

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 03-1749

DIANA R. WILLIAMS

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD,  
UNITED STATES DEPARTMENT  
OF LABOR

Respondent

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**PETITIONER'S INFORMAL BRIEF**

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Petition for Review of Order of the United States Department of Labor,  
Administrative Review Board

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## I. STATEMENT OF JURISDICTION

### A. Agency and Appellate Court Jurisdiction:

The Secretary of the U.S. Department of Labor has subject matter jurisdiction under the whistleblower employee protection provisions of the Safe Drinking Water Act, 42 U.S.C.A. & 3000j-9 (West 1991), Toxic Substances Control Act, 15 U.S.C.A. & 2622 (West 1998), the Clean Air Act, 42 U.S.C.A. & 7622 (West 1995), and the Solid Waste Disposal Act, 42 U.S.C.A. & 6971 (West 1995), Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. & 9610 (West 1995), and the Federal Water Pollution Control Act, 33 U.S.C.A. & 1367 (West 2001), (hereinafter, the "Acts"). Because the petition for review is from a final agency order the above statute, and the claim for relief arose in the State of Maryland, review is within the exclusive jurisdiction of this Court under the Administrative Procedure Act, 5 U.S.C. & 706.

### Timeliness of Appeal:

The Petitioner filed her Petition for Review on June 10, 2003 from the Final Decision and Order of the Administrative Review Board of the United States Department of Labor dismissing her complaints with prejudice, entered on May 30, 2003. Therefore, the Petition was filed within the sixty day period provided in the Acts.

## II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Petitioner frames the following eight issues for review:

ISSUE (1): WHETHER THE DISCLOSURE OF INFORMATION FROM THE PETITIONER RELEVANT TO SPECIFIC DANGERS

TO PUBLIC HEALTH AND SAFETY OR A VIOLATION OF LAW IS  
PROTECTED BY THE 1ST AMENDMENT OF THE  
CONSTITUTION OF THE UNITED STATES, NAMELY, THE  
FUNDAMENTAL RIGHT OF INDIVIDUALS TO FREEDOM OF  
SPEECH OR OF THE PRESS?

ISSUE (2): WHETHER THE SUBSTANTIAL EVIDENCE EXIST IN  
THE RECORD TO SUPPORT THAT THE FEDERAL  
ADMINISTRATIVE LAW JUDGE (HEREINAFTER "ALJ") AND  
THE ADMINISTRATIVE REVIEW BOARD (HEREINAFTER  
"ARB") ERRED IN HOLDING THAT THE PETITIONER  
CIRCULATED LETTERS TO STAFF, STUDENTS AND PARENTS  
CONTAINING ERRONEOUS, UNFOUNDED, AND  
SENSATIONALIZED ALLEGATIONS ABOUT HERE BEING LEAD  
IN THE DRINKING WATER AND/OR LEAD-BASED PAINT  
HAZARDS IN BALTIMORE CITY PUBLIC SCHOOL SYSTEM  
(HEREINAFTER "BCPSS")?

ISSUE (3): WHETHER THE PETITIONER IS PROTECTED BY THE  
14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED  
STATES WHICH PROHIBIT ANY CITY, STATE, OR FEDERAL  
AGENCY FROM DEPRIVING THE PETITIONER OF HER  
FUNDAMENTAL RIGHT TO LIFE, LIBERTY, OR PROPERTY,  
WITHOUT DUE PROCESS OF THE LAW, NOR TO DENY  
PERSONS WITHIN ITS JURISDICTION THE EQUAL  
PROTECTION OF THE LAWS?

ISSUE (4): WHETHER THE ARB ABUSED ITS DISCRETION, ACTED ARBITRARILY, CAPRICIOUSLY OR ERRED AS A MATTER OF LAW IN REGARD TO NOT ABIDING BY THE CODE OF FEDERAL REGULATION (HEREINAFTER "C.F.R."), THAT IS, 29 C.F.R. 24.7(a), BUT ARBITRARILY TAKING OVER TWO YEARS TO ISSUE THE FINAL DECISION AND ORDER TO THE PETITIONER?

