WARDELL HARMON,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee	Opinion No. 02-49

OPINION

Appellant, a tenured teacher at the Laurence G. Paquin Middle/Senior High School,[1] contests his five-day suspension without pay for insubordination based on his refusal to attend a meeting on October 25, 2000, with the school principal, Rosetta Stith. The October 25th meeting was preceded by a meeting a week earlier on October 18 with Dr. Stith to discuss some attendance issues. Appellant initially refused to participate in that meeting as well, but ultimately acquiesced after speaking with a union representative who told Appellant that he should attend the meeting. No disciplinary action resulted from the October 18th meeting.

Appellant appealed the five-day suspension maintaining that he should have had union representation at the October 25th meeting. Following a full evidentiary hearing, the local board adopted the hearing examiner's findings and conclusions and upheld the suspension decision.

Appellant appealed the local board's decision to the State Board and the matter was transferred to the Office of Administrative Hearings where a hearing was conducted by an Administrative Law Judge (ALJ). The ALJ recommended that the suspension decision be upheld, concluding that Appellant was insubordinate when he refused to meet with Dr. Stith and Mr. Rainey on October 25, 2000.[2] A copy of the ALJ's proposed decision is attached as Exhibit 1. Appellant filed objections to the ALJ's proposed decision and the parties presented oral argument to the State Board on September 24, 2002.

Having reviewed the record in this matter and considered the arguments of counsel for the parties, we adopt the findings of fact and the conclusions of law of the ALJ, with the following clarification. The ALJ found that Appellant was not entitled to *Weingarten* protections because the National Labor Relations Act (NLRA) and case law interpreting the NLRA do not

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[1]Lawrence G. Paquin School is a Baltimore City public school for expectant and for young mothers.

[2]In several places in his proposed decision, the ALJ incorrectly states that the basis for Appellant's suspension was misconduct rather than insubordination. However, based upon our review of the entire decision, we find these instances to be typographical errors.

apply and are not binding on the local board.[3] However, as noted in its decision, the local board does not dispute the principle that an employee is entitled to union representation during an investigation that may result in discipline provided the employee requests union representation. Thus, we find that the applicability of *Weingarten*-type protections is not at issue here.

For the reasons stated by the Administrative Law Judge on the merits of the discipline, we affirm the five-day suspension without pay decision of the Board of School Commissioners of Baltimore City.

Marilyn D. Maultsby
President

Reginald L. Dunn
Vice President

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Edward L. Root

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[3]In *NLRB v. Weingarten*, 420 U.S. 251 (1975) the U.S. Supreme Court held that an employer's refusal to honor an employee's request for union representation "at an investigatory interview in which the risk of discipline reasonably inheres" is a violation of the NLRA and an unfair labor practice.

Walter Sondheim, Jr.

John L. Wisthoff

October 30, 2002

WARDELL HARMON,	*	BEFORE MARC NACHMAN
APPELLANT	*	ADMINISTRATIVE LAW JUDGE,
v.	*	MARYLAND OFFICE OF
NEW BOARD OF SCHOOL COMMISSIONERS FOR BALTIMORE CITY	*	ADMINISTRATIVE HEARINGS
	*	OAH No.: MSDE-BE-01-200200001
	*	

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

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 November 7, 2000, Wardell Harmon ("Appellant"), a tenured Teacher employed by the Baltimore City Public Schools ("BCPS"), received notification from Judith Black Donaldson, Board Executive, New Board of School Commissioners for Baltimore City ("NBOSCBC" or the "Board") that he would be the subject of a recommended five day suspension. Appellant appealed the recommendation to NBOSCBC. James S. Ruckle, Jr., a Hearing Examiner of the Board ("Hearing Examiner") conducted a hearing on December 10, 2000. Md. Code Ann., Educ. § 6-203 (1999). On November 19, 2001, the Hearing Examiner recommended that the Board affirm the Board Executive's decision to suspend the Appellant for five days for misconduct in office. After reviewing the record compiled by the Hearing Examiner, on December 11, 2001, the Board voted, unanimously, to affirm the Board Executive's recommendation to suspend the Appellant for five

days. The decision was announced at the public School Board meeting, on January 8, 2002. On or about March 5, 2002, 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 (“OAH”). Md. Code Ann., Educ. § 6-202(a)(4) (1999).

