PATRICK MCSWAIN,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
HOWARD COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 09-07

OPINION

INTRODUCTION

In this appeal, Appellant challenges the decision of the Howard County Board of Education (local board) to suspend him without pay for fifteen days for misconduct in office and insubordination.

We transferred this case pursuant to COMAR 13A.01.05.07 to the Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ). The ALJ issued a decision proposing that the State Board reverse the local board's suspension of Appellant for fifteen days for misconduct and insubordination. The local board has filed Objections to the ALJ's proposed decision. The Appellant has filed a response to the Objections. This Board heard oral argument on January 28, 2009.

FACTUAL BACKGROUND

Appellant is a certified teacher employed by Howard County Public Schools (HCPS) as a band director since 1989. He was band director at the following schools: (1) Patuxent Valley Middle School (Patuxent Valley) from 1989 to 2004; (2) Ellicott Mills Middle School (Ellicott Mills) for the 2004-2005 school year; and (3) Harper's Choice Middle School (Harper's Choice) for the 2005-2006 school year. (ALJ Proposed Decision, p.3).

Appellant began having performance problems during the 1999-2000 school year. In May, 2000, the Patuxent Valley school band planned to participate in a band competition in Pennsylvania. Although he was scheduled to attend, Appellant did not make the trip. Because Appellant had the sheet music for the band at his home, the band was unable to participate in the competition. Appellant contacted the school principal the next day and The principal placed Appellant on administrative leave, and Appellant Appellant returned to school for the start of the 2000-2001 school year. (Hearing Examiner Decision, pp. 1-2; Memorandum from Burke to Haskins, 5/17/00).

Appellant did not have any other employment problems until 2003, when he had Consequently, Appellant was repeatedly absent during the fall of 2003.

The school principal urged Appellant to get help through the Employee Assistance Program, but Appellant declined. Appellant's continued absences resulted in the postponement of the Winter Band Concert. On December 18, 2003, the principal issued a letter of reprimand informing Appellant that he was prohibited from taking any more personal days in the 2003-2004 school year because he had used all of his personal days and sick leave. Appellant requested and was granted leave under the Family Medical Leave Act from February 12, 2004 through May 17, 2004, so that he could [redacted] (ALJ Proposed Decision, p. 4; Memorandum from Burke to McSwain, 12/18/03).

Due to Appellant's excessive and unexcused absences, the Interim Superintendent, Sydney L. Cousin, issued a letter of reprimand for misconduct on April 27, 2004. [redacted]

Appellant satisfied the conditions set forth by Dr. Cousin. On July 19, 2004 Dr. Cousin informed Appellant that he could return to his teaching duties for the 2004-2005 school year. He assigned Appellant to Ellicott Mills Middle School. (Hearing Examiner Decision, p. 3).

On June 16, 2005, the last day of the 2004-2005 school year, Appellant was absent from school and failed to contact the school system or substitute hotline. He did not contact the school until several days later. Appellant maintained that he was run off the road on his way to work. Due to his absence on June 16, Appellant was unable to lead the Jazz Ensemble and present awards at the school awards ceremony. (Hearing Examiner Decision, pp. 3-4; Memorandum from Goins to Michaels, 6/21/05). He was marked as taking leave without pay. (ALJ Proposed Decision at 5; Letter from Cousin to Appellant, 8/15/05).

In an August 15, 2005 letter to Appellant, Dr. Cousin expressed concern over Appellant's June 16 absence. [redacted]

Appellant was assigned to Harper's Choice Middle School for the 2005-2006 school year. He planned a "Back to Music Night" event to meet the parents of band and chorus members on September 19, 2005. On the morning of September 19, Appellant called the school and advised the Assistant Principal, Patricia Duffy, that he was taking sick leave and would not be reporting to work. Ms. Duffy directed Appellant to call the school no later than 3:00 pm if he could not make it to the evening event. (Letter from Michaels to McSwain, 9/29/05). Appellant testified that he did not believe he had to contact the school again. Appellant did not contact the school to

advise that he would be absent from "Back to Music Night," nor did he appear at the event. (Hearing Examiner Decision, pp. 4-5).

On September 29, 2005, the Principal of Harper's Choice, Stephen Wallis, issued a written reprimand to Appellant for his absence on September 19, 2005, and cited him for insubordination for failing to contact the school by 3:00 that day to confirm whether or not he was able to attend the evening event. After a heated meeting with Mr. Wallis, Appellant reported to Donald Michaels, Administrative Director for Secondary School Administration. Mr. Michaels advised Appellant of his insubordinate and unprofessional conduct, and required Appellant to send a letter of apology to the parents for being absent. (Letter from Michaels to McSwain, 9/29/05). Appellant grieved the reprimand, the parties reached a negotiated settlement, and HCPS agreed to purge the letter of reprimand from Appellant's file after July 1, 2007. (Hearing Examiner Decision, pp. 5-6).

On October 6, 2006, at the 7th and 8th grade symphonic band rehearsal, Appellant was upset with a group of students who were misbehaving and not paying attention in class. He yelled at the students and told them they were behaving like "a bunch of asses." He then told the entire class: "You all disgust me. I am sick of this. You know what? Rehearsal is over. I'm done with you – leave." He threw his baton, stormed out of the classroom, and slammed the door, leaving the students unsupervised for the remainder of the period. (Hearing Examiner Decision, pp. 7-8). Based on this incident, Mr. Wallis issued a letter of reprimand to Appellant for misconduct and neglect of duties which stated the following:

> Your misconduct, lack of personal self control, and neglect of your duty to supervise your students is a grave concern. Students and parents have expressed serious concern regarding your conduct. Your lack of professionalism, demeaning and inappropriate language, and erratic conduct has raised concerns regarding your abilities to safely and effectively manage a classroom. Students report feeling fearful and confused by your outburst.
>
> When we met on October 9 to discuss this incident, I noted your lack of concern, lack of acceptance of responsibility for your actions, and general disregard for the seriousness of your conduct. Your lack of professional concern and acceptance of responsibility continues to be of concern.

