

JEROME DEMARCHI,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 03-02

OPINION

Appellant, a former assistant principal with the Montgomery County Public School System (“MCPS”) at Silver Spring International School (“SSI”), appeals his suspension without pay for willful neglect of duty based on a breach of test security during the administration of the Comprehensive Test of Basic Skills (“CTBS”) at SSI on March 15, 2001, for which he was the test coordinator. On appeal to the local board, a full evidentiary hearing was conducted by a local hearing examiner who recommended that Appellant receive a three month suspension without pay for willful neglect of duty, rather than termination as recommended by the local superintendent; and that Appellant be reinstated as an assistant principal at the end of the three month period. Accepting the recommendation of the hearing examiner in part and rejecting it in part, the local board suspended Appellant without pay through the end of the first semester of the 2001-02 school year; and directed that upon his return at the start of the second semester, Appellant should be placed in a teaching position at a school to be determined by the superintendent.

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. The ALJ concluded that “the Appellant willfully neglected his duties as a test coordinator, and that his actions were unreasonable given the totality of the circumstances.” The ALJ therefore recommended that the local board decision be upheld. 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 December 3, 2002.

Having reviewed the record in this matter and considered Appellant’s objections as well as the arguments of the parties, we adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge. We thereby affirm the decision of the Board of Education of Montgomery County.

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

Walter Sondheim, Jr.

John L. Wisthoff

January 29, 2003

EXHIBIT 1

JEROME DEMARCHI,

APPELLANT

v.

BOARD OF EDUCATION

OF MONTGOMERY COUNTY

* * * * *

* BEFORE WAYNE A. BROOKS,

* ADMINISTRATIVE LAW JUDGE,

* MARYLAND OFFICE OF

* ADMINISTRATIVE HEARINGS

OAH No.: MSDE-BE-05-200200002

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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 June 12, 2001, Jerome DeMarchi (“Appellant”), Assistant Principal, employed by the Montgomery County Public School System (“MCPS”) received notification from Dr. Jerry D. Weast, Superintendent of Schools, recommending termination from employment for willful neglect of duty and misconduct in office. The Appellant appealed the recommendation to the Board of Education of Montgomery County (the “Board”). Joseph Sickles, a Hearing Examiner of the Board (“Hearing Examiner”) conducted a hearing on September 11, 12, and 17, 2001. Md. Code Ann., Educ. § 6-202 (1999). The Hearing Examiner, after a thorough review of the evidence, and after making certain credibility findings, recommended that the Appellant receive a three (3) month suspension without pay for willful neglect of duty, instead of termination; and further, that he be reinstated as an assistant

principal at the end of the three month loss of income. The Appellant appealed the Hearing Examiner's recommendation to the Board. After hearing arguments from both parties on January 8, 2002, and reviewing the record compiled by the Hearing Examiner, the Board accepted in part and rejected in part the Hearing Examiner's recommendation. The Board suspended the Appellant without pay through the end of the first semester of the 2001-2002 school year. The Board further decided that at the commencement of the second semester of the 2001-2002 school year, the Appellant should be placed in a teacher position, with pay as a teacher at a school to be determined by the Superintendent. 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).

A hearing was conducted on August 22, 2002, before Wayne A. Brooks, Administrative Law Judge ("ALJ"), at the Office of Administrative Hearings, 11101 Gilroy Road, Hunt Valley, Maryland. The Appellant was represented by Douglas J. Adams, Esq. Judith Bresler, Esq., Reese & Carney, represented the Board. Code of Maryland Regulations ("COMAR") 13A.01.01.03P.

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. 2001); COMAR 13A.01.01.03P; COMAR 28.02.01.

ISSUE

The issue on appeal is whether the suspension imposed upon the Appellant pursuant to Md. Code Ann., Educ. § 6-202(a) (1999) for willful neglect of duty and/or misconduct in office was proper.

SUMMARY OF THE EVIDENCE

A. Exhibits

The parties requested that the record below be adopted and incorporated into this record, and neither side submitted any additional exhibits.

B. Testimony

The Appellant testified on his own behalf.

The Board did not present any witnesses.

