

Circuit Court for Montgomery County
Case No. 440503V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 890

September Term, 2018

YVETTE FINLAY-GAINES

v.

MONTGOMERY COUNTY BOARD OF
EDUCATION

Fader, C.J.,
Berger,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: September 17, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from the decision of the Montgomery County Board of Education (the “County Board”), the appellee, to terminate for incompetence Yvette Finlay-Gaines, the appellant, from her teaching position with Montgomery County Public Schools (the “School System”). To get to this point, at least six different individuals or entities have recommended or upheld Ms. Finlay-Gaines’s termination, including the Maryland State Board of Education (the “State Board”), whose final administrative ruling we review, and the Circuit Court for Montgomery County, which upheld the State Board’s determination on judicial review. Ms. Finlay-Gaines contends that the State Board misapplied the relevant legal standard by ignoring considerations of fairness in the termination process. Because the State Board did not ignore considerations of fairness, we affirm.¹

Ms. Finlay-Gaines also contends that the circuit court “erred in failing to apply the ‘substituted judgment’ standard” (emphasis removed)—that is, failing to consider without deference her contention that the State Board committed legal errors. Because we look through the circuit court’s ruling and consider only the State Board’s ruling, we do not consider this assertion of error by the circuit court.

¹ The County Board asserts that the questions Ms. Finlay-Gaines presents on appeal were not adequately briefed for our review and that the judgment should be affirmed for that reason. Although the County Board’s criticism of the argument section of Ms. Finlay-Gaines’s brief is well taken, the brief as a whole provides a sufficient basis for us to understand and address the first issue she raises on appeal. We agree that her second argument was inadequately briefed but, as discussed below, we decline to consider that argument for a different reason.

BACKGROUND²

Ms. Finlay-Gaines’s Employment with Montgomery County Public Schools

Ms. Finlay-Gaines began her employment with the School System as a special education teacher in 2000. She holds a Maryland state license and a “generic special education certification” that allows her to teach “elementary/middle school special education students from Grades 1 through 8 and secondary/adult students Grades 6 through 12.”

At all relevant times during Ms. Finlay-Gaines’s employment, the School System evaluated teacher performance using the following six “Professional Growth System Performance Standards” (the “Standards”):

- I. Teachers are committed to students and their learning.
- II. Teachers know the subjects they teach and how to teach those subjects to students.
- III. Teachers are responsible for establishing and managing student learning in a positive learning environment.
- IV. Teachers continually assess student progress, analyze the results, and adapt instruction to improve student achievement.
- V. Teachers are committed to continuous improvement and professional development.
- VI. Teachers exhibit a high degree of professionalism.

² The State Board adopted the findings of fact of the administrative law judge. Ms. Finlay-Gaines does not contest any of those findings, instead raising only a claim of legal error in the State Board’s application of the legal standard for teacher dismissals. All of the facts contained within this background section are taken from the findings of the administrative law judge as adopted by the State Board.

Concerns about Ms. Finlay-Gaines’s teaching performance began to arise in 2009, when she was a special education transition support teacher at Northwest High School. At that time, her principal became aware of issues related to “paperwork not being completed and Individualized Education Plans (IEPs)^[3] not being filled out appropriately.” As a result of these concerns, Ms. Finlay-Gaines received “individualized coaching and assistance” from teachers and administrators during the 2010-2011 school year. A continuous improvement plan, which is a “working document setting forth standards for teacher improvement and [] developed with input from the teacher,” also was created for Ms. Finlay-Gaines at the end of the 2011-2012 school year.

2012-2013 School Year

During the 2012-2013 school year, Ms. Finlay-Gaines taught career research seminars to special education students at Northwest. She received assistance and professional support from supervisors and administrators in accordance with her improvement plan. Administrators noted, however, that although Ms. Finlay-Gaines improved in some areas, “she continued to make the same mistakes or raise the same concerns for most of the tasked items.” In the spring of 2013, she received a rating of “Below Standard[]” on her teaching evaluation, indicating that she “had not met the performance criteria set forth in Standards I-VI.”

³ An IEP is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with” requirements under the Individuals with Disabilities Education Act (“IDEA”). *See* 20 U.S.C. § 1414(d); Md. Code Ann., Educ. § 8-408(a)(5) (Repl. 2018; Supp. 2018).

