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IN THE MATTER OF:

Diana R. Williams,
Complainant

v.

Baltimore City Public School,
Respondent

Case No. 2000-CAA-15

COMPLAINANT'S INITIAL BRIEF OBJECTING TO THE

RECOMMENDED DECISION AND ORDER

INTRODUCTION

The ALJ was correct in finding that "many of the Claimant's activities fall squarely within the definition of protected activity under the various statutes applicable to this case." (ALJ's Recommended Decision and Order hereinafter "ALJ. Decision" p. 34). Also, the ALJ was correct in citing that ... "Thus, the Claimant's complaints to various regulatory groups as well as her public airing of her concerns about the potential safety hazards presented by the renovation project occurring at Fairmount were clearly protected activity within the meaning of the applicable statutes." (ALJ. Decision p. 34). However, the Claimant intends to reveal that the ALJ erred in stating that the School System undertook significant activity to insure that the environment at Fairmount-Harford High School (hereinafter "FHHS") was safe, that potential problems were correct, and with "clearance" and monitoring by the appropriate regulatory agency. In fact, the Claimant intends to show that the ALJ erred in citing that ... "Clearly by December of 1996, it was no longer reasonable for the Claimant to continue to allege that the conditions at Fairmount were

unsafe." (ALJ Decision pp. 36-37). Consequently, the Claimant intends to reveal that by December of 1996, all of the lead-based paint hazards at FHHS were not addressed. Further, the Claimant will show that the 18-month major renovation at FHHS, that started in the latter part of 1995 and was not completed until some time in 1998, created additional lead-based paint hazards at FHHS. In fact, the Claimant intends to show how there were still lead-based paint hazards being created at FHHS by the on-going renovation project, even after her involuntary transfer from FHHS to Southeast Middle School (hereinafter "SEMS") for the 1997-1998 school year. Still too, the Claimant intends to reveal that although the Respondent may have taken an initial step to address some of the lead-based paint hazards at FHHS (which was only after the Claimant notified her concerns to the principal and general contractor at FHHS, to Maryland Occupational Safety and Health (hereinafter "MOSH"), and then to the media in November of 1996), the Respondent did not completely address and resolve all of the lead-based paint hazards at this time. In fact, the Claimant intends to reveal that the Respondent new about the lead-based paint and lead-based paint hazards at FHHS before the Claimant went public with her concerns about these hazards at the school. Also, the Claimant intends to provide evidence to support the fact that the Respondent had not even identified all of the lead-based paint hazards at FHHS by December of 1996; in fact, the Claimant intend to prove that there were lead-based paint hazards at FHHS in 1997 as well. Moreover, the Claimant will reveal that the Respondent never received a "clearance testing" document by December of 1996 which would indicate that the lead-based paint hazards had been addressed, resolved, and now FHHS was lead safe and thus ready for occupancy or re-occupancy. Indeed, the Claimant intends to reveal that there was never a "clearance testing" document issued by the state agency that is authorized to declare that a property is lead safe and ready for occupancy or re-occupancy after a lead-based paint hazard has

been identified and documented. Further, the Claimant intends to identify the only state agency in Maryland that sets the standards or protocol for lead hazard reduction or abatement, enforces the laws and regulations regarding reducing lead-based paint hazards or performing lead abatement, and that issues the "clearance testing" document. The "clearance testing" document insures that once a property has been identified as having a lead-based paint hazard that the owners of the property have hired a Lead Abatement Contractor to follow the required protocol to reduce or eliminate the lead-based paint hazard according to the state agency's protocol or a protocol that is more stringent. The Claimant will provide evidence to prove that this same state agency is the only state agency that can issue certifications and/or accreditations to individuals in the following areas, namely, Visual Inspector, Lead Abatement Contractor, Projected Designer, The Claimant intends to reveal evidence to prove that she has been certified and/or accredited by this agency in all of these areas of training since 1997. Also, the Claimant intends to reveal how as a Lead Abatement Contractor she is recognized by this agency as well as COMAR Title 26, Section 16 (Code of Maryland Regulation) as a Lead Expert. Still too, the Claimant intends to reveal what protocol is mandated by this state agency for a Lead Abatement Contractor to be able to issue a copy of this state agency's "clearance testing" document to the owners of the property. Also, the Claimant will provide evidence to prove that this state agency mandates that only a certified and accredited lead abatement contractor be allowed perform lead hazard reductions or lead abatement using Housing and Urban Development's (hereinafter "HUD") guidelines or a more stringent guideline approved by this agency. Still too, the Claimant intends to provide evidence to support the fact that the cleaning up of lead dust at FHHS in November of 1996 was not done properly, namely in accordance with this state agency's protocol (or a protocol approved by this agency), and thus lead-based paint hazards still remained afterward December of

