JONATHAN LASSON,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 15-21

OPINION

INTRODUCTION

Jonathan Lasson (Appellant) appeals the decision of the Baltimore City Board of School Commissioners (local board) upholding his termination as a school psychologist based on misconduct and willful neglect of duty.

We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(2). On May 7, 2015, the Administrative Law Judge (ALJ) issued a proposed decision concluding that the Appellant committed misconduct in office and willfully neglected his duties. The ALJ recommended that the State Board uphold the local board's termination decision.

The Appellant did not file any exceptions to the ALJ's proposed decision.

FACTUAL BACKGROUND

The factual background in this case is set forth in the ALJ's proposed decision, Findings of Fact, pp. 7-26.

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).

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).

CONCLUSION

The Appellant offers no exceptions to the ALJ's decision. We concur with the ALJ that the local board's decision to terminate the Appellant should be upheld. We, therefore, adopt the ALJ's proposed decision and affirm the local board's termination for misconduct in office and willful neglect of duty.

Mary Kay Finan
President

James H. DeGraffenreidt, Jr.

Linda Eberhart

Absent
Chester E. Finn, Jr.

S. James Gates, Jr.

Larry Giammo/MCP
Larry Giammo

Luisa Montero-Diaz

Absent
Sayed M. Naved

Madhu Sidhu
Madhu Sidhu

Andrew R. Smarick

Guffrie M. Smith, Jr.

June 23, 2015

JONATHAN LASSON,	*	**BEFORE NEILE S. FRIEDMAN,**
APPELLANT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
BALTIMORE CITY BOARD OF	*	**ADMINISTRATIVE HEARINGS**
SCHOOL COMMISSIONERS	*	**OAH CASE NO.: MSDE-BE-01-14-41290**

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

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 November 18, 2013, Tisha Edwards, the Baltimore City Public Schools' (BCPS) Interim Chief Executive Officer (CEO), recommended to the Baltimore City Board of School Commissioners (Board) that the Appellant's employment be terminated based on misconduct and willful neglect of duty. The Appellant filed an appeal. For four days, on April 1 and 7, 2014, and May 16 and 29, 2014, Hearing Examiner (HE) Robert Kessler, Esquire, conducted an evidentiary hearing. Eilene Brown, Associate Board Counsel, represented the CEO; M. Natalie McSherry, Esquire, represented the Appellant. On August 11, 2014, the HE recommended that the Board affirm the termination.

On September 9, 2014, the Board issued an Order[1] affirming the HE's recommendation that the Appellant be terminated, and on October 15, 2014, the Appellant appealed. On November 20, 2014, the Maryland State Board of Education (State Board) forwarded the case to the Office of

[1] Following the hearing, the Appellant filed exceptions, and the CEO responded. It is unclear whether the exceptions were considered by the Board prior to its September 9, 2014 Order.

Administrative Hearings (OAH) to conduct a hearing in accordance with section 6-202 of the Education Article of the Maryland Annotated Code; and for the Administrative Law Judge (ALJ) 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 January 22, 2015, I conducted a Prehearing Conference. The Appellant appeared on his own behalf and Ms. Brown participated on behalf of the Board. The Board requested that the hearing in this case be limited to argument on the record established by the Board pursuant to COMAR 13A.01.05.05F(2). The Appellant stated that he wished to introduce new evidence. I allowed the parties to file memoranda discussing the law governing the scope of the hearing in this case and I said that I would inform the parties of my decision concerning the scope of the hearing by March 9, 2015. On March 9, 2015, I ruled that I would hear argument on the record below, but would not take any testimony or accept any other evidence.

I conducted the hearing on March 16, 2015, at the OAH in Hunt Valley. Ms. Brown represented the Board and the Appellant represented himself.

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; COMAR 28.02.01.

ISSUE

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

SUMMARY OF THE EVIDENCE

EXHIBITS

A copy of the exhibits presented during the hearing before the HE, as well as a transcript of that hearing, were made a part of the record. COMAR 13A.01.05.07B. The following is a list of documents constituting the record which was created during the hearing before HE Kessler:

- Hearing Transcripts, dated April 1 and 7, 2014 and May 16 and 29, 2014
- HE Kessler's August 11, 2014 Decision
- HE Exhibits:

HE Ex 1 BCPS Board Rule 404.03

HE Ex 2 March 31, 2014 email

- Joint Exhibits:

JT Ex 1 2013 Calendar

JT Ex 2 September and October 2013 Calendar

- CEO Exhibits:

CEO Ex 1 Appellant's weekly schedule

CEO Ex 2 Appellant's September and October 2013 Attendance Record

CEO Ex 3 September 2013 Jewish holiday calendar

CEO Ex 4 Employee Request for Leave forms and WCC notices

CEO Ex 5 October 8, 2013 text message thread

CEO Ex 6 BCPS Faculty and Staff Handbook

CEO Ex 7 October 10, 2013 text message thread

CEO Ex 8 September 25-October 31, 2013 email thread

CEO Ex 9 July 17, 2013 email

CEO Ex 10 July 23, 2013 email

CEO Ex 11 August 28, 2013 email

CEO Ex 12 October 14, 2013 email thread

CEO Ex 13 Photograph of Appellant

CEO Ex 14 Job description: BCPS Coordinator of Psychological Services

CEO Ex 15 Job title of BCPS Psychologist

CEO Ex 16 October 1-4, 2013 email thread

CEO Ex 17 September 24-October 8, 2013 email thread

CEO Ex 18 October 14, 2013 email with disability slips

CEO Ex 19 October 14, 2013 email thread

CEO Ex 20 October 14, 2013 email thread

CEO Ex 21 October 15, 2013 email

CEO Ex 22 October 16, 2013 email thread with medical letter

CEO Ex 23 October 16, 2013 email

CEO Ex 24 October 14- 21, 2013 email thread

CEO Ex 25 October 27, 2013 email

CEO Ex 26 October 29, 2013 email with medical letter

CEO Ex 27 October 29, 2013 email

CEO Ex 28 October 30, 2013 email

CEO Ex 29 October 30, 2013 email

CEO Ex 30 October 30-31, 2013 email thread

CEO Ex 31 Appellant's updated 2013 Attendance Record

CEO Ex 32 5 Weekly sign-in sheets

CEO Ex 33 2 Daily call-in log sheets

CEO Ex 34 9 Daily call-in log sheets

CEO Ex 35	October 14, 2013 email
CEO Ex 36	October 17, 2013 email thread
CEO Ex 37	October 21, 2013 email thread
CEO Ex 38	October 15, 2013 calendar page
CEO Ex 39	Appellant's ADA Request Form with medical letter
CEO Ex 40	October 31, 2013 letter
CEO Ex 41	October 31, 2013 letter
CEO Ex 42	November 5, 2013 email
CEO Ex 43	November 5, 2013 letter
CEO Ex 44	BCPS job description for Labor Associate
CEO Ex 46[2]	October 30, 2013 notification of Loudermill Hearing
CEO Ex 47	November 18, 2013 BCPS disciplinary letter and Statement of Charges

- Appellant Exhibits[3]:

Appellant Ex 1	September 12-October 30, 2013 email thread
Appellant Ex 2	Attendance Reliability and Analysis Program
Appellant Ex 3	October 10, 2013 email
Appellant Ex 4	September 24-October 8, 2013 email thread
Appellant Ex 5	October 9-10, 2013 email thread
Appellant Ex 6	October 14, 2013 email
Appellant Ex 7	October 15, 2013 email
Appellant Ex 8	October 18, 2013 email
Appellant Ex 9	October 31, 2013 email
Appellant Ex 10	October 14, 2013 email

[2] No Exhibit 45 was offered by the CEO.
[3] Appellant Exhibits were designated "Respondent Exhibits" in the HE's record.

Appellant Ex 11	October 14, 2013 email
Appellant Ex 12	October 14, 2013 email thread
Appellant Ex 13	October 17-30, 2013 email thread
Appellant Ex 14	October 27, 2013 email
Appellant Ex 15	BCPS Performance Based Evaluation System
Appellant Ex 16	BCPS Performance Based Evaluation
Appellant Ex 17	Appellant's 2012 Annual Evaluation
Appellant Ex 18	June 28-October 31, 2013 email thread
Appellant Ex 19	September 24-October 10, 2013 email thread
Appellant Ex 20	October 14-October 15, 2013 email thread
Appellant Ex 21	October 29-October 31, 2013 email thread
Appellant Ex 22	October 16, 2013 email thread
Appellant Ex 23	October 16, 2013 email and letter
Appellant Ex 24	2010-2013 Agreement with Baltimore Teachers Union (BTU)
Appellant Ex 25	BCPS Employee Handbook
Appellant Ex 26	October 21, 2013 email thread and letter
Appellant Ex 27	October 31, 2013 email
Appellant Ex 28	October 30-October 31, 2013 email thread
Appellant Ex 29	Appellant's Curriculum Vitae
Appellant Ex 30	Performance Domains and Indicators for Clinical Service Providers
Appellant Ex 31	2009/2010 Annual Evaluation Report
Appellant Ex 32	2008/2009 Annual Evaluation Report
Appellant Ex 33	BCASP Unsung Hero Award
Appellant Ex 34	2008-09 and 2011-12 Crisis Intervention Services honor

Appellant Ex 35	Baltimore Jewish Times Article
Appellant Ex 36	June 28-July 1, 2013 email thread
Appellant Ex 37	July 2, 2013 letter
Appellant Ex 38	July 3-8, 2013 email thread
Appellant Ex 39	July 17, 2013 email
Appellant Ex 40	July 23, 2013 email
Appellant Ex 41	July 9-August 1, 2013 email thread
Appellant Ex 42	August 1, 2013 email
Appellant Ex 43	August 1, 2013 email
Appellant Ex 44	September 24-29, 2013 email thread
Appellant Ex 45	Appellant's medical records

Testimony

Because the hearing was conducted solely on the record below, no testimony was taken.

