

DANIEL PICCA

Appellant

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-34

OPINION

Appellant, a former teacher at Kemp Mill Elementary School, filed this appeal of the Montgomery County Board of Education's decision to terminate him for insubordination and misconduct in office related to Appellant's inappropriate behavior and interactions with students. As is required by COMAR 13A.01.05.07(A)(2), this Board referred the case to the Office of Administrative Hearings for review by an Administrative Law Judge (ALJ).

On July 2, 2012, the ALJ issued a 28 page Proposed Decision recommending that the State Board affirm the local board's decision to terminate Appellant. All parties were given notice that any exceptions to the ALJ's decision were to be filed within 15 days of receipt of the decision. No exceptions were filed.

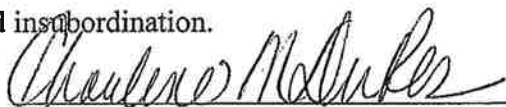
We have reviewed the ALJ's decision. It is comprehensive, well-reasoned, and his recommendation to affirm the local board is supported by the facts and the law. Accordingly, we adopt the Administrative Law Judge's Proposed Decision as the opinion of this Board.

In affirming the decision to terminate this employee, we must emphasize our expectation of school systems. The events chronicled in this case are shocking, not only because they occurred, but because they occurred over and over again for seventeen years. When confronted with such obvious inappropriate behaviors on the part of a teacher toward his students, it is our expectation and, we believe, the expectation of the school community, that the teacher will be removed from contact with students with alacrity. From the first complaint in October 1993, seventeen years passed with patterns repeated and reprimands issued. Yet this teacher was transferred to different elementary schools and remained in the classroom. That should never ever have occurred.

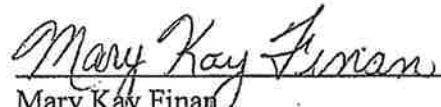
Recent child sex abuse cases have shone a bright light in that dark corner. We think that this case can shine a light on the abusive conduct, albeit infrequent, of school staff toward

children. We ask local boards to review and put in place a policy addressing teacher and staff conduct with students, and make it a part of the message in staff trainings and meetings. We ask local boards to inquire about the safeguards that are in place to assure that the type of persistent conduct that occurred in this case does not occur in their schools. In this case, the personnel record was filled with reprimands and directives which Mr. Picca did not follow. It is as if each reprimand stood alone without reference to past directives. It would be prudent for school systems to review their personnel records to be sure there are no cases, like this one, lurking in their schools.

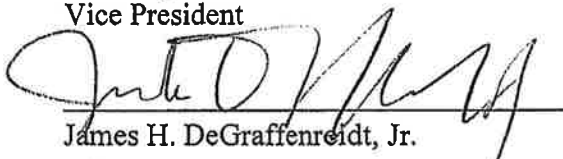
For all of the reasons stated, we affirm the ALJ's Proposed Decision upholding the Appellant's belated termination for misconduct and insubordination.



Charlene M. Dukes
President



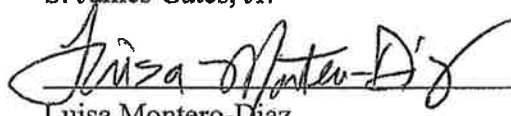
Mary Kay Finan
Vice President



James H. DeGraffenreidt, Jr.

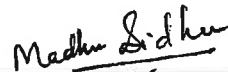


S. James Gates, Jr.

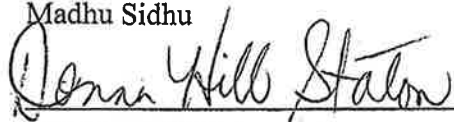


Luisa Montero-Diaz

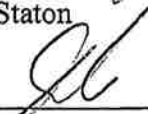
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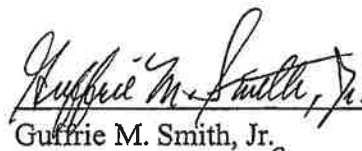
Madhu Sidhu



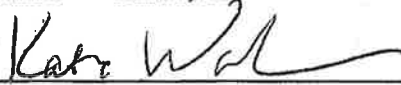
Donna Hill Staton



Ivan C.A. Walks



Guffie M. Smith, Jr.



Kate Walsh

September 25, 2012

DANIEL PICCA,
APPELLANT

v.

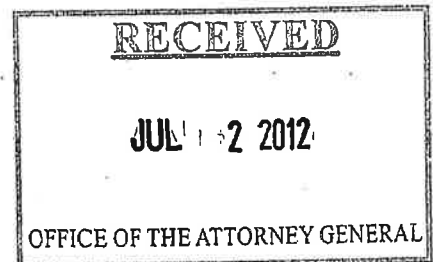
MONTGOMERY COUNTY BOARD
OF EDUCATION

* BEFORE DAVID HOFSTETTER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-BE-01-11-45289

* * * * *

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 May 25, 2010, Jerry D. Weast, Superintendent of Montgomery County Public Schools (MCPS), notified Daniel J. Picca (Appellant), a teacher at Kemp Mill Elementary School (Kemp Mill), that he was recommending that the Montgomery County Board of Education (County Board) terminate the Appellant's employment with MCPS due to insubordination and misconduct in office.

The Appellant requested a hearing and a hearing was held on September 7, 8, and 20, 2010 before William J. Roberts, Esquire, a hearing examiner for the County Board. At the hearing, the Superintendent was represented by Judith S. Bresler, Esquire, and the Appellant was represented by Saurabh Gupta, Esquire. On January 7, 2011, the Hearing Examiner recommended to the County Board that the Appellant's employment with MCPS be terminated. On March 31, 2011, the County Board heard oral argument. Both sides were again represented by counsel and the Appellant also was permitted to address the County Board. On May 10, 2011, the County Board issued its

Decision and Order, terminating the Appellant's employment. Md. Code Ann., Educ. § 6-203 (2008).

The Appellant filed a timely appeal of the County Board's termination decision with the Maryland State Board of Education (State Board). The State Board referred the matter to the Office of Administrative Hearings (OAH), where it was received on November 28, 2011. Md. Code Ann., Educ. § 6-202(a)(4) (2008).

On January 6, 2012, I held a telephone prehearing conference at the OAH in which Ms. Bresler appeared on behalf of the County Board and the Appellant represented himself. I issued my Prehearing Conference Report and Scheduling Order on January 11, 2012. In that Order, I directed that on February 10, 2012, pursuant to COMAR 13A.01.05.05F(2), I would hear argument on the record below, but would not take any testimony or other evidence. I also noted that I would hear argument as to whether, pursuant to COMAR 13A.01.05.07C, additional documentary or testimonial evidence should be permitted at a subsequent hearing.

At the hearing on February 10, 2012, I heard argument on the record below. In addition, the Appellant requested that he be permitted to call numerous additional witnesses to testify at a further hearing on the merits. I directed the Appellant to submit in writing a written proffer, identifying each witness he wished to call and setting forth a concise summary of their expected testimony. I also established a schedule by which the County Board could respond to the Appellant's filing and ordered that any further evidentiary hearing would occur on March 19 and 20, 2012. On or about February 1, 2012, the Appellant filed a list of thirty witnesses and various documentary items that he wished to present at an evidentiary hearing. On or about February 17, 2012, the County Board filed its Opposition to Supplemental Testimony and Documentary Evidence. At a further telephone pre-hearing conference, on March 6, 2012, I informed the parties that after reviewing their filings, and for the reasons stated in the County Board's

Opposition (see discussion below at 19-20), I would deny the Appellant's request for witnesses, with two exceptions. I determined that it was proper to allow the Appellant to call Floyd Starnes, the Principal at Kemp Mill and Myles Alban, an MCPS investigator and directed that subpoenas be issued for those individuals. In addition, I denied the Appellant's request for further documentary evidence on the ground that the documents requested were either already in evidence or would be cumulative or irrelevant.

I conducted the hearing on March 20, 2012,¹ at the OAH in Hunt Valley. Charles S. Rand, Esquire, represented the Appellant. Judith S. Bresler, Esquire, represented the County Board. At the close of the hearing, I left the record open until April 3, 2012 for the filing of written closing arguments.

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 of Education, and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011); Code of Maryland Regulations (COMAR) 13A.01.05; COMAR 28.02.01.

