

IN THE MATTER OF
REQUEST FOR REMOVAL
OF LOCAL BOARD
MEMBER KAREN
HARSHMAN

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION
Opinion No. 17-17

OPINION

INTRODUCTION

The Board of Education of Washington County (local board) requested the removal of board member Karen Harshman from her position on the board on the grounds of misconduct in office and willful neglect of duty. The State Board of Education concluded that the charges were factually and legally sufficient to proceed and referred the matter to the Office of Administrative Hearings (OAH) for findings of fact, conclusions of law, and a proposed decision. Before the Administrative Law Judge, the local board filed a Motion for Summary Decision, arguing that there were no material facts in dispute and that, as a matter of law, Ms. Harshman should be removed from office.

On February 16, 2017, the ALJ issued a proposed decision recommending that the local board's request be granted and that Ms. Harshman should be removed from office. Ms. Harshman filed exceptions to the ALJ's proposed decision and the local board responded. Oral argument was held before the State Board at its April 25, 2017 meeting.

FACTUAL BACKGROUND¹

Karen Harshman joined the local board in November 2010 and voters re-elected her in 2014. Her current term on the board expires in December 2018. Prior to joining the board, Ms. Harshman served as a teacher in Washington County Public Schools (WCPS) for approximately 30 years, retiring in June 2010. (Proposed Decision, at 4).

On October 17, 2016, at 4:14 p.m., Ms. Harshman made the following post on her personal Facebook page:

OMG, Dr. Phil has a story about a teacher having sexual relations with a student. She lost her job and had to register as a sex offender. Washington County seems to look the other way or transfer the teacher to another school—hardly a way of protecting our students from such predators. They should be barred from entering our schools or having any contact with school activities.

¹ This factual background is drawn from the factual findings made by the ALJ and supplemented, as appropriate, with the record created by the parties. We shall address Ms. Harshman's exceptions to these facts later in this opinion.

Several people left comments on Ms. Harshman's post and she responded to some of those comments. Those conversations are as follows:

Julie Beadle Hicks: Washington county is still ignoring the problem?!

Ms. Harshman: Julie, some are still teaching or working on the BOE [board of education].

Julie Beadle Hicks: That is crazy. We all knew who they were. We joked about it when we were in school. Now I would do whatever was needed to make sure they landed in jail.

Ms. Harshman: Julie Beadle Hicks, that is what should have happened to them. I cannot imagine how awful that would be for a student. Teachers are in a position of trust and leadership.

* * *

Cindy Schlotterbeck Spessert: What?? Are you joking?? They are still working?

Ms. Harshman: Cindy Schlotterbeck Spessert you have no idea!

Cindy Schlotterbeck Spessert: Scary.

(Motion for Summary Decision, Ex. 3-A).

This Facebook post garnered considerable attention in Washington County. Members of the local board and WCPS school officials were "inundated" with questions from the community. At a local board meeting, held the next day on October 18, 2016, Board Vice President Justin Hartings spoke publicly about the post and read it in full during the meeting. He explained that, over the past 24 hours, multiple people had sent him messages asking if the post was true and if sexual offenders were teaching at their child's school. He insisted that Ms. Harshman either report her suspicions to the proper authorities, as required by mandatory reporting laws, or apologize to the school system and community for frightening the public. Vice President Hartings said he was not aware of any information to back up Ms. Harshman's claims. (Proposed Decision, at 6-7).

During the meeting and afterwards, Superintendent Clayton Wilcox approached Ms. Harshman and repeatedly asked for the names of the teachers alluded to in her post. Ms. Harshman declined to reveal the names. In an affidavit filed as part of this case, she described Superintendent Wilcox as "verbally abusive" and that he "yell[ed] loudly 'I want those names.'" Superintendent Wilcox told her he would call the police if she did not reveal the names. Ms. Harshman did not provide the names. She explained in her affidavit that "[Superintendent] Wilcox had absolutely no legal or policy basis to make any such request or demand." Ms. Harshman described leaving the meeting "in tears, having been bullied, intimidated, and threatened." (Proposed Decision, at 7-8; Wilcox Affidavit; Harshman Affidavit, at 2).

Reporter Julie E. Greene, of the *Herald-Mail* newspaper,² offered the following account of events in an article published the next day:

After the board meeting, Harshman told *Herald-Mail Media* that some of the people she was alleging behaved inappropriately had retired, but she wasn't sure if they all had retired. Wilcox then approached Harshman and asked her for a list of names, but she replied she wanted a list of employees instead. She refused his multiple requests for the names of the teachers.

Regarding the active teacher who allegedly had inappropriate relations with a student, Harshman told *Herald-Mail Media* on [October 18] that the man left his wife and married a student. Asked if she was a student at the time they got married, Harshman said she might have been a former student at that point but they had been involved when she was a student at the man's school.

(Motion, Ex. 6).

Around 9:30 p.m. that evening, Superintendent Wilcox contacted the Washington County Sheriff's Office and requested that they investigate the allegations. A deputy arrived at Ms. Harshman's home soon afterwards. According to Ms. Harshman, the deputy "was confused and somewhat embarrassed to be there. He indicated he was not sure of his role, and found the whole situation bizarre." Ms. Harshman provided the deputy with the name of one individual, Jacqueline Fischer, a fellow member of the local board. At approximately 10:30 p.m., the sheriff's office called Superintendent Wilcox and informed him that Ms. Harshman had provided Ms. Fischer's name, but she declined to identify other individuals. The sheriff's office determined that Ms. Fischer was "not deemed a threat to young people." (Proposed Decision, at 7-8).