FINDINGS OF FACT

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

1. The Appellant was a school psychologist employed by BCPS since 2000 and assigned to Montebello Elementary/Middle School (MEMS) during the 2013-14 School Year.
2. Staff members at MEMS are required to adhere to practices set forth in a MEMS faculty and staff handbook. The Appellant received a copy of this handbook at a staff meeting on August 27, 2013.
3. The handbook includes a policy on reporting absences. The policy requires staff who are sick and cannot come to work are required to phone the school principal, Lorna Hanley, "whenever possible," the night before; but, otherwise they were required to notify Ms. Hanley **and** the main office of an absence by 6:00 a.m. The policy specifies that "Text

Messages or emails are NOT acceptable notices for reporting your absences." CEO Ex 6. Ms. Hanley later changed the reporting time to 8:00 a.m.

4. The BCPS Attendance Reliability and Analysis Program (ARAP) provides that employees should be orally cautioned after reaching his or her third period of absence or occasion. Absences are viewed not in terms of days, but as periods or occasions. An occasion is any period of continuous absence for the same reason.

5. BCPS policy also provides that whenever medical verification is needed, that verification shall only state that the employee was absent for medical reasons and is now capable of returning to work.

6. The ARAP requires that employees who are unable to report to work on time must notify their supervisor, or designee, prior to the start of the work day.

7. The BCPS Employee Handbook (Handbook) provides, with respect to outside employment, that: "City Schools expects full-time professional employees of the school system to devote their professional time and attention to the business of City Schools." Appellant Ex 25 at 34.

8. The Handbook provides that BCPS is committed to a progressive approach to corrective action, but it considers certain infractions and violations as grounds for immediate termination of employment.

9. The Handbook provides as follows with respect to serious misconduct: "City Schools considers certain misconduct to be serious. In instances in which employees are found to have engaged in such conduct, corrective action will be taken, up to and including termination of employment. This action may not necessarily be preceded by a warning." *Id.*

10. Among the specifically enumerated actions that may constitute grounds for immediate termination are excessive absences or being absent from work without proper notice or authority and misconduct. *Id.* at 35.

11. The Handbook also provides that, "City Schools may also subject employees to corrective action, up to and including termination of employment, for engaging in practices inconsistent with ordinary, reasonable and common sense rules of conduct necessary for the mutual welfare of the school system and its employees." *Id.*

12. On July 29, 2010, the Appellant acknowledged electronically having reviewed an earlier version of the Handbook.

13. The Handbook provides that employees are responsible for understanding and complying with provisions in it, and also to know policies set by the Board.

14. Board Rule 404.03 provides that "All absences of educational staff members shall be with loss of full pay unless otherwise provided for in these Rules, or by special action of the Board. 'With loss of full pay' shall mean that the person concerned shall receive no salary for the full time included in such a leave. Such shall also include the earning of a salary from another source by the staff person on a leave without express approval of the Board and the Chief Executive Officer." HE Ex1.

15. BCPS interprets this rule as forbidding an employee who is on BCPS sick leave pay status from receiving any professional salary from another source.

16. The Appellant's schedule at the beginning of the 2013-14 School Year included six sessions of one-half hour duration per week with students in the special education program whose Individualized Education Program (IEP) required them to receive the services provided by a school psychologist. Other duties involved observations and assessments of students; preparing behavioral intervention plans (BIP); consulting with teachers; helping

students in the general education program if necessary; attending and participating in IEP meetings; report writing, and encountering notes (inputting information into a computer database).

17. IEP meetings are conducted around a conference table where participants engage in discussion about the student's educational program. If a school psychologist is providing services to a student, or if there is a question about a student's social/emotional functioning, the psychologist is considered essential to the running of the IEP meeting.

18. At the beginning of the 2013-2014 School Year, the Appellant's work load was lower than usual; the typical load for psychologists in the BCPS system is 15-30 students.

19. At the beginning of the 2013-2014 School Year the Appellant was the only school psychologist assigned to MEMS.

20. MEMS had lost its previously issued charter. Beginning in the 2013-14 School Year, Ms. Hanley was assigned, as Principal, to transition MEMS away from the failed charter school and reinstitute a successful school program. One huge issue, aside from just turning the school around for the community, was with special education compliance issues, and so the focus during the 2013-14 School Year was making sure the special education program was up and running for the students.

21. The Appellant held secondary employment as an adjunct professor at Stevenson University (Stevenson), where he taught an Introduction to Psychology class at both the Owings Mills and Greenspring locations four afternoons per week. He had about seventeen or eighteen students in each class.

22. On August 27, 2013, the Appellant requested and he was subsequently granted leave for Jewish holidays on September 5, 6, 19, 20, 26 and 27, 2013. Because BCPS employees are

only allowed two days leave per year for religious holidays, he used sick leave on September 19, 20, 26 and 27, 2013.

23. On August 28, 2013, the Appellant sent an email to Ms. Hanley, informing her that he had to "head out a little early on Mondays and Wednesdays to get to Owings Mills for a class that I teach." CEO Ex. 11. Ms. Hanley responded on September 12, 2013, asking him "what time is a little early on Mondays and Wednesdays?" The Appellant responded, on the same day, that he would need to leave between 2:15 and 2:30 p.m. to make it to a class he taught at 3:00 p.m. The class he taught was a lecture class from 3:00 to 4:15 p.m.

24. The Appellant did not mention, in his email, or at any time, that he also taught a lecture class at Stevenson's Greenspring location on Tuesdays and Thursdays from 4:30-5:45 p.m.

25. On August 28, 2013, the Appellant requested and he was subsequently granted personal leave to attend a Workers Compensation Commission (WCC) hearing the next morning, August 29, 2013.

26. On September 17, 2013, the Appellant requested and he was subsequently granted leave to attend a WCC hearing on the morning of September 24, 2013.

27. On Sunday, September 29, 2013, the Appellant sent an email to Ms. Hanley, informing her that he had been sick with the flu all weekend and was "not sure of my status for Monday." Appellant Ex 44.

28. The Appellant did not come in for work on Monday, September 30, 2013. He called the office at 9:43 a.m. to report his absence due to illness.

29. The Appellant did not come in for work on October 1, 2013. At 11:11 a.m., he emailed Ms. Hanley informing her that he was still sick with a fever and was not able to come in. He stated that he had left a message with the main office. He had called the office to report his absence at 10:00 a.m.

30. On October 1, 2013, the Appellant's supervisor, Rebecca Milburn, sent the Appellant and the school social worker an email expressing her concern that the student counseling caseload was uneven, and the social worker had many more counseling cases than the Appellant. She requested that they both review each student and determine if their services could be provided by the Appellant.

31. The Appellant worked from October 2-4, 2013.

32. On October 2, 2013, the Appellant responded to his supervisor's email about his caseload and informed her that he had been out with the flu "for the past few days" but was back today. This was the first time Ms. Milburn was made aware that the Appellant had been out sick.

33. On October 7, 2013, the next school day following October 4, 2013, the Appellant worked.

34. At some point on October 7, 2013, the Appellant communicated with his doctor's office, but no doctor was available to see him. Someone on the office staff with initials LD signed a back-to-work slip on October 7, 2013, indicating that the Appellant was "seen here today for acute medical evaluation," and that "he may [not] return to work until cleared by the doctor." CEO Ex 18.

35. The Appellant did not provide this note to BCPS until October 14, 2013.

36. On October 8, 2013, the Appellant did not appear for work. He sent a text message to the speech pathologist to report his absence. He also called the office at around 10:00 a.m. to report he would not be working.

37. Ms. Hanley sent an email to the Appellant on October 8, 2013, at 11:36 a.m., expressing concern about the "times and the method in which you are reporting your absences." She instructed him, in the future, to contact the main office or to call her directly no later than 8:00 a.m. with his intentions for the day. She expressed concern about the impact that his

multiple absences—coupled with the fact that he leaves early twice a week to teach at Stevenson—was having on the students. She also attached a copy of the BCPS ARAP Policy for his review. She expressed hope that he would feel better, but stated that she was concerned about the missed services for the students.

38. The Appellant responded by email at 3:38 p.m. on October 8, 2013, that due to his illness, which started out as the flu and it seemed to him had turned into bronchitis, he could not "physically talk and still cannot do so…I therefore could not call to speak with anyone." He explained that most of his absences, such as for religious holidays and WCC hearings, were beyond his control and documented in advance. He also explained that his WCC hearings involved an injury at his previous school which resulted in an unsuccessful surgery. CEO Ex 8.

39. On October 8, 2013, at 6:12 p.m., the Appellant sent a text to Ms. Hanley's phone stating "Hi Ms. Hanley. I just wanted to let you know that I will most probably not be in school tomorrow either. I am still too sick to be at work. I probably should not have gone to work yesterday either as I was not well then either. If anything changes, I will text u in the morning before 8." Ms. Hanley responded by text that the Appellant should call or email her his intentions for the next day.

