DARYL YOUNG,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 16-41

OPINION

INTRODUCTION

Daryl Young (Appellant) appeals the decision of the Montgomery County Board of Education ("local board") upholding his termination as a special education teacher based on incompetency. We referred this case to the Office of Administrative Hearings ("OAH") as required by COMAR 13A.01.05.07A(2).

On April 7, 2016, the Administrative Law Judge ("ALJ") issued a proposed decision recommending that the State Board uphold the local board's termination decision. Although the ALJ found in favor of the local board, the local board filed exceptions to two specific issues in the case. The Appellant did not respond to the local board's exceptions. The local board has waived oral argument.

FACTUAL BACKGROUND[1]

The Appellant began his teaching career with Montgomery County Public Schools ("MCPS") in 1999 as a special education teacher at Martin Luther King, Jr. Middle School. He remained in that position until his termination in 2014.

Beginning with the 2011-2012 school year, Appellant's teaching responsibilities changed. He was now assigned to co-teach a subject with a general education teacher in a regular education classroom with both regular and special education students. He was equally responsible with the general education teacher for planning, implementing lessons, and ensuring student progress.

The Appellant co-taught eighth grade English during the 2012-2013 school year. During that time he had four formal classroom observations. Due to deficiencies in his performance, Appellant received a Below Standard rating on his April 3, 2013 evaluation.

For the 2013-2014 school year, MCPS placed Appellant into the Peer Assistance and Review program ("PAR") to help him achieve competence through mentoring and training. During this time, the Appellant co-taught seventh grade English. Appellant had four formal observations during the school year, conducted by his consulting teacher under the PAR program. According to the observer, Appellant's performance did not improve. Appellant

[1] The full factual background is set forth in the ALJ's Proposed Decision.

received a Below Standard rating on his April 23, 2014 evaluation and the PAR Panel unanimously recommended Appellant's termination from his position.

On July 9, 2014, the MCPS Superintendent advised the Appellant that he was recommending to the local board that Appellant be terminated from employment for incompetency. On appeal, the local board referred the matter to a hearing examiner for review. The hearing examiner conducted a two day evidentiary hearing.[2] On January 30, 2015, the hearing examiner issued a decision recommending that the local board affirm the termination. The local board heard oral argument on Appellant's exceptions to the hearing examiner's decision. On April 27, 2015, the local board issued a decision affirming the hearing officer's recommendation that Appellant be terminated.

Appellant timely appealed to the State Board. We referred the matter to the OAH on June 3, 2015. Hearings took place on September 17, 2015, December 8 and 9, 2015 and January 8, 2016. On April 7, 2016, the ALJ issued a proposed decision recommending that the State Board uphold the local board's termination decision.

Although the ALJ recommends upholding the local board's termination decision, the local board has filed exceptions to two of the ALJ's rulings in the case. The Appellant did not respond to the exceptions. The local board has waived oral argument.

STANDARD OF REVIEW

Because this appeal involves the termination of a certificated employee pursuant to §6-202 of the Education Article, the State Board exercises its independent judgment on the record before it in determining whether to sustain the termination. COMAR 13A.01.05.05F(1) and F(3). In addition, the State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.05E.

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216. In reviewing the ALJ's proposed decision, the State Board must give deference to the ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Shrieves,* 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

This is an unusual case. The local board prevailed at the OAH hearing, yet filed exceptions to the ALJ's decision. Typically, a party would not do so with a favorable outcome. The issues raised by the local board, however, have no impact on the merits of the ALJ's proposed decision. They have no bearing on the fact that the Appellant had serious deficiencies in his work performance that did not improve despite the assistance offered by the school system. Thus, based on the record in this case, and given the Appellant's failure to file exceptions to the ALJ's proposed decision, we affirm the case on the merits and uphold the local board's decision

[2] Appellant was represented by legal counsel during the hearing.

to terminate the Appellant from his teaching position based on incompetency.

Why are the Local Board's Exceptions Important?

There are aspects of this case that the local board has called into question. Specifically, the local board maintains that the ALJ improperly allowed the Appellant to introduce additional evidence during the OAH hearing which included testimony from witnesses, as well as the admission of documentary evidence. The local board maintains that the additional testimony offered by the Appellant required the local board to present rebuttal testimony from six witnesses, each of whom had already testified in the local board proceedings. The local board states that this resulted in a protracted four-day hearing in which counsel for the local board litigated the case and witnesses had to be present to testify once again. This issue is worth our attention because an ALJ's improper admission of additional evidence in a State Board appeal can create an unnecessary expense and burden on the school system, as well as on the witnesses and other individuals involved. This militates against notions of judicial economy and efficiency.

In addition, in admitting the evidence, the ALJ explicitly stated that he was not bound to the holding in a State Board Opinion. *See* ALJ's Pre-Hearing Conference Report and Order. Given that our decisions have precedential value in the appeals before us, including those that we transfer to OAH, we believe it is important to address this matter.

The local board has also questioned the ALJ's decision to address a matter that it maintains was not presented for review before the local board. The local board argues that the ALJ again ignored State Board precedent, addressing this issue despite a long line of State Board cases holding that such matters are waived on appeal to the State Board. For the reasons already stated, we believe it is important for us to speak to this issue.

