

THELMA SMITH,

Appellant

v.

CARROLL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 99-13

OPINION

This appeal is a consolidation of two separate appeals by Thelma Smith. In the first, Appellant contests her March 18, 1997 evaluation in which she received an overall “needs improvement” rating in her position as a business education teacher at Francis Scott Key High School in Carroll County. In the second, Appellant contests her termination from employment that was upheld by the local board on January 14, 1998.

The consolidated appeals were transferred to the State Office of Administrative Hearings and a hearing was conducted on July 30, July 31, and August 26, 1998. The administrative law judge issued separate proposed orders and opinions. A copy of the proposed order and opinion on the appeal of the evaluation rating is attached as Exhibit 1. A copy of the proposed decision on the termination is attached as Exhibit 2.

Oral argument occurred before the State Board of Education on January 27, 1999.

APPEAL OF EVALUATION DECISION

We adopt the findings of fact and conclusions of law of the administrative law judge as set forth in Exhibit 1. We therefore affirm the decision of the Board of Education of Carroll County regarding Appellant’s evaluation.*

APPEAL OF TERMINATION DECISION

We adopt the findings of fact and conclusions of law of the administrative law judge as set forth in Exhibit 2. We therefore affirm the decision of the Board of Education of Carroll County to terminate Appellant from her employment with that school system.

Walter Sondheim, Jr.
President

Edward Andrews
Vice President

Raymond V. Bartlett

JoAnn T. Bell

RECUSED
Philip S. Benzil

George W. Fisher, Sr.

*Morris Jones

Marilyn D. Maultsby

Judith McHale

Adrienne L. Ottaviani

John Wisthoff

*DISSENT ON EVALUATION APPEAL

Because I do not believe that a “needs improvement” evaluation is appealable to the State Board, I dissent from the opinion rendered by the majority and would dismiss the appeal for lack of jurisdiction.

Morris Jones

February 23, 1999

EXHIBIT 1

IN THE MATTER OF * BEFORE STEPHEN J. NICHOLS
THELMA P. SMITH * AN ADMINISTRATIVE LAW JUDGE
V. * OF THE MARYLAND OFFICE OF
BOARD OF EDUCATION * ADMINISTRATIVE HEARINGS
OF CARROLL COUNTY * OAH NO. 98-MSDE-BE-01-097
* * * * *

**PROPOSED ORDER AND OPINION DISMISSING
APPEAL OF EVALUATION RATING**

STATEMENT OF THE CASE
ISSUE
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER
NOTICE OF RIGHT TO FILE OBJECTIONS

STATEMENT OF THE CASE

Thelma P. Smith (hereinafter "Appellant" or "Employee"), a business education teacher at the Francis Scott Key High School, Carroll County Public Schools, appeals a March 18, 1997 evaluation giving her an overall "Needs Improvement" rating. In the appeal, the Employee challenges the "Needs Improvement" rating given to her in two categories of the evaluation, "Creates a Positive Learning Climate" and "Demonstrates Professional Ethics," and the overall rating. The Employee's complaint was first heard by Dr. Gary E. Dunkleberger, Assistant Superintendent of Instruction, Carroll County Public Schools, who served as the designee of the Superintendent of the Carroll County Public Schools. After a hearing on the Employee's complaint, at which the Employee was represented by counsel, Dr. Dunkleberger upheld the "Needs Improvement" evaluation. The

Employee noted a timely appeal from that decision to the Board of Education of Carroll County ("the Board").

On December 10, 1997, the Board conducted a hearing on the Employee's appeal. The Employee was also represented by counsel at the December 10, 1997 hearing. The Board incorporated the record of the proceeding before Dr. Dunkleberger into the record of its hearing and received additional testimony from three witnesses: the Employee; George Phillips, Principal, Francis Scott Key High School, Carroll County Public Schools; and George Eckles, Director of Secondary Schools, Carroll County Public Schools. Subsequent to that hearing, on January 14, 1998, the Board issued a decision upholding the decision of the Superintendent's designee regarding the March 18, 1997 evaluation giving the Employee an overall "Needs Improvement" rating.

Pursuant to Md. Code Ann., Educ. § 4-205(c)(3) (Supp. 1997), the Employee appealed the Board's order to the Maryland State Board of Education. The dispute was then referred to the Maryland Office of Administrative Hearings ("OAH") for administrative adjudication. The matter was scheduled to be heard before an administrative law judge of the OAH.

Pursuant to Code of Maryland Regulations ("COMAR") 13A.01.01.03P(1), a hearing was conducted on July 30, 1998, and August 26, 1998, before the undersigned Administrative Law Judge ("ALJ") at the Administrative Law Building located in Hunt Valley, Maryland.¹ The Board was represented in this matter by Rochelle S. Eisenberg, Esquire, and Gail D. Allen, Esquire, of the firm

¹A hearing between the parties was conducted on July 30, 1998, July 31, 1998, and August 26, 1998, before the undersigned Administrative Law Judge. Except for oral arguments received from the parties on July 30, 1998, and August 26, 1998, the evidence presented and the arguments raised by the parties over those three days pertain to an appeal by the Employee of the termination of her employment with the Carroll County Public Schools. The termination appeal was consolidated with the evaluation appeal, herein, under the same case number.

of Blum, Yumkas, Mailman, Gutman & Denick, P.A. The Appellant was represented in this matter by Gustava E. Taler, Esquire, and Kenneth Montague, Esquire, of the firm of Montague & Taler, and Howard J. Needle, Esquire.

On July 30, 1998, oral argument was received on a "Motion for Summary Affirmance" filed by the Board. On August 3, 1998, the ALJ issued an order and opinion denying the Board's "Motion for Summary Affirmance."

On August 26, 1998, oral argument to reconsider the order and opinion of the ALJ on the "Motion for Summary Affirmance" was received from both parties. The ALJ reaffirmed his order and opinion on the "Motion for Summary Affirmance." As part of the affirmance of his order and opinion on the "Motion for Summary Affirmance," the ALJ also denied the Employee's request to present additional evidence regarding the appeal of her March 18, 1997 evaluation.

Post-hearing memoranda were submitted by both parties in accordance with a schedule set at the conclusion of the hearing on August 26, 1998. The record closed on September 24, 1998.

In deciding this matter, the ALJ considered the arguments raised by counsel at oral argument, and reviewed and considered the Post-Hearing Memorandum of the Board addressing the Evaluation Appeal, with attached exhibits (110 pages), the Post-Hearing Memorandum on behalf of the Employee regarding Evaluations (12 pages), the "Motion for Summary Affirmance" with attached exhibits, filed by the Board (116 pages), the Appellant's "Answer to Motion Summary Affirmance" with attached exhibits (22 pages), the Decision of the Board in the Matter of the Evaluation Appeal of the Employee dated January 14, 1998 (6 pages), the transcript of the hearing held by the Board of Education of Carroll County on December 10, 1997 (214 pages), the exhibits admitted into the record of the hearing before the Board of Education of Carroll County on December 10, 1997

(Superintendent Exhibits Nos. 1 - 138 & [Employee] Exhibits Nos. 1 - 7), and the transcript of the hearing conducted by Dr. Dunkleberger on May 27, 1997 (171 pages).

ISSUE

The issue on appeal is whether the "Needs Improvement" evaluation of the Employee dated March 18, 1997, was arbitrary, unreasonable, or illegal.

DISCUSSION

Md. Code Ann., Educ. § 4-205 (Supp. 1997) reads, in pertinent part, as follows:

§ 4-205. Powers and duties

(a) In addition to the other powers granted and duties imposed under this article, the county superintendent has the powers and duties set forth in this section.

. . .

(c)(1) Subject to the authority of the State Board under § 2-205(e) of this article, each county superintendent shall explain the true intent and meaning of:

(i) The school law; and

(ii) The applicable bylaws of the State Board.

(2) Subject to the provisions of § 6-203 and Subtitle 4 of Title 6 of this article and without charge to the parties concerned, each county superintendent shall decide all controversies and disputes that involve:

(i) The rules and regulations of the county board; and

(ii) The proper administration of the county public school system.

(3) A decision of a county superintendent may be appealed to the county board if taken in

writing within 30 days after the decision of the county superintendent. The decision may be further appealed to the State Board if taken in writing within 30 days after the decision of the county board.

. . .

Under Md. Code Ann., Educ. § 4-205(c)(3), the decision of the Superintendent's designee regarding the Employee's March 18, 1997 evaluation is appealable, first to the Board, and then, may be appealed to the State Board. The Employee has appealed the Board's action upholding the decision of the Superintendent's designee regarding her March 18, 1997 evaluation.