Following a telephonic prehearing conference on May 21, 2002, a de novo hearing was conducted on June 21, 2002, before Marc Nachman, Administrative Law Judge ("ALJ"), at OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Code of Maryland Regulations ("COMAR") 13A.01.01.03P. The Appellant was present and was represented by Keith J. Zimmerman, 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 five day suspension for insubordination imposed upon the Appellant by the New Board of School Commissioners for Baltimore City (“Board”) under Md. Ann. Code Ann., Educ. § 6-202(a)(ii) (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 Board:

1. Incident Report from Donald F. Rainey (undated)

2. Memorandum from Carmen Russo, CEO, BCPS transmitting Statement of Charges to the Board

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

1. Appellant's grade transcript from Delaware State College

2. Appelant's Air Force discharge document (form DD214)

3. Professional Status Certificate Renewal from Dept. of Public Instruction, State of Delaware

4. Advanced Professional Certificate from MDSE

5. Letter from BCPS dated March 2, 2000

6. Letter from BCPS dated November 2, 2000 transmitting Statement of Charges

B. Testimony

The Board presented the testimony of Donald F. Rainey, Director of Labor Relations, BCPS. The Appellant testified on his own behalf and presented the testimony of Edward Horsey, Sr., Field Representative, Baltimore Teacher's Union ("BTU").

The parties stipulated that the testimony given before the Hearing Examiner by Dr. Rosetta Stith, Director of the Lawrence G. Paquin School and Detective Sgt. Richard Damon, BCPS, which were transcribed under oath, would be submitted for my consideration, as the witnesses were unavailable.

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 an undergraduate degree and a master's degree from Delaware State University (formerly known as Delaware State College).
2. After teaching in other school systems and at the university level, the Appellant was a teacher in the BCPS at various times from 1992 to the present and is currently a tenured teacher.
3. The Appellant was a member of the BTU, the union for BCPS teachers.
4. Most recently, the Appellant was reassigned to the Lawrence G. Paquin School, a BCPS school for expectant mothers and young parents.
5. Dr. Rosetta Stith, who is the Director of the Paquin School, has been at the Paquin School in some capacity approximately twenty-six years at the time of the incident. She was the Appellant's supervisor for more than one year before the incident.
6. The Appellant had been confrontational with school employees, had harassed them and intimidated them through sometimes loud and threatening behavior. The Appellant intimidated Dr. Stith and other staff members at the Paquin School
7. The Appellant refused to attend meetings with Dr. Stith and at times the only way to communicate with him was in writing. Sometimes these communications had to be mailed to him at his home address.
8. During the 2000-2001 school year, the Appellant missed time from work for medical reasons.
9. On October 18, 2000, during the school day, the Appellant was called to the conference room and was met by Dr. Stith and Donald Rainey, Director of Labor Relations for BCPS. The Appellant had not previously met Mr. Rainey.
10. Because she felt intimidated by the Appellant, Dr. Stith asked Mr. Rainey to come to the Paquin School to meet with her and the Appellant.