Introduction of Additional Evidence

The local board maintains that the ALJ improperly allowed the Appellant to introduce certain evidence during the OAH hearing in contravention of State Board regulations and the State Board's decision in *Sullivan v. Montgomery County Board of Education*, MSBE Op. No. 14-51 (2014). The local board is referring here to additional documentary evidence identified as Appellant's exhibits 1 through 7 (Proposed Decision at pp. 5-6) and the testimony of several of Appellant's witnesses. Those witnesses are Dana Davison, Deborah Good, and the Appellant, each of whom testified at the hearing before the local board's hearing examiner, and Susan Cram and Cathy Haver, neither of whom had testified previously in the local board's hearing. Although the local board opposed the admission of this evidence at the pre-hearing conference, the ALJ rejected the local board's argument. (*See* Pre-Hearing Conference Report and Order).

There are two State Board regulations that address the admission of additional evidence in a State Board appeal. The regulation governing certificated employee termination appeals provides the following:

> C. Additional Testimony
>
> (1) Additional testimony or documentary evidence may be introduced by either party but evidence that is unduly repetitious of

> that already contained in the record may be excluded by an administrative law judge.
>
> (2) Notwithstanding §C(1) of this regulation, the administrative law judge may permit repetitious testimony if credibility is an issue.

COMAR 13A.01.05.07C.[3] The State Board regulation on general appeal procedures states that "[i]f an appellant asks to present additional evidence on the issues in an appeal," it must be "shown to the satisfaction of the State Board that the additional evidence is material and that there were good reasons for the failure to offer the evidence in the proceedings before the local board." COMAR 13A.01.05.04C.

As the local board pointed out to the ALJ, the State Board, in the *Sullivan* case, *supra*, discussed the interplay of these regulations. We explained that the general procedure applies to all State Board appeals, including those involving certificated employee terminations.[4] This requires, therefore, that several determinations be made before evidence not previously introduced during the local board proceedings is admitted as new evidence in the State Board appeal. First, consideration must be given as to whether the evidence is unduly repetitious (COMAR 13A.01.05.07C). In addition, consideration must be given as to whether the evidence is material and whether there were good reasons for not introducing it during the local board appeal. (COMAR 13A.01.05.04C).

The ALJ explicitly rejected the State Board's interpretation of its own regulations in *Sullivan*, finding the interpretation to be contrary to the concept of *de novo* review. Relying on *Oku v. State*, 433 Md. 582, 592 (2013), the ALJ found that the OAH hearing in a certificated employee termination appeal is a *de novo* hearing, requiring an entirely new hearing of the matter conducted as though the original hearing had not taken place. (*See* Pre-Hearing Conference Report and Order). *Oku*, however, was a criminal case, not a review of a civil administrative agency decision. Moreover, as we explained in *Sullivan*, the State Board's *de novo* review of the appeal is different from a *de novo* hearing. We stated that the exclusion of evidence pursuant to COMAR 13A.01.05.04C did not did not mean that the appellant was deprived of a *de novo* review. We stated that "[a]lthough we review the record in a termination proceeding *de novo*, that does not mean that an entirely new record must be created before the ALJ. Rather, it means that we give no deference to the factual or legal conclusions reached by the local board." *Sullivan* at 6.

The ALJ also relied on *Board of Educ. of Charles County v. Crawford*, 284 Md. 245 (1979), a case involving a teacher fired for incompetency, and *Board of School Commissioners*

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[3] In addition to excluding repetitious testimony, OAH also allows an ALJ to exclude evidence that is incompetent, irrelevant, or immaterial. Md. Code Ann., State Gov't §10-213(d).

[4] In the *Sullivan* case, the appellant argued that the general appeal procedure regulation did not apply to an appeal involving the termination of a certificated employee. She maintained that the ALJ improperly relied on the general regulation and excluded exhibits she sought to introduce at the OAH hearing, which appellant had not presented during the local board proceedings.

of Baltimore City v. James, 96 Md. App. 401 (1993), a teacher suspension case. [5] In those cases, the Courts referred to the State Board hearing as a "*de novo*" hearing and found that the State Board's *de novo* hearing cured the due process defects in the local board's hearing. *Id.* 284 Md. at 259 and 96 Md. App. 407, 439. These cases, however, did not rule on the appropriate procedures for a hearing before OAH in a State Board appeal or explain what *de novo* means in the context of a hearing of this type. In particular, the discussion in *James* is focused primarily on the State Board's broad reviewing authority to use its independent judgment to determine whether the grounds for suspension had been established and whether the sanction was too severe, not on the hearing procedures. *Id.* at 418.

This case is a State Board appeal that we transferred to OAH through our delegation authority for a contested case hearing before an ALJ under the Administrative Procedure Act. *See* Md. Code Ann., State Gov't §10- 205. In "a contested case, [OAH] is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case." *Id.* at §10-214. The State Board cases serve as precedent in the cases before this body, including those that we delegate to OAH for fact-finding and proposed decisions. The ALJ was bound by the State Board's regulations and holding in *Sullivan*. We find, therefore, that the ALJ's admission of the evidence was an error.[6]

Despite the admission of the additional evidence, the error is harmless as there is no showing that the error affected the Proposed Decision in any way and the local board was not prejudiced by it. *See Perry v. Asphalt & Concrete Services*, Inc., 447 Md. 31, 49 (2016); *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009). While we have addressed the issue herein based on concerns about judicial economy and the unnecessary devotion of time and resources due to a protracted hearing, it does not impact our decision to adopt the ALJ's proposed decision in its entirety and affirm the local board's termination of the Appellant from his position.