ISSUE

The issue is whether the Appellant's termination was proper.

SUMMARY OF THE EVIDENCE

Joint Exhibits²

1. Memorandum dated 10/8/93 to Appellant from Laura Hart Silkwood, Principal
2. Memorandum dated 11/14/94 to Appellant from Laura Hart Silkwood
3. Memorandum dated 2/15/95 to Mrs. Laura Silkwood, Principal, from Mrs. Sara Blum, sixth grade teacher re: _____ call

¹ The March 19, 2012 date had become unavailable to one of the witnesses and, in any case, only one day of hearing was ultimately necessary.

² The exhibits listed below are the exhibits admitted at the hearing before the County Board in September 2010. The parties in the hearing before me agreed that they could be considered joint exhibits for the purpose of the *de novo* matter before me. The manner of denominating the exhibits and attachments, as well as the descriptions of the documents, is in the form provided me by counsel for the County Board, and without objection from the Appellant.

4. Letter dated 8/22/15 to Appellant from Paul L. Vance regarding reprimand
 - A. Memorandum to Dr. Elfreda Massie through Mr. Stan Schaub from Judith M. Zauderer, re: Appellant, Rachel Carson E.S. Teacher re: investigation

Letter dated 11/14/94 to Appellant from Laura Hart Silkwood re: follow-up conference on November 10

Memorandum dated 10/8/93 to Appellant from Laura Hart Silkwood re: October 8 Conference Summary

(L) 2/22/95 Interview of _____ by Detective Lyon

(M) 2/22/95 Interview with _____ by Detective Lyon

(N) 2/22/95 Statement from _____ to Detective Cunningham

(Q) 3/06/95 Interview responses from _____, to Detective Cunningham

(R) 3/03/95 _____ interviewed by Ms. Anita Castellano, Dept. of Social Services Welfare Division

(S) 5/17/95 _____ answers to questions re: Appellant

(T) 5/16/95 _____ answers to questions re: Appellant

(U) 5/16/95 _____ answers to questions re: Appellant

(V) 6/08/95 _____ answers to questions re: Appellant

(W) 6/08/95 _____ answers to questions re: Appellant

(X) 6/08/95 _____ answers to questions re: Appellant
5. Memorandum dated 10/21/96 to Appellant from Sandra Killen, Principal, Luxmanor E.S. re: formal reprimand
6. Memorandum dated 5/28/99 to Appellant from Sandy Killen, Principal, Luxmanor E.S. re: reprimand/concerns with behavior
7. Memorandum from Dr. Elizabeth L. Arons, Director, Department of Human Resources from Stan Schaub, Assistant Director of Human Resources re: Appellant, fifth grade teacher at Luxmanor E.S.
8. Letter dated February 9, 2000, to Appellant from Dr. Jerry D. Weast re; reprimand

9. Memorandum dated 9/15/08 to Appellant from Floyd Starnes, Principal, Kemp Mill E.S. re: memo for the record about "concern relating to your treatment of students."
(Appellant refused to sign)
10. Letter dated 12/22/09 to Appellant from Colleen Johnson, Assistant Principal, Kemp Mill E.S. re: reprimand
11. Memorandum dated 5/03/10 to Dr. Susan F. Marks, Associate Superintendent through Raymond L. Frappolli, Director, Performance Evaluation Office of Human Resources from Miles F. Alban, Investigation Specialist, Office of Human Relations re: Appellant teacher, Kemp Mill E.S.

(1) Incident Report dated 4/13/10

(2) Email from Raymond Frappolli to Miles F. Alban re: investigation at Kemp Mill E.S.

(3) Letter dated 4/15/10 to Appellant from Floyd Starnes re: administrative leave w/pay for one day.

(4) Letter dated 4/19/10 to Appellant from Larry A. Bowers re: administrative leave w/salary while an investigation is conducted

(5) Note dated 4/13/10 to To whom it may concern from Lori A. Spinelli-Samara

(6) Statement of _____ dated 4/12/10

(7) Statement of _____ dated 4/13/10

(8) Statement of _____

(9) Statement of _____ dated 4/13/10

(10) Event Report dated 2/28/95 at Rachel Carson E.S. signed by Det. J. Lyon

(11) Letter dated 8/9/95 to Judith S. Rudder from Anita D. Castellano and Barbara McCormick of Protective Services

(12) Letter dated 8/22/95 to Mr. Daniel Picca from Paul L. Vance re: reprimand following investigation by the Office of Personnel Services

(A) Memorandum dated 3/21/95 to Dr. Elfreda W. Massie, Associate Superintendent for Personnel Services from Phinnize J. Fisher, Associate Superintendent for School Administration re: Request for Personnel Investigation

(B) Note to Jenny from Carole Burger, Association Relations re:
Appellant's file

(C) Memorandum dated 8/23/95 to Mr. Stan Schaub, Director, and Dept.
of Staffing from Judith M. Zauderer, Staffing Specialist, Elementary
Staffing Team

(D) Letter dated 9/27/95 to Elfreda Massie, Ph.D. from Glenn H. Miller,
M.D., P.A. re: Appellant re: examination

(13) Letter dated 2/9/00 to Appellant from Jerry D. Weast, Superintendent, re:
reprimand

(14) Memorandum dated 5/1/08 to Appellant from Floyd Starnes, Principal re:
Memo for the Record about inappropriate behavior

(15) Statement from Nadine re: _____ (students)

(16) Pictures of an open file drawer, a pair of shorts and 5 pictures of the same
boy

(17) MCPS Confidentiality Notice signed by Appellant and Miles F. Alban dated
4/27/10

(18) Letter dated 4/20/10 to Mr. Ray Frappolli from Appellant re: Written
summation to the three points in the Incident Report

(19) Emails dated 5/03/10 to Miles F. Alban from Floyd Stares re: March 5th
Bucks v. Wizards basketball game

12. Letter dated 5/06/10 to Mr. Daniel Picca from Frieda K. Lacey, Ed.D., Deputy
Superintendent of Schools re: recommendation of dismissal

13. In the Matter of Appellant – Memorandum of Daniel Picca by Alan M. Wright, Esq. and
Charles S. Rand, Esq.

Attachment 1 Resume of Appellant

Attachment 2 Letter dated 5/9/10 to Frieda K. Lacey from Joan Kaltreider, 3rd grade
teacher at Kemp Mill E.S.

Attachment 3 Letter dated May 11, 2010 from Mr. Louis Scarci w/email
to and from Floyd Starnes

Attachment 4 Letter dated 5/11/09 To Whom It May Concern from Carmel Mansour
re: Floyd Starnes

Attachment 5 Letter dated 5/10/10 to Dr. Frieda K. Lacey from Joan Kaltreider,
Carmel Mansour and Barbara Reeks re: letters to Kim Shawn Gary, Uniserve
director

Attachment 6 Letter to Dr. Frieda K. Lacey from Carole Osburn (unsigned)

