

IN THE MATTER OF  
ALLEN R. DYER

BEFORE THE  
MARYLAND  
STATE BOARD  
OF EDUCATION  
Order No. OR11-15

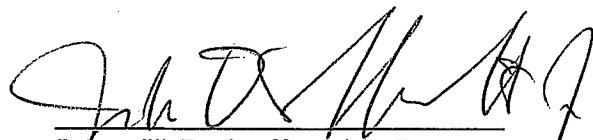
ORDER

On October 26, 2011, the Administrative Law Judge issued a proposed decision denying the Motion to Dismiss filed by Allen R. Dyer. Mr. Dyer has filed Exceptions to that proposed decision. Because that Proposed Decision is an interlocutory decision, it is not a proper subject for Exceptions at this juncture of the case. *Washington Suburban Sanitary Commission v. Bowen*, 410 Md. 287(2009). Therefore, the Exceptions are dismissed.

On November 28, 2011, Mr. Dyer moved to strike the November 18, 2011 letter submitted by counsel to the local board in response to the Exceptions. He also requested that this Board rule that the local board and their counsel have no standing to participate in this matter. We find such a request to border on frivolous. We decline to strike the letter.

It is so Ordered.

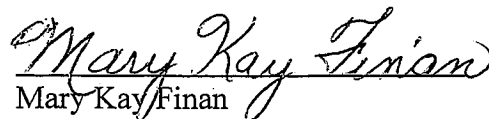
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Kate Walsh

December 6, 2011

BOARD OF EDUCATION OF  
HOWARD COUNTY

v.

ALLEN R. DYER,  
RESPONDENT

\* BEFORE DOUGLAS E. KOTEEN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No. MSDE-BE-17-11-28065

\* \* \* \* \*

**PROPOSED DECISION ON RESPONDENT'S MOTION TO DISMISS**

STATEMENT OF THE CASE  
DISCUSSION  
CONCLUSIONS OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On June 9, 2011, the Board of Education of Howard County (County Board) passed a resolution which directed counsel for the County Board and its Chairman to execute a request to the Maryland State Board of Education (State Board) to remove Allen R. Dyer, Board Member (Respondent), from his position as a member of the County Board on the grounds of misconduct in office. On June 24, 2011, the Chairman of the County Board sent a request for the Respondent's removal from office to the State Board, for alleged misconduct in office. The County Board seeks the Respondent's removal from office under the provisions of section 3-701(g) of the Education Article of the Maryland Annotated Code. Md. Code Ann., Educ. § 3-701(g) (2008). The Respondent filed a request for a hearing with the State Board on July 11, 2011 challenging his removal. The State Board transferred the matter to the Office of Administrative Hearings (OAH) for assignment to an administrative law judge for the scheduling of a hearing and the issuance of a proposed decision in the case pursuant to its delegation

authority under section 10-205 of the State Government Article of the Maryland Annotated Code. Md. Code Ann., State Gov't § 10-205 (2009).

On August 26, 2011, the Respondent filed a Motion to Dismiss the removal action before the OAH. On September 12, 2011, the County Board filed a Memorandum in Reply to Motion to Dismiss. On September 19, 2011, the Respondent filed a Reply to Board's Opposition to Motion to Dismiss. On September 20, 2011, Cynthia L. Vaillancourt, Board Member and requested intervenor (Vaillancourt), filed a Response to Board's Reply to Motion to Dismiss.<sup>1</sup> On September 23, 2011, the County Board filed a Motion to Strike Vaillancourt's Response to County Board's Reply to Motion to Dismiss.<sup>2</sup>

A Prehearing Conference (Conference) was conducted at the OAH on September 8, 2011. A motions hearing was held during the Conference to address several motions and another motions hearing was scheduled to address the Respondent's Motions to Dismiss. The hearing on the Motion to Dismiss was held on September 27, 2011 at the OAH in Hunt Valley, Maryland. Harold H. Burns, Jr., Esquire, appeared on behalf of the Respondent. Judith S. Bresler, Esquire, Carney, Kelehan, Bresler, Bennett & Scherr, LLP, appeared on behalf of the County Board. Vaillancourt appeared and represented herself.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act (APA), Md. State Gov't Code Ann. §§ 10-201 through 10-226 (2009 & Supp. 2011) and the Rules of Procedure of the OAH, Code of Maryland Regulations (COMAR) 28.02.01.

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<sup>1</sup> Vaillancourt filed a Motion to Intervene on August 23, 2011. At the Prehearing Conference held on September 8, 2011, counsel for the Respondent requested that I defer my ruling on the Motion to Intervene until after I rule on the Motion to Dismiss. I agreed to defer ruling on the Motion to Intervene to secure procedural simplicity and administrative fairness. COMAR 28.02.01.11B(11). A separate decision on the Motion to Intervene has been issued on this date.

<sup>2</sup> The Motion to Strike was denied at the motions hearing on September 27, 2011 because no decision had yet been issued on the Motion to Intervene.

## DISCUSSION

### **I. Motions to Dismiss.**

The Rules of Procedure of the OAH permit a party to file a motion to dismiss under COMAR 28.02.01.12C:

#### C. Motion to Dismiss.

Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

A Motion to Dismiss under COMAR 28.02.01.12C is comparable to a permissive motion to dismiss made under Maryland Rule 2-322(b)(2), where a party asserts that a complaint “fail[s] to state a claim upon which relief can be granted.” In interpreting and applying COMAR 28.02.01.12C, it is useful to consider reported cases explaining the Maryland Rule.

When a party seeks dismissal under Md. Rule 2-322, the party asserts that, even if the allegations in the complaint were true, the complaining party would not be entitled to relief as a matter of law. *Lubore v. RPM Assoc.*, 109 Md. App. 312, 322 (1996). In considering a motion to dismiss for failure to state a claim under Rule 2-322(b)(2), the decision-maker must “assume the truth of all well pleaded facts and all inferences that can reasonably be drawn from them.” *Rossaki v. NUS Corp.*, 116 Md. App. 11, 18 (1997); *Hrehorovich v. Harbor Hospital*, 93 Md. App. 772, 781 (1992), *cert. denied*, 330 Md. 319 (1993). The non-moving party, the County Board in the present case, is entitled to all favorable inferences fairly construed from the evidence. *General Mtrs. Corp. v. Lahocki*, 286 Md. 714, 733 (1980).