2013-2014 School Year

In June 2013, Ms. Finlay-Gaines was placed in the School System’s Peer Assistance and Review (“PAR”) program, which was developed to “improve instruction by supporting under-performing teachers” and “ensur[e] that all [School System] teachers meet [School System] Standards of Performance.” As part of PAR, Ms. Finlay-Gaines was matched with an experienced “consulting teacher,” who provided her with “intensive, individualized” attention, observed Ms. Finlay-Gaines’s classes, and reported on her progress to a PAR panel.⁴

During the 2013-2014 school year, Ms. Finlay-Gaines took two leaves of absence that covered all but a three-week period from mid-September 2013 through late April 2014. When she returned to work, her former position had been filled and she was assigned to a special education co-teaching position at Northwest for the remainder of the school year. Ms. Finlay-Gaines’s PAR consulting teacher, who had continued to work with Ms. Finlay-Gaines upon her return from leave, indicated in a final report for the school year that her “performance as a special education teacher was deficient” as to five of the six performance standards, excepting only Standard V. Based on this report, the principal of Northwest recommended to the PAR panel that Ms. Finlay-Gaines be terminated. The panel agreed that her “instructional skills did not meet the standard of performance required by [the

⁴ A PAR panel is composed of teachers and principals who may recommend to the superintendent of schools that an underperforming teacher have his or her contract renewed, continue in the PAR program for another year, or be terminated.

School System],” but ultimately decided to continue her participation in the PAR program for the next academic year.

2014-2015 School Year

For the 2014-2015 school year, Ms. Finlay-Gaines was assigned to teach “Grade 9 English” and “Grade 7 Social Studies” to special education students at John L. Gildner Regional Institute for Children and Adolescents (“RICA”). Ms. Finlay-Gaines did not hold state certifications in English or Social Studies, nor was she designated under the then-existing federal standard as “highly qualified” to teach those particular subjects.⁵ Moreover, “[the School System] did not review [her] record prior to assigning her to teach” these subjects. She did, however, seek out help with her new assignment and “received support from numerous other RICA administrators and teachers,” which included, among other things, co-teaching with a special education teacher and receiving feedback after classroom observations.

Ms. Finlay-Gaines’s performance deficiencies continued throughout the 2014-2015 school year. The final report from her PAR consulting teacher—who was not the same teacher who had evaluated her the prior year—evaluated Ms. Finlay-Gaines’s performance as “Below Standard.” The consulting teacher found that although Ms. Finlay-Gaines had shown signs of improvement as to her interactions with colleagues, she continued to have

⁵ At the relevant time, the No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-6578, required “all teachers . . . teaching in a program supported with” federal funds to be “highly qualified.” *Id.* § 6319(a)(3) (repealed Dec. 10, 2015). The Act was revised by the Every Student Succeeds Act, which eliminated the “highly qualified” requirement. *See* Pub. L. No. 114-95 (Dec. 10, 2015).

teaching deficiencies as to Standards I, II, III, and IV. A separate evaluation by the principal of RICA found Ms. Finlay-Gaines deficient as to all of those standards as well as Standard VI.

The principal of RICA recommended that Ms. Finlay-Gaines’s employment with the School System be terminated, and the PAR panel subsequently recommended her “dismissal for incompetency” to the interim superintendent of schools. In July 2015, the interim superintendent recommended to the County Board that Ms. Finlay-Gaines’s employment be terminated “on the ground of incompetency.” Following a hearing in which several witnesses, including Ms. Finlay-Gaines, testified, a hearing examiner issued a written decision recommending that the County Board adopt the superintendent’s recommendation. The County Board heard oral argument on the recommendation and, on May 10, 2016, issued a written decision adopting the hearing examiner’s findings and terminating Ms. Finlay-Gaines’s employment with the School System.

The Proposed Decision of the Administrative Law Judge

Ms. Finlay-Gaines appealed the County Board’s decision to the State Board, which referred the case to the Office of Administrative Hearings. In October 2016, an administrative law judge (“ALJ”) conducted a hearing at which counsel for Ms. Finlay-Gaines and the County Board were present. There, the ALJ admitted 37 exhibits and considered the testimony of ten witnesses, including Ms. Finlay-Gaines, that the hearing examiner had previously admitted and heard. In January 2017, the ALJ issued a 59-page proposed decision, including 111 paragraphs of factual findings, in which she concluded that the County Board had properly dismissed Ms. Finlay-Gaines for incompetency. The

ALJ recommended that the State Board uphold the County Board’s decision to terminate her employment.

