RONALD WALSH,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 00-54

OPINION

In this appeal, the former Chief Information Technology Officer for Montgomery County Public Schools ("MCPS") contests the superintendent's decision terminating his employment. Appellant essentially argues that: (1) his termination is governed by the requirements and procedures set forth in Section 6-202 of the Education Article, Annotated Code of Maryland; and (2) the superintendent's decision was arbitrary and unreasonable. The local board has submitted a Motion for Summary Affirmance maintaining that the termination decision was not arbitrary, unreasonable or illegal and that proper procedures were followed. Appellant has submitted an opposition to the local board's motion.

FACTUAL BACKGROUND

Appellant began his employment with MCPS on April 1, 1998, as the Chief Information Technology Officer ("CITO").[1] Although Appellant's predecessor had the title Associate Superintendent for Global Access Technology, the CITO position had essentially the same duties and responsibilities as the predecessor position.[2] The CITO position was at the same level as four associate superintendents; Appellant earned the same salary as the four associate superintendents; and he served on a number of high level teams and committees with the associate superintendents; however, Appellant was not a certificated employee.

In his capacity as CITO, Appellant had overall responsibility for the implementation and operation of a new Student Information System ("SIS"), which was to store and retrieve information about students, including grades, course schedules, enrollment, and attendance. SIS was to be ready and operational for the start of the 1999-2000 school year and was to replace the

[1]Before taking on this position, Appellant was on loan from Lockheed Martin and had been doing consulting work for MCPS since September, 1997.

[2]Appellant claims that he recommended the change in title to make it similar to those common in the industry.

then existing legacy computer system which was not Y2K compliant.[3] A contractor named Marconi was awarded the original contract for work on SIS. Marconi worked with a subcontractor named Administrative Assistants Ltd. Appellant had nothing to do with the decision to replace the old system with SIS or with the selection of the contractor for the project. Both before, during, and after Appellant's employment as CITO, SIS experienced delays and problems in adapting the computer system to the school system's operations.

On August 2, 1999, SIS went operational; however there were various problems with the system. Despite some attempts to resolve the problems, when school opened for the 1999-2000 school year on September 1, 1999, SIS experienced further problems and "crashed." Among other things, registrars were unable to access student course schedules and enroll new students; teachers were unable to take attendance; and hundreds of students sat in cafeterias around the county because their class schedules could not be retrieved from the system.

As described by Hearing Officer Sickles:

> The Appellant identified five major (and several minor) problems on September 1: user response time slowed significantly once 600 or more users were using the system simultaneously; several necessary printed reports (e.g., class rosters) had not been delivered; users could not contact the Help Desk because of the overwhelming volume and complexity of calls; some users lacked the proper security authorization to log on to the system; and some users had unrealistic expectations of what SIS was supposed to do.
>
> Marconi promised to further tune the software that night and assured the Appellant that SIS would work well the next day. In addition, under the Appellant's direction, OGAT [Office of Global Access Technology] provided printed class rosters to the schools; reorganized the Help Desk to enhance its ability to respond to questions; began adjusting security authorizations; and advised users to be prepared to use paper and pencil to write student schedules and take attendance.
>
> On the second day of school, there was little or no improvement. Late that afternoon, at a meeting of the Executive Staff, Dr. Weast, the new Superintendent, had the Appellant call Marconi and demand that their executives and technical people come to MCPS immediately and fix the problem. At Dr. Weast's suggestion, the Appellant agreed to give Marconi full access to the

[3]In addition to SIS, Appellant had other job responsibilities and was responsible for other Y2K projects, including updating and replacing computer programs throughout MCPS.

> MCPS computer system and to hold Marconi fully responsible for fixing the problem by the start of the school day on Tuesday, September 7. (Monday, September 6, was Labor Day and a school holiday.) The Appellant and OGAT would simply support Marconi's efforts.
>
> That night, Marconi enhanced the capacity of the computer hardware running SIS. On Friday, the third day of school, the system was somewhat improved – it took even more simultaneous users before the system failed – but it still performed unacceptably. The Appellant determined that there were still two main problems: the system failed once 600-800 users were logged on, and the users had not been adequately trained. 5/12/00 Report, pp. 6-7.

Based on the events that had occurred with the implementation of SIS, the Chief Operating Officer and the Deputy Superintendent believed that Appellant was managing the SIS project poorly. They expressed concern that Appellant failed to comprehend the urgency of the SIS problems and that there was a lack of contingency plans. On September 4, 1999, Appellant was advised that he was being placed on administrative leave with pay pending his termination effective October 8, 1999. The Superintendent's letter stated in part:

> Following discussions with Dr. Seleznow and Mr. Bowers and my observations during the past month, I have become convinced that the Office of Global Access Technology (OGAT) needs a change of leadership. I have, therefore, decided to terminate your employment with Montgomery County Public Schools as Chief Information Technology Officer, effective October 8, 1999.
>
> . . .
>
> MCPS is at a critical stage in our development of key information and instructional technology systems and it is important to the administration of the school system that the right people be in the right positions. The qualities you bring to the position no longer match the needs. I regret this decision had to be made.

Appellant appealed the decision to the local board which referred the matter to a hearing examiner for a determination of whether § 6-202 or § 4-205 of the Education Article, Annotated Code of Maryland, applied to the case, and whether the dismissal of Appellant from his position was appropriate. Hearing Examiner Joseph A. Sickles issued an interim decision holding that § 4-205 was the governing provision for Appellant's termination and appeal. Thereafter, Hearing

Examiner Sickles conducted a hearing on the merits of the case, lasting several days.[4] A comprehensive 32 page decision containing Hearing Officer Sickle's findings and recommendations was issued May 12, 2000, with the recommendation that the local board uphold the dismissal of Appellant from employment with MCPS.

The local board considered the findings and recommendations of Hearing Officer Sickles and heard oral arguments from the parties. However, because the local board was unable, by a majority vote of its members, to either affirm or reverse the decision of the superintendent, the superintendent's termination decision remained unchanged. (Four board members voted to affirm for the reasons set forth in the findings and recommendations submitted by the hearing officer; 1 board member voted to reverse, finding that the appeal was governed by § 6-202 and that the termination decision was arbitrary and capricious; one board member voted to reverse, finding that the appeal was governed by § 6-202, and to remand to the Hearing Examiner for proceedings governed by the procedures and burdens of § 6-202; 2 members did not participate.)

ANALYSIS

Preliminary Issues

As a threshold issue, Appellant argues that his appeal is governed by the procedures set forth in § 6-202 of the Education Article which requires cause for suspension or dismissal of a certificated employee and affords the opportunity for a full evidentiary hearing prior to removal of the individual. Appellant maintains that § 6-202 governs because he is the equivalent of a professional assistant.

In accordance with § 6-201(e) of the Education Article:

> [a]n individual may not be appointed as a professional assistant or to any position listed in subsection (d) of this section unless he holds the appropriate certificate from the State Superintendent issued in accordance with the rules and regulations of the State Board.

As demonstrated by the record in this case, Appellant did not hold any certification nor was he eligible for certification. Moreover, the job description for the CITO position specifically stated that no certificate or license was required for the position. Based on these facts, we find that Appellant was not a professional assistant as contemplated by § 6-202. We therefore concur with the analysis of Hearing Officer Sickles who stated:

> The Appellant argues that all employees of the BoE must be either (1) professional personnel, or (2) clerical and nonprofessional

[4]The cumulative transcript in this case consists of approximately 600 pages.

> personnel (§6-201 (b) and (c)), and he clearly does not fall into the second category. However, both parties admit that this law was written years ago, when hiring practices were different and boards of education routinely appointed only certificated teachers to higher level positions.
>
> Times and practices may have changed, but a rational interpretation of the law does not limit classes of employees to those two categories alone. The law is simply silent about other possible classes of employees.
>
> But, the law is clear that the appellate procedures of Section 6-202 apply only to the category of employees identified therein as 'professional personnel.' The law is equally clear that an individual must be certificated to be included in this category.
>
> The Appellant was not certificated. Therefore, the Superintendent had the authority to dismiss Appellant directly.
>
> The Appellant is not left without recourse. Although he may not appeal his termination under the provisions of Section 6-202, he is entitled to appeal his termination under the provisions of Section 4-205 of the *Education Article*. (emphasis in original).