(Letter from Wallis to McSwain, 10/24/06).

Shortly thereafter, on November 29, 2006, Appellant was involved in another incident in which he made some comments to a student in his class. The student reported to Ms. Duffy that Appellant stated during class that the student was "a bum sitting on a log" and " I feel sorry for your mother." The student, who was seated approximately two feet from Appellant's podium,

had not brought his instrument to class and was not participating. (Hearing Examiner Decision, p.9; ALJ Proposed Decision, p. 6).

Appellant reported that he called the student a "bump on a log" and said, in a conversational tone, "I feel bad for your mother." Another student corroborated Appellant's version of the incident. Appellant explained that this student had a history of not bringing his instrument, of being uninvolved in class, and sometimes falling asleep. He also explained that he had met with the student's mother the previous week to discuss his and the mother's concerns about the student's indifference to class. (Hearing Examiner Decision, pp. 9-10; ALJ Proposed Decision, p. 6).

Appellant met with Ms. Duffy and the student. Appellant apologized to the student and told him that he had a lot of potential but that Appellant was frustrated with his habit of being unprepared for class. (ALJ Proposed Decision, p.7).

The matter was referred to Dr. Cousin. Dr. Cousin reviewed Appellant's employment history and recommended to the local board that Appellant be suspended without pay for fifteen days for misconduct in office, insubordination, incompetency, and willful neglect of duty. In a January 17, 2007 letter to Appellant, Dr. Cousin stated the following:

> Your employment in the past several years had been marked by frequent instances of neglect of duty, misconduct in office, insubordination, threatening behavior, and mistreatment of students. This behavior has far outweighed any contributions you have made to the school system, and has come to defined your qualities as a teacher. In each of these instances, the school system warned you that continued misconduct could result in further and more severe disciplinary action. Based on your continued misconduct, which can only be characterized as a persistent refusal to obey school rules and the continual mistreatment of students, I have no choice but to take the additional measure of recommending to the Board of Education that your employment be suspended without pay for 15 work days and directing that you undergo a fitness for duty evaluation. My recommendation is issued pursuant to Section 6-202 of the Education Article and is based on your misconduct in office, insubordination, incompetency, and willful neglect of duty.

As support for the recommendation, Dr. Cousin cited the examples of Appellant's behavior that we have set forth in the factual background above.

The local board appointed a hearing examiner, Gregory A. Szoka, to take testimony, receive documentary evidence, and submit a report and recommendation to the local board. Mr.

Szoka conducted a hearing on April 12, 2007. He recommended that the local board reject the superintendent's recommendation. He stated as follows:

> Given the totality of the evidence in this case, I am not persuaded that Mr. McSwain's conduct on November 29, 2006, was of such a nature that would trigger a recommendation for a 15-day suspension without pay. This incident, standing on its own, lacks any egregious conduct that would warrant a suspension. The conversation that Mr. McSwain held with Student K and the use of the phrase "bump on a log" was an accurate description of the student's conduct. I note that there is no testimony that Mr. McSwain lost his temper, yelled at Student K or was in any way emotionally out of control when he made his comments to the student. There is no evidence that Mr. McSwain held the student up to classroom ridicule or in any way intentionally sought to embarrass the student. Appellant's reference to "feeling bad" for the student's mother, was again a comment on the student's indifference to his performance at school – a cause for concern for any parent. This disciplinary recommendation represents an attempt to bootstrap a minor incident into a suspension offense by attempting to relate back to other incidents in Appellant's work history. Given the nature of these other events, the "bump on a log" incident bears no relationship to the other incidents cited in the Superintendent's letter.

(Hearing Examiner Decision, p. 16).

The local board disagreed with the hearing officer's assessment of Appellant's behavior, finding that it rose to the level of misconduct and insubordination. The local board found that Appellant's statements that the student was a "bump on a log" and "I really feel bad for your mother" demeaned the student in front of his peers and fell short of the professional standards expected of teachers for providing a safe and nurturing environment. Having found that Appellant's conduct was wrongful, the local board then looked at Appellant's employment history during the 2006-2007 school year, in particular, the October 6, 2006 classroom incident, to determine that the penalty recommended by the superintendent, fifteen days suspension without pay, was appropriate. The local board stated as follows:

> Given the events leading up to the November 29, 2006, incident and the context, even limiting our consideration to the 2006-2007 school year, we are convinced that a 15-day suspension without pay is fully justified, even lenient. Given the depth of our concern about Mr. McSwain's ability to appropriately and positively interact with his students, even when they are misbehaving, and to

> conform to our goals and the expectations from staff, we considered seriously more severe sanctions. Schools and classrooms must be places where students feel safe and are nurtured; where professionals strive to find positive interventions to alter unsatisfactory behavior, through a team approach to problem-solving if necessary. We hope that the 15-day suspension without pay, recommended by the Superintendent and adopted by us, sends a clear message that Mr. McSwain's interactions must change immediately and permanently because we view this as Mr. McSwain's last chance.

(Local Board Decision, pp.4-5).

This appeal followed.