FINDINGS OF FACT

After careful consideration of the record and the additional testimony presented, I find, by a preponderance of the evidence, the following facts:

1. At all times applicable herein, the Appellant, was assigned as an Assistant Principal at Silver Spring International Middle School (“SSI”).
2. As a part of his duty assignments, the Principal of SSI assigned the Appellant as the testing coordinator during the 2000-2001 school year. As the testing coordinator, he was required to attend training on test procedures and test security protocols, train others involved in the administration of tests on the procedures and protocols, maintain the inventory of the tests, and develop procedures for the distribution and collection of the tests, among other duties.
3. The Principal did not assign anyone else as a co-coordinator or back-up coordinator for testing.
4. The Comprehensive Tests of Basic Skills (“CTBS”) is a state-mandated test, administered to students throughout the state in grades 2, 4, and 6. The Appellant was responsible for coordinating the administration of the CTBS.
5. SSI received its allotment of the CTBS materials and tests on or about February 6, 2001.

6. The instructions from the MCPS Manual indicated that the materials should not be opened until February 12, 2001, and in any event, the test should not be copied or provided to students. However, test coordinators could view the materials.
7. The CTBS test was scheduled for March 13 and 15, 2001.
8. Sometime between February 6 and 12, 2001, the Appellant gave a test booklet to Amy Land, the chair of the math department.
9. Ms. Land made eight copies of the math portion of the booklet and distributed the copies to the 6th grade math teachers present at a department meeting on February 12, 2001.
10. Ms. Land advised the teachers that the copy she provided them was from the actual CTBS test booklet, and that students were not to see it, but that they could extract concepts from it to prepare their students for the test.
11. One of the math teachers was not present at the February 12, 2001 department meeting. He subsequently received a copy of the test as well. He and another teacher, who had been present at the February 12, 2001 meeting, used actual test questions in classroom exercises and homework assignments in preparation for the test.
12. Training on the CTBS (the School Assessment Leadership Training, "SALT") for test coordinators and others involved in the administration of the test, occurred on February 15 and 16, 2001.
13. The SALT consisted of five areas: non-disclosure forms and guidelines for test security; accommodations and exemptions; administering the test; tips for training staff; and, preparing and packing scorable materials and tests.
14. The Appellant and Ms. Land were directed to attend the SALT by the Principal.

15. The Appellant and Ms. Land, who drove together, arrived 45 – 60 minutes late for the SALT on February 16, 2001 because the Appellant was attempting to complete some of his other school assignments first.

16. The Appellant and Ms. Land missed all of the training except for the area concerning the preparation and return of the materials and tests. Consequently, they also missed the instructions on the need to sign non-disclosure forms. The forms are required by the State for anyone who sees secure test materials, and a signature is required to promise that the test materials will not be disclosed.

17. After being contacted by the central office, the Appellant and Ms. Land, executed non-disclosure forms on or about February 26, 2001.

18. Prior to the administration of the CTBS, the Appellant did not conduct any formal training for the test proctors – those who were selected to assist in administering the test.

19. On the first day of the test, March 13, 2001, the Appellant provided each test proctor a non-disclosure form to review and sign as they picked up their packets of test materials.

20. On March 15, after the Appellant distributed the test materials and non-disclosure forms, and the test was underway, the Appellant left SSI to attend a student expulsion hearing. He did not inform the Principal, Ms. Land, or any of the test proctors that he would not be present for portions of the test. He returned in time to collect the test materials.

21. At the conclusion of the test, two students reported to their test proctor that they had seen portions of the test in their math homework assignments the night before.

22. Ms. Land was notified, and she questioned the two student's math teacher about the student's allegation. The teacher admitted that he used the questions for homework. Ms. Land reported the incident to the Principal.

23. After an investigation, Dr. Jerry D. Weast, Superintendent of Schools, recommended termination from employment for willful neglect of duty and misconduct in office.

DISCUSSION

The applicable law provides that a teacher, principal, etc., may be suspended or dismissed, for cause, by a local board on the recommendation of the local superintendent, and that the professional 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)(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 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 suspension case to the State Board is set forth in COMAR 13A.01.01.03E. In pertinent part, COMAR 13A.01.01.03E 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 the 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 demeanor-based credibility of the witnesses who testified before the Hearing Examiner, I gave considerable deference to his findings. *Department of Health and Mental Hygiene v. Shrieves*, 100 Md.App. 283 (1994); *Anderson v. Dep't of Public Safety*, 330 Md. 187 (1993). I also recognize the Board's right to reject the Hearing Examiner's findings if such findings were based not solely upon demeanor, but upon derivative inferences drawn from the evidence of record. *Galbaldoni v. Board of Physician Quality Assurance*, 141 Md.App. 259 (2001). As a result of my review, I must conclude that the evidence clearly established the reasonableness of the Board's decision to suspend the Appellant for one semester and to demote him from an assistant vice principal to a teacher.

