

JOHN KRPAN,
Appellant

v.

PRINCE GEORGE'S COUNTY BOARD OF
EDUCATION,
Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 11-36

OPINION

INTRODUCTION

John Krpan, a teacher who is deaf, appealed the non-renewal of his teaching contract on the grounds that he was discriminated against. The Prince George's County Board of Education (local board) filed a Motion for Summary Affirmance to which Mr. Krpan filed a Reply. The local board filed a Response.

FACTUAL BACKGROUND

Mr. Krpan resides with his family in Prince George's County. His children attended school there. He was involved with his children's schools for 17 years and was always provided interpreting services. (T. Vol. II, 160-161). He had taught American Sign Language in Virginia schools for 25 years and had tenure there. (*Id.* at 159; 169-170). Because of the long commute, he applied to teach in Prince George's County. (*Id.* at 170)

In the summer of 2008, Prince George's County Public Schools (PGCPS) interviewed Mr. Krpan to teach American Sign Language (ASL) for the 2008-2009 school year. He was interviewed first on August 14, 2008 by Donald King and Chante Smith, both of whom were assistant principals at Issac Gourdine Middle School. There was an interpreter at the interview, (T. Vol. I, 130) but Mr. Krpan states that he needed to repeat himself because the interpreter "was not able to do the job." (T. Vol. II, 16).

At that interview, all participants agree that Mr. Krpan asked for an interpreter for the first two weeks of school. (Krpan, T. Vol. II 167; King, T. Vol. 106; Smith, T. Vol. I, 142). Mr. King and Ms. Smith concluded that Mr. Krpan meant he needed an interpreter for only the first two weeks of school. (*Id.*). Mr. Krpan says he meant that that was his interim request and he planned to talk further with persons in authority about further accommodation needs. (T. Vol. II,

167). That was a critical misunderstanding in this case. It led to a chain of events that resulted in this discrimination case.

Shortly thereafter, Mr. Krpan met with Homer McCall, Recruiting Staff Specialist. There was no interpreter at that meeting (T. Vol. I, 84). Mr. McCall and Mr. Krpan communicated by talking to one another; lip reading; and written communication. (*Id.* at 93). Mr. McCall recalls that Mr. Krpan said he needed an interpreter for just the first two weeks of school. (*Id.* at 85).

Mr. McCall reviewed Mr. Krpan's credentials and certification. Mr. Krpan held a Maryland Educator Certificate, Administrator I and II, effective 7/1/04 to 6/30/09. Despite the fact that Mr. Krpan did not have a Maryland teacher's certificate in any content area, Mr. McCall concluded that Mr. Krpan met the requirements for the job. (*Id.* at 90).

After that interview, PGCPS offered Mr. Krpan a Regular Contract. By law, it is a probationary contract which for the first two years could be non-renewed for any reason. *See* COMAR 13A.07.02.01. The contract states that it will automatically terminate if the employee ceases to hold a professional certificate. (Admin. Ex. 9).

Four days later, on August 18, 2008, the school year began. Mr. Krpan was assigned to Isaac Gourdine Middle School. PGCPS did not provide an interpreter for him during 2 of the 4 days of teacher orientation. (T. Vol. II, 174-75). PGCPS provided him with two full time sign language interpreters when teaching began. (T. Vol. II, 181). Apparently, the interpreting company required two interpreters if the service was for more than two hours. (T. Vol. II, 180). According to Mr. Krpan, only one of the interpreters was "qualified and efficient." (*Id.* at 181).

On September 1, 2008, Dr. David Boetcher wrote to Traketa Wray, Labor Relations Specialist for the union working in the Office of Employee Relations. (T. Vol. I, 19). He requested additional accommodations for Mr. Krpan - - a full time interpreter before, during and after school, a pager, a laptop computer with webcam or videophone, and visual alerting devices in the building. (Letter Attached to Joint Ex. 1). On September 2, 2008, Mr. Krpan further presented his accommodation needs to Ms. Wray in a detailed three page memo covering the need for a certified interpreter, full information about interpreter availability, and tools to make school communications accessible to the deaf. (Admin. Ex. 2; T. Vol. I, 20).