At some point that evening, Ms. Harshman provided the *Herald-Mail* with the names of two other individuals besides Ms. Fischer that she believed had inappropriate sexual relations with students. She did not provide those names to the deputy when he visited her home. Superintendent Wilcox learned about these names after Ms. Greene, the reporter, contacted him to inquire whether the individuals were still employed by the school system. After learning of the names, Superintendent Wilcox provided the names to the Washington County Department of Social Services, which began an investigation. He temporarily suspended one individual, a retired male teacher who may have still been teaching as a substitute, pending an investigation. Ms. Harshman provided a fourth and final name to the *Herald-Mail* sometime later that week. (Motion, Ex. 2, 9).

On October 19, the *Herald-Mail* published an article titled "Washington County BOE

² The *Herald-Mail* is the leading newspaper in the Hagerstown area with a circulation of 27,000 daily, 32,000 on Sunday, and more than 4 million page views monthly. (Proposed Decision, at 8). An online version of the newspaper can be found at www.heraldmallmedia.com and many of the articles included in the record are taken from that website.

member alleges active teacher had inappropriate relations with student.” In the article, a WCPS spokesman confirmed that one of the three employees named by Ms. Harshman was an active teacher and that an investigation was underway. In a later interview, Ms. Harshman stated that she became aware of allegations of misconduct in the 1980s but never reported the incidents to authorities. (Proposed Decision, at 9-10; Motion, Ex. 6).

That same day, October 19, Superintendent Wilcox issued the following letter to the public:

As I have said repeatedly during my tenure as your Superintendent – the safety and security of your children is our highest priority. We would never knowingly place them in a compromised position or within the reach of a person with questionable character. We take each allegation of potential harm to any student seriously and act with extreme prejudice with regard to adults who pose a threat to your children.

With that said, Tuesday evening at our regularly scheduled school board meeting, one member made a public comment about the social media posts of another. The comments dealt with claims of inappropriate contact between teachers and students within the school district.

No names were presented during or after the meeting by any member of the Board to a member of the administrative team, despite repeated requests to the member making the allegations. In order to be certain our students are safe, I asked the Sheriff’s office to contact the member who made the allegations to attempt to obtain the names of those alleged to have had inappropriate contact with students. The Sheriff’s office reported back to me that they had been given the name of a retired classroom teacher, who also serves on the elected Board of Education. This retired teacher was not deemed a threat to young people by the investigating officer.

I was later informed that the alleging member had also provided two additional names to a *Herald-Mail* reporter. The *Herald-Mail* immediately asked us to confirm whether or not the names provided to them were employees of the district. This morning we confirmed that one of the names provided is that of an active teacher in the system and the other name is that of a retired teacher who is on our substitute registry. We have spoken to each of those named and are following our normal protocols for allegations of this type, which include reviewing background materials thoroughly and reporting the allegations to the Department of Social Services (DSS).

(Motion, Ex. 5).

On October 20, 2016, Ms. Fischer, the board member named by Ms. Harshman as an alleged child abuser, spoke to the *Herald-Mail* about her past. In 1968, when Ms. Fischer was 22, she began dating a 16-year-old student at the school where she taught, although he was not one of

her students and she “never had any authority over him.” Ms. Fischer said their dating involved going “to a cousin’s house or one of their parents’ homes and another adult was present.” The next year, the two married with the blessing of both families. At the time, Ms. Fischer was 23 and her future husband was a 17-year-old high school senior. The couple has now been married for 47 years. After the marriage, Ms. Fischer was transferred to another high school but never received an explanation for the transfer. According to school officials, there was no policy in place at the time that prohibited Ms. Fischer’s actions.³ (Response to Motion, Ex. 2).

On October 21, 2016, the head of the Washington County Teachers Association told the *Herald-Mail* he was “100 percent confident” that students in the school system were safe. He described “allegations of misconduct and cover-ups” as being “unfounded.” WCPS officials told the *Herald-Mail* that they had cleared Ms. Fischer and others named by Ms. Harshman from wrongdoing or constituting a threat to students. Around this same time, the Department of Social Services informed WCPS that there was no basis to pursue an investigation of child sexual abuse against any of the individuals named by Ms. Harshman. (Proposed Decision, at 10; Motion, Ex. 2, 8).

The *Herald-Mail* described the accusations as creating “a stir on social media” with more than 100 comments left on stories online. Some people commented that Ms. Harshman’s allegations were inappropriate or, if true, should have been reported sooner. There were also some calls for her to resign. (Proposed Decision, at 10; Motion, Ex. 2, 8). On October 25, 2016, the *Herald-Mail* ran an editorial entitled “Harshman unworthy of public trust.” (Proposed Decision, at 12; Motion, Ex. 12).

On October 26, 2016, Vice President Hartings circulated a six-page letter among the local board in which he indicated his intention to adopt a resolution to seek Ms. Harshman’s removal from office. Vice President Hartings stated he planned to discuss the matter at the board’s November 1 meeting. He recounted the allegations made by Ms. Harshman and observed that parents “immediately began to raise questions and concerns about the possible existence of child sex offenders in our schools.” Vice President Hartings stated that WCPS, the sheriff’s office, and the Department of Social Services, had been unable to find evidence to support her allegations. Vice President Hartings concluded Ms. Harshman’s allegations were untrue and recklessly made, particularly as she falsely accused staff of covering up abuse. He expressed his belief that Ms. Harshman had a statutory duty to inform DSS if she was aware of potential abuse and that failing to do so was an additional ground for removal. Specifically, Vice President Hartings referred to Board Policy JLF which requires all school system employees “to report any suspected child abuse or child neglect to the local department of social services or the appropriate law enforcement agency as soon as possible.” He also viewed her actions as violating a provision in the superintendent’s contract in which individual board members agree to promptly refer criticism and complaints regarding the school system to the superintendent and alert the board and superintendent if a board member believes the superintendent is not discharging his responsibilities. (Proposed Decision, at 12-15; Motion, Ex. 2).