ISSUE (5): WHETHER THE SUBSTANTIAL EVIDENCE EXIST IN THE RECORD TO SUPPORT THAT THE ALJ AND ARB ERRED BY ALLOWING THE BCSS TO AMEND THE ORIGINAL STATEMENT OF CHARGES DOCUMENT ON A CASE ON APPEAL AND THEN WORD THE ILLEGALLY AMENDED ALLEGATION IN SUCH A WAY THAT IT APPEARS TO BE THE INITIAL AND PRIMARY REASON FOR THE PETITIONER'S SUSPENSION WITHOUT PAY AND TERMINATION AS ALLEGED IN THE PETITIONER'S ORIGINAL LETTER OF SUSPENSION WITHOUT PAY AND ORIGINAL STATEMENT OF CHARGES DOCUMENT?

ISSUE (6): WHETHER THE PETITIONER'S WHISTLEBLOWING, BY PUBLICLY DISCLOSING INFORMATION RELEVANT TO SPECIFIC DANGERS TO PUBLIC HEALTH AND SAFETY, IS COVERED UNDER "PROTECTED ACTIVITY" OF THE ACTS AND STATE LAWS AND, THUS, THE DISMISSAL OF THE PETITIONER FOR SUCH REASON IS ILLEGAL AND

DISCRIMINATORY?

ISSUE (7): WHETHER THE ALJ'S AND ARB FAILURE TO

THOROUGHLY EXAMINE THE FACTS IN THE MASSIVE

RECORD, INCLUDING THE TRANSCRIPT OF THE CASE OF

DISMISSAL BY THE ORIGINAL FINDER OF FACT, CAUSED THE

ALJ AND THE ARB TO ERR BY RELYING ON THE TESTIMONIES

OF WITNESSES WHOSE CREDIBILITY HAD BEEN DAMAGED

DUE TO THEIR ERRONEOUS, INCONSISTENT, AND,

ULTIMATELY, IMPEACHED TESTIMONIES AT THE DISMISSAL

HEARING BEFORE THE ORIGINAL FINDER OF FACT?

ISSUE (8): WHETHER THE ALJ AND ARB ABUSED ITS

DISCRETION, ACTED ARBITRARILY, CAPRICIOUSLY, OR

ERRED AS A MATTER OF LAW IN HOLDING THAT THE

PETITIONER DID NOT PROVE THAT HER DISMISSAL BY THE

BCPSS WAS DISCRIMINATORY AND, THUS, IN VIOLATION OF

THE ACTS, STATE LAWS AND REGULATIONS?

### REFERENCE TO PERTINENT CONSTITUTIONAL PROVISIONS

1st Amendment to the Constitution of the United States

14th Amendment to the Constitution of the United States

### REFERENCE TO PERTINENT STATUTES

Federal Safe Drinking Water Act--Employee Protection Provision  
Federal Clean Air Act--Employee Protection Provision

Public attention and extensive media coverage have been recently focused on the corruption on the part of Baltimore City Public School System officials (hereinafter "BCPSS") in concealing the fact that for over ten (10) years, the BCPSS officials have had documentation which revealed lead-contaminated drinking water in the schools and have allowed staff, but more importantly, the children to drink water from fountains in which they knew had lead levels higher than the standard set by the Environmental Protection Agency (hereinafter "EPA"). In response to such public outcry and wide-spread

**STATEMENT OF RELEVANT FACTS**

Professional Employees  
 Policy 201.07(B)(5) - (10): Suspension and/or Dismissal of

**REFERENCE TO PERTINENT SCHOOL BOARD POLICY**

COMAR - Title 26.16.01.18 (B)(1): Recognized experts  
 of the Act  
 COMAR - Title 09, .05 Protection of Employees Under & 5-604  
 COMAR 17.04.08.05