April 3, 2013 Evaluation

In the proceedings before the ALJ, the Appellant argued that his termination was improper because his April 3, 2013 evaluation was not conducted in accordance with the school system's Teacher-level Professional Growth System Handbook ("Handbook"). Appellant maintained that the Handbook required that the evaluation be based on his performance from 2009-2013, during which Appellant was mostly a successful teacher. In the Proposed Decision, the ALJ addressed and rejected the substance of the Appellant's challenge to the evaluation. (Proposed Decision at 15-16). The local board takes exception to the ALJ's analysis, maintaining that the ALJ should have dismissed Appellant's challenge to the evaluation because Appellant failed to raise the issue in the proceedings before the local board, thereby waiving his right to raise it in the State Board appeal. Moreover, the Appellant did not appeal the April 3,

[5] Cases involving the suspension of certificated employees are subject to the same procedures and standard of review as the termination cases on appeal to the State Board. *See* Md. Code Ann., Educ. §6-202; COMAR 13A.01.05.05F.

[6] We note that, despite the argument made by Appellant's lawyer that the evidence should be admitted because Appellant had ineffective legal representation at the prior hearing, we find that there was not good cause for the Appellant's failure to introduce the evidence at the local board proceedings. *See Sullivan* at 6 (stating that the decision of the appellant's attorney to not present evidence to the board, for whatever reason, is not a "good reason" to admit the evidence.).

2013 evaluation at the time it was issued, more than one year prior to his termination.

By addressing the Appellant's claims regarding his April 3 evaluation, the ALJ ignored our long held ruling that issues not presented to the local board for review are waived on appeal to the State Board. *See King v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 15-10 (2015); *Nicole B. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 13-57 (2013); *Susan H. v. Howard County Bd. of Educ.*, MSBE Op. No. 13-22; *Cone v. Carroll County Bd. of Educ.*, MSBE Op. No. 99-31 (1999). Thus, it was an error for the ALJ to have ruled on the Appellant's challenge to the 2013 evaluation. Although it was technically an error, it was harmless because the error had no effect on the outcome of the case and the local board was not prejudiced by it.

CONCLUSION

For the foregoing reasons, we modify the Proposed Decision as set forth herein, adopt the Proposed Decision of the ALJ, and affirm the local board's decision to terminate the Appellant for incompetency.

Andrew R. Smarick
President

S. James Gates, Jr.
Vice-President

Chester E. Finn, Jr.

Michele Jenkins Guyton

Laurie Halverson

Stephanie R. Iszard

Jannette O'Neill-González

Barbara J. Shreeve

Madhu Sidhu

Guffnie M. Smith, Jr.

Laura Weeldreyer

September 27, 2016

MONTGOMERY COUNTY	*	**BEFORE RICHARD O'CONNOR,**
BOARD OF EDUCATION	*	**ADMINISTRATIVE LAW JUDGE,**
v.	*	**THE MARYLAND OFFICE OF**
DARYL YOUNG,	*	**ADMINISTRATIVE HEARINGS**
APPELLANT	*	**OAH CASE NO.: MSDE-BE-01-15-18845**
	*	

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On July 9, 2014, Dr. Joshua Starr, then Superintendent of the Montgomery County Public Schools (MCPS), terminated the Appellant's employment as a special education teacher with MCPS for incompetency. The Appellant filed an appeal. Hearing Examiner Andrew Nussbaum, Esquire, conducted an evidentiary hearing on December 11 and 12, 2014. On January 30, 2015, the hearing examiner recommended that the Montgomery County Board of Education (MCBOE) affirm the termination.

The Appellant filed exceptions to the hearing examiner's recommendations, and on March 24, 2015, the MCBOE heard oral argument on the exceptions. Saurabh Gupta, Esquire, represented the Appellant in the evidentiary hearing before the hearing examiner and before the MCBOE.

On April 27, 2015, the MCBOE issued a Decision and Order affirming the hearing examiner's recommendation that the Appellant be terminated. On May 22, 2015, the Appellant appealed to the Maryland State Board of Education (State Board). On June 3, 2015, the State Board forwarded the case to the Office of Administrative Hearings (OAH) to conduct a hearing in accordance with section 6-202 of the Education Article of the Maryland Annotated Code. Further, it directed the administrative law judge to submit proposed written Findings of Fact, Conclusions of Law, and Recommendations to the State Board in accordance with Code of Maryland Regulations (COMAR) 13A.01.05.05F.

On September 17, 2015, the hearing convened at the MCBOE headquarters in Rockville, Maryland. James S. Maxwell, Esquire, and Joel R. Zuckerman, Esquire, Maxwell, Barke & Zuckerman LLC, 51 Monroe Place, Suite 806, Rockville, Maryland 20850, represented the Appellant, who was present. Eric C. Brousaides, Esquire, Carney, Kelehan, Bresler, Bennett & Scherr, LLP, 10715 Charter Drive, Suite 200, Columbia, Maryland 21044, represented the MCBOE.

At the close of the MCBOE's case-in-chief, the Appellant moved for judgment. After hearing argument from the parties, I declined to issue a ruling on the record and indicated that I would issue a written ruling within thirty days. On October 13, 2015, I issued a ruling denying the Appellant's motion for judgment.

On November 9, 2015, the Appellant filed a Motion for Summary Decision. On November 23, 2015, the MCBOE filed an Opposition to Appellant's Motion for Summary Decision (Opposition). On December 3, 2015, I issued a ruling denying the Appellant's Motion for Summary Decision.