ALJ'S PROPOSED DECISION

Pursuant to the requirements of COMAR 13A.01.05.07A(2), we referred this case to the Office of Administrative Hearings (OAH). The Administrative Law Judge (ALJ) conducted a hearing. The ALJ issued a Proposed Decision finding that Appellant's suspension for misconduct was not supported by the preponderance of the evidence.[1] She concluded that school system officials and the local board based their misconduct determinations on the cumulative effect of Appellant's employment problems, rather than first reaching a misconduct finding based only on the November 29 incident and then considering Appellant's employment history to determine the appropriate progressive sanction to impose. She stated:

> Clearly, the general attitude of the other school staff, including [Ms. Duffy] and the others who testified at the hearing below, toward the Appellant was that he was a problem they did not quite know how to handle. However, I find it inappropriate to penalize the Appellant, ostensibly for the incident with Student K on November 29, 2006, based on the cumulative effect of his entire employment history, including past incidents for which he had been sanctioned by written reprimands, etc.

(ALJ Proposed Decision, p.10). The ALJ recommended that the State Board reverse the decision of the local board.[2]

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[1]She also found that the local board offered no justification for the insubordination charge. The local board does not pursue the insubordination charge in this appeal.

[2]The ALJ sets forth her Findings of Fact on pp. 3-7 of the proposed decision. Her analysis of the case is in the Discussion section, pp. 7-12.

The local board has submitted Objections to the ALJ's proposed decision. Appellant has submitted a response to the Objections. We heard oral argument on January 28, 2009.

STANDARD OF REVIEW

Because this appeal involves the suspension of a certificated employee pursuant to § 6-202 of the Education Article, the State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension. COMAR 13A.01.05.05(F)(1) and (2). The local board has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(F)(3).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the Proposed Decision. *See* Md. Code Ann., State Gov't § 10-216. In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor based witness 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).

ANALYSIS

Section 6-202 of the Education Article provides the grounds and procedure for suspension and dismissal of teachers, principals, and other professional personnel. It sets forth the five grounds for suspension or termination: (1) immorality; (2) misconduct in office; (3) insubordination; (4) incompetency; and (5) willful neglect of duty. §6-202(a)(1)(I – v).

In our view, the primary issue in this case is whether or not Appellant's conduct on November 29, 2006 rises to the level of misconduct. Appellant called the student, who was not paying attention in class and had failed to bring his band instrument with him, a "bump on a log" and said "I feel bad for your mother." The local hearing examiner and the ALJ did not find that this amounted to misconduct. On the other hand, the superintendent and local board found that Appellant's actions constituted misconduct warranting a suspension for fifteen days without pay.

What constitutes misconduct in office in Maryland is not defined in the statute at issue. In *Public Service Commission v. Wilson*, 389 Md. 27 (2005), however, the Court of Appeals defined the parameters of "misconduct" by reviewing court decisions in state employee termination cases and unemployment compensation cases. The Court concluded that:

> The term "misconduct," . . . means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his

> employment relationship, during hours of employment, or on the employer's premises.

Id. at 77, *citing Department of Labor Licensing, and Regulations v. Hider*, 349 Md. 71, 85 (1998).

In *Resetar v. State Board of Education*, 284 Md, 537, a case involving teacher misconduct, the Court of Appeals reviewed court decisions in both teacher discipline and unemployment compensation cases, as well as other legal sources. The Court stated that misconduct is "sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful." *Id.* at 560-561 (*citing* 58 C.J.S. Misconduct §818 (1948). The Court also noted that a teacher's conduct must bear on the teacher's fitness to teach in order to constitute misconduct. 284 Md. at 238, *citing Wright v. Superintending Sch. Com., City of Portland*, 331 A.2d 640 (ME. 1975).

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

We view the facts of this case in light of the parameters described above in determining whether Appellant's actions rose to the level of misconduct. We have reviewed the entire record to try to understand what happened on November 29, 2006 and when it happened.

On the day of the incident, Student K came to class without his instrument. He was seated approximately two feet from the Appellant and was sitting in class doing nothing. Even without his instrument, Appellant expected the student to look at the music and follow along with the class. He was not doing so. Therefore, Mr. McSwain took the sheet music and gave it to another student. At the same time, he called Student K a "bump on a log." (T. 274-277).

The Appellant described the in-class interaction with the student as follows:

> I said, "Do you know what a bump on a log is?" I said "when you - - it just kind of sits there. When you don't involve yourself in a classroom - -" This is just the demeanor that I used to talk to him in, just like we're sitting here.

> "When you don't involve yourself, when you don't take the initiative then that's what you're like, you're like a bump on a log." I said, "You really don't want to be that way," I said. (T. 276-277).

Appellant does not deny that other students heard his statements because this was not a private conversation. (T. 306).

Student K had a history of coming to class without his instrument and not participating. Appellant testified that Student K had come without his instrument for approximately ten or twelve of the twenty preceding classes. The student had also fallen asleep during class the previous week. (T. 274-275).

At the end of class, Appellant spoke to the student again and told him he felt bad for his mother. (T. 277). Appellant claims that this discussion was more private than the previous interaction because he was speaking to Student K after class. (T.306). The Appellant described the interaction at the end of class as follows:

> And then it wasn't until later, it was the end of class, and it was just to him personally, the whole thing was to him personally. There were about twenty people in this particular class, but it was -- you know, he sits next to me. It wasn't meant to go out.
>
> At the very end of the class, I - - you know, this was all at the podium, and I walked up and I said, "[Student K], you know, I just had a discussion with your mom last week," I said, you know, "we just had a conference and we both voiced our frustration," I said, "and I really feel bad for her, because it's not just here that you're having a problem." (T. 277).