### **II. Legal Background.**

The County Board seeks to remove the Respondent from his position as an elected member of the Board of Education of Howard County due to alleged misconduct in office under section 3-701 of the Education Article of the Maryland Annotated Code. Md. Code Ann., Educ. §

3-701(2008). That statute provides, in pertinent part, as follows:

(g) Removal.

(1) The State Board may remove a member of the county board for:

- (i) Immorality;
- (ii) Misconduct in office;
- (iii) Incompetency; or
- (iv) Willful neglect of duty.

(2) Before removing a member, the State Board shall send the member a copy of the charges against the member and give the member an opportunity within 10 days to request a hearing.

(3) If a member requests a hearing within the 10-day period:

- (i) The State Board promptly shall hold a hearing, but a hearing may not be set within 10 days after the State Board sends the member a notice of the hearing; and
- (ii) The member shall have an opportunity to be heard publicly before the State Board in the member's own defense, in person or by counsel.

(4) A member removed under this section has the right to a de novo review of the removal by the Circuit Court for Howard County.

The State Board has the authority to delegate contested case hearings to the Office of Administrative Hearings under section 10-205 of the State Government Article of the Maryland Annotated Code. Md. Code Ann., State Gov't § 10-205 (2009). The statute provides, in pertinent part, as follows:

**§ 10-205. Delegation of hearing authority.**

(a) To whom delegated; limitation. –

(1) Except as provided in paragraph (2) of this subsection, a board, commission, or agency head authorized to conduct a contested case hearing shall:

- (i) conduct the hearing; or
- (ii) delegate the authority to conduct the contested case hearing to:

1. the Office[of Administrative Hearings][.]

...  
(b) Scope of authority delegated. – An agency may delegate to the Office the authority to issue:

- (1) proposed or final findings of fact;
- (2) proposed or final conclusions of law;
- (3) proposed or final findings of fact and conclusions of law;
- (4) proposed or final orders or orders under Title 20 of this article; or
- (5) the final administrative decision of an agency in a contested case.

(c) Procedure upon receipt of hearing request. – Promptly after receipt of a request for a contested case hearing, an agency shall:

- (1) notify the parties that the authorized agency head, board, or commission shall conduct the hearing; [or]
- (2) transmit the request to the Office so that the Office shall conduct the hearing in accordance with the agency's delegation[.]

...

The regulations governing this matter provide, in pertinent part, as follows:

#### **.07 Hearing Procedures.**

A. The State Board shall transfer an appeal to the Office of Administrative Hearings for review by an administrative law judge under the following circumstances:

- (1) An appeal of a school consolidation, school redistricting, or school closing pursuant to COMAR 13A.02.09;
- (2) An appeal of a certificated employee suspension or dismissal pursuant to Education Article § 6-202, Annotated Code of Maryland; or
- (3) An appeal upon review in which the State Board finds there exists a genuine dispute of material fact.

COMAR 13A.01.05.07A.<sup>3</sup>

#### **III. Positions of the Parties.**

In the instant case, the Respondent seeks to dismiss the charges filed against him by the County Board because he alleges that the statute on which the County Board relies in seeking his

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<sup>3</sup> Although it is not clear that COMAR 13A.01.05.07A(3) applies to this matter, even in the absence of applicable regulations, the statutes at section 3-701(g) of the Education Article and 10-205 of the State Government Article provide for a removal hearing before the State Board and the authority of the State Board to delegate the hearing to the OAH, as addressed below.

removal is unconstitutional as it violates the separation of powers doctrine. He contends that the Respondent's position as an elected member of the County Board is legislative in origin because the position was created by the General Assembly. He further contends that the statute is unconstitutional because it grants power to the State Board of Education, an agency or board within the Executive Branch, to remove the Respondent, an elected member of the County Board, which he contends is within the Legislative Branch, and argues that the County Board is rooted in local government. He relies on the case of *Schisler v. State*, 349 Md. 519 (2006) to support the constitutional argument.

The Respondent also contends that the resolution passed by the County Board supporting his removal as a member was fatally flawed and void because the Student member, having graduated from a public high school in Howard County before the resolution was passed, was no longer qualified to serve as a student member on the County Board under section 3-701(e) of the Education Article. Md. Code Ann., Educ. § 3-701(e) (2008).

The Respondent also argues that the State Board had no authority to delegate its hearing responsibilities to the OAH under section 3-701(g) of the Education Article. Md. Code Ann., Educ. § 3-701(g). He contends that the statute authorizes only the State Board to conduct the Respondent's removal hearing and that the State Board's attempt to delegate this authority to the OAH is void. He contends further that State Board's delegation to the OAH is not authorized because the removal hearing required by statute to be held before the State Board is a public hearing and not a contested case hearing. He asserts further that even if the delegation was authorized, it was not properly executed in this case.

The Respondent also argues that the County Board failed to provide him with sufficient notice of the charges against him in violation of the APA and due process. He argues that the County Board's June 9, 2011 resolution is vague and conclusory and fails to provide the Respondent



with adequate notice of the basis for the requested removal. He contends further that the letter the Chairman of the County Board sent to the State Board requesting his removal is too general, still fails to provide sufficient notice of the charges, and was not authorized by the County Board. For the foregoing reasons, the Respondent argues that his Motion to Dismiss should be granted and this action dismissed in its entirety or remanded to the State Board.

The County Board argues that the removal statute is constitutional. It contends that county boards of education are legally State agencies in the Executive Branch of government. Contrary to the Respondent's position, it argues that the County Board is not within the Legislative Branch merely because the General Assembly created it and authorized that its members be elected, and that the removal statute does not violate the separation of powers doctrine. It also contends that *Schisler v. State* is distinguishable and inapplicable to this matter.

The County Board also asserts that the student member was serving a statutory one-year term when the resolution was passed so she was legally authorized to vote on the resolution, regardless of her graduation from high school before the resolution passed.

The County Board also contends that the hearing before the State Board is a contested case hearing and that the APA authorizes a board, commission, or agency head, such as the State Board, to delegate its contested case hearing authority to the OAH. It further asserts that the delegation in this case was proper.