In the instant case, the Board, after a review of the recommendations of the Superintendent, the Hearing Examiner, and the evidence, determined that the Appellant was responsible for willful neglect of duty. The Board then determined that a measured disciplinary action was a suspension for a semester, and a return to the ranks of teacher thereafter. The Board based its determination upon facts that were mainly undisputed.

The Appellant was assigned as an Assistant Principal at SSI. As part of his duties, he was responsible for coordinating tests, such as the CTSB, during the 2000-2001 school year. As the testing coordinator, he was required to attend training on test procedures and test security protocols, train others involved in the administration of tests on the procedures and protocols, maintain the inventory of the tests, and develop procedures for the distribution and collection of

the tests. Competing with that responsibility was his duty involving disciplinary actions in the school. In addition, there is no dispute that the Appellant was in training and attempting to learn his job as an administrator and balance his responsibilities.

What is in dispute is whether the Appellant conducted himself in his duty as a test coordinator in a reasonable manner. COMAR 13A.03.04.07D states that “all conduct with respect to test administration...will be reviewed under a reasonable person standard, that is, what a reasonable person would do under similar circumstances.” What was raised and sufficiently reviewed and addressed in the hearings below were five contested areas:

1. receiving training;
2. providing training;
3. review and collection of non-disclosure forms;
4. presence during testing; and,
5. security of test materials.

Training

I find it somewhat interesting that the CTBS materials and tests were delivered to SSI on or about February 6, 2001, before the Appellant was scheduled for training on the security and administration of the CTBS. Some of his failures certainly could be attributed to his relative lack of experience and training in this area. Nonetheless, he was scheduled to attend training, SALT, for the CTBS on February 16, 2001. The training would have provided the Appellant with everything that he needed to know about administering and securing the CTBS. On the afternoon of the Appellant’s SALT training, the Appellant arrived approximately 45 – 60 minutes late, consequently missing most of the training. The Appellant contended that the reason for his

tardiness was because he was attending to other pressing school business, more particularly, some disciplinary issues that he believed to be a priority. The Appellant argued that his failure to attend the training on time was not based upon a willful disregard of his duties, but was a judgment decision. As noted, he believed that his Principal wanted disciplinary issues to be a higher priority for him than testing. Therefore, he argued that in his judgment, he needed to make certain that the pressing disciplinary issues were taken care of before he went to the training.

I agree with the decision of the Hearing Examiner. At best, it was poor judgment on the Appellant's part to have placed the training for the CTBS at such a low priority status. Again, it may not have solved all of the problems that occurred, but many of the Appellant's problems were directly related to his failure to timely attend the SALT. Therefore, I also find that it was not a reasonable decision—there was nothing more important than attending the comprehensive training that was provided.

Secondly, the Appellant readily admitted that he did not provide any formal training to the test proctors. He believed that the team leaders were responsible for such training. He further contended that the MCPS Manual did not specify formal training, but he contended that for those that had questions he did provide personal training.

The word “formal” may, in fact, not appear in the MCPS Manual, however, the clear intent is that training be provided to all involved in the administration of the test, including the test proctors. The Hearing Examiner found the Appellant's failure to train willful neglect of his duties, and I have seen no evidence to contradict that finding. It matters not that the lack of training potentially had nothing to do with the breach of the test protocol involved in this case; it by itself was offensive.

Non-Disclosure Forms

The non-disclosure forms were required by the State for anyone who sees secure test materials, and then a signature is required to promise that the test materials will not be disclosed to anyone else. This too was a portion of SALT that the Appellant missed because of his tardiness. The form also contained plenty of information involving the security of the test, information that was essential to all those who were involved in the administration of the test. Furthermore, the information on the forms was something that should have been thoroughly reviewed with all participating in the administration of the test so that they knew of their legal and ethical obligations. The Appellant basically handed out the forms at the beginning of the testing - no substantial review was conducted. I find, as did the Hearing Examiner, that the failure to provide the forms earlier would not have prevented the breach, but as I previously stated, it matters not. The failure to provide training and/or a thorough explanation of the form was a failure to perform a fundamental part of the job as a test coordinator.

