KAY KIMBLE,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 02-27

OPINION

Appellant, a tenured teacher with Montgomery County Public Schools (MCPS), contests her termination from employment based on incompetence. She asserts that she was dismissed without proper cause, that she has been denied over 200 sick leave bank days, and that she should be reinstated or be granted full accidental disability retirement. The local board maintains that the termination decision should be upheld.

A full evidentiary hearing took place before Hearing Examiner Joseph A. Sickles for MCPS who recommended that the local board uphold the superintendent's recommendation to terminate Appellant. Upon review of the entire record, the local board voted unanimously to affirm the dismissal of Appellant for incompetence.

Appellant appealed the local board's decision to the State Board and the matter was transferred to the Office of Administrative Hearings (OAH) where a hearing occurred on February 21, 2002.[1] The administrative law judge (ALJ) issued a proposed decision upholding the local board's decision to terminate Appellant from her position with MCPS based on incompetence. A copy of the ALJ's proposed decision is attached as Exhibit 1.

The State Board heard final oral argument from Ms. Kimble and the attorney for the local board on May 21, 2002. Having reviewed the record in this matter and considered the arguments of the parties, we adopt the Findings of Fact and Conclusions of Law as set forth in Exhibit 1.

CONCLUSION

For the reasons stated by the administrative law judge, we affirm the termination decision made by the Board of Education of Montgomery County.

Marilyn D. Maultsby
President

[1]Appellant represented herself at the OAH hearing.

June 26, 2002

EXHIBIT 1

KAY JOYCE KIMBLE	*	BEFORE DAVID HOFSTETTER,
APPELLANT	*	ADMINISTRATIVE LAW JUDGE,
v.	*	MARYLAND OFFICE OF
MONTGOMERY COUNTY BOARD OF EDUCATION	*	ADMINISTRATIVE HEARINGS
	*	OAH No.: MSDE-BE-01-200100010

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

By letter dated March 23, 2001, the Superintendent of the Montgomery County Public Schools ("MCPS") recommended the dismissal of Kay Joyce Kimble ("Appellant"), a tenured teacher, for incompetence. Appellant appealed the recommendation to the Montgomery Board of Education ("the Board"). On July 12, 2001, Joseph A Sickles, a Hearing Officer of the Board ("Hearing Officer") conducted a hearing pursuant to Md. Code Ann., Educ. § 6-203 (1999). The Hearing Officer recommended that the Superintendent's decision to dismiss the Appellant be affirmed. After reviewing the record compiled by the Hearing Officer, the Board voted to uphold the Hearing Officer's recommendations and affirmed the Superintendent's recommendation to dismiss the Appellant for incompetence. The Appellant appealed the Board's order to the Maryland State

Board of Education and the matter was scheduled before an administrative law judge of the Office of Administrative Hearings. Md. Code Ann., Educ. § 6-202(4) (1999).

Following a telephonic prehearing conference on January 3, 2002, a hearing was conducted on February 21, 2002, before David Hofstetter, 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 herself. Judith C. Bresler, 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 Board's dismissal of the Appellant for incompetence 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 record below are incorporated and adopted by reference into this record.

B. Testimony

No testimony was taken at the hearing.[2] The parties made oral arguments and relied on the record below.

In the hearing below, conducted on July 12, 2001 before a hearing officer, Stanley Schaub, former Director of Performance Evaluations and former Director of Staffing for MCPS, and Kate Gutterman, Acting Supervisor of the Division of Insurance and Retirement and Senior Benefits Specialist, MCPS, testified on behalf of the Superintendent. The Appellant testified on her own behalf and called no other witnesses.

FINDINGS OF FACT

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

1. The Appellant has been employed by MCPS as a high school English and writing teacher since 1966. She worked at Northwood High School until it closed in 1985 and then transferred to Gaithersburg High School.
2. On January 22, 1997, the Appellant submitted to her principal a nine-page, handwritten report alleging that she had been sexually assaulted and harassed on January 8, 13, and 14, 1997 by F. Young, a security assistant at Gaithersburg High School.

[2] At a pre-hearing conference held on January 3, 2002, the Appellant stated that she wished to call witnesses at the hearing in this matter whom she had not called at the evidentiary hearing below conducted July 12, 2001. In my Pre-Hearing Order of January 4, 2002 I granted the Appellant leave to file a motion detailing the names, positions, and expected testimony of the witnesses she sought to call and stating why the requested witnesses had not been called below and why taking their testimony now would be legally proper. Within the prescribed time limits, the Appellant file a "Motion for Additional Testimony" ("Motion") and the Board filed an Opposition. On February 8, 2002, I ruled on the Appellant's Motion, determining, in summary, that the Appellant's proffered reasons for requesting additional testimony were inadequate or non-existent, and that, under COMAR 13A.01.01.01E, my review is limited to the record below and that, other than in exceptional cases, additional testimony is not proper at the hearing before me. I concluded that the Appellant had not established that any exceptional circumstances existed such as to justify further testimony, and denied the Motion.