11. The purpose of the October 18, 2000 meeting was to advise the Appellant regarding work place rules and obligations, including attendance and work performance issues.
12. Dr. Stith and Mr. Rainey assured the Appellant that the purpose of the meeting was not to discipline him.
13. The Appellant subjectively believed that the meeting could lead to disciplinary actions being taken, and insisted that before he would meet with them, he wanted to consult with a BTU representative.
14. The Appellant was agitated during this encounter.
15. Mr. Rainey then placed a telephone call to the BTU office and the Appellant spoke with Edward Horsey, Sr., a BTU Field Representative. Mr. Horsey spoke with the Appellant, calmed him and suggested that he meet with Dr. Stith and Mr. Rainey.
16. After speaking with Mr. Horsey, the Appellant came back to the room and concluded the meeting.
17. On October 25, 2000, Dr. Stith again summoned the Appellant to the conference room for a meeting. Again, Mr. Rainey was present.
18. When entering the room, Mr. Rainey forcefully told the Appellant to sit down. The Appellant refused to do so. Mr. Rainey told the Appellant that if he did not sit down as Mr. Rainey directed him to, the Appellant would be suspended for insubordination.
19. Again, the Appellant wanted to have a BTU representative present. He was denied that request. Mr. Rainey told him that the meeting was not disciplinary in nature, and again warned the Appellant that if he did not sit down as Mr. Rainey told him to, he would be suspended for insubordination.

20. In defiance of this warning, the Appellant left the conference room; he was in an agitated and aggressive mood.
21. Because Dr. Stith and Mr. Rainey had not completed their meeting with the Appellant, they intended to call him back to the conference room to complete the meeting.
22. Because the Appellant appeared to them to be agitated and aggressive when he left the conference room, Mr. Rainey called the BCPS police to come to the Paquin School in case a confrontation.
23. Detective Sgt. Richard Damon responded in plain clothes; with him were two uniformed officers.
24. Det. Sgt. Damon entered the conference room; the uniformed officers remained in the hallway.
25. Dr. Stith again summoned the Appellant to the conference room for a second meeting that day.
26. Upon entering the room, Mr. Rainey again directed the Appellant to sit down and attend the meeting, stating that his failure to do so would result in a suspension.
27. Mr. Rainey was familiar with the *Weingarten* rule, knowing that it allowed that an employee be allowed union representation at any meeting that was disciplinary in nature.
28. During the meetings of October 18 and October 25, 2000, neither Dr. Stith nor Mr. Rainey asked the Appellant any questions concerning disciplinary issues requiring his response.
29. When the Appellant came to the conference room, he saw the uniformed officers in the school hallway. When entering the room, he again saw Dr. Stith and Mr. Rainey, and was introduced to Det. Sgt. Ramon.

30. Again the Appellant was directed to sit down or face suspension; he again left the room. Det. Sgt. Ramon was then asked to escort him back to his office to collect his personal items and depart from the building.
31. Because the Appellant disobeyed the direct order of his supervisor to remain at the meeting, he was charged with insubordination and it was recommended that he be suspended for five days.
32. The Chief Executive Officer ("CEO") for BCPS adopted the Board Executive's recommendation, and recommended that the Board order that the Appellant be suspended for five days.
33. The Appellant appealed the CEO's decision to the Board.
34. The Board appointed a hearing examiner, who, on December 10, 2000, conducted a hearing and recommended that the Board affirm the CEO's decision.

35.The Board voted unanimously to affirm the hearing examiner's recommendations and affirmed the decision of the CEO to suspend the Appellant for five days for misconduct.

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:

> (1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:
> (i) Immorality;
> (ii) Misconduct in office, including knowingly failing to **r**eport 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.

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 suspend the Appellant for five days from his employment with the BCPS on the ground of insubordination because he refused to meet with the director of the Paquin School when requested to do so on October 25, 2000. There were three such meetings: one on October 18, 2000, and two on October 25, 2000.[1] The Board argued that a BCPS employee who is requested to meet with school administrators constituted insubordination and the

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[1] The Appellant's testimony regarding what transpired at the meeting on October 25 was somewhat confusing, as he did tend to place events taking place in the second meeting into the first (e.g., that Det. Sgt. Damon was present at the first meeting rather than the second). The Appellant did, however, catch this mistake towards the end of his testimony. I still question his ability to sequence the events. Mr. Rainey prepared a memorandum of the events (Board Ex. #1), which, due to its recitation of detail, I believe was written close in time to the events leading to this case.

suspension should be upheld. The Appellant argued that he was being subjected to a disciplinary meeting and was within his right to refuse to meet unless he had union representation present, which he actively sought. Accordingly, the Appellant argues that he cannot be compelled to attend a disciplinary meeting without union representation, if he asks for it.

