WILLIAM MORRISON,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 15-19

OPINION

INTRODUCTION

The Appellant, Mr. Morrison, appealed the decision of the Baltimore City Board of School Commissioners to terminate him from his position as a 7th/8th grade social studies teacher. The State Board referred the appeal to the Office of Administrative Hearings (OAH) for a *de novo* hearing. The Administrative Law Judge (ALJ) issued a Proposed Decision on February 13, 2015 recommending that this Board uphold the termination. No exceptions have been filed.

FACTUAL BACKGROUND

This case is about the Appellant's absences from school in the 2012-2013 school year. The record shows that the Appellant had 8-9 periods of absences. Under school system rules, one absence is logged for "any period of continuous absence for the same reason." (ALJ Decision, Finding of Fact #17). The eight or nine periods of absence accounted for 18-19 days of absences.

Appellant received several cautions and notices that his absences could be in violation of the Attendance Reliability and Analysis Program (ARAP). Under the ARAP rules, a ten-month employee should not have more than seven periods of absences in one year (CEO Ex. 1) (ALJ Decision, Finding of Fact #20). When a teacher exceeds seven periods of absences in one year, a principal "may apply appropriate discipline up to and including a recommendation for dismissal." (CEO Ex. 1; ALJ Decision, Finding of Fact #21).

At some point in 2013, the Appellant submitted a request for Family and Medical Leave (FMLA). FMLA absences do not count as absences under the ARAP. (CEO Ex. 1 at 6). His doctor signed the FMLA request form on February 6, 2013. Appellant claims he filed the request in February, 2013. The local board claims the request was filed in April, 2013. The ALJ concluded that it was filed in April, 2013. (ALJ Decision, Finding of Fact #27). Although the date of filing may be of some importance in this case, the record reflects that the principal provided the Appellant with FMLA forms and information several times during the school year and in the preceeding school year. The Appellant testified that he delayed filing for FMLA for many months because he did not want to reveal his chronic medical condition. (ALJ Decision, Finding of Fact #31).

On or about March 19, 2013, the Appellant received his third letter of caution stating he had accumulated eight periods of absences. (ALJ Decision, Finding of Fact #26). On April 13, 2013, the Appellant received a notice that a *Loudermill* hearing would be held on April 18, 2013. (ALJ Decision, Finding of Fact #34). At the hearing, the Appellant provided medical documentation for some but not all of his absences. (ALJ Decision, Finding of Fact 34-37). Coincidentally, the school system denied Appellant's request for FMLA leave on the same day as the *Loudermill* hearing. On May 15, 2013, the Appellant was terminated for willful neglect of duty because of his absences. (ALJ Decision, Finding of Fact #38).

On January 24, 2014, the local board's Hearing Officer convened an evidentiary hearing to address the validity of the termination. The local board had the burden to prove that its actions in terminating the Appellant were legal and appropriate. (Hearing Officer Decision ("H.O. Decision") at 34).

Four letters of caution were introduced at the hearing showing up to 8-9 periods of absence totaling 18-19 days of absences.[1] (H.O. Decision at 9, 11). The Appellant testified he had a chronic medical condition that required intermittent treatment, at least quarterly, and that he had some dental problems during the 2012-2013 school year that required extractions that were painful. He testified as to the reasons for his absences, albeit there were issues about the documentation he produced and what it meant.

- September 16-21, 2012 – the flu
- October 19, 2012 – professional development day, but he attended from 11-3. Thus he marked ½ day as a sick day.
- November 7, 2012 – appointment related to his chronic illness
- January 7-11, 2013 – absence related to his chronic illness
- February 4-6, 2013 – blood work at Veteran's Hospital related to chronic illness
- February 18-20, 2013 – dental appointment extraction
- February 25, 2013 – no explanation
- March 11, 2013 – dental appointment extraction
- April 9, 2013 – Veteran's Hospital appointment for blood work

(H.O. Decision at 15-29).

The Hearing Officer concluded that the Appellant's termination was appropriate because his absences exceeded the 7 periods of absences allowed under the ARAP rules. (H.O. Decision at 40). The Hearing Officer also concluded that the school system's denial of FMLA was legally incorrect, (H.O. Decision at 42), but that finding did not change his decision that the termination was appropriate. (H.O. Decision at 44).

[1] There are some factual differences in the record as to the number of periods of absences and the total days absent. But those differences are not relevant to the decision here.