Finally, the County Board argues that the resolution and accompanying letter sent to the State Board seeking the Respondent's removal provided the Respondent with adequate notice of the basis for his removal. Furthermore, it contends that any actual notice the Respondent receives sufficiently in advance of his removal hearing constitutes proper notice consistent with due process standards in administrative hearings under Maryland law. *Brown v. Handgun Permit Review Board*, 188 Md. App. 455 (2009), *cert. denied*, 412 Md. 495 (2010). It asserts that the

Respondent will have the opportunity to receive additional information and further detail through the discovery process, regarding the basis for his removal, well in advance of the contested case hearing scheduled to commence in May 2012. For these reasons, the County Board argues that the Respondent's Motion to Dismiss should be denied.

#### **IV. Separation of Powers.**

The Respondent argues that section 3-701 of the Education Article is unconstitutional as it violates the separation of powers doctrine. Article 8 of the Maryland Declaration of Rights in the Maryland Constitution provides as follows:

##### **Article 8. Separation of powers.**

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Md. Const., Declaration of Rights, art. 8.

A statute will be construed to avoid a conflict with the Constitution whenever reasonably possible. *Koshko v. Haining*, 398 Md. 404, 425 (2007); *Brown v. Handgun Permit Review Board*, 188 Md. App. 455, 468 (2009), *cert. denied*, 412 Md. 495 (2010).

The Court of Appeals has consistently considered county boards of education to be State agencies. *BEKA Industry, Inc. v. Board of Educ. of Worcester Co.*, 419 Md. 194, 210 (2011). In *BEKA*, the court found that a county board of education was a State agency and unit of State government that was entitled to sovereign immunity and was also subject to a legislative waiver of that immunity in certain circumstances. The court in *BEKA* noted that budgetary issues involving county school boards are distinct from their general legal status. The court stated that the "local budgetary character" of the county boards of education "appears insufficient to overcome the overwhelming support in our case law for the notion that county boards of education are 'legally State agencies.'" *BEKA*, 419 Md. at 217. As State agencies, the county

boards of education are administrative agencies that are closely supervised by the State Board, which is within the Maryland State Department of Education (MSDE), another State administrative agency within the Executive Branch.

The Respondent's reliance on *Chesapeake Charter v. Board of Educ. of Anne Arundel Co.*, 358 Md. 129 (2000) for the proposition that the County Board is not a State agency within the Executive Branch is misplaced. As the court in *BEKA* explained, the *Chesapeake* case addressed only a limited exception, for budgetary and procurement matters, to the general principle that county boards of education are legally State agencies. *BEKA*, 419 Md. at 213. In *Chesapeake*, the court explained the basis for its long-held view that county boards of education are State agencies:

County school boards are considered generally to be State agencies because (1) the public school system in Maryland is a comprehensive State-wide system, created by the General Assembly in conformance with the mandate in Article VIII, § 1 of the Maryland Constitution to establish throughout the State a thorough and efficient system of free public schools, (2) the county boards were created by the General Assembly as an integral part of that State system, (3) their mission is therefore to carry out a State, not a county, function, and (4) they are subject to extensive supervision by the State Board of Education in virtually every aspect of their operations that affects educational policy or the administration of the public schools in the county. Although legally State agencies for those reasons, they are not normally regarded, *for structural or budgetary purposes*, as units within the Executive Branch of the State government.

*Chesapeake*, 358 Md. at 136-137 (emphasis supplied). The court explained that it was only for budgetary purposes that it did not find the county boards of education to be units of State government. In all other respects, the court reiterated its view that county school boards are State agencies. The court provided further support for the view that county boards of education are State agencies that are supervised by the State Board when it acknowledged the State Board's function in determining the educational policies of the State and in deciding all controversies and

disputes arising under the Education Article that are within its jurisdiction. *Chesapeake*, 358 Md. at 138. Such disputes include the removal of county board of education members.

The court in *Chesapeake* pointed out that in some counties in Maryland the members of the county boards are elected by the voters, while in the other counties, the members are appointed by the Governor or, as in Baltimore City, the non-student members are appointed jointly by the Governor and Mayor of Baltimore.<sup>4</sup> Despite these differences in how individuals become members of the county school boards in Maryland, the Court of Appeals has never drawn any distinction in its determination that county boards of education are State agencies based on whether their members are appointed or elected.

Accordingly, the General Assembly has granted authority to the State Board to remove members of the County Board for specified reasons, after a hearing, and this does not violate the separation of powers doctrine of the Maryland Constitution because both the State and County Boards are State administrative agencies. This is true regardless of whether the board members are elected or appointed.

The Respondent also relies on *Schisler v. State*, 394 Md. 519 (2006), to support his claim that the statute authorizing the State Board to remove him, after a hearing, is unconstitutional as it violates the separation of powers doctrine. For the reasons addressed below, that case is inapplicable to the Respondent's circumstances. In *Schisler*, the court found that a statute passed by the General Assembly to remove incumbent members of the Public Service Commission (PSC) before the end of their terms was an unconstitutional violation of the separation of powers doctrine because it violated express provisions of the Maryland Constitution regarding the Governor's authority to appoint and

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<sup>4</sup> Currently, the voters in eighteen Maryland counties elect the members of their county boards of education. Md. Code Ann., Educ. § 3-114(a) (Supp. 2011). In two Maryland counties, the county boards have a combination of members who are elected or appointed. Md. Code Ann., Educ. § 3-114(b), (c) (Supp. 2011). In the other Maryland counties and Baltimore City, the members are appointed. Md. Code Ann., Educ. § 3-108 (Supp. 2011).

remove State employees. As the PSC members were appointed by the Governor, the Maryland Constitution provides that they can only be removed by the Governor.

The applicable constitutional provisions regarding appointment and removal state as follows:

**Section 10. Appointment of officers**

He [the Governor] shall nominate, and, by and with the advice and consent of the Senate, appoint all civil and military officers of the State, whose appointment, or election, is not otherwise herein provided for, unless a different mode of appointment be prescribed by the Law creating the office.

Md. Const. art II, § 10.

**Section 15. Suspension and removal of officers**

The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years.

Md. Const. art. II, § 15.