An appeal to the State Board is regulated under COMAR 13A.01.01.03. In pertinent part, COMAR 13A.01.01.03C(1) provides:

In an appeal of a county board decision on a controversy or dispute regarding a policy or regulation of the county board and the proper administration of a local public school system, the State Board may decide the appeal on the record made before the county board . . .

The Employee's appeal of the Board's action upholding the decision of the Superintendent's designee regarding her March 18, 1997 evaluation is an appeal on the record.

The standard of review in an appeal to the State Board is prescribed by COMAR 13A.01.01.03E. In pertinent part, COMAR 13A.01.01.03E provides:

E. Standard of Review.

(1) Decisions.

(a) Decisions of a county board involving a local policy or a controversy and dispute regarding the rules and regulations of the county board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the county board

unless the decision is arbitrary, unreasonable, or illegal.

(b) A decision may be arbitrary or unreasonable if it is one or more of the following:

- (i) It is contrary to sound educational policy;
- (ii) A reasoning mind could not have reasonably reached the conclusion the county board reached.

(c) A decision may be illegal if it is one or more of the following:

- (i) Unconstitutional;
- (ii) Exceeds the statutory authority or jurisdiction of the county board;
- (iii) Misconstrues the law;
- (iv) Results from an unlawful procedure;
- (v) Is an abuse of discretionary powers; or
- (vi) Is affected by any other error of law.

(d) The appellant shall have the burden of proof.

(2) State School Laws and Regulations. The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.

(3) Teacher Dismissal and Suspension.

(a) The standard of review in teacher dismissal or suspension shall be de novo as defined in §E(3)(b).

(b) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain a disciplinary infraction.

(c) The county board shall have the burden of proof.

(d) The State Board, in its discretion, may modify a penalty. . . .

The Employee's appeal of her March 18, 1997 evaluation is an appeal of a "[decision] of a county board involving a local policy or a controversy and dispute regarding the rules and regulations of the county board" COMAR 13A.01.01.03E(1)(a). According to COMAR 13A.01.01.03E(1)(a), the decision of the county board is considered to be *prima facie* correct and the ALJ may not substitute his judgement for that of the county board unless the decision is "arbitrary, unreasonable, or illegal."

The evaluation of "professionally certificated personnel" by a local board of education must be in accordance with the guidelines found at COMAR 13A.07.04. The Employee is a professionally certificated individual and the provisions of COMAR 13A.07.04 apply to her evaluation.

One question, considered by the ALJ *ab initio*, is quickly disposed of. The Board argues that as a professionally certificated individual, the Employee's appeal of her March 18, 1997 evaluation is not authorized by the applicable regulations (as interpreted by prior decisions of the State Board).² In support of this argument, the Board points to COMAR 13A.07.04.04:

.04 Appeal of an Evaluation.

A. In the event of an overall rating of unsatisfactory , the local school system shall, at a minimum, provide certificated individuals with a meaningful appeal in accordance with Education Article, §4-205(c)(4), Annotated Code of Maryland.³

. . .

²*Compare Jones v. Board of Educ. of Charles County*, MSBE Op. 95-27 (1995) with *Peperman v. Montgomery County Board of Educ.*, MSBE Op. 98-12 (1998).

³Md. Code Ann., Educ. § 4-205 was amended effective June 1, 1997, the text now appearing at § 4-205(c)(3) was previously found at § 4-205(c)(4).

C. The burden of proof is on the certificated individual appealing an overall rating of unsatisfactory. (*emphasis added*)

The Board maintains that the Employee's evaluation was not an overall rating of unsatisfactory. The Board argues that only professionally certificated individuals with an overall rating of unsatisfactory may appeal an evaluation to the State Board under COMAR 13A.07.04.04A. In this argument, however, the Board overlooks the "general standards" applicable to the evaluation of "professionally certificated personnel" found at COMAR 13A.07.04.02A. "An overall rating that is not satisfactory or better is considered unsatisfactory." COMAR 13A.07.04.02A(3).

In her March 18, 1997 evaluation, the Employee could have been rated as overall "Effective," "Needs Improvement," or "Unsatisfactory." The Employee was not rated overall "Effective" (which the ALJ equates to "satisfactory"). The Employee was given an overall rating of "Needs Improvement." Insofar as the Employee was not given an overall rating of "Effective," her March 18, 1997 evaluation "is considered unsatisfactory" under COMAR 13A.07.04.02A(3). Therefore, the Employee is authorized to appeal her March 18, 1997 evaluation to the State Board under COMAR 13A.07.04.04A.

In her appeal to the State Board, the Employee contends that it was necessary for the ALJ to hear from numerous additional witnesses and receive numerous additional exhibits. The Employee insists that all material facts are disputed. The Employee suggests that the ALJ hear additional evidence on the same factual questions considered below, substitute his judgement for that of the Board and/or the Superintendent's designee concerning the appropriate evidentiary inferences to be drawn from the evidence, and reach *de novo* findings of fact. The Employee contends that the ALJ must hear from her additional witnesses and consider her numerous additional documents, in this

fashion, to determine whether the Board's decision upholding the "Needs Improvement" evaluation was arbitrary, unreasonable, or illegal.

However, the standard of review for the State Board (and the ALJ) prescribed by COMAR 13A.01.01.03E(1) is substantially the same as the standard of review of an administrative agency's decision in an appeal of that decision to a court of law. With the limited exception specified under COMAR 13A.01.01.03E(1)(b)(i), the ALJ's review of the Board's decision upholding the March 18, 1997 evaluation entails an appraisal and evaluation of Board's fact-finding and is not an independent decision on the evidence, itself. Under COMAR 13A.01.01.03E(1)(a), the ALJ may not substitute his judgement for that of the Board or the Superintendent's designee concerning the appropriate evidentiary inferences to be drawn from the evidence in the record. Therefore, the ALJ denied the Employee's request to present additional evidence regarding the appeal of her March 18, 1997 evaluation.

The Employee's main theme in this appeal is that because of racial discrimination at the Francis Scott Key High School, where she was employed as a teacher, she was unfairly evaluated in her March 18, 1997 evaluation. The March 18, 1997 evaluation of the Employee was authored by George Phillips, Principal, Francis Scott Key High School, and William Piercy, Supervisor of Business Education, Carroll County Public Schools.

The Employee contends that George Phillips, other school staff members, parents and students were racially biased against her. The Employee points out that she was the only African American female at the Francis Scott Key High School. The Board considered this argument and the evidence raised in support of same in its January 14, 1998 decision:

Regarding [the Employee's] accusation that Mr. Phillips is a racist, she offered no

evidence, other than her own opinion to support her allegations. It is unfortunate that [the Employee] is of the opinion that nearly any circumstance in which she had a disagreement with another person is the consequence of racial bias towards her.

In the record below, before the Board, there was evidence offered by the Superintendent that responded to every allegation by the Employee of discriminatory conduct against her, having to do with her evaluation, with a legitimate non-discriminatory basis. The Board considered this evidence, and where the existence of a fact was not shown by direct proof, drew reasonable and permissible inferences from other facts shown by direct proof. The Board made credibility determinations on the various sources of evidence on the alleged discriminatory conduct or lack of same. The Board made note of the fact that the record is devoid of any statements or actions evidencing racial animosity by George Phillips towards the Employee. The Employee never claimed that William Piercy, the other author of the evaluation complained of, was racially biased against her. The Board determined that racial discrimination did not play a part in the Employee's evaluation.

The ALJ may not substitute his assessment of witness credibility for that of the Board. In the record below, before the Board, there were facts, by direct proof, or by possible inference, from which reasoning minds could reasonably reach the conclusion that racial discrimination did not play a part in the Employee's evaluation. On this record, the ALJ has no power to reject that conclusion.

Paragraph A of Article VII, *Evaluation of Non-Tenured Teachers*, of the Master Agreement between the Board of Education and the Carroll County Education Association (Board Exhibit #5, page 15) states, in pertinent part:

A. OBSERVATION

1. Teachers who have not achieved tenure status shall be observed by personnel eligible for certification by the State Department of Education at least four (4) times during the school year, two (2) times before January 1 and two (2) times before April 1. Each observation of performance shall be conducted openly and with full knowledge of the teacher for a period of time sufficient for an adequate appraisal of that instructional activity.

. . .

3. Within five (5) days subsequent to each observation, the observer shall hold a conference with the teacher, at which time a written observation report shall be submitted. The report should include, where appropriate, favorable comments, criticisms and specific recommendations for improvement.