In defining the standard of proof in this type of case – proof by a preponderance of the evidence - the Court of Appeals in *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 125, n. 16, 797 A.2d 770, 781, 2002 Md. LEXIS 229 (2002) looked to the Maryland Pattern Jury Instructions:

> To prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.
>
> . . . .
> MPJI 1:7 (3d ed. 2000).

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 the that the Appellant's suspension for five days for misconduct be upheld for the following reasons.

I. Weingarten Rights.

A. Applicability of the NLRA and supporting case law to the present controversy.

The Appellant argues that he was denied his right to have a BTU representative present when meeting with Dr. Stith and Mr. Rainey based on the holding by the United States Supreme Court in the case of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, the National Labor Relations Board sought enforcement of an order determining that an employer had committed an unfair labor practice by denying a union member the right to representation when being interviewed about an employment infraction. The Supreme Court held that an employer's refusal of an employee's request for union representation "at an investigatory

interview in which the risk of discipline reasonably inheres" is a violation of guarantees set forth in the National Labor Relations Act ("NLRA") and an unfair labor practice.

According to the Appellant, the BCPS deprived Appellant of his right to union representation when he refused the Employee's request to call his BTU representative to the meeting. The Appellant claims this right through Md. Educ. Code Ann., § 6-402, which permits public school employees to "form, join, and participate in the activities of employee organizations of their own choice for the purpose of being represented on all matters that relate to salaries, wages, hours, and other working conditions." The Appellant therefore claims certain rights and status granted under the NLRA.

The statute allowing teachers to unionize does not grant them all federally established rights, including the right to have a union representative present during an investigatory interview discussed in *Weingarten*. The NLRA, which regulates labor matters and under which *Weingarten* was decided, defines "employers" that are subject to that act as follows:

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, *or any State or political subdivision thereof*, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2) [emphasis added].

The United States Court of Appeals for the Fourth Circuit, in *NLRB v. Princeton Memorial Hosp.* 939 F. 2d 174 (1991), provided that the term "political subdivision" includes those entities that are either "(1) created directed by the State, so as to constitute a department of administrative arm of the government or (2) . . . administered by individuals responsible to public officials or the general electorate." *Id.* at 177 (citing *NLRB v. Natural Gas Utility District of Hawkins*

County, 402 U.S. 600, 604-605 (1971)). Specifically, school boards have been excluded from the definition of employers subject to the act. *R. W. Harmon & Sons, Inc. v. NLRB*, 664 F.2d 248, 251 (10th Cir., 1981) (affirming that the NLRA exempts from the definition of "employer" any "state or political subdivision thereof"). *See also North Royalton Education Ass'n v. North Royalton Bd. of Ed*., 41 Ohio App. 2d 209, 214 n.5 (1974). Based on this rationale, the BCPS is a "political subdivision," excluded from the definition of "employer" for NLRA purposes and is, thus, excepted from the provisions of the statute. Therefore, the NLRA and case law interpreting the NLRA do not apply to and are not binding on the BCPS. I find reliance on *Weingarten* inapplicable in the present controversy.[2]

***B. Arguendo* application of the *Weingarten* doctrine in the present case.**

1. Defining the nature of the right.

Assuming, *arguendo*, that *Weingarten* applies to the BCPS and the Appellant, I cannot find that the BCPS violated the Appellant's *Weingarten's* rights by failing to allow him to have a BTU representative present during the October 25, 2000, meetings with Dr. Stith and Mr. Rainey.

The Employee contends that the BCPS violated his *Weingarten* rights by failing to allow him to have his BTU representative present at the meeting. One need look no farther than the

[2] There may be contractual obligations granting this right to the Appellant, but no such provision was presented for me to consider.

opening paragraph of *Weingarten* to ascertain the triggering event for such a right:

> The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an *investigatory interview* which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice….