Additionally, because Appellant was not in the category of professional personnel, local board administrative regulation GJC-RA - Suspension and Termination of Professional Personnel was not applicable. We do not believe that the local board intended a definition of professional personnel in its regulations and policies that is different from that contemplated by the applicable provisions of the Education Article. Rather, we believe administrative regulation GJC-RA established the local procedures to carry out the requirements of § 6-202. Moreover, local board policy BLB - Rules of Procedure in Appeals and Hearings does not require the application of § 6-202 to noncertificated professionals.

Merits of Appeal

In *Livers v. Charles County Board of Education*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied*, 336 Md. 594 (1994), the State Board held that a noncertificated support employee is entitled to administrative review of a termination pursuant to § 4-205(c)(4) of the Education Article. The standard of review that the State Board applies to such a termination is that the local board's decision is prima facie correct and the State Board will not substitute its judgment for that of the local board unless its decision is arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.01.03E(1). This same standard applies to termination of noncertificated professional employees.

A review of the record in this case discloses that Appellant did not adequately prepare for the possibility of an SIS failure that would impact a school system with an enrollment of 130,000 students. We find that Hearing Examiner Sickles thoroughly analyzed the merits of this case, stating in relevant part:

> The crux of the matter, in my opinion, is the lack of contingency plans. Especially in the absence of viable stress testing, contingencies should have been made for potential problems with the system.
>
> The Appellant claimed he had contingency plans in place, but the record does not support this claim. For example, the Appellant contended that he had decided to buy two servers for SIS (rather than a single server, as recommended by Mr. Coldren), and thereby MCPS was able to cannibalize the second server to enhance the capacity of the main server. However, the Appellant also testified that the second server was purchased to serve as a system testing platform. That latter explanation for the second server makes more sense. (Surely, it would have made more economic sense to buy a single server with more capacity at the outset if the Appellant suspected SIS might need additional capacity.)
>
> Ms. Dwyer and Mr. Coldren both testified that the OGAT staff had no detailed contingency plans, no predetermined procedure of who would be responsible and what would be done in the event of problems. Moreover, the events of the first three days of school confirm that OGAT had no plans in place in the event of a system failure, despite the Appellant's assertions to the contrary. Hundreds of secondary school students were simply left to congregate in cafeterias because the schools were unable to enroll and withdraw them from classes. The Appellant had no back-up procedure to handle the SIS functions when SIS crashed.
>
> The Appellant would have us believe that he did all of the contingency planning that was prudent and he bears no responsibility whatsoever for the failure of SIS and the resulting chaos in the first three days of school. . . . However, it is clear that as head of OGAT, the Appellant should have seen to it that contingency plans existed – whether he personally developed them or delegated that responsibility to others.

Hearing Examiner report at pages 27-28. Finding the record replete with testimony concerning Appellant's lack of contingency planning for problems encountered with SIS, we concur with the

Hearing Examiner. *See* Tr. at pp. 452-453, 459 (3/15/00); pp. 152, 158, 160 (3/3/00); pp. 396 (3/13/00). Moreover, once the crisis occurred, Appellant did not respond adequately to the situation. As the local board explains in its memorandum in support of summary affirmance:

> Appellant had overall responsibility for SIS. SIS failed miserably and caused hundreds of students to miss instructional time. It caused administrative chaos at schools throughout the county as school opened for the 1999-2000 year. Perhaps a large part of that failure was due to the contractor, Marconi, and/or the subcontractor, AAL, but there were definite warning signs that either were ignored by Appellant or were not taken seriously enough. The "dry run" in August showed the same weaknesses that one month later brought the entire system down; yet, Appellant had no contingency plan or procedure in place. Ultimately the functioning of SIS and the implementation of that system, including adequate back up plans, was Appellant's responsibility. It is not unreasonable to hold the person in charge responsible.

CONCLUSION

We adopt the Hearing Examiner's findings and recommendations, a copy of which is attached as Exhibit 1. For the reasons stated therein we do not find that the termination of Appellant's employment was arbitrary, unreasonable or illegal. We therefore affirm the decision of the Board of Education of Montgomery County.

Philip S. Benzil
President

Marilyn D. Maultsby
Vice President

Raymond V. Bartlett

JoAnn T. Bell

Reginald L. Dunn

George W. Fisher, Sr.

Walter S. Levin, Esquire

Judith A. McHale

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

December 5, 2000

EXHIBIT 1

BOARD OF EDUCATION OF MONTGOMERY COUNTY

In the Matter of an Appeal to the Board of Education	BoE Appeal No. 1999-35
Ronald H. Walsh	

FINDINGS AND RECOMMENDATIONS

JOSEPH A. SICKLES, ESQ.
Hearing Examiner

APPEARANCES:

For the Superintendent: Judith Bresler, Esq.

For the Appellant: Ronald H. Walsh
(appeared without representation)

STATEMENT OF THE CASE

On September 7, 1999, Mr. Ronald H. Walsh (Appellant) was

dismissed from his position as Chief Information Technology Officer for the Montgomery County Public Schools (MCPS) by Superintendent Jerry D. Weast. The Appellant was advised that he would remain an employee of MCPS until October 8, 1999, but that he was not to return to work, effective immediately.

The Appellant notified the Board of Education (BoE) on September 15, 1999, that he wished to appeal his termination by the Superintendent.

By letter of November 12, 1999, the undersigned was appointed Hearing Examiner in this case and was advised by the BoE that a threshold issue in dispute was "whether Section 4-205 or Section 6-202 of the *Education Article* is controlling of this appeal." In addition, I was to make recommendation of whether the dismissal of the Appellant was appropriate.

At a preliminary meeting on Monday, December 6, 1999, the parties presented their initial positions on whether the procedures of Section 4-205 or Section 6-202 should apply in the termination of the Appellant. At a subsequent hearing on Monday, December 20, 1999, the parties presented legal argument and evidence on the issue of which section of the *Education Article* controls. At the December 20, 1999, hearing, the Appellant notified the Hearing Examiner that he was no longer represented by counsel, and that he was appearing on his own behalf. He was advised of his right to have counsel and he assured the Hearing Examiner that he understood

that right.[1]

Both parties were present at the hearing and afforded full opportunity to present evidence, testimony, and argument. An 81-page combined transcript of the preliminary meeting and the hearing was compiled, the final portion of which the Hearing Examiner received from the BoE on January 10, 2000. Neither party presented posthearing briefs.

The undersigned Hearing Examiner issued an Interim Determination on January 17, 2000, that the appellate procedures of Section 4-205 were applicable in this case, and proceeded to conduct a hearing on the merits of the dismissal. A copy of that Interim Determination is attached hereto and made a part hereof.

The hearing on the merits was held on February 3, March 3, March 13, March 15, and March 23, 2000, at the central offices of MCPS in Rockville, Maryland. On April 18, 2000, the parties met to present oral closing arguments. Both parties were present at all sessions of the hearing and afforded full opportunity to present evidence, testimony, and argument. A verbatim transcript was compiled, the final portion of which the Hearing Examiner received from the BoE on May 3, 2000. Neither party presented a written posthearing brief.

STATEMENT OF ISSUE

[1]At the preliminary meeting of December 6, 1999, Mr. Walsh was represented by counsel. He subsequently elected to appear pro se.

Was the dismissal of the Appellant from employment with MCPS appropriate?

STATEMENT OF FACTS

The Appellant was hired by the BoE on April 1, 1998, to serve as the Chief Information Technology Officer (CITO) for MCPS. He had been consulting for MCPS, on loan from Lockheed Martin, since September 1997, up until his appointment as CITO. His immediate supervisor (initially) was Larry Bowers, who was then the Acting Deputy Superintendent of MCPS, and subsequently Dr. Stephen Seleznow, Deputy Superintendent.