Despite the additional requests for accommodations, on September 4, 2008, about two weeks into the school year, PGCPS stopped providing interpreter service to Mr. Krpan. (T. Vol. II 186).

On September 16, 2008, five PGCPS staff persons (Covington, King, Wray, McCall, Smith), as well as Mr. Krpan and an interpreter (Costa-Barnes), met to determine the reasonable accommodations Mr. Krpan needed to perform essential job functions. (Admin. Ex. 3). The minutes of that meeting reflect a wide-ranging discussion about the law, about specific accommodations, about student needs, and about why Mr. Krpan at his interview requested an

interpreter for only the first two weeks of the school year. He said that he feared he would not be hired if he asked for more, but he knew he would further talk to Human Resources about all his needs. (Admin. Ex. 3). It is difficult to tell from the minutes if the parties agreed to what were the reasonable accommodations. Indeed, Mr. Krpan says he did not agree. (T. Vol. II, 198). It appears that an interpreter and TV/VCR with closed caption were considered necessary to provide instruction. (Admin. Ex. 3).

After the September 16, 2008 meeting, PGCPS did not immediately provide an interpreter for Mr. Krpan. According to Mr. Krpan, the lack of an interpreter made communicating with his students and classroom management difficult. (T. Vol. II 201). After seven more days without an interpreter, on September 23, 2008, two students in his classroom began to fight. When Mr. Krpan intervened, he was kicked and beaten. His hand was broken. He was seriously injured. (T. Vol. II 201-206). Because of the injuries he sustained, he went on assault leave.¹

On November 19, 2008, counsel to the Maryland State Teacher's Association (MSTA) wrote to counsel for PGCPS stating that Mr. Krpan would return to school on December 1, 2008 and needed the following accommodations on that date:

1. A certified (CI or better) full-time interpreter, from the hours of 7:15 a.m. to 4:00 p.m., Monday through Friday for the rest of the school year.
2. Interpreting services for after school meetings, activities, workshops, events, and training.
3. A security/emergency plan for Mr. Krpan and the service providers who will work with him.
4. A Blackberry pager.
5. Visual alerting devices for emergencies and communications.
6. A videophone.

(Appell. Ex. 10).

Mr. Krpan did not return on December 1, 2008. He needed to have knee surgery. (T. Vol. II, 206).

On February 10, 2009, Chante Smith, the Assistant Principal, sent an e-mail to Traketa Wray and Homer McCall stating that Mr. Krpan was due back on February 23, 2009. She wanted to meet with Mr. Krpan and asked that an interpreter be scheduled. She went on to state: "Remember, they will not schedule any more interpreters per the school's request due to the outstanding bill." (Appell. Ex. 5). Thereafter, central office scheduled the interpreter for the meeting. (Appell. Ex. 14). Mr. Krpan did not return on February 23, 2009.

¹ Full-time pay leave is available by statute to a school system employee who has been assaulted. Md. Educ. Code Ann. §6-111.

On March 18, 2009, Leatriz Covington, the Principal, sent a memo to the Superintendent requesting a non-renewal of Mr. Krpan's contract because of unsatisfactory observations on informal walk-throughs of Mr. Krpan's class. Her memo states:

During Mr. Krpan's time here at Isaac Gourdine Middle School, there was a major concern with classroom management. Mr. Krpan put students out of his class on a regular basis. Mr. Krpan also consistently escorted his entire classes to the main office for discipline concerns which had a major impact on instruction. Members of my administrative team visited Mr. Krpan's class regularly in order to assist with classroom management. Parents were contacted by administrators and guidance counselors; however, the problem continued. Due to Mr. Krpan's leave of absence, I was not able to conduct any formal observations on Mr. Krpan.

