

COLLIS PATTERSON,

Appellant

v.

NEW BOARD OF SCHOOL COMMISSIONERS OF EDUCATION
OF BALTIMORE CITY,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

Opinion No. 02-03

OPINION

Appellant, a tenured teacher with the Baltimore City Public School System (“BCPSS”), contests his five day suspension from employment for misconduct in office based on: (1) making false statements at the Baltimore City Pretrial Detention Center where he was assigned to teach at School #370, including a false claim that he called for security assistance without a response from the institution; (2) making false public statements concerning conditions at the Detention Center; and (3) unexcused absenteeism.

Following a full evidentiary hearing, the local board voted unanimously to accept the hearing examiner’s recommendations and affirmed the decision of the CEO to suspend Appellant for five days for misconduct in office.

Appellant appealed the local board’s decision to the State Board and the matter was transferred to the Office of Administrative Hearings where an administrative law judge (ALJ) conducted a hearing on September 13, 2001. The ALJ subsequently issued a proposed decision recommending that the five day suspension be upheld. *See* Exhibit 1. The parties presented oral argument to the State Board on December 4, 2001.

Having reviewed the record in this matter and considered the arguments of the parties, we adopt the Findings of Fact and Conclusions of the ALJ as they relate to the charges of (1) making false statements regarding an alleged injury and the alleged failure of security to respond; and (2) unexcused absenteeism. For the reasons stated by the ALJ, we find that these two grounds are more than sufficient to constitute misconduct in office for which a five-day suspension is justified. We therefore affirm the decision of the New Board of School Commissioners of Baltimore City.

Marilyn D. Maultsby
President

JoAnn T. Bell

Philip S. Benzil

Reginald L. Dunn

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

January 29, 2002

	EXHIBIT - 1
COLLIS PATTERSON	* BEFORE ALAN B. JACOBSON,
APPELLANT	* ADMINISTRATIVE LAW JUDGE,
v.	* MARYLAND OFFICE OF
NEW BOARD OF SCHOOL	* ADMINISTRATIVE HEARINGS
COMMISSIONERS FOR BALTIMORE	
CITY	* OAH No.: MSDE-BE-01-00100004

PROPOSED DECISION

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

STATEMENT OF THE CASE

On or about March 15, 2000, Collis Patterson ("Appellant"), a tenured Teacher employed by the Baltimore City Public Schools ("BCPS"), received notification from Chief Executive Officer ("CEO") Robert Booker, that he would be the subject of a recommended five day suspension. Appellant appealed the recommendation to the New Board of School Commissioners of Baltimore City (the "Board"). Devy Patterson Russell, a Hearing Examiner of the Board ("Hearing Examiner") conducted a hearing on July 7, 2000. Md. Code Ann., Educ. § 6-203 (1999). On November 27, 2000, the Hearing Examiner recommended that the School Board affirm the CEO's decision to suspend the Appellant for five days for misconduct in office. After reviewing the record compiled by the Hearing Examiner, on January 9, 2001, the Board voted, unanimously, to affirm the Chief Executive Officer's recommendation to suspend the

Appellant for five days. The decision was announced at the public School Board meeting, on January 23, 2001. On or about March 5, 2001, the Appellant appealed the Board's order to the Maryland State Board of Education, and the matter was scheduled before the Office of Administrative Hearings ("OAH"). Md. Code Ann., Educ. § 6-202(a)(4) (1999).

Following a telephonic prehearing conference on July 11, 2001, a de novo hearing was conducted on September 13, 2001, before Alan B. Jacobson, Administrative Law Judge ("ALJ"), at OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Code of Maryland Regulations ("COMAR") 13A.01.01.03P. The Appellant was present and was represented by Bruce Richardson, Esq. Brian K. Williams, Esq., represented the Board. Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board of Education, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2000); COMAR 13A.01.01.03D; COMAR 28.02.01.¹

ISSUE

The issue on appeal is whether the five day suspension for misconduct imposed upon the Appellant by the New Board of School Commissioners for Baltimore City ("Board") under Md. Ann. Code Ann., Educ. § 6-202(a)(ii) (1999) is supported by a preponderance of the evidence.

SUMMARY OF THE EVIDENCE

A. Exhibits

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

¹The current regulations are published at 27:26 Md. Reg. 2360 (Dec. 29, 2000, effective Jan. 8, 2001) (proposed 27:18 Md. Reg. 1678-1684 (Sept. 8, 2000) (to be codified at Code of Maryland Regulations ("COMAR") 28.02.01).

1. BCPS Attendance Reliability and Analysis Program.
2. Attending Physician's Return to Work Recommendation Record, dated January 3, 2000.
3. Physician's Certificate for Return to Work, dated December 13, 1999.
4. Physician's Certificate for Return to Work, dated February 15, 2000.