The conference to which Appellant refers is a meeting he had with Student K's mother during the preceding week to discuss the student's inattentiveness and lack of participation. (T. 275; 277-278).

Student K was upset after class. He was crying when he arrived at Ms. Duffy's office and reported that Appellant embarrassed him during class by calling him a "bum sitting on a log" three times, describing the phrase to him, and then saying that he "felt sorry for [Student K's] mom." (T. 96; Student K Statement).

Two students overheard Appellant's remarks. One student confirmed that Student K was upset by Appellant's statements. She too was very upset and anxious after the incident. She spoke to Ms. Duffy and made the following written statement:

> Every day when I walk into band I feel a little scared and nervous

> that I will get in trouble. Ms. Duffy says "no one no matter who it is should feel that way." Mr. McSwain is a nice guy but he really need (sic) to think before he speaks.

(Student 1 Statement; 12/1/06 e-mail from Duffy to Michaels). The other student stated that he wished that he had not heard Appellant's "bumb (sic) on a log" statement. He characterized it as sarcastic. He also stated that he did not hear the statement referring to Student K's mom, but that other kids had heard it. (Student 2 Statement).

In Ms. Duffy's report of the incident to Mr. Michaels, she did not specifically illustrate the events as they unfolded on November 29. Rather, she stated that she met with students during the course of her investigation and each one mentioned that this was not the first time Mr. McSwain has made "mean comments to kids." (12/1/06 e-mail from Duffy to Michaels). She also mentioned her interaction with Student 1, as described above. Ms. Duffy stated that "this interaction [with Student 1] was the pinnacle that illustrated to me the emotional strain that this adult is having on our children each and every day." (*Id.*).

The facts set forth above describe in full the Appellant's conduct on November 29, 2006. It is our view that those facts describe misconduct on the part of Mr. McSwain.

In coming to the conclusion that the action described here constitutes misconduct we find compelling the fact that the comments made to Student K were negative and started while Mr. McSwain was taking away Student K's sheet of music and giving it to another student calling Student K a mere "bump on a log." In our view, that comment was a way to demonstrate to the class that Student K himself was a worthless member of the class.

At the end of class, Mr. McSwain chose to speak to the student again. He stated that he intended this to be a private conversation, but it was not. He made no effort to assure that the place was private. It was during this conversation that Mr. McSwain said to Student K, "I feel bad for your mother." That remark was overheard by other students. On the surface, that remark may seem innocuous, but in our view, to implicate a student's mother and attribute to her disappointment in her son is too personal a conversation to have within the range of several other students. Mr. McSwain's decision to have that conversation where it could be overheard indicates an indifference to the student's feelings. Although during oral argument Mr. McSwain's counsel tried to put this incident in the positive light of motivating the student, we believe that Mr. McSwain was indifferent to the setting of the conversation and, indifferent to the consequences.

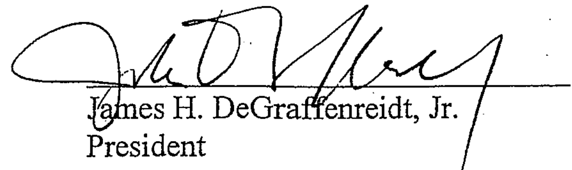
We understand that there are worse things that a teacher can say or do to a student, but misconduct is not always an egregious act. If it were, it would be easy to identify and to ferret out. Here we give the benefit of the doubt to the children in Mr. McSwain's care.

In our view, misconduct occurred on November 29, 2006.

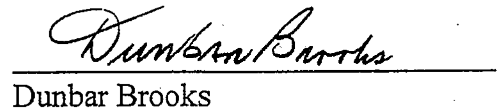
The penalty imposed here is a heavy one. Counsel for Mr. McSwain stated at the hearing that the monetary loss to her client would be over $5,000. Yet, we find that the penalty of fifteen days without pay is reasonable given the evidence in this case.

CONCLUSION

For all these reasons, we reverse the decision of the ALJ and rule that the conduct described herein was misconduct and the penalty was an appropriate one.



James H. DeGraffenreidt, Jr.
President



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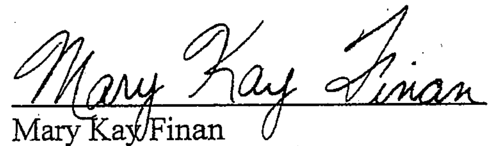
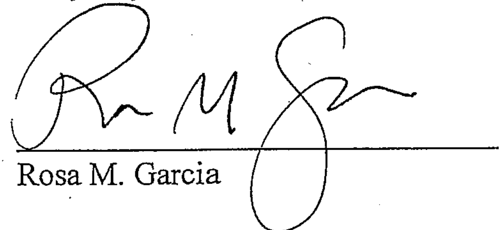


Mary Kay Finan



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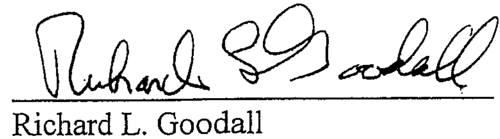
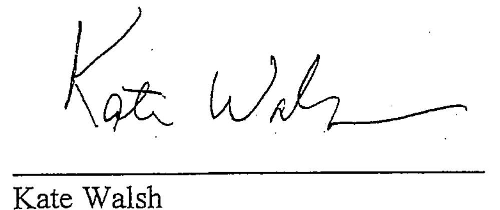
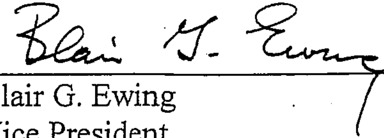


Richard L. Goodall

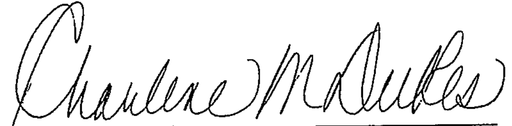


Kate Walsh

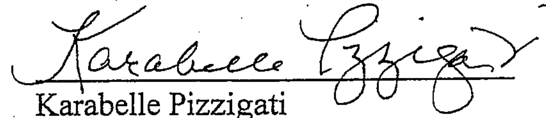
The four Board members signing below voted to affirm the decision of the Administrative Law Judge because they believe that this case does not meet the requirements for misconduct.