The local board adopted the Hearing Officer's decision on May 13, 2014. The Appellant appealed to the State Board and, on November 16, 2014, an ALJ heard the *de novo* appeal based solely on the record below.

The ALJ focused his decision on the number of periods of absences and on the Appellant's unwillingness "to comply with…requirements for notice of absence or requesting excused absences." (ALJ Proposed Decision at 11, 13, 15). The ALJ also concluded that the denial of FMLA was irrelevant to the decision to terminate the Appellant. (*Id.* at 15). This appeal ensued.

STANDARD OF REVIEW

The State Board exercises its independent judgment on the record before it in determining whether to sustain the dismissal of a certificated employee. COMAR 13A.01.05.05F.

LEGAL ANALYSIS

The ALJ based his recommendation to affirm the local board's decision to terminate the Appellant, in part, on a conclusion that the Appellant "failed – on numerous occasions – to comply with the…requirements for notice of absence or requesting excused absence." (ALJ Decision at 13).

As to "notice of absence", the ARAP rules require that a teacher who is unable to report to work "notify the principal prior to the start of the school day or as soon as possible thereafter." (ALJ Decision, Finding of Fact #19). The ALJ placed emphasis on that rule in his decision (*see* Finding of Fact #19) and concluded that the Appellant did not timely call in sick. The record below does not support that conclusion. Indeed, the Hearing Officer stated in his decision that the Appellant "continued to call in sick on the morning of the absence, even on days that the [Appellant] allegedly scheduled blood work for his chronic illness." (H.O. Decision at 41). Thus, we do not accept as a finding of fact or conclusion of law that the Appellant did not comply with the "notice of absence" provision of ARAP.

The ALJ also cites Appellant for failing to notify BCPS in advance to obtain "excused absences." (ALJ Proposed Decision at 15). We cannot find in the ARAP rules any reference to "excused" medical absences. If FMLA leave is approved, however, an FMLA absence is considered an "approved" absence. (CEO Ex. 1 at 6). The ALJ is not clear in his decision that he is referring to FMLA approved leave as an "excused absence." We will assume that he is.[2]

The FMLA issue factors into our analysis. Specifically, the school system denied the FMLA request because the Appellant did not meet the eligibility requirement to have worked "1250 regular hours prior to the request for this leave." (Appellant's Ex. 10). The Hearing Officer ruled, and we agree, that the school system could not use the 1250 hour requirement to

[2] The local board argued in its Memorandum of Law filed at OAH that an employee "must consult with the employer and make a reasonable effort to schedule treatment so as not to disrupt unduly the employer's operations." (Local Board, Memorandum of Law at 3). The local board, however, cites an FMLA rule, not an ARAP rule for that proposition.

deny the FMLA request, even if in-class hours do not total 1250, because teachers work many hours outside the classroom. Specifically, teachers are exempt from the 1250 hour requirement unless the school system affirmatively documents that the teacher did not work 1250 hours inside and outside the classroom combined. 29 CFR §25.110(c)(3)(Appellant's Ex. 11). The Hearing Officer ruled that the school system did not present such evidence and thus the school system should not have used the 1250 hour rule as a basis to deny FMLA. (H.O. Decision at 43). The Hearing Officer also determined that even though the FMLA request was illegally denied, the number of absences and the Appellant's inattention to providing medical documentation timely for each absence along with his failure to apply for FMLA earlier (so that the FMLA absences would not be counted against him) were sufficient facts to support the termination.

The ALJ in his Proposed Decision came to a similar conclusion. To uphold the termination, he found that the local board correctly applied the ARAP rule that states:

> It is expected that a teacher/employee will not have more than seven periods of absence in any school year. There may be cases, however, where a teacher exceeds the boundaries. The principal must use discretion in these cases and may apply appropriate discipline up to and including a recommendation for dismissal. In determining if, and to what extent, discipline should be administered, the supervisor should in all cases take into account the employee's pattern of absenteeism, evidence of efforts to improve attendance, the length of each occasion and any extenuating circumstances which may be present.

(CEO, Ex. 1 at 4).

The record reflects that the Appellant had more than seven absences totaling 19 days, that the Appellant was encouraged to improve his attendance and he did not. Nor did he explain his chronic medical condition or apply for FMLA until the 11th hour. The ALJ concluded that the Appellant had intentionally withheld information about his chronic illness and failed to request FMLA leave until termination was imminent. He found that those reasons, along with the number of periods of absences, were sufficient to support the termination.