- Attachment 7 To Whom It May Concern dated 5/10/10 from Kristen Domenick
(unsigned)
- Attachment 8 Letter dated 5/09/10 To Whom It May Concern from Brian McCarty
(unsigned)
- Attachment 9 Letter to Dr. Lacey from Barbara Schwartz
- Attachment 10 Letter To Whom It May Concern from Barbara Reeks (unsigned)
- Attachment 11 Letter To Whom It May Concern from Manuela McKenna (unsigned)
- Attachment 12 MCPS Post-Observation Conference Report – Report-Formal
Observation #1 Teacher: Appellant. Observer: Donna Michel Dated 01/12/09
- Attachment 13 Post-Observation Conference Report – Report-Formal
Observation #2 Teacher: Appellant Observer: Donna Michel Dated 01/22/09
- Attachment 14 Professional Growth System Post-Observation Conference Report
Teacher: Appellant Observer: Floyd Starnes Dated 02/26/09
- Attachment 15 Professional Growth System Final Evaluation Report: Teacher Appellant,
Principal Floyd Starnes 5/19/09
- Attachment 16 To Whom It May Concern dated 4/13/10 from Lori A. Spinelli-Samara
- Attachment 17 Incident Report dated 4/13/10 from Floyd Starnes re: Appellant
- Attachment 18 Letter dated 4/15/10 to Appellant from Floyd Starnes re:
Administrative Leave w/pay
- Attachment 19 Letter dated 4/30/10 to Mr. Ray Frappolli from Appellant re:
three points in the Incident Report
- Attachment 20 Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary
(unsigned)
- Attachment 21 Memorandum dated 3/21/95 to Dr. Elfreda W. Massie from Phinnize J.
Fisher re: Request for Personnel Investigation (Appellant)
- Attachment 22 Letter dated 8/22/95 to Appellant from Paul L. Vance,
Superintendent
- Attachment 23 Note dated 9/29/95 to Jenny from Carole Berger re: Appellant's file
- Attachment 24 Letter dated 2/09/00 to Appellant from Jerry D. Weast, Super.
- Attachment 25 Memorandum dated 5/01/08 to Appellant from Floyd Starnes re: record
14. Letter dated 5/17/10 to Jerry D. Weast from Charles Rand, Esquire and Alan M. Wright
re: Appellant: Contemplated Dismissal
15. Letter dated 5/25/10 to Appellant from Jerry D. Weast re: recommending dismissal
16. Letter dated 5/28/10 to Ray Frappolli from Sheila Dennis, LCSW-C re: Clearance
Request – Appellant
17. Letter to Ms. Patricia O'Neil (sic) dated 6/02/10 from Saurabh Gupta, Esquire
18. Letter dated 6/10/10 to William J. Roberts, Esquire from Suzann M. King re: Board
Appeal No. 2010-13-Appellant
19. Email dated 6/15/10 to Glenda Rose from William Roberts, Esq. re: possible settlement
of appeal

20. Letter dated 7/29/10 to William Roberts, Esq. from Suzann King re: dates, time and place for Appellant's appeal hearing
21. Draft letter dated 8/31/10 to William Roberts, Esq. from Judith S. Bresler re: exhibits
22. Email dated 9/01/10 from William Roberts, Esq. to Saurabh Gupta and Judith Bresler re: Appellant's Appeal
23. Letter dated 9/02/10 to William Roberts, Esq. from Saurabh Gupta re: documents submitted by Appellant
24. Email dated 9/03/10 to Saurabh Gupta and Judy Bresler from William Roberts, Esq.
25.
 - A. Note dated 3/04/10 to Kemp Mill Elementary School from Jackie Figueroa re: Permission Slip to allow [redacted] (student) to take a trip w/Appellant
 - B. Letter dated 8/23/10 to Mr. Saurabh Gupta from [redacted] re: Sons attending the March 5th NBA game permission slips
 - C. Email dated 7/02/10 from Parent Group at KMES Magdalena Cabral to Frieda Lacey, Suzanne Peang-Meth, BOE; Amiedoor@yahoo.com and Daniel J. Picca re: improper questioning
 - D. Letter dated 07/01/10 to Mr. Gupta from [redacted] re: questioning son
 - E. Email dated 6/30/10 from Jackie Figueroa to Frieda Lacey re: Crisis at Kemp Mill ES
 - F. Letter dated 6/26/10 to Mr. Gupta from [redacted] mother re: questioning by principal
 - G. Letter dated 6/24/10 to Mr. Gupta from [redacted] re: Appellant's alleged misconduct with her son,
 - H. Letter dated 9/07/10 to Mr. Gupta from [redacted] parent of [redacted]
 - I. Letter dated 8/14/10 to Mr. Gupta from [redacted] re: questioning son [redacted] by Mr. Starnes
26. Two Letters dated 7/02/10 from Mr. Louis A. Scarci re: Floyd Starnes
27.
 - Letter dated 8/01/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 7/23/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 7/30/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 8/04/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 8/01/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 7/14/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 7/26/10 to Dr. Lacey from [redacted] (student)
 - Letter dated 8/03/10 to Dr. Lacey from [redacted] (student)
28. Letter from Parent to Deputy Superintendent sent 6/26/10 to Dr. Lacey from [redacted] and other concerned parents of Kemp Mill E.S. (unsigned)
29. Field Trip Guidelines

30. Letter from _____ re: "forced" statement by Floyd Starnes
31. Undated letter to Dr. Lacey from Carol Osburn (unsigned)
Letter dated 5/10/10 to Dr. Lacey from Carol Osburn
Undated letter to Dr. Lacey from Carol Osburn (unsigned) w/Appellant's fax information on the top
32. (1) Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (unsigned)
(2) Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (unsigned) and "Your Written Summation/Teacher Letters" from Kim-Shawn Gary to Appellant re: "Here is my final letter."
(3) Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (signed)
33. Drawing the seating arrangements for interviews
34. Affidavit of Nancy Teague dated 9/5/10 re: Appellant's lunch math class
35. Facebook Messages -- Lunch Bunch 07-08 between Appellant and Nancy Teague

Additional Exhibits

In addition to the exhibits listed above, I admitted the following exhibits into evidence:

- ALJ Ex. 1 Transcript of the hearing conducted on September 7, 8, and 20, 2010
- ALJ Ex. 2 Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation, dated January 7, 2011
- ALJ Ex. 3 County Board Decision and Order, dated May 10, 2011

Testimony

At the hearing conducted on September 7, 8, and 29, 2010, before Hearing Officer Roberts, the following witnesses testified:

MCPS Witnesses

Raymond Frappolli, Director of Performance Evaluation and Compliance, Office of Human Resources and Development, MCPS

Lori Spinelli-Samara, Math Content Coach, Kemp Mill Elementary School (Kemp Mill)

Daniel Picca, the Appellant (called as an adverse witness)

Nadine Lyons, Counselor, Kemp Mill (called as a rebuttal witness)

Appellant Witnesses

The Appellant

Carol Osburn, former administrative secretary at Kemp Mill

parent of a student of the Appellant

Carmel Mansour, teacher at Kemp Mill

At the hearing conducted before me on March 20, 2012, the following witnesses were called by the Appellant and testified as adverse witnesses:

Floyd Starnes, Principal, Kemp Mill

Myles Alban, Investigation Specialist, Office of Human Resources and Development, MCPS

The County Board did not offer any witnesses at the March 20, 2012 hearing.

FINDINGS OF FACT³

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

1. The Appellant was a tenured teacher in the Montgomery County School System, assigned to Kemp Mill during the 2009-2011 school year.
2. The Appellant was first employed by MCPS as an elementary school teacher at Candlewood Elementary School in 1985. In 1990, the Appellant transferred to Rachel Carson Elementary School (Rachel Carson).
3. While assigned to Rachel Carson, the Appellant engaged in various misconduct with male students, including having students sit on his lap, directing students to take off their shirts, wrestling with students, photographing students, and feeling their muscles

³ Some of these Findings of Fact are similar in wording to the findings made by the Hearing Examiner in the hearing before the County Board. I have generally followed his findings because they are comprehensive, well-reasoned, and based on a full and detailed examination of the evidence before him. To the extent that the Hearing Examiner's findings contain additional or more detailed facts than those set forth here, this should not be understood to reflect a rejection by me of those additional or more detailed facts. Rather, certain subsidiary or more detailed facts as set forth in the Hearing Examiner's decision are omitted here solely for the sake of conciseness. After carefully reviewing the entire record, including the transcript of the hearing below, there is *no* fact as found by the Hearing Examiner that I consider to be incorrect.

4. In October 1993, the Appellant received a memorandum from Laura Silkwood, principal of Rachel Carson, dated October 8, 1993. The memorandum noted that on the prior Friday, after dismissal, a male fifth grade student was sitting on the Appellant's lap in his classroom and that the Appellant and the student were alone at the time. The memorandum further stated that similar conduct was alleged to have occurred in the past. Principal Silkwood noted that the alleged conduct was inappropriate and would not be tolerated. Jt. Ex.1.
5. On November 14, 1994, Principal Silkwood wrote another memorandum to the Appellant. In that memorandum, Principal Silkwood stated that a parent had reported that her son stated that he "belongs to [the Appellant's] Strong Boys Club" and that the boys in the club clean the classroom and are awarded with candy. The parent reported that her son was uncomfortable remaining in the club because the Appellant would direct the boys to take off their shirts and feel their muscles. The memorandum stated that the "club" was "not a school-sponsored activity and that it must end. There should be no students meeting with you in your classroom or any afternoons after school." Jt. Ex. 2.
6. Approximately three months later, by memorandum dated February 15, 1995, Ms. Sara Blum, a sixth grade teacher at Rachel Carson reported to Principal Silkwood that the mother of a former student of hers had contacted her about the Appellant's behavior. The student's mother reported that her son stated that the Appellant wrestled and grabbed male students; took male students to McDonald's without the permission or knowledge of their parents, had the boys take their shirts off, took pictures of them, and had them slide back and forth on his lap. The parent also reported that another student had confirmed these allegations. Jt. Ex. 3.
7. The parent who reported the matter to Ms. Blum, also reported the information to the Montgomery County Police Department (MCPD), which initiated an investigation. As part of its investigation, MCPD detectives interviewed five boys who had been students of the

Appellant. The boys described activities similar to those reported to Ms. Blum, including being told to disrobe to the waist, to "make muscles," being photographed, and sitting on the Appellant's lap. Jt. Ex. 4A.