On October 28, 2016, Ms. Harshman issued a statement to the *Herald-Mail* in response to Vice President Harting’s letter:

³ The *Herald-Mail* article also discussed the state of the law at the time and concluded that Ms. Fischer did not violate any then-existing criminal laws. (Response to Motion, Ex. 2).

As a Hagerstown native and a product of (Washington County Public Schools), I have proudly served the students and parents of my county as an educator for over 30 years and am honored to have been overwhelmingly elected to the BOE for 8 years. I deeply regret that Superintendent Wilcox and board member Hartings have chosen to score political points two weeks prior to an election^[4] by using a genuine point of concern that I raised regarding people in positions of authority and their interactions with students in our schools. I plan to get up every day and work hard on behalf of our students and the taxpayers I promised to serve. Our county would be best served if Wilcox and Hartings did the same.

(Motion, Ex. 11).

On October 30, 2016, the *Herald-Mail* reported that the school system spent 50 hours during an 18-hour period investigating Ms. Harshman's allegations.⁵ Five administrators reviewed personnel information for four individuals, including Ms. Fischer, and found nothing to substantiate Ms. Harshman's allegations about a danger to students. Dr. Wilcox stated that the issue had "been a shadow cast over us for the last couple weeks." He described people approaching him in public to discuss the allegations and viewed it as a distraction for the school system. (Motion, Ex. 9).

On November 1, 2016, the local board met to discuss the proposed resolution requesting Ms. Harshman's removal from office. During public comment, two residents spoke about the controversy and one urged Ms. Harshman to resign from the board. Ms. Harshman, responding to the public comment, stated "My comment is just that I have not lied. I do not apologize for the truth and it is what it is." (Motion, Ex. 13). Prior to the vote, Ms. Harshman requested to speak with board counsel to discuss the potential charges, but was denied the opportunity. She did not have legal counsel of her own at the time. (Harshman affidavit).

During the November 1 meeting, Ms. Fischer spoke directly to two of her fellow board members whom she claimed were friends of Ms. Harshman's. She urged them to vote in favor of the resolution and told them their votes would be scrutinized closely. (Recording of Nov. 1, 2016 Board Meeting; Motion, Ex. 15).

Ms. Harshman made the following statement in response to Ms. Fischer's comments:

I will welcome the State's involvement where there will be no chance of the controlling majority making a decision based on political desires. I have maintained that I am no politician – I am a statesman. As James Clarke defined it, a politician is concerned with the next election. A statesman is concerned with

⁴ Although some of the board seats were up for election in 2016, Ms. Harshman and Ms. Fischer were not up for re-election. Vice President Hartings did not run for re-election for his seat.

⁵ Vice President Hartings's letter indicated that, overall, the school system had spent hundreds of hours investigating and responding to the claims. (Motion, Ex. 2; 14).

the next generation. I am a statesman. So we don't need to take the vote. I'm willing to let the State determine it. Certainly not the majority of four.

(Proposed Decision, at 13; Motion, Ex. 15; Recording of Nov. 1, 2016 Board Meeting).

Ms. Harshman had planned to read a statement in her defense and vote against the resolution, but later changed her mind. According to her affidavit, Ms. Harshman "knew that there would be enough votes to refer the charges to the State Board" and she "welcomed the opportunity to be heard by an objective tribunal at the State level." (Harshman Affidavit).

The resolution carried by a vote of 7 to 0. The resolution recommended that the State Board remove Ms. Harshman for misconduct in office and willful neglect of duty; adopted Vice President Hartings's October 26 letter as its official position; authorized board counsel and outside counsel to prepare a statement of charges based on the October 26 letter; and authorized counsel to pursue the removal through all stages of the process. (Proposed Decision, at 13-16; Motion, Ex. 1). In her affidavit, Ms. Harshman stated that "the errors and omissions contained" in the charging statement "were so pervasive and profound that there was no real point in attempting to refute them in such a hostile and partisan environment." She maintained that her vote was not meant to be an agreement to the truth of the charges against her, but rather her desire to have the State Board independently decide the matter. (Harshman Affidavit).

On November 4, 2016, counsel for the local board forwarded the request and statement of charges to the State Board. On December 5, 2016, the State Board concluded that the charges were legally and factually sufficient to proceed. Ms. Harshman requested a hearing and the State Board referred the matter to the Office of Administrative Hearings for a hearing and proposed decision. (Proposed Decision, at 1).

On January 23, 2017, the local board filed a Motion for Summary Decision, arguing that there were no genuine disputes of material fact and that the board was entitled to a decision in its favor, in this case Ms. Harshman's removal, as a matter of law. On February 10, 2017, Ms. Harshman filed an opposition to the motion. That same day, the parties presented oral argument on the motion to Administrative Law Judge (ALJ) Michael J. Wallace. (Proposed Decision, at 2).

On February 16, 2017, ALJ Wallace issued his proposed decision recommending that the State Board grant the motion for summary decision and remove Ms. Harshman from the local board based on misconduct in office and willful neglect of duty. Ms. Harshman filed exceptions to the decision via email to OAH on March 6, 2017 and to the State Board on March 8, 2017. The State Board received a copy of the exceptions by mail on March 10, 2017. The local board filed a motion to strike the exceptions on March 16, 2017 and a Memorandum in Opposition to the Exceptions on March 21, 2017. Ms. Harshman responded to the Motion to Strike the Exceptions.

