ALLEN DYER, Appellant v. HOWARD COUNTY BOARD OF EDUCATION, Appellee.	BEFORE THE MARYLAND STATE BOARD OF EDUCATION Opinion No. 13-30

OPINION

On or about June 9, 2011, the Howard County Board of Education passed a Resolution stating that Mr. Allen Dyer, a board member:

(1) repeatedly breached confidentiality provisions;
(2) acted unilaterally on board related matters in contravention of decisions made by the local board;
(3) undermined the functioning of the board;
(4) used litigation as tactic against the board;
(5) threatened other board members and staff.

The Resolution directed the local board's attorney to prepare, and the Chairman of the local board to execute, a letter requesting the State Board to remove Mr. Dyer from office.

The letter was submitted to the State Board on June 24, 2011. The request for removal repeated the statements contained in the Board Resolution and provided specific examples of actions by Mr. Dyer that illustrated alleged misconduct in office. Specifically:

(1) releasing confidential information to a third party about a student appeal;
(2) releasing confidential attorney client privileged advice;
(3) surreptiously taping public and private discussions at a Board retreat, and posting them on the internet;
(4) using altered board stationary to order staff to take actions in contravention of board decisions and to communicate to County Council;
(5) using his position as a board member to request sealed confidential board documents involving a case in which Mr. Dyer had represented an employee in a lawsuit against the board; and
(6) threatening to bring charges, terminate, or publically embarrass employees who opposed his views.

On July 6, 2011, the State Board of Education sent a letter to Mr. Dyer stating, *inter alia,* that the June 24, 2011 letter from the local board and the local board's Resolution constituted the charges against him.

Pursuant to the authority set forth in State Gov't Art. §10-205(a)& (b), the State Board delegated the task of conducting a contested case, evidentiary hearing to the Office of Administrative Hearings (OAH) and directed OAH to issue a Proposed Decision(s) for consideration by the State Board. That hearing process resulted initially in an October 26, 2011 Proposed Decision on Mr. Dyer's Motion to Dismiss. The Administrative Law Judge denied the Motion and scheduled the matter for hearing on the merits. Thereafter, Mr. Dyer filed Exceptions to the Proposed Decision with the State Board. The State Board considered the Exceptions to be premature, and on December 6, 2011, declined to rule and dismissed the Exceptions.

Mr. Dyer then initiated a case in Howard County Circuit Court against the Maryland State Board of Education in which he sought an "Interlocutory Appeal of the Agency Denial of Motion to Dismiss" or a "Writ of Mandamus" directing the State Board to cease and desist until it provided Mr. Dyer with the "date of [his] conviction . . . the common law [crime] of misconduct in office in a court of proper jurisdiction." Mr. Dyer also requested a preliminary injunction to stop the administrative proceedings on the grounds of legislative immunity.

The Howard County Circuit Court dismissed the complaint and declined to issue a writ of mandamus or a preliminary injunction. Mr. Dyer appealed that decision to the Court of Special Appeals which will hear argument in June, 2013. Mr. Dyer also petitioned the Court of Appeals for a writ of certiorari. That petition has been denied.

While those court proceedings were going on, the administrative proceedings continued. On March 30, 2012, the ALJ issued another Proposed Decision denying another Motion to Dismiss and Stay Proceedings filed by Mr. Dyer. The case then proceeded on the merits over the course of 10 days in May, June, and July of 2012. In November, 2012, Mr. Dyer lost his bid for re-election to the local board.

On December 5, 2012, the ALJ issued a Proposed Decision recommending that Mr. Dyer be removed as a member of the Howard County Board of Education for misconduct in office. Mr. Dyer filed Exceptions to the Proposed Decision(s). The local board responded. This Board held oral argument on April 23, 2013.

LEGAL ANALYSIS

A. Jurisdiction and Mootness

While this case was making its way through the administrative process, Mr. Dyer lost his bid for re-election. He is no longer in office. That occurrence raises a question concerning our jurisdiction to hear and decide this case, as well as the question of mootness. We address each question *seriatim.*

Jurisdiction

The jurisdiction of an administrative agency to adjudicate a matter arises from the statute that gives the agency "the power to render a judgment over [a] class of cases . . . ." *See Maryland Commission on Human Relations v. Freedom Express/Dome Gold, Inc.,* 375 Md. 2, 16 (2003); *Board of Nursing v. Nechay,* 347 Md. 396, 405 (1997). The Court of Appeals has defined the fundamental jurisdiction of an adjudicating body as the "power to act with the regard to a subject matter, which 'is conferred [on the agency] by the sovereign authority . . . .'" *Carey v. Chessi Computer,* 369 Md. 741, 755-56 (2002).

Thus, we look to Ed. Art. §3-702(g), the statute governing this case, to determine the "class of cases" and "subject matter" on which we have been given the power to render judgment. The statute provides:

> (g) *Removal.* – (1) The State Board may remove a member of the county board for:
> (i) Immorality;
> (ii) Misconduct in office;
> (iii) Incompetency; or
> (iv) Willful neglect of duty;
> (2) Before removing a member, the State Board shall send a member a copy of the charges against the member and give the member an opportunity within 10 days to request a hearing.
> (3) If the member requests a hearing within the 10-day period:
> (i) The State Board promptly shall hold a hearing, but a hearing may not be set within 10 days after the State Board sends the member a notice of the hearing; and
> (ii) The member shall have an opportunity to be heard publicly before the State Board in the member's own defense, in person or by counsel.
> (4) A member removed under this subsection has the right to a de novo review of the removal by the Circuit Court for Howard County.

We have considered whether the fact that we could not order the removal of Mr. Dyer from office, if we determined that he committed misconduct, deprives us of jurisdiction to hear this case.

While there is no case directly on point and no clear answer to that inquiry, the Court of Appeals has opined, in cases seeking to stop an administrative proceeding on jurisdictional grounds, that " 'Simply because a statutory provision directs a court or an adjudicatory agency to decide a case in a particular way, if certain circumstances are shown, [that] does not create an issue going to the court's or agency's subject matter jurisdiction." *Freedom Express/Dome Gold,*

Inc., 375 Md. at 16, citing *Board of Licensing Comm'rs v. Corridor Wine, Inc.*, 361 Md. 403, 417-418 (2000) (hereinafter *Corridor Wine, Inc.*).

For example, in *Corridor Wine, Inc.,* the statute completely precluded a case against a bar owner if the employee, who was charged with selling alcohol to a minor, was found not guilty or placed on probation without a verdict. During the administrative proceeding against the bar owner, the employee was given probation before judgment. The bar owner moved to dismiss the administrative proceeding. The agency denied that motion, and the bar owner filed a interlocutory appeal asserting that the employee's probation before judgment deprived the agency of jurisdiction to proceed against the owner. The owner sought a writ to that effect. The case ultimately was decided by the Court of Appeals which ruled that "[t]he underlying statutory interpretation concerning the meaning of [the statute at issue] relates to how the Board should exercise its jurisdiction in a particular case, and not whether it has subject matter over the case." *Id.* at 418.

Applying that principle in this case, we conclude that the subject matter over which we have jurisdiction is cases involving misconduct in office, and the removal provision is the statutory directive as to how we must exercise our jurisdiction if we find misconduct has occurred. The fact that we could not order removal from office, in our view, does not deprive us of jurisdiction to decide the misconduct issue.

Mootness

Even though we have concluded that we have jurisdiction to hear this case, we must also consider whether the case is moot. The test for mootness is "whether there is no longer any existing controversy between the parties . . . or [whether] the court can no longer fashion an effective remedy." *Cottman v. State,* 395 Md. 729, 743 (2006); *Adkins v. State,* 324 Md. 641, 646 (1991); *Attorney General v. Anne Arundel County School Bus,* 286 Md. 324, 327 (1979). At oral argument, we asked both parties to address the mootness issue. Each argued, for different reasons, that the case was not moot, and it was clear from the arguments that a controversy continued to exist between the parties as to whether misconduct in office occurred.

At oral argument, the parties also addressed the issue of "effective remedy." Mr. Dyer argued that because his character had been slandered by the charge of misconduct and because this Board needed to clarify the limits of its power and authority to remove elected board members from office, it was necessary to decide the legal and factual issues presented in the case. Thus, for Mr. Dyer, the remedy he seeks, and one which this Board could provide, is dismissal of all the charges against him, either on purely legal grounds or on the grounds that no misconduct occurred.

For the local board, if we were to find that misconduct occurred in this case, the only remedy we have statutory authority to provide is removal from office. But, as we have explained, Mr. Dyer is no longer in office as a result of the November election. The local board argued, however, that if the lack of an effective remedy were grounds to declare the case moot, this Board should apply the "rules of future conduct exception" to the mootness doctrine.

The rules of future conduct exception to the mootness doctrine is applicable when the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest. . . If the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between the government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight. *Edy Sanchez v. Potomac Abatement, Inc.,* 198 Md. App. 436, 443 (2011) (hereinafter Edy Sanchez) *aff'd, Potomac Abatement, Inc. v. Edy Sanchez,* 44 Md. 701 (2012); *see also Floyd v. Board of Supervisors of Elections,* 206 Md. 36, 43 (1954).

Over the years, the Court of Appeals has applied the rules of future conduct reasoning in cases "where it appears that there are important issues of public interest raised which merit an expression of our views for guidance of courts and litigants in the future." *See, e.g., Potomac Abatement, Inc. v. Edy Sanchez,* 424 Md. at 710(right to worker's compensation); *Office of the Public Defender v. State,* 413 Md. 411, 424 (2010)(power to appoint public defender); *In re: Joseph N.,* 407 Md. 278, 304 (2009) (CINA periodic six month reviews); *Arrington v. Department of Human Resources,* 402 Md. 79, 92 (2007)(contempt for failure to provide child support); *Hammen v. Baltimore County Police Dept.,* 373 Md. 440, 452 (2003)(access to surveillance tapes); *Board of Education of Montgomery County v. Montgomery County,* 237 Md. 191,195 (1964)(return of surplus funds).

Like the cases cited above, this case presents a matter of important public concern - - defining the contours of misconduct in office for local boards. This is a case of first impression for this Board giving the matter heightened importance in the education community. This is a case involving the relationship between the government and its citizens and a duty of government. We note that the proceedings involving misconduct in office can be lengthy ones, as this case demonstrates, and thus not may reach conclusion before the next election. We conclude that, if necessary, it would be proper to invoke the rules of future conduct reasoning.

Thus, we turn to the merits of this case.

B. Did Misconduct Occur in this Case?

In coming to a decision on whether misconduct occurred in this case, the ALJ considered three fundamental questions:

(1) Did the Board member violate a rule or duty of his office about which he knew or should have known?
(2) Was the conduct willful?
(3) As a result, is the Respondent unfit to be a Board member?

We agree that those three questions form an appropriate construct for an inquiry about misconduct in office. The ALJ reviewed the facts in light of the three questions. We summarize

the ALJ's findings here and incorporate them by reference herein. *See* ALJ Proposed Decision, December 5, 2012, *passim* and at 82-90.

Violation of Rules and Duties

The ALJ concluded that Mr. Dyer violated the confidentiality of Board documents and discussions. He acted improperly in violation of Board Policy 2000 and the Board Handbook when he attached an attorney-client privileged memo, "the Blom Memo," to one of his appeals to the State Board in defiance of Board instruction and Board authority after the County Board had invoked the attorney-client privilege for the memo, clearly instructed the Respondent to maintain confidentiality of the memo, and advised him that as an individual Board member he did not have the authority to waive confidentiality. The Board's position and instructions on this issue were clearly communicated to Mr. Dyer by email from the Board Chairman on April 18, 2009. He directly defied the Board's instructions and its unambiguous position on this matter. Mr. Dyer undermined the collective authority of the Board, acted in opposition to the Board's official position, and failed to uphold the Board's decision.

The ALJ found that Mr. Dyer also violated Policy 2000 on School Board Governance, at section III.D, when he disclosed the Blom memo because he acted unilaterally and without authorization from the full County Board and contrary to the collective decision of the Board.

The ALJ also concluded that the Mr. Dyer violated the confidentiality provisions of the Ethics Regulations and Policies after receiving unambiguous notice from the Ethics Panel regarding his obligation to maintain the confidentiality of the Ethics proceedings. His mass disclosure of the ethics materials was not justified by an anonymous and partially inaccurate leak of limited information or by erroneous advice from his private attorney. Mr. Dyer also disclosed other confidential information regarding the ethics investigation and invited Board members to attend the closed hearing even before the leak occurred.

The Ethics Regulations and Policies that he violated applied to all Board members and school system staff. He was provided prior notification in writing by counsel for the Ethics Panel of the confidentiality requirements of the ethics proceedings. Mr. Dyer himself also participated in the adoption of the amended Ethics Regulations and Policies at a County Board meeting on November 4, 2010. (Resp. Ex. 1, at 0877-0878).

The ALJ also concluded that Mr. Dyer violated the FERPA confidentiality requirement when he disclosed personally identifiable student information and education records to a private attorney without obtaining authorization from the County Board to hire a private attorney to assist him in preparing dissenting opinions in two confidential student appeal cases heard by the County Board. Mr. Dyer posted the decision in a student appeal case on a public website without authorization from the Board. He also failed to wait for an official redacted version from the school system, and failed to wait for the General Counsel to obtain advice from the United States Department of Education regarding the propriety of releasing the information. The County Board and school system are responsible for compliance with the FERPA requirements to avoid a violation federal law and the possible loss of federal funds. Mr. Dyer's actions in

disclosing education records and posting a student appeal decision without authorization from the County Board also violated provision of Board Policy 2000. He acted unilaterally without obtaining authorization from the full County Board. He also violated the Board Handbook by undermining the collective authority of the Board and failing to uphold the Board's decision.

The ALJ also concluded that Mr. Dyer acted without authorization from the County Board in violation of Policy 2000 at section III.D when he unilaterally directed school system staff in writing to cease and desist from the destruction of public records in defiance of the Board's position regarding the records retention issue. He also violated the Board Handbook at Chapter 2, section C, because the Mr. Dyer impugned the collective decision of the Board, undermined the Board's collective authority, acted in opposition to the Board's official position, and failed to uphold the Board's decision. We note that Mr. Dyer believed that the County Board was violating the record's retention law.

The ALJ also concluded that Mr. Dyer acted without Board authority in violation of Policy 2000 and the Board Handbook when he independently directed General Counsel Blom to notify outside counsel in writing that Blom had exceeded his authority to hire outside counsel and also directed Blom to cease the destruction of all evidence since he became employed by the HCPSS. Mr. Dyer acted again on his own without the authority of the full Board.

We agree with the ALJ that Mr. Dyer did not violate Board Policy or the Handbook when he made offensive or intimidating comments to school system staff, Board staff, or Board members, or when he sent a minority report to the County Council. While such comments were inappropriate or offensive, they did not establish a violation of rules that rose to the level of misconduct in office. Nor did the Mr. Dyer violate Board Policy or the Handbook when he expressed his minority viewpoint on a downtown development issue. Although Mr. Dyer used Board letterhead to convey his views to county council, he was not aware that the use of Board letterhead was limited to the Chair and Vice Chair. The ALJ also concluded that filing complaints, appeals, or lawsuits against the County Board, while costly and contentious, did not violate a rule or policy and did not demonstrate misconduct in office because he was pursuing legal issues or seeking interpretations of law.

Willful

Mr. Dyer had knowledge of the requirements for board members set forth in County Board Handbook as the Board Chairman used the Handbook as an orientation tool for all new Board members, including Mr. Dyer, after he became a member of the Board in December 2008. Mr. Dyer served on the County Board when the Board amended its Handbook in November 2010. In June 2009, August 2010, and October 2010 various Board Charimen also wrote letters counseling Mr. Dyer on Board rules. They sent him numerous emails regarding his failure to comply with Board rules and instructions, failure to follow positions adopted by the Board. They advised him of the prohibition against acting unilaterally in contravention of collective Board decisions. Mr. Dyer was also aware of and counseled on the Board Policy on Governance, FERPA confidentiality requirements, and other rules and policies.

A local board member's misconduct is willful when he repeatedly violates rules of the local board of education and continues to do so after being counseled. Willfulness does not require the showing of an evil motive. In *Kim v. State Bd. of Physicians,* 423 Md. 523 (2011), the Court of Appeals determined that the term "willful," as it is applied in a physician's administrative disciplinary proceeding, "requires proof that the conduct at issue was done intentionally, not that it was committed with the intent to deceive or with malice." *Id.* at 546. The Court also noted that willful is defined as "intentional, or knowing, or voluntary, as distinguished from accidental." *Id.* at 545.

In the instant matter, the ALJ concluded that the Mr. Dyer's action were intentional. He repeatedly violated Board policies, rules in the Board Handbook, Ethics Regulations and Policies, or clear instructions from the Board. He ignored positions adopted by the Board, disregarded instructions from the Board Chairman or the HCPSS General Counsel, and acted individually without authorization from the full Board. He also failed to comply with confidentiality protections under the federal FERPA requirements and ignored a warning from the General Counsel that certain education records not be released until guidance could be obtained from the United States Department of Education. Mr. Dyer also continued to act without authorization and contrary to Board positions or instruction even after receiving several letters of counseling from Board Chairmen and other instructions or advice by email.

Fitness to be a Board Member

The final inquiry is whether Mr. Dyer's misconduct demonstrated that he is unfit to be a member of the County Board. A board member is unfit to be a member of the local board when his conduct involves substantial violations that are harmful to the local board's functioning.

In the instant case, the ALJ concluded that Mr. Dyer's misconduct was substantial and harmful to the operations of the County Board and the school system. The Mr. Dyer's blatant disregard of the confidentiality requirements of the ethics process demonstrated that Mr. Dyer failed to accept that the Ethics Regulations and Policies applied equally to him as to everyone else. He demonstrated disdain for the ethics process, the Ethics Panel, and its counsel, put his own interests above the confidentiality of other participants, jeopardized the Board's neutral roles in handling ethics matters, and undermined the willingness of individuals to use the ethics process to resolve future ethics complaints by obliterating the confidentiality provisions. The Ethics Regulations, which were adopted by the County Board in November 2010 and approved by the State Ethics Commission, provide that violations of those Regulations "shall constitute grounds for discipline or personnel action or removal from office where provided by law…." (Bd. Ex. 40, Regulations, p.10).

Mr. Dyer repeatedly undermined the collective nature of Board operations and decision-making, ignored positions adopted by the Board, and acted unilaterally without authority from the full Board. He refused to accept Board positions when he disagreed with them, whether it involved the alleged confidentiality of attorney-client communications, the confidentiality of education records, or the confidentiality of ethics complaints and proceedings. He acted without authority from the Board and in direct contravention of Board positions in directing Board

members and school system staff to cease the destruction of record, and in directing the General Counsel to state that he exceeded his authority in hiring outside counsel.

Although Mr. Dyer desired that all Board operations be conducted with transparency, he ignored those provisions of the Open Meetings Act that clearly authorized closed sessions for certain functions of a public body. Md. Code Ann., State Gov't §10-508 (2009). He also ignored other confidentiality requirements in State and federal law. Other Board members lost trust in him and their ability to work with him due to his failure to observe confidentiality requirements. (TR 747-748). Other Board members feared that internal emails would be posted on-line. (TR 1512).

Mr. Dyer's unilateral actions contrary to positions adopted by the Board interfered with the Board's efficient operations, and the Board's ability to conduct business and serve the best interests of the students of HCPSS. Although the Respondent has the right to file complaints, State Board appeals, and lawsuits in court, he did not have the right to act contrary to positions adopted by the Board, unless and until he received rulings that reversed or altered Board positions. The Respondent's repeated rogue actions made it difficult for the Board to conduct its operations in a fair and orderly manner.

We agree with the ALJ that a public official must be held to a high standard of professionalism and must carry out his or her duties with integrity and a high degree of trust. We add to that the responsibility to work collaboratively on the Board and to avoid unilateral actions once the Board has taken a position. Mr. Dyer's failure to respect rules and laws and his refusal to comply with positions adopted by the Board with which he disagreed undermined the ability of the County Board members to work with and rely on him.

The ALJ concluded that Mr. Dyer's refusal to comply with Board rules and policies, his refusal to comply with positions adopted by the Board, and his insistence on acting without authority of the Board, including the disregard of confidentiality requirements, have rendered him unfit to serve as a member of the County Board.

Thus, the ALJ concluded that Mr. Dyer's repeated violations of rules and duties of his position constituted misconduct in office.

C. Merits of Exceptions

Mr. Dyer filed 49 specific exceptions to the ALJ's Proposed Decision covering a wide range of topics. We have grouped the exceptions into 12 categories. We address each one.

(1) Lack of Notice of the Charges (Exceptions 1, 11, 16, 19, 34-45, and 48)

The most discussed topic in the exceptions is the assertion that the charging document did not provide Mr. Dyer with sufficient notice about what he had actually done wrong and, thus, neither he nor his lawyer could prepare an adequate defense. He says that the charges are "vague and conclusory" and contain no "allegations of fact." (Excep. 1, 35, 37, 41-45, and 48). He

claims that the lack of notice deprived him of his "right to counsel" because his counsel could not "rationally represent [him] without notice of the charges against him." (Excep. 19). Mr. Dyer asserts that none of the facts supporting the charges were revealed to him until the local board members testified at the Office of Administrative Hearings (OAH). (Excep. 36). He claims that because the discovery procedures applicable in Circuit Court were not available to him at OAH, he did not receive a "fair and impartial hearing." (Excep. 38-39).

The ALJ addressed the notice issue several times. First, in his October 26, 2011 Proposed Decision denying Mr. Dyer's Motion to Dismiss, the ALJ explained that the Administrative Procedures Act requires that the notice "state concisely and simply the facts asserted; or if the facts cannot be stated in detail when notice is given, the issues that are involved." State Gov't Art. §10-207. The notice that the State Board issued stated that the local board's Resolution and letter of June 24, 2011 constituted the charges. The local board alleged that Mr. Dyer committed misconduct in office because he:

(1) repeatedly breached confidentiality provisions;
(2) acted unilaterally on board related matters in contravention of decisions made by the local board;
(3) undermined the functioning of the board;
(4) used litigation as tactic against the board;
(5) threatened other board members and staff.

Illustrating misconduct in office were the following facts:

(1) releasing confidential information to a third party about a student appeal;
(2) releasing confidential attorney client privileged advice;
(3) surreptiously taping public and private discussions at a Board retreat, and posting them on the internet;
(4) using altered board stationary to order staff to take actions in contravention of board decisions and to communicate to County Council;
(5) using his position as a board member to request sealed confidential board documents involving a case in which Mr. Dyer had represented an employee in a lawsuit against the board; and
(6) threatening to bring charges, terminate, or publically embarrass employees who opposed his views.

The ALJ found that the charging document contained sufficient notice to move forward, particularly because Mr. Dyer would have an opportunity to obtain further detail, through discovery, "well in advance of the contested case hearing" scheduled six months later. October 26, 2011 Proposed Decision at 28-29.

The ALJ returned to the notice issue in his Proposed Decision of December 5, 2012. He notes:

> Repeatedly throughout this proceeding the Respondent has alleged that the County Board failed to provide him with proper notice of the charges against him. I have denied the Respondent's notice argument on multiple occasions, both in writing by decision October 26, 2011, and orally from the bench. While the charges did not allege date, time, and place for the each of the allegations of misconduct, the charges identified broad categories of misconduct and set forth examples of the Respondent's alleged improper conduct. (Jt. Ex. 2). Additionally, after requesting and being provided with the opportunity for discovery, the Respondent failed to pursue any discovery during the long pre-hearing period that would have provided him with the County Board's relevant documents related to this proceeding at least five months before the commencement of the contested case hearing in May 2012. In any event, the County Board provided the Respondent with all of its designated exhibits nearly two months before the hearing began in accordance with the Supplemental Prehearing Order issued March 1, 2012. I have concluded previously and hereby reaffirm that the Respondent was afforded adequate notice in an administrative proceeding. *Brown . Handgun Permit Review Bd.,* 188 Md. App. 455 (2009), *cert. denied,* 412 Md. 495 (2010).

December 5, 2012 Proposed Decision at 36-37, fn. 7.

We agree with the ALJ that the initial notice was legally sufficient and that subsequent opportunities for discovery were available to Mr. Dyer to ascertain further the facts supporting the misconduct charge. Mr. Dyer apparently chose not to use the discovery process. He continued to stand at the starting line of this case crying "foul." He maintains that same position today. That position, in our view, lacks merit, particularly because he received all relevant documents two months before the hearing began. (*See* Board's Exhibits). Those documents, provided to Mr. Dyer on March 21, 2012, contain written communications that document discussions with Mr. Dyer about his actions going back to 2009. For example, releasing a confidential attorney client memo (Ex. 2, June 2, 2009); releasing confidential information about collective bargaining and student appeals (Ex. 3, August 2, 2010); continued failure to honor board responsibilities; ordering staff to take specific actions; publishing redacted student appeal (Ex. 4, October 19, 2010); submitting an expense report that sought payment of a $135 court filing fee for a lawsuit Mr. Dyer initiated against the board (Ex. 8, January 11, 2011).

Mr. Dyer objects to the fact that discovery under administrative rules is not as robust as discovery under court rules. He maintains throughout his exceptions that the discovery limitations deprived him of a fair hearing. We know of no case that holds that the limited discovery provisions in administrative hearings result in unfair hearings.

(2) The Local Board's Procedures Were Wrong, Legally Flawed, Imbued With Political Rancor, Lacked Proof of Criminal Action (Exceptions 2, 3, 9, 15, 17, 28, 31, 32, 33)

In most of these exceptions and in others, Mr. Dyer asserts that there were no facts presented at the hearing to support the misconduct in office charges. We have reviewed the record and the ALJ's Proposed Decision of December 5, 2012. From page 4 to page 34, the ALJ sets forth a Statement of Facts concerning Mr. Dyer's conduct. The ALJ thereafter discusses the law concerning misconduct in office. *Id.* at 37-42. He then analyzes which actions did or did not constitute misconduct in office. *Id.* at 42-78. That analysis is thoughtful, even-handed, and we conclude, legally correct given the law governing misconduct in office.

We focus on that law here in light of Mr. Dyer's repeated arguments that misconduct in office must be based on criminal conduct. As the ALJ explained:

> Misconduct in office under the Education Article does not require a showing of criminal misconduct. In *Resetar,* the Court of Appeals found that misconduct in office included malfeasance, which is doing an act that is wrongful in itself; and misfeasance, which involves doing an otherwise lawful act in a wrongful manner. The Court also found misconduct in office to include unprofessional acts, even though they are not inherently wrongful, as well as transgression of established rules, forbidden acts, dereliction from duty, and improper behavior, among other definitions. *Resetar,* 284 Md. at 560-561. In *Judy,* the Superintendent found that "misconduct in office can be found to exist even in the absence of evil motives, moral turpitude, corrupt or criminal conduct or intentional wrongdoing." *Judy,* at p. 6, citing *Bunte v. Mayor of Boston,* 278 N.E.2d 709, 711 (Mass. 1972). The Superintendent also determined in *Judy* that public employees must be "held to a higher standard of stewardship than merely that of refraining from criminal actions while in office." *Judy,* at p. 6, citing *Bunte,* 278 N.E.2d at 712.

Id. at 79.

In supporting that conclusion, we point out that the Attorney General has opined that "serious misconduct that falls short of the commission of a crime but that relates to an official's duties may be grounds for removal under a civil removal statue." *See* 82 Op. Atty. Gen 117, 120 (1997). Moreover, the statute giving the State Board removal authority provides four specific grounds for removal - - immorality, misconduct in office, incompetence or willful neglect of duty. Md. Educ. Code Ann. §3-701(g)(1). None of those grounds are defined in criminal law terms. While "misconduct in office" may include criminal conduct, the ordinary definition of the term more broadly includes "[a] transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, . . . improper or wrong behavior . . ." *Resetar v. State*

Board of Educ., 284 Md. 537, 561 (1979). Mr. Dyer's conduct falls well within that broad definition.

Moreover, as the Supreme Court of Massachusetts has explained, "misconduct in office can be found to exist in the absence of evil motives, moral turpitude, corrupt, or criminal conduct and intentional wrongdoing . . . . Public employees are, and must continue to be, held to a higher standard of stewardship than merely refraining from criminal actions while in office. The saying, 'Public office is a public trust' is more than mere rhetoric." *Bunte v. Mayor of Boston,* 278, N.E. 2d 709, 711-712 (Mass. 1972).

In our view, the exceptions filed on the grounds cited above are without merit.

(3) Misplaced Reliance on *In the Matter of Maryann Judy* (Exception 18)

Mr. Dyer excepts to the ALJ's reliance on the one and only school board member removal case, *In the Matter of Maryann Judy,* Sup. Case No. 1-07 (July 30, 2007). In that case, the State Superintendent of Schools, pursuant to her statutory authority, recommended to the Governor that Maryann Judy, an *appointed* board member, be removed from the Talbot County Board of Education for misconduct in office. The Governor followed that recommendation. In this exception, Mr. Dyer argues that the *Judy* decision supports his contention that a finding of misconduct in office requires a finding that a crime has been committed. There is, however, no finding in *Judy* that she committed any crime.

Mr. Dyer also argues in this exception that there is a "world of difference" between appointed officials and elected officials. We do not agree. Each perform the same functions and should be held to the same standard of conduct.

(4) Denial of Motion to Admit Constitutional Amendment (Exception 4)

Related to the criminal conduct argument is the exception "to OAH's failure to grant Respondent's November 19, 2012 Motion for Administrative Notice of the Amendment to Maryland Constitution Article XV on November 13, 2012." Mr. Dyer asserts that Amendment XV "directly links the removal to a finding of guilt . . . for a crime related to the elected official's public duties . . . ." (Excep. 4). The ALJ denied the Motion because it was filed after the record closed in this case. (December 5, 2012 Proposed Decision at 3, fn. 4).

Even if the Motion had been granted, it is our view that that would not change the outcome here. The amendment at issue was Question 3 on the ballot in November, 2012. It was adopted. The State Board of Elections certified the results of the vote and explained the reason for the amendment. (attached).

Question 3
Constitutional Amendment
(Ch. 147 of the 2012 Legislative Session)
Suspension and Removal of Elected Officials

(Amending Article XV, Section 2 of the Maryland Constitution)

> Changes the point at which an elected official charged with certain crimes is automatically suspended or removed from office. Under existing law, an elected official who is convicted or pleads no contest is suspended and is removed only when the conviction becomes final. Under the amended law, an elected office is suspended when found guilty and is removed when the conviction becomes final or when the elected official pleads guilty or no contest.

It is clear from the Amendment and from the Board of Election's explanation that the intent was not to limit removal from office to criminal misconduct. The intent was to change the time for automatic removal. Thus, this exception is without merit.

(5) Exception to Denial of All Motions (Exception 14)

In this exception, Mr. Dyer generally excepts to the denial of all his motions. He presents no grounds or reasons. We are not required to divine those reasons.

(6) Exception to The Jurisdiction and Authority of All Entities to Bring the Removal Action (Exceptions 5-8; 12-13)

Each of these exceptions questions the jurisdiction or authority of OAH, the State Board, or the local board to interfere with the political operation of the local board, to spend money on this matter, or render any judgment on local board ethics rules or procedures. Each exception is stated in conclusory terms. None contains an argument, citation, or reasoning supporting the exception. As such, the exceptions are without merit.

(7) Separation of Powers (Exception 47)

Exception 47 contains a brief argument asserting that it is "unconstitutional for the General Assembly to grant power to the Executive Branch to remove officers of the legislative branch…." It is essentially an argument that Ed. Art. §3-701 violates the separation of powers clause. The ALJ concluded that §3-701 did not violate that clause of the Maryland Constitution. (October 26, 2011, Proposed Decision 8-13).

Article 8 of the Maryland Declaration of Rights established the separation of powers doctrine. It states "that the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." In Mr. Dyer's view, it violates the separation of power doctrine for the General Assembly to delegate to the State Board the power to remove him from office. It has long been held, however, that the legislature can provide for the method of obtaining an office created by it, notwithstanding the separation of

powers provision of the Declaration of Rights. *See, e.g., Comm'n on Medical Discipline v. Stillman,* 291 Md. 390, 410-411 (1981) (citing *Anderson v. Baker,* 23 Md. 531 (1865)). Likewise, it has long been held that the legislature has "the complete power to remove officers from office, whether they be elective or not, or to authorize their removal, subject only to such limitations as the Constitution of the state may impose as to the particular office." 99 A.L.R. 321, 336 (1935); *see also* 63C Am. Jur. 2d. §§168-169 (2009).

Mr. Dyer asserts that the separation of powers doctrine is a constitutional limit on the State Board's statutory authority to remove him. He incorrectly argues that he is a member of the Legislative Branch, and thus not subject to removal by the Executive Branch. The Legislative Branch of government, as defined in the Maryland Constitution, consists of "two distinct branches; a Senate, and a House of Delegates and shall be styled the General Assembly of Maryland." Md. Const. Article III, §1. That constitutional provision obviously does not include local board members. Of course, as a board member, Mr. Dyer would have engaged in legislative functions. For example, he would have voted on regulations and policies. The State Board likewise votes on regulations and policies. That does not mean, however, that a State or local board member thereby becomes a member of the Legislative Branch.

The State Board is a principal department in State government and a member of the Executive Branch. Md. Educ. Code Ann §2-101; Md. State Gov't Code Ann. §8-201. Local boards are, for most intents and purposes, considered State agencies. As the Court of Appeals has explained:

> County school boards are considered generally to be State agencies because (1) the public school system in Maryland is a comprehensive State-wide system created by the General Assembly in conformance with the mandate in Article VIII, §1 of the Maryland Constitution to establish throughout the State a thorough and efficient system of free and public schools, (2) the county boards were created by the General Assembly as an integral part of that State system, (3) their mission is therefore to carry out a State, not a county, function, and (4) they are subject to extensive supervision by the State Board of Education in virtually every aspect of their operations that affects educational policy or the administration of the public schools in the county.

Chesapeake Charter v. Board of Educ. of Anne Arundel County, 358 Md.,129, 136-137 (2000). *See* also *Beka Industries, Inc. v. Worcester County Bd. of Educ.,* 419 Md. 194, 210-219 (2011).

We agree with the ALJ's conclusion that the General Assembly did not "violate the separation of powers doctrine of the Maryland Constitution because both the State and County Boards are State administrative agencies. This is true regardless of whether the board members are elected or appointed." October 26, 2011 Proposed Decision at 10.

(8) Confidentiality Issues (Exceptions 20, 24, 25, 27)

In Exception 20, Mr. Dyer asserts that neither the *Local Board Handbook* nor *Local Board Policy 2000* can be the legal basis for which documents can be made confidential. We agree that a handbook or policy cannot cloak a document in confidentiality if the document itself is not legally considered confidential. We note, however, that the document at issue is the "Blom Memo, " an advice memo from counsel to the local board and as such is covered by attorney client privilege and is considered confidential.

Mr. Dyer further asserts that neither the *Handbook* nor *Policy 2000* can "force" him to keep documents confidential. Again, we agree that no one can force Mr. Dyer to keep documents confidential. But when he repeatedly disclosed confidential documents, a consequence flowed from those actions – to wit: being charged with misconduct in office. Thus, in the December 5, 2012 Proposed Decision the ALJ found that repeated disclosure of confidential information was one of the grounds to support the misconduct in office charge.

In Exceptions 24 and 27, Mr. Dyer denies disclosing confidential information, but that denial is not supported by the facts of this case. In Exception 24, Mr. Dyer also challenged the local board's authority to require confidential hearings by the ethics panel. Mr. Dyer provides no legal explanation or basis for that challenge. We conclude that these exceptions are without merit.