The hearing continued on December 8 and 9, 2015, and concluded on January 8, 2016. The above-named attorneys represented their respective clients throughout the proceedings.

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, and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; and COMAR 28.02.01.

ISSUE

The issue is whether the Appellant's termination was proper.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the MCBOE: [1]

A. Appeal to the State Board, May 22, 2015.

B. MCBOE Decision and Order, April 27, 2015.

C. Transcript of Oral Argument before the MCBOE, March 24, 2015.

D. Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation, January 30, 2015.

E. Packet of numbered exhibits attached to the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation, as follows:

1. Final Evaluation Report: Teacher, April 3, 2013; Post-Observation Conference Report, May 1, 2013; Post-Observation Conference Report, May 21, 2013.

2. Letter to the Appellant from the MCPS Peer Assistance and Review Program, June 6, 2013.

3. Report – Announced Formal Observation # 1, October 7, 2013.

4. Growth Plan # 1, November 14, 2013.

5. Report – Unannounced Formal Observation # 2, November 20, 2013.

6. Peer Assistance and Review Program Mid-Year Summary, December 11, 2013.

[1] MCBOE Exhibits A through F are the case record as developed before the hearing examiner and the MCBOE. The exhibits were pre-marked as listed here.

7. Report – Unannounced Formal Observation # 3, March 26, 2014.

8. Report – Unannounced Formal Observation # 4, April 23, 2014.

9. Final Summative Report – Tenured Teacher, April 23, 2014.

10. Principal's Response Form, April 28, 2014.

11. Letter to the Appellant from the MCPS Peer Assistance and Review Program, May 15, 2014.

12. Letter to the Peer Assistance and Review Program from the Appellant, May 29, 2014; Final Summative Report – Tenured Teacher Rebuttal, April 28, 2014; Conference Summary, May 1, 2014; MCPS Observation Report, April 8, 2014; students' report cards; the Appellant's calendars for the 2013-2014 school year.

13. Letter to the Appellant from the MCPS Peer Assistance and Review Program, May 29, 2014.

14. Letter to the Appellant from Kimberly A. Statham, MCPS Deputy Superintendent, June 6, 2014.

15. Final Summative Report – Tenured Teacher Rebuttal, April 28, 2014.

16. Letter to the Appellant from Joshua P. Starr, MCPS Superintendent, terminating employment, July 9, 2014.

17. Letter to the MCBOE from the Appellant's union representative, July 15, 2014.

18. Letter to Saurabh Gupta, Esquire, from the MCBOE, July 18, 2014.

19. Peer Assistance and Review Summary, with attachments, undated.

20. [This exhibit was pulled from the list before the file was transmitted to the OAH.]

21. *Curriculum Vitae* of Delena M. Harrison.

22. *Curriculum Vitae* of Dawn M. Fersch-Burns.

23. *Curriculum Vitae* of Angela McNellage.

24. *Curriculum Vitae* of Jane A. Lewis.

25. *Curriculum Vitae* of Dana E. Davison.

26. *Curriculum Vitae* of Christopher Lloyd.

F. Two transcripts, as follows:

1. Transcript of Proceedings before the hearing examiner, Volume I, December 11, 2014.

2. Transcript of Proceedings before the hearing examiner, Volume II, December 12, 2014.

G. Post-Observation Conference Report, October 1, 2012.[2]

H. Informal Observation Checklist, October 23, 2012.

I. Informal Observation Checklist, November 1, 2012.

J. Informal Observation Checklist, November 8, 2012.

K. Post-Observation Conference Report, January 18, 2013.

L. Post-Observation Conference Report, March 20, 2013.

M. Informal Observation Checklist, March 7, 2013.

N. Memorandum from then-MCPS Superintendent Weast to the MCBOE rescinding MCPS Regulation GJB-RA, December 18, 2009.

O. MCPS Regulation GJA-RA, revised October 19, 2009, underlined and highlighted.

I admitted the following exhibits into evidence on behalf of the Appellant:

App. Ex. 1. Selected pages from the Transcript of Oral Argument before the MCBOE, March 24, 2015.

App. Ex. 2. Agreement Between Montgomery County Education Association and Board of Education of Montgomery County for the School Years 2011-2014, Table of Contents and pages 33 to 43 only.

App. Ex. 3. Final Evaluation Report: Teacher, April 3, 2013.

App. Ex. 4. Professional Growth System Final Evaluation Report, May 30, 2008.

App. Ex. 5. Professional Growth System Final Evaluation Report, June 10, 2004.

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[2] Exhibits G through M were originally marked Exhibits A through G and were attached to the MCBOE's Opposition to Appellant's Motion for Summary Decision. Exhibit N was originally attached to the Opposition as Exhibit J.

App. Ex. 6. Tenure Evaluation, May 17, 2001.

App. Ex. 7. Teacher-Level Professional Growth System Handbook, 2012-2013, pages 4, 5, 6, 7, and C-7, highlighted.

Testimony

The MCBOE did not call any witnesses in its case-in-chief, electing to submit on the record (including exhibits) as developed before the hearing examiner and the MCBOE.

The Appellant testified and presented the following additional witnesses:

1. Dana E. Davison, former principal at Dr. Martin Luther King, Jr., Middle School (MLKMS), now Executive Director of the Chief Operating Office, MCPS.
2. Deborah Good, Special Education Resource Teacher at MLKMS.
3. Susan Cram, retired Special Education Teacher.
4. Cathy Haver, former Special Education Teacher at MLKMS.