8. Following its investigation, neither the MCPD nor the state's attorney's office sought criminal charges against the Appellant.
9. On August 22, 1995, following the MCPD investigation, then-Superintendent Paul L. Vance issued a letter of reprimand to the Appellant. The letter of reprimand stated that even after the memoranda from Principal Silkwood "you have engaged in activities of the sort that you were directed to cease." Supt. Vance further stated that after reviewing the information collected by the police investigation, the Appellant's conduct was "unacceptable, unprofessional and suspect. Your disobedience in failing to follow your principal's directive is clear." The letter of reprimand further stated that the Appellant would be transferred to Luxmanor Elementary School (Luxmanor) for the 1995-96 school year and that all interactions with students there must be conducted "in a responsible and professional manner. Non-sanctioned after-school activities will not be permitted." Finally, the letter of reprimand informed the Appellant that further inappropriate activity would result in a recommendation to the County Board of serious disciplinary action, including dismissal. Jt. Ex. 4.
10. As a result of the allegations of misconduct on the part of the Appellant while at Rachel Carson, the Montgomery County Department of Health and Human Services, Child Protective Services Division (the local department) initiated an investigation of the Appellant on August 9, 1995. Following its investigation, the local department found the Appellant to be responsible for indicated child abuse. At the time, contested case hearings were not offered to individuals appealing such findings, but the Appellant requested and

received a record review of the finding from an administrative law judge (ALJ) at OAH. Following the record review, the finding of indicated child abuse was upheld and the Appellant requested the opportunity for oral argument. On May 28, 2006, following oral argument by counsel on April 26, 1996, the ALJ again sustained the finding of indicated child abuse. Jt. Ex. 16.

11. Subsequent to the 1996 ALJ decision upholding the finding of indicated child abuse, changes in the law gave the Appellant the right to request a contested case hearing. A contested case hearing was held on September 28, 1999 before another ALJ at OAH. On November 9, 1999, that ALJ issued her decision, affirming the finding of indicated child abuse. Jt. Ex. 16.
12. MCPS did not become aware of the 1996 and 1999 indicated child abuse findings until June 2010 when information was requested from the local department as part of a then-ongoing investigation of the Appellant. Jt. Ex. 16.
13. The Appellant was a teacher at Luxmanor from school year 1995-1996 through school year 1996-2000.
14. While at Luxmanor the Appellant made inappropriate sexual references to students, improperly showed fifth grade students a PG-13 movie, and had students remove their shirts, flex their muscles, and perform similar actions.
15. In the fall of 1996, the principal of Luxmanor, Sandra Killen, received complaints about the Appellant concerning inappropriate behavior. On October 15, 1996, Principal Killen met with the Appellant concerning the complaints and, on October 21, 1996, issued to him a formal reprimand concerning his conduct with his fifth-grade students. The letter of reprimand describes four incidents in which the Appellant made inappropriate references or directed inappropriate activities concerning body parts or functions. For example, in a

discussion of parts of the body, the Appellant stated, "Trachea. That's Tra-che-a, not training bra." In another science lesson concerning shadows, the Appellants instructed students to touch the "buttocks" of a shadow figure. The letter of reprimand stated, "I have serious concerns about what appears to be a lack of judgment on your part . . . It is important that you rethink what is acceptable to say to students and that you are careful to consider the impact of the comments you have made in such a flippant manner . . . You are therefore expressly directed to avoid any sexual references, and to be mindful not to say or do things which might hurt the feelings or sensibilities of Luxmanor students." Jt. Ex. 5.

16. On May 28, 1999, the Appellant received another formal reprimand from Principal Killen. The reprimand concerned, among other things, the Appellant's showing of PG-13 movies to fifth grade students on a bus trip to Williamsburg, without parental notice or permission and contrary to MCPS regulations, as well as using inappropriate language with students and creating an atmosphere of "bullying" (by the Appellant) in the classroom. The letter of reprimand stated, "I am, again, directing you to conduct yourself in a professional matter . . . I am very concerned that previous directives to avoid sexual references, and to be sensitive in your interactions with students have been ignored." Jt. Ex. 6.
17. Following Principal Killen's reprimand of May 28, 1999, MCPS conducted an investigation regarding additional allegations of misconduct, including having students remove their shirts, flex their muscles, and perform similar actions. The investigation included interviews with four students, who provided corroboration of the allegations. The investigator issued his report on December 2, 1999 and recommended that the Appellant be reprimanded and that he be transferred to a school where "the principal is judged to be adept in monitoring his performance as well as his interactions with students." Jt. Ex. 7.

18. On February 9, 2000, as a result of complaints against the Appellant, a formal reprimand was issued to the Appellant by then-Superintendent Jerry Weast. The letter of reprimand stated that its purpose was to “strongly reprimand [the Appellant] for conduct I consider to be inappropriate, unprofessional and highly suspect.” The reprimand directed the Appellant to “abide by a very specific set of directives.” The directives were as follows:

You will not be permitted to seek or accept stipend activities nor voluntary “club” activities that permit you to work with students outside your classroom duties and responsibilities. You are not permitted, even on an informal basis, to engage students in activities related to body building, muscular development and the like nor or any activities not related to instruction. Additionally, you will not be permitted to share with your students reading material or other visual arts depicting wrestling or body building. You should know that swift and drastic action will follow any proven allegations of you as much as asking a student to raise or remove a shirt or flex his muscles for you regardless of the reason . . . Most importantly you are not permitted to allow students to be separated from their classmates to have lunch or engage in other non-curricular activities with you. This applies to small groups of students as well as individuals . . . Finally you should be aware that proven allegations of violation of any of the directives listed above will be grounds for me to recommend more serious disciplinary action, up to and including dismissal.

Jt. Ex. 9.

19. Beginning in school year 2000-2001, the Appellant was re-assigned to Kemp Mill.
20. In 2008, the principal at Kemp Mill, Fred Starnes, was made aware of recent complaints concerning alleged inappropriate behavior of the Appellant with students. On April 30, 2008, Principal Starnes met with the Appellant and Assistant Principal Cheryl Smith to discuss the allegations.
21. On May 1, 2008, Principal Starnes issued a memorandum to the Appellant. The memorandum stated that the principal was concerned “that there may be inappropriate touching and that individual students are alone with you sometimes in your room.” The memorandum directed the Appellant “to make every effort not to be alone with an individual student anywhere in or out of the school unless there are circumstances beyond your control”

and “to refrain from physical contact with a student, unless an emergency requires that you make contact when a student is a danger to him-herself or others.” (Ex.11, Attachment 14).

22. On March 5, 2010, the Appellant and another teacher at Kemp Mill accompanied four male students to an evening Washington Wizards basketball game in Washington, D.C. The outing had not been approved by the school administration as a field trip. After the game, the group returned to the Kemp Mill parking lot and the Appellant drove one of the boys home. The Appellant and the boy were the only persons in the Appellant’s car. T. 459.
23. On April 12, 2010, at approximately 3:40 p.m., the Appellant was in his classroom with several male students who were waiting to be released from the classroom to report to their buses. One male student, _____, was pushed or fell into a desk when he rose from his seat. The Appellant then directed the student to position himself so that the Appellant could massage the student so as to “treat” any injury to the student’s shoulder, back, and arms. The Appellant then began to rub or massage the student. Jt. Ex. 11.
24. As the Appellant massaged the student, another teacher, Lori A. Spinelli-Samara, walked into the room and observed the Appellant rubbing the student’s shoulders and upper arms. Jt. Ex. 13, Attachment 16, T. 158.
25. Immediately after witnessing the incident on April 12, 2010, Ms. Spinelli-Starnes reported the incident to Principal Starnes and he reported the incident, by telephone, to MCPS headquarters.
26. Ms. Spinelli-Starnes created a written statement concerning the incident on April 13, 2010. Jt. Ex. 13, Attachment 16.
27. On April 13, 2010, Principal Starnes interviewed _____, with a school counselor present. _____ wrote a statement in which he said that on the prior day, after being pushed into a desk, “Mr. Picca massage my back because he made me loose.” Jt. Ex. 11, Attachment 8.