We agree with the ALJ that the evidence supports the termination. The Appellant was counseled often to file a request for FMLA leave, to document his absences, to schedule his appointments so that his students and the school would not be adversely affected. He did none of those things. He missed 19 days of school over seven periods of absence. Attendance matters, both for students and teachers.

CONCLUSION

For the reasons stated, we adopt the decision of the ALJ as a final decision of the State Board, with the exception of Finding of Fact #19 and any conclusion of law related to that Finding of Fact.

Mary Kay Finan
Mary Kay Finan
President

James H. DeGraffenreidt, Jr.

Linda Eberhart
Linda Eberhart

Chester E. Finn, Jr. /mcp
Chester E. Finn, Jr.

S. James Gates, Jr.
S. James Gates, Jr.

Luisa Montero-Diaz
Luisa Montero-Diaz

Andrew R. Smarick

Guffrie M. Smith, Jr.
Guffrie M. Smith, Jr.

June 23, 2015

Dissent:

Larry Giammo /mcp
Larry Giammo

Sayed M. Naved /mcp
Sayed M. Naved

Madhu Sidhu
Madhu Sidhu

WILLIAM MORRISON,	*	**BEFORE MICHAEL W. BURNS,**
APPELLANT	*	**AN ADMINISTRATIVE LAW JUDGE**
V.	*	**OF THE MARYLAND OFFICE**
BALTIMORE CITY BOARD OF	*	**OF ADMINISTRATIVE HEARINGS**
SCHOOL COMMISSIONERS	*	**OAH NO.: MSDE-BE-01-14-25741**

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

PROPOSED DECISION

STATEMENT OF THE CASE

On May 15, 2013, the Baltimore City Public Schools' (BCPS) Chief Executive Officer (CEO) recommended to the Baltimore City Board of School Commissioners (BCBSC or Board) that the Appellant's employment be terminated based on willful neglect of duty. The Appellant filed an appeal. On January 23, 2014, Hearing Examiner Gary M. Brooks, Esquire, conducted an evidentiary hearing, and on April 18, 2014, he recommended that the Board affirm the decision of termination.

On May 13, 2014, the Board issued an Order terminating the Appellant, and on June 2, 2014, the Appellant appealed. On July 22, 2014, the Maryland State Board of Education (State Board) forwarded the case to the Office of Administrative Hearings (OAH) to conduct a hearing in accordance with section 6-202 of the Education Article of the Maryland Annotated Code with the Administrative Law Judge (ALJ) to submit proposed written Findings of Fact, Conclusions of Law and Recommendations to the State Board which are in accordance with Code of

Maryland Regulations (COMAR) 13A.01.05.05F. On August 1, 2014, the OAH sent the parties a Notice of Telephone Prehearing Conference (Conference) to be held on September 9, 2014.

On September 9, 2014, I conducted the Conference with James C. Strouse, Esquire, representing the Appellant, and Lori Branch-Cooper, Esquire, counsel for the Board, participating. On September 10, 2014, I issued a Prehearing Conference Report and Scheduling Order (Scheduling Order).

Pursuant to the Scheduling Order, on September 10, 2014, the OAH issued a Notice of Settlement Conference Hearing informing the parties that a settlement conference was scheduled for October 7, 2014, at the OAH in Hunt Valley, Maryland. The settlement conference did not resolve the case.

Pursuant to the Scheduling Order, on September 11, 2014, the OAH issued a Notice of Motions Hearing informing the parties that a hearing on any open motions (Motions Hearing) would be held on October 24, 2014 at the OAH.

In the Scheduling Order, I noted that requests to supplement the record below with additional testimony pursuant to COMAR 13A.01.05.04C and 13A.01.05.07C(1) would be addressed, as necessary, at the Motions Hearing. Since neither party filed any motions, the scheduled Motions Hearing did not take place. Neither party sought to supplement the record. Accordingly, the Hearing on the Merits (Merits Hearing) was conducted based on the record produced before the Hearing Examiner.

Pursuant to the Scheduling Order, on September 12, 2014, the OAH issued a Notice of Hearing informing the parties that a Merits Hearing would be held on November 6, 2014, at the OAH.