40. The Appellant did not work on October 9, 2013; he did not phone or email Ms. Hanley or the office to report he was not coming in to work.

41. On October 9, 2013, Ms. Milburn sent an email to the Appellant at 3:08 p.m., in which she suggested that, if the Appellant could not talk, he have someone in his house call in at the appropriate time.

42. The Appellant sent a response to Ms. Milburn at 6:12 p.m. the same evening, stating that "Calling in was not really an option as I do not have a voice do (sic) to

bronchitis/laryngitis. No family members were available to make the call for me as they leave or left while I was sleeping." Appellant Ex 18.

43. On October 10, 2013, at 7:18 a.m., the Appellant sent a text to Ms. Hanley's phone stating that he had a scheduled appointment that day with regard to his WCC related injury and would let her know what his status was after his appointment.

44. On October 10, 2013, the Appellant was seen in the office of Julian Jakobovits, M.D., by Tikva Dixler, PA-C. This was the Appellant's first appointment for his illness. The Appellant had rhonchi sounds in his right lower lungs. Ms. Dixler noted in her progress notes that the Appellant had reported to her that he had been sick for two weeks, he had shortness of breath lately, was coughing up green sputum, and had had a low grade fever for the past two weeks. She also reported his telling her that he had a temperature of 99.7 degrees the previous evening. Ms. Dixler prescribed Levaquin antibiotics, and ordered a chest X-ray, as well as blood tests. She also noted that she planned to provide a work note. She stated that her impression was "[right lower lobe] pneumonia?" Appellant's Ex 45.

45. Someone on the office staff with initials LD signed a back-to-work slip on October 10, 2013, indicating that the Appellant was "seen here today for acute medical evaluation," and that "he may [sic] return to work until cleared by the doctor." CEO Ex 18.

46. A chest X-ray taken the same day confirmed a left lower lobe infiltrate compatible with pneumonia. It also noted a small density in the right lung that required a follow up CT scan to exclude a pulmonary mass.

47. On October 10, 2013, at 12:48 p.m., the Appellant sent a text to Ms. Hanley's phone indicating that he had pneumonia and "will probably be out through the weekend. I will keep u posted. I will send a doctors note when I am able."

48. Ms. Hanley had not asked the Appellant to bring in a doctor's note.

49. The Appellant did not send a doctor's note as promised.

50. On October 10, 2013, the Appellant's supervisor, Rebecca Milburn, telephoned the Appellant. She told him that he must follow proper procedure with respect to calling the office or Ms. Hanley by 8:00 a.m. to report daily absences. The Appellant pointed out that he had lost his voice during his illness and could not telephone the office, and Ms. Milburn responded that he should have someone in his home place the call for him. He responded that this was not possible, because family members leave before he wakes up in the morning. During this phone call, the Appellant did not sound hoarse.

51. On October 10, 2013, at 6:28 p.m., the Appellant sent an email to Ms. Hanley indicating that he had pneumonia and that his return was "dependent on the all clear from my doctor." Appellant Ex 3.

52. On Friday, October 11, 2013, the Appellant did not report for work, and did not call Ms. Hanley or the office.

53. On Monday, October 14, 2013, at 7:07 a.m., the Appellant emailed Ms. Hanley, with a copy to Ms. Milburn, stating that he was still unable to work and that he "will keep you posted." CEO Ex 12. Ms. Milburn emailed back, asking him how long he anticipated being out that week, and the Appellant responded, at 9:38 a.m., by email to Ms. Milburn, with a copy to Ms. Hanley, that "I just returned from the doctor. They are concerned about my condition and are ordering further testing. I will not know until after the tests are performed and the results are read. Since my return date is unknown, it might be a good idea to have someone cover my caseload if you are concerned about a missed service. Attached are doctor notes indicating that they will clear me when they see fit." *Id.*

54. The doctor's notes which were attached to the October 14, 2013, 9:38 a.m. email were dated October 7 and October 10, 2013; both stated that the Appellant was advised that he may not return to work "until cleared by doctor." CEO Ex 18.

55. This was the first time Ms. Milburn and Ms. Hanley received any doctor's notes.

56. The Appellant had not seen a doctor on October 14, 2013. He did have a CT scan that day, but the CT scan exam was at 12:50 p.m. The CT scan showed that the pneumonia was present in both lungs and was likely related to inflammatory/infectious etiology.

57. On October 14, 2013, sometime after 4:15 p.m., when she received the Appellant's email stating that his return date was unknown due to his doctor's concern about his medical condition, Ms. Hanley telephoned Jeff Elliott, the department chair for Psychology at Stevenson, who confirmed that the Appellant was present that afternoon teaching his course from 3:00 to 4:15 p.m.

58. When Ms. Hanley called Dr. Elliot, she did not identify herself as a BCPS employee, but stated that she was the parent of a Stevenson student, which is false.

59. At 5:51 p.m. on October 14, 2013, Ms. Hanley sent an email to Ms. Milburn, informing her that the Appellant was working at Stevenson that afternoon.

60. At 8:07 p.m. on October 14, 2013, the Appellant sent an email to Ms. Milburn. The email indicated that the Appellant's chest x-ray and blood tests he had the previous week confirmed a "pretty bad case of pneumonia." He further stated that "I was sent for a CT scan today because they are concerned about something else they saw on the x-ray. The doctor said the infection spread to both lungs and is causing upper respiratory problems. He said I should not go back to work until I have another CT scan and things clear up. That CT scan won't be for at least another two weeks. At this point I would suggest sending in a replacement to cover my caseload." CEO Ex 19.

61. In BCPS, a team of service providers is available to provide "coverage" for a school whose assigned psychologist is on long term medical leave for pregnancy, paternity leave or surgery. Coverage is important to ensure that the children get needed services and also to ensure that the school psychologist, when he returns, is not very far behind. The team is deployed to assist only in a limited range of services, such as counseling services for special education students. They do not assist with IEP meetings, perform assessments, or provide services for general education students. Because of staffing issues, coverage is not available for a psychologist who is out on short-term leave.

62. On October 14, 2013, Dr. Rivka Olley, BCPS's Supervisor for Psychological Services, assigned two staff members to provide counseling services to MEMS special education students three days a week until the Appellant's return. At that time, Dr. Olley did not anticipate a long absence for the Appellant, so she recommended that the IEP chair just alert the Appellant to any requested testing, so that he could immediately provide the testing upon his return.

63. Dr. Olley delayed sending coverage for the Appellant until October 14, 2013, because initially the Appellant said he might be better, but then he said he might not be better, so she was waiting to see if he was going to come in to work. By October 14, 2013, it had been long enough that she felt she needed to go ahead and assign coverage to make sure services were provided.

64. Ms. Milburn called Stevenson's Psychology Department Chair Jeff Elliot on Tuesday, October 15, 2013, to inquire about the Appellant's teaching schedule on Mondays and Wednesdays, which were the days the Appellant had informed Ms. Hanley he had to leave MEMS early to teach his course. Dr. Elliot informed her that the Appellant had only

missed one day of his teaching duties over the past few weeks. He also stated that the Appellant worked at Stevenson much more than just Mondays and Wednesdays.

65. On October 15, 2013, at 2:24 p.m., the Appellant sent an email to Ms. Hanley, with a copy to Ms. Milburn, reporting that, due to his condition, he would be unable to return to work for "at least a couple of weeks." He stated that he had informed the coordinator of "psych services" so the "appropriate steps can be taken regarding coverage." Appellant Ex 7.

66. On October 15, 2013, at 4:30 p.m., Dr. Olley, along with Labor Relations Associate Mary Ellen Johnson, went to Stevenson Greenspring campus. They observed the Appellant teaching in his classroom. In the beginning, he was seated and talking with students in the class. Ten to fifteen minutes later, he was standing up near the front board talking easily with the students. He exhibited no shortness of breath. He did not appear to be weak; his voice was not hoarse. He had no difficulty standing or teaching the class.

67. The Appellant went for a follow- up visit to the doctor on October 16, 2013. He saw Ms. Dixler. The Appellant showed clear lungs, with slight rhonchi sounds in the left base. Ms. Dixler did not report an elevated temperature. In her progress notes from the visit, Ms. Dixler reported that the Appellant had told her he was up all night coughing up thick green sputum; that he still had a slight fever yesterday of 99.8 degrees; and that his shortness of breath with exertion was maybe worse. She did not note that the Appellant developed any increased energy as the day progressed. Ms. Dixler did not note any concern about the Appellant being around children. She ordered a Z-pack antibiotics regimen.

68. On or about October 16, 2013, after Dr. Olley and Ms. Johnson observed the Appellant teaching at Stevenson, BCPS determined that the Appellant was absent without permission, and stopped paying him for sick leave, effective the following day, pursuant to BCPS Board Rule 404.03.

69. On October 16, 2013, at 9:57 a.m., the Appellant sent an email to Ms. Milburn, informing her that he was starting a new course of treatment, and indicating that he had "sent notices" to Ms. Hanley, but had not received any responses. He stated that he "assume[d] you have been in touch with her and are taking care of coverage." He also informed her that he would not be attending the monthly professional development sessions due to his condition. He asked her to make sure the school was documenting his absences as sick leave. CEO Ex 22.