The following then testified as rebuttal witnesses for the MCBOE:

1. Jane Lewis, English Teacher at MLKMS.
2. Christopher Lloyd, accepted as an expert in performance standards applicable to MCPS teachers.
3. Delena Harrison, Special Education Resource Teacher at MLKMS.
4. Angela McNellage, English Teacher at MLKMS.
5. Dawn M. Fersch-Burns, Resource Teacher at Montgomery Village Middle School, accepted as an expert in special education.
6. Dana E. Davison.

PROPOSED FINDINGS OF FACT

I find the following the following facts by a preponderance of the evidence:

1. The Appellant began his teaching career with MCPS as a special education teacher at MLKMS in 1999 and remained in that position until his termination in 2014.

2. The Appellant is certified as a special education middle school teacher and is a highly qualified English and reading teacher.

3. The Appellant obtained tenure with MCPS in 2001.

4. By the time of the events relevant to this decision, 2012 to 2014, the Appellant was on a five-year professional growth cycle, as called for in the Agreement Between Montgomery County Education Association and Board of Education of Montgomery County for the School Years 2011-2014 (App. Ex. 2). This means that he received a formal evaluation every five years.

5. Before the 2011-2012 school year, the Appellant's duties as a special educator at MLKMS were, generally, to teach special education students in a self-contained classroom, write and update Individualized Education Programs (IEPs), attend IEP meetings, perform as case manager for several special education students, and provide support for special education students in general education classrooms.

6. Dana E. Davison became principal of MLKMS in July 2010.

7. Ms. Davison, after reviewing data relating to the special education students at MLKMS, became concerned that the school was not meeting those students' needs and that the students were not making adequate academic progress.

8. Beginning in the 2011-2012 school year, the administration at MLKMS changed the methodology for delivering special education services to students. Henceforth, special education teachers would be assigned to regular education classrooms, where they would co-teach a subject with a general education teacher. Most of the school's special education students would be included in the general education setting.

9. Under this model, special education teachers, including the Appellant, were equally responsible with the general education teacher for planning, implementing lessons, and ensuring student's progress.

10. The Appellant was assigned as co-teacher in sixth, seventh, and eighth-grade English classes.

11. The Appellant still had special education responsibilities, including writing and updating IEPs, attending IEP meetings, and serving as case manager for eight to fifteen special education students.

12. The Appellant had the same responsibilities and duties as other special education teachers on the staff at MLKMS at that time.

13. In addition to the Appellant, special education teachers at MLKMS included: Deborah Good, who is still at MLKMS as a resource teacher but is in the Peer Assistance and Review (PAR) program this year; Susan Cram, who retired from MCPS in 2012; and Cathy Haver, who retired in 2014 after a year in the PAR program.

14. Other MLKMS special education teachers, such as Christina Barrios and Quan Nguyen, were successful in the newly-introduced co-teaching model.

15. The Appellant co-taught English with Jane Lewis in eighth grade during the 2012-2013 school year and in seventh grade during the 2013-2014 school year.

16. Angela McNellage was the seventh grade English team leader at that time. She, the Appellant, and Ms. Lewis made up the seventh grade English "cohort" and did planning together during the 2013-2014 school year.

17. Delena Harrison came to MLKMS in 2012 as a Special Education Resource Teacher. As such, she was the Appellant's direct supervisor and worked closely with him from 2012 through 2014.

18. The Appellant was not an effective co-teacher in 2012-2013 or 2013-2014. He did not prepare lesson plans adequately (if at all), did not master the English curriculum, and did not participate equally with the general education teacher in teaching the classes.

19. The Appellant often came into the classroom a few minutes after class had started, then devoted most of his time to giving individual help to a few students. He was effective at providing assistance and had a good rapport with the students.

20. The Appellant sometimes sat in the back of the classroom working on his laptop, and sometimes fell asleep during class.

21. The Appellant also failed to write students' IEPs in a timely fashion, and those he wrote were not geared toward the individual student and were lacking in content.

22. The Appellant was the subject of four formal observations during the 2012-2013 school year: September 19, 2012 by Ms. Davison; November 8, 2012 by someone with the last name Loznak; December 14, 2012 by Ms. Harrison; and March 3 and 7, 2013 by Randy Gruber, Assistant Principal (BOE Ex. E 1, G, J, K, and L) .

23. Because of observed deficiencies, the Appellant received a Below Standard evaluation on April 3, 2013 (App. Ex. 3).

24. Because of the Below Standard evaluation, MCPS placed the Appellant into the PAR program for the 2013-2014 school year.

25. The PAR program is designed to help struggling teachers achieve competence through mentoring and training. The program assigns a consulting teacher, who works with the teacher throughout the year, observes the teacher in the classroom, develops a professional growth program, and provides feedback and suggestions.

26. MCPS assigned Dawn Fersch-Burns as the Appellant's consulting teacher. Ms. Fersch-Burns is a certified special education teacher who has been trained in Observing and

Analyzing Teaching.[3] Seventeen teachers in Ms. Fersch-Burns's twenty- teacher caseload in 2013-2014 were special education teachers.

27. Ms. Fersch-Burns observed the Appellant in the classroom formally four times and informally fourteen times during the 2013-2014 school year and had a conference with him after each observation. She also met with and communicated with him at other times throughout the year.

28. The Appellant's performance did not improve during the 2013-2014 school year. He continued to be an ineffective co-teacher, contributed little to planning, and did not have sufficient mastery of the English curriculum.