**REFERENCE TO REGULATIONS**

Federal Toxic Substances Control Act- Employee Protection  
 Provision  
 Federal Solid Waste Disposal Act--Employee Protection Provision  
 Title X  
 Federal Lead Contamination Act of 1988  
 Maryland Code Annotated, State Pers. & Pens., Section 5-305 and  
 5-306  
 Maryland Code Annotated, & 6-202 and &6-203  
 Maryland Code Annotated, & 10-220 and & 10-221

media attention, the Baltimore City Council held an informational hearing on March 26, 2003 on lead in the drinking water in BCPSS. The hearing was chaired by Councilman Edward Reisinger. City council members, the Health Commissioner, the CEO of BCPSS, the Director of the "Coalition to End Childhood Lead Poisoning", former special agent for the FBI and presently the Director Criminal Justice Legal Studies and Public Service at the Anne Arundel County Community College and Founder of the "Children's First Movement", the Founder of "Youth Warriors", other activists, parents, and the petitioner gave testimony relevant to the lead in the drinking water in BCPSS. As evidenced in the video taping of the hearing, Councilman Reisinger stated that "It is a sad spectacle that one branch of city government, the Health Department, imposing fines on another branch, the Baltimore City Public School System, for failing to protect children from possible lead contamination". (Exhibit 1 [2 video tapes]). Furthermore, Councilman Reisinger testified that the Health Commissioner, Dr. Peter Beilinson, imposed daily fines totaling about \$4,000 against 36 schools, most of which were elementary schools, for failing to shut off drinking fountains and alerting students and staff that the sinks are to be used for only hand washing. Moreover, Councilman Reisinger stated that "we know who dropped the ball" and "who is responsible", namely, BCPSS. City Council President, Sheila Dixon, cited that "we know that ten years ago a report was done, nobody moved on the report, and maybe they did move on it, but, we are in a crisis situation". Councilman Keiffer Mitchell III testified that the issue of lead in the drinking water in BCPSS has been on going for more than ten years and that he had written a letter to the Chief Executive Officer (CEO) of BCPSS about a



school that had lead-tainted drinking water. Also, Councilman Mitchell stated that those that are responsible should pay for this travesty because our children have been poisoned for many years, and we don't know the effects of such. Councilman Mitchell III remarked, "we have got lawsuits" and testified that he wrote a letter to Governor Erlich asking him "to declare a state of emergency on this issue "of lead-tainted drinking water in BCPSS in order to "help open some funds for this problem."

The Health Commissioner testified that on February 27, 2003 a Commissioner's Order was issued to BCPSS which gave the school system ten days to be in compliance and meet several different criteria in order to prevent staff and students from drinking lead-tainted water from the fountains. Dr. Beilinson testified that the Health Department inspected 173 schools; 51 schools had 55 different violations; citations were written and about \$5,500 in fines have been issued to BCPSS. The Health Commissioner stated that the Health Department will begin testing students sometime during the spring break and that other students will be tested for lead exposure next year. Dr. Beilinson informed the City Council that the students would be tested for lead using blood lead testing.

Dr. Tyrone Powers, the Director of the Criminal Justice Legal Studies and Public Services at Anne Arundel County Community College, testified that, since 1992, the BCPSS has been in violation of the "Federal Lead Contamination Act of 1988 by allowing students to drink from lead-tainted water fountains which had levels of lead higher than 20 parts per billion (hereinafter "ppb"). Dr. Powers testified that "96,000" children are potentially being poisoned by lead in the drinking water in BCPSS and that it is a crime that the BCPSS has been "murdering children" instead of educating

them since 1992. Also, Dr. Powers stated that he could not understand how the leaders of BCPSS were allowed to be in violation of a Health

Commissioner's "Order", namely, to discontinue allowing the students to consume lead-tainted drinking water without any one being fired or having other severe penalties imposed upon him/her. Dr. Powers stated that Dr. Beilinson informed him that, after a certain time period has lapsed, testing children for lead using the blood lead testing would not give an accurate reading of the amount of lead in the body. Dr. Powers testified that Dr.

Beilinson stated to him that lead leaves the blood stream and enters the bones after a period of time. Dr. Powers cited the urgency of performing the blood lead testing before the lead leaves the blood stream. Dr. Powers testified that he has talked with delegates, senators, and the federal government relevant to declaring "a state of emergency" on the issue of the lead-contaminated drinking water in BCPSS.