On November 6, 2014, I conducted the Merits Hearing at the offices of the OAH in Hunt Valley, Maryland. Mr. Strouse represented the Appellant, and Ms. Branch-Cooper represented the Board.

The hearing was continued, and the record left open, until November 21, 2014, in order to permit the parties to submit briefs regarding the application of the Federal Medical Leave Act (FMLA) to the case. The Merits Hearing concluded, and the record was closed, on November 21, 2014.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board, and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; and COMAR 28.02.01.

ISSUE

Was the Appellant's termination proper?

SUMMARY OF THE EVIDENCE

Exhibits

The parties did not introduce any exhibits into evidence but instead relied on the exhibits that were introduced at the hearing below on January 23, 2014. A transcript of the hearing, the exhibits introduced by the parties at that hearing, and the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation, dated April 18, 2014, are also part of the record before me.

Testimony

The Appellant did not present testimony from any witnesses.

The Board did not present testimony from any witnesses.

PROPOSED FINDINGS OF FACT

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

1. The Appellant is a tenured teacher certified to teach social studies for grades six through twelve.
2. The Appellant was employed by the Board in 2006 as a teacher. Prior to that, he was a substitute teacher with the BCPS.
3. The Appellant taught seventh and eighth grade social studies classes at Woodholme Elementary/Middle School (Woodholme) during the 2012-2013 school year until being suspended without pay effective May 15, 2013.
4. Shontel Douglas has been the Principal at Woodholme since August of 2011.
5. During the 2012-2013 school year, the reporting time at Woodholme for teachers was 7:30 a.m. with a five minute grace period.
6. A teacher who was going to be absent from Woodholme was required to notify the assistant principal of Woodholme by 6:00 a.m. on the day of the intended absence.
7. A teacher who was going to be absent from Woodholme was also required to notify the school and leave a message regarding the intended absence.
8. When a teacher at Woodholme notified the school of an intended absence, the school would use a substitute list to contact a replacement. If a substitute was unavailable, the teacher's students could be split among other classes or instructional level teachers might cover the teacher's classes.
9. Substitute teachers were not always available to cover classes at Woodholme.
10. Ms. Douglas had the teachers at Woodholme, including the Appellant, informed of the school's absence notification policy.

11. The BCPS policy and procedures regarding staff absenteeism are contained in the Attendance Reliability and Analysis Program (ARAP).

12. All staff members at Woodholme, including the Appellant, were given copies of the ARAP for the 2012-2013 school year.

13. The Appellant received a copy of the ARAP in August of 2012.

14. All staff members at Woodholme, including the Appellant, received training in the ARAP.

15. BCPS employees are, according to the ARAP, "expected to come to work every day."

16. The ARAP defines absenteeism as:

> Absenteeism is any failure to report for, or remain at, work as scheduled, regardless of the reason. The use of the term "as scheduled" is very significant, for this automatically excludes vacation leave, personal leave, permission leave, i.e. jury duty, professional training, bereavement, and the like for leaves of this nature. . . Confusion can be avoided by simply recognizing if the teacher/employee is not on the job as scheduled, he or she is absent regardless of the cause.

17. The ARAP defines absence as:

> Absences shall be viewed not in terms of days, but as periods of absence or occasions. An occasion is any period of continuous absence for the same reason.

18. The ARAP also defines a reporting time requirement as:

> Employees are responsible for reporting to work promptly as scheduled. Employees who are unable to report for work on time must notify their supervisor or his/her designee prior to the start of the work day. Such notification notwithstanding, employees will be recorded as failing to report to work on time.

19. Teachers have responsibilities under the ARAP, including:

> Teacher/employees are expected to maintain good health standards, to take precautions against illness and accidents, and to prevent minor indispositions or inconveniences from keeping them away from work. Teacher/employees unable to report for work shall notify the principal or his/her designee prior to the start of the school day or as soon thereafter as possible. It is important that the teacher/employee know where, when, and whom to call and that the responsibility for notifying the principal rests with the teacher/employee.
>
> (Emphasis added).

20. The ARAP anticipates "that a teacher/employee will not have more than seven periods of absence in any school year."

21. The ARAP states that when a teacher/employee exceeds seven absences in one year, a principal "may apply appropriate discipline up to and including a recommendation for dismissal."