28. Perry also identified to Principal Starnes three other male students who had had physical contact with the Appellant.
29. Principal Starnes interviewed two of the male students on April 13, 2010 and one on April 14, 2010. Ex. 11, Attachments 7-9.
30. As a result of the information received from Ms. Spinelli-Starnes and the boys interviewed, Principal Starnes made a further referral to the MCPS central offices on or about April 14, 2010.
31. As a result of the referral, an investigation was conducted by Miles F. Alban, Investigation Specialist with the Office of Human Resources of MCPS who formerly served as a Montgomery County police officer for thirty-five years.
32. On April 24, 2012, Mr. Alban, as part of his investigation, interviewed _____ and the three other students interviewed by Principal Starnes. Jt. Ex. 11.
33. On May 3, 2010, Mr. Alban completed his report concerning the investigation. Jt. Ex. 11.
34. During school year 2009-2010, the Appellant acted inappropriately with male students by having them sit in his lap; engaging in wrestling moves including "full nelsons" with them; arm wrestling; feeling students biceps; giving back and shoulder massages; having male students stay in his classroom after regular instructional time; complimenting male students on their physical development and physical strength. Ex. 11, Attachments 7-9.
35. During school year 2009-2010, the Appellant regularly had contact with male students outside of classroom instructional hours.
36. The Appellant was placed on paid administrative leave on April 19, 2010.
37. By letter dated May 6, 2010, from Deputy Superintendent Frieda Lacey, the Appellant was notified that the Superintendent was considering dismissing the Appellant for

- insubordination and misconduct in office. The letter advised the Appellant that he could appear at a so-called "Loudermill" or pre-determination hearing on May 14, 2010. Ex. 12.
38. The Appellant appeared at the pre-termination hearing and was represented by counsel.
39. By letter from Superintendent Weast, dated May 25, 2010, the Appellant was notified that the Superintendent was recommending termination to the County Board for insubordination and misconduct in office.
40. The Appellant requested a hearing and a hearing was held on September 7, 8, and 20, 2010 before William J. Roberts, Esquire, a hearing examiner for the County Board. At the hearing, the Superintendent was represented by Judith S. Bresler, Esquire and the Appellant was represented by Saurabh Gupta, Esquire. On January 7, 2011, the Hearing Examiner recommended to the County Board that the Appellant's employment with MCPS be terminated. On March 31, 2011, the County Board heard oral argument. Both sides were represented by counsel and the Appellant also was permitted to address the County Board. On May 10, 2011, the County Board accepted the Hearing Examiner's recommendation and terminated the Appellant. ALJ Ex. 3.

DISCUSSION

The Legal Framework

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 "misconduct in office" and "insubordination." Md. Code Ann., Educ. § 6-202(a)(1)(ii) and (iii). (2008). It 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: “[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). I read that to mean that I am to make a new decision, that is, a *de novo* determination based primarily upon the record created before the matter came to me. I do not read it to mean that I am to conduct an entirely *de novo* hearing, starting everything anew. Although an entirely *de novo* hearing is not contemplated 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 this case, the parties agree that the Appellant did not have subpoena power at the hearing conducted below in September 2010 and therefore the Appellant was unable to compel the testimony of any witness. Once the matter came before me, the Appellant requested that he be permitted to call thirty witnesses at the hearing I would conduct. In its opposition, the County Board argued that nearly all the witnesses requested by the Appellant either had already testified at the hearing below; were witnesses friendly to the Appellant and therefore available to testify without subpoenas but not called for tactical reasons, or, unlikely to offer evidence that was relevant. I determined, essentially for the reasons set forth in the County Board’s Opposition, to deny the subpoena request for nearly all of the witnesses. I determined, however, that under COMAR 13A.01.05.04C, the Licensee was entitled to call the Kemp Mill principal, Floyd Starnes,

and the MCPS principal investigator, Myles Alban, concerning alleged misconduct by the Appellant in and around April 2010.

Accordingly, I shall exercise my independent judgment based both on the record of the proceedings before the County Board in September 2010 and the evidentiary hearing at which I presided on March 20, 2012. I shall render a *de novo* decision as to whether the Appellant was insubordinate or engaged in misconduct in the performance of his duties. If I find either or both of these violations, I will then determine whether termination of the Appellant's employment is an appropriate sanction.

The Legal Meanings of Misconduct In Office and Insubordination

One of the basis for dismissal under Md. Code Ann., Educ. § 6-202(a)(1) is "misconduct in office." Although that term is not defined in the statute, its meaning was delineated by the Court of Appeals in *Resetar v. State Bd. Of Educ.*, 284 Md. 537, 560-61 (1979). In *Resetar*, a teacher used language that was derogatory and racially offensive after being warned numerous times not to use such language. The Court held that the misconduct must bear on the teacher's fitness to teach and further stated:

The word [misconduct] is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. 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.

Id.

Section 6-202 of the Education Article also establishes "insubordination" as a basis for dismissal; as in the case of "misconduct," it does not define the term. Once again, the *Resetar* Court provides guidance, defining insubordination in the context of the Education Article as a "conscious, willful and recalcitrant rejection of authority of a supervisory office." *Resetar, supra*, at 562. In issuing opinions, the MSDE has defined insubordination variously as "repeatedly refusing to follow

directions,” “a willful disregard of expressed or implied directions... refusal to obey reasonable orders.” *Pepperman v. Board of Education of Montgomery County*, 7 Op. MSBE 555 (1997); *Cureton v. Montgomery County Board of Education*, MSBE Op. No. 10-21 (May 25, 2010), respectively.

Analysis

In present case, the evidence is overwhelming that the Appellant engaged in a pattern of conduct over many years which was reckless, brazen, unjustified and, most importantly, of grave potential harm to his students. The decision of the County Board to terminate the Appellant’s employment was undoubtedly proper, if not long overdue. Questions concerning the Appellant’s conduct, especially with young boys, were first raised nearly twenty years ago in 1993. Since that time the Appellant has received a steady flow of memoranda, letters, reprimands, and warnings concerning his behavior. For example:

- In October 1993, the Appellant received a memorandum from Principal Silkwood at Rachel Carson concerning allegations that he had boys sit on his lap. He was told that the conduct was unacceptable and had to stop. Jt. Ex. 1.
- On November 14, 1994, Principal Silkwood wrote again to the Appellant tell him to disband his “Strong Boys Club” and directing him that “[t]here should be no students meeting with you in your classroom or any afternoons after school.” Jt. Ex. 2.
- In August 1995, following a police investigation, Superintendent Paul L. Vance issued a letter of reprimand to the Appellant stating that, despite prior warning, “you have engaged in activities of the sort that you were directed to cease” and that his conduct was “unacceptable, unprofessional and suspect. Your disobedience in failing to follow your principal’s directive is clear.” The Appellant was prohibited from engaging in any non-school sanctioned activities with his students. Jt. Ex. 4.