(9) Redactions to Decision of the Local Board (Exceptions 21, 22, 23, 24)

Each of these exceptions addresses the redactions that Mr. Dyer made to a walking-route appeal decision of the local board when he posted the majority decision and his dissent on the Howard County Public Education List Website. The ALJ concluded that the redactions were flawed. He stated:

> The County Board also relied upon the Respondent's posting of the majority and dissenting opinions in the walking route appeal on the Howard County Public Education website without authorization from the County Board as further evidence of his misconduct. Sometime in 2010 the Respondent requested under the MPIA that the County Board provide him with an officially redacted copy of the walking route student appeal decision so it could be released. However, before the County Board responded to the request, had an opportunity to properly redact the opinions under FERPA and the MPIA, the Respondent self-redacted the opinions and unilaterally posted them on the public website on or about August 30, 2010 without knowledge or authorization from the County Board. (Resp. Ex. 21). The Respondent's personal redactions were flawed and he did not obtain redactions from the Board or school system that was responsible to ensure compliance with the FERPA requirements.

Id. at 67.

We have reviewed the redactions. (Resp. Ex. #21). Whether or not the redactions were "flawed" is not the central issue here. Mr. Dyer refused to wait for counsel to the local board to do the redactions to assure compliance with FERPA. He acted in his own independent way. Moreover, as the ALJ found, Mr. Dyer shared an un-redacted copy of the board's decision and his dissent with an outside attorney. (December 5, 2012 Proposed Decision at 65). That was likely a FERPA violation.

(10) Restrictions on Free Speech (Exceptions 26 and 29)

Mr. Dyer excepts to any part of the Proposed Decision(s) that hold that the local board can impose "restrictions on the individual free speech rights of its members" or holds that the local board "did not violate Respondent's rights to freedom of speech."

The ALJ's discussion of the First Amendment issue is well-reasoned. He concluded that "the County Board did not prevent the Respondent from expressing his disagreement with Board positions. However, he was not permitted to take unilateral actions that contravened or undermined the collective position adopted by the Board in violation of Board policy." *Id.* at 80. We emphasize that full and robust debate of policies and principals is a hallmark of a functioning board. Each board member who contributes to the debate and the decision-making is a valued board member.

The ALJ went on to explain why the Board's action to remove Mr. Dyer did not violate Mr. Dyer's First Amendment rights:

. . .

> In *Garcetti v.Ceballos,* 547 U.S. 410 (2006) the [Supreme] Court upheld disciplinary action against a public school employee for written expressions he made pursuant to his official job duties and denied the employee's claim that he had been retaliated against in violation of his free speech rights. The Court found that when public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for purposes of the First Amendment, and thus the First Amendment does not prohibit managerial discipline of such employees for speech made in their professional capacity. The Court recognized that it must afford government employers sufficient discretion to manage its operations. Although the Respondent is a public official and not a public employee, *Garcetti* is analogous to the instant matter. The County Board has the authority to manage its operations and to remove the Respondent from his position for the violations of law and of Board rules and policies where it substantially interferes with the County Board's operations. Accordingly, the

> Respondent's free speech argument must fail under the circumstances of this case.

Id. at 81.

We agree with the ALJ.

(11) ALJ's Gratuitous Comments (Exception 30)

Mr. Dyer excepts to the ALJ's "gratuitous comment that: 'the added expense that resulted from [Respondent's] litigation does not establish misconduct in office but it does highlight the hypocrisy of the Respondent's complaints about Board expenses while he was himself adding substantial expenses to Board operations through his litigation.'" He asserts that the comment is "an ad hominem argument that is a logical fallacy and an open vivid expression of the hearing officer's lack of impartiality." We do not agree that that statement shows that the ALJ was biased against Mr. Dyer. Indeed, the decision, read as a whole, is well-reasoned and, in our view, a balanced appraisal of the evidence.

In this same exception, Mr. Dyer discusses facts about personnel changes at the Howard County Public School System. Those facts are outside the record, and we decline to consider them.

(12) Use of Public Funds to Prosecute An Ephemeral Case (Exception 46)

Mr. Dyer takes exception to the use of public funds to prosecute the removal proceedings which he asserts rests on "an ephemeral foundation." While he may object to the use of public funds, use of public funds to pay litigation costs for this purpose is appropriate.

We strongly disagree that this case rested on ephemeral grounds. We agree with the ALJ that the facts support that:

- The Respondent repeatedly undermined the collective nature of Board operations and decision-making, ignored positions adopted by the Board, acted unilaterally without authority from the full Board, and demonstrated a lack of respect for student privacy issues and the confidentiality of Board proceedings and materials;
- The Respondent refused to accept Board positions when he disagreed with them, whether it involved the alleged confidentiality of attorney-client communications, the confidentiality of education records, or the confidentiality of ethics complaints and proceedings;
- He acted without authority from the Board and in direct contravention of Board positions in directing Board members and school system staff to cease the destruction of records, and in directing the General Counsel to state the he exceeded his authority in hiring outside counsel;
- The Respondent's repeated efforts to act unilaterally without authority from the full Board, and contrary to positions adopted by the Board, interfered with the

Board's efficient operations, and the Board's ability to conduct business and serve the best interests of the students of HCPSS;

- The Respondent's repeated rogue actions made it difficult for the Board to conduct its operations in a fair and orderly manner.

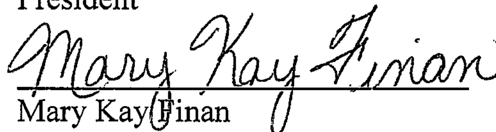
Id. at 87-88.

In our view, the ALJ correctly assessed the evidence and concluded that Mr. Dyer's conduct constituted misconduct in office.

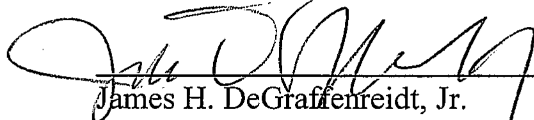
CONCLUSION

For all these reasons, we deny the Exceptions and issue this final decision adopting as final the Proposed Decisions of the ALJ, filed on October 26, 2011, March 30, 2012, and December 5, 2012.

Charlene M. Dukes
President



Mary Kay Finan
Vice President



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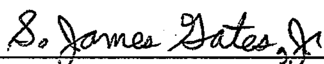
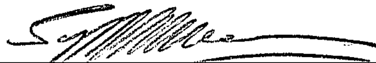


S. James Gates, Jr.

Luisa Montero-Diaz



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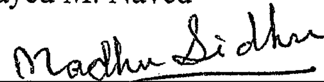

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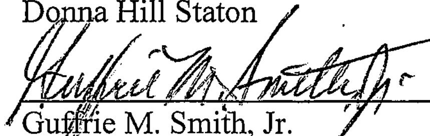

Guffrie M. Smith, Jr.

Linda Eberhart

May 21, 2013

ALJ's Decision
December 5, 2012

Dec 5, 2012

BOARD OF EDUCATION OF	*	BEFORE DOUGLAS E. KOTEEN,
HOWARD COUNTY	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
ALLEN R. DYER,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No. MSDE-BE-17-11-28065

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

PROPOSED DECISION

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

STATEMENT OF THE CASE

On June 9, 2011, the Board of Education of Howard County (County Board or Board) passed a resolution directing the County Board's counsel and Chairman to request that the Maryland State Board of Education (State Board) remove the Respondent from his position as a member of the County Board on the ground of misconduct in office (Resolution). By letter to the State Board dated June 24, 2011, the Chairman requested the Respondent's removal from office by the State Board for misconduct in office under the provisions of section 3-701(g) of the Education Article (Request). Md. Code Ann., Educ. § 3-701(g) (2008). By letter dated July 6, 2011, the State Board notified the Respondent of the Resolution and Request (collectively, Charges) and advised him of his right to a hearing under section 3-701(g)(2). On July 11, 2011, the Respondent requested a hearing on the Charges. The State Board delegated its hearing authority in this matter to the Office of Administrative Hearings (OAH), and directed that an Administrative Law Judge issue a proposed decision.

Pursuant to the Code of Maryland Regulations (COMAR) 28.02.01.17E, I conducted a pre-hearing conference on September 8, 2011, at the OAH in Hunt Valley, Maryland. At that conference, the County Board was represented by Judith S. Bresler, Esquire; the Respondent was present and represented by Harold H. Burns, Jr., Esquire.

On August 26, 2011, the Respondent filed a Motion to Dismiss this matter. On September 12, 2011, the County Board filed a Memorandum in Reply, and on September 19, 2011, the Respondent responded to the County Board's opposition. On September 27, 2011, I held a motions hearing at the OAH in Hunt Valley, Maryland to consider the Motion to Dismiss. Mr. Burns appeared on behalf of the Respondent and Ms. Bresler appeared on behalf of the County Board. Board member Cynthia Vaillancourt appeared and represented herself regarding her Motion to Intervene.[1] On October 26, 2011, I issued a proposed decision denying the Respondent's Motion to Dismiss.

On January 9, 2012, the Respondent filed a Motion to Dismiss and Stay Proceedings and on January 25, 2012, the County Board filed an Opposition. On January 31, 2012, the Respondent filed a Motion for Summary Dismissal for Failure to State a Claim, and on February 15, 2012, the County Board filed its Opposition. The parties presented their arguments on these and other motions at a motions hearing on February 29, 2012.[2] The Respondent was present and

[1] Ms. Vaillancourt also attended the pre-hearing conference. Ms. Vaillancourt filed a Motion to Intervene in this matter on August 23, 2011, and represented herself. On August 29, 2011, Ms. Bresler filed an Opposition to Motion to Intervene. On September 8, 2011, Mr. Burns filed a Reply to Motion to Intervene and Opposition and a Motion to Stay Consideration Thereof. On September 8, 2011, Ms. Vaillancourt filed an Answer to Opposition to Motion to Intervene. At the pre-hearing conference, the parties argued their respective positions on the Motion. I granted the Respondent's request to defer my ruling on the Motion until I issued a decision on the Motion to Dismiss, to secure procedural simplicity and administrative fairness. COMAR 28.02.01.11B(11). On October 26, 2011, I issued a Proposed Order denying the Motion to Intervene.

[2] At the February 29, 2012 motions hearing the parties also presented arguments regarding three additional motions raised by the Respondent. During the course of that hearing, I denied the Respondent's written Motion to Dismiss for Failure to Satisfy the Statute of Limitations and the Respondent's written Motion to Invoke Clear and Convincing Evidence for the reasons stated on the record. On February 29, 2012, the Respondent made an oral Motion to Renew Motion to Dismiss on the basis of notice, which I denied for the reasons stated on the record.

represented himself. Ms. Bresler represented the County Board. On March 27, 2012, I issued a proposed decision denying the Motion for Summary Dismissal, and on March 30, 2012, I issued a proposed decision denying the Motion to Dismiss and Stay Proceedings.

I held a hearing in this matter at the OAH in Hunt Valley, Maryland, on May 7, 8, 9, 14, and 15; June 28 and 29; and July 3, 6, and 11, 2012.[3] Ms. Bresler represented the County Board at the hearing and the Respondent represented himself. The County Board filed its Post-Hearing Memorandum on August 9, 2012; the Respondent filed his Post-Hearing Memorandum on August 30, 2012; and the County Board filed a Reply on September 6, 2012, at which time, the record in this matter closed.[4]

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 28.02.01.

ISSUE

The issue is whether the County Board has established that the Respondent is responsible for misconduct in office and whether this warrants his removal as a member of the County Board pursuant to section 3-701(g)(1)(ii) of the Education Article. Md. Code Ann., Educ. § 3-701(g)(1)(ii) (2008).

SUMMARY OF THE EVIDENCE

Evidence

A list of exhibits admitted into evidence is attached to this decision.

[3] On May 7, 2012, I granted the County Board's written Motion in Limine for the reasons stated on the record, thereby denying the Respondent's request to call Judith Bresler, counsel for the County Board, as a witness in this proceeding. On May 7, 2012, I also granted, in part, and denied, in part, the Respondent's written Motion for Administrative Notice and Bates Numbering for the reasons stated on the record.
[4] The Respondent filed a Motion for Administrative Notice of the Amendment to Maryland Constitution Article XV on November 13, 2012. The Respondent filed a letter on November 19, 2012. I did not consider these filings as the record in this matter closed on September 6, 2012.

Testimony

The following witnesses testified on behalf of the County Board: Frank J. Aquino, County Board Vice-Chairman; Ellen F. Giles, County Board member; Joel Gallihue, Howard County Public School System (HCPSS) Manager of School Planning; Janet Siddiqui, M.D., County Board member; Douglass Pindell, HCPSS Director of Purchasing; Sandra H. French, County Board Chairman; and Mark Blom, HCPSS General Counsel.

The Respondent testified in his own behalf and also presented testimony from the following witnesses: Peter Sola, Ph.D., accepted as an expert in public school policy; Michael Borkoski, HCPSS Technology Officer; Carl Silverman, Esquire; Raymond H. Brown, HCPSS Chief Operating Officer; Cynthia L. Vaillancourt, County Board member; Kathleen Hanks, County Board Administrative Specialist; Joel Gallihue, HCPSS Manager of School Planning; Brian Meshkin, County Board member; and Frank J. Aquino.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

County Board and Superintendent

1. The County Board consists of seven elected members and one student member.

2. All members of the County Board must be residents of Howard County. Elected members must be registered to vote in the County, and the student member must be a regularly-enrolled junior or senior-year student at a high school in the HCPSS.

3. The elected members are elected from the county-at-large for staggered four-year terms, with some members being elected every two years.

4. Terms for newly-elected members begin on the first Monday in December following the general election in November. Following their swearing-in, members of the County Board elect a chairman and vice-chairman from among their members for one-year terms. Frank Aquino,

Esquire, was Chairman of the County Board from December 2007 to December 2009. Ellen Giles was County Board Chairman from December 2009 to December 2010. Dr. Janet Siddiqui was Chairman of the County Board from December 2010 to December 2011. Sandra French has been the current Chairman of the County Board since December 2011.

5. The student member is elected by HCPSS students in the sixth through eleventh grades, and is subject to confirmation by the County Board.

6. The student member of the County Board serves a one-year term beginning on July 1 following his or her election, and has limited voting rights. The student member is prohibited by statute from voting regarding, among other things, the appointment and salary of a County Superintendent of Schools (County Superintendent) and other personnel matters.

7. The County Superintendent is appointed and employed by the County Board, but the appointment is not valid until approved by the Maryland State Superintendent of Schools (State Superintendent).

8. The County Superintendent serves as the *ex officio* executive officer, secretary, and treasurer of the County Board, and may advise the County Board but has no vote. The Deputy County Superintendent assists the County Superintendent.

9. The County Superintendent or designee attends all meetings of the County Board and its committees, unless the tenure, salary, and/or administration of the County Superintendent are being considered.

10. The Respondent was elected to the County Board in November of 2008, and took the oath of office for a four-year term during the first week of December 2008.

<u>Board Handbook and Policy on Board Governance</u>

11. At a meeting on November 4, 2010, the County Board reviewed its 2004 Handbook, updating the provisions and practices of that document. (Resp. Ex. 1, at 0878, 0889).

12. At the November 18, 2010 scheduled meeting, County Board member French indicated that the Handbook explains how the Board behaves as a body, how members treat other Board members, and what is expected of each Board member. The County Board has the right, obligation, and authority to determine how it will govern itself. (Resp. Ex. 1, at 0890). The Handbook is a guide adopted by the County Board to provide structure to the organization and Board operations. (TR 317).

13. After discussion on November 18, 2010, the County Board approved the amended Handbook by a vote of six to one. The Respondent cast the sole dissenting vote. (Resp. Ex. 1, at 889-890; TR 378).

14. The provisions of the Handbook apply to members of the County Board. The Chairman and Vice-Chairman reviewed the County Board's Handbook with the Respondent after he became a Board member as part of a formal orientation process. Chairman Aquino also provided the Respondent with informal assistance and orientation. (TR 112).

15. HCPSS Policy 2000 on School Board Governance was initially adopted on June 22, 2004. Amendments to that policy were adopted on October 6, 2005 and became effective as of that date. Policy 2000 applies to members of the County Board. Policy 2000 requires the County Board to develop and maintain a Handbook. (Bd. Ex. 47).

<u>Royalties Policy/Blom Memorandum</u>

16. The agenda for the County Board's scheduled meeting on February 12, 2009, included presentation of the report of a committee charged with reviewing and making recommendations for changes to the Royalties Policy (HCPSS Policy 7060) and Royalties Procedures (Policy 7060-PR).

17. At the open meeting of the County Board on February 12, 2009, Mark Blom, HCPSS General Counsel, presented the report and recommendations of the committee. After the Respondent noted that he had concerns regarding copyrights obtained by appointees of HCPSS,

Chairman Aquino asked Mr. Blom to provide a written legal analysis of the issues involved with the Royalties Policy. This request was made in the open meeting. (Resp. Ex. 1, at 0145-0146).

18. On March 4, 2009, when the Respondent inquired about the status of the requested memorandum, Mr. Blom stated that he would send it out prior to the March 12, 2009 public hearing on the Royalties Policy. (Resp. Ex. 2, at 1516).

19. On March 11, 2009, Mr. Blom sent an email to the County Board, County Superintendent, and S.J. Erickson, Deputy Superintendent, attaching "a confidential legal opinion" (Blom Memo). The attachment was on HCPSS letterhead and contained the following heading: "CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGED—DO NOT DISTRIBUTE OR REDISCLOSE." (Resp. Ex. 2, at 1517, 1530-1536).

20. In a March 12, 2009 email to the listed recipients of the Blom Memo and the student member of the County Board, the Respondent stated that he understood Mr. Blom, as the HCPSS General Counsel, to represent the County Superintendent. He stated that he believed that by distributing his memorandum to the County Board, Mr. Blom had distributed it to non-clients. The Respondent also stated that he did not remember anyone on the County Board requesting a confidential memorandum on the policy issues surrounding the Royalties Policy. The Respondent also stated that he was unable to "fathom why any public body would ever want to be perceived as having developed a policy involving copyright based on documents not available to the public." The Respondent stated that if he did not receive a rational reason why he should not do so within two days, he would make the Blom Memo public. (Resp. Ex. 2, at 1535, 1555-1556).

21. Mr. Blom responded by email on March 12, 2009 that when the County Board requested a legal opinion, he was providing legal services to the County Board as a client. Mr. Blom sent another email on March 13, 2009, in which he quoted and attached a statement regarding the division of responsibilities in the provision of legal services to the Board of Education and the

school system staff. The policy provides that the general counsel represents the Superintendent, the school system staff, and the Howard County Department of Education. The policy also provides that the County Board may obtain legal advice from its outside counsel or from the general counsel. (Resp. Ex. 2, at 1555-1560). Mr. Blom was representing the County Board, HCPSS, and its staff when he provided the requested legal advice.

22. On March 14, 2009, the Respondent sent another email noting that he appreciated the information and reasoning provided to him by Mr. Blom and Mr. Aquino, and would delay his decision regarding release of the Blom Memo until the end of business on March 17, 2009. (Resp. Ex. 2, at 1560).

23. On March 16, 2009, the Respondent sent an email to Mr. Aquino noting that he considered the Blom Memo's importance to public policymaking sufficient to release it on his own, but he hoped that as County Board Chairman, Mr. Aquino would agree to release the memorandum. The Respondent also indicated that he would be happy to discuss the issue further. Discussions about release of the Blom Memo were ongoing as reflected in emails of March 18 and 19, 2009 from Mr. Aquino and County Board member French.

24. At the County Board meeting on April 16, 2009, proposed revisions to the Royalties Policy were discussed and approved by a vote of five to one, with an effective date of July 1, 2009. The Respondent stated that he believed the Board would be acting illegally and beyond its authority to adopt the policy as written, and he cast the sole dissenting vote. (Resp. Ex. 1, at 0262-0264).

25. After close of the meeting on April 16, 2009, the Respondent sent an email to the other members of the County Board citing a 1980 opinion of the Maryland Attorney General[5] regarding the duty of confidentiality for members of county boards of education related to closed meetings. He also listed his reasons to support release of the Blom Memo, but indicated that he would not

[5] 65 Op. Att'y Gen. Md. 347 (1980).

release it until after the County Board's closed meeting the following day to allow further discussion. (Resp. Ex. 2, at 1603-1609).

26. On April 17, 2009, County Board member French emailed the Respondent and the other Board members stating that she did not like the Respondent conducting side-bar discussions with Mr. Aquino and not with the full Board, considered the Respondent's forty-eight-hour ultimatum to be a form of bullying, and objected to discussion of these issues in a public forum. Ms. French also stated that an individual Board member did not have the authority to release a confidential legal memo contrary to the decision of the full Board. (Resp. Ex. 2, at 1610).

27. On April 17, 2009, the Respondent stated by email that he was willing to delay release of the Blom Memo to allow further discussion by all County Board members. The Respondent stated that time was of the essence because he intended to appeal the Board's action in adopting the revised Royalties Policy. (Resp. Ex. 2, at 1612).

28. On April 17, 2009, the Respondent responded separately to Ms. French's question of whether he had premeditated public release of the memorandum when it was requested. The Respondent stated that he fully expected the result to be made public, and was stunned to learn that the other members of the County Board accepted a claim of confidentiality for documents generated during the process of creating policy. (Resp. Ex. 2, at 1613).

29. On April 18, 2009, Chairman Aquino emailed the Respondent. Mr. Aquino told the Respondent that, as Chairman, he and the other members of the County Board considered the Blom Memo to be confidential as attorney work product and subject to the attorney-client privilege. He also told the Respondent that as a collective entity the Board would not waive the attorney-client privilege and that the Respondent, as an individual Board member, lacked the authority to take unilateral action on behalf of the Board. (Resp. Ex. 2, at 1614).

30. On April 20, 2009, the Respondent sent an email to Mr. Aquino asking whether he planned

to arrange an opportunity for the full County Board to discuss release of the Blom Memo.

31. On or about May 15, 2009, the Respondent filed a Petition for Review/Notice of Appeal (Petition) with the State Board seeking declarations that the Royalties Policy was illegal, and that the County Board lacked legal authority to suppress publication of the Blom Memo. The Respondent attached the Blom Memo to the Petition. (Resp. Ex. 2, at 1620-1625; 1639-1644).

32. In a June 3, 2009 letter to the Respondent, Mr. Aquino asserted that by attaching the Blom Memo to his Petition, the Respondent had publicly released it in direct contravention of a Board decision. Mr. Aquino requested that the Respondent retract the attachment, ask the State Board to purge its files, and respond to his request so Mr. Aquino would know how to proceed. (Resp. Ex. 2, at 1686).

Records Retention Policy

33. On February 18, 2009, the Respondent emailed Mr. Aquino to ask about the status of a records retention policy for HCPSS.

34. On February 19, 2009, Mamie Perkins, HCPSS Chief of Staff, responded that HCPSS was delaying work on the policy until after a committee of the Maryland Association of Boards of Education (MABE), which was working on developing a model records retention policy for all local boards of education in Maryland, issued a document on that subject. County Board member Giles was on the State committee that was working on the development of a new records retention policy. (TR 759). The Respondent replied that he did not have a problem with such a delay as long as no documents were destroyed prior to adoption of a policy by the County Board. (Resp. Ex. 4, at 1805; TR 736).

35. At a County Board meeting on June 25, 2009, the Respondent claimed that HCPSS did not have a records retention policy. In fact, the County Board had an existing records retention schedule that had been filed with the State Archivist. (Resp. Ex. 5, at 1960-1965; TR 278-279; TR

736-737). The County Board and the HCPSS maintained its records in accordance with the records retention schedule. (TR 877-880). The HCPSS was the only school system in Maryland to have filed their records retention schedule with the State Archivist. (TR 279-280). The County Board also maintained a protocol for the use, retention, and deletion of emails. (Resp. Ex. 5, at 1953-1954; TR 737, 766).

36. On February 26, 2010, the Respondent forwarded an email to Michael Borkoski at HCPSS, which attached information regarding the use of commercial software by a Florida school district to archive emails. On March 7, 2010, Mr. Borkoski offered to meet with the Respondent, Board Chairman Giles, and another HCPSS staff member at a mutually convenient time to discuss records retention issues.

37. On May 11, 2010, the Respondent emailed the County Superintendent and Ms. Giles to say that he had received a complaint from a HCPSS employee about the administrative deletion of two inoffensive emails from the email system for the County Board and HCPSS, known as the Community Learning Center (CLC). The Respondent expressed concern about the destruction of CLC communications.

38. On September 11, 2010, the Respondent emailed Ms. Giles and referred to a statement made by an HCPSS staff member at a County Board meeting regarding the deletion of HCPSS emails after thirty days. The Respondent insisted that no documents should be destroyed before the County Board adopted a document retention policy, and requested assurances that emails were not being destroyed. (Resp. Ex. 4, at 1813). On September 23, 2010, the Respondent again emailed Ms. Giles asking her to raise the issue of destruction of emails at the scheduled meeting that day.

39. On September 23, 2010, at a County Board meeting, the Board authorized the creation of a new document retention and document management policy. The Respondent made a motion that no emails be deleted until the document retention policy was in place. The motion failed due to a lack

of a second. The County Board elected to continue to rely on its current policy and practice in handling documents and emails. (TR 358; Bd. Ex. 4). The County Board retained all significant public records and insignificant documents were destroyed in the normal course of business. The Board also discussed in the meeting that the federal law on which the Respondent was relying did not apply to local boards of education, but did apply to private companies and certain non-profit organizations. (TR 360-365).

40. On September 28, 2010, the Respondent emailed Mr. Borkoski asking him to confirm that any email message marked as deleted by a user of the HCPSS system was permanently destroyed after thirty days. The Respondent also requested information about the HCPSS email archives. On September 29, 2010, Mr. Borkoski responded that he would send the Respondent a copy of the HCPSS guidelines by October 1, 2010. (Resp. Ex. 4, at 1814).

41. On October 1, 2010, Mr. Borkoski sent an email to the County Board and County Superintendent, attaching a memorandum of the same date on HCPSS letterhead. In the memo, Mr. Borkoski described storage capacity allotments for different categories of email. He also addressed HCPSS protocols for deletion of email by users, email accounts of terminated employees and those on long-term leave, email backup, email recovery, and deletion of inactive email accounts. (Resp. Ex. 4, at 1816; Resp. Ex. 5, at 1953-1954).

42. On October 4, 2010, the Respondent sent an email to Mr. Borkoski attaching a letter. The letter was addressed to Mr. Borkoski on stationery with letterhead that stated, "Allen Dyer, Esq., Board Member, Board of Education of Howard County." The stationery also contained the seal of the County Board, and listed the names of all Board members and the Superintendent. (Resp. Ex. 4, at 1819).

43. In the October 4, 2010 letter to Mr. Borkoski, the Respondent stated that he could not accept the destruction of any records before certain actions were taken in compliance with COMAR

14.18.02.07A, B. The Respondent stated that he was acting as a member of the Board, authorized by the Education Article and COMAR 14.18.02.04, to direct Mr. Borkoski to "cease and desist from the destruction of any records" and take action to "recover records previously removed without authorization." (Resp. Ex. 4, at 1819).

44. On October 7, 2010, the Respondent sent an email to Mr. Borkoski requesting confirmation of his directive that Mr. Borkoski cease and desist in the destruction of public records. He also stated that he believes Maryland law prohibits the destruction of public agency records without a records retention and disposal schedule, and that he did not know of the existence of a schedule covering email. (Resp. Ex. 4, at 1820).

45. Ms. Perkins responded to the Respondent by email on October 7, 2010, indicating that Mr. Borkoski takes direction only from the County Superintendent or from Theresa Alban, Mr. Borkoski's direct supervisor. (Resp. Ex. 4, at 1821). Mr. Borkoski does not take direction from individual Board members.

46. On October 19, 2010, Board Chairman Giles and Board Vice-Chairman Janet Siddiqui wrote a letter to the Respondent advising him, in accordance with Policy 2000 on School Board Governance, that the Superintendent was responsible for the direction and supervision of HCPSS staff, and that the Respondent had no legal authority over them. (Bd. Ex. 4). The letter further advised the Respondent that he had no authority to determine the duties and responsibilities of the general counsel, or to threaten him, accuse him of misconduct, threaten other school staff, or direct school staff to take actions that the full County Board had refused to authorize. (Bd. Ex. 4).

47. On October 21, 2010, the Respondent sent a letter to Mr. Blom on the same stationery he used for his October 4, 2010 letter. The letter was captioned "Notice to Preserve Existing Evidence," and indicated that the Respondent intended to ask the Circuit Court for Howard County (Circuit Court) to order the County Board and its employees to stop their destruction of public

records without a current records inventory and records schedule. The letter directed Mr. Blom to preserve existing public records. (Resp. Ex. 4, at 1864-1865).

48. On October 22, 2010, the Respondent wrote a letter on the same stationery he used on October 4 and 21, 2010, to past Chairman Aquino and current Chairman Giles, accusing them of concealing the destruction of emails and other public records during their respective terms as County Board chairmen, and offering them a last opportunity to explain their conduct regarding the destruction of public records. (Bd. Ex. 5; TR 704-705).

49. The County Board discussed the destruction of public records at a February 16, 2011 Board meeting. Topics included whether HCPSS was in compliance with the applicable law and whether HCPSS had a records retention policy, as well as possible agreements concerning these issues as a means of settling the pending lawsuit.

Student Appeals

50. In 2009, the Respondent asked Carl Silverman, an attorney with extensive experience in employment law, to review a draft of his dissenting opinion and provide legal advice in the matter of a student's out-of-district appeal being considered by the County Board in its quasi-judicial capacity. The Respondent provided Mr. Silverman with a copy of the majority opinion that was prepared by the Board, and a draft of his dissenting opinion. He also provided Mr. Silverman with information about the student who was the subject of the appeal. (TR 1203-1204, 1213).

51. On June 5, 2009, the Respondent sent a draft of his written dissenting opinion in the student appeal to County Board Administrative Specialist Kathy Hanks and requested that she forward it to Board counsel, Mike Molinaro. In a June 5, 2009 email to Mr. Molinaro, the Respondent advised that he had asked Mr. Silverman to review a draft of his dissent and had incorporated several suggestions from Mr. Silverman into the final dissenting opinion. (Resp. Ex. 10, at 2770; TR 239-240).

52. Prior to the 2009-2010 academic year, the County Superintendent declined to grant an

exception for a student to the HCPSS bus transportation policy based on the route the student had to walk to reach his middle school. The parent appealed the decision to the County Board, which affirmed the Superintendent's decision.

53. The Respondent decided to draft a dissenting opinion regarding that student appeal. He again sought assistance from Mr. Silverman in drafting a dissenting opinion. He provided Mr. Silverman with a copy of the County Board's majority opinion and also provided him with a draft of his dissenting opinion. He also provided Mr. Silverman with information regarding the student that was the subject of the appeal. (TR 1203-1204, 1213).

54. The Respondent sought assistance from Mr. Silverman rather than from the County Board's in-house or outside counsel based on his view that there was friction between the Respondent and the counsel that represented the County Board. (TR 1206-1207). The Respondent did not request authorization from the County Board to hire a private attorney to assist in his dissent and did not obtain consent to release confidential student information to the private attorney.

55. On October 29, 2009, the Respondent emailed Ms. Hanks to advise that he was still working on his dissent in the walking route case, but that she should "feel free" to mail out the majority decision. (Bd. Ex. 32).

56. On December 8, 2009, Ms. Hanks mailed the County Board's decision to the student and his parents.

57. On December 16, 2009, Mr. Aquino asked the Respondent by email who had reviewed his earlier dissenting opinion, and the Respondent responded that it was an attorney with no connection to the appellant in that case. (Resp. Ex. 10, 2809-2810; TR 245-252).

58. On January 4, 2010, Chairman Giles sent an email to the Respondent stating that Ms. Hanks was about to send out his revised dissenting opinion in the walking route appeal, and asked whether, in an abundance of caution, he would agree to redact the appellant's surname. (Resp. Ex. 10, at

2814). The Respondent agreed, and suggested that all County Board decisions and dissents use the generic term "appellant" to avoid this issue.

59. On January 6, 2010, Ms. Hanks emailed all County Board members to inform them that she had posted the walking route decision and dissent to a restricted Board website not available to the public.

60. On January 7, 2010, the Respondent learned that when Ms. Hanks mailed the majority decision to the appellant in early December 2009, she enclosed a standard notice of the thirty-day time frame to appeal the decision to the State Board.

61. On January 11, 2010, the Respondent emailed Chairman Giles and former Chairman Aquino to inform them that he had been contacted by the appellant who, after reading the dissent posted the previous week, was considering an appeal. The Respondent asked Ms. Giles and Mr. Aquino to instruct Ms. Hanks to send another letter to the appellant indicating that the deadline for appeal would run from the posting of his dissent rather than the earlier issuance of the majority decision.

62. The Respondent spoke to Ms. Hanks in an intimidating and threatening manner instructing her to contact the parent and advise him that he had additional time to file an appeal to the State Board based on the date the dissent was issued.

63. On September 29, 2010, the Respondent emailed Ms. Hanks to inquire if there was a protocol that permits the purchase of transcripts without the electronic version so that he can advise the entire Board regarding the flagrant misuse of tax dollars. Ms. Hanks became upset because she perceived that the Respondent was yelling at her and being disrespectful and she requested a meeting with the Chairman and Superintendent. (Bd. Ex. 26; Resp. Ex. 17; TR 1412-1418).

64. Board member French has spoken to Ms. Hanks on several occasions in an intimidating or insulting manner, which has caused Ms. Hanks to cry. (TR 1274-1277). Ms. Vaillancourt spoke to

Ms. Hanks in December 2010 to ask if she had a problem with bullying by the Respondent. Ms. Hanks told Ms. Vaillancourt that she worked it out and did not have a problem with the Respondent. (TR 1277-1278).

65. In an August 2, 2010 letter to the Respondent, Chairman Giles and Vice-Chairman Siddiqui expressed their deep concern regarding the Respondent's pattern of careless or intentional disregard of confidentiality in connection with student appeals. They also emphasized the importance of functioning as a corporate body rather than a group of individuals who were "deciding independently what legal or ethical obligations apply to their individual actions." Ms. Giles and Dr. Siddiqui also noted that the Board's ability to function was impaired if Board members could not be certain matters that were intended to be discussed confidentially would remain confidential. In this letter, they also criticized the Respondent's actions in sharing materials from the student appeal with an outside advisor or proofreader, noting that the appeal contained confidential identifying information about students or employees. They expressed concern that the Respondent's disclosure of such information to individuals outside the confines of the Board could breach the County Board's ethical or legal responsibilities. (Bd. Ex. 3); (TR 177-178, 340-341).

66. Sometime in 2010, the Respondent requested that the County Board publicly release both the majority decision and his dissent in the walking route appeal and requested a redacted copy of the student appeal decision.

67. On August 30, 2010, the Respondent posted a redacted copy of the County Board's majority opinion in the walking route appeal and a redacted copy of the Respondent's dissenting opinion in that student appeal on the Howard Public Education List website. (Resp. Ex. 21). The Respondent did not wait for a response from the County Board or General Counsel Blom regarding whether he was permitted to post these decisions on a public website. He also made his own redactions to the decision rather than obtaining an officially redacted copy from the County Board or General

Counsel to ensure compliance with the Family Educational Rights and Privacy Act (FERPA). (Resp. Ex. 21, at 3702-3736; TR 349, 436-440).

68. On or about September 22, 2010, Mr. Blom advised the Respondent that the decision in a student appeal might constitute a confidential student record under FERPA for which inspection would have to be denied under the Maryland Public Information Act (MPIA). Mr. Blom was concerned that the unique factual circumstances of the case made it a confidential student record. Mr. Blom stated that he had asked special counsel to the County Board to contact the U.S. Department of Education (DOE) to obtain its opinion on this issue, and requested that the Respondent wait until such guidance was received from the DOE before releasing a student appeal decision. (Bd. Ex. 20, 25; TR 927-928).

69. On September 23, 2010, the Respondent replied to Mr. Blom, stating that he found Mr. Blom's opinion that the walking route appeal decision might be confidential under FERPA to be without merit. The Respondent also challenged Mr. Blom's authority to engage special counsel to the Board regarding this matter, stated that he believed this action "placed the public fisc at risk," and directed Mr. Blom to advise outside counsel that he had exceeded his authority in hiring counsel. He also directed Mr. Blom not to destroy evidence of any actions taken during his employment. (Bd. Ex. 19; Resp. Ex. 10, at 2831). The Respondent failed to disclose that he had already posted the student appeal decision on the Howard County Public Education website.