(Appell. Ex. 3).

On April 22, 2009, the Superintendent notified Mr. Krpan that his teaching contract would not be renewed. (Admin. Ex. 11). The letter provided no explanation for the non-renewal. It is not legally required that an explanation be provided.

Mr. Krpan returned to his teaching duties on May 12, 2009. (T. Vol. II 223). None of the accommodations he had requested were provided. (T. Vol. II 220). Particularly, a certified interpreter was not provided. Instead, Ms. Battle, the teacher who substituted for Mr. Krpan, stayed on to interpret. (T. Vol. II 221). According to Mr. Krpan, Ms. Battle was a fine substitute, but not an interpreter. He wrote to the Principal on May 12, 2009:

It is quite apparent that Ms. Battle does not know and understand the role and responsibilities of an interpreter. The public announcements came and she did not interpret them. She answered a phone call and did not tell me what it was for. Many students talked in classes all day long and she didn't tell me what they said. When she spoke to someone else, she did not sign for me. She did not function as a sign language interpreter.

We need to meet to enable me to finish the school year. Will you please have a professional, qualified and certified, interpreter for our meeting?

I need a professional, qualified and certified, sign language interpreter.

(Appell. Ex. 6).

On May 13, 2009, the Assistant Principal wrote to Employee Relations that the video phone supplier was having trouble installing the service because "most of the schools have not had the capabilities to support the internet needed for the phone." (Appell. Ex. 1).

On May 14, 2009, Mr. Krpan filed with the Superintendent a §4-205 appeal of the non-renewal decision. Mr. Krpan completed the school year in June 2009.

In January/February 2010, a three day appeal hearing occurred. At the hearing, Mr. Krpan argued that the non-renewal occurred because he asked for accommodations. The school system argued that the non-renewal was not a discriminatory act because Mr. Krpan performed unsatisfactorily and did not have proper certification. (T. Vol. I, 17).

On August 2, 2010, the Hearing Officer issued his decision. In the decision, the Hearing Officer addressed the three issues presented: (1) accommodations; (2) job performance; (3) certification.

The Hearing Officer concluded that the school system had made reasonable efforts to provide accommodations. The decision explains that the school system provided an interpreter for the first two weeks of school and that it made "efforts to complete further evaluation of the feasibility of providing additional accommodations requested by the Appellant." (H.O. Decision at 33). Among the efforts was a facility assessment.

The school system assessed the facility at Isaac J. Gourdine Middle School and concluded that the portion of the building where Appellant's classroom was located would not support installation of emergency flashing lights. By January 2009, staff at Isaac J. Gourdine Middle School developed an emergency response plan for Appellant. Ms. Wray also contacted the Department of Rehabilitative Services (DORS) to seek assistance from the organization to conduct a work site assessment for Appellant. However, due to his refusal to attend a site visit, the assessment could not occur.

(*Id.*).

The Hearing Officer concluded that:

While staff in the Human Resources Office and the school could have coordinated their efforts to provide some of these requested accommodations for Appellant in timelier manner and the school system should have had in place a process for employees to request accommodations in writing, the school system engaged in reasonable efforts to evaluate and respond to Appellant's request for accommodations. . . .

(*Id.* at 32).

The Hearing Officer next turned to job performance. At the hearing, the two assistant principals and principal had testified about their informal observations of Mr. Krpan's classes during the time period from August 18 to September 23.

Assistant Principal King informally observed Mr. Krpan's classes several times. He saw students on their Ipods, "talking, socializing. They weren't engaged in any instructional activity ...there was no objective posted." (T. Vol. I, 109). He further testified that "a few times" Mr. Krpan brought his whole class to the office for discipline. (*Id.*)

Assistant Principal Smith testified that "[f]rom the beginning of the school year there were some classroom management concerns in terms of noise level." (*Id.* at 132). She explained that the students were talking on their phones or using their Ipods.