The Employee points out that she was subjected to more than four (4) observations during the 1996-1997 school year. In fact, the Employee received seven such observations. Four observations took place during each of the months of September, October, November, and December 1996. (Superintendent Exhibits Nos. 4, 19, 32 & 45) Two observations took place during February 1997. (Superintendent Exhibits Nos. 59 & 60) One observation took place during March 1997. (Superintendent Exhibit No. 67) The Employee suggests that being subjected to more than the minimum required number of observations renders her evaluation "arbitrary, unreasonable, or illegal."

The Employee's reasoning on being subjected to more than the minimum required number of observations is unsound. The fact that more not less than the minimum number of observations were conducted simply demonstrates that the Employee's evaluation was based on more data than that minimally required under the Master Agreement. That does not render her evaluation "arbitrary, unreasonable, or illegal."

The Employee next contends that the overall "Needs Improvement" is not supported by the underlying data of the actual classroom observations made. The Employee also argues that because

she was determined effective in fifteen out of seventeen category areas on the March 18, 1997 evaluation, that she should have received an overall rating of "Effective." The Employee argues, therefore, that the overall "Needs Improvement" rating was arbitrary and unreasonable. The Employee suggests that her observations/evaluation should be considered quantitatively.

The Board considered both these arguments and the evidence raised in support of same in its January 14, 1998 decision:

The Board rejects the contention that [the Employee's] overall rating was mathematically inconsistent. The Board understands that the purpose of the evaluation instrument is to convey qualitative values and not to designate a quantitative performance rating. The evaluation instrument is a management tool for the school system to communicate to teachers areas for improvement. The Board also recognizes that the Teacher Evaluation Manual for the Carroll County Public Schools explains that a teacher's year end evaluation is based on other interactions than classroom observations: "the greatest, but not exclusive, basis of an evaluation is derived from formal classroom observations." [Superintendent's Exhibit #1, pg. 3] Indeed, the Board recognizes that the two criteria at issue in this appeal, Creates a Positive Learning Climate and Professional Ethics, are significant areas in the evaluation of a public school educator's performance. *(emphasis in original)*

The Employee suggests that the ALJ substitute his judgement for that of the Board, the Superintendent's designee, and her supervisors at the Francis Scott Key High School, and arrive at an overall evaluation of her performance as a teacher for the 1996-1997 school year. The ALJ declines this invitation. The ALJ may not substitute his judgement for that of the Board; the Board's decision on this point is considered *prima facie* correct. The Employee offers nothing that demonstrates that the Board's judgement on this question was "contrary to sound educational policy." COMAR 13A.01.01.03E(1)(b)(i).

In her Post-Hearing Memorandum regarding Evaluations, the Employee states, "within five

duty days subsequent to each observation, the observer is required to hold a conference with [the Employee] . . . [the Employee] was never afforded the post-observation conference, which was required." (page 5) This allegation -- a failure to hold post-observation conferences -- was first raised in this record during the Employee's post-hearing written submission received at OAH on September 24, 1998. In support of this allegation, the Employee did not proffer or offer any testimony or other evidence at anytime in this record. The ALJ has examined the documents of record containing the written classroom observations on the Employee. Each of the written classroom observations appear to be signed by the Employee. The signatures of the Employee appearing on those documents are dated the same as the date of the observation or within a few days of same. The written record appears inconsistent with the Employee's claim that timely post-observation conferences were not held. The ALJ is not persuaded that this claim, as advanced by the Employee in her post-hearing written submission, has any merit.

The findings of fact, reflected in the Board's decision, are supported by evidence before the Board. The findings of fact, reflected in the Board's decision, reasonably follow from facts that are shown by direct proof or by reasonable and permissible inference from facts shown by direct proof. Reasoning minds could reasonably reach the Board's conclusion on the Employee's evaluation from facts in the record before the Board, by direct proof, or by permissible inference.

The ALJ is not persuaded by the Employee that the Board's action on her March 18, 1997 evaluation was "arbitrary, unreasonable, or illegal."

CONCLUSIONS OF LAW

The "Needs Improvement" evaluation of the Employee as a professionally certificated

individual dated March 18, 1997, was not arbitrary, unreasonable, or illegal. Md. Code Ann., Educ. § 4-205(c)(3); COMAR 13A.07.04.04.

PROPOSED ORDER

THEREFORE, it is **ORDERED** that the Employee's appeal of the Board's action upholding the decision of the Superintendent's designee regarding her March 18, 1997 evaluation is **DENIED** and **DISMISSED**.⁴

Date: October 27, 1998

Stephen J. Nichols
Administrative Law Judge

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this proposed decision has the right to file objections with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, within ten (10) days of receipt of the proposed decision, in accordance with COMAR 13A.01.01.03P(4).

⁴In pertinent part, COMAR 13A.01.01.03J provides:

(1) The State Board may, on its own motion, or on motion filed by any party, dismiss an appeal.

. . . .

(6) The State Board or a hearing examiner may reserve a ruling on a motion to dismiss until the appeal has proceeded on the merits.

EXHIBIT 2

IN THE MATTER OF * BEFORE STEPHEN J. NICHOLS
THELMA P. SMITH * AN ADMINISTRATIVE LAW JUDGE
V. * OF THE MARYLAND OFFICE OF
BOARD OF EDUCATION * ADMINISTRATIVE HEARINGS
OF CARROLL COUNTY * OAH NO. 98-MSDE-BE-01-097
* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER
NOTICE OF RIGHT TO FILE OBJECTIONS
APPENDIX A
APPENDIX B

STATEMENT OF THE CASE

On or about October 17, 1997, Thelma P. Smith (hereinafter "Employee"), a business education teacher at the Francis Scott Key High School, Carroll County Public Schools, received notification from the Superintendent, Carroll County Public Schools, recommending a termination of her employment. The Employee appealed the recommendation to the Board of Education of Carroll County Public Schools (the "Board").

On December 10, 1997, the Board conducted a hearing on the Employee's appeal pursuant to Md. Code Ann., Educ. § 6-202(a)(3) (Supp. 1997). The Employee was represented by counsel at the December 10, 1997 hearing. At that hearing, the Board received testimony from

seven witnesses: Sharon Adams, secretary, Personnel Office, Carroll County Public Schools; William Rooney, Director of Personnel, Carroll County Public Schools; George Phillips, Principal, Francis Scott Key High School, Carroll County Public Schools; Brian Lockard, Superintendent, Carroll County Public Schools; the Employee; Douglas Yust, teacher, Francis Scott Key High School, Carroll County Public Schools; and Gary Dunkleberger, Assistant Superintendent of Instruction, Carroll County Public Schools. Subsequent to that hearing, the Board issued a decision upholding and accepting the Superintendent's recommendation that the Employee be dismissed from employment on the grounds of willful neglect of duty, insubordination, and misconduct in office.

Pursuant to Md. Code Ann., Educ. § 6-202(a)(4) (Supp. 1997), the Employee appealed the Board's order to the Maryland State Board of Education and, pursuant to a delegation of authority, the matter was scheduled before the Office of Administrative Hearings.

Pursuant to the Code of Maryland Regulations ("COMAR") 13A.01.01.03P(1), a hearing was conducted on July 30, 1998, July 31, 1998, and August 26, 1998, before the undersigned Administrative Law Judge ("ALJ") at the Administrative Law Building located in Hunt Valley, Maryland. The Board was represented by Rochelle S. Eisenberg, Esquire, and Gail D. Allen, Esquire, of the firm of Blum, Yumkas, Mailman, Gutman & Denick, P.A. The Appellant was represented by Gustava E. Taler, Esquire, and Kenneth Montague, Esquire, of the firm of Montague & Taler, and Howard J. Needle, Esquire.

Procedure in this case is governed by the "contested cases" provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1995 & Supp. 1997), COMAR 13A.01.01, and the Rules of Procedure of the Office of Administrative

Hearings, COMAR 28.02.01.

Post-hearing memoranda were submitted by both parties in accordance with a schedule set at the conclusion of the hearing on August 26, 1998. The record closed on September 24, 1998.

ISSUE

The issue on appeal is whether the Employee's dismissal for misconduct in office, willful neglect of duty, and/or insubordination, pursuant to Md. Code Ann., Educ. § 6-202(a)(1) (1992 & Supp. 1997), is supported by a preponderance of the evidence.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following exhibits were admitted into evidence on behalf of the Board:¹

Board Ex. #1 - A copy of the Employee's employment file with the Howard County Public Schools (72 pages)

Board Ex. #2 - A copy of the Employee's Certificated Administrative/Supervisor Application (28 pages)

Board Ex. #4 - A copy of the Carroll County Public Schools Employee Handbook (bound booklet)

Board Ex. #5 - A copy of the Carroll County Public Schools Master Agreement (bound booklet)

Board Ex. #6 - A copy of a letter to Linwood L. Roberts from the Employee (2 pages)

Board Ex. #7 - A copy of a memorandum to the Employee from Ellen D. Gonzales dated January 16, 1996

¹An objection to the admission of Board Exhibit #3 was sustained.