29. Ms. Fersch-Burns rated the Appellant's teaching Below Standard on April 23, 2014, after almost one year on the PAR program (BOE Ex. E 9).

30. Ms. Davison, as principal of MLKMS, accepted Ms. Fersch-Burns's recommendation on April 28, 2014 (BOE Ex. E 10).

31. After considering the Appellant's rebuttal to Ms. Fersch-Burns's report, on May 29, 2014, the PAR Panel unanimously recommended that the Appellant be terminated from his teaching position (BOE Ex. E 12 and 13).

DISCUSSION

The MCBOE has the burdens of production and persuasion in this case; the standard of proof is by a preponderance of the evidence. COMAR 13A.01.05.05F(3). The MCBOE dismissed the Appellant from his position under section 6-202 of the Education Article, Annotated Code of Maryland, which, in pertinent part, provides:

> (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;

[3] MCPS provides two courses in Observing and Analyzing Teaching, called OAT 1 and OAT 2, that are required before an employee may observe and report on a teacher's classroom performance.

(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 the county board to the State Board.

Md. Code Ann., § 6-202(a) (2014). The MCBOE relied on paragraph (a)(1)(iv), "incompetency," as the basis for its decision.

The Education Article and the regulations in COMAR Title 13A do not define "incompetency" (or, more correctly, "incompetence"). Section 6-202(c)(3) of the Education Article authorizes local school boards to establish their own "performance evaluation criteria" to measure a teacher's performance and to determine competency. *See also* COMAR 13A.07.04.02.A(1): "An evaluation shall be based on written criteria established by the local board of education, including but not limited to scholarship, instructional effectiveness, management skills, professional ethics, and interpersonal relationships."

The Maryland courts have spoken in a limited fashion on the definition of teacher incompetence. Many absences, alone, do not amount to incompetence. *Toland v. State Bd. of Ed.*, 35 Md. App. 389, 397-398 (1977). The court in *Bd. of Ed. of Chas. Co. v. Crawford*, 284 Md. 245, 259 (1979) applied existing employment contract law, as follows: "Implicit in any employment contract is an implied promise on the part of an employee to perform his duties in a workmanlike

manner. In the case of a teacher this must mean in accordance with established professional standards."

In *Bd. of School Commissioners of Balto. City v. James*, 96 Md. App. 401 (1993), the court acknowledged that determining teacher incompetence was "necessarily qualitative in nature" and, quoting *Clark v. Whiting*, 607 F. 2d 634, 639 (4th Cir. 1979) stated, "teacher's competence and qualifications . . . are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests."

MCPS, in conjunction with the Montgomery County Education Association,[4] applies the following Performance Standards in evaluations of teachers:

I. Teachers are committed to students and their learning.

II. Teachers know the subjects they teach and how to teach those subjects to students.

III. Teachers are responsible for establishing and managing student learning in a positive learning environment.

IV. Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement.

V. Teachers are committed to continuous improvement and professional development.

VI. Teachers exhibit a high degree of professionalism.

App. Ex. 3; BOE Ex. E 9.

The Appellant's troubles began in the 2012-2013 school year. Prior to that, he had been a tenured special education teacher at MLKMS since 1999 and had received an "Effective" evaluation

[4] *I.e.*, the local teachers' union.

in 2001, "Meets Standard" in 2004, and "Meets Standard" again in 2008 (App. Ex. 6, 5, and 4, respectively).[5]

One element of the Appellant's presentation is that he and the other established special education teachers were unfairly victimized by the new principal, Ms. Davison. He, Ms. Good, and Ms. Cram all testified that they were essentially forced out of the school and their profession by Ms. Davison and the changes she wrought. Essentially, those changes were to establish a co-teaching model for special educators, making them equally responsible with the general education teachers for planning and classroom presentations. Prior to this, the special education teachers had been primarily focused on the special education students – those with IEPs. The teachers might be in a general education classroom but would devote their time to the special education students. Their other duties included IEPs, meetings, case management, and maintaining records.

When the new methodology went into effect in 2011, according to Ms. Good, it "became more difficult to get all the paperwork done" because meeting with one's co-teachers and other departments "took up a lot of time," about two hours each day. Ms. Good testified that she stayed at school until five, six, or seven p.m. every day to complete the required work. Ms. Good stated that she is on the PAR program this year and received a Below Standard evaluation in 2014. Ms. Good is a Social Studies teacher and did not teach in a classroom with the Appellant.

Ms. Cram, who retired as a special education teacher in 2012, testified that with the new co-teaching model "there was no morale – it was horrible." She stated that she decided to retire because Ms. Davison "was out to get everyone in the special education department." Ms. Cram complained that planning for co-teaching took up all her time for writing IEPs, so she had to spend

[5] In the MCPS system, a new teacher is evaluated after two years, when a decision is made whether to grant tenure. The next professional growth cycle is three years, with an evaluation at the end of that period. Then comes a four-year cycle ending with an evaluation, followed by five-year cycles for the rest of the teacher's career. The Appellant's evaluations in 2001, 2004, 2008, and 2013 followed this pattern.

four or five hours every night doing that task. Ms. Cram testified that she taught in a classroom with the Appellant in 2011-2012, or possibly 2010-2011, and that the Appellant knew the curriculum and prepared adequate lesson plans.