The court determined that the statute terminating the PSC members violated the Maryland Constitution because the General Assembly was attempting to remove from office the incumbent members of the PSC in direct contravention of Article II, section 15, of the Constitution, which reserved the removal power to the Governor who had appointed the PSC members for a term of years. The court found the statute unconstitutional because it also violated the separation of powers clause in Article 8 of the Declaration of Rights in the Maryland Constitution as the statute improperly authorized the Legislative Branch to usurp the constitutional authority of the Governor in the Executive Branch to appoint and remove members of a State commission.

*Schisler* is clearly distinguishable because the State and County Boards are both State administrative agencies, and there is no provision in the Maryland Constitution that prohibits the State Board, which regularly exercises supervisory authority over the county boards of education,

from removing from office an elected member of the County Board. Furthermore, unlike in *Schisler*, the statute creating the County Board expressly provides that elected members of that board can be removed by the State Board for certain listed reasons, including misconduct in office, after a member is afforded the opportunity for a hearing.<sup>5</sup>

The Respondent argues further that the statute is unconstitutional because it improperly gives the State Board the authority to “impeach” an elected member of a county board of education. The Maryland Constitution contains no provision for the impeachment of elected members of county boards of education. The Constitution expressly addresses removal by impeachment only with regard to the Governor, the Lieutenant Governor, and Judges. Md. Const., art. II, § 7; art. IV, § 4. Although there is an impeachment provision in Article III, section 26, of the Maryland Constitution which covers the Legislative Department, that provision does not identify the specific persons to whom it applies, and certainly does not provide that it applies to elected members of county boards of education.

An Attorney General’s Opinion, at 58 Op. Att’y. Gen. 683 (1973), found that an elected county sheriff could be subject to impeachment proceedings under Article III, section 26, of the Maryland Constitution after a criminal conviction. The office of county sheriff is a constitutional position provided for by Article IV, section 44, of the Maryland Constitution. That constitutional provision addresses the qualifications, manner of election, disqualification, and compensation for the office of county sheriff, but does not expressly address removal from office. There was no statute addressing the removal from office of a county sheriff. In finding that the impeachment

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<sup>5</sup> The Texas case relied upon by the Respondent is distinguishable because the court decided that when elected trustees of a Texas school district make discretionary decisions regarding school policy under Texas law, the courts should not interfere. *Harper v. Taylor*, 490 S.W.2d 227 (1972). However, the court found that if the issue to be decided is whether public officials have violated the duties of their position, then they may be subject to removal by the courts. *Id.*, at 230.

section of the Maryland Constitution might apply to the elected office of county sheriff, the Attorney General relied on the fact that the office of county sheriff was established under the Maryland Constitution. There is no similar provision in the Maryland Constitution that establishes the position of a member of a county board of education.<sup>6</sup> The position of County Board member has, instead, been created by statute and that statute sets forth the eligibility requirements, the manner of election, and the manner and basis for removal of such member. The statute expressly provides that the authority for removal shall rest with the State Board for certain specified reasons, after the member is afforded an opportunity for a hearing. While the election of county sheriffs is required by the Maryland Constitution, the election of members of county boards of education is authorized by statute, with members of some county boards being elected and others appointed. For these reasons, the Attorney General's Opinion is distinguishable and, unlike the constitutional office of county sheriff, members of county boards of education are not subject to impeachment proceedings under the Maryland Constitution.

For the foregoing reasons, I conclude that section 3-701 of the Education Article, which calls for the removal of an elected County Board member for certain stated reasons, after a hearing before the State Board, is constitutional.

#### **V. Student Member.**

The Respondent contends that the resolution passed by the County Board on June 9, 2011 was invalid because the Student member had graduated from a public high school in Howard County before this vote was taken. He argues that the Student member was no longer a qualified member of the County Board following her graduation and that without her vote, the resolution

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<sup>6</sup> Although there is a brief reference in the Maryland Constitution to members of elective local boards of education, the provision does not establish the position and actually excludes such members from much of Article XVII, which addresses the scheduling of elections. Md. Const. art. XVII, § 7. The Maryland Constitution makes no other mention of county boards of education.

failed to receive the five votes needed for passage. The Respondent relies on that provision of section 3-701 of the Education Article which states that “[t]he student member shall be a bona fide resident of Howard County and a regularly enrolled junior or senior year student in a Howard County public high school.” Md. Code Ann., Educ. § 3-701(e)(1) (2008).

The Respondent’s argument regarding the invalidity of the student member’s vote ignores other provisions of the statute. A court shall attempt to ascertain the intent of the legislature in the interpretation of a statute that is susceptible to more than one meaning. The court will “avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense.” *BEKA*, 419 Md. at 218. The statute provides that a student member shall serve for a term of one year, beginning on July 1 after the student member’s election. Md. Code Ann., Educ. § 3-701(e)(2). The statute includes no provision requiring that a student member be disqualified from serving on the County Board upon his or her graduation from high school. The statute also identifies other qualifications for serving on the County Board which include being a resident and registered voter in Howard County. The statute provides further that “any elected member who no longer resides in Howard County may not continue as a member of the board.” Md. Code Ann., Educ. § 3-701(b). With regard to the residency requirement, the statute sets forth a specific disqualification for a person who no longer satisfies that requirement. In contrast, however, the statute contains no similar disqualification for a student member who graduates from high school. If the Legislature had intended for graduation to disqualify a student member from continuing to serve, then the statute would have included such language. This conclusion is even more logical where graduation is a common event likely to occur for every student member who is a high school senior.

Accordingly, I conclude that the Student member was qualified to serve on the Board after her graduation through the end of her one-year term that began on the previous July 1. Therefore, when



she voted on the June 9, 2011 resolution, she was still a qualified member of the County Board.

## **VI . Delegation of Hearing Authority.**

### **A. Authority to Delegate**

The Respondent contends that that the State Board has no authority to delegate the hearing in this matter to the OAH. The Respondent claims that the delegation is not authorized because section 3-701 of the Education Article provides only for a hearing before the State Board. Furthermore, the Respondent contends that the hearing authorized in section 3-701 is a public hearing and not a contested case agency hearing and that the State Board does not have statutory authority to delegate this public hearing to the OAH.