22. By letter dated October 19, 2012, Ms. Douglas notified the Appellant that his current number of days of absence was 6[1] and days of lateness was 2. The letter referenced the ARAP and requested that the Appellant "familiarize" himself with the attendance policy and notify the school administration if there were "extenuating circumstances" affecting his ability to comply with the attendance requirements of the ARAP.

23. In accordance with the ARAP, the Appellant was sent a First Letter of Caution dated November 9, 2012, in which Ms. Douglas notified the Appellant that his current number of days of absence was 5 1/2 and days of lateness was 2. The letter referenced the ARAP and requested that the Appellant "familiarize" himself with the attendance policy and notify the school administration if there were "extenuating circumstances" affecting his ability to comply with the attendance requirements of the ARAP.

24. In a memorandum from Ms. Douglas to the Appellant dated November 9, 2012, the Appellant was advised to "be mindful" of the effect of his absence and lateness on instruction and student achievement.

25. In accordance with the ARAP policy, the Appellant was sent a Second Letter of Caution dated February 8, 2013, in which Ms. Douglas notified the Appellant that he had accumulated six periods of absence and/or lateness. The letter referenced the ARAP and notified the Appellant that he was expected to improve his attendance and that failure to

[1] Ms. Douglas testified at the hearing that the correct number of absences should have read 4 ½ and not 6.

comply with the ARAP attendance requirements might "result in disciplinary action up to and including dismissal." The Appellant was notified that if there were "extenuating circumstances" affecting his ability to comply with the attendance requirements of the ARAP, he should notify the BCPS.

26. In accordance with the ARAP, the Appellant was sent a Third Letter of Caution dated March 19, 2013, in which Ms. Douglas notified the Appellant that he had accumulated eight periods of absence and/or lateness. The letter once again referenced the ARAP and again notified the Appellant that he was expected to improve his attendance and that failure to comply with the ARAP attendance requirements might "result in disciplinary action up to and including dismissal." The Appellant was again notified that if there were "extenuating circumstances" affecting his ability to comply with the attendance requirements of the ARAP, he should notify the BCPS.
27. On or about April 10, 2013, the Appellant submitted a Request for Family and Medical Leave (Family Medical Leave Act (or FMLA) Request) to the BCPS.
28. The FMLA Request indicated that the Appellant's condition commenced in 2005 and that he had been treated for the condition on August 15, 2012, January 9, 2013 and February 6, 2013.
29. Ms. Douglas had given the Appellant a FMLA Request form in 2012.
30. The Appellant waited a number of months from the time he was given an FMLA Request form until the submission of the FMLA Request in April of 2013.
31. The Appellant did not apply for FMLA leave before April 10, 2013, because he did not want to disclose his health issues to the BCPS.
32. The Appellant's FMLA Request was denied on April 18, 2013.

33. In accordance with the ARAP, the Appellant was sent a Fourth Letter of Caution dated April 15, 2013, in which Ms. Douglas notified the Appellant that he had accumulated nine periods of absence and/or lateness. The letter once again referenced the ARAP and once again notified the Appellant that he was expected to improve his attendance and that failure to comply with the ARAP attendance requirements might "result in disciplinary action up to and including dismissal." The Appellant was again notified that if there were "extenuating circumstances" affecting his ability to comply with the attendance requirements of the ARAP, he should notify the BCPS.

34. A Loudermill[2] hearing (Loudermill hearing) was conducted by the BCPS on April 18, 2013 regarding the Appellant's absences and whether the absences constituted "willful neglect" of his duties.

35. At the Loudermill hearing, the Appellant did not dispute the occasions of his absences from Woodholme. The Appellant raised an issue regarding an alleged chronic illness and also provided some medical documentation at the hearing regarding his absences.

36. The medical documentation provided by the Appellant at the Loudermill hearing had not been previously supplied to the BCPS Office of Labor Relations.[3]

37. The medical documentation provided by the Appellant at the April 18, 2013 hearing indicated more than one reason for his absences.

38. On May 15, 2013, the BCPS notified the Appellant that Dr. Andres A. Alonzo, CEO of the BCPS, had recommended his termination from his position with BCPS for willful neglect of duty because of his absences.

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[2] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) mandates that public employees be afforded due process by way of a pre-termination hearing.

[3] It is not clear from the record if this information was otherwise submitted by the Appellant to the BCPS at any other time.