She further testified:

--after the first couple days, the biggest concern is that Mr. Krpan would walk his classroom, the entire class, to the front office. There would be, I guess, a few students in the classroom that would be a discipline problem, yet he would escort the entire class to the front office and, you know, try to mandate that someone address the students in the class.

(*Id.*)

According to Ms. Smith, Mr. Krpan brought his class to the office because "[t]hey're not listening, they won't do work, they're cheating, they can't do the work . . . they won't sit in their seats." (*Id.* at 160). She testified that she counseled Mr. Krpan on appropriate discipline techniques (*id.* at 132-135), but she found Mr. Krpan to be unreceptive and likely to blame the students and denigrate their abilities. (*Id.* at 134, 138).

On cross examination, Ms. Smith was asked her opinion whether "it would assist Mr. Krpan in classroom management if there was an interpreter...?" She answered "No," explaining that if Mr. Krpan had "established procedures from the beginning...putting the objective, putting the warm-up, putting the agenda, following it consistently with the routine" (*Id.* at 143).

The principal, Ms. Covington, testified that she "and her administrative team visited Mr. Krpan's class on numerous occasions [noting that] the students were often engaged in side conversation . . . were not on task . . .were not focused." (T. Vol. II, 8). She expressed serious concern after hearing from parents, students, and one of the interpreters that instruction was poor and the students were not learning ASL. (*Id.* at 9). She also mentioned Mr. Krpan's failure to define a daily objective for learning. (*Id.* at 8).

Based on that evidence, the Hearing Officer concluded that the evidence showed poor performance, poor teaching skills, poor classroom management. (*Id.* at 36-38).

Finally, the Hearing Officer addressed the certification issue. He noted that Mr. Krpan at the time he was hired held a Maryland Administrator I and II certificate valid from 7/1/04 to 6/30/09 with ancillary credits in Special Education. (*Id.* at 34; Appell. Ex. 15). He did not have a teaching certificate. The Hearing Officer concluded:

In Spring 1009, Appellant attempted to obtain certification from the State of Maryland for teaching endorsement in several areas, including English and ESL. However, by the end of the 2008-2009 school year, Appellant had not obtained any teaching endorsement certification, and Appellant was not eligible to continue to teach on a Regular Contract for the State of Maryland and in Prince George's County at the end of the school year.

(*Id.* at 35).

Based on all the reasons set forth in his decision, the Hearing Officer concluded that the problems Mr. Krpan had in his classroom "were not due to his disability or lack of accommodations . . . [and that] the decision not to renew [his] contract . . . did not occur because of Appellant's request for reasonable accommodation, but, rather occurred because he failed to meet the teaching certification requirements of his Regular Contract." (*Id.* at 41).

One August 5, 2010, the Superintendent concurred and affirmed the Hearing Officer's decision. Mr. Krpan filed exceptions to the Superintendent's decision with the local board. The local board ruled on December 20, 2010 to uphold the Superintendent's decision not to renew the contract. In that decision the local board noted the Mr. Krpan had recently obtained teaching certification in ASL; they rejected the consideration of Mr. Krpan's job performance as a basis for the non-renewal, but concluded that he was properly terminated because he did not have proper certification at the time of the non-renewal. (Local Board Decision at 5).

This timely appeal ensued.

STANDARD OF REVIEW

Because this appeal involves a decision of the local board concerning a controversy or dispute about the non-renewal of a teacher's contract, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.03E(1). The local board's decision not to renew a probationary contract will be upheld unless the Appellant meets his burden to show that the decision is illegal or a result of discriminatory action. *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003); *Higgs v. Prince George's County Bd. of Educ.*, MSBE Op. No. 06-13 (2006).

