

PATRICK MCSWAIN,

Appellant

v.

HOWARD COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 09-29

### OPINION

#### INTRODUCTION

Appellant has requested that this Board reconsider its decision in *Patrick McSwain v. Howard County Bd. of Educ.*, MSBE Opinion No. 09-07. The Howard County Board of Education (local board) has filed a response to the Motion for Reconsideration.

In *McSwain*, this Board affirmed the decision of the local board suspending Appellant from his position as band director for 15 days without pay for misconduct based on his comments to a student in his class.<sup>1</sup> In doing so, the State Board rejected the Proposed Decision of the Administrative Law Judge which recommended that the State Board find that Appellant's actions did not rise to the level of misconduct.

#### STANDARD OF REVIEW

A decision on a request for reconsideration shall be made in the discretion of the State Board except that a decision may not be disturbed unless there is sufficient indication in the request that:

- (1) The decision resulted from a mistake or error of law; or
- (2) New facts material to the issues have been discovered or have occurred subsequent to the decision.

The State Board may refuse to consider facts that the party could have produced while the appeal was pending. The State Board may, in its discretion, abrogate, change, or modify the original decision. COMAR 13A.01.05.10(D).

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<sup>1</sup> The factual background of the case is set forth in Opinion No. 09-07.

## ANALYSIS

### 1. *Alleged Failure to Follow Precedent*

Appellant argues that the State Board failed to follow its own precedent regarding the definition of misconduct, focusing instead on a definition used in a case involving a different agency.

There is nothing impermissible about the State Board looking to court decisions involving forums outside of the educational arena for guidance. Moreover, regardless of the State Board's discussion of those cases, the State Board highlighted the definition of misconduct set forth in *Resetar v. State Board of Education*, 284 Md. 537 (1979), the seminal teacher misconduct case. MSBE Opinion No. 09-07 at 8. The State Board's conclusion that misconduct occurred in this case is not inconsistent with the description of misconduct in *Resetar*.

### 2. *Concerns About the Hearing Process*

The Appellant argues that the State Board's disagreement with the recommendation of an ALJ makes a mockery of the hearing process in §6-202 cases. We disagree. The ALJ's proposed decision is a recommendation. The State Board makes the final decision in all appeals and is not required to accept the proposed decision. See COMAR 13A.01.05.09. That is the process that is in place.

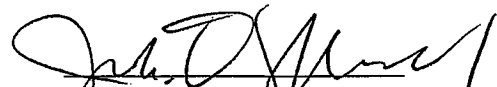
We recognize that the State Board must give deference to an ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. See *Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994). We disagree, however, with Appellant's contention that the State Board failed to do so here with regard to the ALJ's decision not to credit Ms. Duffy's testimony. The ALJ disagreed with Ms. Duffy's conclusions because the ALJ did not believe that the evidence supported them. (ALJ Proposed Decision at 10.) This was not a situation where the ALJ found that Ms. Duffy was not credible witness based on her demeanor. Thus, no deference was due the ALJ's findings in this regard.

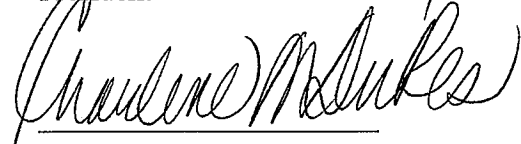
### *Appropriateness of Penalty Imposed*

Appellant argues that the State Board failed to consider the appropriateness of the discipline imposed and failed to take into consideration Appellant's employment record in deciding the consequence. Contrary to Appellant's claim, however, the State Board considered the entire record in the case in deciding the penalty. The State Board recognized that although a 15 day suspension without pay was a heavy penalty, it was reasonable given the evidence in the case.

## CONCLUSION

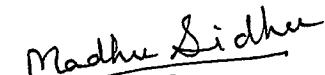
For all these reasons, we do not find that the Appellant has demonstrated any mistake or error of law which would justify the State Board's reconsideration of this case. Accordingly, we deny Appellants' Request for Reconsideration of the State Board's decision in *Patrick McSwain v. Howard*

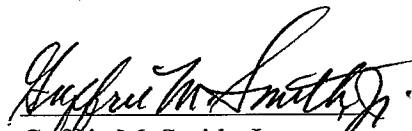
  
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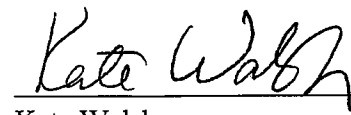
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Ivan C.A. Walks

  
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August 25, 2009