70. Attached to the October 16, 2013 email was a note, also dated October 16, 2013, on the letterhead of Julian Jakobovitz, M.D., but signed by Tikva Dixler, PA-C. The note contained two paragraphs. In the first, Ms. Dixler stated that the Appellant had been suffering from pneumonia "since September 27th 2013 and is still not improving. He is weak and gets short of breath from even slight exertion. He needs to rest, and therefore take off from work during this time." In the second paragraph, Ms. Dixler indicated that the Appellant "will probably need to stay off from work for at least another two weeks." She then qualified this by saying "There are times of the day, when [the Appellant's] energy does improve, and he can use his discretion about going to work during those times as long his activities will not require a lot of exertion on his part." CEO Ex 22.

71. BCPS requires that in order to constitute valid documentation of an illness for which an employee is paid sick leave, or to allow an employee to return to work, a doctor's note must specifically indicate whether an employee is cleared to return to work or not. BCPS cannot accept a doctor's note that gives an employee discretion as to when he will return to work.

72. When Ms. Johnson saw Ms. Dixler's note, she became concerned about the doctor's earlier notes and the Appellant's statements that he was unable to return to work, to attend

professional development, and even to speak, and yet he was teaching at Stevenson; and that the most recent doctor's note's neither cleared the Appellant to work nor kept him out of work.

73. On October 17, 2013, because of these concerns, Ms. Johnson asked her assistant to schedule a Loudermill Hearing for the Appellant on grounds of misconduct and willful neglect. A Loudermill Hearing is a pre-deprivation hearing to determine whether an employee should be terminated.

74. Ms. Johnson also contacted Ms. Dixler for clarification of her October 16, 2013 note—she wanted to know whether the Appellant was cleared to work or not.

75. On Friday, October 18, 2013, the Appellant sent an email to Ms. Hanley, informing her that he still did not have an anticipated return date. He stated that "the doctor on Tuesday said two weeks but that date is pending an improvement in my condition." Appellant Ex 8.

76. On October 18, 2013, the Appellant also sent an email to Ms. Milburn, inquiring whether she had arranged for coverage. He stated that his anticipated return date was still uncertain.

77. On or before October 21, 2013, Ms. Johnson spoke to Ms. Dixler on the telephone in response to Ms. Johnson's desire for clarification as to whether the Appellant could return to work. Ms. Dixler stated that she needed to speak to the Appellant before she could respond, and he was coming in later that week. Ms. Dixler further stated that, after she sees the Appellant, she would write a note that keeps him out of work.

78. On October 21, 2013, Ms. Dixler sent an email to Ms. Johnson that stated as follows:

> [The Appellant] has pneumonia in both lungs, and is on his second course of antibiotics for this. It has been causing fever, weakness and shortness of breath with exertion. There are times of the day that [the Appellant] has a little more energy. He is finding that this tends to happen in the afternoon. Since he is not highly contagious at this point, we have left it to his discretion to decide how much exertion he can handle. In general, he does not have enough energy to work a full schedule. If he can handle teaching a

class in the afternoon, this is fine. He will have to use his good judgement as to how much exertion he can handle, and attempt to save energy whenever possible.

Appellant Ex 26.

79. The Appellant went for a follow-up visit to the doctor on October 22, 2013. He saw Ms. Dixler. The Appellant showed clear lungs and registered a 98 degree temperature. In her progress notes from the visit, Ms. Dixler reported that the Appellant had told her he was having a slight decrease in coughing, on-and-off low grade fever, and continued shortness of breath with exertion. She also noted that the Appellant had reported to her that he still feels bad in the mornings, with increased energy as the day progresses.

80. The Appellant did not communicate with BCPS again until Sunday, October 27, 2013, at 5:42 p.m., when he informed Ms. Milburn and Ms. Hanley, by email, that he was going for a checkup with the doctor the next day, and he would let them know of the status.

81. On October 29, 2013, the Appellant went to the doctor's office and saw Ms. Dixler. She noted that the Appellant felt better, had no temperature, his lungs were clear, and his pneumonia was improved. She noted that he may return to work with accommodations due to his shortness of breath with exertion.

82. On Tuesday, October 29, 2013, at 2:53 p.m., the Appellant sent an email to Ms. Milburn. He attached a doctor's note. He asked her to "confirm whether or not the principal is interested in accommodating as per the note. If she is, I will come in on Wednesday morning." CEO Ex 26.

83. The note, again written on the letterhead of Dr. Jakobovits, but signed by Tikva Dixler, stated that the Appellant was "improving from his recent pneumonia. He is ready to go back to work this week. At this point, he still is a bit weak and gets short of breath with exertion. He is capable of meeting with students, but may have trouble walking around the building to bring them to his office. He will need them to be brought to him in some other

way for the time being. If any other accommodations can be made to lessen his exertion while at work, it will make it easier for him." *Id.*

84. The Appellant sent another email to Ms. Milburn at 6:29 p.m. on October 29, 2013, and then another the following morning at 8:52 a.m. In both, he asked her to confirm if he should report to work.

85. Ms. Milburn received all three emails just before 9:00 a.m. on October 30, 2013. She responded that she was waiting on advice so that she could respond to him.

86. At 9:30 a.m., October 30, 2013, the Appellant telephoned Ms. Milburn and informed her that he was in his car outside his school building waiting to hear from her about whether he should report to work. He did not come inside. Ms. Milburn instructed him to go home until she found out about his accommodation request.

87. Ms. Milburn spoke to the Appellant again at 12:00 p.m., informing him to contact the Office of Legal Counsel about his accommodation request.

88. On October 30, 2013, the Appellant submitted a Reasonable Accommodation Request Form to the BCPS Office of EEO (Equal Employment Opportunity) Compliance. This office is part of the Office of Legal Counsel. The Appellant requested access to an elevator, to have students brought to his office, and a room with better ventilation. This was the first time the Appellant requested these or any accommodations.

89. On October 30, 2013, Jerome Jones, BCPS Manager, Labor Relations, Office of Human Capital, sent a notice to the Appellant, by email, that a Loudermill Hearing was scheduled for Tuesday, November 5, 2013, for willful neglect.

90. On October 30, 2013 at 6:58 p.m., the Appellant sent an email to Ms. Milburn in which he asked her to clarify her "position." He stated that he had a note stating he could return to work with accommodations, but he was unsure whether he would be allowed to return until

he had clearance from the Office of Legal Counsel. He also stated that as per a notice he had received that afternoon, he had been requested to attend a Loudermill Hearing on November 5, 2013.

91. Ms. Milburn responded, the following day, that the two matters—the Loudermill Hearing and the accommodations request—were separate, and that he should both remain in discussion with the BTU about the hearing, and submit whatever forms were necessary to pursue his accommodations request. She informed him that, because he was requesting accommodations, he should not return to work until the Office of Legal Counsel reviewed and approved his request.

92. On the following day, October 31, 2013, BCPS EEO Manager LaTosha Barnes requested additional information from the Appellant's doctor on his accommodations request.

93. On October 31, 2013, the Appellant sent an email to Ms. Hanley stating that he had been ready to return to work the day before, on October 30, 2013, but was awaiting a response from the Office of Legal Counsel as to a request for accommodations he had made so that he could return to work.

94. Ms. Barnes received an email on November 5, 2013 from Ms. Dixler that stated:

> [The Appellant] was seen in this office for the first time for this illness on October 10, 2013. He had already been sick for two weeks prior to that with fever and a cough, which he had presumed to be a virus until then. [The Appellant] does not suffer from any prior lung disease. This pneumonia is an acute condition. I expect [the Appellant] to be completely recovered from his residual weakness and shortness of breath within the next two weeks.

CEO Ex 42.

95. On November 5, 2013, on the basis of the information provided by Ms. Dixler, Ms. Barnes denied the accommodations request because the Appellant's illness was not expected to last more than a short period of time, and he therefore did not suffer from a disability requiring accommodations under the Americans with Disabilities Act (ADA).

96. A Loudermill Hearing was conducted on November 5, 2013 by Ms. Johnson.

97. Professional development for school psychologists consists of two days of programming. The first day involves attending lectures; the second involves participating in workshops. Participation involves sitting only; no speaking is required.

98. The Appellant did not ask his supervisor, Ms. Milburn, or his principal, Ms. Hanley, or anyone else at BCPS whether there was work he could do requiring less exertion during those times of the day when his energy was improved, or whether he could attend a portion of the professional development programming.

99. The Appellant's counseling duties generally involved students going to his office and sitting down with him for counseling in half-hour sessions.

100. It takes the Appellant approximately twenty minutes to drive from his home to the Stevenson campuses at Owings Mills and Greenspring. If there is more traffic, it might take a half hour.

101. To prepare for his teaching job at Stevenson, the Appellant created Power Point presentations. He created them in the evening or whenever he had a chance. He prepared for about a half-hour for each class. He also graded exams in the evenings around October15-16, 2013, which was about three weeks into his illness. From October 7-30, 2013, the Appellant only missed one day of teaching at Stevenson--on October 8, 2013.

