

RICHARD BOYNTON,

Appellant

v.

NEW BOARD OF SCHOOL
COMMISSIONERS OF BALTIMORE CITY,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 01-26

OPINION

In this appeal, Appellant challenges the decision of the New Board of School Commissioners of Baltimore City to terminate him for incompetency based on two consecutive years of unsatisfactory performance. The matter was referred to the State Office of Administrative Hearings where, following a hearing on the appeal, the Administrative Law Judge (“ALJ”) issued a proposed decision on June 11, 2001, a copy of which is attached to this opinion as Exhibit 1. Oral argument was heard by the State Board of Education on July 24, 2001.

Having reviewed the record in this matter and after considering the arguments of counsel, we adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge.¹ For the reasons stated by the ALJ, we affirm the decision of the New Board of School Commissioners of Baltimore City terminating Appellant from employment for incompetency based on two consecutive years of unsatisfactory performance.

Raymond V. Bartlett
President

Marilyn D. Maultsby
Vice President

JoAnn T. Bell

Philip S. Benzil

Reginald L. Dunn

Clarence A. Hawkins

¹There is a typographical error on page 9 of the ALJ’s proposed decision. It is the New Board of School Commissioners of Baltimore City, not the State Board, that seeks to dismiss Appellant from employment with the Baltimore City Public School System.

Walter S. Levin, Esquire
Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

August 29, 2001

RICHARD BOYNTON,

APPELLANT

v.

NEW BOARD OF SCHOOL
COMMISSIONERS FOR BALTIMORE
CITY

* * * * *

EXHIBIT I

* BEFORE JUDITH FINN PLYMYER
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH CASE #MSDE-BE-01-200100001

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about September 1, 1999, Richard Boynton ("Appellant"), a tenured Teacher employed by the Baltimore City Public Schools ("BCPS"), received notification from Chief Executive Officer Robert Booker, recommending a dismissal. Appellant appealed the recommendation to the New Board of School Commissioners of Baltimore City (the "Board"). Avalon S. Brandt, a Hearing Examiner of the Board ("Hearing Examiner"), conducted a hearing on March 23, 2000. Md. Code Ann., Educ. § 6-203 (1999). The Hearing Examiner recommended that the Appellant be transferred to a different school, that he be placed on probation for one year, and that he remain on any current performance improvement program. After reviewing the record compiled by the Hearing Examiner, the Board voted to reject the

Hearing Examiner's recommendations and affirmed the Chief Executive Officer's recommendation to dismiss the Appellant for incompetency on October 27, 2000. The Appellant appealed the Board's order to the Maryland State Board of Education and the matter was scheduled before the Office of Administrative Hearings. Md. Code Ann., Educ. § 6-202(4) (1999).

Following a telephonic prehearing conference on February 16, 2001, a de novo hearing was conducted on April 26, 2001, before Judith Finn Plymyer, Administrative Law Judge ("ALJ"), at the offices of the Baltimore City Public Schools, 200 E. North Avenue, Baltimore, Maryland. Code of Maryland Regulations ("COMAR") 13A.01.01.03P. Appellant was present and was represented by Sabrina Willis, Esq. Brian K. Williams, Esq., represented the Board.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board of Education, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2000); COMAR 13A.01.01.03D; COMAR 28.02.01.

ISSUE

The issue on appeal is whether the dismissal for incompetency imposed upon the Appellant by the New Board of School Commissioners for Baltimore City ("Board") under Md. Ann. Code Ann., Educ. § 6-202(a)(iv) (1999) 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 Appellant:

1. Photocopy of COMAR 13A.07.04.
2. Transcript from Bowie State College, 3-18-88.
3. Transcript from Coppin State College, 8-16-90.
4. Appellant's Teacher's Certificate Renewal, 8-24-99.
- 5A. Teacher Evaluation Form, 6-10-88.
- 5B. Teacher Evaluation Form, 4-28-89.
- 5C. Teacher Evaluation Form, 12-1-89.
- 5D. Teacher Evaluation Form, 5-27-90.
- 5E. Teacher Evaluation Form, 3-27-91.
- 5F. Teacher Evaluation Form, 6-15-92.
- 5G. Teacher Evaluation Form, 5-27-93.
- 5H. Teacher Evaluation Form, 5-12-94.
- 5I. Annual Evaluation Report, 6-19-95.
- 5J. Annual Evaluation Report, 1-19-96.
6. Article in the National Society of Black Engineers Magazine, September 1991.
7. Baltimore City Employee Assistance Program Records, 2-23-98 through 7-2-98.
8. MSPAP Results by School, 1999.