70. Mr. Blom responded the same day, indicating that HCPSS staff had the authority to procure legal services, that he was referring the matter to the Carney, Kelehan law firm, and that he had done nothing wrong. He also objected to the Respondent's claim that he had acted inappropriately and exceeded his authority. He also instructed the Respondent not to post erroneous accusations on the Internet. (Bd. Ex. 20).

71. On October 19, 2010, Ms. Giles and Dr. Siddiqui wrote to the Respondent to instruct him

that the Board's authority was collective, and that an individual Board member could not "act on behalf of the Board or represent the authority of the Board, unless so authorized by the full Board." The letter noted, among other things, that the Respondent lacked authority to determine individually what documents were confidential under federal law and what information was subject to public disclosure under the MPIA, and expressed concern that the Respondent's decision to self-redact the student appeal decision and release it might jeopardize the ability of HCPSS to receive federal funds. (Bd. Ex. 4).

72. Ms. Giles and Dr. Siddiqui also stated in their October 19, 2010 letter that the Respondent lacked authority to determine the job responsibilities of the HCPSS General Counsel, to order him to take action, or to threaten him with censure. They also stated that the Respondent did not have the authority to order other HCPSS staff to take actions, and his threat to publicly accuse staff of the misuse of funds was a gross abuse of the Respondent's position. They also instructed the Respondent that he was obligated to conform his conduct to County Board Policy 2000 on School Board Governance. (Bd. Ex. 4).

Minority Report to County Council

73. In December 2009 and January 2010, the County Board discussed the planned development of the Columbia Town Center and its impact on school development. At a meeting on January 14, 2010, the County Board voted to support County Bill 58 (CB58) and County Bill 59 (CB59), which addressed the planned development issues for the Columbia Town Center. The County Board subsequently sent a letter to the Howard County Council (County Council) at its request explaining the County Board's support of these bills.

74. On January 26, 2010, the Respondent sent a letter on HCPSS and County Board stationery to Courtney Watson, Chairperson of the County Council. The Respondent identified the subject of his letter as "A Minority Report on CB58 and CB59 Educational Infrastructure." The Respondent

indicated in this letter that, although the County Board had voted to support CB58 and CB59, the Respondent, as an individual Board member, did not support a provision of CB58 that postponed the reservation of an elementary school site. He also expressed concern that the bills did not include tools to ensure that the cultural, racial, and economic mix of a new urban residential community contemplated by these bills would reflect the demographics of Howard County. The Respondent identified the changes he would propose and reasons for those changes. (Bd. Ex. 12).

75. The Respondent stated in his January 26, 2010 letter that he was providing minority advice and was speaking as an individual member of the County Board. (Bd. Ex. 12).

76. On January 27, 2010, Ms. French sent an email to Ms. Watson, the Superintendent, the County Board members, and others, in which she acknowledged the Respondent's right to express his minority opinion. She also stated, however, that the Respondent's use of County Board letterhead to express his minority opinion was improper and undermined the authority of the Board Chairman. (Resp. Ex. 15).

77. Ms. Watson replied the same day that a County Board member was free to provide his or her opinion anytime and that the County Council understood the difference between the County Board's position and the opinion of a dissenting member of the County Board. (Resp. Ex. 15).

78. On October 19, 2010, Ms. Giles and Dr. Siddiqui wrote to the Respondent to address certain actions by the Respondent, including among other things their view that the Board's authority was collective and that an individual Board member could not "act on behalf of the Board or represent the authority of the Board, unless so authorized by the full Board." (Bd. Ex. 4).

79. The County Board Handbook that was adopted on November 18, 2010 provides that "Only the Chairman or the Chairman's designee is to use Board letterhead. Correspondence on the official letterhead speaks for the entire Board." (TR 380-385; Bd. Ex. 1, p. 39).

80. On or about December 18, 2009, the Respondent spoke with Joel Gallihue, Manager of

School Planning for HCPSS, regarding the issue of the planned development of the Columbia Town Center and its impact on schools. Gallihue is also a certified planner with approximately fifteen years of experience. The Respondent disagreed with the Board's position regarding CB58 and CB59 and with Gallihue's role in helping the Board develop that position.

81. The Respondent confronted Gallihue at a holiday meal and told him to do something to stop the proposal regarding the planned development for Columbia Town Center. The Respondent also told Gallihue that he was telling him this as a Board member, and that Gallihue worked for him (the Respondent). Gallihue explained that as a staff member, he does not report to the Board. He reports to Ken Roey, Executive Director of Facilities and Planning for the HCPSS, who in turn reports to the Superintendent. (TR 517-521, 538-539, 544). Gallihue also stated that because he is a voter in Howard County, the Respondent might actually work for him. The Respondent concluded by calling Gallihue a lackey for the developers. (TR 518-519, 538). Gallihue considered this an attack on his professionalism and integrity as a certified planner. (TR 519-522).

As a result of this confrontation with the Respondent, Gallihue avoided further contact with County Board members outside of work encounters and avoided speaking with the Respondent alone. (TR 522, 548-549).

Ethics Investigation

82. At a regularly scheduled meeting on November 4, 2010, the County Board discussed and adopted revisions to the HCPSS Ethics Regulations. At the same meeting, the County Board also discussed and adopted Policy 2070, Ethics, establishing ethical standards, and Policy 2070-PR, containing implementation procedures.

83. The Policies and Regulations were approved by the State Ethics Commission. (Resp. Ex. 1, at 0878; Bd. Ex. 40A). The Ethics Regulations and Policies apply to the members and employees of the County Board, and to the Superintendent. (Bd. Ex. 40, Regulations, p. 1).

84. The Ethics Regulations establish a HCPSS Ethics Panel of five members appointed by the County Board. The Ethics Panel is authorized to process complaints alleging violations of the Ethics Regulations and to make findings and determinations. (Bd. Ex. 40).

85. Section V.F. of the Ethics Regulations addresses Advisory Opinions, and provides that any person subject to the Regulations may request an advisory opinion regarding the applicability of the Regulations. (Bd. Ex. 40, Regulations, p. 4).

86. Section V.G. of the Ethics Regulations addresses Complaints, and provides that a person may file a complaint with the Ethics Panel alleging a violation of the Regulations. The Panel's determination regarding a complaint is then referred to the County Board, either for further action by the Board if a violation is found, or with a recommendation for dismissal of the complaint if no violation is found. (Bd. Ex. 40, Regulations, p. 4).

87. Section V.G.1 of the Ethics Regulations provides that "all actions regarding a complaint shall be treated confidentially." (Bd. Ex. 40, Regulations, p. 4). Other than in the discharge of official duties, section VII.F of the Ethics Regulations prohibits the disclosure of confidential information acquired by reason of a public position with HCPSS if such information is not available to the public. (Bd. Ex. 40, Regulations, pp. 6, 10).

88. Section XI of the Regulations provides that violations of the ethics regulations "shall constitute grounds for discipline . . . or removal from office," where provided for by law and consistent with procedures under the Education Article or policies of the County Board. (Bd. Ex. 40, Regulations, p. 10).

89. Policy 2070, at section IV.A., provides that "[a]ll Board members . . . will conduct their duties and responsibilities . . . in a responsible and ethical manner that reflects and exemplifies their position of public trust." (Bd. Ex. 40, Policy 2070, p. 3). Policy 2070 provides, at section IV.P.4, that a violation of the Ethics Policy or Regulations includes, "Disclosing confidential information or using

confidential information for one's own benefit or that of another." (Bd. Ex. 40, Policy 2070, p. 6).

90. Section II.A.6 of Policy 2070-PR states that the Ethics Panel meets in accordance with the Open Meetings Act (OMA). Section II.E.2 of that Policy provides that "[a]fter a complaint is filed, and until there is a final decision made by the Board, all actions regarding a complaint will be treated confidentially." Section II.E.3 provides that the "Ethics Panel, its staff, the complainant, and the respondent will not disclose any information relating to the complaint, including the identity of the complainant and respondent." Section II.E.3 also provides that the "Ethics Panel may release information at any time if a release has been agreed to in writing by the respondent," and "the identity of the complainant will be disclosed to the respondent" at the respondent's request. (Bd. Ex. 40, Policy 2070-PR, pp. 2, 4).

91. On or about December 3, 2010, two outgoing members of the County Board filed complaints with the Ethics Panel against the Respondent, alleging improper influence of the student member of the County Board regarding the upcoming election for County Board chairman and vice-chairman.

92. On December 23, 2010, Andrew Nussbaum, Esquire, notified the Respondent by letter that he had been retained as counsel for the Ethics Panel in connection with the complaints and provided the Respondent with redacted copies of the complaints. He also provided the Respondent with copies of the Ethics Regulations and the Rules and Procedures of the Ethics Panel. (Resp. Ex. 7, at 2444). Ethics Policy 2070-PR provides that the Ethics Panel may hire counsel to the Ethics Panel to avoid any conflict with the HCPSS General Counsel. (Bd. Ex. 40, Policy 2070-PR, p. 2).

93. On February 15, 2011, Mr. Nussbaum wrote to the Respondent to confirm a scheduled hearing date of March 3, 2011. That letter was also copied to the complainants and the student Board member, and reminded the recipients that the Ethics Regulations required that "[a]ll actions regarding a complaint shall be treated confidentially." Mr. Nussbaum further instructed that "all

parties maintain that confidentiality and that nothing regarding this matter be discussed with, or disclosed to, any other individuals." (Bd. Ex. 39, at 10; Resp. Ex. 7, at 2445).

94. On February 24, 2011, Harold Burns, Jr., Esquire, counsel for the Respondent, responded to Mr. Nussbaum. Mr. Burns claimed that the ethics complaint infringed on the Respondent's free speech rights and he requested that the proceedings be open to the public in their entirety. Mr. Burns also asserted that because the County Board created the Ethics Panel, the ethics proceedings could not be confidential as to the Board itself and, therefore, he was copying his letter to the members of the County Board. (Bd. Ex. 39, at 5-7; Resp. Ex. 7, at 2446-2448).

95. By letter dated February 28, 2011, Mr. Nussbaum asserted that under the Ethics Regulations and Policies, all actions regarding a complaint are confidential and, therefore, the hearing must be closed. However, he agreed to transmit the request for an open hearing to the Ethics Panel, and to seek the views of the complainants. (Bd. Ex. 39, at 11-12).

96. On February 28, 2011, the Respondent sent a copy of Mr. Burns' February 24, 2011 letter to all members of the County Board. (Bd. Ex. 39, pp. 3-7).

97. On March 3, 2011, the Respondent forwarded Mr. Nussbaum's February 15 and February 28, 2011 letters by email to the other members of the County Board, stating "in case you are interested, please feel free to attend the ethics committee hearing today at 3p.m." (Bd. Ex. 39, at 8-9; Resp. Ex. 7, at 2449; TR 556).

98. Later on March 3, 2011, Mr. Blom sent an email to the members of the County Board with copies to the Board's outside counsel and the HCPSS Chief of Staff. Mr. Blom advised the County Board members not to attend the ethics hearing and not to accept any information regarding the ethics proceeding. He explained that the Board members should not be involved because the ethics proceedings are confidential and because the County Board will be required to consider the recommendations of the Ethics Panel after it has concluded its deliberations and the County Board

members should not be influenced by any information outside the formal record of the proceedings. (Resp. Ex. 7, at 2450).

99. On March 4, 2011, an online blog by "Wordbones" under the name "Tales of Two Cities" stated that an ethics complaint had been filed against the Respondent by the student member of the County Board. Claiming to have confirmation from "multiple sources," the blog stated that the complaint arose from the Respondent's attempt to "improperly influence" the vote of the student member (whom it named) for Board chairmanship, and that the complaint was the subject of a hearing the previous night. The blog then claimed to find it "interesting" that the Respondent had been "silent" about the matter "so far." (Bd. Ex. 39, at 13; TR 557).

100. The Respondent did not request an advisory opinion from the Ethics Panel regarding his options in light of the information posted on the blog. On March 5, 2011, the Respondent unilaterally posted copies on the HCPSS website of the complaints against him, the exhibits he submitted at the Ethics Panel hearing, and correspondence between counsel for the Ethics Panel and the Respondent's own counsel. In his disclosure, the Respondent also stated his intention to release the transcript of the proceedings as soon as it became available. (Bd. Ex. 39; TR 557-558).

101. On March 6, 2011, the "Tales of Two Cities" blog noted that the Respondent had released those materials "in defiance of ethics panel rules." (Bd. Ex. 39, at 14).

102. On March 7, 2011, the Respondent sent an email to other Board members attaching a letter dated March 5, 2011, from Mr. Burns to Mr. Nussbaum. The letter noted that, although neither he nor the Respondent was behind the leaks to the blog, "having been destroyed, the confidentiality of this matter cannot be restored." Mr. Burns stated in his letter that he had advised the Respondent to "feel free to release" the complaints, the attorney correspondence, the Respondent's hearing exhibits, and the Board's ethical rules and Handbook, as well as a transcript of the Ethics Panel hearing when it was obtained. (Bd. Ex. 39, at 16-17).

103. A special meeting of the County Board was scheduled for March 10, 2011. After discussion at that meeting, a motion was passed by a vote of five to three to go into closed session to discuss the release of confidential information. (Resp. Ex. 1, at 1028-1031; TR 628-629).

104. On or about March 18, 2011, Eric Brousaides, Esquire, outside counsel to the County Board, wrote to the Ethics Panel. On behalf of the County Board, Mr. Brousaides requested that the Ethics Panel investigate allegations that the Respondent had breached "the confidentiality provisions of the Ethics Regulations/Rules . . . both prior to and following the March 3, 2011, Ethics Panel hearing" concerning the complaints against him. (Bd. Ex. 39, p.1; TR 560). The Ethics Panel treated the letter from Mr. Brousaides as a request for an advisory opinion.

105. On or about March 22, 2011, Mr. Burns requested a transcript of the Ethics Panel hearing on the complaint, and reiterated that his client had "long since released any right of confidentiality" of those proceedings. (Resp. Ex. 7, at 2451).

106. On or about April 15, 2011, the Respondent filed a Circuit Court complaint related to the Ethics proceedings, which he subsequently amended to include a challenge to the County Board's closed meeting on March 10, 2011.

107. On May 12, 2011, the Respondent asked the County Board to publicly release the complete Ethics Panel proceedings, including the transcript of the ethics hearing, but his request was denied by the County Board by a vote of six to two. Despite the position of the County Board, the Respondent subsequently released the transcripts of the ethics hearing. (TR 1336-1337).

108. On June 6, 2011 the Ethics Panel met to inquire further into the Respondent's disclosure of information regarding the Ethics complaints and hearing. The original complainants and the Respondent were among those invited to address the Panel. An individual who was believed to blog under the name of "Woodbones," Dennis Lane, was also invited to attend. He declined the invitation stating, "as I have no intention of revealing my sources, I respectfully decline your

invitation." (Bd. Ex. 40A, at p. 2 of 8).

109. On June 9, 2011, during the discussion of the Resolution proposing the Respondent's removal from office, the student member of the County Board indicated that she and other students had been harmed by the Respondent's release of confidential materials regarding the ethics investigation. (Resp. Ex. 1, at 1153-1157; TR 882-883).

110. On July 7, 2011, the Ethics Panel issued an advisory opinion.[6] The Panel noted that the HCPSS Ethics Regulations and Policies are patterned on State ethics statutes containing similar confidentiality provisions. It stated that the purposes of the confidentiality provisions are to protect individuals charged with an ethics violation, and to encourage individuals to report suspected violations. (Bd. Ex. 40A, at 6).

111. The Ethics Panel found that the prior breach of confidentiality and release of certain information through the blog did not waive or eliminate the duty of confidentiality or justify the Respondent's public release of the entire record. The Ethics Panel also found that premature disclosure of information regarding a complaint could interfere with its consideration and resolution of the complaint, and could possibly prejudice the County Board members before they received the conclusions of the Ethics Panel. (Bd. Ex. 40A, at 7).

112. The Ethics Panel concluded that the Respondent violated the Ethics Regulations and Policies requiring confidentiality by releasing confidential documents and information to the Board and to the public at large through the Internet. (Bd. Ex. 40A).

113. The Ethics Panel recommended dismissal of the underlying ethics complaints that had been filed against the Respondent. The County Board accepted the Ethics Panel recommendation and dismissed the underlying ethics complaints filed against the Respondent. (TR 1244-1245).

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[6] Although the Ethics Panel issued its opinion after the June 9, 2011 Resolution seeking the Respondent's removal was passed, the results of the Ethics Panel's decision are relevant.

114. The County Board continued to maintain the confidentiality of the Ethics Panel process, but in fairness to the Respondent included a reference in its closed meeting minutes to the dismissal of the ethics complaints against the Respondent. (TR 1244-1245).

Recording the Retreat

115. On April 1, 2011, the County Board held a meeting, which it characterized as a retreat, that was open to the public. The minutes of the retreat were approved at a regular meeting on April 14, 2011.

116. County Board members' access to confidential minutes of prior closed meetings before an individual had become a member of the County Board was among the issues discussed at the April 1, 2011 retreat. The County Board voted six to one to allow access to confidential closed session minutes to Board members who requested access for a relevant reason and who were granted authorization for such access by a vote of the County Board. (TR 1345-1351).

117. Before the April 1, 2011 retreat began, the Respondent placed a personal recording device on the table alongside the recording device placed by Ms. Hanks, who was making the official recording of the meeting. He recorded the entire retreat, including private conversation that occurred during a break. He failed to notify the County Board chairman, the administrative specialist, or the other attendees that he was recording the meeting. (TR 889-890; 1251-1252, 1352-1354).

118. Following the retreat, the Respondent released his recording of the April 2, 2011 retreat on the Howard Public Education website. (TR 1250-1251).

119. During the public session at the regularly scheduled April 14, 2011 meeting, Chairman Siddiqui criticized the Respondent for not informing other County Board members that he was recording the retreat, and emphasized that the minutes prepared by Ms. Hanks and subsequently approved by the County Board constitute the official records of all meetings of the County Board. Chairman Siddiqui considered that one possible response to the Respondent's actions was for the

Board to consider a public reprimand. The Board did not vote to issue a public reprimand to the Respondent. The Respondent apologized for failing to notify the other participants that he was recording the retreat, but indicated that he would continue recording public meetings. (Resp. Ex. 1, at 1087; TR 669-677, 1353-1354).

120. On April 25, 2011, the Respondent wrote a letter to Chairman Siddiqui asking her, among other things, how and when the County Board had decided to sanction him publicly for recording the retreat. (Resp. Ex. 7, at 2479).

121. On May 24, 2011, the Respondent again wrote to Dr. Siddiqui, claiming that she had reprimanded the Respondent and that it had received widespread press coverage. He inquired about the Chairman's authority to issue a reprimand. The Respondent notified Dr. Siddiqui that if she did not apologize for her reprimand, he would file a complaint under the Open Meetings Act (OMA). (Bd. Ex. 6; TR 696).

122. On May 30, 2011, the Respondent emailed Dr. Siddiqui advising her that because he had not received an apology, he had amended his lawsuit to include another count regarding the OMA. (TR 696-697).

Filing Lawsuits and Complaints

123. On or about May 15, 2009, the Respondent filed a Petition for Review/Notice of Appeal (Petition) with the State Board seeking declarations that the Royalties Policy adopted at an open meeting of the County Board on April 16, 2009, was illegal and that the County Board lacked legal authority to suppress publication of the Blom Memo. (Resp. Ex. 2, at 1620-1625; 1639-1644).

124. On October 27, 2009, the State Board dismissed the Petition on the ground that it lacked jurisdiction over issues concerning copyright law and issues concerning the release of a legally privileged and confidential memorandum because those issues did not involve an interpretation of education law. (Bd. Ex. 46A; Resp. Ex. 3, at 1789-1790).

125. The Respondent filed a complaint with the Open Meetings Compliance Board (OMCB) on August 20, 2010 challenging the County Board's decision to conduct a closed session on August 19, 2010 to consult with counsel and to consider matters related to collective bargaining negotiations. (Bd. Ex. 11). On November 16, 2010, the OMCB issued a decision finding that no violation had occurred. (Bd. Ex. 38).

126. The Respondent filed another complaint with the OMCB on December 3, 2010 challenging the propriety of the County Board's secret ballot elections to fill the positions of Chairman and Vice-Chairman. The OMCB found there was no violation because the election of officers was an administrative matter not subject to the OMA. (Bd. Ex. 22).

127. On or about October 26, 2010, the Respondent filed in the Circuit Court a complaint and motions seeking a temporary restraining order (TRO) and preliminary injunction against the County Board regarding its alleged destruction of public records. On October 27, 2010, the Circuit Court denied the Respondent's motion for a TRO. On December 1, 2010, the Circuit Court denied the Respondent's motion for a preliminary injunction. (Resp. Ex. 5, at 1873-1881, 2065-2066, 2114).

128. On or about December 31, 2010, the Respondent amended his complaint to add Count III regarding individual County Board members' lack of access to minutes of closed County Board sessions. On February 16, 2011 the Circuit Court granted summary judgment for the County Board as to Count III.

129. On January 7, 2011, the Circuit Court dismissed Counts I and II of the Respondent's Complaint, with prejudice, based, in part, on lack of standing. (Bd. Ex. 5, at 2194).

130. On or about January 31, 2011, the Respondent amended his complaint to add Count IV regarding the inspection of public records. On July 18, 2011, the Circuit Court stayed the action pending "visitatorial review" by the State Board. (Resp, Ex. 5, at 2310-2312).

131. On or about April 15, 2011, the Respondent filed a lawsuit in the Circuit Court for Howard

County against the County Board regarding the confidentiality of the proceedings before the Ethics Panel. (Resp. Ex. 7, at 2434-2451). On or about April 22, 2011, the Respondent amended his complaint to add a count challenging a County Board meeting on March 10, 2011, regarding the Respondent's actions in connection with the Ethics Panel proceedings.

132. On May 27, 2011, the Respondent amended his OMA Complaint in the Circuit Court to add another count challenging the closing of a portion of the April 14, 2011 County Board meeting, and challenging the authority of the County Board to issue a public reprimand against him.

133. Attempts by the County Board to settle disputes with the Respondent have been thwarted when the Respondent would not agree to binding arbitration. (TR 1366-1367).

Resolution

134. Various County Board chairmen, including Mr. Aquino, Ms. Giles, and Dr. Siddiqui, had sent the Respondent several letters over the years describing the Respondent's inappropriate conduct as a member of the County Board. (Bd. Exs. 2, 3, 4). The Maryland Association of Boards of Education (MABE) also provided training to the Respondent and other new Board members regarding their duties and obligations as members of the County Board. The Chairman and Vice-Chairman also provided the Respondent and other new Board members with training regarding their role as new County Board members. (TR 866-867).

135. The County Board Handbook sets forth the duties and responsibilities of County Board members. It also authorizes the County Board chairman to monitor the behavior of its members and their compliance with County Board rules and applicable laws. (Bd. Ex. 1; TR 868).

136. Mr. Aquino circulated a proposed resolution several days before June 9, 2011 to remove the Respondent from the County Board for misconduct in office. Mr. Aquino telephoned County Board members, including Ms. Vaillancourt, in advance of the meeting about the resolution. (TR 1284). At the regularly-scheduled County Board meeting on June 9, 2011, a motion to add a

resolution to the agenda regarding the Respondent was passed by a vote of seven to one.

137. Mr. Aquino proposed a resolution (Resolution) finding the Respondent to have engaged in numerous inappropriate actions as a member of the County Board, and authorizing the County Board to direct its counsel to prepare and its Chairman to execute a request to the State Board to remove the Respondent as a member of the County Board for misconduct in office. Mr. Aquino relied on the Respondent's continued disregard for the County Board's practices and decisions, his release of confidential materials and information, and the multiple lawsuits he filed against the Board, as the reasons for proposing the Resolution. Mr. Aquino read the Resolution into the record at the June 9, 2011 meeting. (Resp. Ex. 1, at 1153-1154; Jt. Ex. 2; TR 288).

138. The Resolution addressed numerous actions by the Respondent over several years and noted the Respondent's repeated release of confidential materials, the severity of the incidents, and the impact on the integrity of the Board's operations. (TR 169-171).

139. During the discussion that followed, Board member Brian Meshkin expressed his concern about overturning the public will that was expressed through the Respondent's election to the County Board, and stated that while he found some of the Respondent's behavior objectionable, he did not believe that it rose to the level of "impeachment." Mr. Meshkin introduced a resolution to censure the Respondent as an alternative to removal. (Resp. Ex. 1, at 1155).

140. County Board member Vaillancourt urged fellow members of the Board to "censor first and then move for removal," if necessary. Ms. Vaillancourt and the student member both expressed a desire to hear more about Mr. Meshkin's proposal. (Resp. Ex. 1, at 1155). Ms. Vaillancourt proposed that the Respondent be removed from his chairmanship of the audit committee, and be removed entirely from the audit committee, rather than removal from the County Board. (TR 1282-1283). This proposal was incorporated into Mr. Aquino's Resolution, but did not replace the proposed removal from the County Board. (Jt. Ex. 2; TR 1283).

141. Mr. Meshkin stated that he feared that "extreme measures" taken by the Respondent had caused other Board members to move to the opposite extreme, with "the school system being caught in the middle." (Resp. Ex. 1, at 1155).

142. Two members noted that these proposed actions might have an adverse effect on the County Board's upcoming search for a new County Superintendent.

143. The student member stated that although the Respondent provided "different perspectives and insights that may not have been considered," she felt that he was willing to take action that would hinder Board operations. The student member also stated that the Respondent's release of the Ethics Panel materials caused unforeseen harm to her and other students mentioned in the documents. (Resp. Ex. 1, at 1156).

144. Dr. Siddiqui, Ms. French, and Ms. Giles expressed their belief that sufficient steps were taken to bring about desired changes in the Respondent's conduct, but those steps proved unsuccessful. Dr. Siddiqui emphasized the need for the Board to work together; Ms. Giles thought the release of the Ethics Panel transcript was a violation of FERPA, and she feared the County Board would be found "guilty of complicity;" and Ms. French was concerned about the willingness of others to bring issues to the Ethics Panel if the Respondent remained on the Board and posted documents and other confidential ethics information on the Internet. (Resp. Ex. 1, at 1155-1157).

145. The Resolution for removal was approved by a vote of five to two, with the Respondent abstaining. (Jt. Ex. 2).

146. On June 24, 2011, Dr. Siddiqui sent a letter to James DeGraffenreidt, President of the State Board, requesting on behalf of the County Board that the State Board remove the Respondent from the County Board for a pattern of behavior constituting misconduct in office. (Jt. Ex. 2).

147. On July 6, 2011, Mr. DeGraffenreidt sent the Respondent a letter formally notifying him of the charges against him and the statutory basis of the State Board's authority to remove a member of

the County Board for misconduct in office. The letter also notified the Respondent of his right to request a hearing on the charges with the OAH, which had been delegated authority to conduct a hearing and issue a proposed decision on the County Board's request to the State Board for the Respondent's removal from office. (Jt. Ex. 1).

DISCUSSION

Applicable Law

By the Resolution dated June 9, 2011, and a follow-up letter dated June 24, 2011, the County Board requested that the State Board remove the Respondent from his position as a member of the County Board for misconduct in office. (Jt. Ex. 1, 2). The County Board relies on the statutory authority contained in the Education Article for this removal action. The relevant statute provides, in pertinent part, as follows:

> (g) Removal.
>
> (1) The State Board may remove a member of the county board for:
>
> (i) Immorality;
> (ii) Misconduct in office;
> (iii) Incompetency; or
> (iv) Willful neglect of duty.
>
> (2) Before removing a member, the State Board shall send the member a copy of the charges against the member and give the member an opportunity within 10 days to request a hearing.
>
> (3) If the member requests a hearing within the 10-day period:
>
> (i) The State Board shall promptly hold a hearing, but a hearing may not be set within 10 days after the State Board sends the member a notice of the hearing; and
>
> (ii) The member shall have an opportunity to be heard publicly before the State Board in the member's own defense, in person or by counsel.
>
> (4) A member removed under this subsection has the right to a de novo review of the removal by the Circuit Court for Howard County.

Md. Code Ann., Educ. § 3-701(g) (2008).

The Education Article addresses the powers and duties of the State Board at section 2-205. Under section 2-205(e) of the Education Article, the State Board has the authority to explain the true intent and meaning of the Education Article and to decide all controversies and disputes that arise under its provisions. The statute provides, in pertinent part, as follows:

> **§ 2-205. Powers and duties.**
>
> . . .
>
> (e) Explanations of law; controversies and disputes. –
>
> (1) Without charge and with the advice of the Attorney General, the State Board shall explain the true intent and meaning of the provisions of:
>
> (i) This article that are within its jurisdiction;
> (ii) Except as provided in paragraph (4) of this subsection and in Title 6, Subtitles 4 and 5 of this article, the Board shall decide all controversies and disputes under these provisions.

Md. Code Ann., Educ. § 2-205(e) (Supp. 2012).

On July 6 and 13, 2011, the State Board delegated its hearing authority to the OAH to conduct a contested case hearing and issue a proposed decision regarding the County Board's request for removal of the Respondent in accordance with the Maryland Administrative Procedure Act (APA). Md. Code Ann., State Gov't § 10-205 (2009); (Jt. Ex. 1).

State Board regulations provide for the OAH to conduct contested case hearings on behalf of the State Board in accordance with the APA and the OAH Rules of Procedure. COMAR 13A.01.05.07A, D. The regulations also provide that the Administrative Law Judge shall submit a proposed decision to the State Board, with copies to the parties, that contains findings of fact, conclusions of law, and recommendations. COMAR 13A.01.05.07E.

Charges

The County Board contends that it has properly requested that the State Board remove the Respondent from his position as a member of the County Board due to misconduct in office based

on a number of incidents of misconduct which it asserts has demonstrated a pattern. The June 9, 2011 Resolution passed by the County Board provided the following bases for removal:

1) Repeatedly breached confidentiality provisions ...
2) Repeatedly acted unilaterally on matters affecting the operation of the Board and/or the school system ...
3) Acted in ways that undermine the functioning of the Board of Education
4) Intentionally spurned less divisive, less contentious and less costly methods of resolving disputes in favor of litigation
5) Has used his position in ways designed to further his personal litigation against the Board of Education and
6) Has threatened other Board members and school staff....

(Jt. Ex. 2). The Resolution authorized the County Board to make a request to the State Board to remove the Respondent for misconduct in office.

In the June 24, 2011 letter from the County Board requesting the Respondent's removal, authored by County Board Chairman Siddiqui, the County Board restated the reasons for removal and provided further examples of the alleged misconduct that the County Board contends warrant his removal from office. (Jt. Ex. 2). Thereafter, State Board President James H. DeGraffenreidt, Jr. sent the Respondent a letter, dated July 6, 2011, which complied with the notice requirements of the Administrative Procedure Act (APA). Md. Code Ann., State Gov't § 10-207 (2009). The letter set forth the reasons for the request for the Respondent's removal for misconduct in office, advised that the June 9, 2011 Resolution and the June 24, 2011 letter constituted the charges for the Respondent's removal, asserted the statutory authority for the request for removal and the Respondent's right to request a hearing on the charges, and that the matter has been delegated to the OAH for a contested case hearing and the issuance of a proposed decision. (Jt. Ex. 1).[7]

[7] Repeatedly throughout this proceeding the Respondent has alleged that the County Board failed to provide him with proper notice of the charges against him. I have denied the Respondent's notice argument on multiple occasions, both in writing by decision dated October 26, 2011, and orally from the bench. While the charges did not allege date, time, and place for the each of the allegations of misconduct, the charges identified broad categories of misconduct and set forth examples of the Respondent's alleged improper conduct. (Jt. Ex. 2). Additionally, after requesting and being provided with the opportunity for discovery, the Respondent failed to pursue any discovery during the long pre-hearing period that would have provided him with the County Board's relevant documents

In its Post-Hearing Memorandum, the County Board identified the categories of misconduct in office supporting the Respondent's removal as follows:

A. Blom Legal Memorandum;
B. Disclosure of Student Information;
C. Disclosure of Confidential Ethics Investigation Information;
D. Dyer and School System Staff; and
E. Less Divisive and Costly Alternatives.

(County Board Memo, pp. 22-29). I shall address the issues that formed the basis for the County Board's request for removal in the manner in which they were characterized by the County Board after addressing the issue of misconduct in office.[8]

Misconduct in Office

The County Board contends that the Respondent's actions constitute misconduct in office and warrant his removal by the State Board as a member of the Board of Education of Howard County. The County Board relies primarily on the Court of Appeals' decision in *Resetar v. State Bd. of Educ.*, 284 Md. 537 (1979), and the decision of the State Superintendent of Schools of the Maryland State Department of Education in *In the Matter of Maryann Judy*, Superintendent's Case No. 1-07, MSDE (July 30, 2007), to interpret the concept of misconduct in office under the Education Article of the Maryland Annotated Code. As noted above, the State Board has the authority under section 2-205(e) of the Education Article to interpret the meaning of all provisions in the Education Article and to decide all controversies and disputes under the Education law.

Although the term misconduct in office is undefined in the Education Article, it has been

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related to this proceeding at least five months before the commencement of the contested case hearing in May 2012. In any event, the County Board provided the Respondent with all of its designated exhibits nearly two months before the hearing began in accordance with the Supplemental Prehearing Order issued March 1, 2012. I have concluded previously and hereby reaffirm that the Respondent was afforded adequate notice in an administrative proceeding. *Brown v. Handgun Permit Review Bd.*, 188 Md. App. 455 (2009), *cert. denied*, 412 Md. 495 (2010).

[8] At the hearing in this matter I directed the County Board to address in its post-hearing brief all of the allegations on which it relies to support the requested removal. (TR 1878-1882). In the Conclusions of Law section of its Post-Hearing Memorandum, the County Board did not address all of the incidents that formed the basis for its Charges in this case. As a result, I have not in this Proposed Decision relied on any incidents that the County Board abandoned in the Conclusions of Law section of its Post-Hearing Memorandum.

interpreted in court opinions and decisions of the Maryland State Department of Education (MSDE) and the Maryland State Superintendent of Schools. The charging documents in this case include specific reference to a Maryland Court of Appeals decision that interpreted the terms misconduct and misconduct in office under the Education Article. *Resetar v. State Bd. of Educ.*, 284 Md. 537 (1979). In *Resetar*, the Court upheld the termination of a teacher for misconduct in office under the Education Article when the teacher referred to students as "jungle bunnies" in front of several coworkers. The Court reasoned that the teacher's comments would undermine his future classroom performance and would have a negative impact on his students. The Court in *Resetar* looked to other sources to define "misconduct" and "misconduct in office" and stated the following:

> The word is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though they are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences. [58 C.J.S. Misconduct at 818.]
>
> . . .
> A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness. [Black's Law Dictionary at 1150 (4th ed. 1968).]
>
> The same authority refers at 1150 to "misconduct in office" as being "[a]ny unlawful behavior by a public officer in relation to his duties in his office, willful in character."

Resetar, 284 Md. at 560-561. Although the *Resetar* case involved the termination of a teacher, the Court's interpretation of the terms misconduct and misconduct in office under the Education Article is directly relevant to the removal action here, which also is based on misconduct in office by the Respondent under the Education Article. The Court of Appeals has approved similar definitions of misconduct in other contexts. *Public Serv. Comm'n v. Wilson*, 389 Md. 27, 77 (2005).

The State Superintendent of Schools (Superintendent) has issued a decision involving the

removal from office of an appointed member of a local board of education (Talbot County) based on charges of misconduct in office under the Education Article. *In the Matter of Maryann Judy*, Superintendent Case No. 1-07, MSDE (July 30, 2007). In *Judy*, in upholding the board member's removal, the Superintendent relied on similar definitions for misconduct and misconduct in office as addressed above. Although the *Judy* case involved a member of a local board of education who was appointed by the Governor, the Superintendent exercised her authority to interpret the meaning of misconduct and misconduct in office under the Education Article. The statute relied upon to support Judy's removal as an appointed local board member, section 3-108(d) of the Education Article, is nearly identical to section 3-701(g) of the Education Article relied upon by the County Board to support its request for Respondent's removal as an elected local board member. Both statutes provide for the removal of a member of a local board of education for misconduct in office.