420 U.S. at 252 [emphasis added]. The United States Supreme Court held that an employer violates the NLRA if the employer denies an employee's request for the presence of a union representative at an *investigatory interview* that the employee reasonably believed would result in disciplinary action. *Id.* at 256-268. But before the right can be violated, the triggering event must occur. I do not find that there was an investigatory interview that the employee reasonably believed would result in disciplinary action.

2. Defining the "Investigatory Interview."

An "investigatory interview" can be defined by its component terms. "Investigatory" is defined as "designed to find information or ascertain facts…." [3] The root of that word is "investigate" which is defined as, "to make a detailed inquiry or systematic examination."[4] An interview is defined as "a conversation, such as one conducted by a reporter, in which facts or statements are elicited from another." *Id.* An investigatory interview is therefore a conversation in which one is in order to elicit, find or ascertain facts.

What took place at either meeting on October 25, 2000 was not an investigatory interview. The Appellant was at first summoned to the conference room and was met by Dr. Stith and Mr. Rainey. He was not asked any questions, but was instructed to seat himself. He never stayed long enough for questions to be asked. Instead, he stood, refusing to attend the

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[3] *WordNet 1.6, Princeton University, 1997.*
[4] *The American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Company, 2000.*

"meeting" complaining that the agenda was not presented to him earlier.

Whether the Appellant believed that he was going to be asked questions is irrelevant to the inquiry. The Appellant's subjective belief is irrelevant to the determination of this issue. Whether the triggering event is an investigatory interview is an objective test. In *Weingarten*, the Court noted:

> The Board stated in *Quality*[5]: "'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." **195 N. L. R. B. 197, 198 n. 3.** In ***NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969),** the Court announced that it would "reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry," and we reaffirm that view today as applicable also in the context of this case.

420 U.S. at 257 n.5. An objective test determines whether the meeting was an investigatory interview.

At no time was the Appellant asked any work or disciplinary related questions for which an answer was required. In his testimony, he did not relate any question he was asked, other than whether he was going to sit down and attend the meeting. The appellant testified that he felt threatened by Mr. Rainey's asking him to sit down and threatening him with suspension if he did not do so. He testified that he believed that the meeting was going to be disciplinary in nature because of the way that Mr. Rainey spoke to him. Although he subjectively believed that the meeting was going to be disciplinary, the inquiry is objective: whether he was going to be asked questions in an "investigatory interview." Even from the Appellant's testimony, it was apparent that at either meeting on that day was he asked *any* questions requiring an answer, other than whether he would stay in the conference room. The Appellant testified emphatically that he was

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[5] *NLRB* v. *Quality Mfg. Co*., 481 F.2d 1018 (CA4 1973).

not asked for "his side of the story." In fact, I find that he was not asked any questions relevant to his performance or attendance at that meeting. Objectively, unless a question is posed, there is neither an investigation nor an interview.

Moreover, not every meeting regarding discipline requires union representation. I find that the purpose of the meeting was for the BCPS representative to impart rather than obtain information. In *Amoco Oil Co, and Nunn*, 238 NLRB 551 (1978), the employee claimed that his employer denied him union representation during a disciplinary interview. The NLRB denied that claim as no such interview was conducted. Instead, as I believe occurred in the present case, in the present case, the employee, who was involved in a disciplinary dispute with his employer, was directed to come to his supervisor's office. The employee insisted that before the meeting could start, he wanted his union representative present. However the purpose of the meeting was not to elicit information *from* the employee, but rather to relate information *to* the employee.[6] The supervisor asked the employee no questions, only imparting information.[7] I find that the meetings on October 25 had a similar purpose.

Thus, even if it were applicable, the Employee failed to establish a violation of his purported *Weingarten* rights.

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[6] The supervisor said, "I'll make it short and simple, you are suspended as of 4 p.m. indefinitely; if and when you return to work you will receive a white slip."