Oral argument was held before the State Board at its April 25, 2017 meeting.

STANDARD OF REVIEW

In the Proposed Decision, the ALJ described an incorrect standard of review for the removal of a local board member. The ALJ considered whether the local board's request for removal was "unconstitutional," exceeded the local board's statutory powers, misconstrued the law, or was an abuse of discretionary power. (Proposed Decision, at 38). The State Board reviews removal cases independent of the local board's request for removal and we give no deference to the local board's decision to request removal. We exercise our independent judgment to determine whether Ms. Harshman should be removed from office. Accordingly, we adopt the findings of fact from the ALJ, as supplemented by this decision, but replace the remainder of the proposed decision with the following legal analysis. In doing so, we shall also address Ms. Harshman's exceptions to the proposed decision.⁶

LEGAL ANALYSIS

The ALJ decided this case on a Motion for Summary Decision. Before we can reach that question, we must address several other legal issues presented by the parties.

Motion to Strike the Appellant's Exceptions

On March 16, 2017, the local board filed a motion to strike Ms. Harshman's exceptions as untimely or, in the alternative, to dismiss her appeal from the local board's statement of charges. The ALJ issued his proposed decision on February 16, 2017. On the last page of the proposed decision, the ALJ informed the parties of their right to file exceptions to the decision. The decision states that a party "may file exceptions with the State Board within fifteen (15) days of receipt of the findings."

Ms. Harshman's counsel received a copy of the decision via email from the local board counsel late in the day on February 17, 2017. Ms. Harshman's counsel received an official copy of the decision from OAH in the mail on February 21, 2017. The parties disagree on whether the 15 days should be calculated from the date on which Ms. Harshman received the email, or whether it should be calculated from when the mailed copy of the decision from OAH arrived.

Ms. Harshman's counsel emailed a copy of her exceptions on March 6, 2017 to OAH and local board counsel and delivered a copy via email to the State Board on March 8, 2017. The State Board received a hard copy of the exceptions by mail on March 10. Ms. Harshman's attorneys have indicated that computer problems were to blame for the State Board not receiving the exceptions prior to March 8. (Motion to Strike, Exs. 1-5, 8; Response to Motion.)

The parties disagree on when Ms. Harshman had "receipt of the findings" and whether her exceptions could be emailed to the State Board. Our appeal regulations are silent on both of these points. With that in mind, we shall consider the date on which Ms. Harshman received the official copy of the decision – February 21 – as being the date of "receipt." Based on that date, the exceptions were due on March 8. The State Board received the exceptions via email on that

⁶ Ms. Harshman's exceptions are divided into three categories: (1) exceptions to facts and legal findings; (2) procedural exceptions to evidentiary basis of facts; and (3) exceptions to legal standards application. The exceptions include 104 numbered paragraphs, not all of which constitute separate exceptions. We have reordered the exceptions in our discussion for the sake of clarity.

date. Accordingly, we shall accept the exceptions and consider them in full before rendering our decision.

Motion to Consider Additional Evidence

As part of her exceptions, Ms. Harshman requests that the State Board consider an additional piece of evidence that was not submitted to the ALJ. (Exceptions, Ex. D). The evidence is a February 22, 2017 newspaper article from the *Herald-Mail*, entitled “Ex-substitute accused of exposing himself to 4 girls in Hagerstown makes court appearance.” The article indicates that a former WCPS substitute teacher was arrested in late 2016 on charges including sex abuse of a minor after being accused of exposing himself to elementary-school-aged girls on two occasions at his home and attempting to put his hands down a girl’s pants. He was not employed as a substitute at the time of his arrest. (Exceptions, Ex. D).

Ms. Harshman argues that, despite claims from school officials that WCPS was safe from sexual predators, “a sexual predator *was* found teaching [in] Washington County schools within the last months” (emphasis in original). It appears Ms. Harshman seeks to use the newspaper article as evidence that she was correct regarding her comments about sexual predators in Washington County schools.

In our view, the newspaper article is not relevant to our decision. The substitute teacher is accused of committing acts that took place after Ms. Harshman made her Facebook posts. She does not claim that she was aware of this particular substitute teacher prior to his arrest or that he was among the individuals that she suspected of child abuse. Accordingly, we decline to consider this evidence as part of our decision.

Admission of Documentary Evidence (Exceptions 54-59)

Ms. Harshman argues that the ALJ’s reliance, in part, on newspaper articles submitted by the local board was improper and legally insufficient to support the factual findings. Ms. Harshman argues that newspaper articles are “inherently unreliable” because newspapers “are not scrupulous in differentiating between fact, opinion, speculation, and/or conjecture, and they do not hold their sources to any such standard.” Ms. Harshman also objects to citing to “an admitted editorial opinion as factual proposition.” All of the articles were taken from the *Herald-Mail*.

Courts generally consider newspaper articles to be inadmissible hearsay if they are introduced to prove the truth of factual matters contained within them. *See U.S. v. ReBrook*, 58 F.3d 961, 967 (4th Cir. 1995). Hearsay evidence is, however, admissible as part of administrative proceedings. COMAR 28.02.01.21C. In our view, the newspaper articles are relevant primarily to show the effect Ms. Harshman’s actions had on the community, not for the truth of the statements contained within them. Additionally, Ms. Harshman’s own statements to the newspaper are admissible as an exception to the hearsay rule. *See Md. Rule 5-803(a)*. Finally, Ms. Harshman fails to point to any specific fact contained within the newspaper articles as being incorrect or in dispute to render them unreliable. For all of these reasons, it was not improper for the ALJ to admit newspaper articles into evidence and we will use them in our legal

analysis for the purposes stated above.