Blair G. Ewing
Vice President



Charlene M. Dukes



Karabelle Pizzigati

Ivan C.A. Walks

February 24, 2009

PATRICK MCSWAIN	*	BEFORE MAE CATHERINE REEVES,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF MARYLAND OFFICE OF
BOARD OF EDUCATION OF	*	ADMINISTRATIVE HEARINGS
HOWARD COUNTY	*	OAH No.: MSDE-BE-01-07-41267

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

PROPOSED DECISION

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

STATEMENT OF THE CASE

By letter dated January 17, 2007, Patrick McSwain (Appellant), a music teacher employed by Howard County Public Schools (HCPS), received notification from Dr. Sydney Cousin, Superintendent of Schools, that he was recommending to the Board of Education of Howard County (Local Board) that the Appellant be suspended without pay for fifteen days for misconduct in office, insubordination, incompetency, and willful neglect of duty. The letter also advised the Appellant that Dr. Cousin was directing that he obtain a fitness for duty evaluation from the HCPS Office of Equity Assurance and that he would be reassigned for the remainder of the school year from Harpers Choice Middle School to a position to be determined by Daniel Michaels, Director of Secondary Education.

The Appellant appealed the recommendation regarding the proposed suspension, but not the reassignment and fitness for duty evaluation, to the Local Board, which appointed a hearing examiner to conduct an evidentiary hearing and submit a report and recommendation to it. On June

11, 2007, the hearing examiner recommended that the Local Board not impose the fifteen-day suspension. Subsequent to oral argument on August 9, 2007, the Local Board adopted the Superintendent's recommendation for a fifteen-day suspension without pay for misconduct in office and insubordination by the Appellant. The Local Board notified the Appellant of its decision on August 30, 2007.

On September 21, 2007, the Appellant submitted a Notice of Appeal and Request for a Hearing to the State Board of Education (State Board) of the Maryland State Department of Education (MSDE). On or about October 26, 2007, MSDE transferred the case to the Office of Administrative Hearings (OAH) for a hearing and review by an administrative law judge.

Following a telephonic prehearing conference on December 11, 2007, I conducted a hearing on January 31, 2008 at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Code of Maryland Regulations (COMAR) 13A.01.05.07. The Appellant was present and was represented by James R. Whattam, Esquire.[1] Mark C. Blom , Esquire, represented the Local Board. I held the record open until March 28, 2008 for the submission of post-hearing briefs.

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, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2007); COMAR 13A.01.05; COMAR 28.02.01.

ISSUE

Did the Board establish by a preponderance of the evidence that its decision to suspend the Appellant for fifteen days without pay for alleged misconduct in office and insubordination, based on the Appellant's actions on November 29, 2006, is warranted?

[1] Post-hearing, Kristy K. Anderson, Esquire, represented the Appellant due to Mr. Whattam's retirement.

SUMMARY OF THE EVIDENCE

Exhibits

Transcripts of the hearing before Hearing Examiner Gregory A. Szoka, Esquire, on April 12, 2007 and the hearing before the Local Board on August 9, 2007 are part of the administrative record that was transmitted by the State Board to OAH. Additionally, I admitted into evidence three Joint Exhibits. An exhibit list is attached.

Testimony

Patricia (Duffy) Murray, assistant principal at Harper's Choice Middle School (HCMS) testified as the Board's only witness at the hearing before me. The Appellant did not supplement the record with any additional testimony.

FINDINGS OF FACT

After considering the entire administrative record, I find the following facts by a preponderance of the evidence:

1. The Appellant is a certified teacher, with a Master's degree in music education, employed by HCPS since 1989.
2. From 1989 to 2004, the Appellant held the position of band director at Patuxent Valley Middle School (PVMS).
3. During the 2004-2005 school year, the Appellant was assigned temporarily as band director at Ellicott Mills Middle School. (EMMS).
4. For the 2005-2006 school year, the Appellant was assigned to HCMS as band director.
5. In May 2000, the Appellant [redacted] caused him to be absent from a band trip to a competition in Pennsylvania. His students were unable to compete because the Appellant had the sheet music at home. The Appellant

subsequently apologized for his behavior and was [redacted] 2003.

6. Excessive absenteeism became a problem for the Appellant in 2003 [redacted]

7. At a meeting on November 25, 2003, Sterlind S. Burke, principal of PVMS, suggested that the Appellant avail himself of the approved Employee Assistance Program, which the Appellant declined.

8. The Appellant's continued absences resulted in the postponement of the Winter Band Concert that was scheduled for December 17, 2003.

9. On December 18, 2003, Mr. Burke issued a letter of reprimand to the Appellant, among other things, informing him that he was not authorized to use any more personal leave days for the 2003-2004 school year.

10. At a meeting on January 12, 2004, the Appellant [redacted] he was granted leave under the Family Medical Leave Act (FMLA) for the period of February 12, 2004 to May 17, 2004.