As CITO, the Appellant headed the Office of Global Access Technology (OGAT), which was responsible for (among other things) all of the computer systems and networks used by the schools and the MCPS central office. He was a member of the Executive Staff of MCPS. On April 27, 1999, Mr. Bowers completed the Appellant's first annual evaluation, in which he was rated "effective" (the highest rating available) in every performance criterion. Mr. Bowers recommended that the Appellant be continued in his assignment.

In the summer of 1999, Dr. Vance retired as Superintendent of MCPS, and Dr. Jerry Weast was hired to replace him. Dr. Weast began work for MCPS on August 2, 1999.

As head of OGAT, the Appellant was responsible for some 24 Y2K projects — updating and replacing computer programs throughout MCPS

to make their dating systems compliant with the year 2000 — as well as implementing new programs. One of the major new computer programs OGAT was working on was the Student Information System (SIS), a program to store and retrieve a full complement of student data, including grades, schedules, attendance, and enrollment information.

Before the Appellant was employed by MCPS — in fact, even before the Appellant worked as a consultant for MCPS — the decision was made by MCPS to replace the 25-year-old existing computer system (the legacy system) with an entirely new, Y2K-compliant program. A proposal was let for public bids, and a contract for SIS was awarded in August 1997 to Marconi, the prime contractor, working with Administrative Assistants Ltd. (AAL), the subcontractor. It was also decided that there was sufficient lead time to install SIS for the 1999-2000 school year, and there was no need to update the legacy system for Y2K.[2]

SIS was a new software program; at the time, it was operational in only one other school system, in Canada. MCPS would be the first U.S. school system to use it.

There were problems and delays with SIS from the beginning, due, at least in part, to the fact that MCPS wanted a number of customizations to the program. Marconi regularly missed deadlines

[2]The record is unclear as to who made these decisions. It is clear, however, that the Appellant had nothing to do with the selection of a contractor or the decision not to update the legacy system.

for delivery of portions of the program. SIS was designed to be used in the schools, and registrars and teachers had to be trained. SIS training for school-based personnel was scheduled for the summer of 1999, and training had to be done on an early version of the program, because Marconi failed to deliver the most recent version in time for the training.

On August 2, 1999, SIS went "live" in the schools, as the registrars and principals returned to work and began using the program to enroll and withdraw students and assign them to classes for the upcoming school year. Response time was slow. Some users were denied access to the computer program because passwords and security clearances had been misassigned by OGAT staff. The Help Desk was overwhelmed with questions and calls for assistance.

Over the next month, OGAT and Marconi worked to "tune" the program and correct problems, in preparation for the opening of school on Wednesday, September 1, 1999.[3]

Opening day of school was a disaster for SIS. Although the system seemed to work acceptably at the start of the day, as soon as more users logged on, SIS "crashed." Registrars were unable to enroll new students, make changes to students' course schedules, or print reports of these activities. Data that registrars entered could not be saved. Teachers were unable to use the system to take

[3]"Tuning" is a process of adjusting the programming to make it work more efficiently, using less of the computer hardware's resources.

attendance. In the secondary schools, hundreds of students were left to sit in cafeterias because their course schedules could not be retrieved from SIS.

The Appellant identified five major (and several minor) problems on September 1: user response time slowed significantly once 600 or more users were using the system simultaneously; several necessary printed reports (e.g., class rosters) had not been delivered; users could not contact the Help Desk because of the overwhelming volume and complexity of calls; some users lacked the proper security authorization to log on to the system; and some users had unrealistic expectations of what SIS was supposed to do.

Marconi promised to further tune the software that night and assured the Appellant that SIS would work well the next day. In addition, under the Appellant's direction, OGAT provided printed class rosters to the schools; reorganized the Help Desk to enhance its ability to respond to questions; began adjusting security authorizations; and advised users to be prepared to use paper and pencil to write student schedules and take attendance.

On the second day of school, there was little or no improvement. Late that afternoon, at a meeting of the Executive Staff, Dr. Weast had the Appellant call Marconi and demand that their executives and technical people come to MCPS immediately and fix the problem. At Dr. Weast's suggestion, the Appellant agreed to give Marconi full access to the MCPS computer system and to hold

Marconi fully responsible for fixing the problem by the start of the school day on Tuesday, September 7. (Monday, September 6, was Labor Day and a school holiday.) The Appellant and OGAT would simply support Marconi's efforts.

That night, Marconi enhanced the capacity of the computer hardware running SIS. On Friday, the third day of school, the system was somewhat improved — it took even more simultaneous users before the system failed — but it still performed unacceptably. The Appellant determined that there were still two main problems: the system failed once 600-800 users were logged on, and the users had not been adequately trained.

On Saturday, September 4, Dr. Weast met with several of his executives, including the Appellant, and mentioned that he wanted to change the leadership of OGAT. The Appellant asked Mr. Bowers (then the Chief Operating Officer of MCPS) later that day exactly what Dr. Weast meant, and Mr. Bowers told him that he was being dismissed. Mr. Bowers advised the Appellant not to return to work that weekend, although the OGAT staff would be working with Marconi over the holiday. On Monday evening, September 6, Mr. Bowers called the Appellant at home and told him not to return to work at all, that he would be terminated effective October 8, and that he would be on paid administrative leave until that date.

On Monday, September 6, 1999, the Superintendent advised the members of the Board by memo that he had dismissed the Appellant

because of his "lack of leadership . . . in anticipating the problems of SIS and in managing our resources to deal with the problems effectively."

On Tuesday, September 7, 1999, a letter from Dr. Weast was hand delivered to the Appellant. It stated, in part:

> Following discussions with Dr. Seleznow and Mr. Bowers and my observations during the past month, I have become convinced that the Office of Global Access Technology (OGAT) needs a change of leadership. I have, therefore, decided to terminate your employment with Montgomery County Public Schools as Chief Information Technology Officer, effective October 8, 1999.
>
> . . .
>
> MCPS is at a critical stage in our development of key information and instructional technology systems and it is important to the administration of the school system that the right people be in the right positions. The qualities you bring to the position no longer match the needs. I regret this decision had to be made.

CONTENTIONS OF THE PARTIES

Superintendent's Contentions

As a member of the Executive Staff, the Appellant was essentially an at-will employee. While the *Education Article* permits review by the Board of the Superintendent's decision, the only restriction on the Superintendent's action to remove an employee is that the dismissal not be "arbitrary and capricious" or "discriminatory." The appropriate test for review is whether the action was reasonable, not whether it was right or fair.

Despite the Appellant's assertions that others

were responsible for the problems, as CITO he was ultimately responsible for SIS. There was a massive failure of the system. The testimony and evidence show that the problems could have been anticipated, yet the Appellant had no contingency plans in place to deal with a potential failure.

The Superintendent's decision to remove the Appellant and put in his place someone better able to lead and manage OGAT was a reasonable decision under the circumstances.

Appellant's Contentions

The Appellant was wrongfully terminated and was made the scapegoat for the failure of a system that was inherently flawed. Even now, more than six months later, SIS is not working properly; in fact, MCPS has decided to take SIS off-line at the end of the school year, update the legacy system for Y2K, and install the legacy system for the next school year.[4]

SIS was only a small part of the Appellant's responsibilities for MCPS, and it was the only reason given for his dismissal. The Superintendent ignored his satisfactory performance evaluation and his accomplishments in all other areas of his work.

The Superintendent's decision to dismiss the Appellant was made at the suggestion of Dr. Seleznow. Dr. Seleznow had been Deputy Superintendent for only seven weeks at the time, and he impulsively "pulled the trigger." He had given the Appellant no warning of problems with his performance and no opportunity to resolve his concerns. The Appellant had never been advised that he was an at-will employee, that he was not entitled to the same protections as "professional employees," and that he could be dismissed without warning.

[4]The conclusion that SIS was not viable was made well after the events of this case and obviously was not a part of Dr. Weast's decision.

> There was a conspiracy to reorganize the management team at MCPS — the team Dr. Weast inherited from the previous Superintendent — and the Appellant was a victim of that conspiracy.