The Superintendent noted in *Judy* that misconduct in office includes "wrongful conduct done under color of office" and includes the act of "doing something which the officer ought not do, or the failure to do something which he ought to do, in the conduct of his office." *Judy*, Sup't Case No. 1-07, at pp. 4-5. The Superintendent found that when misconduct in office is defined as unlawful conduct, it includes the violation of a statute, rule, or policy, and need not rise to the level of criminal conduct. *Judy*, at pp. 5-6. Relying on case law from other jurisdictions, the Superintendent noted 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." *Judy*, at p. 6, citing *Bunte v. Mayor of Boston*, 278 N.E.2d 709, 711 (Mass. 1972). The Superintendent noted that public employees must be "held to a higher standard of stewardship than merely that of refraining from criminal actions while in office." *Judy*, at p. 6, citing *Bunte*, 278 N.E.2d at 712. The Superintendent also found that the rules or duties violated must be important in the

administration of the public office. The Superintendent also stated that "the rule or duty must be important enough so that its breach renders the officer unfit to continue to hold office." *Judy*, at p. 6, citing *Miller v. Town of Hull*, 878 F.2d 523, 531 (1st Cir. 1989), *cert denied*, 493 U.S. 976 (1989).

The Superintendent determined that the relevant questions in deciding whether a local board member should be removed for misconduct in office include: 1) whether the board member violated a rule or duty of her office about which she knew or should have known; 2) whether her conduct was willful; and 3) whether her conduct demonstrated that she was unfit to be a board member. *Judy*, at pp. 6-7, 13.

The *Judy* decision demonstrates that the term misconduct in office under the Education Article has reasonably been interpreted to include wrongdoing that does not rise to the level of criminal activity. The County Board has not attempted to create a new definition of misconduct in office, as various decisions of the courts, the MSDE, and the State Superintendent of Schools have already interpreted this term under the Education Article. Furthermore, the Education Article authorizes the State Board to explain the true intent and meaning of the provisions of the Education Article and to decide all controversies and disputes under that Article. Md. Code Ann., Educ. § 2-205(e) (Supp. 2012). The Court of Appeals in *Resetar* noted and approved this authority of the State Board to interpret the intent and meaning of the Education law. *Resetar*, 284 at 555-556. Accordingly, it is appropriate to consider other cases that interpret the terms misconduct in office under the Education Article concerning removal of an appointed member of a local board of education or termination of a teacher, even though those cases do not involve removal of an elected member of a local board of education.

In the *Judy* case, the Superintendent upheld the removal of the local county board member for misconduct in office based essentially on three incidents. The central incident involved Judy's

attempt to submit an untimely evaluation of the local superintendent after missing the deadline for submission; the attempt to direct the local board's executive assistant to place the untimely evaluation in the local superintendent's personnel file without discussing the evaluation with the local superintendent; and the threat to report the executive assistant to the State Board if she failed to comply. In the second incident, Judy directed the local superintendent to terminate the assistant superintendent because of comments she found offensive, although she did not have authority to order such discipline. The third incident was based on Judy's improper involvement in a student disciplinary incident after being instructed to avoid becoming involved and jeopardizing her neutrality because the matter could potentially come before the local board in a student appeal.

The Superintendent found that Judy violated several rules and duties set forth in the local board of education handbook. She concluded that Judy violated local board rules prohibiting unilateral action, requiring participation in the local superintendent's evaluation, and sharing the findings of her evaluation with the local superintendent. The Superintendent also found that Judy violated rules requiring local board members to recognize and accept the difference between the role and duties of the local superintendent and that of a local board member. *Judy,* at pp. 18-19. The Superintendent found that Judy's conduct in violating local board rules was willful because her misconduct was repeated and continued after she was counseled. The Superintendent noted that willfulness does not require the showing of an evil motive. *Judy,* at p. 19.

The Superintendent concluded that Judy's misconduct rendered her unfit to be a board member because it was substantial and harmed the local board and school system. The Superintendent found such harm because the local board had to devote substantial staff time to handling Judy's misconduct, and her actions were contrary to the best interests of the students. The Superintendent also found the rule violations were important and substantial because she concluded that the rule prohibiting board members from acting unilaterally on school matters is

"the linchpin of school board functioning"; a board must function collectively to make decisions; and Judy attempted to circumvent the collective process. Furthermore, Judy's failure to understand and maintain the separation of functions between the local superintendent and a board member undermined the efficient operation of the school system, impeded the work of the local superintendent, and impaired Judy's ability to remain neutral on disputed issues that might come before the local board. *Judy,* at pp. 19-21. For all these reasons, the Superintendent concluded that Judy's misconduct warranted her removal from the local board of education. The removal was based on her violation of rules in the local board of education handbook and did not involve the violation of statutory, constitutional, or criminal law. The Respondent's claim that Ms. Judy's removal from office was based on criminal misconduct is not supported by the *Judy* decision.

Disclosure of Confidential Ethics Investigation Information

The County Board contends that the Respondent disclosed confidential information regarding an ethics complaint filed against him and the ensuing investigation in violation of the Ethics Panel Regulations and Ethics Policies requiring confidentiality. The Respondent argues that his disclosure was justified in response to an anonymous leak of information concerning the ethics investigation because he claims that confidentiality of the ethics proceedings had already been breached by the leak. He also claims that his disclosures were justified because he was acting upon the advice of counsel.

The Regulations of the HCPSS Ethics Panel apply to all members of the County Board, the Superintendent, and employees of the County Board. The County Board appoints the five members of the Ethics Panel. (Bd. Ex. 40, Regulations, pp. 1, 3). The Regulations provide that all aspects of an ethics investigation before the Ethics Panel are confidential. The Regulations provide, in pertinent part, as follows:

V. Rules of Procedure

G. Complaint

1. A person may file a complaint alleging a violation of any of the provisions of these regulations. Such complaints shall be written and under oath or by affirmation. All actions regarding a complaint shall be treated confidentially.

VII. Prohibitions

F. Disclosure of confidential information

Other than in the discharge of official duties, Board members, the Superintendent, or employees may not disclose or use for their own economic benefit or that of another, confidential information which they have acquired by reason of their public position and which is not available to the public.

XI. Sanctions.

A. Violations by any Board member, the Superintendent, or an employee of the provisions of these regulations shall constitute grounds for discipline or personnel action, or removal from office where provided by law, consistent with procedures set forth in the Education Article of the *Annotated Code of Maryland* or the policies of the Howard County Board of Education.

(Bd. Ex. 40, Regulations, pp. 6, 10).

Board of Education, Policy 2070, Ethics, provides, in pertinent part, as follows:

IV. Standards

A. All Board members and/or employees will conduct their duties and responsibilities, while in the employ of the HCPSS, in a responsible and ethical manner that reflects and exemplifies their position of public trust.

H. If a conflict arises between a provision of this ethics policy and the terms of the Ethics Regulations, the provisions of the Ethics Regulations will supersede and be applied.

N. All Board members and/or employees may seek an advisory opinion from the Ethics Panel.

P. Violations of this ethics policy or the Ethics Regulations can include, but not be limited to:

4. Disclosing confidential information or using confidential information for one's own benefit or that of another.

(Bd. Ex. 40, Policy 2070, pp. 3-6).

The HCPSS Policy 2070-PR, Ethics, Implementation Procedures, provides, in pertinent part, as follows:

> II. Rules for the Ethics Panel
>
> E. Formal Hearings by the Ethics Panel
>
> 2. After a complaint has been filed, and until there is a final decision made by the Board, all actions regarding a complaint will be treated confidentially.
> 3. The Ethics Panel, its staff, the complainant, and the respondent will not disclose any information relating to the complaint, including the identity of the complainant and the respondent, except that:
>
> a. The Ethics Panel may release information at any time if a release has been agreed to in writing by the respondent, and
>
> b. The identity of the complainant will be disclosed to the respondent at the request of the respondent at any time.

(Bd. Ex. 40, Policy 2070-PR, p. 4).

An ethics complaint was filed against the Respondent by two outgoing members of the County Board in December 2010 alleging improper influence of the Student Board member's vote for the election of a chairman of the County Board. The counsel for the Ethics Panel communicated to the Respondent regarding the investigatory process and advised him repeatedly to maintain confidentiality of the ethics complaint process. (Bd. Ex. 39). This is reflected in several letters sent by the Ethics Panel counsel.

On February 15, 2011, Andrew W. Nussbaum, Esquire, counsel to the Ethics Panel, sent a letter to the Respondent's counsel advising that a hearing had been scheduled for March 3, 2011 to address the ethics complaint filed against the Respondent. In that letter, Mr. Nussbaum stated, in pertinent part, as follows:

> I would again remind you, your client, the Complainants, and Student Board Member ..., to whom copies of this letter are also being sent, that, *pursuant to the Ethics Regulations, "[a]ll actions regarding a complaint shall be treated*

> *confidentially." I would request that all parties maintain that confidentiality and that nothing regarding this matter be discussed with, or disclosed to, any other individuals.*

(Bd. Ex. 39, p. 10) (Emphasis supplied). On February 28, 2011, Mr. Nussbaum sent another letter to the Respondent's counsel regarding the ethics complaint and investigation in response to a letter from the Respondent's counsel. In this letter, Mr. Nussbaum stated, in pertinent part, as follows:

> With regard to your request that the Hearing be open to the public, *I have found no provisions in the School System's Ethics Regulations, Rules for the Ethics Panel, or Rules of Procedure for Hearings, which would allow for an open Hearing. Regulation V.G. requires that "all actions regarding a complaint shall be treated confidentially." (Emphasis added). Therefore, I believe that the Hearing in this matter must be closed.* However, I will transmit this request to the Panel for their decision. Additionally, I would ask that the Complainants, to whom I am sending a copy of this letter, and your letter, respond to that request.

(Bd. Ex. 39, p. 11) (Emphasis supplied).

Contrary to the clear instructions from counsel for the Ethics Panel that the ethics complaint investigation was a confidential matter and that the ethics hearing was a confidential closed proceeding, the Respondent sent several emails to the members of the County Board regarding the ethics proceeding. On February 28, 2011, he enclosed with his email to all members of the County Board a copy of a February 24, 2011 letter from his counsel to counsel for the Ethics Panel. (Bd. Ex. 39, pp. 3-7). This letter included the names of the complainants, the name of the alleged victim of the complaints, who was an HCPSS student, the substance of the complaints, and the Respondent's defense to the allegations. On March 3, 2011, the Respondent sent another email to the County Board members inviting them to attend the ethics hearing scheduled for later that day, and enclosing the February 15, 2011 and February 28, 2011 letters from counsel for the Ethics Panel to the Respondent's counsel. (Bd. Ex. 39, pp. 8-12). As noted above, both letters addressed the confidentiality requirements of the Ethics Regulations, including the confidential nature of the closed ethics hearing.

Later on March 3, 2011, HCPSS General Counsel Marc Blom responded to the Respondent's email by sending an email of his own to the members of the County Board instructing them not to attend the ethics hearing and not to receive any information regarding the ethics proceeding. He explained that the rules of the Ethics Panel provide that the hearings are closed and confidential, and the County Board is required to consider the recommendation of the Ethics Panel after it completes its deliberations, so the County Board members should not consider any information outside the formal record or inconsistent with the formal procedures. (Resp. Ex. 7, at 2450).

On March 4, 2011, an Internet blogger reported that an ethics complaint had been filed against the Respondent and erroneously identified the complainant as the Student member of the County Board. The source of this disclosure regarding the ethics complaint was not revealed in the blog nor was it subsequently identified. (Bd. Ex. 39, p. 13). After this information was released, the Respondent disclosed on the Howard Public Education website a copy of the ethics complaint, all documents he submitted into evidence during the ethics hearing, correspondence from his own counsel and counsel for the Ethics Panel, as well as the Rules of the Ethics Panel. He advised further that he would release the transcript from the ethics hearing as soon as it became available. (Bd. Ex. 39, pp. 24-39).

The Respondent chose to unilaterally release virtually all of the confidential information regarding the ethics complaint, investigation, and hearing, despite the confidentiality of the ethics process as set forth in the Ethics Regulations and Policies, and despite clear direction from counsel for the Ethics Panel directing the Respondent and other participants to maintain the confidentiality of the proceedings.

The Ethics Regulations were originally adopted in or about 1983 and were revised on several occasions including most recently in a County Board meeting on November 4, 2010. The Ethics

Policy 2070 and the Ethics Implementation Procedures, Policy 2070-PR, were also adopted at the November 4, 2010 County Board meeting. (Resp. Ex. 1, at 0877-0878). The HCPSS Ethics Panel was created in accordance with State Public Ethics law and the State Ethics Commission. The Public Ethics law requires county school boards to adopt conflict of interest and financial disclosure regulations applicable to school board members, and permits county school boards to adopt regulations on lobbying. The regulations shall be equivalent to or exceed the requirements of the State Public Ethics law and may be modified to make them relevant to the school system. Md. Code Ann., State Gov't §§ 15-812, 15-813, 15-814, 15-815 (2009 & Supp. 2012). The confidentiality provisions in the Ethics Regulations and Policies are patterned after similar confidentiality provisions of the State Ethics Commission. Md. Code Ann., State Govt. § 15-407 (2009). County boards of education are required to submit their ethics regulations to the State Ethics Commission for review and approval. The Ethics Regulations were approved by the State Ethics Commission. Even if the State Ethics Commission does not act, the regulations or amendments are deemed approved and become effective by operation of law. Md. Code Ann., State Gov't § 15-815 (2009).

The Respondent contends that the OAH lacks jurisdiction to consider the matter of "the legality of the Local Board's efforts to require confidentiality by subjects of an ethics investigation" because he contends this matter is a legal issue that is currently before the Circuit Court for Howard County. The Respondent also argues that he was justified in releasing the materials involving the ethics proceedings because once a leak occurred involving the ethics complaints, the confidentiality of the process had been breached and he was no longer required to maintain confidentiality of the ethics investigation information. The Respondent also claims that because he relied upon the advice of his counsel before disclosing the materials, his actions were protected. The Respondent also claims that the name of the student Board member was not confidential under federal law.

The Respondent supports his claim that the OAH does not have jurisdiction to consider the issue of confidentiality of the ethics proceedings by relying on section 10-214(b) of the State Government Article. That provision states:

> § 10-214. Consideration of other evidence
>
> (b) Regulations, rulings, etc., binding. – In a contested case, the office is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case.

Md. Code Ann., State Gov't § 10-214 (2009).

While the Respondent contends that the legal issue regarding confidentiality is currently pending before the Circuit Court for Howard County, he does not provide any detail regarding the precise issue that is before the Court or the current status of that proceeding. Furthermore, he fails to explain why the statute he cites would deprive the OAH of jurisdiction in this matter. If there was a court ruling that directly addressed the confidentiality issue pending here, perhaps that ruling would be binding on the OAH. However, the Respondent has identified no such relevant ruling. Even in that circumstance, the OAH would still have jurisdiction to consider whether the Respondent should be removed from the County Board for misconduct in office under section 3-701(g) of the Education Article and section 10-205 of the State Government Article. Md. Code Ann., Educ. § 3-701(g) (2008); Md. Code Ann., State Gov't § 10-205 (2009). The Respondent's argument that the OAH lacks jurisdiction over this issue has no merit.[9]

The Respondent also contends that once the leak occurred, he was no longer bound to maintain confidentiality of the ethics investigation and proceedings. The Respondent provides no

[9] In its November 16, 2012 letter, the County Board contends that the lawsuit that the Respondent filed against the County Board, that was pending in the Circuit Court for Howard County, included issues regarding the legality of the ethics confidentiality requirements. The County Board also contends that on or about November 13, 2012, the court "dispos[ed] of all counts in the lawsuit pending before [it]." I have already concluded that I will not consider any pleadings filed by the parties after the record in this matter closed on September 6, 2012. I also note, however, that the County Board has not explained in its letter the legal basis for the court's "dispos[al] of all counts in the lawsuit," so I am unable to determine the legal significance of the court's action, in any event.

legal support for that position. The Ethics Regulations and Policies are mandated by State Public Ethics law and the confidentiality provisions are patterned after similar confidentiality provisions of the State Ethics Commission set forth in the State Government Article. The Ethics Regulations provide that all actions regarding an ethics complaint shall be treated confidentially. The Ethics Regulations also provide that violation of the Regulations shall constitute grounds for discipline, personnel action, or removal from office where provided by law. (Bd. Ex. 40, Regulations, pp. 4, 10). Ethics Policy 2070 provides that all County Board members are required to conduct their duties and responsibilities in a responsible and ethical manner that reflects their position of public trust. Disclosure of confidential information is considered a violation of Policy 2070. (Bd. Ex. 40, Policy 2070, pp. 3, 6). Ethics Policy 2070-PR provides that the Ethics Panel, its staff, the respondent, and the complainant will not disclose any information relating to a complaint, including the identity of the complainant or the respondent. Policy 2070-PR also provides that *the Ethics Panel may release information* if a release has been agreed to in writing by the respondent. (Bd. Ex. 40, Policy 2070-PR, p. 4) (Emphasis supplied).

The Ethics Regulations and Policies clearly provide that the entire ethics investigation and proceedings are required to remain confidential. The only entity permitted under the State statute, the Ethics Regulations, and the Ethics Policies to release information regarding an ethics complaint is the Ethics Panel itself, and that may only occur in the discretion of the Ethics Panel after a respondent has agreed to such release in writing. Those conditions did not occur in this case. The Respondent did not make a request to the Ethics Panel for release of information and then wait for the Panel's response. Instead, the Respondent unilaterally released all information regarding the ethics complaint and investigation because a leak regarding the ethics complaint occurred in an Internet blog. The source of the information disclosed in the blog regarding the ethics complaint was never identified. There was no waiver of the confidentiality provisions even though some

information regarding the ethics complaint was leaked because the blogger, or an anonymous tipster, cannot waive the confidentiality provisions of the Ethics Regulations and Policies. The Respondent was not justified in orchestrating a mass disclosure of all information regarding the ethics complaint because the confidentiality provisions remained in effect and they clearly prohibited the Respondent from breaching confidentiality of the ethics proceedings. The Respondent subsequently released the transcript of the ethics hearing, also in violation of the Regulations, after the County Board voted at a meeting to deny his request for this release.

Furthermore, the Respondent never requested an advisory opinion from the Ethics Panel to determine what actions he could take as a result of the leak. He acted without authorization in clear violation of the Ethics Regulations and Policies. The confidentiality requirements are designed to protect the identity of complainants and respondents, and to protect the integrity of the ethics process. The Respondent and his counsel demonstrated disdain for the ethics process because they believed the complaints were unwarranted. However, there was a clearly defined process to investigate the complaints, which process was adopted by the County Board. That process produced a fair result when the underlying complaints were ultimately dismissed by the Ethics Panel. However, the Respondent attempted to make a mockery of the ethics process by ignoring the confidentiality provisions, releasing the materials, and disclosing all aspects of the ethics investigation without regard to the privacy of other individuals, including students. If participants fail to comply with the confidentiality provisions of the ethics process, this could have a chilling effect on individuals' willingness to utilize the Ethics Panel to investigate and resolve potential ethical violations. Moreover, the clear breach of the ethics confidentiality provisions also jeopardizes the Panel's ability to conduct a fair and impartial investigation and render a just and reasonable determination.

The student Board member explained at the June 9, 2011 Board meeting when the Resolution

for removal was being considered that the Respondent's release of the confidential ethics materials caused harm to her and other students who were mentioned in the released materials. (Resp. Ex. 1, at 1156). The Respondent failed to consider the broader consequences of his unauthorized disclosure which was motivated by self-interest.

The Respondent's breach of the Ethics Regulations was not confined to his release of the complaint and other ethics materials on the Internet after the leak. The Respondent also disclosed correspondence to all members of the County Board which revealed substantial information regarding the nature of the ethics complaints, and he invited the members of the County Board to attend the pending ethics hearing. He made those disclosures, which also violated the confidentiality provisions of the Ethics Regulations and Policies, before he became aware of a leak. The Respondent was notified repeatedly by counsel for the Ethics Panel regarding the confidentiality of all aspects of the ethics investigation, and was advised that the ethics hearing was a confidential closed proceeding. The Ethics Panel also provided him with copies of the Ethics Regulations and Policies. By disclosing information to the entire County Board, he undermined the integrity of the ethics investigation and decisional process. The Ethics Panel must rely on the official record of the complaint proceedings to make a determination regarding the validity of a complaint. If the Ethics Panel determines that there is no violation, it must refer the matter to the County Board with a recommendation that the complaint be dismissed. If the Ethics Panel determines that there is a violation, then it must refer the matter to the County Board for further action. (Bd. Ex. 40, Regulations, p. 4). The County Board then must act based on the official record and the recommendation provided by the Ethics Panel.

When the Respondent submitted information to the County Board and invited the members to attend the ethics hearing, he jeopardized the integrity of the ethics proceedings and provided the County Board with additional materials or access to information beyond the formal record of the proceedings. This demonstrates that the Respondent violated the confidentiality provisions of the

Ethics Regulations and Policies even before he became aware of the leak. There is no basis for the Respondent's claim that because the County Board appointed the Ethics Panel that the County Board was entitled to access to all ethics materials and proceedings during the course of the Panel's investigation. The Regulations clearly require a confidential process and a separation of functions between the Ethics Panel and the County Board. The Respondent breached the Regulations and Policies and undermined the ethics process.

The Respondent alleges that his actions were also justified because he relied on the advice of his counsel in disclosing information about the ethics complaint. The Respondent relies on a New Jersey case in claiming that his actions were protected based on his reliance on the advice of counsel. *In the Matter of John F. Zisa*, 285 N.J. Super. 188 (App. Div. 2006). This out-of-state has no precedential value in Maryland. Moreover, the *Zisa* case does not support the Respondent's position. The court stated that reliance on the advice of counsel is not an absolute defense to a charge of violating a local government ethics law. In *Zisa*, the elements for the defense of reliance on advice of counsel were developed by a New Jersey Executive Commission on Ethical Standards. The case found that one of the critical elements for that defense was that the individual who offered the advice or approval relied upon possessed authority or responsibility with regard to ethical issues. In the *Zisa* case, Zisa was the Mayor of Hackensack, New Jersey. He relied on the advice of the City Attorney who was responsible for rendering advice concerning the local government ethics law. *Zisa*, 385 N.J. at 198-199. The underlying case that supported the *Zisa* decision involved a New Jersey Department of Corrections employee who similarly relied on the advice of an individual who was the legal advisor to the Commissioner of Corrections and a member of the Ethics Committee for the Department of Corrections. *In re Howard*, 93 N.J.A.R.2d (Vol. 5A) 1 (Exec. Comm'n on Ethical Standards), *aff'd as modified*, 94 N.J.A.R.2d (Vol. 5A) 1 (App. Div. 1994). In each of these cases, the attorney whose advice was relied upon was an agency or City attorney responsible for advising on ethical issues.

The Respondent's reliance on the advice of his own personal attorney in the instant matter does not meet the standard established in *Zisa*, even were that standard to apply here. The Respondent claims that his personal attorney possessed authority or responsibility regarding ethical issues as required by the *Zisa* case simply because he was representing the Respondent in the ethics proceedings. However, that relationship is not sufficient to meet the standard of the *Zisa* and *Howard* cases. Only if the Respondent had relied on the advice of the counsel to the Ethics Panel itself, counsel to the State Ethics Commission, or counsel to a similar ethics body or other agency handling ethical issues would it meet the standard for the defense of reliance on advice of counsel. Moreover, in the instant matter, counsel to the Ethics Panel advised the Respondent repeatedly that the Ethics Regulations and Policies mandated that all matters regarding an ethics complaint were confidential, that nothing regarding an ethics matter could be discussed or disclosed, and that the ethics hearing was a closed confidential proceeding. The HCPSS General Counsel, who represents the school system and the County Board, also instructed all County Board members not to attend the ethics hearing because it was confidential and their attendance might interfere with their distinct role in the ethics investigation. The Respondent violated the confidentiality provisions of the Ethics Regulations and Policies and never sought an advisory opinion from the Ethics Panel.

For all the foregoing reasons, I conclude that the Respondent violated the important confidentiality provisions of the Ethics Regulations and Policies when he disclosed information to the County Board members, invited the members to attend the confidential closed ethics hearing, and released materials regarding the ethics complaint on a public website and subsequently released a transcript of the ethics proceedings.

Blom Memorandum

The County Board contends that the Respondent violated the attorney-client privilege when he attached a copy of the Blom Memo, which had been designated by HCPSS General Counsel

Marc Blom as an attorney-client privileged document, to his appeal to the State Board regarding issues concerning the Royalties Policy. The County Board argued further that even if the document was ultimately determined not to be protected by the attorney-client privilege, the Respondent's actions were improper because he acted unilaterally in defiance of the County Board's clearly stated position that it believed the document was protected by the attorney-client privilege; that it did not authorize release of the document; and that as an individual member of the County Board the Respondent did not have the authority to waive the attorney-client privilege and act unilaterally in defiance of the County Board's position. The Board argued that the Respondent's behavior was similar to the conduct the Superintendent found in the *Judy* decision to constitute serious misconduct in office because, like Judy, the Respondent acted unilaterally against the County Board's collective decision in violation of the rules set forth in Policy 2000 on School Board Governance and the County Board Handbook.

The Respondent argued that the Blom Memo was not protected by the attorney-client privilege because the legal memorandum was not requested in a manner satisfying all of the elements of the attorney-client privilege. The Respondent also claimed that because the Blom Memo was prepared to assist the County Board in developing the Royalties Policy, it should never be confidential as the public should not be denied access to the process of developing the policy. The Respondent also contends that the OMA prevents the County Board from maintaining confidentiality of the Blom Memo based on attorney-client privilege.

The OMA does not prevent the County Board from requesting that its attorney prepare a confidential memorandum containing legal advice and protected communications. The OMA requires a public body to meet in open session, except for certain stated exceptions when a public body may meet in closed session. Md. Code Ann., State Gov't §§ 10-505, 10-508 (2009). One of the express exceptions for when a public body may meet in closed session is to consult with counsel

to obtain legal advice. Md. Code Ann., State Gov't § 10-508(a)(7). The Respondent's claim that the County Board can never maintain the confidentiality of a legal memorandum pursuant to the attorney-client privilege is simply incorrect because the OMA authorizes a public body to conduct closed sessions or to adjourn to closed sessions when it consults with counsel to obtain legal advice.[10]

The Respondent also argues that even if a legal memorandum might be protected from disclosure under the attorney-client privilege in certain circumstances, the County Board failed to properly create a privileged attorney-client communication in this instance. In *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396 (1998), the Court of Appeals held that "in Maryland, the privilege has been recognized as a rule of evidence that prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice." *du Pont*, 351 Md. at 414. The court noted that the attorney-client privilege is codified in Maryland law and provides that "a person may not be compelled to testify in violation of the attorney-client privilege." Md. Code Ann., Cts. & Jud. Proc. § 9-108 (2006). The Court also held that the party seeking protection of the privilege bears the burden of establishing its existence, and because application of the privilege withholds relevant information from a fact-finder, the privilege contains some limitations and should be narrowly construed. *du Pont*, 351 Md. at 415. Additionally, the Court held that, "Only those attorney-client communications pertaining to legal assistance and made with the intention of confidentiality are within the ambit of the privilege." *Id.* at 415-416. The *du Pont* case relied on *Wigmore on Evidence* in describing the essential elements of the attorney-client privilege, as follows:

[10] The Attorney General's Opinion that the Respondent relied upon was inapplicable because it did not involve the attorney-client privilege. 65 Op. Att'y Gen. Md. 347 (1980). The Respondent's claim that his actions in disclosing the Memo were justified because the Royalties Policy issue involved alleged criminal wrongdoing was not supported by the evidence in this record.

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except that the protection may be waived.

Id. at 415. The communications protected by the privilege must have been made by the client to the attorney. *Newman v. State*, 384 Md. 285, 302, 304 (2004).

The Respondent argues that when County Board members discussed the issues of the Royalties policy and requested a legal opinion from counsel to the County Board, the communication was not made in confidence; therefore, the legal opinion prepared by counsel that included those communications was not protected by the attorney-client privilege. The evidence reflects that the Respondent raised this issue in March 2009 when he first received the Blom Memo, which was identified as a confidential attorney-client privileged document. In a March 12, 2009 email, the Respondent argued that he did not believe the County Board had requested that the legal memorandum surrounding the Royalties Policy be a confidential document. (Resp. Ex. 2, at 1535-1536). For the reasons addressed below, I agree.

The evidence reflects that the County Board members discussed issues regarding the Royalties Policy in an open meeting of the County Board on February 12, 2009. In addition, when Chairman Aquino requested that General Counsel Blom prepare a legal analysis of the issues, this request was also made in the same open meeting of the County Board. There was no request by Aquino or any member of the Board that the County Board adjourn to a closed session, nor was there a request that the memorandum be prepared or maintained in a confidential manner. In addition, when the Respondent asked questions about copyright issues related to the Royalties Policy, Blom stated in the open meeting that he had researched the issue and that the Royalties Policy had been drafted in conformity with the law. (Resp. Ex. 1, at 0145-0146). There could be no reasonable expectation of confidentiality when the communications were discussed by the County

Board members with their counsel in an open meeting, counsel discussed the legal research he had undertaken in the open meeting, and the Chairman's request for a further legal analysis by counsel was also made in the open meeting. In a subsequent email on April 17, 2009, County Board member Sandra French noted that if confidential advice was being requested from County Board counsel it should be done by requesting a closed meeting. (Resp. Ex. 2, at 1610). Although Blom identified the Memo as confidential, attorney-client privileged, the privilege rests with the client and not the attorney, and the client took no action to assert confidentiality. Although the client ultimately asserted that it was confidential after the Memo was drafted, at this time it was too late.

Under the definition of the attorney-client privilege adopted by *Wigmore on Evidence* and approved by the Court of Appeals in *du Pont*, the County Board has failed to show that the communications by the client (the County Board) were made in confidence because the communications were made in an open meeting, and the request that counsel prepare a legal memorandum was also made in the open meeting. Therefore, I conclude that the County Board failed to establish on this record that the Blom Memo was entitled to confidential protection under the attorney-client privilege.[11]

Although I conclude that the Blom Memo did not acquire confidentiality under the attorney-client privilege, I will also consider whether the Blom Memo was confidentially protected by the attorney work product doctrine. In the *du Pont* case, the Court stated:

> The work product doctrine protects from discovery the work of an attorney done in anticipation of litigation or in readiness for trial.... Determining whether a document ... was prepared in anticipation of litigation or for trial ... is essentially a question of fact, which, if in dispute, is to be determined by the trial judge following an evidentiary hearing.... In addition, the party claiming the privilege bears the burden to substantiate its non-discovery assertion by a preponderance of the

[11] The Respondent also argued that Mr. Blom waived the privilege when he released the Blom Memo to both members of the County Board and to HCPSS staff. However, the evidence establishes that Mr. Blom was counsel to the County Board and to the HCPSS Superintendent and staff so that he properly released the Memo only to persons who were his client. (Resp. Ex. 2, at 1555-1560).

> evidence....
>
> In determining whether particular materials were prepared in anticipation of litigation, courts examine whether or not they were created in the ordinary course of business. *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 18 (D. Md. 1980). The Advisory Committee notes to the 1970 Amendments to the Federal Rules noted that materials assembled in the ordinary course of business or for nonlitigation purposes are not under the partial immunity granted by [Rule 26] subsection (b)(3).

du Pont, 351 Md. at 407-410. For the attorney work product doctrine to apply, the threat of litigation must be "real and imminent." *Id.* at 410. There must be "a substantial probability of litigation, a mere possibility is not enough." *Id.* The mere fact that "litigation does eventually occur does not by itself bring documents within the ambit of the work-product doctrine." *Id.* at 411.

In the instant case, the Blom Memo was not prepared in anticipation of litigation or in readiness for trial. Rather, it was prepared in the ordinary course of business to determine whether the draft of the Royalties Policy that was under consideration by the County Board was an appropriate and lawful policy. Although the Respondent subsequently filed an appeal with the State Board, the evidence in this record does not establish that there was a reason for the County Board or Blom to have anticipated at the time the memorandum was prepared that litigation would ultimately occur. The Respondent had been a member of the County Board for only a few months, and at that time he had not yet filed any lawsuits or appeals as a Board member against the County Board. It was more than one month after Blom prepared and distributed the memorandum, and more than two months after the Board had requested its preparation, that the Respondent first made any mention, in an April 17, 2009 email, of the possibility of filing an appeal to the County Board's action of adopting the Royalties Policy. (Resp. Ex. 2, at 1612).

Accordingly, I conclude that the Blom Memo was not prepared in anticipation of litigation or in readiness for trial and, therefore, it was also not confidentially protected under the attorney

work product doctrine.

The County Board next argues that even if the document ultimately was shown not to be protected by the attorney-client privilege or the attorney work product doctrine, the Respondent's release of the document by attaching it to his State Board appeal was still improper because the Respondent acted unilaterally, contrary to the position of the County Board that the document should not be released. The County Board contends that the Respondent did not have the authority to make an individual determination as to whether the document was protected by the attorney-client privilege contrary to the Board's position. The County Board relies on the *du Pont* case to assert that "once the attorney-client privilege is invoked, the trial court decides as a matter of law whether the requisite privilege relationship exists, and if it does, whether or not any such communication is privileged." *du Pont*, 351 Md. at 415.

The County Board also relies on the rules set forth in Policy 2000 on School Board Governance and in the County Board Handbook in support of its position that the Respondent did not have authority to make a unilateral determination to release the Blom Memo contrary to the clearly stated position of the County Board that the memorandum was confidential, that it should not be released, and that the Respondent did not have the authority as an individual Board member to waive attorney-client privilege. The County Board contends that even if it was ultimately determined that its position was incorrect and the Blom Memo was not protected by the attorney-client privilege, the Respondent was still obligated to comply with the position of the County Board and not release the document until there was a determination to the contrary.[12] The State Board ultimately dismissed the Respondent's appeal because it determined that it did not have jurisdiction to decide the issues raised by the Respondent because they did not involve an interpretation of

[12] Neither party argued that the Respondent's action in attaching the Blom Memo to his State Board appeal was not a disclosure of the Memo. Therefore, I have treated the Respondent's action in attaching the Memo to that appeal as a disclosure in violation of the County Board's directive to the Respondent not to disclose it.

Education law. (Bd. Ex. 46A).

There is no dispute that the Respondent attached a copy of the Blom Memo to his State Board appeal. The appeal concerned the Respondent's claim that the Royalties Policy adopted by the County Board did not comply with copyright law and that the County Board did not have the right to insist that the Blom Memo remain confidential. When the Respondent attached the Blom Memo to the State Board appeal, he disclosed it in contravention of the County Board's directive to keep it confidential.

Policy 2000 states, in pertinent part, as follows:

> III. D. Officers
>
> The authority of the Board is collective and not individual. An individual Board member cannot act on behalf of the Board or represent the authority of the Board, unless so authorized by the full Board. Nonetheless, the Board recognizes that the effective administration of Board responsibilities requires the delegation of certain authority to officers.

(Bd. Ex. 47, p. 3).

The County Board Handbook provides, in pertinent part, as follows:

> Chapter 2 – Governance
>
> C. Individual Board Member Authority
>
> Individual Board members are free to express their personal viewpoint should it differ from a Board adopted position. However, in so doing a Board member shall properly note the divergence of their personal viewpoint in a manner that facilitates the public's understanding of how and why the Board member's view differs from that of the Board's position on the issue and in such a way that the Board member does not impugn the collective decision of the Board, i.e., a Board member should be free to maintain a different position than that of the Board as a whole as long as in so doing the Board member does not act in a way to undermine the collective authority of the Board such as acting in opposition to the Board's official position or failing to uphold or enforce the Board's decision.