1996. Moreover, the Claimant intends to show that MOSH did note that there was lead-based paint hazards at FHHS and did make recommendations to the Respondent. Also, the Claimant intends to show that MOSH also cited another school reported by the Claimant as having lead-based paint hazards and made the recommendation to the Respondent to abate the lead-based paint hazards. The Claimant intends to show evidence to support the fact that the blood lead level of some staff and headstart children at FHHS that was taken by Kennedy Krieger Institute (hereinafter "KKI") from Johns Hopkins in or around December of 1996 did not indicate that there was no lead-based paint hazard at FHHS, and that KKI did make some recommendations to the owners of this facility in regards to protecting the occupants from the exposure of the lead-based paint hazards. Also, the Claimant intends to reveal that the contract between the Respondent and KKI was not to determine if FHHS had lead-based paint hazards or whether the school was lead safe and thus ready for occupancy or re-occupancy. The Claimant will provide evidence to reveal that as late as April of 1997 FHHS still had lead-based paint hazards that had not been addressed and resolved even after the Claimant went public again about her concerns. The Claimant intends to provide evidence to prove that the City Council and the Health Department should have cited FHHS as having lead-based paint hazards in April of 1997 from the chipping, peeling, flaking, and deteriorating conditions of the lead-based paint in the interior of FHHS. Still too, the Claimant intends to reveal evidence that support the fact that the three (3) other schools she cited, namely Highlandtown Middle (hereinafter "HMS"), James Mosher Elementary School (hereinafter "JMES"), and Southeast Middle School (hereinafter "SEMS") had lead-based paint hazards and/or lead in the drinking water above EPA's action level. Still too, the Claimant will reveal evidence to prove that the Respondent knew in 1992-1993 about the lead-contaminated drinking

water at two of these schools as well as at thirty other public schools in Baltimore City and about the lead-based paint at FHHS. Thus, the Claimant intends to reveal how the letter she sent out on February 24, 1999 to the parents at SEMS about there being lead in the drinking water above EPA's standard was not erroneously stated, that the fountain from which the students were drinking the lead-contaminated water was operable and in use by the students when the Claimant sent the letter to the parents at SEMS, and that the parents were not made aware of the lead in the drinking water at SEMS prior to the Claimant going public with her letter to the parents at SEMS. Also, the Claimant intends to prove that at least one of the water fountains that the Claimant sampled for lead at SEMS was turned off after the Health Department sampling of the same water fountain in March of 1999 revealed also that there was lead in the water at SEMS above EPA's action level of 15 ppb (which is the same as 15 ug). The Claimant will reveal that the ALJ erred when she stated that all of the water fountains had been turned off at the time that the Claimant sent the letters to the parents. Moreover, the Claimant intends to prove that, although there were 4 bottled water stations available at SEMS before the Claimant sent her letters to the parents about the lead-contaminated drinking water, these bottled water stations were not readily available to the students. And, that it was only after the Claimant sent the letter to the parents of the students at SEMS that the principal at SEMS ordered bottled water for the students at SEMS. Finally, the Claimant intends to reveal that all of her whistleblowing were substantiated by voluminous evidence, were valid, and had substance due to the fact that all of the lead-based paint hazards and/or lead contaminated drinking water hazards at these schools had not been addressed or resolved, and that the Respondent continued to intentionally ignore the Claimant's concern in some cases and tried to make it seem as though the Claimant was "babbling" about issues that had been addressed and resolved.

CX227-CX247, CX251, CX256, CX257, CX258, CX260, CX262, CX264, CX268, CX273, CX274, CX281pp. 167-278; CX282-CX298; ALJ. Tr. pp. 140-276 and pp. 314-664). However, the hearing before the ALJ and the Federal OSHA's ruling resulted from the writing of complaints and the filing charges of discrimination against the Respondent as a result of the Respondent deciding to dismiss the Claimant as a Mathematics teacher in the Baltimore City Public School System (hereinafter "BCPSS") despite the recommendation of the Hearing Examiner who ruled otherwise. (CX139).

The Respondent, who hired the Hearing Examiner to be the fact finder, draw the conclusions of law, and recommendation, rejected the decision of the Hearing Examiner who denied the recommendation of the CEO (who is a member of the School Board and is thus considered part of the Respondent) to dismiss the Claimant in a correspondent sent to the Claimant on December 8, 1999. (CX280). The Respondent indicated in the correspondence dated December 8, 1999 that they would send the Claimant a Final Order and a copy of the Appeal process after the December 14, 1999 meeting of the Executive School Board. However, although the Claimant has repeatedly inquired about the Final Order and the Appeal process, the Respondent has yet to provide the Claimant with a copy of the Appeal process. (CX 140; CX 141). And, in an envelope that is postmarked on 8-16-2000, the Claimant received an unsigned and undated Final Order from the Respondent on 8-17-2000 and made mention of this fact on the second day of the hearing before the ALJ, namely, 8-18-2000. (ALJ Tr. pp. 278-300).

In the Hearing Examiner's "Findings of Facts and Conclusions of Law and Recommendation", he cited the issues in the Claimant's dismissal to be as follows:

a) " Did the Respondent (Claimant) commit misconduct in office by circulating erroneous information to parents, students, and staff regarding potential health hazards at SMS, FHHS, and JMES?