- In 1995, the Appellant received further notice as to the impropriety of his conduct when he was found by CPS to be a person responsible for indicated child abuse, a determination that was repeatedly affirmed in subsequent administrative proceedings. Jt. Ex. 6.
- In the fall of 1996, the Appellant received a letter of reprimand from Principal Killen at Luxmanor expressing “serious concerns about what appears to be a lack of judgment on your part” and informing the Appellant that he was “expressly directed to avoid any sexual references, and to be mindful not to say or do things which might hurt the feelings or sensibilities of Luxmanor students.” Jt. Ex. 5.
- In May 1999, the Appellant received another reprimand from Principle Killen at Luxmanor, this one concerning, among other offenses, showing fifth grade students inappropriate movies during a bus trip. The letter of reprimand found that the Appellant created an atmosphere of “bullying” in his classroom, directed him to conduct himself in a professional manner stating, “I am very concerned that previous directives to avoid sexual references, and to be sensitive in your interactions with students have been ignored.” Jt. Ex. 6.
- In February 2000, the Appellant received a strongly-worded reprimand from the Superintendent of Schools, Jerry Weast. The letter stated that the Appellant’s conduct was “inappropriate, unprofessional and highly suspect.” The reprimand set forth specific directives, forbidding the Appellant from engaging in any “bodybuilding”-type of activities with students, or to have any contact with students outside the classroom or unrelated to instruction, including lunch or extra-curricular activities. The Appellant was warned that any violation could result in termination. Jt. Ex. 9
- In May 2008, Principal Starnes of Kemp Mill issued a memorandum to the Appellant expressing concern about inappropriate touching of students. The memorandum directed

the Appellant “to make every effort not to be alone with an individual student anywhere in or out of the school unless there are circumstances beyond your control” and “to refrain from physical contact with a student, unless an emergency requires that you make contact when a student is a danger to him-herself or others.” Jt. Ex.11, Attachment 14.

In sum, the Appellant received at least seven clear and unequivocal written warnings from the principals of three schools, as well as two superintendents of MCPS (as well as what was, in effect, a warning in the form of the finding of indicated child abuse), putting him on notice that his conduct was unacceptable and would not be tolerated. Despite being given a remarkable number of “second chances,” the Appellant continued to violate the clear warnings and directives he received. His continued actions constitute both insubordination and misconduct.

The Incident of April 12, 2010

The incident which finally led to the events culminating in the Appellant’s termination occurred on April 12, 2010. On that date, at around 3:40 p.m., Ms. Lori Spinelli-Samara, the math coach at Kemp Mill, entered the Appellant’s classroom. At the hearing below, she testified that what she saw was “alarming.” T. 168. She testified:

I approached the door, and I stepped in and I stopped because [the Appellant] was sitting in a chair and there was a student standing in very close proximity, and [the Appellant’s] hands were placed on this student’s shoulders and he was rubbing them up and down, so I stopped –

T. 158.

Ms. Spinelli-Samara immediately reported what she saw to the principal and, the next day, prepared a written statement concerning her observations in the Appellant’s classroom. Jt. Ex. 13, Attachment 16. There is no reason to doubt Ms. Spinelli-Samara’s evidence. She testified that her relationship with the Appellant was “collegial,” T. 156, that she was unaware of his prior “history,” and that she harbored no ill-will toward him.

The evidence of misconduct on April 12, 2010 is not limited, however, to Ms. Spinelli-Samara's testimony. The student receiving the "massage," Perry, provided statements to Principal Starnes and later to the MCPS investigator, Mr. Alban, and confirmed the incident. Jt. Ex. 11. Each of the boys who were present in the room also confirmed the incident and provided additional information about similar activities.⁴ Jt. Ex. 11, Attachments 6-9.

The Appellant does not entirely deny the incident, but testified that he merely ran his hand over the student's shoulder to be sure that there was no break after he tripped or fell into a desk. T. 289. As to why he was then massaging both shoulders, he testified that he did so to determine if there was "bilateral symmetry." T. 289-90. The Appellant's further argues that the statements of the students were somehow coerced or fraudulent. He also argues, in substance, that Principal Starnes was "out to get him" as a result of prior difficulties regarding union matters and other unrelated matters.

It suffices to say that none of these explanations or defenses is credible. Regarding the Appellant's claim that he was merely checking for injuries and "bilateral symmetry," one must ask why, if he suspected an injury as serious as a broken bone, did he not immediately send the student to the nurse for medical attention. Nothing in the record suggests that the Appellant is competent to treat or diagnose medical conditions. It is clear that his explanation for the incident is simply an attempt to mask the likely real reason for his placing his hands on [redacted] namely, that he received some gratification from doing so. In any event, his precise motive is not critical; what is important is that he performed this "massage" despite repeated warnings not to touch children in his care.

Similarly, a review of the transcript of both hearings (including the hearing before me where Mr. Starnes and Mr. Alban testified), reveals nothing to support the notion that the Appellant was

⁴ One of the students told Mr. Alban that Appellant had given him as many as 35 back rubs. Jt. Ex. 11, page 3.

the victim of some sort of vendetta or conspiracy.⁵ The reporting teacher had no motive to lie; Principal Starnes had no motive to lie about what the boys told him; Mr. Alban had no motive to lie about what the boys and Ms. Spinelli-Samara told him; and, the boys had no motive to lie. The Appellant's claims that he is an innocent victim of a witch hunt are fanciful and not worthy of credit.⁶

The Night Basketball Game

On the evening of March 5, 2010, the Appellant, together with another Kemp Mill teacher, took four male students to a Washington Wizards basketball game. The trip was not a school-sanctioned activity and the principal had no knowledge of it. At the end of the evening, the Appellant was alone with one student as the Appellant drove him home in the Appellant's car. T. 459. Although there was conflicting evidence of whether the Appellant or the other teacher organized the event, that issue is not of great significance. What is significant is that by going to the game with students and, in particular, by being alone with a student, the Appellant violated the clear directive in the reprimand from Superintendent Weast, dated February 9, 2000. In that document, the Appellant was ordered not to engage in any activities, including "voluntary" activities "that permit you to work with students outside your classroom duties and responsibilities." In addition, the letter emphasized: "Most importantly, you re not permitted to allow students to be separated from their classmates to have lunch or engage in other non-curricular activities with you. This applies to small groups as well as to individuals." Jt. Ex. 8.

⁵ The Hearing Examiner's discussion on this issue is comprehensive and persuasive. ALJ Ex. 2 at 33-39.

⁶ At hearing before me, Appellant's counsel cross-examined Principal Starnes regarding alleged "bad blood" between him and the Appellant. Although Principal Starnes admitted that the Appellant was at times "a thorn in my side," OAH T. at 22, (a phrase suggested by Appellant's counsel), he credibly denied various factual allegations proposed by counsel, such as that the Appellant filed "80 grievances" against him as well as "12 complaints with the union" against him. OAH T. at 22. The Appellant never presented any evidence in support of these allegations. Principal Starnes also denied, when suggested by counsel for the Appellant, that the faculty at Kemp Mill was in "turmoil," OAH T. at 29, and that the Appellant was the "fulcrum of that discontent." OAH T. at 30. Again, no evidence was presented to support these claims. Appellant's counsel also made a point of having Principal Starnes, who is openly gay, "admit" that fact, although counsel's reason for pursuing this line of questioning remains unclear. OAH T. at 21.

It is beyond cavil that by participating in this event and by being alone in his private automobile with a student, the Appellant violated the directives of Superintendent Weast and was insubordinate and engaged in misconduct.

Prior Incidents of Misconduct and Insubordination

The Appellant's actions discussed above regarding the April 2010 "massage" incident and the night basketball game are, in themselves, sufficient to uphold the County Board's finding. However, prior incidents of misconduct and attendant repeated warnings provide further evidence of the Appellant's malfeasance and unfitness to teach.

In 1993 and 1994, the Appellant received written memoranda from the principal at Rachel Carson concerning various allegations regarding, among other things, boys sitting on his lap, removing their shirts, wrestling with the Appellant, flexing their muscles, the Appellant feeling their muscles, and participating in a "Strong Boys Club." Jt. Exs. 1 and 2. The allegations were based on reports from the students involved and are supported by interviews with the students conducted by Montgomery County police. Attachments to Jt. Ex. 4A.⁷ While the Appellant simply denies most of these allegations, T. 371-400, his denials pale in comparison to the detailed and corroborating accounts of the various students.

It is also important to note that, as a result of these allegations concerning the Appellant's conduct at Rachel Carson, CPS conducted an investigation and, in 1995, made a finding of indicated child abuse against the Appellant, subsequently upheld in various administrative proceedings. Jt. Ex. 16. The 1995 finding of indicated child abuse would unquestionably have been sufficient to terminate the Appellant at that time. As set forth above, MCPS was apparently unaware of that finding until May 2010, when it learned of the matter as part of its investigation of the April 2010 "massage" incident. As a result, MCPS continued for fifteen years to employ a teacher who had

⁷ See, the Hearing Examiner's decision at 6-13.

been found responsible for indicated child abuse. (It is not clear whether the apparent lack of knowledge of the finding was attributable to CPS or to MCPS; certainly the Appellant never thought it necessary to notify his employer of the finding against him.) In any event, the finding of indicated child abuse remains today a fully independent and sufficient reason to terminate the Appellant.