3. Following an investigation by MCPS staff, Young was formally reprimanded on March 21, 1997 and suspended for two days for "inappropriate verbal interactions with female staff members . . .and unwanted remarks containing sexually explicit language."
4. On August 28, 1997, Young was transferred to a different school.
5. On September 7, 1997, the Appellant wrote to then-Superintendent Vance, offering to forego legal action against MCPS in exchange for a cash settlement of $1 million, disability income of $63,200 per year for life, and certain health insurance benefits.
6. Superintendent Vance rejected the Appellant's offer on October 3, 1997.
7. Subsequent to the alleged assault and harassment in January 1997, the Appellant suffered from anxiety and depression.
8. On December 25, 1998, the Appellant went on personal illness leave as a result of her emotional condition.
9. In support of her personal illness leave, the Appellant's psychologist, Dr. Harvey Sweetbaum, submitted a report, dated December 18, 1998, stating a diagnosis of mild or transient stress-related disorders and prescribing treatment of "individual psychotherapy and medication management." Dr. Sweetbaum recommended leave for the remainder of the school year, i.e., to June 30, 1999, and stated that the Appellant would be unable to perform her job functions during that period.
10. In the spring of 1999, following her request for an extension of her personal illness leave, MCPS sent the Appellant to Dr. Glenn Miller, a psychiatrist, for an examination.
11. In his report dated April 16, 1999, Dr. Miller concluded that the Appellant suffered from anxious and depressive symptoms that "do not reach the level of a substantial mental disorder such as a psychosis." He further concluded that she would perform poorly if she were to return to teaching at that time and stated that a continuation of her personal illness leave was "reasonable".

12. On May 2, 1999, the Appellant notified MCPS that she planned to return to work for the 1999-2000 school year.
13. In June, 1999, the Appellant applied for and was assigned a teaching position with MCPS in the 1999 summer school program.
14. On June 29, 1999, before the commencement of summer school, the Appellant notified MCPS that she would be unable to teach in summer school because Dr. Sweetbaum would not release her to return to work.
15. Subsequent to June 29, 1999, the Appellant requested sick leave for the summer. MCPS denied the request on the ground that she had never started the summer school teaching assignment and therefore was ineligible for sick leave for that period.
16. On July 16, 1999, Dr. Miller again examined the Appellant. In his report of July 28, 1999, he concluded that although the Appellant "does not suffer from a major psychiatric disorder . . . it is certain that she will perform poorly" if she returns to teaching. He further concluded that "she displays enough symptomatology that it could be reasonably argued that for psychiatric reasons she should not return to the classroom."
17. On July 22, 1999, the Appellant applied to the Maryland State Retirement Agency for accidental disability retirement. As part of her application, the Appellant certified that her disability "totally and permanently incapacitates me from the further performance of the normal duties of my position."
18. On May 13, 2000, Dr. Sweetbaum certified that the Appellant could return to work after June 2000.
19. As a result of Dr. Sweetbaum's report, MCPS required that the Appellant again be examined by Dr. Miller. On June 21, 2000, following an examination of the Appellant, Dr. Miller reported that

the Appellant was unfocused and paranoid and opined that, due to her condition, it was unlikely that she could successfully perform any job in the MCPS.

20. Based on Dr. Miller's report of June 21, 2000, MCPS declined to permit the Appellant to return to work.
21. On August 15, 2000, the State Retirement Agency approved the Appellant for ordinary disability retirement, but denied her claim for accidental disability retirement.
22. The Appellant appealed the denial of her claim for accidental disability retirment.
23. The Appellant refused to complete the paperwork which would allow her to begin receiving ordinary disability retirement benefits, although she was entitled to such benefits while appealing the denial of her accidental disability claim.
24. On September 28, 2000, the MCPS Chief Operating Officer wrote the Appellant and informed her that she must complete the retirement process by December 13, 2000 (120 days from the state retirement board's letter) or MCPS would terminate her employment because she had been found by the retirement agency to be disabled and unable to work.
25. MCPS subsequently agreed to delay taking any action regarding termination until the outcome of the Appellant's appeal to the state retirement agency regarding accidental disability retirement was known.
26. In September 2000, the Appellant took a job teaching in the Prince George's County Public Schools. After approximately a month, she left that job and did not return, stating that she had been "traumatized" by students in her class.
27. On February 20, 2001, the state retirement agency denied the Appellant's appeal for accidental disability retirement.

28. Subsequent to February 20, 2001, the Appellant has continued to refuse to retire on ordinary disability retirement.

29. On March 23, 2001, the Superintendent recommended to the Board of Education that the Appellant be dismissed for incompetence.

30. From December 25, 1998 to the present, the Appellant has been unable, by reason of her emotional or psychiatric condition, to perform the functions of her position as a teacher with MCPS.

31. The Appellant wishes to return to her teaching position with MCPS.

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 § 5-704 of the Family Law Article;
> (iii) Insubordination;
> (iv) **Incompetency**; or
> (v) Willful neglect of duty.
>
> (2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.
> (3) If the individual requests a hearing within the 10-day period:
>
> (i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
> (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.
>
> (4) The individual may appeal from the decision of 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.