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b) If the information circulated by the Respondent (Claimant) is basically accurate, did the Respondent commit misconduct in office by failing to follow the chain of command by disseminating the information directly to the public and the media?

c) Whether the acts allegedly committed by the Respondent (Claimant) would bear upon the Respondent's fitness to teach such that it would undermine her future classroom performance and overall impact on her students." (CX139 p. 8)

Also, the Hearing Examiner cited that....

"In the Statement of Charges, the CEO claims that the Respondent (Claimant) circulated erroneous information to parents, students, and staff regarding potential health hazards at SMS (Southeast Middle School), FHHS (Fairmount-Harford High School), and JMES (James Mosher Elementary School). According to the CEO (Respondent), the erroneous communications (CEO Exhibit 1 page 3 & Exhibit 10 page 3 [which is CX279 which is the Respondent's exhibits from the dismissal hearing]) caused unnecessary panic amongst parents, students and staff which resulted in the disruption of the education process at the schools.

The CEO must prove by a preponderance of the evidence that the information contained in the two (2) communications was erroneous. The Hearing Examiner finds that the CEO failed to carry his burden of proof. In fact, based on the substantial documentation presented at the hearing, the Hearing Examiner finds that the information contained in the two (2) communications concerning SMS, FHHS, and JMES was basically true.

First, the Hearing Examiner finds that the Respondent (Claimant) has received substantial training in the field of lead paint assessment and abatement and could validly consider herself an expert in the field. See Respondent's (Claimant's) 8 & 9 [CX 278 which is the Claimant's exhibits from the dismissal hearing]. Secondly, with regards to the correspondence dated February 24, 1999 (CX 248), to parents SMS students regarding lead in the water, the Respondent presented sufficient documentation to support the statement made in the correspondence.

In 1993, the State Department of Health and Mental Hygiene sampled the water at

SMS [CEO Exhibit 15]. The State Department of Health and Mental Hygiene found that there was lead in the water but only one (1) drinking fountain had a lead content in excess of EPA standards. According to Fields (principal at SMS at the time), the high lead content found in the one fountain was due to a deteriorating bubbler or spigot. Fields testified that in response to the report received from the State Department of Health and Mental Hygiene, the fountain was turned off and the school established four (4) bottle water stations.

The Hearing Examiner finds, that, though bottle water was available to the students, the water was not readily accessible due to the locations of the water stations [Transcript p. 391 Line 7 through p. 394 Line 5]. Except for the water fountains that had been turned off, students still had access to water fountains in the school. The Respondent (Appellant) testified that she took a water sample from a fountain that was still being used by the students for testing at a certified laboratory [Respondent's (Claimant) Exhibit 27]. The lab found that the lead content of the water exceeded the standards allowed by EPA.

The CEO (Respondent) relied on the report from the City Health Department dated February 11, 1999 [CEO (Respondent) Exhibits 8 & 9] in determining that the Respondent (Claimant) had issued erroneous information regarding the water at SMS and placing her on suspension. The Hearing Examiner questions how the CEO (Respondent) determined that there was no lead problems with SMS's drinking water because there was no assessment of the lead content of the school's drinking water in the inspection report.

Moreover, the actual sampling of the school's water by the City Health Department did not occur until March 9, 1999 [CEO Exhibit 16] and the report was not issued until March 15, 1999; two (2) weeks after the Respondent (Claimant) was suspended.

The report indicates that there is lead in the water at SMS and that at least one (1) fountain that was still in use prior to February 11, 1999 had a lead content in excess of EPA standards for drinking water. Elam (Safety Officer for Baltimore City Public Schools) testified that SMS was 1 of 32 schools that had been identified with lead in its drinking water [Transcript p. 130, Line 9 et. due.].

Though the Respondent (Claimant) may not have had her dates correct as to when the fountains were turned off, the fountains were in deed turned off after the Health Department's inspection and the parents of the students were not notified of the situation as stated in the correspondence. It would appear prudent to recommend that students who may have consumed water with a high lead content be tested as a precaution.

The CEO (Respondent) complains that the actions of the Respondent (Claimant) cause panic amongst the parents, students and staff that disrupted the education process. According to Fields' testimony, the primary disruption to school activities was telephone calls from parents inquiring about the accuracy of the information contained in the communication and about the person who disseminated the information. Fields also testified that she had to call an emergency staff meeting to answer concerns raised by the staff regarding the information in the communication.

However, the facts clearly establish that school system did not fully disclose to the parents that there was an issue with the lead content of the water at SMS before the Respondent (Claimant) issued her communication. Additionally, it appears to the Hearing Examiner that the school system, relying on the February 11th Health Department report, may have issued misinformation regarding the matter [CEO Exhibit 6].

The Hearing Examiner also finds that the weight of the evidence supports the Respondent's (Claimant's) claim that FHHS and JMES had been cited for lead paint hazards [CEO Exhibit 10, p. 3]. The school system hired a certified lead abatement contractor to clean FHHS after a sampling reveal lead bearing dust in excess of EPA standards. JMES was cited in a report by MOSH (Maryland Occupational Safety and Health) to have a lead based paint problem and was ordered to abate the lead bearing paint throughout the facility (Respondent's Exhibit 29, p. 14]. It is also clear from the evidence that it was the complaints filed by the Respondent (Claimant) that spurred the school system into taking corrective action at the two (2) schools.