(Bd. Ex. 1, p. 19).

The Respondent was free to voice his opposition to the County Board's view that the Blom

Memo was protected by the attorney-client privilege. When he sent numerous emails to the County Board members explaining his reasons for disagreement with the Board's position, he was acting in compliance with the Handbook and Policy 2000 by expressing his personal viewpoint and explaining the reason for his disagreement with the Board's position. When he requested the opportunity to further discuss the issue with the County Board members to try to convince them that the memorandum should be released, he was also acting appropriately. Even threatening to release the Blom Memo, while provocative and intimidating to other County Board members, was not itself a violation of Policy 2000 or the Handbook.

County Board Chairman Aquino made it quite clear to the Respondent, however, regarding the County Board's position of whether the Respondent was free to release the Blom Memo. In an email he sent to the Respondent on April 18, 2009, Aquino stated unequivocally, in pertinent part, as follows:

> While I have not reviewed the AG's opinion in great detail, I must reassert my position, and that of the Board, that the memo is attorney work product and it is subject to the attorney client privilege and the Board has not agreed to waive that privilege. Quite the contrary in a prior meeting the Board members (aside from you) agreed that the memo was to remain confidential and that attorney client privilege was not to be waived. … As I have previously stated – the Board is a collective authority and no Board member is authorized to take unilateral action on behalf of the Board. No one member can exercise the authority of the Board. Board authority is exercised by majority vote of the Board and once a position is adopted by vote of the Board, it is the Board's decision regardless of whether a particular Board member might have voted against it.
>
> ....
>
> As has been the case since you were sworn into office, I am happy to discuss this and any issue of concern to you, but I cannot support unilateral action by a Board member to waive attorney client privilege. The implications on future Board operations are too severe.

(Resp. Ex. 2, at 1614-1615).

Despite these instructions, the Respondent filed the State Board appeal and attached the Blom Memo to that appeal on or about May 15, 2009. In response, Chairman Aquino sent the

Respondent a letter on June 3, 2009. In that letter Chairman Aquino stated, in pertinent part,

> I am disappointed, to say the least, that you took it upon yourself to append Marc Blom's legal memorandum to your complaint to the Maryland State Board of Education, thereby releasing it publicly when the Board, as an entity, except for you, agreed that it should remain confidential.
>
> You have been advised previously that no one Board member has the authority to take unilateral action on behalf of the Board. The Board's authority is exercised by majority vote of the Board, whether you agree with that decision or not.
>
> As Board Chairman, I cannot countenance or acquiesce in a unilateral action by an individual Board member that is in direct contravention of a Board decision on a Board of Education issue and, most especially one that involves as important a consideration as a decision on whether or not to waive attorney-client privilege. As a lawyer, I would have thought that you would have had more respect for that principle.

(Bd. Ex. 2). Chairman Aquino also requested that the Respondent retract the memo from his complaint and ask the State Board to purge its files. (Bd. Ex. 2). The Respondent did not comply.

It was not improper for the Respondent to file an appeal to the State Board to clarify whether the Royalties policy adopted by the County Board was lawful under copyright law and whether the County Board was authorized to maintain confidentiality of the Blom Memo based on the attorney-client privilege. The County Board has acknowledged in its brief that a court or other quasi-judicial entity would ultimately determine whether the Blom Memo was entitled to confidential protection under the attorney-client privilege. It would have been advisable for the Respondent to provide the County Board with clear notice of the nature of his appeal to the State Board and when he intended to file it. However, once the Respondent attached the Blom Memo to his State Board appeal, he disclosed it contrary to the clearly stated position of the County Board that it considered the Memo to be confidential under the attorney-client privilege and that the Respondent did not have authority as an individual Board member to waive the Board's privilege.[13]

[13] The County Board, as the client, was the entity that was entitled to invoke the privilege. The privilege could only be waived by the entity entitled to invoke the privilege. Caffrey v. Dep't of Liquor Control, 370 Md. 272, 287 (2002). The Respondent as an individual member of the Board had no authority to waive the privilege.

The Respondent argues that the County Board Handbook is only advisory and has no binding authority. The Handbook states at Chapter 9, section G, in pertinent part, as follows:

> This Board Handbook is intended to be an advisory resource for Board members and is superseded by all HCPSS policies.

(Bd. Ex. 1, p. 63). Although the term "supersede" means to replace or set aside, a literal meaning of that language would render the entire sixty-three page County Board Handbook superfluous. Contrary to that language, the evidence demonstrates that the County Board regularly relies on the Handbook in its regular operations. Chairman Aquino testified that new Board members, including the Respondent when he joined the Board, receive training and orientation in part based on the information set forth in the Handbook. Therefore, the logical and reasonable interpretation of this language is that the Board Handbook is applicable and provides meaningful direction and guidance on Board operations and Board member conduct unless there is a conflicting Board policy. If a Board policy conflicts with the language in the County Board Handbook, then the Policy would control. Here, the language from the Board Handbook and Policy 2000 is consistent and does not conflict. Furthermore, Policy 2000 provides that the County Board shall develop and maintain a Board Handbook. (Bd. Ex. 47, p. 5).

In any event, the Respondent violated the Board Handbook at Chapter 2, section C, when he released the Blom Memo by undermining the collective authority of the Board, acting in opposition to the Board's official position, and failing to uphold the Board's decision. In addition, the Respondent violated Policy 2000 on School Board Governance, at section III.D, when he disclosed the Blom Memo because he acted individually without authorization from the full County Board and contrary to the collective decision of the full Board. This is a serious violation under the *Judy* decision because the Superintendent concluded that not acting unilaterally on school matters is considered "the linchpin of effective Board functioning." *Judy*, at 21.

Disclosure of Student Information

The County Board contends that the Respondent improperly released confidential, personally identifiable student information to his own private attorney, without consent from the student's parents or from the County Board, when he consulted with private counsel while drafting two dissenting opinions in two separate student appeals to the County Board. The County Board also claims that he improperly released the majority opinion and his dissent in the walking route appeal by posting them online rather than waiting for an official redacted version and for the County Board to obtain legal advice from the U.S. Department of Education (DOE) about whether the County Board could lawfully authorize the release of the student appeal decision to the public.

The Respondent claims that he properly consulted with counsel to assist him in preparing his dissenting opinions, and that any information he disclosed to his counsel remained confidential through the attorney-client relationship. He also claims that he lawfully posted the majority and dissenting opinions online because he first redacted those opinions.

In general, FERPA prohibits the disclosure of students' education records, or personally identifiable information from the records, to a third party without the prior written consent of a parent. The statute states that "no funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization ...." 20 U.S.C.A. § 1232g(b)(1) (2010). The Maryland Court of Appeals explained the following in *Kirwan v. Diamondback*, 352 Md. 74, 90 (1998):

> FERPA was enacted with an intent to ensure that students and their parents had access to education records, as well as an intent to stop the widespread dissemination of education records to others.... At the same time, Congress was greatly concerned with the systematic violation of students' privacy.

The federal regulations define a "disclosure" as "the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 C.F.R. § 99.3 (2012). The regulations define "education records" as "those records that are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution." *Id.*

The Respondent provided the majority opinion of the County Board and a draft of his dissenting opinion and personally identifiable information regarding the students to his private attorney while he was drafting the dissent in two separate student appeals to the County Board. One was an out-of-district appeal regarding school jurisdictional boundaries, and the other was a walking- route appeal regarding a student's eligibility for bus transportation. The private attorney testified and acknowledged that he received this information from the Respondent. (TR 1201-1204, 1213). The information that the Respondent forwarded to his private attorney regarding these two student appeals are considered education records.

FERPA provides an exception to the prior written consent requirement for disclosures to "school officials … determined by such [educational institution or local educational agency] to have legitimate educational interests…." 20 U.S.C.A. § 1232g(b)(1)(A) (2010). The Respondent argues that his disclosure to a private attorney is permissible because his private attorney is a school official with a legitimate educational interest. The statute and regulations do allow for non-consensual disclosures to particular parties, including attorneys, under the umbrella of "school officials." 34 C.F.R. § 99.31(a)(1)(i)(B) (2012); *The Family Educational Rights and Privacy Act: Guidance for Eligible Students*, U.S. Dep't of Educ., Feb. 2011, ("This office generally interprets the term [school official] to include parties such as … attorneys … to whom the school has outsourced institutional services or functions"). The Education Article provides that "each county school board may retain

counsel to represent it in legal matters that affect the board." Md. Code Ann., Educ. § 4-104(a)(1)(i) (2008). The federal regulations also provide that such attorney must be a "party to whom an agency or institution has outsourced institutional services or functions" and "is under the direct control of the agency or institution with respect to the use and maintenance of education records." 34 C.F.R. § 99.31(a)(B)(2) (2012).

An attorney properly authorized by the County Board to perform legal services for the County Board, such as the HCPSS General Counsel or outside counsel for which the County Board has contracted for legal services, would be under the direct control of the County Board. However, the Respondent did not request permission from the County Board to hire a private attorney to assist him in preparing a dissenting opinion and did not notify the County Board in advance that he was consulting a private attorney rather than Board counsel. Therefore, it is clear that the private attorney hired by the Respondent was not under the direct control of the County Board. While the Respondent was free to consult with private counsel on any issue, the critical issue here is whether the Respondent was authorized to disclose education records or personally identifiable student information from those records to a third party without consent from the students' parents. I conclude that he was not so authorized by the County Board.

The Respondent could have used HCPSS General Counsel or outside counsel already contracted for by the County Board to assist him in preparing his dissenting opinions. He also could have requested authorization from the County Board to hire private counsel based on his view that he could not work comfortably with the County Board's existing counsel when preparing a dissenting opinion. The Respondent did not pursue any of these reasonable options. He simply disclosed unredacted education records and personally identifiable information to a third party without authorization from the County Board and without consent from the students' parents. The County Board properly considered this to be a FERPA violation. Although isolated disclosures by an

individual might not be the type of systematic violations of students' privacy rights that the U.S. DOE generally pursues, the County Board and the HCPSS are still obligated to comply with the FERPA requirements and to ensure compliance by their staff to avoid liability or the loss of federal funds.

The County Board also relied upon the Respondent's posting of the majority and dissenting opinions in the walking route appeal on the Howard County Public Education website without authorization from the County Board as further evidence of his misconduct. Sometime in 2010 the Respondent requested under the MPIA that the County Board provide him with an officially redacted copy of the walking route student appeal decision so it could be released. However, before the County Board responded to the request, had an opportunity to consider the propriety of releasing the decision, or had an opportunity to properly redact the opinions under FERPA and the MPIA, the Respondent self-redacted the opinions and unilaterally posted them on the public website on or about August 30, 2010 without knowledge or authorization from the County Board. (Resp. Ex. 21). The Respondent's personal redactions were flawed and he did not obtain redactions from the Board or school system that was responsible to ensure compliance with the FERPA requirements.

When General Counsel Blom responded on September 22, 2010, he advised the Respondent that the decision might constitute a confidential student record under FERPA for which inspection would have to be denied under the MPIA. He was concerned that the unique factual circumstances of the case would make it a confidential student record for which release would be problematic. He advised that he would ask outside counsel to seek an opinion from the U.S. DOE and requested that the Respondent wait until such guidance was received before he released any opinions. The Respondent replied on September 23, 2010 that he found Mr. Blom's opinion that the FERPA confidentiality requirements might apply to be without merit; that Mr. Blom did not have authority to engage outside counsel for this matter; and criticized the expense of funds for this inquiry. The Respondent failed to disclose to Mr. Blom or the County Board that he had already posted the

opinions on the website without authorization.

On October 19, 2010, Chairman Giles and Vice Chairman Siddiqui wrote a letter to the Respondent, relying on Policy 2000 regarding School Board Governance, that the authority of the County Board is collective and not individual and that an individual member cannot act on behalf of or represent the authority of the County Board, unless authorized by the full County Board. They explained in the letter that the Respondent did not have the authority to determine individually which documents were confidential under federal law, which documents were subject to public disclosure under the MPIA, and further explained that the Respondent's actions in self-redacting the decision and releasing it to the public without authorization from the Board might jeopardize the school system's receipt of federal funds. (Bd. Ex. 4).

The Respondent's actions in sharing confidential student information contained in education records with a third party private attorney whose representation was not authorized by the full County Board constituted a violation of Section III.D of Policy 2000 on School Board Governance, which prohibits certain individual actions by County Board members that have not been authorized collectively by the full County Board. (Bd. Ex. 47, p. 3). The Respondent also violated Policy 2000 when he posted it on the website without authorization from the full County Board and failed to wait for the school system or Board to provide him with an officially redacted version of the walking-route decision consistent with their agency obligation. The Respondent's action also violates the Handbook, which prohibits individual Board members from undermining the collective authority of the Board or failing to uphold Board decisions. The General Counsel also asked the Respondent to refrain from posting the decision until the County Board could obtain guidance from the U.S. DOE regarding the applicability of the confidentiality requirements under FERPA to a student appeal decision issued by the County Board. The Respondent posted the decision without authorization from the County Board and failed to disclose to Blom or the County Board that he had

already posted it without authorization.

Dyer and School System Staff

The County Board contends that the Respondent repeatedly mistreated, threatened, and bullied HCPSS staff and County Board members. The Board argues further that the Respondent overstepped the bounds of his role as a member of the County Board by directing County Board members and HCPSS staff to perform or refrain from certain actions regarding matters of which he was not authorized to act. The County Board relies on the Respondent's comments made to Joel Gallihue, Manager of School Planning for HCPSS, and Kathleen Hanks, Administrative Specialist for the County Board; comments and a letter sent to Michael Borkoski, HCPSS Technology Officer; a letter sent to then-present County Board Chairman Ellen Giles and former Chairman Frank Aquino; and emails sent to Marc Blom, HCPSS General Counsel.

The Board contends that the Respondent lacked the authority to direct Gallihue to act regarding the redevelopment of downtown Columbia in a manner contrary to the position the full County Board adopted in a public meeting, to state to Gallihue that he was telling him this as a Board member and that Gallihue worked for him (the Respondent), and to accuse Gallihue of being a lackey for the developers. The County Board contends these comments were unauthorized because the Respondent, as an individual Board member, lacked the authority to direct Gallihue, a HCPSS staff member, to take any action and had no authority to direct Gallihue to act contrary to the position adopted by the full County Board.

The County Board Handbook provides that Board members are free to express their personal viewpoints if they differ from the Board's adopted position so long as they explain the basis for their divergent views. The Handbook states that Board members can express differing viewpoints so long as the members do not undermine the collective authority of the Board by acting in opposition to the Board's official position or failing to uphold or enforce Board decisions.

Although the Respondent desired that Gallihue proceed differently from the position adopted by the County Board, he was merely expressing a different view and the basis for his position. Gallihue disagreed with the Respondent's position and told him that as a voter in Howard County the Respondent might actually work for him. Gallihue held his own in the encounter and did not allow the Respondent to bully him. Gallihue explained effectively in the hearing how he was offended by the Respondent's claim that he was a lackey for the developers because it challenged his professional integrity. He also explained that he took additional care in future encounters with the Respondent and tried to avoid meeting with him alone. While the Respondent may have been forceful and insulting to Gallihue, I do not find this encounter to demonstrate that the Respondent acted without authority while voicing his opposition to the County Board's position. Merely expressing his forceful opinion that differed from the position adopted by the Board did not establish unauthorized action or misconduct in office.

The County Board also claimed that the Respondent's letter of January 26, 2010 to the Chairperson of the Howard County Council regarding his view of the redevelopment of downtown Columbia undermined the recently-adopted position of the County Board. The Respondent's letter expressed his position that differed from the position adopted by the County Board and explained his reasoning. The Respondent clearly labeled his letter as a "Minority Report" and stated directly beneath his signature that he was "Speaking as an individual member" of the County Board. Chairperson Watson of the County Council acknowledged in her email to the Board that members are welcome to provide the County Council with their opinion anytime, and that she understood the difference between the County Board's position and a dissenting member's opinion. (Resp. Ex. 15). Although the letter was drafted on what apparently was official County Board letterhead, this did not prevent Watson from discerning that the letter was merely the Respondent's own opinion. While the Handbook provides that only the Chairman or the Chairman's designee is to use Board

letterhead, former Chairman Giles, who was Chairman at the time, and other Board members did not recall the existence of a written policy regarding the use of Board stationery and Ms. Giles acknowledged that Administrative Specialist Hanks was not aware of the practice concerning the use of Board stationery. In addition, the evidence did not establish that this policy was discussed with the Respondent in advance, the Respondent clearly identified on its face the nature of the letter as only his minority view, and the County Council was not misled by the Respondent's letter. (Bd. Ex. 1, p. 39; Bd. Ex. 12; TR 380-390, 1504). For all these reasons, I do not find that the Respondent's letter to the County Council undermined the position of the Board or established misconduct in office.

The County Board also contends that the Respondent acted without authority when he sent a letter on modified Board stationery directing Technology Officer Borkoski to immediately cease and desist from the destruction of records and recover records previously removed without authorization. (Resp. Ex. 4, at 1819). The Respondent copied the full County Board, the HCPSS staff, and the director of records management for the Department of General Services. The heading of the letter identified only the Respondent as a Board member of the County Board. The Respondent sent this letter after Borkoski had sent the Respondent and the County Board guidelines for the handling of emails and after the County Board had rejected the Respondent's efforts to place a moratorium on the routine destruction of unsaved emails. After receiving this letter, the County Superintendent's Chief of Staff, Mamie Perkins (Perkins), notified the Respondent that Borkoski does not report to him. (Resp. Ex. 4, at 1821). The Respondent responded by letter to Perkins threatening that HCPSS staff and County Board members would be found guilty of criminal violations for the destruction of public records. (Bd. Ex. 7). The Respondent also wrote to then-current and former Board Chairmen Giles and Aquino threatening them with a last opportunity to explain their conduct of concealing the fact that emails were being destroyed. (Bd. Ex. 5).

On October 19, 2010, Chairman Giles and Vice Chairman Siddiqui wrote to the Respondent warning him to follow his responsibilities and addressing several issues in which he had exceeded his authority as a Board member. They told him directly that he did not have legal authority over school system staff. (Bd. Ex. 4).

In the *Judy* decision, the Superintendent determined that Judy had exceeded her authority as a Board member and had failed to distinguish her role from that of the county superintendent when she instructed the county superintendent to fire an assistant superintendent for making offensive comments. The evidence in this case established that the Respondent had no authority to unilaterally direct the school system's technology officer to immediately cease and desist from the destruction of records and recover records previously removed without authorization, regardless of his view of the law. The Respondent had the right to voice his opposition to the Board's position and explain his reasons for disagreement. The Respondent had no authority, however, to individually direct school system staff to take action regarding the public records when the County Board had already considered and rejected the Respondent's requests for a moratorium on the routine destruction of deleted emails. Moreover, the County Board and school system had previously filed a records retention schedule with the State Archive; then-Chairman Giles was participating on a State committee to develop new records retention policies; and Borkoski had sent guidelines for handling emails to the County Board and school system.

The Respondent's actions in directing Borkoski to cease the destruction of public records was evidence of the Respondent's individual actions that were not authorized by the full County Board, which violated section III.D of Policy 2000. It also established a violation of Chapter 2, section C, of the Board Handbook because the Respondent's actions went far beyond merely expressing his personal views that differed from the Board; instead he impugned the collective decision of the Board, undermined the Board's collective authority, acted in opposition to the

Board's official position, and failed to uphold the Board's decision. The Respondent's actions violated Policy 2000 and the Board Handbook because the County Board had already rejected the Respondent's requests concerning the records retention issue, and the County Board and HCPSS staff had taken other actions regarding records retention and email guidelines. The Respondent acted individually without authority from the full Board merely because he disagreed with the County Board's position on this issue.[14] There was no policy prohibiting the Respondent from sending a letter with a heading that identified only the Respondent as a Board member of the County Board.

The Respondent also accused General Counsel Blom of exceeding his authority and placing the "public fisc" at risk when Blom requested that the Respondent delay his plan to release the walking-route decision until Blom could engage outside counsel to obtain guidance from the U.S. DOE regarding the confidentiality of student appeal decisions under FERPA. The Respondent's disagreement with Blom over whether FERPA confidentiality provisions were applicable and whether it was necessary to hire outside counsel to research the issue was another example of the Respondent's undiplomatic manner of expressing disagreement. Those actions, while examples of intimidation and bullying by the Respondent, were not unauthorized actions because the Respondent has the right to disagree with the County Board and HCPSS, even if those disagreements are carried out in an offensive and insulting manner. Blom characterized the Respondent's comments as unprofessional, insulting, slanderous, and intimidating. (TR 932-935).

The Respondent carried his disagreement too far, however, when he directed Blom, without authorization, to "immediately contact any attorney you have attempted to retain in this matter and advise them, in writing, that you have exceeded your authority ...." (Bd. Ex. 19; Resp. Ex. 10, at

[14] The COMAR regulations the Respondent relied on which he claimed supported his directive to Borkoski did not support his unilateral action. The COMAR provisions the Respondent cited, COMAR 14.18.02.04 and 14.18.02.07, addressed only the responsibilities of agencies with regard to records, not individuals.

2831). The Respondent could have requested the full Board to consider Blom's actions and take appropriate steps. However, he had no authority to individually direct Blom to write a letter to outside counsel stating that he had exceeded his authority. Furthermore, the Respondent also acted without authorization when he individually directed Blom that "pending the results of my request for a review of your actions, do not destroy any documents or other evidence with regard to any actions that you have taken in your employ." (Bd. Ex. 19; Resp. Ex. 10, at 2831). While the Respondent could have raised this issue with the full Board, he lacked authority to unilaterally direct Blom to take this action. Policy 2000 reiterates that the authority of the Board is collective and not individual and an individual Board member cannot act on behalf of the Board unless authorized by the full Board. (Bd. Ex. 47, p. 3). These actions by the Respondent in directing Blom to write to outside counsel and advise them that he had exceeded his authority and directing Blom to cease the destruction of all documents and other evidence throughout his employment exceeded the Respondent's individual authority, was not authorized by the Board, and violated Policy 2000, at section III.D., and Chapter 2, section C, of the Board Handbook. Furthermore, Blom did have authority to research FERPA issues and engage outside counsel to obtain guidance regarding FERPA considerations. As General Counsel to the HCPSS, Blom was responsible for ensuring that the school system complied with FERPA requirements and that it did not jeopardize its receipt of federal funds.

With regard to his encounter with Administrative Specialist Kathleen Hanks, the evidence established that the Respondent was seeking a copy of a transcript in an employee discipline case. Blom directed the Respondent to check with Hanks regarding transcript issues. The Respondent sent an email to Hanks inquiring as to whether the Board would be receiving an electronic version of the transcript, whether there was an existing HCPSS protocol regarding the purchase of transcripts, and indicated that he intended to raise these issues regarding expenses with the entire

Board at the next public meeting. Although Hanks became understandably upset by the Respondent's intimidating style and believed that the Respondent was accusing her of wrongdoing, she acknowledged there might have been a misunderstanding. I do not find that the Respondent directed Hanks to take action without authorization. He simply made an undiplomatic request that Hanks provide him with information regarding the practice for purchasing transcripts so that he could raise expense issues with the County Board. While intimidating comments or bullying tactics are inappropriate and should be addressed, they do not rise to the level of misconduct in office. The Respondent also sent a provocative letter to Chairman Giles and former Chairman Aquino regarding the records retention issue. While the letter was undiplomatic, it essentially set forth his differing viewpoint on the records issue. Even if the letter included an implied threat to file suit, that action alone did not establish misconduct in office.

This evidence establishes that on several occasions the Respondent acted without authority from the full Board in violation of the Policy 2000 and the Board Handbook. This unauthorized action demonstrates further evidence of misconduct in office. However, not every transgression such as offensive comments or an intimidating style establish evidence of misconduct in office because there must be some room to acknowledge the inevitable rough and tumble of politics.

Less Divisive and Costly Alternatives

The County Board contends that the Respondent spurned less divisive and less costly alternatives to resolving disputes in favor of filing civil suits in Circuit Court against the Board. The Board does not challenge the Respondent's "legal right to file lawsuits on any topic he chooses whenever he wants." (Bd. Post-Hearing Memo., p. 29). However the Board argues that "he has no right to use it as a tool of persuasion or intimidation." *Id.* The County Board did not challenge the Respondent's right to file complaints with the Open Meetings Compliance Board (OMCB) because it views these complaints as less costly and less contentious requests for advisory opinions from the

OMCB. The Board contends, however, that the Respondent chose instead to file more expensive civil suits in Circuit Court and never sought declaratory judgments to demonstrate that his goal was only to obtain an interpretation of law from an outside source. The Board argued further that if the Respondent had truly desired a legal interpretation of disputed issues, he could have requested an Attorney General's opinion, but did not. Instead, the Respondent filed civil suits against the County Board, accused it of violating the law, and sought court orders to require the Board to change its position.

The County Board also alleges that the Respondent refused to compromise or mediate any of his disputes with the full Board. Just as the Respondent has the right under the Handbook to adopt a different viewpoint from the position of the full Board, so long as he explains his view, the Board has not identified any legal obligation for the Respondent to reach a compromise or to mediate or arbitrate a dispute. The refusal to compromise might cause the Board's regular operations to be more contentious and uncomfortable for its members, but the Respondent's failure to resolve disputes with Board members does not itself establish evidence of misconduct in office.

The County Board also argues that the Respondent does not have the right to use the filing of civil suits as a tool of persuasion or intimidation. The Board offers no legal support for this claim. The Board concedes that the Respondent has a right to file lawsuits. Therefore, he also has the right to file such suits for any reason he deems appropriate. The Board contends that the Respondent has on several occasions threatened Board members, such as then-Chairman Siddiqui, when he told her that if she did not apologize for the alleged reprimand in April 2011, he would add a new count to an existing lawsuit. The Board characterizes the Respondent's action as a threat. The Respondent argues that he is merely providing the Board with notice of his intent to file a new lawsuit or add a new count to an existing suit.

The Board has not identified any legal authority that would prohibit the Respondent from

filing a lawsuit, even one that names his own Board as a defendant. Although the Board contends that most or all of his lawsuits have been dismissed, the Board has never claimed that any of these lawsuits was dismissed as frivolous or that the Board was awarded sanctions for a groundless action. I do not find that even if the Respondent's lawsuits were motivated, in part, by persuasion or intimidation that this establishes misconduct in office by the Respondent. Lawsuits are frequently filed to persuade or intimidate. Yet, the Respondent has regularly identified a legal issue that motivated his disagreement with a Board position and the basis for filing suit in court. While filing a civil suit in court may result in added expense to the school system's budget, his actions were motivated by pursuit of a legal position or principle; the Board has conceded that he has a right to file lawsuits; and the Board has cited no statute or rule that was violated that would support a determination of misconduct in office. Filing lawsuits against his own Board undoubtedly places a strain on the members and on the Board's operations. However, the Board did not present any evidence to establish that any school business could not be carried out as a result of the Respondent's litigation.

For all the foregoing reasons, I conclude that the Respondent's tactics in filing lawsuits regarding Board policies with which he disagrees do not establish rule violations or evidence of misconduct in office. I also find that the Respondent's alleged threats to file suit were merely his intimidating method of notifying the Board that he intended to file suit. This advance notice was advantageous to the Board so it could either consider its actions or prepare for an impending lawsuit. Whether the Respondent filed a complaint with the OMCB, an appeal to the State Board, or a civil suit in Circuit Court, the Respondent was merely pursuing a legal issue that he believed to be justified. The added expense that resulted from this litigation does not establish misconduct in office but it does highlight the hypocrisy of the Respondent's complaints about Board expenses while he was himself adding substantial expenses to Board operations through his litigation. There

being no evidence that any court found his lawsuits to be frivolous, I do not find that the Respondent's multiple lawsuits and complaints have established an independent basis for finding misconduct in office. Moreover, attempts to persuade and intimidate through comments, letters, emails, and the filing of complaints and lawsuits, are consistent with the Respondent's intimidating and offensive manner of expressing his different viewpoint, but they do not rise to the level of a violation of Board rules or misconduct in office.

Conclusion

The Board argues that the Respondent should be removed from office due to the pattern of misconduct in office that he has demonstrated throughout his term as a member of the County Board as reflected in the numerous incidents addressed here. *In the Matter of Maryann Judy*, Superintendent's Case No. 1-07, MSDE (July 30, 2007), is the only reported decision in Maryland that involves the removal of a member of a county board of education for misconduct in office. The Respondent argues that *Judy* is inapplicable because Ms. Judy was appointed by the Governor while the Respondent was elected to his position. While this is a significant distinction, I find that *Judy* is relevant and provides meaningful guidance here for the reasons noted above. In *Judy*, the Superintendent conducted a thoughtful review of the term misconduct in office and how that standard is applied in this context. As the State Board is statutorily mandated to "explain the true intent and meaning of the provisions of" the Education Article and to "decide all controversies and disputes" under its provisions, Md. Code Ann., Educ. § 2-205(e) (Supp. 2012), it is appropriate for the State Board and, through this delegation to the OAH, for me to consider analogous interpretations of the term misconduct in office under the Education Article as it applies to the duties of a member of a county board of education. The decision of *Resetar v. State Bd. of Educ.*, 284 Md. 537 (1979), is similarly relevant because the Court of Appeals has also interpreted the meaning of the term misconduct in office under the Education Article, applying it to the termination

of a teacher for misconduct in office. *Judy* is also applicable here because the statute relied upon for the removal of Ms. Judy, section 3-108(d) of the Education Article, is nearly identical to the language in the statute that controls this proceeding, section 3-701(g) of the Education Article. The Maryland Legislature has determined that an elected member of a local board of education may be removed from office for misconduct in office.

Misconduct in office under the Education Article does not require a showing of criminal misconduct. In *Resetar*, the Court of Appeals found that misconduct in office includes malfeasance, which is doing an act that is wrongful in itself; and misfeasance, which involves doing an otherwise lawful act in a wrongful manner. The Court also found misconduct in office to include unprofessional acts, even though they are not inherently wrongful, as well as transgression of established rules, forbidden acts, dereliction from duty, and improper behavior, among other definitions. *Resetar*, 284 Md. at 560-561. In *Judy*, the Superintendent found that "misconduct in office can be found to exist even in the absence of evil motives, moral turpitude, corrupt or criminal conduct, or intentional wrongdoing." *Judy*, at p. 6, citing *Bunte v. Mayor of Boston*, 278 N.E.2d 709, 711 (Mass. 1972). The Superintendent also determined in *Judy* that public employees must be "held to a higher standard of stewardship than merely that of refraining from criminal actions while in office." *Judy*, at p. 6, citing *Bunte*, 278 N.E.2d at 712.

The Respondent relied on an Attorney General's Opinion which found that the Montgomery County Board of Education (BOE) could not discipline its own members for failing to maintain the confidentiality of a properly closed executive session of the local board. 65 Op. Att'y Gen. Md. 347 (1980). The Opinion determined that there was no provision in the OMA which established a sanction for disclosing confidential information discussed in a closed executive session. The Opinion did acknowledge that other statutes might prevent the disclosure of confidential information, such as the MPIA or statutes that prohibit the disclosure of, for

example, the contents of personnel records. The Opinion also observed that, while the Montgomery County BOE could not discipline or expel its own members, section 3-701(g) of the Education Article provided at that time that the County Council could remove members of the Montgomery County BOE for "immorality, misconduct in office, incompetency, or willful neglect of duty." The Attorney General concluded that "removable conduct obviously may include something less than breach of an express statutory duty." 65 Op. Att'y Gen. Md. at 347, at p. 5. The Opinion also noted that:

> Finally, although a single instance of a breach of confidentiality by a Board member would not furnish sufficient grounds for his or her removal by the County Council, we do think that repeated violations of confidentiality that demonstrably impair the Board's ability to function (e.g., by inhibiting free and open discussion at properly-closed executive sessions) might well constitute grounds for removal by the County Council.

65 Op. Att'y Gen. Md. 347, at p. 3.

The Respondent contends that his removal is improper because the County Board has violated his right to free speech. The evidence does not support this claim. The Respondent was always permitted to express his views in meetings of the Board, through letters and emails, and elsewhere. The Respondent was consistently allowed to express his viewpoint when he disagreed with positions of the Board and he regularly did so. The Board Handbook clearly recognizes the right of a Board member to express personal views that differ from positions adopted by the Board. Members are encouraged to explain the basis for their disagreement. The County Board did not prevent the Respondent from expressing his disagreement with Board positions. However, he was not permitted to take unilateral actions that contravened or undermined the collective positions adopted by the Board in violation of Board policy.

The Respondent's reliance on *Pickering v. Bd. of Education*, 391 U.S. 563 (1968) in support of his free speech argument is misplaced. In *Pickering*, the Court found that a teacher

could not be terminated for writing a letter to a newspaper that merely expressed his views on matters of public concern that were critical of past actions of a local board of education. The Court found that it was not shown that the teacher's actions impeded proper performance of his daily duties in the classroom or that they interfered with the regular operation of the schools. Therefore, the teacher's employment was only tangentially and insubstantially involved in his actions. In contrast, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) the Court upheld disciplinary action against a public employee for written expressions he made pursuant to his official job duties and denied the employee's claim that he had been retaliated against in violation of his free speech rights. The Court found that when public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for purposes of the First Amendment, and thus the First Amendment does not prohibit managerial discipline of such employees for speech made in their professional capacity. The Court recognized that it must afford government employers sufficient discretion to manage its operations. Although the Respondent is a public official and not a public employee, *Garcetti* is analogous to the instant matter. The County Board has the authority to manage its operations and to remove the Respondent from his position for the violations of law and of Board rules and policies where it substantially interferes with the County Board's operations. Accordingly, the Respondent's free speech argument must fail under the circumstances of this case.

In the *Judy* decision, the Superintendent considered three fundamental questions to determine if the local board member's misconduct warranted her removal from office. As addressed above, those questions are as follows:

1. Did the Board member violate a rule or duty of his office about which he knew or should have known?;
2. Was the conduct willful?; and
3. As a result, is the Respondent unfit to be a Board member?

Judy, at p. 13. I will address these questions to determine whether the Respondent's misconduct already found warrants his removal from office.

A. Violation of Rules or Duties.

I have already determined that the Respondent violated County Board rules, regulations, and policies, as well as some statutes. I will summarize those findings. I have concluded that the Respondent acted improperly in violation of Board Policy 2000 and the Board Handbook when he attached the Blom Memo to his appeal to the State Board in defiance of Board instructions and Board authority after the County Board had invoked the attorney-client privilege for the memo, clearly instructed the Respondent to maintain confidentiality of the memo, and advised him that as an individual Board member he did not have authority to waive confidentiality. The Board's position and instructions on this issue were clearly communicated to the Respondent by email from the Board Chairman on April 18, 2009 and the Respondent directly defied the Board's instructions and its unambiguous position on this matter. (Resp. Ex. 2, at 1614-1615). As a result of his actions, the Respondent violated the Board Handbook, at Chapter 9, section C, when he released the Blom Memo, by undermining the collective authority of the Board, acting in opposition to the Board's official position, and failing to uphold the Board's decision. The Respondent also violated Policy 2000 on School Board Governance, at section III.D, when he disclosed the Blom Memo because he acted individually and without authorization from the full County Board and contrary to the collective decision of the Board. The Superintendent in the *Judy* decision considered acting unilaterally on school matters without the authority of the Board a serious violation because she determined that a board member's responsibility to not act unilaterally on school matters is the "linchpin of effective Board functioning." *Judy*, at 21.

I have also concluded that the Respondent blatantly violated the confidentiality provisions of the Ethics Regulations and Policies after receiving unambiguous notice from the Ethics Panel

regarding his obligation to maintain the confidentiality of the Ethics proceedings. His mass disclosure of the ethics materials was not justified by an anonymous and partially inaccurate leak of limited information or by erroneous advice from his private attorney. The Respondent also disclosed other confidential information regarding the ethics investigation and invited Board members to attend the closed hearing even before the leak occurred.