LEGAL ANALYSIS

As one court of appeals has said in reviewing a disability discrimination case, "The record in this case demonstrates an employment relationship that was beset on all sides by strains and difficulties." *Johnson v. Shalala*, 991 F.2d 126, 128 (4th Cir. 1993). So, too, the record here reflects problems on both sides of the employment relationship.

One particular problem, in our view, was that there was no organized, thoughtful, understandable process in place to deal with accommodation requests of employees with disabilities. (See T. Vol. I, 36-42). That alone would strain even a good employment relationship. This employment relationship was not a good one, however. It had a rocky beginning when Mr. Krpan was not forthcoming at his interview about his need for a full-time qualified interpreter. It got rockier when PGCPs stopped providing interpreter services after the first two weeks of school. It got worse when informal observations of his class showed that Mr. Krpan had serious classroom management problems that ultimately resulted in interrupted instruction, at best, and in a student fight and an assault on Mr. Krpan, at worst. The failures on both sides of this employment relationship were exacerbated by the lack of a clearly defined process governing requests for accommodations.

This case arose in 2008. We are heartened, however, by the specific actions that the local board has undertaken since then. In the 2009-2010 school year, the Disability Issues Advisory Board advocated to the local board for an ADA compliance officer. A compliance officer was hired, it appears, in 2010. In August 2010, the local board adopted Policy No. 4172 governing requests for reasonable accommodations. It is a comprehensive policy, clearly written, and clearly delineating employee and employer responsibilities. It is easily understandable and available on the school system's website at <http://www1.pgcps.org/ada/index.aspx?id=107980>.

It seems to us that the local board, by implementing policies and procedures to govern accommodation requests, has gone some way toward addressing the problems we saw in this case. We encourage the board to hold school staff accountable for complying with the ADA and scrupulously following the local policy and procedures. What occurred in this case should never happen again.

With that said, we note that problematic employment relationships may or may not be rooted in discriminatory action. The Appellant asserts that the decision not to renew his contract was discriminatory because he asked for accommodations which PGCPs was unable or unwilling to provide to him and, as a result, he could not perform his job. Thus, we are called upon to discern whether Mr. Krpan has met his burden to show that the employer's action in this case, the non-renewal of his contract, was a discriminatory act.

In analyzing the facts of a disability discrimination case to determine whether an employee has met his burden to prove discrimination, we use the same legal structure that courts use. Specifically, in the absence of direct evidence of the discriminatory intent of an employer, an employee who is terminated must initially show that he is an individual with a disability; who was able to perform the essential duties of the job with accommodations that were reasonable; and that

the failure to provide the accommodation raises the inference of discriminatory termination. *Tangires v. John Hopkins Hospital*, 79 F.Supp 2d 587, 594 (D. Md. 2000); *Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720, 733-34 (D. Md. 1996).

If the employee proves each of those elements, he has established a *prima facie* case of disability discrimination.

A. Appellant's *Prima Facie* Case

(1) Satisfactory Performance?

There is no dispute that Mr. Krpan is deaf and, thus a person with a disability. It is less certain that Mr. Krpan was performing satisfactorily, however. The record contains evidence the he was not. Prior to the decision not to renew his contract, the school system did not have much opportunity to observe Mr. Krpan formally, but according to the Principal, informal observations between August 18 and September 23, 2008 revealed instruction and classroom management problems. (Appell. Ex. 3).

The principal and the two assistant principals testified that they observed little instructional activity; had received complaints from parents; observed children socializing and listening to Ipods in the classroom. On several occasions, Mr. Krpan brought his entire classroom to the office for discipline. They counseled him that he needed to take action to manage his classroom. They testified that they made recommendations to Mr. Krpan on how to improve instruction. (T. Vol. I, 118; 131-35; Vol. II, 9-11). Mr. Krpan testified, however, that he was never made aware of performance-related concerns. (T. Vol. II, 224-225). Yet, he admitted that he took his whole class to the office for discipline when there was disruptions, when the "students were becoming violent in the classroom, and they were pushing and touching." (T. Vol. III, 13).