The Hearing Examiner finds that the Respondent (Claimant) did not follow proper procedure when she disseminated the information regarding the health related issues directly to the public without first providing the school system a fair opportunity to take corrective action. In regards to the situations at FHHS and SMS, the Respondent did raise her concerns to the principals of the schools, respectively. However, the Respondent acknowledges that she did not present her concerns to the area executive officer of officials at North Avenue before filing a complaint with MOSH or going public.

JMES' principal was not notified of the Respondent's concern regarding lead paint at the school before the Respondent (Claimant) issued her communications to the public. The Respondent (Claimant) testified that, after her experience, at FHHS, she did not believe that the school system would take her concerns seriously. The Respondent

testified further that, because the health and welfare of the students were at issue, she felt time was of the essence in having the situations investigated.

Though the Hearing Examiner finds that the Respondent (Claimant) did not follow proper procedure in filing a complaint with MOSH or circulating information to the public without following the chain of command, the Hearing Examiner does not find that such actions constitute misconduct in office. Employees have a legal right to file complaints regarding safety and health issues affecting their condition of employment directly to MOSH. The Respondent also has the right as a citizen to file a complaint regarding safety and health issues that generally affect the public to MOSH. Moreover, the concerns raised in the Respondent's complaints were validated by MOSH.

The Hearing Examiner does not find that the acts committed by the Respondent bears upon her fitness to teach such that it would undermine her future classroom performance and overall impact on her students. There was no evidence offered by witnesses for the CEO (Respondent) that any parents, students or other staff members at the three (30 schools complained about the Respondent issuing the two (2) communications. In addition, there was no evidence offered by witnesses for the CEO that the Respondent was not a competent teacher.

The CEO (Respondent) relied on the Abernathy's recommendation in suspending the Respondent (Claimant) without pay and recommending her dismissal. The case for dismissal is based primarily on the premise that the Respondent (Claimant) irresponsibly disseminated erroneous (and unfounded) information to parents and the public. However, even Abernathy stated that if she had determined that there was some validity to the Respondent's allegations, she may have recommended a different disciplinary action.

The Hearing Examiner finds that there was more than some validity to the Respondent's (Claimant's) allegations.

RECOMMENDATION

WHEREFORE, the undersigned Hearing Examiner respectfully recommends that the CEO's (Respondent's) recommendation to dismiss the Respondent (Claimant) be denied." (CX 139 pp. 8 thru 11)

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As part of the evidence that was included in the record at the dismissal hearing of the Claimant, the Hearing Examiner used the testimony and exhibits of all of the witnesses from the Respondent and the Claimant and cited

"STATEMENT OF CASE"

"On August 26, 1999, a hearing was held in the matter of the termination of Diana Williams ("Respondent") pursuant to &6-202 (a) of the Education Article of the Annotated Code of Maryland. The Chief Executive Officer of Public Instruction for the City of Baltimore's Department of Education ("CEO") charged the Respondent with misconduct in office. The CEO has recommended to the New Board of School Commissioners for Baltimore City Public Schools that the Respondent be dismissed from her teaching position.

The CEO was represented by Cheryl Y. Haskins, Esquire. The Respondent proceeded pro se. The official record consists of the exhibits offered by the parties and accepted into evidence by the Hearing Examiner and the transcript of the proceedings.

Witnesses were Patricia Abernathy, P.H.D., Area Executive Officer for Southeast Region; Jane Ellen Fields, Principal - Southeast Middle School #202; Elaine White, Principal - Fairmount-Hartford High School; Cascelia Spears, Principal - James Mosher Elementary School; Jack Elam, Building Safety and Education Officer for the Baltimore Public School System; and the Respondent (Claimant).

EVIDENCE

The first witness to testify was Dr. Patricia Abernathy [hereinafter "Abernathy"].

Abernathy testified that she has served as the Area Executive Officer for the Southeast Region since November, 1998. She testified that she is responsible for insuring the safety of the children in the southeast quadrant, that school system policies are enforce and that the process functions smoothly.

Abernathy testified that, on February 25, 1999, she received a telephone call from Jane Fields regarding a letter [CEO Exhibit 1, item 3] that had been sent to parents of Southeast Middle School (hereinafter "SMS") students by the Respondent (Claimant). Abernathy testified that she was advised by Jane Fields that the Respondent's business card

was enclosed in the letter. Abernathy testified that the Respondent was a teacher at SMS at the time.

Abernathy testified that she ordered the Respondent (Claimant) to the telephone to question the Respondent about the letter. Abernathy testified that, when she asked the Respondent whether she had wrote the letter, the Respondent replied, "If you can prove it, I will take the charge." Abernathy testified that, when she directed the Respondent to answer her question, the Respondent stated that she would not answer the question until Abernathy talked about what the School System was doing and then hung up the telephone.