Admission of Superintendent Wilcox's Affidavit (Exceptions 60-70)

Ms. Harshman objects to the ALJ's use of statements in Superintendent Wilcox's affidavit in the findings of fact, arguing that the affidavit was insufficient as a matter of law and contains no assertions that could be submitted into evidence through his testimony. Ms. Harshman claims that Superintendent Wilcox "has no idea" what she posted on Facebook or said in statements to the media and that the proposed decision should be rejected because of defects in the affidavit.

COMAR 28.02.01.12D(3) requires an affidavit to be "made upon personal knowledge" and "set forth the facts that would be admissible in evidence" and "show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Superintendent Wilcox's affidavit essentially incorporated the local board's statement of charges and attested that they were "true and correct to the best of my personal knowledge, information, and belief." Many of those charges, in turn, were based on Superintendent Wilcox's own actions in investigating Ms. Harshman's allegations.

We agree with the ALJ that the affidavit was legally sufficient. (Proposed Decision, at 22-23). Superintendent Wilcox was in a position to have personal knowledge of the charges, he attested that he did have personal knowledge, and he was competent to testify to those matters. Superintendent Wilcox was not required to have personally watched Ms. Harshman type her comments on Facebook in order to be aware that she had done so. Nor was he required to have been present when a reporter interviewed Ms. Harshman in order to be aware of her statements as reported in the media.

Motion for Summary Decision

A Motion for Summary Decision may be filed in a case heard before the Office of Administrative Hearings if "there is no genuine dispute as to any material fact" and "the party is entitled to judgment as a matter of law." COMAR 28.02.01.12D. A motion must be supported by affidavit. *Id.* Although referred to as a Motion for Summary Affirmance in the State Board appeal regulations, the standard applied is the same. COMAR 13A.0.105.03D; *see Matthews v. New Bd. of Sch. Comm'rs*, MSBE Op. No. 02-04 (2002).

In deciding motions for summary judgment, courts consider "whether a genuine dispute of material fact exists and then whether the movant is entitled to summary judgment as a matter of law." *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 71 (2001) (internal citation and quote marks omitted). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Id.* at 72 (citing *King v. Bankerd*, 303 Md. 98, 111 (1985)). The court "must view the facts, including all inferences, in the light most favorable to the opposing party." *Id.* at 72 (citing *Beard v. American Agency*, 314 Md. 235, 246 (1988)). Once "the moving party has provided the court with sufficient grounds for summary judgment, the nonmoving party must produce sufficient evidence to the trial court that a genuine dispute to a material fact exists." *Id.* at 73. On a Motion for Summary Decision, the State Board does not decide disputed issues of

fact or credibility, but must only determine whether or not those issues exist. *See Eng'g Mgt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 226 (2003).

The ALJ recommended that the State Board grant the local board's Motion for Summary Decision because he found there were no material facts in dispute and that the local board was entitled to judgment as a matter of law, i.e. that the facts supported Ms. Harshman's removal from the local board based on misconduct in office and willful neglect of duty. Ms. Harshman's challenge to the proposed decision can be divided into two categories: (1) her challenge to the ALJ's conclusion that there were no material facts in dispute; and (2) her challenge to the ALJ's conclusion that she committed misconduct in office and willful neglect of duty.

We first determine whether there are material facts in dispute. If there are, this matter must return to OAH for additional fact-finding before we can consider a proposed decision on the merits.

(1) Whether there is a material fact in dispute

In order to resolve this case through a Motion for Summary Decision, the State Board need not find that there are no disputed facts. Rather, it has to determine whether there are *material* facts in dispute, i.e. facts that will somehow affect the outcome of the case. *Grimes*, 366 Md. at 72. It is up to Ms. Harshman, as the nonmoving party, to "produce sufficient evidence . . . that a genuine dispute to a material fact exists." *Id.* at 73.

Ms. Harshman argues that the format of the proposed decision, particularly the lack of "competent evidence" and missing citations to the record made it "impossible" for her "to succinctly take exception" to the ALJ's findings of fact. (Exceptions 45-52). She "therefore takes exception with the entire Proposed Decision," arguing that "Summary Decision requires proof that all facts provided . . . are both true, and undisputed, as a matter of law." (Exceptions at 13). In our view, Ms. Harshman's blanket exception to the entire decision is the type of "[b]ald, unsupported statements or conclusions of law," which is insufficient to demonstrate that a dispute of material fact exists. *Lightolier v. Hoon*, 387 Md. 539, 552 (2005) (citing *Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank*, 297 Md. 691, 712 (1983)).

Rather than examine each and every fact as found by the ALJ, we shall instead focus on the few facts that Ms. Harshman asserts are disputes.

A. Ms. Harshman's knowledge of events at the time she made her Facebook posts (Exceptions 5-10)

Ms. Harshman appears to argue that there is a dispute of fact regarding the extent of her knowledge of the underlying allegations referenced in her Facebook post. In an affidavit filed as part of this case, Ms. Harshman explains that all of the incidents she referenced on Facebook happened "long in the past." All of the incidents she referred to had already been, to her knowledge, referred to authorities by others. Ms. Harshman had no firsthand knowledge of any of the incidents and only learned of them third hand, never from a victim. She emphasizes that her posts did not mention "any individuals, schools or even time-frames regarding the subject matter of the posts."