[7] After the employee asked for union representation, the supervisor…" confined himself to a single sentence informing [the employee] of his suspension; he made no attempt to question him, engage in any manner of dialogue, or participate in any other interchange which could be characterized as an interview." Similarly, in the present case, no attempt at a disciplinary-related interchange or dialogue was made.

C. Conduct of the meetings.

Dr. Stith's testimony, although shaky,[8] did not convince me that the Appellant was present to be questioned. Mr. Rainey's testified more cogently. I determined through his testimony that the Appellant was not asked any significant questions which would require a response or would elicit information that related to disciplinary action. His purported reason for coming to the school was that Dr. Stith was uncomfortable dealing with the Appellant, who would not accept a letter from her or meet to discuss performance issues. The meeting was called in order for Dr. Stith to hand the Appellant a letter in order to request information from him at a later time.[9]

Although I did not find her recollection of the details of the meetings useful, Dr. Stith's testimony was helpful to determine the tenor of the relationship between her and the Appellant. She testified that it was not out of the ordinary to mail inquiries to the Appellant at his home address by certified mail to make sure that he accepted information or inquiries from her. It appeared that the nature of these meeting was similarly to delivery this type of missive. The Appellant and Mr. Rainey both testified that the Appellant was given envelopes that Mr. Rainey wanted the Appellant to open at the meeting and that the Appellant wanted to review outside of their presence.

None of the witnesses proved to me that the reason for the October 25 meeting was to ask

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[8] The parties stipulated that Dr. Stith's presence at the hearing was excused, and in lieu of her testimony, her earlier transcribed testimony was to be considered. Throughout her testimony, she complained that she did not have her notes present and therefore she could not recall the details of the meeting. Even though I only had Dr. Stith's transcribed testimony before me, I could still determine that she was not a reliable witness and that her recollection of the relevant meetings was faulty. I therefore gave her testimony regarding the meetings very little weight.

[9] Although the Appellant was asked to open the envelope while still present in the conference room, I do not find this to be a significant fact. There was no indication that an immediate response to the written inquiry was required at that time, as this was the means in which the Appellant chose to accept communication from his employer.

the Appellant questions; it was more likely than not to impart information to him and to get him to agree to commit to discuss issues that he had heretofore refused to discuss. Specific questions were not asked, and responses were not elicited from him. I therefore find that, even if the Appellant had *Weingarten* rights, those rights were not violated.

II. Insubordination

On two occasions on October 25, the Appellant was asked to come to a meeting and remain in the room to accomplish school business. Appellant believed that before a proper meeting could take place, he needed to be provided with prior knowledge of the purpose of the meeting. However, if an employee is asked to attend a meeting, it is incumbent upon him to do so.

To be insubordinate is to be disobedient to lawful authority. *Webster's Revised Unabridged Dictionary, 1996.* It implies the failure or refusal to recognize or submit to the authority of a higher-ranking employee, in this instance the principal of the Appellant's school. Dr. Stith, as the Director of the Paquin School, and Mr. Rainey, as Director of Labor Relations for BCPS, were the Appellant's superiors. The Appellant should have followed directions given by these individuals; failure to carry out these instructions amounts to insubordinate.

The Appellant claims that Mr. Rainey intimidated him. The Appellant also claims that he was intimidated by the presence of uniformed officers in the school hallway and by the presence of Det. Sgt. Damon inside the conference room at the second meeting on October 25.

Dr. Stith testified that she had been having "difficulties" with the Appellant for some time prior to the series of conferences. The Appellant himself intimidated staff members at the

school[10] including Dr. Stith, the assistant principal and the director's assistant. He was known to raise his voice and "throw his hands up" when speaking, Dr. Stith testified that his mannerisms were threatening and harassing, that he had been insubordinate to her in the past,[11] and that she feared him. The Appellant had previously refused to attend meetings with her when requested, and she called Mr. Rainey to assist her in confronting the Appellant to provide him with information that she wanted to impart to him to make sure that he understood what she had written to him in the letters.[12] I do not believe that Mr. Rainey's attendance at the meeting intimidated the Appellant. I believe that Mr. Rainey's presence was justified by the Appellant's behavior in the school.