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

1. Department of Public Safety and Correctional Services ("DPSCS"), Standards of Conduct.
2. DPSCS Acknowledgement Form, dated December 9, 1999.
3. DPSCS Memorandum from Assistant Warden, Division of Pretrial Detention and Services ("DPDS") to Principal School #370, dated February 17, 2000.
4. DPSCS, DPDS, Memorandum to "ALL ENTRY POSTS", effective February 7, 2000.
5. DPSCS, Matter of Record, dated December 10, 1999.
6. Handwritten note to Mrs. Downing, from Ms. Carr, re: "Concerns 2-3-2000."
7. Memorandum of Robert Booker, CEO, to Board, dated March 15, 2000.
8. Memorandum from Executive Officer, Southeast Area Office, to Appellant, dated February 16, 2000 (re: Not Calling in, etc.).
9. Memorandum from Executive Officer, Southeast Area Office, to Appellant, dated February 16, 2000 (re: Sick Occurrences).
10. Attendance Reliability & Analysis Program, Summary.

B. Testimony

No testimony was taken at the hearing. Counsel made oral arguments and relied on the record below. In the hearing below, conducted on July 7, 2000, before a hearing examiner, the following persons testified in support of the CEO's decision to suspend for five days:

Danny Drew McCoy, Assistant Warden of Programs and Services, DPDS.

Patricia Abernethy, Ph.D., Southeast Area Officer, BCPS..

The Appellant testified in his own behalf, and presented the testimony of the following:

Dominque Robinson, American Friends Service Committee.

FINDINGS OF FACT

After careful consideration of the record below, I find, by a preponderance of the evidence, the following facts:

1. The Appellant has a bachelor's degree from Towson University, a master's degree from Loyola College, and about 50 credits of post-graduate courses.
2. The Appellant has been employed as a teacher for BCPS for about 27 years.
3. In December 1999, the Appellant was reassigned to School 370, which is located at the Baltimore City Pretrial Detention Center, DPSCS, to teach social studies.
4. The Appellant falsely alleged that, on December 8, 1999, he was injured during a physical fight between two students in his classroom, that the two students were removed in handcuffs by security officers, and that tear gas was sprayed into the classroom. Further, he falsely alleged that during the alleged incident he requested assistance from a fellow teacher, who failed to respond.
5. On December 9, 2000, the Appellant signed a written acknowledgment that he received and would become familiar with the DPSCS Standards of Conduct.
6. On Sunday, January 30, 2000, the Appellant attended a "State Legislation for Juvenile Justice Seminar" at St. Johns College. This seminar was attended by a number of elected and appointed officials. At the seminar the Appellant made unsubstantiated statements to the public officials about the detention center being unsafe, that the classrooms were overcrowded, and that the school curriculum was poor. These statements were repeated by

the Appellant at a teachers' forum before the Board at around the same time and heard by the CEO, Dr. Booker, and the Area Officer, Southeast Area.

7. On Friday, February 4, 2000, the Appellant was escorted out of School No. 370, at the Pretrial Detention Center, by two correctional officers and told not to return. On February 7, 2000, by order of the Assistant Warden, the Appellant was banned from entry on DPDS property.
8. After being banned from DPDS, the Appellant was assigned to duties at the office of the Area Officer Southeast Area, BCPS.
9. The Appellant was absent for 7 sick days as of February 16, 2000, equaling 6 occurrences of absence from his job, including the following dates: November 12 and 15, 1999, November 22, 1999, December 1, 1999, December 13, 1999, January 21, 2000, and February 10, 2000.
10. On Friday, February 11, 2000, the Appellant did not call in to notify the office of his absence, and he was marked "X."
11. Based on the false statements made by the Appellant and his failure to meet attendance standards, on February 17, 2000, the Area Officer for the Southeast, BCPS, recommended that he be suspended for five days.
12. The Chief Executive Officer ("CEO") for BCPS adopted the Area Officer's recommendation, and, on March 15, 2000, recommended that the Board order the Appellant suspended for five days.
13. The Appellant appealed the CEO's decision to the Board.
14. The Board appointed a hearing examiner, who, on July 7, 2000, conducted a hearing and, on or about November 27, 2000, recommended that the Board affirm the CEO's decision.
15. The Board voted unanimously to affirm the hearing examiner's recommendations and

affirmed the decision of the CEO to suspend the Appellant for five days for misconduct.