11. [redacted], on April 27, 2004, then Interim Superintendent Sydney L. Cousin, issued a letter of reprimand to the Appellant for "misconduct" and admonishing him that he needed to serve as a role model to students. Dr. Cousin enumerated conditions for the Appellant's continued employment [redacted]

12. He has complied with the conditions set forth in Dr. Cousin's letter of April 27, 2004.

13. On June 16, 2005, the last day of school that term, the Appellant was absent due to being run off the road on his drive to work and failed to contact the school system or substitute hot-line immediately, resulting in his being deemed absent without leave and not being paid for that day.

14. Superintendent Cousin expressed his concern about the Appellant's unexcused absence on June 16, 2005 in a letter, dated August 15, 2005, and reiterated the conditions of employment

15. When the Appellant was assigned to HCMS for the 2005-2006 school year, he proposed that he meet with the parents of band and chorus members the evening of the first day of school, September 19, 2005. Flyers were prepared and distributed to parents, inviting them to a "back to music night." Faculty attendance was voluntary.

16. The Appellant was unable to attend "back to music night" because he was ill with the flu; he attempted to call the substitute hot-line and informed the assistant principal, Patricia Duffy, of his illness by telephone call the morning of September 19, 2005.

17. There was some misunderstanding about whether Ms. Duffy directed the Appellant to call the principal by 3:00 p.m. that day to let him know whether he would be attending "back to music night" or not. The Appellant did not believe he had to make that call.

18. On September 20, 2005, Principal Stephen Wallis issued a written reprimand to the Appellant for his absence September 19, 2005 and accusing him of insubordination for

failing to call him directly no later than 3:00 p.m. to confirm whether or not he would be able to attend the activities that night.

19. Based on the incident of September 19, 2005, Daniel J. Michaels, Director of Secondary Education issued a written reprimand to the Appellant on September 29, 2005. The Appellant disagreed with the contents of the letter.

20. At a 7th and 8th grade symphonic band rehearsal on October 6, 2006, the Appellant, in an emotional outburst, yelled at the students, said that they were behaving like "a bunch of asses" and stormed out of the room, ending rehearsal, leaving the students unsupervised for the remainder of the period. The Appellant has acknowledged his wrongful, unprofessional conduct in this instance.

21. On October 24, 2006, Principal Wallis issued a written reprimand to the Appellant for his "misconduct and neglect of duties."

22. On November 29, 2006, Student K[2] who was seated approximately two feet from the Appellant's podium had not brought his instrument to band class and was not participating. K had a pattern of not bringing his instrument to class and being uninvolved, even falling asleep.

23. The Appellant had met with K's mother the preceding week and learned that she had concerns about K's indifference also.

24. The Appellant told K in a conversational tone that he was being a "bump on a log," which K misunderstood as "bum on a log." The Appellant also told K that he felt bad for his mother, based on what he had learned about her concerns.

[2] For the sake of confidentiality, I am not using the Student's full name.

25. Later that day, K complained to the assistant principal that the Appellant had said something "mean" to him, being primarily upset because the Appellant said he felt bad for his mother.

26. When the Appellant met with the assistant principal and the student on November 29, 2006, he said that "[teachers] are not in the business of hurting people" and that K had a lot of potential but that he was frustrated with his habit of being unprepared and forgetting his instrument.

27. The Appellant did not curse or yell during the meeting with the assistant principal and K.

28. On January 3, 2007, the Appellant explained the incident with Student K to Superintendent Sydney Cousin.

29. After a review of the Appellant's entire employment history with HCPS, Superintendent Sydney Cousin informed him by letter dated January 17, 2007 of his decision to recommend to the State Board that he be suspended for fifteen days without pay, that he obtain a fitness for duty evaluation and that he be reassigned out of HCMS.

DISCUSSION

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) (2006) reads, in pertinent part, as follows:

> (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.

(Emphasis added.)

In an appeal of a suspension of a certified employee to the State Board, the local board bears the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05F(3). Pursuant to COMAR 13A.01.05.05F(2), the State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension of a certified employee. Accordingly, on behalf of the State Board, I am exercising my independent judgment on the record before me

In *McCrumb v. Board of Education of Howard County*, 2 Opinions of MSBE 78, 80 (1979), the State Board described the interrelationship of the Superintendent's and the local board's authority to suspend under Md. Code Ann., Educ. § 6-202(1) and the authority of a local board of education to suspend pursuant to § 6-202. The Superintendent's authority is limited to an emergency power only to address an immediate crisis. A superintendent's decision to suspend certificated personnel which involves a forfeiture of pay[3] must be made as part of a recommendation to the board. The Superintendent has the burden of supporting his recommendation for suspension to the Local Board and the Local Board has the burden of proof in the appeal before the State Board.

[3] The Appellant maintains he would forfeit $5,600.00 if suspended without pay for fifteen days.

In *Board of Education of Howard County v. McCrumb*, 52 Md. App. 507, 514 (1982), the court held that the modification of a penalty imposed on school personnel by a local board of education is within the State Board's broad powers.

In this case, although counsel for the Local Board asserted in his opening statement at the hearing on January 31, 2008 that this is a matter of a traditional application of progressive discipline, the relevant facts do not support this proposition.

Although the Superintendent and the Local Board based their decisions on the Appellant's entire personnel record-which is not devoid of past problematic behavior-the only relevant incident before me is the occurrence on November 29, 2006. The Appellant's actions on November 29, 2006 would need to rise to the level of misconduct in order to warrant a fifteen-day suspension without pay or any other penalty.

<u>Misconduct</u>.