Abernathy testified that, after reviewing the information made available to her regarding lead in the water at SMS and talking with Jack Elam, the Building Safety and Education Officer, she recommended that the Respondent be suspended without pay. Abernathy testified that the "parents were unduly alarmed, that there was access to all of the files of all of the students in that school unauthorized, because the letters were sent to these children and we (School System) didn't give permission for that." [Transcript p. 20, Line 4 et. seq.]

Abernathy testified that the letter cause a serious disruption of the educational process and unduly alarmed school staff and parents of students.

On cross examination, Abernathy testified that, in her brief conversation with the Respondent (Claimant) on the telephone, she did not ask the Respondent whether the information in the letter to the parents was valid. Abernathy testified that she has read a 1992 - 1993 report that recommended certain fountains in Southeast Middle School be turned off because of deteriorated faucets. Abernathy testified that there was a relationship between the deteriorated faucet and lead in the water. [Transcript p. 34, Line 5 et. seq.]

The next witness to testify was Jane Ellen Fields [hereinafter "Fields"].

Fields testified that she was the principal of SMS at all times relevant to this matter. Fields testified that the Respondent (Claimant) was assigned to SMS for the 1997 - 1998 school year.

Fields testified that, on February 25, 1999, the educational process at her school was severely disrupted because of the letter the Respondent (Claimant) had sent to parents. Fields testified about the phone calls from parents, people showing up on the school's property and the media coverage. Fields testified that the phone lines were tied up by calls concerning the letter to the extent that the Area Office had to use the fax line to get messages through.

Fields testified that the next day she called the Respondent (Claimant) into her office to discuss the matter and to advise the Respondent of her suspension without pay. Fields testified that she instructed the Respondent not to return to work on Monday, March 1st. Fields testified that, upon being notified of her suspension, the Respondent went out in the foyer of the school and loudly cursed the "damn water" several times. Fields testified that the Respondent told every student she could that she had been suspended.

Fields testified that the Respondent (Claimant) reported to the school on March 1, 1999. Fields testified that the Respondent advised her that she came to work because she had not received a suspension letter from the CEO (Respondent). Fields testified that she instructed the Respondent to wait in the inner office while she contacted the Area Office about the suspension letter. Fields testified that the Respondent refused to wait in the inner office and, instead sat in the outer office. Fields testified that she was informed by the school secretary that the Respondent confronted every parent that came in the office about lead in the school's water and that she had been fired.

On cross examination, Fields testified that she did receive a call from the Respondent (Appellant) regarding a report the Respondent had received about lead in the school's water. [Transcript p. 74, Line 18 et. seq.]. Fields further testified that she is not an expert on lead and that she does not know the EPA guidelines for safe levels of lead in drinking water. Fields testified that she relied on the Health Department's report [CEO Exhibit 8] in preparing her letter to the parents dated February 26, 1999 [CEO Exhibit 6].

On redirect, Fields testified that the Respondent (Claimant) held the position of a mathematics teacher. Fields testified that the responsibilities of a mathematics teacher did not include determining whether there is lead in the drinking water. Fields further testified that, even if she believed the Respondent was correct in her allegations regarding lead in the water, she would have still recommended the Respondent's suspension without pay because of the disruption cause at the school.

The next witness to testify was Elaine White [hereinafter "White"].

White testified that she is the principal of Fairmount-Hartford High School (hereafter "FHHS"). White testified that the Respondent (Claimant) was a teacher at FHHS when she became principal in 1991. White testified that the Respondent, during her tenure at FHHS, expressed concerns about the dust that was in the building during a major renovation project.

White testified that the Respondent had advised her several times that the reports that she had received from Kennedy Krieger and Bayview Medical Center regarding students exposure to lead bearing dust were inaccurate and that she could provide her with accurate information.

On cross examination, White testified that the Respondent (Claimant) mentioned to White her concerns about the health and safety of people in the building during the renovation project. White testified that a report was given to school staff that stated high levels of lead were found in some areas of the building. White testified that the report indicated that there was lead paint through out the building.

White testified further, under floors examination, that there were children under 6 years of age and some pregnant females in the building for a short period of time after the renovations were started. White further testified that she did receive a general report that stated that some of the Morgan Head Start students had a high level of lead; however, there was no evidence of whether the exposure was from the school or from their homes.

The next witness to testify was Cascella Spears [hereinafter "Spears"].

Spears testified that she is the principal of James Mosher Elementary School (hereafter "JMES"). Spears testified that individuals in the JMES community had received a communication concerning lead and asbestos levels at the school [CEO Exhibit 10]. Spears testified that, upon receiving copies of the communication, she forwarded the same to school headquarters for instructions. Spears testified that, as a result of the flyers, parents of students began calling and visiting the school to discuss the matter.

On cross examination, Spears testified that she did not investigate to see whether the allegations in the communications were true.

The next witness to testify was Jack Elam [hereinafter "Elam"].

Flam testified that he is the Building Safety and Education Officer for the School System. Flam testified that SMS and Highlandtown Middle School were on the list of schools identified as having lead in their water that were being provided alternative water (bottled water). Flam testified that FHHS was no longer a school with that concern and that JMES was never on the list.