The following exhibits were admitted into evidence on behalf of the Employee:²

Employee Ex. #1 - A copy of a letter from the Employee to Brian Lockard dated November 24, 1995

Employee Ex. #89 - A copy of a memorandum from the Employee to George Phillips dated August 22, 1997

Employee Ex. #95 - A copy of a letter from the Employee to Brian Lockard dated October 27, 1997

Employee Ex. #96 - A copy of a letter from Brian Lockard to the Employee dated November 4, 1997

Employee Ex. #97 - A copy of a letter from C. Scott Stone to the Employee dated November 12, 1997, and a handwritten response (3 pages)

Employee Ex. #98 - A list of dates and Sub-finder job numbers

Employee Ex. #108 - A copy of a letter from the Employee to William Rooney dated June 2, 1997

Employee Ex. #109 - A copy of a letter from Penny Post to the Employee dated June 5, 1997, with enclosures (7 pages)

Employee Ex. #110 - A copy of a letter from George Phillips to the Employee dated August 26, 1997 (2 pages)

Employee Ex. #111 - A copy of a medical note initialed by Ellis Mez, M.D., dated

²Objections to the admission of Employee Exhibits #91, #99, #100, #101, #102, #104, #112, #113, #115, & #116 were sustained. The exhibits offered on behalf of the Employee were prenumbered. Many of the Employee's exhibits were duplicates of exhibits already made a part of the record. Gaps appearing in the sequence of the Employee's exhibits represent exhibits not offered into the record.

February 2, 1997

Employee Ex. #114 - A copy of a resume of the Employee (2 pages)

The exhibits admitted into the record before the Board of Education of Carroll County on December 10, 1997 (Superintendent Exhibits Nos. 1 - 138 & Smith Exhibits Nos. 1 - 8) are part of the record herein. A complete list of the exhibits that were admitted on December 10, 1997, is found in Appendix A to this decision.

B. Testimony

Christine Wood, Supervisor of Classified Services, Department of Human Resources, Howard County Public Schools; Brian Lockard, Superintendent, Carroll County Public Schools; Thomas Saunders, Assistant Principal, Wildlake Middle School, Howard County Public Schools; and Albertha Caldwell, Principal, Wildlake Middle School, Howard County Public Schools, testified on behalf of the Board.

Brian Lockard was admitted as an expert witness in the field of the duties and obligations of a certificated employee/teacher in Carroll County Public Schools.

The Employee testified on her own behalf.³

The transcript of the hearing held by the Board of Education of Carroll County on December 10, 1997 (215 pages) is part of the record herein.

C. Stipulations

³Kevin Smith, the spouse of the Employee, was called as a witness in her behalf. As a result of the Board's objection, Kevin Smith was not allowed to testify.

Eighteen (18) written stipulations of fact were prepared by the parties and provided to the presiding ALJ before the hearing. The stipulations were filed on July 27, 1998. Those stipulations were considered and, in pertinent part, incorporated into the findings of fact, below. Those stipulations of fact are listed in Appendix B to this decision.

FINDINGS OF FACT

After careful consideration of the record, below, and the additional evidence presented, the ALJ finds, by a preponderance of the evidence, the following facts:⁴

1. The Board is the educational entity established by State statute to control public education in Carroll County, Maryland.
2. The Board is authorized to hire and employ teachers.
3. On July 26, 1996, the Employee signed a "Regular Teacher's Contract" for employment with the Carroll County Public Schools during the 1996-1997 and 1997-1998 school years. Either the Employee or the Carroll County Public Schools could terminate the contract at

⁴Both parties submitted proposed findings of fact as part of their post-hearing written submissions. Insofar as those proposed findings of fact are accepted by the ALJ, they are incorporated into the findings of fact herein. Proposed findings of fact not incorporated herein are rejected as immaterial or not supported by a preponderance of the credible evidence.

the end of a school year by giving written notice to the other party not later than the first day of May.

4. Prior to her employment with the Carroll County Public School system, the Employee had been employed for four years as a teacher in the Baltimore City Public School system.

5. The Employee's "Regular Teacher's Contract" (Superintendent Exhibit #31) dated July 26, 1996, provides:⁵

. . . said certificated employee will not vacate the position to which assigned after his or her first duty day of the school year except in case of emergency, of which the Local Board of Education shall judge. . . .

6. On August 19, 1996, the Employee began working for the Carroll County Public School system.

7. During the 1996-1997 school year, the Employee was a Business Education teacher at the Francis Scott Key High School. The Francis Scott Key High School is part of the Carroll County Public School system.

8. There was a significant drop in student enrollment for business courses at the Francis Scott Key High School for the 1997-19-98 school year, with approximately 150 fewer students enrolling than the year before. As a result, there was a reduction-in-force for the 1997-1998

⁵An approved form for regular teacher contracts is found at COMAR 13A.07.02.01B(2). The cited provision from the Employee's "Regular Teacher's Contract" is the same as the approved form.

school year at that school of one full-time Business Education teacher position.

9. A half-time Business Education teacher and the Employee had the least seniority among the teachers in the Business Education department at the Francis Scott Key High School. Of those two, the Employee was the teacher with the most seniority. The half-time Business Education teacher position was eliminated. The Employee's Business Education teacher position was reduced from full-time to half-time.⁶

10. In May 1997, George Phillips, Principal, Francis Scott Key High School, advised the Employee of the reduction in personnel and that her position was to be reduced to a half-time position.

11. The Employee indicated her intent to continue to work at the Francis Scott Key High School during the 1997-1998 school year as a part-time Business Education teacher.

12. Two full-time Business Education teacher positions were available at other schools in the Carroll County Public School system (South Carroll High School and Westminster High

⁶Reductions-in-force of teachers within the Carroll County Public School System are governed by the master Agreement between the Board of Education and the Carroll County Education Association. Paragraph E of Article XIV of the Master Agreement, in pertinent part, states:

In any reduction in personnel as a result of budgetary actions or curriculum and/or administrative reorganization, teachers shall be laid off solely on the basis of seniority by date of employment and certification for said positions. . . .

(emphasis added) (Board Exhibit #5)

School) for the up-coming 1997-1998 school year. William Piercy, Supervisor of Business Education, the Employee's direct supervisor, seeking to interest her in one of the full-time positions, informed the Employee of the availability of these openings before the end of the 1996-1997 school year. The Employee indicated to William Piercy that she wanted to stay at the Francis Scott Key High School, even if it was only a half-time position.

13. The negotiated agreement between the Board and its teachers requires teachers to prepare substitute lesson plans for 10 duty days, subject to relaxation by any local school standard. Paragraph B.1 of Article XIII of the Master Agreement between the Board of Education and the Carroll County Education Association (Board Exhibit #5, page 15), in pertinent part, states:

The regular classroom teacher shall make every effort to provide adequate planning for the substitute teacher to function in the regular teacher's absence. Such plans shall cover a period of up to ten (10) duty days except where a lower number has been required in the particular school.

14. Teachers at the Francis Scott Key High School were requested to provide substitute lesson plans by George Phillips, Principal, Francis Scott Key High School.

15. Monday, August 18, 1997 through Friday, August 22, 1997, were duty days for Carroll County Public School teachers. During that week, Carroll County Public School teachers attended pre-service professional activities.

16. The Employee failed to report for work after August 20, 1997.

17. The Sub-finder is a specialized computer system established by the Carroll County Public School system for teachers to call in and request substitute teacher coverage. Teachers at the Francis Scott Key High School were asked to call the Sub-finder system and report when they would be absent.

18. The Employee was familiar with the Sub-finder system.

19. On Thursday, August 21, 1997, at 7:30 p.m., the Employee called the Sub-finder system and reported she would be absent from work on August 22, 1997, because of illness.

20. Monday, August 25, 1997, was the first school day for students at the Francis Scott Key High School for the 1997-1998 school year.

21. On Sunday, August 24, 1997, at 5:34 p.m., the Employee called the Sub-finder system and reported she would be absent from work on Monday, August 25, 1997, through Friday, August 29, 1997, because of illness. A substitute teacher was required at the Francis Scott Key High School to replace the Employee during this period.

22. On Monday, August 25, 1997, no substitute lesson plans were stored in the main office or in the Employee's assigned classroom at the Francis Scott Key High School to cover the Employee's absence. The Employee had not prepared substitute lesson plans for use during the 1997-1998 school year.

23. On August 26, 1997, George Phillips telephoned the Employee regarding her absence from the Francis Scott Key High School. During this phone conversation, George Phillips and the Employee spoke regarding the lack of substitute lesson plans for August 25, 1997, and August 26, 1997.