DISCUSSION

The Superintendent argues that the Appellant was an at-will employee, entitled only to protection from an arbitrary and capricious dismissal. The Appellant believes he is entitled to somewhat more protection because (1) he was never told that he was an at-will employee; (2) MCPS's unionized employees may not be discharged in the absence of just cause; and (3) under Section 6-202 of the *Education Article*, professional personnel may only be dismissed for immorality, misconduct in office, insubordination, incompetence, or willful neglect of duty, none of which were cited in his letter of dismissal.

The Appellant's arguments are unpersuasive. While he may never have been directly told that he was an at-will employee, likewise he was never told that he was entitled to any special job protection. The Appellant acknowledges that his position was not covered by any union contract, so it is inexplicable that he believes the benefits of the union contracts somehow inure to him.[5]

[5]The Appellant seems to believe that only a very small number of MCPS employees are not covered by one of the three union contracts and that it would be illogical if not unfair that the job protections contained in those contracts were not universal. Dr. Elizabeth Arons, the Director of Human Resources for MCPS, testified that roughly 60 to 70 employees are exempt from any of the three union contracts and are, therefore, not entitled to the job protections therein.

The provisions of Section 6-202 apply to *professional assistants,* who must be certificated under Section 6-201(e). The Appellant is not certificated and is not a professional assistant as defined in the *Education Article*. (See the Interim Determination in this matter, issued on January 17, 2000.)

Therefore, I conclude that as a member of the Executive Staff, the Appellant was entitled to job protection only to the extent that the Superintendent may not act in an illegal, unreasonable, arbitrary, or capricious way. According to the Court of Special Appeals of Maryland in *Hurl v. Board of Education of Howard County* (107 Md. App. 286, 1995) the appropriate standard of review is whether there is substantial evidence to support the action or if a reasoning mind could reasonably reach the same conclusion.

There is no dispute that the SIS system failed miserably on the opening days of school. The issue in dispute is whether it was reasonable for the Superintendent to hold the Appellant responsible for that failure, or if the Superintendent (or others) had some ulterior motive in blaming the SIS failure on the Appellant as an excuse to remove him from his position.

There appear to have been several factors contributing to the chaos resulting from the abysmal performance of SIS during the first three days of school:

1. The SIS program itself apparently was inadequate. MCPS has recently come to that conclusion, having decided to abandon the

program for the coming school year in hopes of bringing it back on-line for the 2001-2002 school year.[6] However, there is no evidence in the record that MCPS knew that the program was unworkable in September 1999.

2. Testing of the SIS program was inadequate. There obviously was insufficient testing of the software itself; all of the involved witnesses testified that there were "bugs" and "glitches" with each version of the program that Marconi delivered. Marconi and AAL were responsible for this testing. In addition, no stress or capacity testing was done, to determine if the computer hardware was adequate to run the program under real-time conditions and actual levels of usage. There was some disagreement whether the contractors or MCPS was responsible for stress testing.

3. There was a lack of reasonable and/or effective contingency plans in place to support the schools on the opening days in the event this brand new program failed. (MCPS contended there were *no* concrete contingency plans; the Appellant claimed there were adequate plans for the problems that could reasonably be anticipated.)

4. The users in the schools were not adequately trained in the new SIS technology.

Summary of the Testimony

[6]Information that MCPS has decided to pull the plug on SIS for the next school year comes from newspaper articles published in April 2000, after all the evidence and testimony had been received in the hearing, but before the parties presented their closing arguments.

As CITO and head of OGAT, the Appellant was the highest level manager with technical responsibility for SIS. Reporting to him in descending order of the management hierarchy were Leland Coldren, the Director of the Application Development and Implementation Team; Ruth Orland, Supervisor of the Student Development Team;[7] and Karen Dwyer, SIS Project Manager.

Ms. Dwyer spent almost all of her time on the SIS project. She was hired for OGAT in mid-August 1997, after the contract had been awarded to Marconi and after the decision had been made not to make the legacy system Y2K-compliant. Although Ms. Dwyer had oversight responsibility for the SIS contract, she testified that she did not always have the power or authority to execute that responsibility.

In hindsight, Ms. Dwyer said, there was insufficient lead time to bring up SIS before the Y2K problem would emerge on December 31, 1999. When Ms. Dwyer started with MCPS, she assumed there was ample time. However, throughout the contract, Marconi failed to meet its timelines. A mid-contract change in Marconi management (at the Appellant's urging) improved things somewhat, but problems with the program persisted.

Originally, AAL, the subcontractor, was supposed to test the software. Sometime before August 1999, Marconi began doing additional testing. However, according to Ms. Dwyer, neither

[7]Ms. Orland did not testify at the hearing.

Marconi nor AAL was responsible for stress testing; MCPS was.

OGAT did no quantitative simulation modeling to predict the kinds and quantities of usage of the system — the cost was considered prohibitive and other priorities prevailed. According to Ms. Dwyer, OGAT had no detailed back-up or contingency plans in case of a system failure; the Appellant had directed that they would address any problems as they occurred. Ms. Dwyer explained that there are common problems with any new program and common solutions to those problems that are applied industrywide.

Despite Marconi's assurances that SIS was ready for operation on September 1, 1999, the system failed as more users logged on and system contention increased. The primary problem the first three days of school, according to Ms. Dwyer, was inadequate hardware for the program. More capacity was added to the hardware, and Marconi did some software tuning. Therefore, by the end of the first three days, SIS performance had improved somewhat, but not to a satisfactory level. Since that time, Ms. Dwyer testified, SIS has been performing better; but MCPS still has work-arounds for some functions and still expects more from the program.

Leland Coldren, the Director of the Application Development and Implementation Team, spent about 40 percent of his time on the SIS project, and 100 percent of his time on it in August 1999. He participated in the selection and award of the SIS contract to Marconi in 1997 and the decision not to update the legacy system

for Y2K. Mr. Coldren believed that there was ample time to bring up SIS for the 1999-2000 school year, because he had not anticipated a lot of customization of the program. In hindsight, he concurred, there was not enough lead time to complete the project.

Mr. Coldren had requested on more than one occasion that MCPS conduct stress tests of SIS, but the Appellant insisted there was neither time nor money for such testing.

According to Mr. Coldren, the SIS program performed acceptably on September 1, 1999; the problem was strictly inadequate hardware for the number of simultaneous users. OGAT had done no simulations or estimate of concurrent users prior to the start of school to assure the adequacy of the hardware.

Mr. Coldren admitted that there were no contingency plans in place to deal with a possible SIS failure. He conceded that he would have been responsible for developing contingency plans for a software failure, but not for a hardware failure. According to Mr. Coldren, Ms. Dwyer would not have been responsible for contingency planning at all. The Appellant had the primary responsibility for contingency planning, Mr. Coldren stated.

The SIS program still is not operating properly and MCPS still has to use work-arounds, Mr. Coldren indicated.

Both Ms. Dwyer and Mr. Coldren stated that the Appellant took the SIS problems seriously during the first three days of school and appreciated the urgency of the situation.

Mr. Larry Bowers served as Acting Deputy Superintendent from October 1, 1998, through July 13, 1999. The Appellant reported to him during this period. On April 27, 1999, he completed a performance evaluation of the Appellant, rating him "effective" in every category. The evaluation made no specific mention of the SIS project, but referred to the Appellant's work on Y2K projects and stated that he had "provided the leadership for the organization to address these challenges." The suggestions for improved performance were related to better communications, especially with school-based personnel.

In mid-July 1999, Mr. Bowers was appointed Chief Operating Officer of MCPS. He testified that the Appellant indicated to the Executive Staff that SIS would be ready for use on August 2, when the registrars and principals returned to school, with only a few problems, but to expect slow computer response time. In mid-August, the Appellant reported that on August 2 and 3, "response time was so poor that the system was effectively unusable," but that adjustments had been made.

On opening day, September 1, members of the Executive Staff visited schools throughout the county, as they did on opening day every year. At the Executive Staff meeting at the end of the day, Mr. Bowers testified, everyone reported major problems with SIS. Users were unable to enroll or withdraw students, unable to schedule students' classes, unable to use SIS to take attendance,

and unable to print necessary reports and schedules. The Help Desk was so overwhelmed with inquiries that users were unable to get through for assistance. According to Mr. Bowers, the Appellant did not seem to appreciate the magnitude of the problem.