Section 3-701 of the Education Article provides that the State Board may remove a member of the County Board for, among other reasons, misconduct in office. Before removal, the State Board must send the member a copy of the charges against him and afford him an opportunity to request a hearing. If requested, the State Board shall promptly hold a hearing and the member shall have the opportunity to be heard publicly before the State Board in his own defense, in person or by counsel. If removal is upheld, the member has a right to a *de novo* review of the removal by the Circuit Court for Howard County. Md. Code Ann., Educ. § 3-701(g).

Although section 3-701 of the Education Article does not address the right of the State Board to delegate its hearing authority to the OAH, the delegation authority is set forth in the APA. Md. Code Ann., State Gov't § 10-205(a) (2009). Section 10-205(a) of the State Government Article provides that "a board, commission, or agency head authorized to conduct a contested case hearing shall: (i) conduct the hearing; or (ii) delegate the authority to conduct the contested case hearing to: 1. the [OAH] [.]” The State Board is the head of the MSDE, a principal department in the State government, and clearly falls within the category of boards and other State administrative agencies that are authorized to conduct contested case hearings. The

State Board has frequently delegated contested case hearings to the OAH in other matters. Contrary to the Respondent's argument, the APA does not provide that a board, commission or agency head authorized to delegate contested case hearings to the OAH is prohibited from doing so if the enabling statute does not expressly refer to the APA or the delegation authority. Only if the contemplated hearing is a public hearing, rather than a contested case agency hearing, must the enabling statute provide that the hearing shall be conducted in accordance with the APA. Md. Code Ann., State Gov't § 10-203(c).

Therefore, I must consider whether the State Board hearing provided for in section 3-701(g) of the Education Article is a contested case hearing or a public hearing. The APA defines a contested case hearing, in pertinent part, as follows:

(d) Contested case. –

(1) "Contested case" means a proceeding before an agency to determine:

(i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after the opportunity for an agency hearing; or

(ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.

(3) "Contested case" does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.

Md. Code Ann., State Gov't § 10-202(d)(1) (2009).

The term public hearing is not defined in the APA. However, it is defined elsewhere in the State Government Article of the Maryland Annotated Code. The term "public hearing" is defined in section 8-306(a) of the State Government Article as follows:<sup>7</sup>

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<sup>7</sup> Section 8-306 of the State Government Article deals with the change in use, purpose, or function of certain State facilities, and the acquisition of property by State agencies.

(a) Definitions. –

(1) In this section the following words have the meanings indicated.

...

(3)(i) “Public hearing” means an informational hearing, the sole purpose of which is to obtain public comment and answer public questions.

(ii) “Public hearing” does not mean a contested case hearing under Title 10, Subtitle 2 of this article.

...

Md. Code Ann., State Gov’t § 8-306(a) (2009). Although this definition falls outside the APA, it provides useful guidance as the parties have not identified another definition of a public hearing.

Section 3-701(g) of the Education Article provides that the State Board may not remove an elected member of the County Board from office without providing him with notice of the charges and affording him the opportunity for a hearing before the State Board. The nature of the hearing contemplated by this statute falls within the definition of a contested case hearing at section 10-202(d)(1)(i) because the removal hearing is held to determine a right, duty, statutory entitlement or privilege of the Respondent – whether he shall remain a member of the County Board or shall be removed for misconduct – and a statute requires that the removal can only be carried out after the Respondent is afforded an opportunity for an agency hearing. According to the charges, the issue to be determined in the removal hearing is whether the Respondent is responsible for misconduct in office. If such misconduct is found, then the statute authorizes the State Board to remove him from office.

Although the Respondent argues that the contemplated hearing is a public hearing and not a contested case agency hearing, he provides no legal support for that contention. The mere fact that the statute provides that a member shall have an opportunity to be heard *publicly* before the State Board in his own defense, with or without counsel, does not establish that the contemplated hearing is a public hearing under section 10-203(c) of the APA. Furthermore, the removal hearing contemplated by section 3-701(g) does not fall within the definition of a public hearing.

The removal hearing is not designed to be an informational hearing in which the sole purpose is to obtain public comment and answer public questions. This view is further supported by the language in section 3-701(g)(4), which provides that if removal is upheld, then the member has the right to a *de novo* review of the removal by the Circuit Court for Howard County. The statute could not have intended that a *de novo* public hearing would be held in Circuit Court.

Accordingly, I conclude that the State Board hearing contemplated by section 3-701 satisfies the statutory definition of a contested case hearing under the APA. Moreover, the State Board is an agency or board within the Executive Branch of State government that is authorized to conduct contested case hearings.<sup>8</sup>

The Respondent also claims that the removal hearing contemplated in the Education Article is subject to the general exclusions in section 10-203(a) and the public hearing provisions in section 10-203(c) of the State Government Article. Section 10-203 provides, in pertinent part, as follows:

**§ 10-203. Scope of subtitle**

(a) General exclusions. – This subtitle does not apply to:

...

(4) an officer or unit not part of a principal department of State government that:

- (i) is created by or pursuant to the Maryland Constitution or general or local law;
- (ii) operates in only 1 county; and
- (iii) is subject to the control of a local government or is funded wholly or partly from local funds;

...

(c) Public hearings. – A public hearing required or provided for by statute or regulation before an agency takes a particular action is not an agency hearing under § 10-202(d) of this subtitle unless the statute or regulation:

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<sup>8</sup> The agency hearing in this case is required by statute, not regulation, so the requirement in section 10-202(d)(2) of the State Government Article for more specificity in the regulation regarding the nature of the hearing is inapplicable.

- (1) expressly requires that the public hearing be held in accordance with this subtitle; or
- (2) expressly requires that any judicial review of the agency determination following the public hearing be conducted in accordance with this subtitle.

...

Md. Code Ann., State Gov't § 10-203(a), (c) (2009).

The Respondent argues that the County Board cannot delegate hearing authority to the OAH because the APA does not apply to the County Board under section 10-203(a)(4) of the State Government Article. That section provides that the APA does not apply to “an officer or unit not part of a principal department of State government” that “operates in only 1 county; and ... is funded wholly or partly from local funds.” The Respondent’s reliance on this language is misplaced because it is not the *County Board* that is delegating the hearing authority to the OAH in this proceeding. Under section 3-701(g), it is the *State Board* that has the authority to remove a member of the County Board after conducting a removal hearing, and it is the *State Board* that is permitted to delegate its contested case hearing authority to the OAH under section 10-205(a) of the State Government Article.