24. On August 26, 1997, George Phillips sent a follow-up letter to the Employee requiring that she submit five (5) days of substitute lesson plans. In pertinent part, the letter (Employee Exhibit #110) reads:

It is most unfortunate that you have been unable to be in attendance at Francis Scott Key High School for the period of August 21, 1997 - August 26, 1997 and according to your call to the Sub-finder system, through August 29, 1997. Your stated reason for the absence has been illness. . . . Regardless of your date of return to duty, as per the contract, please submit a minimum of five days of lesson plans to me on or before the beginning of school on Friday, August 29, 1997.

25. On August 27, 1997, the Employee wrote a letter (Superintendent Exhibit #126) to George Phillips asking that she be released "immediately" from her teaching contract with the Carroll County Public School system, in pertinent part, stating:

. . . I accepted this teaching position as a full-time position. The half-time status the system has reduced my full-time position imposes a hardship on my family. . . .

26. On August 28, 1997, at 10:08 p.m., the Employee tele-faxed five substitute lesson plans to the Francis Scott Key High School. The Employee did not submit additional substitute lesson plans after August 28, 1997.

27. Each time a teacher calls the Sub-finder system to report an absence, he or she is given a job number; if someone else, such as a school administrator, has already called the Sub-

finder system to request a substitute, the teacher is told there is a "conflict." If there is a conflict, the teacher can review the submenus in the Sub-finder system and obtain the job number that was assigned to the previous caller.

28. For all her duty days from August 22, 1997 through October 31, 1997, the Employee, in a timely fashion, called the Sub-finder system, reported illness, and asked for a substitute or, in a timely fashion, called into the Sub-finder system and learned that the administration at the Francis Scott Key High School had already obtained a substitute for her absence (she was told by the Sub-finder system that there was a "conflict" and she obtained the job number that had been assigned to the previous caller).

29. Except for the telephone conversation with George Phillips on August 26, 1997, the Employee did not directly contact anyone at the Francis Scott Key High School and explain a reason for her continued absence from school.

30. Legal counsel for the Employee and the Carroll County Public School system agreed to a conference between themselves, the Employee, and Brian Lockard, Superintendent, Carroll County Public Schools, to give the Employee an opportunity to explain her continued absence from work, the reason for her illness, why she had not been providing substitute lesson plans, and to discuss her continued employment with the Carroll County Public School system. That conference was scheduled for October 10, 1997.

31. On or about October 10, 1997, the Employee requested that the conference scheduled for October 10, 1997, be postponed.

32. On October 10, 1997, Brian Lockard wrote a letter to the Employee advising her that the October 10, 1997 meeting was being rescheduled for October 17, 1 997. This date was selected, after coordination with the attorney for the Employee, to make sure that the attorney for the Employee did not have a schedule conflict on that date. In that letter (Superintendent Exhibit #129), the Employee was informed, "we will give you one last opportunity to meet with me prior to my taking action on your employment."

33. On October 16, 1997, the attorney for the Employee notified the attorney for the Carroll County Public School system that the Employee would not attend the meeting with Brian Lockard on October 17, 1997.

34. During the 1996-1997 and 1997-1998 school years, William Rooney was the Director of Personnel for the Carroll County Public School system.

35. At all times relevant herein, the Employee did not provide Brian Lockard, William Piercy, William Rooney, George Phillips, or any other employee or staff member of the Carroll County Public School system, with an explanation of her continued absence from the Francis Scott Key High School after August 29, 1997.

36. At all times relevant herein, the Employee did not inform Brian Lockard, William Piercy, William Rooney, George Phillips, or any other employee or staff member of the Carroll County Public Schools, that she was diagnosed by a qualified health care professional as suffering from clinical depression.

37. Students' educational programs suffer without an assigned regular teacher who is able to develop and teach lesson plans on a long term basis.

38. On October 17, 1997, Brian Lockard wrote the Employee a letter notifying her that he was recommending to the Board that she be dismissed from employment on the grounds of willful neglect of duty, insubordination, and misconduct in office. In pertinent part, the letter (Superintendent Exhibit #131) reads:

My recommendation is based on your failure to call in or report for duty on a regular basis since September 1997 and for your failure to submit lesson plans during the period of your absence.

39. On or about October 29, 1997, the Employee filed a timely appeal of the Superintendent's recommendation of dismissal. A hearing on the appeal was held before the Board on December 10, 1997.

40. The Board first learned that the Employee was purportedly suffering from "Major Depression" through a letter offered into evidence at the December 10, 1997 hearing before the Board. This letter, dated December 5, 1997, was addressed to the Employee's attorney from Zachery Green, Ph.D, Executive Director/Licensed Psychologist, The Alexander Institute for

Psychotherapy and Consultation.

41. The "Employee Handbook for Carroll County Public Schools" specifies those procedures which must be followed in order for an employee to take an approved leave of absence. The "Leaves of Absence - Exception to the Contract" provision (Board Exhibit #4, page 17-18), in pertinent part, states:

The Board recognizes that there may be emergency situations where an employee must take time off from work which would be contrary to the Master Agreement. The Board will consider such requests if made in writing. The letter must describe the reason for the requested leave, the dates the employee wants to take off, any personal time to be applied, and any additional pertinent documentation. The letter should be addressed to the Director of Personnel but must first be directed to the principal or other cost center administrator to whom the employee may report.
. . . (*Emphasis in original.*)

42. After the Employee became employed by the Carroll County Public Schools, she received a copy of the "Employee Handbook for Carroll County Public Schools."

43. The Employee never submitted any written documentation to George Phillips, William Rooney, or any other employee or staff member of the Carroll County Public Schools, requesting a leave of absence.

44. Teachers in the Carroll County Public School system are authorized ten (10) sick days per school year.

45. On September 18, 1997, the Employee filed an employment application with the

Howard County Public Schools. On her application, the Employee indicated that she was employed -- at that time -- by the Carroll County Public Schools. According to the employment application, the Employee's reason for leaving her present employer was "to get administrative experience to become an administrator."

46. The Employee was hired by the Howard County Public Schools as a principal's secretary and started working at the Wildlake Middle School on October 6, 1997. The Employee resigned from her employment with the Howard County Public Schools on November 7, 1997.

47. During her employment with the Howard County Public Schools, the Employee came in regularly, reported on time, and worked a full day (6:30 a.m. to 3:30 p.m.). The Employee's attire was neat and professional during her working hours with the Howard County Public Schools. During her employment with the Howard County Public Schools, the Employee was able to perform her secretarial duties (typing, filing, and answering the telephone).

48. On January 14, 1998, the Board issued a written decision upholding and accepting the Superintendent's recommendation that the Employee be dismissed from her employment with the Carroll County Public Schools.

DISCUSSION

The applicable law provides that a teacher may be suspended or dismissed, for cause, by a local board on the recommendation of a superintendent, and that the teacher has a right to a

hearing on such a dismissal or suspension. Md. Code Ann., Educ. § 6-202 (Supp. 1997) reads, in pertinent part, as follows:

§ 6-202. Suspension or dismissal; probationary periods

(a)(1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:

(i) Immorality;

(ii) Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article;

(iii) Insubordination;

(iv) Incompetency; or

(v) Willful neglect of duty.

(2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.

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

(i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and

(ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.

(4) The individual may appeal from the decision of the county board to the State Board.

. . .

The standard of review in an appeal of a teacher dismissal case to the State Board is

prescribed by COMAR 13A.01.01.03E. In pertinent part, COMAR 13A.01.01.03E provides:

. . .

(3) Teacher Dismissal and Suspension.

(a) The standard of review in teacher dismissal or suspension shall be de novo as defined in §E(3)(b).

(b) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain a disciplinary infraction.

(c) The county board shall have the burden of proof.

(d) The State Board, in its discretion, may modify a penalty.

. . .

In the Employee's appeal of her dismissal by the Board, the ALJ, on behalf of the State Board, exercises independent judgment on the record. COMAR 13A.01.01.03E(3).

The Board seeks to dismiss the Employee from her employment with the Carroll County Public Schools on the grounds of willful neglect of duty, insubordination, and/or misconduct in office. The factual basis for this action is "[the Employee's] failure to call in or report for duty on a regular basis since September 1997 and for [her] failure to submit lesson plans during the period of [her] absence." (Superintendent Exhibit #131)

Initially, the ALJ will address several of the facts as found above.

The Employee testified that she was never informed that two full-time Business Education teacher positions were available at other schools in the Carroll County Public School system for the 1997-1998 school year. The Employee's testimony on this point is self-serving and at odds with more credible evidence in this record. An explanation follows.