On the second day of school, SIS problems persisted and, according to at least some people, were even worse. At the Executive Staff meeting at the end of the second day, the Appellant presented some suggestions for working around the problems; but, according to Mr. Bowers, the Appellant did not reflect a sense of urgency or an understanding of the magnitude of the problems. It fell to the Executive Staff to devise an "action plan," and it was the Superintendent's idea to call in Marconi's top management and **demand** that they fix the problems immediately.

Also on September 2, Mr. Bowers presented a proposed management reorganization plan to the Executive Staff at a meeting in the early afternoon. Under that plan, OGAT would be divided up among three departments and the position of CITO would be eliminated, to be replaced by a lower-level position responsible for technology in the school system.[8] The following morning, the Appellant held a 30-minute meeting with his own staff to discuss the proposed reorganization. Mr. Bowers believed that the fact that the Appellant would discuss the reorganization with his staff

[8]CITO was the only Executive Staff position to be eliminated under the proposed reorganization.

in the midst of the SIS crisis demonstrated that he was not sufficiently aware of the magnitude of the problem at hand and lacked the necessary leadership to see MCPS through the problem. Mr. Bowers further testified that many of the SIS problems should have been anticipated, and in fact were identified by Marconi in August; yet the Appellant had no contingency plans in place.

On Saturday, September 4, a number of executives were at MCPS offices. Mr. Bowers told the Superintendent of his concerns that the Appellant did not comprehend the urgency of the SIS problems and had no contingency plans. Later that day, Mr. Bowers conveyed a message from the Superintendent to the Appellant: he was being terminated and he should not return to work over the Labor Day holiday. On Monday, September 6, Mr. Bowers called the Appellant at home and told him not to return to work at all, that he would be on administrative leave until October 8.

Mr. Bowers testified that since the Appellant left MCPS, SIS still is not operating satisfactorily. It cannot be used for taking attendance, and there are problems with report cards.

Dr. Steven Seleznow was appointed the Deputy Superintendent for Education in July 1999 and was the Appellant's immediate supervisor from that time. He testified that SIS was "absolutely critical" to the functioning of the schools, that it connected the schools and the central office. He met with the Appellant regarding SIS frequently; and the Appellant gave him the impression

that everything with SIS was under control, despite Marconi's late deliveries of each release (or version) of the software, and that there were only a few minor glitches. However, after the problems associated with the August 2 introduction of SIS, Dr. Seleznow began to get concerned. The Appellant insisted that there would be no serious problems beyond the typical problems users always have with new technology.

"So I wanted to make sure that in my first year as Deputy that it was the smoothest opening ever," Dr. Seleznow testified, "and it was clear to me that the contingencies weren't in place in case there was a major problem or breakdown." After the first day of school (September 1), Dr. Seleznow concluded that SIS was in pretty bad shape and the problems were urgent; but, he said, the Appellant did not see it that way.

In fact, on September 1, the Appellant attended a luncheon downtown with his counterpart at Microsoft (and 15 other people) in the midst of the SIS crisis and had to be paged to return to work.[9] Early in the morning on September 3, the Appellant held a meeting with the OGAT staff to discuss the proposed management reorganization. It was clear to Dr. Seleznow that the Appellant

[9]Dr. Seleznow admitted that the Appellant had asked him about attending the luncheon a week earlier, and Dr. Seleznow had told him to use his own judgment about going downtown for lunch on the day SIS would be introduced for full school operations. The Appellant recalled that Dr. Seleznow told him it would probably be a good idea for him to attend the luncheon, and he could be called if needed. In either case, this conversation occurred a week before the opening of school, and Dr. Seleznow would not have known of the ensuing SIS chaos at that time.

was not focused on SIS and did not appreciate the impact on the users.

Later in the day on Friday, September 3, Dr. Seleznow and the Appellant met with officials of Montgomery County to report on their progress with Y2K updates. In view of Dr. Seleznow's criticism of the Appellant attending the downtown luncheon and holding a staff meeting in the midst of the SIS crisis, the Appellant questioned, at the hearing in this matter, the propriety of taking time to attend a meeting with county officials about Y2K. Dr. Seleznow stated that it was a brief meeting, and the urgency of the Y2K issue necessitated the immediate report to county officials.

On either September 1 or 2, Dr. Seleznow told the Superintendent that he had completely lost confidence in the Appellant's leadership abilities, although his technical expertise was not in question. Dr. Seleznow advised Dr. Weast at that time that the Appellant should be removed. Dr. Weast considered Dr. Seleznow's recommendation for a couple of days. When Mr. Bowers also expressed reservations about the Appellant on Saturday, September 4, Dr. Weast concluded that the Appellant should be dismissed. He directed Mr. Bowers to so inform him.[10]

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[10]Although much of the rest of the Executive Staff came to work that Saturday, Dr. Seleznow had elected to stay home with his family that day. Therefore, even though Dr. Seleznow was the Appellant's immediate supervisor at that point, Dr. Weast asked Mr. Bowers to convey his decision.

The Appellant had first met the new Superintendent at a luncheon meeting for the Executive Staff on July 12, 1999. At that luncheon, Dr. Weast described his intentions to reorganize MCPS management.

On August 3, his second day on the job, Dr. Weast met privately with the Appellant and expressed his concerns about turnover among staff. Dr. Weast asked him if he would be willing to stay on as CITO for five years. The Appellant said yes, and the two men shook hands on it. The Appellant considered that conversation a verbal contract for continued employment.

The Appellant considered SIS a very small, but important, part of his job. In fact, until the end of July 1999, it comprised only 5 to 10 percent of his time.[11] He noted that SIS was not mentioned in his job description or his performance evaluation. SIS was just one of 24 Y2K projects he was responsible for; he also had to manage the introduction of an entirely new personnel/payroll system that modified the financial ledger, train teachers in classroom technology, and oversee the merger of the MCPS print shop with the county print shop.

From a technical point, the Appellant asserted, Ms. Dwyer exclusively managed the SIS contract and had maximum accountability to assure that SIS was managed properly. Ms. Orland, Mr. Coldren,

[11]When asked if he would be surprised to learn that the SIS obligations comprised such a small portion of the Appellant's time, Dr. Seleznow stated that he would be quite surprised.

and the Appellant had only oversight responsibility.

Marconi had originally assigned work on the SIS contract to its office in St. Marys County. The Appellant was dissatisfied with their performance and strongly urged Marconi to assign the work to another team, preferably in Montgomery County, in close proximity to the MCPS central office. Marconi did so; according to the Appellant, things improved somewhat. However, Marconi continued to miss deadlines and did a poor job of testing. Software was consistently delivered with numerous problems.

By the end of the second day of school, the Appellant and his staff had concluded that they would have to enhance the physical capacity of the SIS hardware. But they felt it would be too risky to do it that night and decided instead to wait for the three-day Labor Day weekend to take the system down. When the Appellant reported this plan to the Executive Staff at the end of the day on September 2, the Superintendent said that he thought the plan was "a little too sluggish." That was when Dr. Weast decided to call the Marconi executives and get them involved. During that conversation, the Appellant testified, Dr. Weast told the CFO of Marconi that Marconi was the cause of the SIS problems.

The Appellant noted that Mr. Bowers chose September 2, in the midst of the SIS crisis, to present the proposed management reorganization plan to the Executive Staff. Executive Staff members were told they could discuss the proposal with their own

staffs, although no one was allowed to take a written copy of the plan out of the Executive Staff meeting. Since the proposed reorganization had a substantial impact on OGAT staffers, the Appellant felt he should tell his own people about the proposal the very next morning, before they heard rumors from others at the central office. He argued that he should not be criticized for the timing of his discussion of the proposed reorganization with his staff because Mr. Bowers had created the timing.

The Appellant noted that problems with SIS continued even after his departure from MCPS. Virtually all of the witnesses testified that the program still is not working properly.[12]

The Appellant blamed Marconi for the SIS fiasco, insisting that Marconi failed to oversee software development by AAL; failed to do adequate testing despite their assurances; and failed to deliver releases on schedule, which adversely impacted testing and user training by MCPS. The Appellant claimed that the hardware in place was adequate in both his and Marconi's judgment, but the software tuning was so inefficient that it required more hardware than either he or Marconi anticipated.

