

RACHEL JOHNSON,

Appellant

v.

NEW BOARD OF SCHOOL
COMMISSIONERS OF BALTIMORE CITY,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 01-35

OPINION

In this appeal, Appellant challenges her termination from employment with the Baltimore City Public School System (BCPSS) based on incompetency. 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 August 27, 2001, a copy of which is attached to this Opinion as Exhibit 1. Oral argument was heard by the State Board of Education on September 25, 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 ALJ, with the following clarification. On page 9 of the ALJ's Proposed Decision, the ALJ refers to *Maryland State Retirement Agency v. DeLambo*, 109 Md. App. 683 (1995), and states that the five factors enumerated in *DeLambo* must be considered in determining whether termination is the appropriate sanction for an employee. We note that *DeLambo* concerns the termination of State employees and believe that it is inapplicable in this case. Appellant was an employee of BCPSS, not the State. It was not necessary for BCPSS to consider the five factors enumerated in *DeLambo* prior to terminating Appellant. Rather, the parameters of § 6-202 of the Education Article, Annotated Code of Maryland, and COMAR 13A.01.01.03D & E(3) are the governing statute and regulations.

With this clarification and for the other reasons stated by the ALJ, we affirm the decision of the New Board of School Commissioners of Baltimore City to terminate Appellant from employment for incompetency.

Raymond V. Bartlett
President

Marilyn D. Maultsby
Vice President

JoAnn T. Bell

Philip S. Benzil

Reginald L. Dunn

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

October 31, 2001

EXHIBIT 1

RACHEL JOHNSON,

APPELLANT

v.

NEW BOARD OF SCHOOL
COMMISSIONERS FOR
BALTIMORE CITY

* BEFORE WAYNE A. BROOKS,
* ADMINISTRATIVE LAW JUDGE,
* MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-BE-01-200100003

* * * * *

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 August 20, 1999, Rachel Johnson ("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"). Robert Kessler, a Hearing Examiner of the Board ("Hearing Examiner") conducted a hearing on March 15, 2000. Md. Code Ann., Educ. § 6-203 (1999). The Hearing Examiner recommended that the CEO's decision to dismiss the Appellant be affirmed. After reviewing the record compiled by the Hearing Examiner, the Board voted to uphold the Hearing Examiner's recommendations and affirmed the Chief Executive Officer's recommendation to dismiss the Appellant for incompetency. 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 May 4, 2001, a de novo hearing was conducted on July 13, 2001, before Wayne A. Brooks, Administrative Law Judge ("ALJ"), at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland. Code of Maryland Regulations ("COMAR") 13A.01.01.03P. Appellant was present and represented her own interests. 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 28.02.01¹.

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 parties agreed to submit the case upon the documents already submitted in the record below. Therefore, no additional documents were submitted for review, and the exhibits from the

¹ The current regulations are published at 27:26 Md. Reg. 2360 (Dec. 29, 2000, effective Jan. 8, 2001) (proposed 27:18 Md. Reg. 1678-1684 (Sept. 8, 2000)) (to be codified at Code of Maryland Regulations ("COMAR") 28.02.01).

record below are incorporated and adopted by reference into this record.

B. Testimony

No testimony was taken at the hearing. The parties made oral arguments and relied on the record below. In the hearing below, conducted on March 15, 2000, before a hearing examiner, Mildred S. Harris, former Principal of Southwestern High School (“Southwestern”), Patricia Lowe-Gould, former Assistant Principal at Southwestern, and Joanne McNair, Acting Head of the English Department at Southwestern testified in support of the CEO’s decision to dismiss. The Appellant testified in her own behalf.