39. The Appellant had more than seven ARAP absences, which included eighteen days of absence, during the 2012-2013 school year.
40. The Appellant was counseled personally by Ms. Douglas several times during the 2012-2013 school year regarding the Appellant's ongoing issues with absences and their effect on his professional and teaching responsibilities.
41. The Appellant has given multiple reasons for his absences during the 2012-2013 school year.
42. The Appellant failed to comply with the ARAP absence notification procedures and requirements on more than seven occasions during the 2012-2013 school year.
43. The Appellant has given no reason for his failure to comply with the requirements of the ARAP during the 2012-2013 school year.
44. The Appellant's health and medical condition did not impact his ability to comply with the requirements of the ARAP during the 2012-2013 school year.
45. The Appellant's absences adversely affected his ability to teach; his effectiveness as a teacher; and his planning and presentation of lessons to his classes during the 2012-2013 school year.
46. The Appellant's absences disrupted the operations of Woodholme, in particular as regards to staffing and the education of his assigned classes during the 2012-2013 school year.
47. The Appellant's absences adversely affected the effectiveness and continuity of learning received by his students during the 2012-2103 school year.
48. The Appellant willfully chose not to follow the requirements of the ARAP repeatedly during the 2012-2013 school year.

DISCUSSION

Section 6-202 of the Education Article of the Maryland Annotated Code provides that "[o]n the recommendation of the county superintendent, a county board may suspend or dismiss a teacher,

principal, supervisor, assistant superintendent, or other professional assistant" for reasons including "willful neglect of duty." Md. Code Ann., Educ. § 6-202(a)(1)(v) (2008). The law further states that the individual "may appeal from the decision of the county board to the State Board." Md. Code Ann., Educ. § 6-202(a)(4). Under COMAR 13A.01.05.07A, the State Board "shall transfer an appeal to the [OAH] for review by an administrative law judge" under circumstances including an "appeal of a certificated employee suspension or dismissal" pursuant to section 6-202 of the Education Article. Under COMAR 13A.01.05.05F(1), the standard of review for dismissal actions involving certificated employees is described as "*de novo*." The next subsection provides that "[t]he State Board shall exercise its independent judgment on the record before it in determining whether to sustain the . . . dismissal of a certificated employee." COMAR 13A.01.05.05F(2). Accordingly, I will make a *de novo* determination based upon the record created before me. Although an entirely *de novo* hearing is not contemplated or authorized by the regulation, COMAR 13A.01.05.04C provides that an appellant may present additional evidence if it is shown that the evidence is material and that there were good reasons for the failure to offer the evidence in the proceeding before the local board. Even in such a case, however, COMAR 13A.01.05.07C(1) allows for the exclusion of additional evidence that is "unduly repetitious of that already contained in the record." The local board has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05F.

In the instant case, no additional evidence was received. Accordingly, because there is no evidence to supplement the record below, I shall exercise my independent judgment based on the record below, and I shall make a *de novo* decision as to whether the Appellant engaged in the willful neglect of duty.

Having carefully reviewed and considered the entire record below as well as the arguments of counsel, I find that the Board has met its burden by a preponderance of the evidence. and I

recommend that the Appellant's dismissal as a tenured teacher for willful neglect of duty be upheld for the reasons that follow.

This is not a difficult case. The record is clear that the BCPS presented clear and credible evidence, which was often not effectively challenged, that the Appellant engaged in willful neglect of his duties over the 2012-2013 school year.

Ms. Douglas, the Principal at Woodhome, testified in detail at the hearing regarding the case. She explained the process and requirements for obtaining excused absences at Woodholme, including the requirements of the ARAP. She described in detail how the Appellant had repeatedly failed to comply with those requirements in spite of numerous attempts, in writing and by way of personal meetings between herself and the Appellant, to notify the Appellant as to his failures to comply, to illustrate the serious negative effect those failures were having on both the staff and students of Woodholme, and to emphasize the need for the Appellant to comply with the ARAP, including the requirements of applying for excused absences. She presented a clear, compelling, organized and persuasive case that in spite of her numerous efforts over a period of months, the Appellant was unwilling to comply with the requirements for obtaining excused absences. Inexplicably, the evidence is clear that the Appellant refused to respond to her repeated efforts with any improvement. Eventually, after the Appellant had accumulated 9 ½ occasions of unexcused absences,[4] Ms. Douglas brought the matter to the BCPS and a Loudermill hearing was scheduled to consider whether the Appellant had engaged in willful neglect of duty. The Loudermill hearing found that to be the case, and termination was recommended and agreed to by the BCPS.