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

1. Annual Evaluation Report, 6-12-98.
2. Performance Improvement Plan, 6-18-98.
3. Letter of Robert Booker to Appellant, 8-7-98.
4. Pre-Observation Conference Form, 11-16-98.
5. Formal Observation Data Collection Form, 11-16-98.
6. Performance-Based Teacher Evaluation Handbook, August 1998.
7. Post-Observation Conference/Performance Review Report, 11-16-98.
8. Performance Improvement Plan, 10-12-98.
9. Formal Observation Data Collection Form, 2-5-99.
10. Post-Observation Conference/Performance Review Report, 2-5-99.
11. Pre-Observation Conference Form, 3-1-99.
12. Annual Evaluation Report, 3-31-99.
13. Emergency Plan Checklist, 1-11-99.
14. Memorandum of Principal, Everene Johnson-Turner, to Appellant, 11-9-98.
15. Letter of Robert Booker, CEO, to Appellant, 7-7-99.

The following exhibit was admitted as a Joint Exhibit:

1. Statement of Charges, 8-20-99.

Official Notice was taken of *Board of School Commissioners of Baltimore City v. James*, *Board of School Commissioners of Baltimore City v. Davis*, 96 Md.App. 401, 625 A.2d 361 (1993).

The record was held open until May 4, 2001, to allow the parties to submit a video-tape concerning the Appellant's earlier successful year's as a teacher in Baltimore City.

(App. Ex. 9)

B. Testimony

No testimony was taken at the hearing. Counsel made oral arguments and relied on the record below. In the hearing below, conducted on March 23, 2000, before a hearing examiner, Everene Johnson-Turner, Principal of Frankford Intermediate School, testified in support of the CEO's decision to dismiss. The Appellant testified in his own behalf, and presented the testimony of two of his former students, George A* and Donatus G*.

FINDINGS OF FACT

After careful consideration of the record below, I find, by a preponderance of the evidence, the following facts:

1. The Appellant graduated from Bowie State College on May 17, 1980, with a bachelor of science degree in Early Childhood Education, and then served in the military from 1985 to 1988, receiving an honorable discharge in February 1988.
2. The Appellant began working as a long-term substitute second grade elementary school teacher for Baltimore City Public School System on April 11, 1988, at Matthew Hensen Elementary School, #29.
3. The Appellant was reassigned to Matthew Hensen Elementary as a regular second grade teacher for the 1988/89 school year.
4. In 1990 the Appellant began experimenting with cocaine.
5. The Appellant passed two additional college courses at Coppin State College with A's in 1989

and 1990 during the summer sessions.

6. At the end of the 1989/90 school year the Appellant received tenure.
7. The Maryland State Department of Education certified the Appellant to teach early childhood, nursery to grade 3, from July 1, 1991, to July 1, 1996.
8. Beginning in the 1989/90 school year and continuing for six more school years, the Appellant taught all male classes in a program targeting at-risk boys from single-parent homes.
9. The Appellant advanced with his students from second grade to the fifth grade.
10. The Appellant's performance as a teacher was rated satisfactory or better from June 1988 until June 1996, specifically:
 - June 1988, Grade 2, Satisfactory
 - April 1989, Grade 2, Good
 - May 1990, Grade 2, Good
 - March 1991, Grade 3, Superior
 - June 1992, Grades $\frac{3}{4}$, Superior
 - May 1993, Grade 5, Social Studies/Health Science, Good
 - May 1994, Grade 5, Social Studies/Health Science, Good
 - June 1995, Grade 5, Social Studies/Health Science, Meets Expectations
 - June 1996, Grade 5, Math, Meets Expectations.
11. The Appellant received treatment for substance abuse through the Veterans Administration in February and March 1995, causing the Appellant to miss a total of 44 out of 180 school days.
12. For the 1996/97 school year the Appellant was voluntarily reassigned to Frankford Intermediate School, #216, to teach fifth grade.
13. The Appellant reported his cocaine addiction to his principal, Kimberly Evans, in January or February 1998.
14. Ms. Evans referred the Appellant to the Baltimore City Employee Assistance Program,

and the Appellant voluntarily attended and completed an outpatient rehabilitation day-program offered by the Veterans Administration from March 4, 1998 to April 10, 1998.