Mr. Rainey told the Appellant that if he left the room he was going to be suspended. It was significant to me, however, that the sanction did not result from the Appellant failing to respond to any questions. At no time did Mr. Rainey tell the Appellant that he would be suspended unless he answered questions – that sanction was proposed if the Appellant did not stay for the meeting. The request was reasonably related to his duties, made during the regular work day, and did not violate any specified rights, other than the claimed *Weingarten* rights which I dismissed, above.

An administrator has the right to call a meeting and the employee has an obligation to attend that meeting. Anything short of this response amounts to insubordination, which subjects

[10] Even Mr. Horsey, who knew the Appellant, testified that he was a very assertive person, and became expressive in demeanor when he felt threatened. I found that the Appellant's demeanor at the hearing to be aggressive as well, confrontational and arrogant. Based on my observations and the witnesses' testimony, I believe that he projected these traits towards Mr. Rainey and Dr. Stith at their meetings.

[11] CEO Exhibit 1, which was admitted by the Hearing Examiner, attested to a prior encounter between Dr. Stith and the Appellant when he loudly refused to sign in late, proclaiming in front of students and staff that he was not going to sign the book "no matter shat you say" and that she was not his "mother or [his] wife."

[12] Although I discounted Dr. Stith's testimony in which she was asked to recall the series of meetings with the Appellant in October, I found that her recounting of previous problems more complete and therefore more credible.

the Appellant to sanctions, including suspension.

III. Severity of the sanction imposed.

When determining the appropriate sanction for an employee's misconduct, the Court of Special Appeals in *Maryland State Retirement Agency v. Delambo*, 109 Md. App. 683, 692, 675 A.2d 1018 (1996)[13] mandated 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.

Although it is not clear from the evidence presented in this case that all of the above criteria were considered *in seriatim*, evidence of the Appellant's behavior was apparent. His attendance was the subject of the initial complaint. His refusal to attend meetings to which he was called shows poor work habits, and he apparently does not get along well with his co-workers, whom I believe he intimidates. The Appellant counters only that he is a tenured employee. Accordingly, the suspension for five days appears to be an appropriate sanction, which I will sustain.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Board's five-day suspension of the Appellant, a tenured teacher, for insubordination is supported by a preponderance of the evidence. Md. Code Ann., Educ. § 6-202(a)(ii) (1999); COMAR 13A01.01.03E.

[13] Although *Delambo* may be inapplicable to a personnel matter emanating from the BCPS, I needed a framework in which to analyze the magnitude of the sanction. *Delambo* presents a reasonable framework in which to make this analysis.

PROPOSED ORDER

It is proposed that the decision of the New Board of School Commissioners for Baltimore City suspending the Appellant for five days for misconduct be **UPHELD**.

Date: August 5, 2002

Marc Nachman
Administrative Law Judge

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.

WARDELL HARMON,	*	BEFORE MARC NACHMAN
APPELLANT	*	ADMINISTRATIVE LAW JUDGE,
v.	*	MARYLAND OFFICE OF
NEW BOARD OF SCHOOL COMMISSIONERS FOR BALTIMORE CITY	*	ADMINISTRATIVE HEARINGS
	*	OAH No.: MSDE-BE-01-200200001
	*	

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FILE EXHIBIT LIST

Exhibits

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

1. Incident Report from Donald F. Rainey (undated)

2. Memorandum from Carmen Russo, CEO, BCPS transmitting Statement of Charges to the Board

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

1. Appellant's grade transcript from Delaware State College

2. Appelant's Air Force discharge document form DD214

3. Professional Status Certificate Renewal from Dept. of Public Instruction, State of Delaware

4. Advanced Professional Certificate from MDSE

5. Letter from BCPS dated March 2, 2000

6. Letter from BCPS dated November 2, 2000 transmitting Statement of Charges