[4] The issue of just how many unexcused absences the Appellant had was the subject of considerable discussion at the hearing. It is clear that the hearing officer went to considerable effort to determine an accurate number of unexcused absences. His finding that there were more than seven such absences is clearly supported by the evidence. Whether the precise number is nine and one-half or ten, it is absolutely clear that that the evidence of the BCPS establishes more than seven relevant absences.

Ms. Douglas also testified as to how the Appellant's repeated absences negatively affected the staff and the students of Woodholme. She noted that the Appellant's repeated absences resulted in his ability to teach being adversely affected and that his students' education was disrupted because of the inconsistency and interruptions his repeated absences caused to his classes over the school year. She also described how his failure to comply with the requirements of ARAP caused problems for staffing at Woodholme and disrupted education planning and implementation at the school.

Ms. Lydia Henderson, BCPS Labor Relations Associate, also testified at the hearing below. She said that the Appellant's testimony at the Loudermill hearing as to his medical issues involved dental problems as well as other medical issues that resulted in the absences. It was Ms. Henderson's conclusion that the medical documentation supplied by the Appellant did not indicate that the same medical issue was the cause for his numerous absences. Ms. Henderson provided detailed evidence as to how she accumulated ten absences for the Appellant and how the figure of Ms. Douglas should not have been 9 ½ because the half absence is considered to be one absence. Ms. Henderson's testimony was knowledgeable and persuasive as well.

The Appellant testified on his own behalf. Frankly, his testimony was often vague and sometimes provided more support for the BCPS than for his own cause. For example, his testimony indicated that his repeated dental work, not a chronic illness, led to many of his absences. He also admitted to speaking to Ms. Douglas regarding his alleged chronic illness, but he never detailed what that illness was nor did he contemporaneously request any leave for that alleged illness. He offered no reason why he repeatedly failed to follow the established procedure for requesting excused leave, nor did he explain how any alleged chronic illness would have resulted in him failing to comply with leave request procedures. He offered no evidence to contradict the evidence presented by the BCPS that his repeated absences caused

disruptions to the education of his students. He failed to effectively contest the evidence that his repeated absences, which occurred in spite of repeated attempts to notify him of his deficiencies and the need for improvement, were a willful neglect of duty that caused harm to the staff and students at Woodholme.

As such, I find that the evidence in this case overwhelmingly supports the conclusion that the Appellant was engaged in the willful neglect of duty, specifically by way of multiple improper absences which occurred throughout the 2012-2013 school year. These absences violated the policies for seeking excused absences contained in the ARAP of which the Appellant was aware. The Appellant was counseled repeatedly about these absences, both personally and in writing, and failed to respond or improve his compliance. Based upon the evidence, no other conclusion is possible than the Appellant engaged in a pattern over many months of willful neglect of duty. This neglect impacted the operations of Woodholme and the education of his students. The Appellant's arguments as to the reasons for the absences do not explain why he failed – on numerous occasions – to comply with the quite clear and reasonable requirements for notice of absence or requesting excused absence.

The Appellant raised an issue regarding the FMLA Request he filed on April 10, 2015 both at the hearing and by way of argument before this ALJ. I permitted the parties to file briefs regarding the relevance of the FMLA Request to this case. After considering the briefs filed and the issue, I find that the FMLA Request is not relevant to the issues herein and provides no support to the Appellant's case.

The Appellant claims that he should have received FMLA, that three of his absences "were due to FMLA," and that application of FMLA would have resulted in "only 5 absences."

I take this to mean that the Appellant believes that there are insufficient absences to justify termination. This argument is without merit. I agree with the conclusion of the Hearing Examiner who found:

> Even if the FMLA was eventually approved, the timing and the reasons for the approval would not overturn the fact pattern and exhibits supporting the termination of the Appellant under ARAP.

The issue here is the Appellant's failure to follow procedures for notifying the BCPS of his intended absences, not the applicability of the FMLA. As noted by the United States District Court for the District of Maryland in *Rodriguez v. Smithfield Packing Co.*, 545 F.Supp 2d 508, 516 (2008), regarding the applicability of the FMLA:

> The core requirements for triggering an employer's obligations are a serious health condition and adequate communication, meaning a timely communication sufficient to put an employer on notice that the protections of the Act may apply. (Citations omitted). When timely and adequate communication is not given, the protections of the Act do not apply, even if the employee has a serious health condition.