When Mr. Krpan returned in May, 2009, he was formally observed once - - on June 11, 2009. The principal made the following observations:

- According to Ms. Battle, students had not reviewed chapters ten through twenty-two. Why were they assigned these to complete if they were not taught by you?
- Throughout the lesson, the majority of your attention was focused on the students in the front row. Ensure that all students are allowed to participate to ensure that everyone masters the concept taught.
- Students were engaged in off task behavior and side conversations throughout the lesson. A few appeared to be lost and not grasping concepts. Implement your discipline plan and ensure students adhere to it. If students are not focused and engaged, they are not learning.
- Review today's concepts again tomorrow. Many of the students were still unclear about what they were supposed to sign.
- Remember to post the objective and warm-up on the board daily. Both should be discussed at the beginning of the lesson to ensure that students comprehend what they are expected to learn throughout the lesson.

- Although students were signing what they saw you sign, where was the actual assessment to ensure that they understood what they were signing?
- No closure was observed. Closure should be an integral part of each lesson in order to ensure that student has mastered the objective.

(Admin. Ex. 6)

The Hearing Officer found sufficient evidence of poor performance. (Hearing Officer Decision at 36-40). The local board, however, concluded that evidence of poor performance was not a basis to support the decision not to renew Mr. Krpan's contract because, given the circumstances of the assault leave, there was no opportunity for Mr. Krpan to show improvement. (Local Board Order at 5).

Viewing the local board's decision in the context of Mr. Krpan's burden to show he was performing satisfactorily at the time of the non-renewal is confounding. The record would support a finding that Mr. Krpan was not performing satisfactorily. It may very well be, however, that his unsatisfactory performance was due to the failure to provide the accommodations Mr. Krpan requested. At the hearing, Mr. Krpan attempted to show how the failure to provide an interpreter affected his performance. He testified that without the interpreter instruction was difficult. "I was able to use gestures [It was] hard to communicate with students . . . the communication rather started to fall apart gradually." (T. Vol. II, 190-194). We believe that testimony establishes some link between the failure to provide the accommodation and his difficulty controlling his class. We must point out, however, that taking one's whole class to the office for discipline, not just once, but several times, raises serious doubts about the strength of that causal link. However, at this stage of the analysis we will accept that a link exists and move on to the next rung on the burden ladder - - Mr. Krpan needed to show that the accommodations he requested were reasonable.

(2) Reasonable Accommodation Requested?

Under the ADA, the employee has the responsibility to make the request for an accommodation. *EEOC v. Life Technologies Corp.*, 2010 U.S. Dist. Lexis 117563 (D. Md. 2010). Mr. Krpan did so at his initial interviews, but he did not make his request a full and complete one.

On September 1 and 2, Mr. Krpan asked for further accommodations, including a full-time interpreter, a pager, a laptop computer with webcam or video phone, and visual alerting device.

Under the ADA, one of the "reasonable" accommodations listed is "the provision of qualified readers or interpreters." 42 USC §12101. Thus, as a matter of law and fact we must conclude that Mr. Krpan's request for an interpreter was *per se* reasonable.

(3) Inference of Discrimination?

Under the ADA, when an employer fails to provide reasonable accommodations it is a *prima facie* proof of discrimination. 42 U.S.C. §12101(9).

PGCPS did not provide Mr. Krpan with an interpreter for several of the in-service trainings that occurred before school started. It did provide him with two interpreters per day for the first two weeks of school.

Even though it had received further requests for accommodations, including one to continue the interpreter services, PGCPS stopped providing interpreter service a few days after receiving the request. It took about two weeks to schedule a meeting with Mr. Krpan to discuss accommodations. That meeting, on September 16, was contentious, but it appears that the school system concluded that reasonable accommodation would be an interpreter and a closed caption TV/VCR. Even after that meeting PGCPS did not provide an interpreter. When Mr. Krpan returned to school in May, PGCPS did not provide an interpreter.