From our review of the record, there does not appear to be a dispute of material fact concerning Ms. Harshman’s knowledge of events. There is no dispute concerning what Ms. Harshman posted on Facebook, her comments made in public, and her statements to the media. Nor does the local board appear to challenge the statements in her affidavit about her knowledge of the underlying accusations. In our view, no material dispute of fact exists.

B. Mandatory reporting of suspected child abuse (Exceptions 11-13, 19-20)

The ALJ found, as a fact, that Ms. Harshman’s actions were “contrary to Maryland’s mandatory reporting laws and County Board Policy JLF.” Ms. Harshman disputes this conclusion. There is no dispute that Ms. Harshman never reported her allegations to authorities. But the issue of whether, in failing to report, Ms. Harshman violated mandatory reporting laws is a legal question, not a factual one. We shall address this issue as a legal matter elsewhere in this opinion.

C. Whether Ms. Harshman’s allegations of sexual abuse were true (Exceptions 15-18, 24-29, 84)

The ALJ found that none of Ms. Harshman’s allegations of sexual abuse “were found to have any merit by the Washington County Sheriff’s Department (Sheriff) or the Washington County Department of Social Services.” (Proposed Decision, at 6). The ALJ also found that the Department of Social Services “conducted an investigation that revealed no evidence or substantiation of [Ms. Harshman’s] claims.” (Proposed Decision, at 8). The ALJ further stated that “investigations by the Sheriff’s Department and the local department failed to establish that any of [Ms. Harshman’s] accusations had merit.” (Proposed Decision, at 11). From our review of the record, the actions of the Sheriff’s Department and Department of Social Services are not in dispute. Ms. Harshman may disagree with their decision not to pursue further action, but the record is clear that neither the Sheriff’s Department or the Department of Social Services took action based on Ms. Harshman’s accusations.

Ms. Harshman maintains that she presented “copious evidence” of the allegations about sexual predators in WCPS schools. She adds that she “has shown, via evidence, that all of the things she alleged have occurred.” Contrary to Ms. Harshman’s assertions, we find very little evidence in the record that supports her accusations, let alone “copious” evidence. The only evidence in the record supporting Ms. Harshman’s accusations concerns statements made by Ms. Fischer to the *Herald-Mail* about her relationship with a student who became her husband. The parties do not dispute Ms. Fischer’s background. Ms. Harshman has otherwise failed to direct us to any evidence in the record that would create a dispute of material fact about the truth of her remaining accusations.

D. Ms. Harshman’s reasons for voting in favor of the resolution requesting her removal (Exceptions 30-41, 92-101).

The local board has argued throughout these proceedings that Ms. Harshman’s decision to vote in favor of the resolution recommending her removal is a tacit admission to the charges. Ms. Harshman maintains that her motivation in voting for the resolution – as explained during the board meeting – was to have the State Board, as a neutral body, consider the matter. Ms. Harshman argues that the ALJ held her vote against her in his proposed decision. She explains that she was without the benefit of legal counsel and may have acted differently had she had the opportunity to be advised. She points to this as a dispute of material fact concerning her “knowledge, intent, or motive” in voting for the resolution.

The ALJ acknowledged that Ms. Harshman’s motivation and purpose in voting for the resolution was one of the few factual disputes in the record. He found that Ms. Harshman’s explanation of her decision to vote in favor of the resolution made “little sense.” (Proposed Decision, at 25). But the ALJ ultimately concluded that it was irrelevant what Ms. Harshman’s motivation was in voting for the resolution.

This issue is immaterial to our final decision. Ms. Harshman clearly explained her rationale at the time she cast her vote and has made clear throughout these proceedings that she does not agree with the factual basis of the resolution. We shall not hold that vote against her in considering whether her earlier actions constituted misconduct. As a result, any factual disputes concerning why she voted for the resolution are not material and therefore do not preclude summary decision.⁷

For all of these reasons, we adopt the ALJ’s conclusion that there are no genuine disputes of material fact, as modified by the reasoning included in this opinion.

(2) Whether Ms. Harshman Committed Misconduct in Office or Willful Neglect of Duty

Having decided that there are no material facts in dispute, we can turn to whether the findings of fact support charges of misconduct in office and willful neglect of duty. In doing so, we use our independent judgment to determine whether Ms. Harshman should be removed from office and our legal analysis here replaces that contained in the ALJ’s Proposed Decision.

Misconduct in Office⁸

In a previous removal case, the State Board defined misconduct as including “unprofessional acts, even though they are not inherently wrongful, as well as transgression of established rules, forbidden acts, dereliction from duty, and improper behavior, among other definitions.” *See Dyer v. Howard County Bd. of Educ.*, MSBE Op. No. 13-30 (2013) (citing *Resetar v. State Bd. of Educ.*, 284 Md. 537, 560-61 (1979)). Misconduct includes malfeasance,

⁷ Similarly, Ms. Harshman’s argument that Ms. Fisher should not have participated in the investigation of the charges or voted on them is not relevant to our decision. (Exceptions, 100-101). Even had Ms. Fisher abstained from the vote or not encouraged other members to vote in favor of it, Ms. Harshman voted in favor of the resolution and encouraged her fellow board members to do the same.

⁸ The parties do not appear to dispute that Ms. Harshman’s actions took place “in office.” We agree that her actions occurred as part of her official duties and in the context of her role as a board member.

doing an act that is legally wrongful in itself, and misfeasance, doing an otherwise lawful act in a wrongful manner. *Id.* Such conduct need not be criminal. *Id.* “[S]erious misconduct that falls short of the commission of a crime but that relates to an official’s duties may be grounds for removal under a civil removal statute.” *Id.* (quoting 82 Op. Atty. Gen 117, 120 (1997)).