The Respondent also contends that the applicable statute at section 3-701(g) of the Education Article fails to provide that the hearing before the State Board shall be conducted under the contested case provisions of the APA. He argues that in the absence of such express language in the enabling statute, the State Board has no authority to delegate the hearing authority to the OAH. Contrary to the Respondent’s assertion, the APA does not provide that a delegation can occur only if the enabling statute includes express language that an agency hearing may be delegated to the OAH or that it must be held in accordance with the APA. The language on which the Respondent relies, at section 10-203(c) of the State Government Article, to support this contention, applies only to public hearings and not contested case agency hearings. As

addressed above, the hearing called for in section 3-701(g) is a contested case hearing so the requirements set forth in section 10-203(c) do not apply. Moreover, the broad authority to delegate contested case agency hearings to the OAH is set forth at section 10-205 of the APA.<sup>9</sup>

The Respondent argues further that the hearing cannot be delegated to the OAH because the statute provides that the hearing shall be conducted by the State Board. In this case, the State Board has delegated to the OAH the authority to issue only a proposed decision on removal. The authority to issue a final administrative decision in this matter on the issue of removal still rests with the State Board.

For the foregoing reasons, I conclude that the State Board has the legal authority under the APA to delegate the removal hearing provided for in section 3-701(g) of the Education Article to the OAH as a contested case agency hearing.

**B. Actual Delegation.**

The Respondent also contends that the actual delegation from the State Board in this case fails to comply with the statutory requirements for a proper board delegation. The Respondent contends that the State Board's delegation of the hearing authority to the OAH is invalid because "the State Board has never taken any action regarding this proceeding in open session as required by law; and therefore, its delegation could not be proper even if permitted." *Resp. Reply Brief* at 13. The Respondent has not provided any legal authority to support his claim that the State Board's delegation of the contested case hearing authority to the OAH must be taken "in open session as required by law." *Resp. Reply Brief* at 13.

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<sup>9</sup> The County Board notes that the public hearing language set forth in section 10-203(c) was enacted in 1993 to limit the circumstances in which public hearings involving environmental permit matters would result in contested case hearings following the expansion of the contested case procedures in permit cases by the Court of Appeals in *Sugarloaf Citizens Ass'n v. Northeast Maryland Waste Disposal Auth.*, 323 Md. 641 (1991); 78 Md. Op. Att'y Gen. 174, 177 (1993). This further supports the view that the removal hearing in section 3-701(g) is a contested case agency hearing and not a public hearing, and that section 10-203(c) of the APA is inapplicable.

The Respondent also contends that the purported delegation letter from the State Board is inadequate as it only constitutes a transmittal letter from an Assistant Attorney General. The Respondent contends that the delegation of this matter to the OAH is based on a July 13, 2011 letter sent to the OAH from an Assistant Attorney General, purporting to act on behalf of the State Board. That letter states, in pertinent part, as follows:

This case arose on the request of the Howard County Board of Education to have the State Board of Education remove a local board member, Allen R. Dyer, from office for misconduct in office pursuant to § 3-701(g) of the Education Article. Mr. Dyer has asked the State Board for a hearing. We are transferring this matter to OAH for assignment to an administrative law judge for the scheduling of a hearing and the issuance of a proposed decision in the case.

*Resp. Reply Brief*, Resp. Ex. 2. The Respondent also attached to his Reply Brief a September 13, 2011 letter from William Reinhard (Reinhard), Custodian of Records for MSDE, that was sent to the Respondent's counsel in which Reinhard designates the July 13, 2011 letter from the Assistant Attorney General as the delegation document. Reinhard notes in his letter that MSDE counsel was acting on behalf of the State Board and that the State Board has the authority to delegate contested case hearings to the OAH under section 10-205 of the State Government Article. Reinhard's letter was sent in response to counsel's September 9, 2011 letter to the State Board requesting, under the federal Freedom of Information Act (FOIA) and the Maryland Public Information Act (PIA), evidence of the delegation authority. *Resp. Reply Brief*, Resp. Ex. 2. As the Respondent's counsel's letter to the State Board was a PIA request, it was appropriate for the response to be issued by an MSDE Custodian of the Records.

The record also contains a July 6, 2011 letter from James H. DeGraffenreidt, Jr. (DeGraffenreidt), President of the State Board, sent to the Respondent, which was transmitted to the OAH on or about July 14, 2011. The July 6, 2011 DeGraffenreidt letter notified the Respondent that the County Board had requested that the State Board remove him from office on

the grounds of misconduct in office, sent him copies of the charges for removal, advised him that he had the right to request a hearing on the charges, the deadline for making a request, and the address where a hearing request should be sent. The July 6, 2011 letter from DeGraffenreidt also stated, in pertinent part, as follows:

If you request a hearing, the State Board has delegated hearing authority to the Office of Administrative Hearings which shall promptly schedule such a hearing. You may represent yourself or be represented by counsel at the hearing.

The Office of Administrative Hearings will issue a Proposed Decision on Removal to the State Board. You will have an opportunity, if necessary, to file exceptions to the Proposed Decision with the State Board. The State Board will, thereafter, provide you with an opportunity to be heard publicly in oral argument before the State Board in your defense.

Despite the language in the DeGraffenreidt letter of “has delegated,” the record does not contain any earlier delegation from the State Board to the OAH that covers this matter.

Despite certain technical deficiencies in the July 13, 2011 delegation letter from the Assistant Attorney General, that letter together with the other letters addressing delegation that are part of this record, demonstrate a clear intent by the State Board of Education to delegate to the OAH the authority to conduct a contested case agency hearing and issue a proposed decision on the issue of the requested removal of the Respondent from the County Board for alleged misconduct in office under section 3-701(g) of the Education Article. As discussed above, the State Board has the authority to delegate the removal hearing to the OAH under section 10-205 of the APA. Although the July 13, 2011 letter was written by an Assistant Attorney General rather than by an agency head or board president, she is counsel for the MSDE, the letter was written on State Board letterhead, and indicates that it was sent in response to the Respondent’s request to the State Board for a hearing on removal. While the letter states only that the State Board is “transferring” the matter to the OAH, the review of this July 13, 2011 letter, along with the July 6, 2011 DeGraffenreidt letter and the September 13, 2011 Reinhard letter, demonstrate



that the State Board has exercised its statutory authority to delegate this matter to the OAH for a contested case hearing.