102. The Appellant's lengthy absence from school, as well as the uncertainty over when he was going to return, had a negative impact on the entire school. At first, the children who needed services and who were required by law to receive them were not being serviced at all, because it was not clear when the Appellant would return, and so coverage was not provided. Coverage for a full time psychologist is troublesome because the covering professional usually only provides counseling. A covering professional is not able to

attend IEP meetings which is a problem because major decisions are made at IEP meetings regarding whether children need testing or counseling. When a psychologist is not at an IEP meeting, the decisions are not as well-made. Also, without the permanently assigned psychologist, there is nobody in the school to provide any services to the general education students or consult with teachers. During the time period the Appellant was out on sick leave, he was not present to perform assessments or otherwise meet the needs of the children in MEMS.

103. MEMS students started the School Year with the Appellant providing services, and then they had to be seen by a different provider. This inconsistency affects the children directly.

104. Functional Behavioral Assessments (FBA) and BIPs are best prepared for students by professionals who are in the school and know the students and the school and how it functions, as opposed to outsiders who are not familiar with the students and the teachers and how the school functions.

105. On October 21, 2013, a BIP and observation needed to be provided for a student at MEMS who was recommended to receive an IEP. This would have been done by the Appellant, if he was working. In his absence, this had to be performed by the school's social worker, who already had too heavy a caseload.

106. During his sick leave, the Appellant never requested informally that BCPS adjust his schedule due to his illness. He never asked whether the six students on his caseload could be brought to his office or whether he could have an adjusted or shortened work day.

107. Had he requested this, the Appellant's supervisors would have been willing to provide informal accommodations, as they did for other professionals seeking them.

108. The Appellant received a grade of "proficient" on his performance evaluations for the 2012-13, 2011-2012, 2009-10, and 2008-2009 School Years.

109. In 2012, the Appellant prevented a student from jumping out of a window at Samuel Coleridge-Taylor Elementary School. During the incident, the Appellant injured his thumb. The Appellant has an ongoing WCC claim as a result of the incident, which requires him to attend hearings.

DISCUSSION

Section 6-202 of the Education Article provides the framework under which certain school system employees may be suspended or dismissed. Section 6-202(a) (Supp. 2014) states:

> (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 the county board to the State Board.

In an appeal of a suspension or dismissal of a certificated employee pursuant to Education Article section 6-202, COMAR 13A.01.05.05F provides the following:

(1) The standard of review for certificated employee suspension or dismissal actions shall be de novo as defined in F(2) of this regulation.

(2) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of a certificated employee.

(3) The Local Board has the burden of proof by a preponderance of the evidence.

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

Accordingly, on behalf of the State Board and on the record before me, I am exercising my independent judgment and discretion to determine whether the Board has established by a preponderance of the evidence that the Appellant committed acts of misconduct and willful neglect of duty, and whether termination of his employment is an appropriate sanction.

One of the bases for dismissal under section 6-202(a)(1) of the Education Article is "misconduct in office." Although that term is not defined in the statute, its meaning was considered by the Court of Appeals in *Resetar v. State Bd. of Educ.*, 284 Md. 537, 560-61 (1979). In *Resetar,* a teacher used language that was derogatory and racially offensive after being warned numerous times not to do so. The Court held that the misconduct must bear on the teacher's fitness to teach and further stated:

> The word [misconduct] is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.

Id.

Similarly, "willful neglect of duty" is not defined in the statute. The plain meaning of the phrase, however, is apparent. I take "willful neglect of duty" to mean an employee's intentional failure to perform some act or function that the employee knows is part of his or her job responsibilities. The interpretation is consistent with MSDE's past determination that "willful neglect of duty" is a "willful failure to discharge duties which are regarded as general teaching."

Margaret R. Crawford v. Bd. of Educ. of Charles County, 1 Op. Maryland State Board of Educ. Rep (MSDE) 503,519 (July 28, 1976).

The Board argued that the Appellant engaged in misconduct and willful neglect of duty by abusing sick leave in his primary job at MEMS while working secondary employment at Stevenson. It maintained that he misrepresented the extent and duration of his symptoms and his illness because he claimed and produced medical documentation certifying that he was unable to work, yet his actions demonstrated that he could work.

For further authority justifying the Appellant's termination, the Board relies on the Handbook, which provides, with respect to outside employment, that "City Schools expects full-time professional employees of the school system to devote their professional time and attention to the business of City Schools." The Handbook further provides that BCPS is committed to a progressive approach to corrective action, but it considers certain infractions and violations as grounds for immediate termination of employment.

The Handbook provides as follows with respect to serious misconduct: "City Schools considers certain misconduct to be serious. In instances in which employees are found to have engaged in such conduct, corrective action will be taken, up to and including termination of employment. This action may not necessarily be preceded by a warning." Among the specifically enumerated actions that may constitute grounds for immediate termination are: excessive absences or being absent from work without proper notice or authority; and misconduct.

The Handbook further provides that "City Schools may also subject employees to corrective action, up to and including termination of employment, for engaging in practices inconsistent with ordinary, reasonable and common sense rules of conduct necessary for the mutual welfare of the school system and its employees."

After reviewing the entire record, including the testimony of the witnesses and all the documents, I find that the Board has met its burden of proof that the termination was proper under these policies because the Appellant did have excessive absences and he was absent from work without proper notice or authority. In addition, he was dishonest about his ability to work and he submitted misleading and untrue doctor's notes, all of which constituted serious misconduct justifying corrective action, including termination. Finally, he engaged in practices inconsistent with ordinary, reasonable and common sense rules of conduct necessary for the mutual welfare of the school system and its employees.

At the outset, I note that the findings of fact set forth above resulted from my determination that the witnesses offered by the Board were credible; had no motive to fabricate the truth;[4] and presented testimony that was consistent with other testimony presented by Board witnesses, as well as with the extensive documentary record. I even found Ms. Hanley to be a credible witness, despite the fact that she misrepresented her identity to Stevenson's Dr. Elliot. Her fabrication was inappropriate, but it did not change my opinion that the rest of her testimony was credible, in that it was consistent with the other Board evidence.

The Board's witnesses presented as individuals who were truly concerned about the successful operation of a new Baltimore City middle/elementary school with numerous challenges, including those requiring the ongoing and dedicated services of the school's single psychologist. MEMS had been a charter school, but had lost its charter, so, beginning in the 2013-14 School Year, Principal Hanley was assigned to transition away from the failed charter school and to reinstitute a successful non-charter school program. One critical issue, aside from just turning the school around for the community, was with special education compliance issues. Thus, a central focus at the start

[4] Vague suggestions by counsel for the Appellant that motives might exist to push out the Appellant, such as for excessive use of leave for Jewish holidays, for being a whistleblower, and for reasons related to his WCC claim were not borne out by any credible evidence whatsoever.

of the 2013-14 School Year was making sure the special education program was up and running for the students.

One of the specific challenges at the time was that the school's counseling caseload was unevenly distributed, with the Appellant only being responsible for counseling six students, whereas a normal caseload for a school psychologist is 15-30 students. The school's social worker was assigned many more counseling cases than the Appellant. The Board's witnesses, especially Principal Hanley and Becky Milburn, the Appellant's supervisor, had cause for concern.

The problems presented by the Appellant's leave-taking occurred due to the Appellant's own neglect of his professional responsibilities. The School Year started in late August, and between the Jewish holidays and leave taken for WCC hearings in late August and September 2013, the Appellant missed six full days of work and two half days—this at the start of the School Year when children and staff were still adjusting to a new routine. While these were excused absences, they were absences nonetheless. For the school, the absences raised the possibility that services were backing up. Yet, at that point, there was every reason to expect that the Appellant, as an experienced professional, would do everything necessary to make up the work and fulfill the needs of the children and the school for the services of a full-time psychologist.

But this did not happen. Beginning on September 30, 2013, the next Monday after the Appellant was absent for Shemini Atzeret and Simchat Torah, the last two days of the fall Jewish holidays, when the school had every reason to believe the Appellant would appear to make up work he had missed the previous weeks, he failed to show up for work and failed to report his absence to the school office until 9:43 a.m. The Appellant did not report for work on October 1, 2013, either. At 11:11 a.m., he emailed Ms. Hanley informing her that he was still sick with a fever and was not able to come in. He had called the office to report his absence at 10:00 a.m.

Under the circumstances, considering the Appellant had been out for two days the previous week, I find it to be unprofessional and plainly in violation of the absenteeism reporting policy for the Appellant to simply fail to show up for work on these two days without having a timely discussion with someone in charge—the school principal and/or his supervisor—about how to redistribute his work or at least to cancel or rearrange scheduled appointments (he had appointments with students for counseling on Mondays and Tuesdays and IEP meetings on Wednesdays). The Appellant's suggestion at the hearing that he did not know about Principal Hanley's rule that absences must be reported to her and the office as soon as possible the night before, but by no later than 8:00 a.m. at the start of the school day was self-serving and non-credible in light of Principal Hanley's credible testimony that she explained the attendance rules and handed out her handbook containing the school's rules at a staff meeting on August 27, 2013. In addition, the Appellant demonstrated familiarity with the attendance rules, in that he submitted leave requests for the Jewish holidays and his WCC hearings early in the School Year. As a long time professional with BCPS, the Appellant knew or should have known that he must adhere to each school's attendance policies—and their importance to the effective management of a school.