The Appellant further maintained that Ms. Dwyer was responsible for monitoring the SIS contract on the technical side, and someone from procurement was responsible for monitoring the

[12]A number of press reports confirm that SIS continued to be a problem. For example, February report cards were incorrect and had to be reissued, and MCPS subsequently decided to take SIS off-line at the end of the current school year.

contract on the business side. He denied any personal responsibility for performance of the SIS project.

The Appellant contended that his dismissal was a conspiracy to get rid of him because his position was to be eliminated under the proposed reorganization.[13] Therefore, he was simply made a scapegoat for the SIS problems.

Analysis of the Testimony

One notably significant individual declined to testify in this matter: Dr. Weast. He refused a request from the Appellant and a directive from the Hearing Examiner to appear.[14] Therefore, I am constrained to accept as accurate any of the Appellant's factual assertions (but not opinions) that were not inherently incredible or contradicted by other witnesses. I also draw an adverse inference by the Superintendent's refusal to testify.

Mr. Bowers and Dr. Seleznow both remarked that the Appellant lacked a sense of urgency concerning the SIS problems. As examples, they both cited the fact that the Appellant held a staff meeting to discuss the proposed management reorganization on the morning of September 3, when the OGAT staff should have been concentrating on SIS. I give little weight to their observation. There is no indication in the record that there was any urgent need

[13]In fact, the CITO position was eliminated in January 2000.

[14]BoE Policy BLB provides on page 8, "The presiding officer may examine all witnesses. The presiding officer may call as a witness any person whose testimony may be relevant and material."

for Mr. Bowers to present this proposal to the Executive Staff on September 2, in the midst of the SIS chaos. A reasonable person could have foreseen that the Appellant would be personally disturbed by the proposal and concerned for the OGAT staff as well. In fact, I find it was more than appropriate for the Appellant to discuss the proposed reorganization with his staff when he did, before rumors and gossip from other MCPS employees (who clearly would have been told about the proposal by the other Executive Staff members) could distract their attention.

Dr. Seleznow also commented negatively on the Appellant's decision to have lunch downtown with his Microsoft counterpart and 15 other IT professionals on September 1. Attending the luncheon demonstrates an error in judgment. The Appellant had made the appointment a week before, with Dr. Seleznow's approval (but see footnote no. 9). However, I assume, since the Microsoft executive was in town from Washington State and 15 other people were involved, that the Appellant could not have rescheduled the luncheon for another day. It is understandable that the Appellant was anxious to meet with his peers, and possible he could have gained some valuable insights that would benefit MCPS; but it does indicate a lack of appreciation for the magnitude of the SIS problems and helps to explain the Appellant's failure to recognize — and keep the senior staff advised of — the potential SIS problems during August.

I do not equate the Appellant's decision to attend the luncheon on September 1 with Dr. Seleznow's decision to go ahead with the Y2K meeting with county officials on September 3. Although possibly that Y2K meeting could have been postponed and rescheduled, Dr. Seleznow felt the matter warranted the 45-to-60-minutes away from the SIS problems, even though the magnitude of the SIS problems was more apparent at that point than at lunchtime on September 1. However, it may very well be that Dr. Seleznow should not have removed the Appellant from his SIS duties at that particular time.

I also note the testimony of Ms. Dwyer and Mr. Coldren, who were working closely and constantly with the Appellant, that the Appellant appreciated the magnitude and urgency of the SIS problems. It is clear that he chose to take a more cautious approach to solving the problems than others might wish — Dr. Weast found the Appellant's plans to enhance the physical capacity of the computer system over the three-day weekend "a little too sluggish" — but that alone is not proof that the Appellant did not take the problems seriously. I conclude that the Appellant believed that he had an appropriate sense of urgency and appreciation of the ramifications of the SIS failure. However, his actions and reactions failed to respond appropriately to the reality of the situation.

It appears that the users in the schools were not adequately

trained before SIS became operational. Training efforts were certainly hampered by the fact that Marconi failed to deliver the most recent version of the software in time for the training. Consequently, users were trained on a version that had a very different appearance than the version in place on September 1. Beyond that, there was little testimony to indicate if the OGAT staff did a poor job of training or if there was anything more the Appellant could have or should have done to prepare the users for this new technology.

The SIS program was flawed. None of the witnesses have even remotely suggested that the Appellant was personally responsible for bugs in the program. However, inadequate testing of the system meant that the problems were not fully known until school opened on September 1. Both Ms. Dwyer and Mr. Coldren stated that the problems on September 1 were due to inadequate hardware, not a faulty program. I am not convinced that is entirely accurate. The Appellant testified, without contradiction, that both he and Marconi had concluded that the computers that MCPS had purchased were adequate for running SIS. But because the software was so inefficiently designed, the program required more computer capacity than anticipated.[15]

Both Ms. Dwyer and Mr. Coldren also noted that realistic

[15]Moreover, it has since been determined that the software itself is thus far incapable of doing what it was supposed to do, and MCPS has decided to pull the plug for now.

stress or capacity tests and quantitative simulation modeling were not done because the Appellant said there was neither enough time nor resources to do the tests. (The only stress testing that OGAT did consisted of several staff members accessing the system simultaneously, but this exercise did not come close to simulating the real-life levels of usage.) It is not clear from the record whether the Appellant himself decided there was not enough time and money for stress tests or modeling, or if someone else made that decision and the Appellant merely passed that information along to his staff. It is reasonable to assume that stress tests and/or modeling would have predicted at least some of the problems SIS experienced at the opening of school. If, in fact, the Appellant himself made the decision not to do those tests, he must bear a major portion of the blame for the SIS failure.[16]

The crux of the matter, in my opinion, is the lack of contingency plans. Especially in the absence of viable stress testing, contingencies should have been made for potential problems with the system.

The Appellant claimed he had contingency plans in place, but the record does not support this claim. For example, the Appellant contended that he had decided to buy two servers for SIS (rather than a single server, as recommended by Mr. Coldren), and thereby

[16]The Appellant never testified that anyone other than himself made the decision not to do adequate stress testing.

MCPS was able to cannibalize the second server to enhance the capacity of the main server. However, the Appellant also testified that the second server was purchased to serve as a system testing platform. That latter explanation for the second server makes more sense. (Surely, it would have made more economic sense to buy a single server with more capacity at the outset if the Appellant suspected SIS might need additional capacity.)

Ms. Dwyer and Mr. Coldren both testified that the OGAT staff had no detailed contingency plans, no predetermined procedure of who would be responsible and what would be done in the event of problems. Moreover, the events of the first three days of school confirm that OGAT had no plans in place in the event of a system failure, despite the Appellant's assertions to the contrary. Hundreds of secondary school students were simply left to congregate in cafeterias because the schools were unable to enroll and withdraw them from classes. The Appellant had no back-up procedure to handle the SIS functions when SIS crashed.

The Appellant would have us believe that he did all of the contingency planning that was prudent and he bears no responsibility whatsoever for the failure of SIS and the resulting chaos in the first three days of school. There is insufficient evidence in the record to determine if others should share in the blame for the failure to have contingency plans in place. However, it is clear that as head of OGAT, the Appellant should have seen to

it that contingency plans existed — whether he personally developed them or delegated that responsibility to others.

Both Dr. Seleznow and Mr. Bowers concluded that the Appellant was managing the SIS project poorly, due largely to the lack of contingency plans. Dr. Weast soon reached the same assessment.