Flam testified that, as a result of the concerns relative to lead exposure at FHHS, the school system retained Bayview Medical Clinic and the Kennedy Krieger Institute to assess students in the facility that might be at risk. Flam testified that the report issued by Bayview Medical and Kennedy Krieger indicated that there was no evidence linking any student's exposure to lead paint to the facility.

On cross examination, Flam testified that he was aware that any pre-1950 facility is presumed to have lead based paint and that lead paint hazards include chipping, peeling, flaking paint and any disturbance of more than three square feet of lead based paint or any major mechanical or plumbing work. Flam testified that the school system had received variances from the Maryland Department of the Environment which allowed the students to stay in the school while the major renovations were being done. Flam testified that lead abatement contractors were hired because a sampling indicated that there was lead dust on three surfaces at the school in excess of HUD guidelines.

Flam further testified that he recalled seeing a 1993 document that indicated that there was lead paint problems in the building. [Transcript 153, Line 8 et. seq.] Flam testified that he was not aware of the 1993 document until after the plumbing and electrical work had been started.

On redirect, Flam testified that in October, 1996, the school system hired Sports Stevens (industrial hygiene company) to do an assessment of the building to discern if there was a problem with lead dust. Flam testified that, as a result of the assessment, the school system decided to clean the entire building according to HUD guidelines to bring the lead levels down to an acceptable range for occupants in the facility. Flam testified that the facility was under full containment during the abatement [Transcript p. 160, Line 6 et. seq.].

The next witness to testify was the Respondent (Claimant).

The Respondent (Claimant) testified that during a faculty meeting held in August, 1996, she asked the contractor whether it was safe for the staff and students to remain in

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FHHS during such a major renovation. The Respondent testified that the contractor assured her that renovation process would not disturb or cause any problems for the staff or students.

The Respondent (Claimant) testified that she received a report from the U.S. Department of Labor, Occupational Safety and Health Administration [hereinafter "OSHA"] concerning the lead levels throughout the building [Respondent's Exhibit 6].

The Respondent testified that the lead dust sampling done in October, 1996, showed a lead dust level in excess of the HUD guidelines.

The Respondent (Claimant) further testified that the parents of students at FHHS, including the parents of the Headstart students, were not notified of the lead hazards until she went public with the information [See Respondent's Exhibit 18 - video tape].

The Respondent (Claimant) testified that, on or about January 1, 1999, she wrote a letter of complaint to MOSH regarding her suspicion that the drinking water at SMS was contaminated with lead. The Respondent testified that, prior to contacting MOSH, she asked Fields had there been any testing of the water or was there any documentation showing that there was lead in the water at SMS. The Respondent testified that Fields told her no.

The Respondent (Claimant) testified that, if the 1993 report showed lead in the water and if the cause of the problem has not been corrected, there is most certainly lead in the water now [Transcript 217, Line et. seq.]. The Respondent testified that she took a water sampling from Southeast Middle to Martel Laboratories, an EPA certified lab, for testing [Respondent's Exhibit 27]. The Respondent testified that Fields expressed little concern when the Respondent advised her that she could prove "unequivocally" that there was lead in SMS's water.

The Respondent (Claimant) testified that she took her concerns to MOSH because she felt that, after the FHHS experience, the school system did not want to hear her concerns regarding health hazards at other schools.

The Respondent (Claimant) testified that MOSH did inspect JMES and found high levels of lead dust in some areas. The Respondent from the report [Respondent's Exhibit 29] the following comments:

"inform the summer clean-up crew of the sampling results so they can adequately protect themselves while they perform their duties; perform more extensive sampling to determine the extent of the lead-bearing dust; abate the exterior and interior lead-bearing paint throughout the facility."

The Respondent (Claimant) testified that as a teacher she was in the position of loco parentis. The Respondent testified that she believed she was acting in the best interest of the children when she made her complaints regarding the health hazards at the schools. The Respondent testified that she believed the parents of the students would want to know about the situation.

On cross examination, the Respondent (Claimant) testified that she mailed the notice [CEO Exhibit 1] to approximately 500 parents of students at Southeast Middle School. The Respondent testified that she did not get permission from the principal to mail out the notice nor did she get permission to obtain the addresses of the students. The Respondent testified that she did not express her concerns to the area executive supervisor or any official at school headquarters.

Elam was recalled by the Respondent to testify.

Elam testified that FHHS received a normal cleaning in the summer of 1996 before the students returned to school. Elam testified that the lead bearing dust problem was resolved after the concerns raised by the Respondent. Elam testified further that the school system had not received any clearance document from any MDE certified agency that the lead dust was at acceptable levels after the cleaning.

Abernathy was recalled by the Respondent to testify.

Abernathy testified that she did not do an independent investigation of the allegations raised in the Respondent's (Claimant's) communications about FHHS, SMS, Highlandtown Middle School, and JMES. Abernathy testified that she made no effort to determine whether the Respondent was a lead abatement expert. Abernathy testified that she relied on the reports and information she received from Elam, Fields, and a Mr. Giles.