Ms. Haver, who retired in 2014 after being in the PAR program for a year, testified that "it was horrible" for her after Ms. Davison instituted changes in 2011. She was expected to co-teach English classes, but is not certified in English and received inadequate training. Because of her new duties, Ms. Haver had to work at lunch time, after school, at home, and on weekends. She admitted some of her own deficiencies, stating that she was often late to class and did not complete IEPs on time, but "didn't do anything worse than anyone else."

Ms. Davison was called as a witness by both parties. Testifying first for the Appellant, her testimony was not helpful to his cause. She stated that, upon her arrival at MLKMS, she became concerned about the special education department because the school's data showed that the special education students were not making academic progress, and she concluded that their needs were not being met. Therefore, she instituted the co-teaching model as described by the other witnesses. Ms. Davison testified that both teachers in a co-taught classroom are equal partners, equally responsible for the success of all the students, not just the special education students. The teachers were expected to plan together, know the material, and share in-class teaching.

Ms. Davison acknowledged that special education teachers had responsibilities in addition to those of the general education teachers. The former have to write IEPs, attend IEP meetings, prepare quarterly assessments, and be case managers. But she disagreed that this placed an extra burden on the special education teachers, testifying that the Appellant's planning periods were not taken away to be used for other purposes, and that he was given three or four extra days per school year to write IEPs.

Ms. Davison also named eight other MLKMS special education teachers who did not receive Below Standard evaluations or get put into the PAR program during her tenure.[6] She testified that only the Appellant and Ms. Haver complained to her that the co-teaching model created too much work for the special education teachers.

Nothing in the record contradicts Ms. Davison's testimony that the MLKMS special education department was not achieving success when Ms. Davison took over as principal. Her reforms were in accordance with established practices in the MCPS system and seem to have been generally successful. It is unfortunate that some of the more experienced teachers, including the Appellant, were unable or unwilling to adapt to the new methodology, but there is no evidence of any animosity toward those teachers or a desire to force them out. This contention by the Appellant does not withstand scrutiny.

The Appellant also makes a technical argument that the MCBOE failed to follow its own Teacher-Level Professional Growth System Handbook, based on the following language from that publication: "During the formal evaluation year, both the teacher and the administrator gather data from the professional development years as well as from the evaluation year. This data serves [*sic*] as the point of reference for the collaborative evaluation process." (App. Ex. 7, p. 6.) According to the Appellant, this passage required the evaluation performed in 2013 to be based on all the years between 2009 and 2013, during most of which the Appellant was a successful teacher, rather than on the observations conducted in 2012 and 2013.

The Appellant further argues that the MCBOE expressed a desire to explore this issue when Mrs. Smondrowski, a Board member, asked at the MCBOE hearing: "So, again, I guess can you tell me were there problems prior to this year, the year in question, or did something change?" The

[6] Ms. Davison left MLKMS in 2015 to take her current position in the central office.

Appellant faults Mr. Brousaides for responding that "we're limited to the record that we have before us, which is the 2013-2014 school year as well as the evaluation for the 2012-2013 school year." (App. Ex. 1.) This answer, the Appellant urges, contradicts the language in the Teacher-Level Professional Growth System Handbook.

The MCBOE's response to this argument is that the Teacher-Level Professional Growth System Handbook does not confer any rights on teachers; its purpose is to help students get a quality education. The document introduced into evidence, Appellant Exhibit 7, contains just the cover page of the Teacher-Level Professional Growth System Handbook along with pages four through seven. Whatever the purpose of the Handbook may be, it is not explained in those pages.

In *Bd. of Sch. Comm'rs of Baltimore City v. James*, 96 Md. App. 401 (1993), a document entitled "Baltimore City Public Schools Procedures for Evaluation of Teaching Staff" became an issue when the terminated teachers claimed that those "Procedures" had not been followed. The court concluded:

> Thus the title, stated purpose, and effect of the Procedures and the finding by the State Board that their primary purpose was "*not* to confer procedural benefits," as well as the fact that there is no evidence that they were officially promulgated, lead us to conclude the State Board was correct in finding that the violations of the Procedures in the 1988–89 year did not "automatically mandate reversal" of the decisions to terminate Ms. James and Ms. Davis at the end of the 1989–90 year.

Id. at 425 (footnote omitted; emphasis in original.) As in the *James* case, there is no indication here that the Teacher-Level Professional Growth System Handbook was officially promulgated as a MCBOE regulation. Even if the language in the Handbook were not followed, the Appellant's termination would not be invalidated by any such failure.

The Appellant in this case was fired for incompetency. The 2013 evaluation of Below Standard and the PAR Summative Report – Tenured Teacher of April 23, 2014 (BOE Ex. E 9), as well as the testimony of several witnesses and the reports of numerous evaluations, are evidence of

that incompetency. The Appellant can hardly argue that incompetency is not a valid cause for termination, as it is specifically included in section 6-202 of the Education Article as such. *See James* at 429-431. In other words, the Appellant's employment was terminated because he was incompetent, not because he received a Below Standard evaluation or because the PAR Panel recommended termination.

Returning to the evaluation of the evidence, the testimony of Ms. Lewis and Ms. Fersch-Burns was particularly damning for the Appellant. Ms. Lewis, a general education English teacher, co-taught with the Appellant in eighth grade during the 2012-2013 school year, and in seventh grade during the 2013-2014 school year. She testified that in the seventh grade, she, the Appellant, and Ms. McNellage, the "cohort," rotated responsibility for the weekly lesson plans, and all plans for the coming week were to be completed by the preceding Friday. Whoever had the responsibility for the week was expected to plan the instruction for each day. The Appellant, however, would never submit full plans; he would only plan for one or two days, so Ms. Lewis or Ms. McNellage would have to complete the plans. The plans that the Appellant did submit were often cut and pasted from old plans without new content.