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

In the instant case, the critical facts are not in dispute. The Appellant does not deny that, due to her emotional or psychiatric condition, she was unable to teach for at least 18 months (i.e., from December 1998 to June 2000). It is further agreed that during that period, in July 1999, the Appellant applied for accidental disability retirement and explicitly certified that she was totally and permanently incapacitate[d]" from performing the normal duties of her job. On August 15, 2000, the State Retirement Agency approved the Appellant for ordinary disability retirement, but denied her claim for accidental disability retirement.

In a typical case, the matter would have ended there, at least from the employer's point of view. The employee would begin receiving regular disability retirement and could, if she chose, appeal the denial of the accidental disability claim. If the employee's appeal were upheld, she would then receive accidental disability retirement (retroactive to the date of the first payment for

regular disability retirement); if the appeal were denied, she would simply continue to receive her regular disability retirement payments. In this case, however, the Appellant has refused to complete the necessary paperwork for receiving ordinary disability retirement, even though receipt of such retirement would not in any way prejudice her ability to appeal the denial of her claim for accidental disability retirement.

The Appellant, in essence, advances two contradictory positions. On the one hand, she states that she is disabled such that she is totally and permanently prevented from performing her job as a teacher. On the other hand, she states that if she cannot get the type of retirement she desires, she should be permitted to return to work.[3] She can not have it both ways.

As a result of the Appellant's self-contradictory stance, MCPS was left with two options: It could allow her to return to work, or it could dismiss her. The question before me is whether the Board's decision to dismiss the Appellant is supported by a preponderance of the evidence. Md. Ann. Code Ann., Educ. § 6-202(a)(iv) (1999). I conclude that it is. The Board had before it compelling evidence in the form of the reports of Dr. Miller (and to a lesser extent, of Dr. Sweetbaum), indicating that the Appellant's psychiatric condition likely precluded her successful return to teaching. This assessment was supported by the fact that the Appellant had not, in fact,

[3] The benefit paid for accidental disability retirement is considerably greater than the benefit paid for regular disability retirement.

been able, by her own assessment, to teach from December 1998 through June 2000.[4] In addition, the Appellant herself certified in applying for accidental disability retirement benefits that she was totally and permanently incapacitated from performing the regular functions of her job. Moreover, in approving the Appellant for ordinary disability retirement, the State Retirement Agency necessarily found that she was "mentally or physically incapacitated for the further performance of the normal duties of [her] position" and that "the incapacity is likely to be permanent." Md. Code Ann., State Pers. & Pens. § 29-105 (1997).

I conclude that these facts establish the reasonableness of the Board's action in dismissing the Appellant. Indeed, it is my view that the unretracted declaration of the Appellant that she was permanently unable to perform the duties of her position, even if standing alone, would serve as evidence sufficient to support the Board's action.[5]

Finally, I note that a dismissal for "incompetency" does not, in this case, relate to any shortcoming of the Appellant's classroom performance. Incompetence does not require a finding of malfeasance. Webster's Revised Unabridged Dictionary, 1996, defines "incompetent" simply as "not competent; wanting in adequate strength, power, capacity, means, qualifications, or the like; incapable; unable; inadequate; unfit." As the Hearing Officer in this matter explained, "in its simplest context, it suggests that an employee is not able to perform the function [of the job] – for

[4] Indeed, the Appellant was unable, as a result of her condition, to carry through with her decision to teach summer school in 1999. Similarly, when the Appellant attempted to teach in Prince George's County in September 2000, she lasted less than a month before applying for sick leave, claiming to have been "traumatized" by her students.

[5] Both at the hearing below and before me, the Appellant argued various issues related to the veracity of her original claims of assault and harassment. For example, Dr. Miller's reports cast doubt on whether the alleged events occurred as the Appellant described, or even if they occurred at all. The Appellant argues forcefully concerning the atrocious quality of these events and the profound effect they had on her. None of these issues are relevant to the issue before me, however, and, therefore, I make no finding concerning them. While the effect of the alleged events on the Appellant's disability may well be a relevant question in the retirement proceedings, it is not germane to the question of whether the Board's decision to terminate the Appellant was supported by a preponderance of the evidence.

whatever reason." *Findings and Recommendations*, at 11, footnote 8, July 30, 2001. In this case, the medical evidence, as well as the Appellant's own certification to the Maryland Retirement Agency establish that she is "incompetent" to perform the duties of her position.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that Montgomery County Board of Education's dismissal of the Appellant, 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 Montgomery County Board of Education terminating the Appellant for incompetency as a tenured Teacher be **UPHELD**.

April 8, 2002

David Hofstetter
Administrative Law Judge

DH/41050

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file written objections within ten (10) days of receipt of the decision; parties may file written responses to the objections within ten (10) days of receipt of the objections. Both the objections and the responses shall be filed with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.01.03P(4). The Office of Administrative Hearings is not a party to any review process.