After being transferred to Luxmanor at the start of the 1995-1996 school year, the Appellant's misconduct and insubordination continued. As set forth in the Findings of Fact, above, Principal Killen issued the Appellant two memoranda concerning his conduct. On October 21, 1996, he was warned about inappropriate classroom activities and sexual or quasi-sexual references. On May 28, 1999 he was reprimanded by the principal for poor judgment, the use of unacceptable language, and showing a PG-13 movie to fifth grade students without authorization. Jt. Ex. 6. Other, more serious allegations led to an investigation. That investigation resulted in multiple statements from students and their parents that the Appellant had students remove their shirts for him, flex their muscles, and perform similar actions. Jt. Ex. 7. Again, the Appellant simply denied the allegations or contended that some of them ("muscle beach" activity at an end of the year, school-sanctioned pool party) were approved by the principal, T. 405, an allegation denied by the principal. Jt. Ex. 7 at 12. The Appellant's denials are not credible in the face of overwhelming evidence to the contrary and his long history of misconduct.⁸

The Luxmanor misconduct led to the reprimand from Superintendent Weast on February 9, 1998. In it, the Appellant was warned of "drastic action" which would follow any further misconduct, including touching or being alone with students. Jt. Ex. 8. As set forth above, the Appellant did not heed these warnings.

⁸ See, ALJ Ex. 2, Hearing Examiner's decision at 18-20, for a detailed discussion of events related to Luxmanor.

Sanction

Under Section 6-202 of the Education Article, the County Board may either suspend or dismiss a teacher for various violations, including misconduct and insubordination. In this case, there can be no doubt that termination is proper. Given the Appellant's long history of failing to comply with directives concerning his conduct, there is no reason to think that, even after a period of suspension, he would not again begin to touch, or otherwise take impermissible liberties, with his students. Given the gravity of the offenses, the span of decades over which they occurred, the Appellant's proven inability to conform his conduct to professional norms, and the paramount consideration of student welfare and safety, termination is the only proper sanction.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Appellant was insubordinate and committed misconduct in office, and that the Appellant's termination was proper Md. Code Ann., Educ. § 6-202(a); COMAR 13A.01.05.05F.

PROPOSED ORDER

I **PROPOSE** that the decision of the Montgomery County Board of Education terminating the Appellant for insubordination and misconduct in office be **UPHELD**.

July 2, 2012
Date Decision mailed

David Hofstetter
Administrative Law Judge

DH/fe
135909

NOTICE OF RIGHT TO FILE OBJECTIONS

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

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DANIEL PICCA,
APPELLANT

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION

* BEFORE DAVID HOFSTETTER
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-BE-01-11-45289

* * * * *

FILE EXHIBIT LIST

Joint Exhibits⁹

1. Memorandum dated 10/8/93 to Appellant from Laura Hart Silkwood, Principal
2. Memorandum dated 11/14/94 to Appellant from Laura Hart Silkwood
3. Memorandum dated 2/15/95 to Mrs. Laura Silkwood, Principal, from Mrs. Sara Blum, sixth grade teacher re: Mrs. Rudder's call (Kyle's mother)
4. Letter dated 8/22/15 to Appellant from Paul L. Vance regarding reprimand.
 - A. Memorandum to Dr. Elfreda Massie through Mr. Stan Schaub from Judith M. Zauderer, re: Appellant, Rachel Carson E.S. Teacher re: investigation

Letter dated 11/14/94 to Appellant from Laura Hart Silkwood re: follow-up conference on November 10

Memorandum dated 10/8/93 to Appellant from Laura Hart Silkwood re: October 8 Conference Summary

(L) 2/22/95 Interview of _____ by Detective Lyon

(M) 2/22/95 Interview with _____ by Detective Lyon

(N) 2/22/95 Statement from _____ to Detective Cunningham

(Q) 3/06/95 Interview responses from _____ to Detective Cunningham

⁹ The exhibits listed below are the exhibits admitted at the hearing before the County Board in September 2010. The parties in the hearing before me agreed that they could be considered joint exhibits for the purpose of the *de novo* matter before me. The manner of denominating the exhibits and attachments, as well as the descriptions of the documents, is in the form provided me by counsel for the County Board, and without objection from the Appellant.

(R) 3/03/95 interviewed by Ms. Anita Castellano, Dept. of Social Services Welfare Division

(S) 5/17/95 answers to questions re: Appellant

(T) 5/16/95 answers to questions re: Appellant

(U) 5/16/95 answers to questions re: Appellant

(V) 6/08/95 answers to questions re: Appellant

(W) 6/08/95 answers to questions re: Appellant

(X) 6/08/95 answers to questions re: Appellant

5. Memorandum dated 10/21/96 to Appellant from Sandra Killen, Principal, Luxmanor E.S. re: formal reprimand
6. Memorandum dated 5/28/99 to Appellant from Sandy Killen, Principal, Luxmanor E.S. re: reprimand/concerns with behavior
7. Memorandum from Dr. Elizabeth L. Arons, Director, Department of Human Resources from Stan Schaub, Assistant Director of Human Resources re: Appellant, fifth grade teacher at Luxmanor E.S.
8. Letter dated February 9, 2000, to Appellant from Dr. Jerry D. Weast re; reprimand
9. Memorandum dated 9/15/08 to Appellant from Floyd Starnes, Principal, Kemp Mill E.S. re: memo for the record about "concern relating to your treatment of students." (Appellant refused to sign)
10. Letter dated 12/22/09 to Appellant from Colleen Johnson, Assistant Principal, Kemp Mill E.S. re: reprimand
11. Memorandum dated 5/03/10 to Dr. Susan F. Marks, Associate Superintendent through Raymond L. Frappolli, Director, Performance Evaluation Office of Human Resources from Miles F. Alban, Investigation Specialist, Office of Human Relations re: Appellant teacher, Kemp Mill E.S.

(1) Incident Report dated 4/13/10

(2) Email from Raymond Frappolli to Miles F. Alban re: investigation at Kemp Mill E.S.

(3) Letter dated 4/15/10 to Appellant from Floyd Starnes re: administrative leave w/pay for one day.

- (4) Letter dated 4/19/10 to Appellant from Larry A. Bowers re: administrative leave w/salary while an investigation is conducted
- (5) Note dated 4/13/10 to To whom it may concern from Lori A. Spinelli-Samara
- (6) Statement of _____ (student) dated 4/12/10
- (7) Statement of _____ (student) dated 4/13/10
- (8) Statement of _____ (student)
- (9) Statement of _____ (student) dated 4/13/10
- (10) Event Report dated 2/28/95 at Rachel Carson E.S. signed by Det. J. Lyon
- (11) Letter dated 8/9/95 to Judith S. Rudder from Anita D. Castellano and Barbara McCormick of Protective Services
- (12) Letter dated 8/22/95 to Mr. Daniel Picca from Paul L. Vance re: reprimand following investigation by the Office of Personnel Services
- (A) Memorandum dated 3/21/95 to Dr. Elfreda W. Massie, Associate Superintendent for Personnel Services from Phinnize J. Fisher, Associate Superintendent for School Administration re: Request for Personnel Investigation
- (B) Note to Jenny from Carole Burger, Association Relations re: Appellant's file
- (C) Memorandum dated 8/23/95 to Mr. Stan Schaub, Director, and Dept. of Staffing from Judith M. Zauderer, Staffing Specialist, Elementary Staffing Team
- (D) Letter dated 9/27/95 to Elfreda Massie, Ph.D. from Glenn H. Miller, M.D., P.A. re: Appellant re: examination
- (13) Letter dated 2/9/00 to Appellant from Jerry D. Weast, Superintendent, re: reprimand
- (14) Memorandum dated 5/1/08 to Appellant from Floyd Starnes, Principal re: Memo for the Record about inappropriate behavior
- (15) Statement from Nadine re: _____ (students)
- (16) Pictures of an open file drawer, a pair of shorts and 5 pictures of the same boy

(17) MCPS Confidentiality Notice signed by Appellant and Miles F. Alban dated 4/27/10

(18) Letter dated 4/20/10 to Mr. Ray Frappolli from Appellant re: Written summation to the three points in the Incident Report

(19) Emails dated 5/03/10 to Miles F. Alban from Floyd Starnes re: March 5th Bucks v. Wizards basketball game

12. Letter dated 5/06/10 to Mr. Daniel Picca from Frieda K. Lacey, Ed.D., Deputy Superintendent of Schools re: recommendation of dismissal
13. In the Matter of Appellant – Memorandum of Daniel Picca by Alan M. Wright, Esq. and Charles S. Rand, Esq.