Eventually, the Appellant was tasked with planning only the warm-ups for the beginning of class. But he submitted warm-ups that took up half the class time and were often at a second-grade level. The Appellant did not seem to know how to find grade-level content for seventh grade.

Additionally, the Appellant usually had not read or mastered the material for the day's lesson, so he was unable to lead the class. Ms. Lewis testified that she often had to take over the class when she saw that the Appellant was unprepared.

One of the Appellant's duties as a special education teacher was to modify the lesson plans for special education students who required accommodation. According to Ms. Lewis, the only modifications the Appellant ever did were to font and type size, not content or presentation.

Ms. Lewis described the Appellant as often sleeping in class, often arriving late, and often leaving the classroom to get materials. He worked on his laptop in the back of the classroom every day. Ms. Lewis summarized her experience with the Appellant as working together in theory, but not in reality. She provided all this testimony without any hint of animosity toward her former colleague, who was seated across the table from her as she spoke. She described her memory of events as "100 percent accurate" and testified without hesitation, in a very straightforward manner. I found her testimony credible and helpful, and accord it significant weight.

Ms. Fersch-Burns was the Appellant's consulting teacher with the PAR program in 2013-2014. She testified that she gave the Appellant more attention than any of her other nineteen clients that year because he was not meeting standards. She observed the Appellant in the classroom formally four times and informally fourteen times during the school year. In her end-of-year summary (BOE Ex. E 9), Ms. Fersch-Burns particularly faulted the Appellant for not being a true co-teacher because he never led the class. She also noted his failure to prepare IEPs on time, and testified that once she sat with him to write an IEP, and it took six hours. Testifying as an expert in special education, Ms. Fersch-Burns stated that an experienced special education teacher like the Appellant should be able to write an IEP in two to three hours.[7] Ms. Fersch-Burns rated the Appellant "Below Standard" at the end of his PAR year.

In addition to the testimony of Ms. Lewis and Ms. Fersch-Burns, Ms. Harrison, the Appellant's resource teacher, testified that she sat in on a planning session while the Appellant "just sat there with his laptop" and did not participate. She described the Appellant as often unprepared for class and as a person who "did not get things done." Ms. Harrison particularly faulted the Appellant's preparation of IEPs, which she described as not individualized, not effective, and not

[7] Several other witnesses echoed this testimony.

flowing from the students' present levels of performance. He did not connect the students' needs to the services in the IEPs.

The Appellant testified that whenever he was late to class, it was because he was helping a student in the hall or in his room. He stated that he did not understand the general education curriculum and had not been trained for it. The Appellant testified that it was not his role to stand in front of the class. He said that he knew the students better than any observer did and that he knew how to help them succeed. The Appellant complained that his co-teachers were "just nasty" and would take over the class whenever someone came in to observe him. He rationalized that Ms. Davison's instruction for him to be in the front of the class did not require him to lead the class or provide instruction.

The Appellant's view of his actions and competence in 2012 through 2014 is clearly wrong. The picture that emerges from the evidence is of an experienced special education teacher who, when placed in a co-teaching position, resisted and continued to perform the same functions that he had from 1999 to 2010. The problems with that approach are (1) that it was insubordinate, and (2) that it was ineffective. The evidence establishes that the special education students at MLKMS were not succeeding under the old model, but the Appellant could not or would not change to the new model, thus doing a disservice to the students, his colleagues, and the administration.

The Appellant's testimony was generally credible, but it was also often defiant and attempted to place the blame on anyone but himself. The evidence is overwhelming that the Appellant did not co-teach his English classes effectively, did not provide competent lesson plans, did not take responsibility for the success of all the students in the classroom, did not modify the lessons for special education students, and did not write adequate IEPs. The Appellant is an intelligent and ambitious person who has achieved great success in his life. If he had chosen to, he

could have adapted to his new principal's changes and learned to be an effective special education co-teacher, especially with all the support he received from his co-workers and the PAR program. Based on the evidence, I can only conclude that the Appellant rejected that cooperative approach and chose to be an incompetent teacher.

The Appellant has requested that I remand this case to the MCBOE to address Mrs. Smondrowski's concerns about prior years. I do not find that to be a viable option, since, as stated previously, even if the 2013 evaluation failed to take into account the Appellant's teaching success in prior years, that would not entitle the Appellant to have the termination dismissed or invalidated. Under *James*, such a failure would not be a violation of the *Accardi* doctrine (*United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954)). The Appellant was terminated for incompetency, and there is no mathematical formula dictating how long the incompetency must continue. In the *James* case, two years was sufficient, and so it should be in this case as well.

PROPOSED CONCLUSIONS OF LAW

I conclude as a matter of law that the Appellant's employment with MCPS was properly terminated for incompetency. Md. Code Ann., § 6-202(a) (2014); *Bd. of School Commissioners of Balto. City v. James*, 96 Md. App. 401 (1993).

I further conclude as a matter of law that the MCBOE did not violate any of its own regulations or policies in terminating the Appellant's employment. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

RECOMMENDATION

I **RECOMMEND** that the Maryland State Board of Education **UPHOLD** the Montgomery County Board of Education's decision to terminate the Appellant's employment because of incompetency.

April 7, 2016
Date Decision Issued

Richard O'Connor
Administrative Law Judge

ROC/dlm
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