The Ethics Regulations and Policies that he violated applied to all Board members and school system staff. The Respondent was provided prior notification in writing by counsel for the Ethics Panel of the confidentiality requirements of the ethics proceedings. The Respondent himself also participated in the adoption of the amended Ethics Regulations and Policies at a County Board meeting on November 4, 2010. (Resp. Ex. 1, at 0877-0878). The Respondent's claim that the Ethics Regulations and Policies were not authorized by statute is without merit. The County Board was required by statute to develop ethics regulations that met or exceeded the requirements of the State Public Ethics Law. Md. Code Ann., State Gov't §§ 15-812 – 15-815 (2009 & Supp. 2012). The confidentiality provisions in the Ethics Regulations and Policies were patterned after similar confidentiality provisions of the State Ethics Commission. Md. Code Ann., State Gov't §§ 15-407 (2009). The Ethics Regulations were approved by the State Ethics Commission. Furthermore, the Superintendent upheld Ms. Judy's removal from office for misconduct in office based on her violation of local board rules and duties applicable to its members, without regard to whether they involved statutory or criminal violations.

I also concluded that the Respondent violated the FERPA confidentiality requirements when he disclosed personally identifiable student information and education records to a private attorney without obtaining authorization from the County Board to hire a private attorney to assist him in preparing dissenting opinions in two confidential student appeal cases heard by the County Board. The Respondent also posted the decision in a student appeal case on a public website without authorization from the Board. He also failed to wait for an official redacted version from the school system, and

failed to wait for the General Counsel to obtain advice from the U.S. DOE regarding the propriety of releasing the information. The County Board and school system are responsible to ensure compliance with the FERPA requirements to avoid a violation of federal law and the possible loss of federal funds. The Respondent's actions in disclosing education records and posting a student appeal decision without authorization from the County Board also violated provisions of Board Policy 2000 by acting individually without obtaining authorization from the full County Board. He also violated the Board Handbook by undermining the collective authority of the Board and failing to uphold Board decisions.

I also concluded that the Respondent acted without authorization from the County Board in violation of Policy 2000 at section III.D when he unilaterally directed school system staff in writing to cease and desist from the destruction of public records in defiance of the Board's position regarding the records retention issue. He also violated the Board Handbook at Chapter 2, section C, because the Respondent impugned the collective decision of the Board, undermined the Board's collective authority, acted in opposition to the Board's official position, and failed to uphold the Board's decision. Although the Respondent believed that the County Board was violating the law, the Board had already rejected the Respondent's requests concerning the records retention issue and the Respondent ignored the Board's action and acted contrary to its position.

I also concluded that the Respondent acted without Board authority in violation of Policy 2000 and the Board Handbook when he independently directed General Counsel Blom to notify outside counsel in writing that he had exceeded his authority to hire counsel and also directed Blom to cease the destruction of all evidence since he became employed by the HCPSS. The Respondent again acted on his own without the authority of the full Board.

I did not find that the Respondent violated Board Policy or the Handbook when he made offensive or intimidating comments to school system staff, Board staff, or Board members, or when he sent a minority report to the County Council. While such comments were inappropriate or

offensive, they did not establish a violation of rules that rose to the level of misconduct in office. Nor did the Respondent violate Board Policy or the Handbook when he expressed his minority viewpoint on a downtown development issue. Although Board letterhead was limited to use by the Chairman or Vice-Chairman, this practice was not widely known by Board members and staff and the Respondent was not afforded adequate notice of this procedure. I also concluded that filing complaints, appeals, or lawsuits against the County Board, while costly and contentious, did not violate a rule or policy and did not demonstrate misconduct in office because he was pursuing legal issues or seeking interpretations of law.

The Respondent had knowledge of the County Board Handbook as the Board Chairman used the Handbook as an orientation tool for all new Board members, including for the Respondent after he became a member of the Board in December 2008. The Respondent also served on the County Board when the Board amended its Handbook in November 2010. Various Board Chairmen also wrote letters counseling the Respondent in June 2009, August 2010, and October 2010 and sent him numerous emails regarding his failure to comply with Board rules and instructions, the failure to follow positions adopted by the Board, and regarding the prohibition against acting unilaterally in contravention of collective Board decisions. The Respondent was also responsible for knowledge of the Board Policy on Governance, FERPA confidentiality requirements, and other rules and policies.

B. Willful.

In the *Judy* decision, the Superintendent found that the local board member's misconduct was willful because she repeatedly violated rules of the local board of education and her conduct continued after she was counseled. The Superintendent also found that willfulness does not require the showing of an evil motive. *Judy,* at p. 19. In *Kim v. State Bd. of Physicians*, 423 Md. 523 (2011), the Court of Appeals determined that the term "willful," as it is applied in a

physician's administrative disciplinary proceeding, "requires proof that the conduct at issue was done intentionally, not that it was committed with the intent to deceive or with malice." *Kim*, 423 Md. at 546. The Court also noted that willful is defined as "intentional, or knowing, or voluntary, as distinguished from accidental." *Kim*, 423 Md. at 545.

In the instant matter, the Respondent's actions were all intentional. He repeatedly violated Board policies, rules in the Board Handbook, Ethics Regulations and Policies, or clear instructions from the Board. He ignored positions adopted by the Board, disregarded instructions from the Board Chairman or the HCPSS General Counsel, and acted individually without authorization from the full Board. He also failed to comply with confidentiality protections under the federal FERPA requirements and ignored a warning from the General Counsel that certain education records not be released until guidance could be obtained from the U.S. DOE. The Respondent also continued to act without authorization and contrary to Board positions or instructions even after receiving several letters of counseling from Board Chairmen and other instructions or advice by email. For all these reasons, I conclude that the Respondent's actions were willful.

C. Fitness to be a Board Member.

The final inquiry as reflected in the *Judy* decision is whether the Respondent's misconduct demonstrated that he is unfit to be a member of the County Board. In the *Judy* decision, the Superintendent concluded that Ms. Judy was unfit to be a member of the local board because her conduct involved substantial violations that were harmful to the local board and the school system. The local board had to devote substantial time to handling Ms. Judy's misconduct and her actions were not in the best interests of the students. The Superintendent determined that the rule prohibiting Board members from acting unilaterally on school or board matters was important because a board must function collectively to make decisions. The

Superintendent determined that Ms. Judy had attempted to circumvent the collective process of the local board. Her attempt to improperly take actions that were the function of the local superintendent impeded the efficient operations of the school system, impeded the work of the local superintendent, and impaired her ability to remain neutral in her quasi-judicial role.

In the instant case, I conclude that the Respondent's misconduct was substantial and harmful to the operations of the County Board and the school system. The Respondent's blatant disregard of the confidentiality requirements of the ethics process demonstrated that the Respondent failed to accept that the Ethics Regulations and Policies applied equally to him as to everyone else. He demonstrated disdain for the ethics process, the Ethics Panel, and its counsel, put his own interests above the confidentiality of other participants, jeopardized the Board's neutral role in handling ethics matters, and undermined the willingness of individuals to use the ethics process to resolve future ethics complaints by obliterating the confidentiality provisions. The Ethics Regulations, which were adopted by the County Board in November 2010 and approved by the State Ethics Commission, provide that violations of those Regulations "shall constitute grounds for discipline or personnel action or removal from office where provided by law…." (Bd. Ex. 40, Regulations, p.10).

The Respondent repeatedly undermined the collective nature of Board operations and decision-making, ignored positions adopted by the Board, acted individually without authority from the full Board, and demonstrated a lack of respect for student privacy issues and the confidentiality of Board proceedings and materials. The Respondent refused to accept Board positions when he disagreed with them, whether it involved the alleged confidentiality of attorney-client communications, the confidentiality of educations records, or the confidentiality of ethics complaints and proceedings. He acted without authority from the Board and in direct contravention of Board positions in directing Board members and school system staff to cease

the destruction of records, and in directing the General Counsel to state that he exceeded his authority in hiring outside counsel.

Although the Respondent desired that all Board operations be conducted with transparency, he ignored those provisions of the OMA that clearly authorize closed sessions for certain functions of a public body. Md. Code Ann., State Gov't § 10-508 (2009). He also ignored other confidentiality requirements in State and federal law. Other Board members lost trust in the Respondent and their ability to work with him due to his failure to observe confidentiality requirements. (TR 747-748). Other Board members feared that internal emails would be posted on-line. (TR 1512).

The Respondent's repeated efforts to act unilaterally without authority from the full Board, and contrary to positions adopted by the Board, interfered with the Board's efficient operations, and the Board's ability to conduct business and serve the best interests of the students of HCPSS. Although the Respondent had the right to file OMCB complaints, State Board appeals, and lawsuits in court, he did not have the right to act without authority of the full Board and contrary to positions adopted by the Board, unless and until he received rulings that reversed or altered Board positions. The Respondent's repeated rogue actions made it difficult for the Board to conduct its operations in a fair and orderly manner. A public official must be held to a high standard of professionalism and must carry out his or her duties with integrity and a high degree of trust. The Respondent's failure to respect rules and laws protecting confidentiality and his refusal to comply with positions adopted by the Board with which he disagrees have undermined the ability of the County Board members to work with him and to rely on his ability to comply with the rules and duties of his position. The County Board did not impair the Respondent's right of free speech. He was always permitted to express and explain his disagreement with Board positions as reflected in the language in the Board Handbook.

However, his violation of Board rules, policies, and regulations, his disregard for confidentiality requirements and refusal to comply with positions adopted by the Board, and his acting without authority from the Board cannot continue without consequences.

I conclude that the Respondent's refusal to comply with Board rules and policies, his refusal to comply with positions adopted by the Board, and his insistence on acting without authority of the Board, including with disregard of confidentiality requirements, have rendered the Respondent unfit to serve as a member of the County Board. I conclude that the Respondent's repeated violations of rules and duties of his position constitute misconduct in office. I also conclude that the Respondent demonstrated a pattern of repeated incidents of misconduct in office, after being warned, involving multiple violations of Board policies and rules, and confidentiality provisions.

I conclude that the County Board has proven that the Respondent is responsible for repeated incidents of misconduct in office. The County Board has also established that the Respondent's misconduct is substantial and warrants upholding the County Board's request that the Respondent be removed from his position as a member of the Howard County Board of Education for misconduct in office under section 3-701(g) of the Education Article. Although the Respondent was elected to his position, the statute relied upon by the County Board authorizes removal from office for misconduct in office even for elected Board members. I conclude that the County Board has established that the Respondent is responsible for misconduct in office under the Education Article, even though the Board did not prove that each of the allegations it raised constituted misconduct in office. The Board did prove that the Respondent was responsible for repeated violations of important rules and policies that were sufficiently serious to establish misconduct in office and render the Respondent unfit to serve as a member of the County Board. His actions continued even after he was warned. Therefore, I

recommend that the County Board's request that the Respondent be removed as a member of the Howard County Board of Education be upheld. Md. Code Ann., Educ. § 3-701(g) (2008).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the County Board has established that the Respondent is responsible for repeated substantial incidents of misconduct in office. Therefore, I propose that the request by the County Board that the Respondent be removed as a member of the Howard County Board of Education be upheld due to misconduct in office. Md. Code Ann., Educ. §3-701(g) (2008).

PROPOSED ORDER

It is proposed that the request by the Howard County Board of Education that the Respondent be removed as a member of the Howard County Board of Education for misconduct in office be **UPHELD.**

December 5, 2012
Date Decision Mailed

Douglas E. Koteen
Administrative Law Judge

DEK/ch
138154

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen days of receipt of this decision; parties may file written responses to the exceptions within fifteen days of receipt of the exceptions. Both the exceptions and 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 under COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed to:

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BOARD OF EDUCATION OF	*	BEFORE DOUGLAS E. KOTEEN,
HOWARD COUNTY	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
ALLEN R. DYER,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No. MSDE-BE-17-11-28065

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

EXHIBIT LIST

The following exhibits were admitted into evidence jointly on behalf of the County Board and the Respondent:

Jt. Ex. # 1: Letter to Respondent from J.H. DeGraffenreidt, Jr., Maryland State Board, dated July 6, 2011 (2 pages)

Jt. Ex. # 2: Letter to J.H. DeGraffenreidt from J. Siddiqui, Board of Education of Howard County, dated June 24, 2011, with attached Resolution Regarding Allen Dyer, approved June 9, 2011 (3 pages)

The following exhibits were admitted into evidence on behalf of the County Board:[15]

Bd. Ex. # 1: Board of Education of Howard County Handbook, revised effective November 18, 2010 (pages 1-63), with Appendices A-D (pages 64-86)

Bd. Ex. # 2: Letter to Respondent from F.J. Aquino, dated June 3, 2009

Bd. Ex. # 3: Letter to Respondent from E.F. Giles and J. Siddiqui, dated August 2, 2010 (2 pages)

Bd. Ex. # 4: Letter to Respondent from E.F. Giles and J. Siddiqui, dated October 19, 2010 (2 pages)

Bd. Ex. # 5: Letter to F.J. Aquino and E.F. Giles from Respondent, dated October 22, 2010 (2 pages)

Bd. Ex. # 6: Letter to J. Siddiqui from Respondent, dated May 24, 2011 (2 pages)

Bd. Ex. # 7: Letter to M.J. Perkins from Respondent, dated October 14, 2010 (2 pages), with attached statutory material (2 pages)

[15] Exhibits not listed herein were either not submitted or not accepted into evidence.

Bd. Ex. # 8: Emails to Respondent from K.V. Hanks and J. Siddiqui, dated January 11, 2011 (2 pages)

Bd. Ex. # 11: Letter to J. Schwartz from Respondent, dated August 20, 2010 (5 pages)
Bd. Ex. # 12: Letter to C. Watson from Respondent, dated January 26, 2010 (2 pages)

Bd. Ex. # 14: Email to Respondent from F.J. Aquino, dated April 18, 2009 (3 pages)

Bd. Ex. # 19: Email exchange between M.C. Blom and the Respondent, hand-dated September 23, 2010 (2 pages)

Bd. Ex. # 20: Email exchange between M.C. Blom and the Respondent, dated June 14, 2011 and hand-dated September 23, 2010 (4 pages)

Bd. Ex. # 21: Email to J. Siddiqui from Respondent, dated May 30, 2011

Bd. Ex. # 22: Letter to Respondent from Maryland Open Meetings Compliance Board, dated March 10, 2011 (3 pages)

Bd. Ex. # 25: Email to Respondent from M.C. Blom, dated September 22, 2010

Bd. Ex. # 26: Email to K.V. Hanks from Respondent, dated September 29, 2010, with excerpts of related undated emails (2 pages)

Bd. Ex. # 32: Email to J. Bresler from E.F. Giles, dated January 11, 2010, with excerpts of related emails (one dated October 29, 2009, and the others undated) (3 pages)

Bd. Ex. # 38: Letter to Respondent from Maryland Open Meetings Compliance Board, dated November 16, 2010 (5 pages)

Bd. Ex. # 39: Letter to A. Nussbaum from E.C. Brousaides, dated March 18, 2011 (pages 1-2), enclosing:

- email to "Student Member & Board" from Respondent, dated February 28, 2011 (pages 3-4), attaching letter from H.H. Burns, Jr., to A. Nussbaum, dated February 24, 2011 (pages 5-7)
- email to "Student Member & Board" from Respondent, dated March 3, 2011 (pages 8-9)
- letter to H.H. Burns from A.W. Nussbaum, dated February 15, 2011 (page 10)
- letter to H.H. Burns from A.W. Nussbaum, dated February 28, 2011 (pages 11-12)
- "Tales of Two Cities" blog posts, dated March 4 and 6, 2011 (pages 13-14)
- email to "Student Member & Board" from Respondent, dated March 7, 201

(page 15)

- letter to A. Nussbaum from H.H. Burns, dated March 5, 2011 (pages 16-17)
- "writing-the-wrongs" blog post, dated March 4, 2011 (pages 18-20)
- howardpubliced email to A. Nussbaum from H.H. Burns, dated March 5, 2011 (pages 21-23)
- 5 howardpubliced emails from Respondent, dated March 5, 2011 (pages 24-39)
- howardpubliced email correspondence, dated March 7-8, 2011 (pages 40-43)
- email to J. Bresler from J. Siddiqui, forwarding email to A. Nussbaum from H.H. Burns, both dated June 6, 2011 (pages 44-45)

Bd. Ex. # 40: Howard County Public School System Ethics Regulations, revised February 14, 1991 (10 pages), attaching:

- Board of Education of Howard County Policy 2070 – Ethics, adopted November 4, 2010 and effective TBD (7 pages)
- Howard County Public School System Policy 2070-PR Implementation Procedures – Ethics, adopted November 4, 2010 and effective TBD (7 pages)

Bd. Ex. # 40A: Letter to E.C. Brousaides from A.W. Nussbaum, dated July 7, 2011, enclosing Advisory Opinion of the Howard County Public School System Ethics Panel, undated (9 pages total)

Bd. Ex. # 44: HCPSS Staff Attorney position listing, dated November 21, 1997 (2 pages)

Bd. Ex. # 46: Maryland State Board Opinion No. 09-36, dated October 27, 2009 (3 pages)

Bd. Ex. # 47: Board of Education of Howard County Policy 2000 – School Board Governance, effective October 6, 2005 (7 pages)

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

Resp. Ex. # 1: Minutes of meetings of the Board of Education of Howard County on the following dates:

- December 1, 2008 (Bates page numbers 000001-07)
- February 12, 2009 (000128-149)
- April 16, 2009 (000249-267)
- June 25, 2009 (000346-362)
- October 22, 2009 (000453-464)
- December 17, 2009 (000527-540)
- January 14, 2010 (000545-559)
- January 28, 2010 (000566-572)
- June 1, 2010 (000739-747)

- June 24, 2010 (000777-788)
- September 8, 2010 (000821-823)
- November 4, 2010 (000868-879)
- November 18, 2010 (000884-890)
- December 6, 2010 (000891-895)
- February 16, 2011 (000968-974)
- March 10, 2011 (001028-031)
- April 1, 2011 (001067-069)
- April 14, 2011 (001078-093)
- June 9, 2011 (001143-165)

Resp. Ex. # 2: Documents relating to Royalties:

- email to Respondent from K. Clare dated February 10, 2009 (001472), attaching:
  - Meeting Agenda Item for Policy 7060 – Royalties, dated February 12, 2009 (001473)
  - Highlights of proposed revisions to Policy 7060 – Royalties (001474)
  - List of committee members for revision of Policy 7060 – Royalties (001475)
  - County Board Policy 7060 – Royalties, amended February 12, 2009 and effective July 1, 2009 (001476-478)
  - County Board Policy 7060-PR Implementation Procedures – Royalties, amended March 12, 2009 and effective July 1, 2009 (001479)
- 2009 Revisions to Policy 7060 – Royalties (001480-483)
- 2009 Revisions to Policy 7060-PR Implementation Procedures – Royalties (001484-485)
- email correspondence re royalties dated February 12, 2009 (001486-492)
- Minutes of meeting of County Board on February 12, 2009 (001493-514)
- email correspondence re royalties dated March 4-11, 2009 (001515-517)
- results of searches in public copyright catalogue (001518-524)
- Copyright Information Circular 9 – Works Made for Hire under the 1976 Copyright Act (001525-529)
- Memorandum to County Board, et al., from M. Blom, dated March 11, 2009 (001530-534)
- email to M.C. Blom, et al., from Respondent, dated March 12, 2009 (001535-536)
- Minutes of meeting of County Board on March 12, 2009 (001537-554)
- email correspondence re representation of the County Board, dated March 12-13, 2009, with attached description of Legal Services General Counsel/Board Counsel Division of Responsibilities (001555-558)
- email correspondence re royalties memorandum, dated March 14-19, 2009 (001559-566)
- Minutes of meeting of the County Board on April 16, 2009 (001567-585),

attaching:
- Power point presentation: M. Blom to Board on April 16, 2009 (001586-590)
- Meeting Agenda Item for Policy 7060 – Royalties, dated April 16, 2009 (001591)
- Highlights of proposed revisions to Policy 7060 – Royalties (001592)
- County Board Policy 7060 – Royalties, amended February 12, 2009 and effective July 1, 2009 (001593-595)
- County Board Policy 7060-PR Implementation Procedures – Royalties, amended March 12, 2009 and effective July 1, 2009 (001596)
- 2009 Revisions to Policy 7060 – Royalties (001597-600)
- 2009 Revisions to Policy 7060-PR Implementation Procedures – Royalties (001601-602)

- email to "Student Member & Board" from Respondent, dated April 16, 2009 (001603-604), attaching 65 Op. Att'y Gen. 347 (11/26/1980) (001605-609)
- email correspondence re confidentiality, dated April 17-20, 2009 (001610-618)
- email to M.C. Blom from Respondent, dated May 15, 2009, attaching unexecuted Petition for Review/Notice of Appeal to the State Board dated May 15, 2009, with Attachments A-B (001620-644)
- email correspondence re dollar amount of royalties, dated June 24-25, 2009 (001645-49), attaching:
  - State Ethics Commission Opinion No. 06-01, dated February 17, 2006 (001650-653)
  - *Seipp v. Baltimore City Bd. of Elections*, 377 Md. 362 (2003) (001654-664)
- email correspondence re State Ethics Commission opinion, dated June 25, 2009 (001665-666)
- email to M.C. Blom from Respondent attaching Opposition to Motion to Dismiss Appeal to the State Board with Attachments A-D, both dated July 7, 2009 (001667-692)
- email to Respondent from M.C. Blom, dated July 7, 2009 (001693)

Resp. Ex. # 3: Documents relating to Royalties Appeal:

- index (001694-695)
- Petition for Review/Notice of Appeal with Attachments A-B, dated May 15, 2009 (001696-720)
- memorandum to Dr. S.L. Cousin, et al., from J.C. LaFiandra, State Board, dated May 26, 2009 (001721)
- motions pleadings (001722-788)
- Opinion of State Board, dated October 27, 2009 (001789-791)
- *Seipp v. Baltimore City Bd. of Elections*, 377 Md. 362 (2003) (001792-802)

Resp. Ex. #4: Documents relating to Document Destruction Case:

- email correspondence dated February 18-October 1, 2010 (001803-816)
- email to ref@mdsa.net from Respondent, dated October 4, 2010 (001817)
- email to M. Borkoski from Respondent, attaching letter to M. Borkoski from Respondent, both dated October 4, 2010 (001818-819)
- email to M. Borkoski from Respondent and reply to Respondent from M.J. Perkins, both dated October 7, 2010 (001820-21)
- email to Respondent from Respondent, dated October 7, 2010 (001822)
- email correspondence re retention policy, dated February 18-June 3, 2009 (001823-26)
- printout from NSFA website (001827-834)
- email correspondence re destruction of documents, dated February 26-September 27, 2010 (001835-850)
- email to M. Borkoski from Respondent re former employee's lawsuit against County Board (001851)
- email correspondence re destruction of emails (001852-853)
- email correspondence re transcript of hearing in employee's lawsuit against County Board (001854-858)
- email to "Board and Superintendant" from M. Borkoski attaching memo to County Board from M. Borkoski, both dated October 1, 2010 (001859-861)
- email to ref@mdsa.net from Respondent, dated October 4, 2010 (001862
- email to M. Borkoski from Respondent, attaching letter to M. Borkoski from Respondent, both dated October 4, 2010 (001863-865)
- email correspondence re BOE Archive, dated November 19, 2010 (001866-867)
- email correspondence re Respondent's litigation against County Board, dated February 25, 2010 (001868-869)

Resp. Ex. #5: Additional Documents relating to Document Destruction Case:

- Circuit Court Docket printout (001873-881)
- Index to Pleadings (001882-888)
- email to M.C. Blom from Respondent attaching letter to and from same, both dated October 21, 2012 (001889-891)
- [Respondent's] Motion for Preliminary Injunction and Memorandum in Support of Temporary Restraining Order and Preliminary Injunction (001892-897)
- [Respondent's] Complaint with exhibits (001898-926)
- [Respondent's] Motions for Temporary Restraining Order and Preliminary Injunction with affidavit and Memorandum in Support and list of Complaint exhibits (001927-939)
- Writ of Summons and Scheduling Order (001940-943)
- additional copies of documents above (001944-968)

- County Board's Opposition to Motion for Temporary Restraining Order with attachments and supporting memorandum (001969-997)
- Email to "Student Member & Board," et al., from M.C. Blom, dated November 4, 2010 (001998-999)
- County Board's Opposition to Motion for Preliminary Injunction (002000-201)
- County Board's Motion to Dismiss Complaint and supporting memorandum with attachments (002002-058)
- County Board's Motion to Shorten Time to Answer and Consolidate Hearings (002059-064)
- Order denying TRO, dated November 24, 2010 (002065-066)
- [Respondent's] Opposition to Motion to Dismiss Complaint and supporting memorandum (002067-070)
- [Respondent's] Request for Waiver of Bond (002071-072)
- [Respondent's] Reply to Opposition to Motion for Preliminary Injunction with exhibits (002073-088)
- Notice of Hearing/Trial dated October 28, 2010 (002089)
- [Respondent's] Amendment by Interlineation with exhibit and first page of [County] Board's Motion to Dismiss (002090-113)
- Order Denying Preliminary Injunction dated December 1, 2010 (002114)
- Supplement to County Board's Memorandum in Support of Motion to Dismiss with exhibit and attachments (002115-136)
- [Respondent's] Amendment #2 by Interlineation with exhibits (002137-167)
- emails to J. Bresler from Respondent dated November 30 and December 17, 2010, with attached chain (002168-175)
- [Respondent's] Reply to Supplement to [County] Board's Memorandum in Support of Motion to Dismiss (002176-179)
- County Board's Answer to Count III of Amended Complaint (002180-183)
- County Board's Motion for Summary Judgment and supporting memorandum (002184-193)
- Order of Dismissal, dated January 7, 2011 (002194)
- [Respondent's] Amendment #3 by Interlineation with exhibits (002195-205)
- List of exhibits for [Respondent's] Reply to [County] Board's Motion for Summary Judgment (002206)
- [Respondent's] Reply to [County] Board's Motion for Summary Judgment and Request for Hearing (002207-214)
- [Respondent's] Motion to Disqualify Counsel and Request for Hearing, with attachments and supporting memorandum (002215-232)
- County Board's Motion for Extend Time to Answer Counts IV and V, with cover letter (002233-237)
- [Respondent's] (Qualified) Opposition to Motion to Extend Time (002238-2239)
- County Board's Opposition to Motion to Disqualify, with cover letter (002240-2254)

- [Respondent's] Opposition to [County] Board's Motion to Postpone March 7, 2011 Hearing on Motion for Summary Judgment (002255-2257)
- County Board's Amended Motion to Extend Time (002259-2260)
- County Board's Motion to Dismiss Counts IV and V or, in the alternative, to Stay Counts IV and V, with supporting memorandum (2 copies) (002261-2278)
- County Board's Amended Motion to Extend Time (002279-2280)
- Notice of Hearing/Trial, dated February 10, 2011 (002281)
- Order to Postpone March 7, 2011 Hearing on Motion for Summary Judgment and Notice of Hearing/Trial dated 3/25/2011 (002281-2283)
- [Respondent's] Opposition to [County] Board's Motion to Dismiss Counts IV and V with attachment and exhibit (002284-2293)
- Supplement to Memorandum in Support of [Respondent's] Motion to Disqualify Counsel with attachment (002294-2299)
- Notice of Hearing/Trial dated May 17, 2011 (002300)
- Order [Staying Count IV] (002310-312)

Resp. Ex. #7: Documents re 2011 Open Meetings Act Case

- [Respondent's] Complaint, with attachment and exhibits (002434-2451)
- Scheduling Order and Writ of Summons, both dated 4/19/2011 (002452-2455)
- [Respondent's] Amendment by Interlineation #1, with attachment and exhibits (002456-466)
- County Board's Motion to Dismiss, with cover letter (002467-2470)
- [Respondent's] Amendment by Interlineation #2, with attachment and exhibits (002471-481)

Resp. Ex. #10: Miscellaneous Emails

- email re out-of-district appeal, dated June 5, 2009 (002770-2771)
- email re student member, dated November 3, 2009 (002782)
- emails re out-of-district appeal, dated December 16, 2009 (002809-210)
- emails re student member, dated December 16, 2009 (002811-213)
- emails re walking route appeal, dated January 4-11, 2010 (002814-815, 002818-819, 002824-826)
- emails re walking route appeal, dated September 23, 2012 (002831, 002833-836)
- emails re citizen advisory reports (002837-838)
- miscellaneous email (002839)
- Minutes of County Board Meeting June 9, 2011 (002852-872)
- emails re student fees and costs (003960-970)

Resp. Ex. #15: Emails re: use of letterhead dated January 27, 2010 (003761-762)

Resp. Ex. #16: Curriculum Vitae of P.A. Sola (4 pages)

Resp. Ex. #17: emails re transcript, dated September 30, 2010 (000079)

Resp. Ex. #19:

- Minutes of Closed Meeting of County Board on August 19, 2010 (000800)
- emails re student fees and costs (003960-970)

Resp. Ex. #20: Board of Education of Howard County 2011 directory and information (000006-012)

Resp. Ex. #21: email from Respondent to "Howard Public Education List" dated August 30, 2010, attaching majority and dissenting opinions (003702-736)

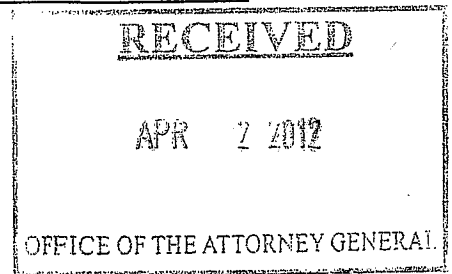
ALJ's Decision
March 30, 2012

March 30 2012

BOARD OF EDUCATION OF	*	BEFORE DOUGLAS E. KOTEEN,
HOWARD COUNTY	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
ALLEN R. DYER,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No. MSDE-BE-17-11-28065

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

PROPOSED DECISION ON RESPONDENT'S MOTION TO DISMISS AND STAY PROCEEDINGS



STATEMENT OF THE CASE
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On June 9, 2011, the Board of Education of Howard County (County Board) passed a resolution which directed counsel for the County Board and its Chairman to execute a request to the Maryland State Board of Education (State Board) to remove Allen R. Dyer, Board Member (Respondent), from his position as an elected member of the County Board on the ground of misconduct in office. On June 24, 2011, the Chairman of the County Board sent a request for the Respondent's removal from office to the State Board, for alleged misconduct in office. The County Board seeks the Respondent's removal from office under the provisions of section 3-701(g) of the Education Article of the Annotated Code of Maryland. Md. Code Ann., Educ. § 3-701(g) (2008). The Respondent filed a request for a hearing with the State Board on July 11, 2011 challenging his removal. The State Board delegated this matter to the Office of Administrative Hearings (OAH) for the scheduling of a hearing and the issuance of a proposed decision pursuant to its delegation authority under section 10-205 of the State Government Article of the Annotated Code of Maryland. Md. Code Ann., State Gov't § 10-205 (2009).

On January 9, 2012, at a motions hearing before me, the Respondent filed a Motion to Dismiss and Stay Proceedings (Motion). On January 25, 2012, the County Board filed an Opposition to the Respondent's Motion to Dismiss and Stay Proceedings.

A motions hearing was held on February 29, 2012 at the OAH in Hunt Valley, Maryland, at which time the parties presented their arguments on this Motion and other motions filed by the Respondent.[1] The Respondent was present and represented himself. Judith S. Bresler, Esquire, Carney, Kelehan, Bresler, Bennett & Scherr, LLP, was present and represented the County Board.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act and the Rules of Procedure of the OAH. Md. State Gov't Code Ann. §§ 10-201 through 10-226 (2009 & Supp. 2011); Code of Maryland Regulations (COMAR) 28.02.01.

DISCUSSION

Motion to Dismiss

The Rules of Procedure of the OAH permit a party to file a motion to dismiss under COMAR 28.02.01.12C:

> C. Motion to Dismiss.
>
> Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

A motion to dismiss under COMAR 28.02.01.12C is comparable to a permissive motion to dismiss made under Maryland Rule 2-322(b)(2), where a party asserts that a complaint "fail[s] to

[1] The parties also presented argument at the February 29, 2012 motions hearing regarding four additional motions raised by the Respondent. During the course of the motions hearing, I denied the Respondent's written Motion to Dismiss for Failure to Satisfy the Statute of Limitations and denied the Respondent's written Motion to Invoke Clear and Convincing Evidence for the reasons stated on the record. At the February 29, 2012 motions hearing, the Respondent also raised an oral Motion to Renew Motion to Dismiss on the basis of notice. During the motions hearing, I also denied the Respondent's Motion to Renew Motion to Dismiss on the basis of notice for the reasons stated on the record. By written decision issued March 27, 2012, I denied the Respondent's Motion for Summary Dismissal for Failure to State a Claim.

state a claim upon which relief can be granted." In interpreting and applying COMAR 28.02.01.12C, it is useful to consider reported cases explaining the Maryland Rule.

When a party seeks dismissal under Md. Rule 2-322, the party asserts that, even if the allegations in the complaint were true, the complaining party would not be entitled to relief as a matter of law. *Lubore v. RPM Assoc.*, 109 Md. App. 312, 322 (1996). In considering a motion to dismiss for failure to state a claim under Rule 2-322(b)(2), the decision-maker must "assume the truth of all well pleaded facts and all inferences that can reasonably be drawn from them." *Rossaki v. NUS Corp.*, 116 Md. App. 11, 18 (1997); *Hrehorovich v. Harbor Hosp.*, 93 Md. App. 772, 781 (1992), *cert. denied*, 330 Md. 319 (1993). The non-moving party, the County Board in this case, is entitled to all favorable inferences fairly construed from the evidence. *General Motors Corp. v. Lahocki*, 286 Md. 714, 733 (1980).

Legal Background

The Board of Education of Howard County seeks to remove the Respondent from his position as an elected member of this County Board due to alleged misconduct in office under section 3-701 of the Education Article of the Maryland Annotated Code. Md. Code Ann., Educ. § 3-701 (2008). That statute provides, in pertinent part, as follows:

> **§ 3-701. Membership.**
> ...
> (g) Removal.
>
> (1) The State Board may remove a member of the county board for:
>
> (i) Immorality;
> (ii) Misconduct in office;
> (iii) Incompetency; or
> (iv) Willful neglect of duty.
>
> (2) Before removing a member, the State Board shall send the member a copy of the charges against the member and give the member an opportunity within 10 days to request a hearing.
>
> (3) If a member requests a hearing within the 10-day period:

(i) The State Board promptly shall hold a hearing, but a hearing may not be set within 10 days after the State Board sends the member a notice of the hearing; and
(ii) The member shall have an opportunity to be heard publicly before the State Board in the member's own defense, in person or by counsel.

(4) A member removed under this section has the right to a de novo review of the removal by the Circuit Court for Howard County.

The Education Article addresses the powers and duties of the State Board at section 2-205. Md. Code Ann., Educ. § 2-205 (Supp. 2011). That statute provides, in pertinent part, as follows:

§ 2-205. Powers and duties.

...

(e) Explanations of law; controversies and disputes. –

(1) Without charge and with the advice of the Attorney General, the State Board shall explain the true intent and meaning of the provisions of:

(i) This article that are within its jurisdiction;
(ii) Except as provided in paragraph (4) of this subsection and in Title 6, Subtitles 4 and 5 of this article, the Board shall decide all controversies and disputes under these provisions.

...

The State Board has the authority to delegate contested case hearings to the OAH under section 10-205 of the State Government Article of the Annotated Code of Maryland. An agency may delegate to the OAH the authority to issue a proposed or final decision. Md. Code Ann., State Gov't § 10-205 (2009). On July 13, 2011, the State Board delegated to the OAH the authority to conduct a hearing in this matter and directed that an administrative law judge issue a proposed decision.

The regulations governing hearings conducted by the OAH on behalf of the State Board provide at COMAR 13A.01.05.07, in pertinent part, as follows:

.07 Hearing Procedures.