DISCUSSION

The applicable law provides that a teacher may be suspended or dismissed, for cause, by a local board on the recommendation of the local superintendent, and that the teacher has a right to a hearing on such a dismissal or suspension. Md. Code Ann., Educ. § 6-202(a) (1999) reads, in pertinent part, as follows:

- (1) On the recommendation of the county superintendent, a county board may suspend or dismiss a teacher, principal, supervisor, assistant superintendent, or other professional assistant for:
 - (i) Immorality;
 - (ii) **Misconduct in office**, including knowingly failing to report suspected child abuse in violation of § 5-704 of the Family Law Article
 - (iii) Insubordination;
 - (iv) Incompetency; or
 - (v) Willful neglect of duty.
- (2) Before removing an individual, the county board shall send the individual a copy of the charges against him and give him an opportunity within 10 days to request a hearing.
- (3) If the individual requests a hearing within the 10-day period:
 - (i) The county board promptly shall hold a hearing, but a hearing may not be set within 10 days after the county board sends the individual a notice of the hearing; and
 - (ii) The individual shall have an opportunity to be heard before the county board, in person or by counsel, and to bring witnesses to the hearing.
- (4) The individual may appeal from the decision of county board to the State Board.

(Emphasis added.)

The standard of review in an appeal of a teacher dismissal case to the State Board is prescribed by COMAR 13A.01.01.03E. In pertinent part, COMAR 13A.01.01.01E provides:

- (3) Teacher Dismissal and Suspension.
 - (a) The standard of review in teacher dismissal or suspension shall be de novo as defined in §E(3)(b).
 - (b) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain a disciplinary infraction.
 - (c) The county board shall have the burden of proof.

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

In the Appellant's appeal of his dismissal by the Board, the ALJ, on behalf of the State Board, exercises independent judgment on the record. COMAR 13A.01.01.03E(3).

In the instant case, the State Board seeks to suspend the Appellant for five days from his employment with the BCPS on the ground of misconduct, based on: 1) making false statements at the Detention Center where he was assigned to teach, including a false claim that he was injured during a physical altercation between two students in his classroom, and a false claim that he called for security assistance without a response from the institution; 2) making false public statements concerning conditions at the detention center; and 3) being absent for an unjustifiable number of days. The Board argued that the facts surrounding the alleged altercation and the unanswered request for security were adequately investigated by DPSCS personnel and found to be without substance. The Board also argued that a teacher is not free to make unsubstantiated public statements which are derogatory to his employer and which can adversely affect the efficiency of the workplace. Finally, the Board argued that the citation for unjustifiable absences was reasonable and consistent with the stated, published attendance policy. Accordingly, counsel for the Board argued that the suspension of the Appellant should be upheld.

The Appellant argued that the evidence shows that he was actually retaliated against for making statements concerning the poor conditions of security and education at the Detention Center where he was assigned. As such, he claims that his rights of free speech and expression under the First Amendment to the U.S. Constitution were violated through the imposition of a suspension, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Having carefully reviewed and considered the entire record below as well as the arguments of counsel, I find that the Board has met its burden by a preponderance of the

evidence, and I recommend the that the Appellant's suspension for five days for misconduct for the reasons cited above be upheld for the following reasons.

The Assistant Warden, DPDS, Danny Drew McCoy, testified at the hearing before the Hearing Examiner. He stated that he is responsible for security at School 370 within the detention center. He described the placement of the classrooms in trailers on the DPDS property. These classrooms are in close proximity to each other, according to the Assistant Warden's description and are attended by several correctional officers who are always close enough to hear any disturbance. The classroom used by the Appellant was linked to other classrooms by a corridor.

Warden McCoy testified that an investigation was conducted, in which a sergeant spoke to the eight students in the Appellant's class on or about December 10, 1999, of the Appellant's claim that he was injured in a student fight. The students unanimously declared that the Appellant was not touched or pushed by any of the students. Further, the Appellant did not notify any security officers or the school principal about the alleged altercation in his class. CEO Ex. 5.

Warden McCoy stated that he conducted an independent investigation of the alleged occurrence in late January when he learned about it after returning from a conference. There was no evidence of any fight taking place on the day alleged by the Appellant or any other day in the Appellant's classroom. The Assistant Warden also spoke to the teacher to whom the Appellant said he appealed for help. That teacher denied any such request was made. McCoy then stated he questioned the Appellant about what allegedly happened, and the Appellant denied having any problems with the students or security on December 8, 1999.

McCoy next testified at the hearing before the Hearing Examiner that he received a

telephone call from a public official concerning certain critical statements about DPDS made by the Appellant at a public meeting. He interviewed the Appellant who admitted attending a juvenile forum at the end of January and admitted making statements “to a lot of people” in reference to the detention center being unsafe and the classrooms being too small. The Hearing Examiner admitted into evidence a letter written by one of the teachers at School 370. In the letter, the teacher stated that during lunch on February 3, 2000, the Appellant said that during a question and answer period at a juvenile forum he attended at the end of January, he told some politicians about his complaints regarding the poor curriculum, having to use antiquated books and limited materials, and about overcrowding at the detention center.