And then, after working the next four days, from October 2-4 and 7, 2013, the Appellant did not return to work at all. At that point, Ms. Hanley and Ms. Milburn understandably became increasingly concerned that the needs of the students were not being met and indeed that the entire focus of the new MEMS, improving special education compliance, was being compromised. Yet, at first, it was unclear whether the Appellant's illness was going to keep him out of work long enough to justify taking staff from elsewhere to provide partial coverage for the Appellant's duties. This is in large part because the Appellant's failure to notify Ms. Hanley at the start of each school day that he would be absent, as required by her attendance policy, made it difficult for her to manage the school's special education needs on a day-to-day basis. To be clear, on September 30 and October 1,

2013, and then from October 8, 2013 through October 14, 2013, the Appellant never once complied with the attendance rules requiring a daily phone call prior to the start of the school day.

On October 8, 2013, the Appellant did not appear for work, but he never notified Ms. Hanley in advance. He sent a text message to the speech pathologist to report his absence. He also called in to the office at around 10:00 a.m. to report he would not be working. Ms. Hanley sent an email to the Appellant on October 8, 2013, at 11:36 a.m., expressing concern about the "times and the method in which you are reporting your absences." She instructed him, in the future, to contact the main office or to call her directly no later than 8:00 a.m. with his intentions for the day. She expressed concern about the impact that his multiple absences—coupled with the fact that he left early twice a week to teach at Stevenson—was having on the students. She expressed hope that he would feel better, but stated that she was concerned about the missed services for the students.

The Appellant responded by email at 3:38 p.m. on October 8, 2013, that due to his illness, which started out as the flu and seemed to him to have turned into bronchitis, he could not "physically talk and still cannot do so…I therefore could not call to speak with anyone." I found this excuse, again, to be self-serving and non-credible, in that the school log states that the Appellant called the office at around 10:00 a.m. to report his absence.

On October 8, 2013, at 6:12 p.m., the Appellant sent a text to Ms. Hanley's phone stating "Hi Ms. Hanley. I just wanted to let you know that I will most probably not be in school tomorrow either. I am still too sick to be at work. I probably should not have gone to work yesterday either as I was not well then either. If anything changes, I will text u in the morning before 8." By texting Ms. Hanley with his plans, instead of calling, he continued to violate the school's attendance policy, and Ms. Hanley responded to him that he needed to call or email her with his intentions the following day. The Appellant did not work on October 9, 2013; he did not phone Ms. Hanley or the office to report he was not coming in to work.

On October 10, 2013, at 7:18 a.m., the Appellant again sent a text to Ms. Hanley's phone, stating that he had a scheduled appointment that day regarding his WCC related injury, and would let her know his status after his appointment. He did not come to work, and he did not phone Ms. Hanley or the office. On October 10, 2013, at 12:48 p.m., the Appellant sent a text to Ms. Hanley's phone indicating that he had pneumonia and "will probably be out through the weekend. I will keep u posted. I will send a doctors note when I am able." The Appellant did not send a doctor's note, as promised.

On October 10, 2013, the Appellant's supervisor, Ms. Milburn, telephoned the Appellant. She told him that he must follow proper procedure with respect to calling the office or Ms. Hanley by 8:00 a.m. to report daily absences. And yet, even then the Appellant failed to follow the correct procedure. That night, at 6:28 p.m., the Appellant sent an email to Ms. Hanley indicating again that he had pneumonia and that his return was "dependent on the all clear from my doctor." On Friday, October 11, 2013, the Appellant did not report for work and did not call Ms. Hanley or the office.

On Monday, October 14, 2013, at 7:07 a.m., the Appellant emailed Ms. Hanley, with a copy to Ms. Milburn, stating that he was still unable to work and that he "will keep you posted." He did not call her or the office. Ms. Milburn emailed back, asking him how long he anticipated being out that week, and the Appellant responded, at 9:38 a.m., by email to Ms. Milburn, with a copy to Ms. Hanley, that "I just returned from the doctor. They are concerned about my condition and are ordering further testing. I will not know until after the tests are performed and the results are read. Since my return date is unknown, it might be a good idea to have someone cover my caseload if you are concerned about a missed service. Attached are doctor notes indicating that they will clear me when they see fit."

The doctor's notes which were attached to the October 14, 2013, 9:38 a.m. email are dated October 7 and October 10, 2013. Both stated that the Appellant was advised that he may not return

to work "until cleared by doctor." This was the first time Ms. Milburn and Ms. Hanley received any doctor's notes.

It was at this point that Ms. Hanley started to wonder about whether the Appellant was teaching at Stevenson. After investigation, BCPS discovered definitively on October 15, 2013 that he indeed was teaching, not two classes per week as he had disclosed to Ms. Hanley at the start of the School Year, but four. And the events unfolded as set forth in the findings of fact above and revealed the Appellant to be involved in inexplicable and inexcusable misrepresentations concerning his sick leave, aided by his doctor's office, which supplied sick leave notes to justify the Appellant's misrepresentations.

In fact, according to the Appellant's medical records, he had not seen a doctor on October 14, 2013, as he reported to Ms. Hanley at 9:38 a.m. that morning. The last time he had been to the doctor was on October 10, 2013, four days earlier, when he was diagnosed with pneumonia. Moreover, he did have a CT scan on October 14, 2013, but the CT scan exam was at 12:50 p.m., more than three hours later. Nor had he seen a doctor on October 7, 2013, as indicated by his back-to-work slip, dated October 7, 2013. The slip, on the Appellant's doctor's office letterhead, and signed by a person purportedly with initials LD, stated that the Appellant was "seen here today for acute medical evaluation," and that "he may [not] return to work until cleared by the doctor." The Appellant's medical records reveal no medical visit that day.

Most significantly, both doctor's notes delivered to Ms. Hanley and Ms. Milburn on October 14, 2013, indicated the Appellant would be out of work indefinitely. But, after BCPS personnel observed Appellant teaching with no difficulty at Stevenson on October 15, 2013, as he had been all along, the doctor's restrictions for him changed. It was at this point, after the Appellant apparently discovered that BCPS personnel knew he was teaching, that the doctor's office changed the

requirement that the Appellant be on off-work status, to allowing the Appellant to work in the afternoons when he had energy, in his discretion.

On October 16, 2013, the Appellant submitted to Ms. Milburn the new note, also dated October 16, 2013, on the letterhead of Julian Jakobovitz, M.D., but signed by Tikva Dixler, PA-C. The new note contained two paragraphs. In the first, Ms. Dixler stated that the Appellant had been suffering from pneumonia "since September 27th 2013 and is still not improving. He is weak and gets short of breath from even slight exertion. He needs to rest, and therefore take off from work during this time." In the second paragraph, Ms. Dixler indicated that the Appellant "will probably need to stay off from work for at least another two weeks." She then qualified this by writing, "There are times of the day, when [the Appellant's] energy does improve, and he can use his discretion about going to work during those times as long his activities will not require a lot of exertion on his part."

This note came just one day after the Appellant sent his October 15, 2013 email to Ms. Hanley, with a copy to Ms. Milburn, reporting that, due to his condition, he would be unable to return to work for "at least a couple of weeks." And, the note came just two days after the Appellant sent his October 14, 2013 email to Ms. Milburn. The email indicated that the Appellant's chest x-ray and blood tests he had the previous week confirmed a "pretty bad case of pneumonia." He further stated that "I was sent for a CT scan today because they are concerned about something else they saw on the x-ray. The doctor said the infection spread to both lungs and is causing upper respiratory problems. *He said I should not go back to work until I have another CT scan and things clear up. That CT scan won't be for at least another two weeks."*

Further diminishing the credibility of Ms. Dixler's October 16, 2013 note are two things: in the first sentence, Ms. Dixler stated that the Appellant had been suffering from pneumonia since September 27, 2013, and was still not improving. This is patently false. The Appellant did not even

see Ms. Dixler, or any other medical office, for an office visit about his illness until October 10, 2013. It was then, after a chest X-ray, that he was diagnosed. For her to state that the Appellant had pneumonia back as early as September 27, 2013 is unsupported by the record. Furthermore, contradicting Ms. Dixler's statement that he was not improving, by his own testimony at the hearing, the Appellant was indeed improving and getting more energy around October 15 and 16, 2013. Hearing Transcript, May 16, 2014 at p. 930.

Moreover, the medical record of the visit on October 16, 2013 does not provide a basis for Ms. Dixler's conclusion that the Appellant was too sick to work except in the afternoon. The objective tests performed at the visit, as recorded by Ms. Dixler, showed clear lungs, with only slight rhonchi sounds in the left base. Ms. Dixler did not report that *she* observed an elevated temperature, coughing, or shortness of breath. Yet she *did* report the Appellant's subjective complaints, including that he stated to her that he was up all night coughing up sputum and that he had shortness of breath with exertion. But these complaints were not borne out by any objective tests. Importantly, Ms. Dixler did not report that the Appellant told her he had any lack of energy or that he developed increased energy as the day progressed, which was the basis for her recommendation on October 16, 2013 that the Appellant could work in the afternoon. I find all of these contradictions unsettling and disturbing, and consider Ms. Dixler's assessment of the Appellant's ability to work to be non-credible. For all these reasons, I also agree with the HE that Ms. Dixler's letter was an after-the-fact attempt to justify the Appellant's secondary employment while on leave from BCPS, and that the Appellant had extracted the new note from his doctor's office because he had been "caught" working.