In reaching her conclusion, the ALJ observed that a three-part test governs the dismissal of a teacher for incompetency. Under this test, “the record must demonstrate that: 1) the evaluation process was fair and impartial; 2) the teacher had serious teaching deficiencies; and 3) the teacher was provided adequate assistance to remedy those deficiencies.” (quoting *Sammarco v. Bd. of Educ.*, MSBE Op. No. 15-01, at 5 (2015)).

In first analyzing the “fair and impartial” requirement, the ALJ concluded that the process had been fair and impartial with respect to most of the County Board’s evaluation. With respect to Standard II, the ALJ observed that Ms. Finlay-Gaines did not hold a certification in either English or Social Studies, both of which she was assigned to teach at RICA, and that she had “sought out help and/or requested training numerous times” for assistance with teaching these subjects. The ALJ determined that Ms. Finlay-Gaines was authorized to teach English and Social Studies to special education students, as state and federal regulations “do[] not contain language specifically requiring certification in specific content areas” for teaching special education students, but nonetheless concluded that assigning Ms. Finlay-Gaines to teach those subjects “was counter to the purpose of the PAR program” due to her inexperience with the content and that it “set [her] up to fail an evaluation under Standard II.” The ALJ thus determined that “with regard to Standard II,

and some parts of Standards III and V,” the evaluation process “was not fair.”⁶ With that exception, however, the ALJ concluded that the “remainder of the evaluation was fair and impartial.”

With respect to the second factor, whether Ms. Finlay-Gaines had “serious teaching deficiencies,” the ALJ considered evidence of underperformance raised in Ms. Finlay-Gaines’s 2013-2014 and 2014-2015 evaluation reports and testimony from school personnel as to Ms. Finlay-Gaines’s performance and conduct. Based on this evidence and observing that “many of the performance issues began before she was assigned to” RICA, the ALJ concluded that “the record clearly supports the conclusion that [Ms. Finlay-Gaines] had serious teaching deficiencies.”

As to the third factor, the ALJ determined that the School System had provided Ms. Finlay-Gaines with “adequate remedies to correct [her] deficiencies.” These efforts, the ALJ found, included that she received (1) individualized attention under her continuous improvement plan, (2) support as a participant in the PAR program, and (3) “assistance from multiple other [School System] personnel.” The ALJ further determined that the County Board had complied with state requirements for evaluations and the PAR process.

The ALJ ultimately determined that the County Board properly dismissed Ms. Finlay-Gaines for incompetency based on her deficient performance under Standards I, III, IV, and VI. Both parties took exceptions to the decision.

⁶ The ALJ determined that some of the observations relating to Standards III and V were also “somewhat connected to [Ms. Finlay-Gaines’s] lack of knowledge of the subject and how to teach it and thus not fairly considered,” but concluded that the process was generally fair with respect to those standards.

The Decision of the State Board

The State Board adopted the ALJ’s findings of facts in full, adopted its analysis with one exception discussed below, and affirmed the termination of Ms. Finlay-Gaines’s employment for incompetency. The State Board noted that Ms. Finlay-Gaines’s performance problems predated the 2014-2015 year and had been evident since 2009. After summarizing the evidence as set forth by the ALJ, the State Board found that her performance deficiencies did not directly relate to specific certifications; rather, the evaluations were designed to examine “generic practices that were not dependent upon the content of the subject being taught.” The State Board concluded that “[b]ased on the record evidence, . . . even if we were to discount those portions of [Ms. Finlay-Gaines’s evaluations] that specifically relate to content area knowledge, there is sufficient evidence of [her] performance deficiencies to support her termination.”

The State Board then specifically addressed the exceptions taken by both parties, first addressing the County Board’s exceptions to the ALJ’s conclusion that a portion of the evaluation process was unfair because Ms. Finlay-Gaines was not certified in English and social studies. The State Board concluded that under applicable regulations “it was appropriate for the school system to assign [Ms. Finlay-Gaines] to teach the special education classes in English and social studies” even though she lacked content area expertise.⁷ However, the State Board ultimately declined to reach a conclusion as to

⁷ The State Board observed that under COMAR 13A.12.02.02A, Ms. Finlay-Gaines’s generic special education certification allowed her “to teach special education children in grades 1 through 12 in various subjects, including English and social studies” without the need for specific content area expertise.

whether this particular aspect of the evaluation was unfair because, it determined, “[e]ven if we assume that [Ms. Finlay-Gaines] lacked any content knowledge in English and social studies as she maintains, there is more than enough evidence in the record to support her termination for incompetency as the ALJ found.” In other words, the State Board concluded that even without considering any alleged deficiencies arising from Ms. Finlay-Gaines’s lack of competence to teach the subjects she was assigned to teach during the 2014-2015 school year, the record was sufficient to support the termination decision.