We have reviewed the findings of fact and the record created by the parties. Under the Summary Decision standard, we view this evidence in the light most favorable to Ms. Harshman. We conclude that Ms. Harshman committed misconduct in office in the following ways:

1) Posting serious accusations of wrongdoing on Facebook without evidentiary support

This entire incident began with Ms. Harshman’s Facebook post, in which she wrote:

- “Washington County seems to look the other way or transfer the teacher to another school—hardly a way of protecting our students from such predators. They should be barred from entering our schools or having any contact with school activities.”
- “Some are still teaching or working on the BOE.”
- Responding to the question, “They are still working?” with “You have no idea!”

In her affidavit, Ms. Harshman maintains that she never mentioned “any individuals, schools, or even time-frames regarding the subject matter of the posts.” She clarified that she never learned about abuse reports directly from a victim, that her information was third-hand, that the events occurred long ago, the students are now all adults, she learned of all incidents long after the fact, and she believed the accusations had already been reported to the proper authorities. Ms. Harshman points to the example of her fellow board member, Ms. Fischer, as proving that her accusations were true.

Ms. Harshman’s affidavit and her Facebook post do not square with one another. Although the affidavit emphasizes that Ms. Harshman’s information concerned past events, her Facebook post was written in the present tense. Ms. Harshman used the phrase “*seems to look the other way or transfer the teacher to another school*” (emphasis added). The active voice does not suggest that, years ago, Washington County looked the other way. Rather, it indicates that Ms. Harshman believed Washington County was *currently* ignoring the problem of child sex offenders and transferring teachers to cover-up that problem. Ms. Harshman stated that “*some are still teaching or working on the BOE.*” (emphasis added). Finally, she emphasized that her allegations involved current teachers and recent events by answering the question, “They are still working?” with the response “You have no idea!”

We find no support in the record for Ms. Harshman’s claim that the school system was overlooking and actively covering up child sexual abuse or that there were many child sexual offenders teaching in Washington County.

2) Failing to report suspected child abuse to the proper authorities

Md. Educ. §6-202, concerning the suspension or dismissal of teachers, principals, and other professional personnel, defines misconduct in office, in part, as “knowingly failing to report suspected child abuse in violation of Sec 5-704 of the Family Law Article.”

The Md. Code, Family Law Article §5-704 states the following:

(a) Notwithstanding any other provision of law, including any law on privileged communications, each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State:

(1) who has reason to believe that a child has been subjected to abuse or neglect, shall notify the local department or the appropriate law enforcement agency; and

(2) if acting as a staff member of a hospital, public health agency, child care institution, juvenile detention center, school, or similar institution, shall immediately notify and give all information required by this section to the head of the institution or the designee of the head.

Similarly, Washington County Local Board Policy JLF requires that “[a]ll school system employees are required to report any suspected child abuse or child neglect to the local department of social services or the appropriate law enforcement agency as soon as possible, but without compromising student safety. Supervisors will provide [the] employee with the information necessary to report an event of suspected child abuse or child neglect.” Local Board Policy JLF. The policy designates what information must be communicated, how that information must be delivered, and provides for the confidentiality of reports.

We are not convinced by Ms. Harshman’s argument that the children at issue are now adults. As the Attorney General has opined, mandatory reporting is required “no matter the present age of the victim.” 78 Md. Op. Atty. Gen. 189 (1993). “Even if one particular victim of abuse or neglect is now an adult and thus outside the scope of the State’s protective efforts, others who are still children might continue to be at risk and in need of child protective services.” *Id.* We are similarly unpersuaded by Ms. Harshman’s argument that she believed these incidents had already been reported to authorities. If a mandatory reporter believes she has information concerning suspected child abuse, she has a duty to report it. A potentially duplicative report is a small price to pay to ensure the safety of children.

No one disputes that Ms. Harshman had the duty to report suspected child abuse as a member of the local board. We agree with Ms. Harshman that neither state law nor the local board policy requires that Ms. Harshman have reported suspected child abuse to Superintendent Wilcox. Although these policies do not prohibit such an action, they do not require it. The law and policies do, however, require Ms. Harshman to report to law enforcement or the Department of Social Services. The record is clear that Ms. Harshman never reported these incidents to either authority. Instead, she posted her accusations to Facebook and only later provided names of teachers she suspected to the news media, not the Department of Social Services. Ms. Harshman provided the name of Ms. Fischer to law enforcement only upon being contacted directly by the Sheriff’s Office. Her actions followed neither the letter nor the spirit of the

mandatory reporting law.

3) Declining to reveal information to the school system and law enforcement

When confronted by Superintendent Wilcox, Ms. Harshman declined to provide him the names of people she suspected of being child sexual offenders. Ms. Harshman was not required to divulge names to the superintendent under mandatory reporting laws, but she was required to inform him of her concerns under school system policy. Superintendent Wilcox's contract, which bound Ms. Harshman as a board member, required her to "refer promptly appropriate criticism, complaints, and suggestions concerning the school system" to Superintendent Wilcox and "immediately notify" the Superintendent and local board if the Superintendent was "not fulfilling his responsibilities" under state law. (Petition for Removal, Ex. 1, Statement of Charges, at 11-16; Ex. 14). If Ms. Harshman truly believed that the school system was ignoring the problem of child sex offenders, she should have done more than simply post such allegations on Facebook.

Moreover, when visited by law enforcement the day after her Facebook post, Ms. Harshman provided only Ms. Fischer's name, not the names of others she suspected of abuse. She later provided three other names to the *Herald-Mail*. Those names were reported to the Department of Social Services only after a reporter revealed the names to Superintendent Wilcox. Ms. Harshman withheld information as part of an investigation into child sexual abuse. She alleged the school system was ignoring the problem of child sex offenders and then declined to assist in an investigation sparked by her claims.