Abernathy testified that she had no evidence from parents, students or teachers to corroborate the statement that the Respondent (Claimant) was disruptive. Abernathy testified that it was the manner in which the Respondent notified the parents of her

concerns that was at issue. Abernathy testified that the Respondent could have dealt with the issue without using scare tactics. Abernathy testified that, if she had determined that there was some validity to the Respondent's allegations, she may have recommended a different disciplinary action.

In response to questions from the Hearing Examiner, Abernathy testified that the calls she received regarding CEO Exhibit 1 were basically inquiries about the information in the communication and not complaints about the communication. Abernathy testified that the parents were confused over why the information came from someone other than the principal or the school system.

White was recalled to testify by the Respondent. White's testimony offered no additional evidence.

Fields was recalled to testify by the Respondent.

Fields testified that she did not receive any complaints from parents, students or teachers about the Respondent being disruptive. Fields testified that she did not feel a need to find out whether the Respondent was a certified lead abatement expert or whether she had any proof that there was lead in the water.

Fields further testified that she believe that the communications sent to the parents contained several misstatements and inaccuracies that cause the parents of Southeast Middle School students unnecessary concern. According to Fields, the communications would lead the parents to believe that their children were in imminent danger of lead poisoning and that the school was attempting to hide the information from them.

On redirect, Fields acknowledged that lead poisoning can be fatal [Transcript p. 389, Line 9]. Fields testified that, before the 1998 - 1999 school year, there were four (4) bottle water stations.

In response to a question from the Hearing Examiner, Fields testified that one of the fountains in House was operable and in use by students [Transcript p. 412, Line 18 et seq.]. " (CX 139).

In addition to the discrepancies of the testimony of Mr. Jack Elam at the dismissal hearing cited by the Hearing Examiner, there was testimony given by Mr. Jack Elam at this dismissal hearing that revealed more inconsistencies. Also, although Mr. Elam gave testimony at the dismissal hearing as well as the hearing before the ALJ, he brought no documentation with him to either of the hearings to support any of his testimony. Mr. Elam gave testimony at the dismissal hearing that were completely erroneously stated. Also, Mr. Elam's testimony was impeached at the dismissal hearing several times. Inconsistencies and impeachable testimony from Mr. Elam were found and cited by the Claimant and the Hearing Examiner at the dismissal hearing. To begin with, Mr. Elam testified at the dismissal hearing he drafted a document for the Superintendent of Baltimore City Public Schools which informed the City Council President of the Fairmount-Harford project, and that this document specified that "The Construction contractor has hired a certified lead abatement contractor, per Baltimore City Public Schools, who will submit a protocol for a "variance" as required by law to the Maryland Department of the Environment. The construction will proceed under that variance, and the occupants are being separated from the construction by distance and containment....." (CX 281 pp. 159-160; CX 279 [CEO Exhibit 14 from the dismissal hearing which is the letter Mr. Elam claimed that he drafted]). Further, Mr. Elam testified that there was a "variance" in place for the lead abatement process at FHHS according to the Maryland Department of the Environment's (hereinafter MDE) standard that permitted the staff (including the Claimant who was teaching at FHHS during this time), pregnant females, Morgan State Headstart children, and other students to enter FHHS for the 1996 - 1997 school year, even though the major renovation project was still in progress at FHHS. Consequently, on examination by the the Hearing Examiner, Mr. Elam testified that ...

"...the variance that was required for lead paint abatement was something that was interpreted through a document from MDE, Maryland Department of the Environment, where an individual conducting lead-based paint abatement in a --actually, they indicated in a housing facility required that they maintain a separation by distance and containment." And that "the facility was under full containment during the abatement and all protocols established by MDE were maintained, and we monitored the facility to make sure that those containment were in place and that they provided negative air to prevent any of the dust getting into the area where the occupants were existing." (CX 281 pp. 159 - 160).

However, through further examination of Mr. Elam by the Hearing Officer, Mr. Elam was forced to change his previously stated testimony above and admit that that there was no "variance" in place as he had previously defined and testified to as being in place when the construction project at FHHS began in the latter part of 1995. Mr. Elam was coerced to admit that there was no "variance" in place when the general contractor impacted lead-based paint surfaces which had not been abated prior to penetration with the major mechanical, electrical, and plumbing work during July and August of 1996; Mr. Elam had to change his previous testimony and admit that there was no "variance" in place when the general contractor created more lead-based paint

hazards (lead dust) by penetrating the lead-based painted surfaces that had not been abated during the summer of 1996; still too, Mr. Elam had to change his erroneous statement and admit that there was no "variance" in place when the general contractor's workers penetrated the lead-based painted surfaces with the major mechanical, electrical, and plumbing work and were thus unprotected from exposing themselves to tremendous amounts of lead dust (which is poisonous to the body and can cause death) and carrying the lead dust home to their wives, children, and other family members. Further, Mr. Elam was forced to admit that there was no "variance" in place when the Claimant, other staff persons, pregnant females, headstart children, and other students entered FHHS in August