15. The Appellant received a negative drug screen from a test on April 23, 1998, and was allowed to return to work near the end of the 1997/98 school year.
16. Although the Appellant attended two aftercare appointments with Operation Recovery in April 1998, and some Narcotics Anonymous meetings, he was noncompliant with EAP recommendations for aftercare treatment, and the Appellant's EAP counselor closed his case on July 2, 1998.
17. During the 1997/1998 school year, the Appellant missed 73 of 186 days of school.
18. The Appellant's performance rating for the 1997/98 school year at Frankford Elementary School under Principal Kimberly Evans was evaluated as "Does not meet Expectations," specifically in the four domain areas of 2) Preparation of Instructional Goals; 3) Selection and Utilization of Instructional Resources; 4) Effectiveness of instructional Methods; and 7) Assessment of Pupil Interests, Abilities, and Needs.
19. The Appellant did not appeal his 1997/98 performance evaluation.
20. On June 11, 1998, Ms. Evans placed the Appellant on a Performance Improvement Program ("PIP") with an emphasis on improvement in attendance and lesson planning.
21. On August 7, 1998, Dr. Robert Booker, Chief Executive Officer, New Board of School Commissioners for Baltimore City, downrated the Appellant's teacher's certificate to second class.
22. The Appellant was required to demonstrate sufficient improvement in his teaching performance in the next school year to have his certificate reclassified as first class.

23. The evaluation procedure for the 1998/1999 school was more extensive, and included more interaction with the principal, Everene Johnson-Turner and observation by the principal and by a qualified observer.
24. Ms. Johnson-Turner met formally with the Appellant to review his performance and offer assistance on October 12, 1998, November 16, 1998, and February 5, 1999.
25. On October 12, 1998, Ms. Johnson-Turner prepared a new PIP advising the Appellant that training videos were available for use at lunchtime, he was to submit weekly lesson plans for review with the lead teacher, and to ask for help from the principal; and the Appellant signed the PIP.
26. On November 16, 1998, Ms. Johnson-Turner observed the Appellant teach a class on homophones and reviewed the PIP with him, noting his willingness to receive suggestions and his need for more improvement in the Domain areas of 1) Teacher Planning and 3) Instruction.
27. As of January 11, 1999, the Appellant had completed no emergency lesson plans for the 1998/1999 school year.
28. As of mid-year in the 1998/99 school year, all the Appellant's student lab books for use with the Houghton-Mifflin Language Arts Curriculum remained unused, although the pages should have been used daily by the students to supplement instruction.
29. On February 5, 1999, Ms. Johnson-Turner again observed the Appellant and noted deficits in Domains 1) Teacher Planning and Preparation, Comment, "Teacher needs to maintain emergency lesson plans," 3) Instruction, Comment, "Lesson uniformity not maintained throughout the lesson, pacing inconsistent," and 4) Teacher's Professional Responsibilities,

Comment, “As team leader, teacher is responsible for organizing team meetings; Teacher must submit documents in timely manner.”

30. Alease Owens, a BPCS qualified observer, observed the Appellant teaching math on March 1, 1999, and found fewer areas of strength than areas for improvement.
31. The Baltimore City Public School System used its Performance-Based Teacher Evaluation Handbook issued August 1998 to rate the Appellant.
32. The Appellant’s performance rating for the 1998/99 school year was “Does Not Meet Expectations” overall, specifically in the Performance Domain areas of Instruction and Teacher’s Professional Responsibilities.
33. The Appellant did not appeal his 1998/99 performance evaluation.
34. Based on two consecutive years of unsatisfactory performance, the Chief Executive Officer (“CEO”) for the Baltimore City Public Schools dismissed the Appellant on August 20, 1999.
35. The Appellant appealed the CEO’s decision to the Board.
36. The Board appointed a hearing examiner who conducted a hearing and recommended the Board reject the CEO’s decision and impose a lesser sanction.
37. The Board voted unanimously to reject the hearing examiner’s recommendations and affirmed the decision of the CEO to dismiss the Appellant for incompetency.

DISCUSSION

The applicable law provides that a teacher may be suspended or dismissed, for cause, by a local board on the recommendation of the local superintendent, and that the teacher has a right to a hearing on such a dismissal or suspension. Md. Code Ann., Educ. § 6-202(a) (1999) reads, in

pertinent part, as follows:

(a)(i) 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 § 50704 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 county board to the State Board.

(Emphasis added.)

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.01.01.01E 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 Appellant's appeal of his dismissal by the Board, the ALJ, on behalf of the State Board, exercises independent judgment on the record. COMAR 13A.01.01.03E(3).