The letters also demonstrate that the Respondent received actual notice of the delegation to the OAH, the authority of the OAH to issue a proposed decision, the right of the Respondent, if necessary, to file exceptions with the State Board, and the authority of the State Board to issue a final administrative decision in this case. Under the statute, if the removal is upheld by the State Board, the Respondent also has the right to a *de novo* review of the removal by the Circuit Court for Howard County. Md. Code Ann., Educ. § 3-701(g)(4).

The Respondent has failed to show any prejudice from any technical defects in the State Board's delegation document. The State Board's intent is clear, the Respondent has been afforded actual notice of the delegation, and the APA authorizes the State Board to delegate its hearing authority to the OAH. For the foregoing reasons, I conclude that the State Board has properly delegated the contested case removal hearing requested by the Respondent to the OAH.

## **VII. Notice.**

The Respondent also argues that the County Board has failed to provide him with reasonable notice of the basis for which it seeks his removal from office. He contends that the June 9, 2011 resolution from the County Board is vague and conclusory. He claims further that the subsequent June 24, 2011 transmittal letter from the County Board Chairman to the State Board is still too general and was not authorized by the County Board.

The County Board contends that it has provided the Respondent with reasonable notice of the basis for the charges for removal. It argues that the State Board is not obligated to provide the Respondent with the kind of specific pleadings required in criminal cases or in other civil cases involving issues such as fraud. It contends that in administrative proceedings, actual notice received sufficiently in advance of an administrative hearing is adequate and satisfies due

process. The County Board contends that through the discovery process the Respondent will have the opportunity to obtain additional information regarding the basis for the charges for removal well in advance of the contested case hearing.

The APA addresses the issue of notice at section 10-207 of the State Government Article.

That statute provides, in pertinent part, as follows:

**§ 10-207. Notice of agency action**

(a) In general. – An agency shall give reasonable notice of the agency’s action.

(b) Contents of notice. – The notice shall:

(1) state concisely and simply:

(i) the facts that are asserted; or

(ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;

(2) state the pertinent statutory and regulatory sections under which the agency is taking its action;

(3) state the sanction proposed or the potential penalty, if any, as a result of the agency’s action;

(4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency’s action may have an opportunity to request a hearing, including:

(i) what, if anything, a person must do to receive a hearing; and

(iii) all relevant time requirements; and

(5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient’s failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.

...

Md. Code Ann., State Gov’t § 10-207(a) (2009).

The County Board contends that the notice provisions in section 10-207 of the APA do not apply to it because the agency referenced in that section is the State Board. It argues further that only the County Board has acted and the State Board will not act until after a hearing has concluded and a recommended decision is sent to the State Board. It argues that the County

Board, which is seeking the Respondent's removal, is not bound by the notice provisions in section 10-207 of the APA.

The provisions of section 10-207 of the APA apply to any agency action for which an individual has the right to a contested case hearing under the APA. Section 3-701 of the Education Article affords the Respondent the right to request a hearing before the State Board. The County Board has already argued that the contemplated hearing is a contested case agency hearing under section 10-202 of the APA and that the State Board has the right to delegate the hearing authority to the OAH. The purpose of the APA notice requirement is to afford a person reasonable notice of the charges and potential sanction before the person participates in a contested case hearing under the APA so the participant will have sufficient information to present a meaningful defense to the charges. The Respondent has requested a hearing before the State Board and the State Board has delegated its contested case hearing authority to the OAH under the APA. The notice requirements in section 10-207 of the APA clearly apply to this proceeding.

The State Board has complied with the notice requirements of section 10-207 of the APA. The State Board issued a notice of agency action as required under section 10-207 when it sent the Respondent a letter dated July 6, 2011 from State Board President DeGraffenreidt, which also attached a copy of the County Board's June 9, 2011 resolution and the County Board Chairman's June 24, 2011 letter to the State Board requesting the Respondent's removal from office. The July 6, 2011 DeGraffenreidt letter stated that the County Board resolution and the Chairman's request for removal letter constitute the charges brought by the County Board against him. The letter also notified the Respondent of his right to request a hearing and the time frame for submission of a hearing request, the address where a hearing request must be sent, the statutory authority for the proposed removal and hearing, the sanction of removal for the alleged misconduct, the delegation of the hearing authority to the OAH, the authority of the OAH to

issue a proposed decision, and the right of the Respondent, if necessary, to file exceptions to the State Board to the proposed decision issued by the OAH. Consequently, the July 6, 2011 DeGraffenreidt letter complied with the notice provisions set forth in section 10-207 of the APA.

The Respondent contends that the June 9, 2011 resolution was vague and conclusory, and that the June 24, 2011 request for removal letter was too general and not authorized by the County Board resolution. The County Board resolution set forth a list of categories of alleged violations by the Respondent. The resolution also stated, in part, as follows:

The Board hereby directs its counsel to prepare and its Chairman to execute a request to the Maryland State Board of Education to remove Mr. Dyer from his position as a member of the Board of Education for Howard County for misconduct in office.

*Resp. Reply Brief*, Resp. Ex. 2. The resolution authorized the County Board to send a letter to the State Board requesting the Respondent's removal from office for alleged misconduct in office. I conclude that the June 24, 2011 letter from the County Board Chairman to the State Board was expressly authorized by the resolution. The Respondent claims that the resolution authorized the County Board to send only a transmittal letter requesting removal, but did not authorize the County Board to provide additional information in that letter beyond what was already stated in the resolution. Contrary to the Respondent's assertion, the resolution contains no language limiting the content of the letter requesting removal.