The Assistant Warden explained that the Appellant’s statements at the forum posed a breach of security and safety at the detention center in contravention of the DPSCS Standards of Conduct. CEO Ex. 1. McCoy determined that the false injury claim and the improper comments at the forum subjected the teachers, students, and the security officers to an unsafe environment.

Dr. Patricia Abernethy testified at the hearing before the Hearing Examiner. Dr. Abernethy stated that she herself heard the Appellant make statements about the unsafe conditions at the detention center school at an open forum for teachers around the same time that he attended the juvenile forum. She then testified about the disruption to the to the education of the students at School 370 as a result of his sudden removal. As a separate matter, Dr. Abernethy testified that the Appellant’s absences were unacceptable and made particular reference to the day when he failed to call in at all and was marked “X.” These absences were also disruptive to the work of her office.

Dr. Abernethy also testified that on January 18, 2000, she received a copy of a memorandum that the Appellant sent to the Principal of School 370. In the memorandum, the

Appellant repeated the false claims of injuries he received from students' fighting. His claim that his sick leave was used when he went to a clinic to get medical assistance was false, as no such clinic visit was documented. His claim that he called Dr. Abernethy's office to discuss the issues but was told to seek a transfer from the Baltimore Teachers' Union was also false. The memorandum was admitted into evidence. CEO Ex. 11. Finally, Dr. Abernethy explained that her recommendation for suspension was based both on the false statements and the Appellant's absenteeism.

The Appellant called as a witness Dominique Williams, who testified that she attended the juvenile forum with her husband and the Appellant, but never heard him make the statements attributed to him. She admitted that there might have been a few minutes when she was not in his company.

Next the Appellant testified before the Hearing Examiner. He gave a detailed account of a fight between two students, during which he was injured. He claimed that one of the students rammed the head of another student against a wall, leaving a dent in the wall. He stated that two guards ran into the room and sprayed tear gas, and the two fighting students were led away in handcuffs. He presented a physician's slip showing he was treated for contusions several days after the date of the alleged incident. He admitted attending the juvenile forum, but denied making any critical statements about the detention center or the school. He also admitted attending the teachers' forum but stated he only commented that the books were outdated. He denied saying that the curriculum was bad.

In view of the contravening statements by responsible authorities, I have no basis to accept the self-serving denials by the Appellant. Moreover, it is not believable that there would be no record of the altercation described by the Appellant if such event did occur. The

Appellant's failure to report the matter to security or to seek immediate medical attention also calls his veracity into question. In light of these facts, I find the statements by Dr. Abernethy concerning the inappropriate remarks by the Appellant at the teachers' forum to be more credible than the Appellant's denial that he made such remarks.

To the extent that the Appellant maintains that the words he used, taken as a whole and in the context of time and place, are protected by the Constitution, he is greatly mistaken. The United States Supreme Court on numerous occasions has held that one's constitutional right to speak as a public employee is separate and more limited than one's right to speak out generally as a citizen. In the leading case of *Pickering v. Board of Education*, Justice Marshall, speaking for the Court, said as follows:

[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.*

391 U.S. 563, 568 (1968). (Emphasis supplied.) Speech which is not of a public concern, but which relates to the employee's personal interests, is not protected when an employer chooses to impose discipline because it finds such speech to be detrimental to the employer's interests.

Connick v. Myers, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987). See *Younkers v. Prince George's County*, 333 Md. 14, 633 A.2d 861, 866 (1993).

It was not established during the hearing that any of the Appellant's criticisms were well-founded. Moreover, where the statements could be seen as stating that security was weak, as a result of overcrowding which does not exist and as a result of falsely alleged injuries sustained during an altercation which likely did not take place, such statements are not protected. Taken as

a whole, the Appellant made both public and institutional statements regarding both the quality of education at DPDS and security which he was unable to establish, and which could and did result in disruption to the institution. These statements were in fact embarrassing to the Area Officer, who was called upon, as she testified, to defend the program, as well as to the Assistant Warden, DPDS, who had to investigate false charges. As the Assistant Warden noted, such statements violate the DPSCS Standards of Conduct, which, while not directly applicable to the Appellant, created an intolerable atmosphere from the Warden's point of view and led to the Appellant being banned from the institution. His removal disrupted the education program at School 370.

Finally, the Appellant did not deny that he was absent on more occasions than is allowed under published standards of the Board. Resp. # 1. For making false statements, public statements that led to disruption of the workplace and endangered security at DPDS, and for unacceptable absenteeism, I find that the Board has met its burden and that the suspension of the Appellant for five days should be upheld.

CONCLUSIONS OF LAW

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

PROPOSED ORDER

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

October 29, 2001

Alan B. Jacobson

Administrative Law Judge