The Appellant maintained that there was a conspiracy to get rid of him because the management reorganization proposal would eliminate his job. The conspiracy theory lacks credibility for the simple reason that the Executive Staff (including the Appellant) was shown the reorganization proposal before any decision was made about the Appellant's employment future. And as I mentioned before, there was no apparent necessity that the reorganization plan be revealed when it was, on September 2. If there were, in fact, a conspiracy, logic suggests that the perpetrators of that conspiracy would have hidden the reorganization proposal until after they had terminated the Appellant.[17]

There **is** something disturbing about the fact that the Appellant's performance had been rated "effective" just a few months earlier, that he apparently did his job well in all areas

[17]The Appellant also implied that there was a conspiracy to get rid of him because the Superintendent wanted a more diverse Executive Staff. One of the questions the Appellant would have asked Dr. Weast if he had appeared to testify was did he tell the entire Executive Staff at a meeting on Monday, August 16, 1999, that the existing racial and gender mix of the staff he inherited from Dr. Vance was something he wanted to rapidly change. However, none of the other witnesses who also were present at that meeting recalled such a statement.

but SIS,[18] and that he had been given no advance warning that his job was in jeopardy. However, because the Appellant was an Executive Staff member exempt from all union contracts, those factors do not have to be considered. The standard the Board should apply requires only that there be substantial evidence to support the Superintendent's decision and that a reasoning mind could reach the same conclusion he did.

The Appellant had ultimate technical responsibility for SIS. To this day, the Appellant denies such responsibility, claiming that Marconi and Ms. Dwyer should bear the blame. Whatever the shortcomings in Marconi's and Ms. Dwyer's performance, the Appellant clearly took insufficient corrective action to ensure that the system would work properly on the opening day of school, or that there would be a back-up system in place in the event of an unavoidable failure.

It was reasonable for the Superintendent to conclude that the Appellant lacked the necessary leadership to manage the very critical Office of Global Access Technology. The Board need not determine that the Appellant's immediate dismissal was the best response or even a preferred response to the SIS crisis — only that it was a reasonable response, and not an arbitrary and capricious one.

[18]At least, there was no testimony or evidence of unsatisfactory performance in any of the many other projects he managed.

I am disturbed that the Superintendent refused to testify as a witness, despite the request by the Appellant and my calling him to appear pursuant to my authority under the BLB. The Superintendent offered no reason for his refusal to appear beyond a statement that Dr. Seleznow and Mr. Bowers were fully aware of all events and could testify to them. That reason fails to contemplate that in his September 7, 1999, letter of termination, the Superintendent stated that he reached the decision to terminate the Appellant "following discussions with Dr. Seleznow and Mr. Bowers and my observations during the past month." [Emphasis supplied.] I have not been privy to what those observations may have been.

At transcript pages 507 through 511 inclusive, the Appellant listed nine questions he wanted to ask Dr. Weast. Since the Superintendent refused to respond to the request and the "call" to appear, I have drawn all necessary inferences concerning any of the questions that were material to this case.[19] However, even granting the Appellant the benefit of certain doubts, I am unable to recommend to the Board that the termination action was illegal, unreasonable, arbitrary, or capricious, as defined in the previously cited decision in *Hurl v. Board of Education of Howard County:*

[19]Counsel to the Superintendent said she would attempt to get an affidavit from him to answer the Appellant's questions. An affidavit does not satisfy the Appellant's right to follow up his questions once he has heard the responses.

> In order to determine whether the appellant sufficiently alleged facts of "arbitrariness and capriciousness," we first must define what is meant by those terms. "Decisions contrary to law or unsupported by substantial evidence are not within the exercise of sound administrative discretion, but are arbitrary and illegal acts." *Department of Health v. Walker,* 238 Md. 512, 523, 209 A.2d 555 (1965). *See also Hackley v. City of Baltimore,* 70 Md.App. 111, 116, 519 A.2d 1354 (1987). BLACK'S LAW DICTIONARY (6th ed. 1990) (citations omitted) defines the term "arbitrary" as including something done "[w]ithout adequate determining principle," "nonrational," and "[w]illful and unreasoning action, without consideration and regard for facts and circumstances presented"; and the term "arbitrary and capricious" as "willful and unreasonable action without consideration or in disregard of facts or law without determining principle." Finally the State Board regulations define decisions of a county board as being "arbitrary" where "contrary to sound educational policy" and/or where a "reasoning mind could not have reasonably reached the conclusion the county board reached." COMAR 13A.01.01.03E(1)(b).

Based upon my January 17, 2000, Interim Determination, the Appellant's only rights of appeal are under Section 4-205. Should the Board disagree with that recommendation and conclude that the Appellant's rights are controlled by Section 6-202, then the burden of proof shifts to the Superintendent, other procedural considerations must be adhered to, and factual allegations must be considered in that light.

RECOMMENDATION

> 1. It is respectfully recommended that the Board find that the Appellant's appeal rights concerning his dismissal are controlled by

Section 4-205.

2. It is respectfully recommended that the Board find that the dismissal of the Appellant from employment with MCPS was appropriate.

_____

Joseph A. Sickles
Hearing Examiner

May 12, 2000

BOARD OF EDUCATION OF MONTGOMERY COUNTY

In the Matter of an Appeal to the Board of Education **Ronald H. Walsh**	:	BOE Appeal No. 1999-35

INTERIM DETERMINATION

JOSEPH A. SICKLES, ESQ.
Hearing Examiner

APPEARANCES:

For the Superintendent: Judith Bressler, Esq.

For the Appellant: Ronald H. Walsh
(appeared without representation)[1]

STATEMENT OF THE CASE

On September 7, 1999, Mr. Ronald H. Walsh (Appellant) was dismissed from his position as Chief Information Technology Officer for the Montgomery County Public Schools (MCPS) by Superintendent Jerry D. Weast. The Appellant was advised that he would remain an employee of MCPS until October 8, 1999, but that he was not to return to work, effective immediately.

The Appellant notified the Board of Education (BoE) on September 15, 1999, that he wished to appeal his termination by the

[1]At the preliminary meeting of December 6, 1999, Mr. Walsh was represented by counsel. He subsequently elected to appear pro se.

Superintendent.

By letter of November 12, 1999, the undersigned was appointed Hearing Examiner in this case and was advised by the BoE that a threshold issue in dispute was "whether Section 4-205 or Section 6-202 of the *Education Article* is controlling of this appeal."

At a preliminary meeting on Monday, December 6, 1999, the parties presented their initial positions on whether the procedures of Section 4-205 or Section 6-202 should apply in the termination of the Appellant. At a subsequent hearing on Monday, December 20, 1999, the parties presented legal argument and evidence on the issue of which section of the *Education Article* controls. At the December 20, 1999, hearing, the Appellant notified the Hearing Examiner that he was no longer represented by counsel, and that he was appearing on his own behalf. He was advised of his right to have counsel and he assured the Hearing Examiner that he understood that right.

Both parties were present at the hearing and afforded full opportunity to present evidence, testimony, and argument. An 81-page combined transcript of the preliminary meeting and the hearing was compiled, the final portion of which the Hearing Examiner received from the BoE on January 10, 2000. Neither party presented posthearing briefs.

INTERIM STATEMENT OF ISSUE

Did the Superintendent have the authority to

dismiss the Appellant under the provisions of Section 4-205 of the *Education Article*, or should the procedures of Section 6-202 control?

STATEMENT OF FACTS

Following the retirement of Dr. Joseph S. Villani, Associate Superintendent for Global Access Technology, the BoE approved the appointment of the Appellant to replace him in a public session on March 23, 1998. The appointment was effective April 1, 1998. However, the Appellant was given the title of Chief Information Technology Officer (CITO).[2] The Appellant's duties and responsibilities were identical to that of his predecessor, and the Appellant was also in charge of the Office for Global Access Technology. Based on the organization chart of the MCPS, the Appellant appears to have occupied a position at the same level as the four Associate Superintendents, he earned the same salary as the four Associate Superintendents, and he served on a number of high-level teams and committees along with the Associate Superintendents.

The Appellant was responsible for the installation and operation of a new Student Information System (SIS), a computerized system for registering students throughout MCPS, enrolling them in classes, and maintaining their academic records. In the month before classes began for the 1999-2000 school year, there were

[2]The Appellant claims he had recommended the change in title when he was consulting for MCPS (before he was employed by the school system), to make the title similar to those common in industry.

serious SIS problems, and the Appellant worked diligently to correct them. Nonetheless, when classes started, the computer system "crashed," and, according to news reports, many high school students were stranded without class assignments.