In the instant case, the State Board seeks to dismiss the Appellant from his employment with the Baltimore City Public Schools on the grounds of incompetency, based on two years of unsatisfactory performance appraisals. The Board argued that the dismissal of the Appellant

should be upheld. The Board acknowledged that the Appellant's teaching performance had been satisfactory or better until 1996, and that the Appellant had reported his substance abuse problem and completed a day rehabilitation program. Nevertheless, the Board contended that the Appellant did not meet expectations in four areas in the 1997/98 school year, receiving an overall rating of "Does Not Meet Expectations." Due in part to his drug treatment, the Appellant missed 73 of the 186-day school year. The Appellant was placed on a Performance Improvement Plan (P.I.P.) for the 1998/99 school year and his teacher certificate was down-rated to second class. Instead of improving his performance in the 1998/99 school year, the Board maintained that the Appellant's performance was again unsatisfactory, this time in Instruction and Teacher Professional Responsibility with continuing problems with emergency lesson plans. Furthermore, the record showed that the principal interacted repeatedly with the Appellant in an effort to improve his performance, to no avail. The Board cited *Board of School Commissioners v. James*, 96 Md. App. 401, 625 A.2d 361 (1993) for the proposition that procedural errors involving teacher observation need not reverse a decision on competency. Finally, the Board maintained that public school students deserve competent teachers.

The Appellant argued that the evidence was inconsistent because the BCPS used different evaluation instruments that showed problems in different areas in the last two years of teaching. He attacked the validity of his first unsatisfactory evaluation due to the lack of an independent observation required under COMAR 13A.07.05.02A(5). He argued that he wanted to improve but was told to seek help from his team although there was no scheduled team meeting team during the school day. Additionally, Appellant argued that the entire school faculty had difficulty with the new language arts curriculum. Having carefully reviewed and considered the entire

record below as well as the arguments of counsel, I find that the Board has met its burden by a preponderance of the evidence and I recommend that the Appellant's dismissal as a tenured teacher for incompetency on the basis of two consecutive years of overall unsatisfactory performance evaluations be upheld for the following reasons.

The Appellant did not contest that he received overall evaluations of "Does not meet expectations" for his last two years of teaching, 1997/98 and 1998/99. He did not appeal these evaluations at the time. He testified that he agreed with the evaluations at the time, and conceded that he had not done his part to improve. (Transcript at 180,186, 200) The fact that the evaluation instruments were different is not dispositive. All teachers in the BCPS would have been affected similarly. The Appellant offered no evidence to show that alteration of the numbering or labeling scheme for teaching criteria in any affected his scoring. Furthermore, the fact that the two principals found different strengths and deficits at different times does not prove that their findings were invalid. It is just as likely that the Appellant's teaching efforts were inconsistent.

The Appellant argued that the evaluation for the 1997/98 school year is invalid because there was no independent observer. Although there was no record of an independent observation of the Appellant during the 1997/98 school year as required by COMAR 13A.07.05.02A(5), such a procedural flaw need not invalidate the dismissal action. There has been no showing of prejudice to the Appellant, such as insufficient notice of his teaching deficits. He signed the evaluation and the PIP, showing that he was well aware of the need to improve his teaching performance. Furthermore, he was absent for 73 days of that school year, primarily in the winter and spring, making it difficult to schedule an independent observation. Under the holding in

Board of School Commissioners v. James, 96 Md.App. 401, 625 A.2d 361 (1993), a case involving similar allegations of incompetency and the lack of an independent observer, the court upheld the dismissal where there was no evidence of prejudice to the teacher.

The Appellant contended that he did not receive the help he needed to improve and there was no time to meet with his team. This argument is inconsistent with the Appellant's testimony below and with the facts. The Appellant admitted that he did not try hard enough to improve. The record showed that the Appellant could have accessed videotapes at lunch time or met with his team after the students left for the day. As team leader, he was in a unique position to schedule team meetings. His 1998/99 school year principal testified that he should have sought her assistance. There is no evidence that he ever did so or that she ever refused to meet with him. This argument has no merit.

Finally, the Appellant maintained that all the faculty were having difficulty with the new Language Arts Curriculum. Whether or not another teacher had a problem and was dismissed for incompetency is not an issue in this case. I note, however, that the Appellant's failure to use the Houghton-Mifflin student lab books for the first half of the 1998/99 school year suggests that the Appellant made no effort to work with the materials provided.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that New Board of School Commissioners for Baltimore City's dismissal of the Appellant, a tenure Teacher, for incompetency is supported by a preponderance of the evidence. Md. Code Ann., Educ. § 6-202(a)(iv) (1999); COMAR 13A01.01.01E.

PROPOSED ORDER

It is proposed that the decision of the New Board of School Commissioners for Baltimore City terminating the Appellant for incompetency as a tenured Teacher be **UPHELD**.

Date: June 11, 2001

Judith Finn Plymyer
Administrative Law Judge