Righteously indignant by the lack of urgency given to the immediate blood lead testing of our children in BCPSS by the Health Commissioner, the

petitioner patiently awaited her opportunity to testify before the City Council. The petitioner testified that, since 1977, she has been certified and accredited by the Maryland Department of the Environment (hereinafter "MDE") as a Visual Inspector, Inspector Technician, Paint Removal and Demolition Supervisor, and Lead Abatement Service Contractor for Residential and Commercial Property and is, thus, a recognized lead expert by COMAR - Title 26.16.01.18 (B)(1). (Exhibits 2 and 3 respectively). As one who

testified before the City Council hearing on lead-based paint poisoning April 9, 1997 and revealed video-taping of the horrific lead-based paint hazards at FHHS as of March 17, 1997, the petitioner testified to the urgency of

immediately testing the children for lead. The petitioner testified that EPA provides information on health effects of lead poisoning. The petitioner testified that lead, a poisonous metal, only stays in the blood stream about 6 to 8 weeks and then moves to the soft tissues. Lead does the most damage when it enters the soft tissues, that is, damage to the brain, nervous system, digestive system, and other major organs. After lead leaves the soft tissues, it enters the bones, where it can stay up to 30 years. Lead can re-enter the blood stream when the body is sick and needs calcium and iron for nutrients, but instead of pulling up these nutrients from the bones, it pulls up the lead from the bones. Dr. Herbert L. Needleman, MD, and others published an article in JAMA on February 7, 1996 entitled "Bone Lead Levels and Delinquent Behavior" which evaluated the association between lead in the bones and delinquent behavior of boys. (Exhibit 4): The amount of lead in the boys' bones was measured using a special x-ray fluorescence machine called the "K x-ray fluorescence spectroscopy" which measured the lead in the body from the tibia. And, in her testimony, the petitioner stated that only a "special x-ray fluorescence" machine could be used to test the cumulative amount of lead, especially after waiting 8 weeks to do the blood-lead testing for lead exposure.

Since 1992 BOPS official knew that Southeast Middle School (hereinafter "SEMS") was one of thirty-two schools in Baltimore City that had lead in the drinking water higher than 20 ppb, but, on March 1, 1999, the petitioner received a letter from the then CEO of BCPSS which stated that she was being immediately suspended without pay for having caused unnecessary panic and disruption in the educational process of BCPS by disseminating communications which erroneously stated that there was lead in the drinking

water at SEMS. (Exhibit 5). The petitioner was never informed of or given her due process right to appear before the New Board of School Commissioners (hereinafter "Local School Board") prior to being placed on suspension without pay. According to Board policy 201.07(B)(5) - (10): Suspension and/or Dismissal of Professional Employees (hereinafter "Board Policy"), the petitioner should have been granted her due process rights of being heard before the Local School Board prior to her suspension without pay. (Exhibit 6). Also, the Board Policy clearly implicates that the CEO only had the authority to suspend the petitioner, a professional employee, with pay. The Board Policy precisely states that only the Local School Board can recommend suspension without pay of a professional employee, and only after the professional employee have had an opportunity to be heard before the Local School Board.

In May of 1999, the CEO of BCPSS issued the statement of charges against the petitioner. (Exhibit 7). The statement of charges document alleges that the petitioner distributed communications to various schools which erroneously stated that there was lead-contaminated drinking water and/or lead-based paint hazards in BCPS and which caused unnecessary panic and disruption to the educational process of the schools.

The Local School Board hired a Hearing Examiner to reside over the case of dismissal of the petitioner. The original Finder of Fact, the Hearing Examiner (hereinafter "H.E"), resided over the two-day dismissal hearing of the petitioner on August 26th and 27th of 1999.

On October 12, 1999, the H.E. issued is 11-page Findings of fact, conclusions, and recommendation (hereinafter "H.E. Report") in which he

denied the CEO's recommendation to dismiss the petitioner as a Mathematics in the BCPS (Exhibit 8). In the H.E. Report, the H.E. cited that the petitioner's case of dismissal was based primarily on the premise that the petitioner irresponsibly disseminated erroneous and unfounded information to parents, staff, and the public regarding lead in the drinking water and/or lead-based paint hazards at SEMS, Fairmount-Hartford High School (hereinafter "FHHS"), and James Mosher Elementary School (hereinafter "JMES") which unduly alarmed and disrupted the educational process at the schools.