Presence During Testing

Again, this an area where the dispute does not center around whether the Appellant was present during testing on March 15, 2001 (he readily admitted that he left the school for a period of time to attend a student expulsion hearing), but whether his actions were reasonable in light of the circumstances. The role of the test coordinator is important, he must oversee the administration of the test to assure that all is going as planned and that there are no breaches of security. His actual absence during the testing, however, if adequate provisions were put in place to substitute for the coordinator's absence, is not necessarily a violation of testing protocol. But, in this case, the Appellant did not make any provisions. He testified that he did not notify the

Principal that he would not be present, nor did he notify Ms. Land, a person that he contended was his back-up coordinator. He believed that he may have mentioned it to the office secretaries, but not to anyone involved in the testing. It is also important to note that the Appellant did not discuss the potential scheduling conflict with the Principal to determine whether his absence, even for a brief period, would be a problem. Therefore, I can not find any of the Appellant's actions on this issue reasonable either.¹ Anything could have taken place during his absence. By chance, the breach that occurred had nothing to do with his absence, but his absence speaks volumes about his willful neglect of his duties. Certainly no one could expect him to be in two places at once, but a reasonable person would have had an alternative plan in place.

Security of Test Materials

There is no more important issue in dispute than the security of the test materials. It appears that one of the only facts undisputed is that the Appellant provided Ms. Land a copy of the actual test booklet. The question is why?

The Appellant maintained that it was reasonable to have a back-up, which by itself is arguably a reasonable idea. The Appellant further contended that it was reasonable to consider Ms. Land as a back-up coordinator, and as such, she was authorized to have a copy of the test. His reasoning is not based upon any authorized decision by the Principal, for no one, not even the Appellant, designated Ms. Land as the back-up test coordinator. The Appellant's basis for relying upon Ms. Land rested upon a number of factors, her experience both at the school and with the SALT, her attendance at the SALT with him, that she was not scheduled as a test proctor so she could fill-in for him if necessary, and other factors. Again, all of those factors

¹ The reasonableness of Appellant's belief that Ms. Land was his back-up will be discussed later in this decision.

could lead one to conclude that Land would be a reasonable choice as a back-up test coordinator. However, as the Board pointed out, no one made such a designation. Therefore, the Appellant could not take a hypothetical ideal back-up and grant her official status. It is the designation of test coordinator or even back-up coordinator that grants one the authority to have access to the test materials. Ms. Land should not have been given a copy of the CTSB because she didn't have any authority to be in possession of the materials. The Appellant's biggest mistake was concluding that she did have such authority. Certainly, he may argue in mitigation that at the time that he provided her with a copy of the materials he had not been to the SALT training, nor had he had a chance to review the terms of the non-disclosure form. However, after he received the training, and after he reviewed his obligations under the non-disclosure forms, he did nothing to correct the mistake. He could have, for example, told Ms. Land that he may have been wrong to give her the test earlier but that he trusted her and had decided to make her his back-up, so she could have possession of the materials. It would not have eliminated the problem that occurred, but it may have made the Appellant's argument more saleable. The Appellant's mistake placed the entire security of the test in jeopardy, that was unreasonable and a willful neglect of his duty to make certain that the materials were secured and maintained by only those authorized to do so.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Board has proven by a preponderance of the evidence that the Appellant willfully neglected his duties as a test coordinator, and that his actions were unreasonable given the totality of the circumstances. Md. Code Ann., Educ. § 6-202(a) (1999); COMAR 13A.01.01.03E; COMAR 13A.03.04.07D.

PROPOSED ORDER

It is proposed that the decision of the Board of Education of Montgomery County suspending the Appellant without pay through the end of the first semester of the 2001-2002 school year, and that at the commencement of the second semester of the 2001-2002 school year, the Appellant should be placed in a teacher position, with pay as a teacher at a school to be determined by the Superintendent be **UPHELD**.

October 7, 2002

Wayne A. Brooks
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.