A. The State Board shall transfer an appeal to the Office of Administrative Hearings for review by an administrative law judge under the following circumstances:

(1) An appeal of a school consolidation, school redistricting, or school closing pursuant to COMAR 13A.02.09;
(2) An appeal of a certificated employee suspension or dismissal pursuant to Education Article § 6-202, Annotated Code of Maryland; or
(3) An appeal upon review in which the State Board finds there exists a genuine dispute of material fact.

...

D. Except as otherwise provided in this chapter, hearing procedures shall be in accordance with the Administrative Procedure Act, State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland, and COMAR 28.02.

E. The administrative law judge shall submit in writing to the State Board a proposed decision containing findings of fact, conclusions of law, and recommendations, and distribute a copy of the written proposed decision to the parties.

F. Exceptions.

(1) A party objecting to the administrative law judge's proposed decision may file exceptions with the State Board within 15 days of receipt of the findings.
(2) A party may respond to the exceptions within 15 days of receipt of the exceptions.

...

The statute relied upon by the Respondent, Section 5-501 of the Courts and Judicial Proceedings Article, addresses the issue of legislative immunity for local officials as follows:

> A civil or criminal action may not be brought against a city or town councilman, county commissioner, county councilman, or similar official by whatever name known, for words spoken at a meeting of the council or board of commissioners or at a meeting of a committee or subcommittee thereof.

Md. Code Ann., Cts. & Jud. Proc. § 5-501 (2006).[2]

Positions of the Parties

The Respondent seeks dismissal of the removal action scheduled for hearing before the OAH based on his invocation of legislative immunity pursuant to Section 5-501 of the Courts

[2] In *State v. Holton*, 420 Md. 530, 539-540 (2011), the Court of Appeals held that the statute was not limited to defamation actions, even though the caption of the statute provided, "Action for defamation against local government official." The Court concluded that a caption or heading is not part of a statute and cannot limit or expand the plain meaning of the statutory language.

and Judicial Proceedings Article of the Maryland Annotated Code, as well as the common law doctrine of legislative immunity. The Respondent argues that he is entitled to immunity from both civil and criminal actions based upon words spoken in his legislative capacity as an elected member of the County Board. In addition, the Respondent argues that this proceeding should be stayed to permit the State Board to dismiss this removal action against the Respondent.

The County Board conceded at the February 29, 2012 motions hearing that section 5-501 of the Courts and Judicial Proceedings Article could apply to a member of a county board of education, but only when that individual is engaged in legislative activity.[3] The County Board argues that legislative immunity attaches only to those actions that are within the "sphere of legitimate legislative activity." It contends that the Respondent is not entitled to legislative immunity in this matter under either common law or section 5-501 of the Courts and Judicial Proceedings Article because his actions which form the basis for the alleged misconduct charged in this proceeding do not involve legitimate legislative activity. The County Board also asserts that the privilege only protects covered officials from personal civil liability or from criminal prosecution when they are acting within this sphere of legislative activity, but does not apply to this administrative removal action under the Education Article. Therefore, the County Board argues that the Respondent's Motion should be denied.

Analysis

A. Legislative Immunity in Internal Disciplinary Proceedings

Courts have recognized that the doctrine of legislative immunity was intended to protect a legislator or other public official engaged in legitimate legislative activity from being sued in a

[3] The Court of Appeals has determined that county boards of education are legally State agencies because they are part of the State public education system and are subject to extensive supervision and control by the State Board. *BEKA Indus., Inc. v. Bd. of Educ. of Worcester Co.*, 419 Md. 194, 217 (2011); *Chesapeake Charter v. Bd. of Educ. of Anne Arundel Co.*, 358 Md. 129, 136-137 (2000). However, the courts have also recognized that officials outside the legislative branch may be entitled to legislative immunity when performing legislative functions. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1988).

civil action or from facing criminal prosecution based on words spoken in the legislative context or other legislative acts. The legislative immunity doctrine protects the spoken words and legislative acts of legislators who are acting within the scope of their legislative duties, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); and within the bounds of their official duties. *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 133 (5th Cir. 1986). The purpose of legislative immunity is to ensure that the legislative function may be performed independently without fear of outside interference. *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731-732 (1980); *Montgomery Co. v. Schooley*, 97 Md. App. 107, 116 (1993).

The defense of legislative immunity usually arises in cases in which a lawsuit has been brought against a public official which alleges that he is personally liable for his actions. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Gambocz v. Sub-Committee on Claims of the Joint Legislative Appropriations Comm.*, 423 F.2d 674 (3rd Cir. 1970); *Berrios v. Agosto*, 716 F.2d 85 (1st Cir. 1983); *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973). If individual school board members are named as defendants only in their official capacities, neither qualified nor absolute immunity would generally apply since the individual board members would not be threatened with personal liability. Even for legislators, the absolute immunity doctrine does not provide blanket protection from burdensome litigation. Not everything an individual with legislative duties does is protected by absolute immunity. Activities performed outside the legislative process may only be entitled to qualified immunity grounded in good faith. *Minton* at 134-135. In addition to protecting against suits for monetary damages, the doctrine has also been applied to "immunize legislators from having to testify regarding conduct in their legislative capacity." *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir 1990).

Courts have also applied the legislative immunity doctrine in criminal proceedings. It has

been raised in actions to quash grand jury subpoenas and in actions to dismiss criminal indictments where the petitioner seeks protection based on legislative immunity. *Gravel v. United States*, 408 U.S. 606 (1972); *State v. Holton*, 420 Md. 530 (2011); Md. Code Ann., Cts. & Jud. Proc. § 5-501 (2006).

The Respondent seeks dismissal of this administrative removal action because he claims that his legislative conduct is protected by the doctrine of legislative immunity under common law and Section 5-501 of the Courts and Judicial Proceedings Article. However, the Respondent has failed to demonstrate that the doctrine of legislative immunity warrants dismissal of this proceeding in which the County Board seeks his removal based on charges of misconduct in office. Instead, case law supports the opposite conclusion. The doctrine of legislative immunity has been used to uphold the right of a local legislative body to discipline one of its own members for inappropriate conduct. *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997). The court in that case noted that the Speech and Debate Clause in the United States Constitution protects members of Congress from being questioned *in any other place* for their speech or debate while in Congress. *U.S. Const. art. I, § 6, cl. 1.*[4] The court pointed out, however, that the Constitution also provides Congress with the power to punish its own members for disorderly behavior and to expel a member on two-thirds vote. *U.S. Const. art. I, § 5, cl. 2.*[5] The court recognized that a legislative body must have the power to make rules, police its own members, and punish them for disorderly behavior or disobedience with regard to rules.[6] Without this power, the court reasoned, the legislative body would be hindered in its efforts to transact business and function in

[4] Article I, Section 6, provides, in pertinent part, "and for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."
[5] Article I, Section 5, states in pertinent part, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."
[6] The Maryland Constitution also provides for the expulsion of members of the General Assembly. Article III, Section 19, provides that each House of the Legislature shall "determine the rules of its own proceedings, punish a member for disorderly or disrespectful behaviour and with the consent of two-thirds of its whole number of members elected, expel a member."

an orderly manner, and this would threaten the deliberative process. *Whitener* at 744, 745. In *Whitener*, the court found that when a local legislative body in Virginia voted to discipline one of its own elected members for ethical violations, that action was a core legislative activity that was protected by legislative immunity. *Id.* at 745. As a result, the court upheld dismissal of a civil suit filed by the disciplined member in federal court against the legislative body under 42 U.S.C. section 1983, for alleged constitutional violations. *See also Monserrate v. New York State Senate*, 599 F.3d 148 (2nd Cir. 2010) (New York State Senator expelled from legislature for misconduct; court upheld denial of preliminary injunction sought by expelled member to stop special election to fill vacant seat; court recognized legitimate state interest in maintaining integrity of legislative body and of body's right to assess fitness of its members to hold office; state statute and procedures employed afforded elected member due process before expulsion).

The purpose of the legislative immunity doctrine is to shield individual legislators from having to account for their legislative conduct to tribunals and officials in other branches of government and to preserve the legislative branch from encroachment by another branch of government. *Montgomery Co. v. Schooley*, 97 Md. App. 107, 119-120 (1993). Under this doctrine, a legislator cannot be compelled to explain his legislative conduct or the events of a legislative session in any place other than before the legislative body of which he is a member. *Schooley* at 117. This supports the authority of a legislative body to conduct internal disciplinary proceedings regarding its own members and authorizes a member to provide testimony regarding his conduct in the internal proceeding. In *Monserrate*, an important due process consideration was that the legislative body afforded the member a sufficient opportunity to be heard regarding why he claimed the proposed action should not be taken. *Monserrate* at 158-160.

The State Board has the authority to supervise and control the county boards of education in matters involving public education in Maryland. This removal proceeding before the State

Board has been lawfully delegated to the OAH and is essentially a proceeding in which the County Board is disciplining one of its own members for misconduct in office, under the supervision of the State Board. The Respondent's motion to dismiss on the basis of legislative immunity does not warrant dismissal of this action because a legislative body, and by extension the County Board, has the authority to discipline and remove its own members for alleged misconduct in office and its legislative acts in carrying out this function are protected by the doctrine of legislative immunity. Furthermore, the Education Article properly provides that a removal proceeding for members of the County Board may be brought based on charges of misconduct in office and shall be determined through a hearing before the State Board. Md. Code Ann., Educ. § 3-701(g) (2008).

B. Legislative Activity

The Respondent has also failed to show that the alleged misconduct with which he has been charged involves the types of legislative acts that are protected by the doctrine of legislative immunity. The Respondent bears the burden to establish that he is eligible for legislative immunity protection with regard to the alleged misconduct at issue. As noted by the Supreme Court in *Forrester v. White*, 484 U.S. 219, 224 (1988), "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy . . . ." The Supreme Court has developed a functional approach to determine whether legislative immunity is applicable in particular circumstances. Legislators are not protected in all of their activities. For the privilege to apply to the Respondent's actions, he must show that the acts at issue were undertaken "in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1988); *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). For the reasons addressed below, I find that the Respondent has not met his burden.

The Supreme Court noted that "[w]hether an act is legislative turns on the nature of the

act, rather than on the motive or intent of the official performing it." *Bogan* at 54. More specifically, "a local government body only acts in a legislative capacity when it engages in the process of 'adopting prospective, legislative-type rules.'" *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994) (citation omitted). The Supreme Court recognized that even "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan* at 55. In *Ryan v. Burlington County*, 889 F.2d 1286 (3rd Cir. 1989), the court explained that legislative acts must satisfy two separate requirements to fall within the protection of legislative immunity. Legislative acts must be "substantively legislative, i.e., legislative in character," and "involve policy-making decision[s] of a general scope." The legislative acts must also be "'procedurally' legislative, that is, passed by means of established legislative procedures." *Ryan* at 1290-1291.

In *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court found the actions of a U.S. Senator, in reading portions of the Pentagon Papers, a classified Defense Department study of U.S. policy in Vietnam, during a Congressional committee hearing and placing the entire study in the public record of the hearing, were legislative acts protected by legislative immunity. The Court stated that in addition to speech and debate, the privilege also covered committee reports, resolutions, and the act of voting. However, a criminal investigation was also being conducted to determine whether Gravel and others were involved in the release and private publication of these materials. The court determined that any arrangements the Senator or his aide made to have these materials published by a private publisher were not part of the legislative process and, therefore, not protected by legislative immunity. *Gravel* at 622. The Court also found that legislators' communications with administrative agencies to cajole or persuade, although common, were not considered protected legislative activity. *Gravel* at 625.

The U.S. Constitution affords legislative immunity to members of Congress under the

Speech and Debate Clause at Article 1, Section 6. The Maryland Constitution includes two such clauses, at Article 10 of the Maryland Declaration of Rights, and in Article III, Section 18, which afford legislative immunity protection to members of the Maryland General Assembly for their legitimate legislative activity.[7] Legislative immunity has been extended to local legislators in Maryland through Section 5-501 of the Courts and Judicial Proceedings Article. Md. Code Ann., Cts. & Jud. Proc. § 5-501 (2006); *State v. Holton*, 420 Md. 530 (2011).

The Respondent argues that the County Board's charges are based on his alleged conduct that occurred during County Board sessions. Accordingly, he relies on *State v. Holton*, 420 Md. 530 (2011), to argue that the County Board's attempt to remove him from his elected office violates his legislative immunity under section 5-501 and common law and that the charges should be dismissed. In *Holton*, the Maryland Court of Appeals affirmed the Court of Special Appeals, *State v. Holton*, 193 Md. App. 322 (2010), in holding that the doctrine of legislative immunity for local officials was applicable in criminal proceedings. While the Respondent cannot properly dispute that this administrative proceeding is not a criminal prosecution, he urges that I order the same remedy that the Court of Appeals concluded was required in *Holton*: i.e., dismissal of the charges. The Court of Appeals in *Holton* held that the case "presents a rare exception to the general rule that suppression of inadmissible evidence, rather than dismissal of the indictment, is the appropriate relief." *Holton* at 543. The Court observed that the indictment against Holton, who was a member of a city council, "is permeated with assertions that Respondent engaged in conduct for which she does have immunity, [and thus] is a criminal action that has been brought in violation of CJ § 5-501." *Id.* The Court determined that the appropriate remedy for this violation was dismissal of the indictment.

[7] Article 10 of the Maryland Declaration of Rights states, "That freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature." Article III, Section 18, of the Maryland Constitution provides "No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate."

The Respondent argues that the County Board's charges are similarly permeated with assertions of alleged misconduct for which he has immunity. These charges include:

1) Releasing to a third party information provided to him in a student appeal matter, despite the confidentiality requirements of the Family Educational Rights and Privacy Act (FERPA);

2) Releasing a memorandum containing advice of the Board's General Counsel, despite the refusal of the Board of Education to waive attorney-client privilege;

3) Releasing confidential information in contravention of specific Board action prohibiting disclosure and provisions of Board Policy;

4) Surreptitiously taping both private and public discussions at a Board retreat intended to build trust, improve communications, and reset fractured relationships and then posting it on the internet;

5) Using altered Board of Education stationery to order staff to take actions in contravention of decisions made by the Board of Education;

6) Using that same altered Board of Education stationery to communicate with the County Council in opposition to the position taken by the Board of Education, attempting to undermine the Board's position before the Council;

7) Seeking disclosure of sealed, confidential minutes of closed meetings between the Board of Education and its counsel on a case, heard and decided by the courts prior to Mr. Dyer's election to the Board, when Mr. Dyer represented a former employee in a lawsuit against the Board of Education; and

8) Threatening to bring charges against employees or to have employees terminated or to publically embarrass them for taking positions in opposition to his views or because he believed the individual failed to respond promptly enough or in concert with his views.

(*Motion*, Ex. 2.)[8]

The Respondent's argument that the charges are permeated with alleged misconduct that is protected by legislative immunity is premised upon his contention that the actions of alleged

[8] The Respondent has repeatedly asserted, in this and prior motions, that the County Board has failed to provide him with adequate notice of the charges against him. I have ruled previously, both in writing and orally, that the County Board has provided the Respondent with adequate notice of the charges against him in this administrative proceeding. *See Brown v. Handgun Permit Review Bd.*, 188 Md. App. 455 (2009), *cert. denied*, 412 Md. 495 (2010). I reassert that finding here. It is noteworthy that the Respondent requested the opportunity for discovery in this proceeding, a discovery period was established in my September 12, 2011 Prehearing Order, and then the Respondent elected to ignore the discovery period and failed to request any discovery. COMAR 28.02.01.13.

misconduct at issue were protected legislative acts. The County Board disagrees and argues, in addition to its claim that *Holton* is inapplicable because it involves a criminal proceeding, that the Respondent has failed to demonstrate that the alleged misconduct set forth in the charges involved legitimate legislative activity. I find the instant matter distinguishable from *Holton* for several reasons. First, while *Holton* involved a criminal indictment, this is an administrative proceeding involving charges for removal under the Education Article. Second, the Respondent has failed to demonstrate that the alleged misconduct set forth in the charges occurred in the sphere of legitimate legislative activity.

The Court of Special Appeals in *Holton* noted, with reference to the *Gravel* decision, that protected legislative acts would "include 'committee reports, resolutions, and the act of voting,' in addition to 'a member's conduct at legislative committee hearings . . . .'" *Holton* at 335. In *Holton*, many of the alleged acts set forth in the criminal indictment were clearly legislative acts, involving votes and other legislative acts undertaken by Holton during council hearings. Accordingly, the Court concluded that Holton's specific acts included in the indictment clearly fell within the sphere of protected legislative activity and, because such immunity was applicable in criminal proceedings, the indictment in *Holton* could not stand. In contrast, the Respondent has failed to demonstrate that the alleged misconduct set forth in the charges for removal fall within the sphere of legislative activity that is protected by immunity. Therefore, the *Holton* case does not warrant dismissal here.

Furthermore, the burden is on the Respondent to establish that the doctrine of legislative immunity is applicable and that his alleged actions fall within the protected sphere of legitimate legislative activity. *Forrester v. White*, 484 U.S. 219, 224 (1988). The Respondent has failed to meet this burden. The alleged misconduct set forth in the charges do not on their face fall into the sphere of legitimate legislative activity. At the motions hearing, the Respondent argued that

at least some of his actions underlying the alleged misconduct took place during sessions conducted by the County Board. However, he offered no evidence to support this claim. He did not submit any affidavits or testify under oath. He did not explain how the alleged misconduct that is charged constitutes legitimate legislative acts. Moreover, he did not argue that all of the alleged acts of misconduct involved protected legislative activity. In the absence of a proper showing by the Respondent that the alleged acts at issue were legislative in nature, I find that he has failed to establish that he is entitled to the protection of legislative immunity.[9]

For the foregoing reasons, I conclude that the Respondent has failed to establish that legislative immunity warrants dismissal of the charges for his removal under section 3-701(g) of the Education Article. Therefore, the Respondent's Motion to Dismiss and Stay Proceedings based on legislative immunity shall be denied.

C. Request for Stay

The Respondent also seeks a stay of the proceedings before the OAH so that the State Board may rule on these matters. Section 12-303 of the Courts and Judicial Proceedings Article sets forth a list of interlocutory orders entered by a circuit court in a civil case that are appealable. Md. Code Ann., Cts & Jud. Proc. § 12-303 (2006). Among the items on that list are orders denying immunity asserted under Sections 5-525 and 5-526 of the Courts and Judicial Proceedings Article. Md. Code Ann., Cts & Jud. Proc. § 12-303(3)(xi). Sections 5-525 and 5-526 involve only immunity for members of a state legislature, including members of the Maryland General Assembly, which involve providing constituent service or making communications on behalf of a constituent involving defamation. However, section 5-501 of the Courts and Judicial Proceedings Article, the statute relied upon by the Respondent in this matter

[9] The Respondent also asserts in his Motion that the County Board's action in retaining counsel "to prosecute this prohibited action is *ultra vires* or illegal." (*Motion* at 6.) The Respondent fails to explain the basis for his claim that the County Board's retention of counsel to pursue this administrative removal action under the Education Article is illegal. That contention is rejected.

that extends immunity to local legislators, is not included in this list of appealable interlocutory orders. Therefore, as orders under section 5-501 are not identified in the statute as appealable interlocutory orders, the Respondent has not established that he is entitled to stay pursuant to section 12-303 of the Courts and Judicial Proceedings Article.

There are limited exceptions to the general requirement that only final judgments are appealable. Appeals may be filed from interlocutory orders that are expressly allowed by statute, immediate appeals may be filed under Md. Rule 2-602(b), and appeals from interlocutory rulings may be filed under the common law collateral order doctrine. *County Comm'rs ex rel. St. Mary's County v. Lacer*, 393 Md. 415 (2006).[10] The Respondent has not addressed with particularity the legal basis to support his request that the OAH issue a stay of these proceedings or that the denial of his Motion constitutes a proper basis for an interlocutory appeal.

I find that I do not have the authority to issue a stay of the OAH proceedings at this time. Currently, there is no appeal or exceptions pending before the State Board in this matter. Furthermore, the State Board has delegated to the OAH the authority to issue a proposed decision in this proceeding. If the Respondent intends to file exceptions with the State Board to this ruling, he should direct any request for a stay of the OAH proceedings to the State Board, the agency that has the final decision-making authority in this matter. Md. Code Ann., State Gov't § 10-205 (2009); COMAR 13A.01.05.07E, F.

CONCLUSIONS OF LAW

Based upon the foregoing discussion, I conclude, as a matter law, that the Respondent has failed to establish that the removal action for alleged misconduct in office under section 3-701(g) of the Education Article, scheduled for hearing at the OAH upon delegation from the State Board of

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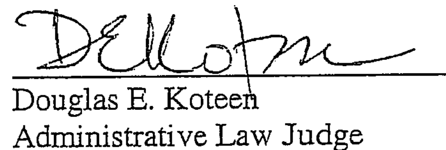
[10] Some courts have found the denial of a motion to dismiss on the basis of legislative immunity or other forms of absolute immunity to be appealable interlocutory orders under the collateral order doctrine. *Roberson v. Mullins*, 29 F.3d 132, 136-137 (4th Cir. 1994); *Brown v. Griesenauer*, 970 F.2d 431, 434 (8th Cir. 1992).

Education, must be dismissed due to legislative immunity pursuant to Section 5-501 of the Courts and Judicial Proceedings Article or the common law doctrine of legislative immunity. Accordingly, the Respondent's Motion to Dismiss and Stay Proceedings is denied. COMAR 28.02.01.12C; Md. Code Ann., Educ. § 3-701(g) (2008); Md. Code Ann., Cts. & Jud. Proc. § 5-501 (2006).

PROPOSED ORDER

I PROPOSE that the Respondent's Motion to Dismiss and Stay Proceedings is **DENIED**. This matter shall proceed in accordance with the Prehearing Conference Report and Scheduling Order issued on September 12, 2011, as modified by the Supplemental Prehearing Report and Scheduling Order issued on March 1, 2012.



March 30, 2012
Date Decision Mailed

Douglas E. Koteen
Administrative Law Judge

DEK/ch
131113

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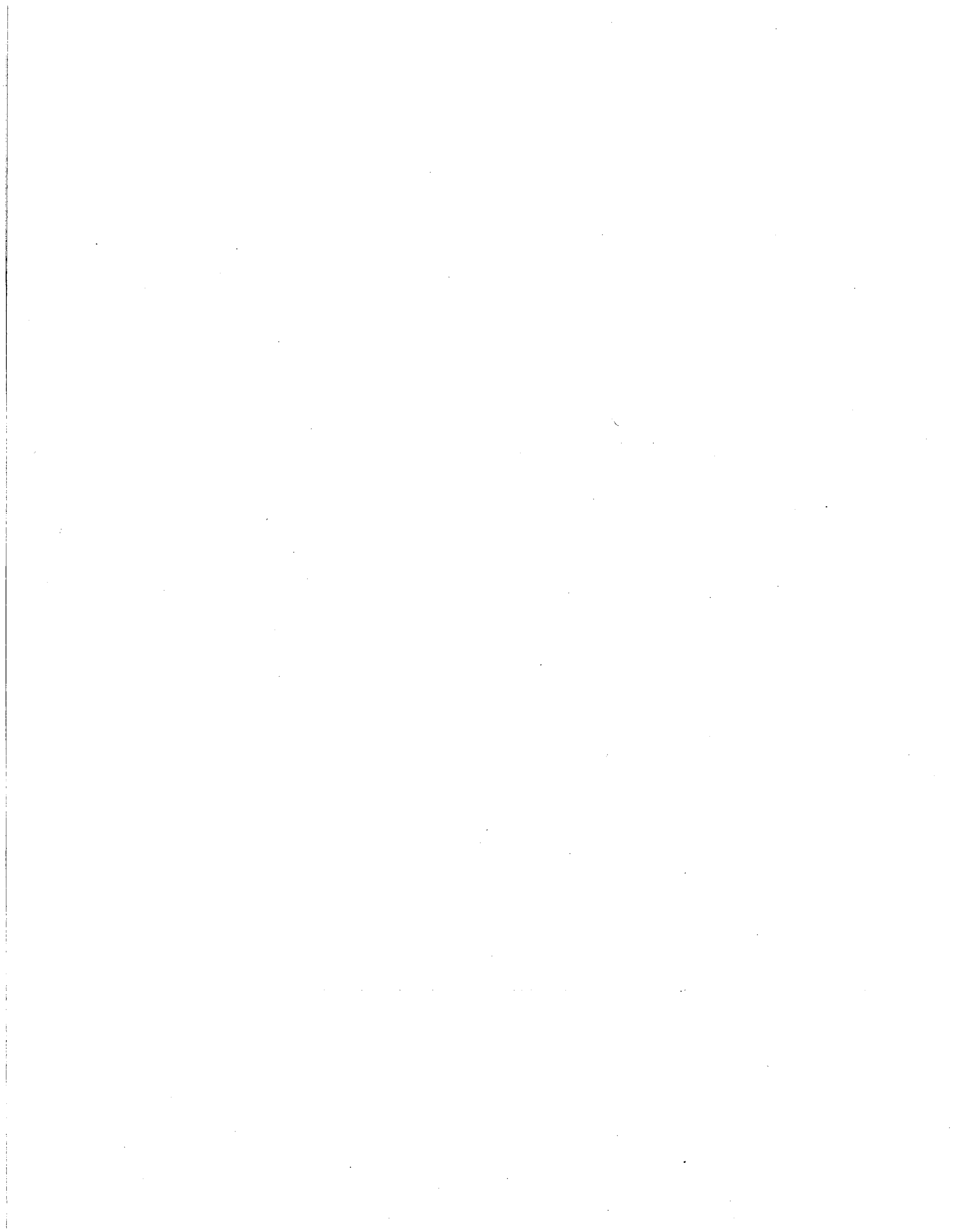

ALJ's Decision
October 26, 2011

Oct. 26, 2011

BOARD OF EDUCATION OF	*	BEFORE DOUGLAS E. KOTEEN,
HOWARD COUNTY	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
ALLEN R. DYER,	*	OF ADMINISTRATIVE HEARINGS
RESPONDENT	*	OAH No. MSDE-BE-17-11-28065

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

PROPOSED DECISION ON RESPONDENT'S MOTION TO DISMISS

STATEMENT OF THE CASE
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On June 9, 2011, the Board of Education of Howard County (County Board) passed a resolution which directed counsel for the County Board and its Chairman to execute a request to the Maryland State Board of Education (State Board) to remove Allen R. Dyer, Board Member (Respondent), from his position as a member of the County Board on the grounds of misconduct in office. On June 24, 2011, the Chairman of the County Board sent a request for the Respondent's removal from office to the State Board, for alleged misconduct in office. The County Board seeks the Respondent's removal from office under the provisions of section 3-701(g) of the Education Article of the Maryland Annotated Code. Md. Code Ann., Educ. § 3-701(g) (2008). The Respondent filed a request for a hearing with the State Board on July 11, 2011 challenging his removal. The State Board transferred the matter to the Office of Administrative Hearings (OAH) for assignment to an administrative law judge for the scheduling of a hearing and the issuance of a proposed decision in the case pursuant to its delegation

authority under section 10-205 of the State Government Article of the Maryland Annotated Code. Md. Code Ann., State Gov't § 10-205 (2009).

On August 26, 2011, the Respondent filed a Motion to Dismiss the removal action before the OAH. On September 12, 2011, the County Board filed a Memorandum in Reply to Motion to Dismiss. On September 19, 2011, the Respondent filed a Reply to Board's Opposition to Motion to Dismiss. On September 20, 2011, Cynthia L. Vaillancourt, Board Member and requested intervenor (Vaillancourt), filed a Response to Board's Reply to Motion to Dismiss.[1] On September 23, 2011, the County Board filed a Motion to Strike Vaillancourt's Response to County Board's Reply to Motion to Dismiss.[2]

A Prehearing Conference (Conference) was conducted at the OAH on September 8, 2011. A motions hearing was held during the Conference to address several motions and another motions hearing was scheduled to address the Respondent's Motions to Dismiss. The hearing on the Motion to Dismiss was held on September 27, 2011 at the OAH in Hunt Valley, Maryland. Harold H. Burns, Jr., Esquire, appeared on behalf of the Respondent. Judith S. Bresler, Esquire, Carney, Kelehan, Bresler, Bennett & Scherr, LLP, appeared on behalf of the County Board. Vaillancourt appeared and represented herself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act (APA), Md. State Gov't Code Ann. §§ 10-201 through 10-226 (2009 & Supp. 2011) and the Rules of Procedure of the OAH, Code of Maryland Regulations (COMAR) 28.02.01.

---

[1] Vaillancourt filed a Motion to Intervene on August 23, 2011. At the Prehearing Conference held on September 8, 2011, counsel for the Respondent requested that I defer my ruling on the Motion to Intervene until after I rule on the Motion to Dismiss. I agreed to defer ruling on the Motion to Intervene to secure procedural simplicity and administrative fairness. COMAR 28.02.01.11B(11). A separate decision on the Motion to Intervene has been issued on this date.

[2] The Motion to Strike was denied at the motions hearing on September 27, 2011 because no decision had yet been issued on the Motion to Intervene.

DISCUSSION

I. Motions to Dismiss.

The Rules of Procedure of the OAH permit a party to file a motion to dismiss under COMAR 28.02.01.12C:

> C. Motion to Dismiss.
>
> Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

A Motion to Dismiss under COMAR 28.02.01.12C is comparable to a permissive motion to dismiss made under Maryland Rule 2-322(b)(2), where a party asserts that a complaint "fail[s] to state a claim upon which relief can be granted." In interpreting and applying COMAR 28.02.01.12C, it is useful to consider reported cases explaining the Maryland Rule.

When a party seeks dismissal under Md. Rule 2-322, the party asserts that, even if the allegations in the complaint were true, the complaining party would not be entitled to relief as a matter of law. *Lubore v. RPM Assoc.*, 109 Md. App. 312, 322 (1996). In considering a motion to dismiss for failure to state a claim under Rule 2-322(b)(2), the decision-maker must "assume the truth of all well pleaded facts and all inferences that can reasonably be drawn from them." *Rossaki v. NUS Corp.*, 116 Md. App. 11, 18 (1997); *Hrehorovich v. Harbor Hospital*, 93 Md. App. 772, 781 (1992), *cert. denied*, 330 Md. 319 (1993). The non-moving party, the County Board in the present case, is entitled to all favorable inferences fairly construed from the evidence. *General Mtrs. Corp. v. Lahocki*, 286 Md. 714, 733 (1980).

II. Legal Background.

The County Board seeks to remove the Respondent from his position as an elected member of the Board of Education of Howard County due to alleged misconduct in office under section 3-701 of the Education Article of the Maryland Annotated Code. Md. Code Ann., Educ. §

3-701(2008). That statute provides, in pertinent part, as follows:

(g) Removal.

(1) The State Board may remove a member of the county board for:

(i) Immorality;
(ii) Misconduct in office;
(iii) Incompetency; or
(iv) Willful neglect of duty.

(2) Before removing a member, the State Board shall send the member a copy of the charges against the member and give the member an opportunity within 10 days to request a hearing.

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

(i) The State Board promptly shall hold a hearing, but a hearing may not be set within 10 days after the State Board sends the member a notice of the hearing; and
(ii) The member shall have an opportunity to be heard publicly before the State Board in the member's own defense, in person or by counsel.

(4) A member removed under this section has the right to a de novo review of the removal by the Circuit Court for Howard County.

The State Board has the authority to delegate contested case hearings to the Office of Administrative Hearings under section 10-205 of the State Government Article of the Maryland Annotated Code. Md. Code Ann., State Gov't § 10-205 (2009). The statute provides, in pertinent part, as follows:

§ 10-205. Delegation of hearing authority.

(a) To whom delegated; limitation. –

(1) Except as provided in paragraph (2) of this subsection, a board, commission, or agency head authorized to conduct a contested case hearing shall:

(i) conduct the hearing; or
(ii) delegate the authority to conduct the contested case hearing to:

1. the Office[of Administrative Hearings][.]

...

(b) Scope of authority delegated. – An agency may delegate to the Office the authority to issue:

(1) proposed or final findings of fact;
(2) proposed or final conclusions of law;
(3) proposed or final findings of fact and conclusions of law;
(4) proposed or final orders or orders under Title 20 of this article; or
(5) the final administrative decision of an agency in a contested case.

(c) Procedure upon receipt of hearing request. – Promptly after receipt of a request for a contested case hearing, an agency shall:

(1) notify the parties that the authorized agency head, board, or commission shall conduct the hearing; [or]
(2) transmit the request to the Office so that the Office shall conduct the hearing in accordance with the agency's delegation[.]

...

The regulations governing this matter provide, in pertinent part, as follows:

.07 Hearing Procedures.

A. The State Board shall transfer an appeal to the Office of Administrative Hearings for review by an administrative law judge under the following circumstances:

(1) An appeal of a school consolidation, school redistricting, or school closing pursuant to COMAR 13A.02.09;
(2) An appeal of a certificated employee suspension or dismissal pursuant to Education Article § 6-202, Annotated Code of Maryland; or
(3) An appeal upon review in which the State Board finds there exists a genuine dispute of material fact.

COMAR 13A.01.05.07A.[3]

III. Positions of the Parties.

In the instant case, the Respondent seeks to dismiss the charges filed against him by the County Board because he alleges that the statute on which the County Board relies in seeking his

[3] Although it is not clear that COMAR 13A.01.05.07A(3) applies to this matter, even in the absence of applicable regulations, the statutes at section 3-701(g) of the Education Article and 10-205 of the State Government Article provide for a removal hearing before the State Board and the authority of the State Board to delegate the hearing to the OAH, as addressed below.

removal is unconstitutional as it violates the separation of powers doctrine. He contends that the Respondent's position as an elected member of the County Board is legislative in origin because the position was created by the General Assembly. He further contends that the statute is unconstitutional because it grants power to the State Board of Education, an agency or board within the Executive Branch, to remove the Respondent, an elected member of the County Board, which he contends is within the Legislative Branch, and argues that the County Board is rooted in local government. He relies on the case of *Schisler v. State*, 349 Md. 519 (2006) to support the constitutional argument.

The Respondent also contends that the resolution passed by the County Board supporting his removal as a member was fatally flawed and void because the Student member, having graduated from a public high school in Howard County before the resolution was passed, was no longer qualified to serve as a student member on the County Board under section 3-701(e) of the Education Article. Md. Code Ann., Educ. § 3-701(e) (2008).

The Respondent also argues that the State Board had no authority to delegate its hearing responsibilities to the OAH under section 3-701(g) of the Education Article. Md. Code Ann., Educ. § 3-701(g). He contends that the statute authorizes only the State Board to conduct the Respondent's removal hearing and that the State Board's attempt to delegate this authority to the OAH is void. He contends further that State Board's delegation to the OAH is not authorized because the removal hearing required by statute to be held before the State Board is a public hearing and not a contested case hearing. He asserts further that even if the delegation was authorized, it was not properly executed in this case.

The Respondent also argues that the County Board failed to provide him with sufficient notice of the charges against him in violation of the APA and due process. He argues that the County Board's June 9, 2011 resolution is vague and conclusory and fails to provide the Respondent

with adequate notice of the basis for the requested removal. He contends further that the letter the Chairman of the County Board sent to the State Board requesting his removal is too general, still fails to provide sufficient notice of the charges, and was not authorized by the County Board. For the foregoing reasons, the Respondent argues that his Motion to Dismiss should be granted and this action dismissed in its entirety or remanded to the State Board.

The County Board argues that the removal statute is constitutional. It contends that county boards of education are legally State agencies in the Executive Branch of government. Contrary to the Respondent's position, it argues that the County Board is not within the Legislative Branch merely because the General Assembly created it and authorized that its members be elected, and that the removal statute does not violate the separation of powers doctrine. It also contends that *Schisler v. State* is distinguishable and inapplicable to this matter.

The County Board also asserts that the student member was serving a statutory one-year term when the resolution was passed so she was legally authorized to vote on the resolution, regardless of her graduation from high school before the resolution passed.