The Appellant testified that he had intentionally withheld information relating to his alleged illness from the BCPS – even though he had been provided a FMLA Request form by Ms. Douglas. The Appellant repeatedly failed to provide the BCPS with anything resembling adequate communication regarding any alleged serious health condition until faced with termination. As stated in *Rodriguez, supra*, quoting 29 C.F.R. § 825.302(d), "an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave." The Appellant is charged with precisely such a failure to comply with the BCPS's "usual and customary notice and procedural requirements for requesting leave." As previously shown, the BCPS proved such failures by the Appellant conclusively in this case. An employee's failure to comply with an employer's internal leave policies (precisely what was charged and proven here) is a sufficient ground for termination and forecloses an FMLA claim. *Righi v. SMC Corp.*, 632 F.3rd 404 (7th Cir. 2009).

I also note that there was no evidence that the Appellant's absences were for FMLA qualifying reasons and, even if so, he failed to meet his obligation to comply with the ARAP as required. In fact, he said that he consciously chose not to inform the BCPS of his alleged "serious health condition."[5] The Appellant also failed to provide any evidence of how any of his alleged health issues resulted in his repeated failure to comply with the provisions of the ARAP. He provided no nexus between his alleged, and unproven, "chronic illness" and his failure to comply with the ARAP. There was, in other words, no evidence as to why the one resulted in the other.

The Appellant was terminated for a series of absences which were proven by the BCPS to have occurred. The absences were proven in the hearing to have violated the procedures for notifying the BCPS in advance and obtaining excused absences as required by the ARAP. The FMLA has nothing to do with the basis for the termination here, and the FMLA issue raised by the Appellant was and is irrelevant to the decision to terminate the Appellant in this case.

In summary, the evidence is clear that the Appellant committed willful neglect of duty as a result of numerous unexcused absences. These absences occurred in spite of numerous attempts by Ms. Douglas to alert the Appellant to his failures to comply with requirements and to get the Appellant to recognize and comply with the clear procedures required to request excused absences. The Appellant refused, over many months, to alter his behavior and comply with the BCPS's absence requirements. The eventual decision by Dr. Alonzo, the BPSC CEO, was to recommend termination for willful neglect of duty.

My review of the record, as is summarized herein, indicates ample, documented evidence to support Dr. Alonzo's recommendation for termination. The numerous documents in evidence, as well as the credible testimony of witnesses – which included Ms. Douglas and Ms.

[5] The record also makes clear that the Appellant failed to provide consistent or persuasive evidence as to what "serious health condition" qualified for FMLA leave at any point in the process.

Henderson – proved that the Appellant willfully neglected his duties. I found substantial evidence that the Appellant saw no need to change his behavior and did not do so.

Having found that the Appellant engaged in willful neglect of his duties, I conclude that dismissal of the Appellant is the only appropriate sanction. Quite frankly, I can find no evidence that the Appellant would have ever changed his behavior and complied with the process outlined for obtaining excused absences had he not been terminated. There is no evidence that Ms. Douglas' efforts had any impact whatsoever on the Appellant. It was only the threat of termination that finally got his attention, and I have no confidence that were he to return as a teacher to the BCPS he would actually alter his behavior to comply with the requirements of the ARAP as regards absences.

I find that the Appellant has committed willful neglect of his duties as described herein, and I conclude that dismissal of the Appellant is a rational, appropriate response and that he should be dismissed by the Board.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Proposed Findings of Fact and Discussion, I conclude as a matter of law that the Appellant willfully neglected his duties and that the Appellant's dismissal was proper. Md. Code Ann., Educ. § 6-202(a); COMAR 13A.01.05.05F.

PROPOSED RECOMMENDATION

I recommend that the decision of the Baltimore City Board of School Commissioners dismissing the Appellant for willful neglect of his teaching duties be **UPHELD.**

PROPOSED ORDER

I **PROPOSE** that the decision of the Baltimore City Board of School Commissioners dismissing the Appellant for willful neglect of his teaching duties be **UPHELD**.

February 11, 2015
Date Decision Mailed

Michael W. Burns
Administrative Law Judge

MWB/dlm
#154245

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within 15 days of receipt of the decision; parties may file written responses to the exceptions within 15 days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

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