Misconduct has been defined as conduct that is "deliberate" and "willful" and which undermines a teacher's fitness to teach. *Resetar v. State Board of Education*, 284 Md. 537, 561 (1979). In *Resetar,* a teacher used language ("jungle bunnies") that was derogatory and racially offensive after being warned numerous times not to use such language. This is a far cry from the innocuous comments that the Appellant made to Student K on November 29, 2006, despite K's emotional response to those comments.

I am not persuaded by Patricia Duffy's[4] assessment of the situation between Student K and the Appellant that it was just another example of the Appellant's inappropriate behavior toward students and colleagues. Clearly, her perception of that event was colored by her perceptions of other, unrelated events, such as the time that the Appellant had a meeting with the principal during which

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[4] Hereafter, I shall use Patricia Duffy's married name of Murray.

time, she was not present, but heard angry voices coming from the principal's office, which she interpreted as an emotional outburst by the Appellant. She also was influenced by a statement made by one female student in the Appellant's band class that she was afraid of getting into trouble with the Appellant and that she did not want the Appellant to be angry with her or say mean things. Ms. Murray did no follow-up to that student's statement.

Clearly, the general attitude of other school staff, including Ms. Murray and the others who testified at the hearing below, toward the Appellant was that he was a problem they did not quite know how to handle. However, I find it inappropriate to penalize the Appellant, ostensibly for the incident with Student K on November 29, 2006, based on the cumulative effect of his entire employment history, including past incidents for which he already had been sanctioned by written reprimands, etc.

I agree with the findings of the hearing examiner who recommended to the Local Board that the Appellant not be penalized by a fifteen-day suspension without pay and reject the Superintendent's recommendation. Specifically, I agree with Hearing Examiner Szoka's conclusion that the Appellant's conduct on November 29, 2006, standing alone, was not of such a nature "that would trigger a recommendation for [a suspension]."

The Appellant offered a perfectly plausible explanation for the comments he made to Student K that he was acting like a "bump on a log" and that he felt bad for K's mother. The Appellant seated K, who had difficulty focusing and often failed to participate, close to him at the podium in order to create a better learning environment. The week before, K had fallen asleep in class and for ten or twelve days before November 29, 2006 had not brought his instrument to class. Again, on November 29, he did not bring his instrument, was not following along with the lesson, and was

simply doing nothing. In a conversational tone, the Appellant said to K that he was like a bump on a log. The comment was not intended to be heard by K's classmates and was not made maliciously.

At the end of class, the Appellant again spoke to K personally, about a conference with K's mother the week before during which K's mother had expressed frustration with K's lack of progress. In the context of speaking about that conference, the Appellant told K that he felt bad for his mother. The intent was to motivate, not to hurt, K.

Later in the day on November 29, 2006, Ms. Murray, assistant principal, met with the Appellant and K. At that meeting, the Appellant spoke to K, saying something to the effect, "We [meaning teachers] are not in the business of hurting people." He also told K that he had a lot of potential and that he was frustrated with K's lack of preparedness. Ms. Murray affirmed that the Appellant's comments then were entirely appropriate and in keeping with good teaching practices.

Despite the Appellant's explanation for the incident and his good behavior at the meeting with her and K, Ms. Murray still was of the opinion that the Appellant had engaged in misconduct. She based her opinion on K's reaction to what had occurred in the classroom earlier in the day. When questioned, she elucidated by saying that the Appellant's conduct "was no longer an isolated incident." Based on statements she obtained from only two of the students out of twenty in the Appellant's class, she concluded that the students were anxious on a daily basis. Even if there were some basis in fact for the students' statements, the incident precipitating the decision to impose a fifteen-day suspension, standing alone, would have to rise (or sink) to the level of misconduct and it does not.

Further, I reject Ms. Murray's interpretation that the issue is not the Appellant's intent in making the comments to Student K, but rather, the student's reaction to the statements. Ms. Murray's interpretation is incongruent with any acceptable definition of teacher misconduct.

Local Board's rationale.

The Local Board disagreed with the hearing examiner's recommendation to reject the Superintendent's recommendation for a fifteen-day suspension without pay, in essence, because it thought that the Appellant got off easy by receiving only a reprimand for his admitted misconduct on October 6, 2006 when he called the students a "bunch of asses" and stormed out of the room, leaving them unsupervised for the rest of the period. To suspend the Appellant for fifteen days without pay for the completely different and innocuous incident on November 29, 2006, would be punishing the Appellant retroactively for the October 6 incident. To do so is not appropriate progressive discipline. Although insubordination was also cited as a ground for the Local Board's Decision and Order, dated August 30, 2007, no justification was offered for finding the Appellant's conduct on November 29, 2006 constituted insubordination.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Local Board's decision for a fifteen-day suspension without pay of the Appellant, a certified teacher, for alleged misconduct and insubordination on November 29, 2006 is not supported by a preponderance of the evidence. Md. Code Ann., Educ. § 6-202(a)(ii), (iii) (2006); COMAR 13A.01.05.05F.

PROPOSED ORDER

It is proposed that the decision of the Howard County Public Schools suspending the Appellant for fifteen days without pay for misconduct and insubordination be **NOT UPHELD**.