The H.E. concluded that the petitioner had received substantial training in the field of lead paint assessment and abatement and could validly consider herself an expert in the field. The H.E. found that the petitioner presented substantial evidence to prove that there was lead in the water at SEMS. In the H.E. Report, the H.E. cited that the Safety Officer for BCPS, Mr. Jack Elam, testified that SEMS was 1 of 32 schools in BCPS that had documented lead-contamination in the drinking water since 1992. The H.E. found that the evidence supported the facts that FHHS and JMES had lead-based paint hazards and that BCPS was notified by the Maryland Occupational Safety and Health (hereinafter "MOSH") to abate the lead-based paint hazards at JMES. Moreover, the founder of "Youth Warriors", Ms. Pinder, testified that JMES was presently closed because of lead-based paint hazards.

The H.E. did not find that the petitioner's action of informing the public about health and safety issues constituted misconduct in office and cited the following:

In a letter dated December 8, 1999, the Local School Board, of whom the CEO is a member, informed the petitioner that the Local School Board had decided to reject the recommendation of the Hearing Examiner. (Exhibit 9). The petitioner, who has been represented Pro Se since the dismissal hearing before the Hearing Examiner, was never notified of the meeting of the Local School Board in which the Local School Board was deciding to accept, reject, or modify the recommendation of the Hearing Examiner. According to the Board Policy, the meeting should have been an "open meeting" in which the petitioner should have been notified of and afforded an opportunity to attend in order to give her argument before the Local School Board as to why the Local School Board should accept the recommendation of the Hearing Examiner. The Local School Board never submitted any written communication to substantiate or explain their reason for rejecting the Hearing Examiner's findings of fact, conclusion, and recommendation. according to the Maryland Annotated Code & 10-220 (d)(4) under "Proposed

....."Though the Hearing Examiner finds the Respondent [Petitioner] 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 by the Respondent's complaints were validated by MOSH"....

decisions and orders", the School Board should have provided written explanation for deciding to accept, reject, or modify the Hearing Examiner's findings, conclusion, and recommendation. (Exhibit 10).

The School Board waited almost nine months to issue an unsigned and undated Order to the petitioner relevant to her termination as a Mathematics teacher in the BCPSS. (Exhibit 11). And, the only way the petitioner could substantiate the date on which she received the unsigned and undated Order was by the envelope in which the Order came in, which is dated August 16, 2000. (Exhibit 12). Being very cognizant of the fact that the petitioner was being represented Pro Se, the Local School Board failed to afford the petitioner with her due process rights as cited in the Maryland Annotated Code, namely that of providing the petitioner with a written statement of her appeal rights along with the Order. In the Maryland Annotated Code & 10-221 under "Final Decisions and Orders", it states that, along with the Order, the Local School Board should provide the terminated teacher with a written statement of his/her appeal rights as well as other written explanations. (Exhibit 13).

On the appeal to the Local School Board (and thereafter) of the recommendation by the H.E., the CEO of BCPSS illegally and cleverly amended the original statement of charges. The petitioner was denied her due process right and never given the opportunity to appear before the Local School Board to argue the issue of the illegal amending of the original statement of charges by the CEO of BCPSS.

In her 9-page final argument before the Maryland State Board of Education (hereinafter "MSBE"), the petitioner informed the MSBE of the

illegally amended statement of charges by the CEO of BCPSS. (Exhibit 14). The petitioner informed the MSBE that she did not illegally accessed and obtained confidential student information as stated in the illegally amended statement of charges, but was voluntarily given an ALPHA Listing, a student directory, by a clerical staff person at SEMS. (Exhibit 15). The petitioner informed the MSBE that the ALPHA Listing is routinely made available to teachers without the permission of the principal. The petitioner informed the MSBE that, as a result of the principal telling her that she was not interested in the lead problem at SEMS, she obtained the ALPHA Listing to inform and educate the parents at SEMS about the lead-contaminated drinking water. In the transcript of an appeal hearing before the Lower Court of a similar litigation with the BCPSS, the petitioner informed the Lower Court that the CEO of BCPSS illegally amended the statement of charges on an appeal, that her due process rights were violated by the CEO of BCPSS and the Local School Board, and that she had not illegally accessed and obtained confidential student information, but was voluntarily given the ALPHA Listing from a clerical staff. (Exhibit 16). Also, as evidenced in the transcript of this appeal, the Lower Court thoroughly examined the issue of how the petitioner obtained the ALPHA Listing and concluded that the petitioner didn't secretly accessed and obtained any confidential student information. The petitioner informed the Lower Court that the ALPHA Listing is routinely made available to teachers from the clerical staff without the permission of the principal.