On September 6, 1999, Acting Deputy Superintendent Larry Bowers phoned the Appellant at home and advised him that the Superintendent had decided to terminate the Appellant and he should not report to work the next day. On September 7, the Superintendent mailed the Appellant a letter stating that "the Office of Global Access Technology (OGAT) needs a change of leadership," and that "[t]he qualities you bring to the position no longer match the needs." He advised the Appellant that he was being terminated from employment effective October 8, 1999, and he was being placed on administrative leave until that date.

On September 15, 1999, the Appellant notified the BoE of his intention to appeal his dismissal. On September 29, 1999, he filed a petition for review pursuant to Section 6-202 of the *Education Article* of the Maryland Annotated Code.

CONTENTIONS OF THE PARTIES

Superintendent's Contentions

> The Appellant was an "at-will" employee, subject to termination by the Superintendent. The Appellant is entitled to appeal his dismissal under the provisions of Section 4-205(c)(3) of the *Education Article,* which provides that any decision of the Superintendent may be appealed to the BoE, in

writing, within 30 days. Under Section 4-205, the Appellant has the burden of proof.

Section 6-202 of the *Education Article* contains a different appellate procedure. However, it applies only for suspensions and dismissals of teachers, principals, and other professional personnel. The Appellant is not a "professional" under the terms of this section of the *Education Article.*

Appellant's Contentions

Section 6-201 of the *Education Article* identifies employees of the BoE as either (1) professional personnel, which the Superintendent may nominate for employment and recommend for dismissal, but which the Board itself must appoint or remove; or (2) clerical and nonprofessional personnel, which the Superintendent may hire and dismiss directly. The Appellant, who was appointed by the BoE, is clearly not clerical or nonprofessional; he is professional personnel and entitled to the protections of Section 6-202.[3]

Under Section 6-202, only the Board has the authority to remove a professional individual, and only after written notice of the charges against him and a hearing. Therefore, the Superintendent's action to terminate the Appellant's employment was invalid.

DISCUSSION

Relevant provisions of the *Education Article* of the State Code provide as follows:

§**6-201. Appointment, tenure, and qualifications.**

(b) *Appointment of professional personnel.*—(1) The

[3]The Appellant has also filed for review of his dismissal under the provisions of Section 4-205, but solely to preserve his rights to do so in the event it is determined that he may not appeal under the provisions of Section 6-202.

county superintendent shall nominate for appointment by the county board:

(i) All professional assistants of the office of county superintendent; and

(ii) All principals, teachers, and other certificated personnel.

(2) As to these personnel, the county superintendent shall:

. . .

(iv) Suspend them for cause and recommend them for dismissal in accordance with §6-202 of this article.

(c) *Appointment of clerical and nonprofessional personnel.*—(1) Except in Worcester County and Baltimore City, the county superintendent shall appoint clerical and other nonprofessional personnel.

(d) *Appointment of supervisory and administrative personnel to be within certain ratios.*— . . .

(2) These personnel shall include:

(i) Supervising or helping teachers;

(ii) Supervisors of pupil personnel I;

(iii) Supervisors of pupil personnel II; and

(iv) Visiting teachers.

(e) *Certificate necessary.*—An individual may not be appointed as a professional assistant or to any position listed in subsection (d) of this section unless he holds the appropriate certificate from the State Superintendent issued in accordance with the rules and regulations of the State Board.

§**6-202. Suspension or dismissal of teachers, principals and other professional personnel.**

(a) *Grounds and procedure for suspension or dismissal.*—(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:

. . .

(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.

Under the provisions of Section 6-201(b)(2), the Superintendent may recommend the dismissal of professional assistants, principals, teachers, and other certificated personnel

in accordance with Section 6-202. Section 6-202 states that its provisions apply to teachers, principals, supervisors, assistant superintendents,[4] or other professional assistants. The critical issue in this case is whether the Appellant was one of the covered categories of employees under Section 6-202.

The Appellant clearly was not a teacher or principal. Although he "supervised" roughly 190 employees in the Office of Global Access Technology, the term "supervisor" in this section of the *Education Article* applies to supervising or helping teachers, supervisors of pupil personnel I and II, and visiting teachers (§6-201(d)(2)). None of these apply to the Appellant.

The Appellant argues that he was the equivalent of an Associate Superintendent. He held the identical position (with the identical responsibilities) as his predecessor, who had the title of Associate Superintendent; he was paid the same and served on the same committees as the four individuals with the title Associate Superintendent.

While the Appellant may have been a high-level executive in the MCPS, apparently with the same status as an Associate Superintendent, he was not an Associate Superintendent. Section 6-101 of the *Education Article* states:

> Unless he is eligible to be issued a certificate by the State Superintendent, an individual may not be employed as a county

[4]The BoE uses the term "associate superintendent" instead of "assistant superintendent."

> superintendent, assistant superintendent, supervisor, principal, or teacher.

By his own admission, the Appellant did not hold such a certificate, and there is nothing in the record to indicate he was eligible for such a certificate.[5] The job description for the CITO position (Exhibit 12 of the Appellant's petition for review) specifically states that no certificate or license is required for the position. Despite the fact that the Appellant's predecessor was an Associate Superintendent, the BoE clearly did not intend that the Appellant was to be an Associate Superintendent.[6]

The Appellant also argues that he was treated "in every substantive way" as a professional assistant. "Professional assistant" is not specifically defined in the *Education Article*. But there are descriptive provisions in the law. From Section 6-201(b), we can determine that professional assistants in the Office of the Superintendent do not include principals or teachers and they must be appointed by the BoE. Professional assistants also do not include clerical and nonprofessional personnel (from Section 6-201(c)). By the terms of Section 6-201(e), a professional assistant must hold "the appropriate certificate from the State Superintendent."

The Appellant notes that his performance was evaluated under

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[5]Presumably, the State Superintendent can issue certificates related to education only. I assume, for example, the State Superintendent cannot "certify" a CPA.

[6]His predecessor was a certified teacher.

Regulation GJB-RA, "Evaluation of Professional Personnel," with the evaluation form titled "Evaluation of Central Office Administrators and Supervisors" (Exhibit 3 of the Appellant's petition for review). He was appointed by the BoE, not by the Superintendent. He asserts that the BoE "waived one mere formality, a certificate," in treating him as a professional assistant. [Emphasis in the original.] I can find nothing in the law to suggest that the BoE has the authority to issue such a waiver, and nothing in the record before me suggests that the BoE did, in fact, issue (or intend to issue) such a waiver. I must conclude that the Appellant was not a professional assistant, as that term is used in Sections 6-201 and 6-202.

The Appellant argues that all employees of the BoE must be either (1) professional personnel, or (2) clerical and nonprofessional personnel (§6-201(b) and (c)), and he clearly does not fall into the second category. However, both parties admit that this law was written years ago, when hiring practices were different and boards of education routinely appointed only certificated teachers to higher level positions.

Times and practices may have changed, but a rational interpretation of the law does not limit classes of employees to those two categories alone. The law is simply silent about other possible classes of employees.

But, the law is clear that the appellate procedures of Section

6-202 apply only to the category of employees identified therein as "professional personnel." The law is equally clear that an individual must be certificated to be included in this category.

The Appellant was not certificated. Therefore, the Superintendent had the authority to dismiss the Appellant directly.

The Appellant is not left without recourse. Although he may not appeal his termination under the provisions of Section 6-202, he is entitled to appeal his termination under the provisions of Section 4-205 of the *Education Article.*[7]

Under the terms of my appointment as Hearing Examiner, I shall now proceed with a hearing under Section 4-205, where the Appellant may attempt to show that the Superintendent misinterpreted or misapplied the BoE's rules and regulations or bylaws of the State Board, or improperly administered the policies of the BoE or the State Board.

INTERIM DETERMINATION

The Appellant may pursue the appeal of his dismissal under the provisions of Section 4-205. I shall convene a hearing under authority from the Board of Education at the earliest date convenient to all parties.

Date: January 17, 2000

Joseph A. Sickles
Hearing Examiner

[7]There was some debate as to whether the Appellant was or was not an "at-will" employee and how that term is defined. I find that issue immaterial, as the Superintendent concedes that the Appellant is entitled to appeal his dismissal under Section 4-205.