June 23, 2008
Date decision mailed

Mae Catherine Reeves
Administrative Law Judge

#97584

NOTICE OF RIGHT TO FILE OBJECTIONS

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

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PATRICK MCSWAIN	*	BEFORE MAE CATHERINE REEVES,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF MARYLAND OFFICE OF
BOARD OF EDUCATION OF	*	ADMINISTRATIVE HEARINGS
HOWARD COUNTY	*	OAH No.: MSDE-BE-01-07-41267

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FILE EXHIBIT LIST

A. Joint Exhibit 1

The parties' Joint Exhibit 1 contained the following Superintendent's Exhibits that were admitted below:

1. Note for Alice Haskins from Sterlind S. Burke, May 17, 2000
2. Letter of Reprimand to Appellant from Sterlind S. Burke, December 18, 2003
3. Urgent Message from Sterlind S. Burke to Michael J. Martirano, October 28, 2003
4. Message from Sterlind S. Burke to Michael J. Martirano, November 24, 2003
5. Messaage from Sterlind S. Burke to Appellant, November 24, 2003
6. Letter to Band/Orchestra Parents from Sterlind S. Burke, November 10, 2003
7. Letter to Parents and Students from Sterlind S. Burke, November 21, 2003
8. Letter to Rob White from Mary A. Blake, November19, 2003
9. Letter to Dr. Michael Martirano from Daniel K. Blake and Mary A. Blake, December 9, 2003
10. Urgent message from Sterlind S. Burke to Kirk J. Thompson, December 18, 2003
11. Urgent message from Sterlind S. Burke and Laura T. Lebe to Kirk Thompson and Michael J. Martirano, December 19, 2003

12. Letter to Appellant from Sydney L. Cousin, April 27, 2004

13. Letter to Appellant from Sterlind S. Burke, July 19, 2004

14. Letter to Principal Burke from Dan and Mary Blake, November 14, 2004

15. Memo to Dan Michaels from Mike Goins, June 21, 2005

16. Message to Peggy Curtis from Tina L. Dadds, June 22, 2005

17. Message from Tina L. Dadds to Michael K. Goins, June 24, 2005

18. Superintendent's letter to Appellant, August 15, 2005

19. *Curriculum vitae* of C. Stephen Wallis, undated

20. Flyer sent to parents re: Back to Music Night, September 19, 2005

21. Message from Patricia K. Duffy to Stephen Wallis, September 21, 2005

22. Principal's letter to Appellant, September 20, 2005

23. Principal's letter to Appellant, September 21, 2005

24. Letter of Reprimand, September 29, 2005

25. Administrative directive to Appellant, October 20, 2005

26. Message from Stephen Wallis to Mark C. Blom and Daniel J. Michaels, October 20, 2005

27. Appellant's letter to parents/guardians, October 21, 2005

28. Message from Stephen Wallis to Daniel J. Michaels and Mark C. Blom, October 21, 2005

29. Nine student statements re: October 6, 2006 symphonic band rehearsal

30. Letter to Stephen Wallis from Debbie Shaffer, October 10, 2006

31. Letter to Principal Wallis from Randy and Jean Boone, October 10, 2006

32. Message to Stephen Wallis re: Appellant, October 11, 2006

33. Message to Stephen Wallis from Appellant, October 10, 2006

34. Letter of reprimand, October 24, 2006.

35. Message from Stephen Wallis to Daniel Michaels and Mark C. Blom, October 24, 2006
36. Appellant's response to administrative directive dated October 24, 2006, October 30, 2006
37. Principal's letter re: Appellant's response, October 31, 2006
38. Memorandum to Principal Wallis from Appellant, November 2, 2006
39. Letter from Scott and Glady Prosise re Appellant's behavior on October 6, 2006, November 27, 2006
40. Message from Patricia K. Duffy to Appellant and Stephen Wallis, November 29, 2006
41. Student statements, November 29, 2006 and November 30, 2006
42. Message from Stephen Wallis to Daniel J. Michaels, November 30, 2006
43. Message from Patricia K. Duffy to Daniel J. Michaels and Stephen Wallis, December 1, 2006
44. Review of Appellant's employment status to Dr. Sydney Cousin from Daniel J. Michaels, December 13, 2006
45. Superintendent's decision re: Appellant's employment status, January 17, 2007

Joint Exhibit 1 contained the following Appellant's Exhibits:

1. Message from Stephen Wallis to Daniel J. Michaels, September 22, 2005
2. Message to Daniel J. Michaels from Stephen Wallis and Renee L Holdefer, October 10, 2006 with original messages to Mr. Wallis
3. Message to Daniel J. Michaels and Mark C. Blom, October 15, 2006 with original messages to Stephen Wallis
4. Message to Daniel J. Michaels and Mark C. Blom from Stephen Wallis, October 31, 2006
5. Message fro Stephen E. Drummond from Daniel J. Michaels, June 22, 2005
6. Message from Daniel J. Michaels to Stephen E. Drummond, August 18, 2005

7. Letter from Maryland Centers for Psychiatry, June 17, 2004
8. Letter to Appellant from Coordinator of Equity Assurance, July 12, 2005
9. Appellant's letter to Min Kim with letter from drug counselor, attendance slips for AA/NA meetings, etc.
10. Master Agreement between Board and the County Education Association, period of July 1, 2005 to June 30, 2007
11. Appellant's letter to Daniel Michaels with medical documentation, September 22, 2005
12. Appellant's letters to Dr. Sydney L. Cousin and Daniel Michaels, September 27, 2005,
13. Grievance Form, October 12, 2005
14. Petition to Stay Arbitration and Application for Permanent Interlocutory Injunction, etc., February 1, 2006
15. Letter from James R. Whattam to Dr. Sydney L. Cousin, June 27, 2006
16. Letter from Director of Staff Relations to James Whattam, Esquire, July 20, 2006
17. Messages re: incident on October 6, 2006 and Appellant's apology

B. Joint Exhibit 2

Hearing Examiner Gregory A. Szoka's decision, June 11, 2007

C. Joint Exhibit 3

Local Board's Decision and Order, August 20, 2007