4) Creating unnecessary fear and panic in the community

Ms. Harshman's Facebook post began to gain attention in the community almost immediately. Her post generated multiple comments and led residents to contact the school system and local board members to find out whether the post was true. Local media began extensive coverage of the situation. The outpouring of concern in the community stemmed from Ms. Harshman's claims that there were sexual predators currently teaching in WCPS schools and that the school system was covering up the problem.

Ms. Harshman's behavior had a considerable negative effect on the community, leading to hundreds of hours of fruitless investigation by the school system and other agencies. As demonstrated by media coverage and the local board's filings, it created panic in the community, particularly given that Ms. Harshman was not even sure if any of the teachers she suspected were still in the classroom at the time she provided names to the media. In short, Ms. Harshman placed the local board and school system in an unwarranted negative light by making unsupported allegations of a cover-up. This weakened the confidence and trust that parents place in the school system and caused unnecessary fear in the community about the safety of children in schools.

Willful Nature of Her Actions

Not only must we find that Ms. Harshman committed misconduct, but that the

misconduct was willful. In the context of physician discipline proceedings, the Court of Appeals has stated that willful conduct “requires proof that the conduct at issue was done intentionally, not that it was committed with the intent to deceive or with malice.” *Kim v. State Bd. of Physicians*, 423 Md. 523, 546 (2011). The conduct is “intentional, or knowing, or voluntary, as distinguished from accidental.” *Id.* at 545. As we have previously stated, willfulness does not require the showing of an evil motive. *See Dyer v. Howard County Bd. of Educ.*, MSBE Op. No. 13-30 (2013).

Ms. Harshman was aware of what she was doing from the moment she first posted her accusations on Facebook. There is nothing accidental about her actions from that point forward. Ms. Harshman had multiple opportunities to reflect on her words and correct the misperceptions caused by her post. Instead, she chose to deliberately escalate her rhetoric and further fan the flames of fear in the community. Ms. Harshman declined to cooperate with Superintendent Wilcox or law enforcement and instead used the media to further spread her accusations. In our view, her conduct was “intentional, or knowing, or voluntary, as distinguished from accidental.” *Kim*, 423 Md. at 545.

Summary of Misconduct

Each of these behaviors standing alone could constitute misconduct in office. When viewed together, they paint an overwhelming portrait of wrongdoing. In our view, Ms. Harshman’s actions constitute misfeasance, an otherwise lawful act done “in a wrongful manner.” *See Resetar*, 284 Md. at 560-61. Raising concerns about child sexual abuse is a lawful act; painting an entire school system with the false accusation of hiding sexual predators is “wrongful.” Ms. Harshman’s actions were unprofessional, a transgression of established rules, and improper. *See Resetar*, 284 Md. at 560-61. For all of these reasons, we conclude that Ms. Harshman committed misconduct in office.

Willful Neglect of Duty

In the education context, the State Board has defined willful neglect of duty as occurring “when the employee has willfully failed to discharge duties which are regarded as general teaching responsibilities.” *Baylor v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Op. No. 13-11 (2013). It is an intentional failure to perform some act or function that the person knows is part of his or her job. *See Lasson v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Op. No. 15-21 (2015).

As described previously, Ms. Harshman failed to report suspected child abuse to the proper authorities. This conduct constitutes not only misconduct in office, but also a willful neglect of duty. We agree with the analysis offered by the ALJ on this point. Ms. Harshman’s “failure over a thirty-six year period to report such information to local department investigators or members of the law enforcement community, as well as school officials, constitutes a willful neglect of duty, both legal and fiduciary, in every sense of the word.” (Proposed Decision, at 36). Ms. Harshman was aware of the duty to report and deliberately did not do so. In our view, her actions constitute a willful neglect of duty for the same reasons that her actions constitute misconduct in office.

Fitness To Be A Board Member

In order to remove a member of a local board, we must not only conclude that a ground for removal has occurred but that the actions render a member unfit to be a local board member. A board member is unfit to continue serving when her conduct “involves substantial violations that are harmful to the local board’s functioning.” *See Dyer v. Howard County Bd. of Educ.*, MSBE Op. No. 13-30 (2013). We have previously stated that “a public official must be held to a high standard of professionalism and must carry out his or her duties with integrity and a high degree of trust.” *Id.*

In the words of the ALJ, “there may be no more compelling reason to deem a board of education member unfit for duty than accusing, without evidence, an entire school system of harboring and protecting sexual predators.” (Proposed Decision, at 37). The school system had to go to great lengths to undo the harm caused by Ms. Harshman’s accusations. We conclude, for all of the reasons previously stated, that Ms. Harshman should be removed from the local board for misconduct in office and willful neglect of duty. Her violations were “substantial” and “harmful to the local board’s functioning” as well as lacking in professionalism. Ms. Harshman’s actions have undermined the trust the community and her fellow board members can place in her judgment and necessitate her removal from the board.

CONCLUSION

We adopt, in part, the ALJ’s Proposed Decision, and modify it as explained throughout this opinion. We conclude that Karen Harshman committed misconduct in office and willful neglect of duty and we remove her from the local board.

Signatures on File:

Andrew R. Smarick
President

Chester E. Finn, Jr.
Vice-President

Michele Jenkins Guyton

Stephanie R. Iszard

Rose Maria Li

Madhu Sidhu

Guffrie M. Smith, Jr.

David Steiner

Laura Weeldreyer

April 25, 2017