William Rooney, Director of Personnel, Carroll County Public Schools, testified during the December 10, 1997 hearing regarding two conversations that he had with William Piercy, Supervisor of Business Education, the Employee's direct supervisor. In the first reported conversation, William Piercy approached William Rooney for the purpose of finding someone to fill two full-time Business Education teacher vacancies available at other schools in the Carroll County Public School system for the 1997-1998 school year. William Rooney advised William Piercy of a contractual obligation to offer the Employee an opportunity to fill one of those positions. Several days later, William Piercy approaches William Rooney on the same topic and the two men have another conversation. In the second conversation, William Piercy indicated to William Rooney that he had talked to the Employee about the vacancies, but she had elected to remain at the Francis Scott Key High School. Given the context and timing of the reported conversations, there appears to have been no motive for William Piercy to deceive William Rooney during the second conversation when he told him that he had provided information to the Employee on the two full-time vacancies. The hearsay from William Piercy, as reported by William Rooney, has indicia of reliability.

At several points in the Employee's testimony, she indicated that she was on friendly terms with, and had a good working relationship with, William Piercy. The duties of William Piercy included trying to find someone to fill two, vacant, full-time Business Education teacher positions for the 1997-1998 school year. The reported friendly nature of the relationship between the Employee and William Piercy makes it unlikely that William Piercy would have failed to inform the Employee of the availability of the two full-time teacher positions that he needed to, and was attempting to, fill.

Gary Dunkleberger, Assistant Superintendent of Instruction, Carroll County Public Schools, testified at the December 10, 1997 hearing regarding two conversations that he, also, had with William Piercy. In both reported conversations, William Piercy advises Gary Dunkleberger that he had informed the Employee of the two full-time Business Education teacher vacancies that were available at other schools in the Carroll County Public School system for the 1997-1998 school year. This hearsay testimony from William Piercy was entered into the record through Gary Dunkleberger at the December 10, 1997 hearing as a result of an agreement between the attorney for the Employee and the attorney for the Superintendent in order to avoid the need of calling William Piercy as a witness. Given the stipulation on its admission, the ALJ sees no reason to doubt this hearsay from William Piercy as reported by Gary Dunkleberger.

The ALJ is persuaded that William Piercy informed the Employee of the availability of two Business Education teacher openings available at other schools in the Carroll County Public School system for the 1997-1998 school year. (Finding of Fact #12)

The Employee testified that for all her duty days from August 22, 1997 through October 31, 1997, she had, in a timely fashion, called the Sub-finder system and reported illness and asked for a substitute or, in a timely fashion, called the Sub-finder system and learned that the administration at the Francis Scott Key High School had already obtained a substitute for her projected absence. In those instances where she, reportedly, learned that the administration at the Francis Scott Key High School had already obtained a substitute for her absence, she was told by the Sub-finder system that there was a "conflict" and she obtained the job number that had been assigned by the Sub-finder to that "conflict." In the instant hearing before the ALJ, and in the hearing before the Board on December 10, 1997, the Employee presented a handwritten list of

"conflict" job numbers that match the job numbers in the Sub-finder system covering the Employee's absences. The Employee testified that she compiled this list of "conflict" job numbers as she made her calls into the Sub-finder system.

The Board, in its written decision dated January 14, 1998, states that on at least six (6) occasions that the Employee failed to timely call into the Sub-finder system, report her absence, and arrange for a substitute. Presumably, the Board makes this determination based on the fact that the administration at the Francis Scott Key High School had arranged for substitutes for the Employee's absence on six (6) to seven (7) occasions in September through October 1997. The Board, in its written decision dated January 14, 1998, discounts the Employee's story that she telephoned the Sub-Finder and learned that the administration at the Francis Scott Key High School had already obtained a substitute for her absence and that she recorded the "conflict" substitute job number at the time of these telephone calls..

At the December 10, 1997 hearing, Sharon Adams testified, on behalf of the Superintendent, on the nature of the Sub-finder system. Sharon Adams testified that the administration at the Francis Scott Key High School initiated calls into the Sub-finder, and, at least twice, canceled the Employee's initiated reports of her absence, in order to keep one particular substitute assigned to the Employee's classes at the Francis Scott Key High School. The testimony of Sharon Adams as to how the Sub-finder system operates was consistent with the testimony of the Employee on obtaining "conflict" substitute job numbers.

The Board uses the Sub-finder, an automated system, to control reported absences and requests for substitute teachers. The documentation from that automated system in this record (Superintendent Exhibit #123) is not at odds with the Employee's testimony that she, in a timely

fashion, called into the Sub-finder system and reported illness and asked for a substitute or, in a timely fashion, called the Sub-finder system and learned that the administration at the Francis Scott Key High School had already obtained a substitute for her absence. In the Board's written decision dated January 14, 1998, its discussion on this point reflects that it incorrectly placed the burden of proof on the Employee to establish that she did call the Sub-finder and reported her absences and requests for substitutes in a timely fashion.

The ALJ finds no conflict in the record with the Employee's story that she, in a timely fashion, telephoned the Sub-finder system and reported illness and asked for a substitute or, in a timely fashion, called the Sub-finder system and learned that the administration at the Francis Scott Key High School had already obtained a substitute for her absence. Her story is supported by her list of "conflict" job numbers that match the job numbers requesting substitutes covering the Employee's absences in the Sub-finder system. On this record, the ALJ has been persuaded to find in favor of the Employee on this fact. (Finding of Fact #28)

The Employee testified in the instant hearing that she informed William Piercy that she was diagnosed as suffering from clinical depression. The Employee, in her testimony at the December 10, 1997 hearing, stated that she told William Piercy in April 1997 that she was suffering from clinical depression. The Employee's testimony on this point is self-serving and at odds with more credible evidence in this record. An explanation follows.

In the instant record, the only evidence from a, presumably, qualified health care professional reflecting a diagnosis of the Employee with "Major Depression" is a letter from Zachery Green, Ph.D, dated November 5, 1997. That letter does not reflect when the reported diagnosis was first reached. The Employee, in her testimony before the Board on December 10,

1997, stated that she first started seeing Dr. Green in the summer of 1997.

It seems inconsistent for the Employee to have, allegedly, informed William Piercy that she was suffering from clinical depression during the Spring of 1997, when she could not have been so diagnosed by a health care professional until the Summer of 1997.

At the December 10, 1997 hearing, Gary Dunkleberger testified regarding a conversation that he had with William Piercy on the same day as that hearing. In this conversation, William Piercy advises Gary Dunkleberger that the Employee never informed him that she had been diagnosed as suffering from clinical depression during the 1996-1997 school year or at any other time. This hearsay testimony from William Piercy was entered into the record through Gary Dunkleberger at the December 10, 1997 hearing as a result of an agreement between the attorney for the Employee and the attorney for the Superintendent in order to avoid the need of calling William Piercy as a witness. Given the stipulation on its admission, the ALJ sees no reason to doubt this hearsay from William Piercy as reported by Gary Dunkleberger.

The ALJ does not believe that the Employee informed William Piercy that she was suffering from clinical depression in April 1997 or at any other time. (Finding of Fact #36)

The Employee, initially, reported illness as the reason for her failing to report for work at the Francis Scott Key High School after August 20, 1997. (Findings of Fact #21 & #24) The Employee now contends that a racist environment prevented her from returning to work at the Francis Scott Key High School after August 20, 1997. The ALJ had the opportunity to observe the Employee while she was testifying and to form an opinion as to her credibility. The ALJ believes that the Employee would voice any statement, no matter how groundless, in an attempt to excuse her failure to report for work at the Francis Scott Key High School after August 20,

1997. No credible evidence supports the Employee's contention that a racist environment prevented her from returning to work at the Francis Scott Key High School after August 20, 1997. Hence, the ALJ has made no findings of fact in support of the Employee's position on a "racist environment."⁷

INSUBORDINATION

Insubordination is a "[r]efusal to obey [the] directions" of an employer/supervisor.

BALLENTINE'S LAW DICTIONARY 641 (3d ed. 1969). Insubordination is defined as the "State of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. [The term] imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer." **BLACK'S LAW DICTIONARY** 801 (6th ed. 1991), citing **Porter v. Pepsi-Cola Bottling Co. of Columbia**, 147 S.E.2d 620, 622, 247 S.C. 370, 371 (1966). See: **Resetar v. State Bd. of Education**, 284 Md. 537, 567, 399 A.2d 225, 241 n.5 (1979). "Insubordination" within causes for discipline of a civil service employee implies a general course of mutinous, disrespectful or contumacious conduct. **Neely v. California State Personnel Bd. App.**, 47 Cal. Rptr. 64, 68, 237 Cal. App.2d 487, 492 (1965).