Ms. Dixler's confusing letter prompted Ms. Johnson to contact Ms. Dixler for clarification of her October 16, 2013 note—Ms. Johnson wanted to know whether the Appellant was cleared to work or not. This is because the BCPS cannot accept a doctor's note giving a patient discretion as

valid documentation either of an employee's illness, allowing an employee to be paid for sick leave or of the employee's recovery, thereby allowing an employee to return to work. A note must indicate whether an employee is cleared to return to work or is not. When Ms. Johnson saw the letter, she noted the fact that the earlier doctor's notes, as well as the Appellant himself, had stated he was unable to return to work, to attend professional development, and to speak and yet he was teaching at Stevenson.

Because of these concerns, on or before October 21, 2013, Ms. Johnson spoke to Ms. Dixler on the telephone. According to Ms. Johnson's credible account of the telephone conversation, Ms. Dixler did not directly answer the question as to whether the Appellant was able to work or not, instead stating that she needed to speak to the Appellant before she could respond, and that he was coming in later that week. Ms. Dixler further stated that, after she saw the Appellant, she would write a note that kept him out of work.

On October 21, 2013, Ms. Dixler sent an email to Ms. Johnson in which she made it more explicit that he could teach, if " he can handle" it. She did not mention whether he could work as a school psychologist if "he can handle" it:

> [The Appellant] has pneumonia in both lungs, and is on his second course of antibiotics for this. It has been causing fever, weakness and shortness of breath with exertion. There are times of the day that [the Appellant] has a little more energy. He is finding that this tends to happen in the afternoon. Since he is not highly contagious at this point, we have left it to his discretion to decide how much exertion he can handle. In general, he does not have enough energy to work a full schedule. If he can handle teaching a class in the afternoon, this is fine. He will have to use his good judgement as to how much exertion he can handle, and attempt to save energy whenever possible.

Again, this opinion is not supported by any objective medical records, but is based upon the subjective complaints of the Appellant during his October 16, 2013 visit.

Indeed, the Appellant went for a follow-up visit to the doctor the very next day, on October 22, 2013, and again saw Ms. Dixler. The Appellant showed clear lungs and a 98 degree temperature. In her progress notes from the visit, Ms. Dixler reported that the Appellant's

pneumonia was improving. She reported that the Appellant had told her he was having a slight decrease in coughing, on-and-off low grade fever, and continued shortness of breath with exertion. She also noted, for the first time, that the Appellant had reported to her that he still feels bad in the mornings, with increased energy as the day progressed. However, as before, there was no objective evidence to document his "feeling bad," continued shortness of breath, or lack of energy except in the afternoon. In fact, her notes are contradicted by the Appellant's own testimony at the hearing that his general energy was improving as of October 15-16, 2013. Thus, the objective findings of this medical visit also did not justify Ms. Dixler's October 21, 2013 email to Ms. Johnson, in which she was continuing to keep the Appellant out of work except to teach in the afternoons.

As stated before, on October 15, 2013, the very day that the Appellant emailed Ms. Hanley and Ms. Millburn a message stating that due to the seriousness of his medical condition, he would be unable to work for at least a couple more weeks, BCPS employees observed the Appellant working at Stevenson. This was during the period of time the October 7 and 10, 2013 doctor's notes were supposedly in effect, prohibiting him from working at all. On October 15, 2013, at 4:30 p.m., Dr. Olley, along with Labor Relations Associate Mary Ellen Johnson, went to Stevenson's Greenspring campus. They observed the Appellant teaching in his classroom. In the beginning, he was seated and talking with students in the class. Then, ten to fifteen minutes later, he was standing up near the front board talking easily with the students. He exhibited no shortness of breath. He did not appear to be weak; his voice was not hoarse. He had no difficulty standing or teaching the class.

The Appellant was able to work. In fact, he worked at Stevenson four days a week just about the entire time he was absent on sick leave from BCPS. The only day he did not work at Stevenson was October 8, 2013. Every day that he was not working for BCPS, except October 8, 2013, he prepared for his classes, drove twenty minutes or more to Stevenson and then back home,

graded papers, lectured students for an hour and fifteen minutes, and was available to advise students as needed. He accepted and apparently needed no accommodations.

The Appellant worked this secondary job despite the fact that the Handbook provides, with respect to outside employment, that "City Schools expects full-time professional employees of the school system to devote their professional time and attention to the business of City Schools."[5] The Appellant was ignoring his duties to City Schools during this time period, never once asking Ms. Hanley or Ms. Milburn whether he could work on an adjusted or shortened schedule, or work with informal accommodations such as having the six students on his caseload brought to his office. Had he requested this, his supervisors would have been willing to provide informal accommodations, as they did for other professionals seeking them. Nor was he willing to come in for monthly professional development during this time, which involved sitting through lectures and workshops without any exertion.

At the hearing before the HE, the Appellant attempted to minimize the strenuousness of the work he performed at Stevenson and to maximize the strenuousness of working in BCPS as a psychologist, suggesting that is why he felt he could work his secondary job even though he could not come to MEMS. I did not find this distinction credible. For one thing, the Appellant presented no medical professional to explain why one job might be more strenuous than another or would have been easier for him to perform during his illness. In any event, there was no credible evidence that the Appellant's work as a school psychologist was strenuous. In fact, the evidence was that the Appellant's caseload was minimal, compared to other school psychologists, and that most of the work of a school psychologist is performed sitting down in a

[5] According to the Appellant's own curriculum vitae, he also worked as a psychology professor and supervisor for psychology practicum students at the Thomas Edison University/Ma'alot Baltimore from 2001-2013 and in private practice as a psychology associate, performing individual psychotherapy, marital therapy and psychological testing from 2000-2013. There was no testimony at the hearing about whether the Appellant was working these jobs during September through October 2013, when the events transpired that resulted in the Appellant's termination from BCPS. However, it does appear as if the Appellant had quite a full schedule of professional activities while working for BCPS.

quiet office. The Appellant suggested that it would be strenuous to rush off after an eloping student; however, he presented no evidence that this had happened or was likely to happen at MEMS, which was a new school and a new professional placement for the Appellant.

Moreover, in his testimony, the Appellant attempted to minimize the hours he worked at Stevenson, referring to his responsibilities there as merely showing movies and monitoring exams. Yet, he conceded on cross examination that the classes are actually an hour and fifteen minutes, and require him to give lectures. In fact, BCPS personnel actually observed him standing up in front of students lecturing. He also was forced to admit that he also had responsibility to prepare for his courses, prepare for and grade exams, and advise students as needed. His wife, who testified at the hearing before the HE, admitted to seeing him prepare for his classes at home during this time period. The Appellant also attempted to minimize the time it took to drive to Stevenson, stating at first that it was only a ten-minute drive. Later he admitted it took him twice that time.

At the hearing before the HE, the Appellant suggested that he was unable to come to work at BCPS because everyone knows elementary schools are "germ cesspools," and that younger children are more susceptible to becoming infected by his illness and that he might be made sicker by having contact with children. He argued that this is not the case in colleges, where the students are older, and this is why he was able to work at Stevenson during this time period. The Appellant stated that his doctor's office had instructed him he should not be working in BCPS schools at all for this reason. I found this testimony not credible. Nowhere in the record, including the medical records, is there any evidence that any medical professional told the Appellant he could not work in BCPS schools because of germs. Moreover, there was no expert testimony that MEMS is "germier" than Stevenson. Accordingly, I reject this argument as well.

I conclude, based upon the discussion above, that the Appellant engaged in misconduct and willful neglect of duty by abusing sick leave in his primary job at MEMS while secretly working secondary employment at Stevenson. He also refused to comply with Principal Hanley's attendance rules, even after he was reminded of the importance of them. For many weeks, he misrepresented the extent and duration of his symptoms and his illness. During this time, he claimed and produced false medical documentation certifying that he was unable to work, yet his actions demonstrated that he could work. These acts of misconduct bear on the Appellant's fitness to perform as a school psychologist because they show he cannot be relied upon or trusted. These acts also constituted willful neglect of duty, because for weeks on end, the Appellant failed to devote any professional time and attention to BCPS, as required by the Handbook and by his professional duties, while he was devoting parts of each day working at his secondary job. In addition, these acts violated common sense rules of conduct for a school professional.

The Appellant's actions were detrimental to the MEMS students, who were, for an extended period of time that fall, without an assigned school psychologist, and therefore not receiving the services they needed and to which they were entitled. At first, the children who needed services and who were required by law to receive them were not being serviced at all, because it was not clear when the Appellant would return and so coverage was not provided. Eventually, when it became clear the Appellant's leave was going to continue indefinitely, coverage was provided, but adequate coverage for a full-time psychologist is difficult, because the covering professional usually only provides counseling. A covering professional is not able to attend IEP meetings, which is problematic, because major decisions are made at IEP meetings regarding whether children need testing or counseling. When a psychologist is not at an IEP meeting, the decisions are not as thorough. . Also, without a permanently assigned psychologist, there is nobody in the school to provide any of a school psychologist's services to the general education students or consult with

teachers. During the time period the Appellant was out on sick leave, he was not present to perform assessments or otherwise meet the needs of the children in MEMS.

Additionally, the Appellant's extended sick leave impacted the welfare of the school system and its employees, because he had fellow employees who were relying on him to perform his share of the work, which had to be picked up and performed by others. For example, on October 21, 2013, a BIP and observation needed to be provided for a MEMS student who was recommended to receive an IEP. This would have been done by the Appellant, if he was working. In his absence, this had to be performed by the school's social worker, who already had too heavy a caseload.