Answering Ms. Finlay-Gaines’s exceptions, the State Board concluded that: (1) the record did not support her “claim that the school system failed to provide her sufficient support to help her overcome her teaching deficiencies”; and (2) the fact that “the ALJ found portions of the evaluation to be unfair” did not mean that the entire process was unfair. On the latter point, the State Board concluded that accepting Ms. Finlay-Gaines’s position that the unfairness of evaluating her based on the content she was required to teach in 2014-2015 tainted the entire evaluation process “would be to ignore the analysis that many of [her] teaching deficiencies predated the 2014-2015 school year and that there were sufficient teaching deficiencies during the 2014-2015 school year that were not dependent upon the content of the subject matter being taught.”

Summarizing its decision, the State Board found substantial evidence to sustain the termination of Ms. Finlay-Gaines’s employment “without consideration of those aspects of the 2014-2015 evaluation process that were related to content area knowledge of English and social studies.” The State Board thus declined to adopt the portions of the ALJ’s

proposed decision addressing those issues, adopted “all other aspects of the ALJ’s Proposed Decision,” and affirmed the termination.

Decision of the Circuit Court for Montgomery County

Ms. Finlay-Gaines sought judicial review of the State Board’s decision in the Circuit Court for Montgomery County, which affirmed the State Board. The circuit court determined that the State Board had not committed any legal errors and that sufficient evidence supported its decision. Ms. Finlay-Gaines appealed.

DISCUSSION

“In reviewing the decision of an administrative agency, ‘we reevaluate the decision of the agency, not the decision of the lower court.’” *Venter v. Bd. of Educ.*, 185 Md. App. 648, 664 (2009) (quoting *Days Cove Reclamation Co. v. Queen Anne’s County*, 146 Md. App. 469, 484 (2002)). “The overarching goal of judicial review of agency decisions is to determine whether the agency’s decision was made ‘in accordance with the law or whether it is arbitrary, illegal, and capricious.’” *Sugarloaf Citizens Ass’n v. Frederick County Bd. of Appeals*, 227 Md. App. 536, 546 (2016) (quoting *Long Green Valley Ass’n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012)). “We ‘review the agency’s decision in the light most favorable to the agency’ because it is ‘prima facie correct’ and ‘entitled to a presumption of validity.’” *Sugarloaf Citizens Ass’n*, 227 Md. App. at 546 (quoting *Anderson v. Dep’t of Pub. Safety & Corr. Servs.*, 330 Md. 187, 213 (1993)).

“[T]he State Board generally has the last word on matters concerning the public school system.” *Mayberry v. Bd. of Educ.*, 131 Md. App. 686, 700 (2000) (citations omitted). Thus, in reviewing a State Board’s decision, “our role is ‘limited to determining

if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Venter*, 185 Md. App. at 665 (quoting *United Parcel Serv., Inc. v. People’s Counsel*, 336 Md. 569, 577 (1994)).

I. THE STATE BOARD APPLIED THE PROPER LEGAL STANDARD IN ITS DECISION UPHOLDING MS. FINLAY-GAINES’S DISMISSAL.

Ms. Finlay-Gaines argues that the State Board failed to apply correctly the legal standard governing teacher dismissals because it did not properly examine the “fairness” requirement of *Sammarco*. She contends that the State Board erroneously “concentrat[ed] on” Ms. Finlay-Gaines’s “deficiencies/incompetence,” with “no consideration of fairness,” and “refused to incorporate into its findings those made by the ALJ.” This assertion is meritless.

Under § 6-202 of the Education Article, “[o]n recommendation of the county superintendent, a county board may suspend or dismiss a teacher . . . for . . . [i]ncompetency.” Md. Code Ann., Educ. § 6-202(a)(1)(iv) (Repl. 2018). Pursuant to § 6-202(a)(4) of the Education Article, the State Board has “broad visitatorial powers” to review county board decisions determining whether a teacher’s misconduct warrants dismissal under § 6-202(a). *Bd. of Sch. Comm’rs v. James*, 96 Md. App. 401, 417-18 (1993) (quoting *Bd. of Educ. v. Waeldner*, 298 Md. 354, 361 (1984)); see also *Bd. of Educ. v. Heister*, 392 Md. 140, 152 n.11 (2006) (“[T]he powers of the County Board are subordinate to those of the State Board and the mere fact that the authority to discipline teachers is initially within the scope of the County Board’s authority does not negate the

power of the State Board to review it and set it aside.” (quoting *Waeldner*, 298 Md. at 361-62)).