Based on those facts, we find that Mr. Krpan met his initial burden to present a *prima facie* case of discrimination based on his disability.

Thus, the burden shifts to the school system to defend its action.

B. School System's Defense

An employer charged with discrimination for failure to make a reasonable accommodation has several defenses available to it. Relevant to this case, the employer can "attempt to demonstrate that: (1) . . . the individual is . . . lacking the skills or knowledge to perform the essential function of the job even with accommodation . . . [or] although reasonable, the proposed accommodation would cause the employer undue hardship." *Bryant v. Better Business Bureau*, 923 F.Supp. 720, 735 (D. Md. 1996).

(1) Undue Hardship?

Undue hardship "means an action requiring the employer to undertake a significant difficulty or expense. . . ." 42 U.S.C. §12111(10)(A). An "undue hardship" determination requires consideration of several factors.

(I) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operation of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Id. at 736.

The record here contains bills reflecting a cost of approximately \$1350 per day during the time period in which the school system provided an interpreter. (Admin. Ex. 5). That would result in a cost of \$243,000 (or more) per year. The local board, however, presented no argument on appeal that providing a full time qualified interpreter and the other accommodations Mr. Krpan requested would impose an undue burden on the school system. The school system did not present such an argument to the Hearing Officer. We decline to make that argument for them.

(2) Skills or Knowledge to Perform Essential Functions of the Job?

The local board asserts that the reason it did not renew Mr. Krpan's contract was that, at the time, he did not have an appropriate teaching certificate.

Under Maryland law, each teacher employed in the public school system of Maryland must hold a professional certificate in the "teacher's area of major assignment." COMAR 13A.12.02.02 (A). If a local school system is unable to fill a position with a qualified person who holds a professional certificate, it must request MSDE to issue a Conditional Certificate to the teacher. COMAR 13A.12.01.07. MSDE will issue a conditional certificate for two years while the applicant successfully pursues and completes an acceptable plan developed by the applicant and the local school system to meet the professional certificate requirements. COMAR 13A.12.01.02(B)(6); COMAR 13A.12.01.08. Thus, the "appropriate certificate" for a teacher in Maryland public schools "means a professional certificate . . . or a conditional certificate." COMAR 13A.12.01.01(B)(5).

Mr. Krpan held an Administrator I and II certificate. That is not a professional certificate in the "teacher's area of major assignment". Thus, as the Hearing Officer stated, when PGCP

hired him, it should have requested a conditional certificate for Mr. Krpan (Hearing Officer Decision at 5) and worked with him to put together a plan for obtaining a professional certificate.² There is no evidence in the record of a request for a conditional certificate or that the parties developed a formal plan.

There is some evidence in the record, although minimal, that school system staff counseled Mr. Krpan that he needed to obtain a teaching certification.

On February 17, 2009 Homer McCall e-mailed Mr. Krpan a detailed explanation about how to obtain a teaching certificate relevant to his position. He explained the requirements for English 7-12, Special Education, Supervisor of Special Education and Supervisor of Teachers of the Hearing Impaired. (Admin. Ex. 10). It is arguable that, absent the opportunity for certification in ASL, a teaching certificate in English or Special Education would be one in a relevant field. There is no evidence in the record that Mr. Krpan made any progress in obtaining the appropriate certification. Lack of proper certification is clearly a valid and sufficient reason not to renew a contract, and this Board has so held in the past. *Georgianna London v. MSDE*, MSBE Op. No. 11-12

Thus, in our view, the local board has met its burden of production in defense of the discrimination charge by showing that the Appellant would not be properly certified as of June 30, 2009 and therefore would not have the necessary prerequisites to perform the job, even with accommodations. Because the local board has met its burden, the burden of proof of discrimination returns to the employee who must show the employer's explanation of its action is pretextual or unworthy of credence. *Champ v. Baltimore County*, 884 F. Supp. 991, 999 (D. Md. 1995).