Under section 6-202 of the Education Article, the BCPS may either suspend or dismiss a school professional for various violations, including misconduct and willful neglect of duty. The Board argued that the Appellant's violations were grounds for immediate termination. The Appellant argued that a much lesser sanction was required by progressive discipline rules and the ARAP.

The Handbook provides that the BCPS is committed to a progressive approach to corrective action, but it considers certain infractions and violations as grounds for immediate termination of employment. The Handbook provides, as follows, with respect to serious misconduct: "City Schools considers certain misconduct to be serious. In instances in which employees are found to have engaged in such conduct, corrective action will be taken, up to and including termination of employment. This action may not necessarily be preceded by a warning." Among the specifically enumerated actions that may constitute grounds for immediate termination are: excessive absences or being absent from work without proper notice or authority, and misconduct. The Handbook also provides that "City Schools may also subject employees to corrective action, up to and including termination of employment, for engaging in

practices inconsistent with ordinary, reasonable and common sense rules of conduct necessary for the mutual welfare of the school system and its employees."

Termination is undoubtedly a proper sanction, given the Appellant's sick leave abuse, excessive absences without proper notice or authority and misconduct. In addition, termination is proper because he engaged in practices inconsistent with ordinary, reasonable, and common sense rules of conduct necessary for the mutual welfare of the school system and its employees, as discussed above.

The Appellant argued at the hearing before the HE that he was a fourteen-year employee of BCPS with proficient evaluations. He pointed out that he had been honored by his peers for crisis intervention and, in fact, saved a student from jumping out of a window and he was injured doing so. He argued that he is a dedicated psychologist and serviced school children. Under these circumstances, the Appellant argued that he should not be terminated. I do not agree. The Appellant's behavior amounted to a serious breach of trust, as discussed above, and termination is appropriate, even for a fourteen-year, proficient employee who has intervened in crises.

The Appellant also argued at the hearing before the HE that the BCPS ARAP prohibits his termination because it requires an employee who has reached his third period of absence or occasion to be orally cautioned. The Appellant pointed out that an occasion is any period of continuous absence for the same reason. Since he was absent from September 30-October 1, 2013, and then from October 8, 2013 onward for the same reason, he only had one occurrence of sick leave. Therefore, according to the Appellant, BCPS was not even authorized to orally caution him, much less terminate him.

The Appellant further maintained that the BCPS ARAP also prohibits his termination because it requires supervisors to provide assistance, and not penalties, for absences, and that supervisors are responsible to communicate with employees about absences. The Appellant pointed

to emails and texts from him to Ms. Hanley and Ms. Milburn that he felt demonstrated that he communicated with them consistently during his illness, and yet, he maintained, they did not communicate with him.

Specifically, he maintained that after his supervisors discovered he was working at Stevenson, they did not tell him that they thought he should be working part-time at BCPS instead of at Stevenson, something that the Appellant testified never occurred to him. Nor did they send him a Family/Medical Leave Act (FMLA) packet[6], as was suggested by Lesley Neely from the Office of Human Capital. He complained that no one told him he was being placed on leave without pay effective October 17, 2013, pursuant to Board Rule 404.03, or that the Board interpreted that rule so as to prohibit him from working a second job while on sick leave from BCPS. He also claimed that it was wrong that he was not told that as of October 17, 2013, Ms. Johnson was scheduling a Loudermill Hearing, and that Ms. Johnson called his health care provider for clarification as to whether he could return to work.[7] Since no one at BCPS ever told him there were problems with his taking sick leave while working a secondary job, the Appellant argued, termination is inappropriate under the Attendance Program, and a warning should be placed in his file instead.

The Appellant was especially bitter about what he perceived as BCPS's refusal to communicate frankly with him after Sunday, October 27, 2013, when he was almost ready to come back to work. On that date, he communicated with Ms. Hanley and Ms. Milburn for the first time in nine days--since October 18, 2013, when he had told them he did not have an anticipated return

---

[6]That law allows eligible employees to take up to twelve weeks of unpaid leave per year for reasons related to serious medical illness. Handbook at 17-18. There is no requirement that an invitation to apply for FMLA must be extended to an employee. Employees are notified about the FMLA via the Handbook, and are instructed to contact the Division of Benefits Management for appropriate forms in the event they wish to apply.

[7] The Appellant argued that this violated the BTU agreement that requires medical documentation only to state that the employee was absent for medical reasons and is now capable of returning to work. I disagree. Ms. Johnson testified credibly that she was only seeking clarification of the ambiguous October 16, 2013 note as to whether he was capable of returning to work.

date. On October 27, 2013, he informed them that he was going to the doctor the next day and would let them know his status. They did not hear from him the next day.

On October 29, 2013, at 2:53 p.m., the Appellant sent an email to Ms. Milburn. He attached a doctor's note, written by Ms. Dixler, stating that he was improving, and was ready to go back to work, and that certain accommodations[8] upon his return would lessen his exertion while at work. The Appellant, in his email, did not state that he was ready to return to work. Instead, he asked Ms. Milburn to "confirm whether or not the principal is interested in accommodating as per the note. If she is, I will come in on Wednesday morning."

The Appellant argued before the HE that this demonstrated he was clearly ready to come back to work as of October 30, 2013, but that BCPS initiated a plan to prevent this. According to the Appellant, BCPS should have, at this point, told him about "the problem," i.e., that they felt he had abused sick leave; disclosed that they were trying to set up a Loudermill Hearing; and let him come back to work with "informal" accommodations. Instead, they put him through a "delay tactic" by requiring him to submit an ADA package. The Appellant maintained that all of this violated the Attendance Program requirement that an employee be counseled prior to discipline being imposed for attendance problems.

I do not agree with Appellant's argument, which sounds like he is saying he should not have been terminated because BCPS was required to—but did not— protect him from himself by counseling him not to submit false doctor's notes and not to work at his secondary job when he was claiming he was unable to work at his primary job due to illness. First, the ARAP is not an "unconditional policy, but provide[s] direction [to administrators] in reducing absenteeism." Appellant Ex 2 at 1. The ARAP is intended to maintain employee attendance reliability on a long

[8] He requested that students be brought to him, access to an elevator, and a room with better ventilation.

term basis, and not, as in this case, to address a single instance of sick leave abuse where an employee is out on extended leave, but working a secondary job.

Moreover, the "communication" that is at the heart of the ARAP is communication that starts "upon [the employee's] return." *Id.* at 3. The Appellant never returned to work for BCPS. In fact, in his October 29, 2013 email to Ms. Milburn, he made his return conditional on accommodations being provided, even though Ms. Dixler's note did not make accommodations mandatory. Finally, at the heart of the ARAP is the requirement that employees unable to work report their absence prior to the start of the school day. In this case, the Appellant failed to meet this key responsibility. In any event, I do not find that BCPS staff improperly failed to communicate with the Appellant or that they were under any obligation to inform him that he was being investigated for and suspected of misrepresenting his sick leave status.

The Employee also argued that Management failed to consider his employment history, attendance, disciplinary record, work habits, and relations with fellow employees and supervisors as required by State government agencies pursuant to *Maryland State Retirement Agency v. Delambo,* 109 Md. App. 683 (1996). However, the Maryland Court of Appeals specifically overruled *Delambo* in *Maryland Aviation Admin. v. Noland*, 386 Md. 556 (2005). The Court held that when an agency imposes a lawful and authorized sanction, within its discretion, the sanction does not have to be justified by findings of fact or reasons articulating why the agency decided upon the particular discipline. Instead, on judicial appeal, the employee must prove that the agency's decision is so extreme and egregious that it constitutes arbitrary and capricious agency action. *Id.* at 581.

The holding in *Noland* does not directly apply here; it applies to judicial review of a State agency's final decisions. Md. Code Ann., State Gov't § 10-222 (2014). In the present proceeding, OAH makes a proposed decision to the State Board, so the *Noland* holding is not

directly applicable to my decision. However, the reasoning in *Noland* is persuasive. The Board was authorized to use its discretion in sanctioning the Appellant, and reasonably concluded that termination was the appropriate sanction in light of the Appellant's egregious sick leave abuse. In light of the above findings and discussion, I find that termination is a reasonable sanction, and not an arbitrary and capricious agency action.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Appellant willfully neglected his duties and committed misconduct in office. I further conclude, as a matter of law, that the Appellant's termination was proper. Md. Code Ann., Educ. § 6-202(a)(Supp. 2014); COMAR 13A.01.05.05F; Handbook at 35-36.

PROPOSED ORDER

I **PROPOSE** that the decision of the Baltimore City Board of School Commissioners terminating the Appellant for willful neglect of duty and misconduct in office be **UPHELD**.

May 7, 2015
Date Decision mailed

Neile S. Friedman
Administrative Law Judge

NSF/emh
155540

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file written objections within fifteen days of receipt of the decision; parties may file written responses to the objections within fifteen 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.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

Copies Mailed to:

Jonathan Lasson
6210 Benhurst Road
Baltimore, MD 21209

Eilene Brown, Esquire
Associate Board Counsel
Office of Legal Counsel
Baltimore City Public Schools
200 E. North Avenue, Suite 208
Baltimore, MD 21202

Lillian M. Lowery, Ed.D.
Superintendent of Schools
200 W. Baltimore Street
Baltimore, MD 21201