Furthermore, the Respondent has argued that he has not been afforded adequate notice of the basis for the requested removal. However, when the County Board provided him with additional information regarding the basis for the removal action, as set forth in the June 24, 2011 letter, he claims that such additional information was not authorized. The Respondent cannot have it both ways. The Respondent is clearly entitled to adequate notice of the basis for the requested removal so that he can properly defend against the charges at the contested case

hearing. In the notice letter sent to the Respondent, the State Board identified the County Board resolution and the June 24, 2011 request for removal letter as the charges brought by the County Board against him, and attached those documents. The Respondent was entitled to receive the charges well in advance of the hearing to assist in his preparation of a defense. The request for removal letter provides additional information regarding the meaning of the charge of misconduct in office, the alleged basis for the requested removal, the categories of the Respondent's alleged violations, and factual examples of the Respondent's alleged violations. I conclude that the request for removal letter was authorized by the language in the resolution and constitutes the charges against him along with the resolution. Moreover, once the County Board resolution authorized its counsel and Chairman to prepare and execute a request to the State Board for the Respondent's removal, the Education Article and the APA provide that the matter is to be resolved through the process of a contested case agency hearing. There is no statute or other legal authority that requires that all aspects of the administrative litigation be conducted in open session.

The Respondent argues further that the resolution and request for removal letter are still too vague, general, and conclusory to provide meaningful notice so that he can properly defend against the charges at the upcoming hearing. The APA requires at section 10-207(b)(1) that the notice "state concisely and simply the facts asserted; or if the facts cannot be stated in detail when the notice is given, the issues that are involved." The resolution and removal letter provide information regarding the charge of misconduct, general categories of the alleged violations, and factual examples of alleged violations within those categories. Although the charges do not provide the date, time, or place of the alleged violations, they do provide facts that place the Respondent on notice of the actions on which the County Board relies in seeking his removal from that board.

Section 10-207(b)(1) provides that the notice shall state concisely and simply the facts that are asserted or, if the facts cannot be stated in detail when the notice is given, the issues that are involved. The notice the State Board has provided to the Respondent in this case includes both facts and issues. While the County Board has not alleged that the facts could not be stated in detail when the notice was given, both forms of notice are contemplated by the statute. Moreover, this language in the notice statute contemplates that additional information can be provided in the future. As addressed below, the Respondent will have an opportunity to obtain additional information and further detail regarding the charges for removal well in advance of the contested case hearing, not scheduled to commence until May 7, 2012.

The County Board has provided the Respondent with charges that include categories of violations, factual allegations, and issues that form the basis for the requested removal. None of the cases cited by the Respondent regarding due process notice involve administrative proceedings. The cases relied upon by the Respondent fail to address the due process standard as it applies to administrative hearings. In administrative proceedings, actual notice provided sufficiently in advance of an evidentiary hearing is consistent with due process. In *Brown v. Handgun Permit Review Board*, 188 Md. App. 455 (2009), *cert. denied*, 412 Md. 495 (2010), an applicant initially received inaccurate information regarding the reason for denial of his handgun permit renewal application. However, the applicant subsequently received actual notice of the reason for denial four months before an evidentiary hearing. The court determined that “actual notice compensates for a failure to provide notice as required by statute, unless the statute prescribes a sanction for the violation.” *Brown*, 188 Md.App. at 469. Section 10-207 of the APA prescribes no such sanction. The court also found that “actual notice must sufficiently precede the hearing that follows in order for the notice to satisfy due process concerns...” *Id.* Due process requires the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Id.*, at 470. The court held that where

the applicant received actual notice of the basis for the permit denial four months prior to the evidentiary hearing, the applicant was afforded "sufficient notice to provide him with due process" and there was no basis to vacate the administrative decision. *Id.*

In the instant case, the charges for removal have provided the Respondent with notice of the categories of the alleged violations and factual examples of the alleged violations. While the Respondent would benefit from receiving additional detail regarding the actions upon which the County Board relies, I do not find that the notice afforded the Respondent at this stage of the proceedings is so vague as to violate procedural due process standards for administrative hearings. In addition, in accordance with the *Brown* holding for administrative proceedings, actual notice received sufficiently in advance of the contested case hearing that allows the Respondent to meaningfully prepare for the removal hearing satisfies due process standards and affords reasonable notice in administrative proceedings.

The Scheduling Order in this case provides for discovery to begin on October 27, 2011 and continue through December 2, 2011. The Scheduling Order also provides for a briefing schedule and motions hearing regarding any discovery disputes that might arise. The discovery process will afford the Respondent an opportunity to obtain additional information regarding the charges for removal well in advance of the scheduled hearing. The discovery period will end more than five months before the hearing is scheduled to begin on May 7, 2012. The motions hearing is scheduled for January 9, 2012 and discovery disputes will be resolved approximately four months before the scheduled hearing. Even though the discovery process in administrative proceedings is less extensive than that provided for in court, the Respondent will be entitled to seek all relevant documents that are not privileged through the discovery process. COMAR 28.02.01.13A.

For the foregoing reasons, I find that the County Board has provided the Respondent with

reasonable notice of the basis for the charges for removal at this stage of the proceedings.

**VIII. Conclusion.**

For the foregoing reasons, the Respondent's Motion to Dismiss the charges for removal filed against him is denied in its entirety. The proceedings in this matter shall proceed as scheduled in the Prehearing Conference Report and Scheduling Order issued on September 12, 2011.

**CONCLUSIONS OF LAW**

Based upon the foregoing discussion, I conclude, as a matter of law, that section 3-701 of the Educational Article is not unconstitutional, that the Student member was qualified to vote on the resolution on June 9, 2011, that the State Board of Education has the authority to delegate a contested case hearing in this matter to the OAH and did effectively delegate that authority, and that the Respondent has been afforded reasonable and adequate notice of the basis for the requested removal consistent with due process at this stage of the proceedings. Accordingly, the Respondent's Motion to Dismiss the charges for removal is denied in its entirety. COMAR 28.02.01.12C; Md. Code Ann., Educ. § 3-701 (2008); Md. Code Ann., State Gov't §§ 10-202, 10-205, 10-207 (2009).

**PROPOSED ORDER**

**I PROPOSE** that the Motion to Dismiss filed by the Respondent in this matter is **DENIED** in its entirety. This matter shall proceed in accordance with the Prehearing Conference Report and Scheduling Order issued on September 12, 2011.

October 26, 2011  
Date Decision Mailed

\_\_\_\_\_  
Douglas E. Koteen  
Administrative Law Judge

DEK/ch  
# 126790



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