST

The BOE's Filings.

1. Transmittal from the MSBE to OAH dated February 3, 2003, including the BOE's *Memorandum, Answer, Motion for a More Definite Statement, Motion to Dismiss* and *Motion for Summary Affirmance*, dated January 29, 2003.
2. Facsimile of *BOE's Pre-hearing Statement*, dated March 11, 2003.
3. Hardcopy of *BOE's Pre-hearing Statement*, dated March 11, 2003.

The Appellant's Filings.

Unnumbered: The Appellant's appeal dated December 20, 2002 and received by the MSBE on December 31, 2002. This appeal consists of forty-two (42) pages, including labeled "A" through "PP" in a bound volume.

1. BOE's Rationale for Consolidation/Reconfiguration of Schools dated December 3, 2002, supplied by the Appellant on February 20, 2003.

2. The Appellant's *Response in Opposition to BOE's Motion for a More Definite Statement* dated February 20, 2003.

3. The Appellant's *Response in Opposition to BOE's Motion to Dismiss* dated February 20, 2003.

4. The Appellant's *Response in Opposition to BOE's Motion for Summary Affirmance* dated February 20, 2003.

5. Document from the Appellant, giving his background and objecting to my ruling excluding the Taxpayers Alliance for Fair & Honest Government from participating in this case without legal counsel, dated February 24, 2003.

6. Postponement Request from the Appellant dated March 4, 2003.

7. Doctor's note supplied by the Appellant dated March 4, 2003.

8. ALJ's Postponement denial dated March 6, 2003.

9. Copy of postponement request made by the Appellant dated March 5, 2003.

10. Letter of Clarification by the Appellant dated March 7, 2003.

11. Duplicate postponement request by the Appellant dated March 7, 2003.

12. The Appellant's Pre-Hearing Statement dated March 14, 2003.

13. Appellant's postponement request based on son's illness received by OAH on March 17, 2003 (with documentation) and the ALJ's decision to grant postponement until April 9, 2003.

14. Appellant's *Memorandum for Clarification, Understanding and Reconsideration* dated April 17, 2003.

OAH Exhibits.

1. Pre-hearing Conference Notice with Instructions dated February 6, 2003.
2. Letter from the ALJ to the parties regarding the need for Taxpayers Alliance for Fair & Honest Government to be represented by counsel.
3. Rescheduled Pre-hearing Conference Notice with Instructions dated March 18, 2003.