and/or September of 1996 for the 1996-1997 school year. Thus, Mr. Jack Elam, who testified that he was a 25-year safety employee with the Baltimore Public School System and was certified as a public sector inspector with MOSH who is capable of providing risk assessment and management for all environmental health and safety issues, knew or should have known that there was no "variance" in place when the general contracting company was penetrating these unabated lead-based paint surfaces, creating more lead-based paint hazards (lead dust is defined by Title 10 and other Federal, State, and Local laws as being a lead-based paint hazard also [CX 278 [Claimant's exhibits 10, 11, and 12 from the dismissal hearing which contains the Federal and State lead laws and definitions]), posing health risk of lead dust exposure to themselves, their families, to the Claimant, to other staff persons, especially to the pregnant females, to the Morgan State headstart children as well as to the other high school students that were housed at FHHS. Also, Mr. Elam should have known that these same Federal, State, and Local laws prohibit the owners of a facility to have "persons at risk" (pregnant females and children under the age of 6 years old) in their dwellings when a lead-based paint hazard as been identified, reported, and even when the lead reduction work is being done to eliminate or reduce the lead-based paint hazard. In fact, in the examination by the Claimant and the Hearing Examiner, Mr. Elam was coerced to testify that it was not until the Claimant went public with her concerns about the potential exposure of lead-based paint and lead-based paint and/or asbestos hazards at FHHS in November of 1996 that some form of a "variance" was put in place. Also, Mr. Elam testified at the dismissal hearing that the Claimant did bring her concerns about the potential lead-based paint and/or asbestos hazards at FHHS to his attention. And, the Claimant testified that she initially made her concerns known to her principal and the contractor at the first staff meeting that was held in late August of 1996. Also, the principal of FHHS testified at the dismissal hearing that the Claimant brought

the concerns to her several times about the health risks involved by allowing FHHS to remain open to staff, students, and the headstart children while the renovation project was being undertaken. However, the Claimant had to go public and make her concerns known to the Maryland Occupational Safety and Health (hereinafter MOSH) and to the media in November of 1996 before a fragment of a "variance" was put in place to prevent some of the lead dust exposure. Also, in the examination by the Hearing Examiner, there were several other inconsistencies in Mr. Elam's testimony which puts a dark cloud over the credibility of any of Mr. Jack Elam's testimony. (CX 281 pp. 161-165).

Still too, as noted several times in his prior testimony, Mr. Elam testified that the subcontractors that were hired by the general contractor did lead abatement at FHHS in 1996. (CX281 p. 145). However, as defined as defined by Code of Maryland Regulations, Title 26, Subtitle 16, Department of the Environment (COMAR 26), lead abatement means....

" a set of measures designed to eliminate or reduce lead-based paint hazards in residential, public, or commercial buildings, bridges, or other structures or superstructures in accordance with standards established by the Department, which may include:

- (a) The removal of lead-based paint and lead-contaminated dust, the containment or encapsulation of lead-based paint, the replacement or demolition of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil; and
- (b) All preparation, cleanup, disposal, and post-abatement clearance testing activities associated with these measures." (CX 278 [Claimant Exhibit 11 from the dismissal hearing]).

Consequently, during the re-examination of Mr. Elam by the Respondent and the Hearing Examiner at the dismissal hearing, Mr. Elam was coerced to change his previous testimony and admit that there was no lead abatement in July and August of 1996 when

the general contractor penetrated the lead-based painted surfaces, there was no lead abatement when the lead abatement contractors were hired in December of 1996. Again, Mr. Elam was forced to change his previous testimony and admit that the lead abatement contractors only wet-scraped chipping, peeling, and flaking lead-based paint and cleaned up lead dust largely generated by the general contractor whose workers penetrated the lead-based painted surfaces and created a tremendous amount of lead dust throughout FHHHS from the major mechanical, electrical, and plumbing work at FHHHS and from the pulling down of the dropped-ceilings. Federal, State, and local prohibit the disturbance of more than 3 square feet of lead-based paint surfaces through renovations such as major mechanical, electrical, or plumbing work by general contractors. These same Federal, State, and Local laws mandate that when a lead-based paint hazard has been identified, the owners of the lead-based painted the facility must hire and document that they have hired a lead abatement contractor whose supervisor must be certified and accredited by the Maryland Department of the Environment and whose workers must be certified and accredited by MDE as lead abatement workers. In fact, Mr. Elam was coerced to change his previous erroneous testimony and admit that even though the lead abatement contractor was hired, there was never any lead abatement at FHHHS. The lead abatement contractors didn't even abate the lead-based paint surfaces prior to the general contractor disturbing the lead-based painted surfaces in July and August of 1996. In fact, the lead abatement contractors were hired in November of 1996 to clean up the lead-based paint hazard (lead dust) that had been created by the work of the general contractor that caused the spread of lead dust throughout FHHHS during the summer of 1996; also, the lead abatement contractor was hired to wet scrape chipping, peeling, and flaking lead-based paint. (CX 281 pp. 145 - 165). And, again, the lead abatement contractor was hired to wet scrape lead-based painted surfaces and clean up lead dust only after the Claimant went