FINDINGS OF FACT

After careful consideration of the record below, I find, by a preponderance of the evidence, the following facts ²:

1. At the time of her dismissal, Respondent had been a teacher at Southwestern High School since 1995, and had been employed by BCPS since April 1988.
2. On November 12, 1997, a formal classroom observation was performed by Virginia Watkins. The subsequent Classroom Observation Report, CEO Exhibit 1, identified three areas of weakness for Respondent.
3. A second classroom observation and report were performed by Clara Davis, CEO Exhibit 2, on March 25, 1998. Six areas of deficiency were reported and a [(“Performance Improvement Plan”)] PIP was recommended.
4. Principal Clara Davis also completed a Performance Review Rating on March 31, 1998,

² Findings of Fact 1 though 8 (a typographical mistake occurred in the numbering of the Hearing Examiner’s decision, so I have renumbered them to run in proper sequence) from the Hearing Examiner’s decision below was wholly adopted and incorporated into this decision. Finding of Fact 9 was not adopted because it is a conclusion.

which also noted several areas of deficiency. (See CEO Exhibit 4). Respondent did not protest the unfavorable rating nor make any comments on the evaluation.

5. A formal observation was conducted by Ms. Lowe-Gould on November 16, 1998. Several deficiencies were noted on the Instructional Observation Checklist. (See CEO Exhibit 8).
6. In May 1999, both Pre-observation and Post-observation conferences were held. CEO Exhibits 9, 10. Although Respondent did show some improvement, her reports were still unsatisfactory, leading to an overall “unsatisfactory” rating on her Annual Evaluation for the 1998-99 school year. CEO Exhibit 6.
7. Respondent was on a PIP for two years, canceled several appointments with the department head, Ms. McNair, to work on her lesson plans and student management skills, and failed to reschedule them.
8. Respondent has over the course of two (2) years been unable to progress in her teaching skills to the satisfaction of the CEO.

Additional facts:

9. The areas of weakness noted by Ms. Watkins from the November 12, 1997 classroom observation were preparation of instructional goals and objectives, selection and utilization of instructional resources, and effectiveness of instructional methods.
10. The areas of weakness noted by Ms. Davis from the March 25, 1998 classroom observation

were competence in subject field, preparation of instructional goals and objectives, selection and utilization of instructional resources, effectiveness of instructional methods, classroom management skills and discipline procedures, and communication skills.

DISCUSSION³

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 count board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:

Immorality;

Misconduct in office, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article⁷

Insubordination;

Incompetency; or

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:

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

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.

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

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

The county Board shall have the burden of proof.

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

³The Discussion (“Conclusions of Law and Recommendation”) from the Hearing Examiner’s decision was adopted and incorporated into this decision.

Pursuant to COMAR section cited above, I have undertaken an extensive review of the evidence presented and the decisions rendered in this matter from all levels. Also, from the standpoint of the credibility of the witnesses who testified before the Hearing Examiner, I have to give considerable deference to his findings. *Anderson v. Dep't of Public Safety*, 330 Md. 187 (1993). As a result of my review, I must conclude that the evidence clearly established the reasonableness of the Board's decision to terminate the Appellant.

In the instant case, the State Board seeks to dismiss the Appellant from her 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 noted that during the 1997-98 school year the Appellant received an unsatisfactory evaluation from her principal. Furthermore, that she was specifically rated as "does not meet expectations" in the areas of preparation of instructional goals, selection and utilization of instructional resources, effectiveness of instructional methods, classroom management skills and discipline procedures, and assessment of pupil interest abilities and needs. As a result, the Appellant was placed on a PIP in order to assist her. The Board contended that despite the efforts to improve her performance, the Appellant's rating during the 1998-99 school year also resulted in an unsatisfactory evaluation. Again she rated poorly in the areas of teacher preparation and planning. The Board finally argued that the Appellant's overall performance led to the recommendation for dismissal, and that the Appellant had an opportunity to appeal the recommendation, and at every level after a review of the evidence, the decision to dismiss the Appellant was affirmed.

The Appellant asserted that she had been a school teacher for over thirteen years, and that

the two years in question are the only periods for which she received unsatisfactory performance evaluations. She indicated that during the 1997-98 and 1998-99 school years she was experiencing tremendous family difficulties that she believed directly contributed to her problems in the classroom. She also contended that she was not given the needed assistance by her school that was necessary to strengthen her performance. She also noted that during that same time she was assigned to classes that she had never taught before and was also not given assistance in those classes. Finally, the Appellant argued that she did not believe that her entire record had been adequately considered, and if so, it would mitigate against a decision to dismiss her.