⁷The Employee would have the ALJ believe that she is the victim of a "racist environment" – staff members, parents, and students with racist attitudes – that prevented her from being "successful as a teacher" at the Francis Scott Key High School. Either the Employee was the victim of such a "racist environment" or those she complains of were the victims of the Employee's skewed and distorted perceptions or the "racist environment" is simply an invention by the Employee (raised as a smoke screen) to hide her own inadequacies. Of those three possibilities, the ALJ believes that the "racist environment" claimed by the Employee is the least likely.

The Board contends that the Employee should be dismissed from employment for insubordination because of her absence from her teaching position at the Francis Scott Key High School since August 1997 without regularly notifying the school system of her absences, or the reasons therefor, and because she failed to submit substitute lesson plans as directed. The negotiated agreement between the Board and its teachers requires teachers to prepare substitute lesson plans for 10 duty days, subject to relaxation by any local school standard. The Employee provided five substitute lesson plans to the Francis Scott Key High School on August 28, 1997. The Employee provided no additional substitute lesson plans after that date. The Board maintains that the Employee's failure to submit substitute lesson plans during the period of her absence from the Francis Scott Key High School at the start of the 1997-1998 school year or after August 28, 1997, was insubordination. The ALJ does not agree. An explanation follows.

In its decision of January 14, 1998, the Board makes reference to the Employee's failure to provide lesson plans for the first three days of school (August 25, 1997, August 26, 1997, and August 27, 1997) as material facts. The Board also states that the five substitute lesson plans provided by the Employee on August 28, 1997, were "to cover the five days from August 25 through August 29." (Board decision, page 8) This implies that the factual predicate supporting the Employee's dismissal was a failure to have substitute lesson plans prepared and on-site at the Francis Scott Key High School on or before Monday, August 25, 1997 (the first school day for students for the 1997-1998 school year).

The Board's focus on the Employee's failure to have substitute lesson plans prepared and on-site at the Francis Scott Key High School before Monday, August 25, 1997 is at odds with the factual predicate for the dismissal of the Employee listed by Brian Lockard, Superintendent of

Schools, Carroll County Public Schools, in his letter of October 17, 1997:

My recommendation is based on your failure to call in or report for duty on a regular basis since September 1997 and for your failure to submit lesson plans during the period of your absence.

The factual predicate for the termination listed in the October 17, 1997 notice of agency action is a "failure to submit lesson plans" during a "period of [the Employee's] absence." The period of absence listed in the notice of agency action is "since September 1997." The failure of the Employee to have substitute lesson plans at the Francis Scott Key High School on or before Monday, August 25, 1997, cannot be the basis for the Employee's termination in the matter *sub judice* insofar as that was not specified in the notice of agency action informing the Employee of her proposed dismissal.⁸

⁸In pertinent part, Md. Code Ann., State Gov't § 10-207 (1995 & Supp. 1997), provides:

(a) *In general.* – An agency shall give reasonable notice of the agency's action.

(b) *Contents of notice.* – The notice shall:

(1) state concisely and simply:

(i) the facts that are asserted, or

(ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;

(2) state the pertinent statutory and regulatory sections under which the agency is taking its action;

(3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;

...

A letter from George Phillips, Principal, Francis Scott Key High School, to the Employee on August 26, 1997, acknowledged that she had telephoned the Sub-finder system to report her absence from work up through and including August 29, 1997. In his letter, Mr. Phillips wrote, "[r]egardless of your date of return to duty . . . please submit a minimum of five days of lesson plans to me on or before the beginning of school on Friday, August 29, 1997." (Employee Exhibit #110) The five substitute lesson plans referred to in this letter could not have been used by a substitute teacher between August 26, 1997, and August 29, 1997, as the instruction provided to the Employee would allow submission of the documentation on the date of Friday, August 29, 1997. On Monday, September 1, 1997, all schools were closed for the Labor Day Holiday. Tuesday, September 2, 1997 was the first day that one of the five lesson plans provided by the Employee to Phillips could have been used by a substitute teacher. This written directive from Phillips to the Employee imposed a requirement to produce five substitute lesson plans for future use at Francis Scott Key High School. In this directive, the Employee is told that five not ten is the number of substitute lesson plans she must submit. A fair reading of the instruction that the Employee was given by Phillips is that the requirement that she prepare substitute lesson plans for 10 duty days had been relaxed to a lower number (five lesson plans) until her return to duty or

(emphasis added)

The scope of the instant administrative adjudication is limited by the notice of agency action, herein. That notice of agency action is the letter from the Superintendent to the Employee dated October 17, 1997. (Finding of Fact #38) That letter provides the Employee with "reasonable notice" of "the facts that are asserted," and "the issues that are involved" under Md. Code Ann., Educ. § 6-202. Md. Code Ann., State Gov't § 10-207(b)(1). Any other factual allegations raised by the Board against the Employee that are alleged to demonstrate willful neglect of duty, insubordination, and/or misconduct in office, not asserted in the October 17, 1997 letter, are outside the scope of the instant hearing insofar as adequate notice of same, as required by Md. Code Ann., State Gov't § 10-207(b)(1), was not provided.

additional instruction was provided.

The Board contends that the Employee was absent from her position at the Francis Scott Key High School and did not notify the school system of her absences. The Board uses the Sub-finder, an automated system, to control reported absences and requests for substitute teachers. No evidence in the record demonstrates that the Employee was directed by any supervisor or staff member of the Carroll County Public Schools to take any other action to report her absences other than calling the Sub-finder system. The ALJ finds as fact that the Employee, in a timely fashion, called the Sub-finder system and reported illness and asked for a substitute or, in a timely fashion, called the Sub-finder system and learned that the administration at the Francis Scott Key High School had already obtained a substitute for her absence.

The evidence relied upon by the Board -- within scope of the instant hearing -- fails to establish a refusal by the Employee to obey some order which a superior officer is entitled to give her or a wilful or intentional disregard by the Employee of such an order. The Board had failed to establish that the Employee was insubordinate.

MISCONDUCT IN OFFICE

The Court of Appeals in **Resetar v. State Bd. of Education**, 284 Md. 537, 399 A.2d 225 (1979) discusses what constitutes "misconduct in office" as a basis for the dismissal of a teacher:

58 C.J.S. *Misconduct* (1948) says of the term used as a noun:

The word 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.* at 818.)

Black's Law Dictionary (4th ed. 1968) says of "misconduct":

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness. *Mandella v. Mariano*, 61 R.I. 163, 200 A. 478, 479. (*Id.* at 1150.)

The same authority refers at 1150 to "misconduct in office" as being "(a)ny unlawful behavior by a public officer in relation to the duties of his office, willful in character." In the context of the unemployment compensation statute in *Emp. Security Board v. LeCates*, 218 Md. 202, 208, 145 A.2d 840, 844 (1958), this Court quoted with approval from 81 C.J.S. *Social Security and Public Welfare* § 162 (1953), relative to "deliberate" and "wilful" misconduct as "(d)eliberate violations or disregard of [399 A.2d 238] standards of behavior which the employer has the right to expect of his employee"

Id. 560-561, 237-238.

In its decision of January 14, 1998, the Board determined that the Employee's failure to telephone the Sub-finder system on a prompt and regular basis and to provide emergency lesson plans constitutes a dereliction of her professional responsibilities and supported the charge of misconduct. As reflected herein, the ALJ has not found that the Employee failed to timely telephone the Sub-finder system or that the Employee failed to provide required substitute lesson plans. The ALJ does not agree with the Board's rationale for its determination of "misconduct in office."

However, the Board in its notice of agency action charged the Employee with a "failure to

. . . report for duty on a regular basis since September 1997 . . ." (Finding of Fact #38)

Clearly, the Employee had a duty to report for work at the Francis Scott Key High School in September and October 1997. Reporting for work on school days is a standard of behavior which the Board has the right to expect of the Employee. A wilful failure to report for work can constitute misconduct in office. The Employee did not report for work after August 20, 1997. The Board now argues that the Employee's failure to report for duty in September and October 1997 constitutes misconduct in office. The ALJ agrees. An explanation follows.