Attachment 1 Resume of Appellant

Attachment 2 Letter dated 5/9/10 to Frieda K. Lacey from Joan Kaltreider, 3rd grade teacher at Kemp Mill E.S.

Attachment 3 Letter dated May 11, 2010 from Mr. Louis Scarci w/email to and from Floyd Starnes

Attachment 4 Letter dated 5/11/09 To Whom It May Concern from Carmel Mansour re: Floyd Starnes

Attachment 5 Letter dated 5/10/10 to Dr. Frieda K. Lacey from Joan Kaltreider, Carmel Mansour and Barbara Reeks re: letters to Kim Shawn Gary, Uniserve director

Attachment 6 Letter to Dr. Frieda K. Lacey from Carole Osburn (unsigned)

Attachment 7 To Whom It May Concern dated 5/10/10 from Kristen Domenick (unsigned)

Attachment 8 Letter dated 5/09/10 To Whom It May Concern from Brian McCarty (unsigned)

Attachment 9 Letter to Dr. Lacey from Barbara Schwartz

Attachment 10 Letter To Whom It May Concern from Barbara Reeks (unsigned)

Attachment 11 Letter To Whom It May Concern from Manuela McKenna (unsigned)

Attachment 12 MCPS Post-Observation Conference Report – Report-Formal

Observation #1 Teacher: Appellant. Observer: Donna Michel Dated 01/12/09

Attachment 13 Post-Observation Conference Report – Report-Formal

Observation #2 Teacher: Appellant Observer: Donna Michel Dated 01/22/09

Attachment 14 Professional Growth System Post-Observation Conference Report

Teacher: Appellant Observer: Floyd Starnes Dated 02/26/09

Attachment 15 Professional Growth System Final Evaluation Report: Teacher Appellant, Principal Floyd Starnes 5/19/09

Attachment 16 To Whom It May Concern dated 4/13/10 from Lori A. Spinelli-Samara

Attachment 17 Incident Report dated 4/13/10 from Floyd Starnes re: Appellant

Attachment 18 Letter dated 4/15/10 to Appellant from Floyd Starnes re: Administrative Leave w/pay

Attachment 19 Letter dated 4/30/10 to Mr. Ray Frappolli from Appellant re: three points in the Incident Report

Attachment 20 Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (unsigned)

- Attachment 21 Memorandum dated 3/21/95 to Dr. Elfreda W. Massie from Phinnize J. Fisher re: Request for Personnel Investigation (Appellant)
- Attachment 22 Letter dated 8/22/95 to Appellant from Paul L. Vance, Superintendent
- Attachment 23 Note dated 9/29/95 to Jenny from Carole Berger re: Appellant's file
- Attachment 24 Letter dated 2/09/00 to Appellant from Jerry D. Weast, Super.
- Attachment 25 Memorandum dated 5/01/08 to Appellant from Floyd Starnes re: record
14. Letter dated 5/17/10 to Jerry D. Weast from Charles Rand, Esquire and Alan M. Wright re: Appellant: Contemplated Dismissal
 15. Letter dated 5/25/10 to Appellant from Jerry D. Weast re: recommending dismissal
 16. Letter dated 5/28/10 to Ray Frappolli from Sheila Dennis, LCSW-C re: Clearance Request – Appellant
 17. Letter to Ms. Patricia O'Neil (sic) dated 6/02/10 from Saurabh Gupta, Esquire
 18. Letter dated 6/10/10 to William J. Roberts, Esquire from Suzann M. King re: Board Appeal No. 2010-13-Appellant
 19. Email dated 6/15/10 to Glenda Rose from William Roberts, Esq. re: possible settlement of appeal
 20. Letter dated 7/29/10 to William Roberts, Esq. from Suzann King re: dates, time and place for Appellant's appeal hearing
 21. Draft letter dated 8/31/10 to William Roberts, Esq. from Judith S. Bresler re: exhibits
 22. Email dated 9/01/10 from William Roberts, Esq. to Saurabh Gupta and Judith Bresler re: Appellant's Appeal
 23. Letter dated 9/02/10 to William Roberts, Esq. from Saurabh Gupta re: documents submitted by Appellant
 24. Email dated 9/03/10 to Saurabh Gupta and Judy Bresler from William Roberts, Esq.
 25.
 - A. Note dated 3/04/10 to Kemp Mill Elementary School from Jackie Figueroa re: Permission Slip to allow _____ (student) to take a trip w/Appellant
 - B. Letter dated 8/23/10 to Mr. Saurabh Gupta from _____ } Sons attending the March 5th NBA game permission slips
 - C. Email dated 7/02/10 from Parent Group at KMES Magdalena Cabral to Frieda Lacey, Suzanne Peang-Meth, BOE; Amiedoor@yahoo.com and Daniel J. Picca re: improper questioning
 - D. Letter dated 07/01/10 to Mr. Gupta from _____

- E. Email dated 6/30/10 from Jackie Figueroa to Frieda Lacey re: Crisis at Kemp Mill ES
 - F. Letter dated 6/26/10 to Mr. Gupta from mother re: questioning by principal
 - G. Letter dated 6/24/10 to Mr. Gupta from _____ re: Appellant's alleged misconduct with her son,
 - H. Letter dated 9/07/10 to Mr. Gupta from _____ parent of _____
 - I. Letter dated 8/14/10 to Mr. Gupta from _____ re: questioning of her by Mr. Starnes
26. Two Letters dated 7/02/10 from Mr. Louis A. Scarci re: Floyd Starnes
 27. Letter dated 8/01/10 to Dr. Lacey from _____ (student)
 Letter dated 7/23/10 to Dr. Lacey from _____ (student)
 Letter dated 7/30/10 to Dr. Lacey from _____ (student)
 Letter dated 8/04/10 to Dr. Lacey from _____ (student)
 Letter dated 8/01/10 to Dr. Lacey from _____ (student)
 Letter dated 7/14/10 to Dr. Lacey from _____ (student)
 Letter dated 7/26/10 to Dr. Lacey from _____ (student)
 Letter dated 8/03/10 to Dr. Lacey from _____ (student)
 28. Letter from Parent to Deputy Superintendent sent 6/26/10 to Dr. Lacey from _____ and other concerned parents of Kemp Mill E.S. (unsigned)
 29. Field Trip Guidelines
 30. Letter from _____ re: "forced" statement by Floyd Starnes
 31. Undated letter to Dr. Lacey from Carol Osburn (unsigned)
 Letter dated 5/10/10 to Dr. Lacey from Carol Osburn
 Undated letter to Dr. Lacey from Carol Osburn (unsigned) w/Appellant's fax information on the top
 32. (1) Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (unsigned)
 (2) Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (unsigned) and "Your Written Summation/Teacher Letters" from Kim-Shawn Gary to Appellant re: "Here is my final letter."
 (3) Letter dated 5/12/10 To Whom It May Concern from Kim-Shawn Gary (signed)
 33. Drawing the seating arrangements for interviews
 34. Affidavit of Nancy Teague dated 9/5/10 re: Appellant's lunch math class
 35. Facebook Messages – Lunch Bunch 07-08 between Appellant and Nancy Teague

Additional Exhibits

In addition to the exhibits listed above, I admitted the following exhibits into evidence:

- ALJ Ex. 1 Transcript of the hearing conducted on September 7, 8, and 20, 2010
- ALJ Ex. 2 Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation,
dated January 7, 2011
- ALJ Ex. 3 County Board Decision and Order, dated May 10, 2011