Under this broad scope of authority, the State Board has established three criteria that must be met for dismissal of a teacher on the ground of incompetency. “The record must demonstrate that: 1) the evaluation process was fair and impartial, 2) the teacher had serious teaching deficiencies, and 3) the teacher was provided adequate assistance to remedy those deficiencies.” *Sammarco*, MSBE Op. No. 15-01, at 5; *see also Beck v. Montgomery County Bd. of Educ.*, MSBE Op. No. 04-13 (2004).

Ms. Finlay-Gaines does not challenge the State Board’s conclusions that she had serious teaching deficiencies or that she was provided with adequate assistance to fix those deficiencies. Instead, her contention is that the State Board erred in focusing only on her alleged deficiencies and “refus[ing] to incorporate into its findings those made by the ALJ regarding the ‘fairness’ requirement, and indeed refus[ing] to address that requirement at all.”

For three reasons, we reject that contention. First, the State Board did not refuse to incorporate all of the ALJ’s findings regarding fairness. The State Board declined to adopt only the ALJ’s conclusions regarding fairness “related to content area knowledge of English and social studies.” The State Board expressly adopted all of the ALJ’s other conclusions, necessarily including her conclusion as to the fairness of the remainder of the evaluation process and the substantial findings that supported that conclusion.

Second, the State Board did not refuse to address the fairness requirement. To the contrary, it did so first and foremost by incorporating the ALJ’s conclusion regarding the

fairness of the evaluation process overall and the findings supporting that conclusion, which the State Board found more than sufficient to sustain the termination. The State Board also addressed fairness explicitly in its own decision, including by (1) discussing the ALJ’s conclusion that the evaluation process relating to Standard II was unfair, but concluding that there were “sufficient teaching deficiencies unrelated to Standard II . . . to support the termination”; and (2) rejecting Ms. Finlay-Gaines’s contention that the entire process was unfair because, the Board observed, many of her deficiencies predated the 2014-2015 evaluation and many of the deficiencies identified in that year “were not dependent upon” her performance “of the subject matter being taught.”

Third, to the extent the State Board did decline to adopt that portion of the ALJ’s discussion relating to the fairness of the evaluation of Ms. Finlay-Gaines’s teaching of English and social studies content in 2014-2015, it did not commit legal error in doing so. The State Board, the entity with primary responsibility for interpreting and applying its own regulations, *see Mayberry*, 131 Md. App. at 700, grounded its difference of opinion with the ALJ in regulations establishing that “special education teachers are expected to be ready and able to teach subjects such as English . . . to their students” (citing COMAR 13A.12.02.20). The State Board was well within its authority to reject the ALJ’s view that a portion of the evaluation process was unfair notwithstanding these regulations. More importantly, however, the State Board ultimately decided to exclude consideration of the deficiencies that the ALJ concluded were connected to the unfairness. As a result, even if it were error for the State Board to decline to adopt the ALJ’s conclusions with respect to

the fairness of certain aspects of the evaluation, it did not affect the State Board’s ultimate conclusion.

In summary, we conclude that the State Board properly considered the fairness of the evaluation process and, therefore, we reject Ms. Finlay-Gaines’s contention that the State Board committed legal error in failing to do so. Because that assertion of error is Ms. Finlay-Gaines’s sole contention on appeal addressing the decision of the State Board, we will affirm that decision.

II. MS. FINLAY-GAINES’S CONTENTION THAT THE CIRCUIT COURT APPLIED AN INCORRECT STANDARD IS NOT REVIEWABLE.

Ms. Finlay-Gaines’s second contention is that the circuit court erred because it “failed to review the State Board of Education decision by applying its substituted judgment, and thus failed to address the *Sammarco* requirements.” As noted, in an appeal from a decision on judicial review of an agency determination, we review the agency’s determination directly and do not review the decision of the circuit court. *Venter*, 185 Md. App. at 664. As a result, we will not consider Ms. Finlay-Gaines’s assertion that the circuit court applied an incorrect standard of review. *See Wilson v. Md. Dep’t of the Env’t*, 217 Md. App. 271, 284 (2014) (“[A]s the reviewing court, we ‘may not pass upon for the first time issues not encompassed in the final decision of the administrative agency.’” (quoting *Cross v. Balt. City Police Dep’t*, 213 Md. App. 294, 307 (2013))).

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**