Again, having carefully reviewed and considered the entire record below as well as the arguments of the parties, 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 evidence presented before the Hearing Examiner indicated that the Appellant's classroom performance was reviewed by members of her administration through formal observations during both the 1997-98 and 1998-99 school years. The observers noted several areas of deficiency for the Respondent. During the November 1997 classroom observation Ms. Watkins noticed that the Appellant did not pace her lessons appropriately, as she spent too much time on a drill that should have taken less time. Ms. Watkins also criticized the Appellant for not organizing the learning tasks in a logical sequence so that the students could follow along, and for not passing out books in advance so she would not lose valuable time. The March 1998 observation by Ms. Davis exposed even more weaknesses of the Appellant. Ms. Davis noted that a number of students were not paying attention to the lesson, and were distracted by a host of

other things. She also found the room and the backboards to be in disarray. Most importantly, Ms. Davis discovered that the Appellant was scheduled to teach English during that period, but had no lesson plan for English, so the Appellant was teaching math. Unfortunately, many of the students were not following the assignment. As a result of the areas of weakness the Appellant was offered additional assistance, and a PIP was developed to enhance her areas of weakness. The evidence further indicated that the Appellant did not take advantage of the assistance available to her. On a number of occasions, the Appellant failed to attend meetings that were specifically set up to help her with her lesson plans and student management skills. Other classroom evaluations in November 1998, April and May of 1999 showed the same if not similar deficiencies. No improvement was noticed in the Appellant's performance. The Appellant received an unsatisfactory performance rating for both the 1997-98 and 1998-99 school years. After two consecutive years of unsatisfactory performance the Appellant demonstrated that she was incompetent to continue as a teacher.

The record showed that the Appellant did not contest that she received overall evaluations of "Does not meet expectations" for two consecutive school years, 1997/98 and 1998/99. Further the record reflected that she did not appeal those evaluations at the time. She argued before the Hearing Examiner, as she did in this case, that she was not given the assistance that was required, and that her personal and family problems during the years in question caused her to experience the difficulties that she had. All of the points made by the Appellant were fully explored and addressed by the Hearing Examiner. It is clear from his decision that he gave more weight to the testimony of the Board's witnesses than to that of the Appellant. In this hearing, the Appellant has shown nothing new that would show that the Hearing Examiner's decisions in those areas were arbitrary, unreasonable or illegal. The Hearing Examiner did not find any procedural errors made

in conducting the Appellant's evaluations. Neither did he find that the school system failed to offer adequate assistance to the Appellant. On the contrary, he found that the Appellant had as much of an obligation to work with and seek out assistance from her administration, as it had to help her. Furthermore, the Hearing Examiner found that the personal troubles that the Appellant experienced during the times in question were not revealed by the Appellant to her administration, so there was nothing that could have been done for her.

Finally, it is appropriate in any termination case to consider the factors enumerated in *Maryland State Retirement Agency v. Delambo*, 109 Md.App. 683, 675 A.2d 1018 (1995) that are to be considered in determining the appropriate sanction for an employee's misconduct. *Delambo* mandates an analysis based on five factors:

1. overall employment history in State service
2. attendance record during that period of time
3. disciplinary record at the present agency and at other State agencies as well
4. work habits, and
5. relations with fellow employees and supervisors.

Delambo, supra p. 691. It is not clear from the evidence presented in this case that all of the above criteria were considered. Certainly the employees' attendance record was considered as a positive. But her work habits were not seen favorably. Even though she raised her overall record as being positive I am not sure how much consideration it was given. No testimony about her relations with coworkers was offered by either side. However, despite her thirteen years of teaching and satisfactory prior records, the two consecutive years of unsatisfactory performance was sufficient justification for the Board to terminate her. She was given ample opportunity to correct her problems, and she did not take advantage of them until well after her termination was requested.

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: August 27, 2001

Wayne A. Brooks
Administrative Law Judge