The County Board also contends that the hearing before the State Board is a contested case hearing and that the APA authorizes a board, commission, or agency head, such as the State Board, to delegate its contested case hearing authority to the OAH. It further asserts that the delegation in this case was proper.

Finally, the County Board argues that the resolution and accompanying letter sent to the State Board seeking the Respondent's removal provided the Respondent with adequate notice of the basis for his removal. Furthermore, it contends that any actual notice the Respondent receives sufficiently in advance of his removal hearing constitutes proper notice consistent with due process standards in administrative hearings under Maryland law. *Brown v. Handgun Permit Review Board,* 188 Md. App. 455 (2009), *cert. denied,* 412 Md. 495 (2010). It asserts that the

Respondent will have the opportunity to receive additional information and further detail through the discovery process, regarding the basis for his removal, well in advance of the contested case hearing scheduled to commence in May 2012. For these reasons, the County Board argues that the Respondent's Motion to Dismiss should be denied.

IV. Separation of Powers.

The Respondent argues that section 3-701 of the Education Article is unconstitutional as it violates the separation of powers doctrine. Article 8 of the Maryland Declaration of Rights in the Maryland Constitution provides as follows:

> **Article 8. Separation of powers.**
>
> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Md. Const., Declaration of Rights, art. 8.

A statute will be construed to avoid a conflict with the Constitution whenever reasonably possible. *Koshko v. Haining*, 398 Md. 404, 425 (2007); *Brown v. Handgun Permit Review Board*, 188 Md. App. 455, 468 (2009), *cert. denied*, 412 Md. 495 (2010).

The Court of Appeals has consistently considered county boards of education to be State agencies. *BEKA Industry, Inc. v. Board of Educ. of Worcester Co.*, 419 Md. 194, 210 (2011). In *BEKA*, the court found that a county board of education was a State agency and unit of State government that was entitled to sovereign immunity and was also subject to a legislative waiver of that immunity in certain circumstances. The court in *BEKA* noted that budgetary issues involving county school boards are distinct from their general legal status. The court stated that the "local budgetary character" of the county boards of education "appears insufficient to overcome the overwhelming support in our case law for the notion that county boards of education are 'legally State agencies.' " *BEKA*, 419 Md. at 217. As State agencies, the county

boards of education are administrative agencies that are closely supervised by the State Board, which is within the Maryland State Department of Education (MSDE), another State administrative agency within the Executive Branch.

The Respondent's reliance on *Chesapeake Charter v. Board of Educ. of Anne Arundel Co.*, 358 Md. 129 (2000) for the proposition that the County Board is not a State agency within the Executive Branch is misplaced. As the court in *BEKA* explained, the *Chesapeake* case addressed only a limited exception, for budgetary and procurement matters, to the general principle that county boards of education are legally State agencies. *BEKA*, 419 Md. at 213. In *Chesapeake,* the court explained the basis for its long-held view that county boards of education are State agencies:

> County school boards are considered generally to be State agencies because (1) the public school system in Maryland is a comprehensive State-wide system, created by the General Assembly in conformance with the mandate in Article VIII, § 1 of the Maryland Constitution to establish throughout the State a thorough and efficient system of free public schools, (2) the county boards were created by the General Assembly as an integral part of that State system, (3) their mission is therefore to carry out a State, not a county, function, and (4) they are subject to extensive supervision by the State Board of Education in virtually every aspect of their operations that affects educational policy or the administration of the public schools in the county. Although legally State agencies for those reasons, they are not normally regarded, *for structural or budgetary purposes*, as units within the Executive Branch of the State government.

Chesapeake, 358 Md. at 136-137 (emphasis supplied). The court explained that it was only for budgetary purposes that it did not find the county boards of education to be units of State government. In all other respects, the court reiterated its view that county school boards are State agencies. The court provided further support for the view that county boards of education are State agencies that are supervised by the State Board when it acknowledged the State Board's function in determining the educational policies of the State and in deciding all controversies and

disputes arising under the Education Article that are within its jurisdiction. *Chesapeake*, 358 Md. at 138. Such disputes include the removal of county board of education members.

The court in *Chesapeake* pointed out that in some counties in Maryland the members of the county boards are elected by the voters, while in the other counties, the members are appointed by the Governor or, as in Baltimore City, the non-student members are appointed jointly by the Governor and Mayor of Baltimore.[4] Despite these differences in how individuals become members of the county school boards in Maryland, the Court of Appeals has never drawn any distinction in its determination that county boards of education are State agencies based on whether their members are appointed or elected.

Accordingly, the General Assembly has granted authority to the State Board to remove members of the County Board for specified reasons, after a hearing, and this does not violate the separation of powers doctrine of the Maryland Constitution because both the State and County Boards are State administrative agencies. This is true regardless of whether the board members are elected or appointed.

The Respondent also relies on *Schisler v. State*, 394 Md. 519 (2006), to support his claim that the statute authorizing the State Board to remove him, after a hearing, is unconstitutional as it violates the separation of powers doctrine. For the reasons addressed below, that case is inapplicable to the Respondent's circumstances. In *Schisler*, the court found that a statute passed by the General Assembly to remove incumbent members of the Public Service Commission (PSC) before the end of their terms was an unconstitutional violation of the separation of powers doctrine because it violated express provisions of the Maryland Constitution regarding the Governor's authority to appoint and

[4] Currently, the voters in eighteen Maryland counties elect the members of their county boards of education. Md. Code Ann., Educ. § 3-114(a) (Supp. 2011). In two Maryland counties, the county boards have a combination of members who are elected or appointed. Md. Code Ann., Educ. § 3-114(b), (c) (Supp. 2011). In the other Maryland counties and Baltimore City, the members are appointed. Md. Code Ann., Educ. § 3-108 (Supp. 2011).

remove State employees. As the PSC members were appointed by the Governor, the Maryland Constitution provides that they can only be removed by the Governor.

The applicable constitutional provisions regarding appointment and removal state as follows:

> **Section 10. Appointment of officers**
>
> He [the Governor] shall nominate, and, by and with the advice and consent of the Senate, appoint all civil and military officers of the State, whose appointment, or election, is not otherwise herein provided for, unless a different mode of appointment be prescribed by the Law creating the office.

Md. Const. art II, § 10.

> **Section 15. Suspension and removal of officers**
>
> The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years.

Md. Const. art. II, § 15.

The court determined that the statute terminating the PSC members violated the Maryland Constitution because the General Assembly was attempting to remove from office the incumbent members of the PSC in direct contravention of Article II, section 15, of the Constitution, which reserved the removal power to the Governor who had appointed the PSC members for a term of years. The court found the statute unconstitutional because it also violated the separation of powers clause in Article 8 of the Declaration of Rights in the Maryland Constitution as the statute improperly authorized the Legislative Branch to usurp the constitutional authority of the Governor in the Executive Branch to appoint and remove members of a State commission.

Schisler is clearly distinguishable because the State and County Boards are both State administrative agencies, and there is no provision in the Maryland Constitution that prohibits the State Board, which regularly exercises supervisory authority over the county boards of education,

from removing from office an elected member of the County Board. Furthermore, unlike in *Schisler*, the statute creating the County Board expressly provides that elected members of that board can be removed by the State Board for certain listed reasons, including misconduct in office, after a member is afforded the opportunity for a hearing.[5]

The Respondent argues further that the statute is unconstitutional because it improperly gives the State Board the authority to "impeach" an elected member of a county board of education. The Maryland Constitution contains no provision for the impeachment of elected members of county boards of education. The Constitution expressly addresses removal by impeachment only with regard to the Governor, the Lieutenant Governor, and Judges. Md. Const., art. II, § 7; art. IV, § 4. Although there is an impeachment provision in Article III, section 26, of the Maryland Constitution which covers the Legislative Department, that provision does not identify the specific persons to whom it applies, and certainly does not provide that it applies to elected members of county boards of education.

An Attorney General's Opinion, at 58 Op. Att'y. Gen. 683 (1973), found that an elected county sheriff could be subject to impeachment proceedings under Article III, section 26, of the Maryland Constitution after a criminal conviction. The office of county sheriff is a constitutional position provided for by Article IV, section 44, of the Maryland Constitution. That constitutional provision addresses the qualifications, manner of election, disqualification, and compensation for the office of county sheriff, but does not expressly address removal from office. There was no statute addressing the removal from office of a county sheriff. In finding that the impeachment

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[5] The Texas case relied upon by the Respondent is distinguishable because the court decided that when elected trustees of a Texas school district make discretionary decisions regarding school policy under Texas law, the courts should not interfere. *Harper v. Taylor*, 490 S.W.2d 227 (1972). However, the court found that if the issue to be decided is whether public officials have violated the duties of their position, then they may be subject to removal by the courts. *Id.*, at 230.

section of the Maryland Constitution might apply to the elected office of county sheriff, the Attorney General relied on the fact that the office of county sheriff was established under the Maryland Constitution. There is no similar provision in the Maryland Constitution that establishes the position of a member of a county board of education.[6] The position of County Board member has, instead, been created by statute and that statute sets forth the eligibility requirements, the manner of election, and the manner and basis for removal of such member. The statute expressly provides that the authority for removal shall rest with the State Board for certain specified reasons, after the member is afforded an opportunity for a hearing. While the election of county sheriffs is required by the Maryland Constitution, the election of members of county boards of education is authorized by statute, with members of some county boards being elected and others appointed. For these reasons, the Attorney General's Opinion is distinguishable and, unlike the constitutional office of county sheriff, members of county boards of education are not subject to impeachment proceedings under the Maryland Constitution.

For the foregoing reasons, I conclude that section 3-701 of the Education Article, which calls for the removal of an elected County Board member for certain stated reasons, after a hearing before the State Board, is constitutional.

V. Student Member.

The Respondent contends that the resolution passed by the County Board on June 9, 2011 was invalid because the Student member had graduated from a public high school in Howard County before this vote was taken. He argues that the Student member was no longer a qualified member of the County Board following her graduation and that without her vote, the resolution

[6] Although there is a brief reference in the Maryland Constitution to members of elective local boards of education, the provision does not establish the position and actually excludes such members from much of Article XVII, which addresses the scheduling of elections. Md. Const. art. XVII, § 7. The Maryland Constitution makes no other mention of county boards of education.

failed to receive the five votes needed for passage. The Respondent relies on that provision of section 3-701 of the Education Article which states that "[t]he student member shall be a bona fide resident of Howard County and a regularly enrolled junior or senior year student in a Howard County public high school." Md. Code Ann., Educ. § 3-701(e)(1) (2008).

The Respondent's argument regarding the invalidity of the student member's vote ignores other provisions of the statute. A court shall attempt to ascertain the intent of the legislature in the interpretation of a statute that is susceptible to more than one meaning. The court will "avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense." *BEKA*, 419 Md. at 218. The statute provides that a student member shall serve for a term of one year, beginning on July 1 after the student member's election. Md. Code Ann., Educ. § 3-701(e)(2). The statute includes no provision requiring that a student member be disqualified from serving on the County Board upon his or her graduation from high school. The statute also identifies other qualifications for serving on the County Board which include being a resident and registered voter in Howard County. The statute provides further that "any elected member who no longer resides in Howard County may not continue as a member of the board." Md. Code Ann., Educ. § 3-701(b). With regard to the residency requirement, the statute sets forth a specific disqualification for a person who no longer satisfies that requirement. In contrast, however, the statute contains no similar disqualification for a student member who graduates from high school. If the Legislature had intended for graduation to disqualify a student member from continuing to serve, then the statute would have included such language. This conclusion is even more logical where graduation is a common event likely to occur for every student member who is a high school senior.

Accordingly, I conclude that the Student member was qualified to serve on the Board after her graduation through the end of her one-year term that began on the previous July 1. Therefore, when

she voted on the June 9, 2011 resolution, she was still a qualified member of the County Board.

VI . Delegation of Hearing Authority.

A. Authority to Delegate

The Respondent contends that that the State Board has no authority to delegate the hearing in this matter to the OAH. The Respondent claims that the delegation is not authorized because section 3-701 of the Education Article provides only for a hearing before the State Board. Furthermore, the Respondent contends that the hearing authorized in section 3-701 is a public hearing and not a contested case agency hearing and that the State Board does not have statutory authority to delegate this public hearing to the OAH.

Section 3-701 of the Education Article provides that the State Board may remove a member of the County Board for, among other reasons, misconduct in office. Before removal, the State Board must send the member a copy of the charges against him and afford him an opportunity to request a hearing. If requested, the State Board shall promptly hold a hearing and the member shall have the opportunity to be heard publicly before the State Board in his own defense, in person or by counsel. If removal is upheld, the member has a right to a *de novo* review of the removal by the Circuit Court for Howard County. Md. Code Ann., Educ. § 3-701(g).

Although section 3-701 of the Education Article does not address the right of the State Board to delegate its hearing authority to the OAH, the delegation authority is set forth in the APA. Md. Code Ann., State Gov't § 10-205(a) (2009). Section 10-205(a) of the State Government Article provides that "a board, commission, or agency head authorized to conduct a contested case hearing shall: (i) conduct the hearing; or (ii) delegate the authority to conduct the contested case hearing to: 1. the [OAH] [.]" The State Board is the head of the MSDE, a principal department in the State government, and clearly falls within the category of boards and other State administrative agencies that are authorized to conduct contested case hearings. The

State Board has frequently delegated contested case hearings to the OAH in other matters. Contrary to the Respondent's argument, the APA does not provide that a board, commission or agency head authorized to delegate contested case hearings to the OAH is prohibited from doing so if the enabling statute does not expressly refer to the APA or the delegation authority. Only if the contemplated hearing is a public hearing, rather than a contested case agency hearing, must the enabling statute provide that the hearing shall be conducted in accordance with the APA. Md. Code Ann., State Gov't § 10-203(c).

Therefore, I must consider whether the State Board hearing provided for in section 3-701(g) of the Education Article is a contested case hearing or a public hearing. The APA defines a contested case hearing, in pertinent part, as follows:

> (d) Contested case. –
>
> (1) "Contested case" means a proceeding before an agency to determine:
>
> (i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after the opportunity for an agency hearing; or
>
> (ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.
>
> (3) "Contested case" does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.

Md. Code Ann., State Gov't § 10-202(d)(1) (2009).

The term public hearing is not defined in the APA. However, it is defined elsewhere in the State Government Article of the Maryland Annotated Code. The term "public hearing" is defined in section 8-306(a) of the State Government Article as follows:[7]

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[7] Section 8-306 of the State Government Article deals with the change in use, purpose, or function of certain State facilities, and the acquisition of property by State agencies.

(a) Definitions. –

(1) In this section the following words have the meanings indicated.

. . .

(3)(i) "Public hearing" means an informational hearing, the sole purpose of which is to obtain public comment and answer public questions.

(ii) "Public hearing" does not mean a contested case hearing under Title 10, Subtitle 2 of this article.

. . .

Md. Code Ann., State Gov't § 8-306(a) (2009). Although this definition falls outside the APA, it provides useful guidance as the parties have not identified another definition of a public hearing.

Section 3-701(g) of the Education Article provides that the State Board may not remove an elected member of the County Board from office without providing him with notice of the charges and affording him the opportunity for a hearing before the State Board. The nature of the hearing contemplated by this statute falls within the definition of a contested case hearing at section 10-202(d)(1)(i) because the removal hearing is held to determine a right, duty, statutory entitlement or privilege of the Respondent – whether he shall remain a member of the County Board or shall be removed for misconduct – and a statute requires that the removal can only be carried out after the Respondent is afforded an opportunity for an agency hearing. According to the charges, the issue to be determined in the removal hearing is whether the Respondent is responsible for misconduct in office. If such misconduct is found, then the statute authorizes the State Board to remove him from office.

Although the Respondent argues that the contemplated hearing is a public hearing and not a contested case agency hearing, he provides no legal support for that contention. The mere fact that the statute provides that a member shall have an opportunity to be heard *publicly* before the State Board in his own defense, with or without counsel, does not establish that the contemplated hearing is a public hearing under section 10-203(c) of the APA. Furthermore, the removal hearing contemplated by section 3-701(g) does not fall within the definition of a public hearing.

The removal hearing is not designed to be an informational hearing in which the sole purpose is to obtain public comment and answer public questions. This view is further supported by the language in section 3-701(g)(4), which provides that if removal is upheld, then the member has the right to a *de novo* review of the removal by the Circuit Court for Howard County. The statute could not have intended that a *de novo* public hearing would be held in Circuit Court.

Accordingly, I conclude that the State Board hearing contemplated by section 3-701 satisfies the statutory definition of a contested case hearing under the APA. Moreover, the State Board is an agency or board within the Executive Branch of State government that is authorized to conduct contested case hearings.[8]

The Respondent also claims that the removal hearing contemplated in the Education Article is subject to the general exclusions in section 10-203(a) and the public hearing provisions in section 10-203(c) of the State Government Article. Section 10-203 provides, in pertinent part, as follows:

> **§ 10-203. Scope of subtitle**
>
> (a) General exclusions. – This subtitle does not apply to:
>
> ...
>
> (4) an officer or unit not part of a principal department of State government that:
>
> (i) is created by or pursuant to the Maryland Constitution or general or local law;
> (ii) operates in only 1 county; and
> (iii) is subject to the control of a local government or is funded wholly or partly from local funds;
>
> ...
>
> (c) Public hearings. – A public hearing required or provided for by statute or regulation before an agency takes a particular action is not an agency hearing under § 10-202(d) of this subtitle unless the statute or regulation:

[8] The agency hearing in this case is required by statute, not regulation, so the requirement in section 10-202(d)(2) of the State Government Article for more specificity in the regulation regarding the nature of the hearing is inapplicable.

(1) expressly requires that the public hearing be held in accordance with this subtitle; or
(2) expressly requires that any judicial review of the agency determination following the public hearing be conducted in accordance with this subtitle.

...

Md. Code Ann., State Gov't § 10-203(a), (c) (2009).

The Respondent argues that the County Board cannot delegate hearing authority to the OAH because the APA does not apply to the County Board under section 10-203(a)(4) of the State Government Article. That section provides that the APA does not apply to "an officer or unit not part of a principal department of State government" that "operates in only 1 county; and ... is funded wholly or partly from local funds." The Respondent's reliance on this language is misplaced because it is not the *County Board* that is delegating the hearing authority to the OAH in this proceeding. Under section 3-701(g), it is the *State Board* that has the authority to remove a member of the County Board after conducting a removal hearing, and it is the *State Board* that is permitted to delegate its contested case hearing authority to the OAH under section 10-205(a) of the State Government Article.

The Respondent also contends that the applicable statute at section 3-701(g) of the Education Article fails to provide that the hearing before the State Board shall be conducted under the contested case provisions of the APA. He argues that in the absence of such express language in the enabling statute, the State Board has no authority to delegate the hearing authority to the OAH. Contrary to the Respondent's assertion, the APA does not provide that a delegation can occur only if the enabling statute includes express language that an agency hearing may be delegated to the OAH or that it must be held in accordance with the APA. The language on which the Respondent relies, at section 10-203(c) of the State Government Article, to support this contention, applies only to public hearings and not contested case agency hearings. As

addressed above, the hearing called for in section 3-701(g) is a contested case hearing so the requirements set forth in section 10-203(c) do not apply. Moreover, the broad authority to delegate contested case agency hearings to the OAH is set forth at section 10-205 of the APA.[9]

The Respondent argues further that the hearing cannot be delegated to the OAH because the statute provides that the hearing shall be conducted by the State Board. In this case, the State Board has delegated to the OAH the authority to issue only a proposed decision on removal. The authority to issue a final administrative decision in this matter on the issue of removal still rests with the State Board.

For the foregoing reasons, I conclude that the State Board has the legal authority under the APA to delegate the removal hearing provided for in section 3-701(g) of the Education Article to the OAH as a contested case agency hearing.

B. Actual Delegation.

The Respondent also contends that the actual delegation from the State Board in this case fails to comply with the statutory requirements for a proper board delegation. The Respondent contends that the State Board's delegation of the hearing authority to the OAH is invalid because "the State Board has never taken any action regarding this proceeding in open session as required by law; and therefore, its delegation could not be proper even if permitted." *Resp. Reply Brief* at 13. The Respondent has not provided any legal authority to support his claim that the State Board's delegation of the contested case hearing authority to the OAH must be taken "in open session as required by law." *Resp. Reply Brief* at 13.

[9] The County Board notes that the public hearing language set forth in section 10-203(c) was enacted in 1993 to limit the circumstances in which public hearings involving environmental permit matters would result in contested case hearings following the expansion of the contested case procedures in permit cases by the Court of Appeals in *Sugarloaf Citizens Ass'n v. Northeast Maryland Waste Disposal Auth.*, 323 Md. 641 (1991); 78 Md. Op. Att'y Gen. 174, 177 (1993). This further supports the view that the removal hearing in section 3-701(g) is a contested case agency hearing and not a public hearing, and that section 10-203(c) of the APA is inapplicable.

The Respondent also contends that the purported delegation letter from the State Board is inadequate as it only constitutes a transmittal letter from an Assistant Attorney General. The Respondent contends that the delegation of this matter to the OAH is based on a July 13, 2011 letter sent to the OAH from an Assistant Attorney General, purporting to act on behalf of the State Board. That letter states, in pertinent part, as follows:

> This case arose on the request of the Howard County Board of Education to have the State Board of Education remove a local board member, Allen R. Dyer, from office for misconduct in office pursuant to § 3-701(g) of the Education Article. Mr. Dyer has asked the State Board for a hearing. We are transferring this matter to OAH for assignment to an administrative law judge for the scheduling of a hearing and the issuance of a proposed decision in the case.

Resp. Reply Brief, Resp. Ex. 2. The Respondent also attached to his Reply Brief a September 13, 2011 letter from William Reinhard (Reinhard), Custodian of Records for MSDE, that was sent to the Respondent's counsel in which Reinhard designates the July 13, 2011 letter from the Assistant Attorney General as the delegation document. Reinhard notes in his letter that MSDE counsel was acting on behalf of the State Board and that the State Board has the authority to delegate contested case hearings to the OAH under section 10-205 of the State Government Article. Reinhard's letter was sent in response to counsel's September 9, 2011 letter to the State Board requesting, under the federal Freedom of Information Act (FOIA) and the Maryland Public Information Act (PIA), evidence of the delegation authority. *Resp. Reply Brief*, Resp. Ex. 2. As the Respondent's counsel's letter to the State Board was a PIA request, it was appropriate for the response to be issued by an MSDE Custodian of the Records.

The record also contains a July 6, 2011 letter from James H. DeGraffenreidt, Jr. (DeGraffenreidt), President of the State Board, sent to the Respondent, which was transmitted to the OAH on or about July 14, 2011. The July 6, 2011 DeGraffenreidt letter notified the Respondent that the County Board had requested that the State Board remove him from office on

the grounds of misconduct in office, sent him copies of the charges for removal, advised him that he had the right to request a hearing on the charges, the deadline for making a request, and the address where a hearing request should be sent. The July 6, 2011 letter from DeGraffenreidt also stated, in pertinent part, as follows:

> If you request a hearing, the State Board has delegated hearing authority to the Office of Administrative Hearings which shall promptly schedule such a hearing. You may represent yourself or be represented by counsel at the hearing.
>
> The Office of Administrative Hearings will issue a Proposed Decision on Removal to the State Board. You will have an opportunity, if necessary, to file exceptions to the Proposed Decision with the State Board. The State Board will, thereafter, provide you with an opportunity to be heard publicly in oral argument before the State Board in your defense.

Despite the language in the DeGraffenreidt letter of "has delegated," the record does not contain any earlier delegation from the State Board to the OAH that covers this matter.

Despite certain technical deficiencies in the July 13, 2011 delegation letter from the Assistant Attorney General, that letter together with the other letters addressing delegation that are part of this record, demonstrate a clear intent by the State Board of Education to delegate to the OAH the authority to conduct a contested case agency hearing and issue a proposed decision on the issue of the requested removal of the Respondent from the County Board for alleged misconduct in office under section 3-701(g) of the Education Article. As discussed above, the State Board has the authority to delegate the removal hearing to the OAH under section 10-205 of the APA. Although the July 13, 2011 letter was written by an Assistant Attorney General rather than by an agency head or board president, she is counsel for the MSDE, the letter was written on State Board letterhead, and indicates that it was sent in response to the Respondent's request to the State Board for a hearing on removal. While the letter states only that the State Board is "transferring" the matter to the OAH, the review of this July 13, 2011 letter, along with the July 6, 2011 DeGraffenreidt letter and the September 13, 2011 Reinhard letter, demonstrate

that the State Board has exercised its statutory authority to delegate this matter to the OAH for a contested case hearing.

The letters also demonstrate that the Respondent received actual notice of the delegation to the OAH, the authority of the OAH to issue a proposed decision, the right of the Respondent, if necessary, to file exceptions with the State Board, and the authority of the State Board to issue a final administrative decision in this case. Under the statute, if the removal is upheld by the State Board, the Respondent also has the right to a *de novo* review of the removal by the Circuit Court for Howard County. Md. Code Ann., Educ. § 3-701(g)(4).

The Respondent has failed to show any prejudice from any technical defects in the State Board's delegation document. The State Board's intent is clear, the Respondent has been afforded actual notice of the delegation, and the APA authorizes the State Board to delegate its hearing authority to the OAH. For the foregoing reasons, I conclude that the State Board has properly delegated the contested case removal hearing requested by the Respondent to the OAH.

VII. Notice.

The Respondent also argues that the County Board has failed to provide him with reasonable notice of the basis for which it seeks his removal from office. He contends that the June 9, 2011 resolution from the County Board is vague and conclusory. He claims further that the subsequent June 24, 2011 transmittal letter from the County Board Chairman to the State Board is still too general and was not authorized by the County Board.

The County Board contends that it has provided the Respondent with reasonable notice of the basis for the charges for removal. It argues that the State Board is not obligated to provide the Respondent with the kind of specific pleadings required in criminal cases or in other civil cases involving issues such as fraud. It contends that in administrative proceedings, actual notice received sufficiently in advance of an administrative hearing is adequate and satisfies due

process. The County Board contends that through the discovery process the Respondent will have the opportunity to obtain additional information regarding the basis for the charges for removal well in advance of the contested case hearing.

The APA addresses the issue of notice at section 10-207 of the State Government Article. That statute provides, in pertinent part, as follows:

> **§ 10-207. Notice of agency action**
>
> (a) In general. – An agency shall give reasonable notice of the agency's action.
>
> (b) Contents of notice. – The notice shall:
>
> (1) state concisely and simply:
> (i) the facts that are asserted; or
> (ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;
>
> (2) state the pertinent statutory and regulatory sections under which the agency is taking its action;
>
> (3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;
>
> (4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:
> (i) what, if anything, a person must do to receive a hearing; and
> (iii) all relevant time requirements; and
>
> (5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.
>
> . . .

Md. Code Ann., State Gov't § 10-207(a) (2009).

The County Board contends that the notice provisions in section 10-207 of the APA do not apply to it because the agency referenced in that section is the State Board. It argues further that only the County Board has acted and the State Board will not act until after a hearing has concluded and a recommended decision is sent to the State Board. It argues that the County

Board, which is seeking the Respondent's removal, is not bound by the notice provisions in section 10-207 of the APA.

The provisions of section 10-207 of the APA apply to any agency action for which an individual has the right to a contested case hearing under the APA. Section 3-701 of the Education Article affords the Respondent the right to request a hearing before the State Board. The County Board has already argued that the contemplated hearing is a contested case agency hearing under section 10-202 of the APA and that the State Board has the right to delegate the hearing authority to the OAH. The purpose of the APA notice requirement is to afford a person reasonable notice of the charges and potential sanction before the person participates in a contested case hearing under the APA so the participant will have sufficient information to present a meaningful defense to the charges. The Respondent has requested a hearing before the State Board and the State Board has delegated its contested case hearing authority to the OAH under the APA. The notice requirements in section 10-207 of the APA clearly apply to this proceeding.

The State Board has complied with the notice requirements of section 10-207 of the APA. The State Board issued a notice of agency action as required under section 10-207 when it sent the Respondent a letter dated July 6, 2011 from State Board President DeGraffenreidt, which also attached a copy of the County Board's June 9, 2011 resolution and the County Board Chairman's June 24, 2011 letter to the State Board requesting the Respondent's removal from office. The July 6, 2011 DeGraffenreidt letter stated that the County Board resolution and the Chairman's request for removal letter constitute the charges brought by the County Board against him. The letter also notified the Respondent of his right to request a hearing and the time frame for submission of a hearing request, the address where a hearing request must be sent, the statutory authority for the proposed removal and hearing, the sanction of removal for the alleged misconduct, the delegation of the hearing authority to the OAH, the authority of the OAH to

issue a proposed decision, and the right of the Respondent, if necessary, to file exceptions to the State Board to the proposed decision issued by the OAH. Consequently, the July 6, 2011 DeGraffenreidt letter complied with the notice provisions set forth in section 10-207 of the APA.

The Respondent contends that the June 9, 2011 resolution was vague and conclusory, and that the June 24, 2011 request for removal letter was too general and not authorized by the County Board resolution. The County Board resolution set forth a list of categories of alleged violations by the Respondent. The resolution also stated, in part, as follows:

> The Board hereby directs its counsel to prepare and its Chairman to execute a request to the Maryland State Board of Education to remove Mr. Dyer from his position as a member of the Board of Education for Howard County for misconduct in office.

Resp. Reply Brief, Resp. Ex. 2. The resolution authorized the County Board to send a letter to the State Board requesting the Respondent's removal from office for alleged misconduct in office. I conclude that the June 24, 2011 letter from the County Board Chairman to the State Board was expressly authorized by the resolution. The Respondent claims that the resolution authorized the County Board to send only a transmittal letter requesting removal, but did not authorize the County Board to provide additional information in that letter beyond what was already stated in the resolution. Contrary to the Respondent's assertion, the resolution contains no language limiting the content of the letter requesting removal.

Furthermore, the Respondent has argued that he has not been afforded adequate notice of the basis for the requested removal. However, when the County Board provided him with additional information regarding the basis for the removal action, as set forth in the June 24, 2011 letter, he claims that such additional information was not authorized. The Respondent cannot have it both ways. The Respondent is clearly entitled to adequate notice of the basis for the requested removal so that he can properly defend against the charges at the contested case

hearing. In the notice letter sent to the Respondent, the State Board identified the County Board resolution and the June 24, 2011 request for removal letter as the charges brought by the County Board against him, and attached those documents. The Respondent was entitled to receive the charges well in advance of the hearing to assist in his preparation of a defense. The request for removal letter provides additional information regarding the meaning of the charge of misconduct in office, the alleged basis for the requested removal, the categories of the Respondent's alleged violations, and factual examples of the Respondent's alleged violations. I conclude that the request for removal letter was authorized by the language in the resolution and constitutes the charges against him along with the resolution. Moreover, once the County Board resolution authorized its counsel and Chairman to prepare and execute a request to the State Board for the Respondent's removal, the Education Article and the APA provide that the matter is to be resolved through the process of a contested case agency hearing. There is no statute or other legal authority that requires that all aspects of the administrative litigation be conducted in open session.

The Respondent argues further that the resolution and request for removal letter are still too vague, general, and conclusory to provide meaningful notice so that he can properly defend against the charges at the upcoming hearing. The APA requires at section 10-207(b)(1) that the notice "state concisely and simply the facts asserted; or if the facts cannot be stated in detail when the notice is given, the issues that are involved." The resolution and removal letter provide information regarding the charge of misconduct, general categories of the alleged violations, and factual examples of alleged violations within those categories. Although the charges do not provide the date, time, or place of the alleged violations, they do provide facts that place the Respondent on notice of the actions on which the County Board relies in seeking his removal from that board.

Section 10-207(b)(1) provides that the notice shall state concisely and simply the facts that are asserted or, if the facts cannot be stated in detail when the notice is given, the issues that are involved. The notice the State Board has provided to the Respondent in this case includes both facts and issues. While the County Board has not alleged that the facts could not be stated in detail when the notice was given, both forms of notice are contemplated by the statute. Moreover, this language in the notice statute contemplates that additional information can be provided in the future. As addressed below, the Respondent will have an opportunity to obtain additional information and further detail regarding the charges for removal well in advance of the contested case hearing, not scheduled to commence until May 7, 2012.

The County Board has provided the Respondent with charges that include categories of violations, factual allegations, and issues that form the basis for the requested removal. None of the cases cited by the Respondent regarding due process notice involve administrative proceedings. The cases relied upon by the Respondent fail to address the due process standard as it applies to administrative hearings. In administrative proceedings, actual notice provided sufficiently in advance of an evidentiary hearing is consistent with due process. In *Brown v. Handgun Permit Review Board*, 188 Md. App. 455 (2009), *cert. denied*, 412 Md. 495 (2010), an applicant initially received inaccurate information regarding the reason for denial of his handgun permit renewal application. However, the applicant subsequently received actual notice of the reason for denial four months before an evidentiary hearing. The court determined that "actual notice compensates for a failure to provide notice as required by statute, unless the statute prescribes a sanction for the violation." *Brown*, 188 Md.App. at 469. Section 10-207 of the APA prescribes no such sanction. The court also found that "actual notice must sufficiently precede the hearing that follows in order for the notice to satisfy due process concerns...." *Id.* Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.*, at 470. The court held that where

the applicant received actual notice of the basis for the permit denial four months prior to the evidentiary hearing, the applicant was afforded "sufficient notice to provide him with due process" and there was no basis to vacate the administrative decision. *Id.*

In the instant case, the charges for removal have provided the Respondent with notice of the categories of the alleged violations and factual examples of the alleged violations. While the Respondent would benefit from receiving additional detail regarding the actions upon which the County Board relies, I do not find that the notice afforded the Respondent at this stage of the proceedings is so vague as to violate procedural due process standards for administrative hearings. In addition, in accordance with the *Brown* holding for administrative proceedings, actual notice received sufficiently in advance of the contested case hearing that allows the Respondent to meaningfully prepare for the removal hearing satisfies due process standards and affords reasonable notice in administrative proceedings.

The Scheduling Order in this case provides for discovery to begin on October 27, 2011 and continue through December 2, 2011. The Scheduling Order also provides for a briefing schedule and motions hearing regarding any discovery disputes that might arise. The discovery process will afford the Respondent an opportunity to obtain additional information regarding the charges for removal well in advance of the scheduled hearing. The discovery period will end more than five months before the hearing is scheduled to begin on May 7, 2012. The motions hearing is scheduled for January 9, 2012 and discovery disputes will be resolved approximately four months before the scheduled hearing. Even though the discovery process in administrative proceedings is less extensive than that provided for in court, the Respondent will be entitled to seek all relevant documents that are not privileged through the discovery process. COMAR 28.02.01.13A.

For the foregoing reasons, I find that the County Board has provided the Respondent with

reasonable notice of the basis for the charges for removal at this stage of the proceedings.

VIII. Conclusion.

For the foregoing reasons, the Respondent's Motion to Dismiss the charges for removal filed against him is denied in its entirety. The proceedings in this matter shall proceed as scheduled in the Prehearing Conference Report and Scheduling Order issued on September 12, 2011.

CONCLUSIONS OF LAW

Based upon the foregoing discussion, I conclude, as a matter law, that section 3-701 of the Educational Article is not unconstitutional, that the Student member was qualified to vote on the resolution on June 9, 2011, that the State Board of Education has the authority to delegate a contested case hearing in this matter to the OAH and did effectively delegate that authority, and that the Respondent has been afforded reasonable and adequate notice of the basis for the requested removal consistent with due process at this stage of the proceedings. Accordingly, the Respondent's Motion to Dismiss the charges for removal is denied in its entirety. COMAR 28.02.01.12C; Md. Code Ann., Educ. § 3-701 (2008); Md. Code Ann., State Gov't §§ 10-202, 10-205, 10-207 (2009).

PROPOSED ORDER

I PROPOSE that the Motion to Dismiss filed by the Respondent in this matter is **DENIED** in its entirety. This matter shall proceed in accordance with the Prehearing Conference Report and Scheduling Order issued on September 12, 2011.

October 26, 2011
Date Decision Mailed

Douglas E. Koteen
Administrative Law Judge

DEK/ch
126790

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