C. Appellant's Final Burden of Proof

(1) Defense pretextual or unworthy of credence?

Mr. Krpan argues that PGCPs hired him to be an ASL teacher knowing full well that he did not have ASL certification or any other teaching certification. Because Maryland did not offer an ASL teaching certificate throughout the relevant time period, Mr. Krpan states that his Administrator certification should have continued to suffice. He states ...“the record does not show that there ever was any indication that [he] needed or was being required to obtain certification in any other subject.” (Appellant's Opposition at 7). As set forth above, the record does reflect some counseling on the need to obtain a professional teaching certificate.

² Interestingly, in 2008-2009, Maryland did not have a professional certificate in ASL. Mr. Krpan testified that, in February 2010, MSDE would be proposing an ASL certificate to the State Board. He also testified the he was a consultant to MSDE on ASL certification issues. (T. Vol. II, 160). He planned to apply for the certificate. (*Id.*) Indeed, by the time the local board ruled in this case in December 2010, he had obtained that professional certificate.

This whole certification issue arose from a mistake made in considering Mr. Krpan to have appropriate certification to be hired for the job. He did not. As set forth above, the school system should have requested conditional certification for Mr. Krpan. If he had made no progress in the first year toward completing the two year plan to achieve professional certification, that would have been much stronger evidence to support the decision not to renew his contract on the grounds of lack of appropriate certification.

While we do not conclude that the lack of proper certification was a pretext to cover discrimination here, we believe it was not the main reason the school system decided not to renew Mr. Krpan's contract. It is clear from the record that the principal recommended the non-renewal because Mr. Krpan's disciplinary techniques were not valid and appropriate. They were dysfunctional and disruptive to the class and to the school.

Although the local board decided not to rest its decision for non-renewal on the classroom management problem, we cannot ignore it. It permeates the whole case. We believe the causal link between the failure to provide an interpreter and how Mr. Krpan handled discipline problems is too weak to support an ultimate finding of discrimination. Taking one's whole class to the office for discipline, not once, but several times in the very short time Mr. Krpan taught at the school, is indication of significant classroom management problems which go deeper than the lack of an interpreter.

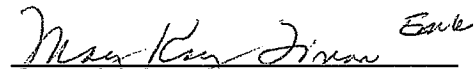
It is our view that Mr. Krpan's performance in the classroom is also a valid, non-discriminatory reason for not renewing his contract. Therefore, we conclude that Mr. Krpan has not met his ultimate burden of persuasion to show that the non-renewal of his contract was a discriminatory act.

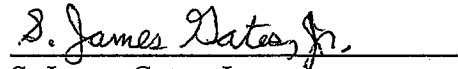
CONCLUSION


For the reasons stated herein, we affirm the non-renewal of Mr. Krpan's contract.


James H. DeGraffenreid, Jr.
President

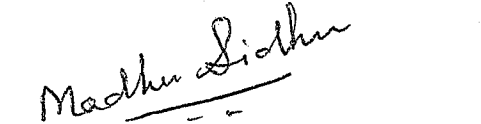
ABSENT
Charlene M. Dukes
Vice President


Mary Kay Finar

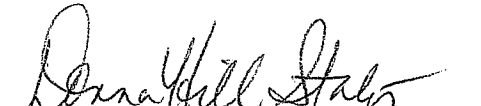

S. James Gates, Jr.


Luisa Montero-Diaz

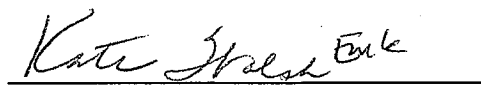
ABSENT
Sayed M. Naved


Madhu Sidhu

ABSENT
Guffrie M. Smith, Jr.


Donna Hill Staton


Ivan C.A. Walks


Kate Walsh

August 30, 2011