The Employee contends that her failure to report for duty after August 20, 1997 should be excused on account of mental illness. The Employee maintains that she was diagnosed by a qualified health care professional with Major Depression. The Employee further argues that she was advised not to return to work at the Francis Scott Key High School by the same health care professional. The Employee points to a letter from Zachary Green, Ph.D, as proof of her reported illness. (Smith Exhibit #7) This letter is dated December 5, 1997. The letter was sent to a lawyer for the Employee and was presented as an exhibit into evidence at the December 10, 1997 hearing before the Board. This letter is the only evidence in this record that might lend support to the proposition that the Employee's failure to report for work in September and October 1997 was not willful in character.⁹

As an excuse for failing to report for work at the Francis Scott Key High School in September and October 1997, the ALJ finds little probative value in the letter from Zachary Green, Ph.D. The letter is dated December 5, 1997. The letter indicates that the Employee has

⁹The Employee, herself, testified on direct examination that, "depression did not keep [her] from doing her job in Carroll County." (July 31, 1998 transcript, page 265)

been evaluated as having "Major Depression." It is not clear when the Employee was evaluated. There is no specificity as to the onset of the "Major Depression." The letter from Zachary Green advises that the Employee "defer her return" to work at her "current professional position." It is unclear whether the "current professional position" reference in the letter refers to the Employee's teacher position at the Carroll County Public Schools or to the Employee's secretarial position at the Howard County Public Schools. It is unknown if the drafter of the letter, presumably Zachary Green, Ph.D, was aware that the Employee was employed at the Howard County Public Schools from October 6, 1997 to November 7, 1997. It is unknown if the drafter of the letter, presumably Zachary Green, Ph.D, was aware that the Employee had not been working as a teacher at the Francis Scott Key High School since August 20, 1997. The ALJ is not persuaded that this letter is material in the analysis of whether the Employee's failure to report for work in September and October 1997 was wilful in character.

The Employee admitted during the December 10, 1997 hearing before the Board, that she never explained the reason for her absences to Mr. Phillips and Dr. Lockard. The ALJ has determined that the Employee never informed William Piercy that she was diagnosed as suffering from clinical depression. (Finding of Fact #36) The first occasion when the Employee reported to the Carroll County Public Schools that she suffered from a mental disorder was December 10, 1997. The Employee's failure to provide the administration at the Francis Scott Key High School with an explanation in September and October 1997 of the reason for her continuing claim of illness casts doubt on the merit of that alleged claim.

After the school year was already underway, the Employee, on August 27, 1997, sought to be released from her teaching contract by writing a letter to George Phillips asking that she be

released "immediately" from her teaching contract with the Carroll County Public School system. (Superintendent Exhibit #126) Her request that she be released from her teaching contract lends support to the view that her failure to report for work at the Francis Scott Key High School in September and October 1997 was wilful in character and not the result of illness.¹⁰

The record reflects that a teacher with the Carroll County Public Schools has only ten (10) sick days authorized per year. In August, September, and October 1997, the Employee called into the Sub-finder and reported illness for more than ten (10) days. The Employee never requested a leave of absence, and she never submitted any written documentation to George Phillips, William Rooney, or any other employee or staff member of the Carroll County Public Schools, requesting a leave of absence. The ALJ infers that the Employee did not request a leave of absence because she had no intention, from August 27, 1997 until after October 17, 1997, of returning to work for the Carroll County Public Schools. Her failure to request a leave of absence to cover her absences from her teaching duties lends support to the view that her failure to report for work was wilful in character.

According to the employment application that the Employee filed with the Howard County Public Schools, the Employee's reason for leaving work at the Carroll County Public Schools was "to get administrative experience to become an administrator." (Finding of Fact #45)

¹⁰In this letter, the Employee complains that her teaching position had been reduced from a full-time position to a half-time position. In this letter, the Employee writes that the change to a half-time position had imposed a hardship on her family. The ALJ believes that an opportunity to fill one of two vacant full-time teacher positions at other schools in the Carroll County Public School system during the 1997-1998 school year had been offered to the Employee, but she had decided not to move to another school and had elected to stay at the Francis Scott Key High School at a half-time position. The ALJ believes that the Employee's expressed rationale in this letter for a release from her teaching contract with the Carroll County Public School system was disingenuous.

The Employee signed the employment application declaring, "all statements made on [this] application are true" (Board Exhibit #1) This evidence bolsters the view that the Employee's failure to report for work at the Francis Scott Key High School in September and October 1997 was wilful in character and without justification.

On September 18, 1997, the Employee applied for work with the Howard County Public Schools. On October 6, 1997, the Employee was hired by the Howard County Public Schools and started working as a principal's secretary at the Wildlake Middle School. The fact that the Employee did, in fact, work as a principal's secretary with the Howard County Public Schools from October 6, 1997 through November 7, 1997, makes her present claim of a mental disorder that prevented her from working at the Francis Scott Key High School during September and October 1997 appear lame. The fact that the Employee did, in fact, apply for work with the Howard County Public Schools in September makes her reports of illness to the Sub-finder system questionable and tends to add to the view that her failure to report for work with the Carroll County Public Schools was wilful in character.

The Employee's absence from her job at the Francis Scott Key High School for the 1997-1998 school year was contrary to the "Regular Teacher's Contract" she executed on July 26, 1996, in which she agreed that she would not vacate the position to which she was assigned after her first duty day of the school year except in case of emergency, of which the local board of education shall judge. COMAR 13A.07.02.01B(2). No emergency was presented to the Board within meaning of COMAR 13A.07.02.01B(2).

The ALJ has been persuaded that the Employee's failure to report for work in September and October 1997 at the Francis Scott Key High School was a dereliction of her duty and was

willful in character. Resultantly, the Employee is subject to dismissal from her employment with the Carroll County Public Schools for misconduct in office.

WILLFUL NEGLECT OF DUTY

"A wilful absence or abandonment of a position of a teacher without any legal justification does provide sufficient justification for removal for `willful neglect of duty.'" Harlan V. Baltimore Public Schools, 2 MSBE Op. 685, 691 (1982), citing Guido v. Board of Education of Charles County, 1 MSBE OP. 356 (1975).

A willful failure by a teacher to report for work on school days without any legal justification is a willful neglect of duty. The discussion under "misconduct in office," listed above, applies -- even stronger -- in consideration of whether the Employee willfully neglected her duty in failing to report for work at the Francis Scott Key High School in September and October 1997.

The Employee did not report for work after August 20, 1997. The record fails to demonstrate any legal justification for the Employee's failure to report for work. The Employee's failure to report for duty in September and October 1997 constitutes a willful neglect of her duty. Resultantly, the Employee is subject to dismissal from her employment with the Carroll County Public Schools for willfully neglect of her duty.

SANCTION

The Board proposes to dismiss the Employee as a result of misconduct in office and/or willful neglect of duty. The ALJ has been persuaded that the Employee is subject to dismissal from her employment as a result of misconduct in office and/or willful neglect of duty. COMAR 13A.01.01.03E(3)(d) provides, "[t]he State Board, in its discretion, may modify a penalty."

Factors present in this record prompt the ALJ to recommend that the State Board not modify the sanction proposed by the Board for the Employee's misconduct in office and/or willful neglect of duty.

The Employee turned down the opportunity to fill one of two vacant full-time teacher positions at other schools in the Carroll County Public School system during the 1997-1998 school year and elected to stay at the Francis Scott Key High School at a half-time position; thereafter, on August 27, 1997, the Employee requested that she be immediately released from her teaching contract with the Carroll County Public School system. On September 18, 1997, the Employee applied for work with the Howard County Public School system. These actions are inconsistent with the Employee remaining an employee of the Carroll County Public School system.

Students' educational programs suffer without an assigned regular teacher who is able to develop and teach lesson plans on a long term basis. The Employee's conduct at the outset of the 1997-1998 school year makes her a poor aspirant for teaching students within the Carroll County Public Schools as an assigned regular teacher.

The Employee's conduct clearly demonstrates a cavalier attitude towards, and a desertion of, her employment with the Carroll County Public Schools. What the Employee's conduct reflects is what she should have; dismissal from her employment with the Carroll County Public

Schools is the appropriate sanction to impose.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes, as a matter of law, that the Employee is subject to dismissal from her employment as a teacher with the Carroll County Public School system for misconduct in office and/or willful neglect of duty in accordance with Md. Code Ann., Educ. § 6-202(a)(1) (1992 & Supp. 1997).

Dismissal of the Employee by the Board is in accordance with existing law and is warranted under the facts of this case. Md. Code Ann., Educ. § 6-202(a) (Supp. 1997); COMAR 13A.01.01.03E.

Based on the foregoing Findings of Fact and Discussion, the ALJ concludes, as a matter of law, that the Employee may not be dismissed from her employment on grounds of insubordination. Md. Code Ann., Educ. § 6-202(a)(1) (1992 & Supp. 1997).

PROPOSED ORDER

It is proposed that the decision of the Board of Education of Carroll County dismissing the Employee from her employment with the Carroll County Public School system for misconduct in office and/or willful neglect of duty be **UPHELD**.

DATE: October 27, 1998

Stephen Nichols
Administrative Law Judge