On several different occasions in the transcript of the appeal before the Lower Court, there were questioning by the Lower Court relevant to the obvious violations of the petitioner's due process rights. The Lower Court



questioned how the CEO and the general Counsel for BCPSS was privy to and afforded the opportunity to be heard before the Local Board at the "open meeting" where the Local School Board was deciding to accept, reject, or modify the recommendation of the H.E. and the petitioner was neither notified of or afforded her due process right of being heard before the Local School Board at the same "open meeting". The Lower Court questioned how the School Board could just arbitrarily reject the recommendation of the H.E. without given the petitioner any written explanation as to why they decided to reject the findings of fact, conclusion, and recommendation of the H.E. The H.E. was hired by the Local Board to be the Finder of Fact. Because the petitioner believed she was terminated from BCPSS as of result of her whistleblowing activities relevant to the disclosure of lead in the drinking water and/or lead-based paint and/or asbestos hazards in the some of BCPSS, she filed complaints of discrimination against BCPSS, initially with MOSH. However, because of MOSH's continual deferral of her discrimination complaints, the petitioner filed a complaint of discrimination against BCPSS with the federal Occupational Safety and Health Administration (hereinafter "OSHA"). OSHA merited the petitioner's complaint of discrimination against BCPSS under the various federal statutes. The Regional Investigator for OSHA (hereinafter "OSHA Investigator") spent over a year investigating the petitioner's complaint of discrimination against BCPSS, namely from December of 1999 to February of 2000. In the "Summary of Pertinent Data" section of his 12-page final investigative report, the OSHA investigator cited the following:

....."The Complainant filed a timely written discrimination complaint on December 14, 1999,

pursuant to the whistle blower protections afforded in the Environmental Protection Agency (EPA) statutes of the Clean Air Act, 42 U.S.C. & 7622, Toxic Substance control Act, 15 U.S.C. & 2622, Safe Drinking Water Act, 42 U.S.C. & 300j-9 and Solid Waste Disposal Act (42 U.S.C. & 6971), hereafter referred to as the Whistle Blower Acts. The complaint meets all the requirements of a prima facie case for a violation of the cited Acts. The evidence developed during the investigation does support the allegation of discrimination under the Acts. Therefore, complaint is recommended for merit findings."...(Exhibit 17)

On June 12, 2000, the Regional Supervisor for OSHA (hereinafter "Regional Supervisor") sent the petitioner a letter informing her that "based upon their investigation and the weight of the evidence to date indicates that there was merit" to her federal discrimination complaint against BCPSS. (Exhibit 18). Along with the letter dated June 12, 2000, the

Regional Supervisor forwarded the petitioner a copy of the 4-page letter sent to BCPSS on June 9, 2000 advising them of their findings. (Exhibit 19). In

the 4-page letter dated June 9, 2000, the federal Regional Supervisor cited the following:

"This letter is to notify you of the results of the investigation in the above noted case, in which Diana R. Williams alleged violations under Section 322 (a)(1-3) of the Clean Air Act (42 U.S.C. 7622), Section 1450 (i)(1) (A-C) of the Safe Drinking Water Act (42 U.S.C. 300j-9), Section 7001(a) of the Solid Waste Disposal Act (42 U.S.C. 6971) and/or Section 23(a)(1-3) of the Toxic Substance Control Act (15 U.S.C. 2622)....Based upon our investigation, and the weight of the evidence to date indicates that Diana R. Williams was a protected employee engaging in a protected activity within the scope of the Act, and that discrimination

as defined and prohibited by the statute was a factor in the actions which comprise the complaint." ....

The BCPSS appealed the findings of the Regional Supervisor for OSHA, and on August 17, 18, and 23, 2000, a formal hearing was conducted before the ALJ. The ALJ issued her Recommended Decision and Order on November 30, 2000. On January 23, 2001, the petitioner submitted a 52-page Brief (hereinafter "Brief") to the ARB in rebuttal of the ALJ's Recommended Decision and Order. (Exhibit 20). Along with other massive evidence that accompanied the Brief, the petitioner's Brief gives the page numbers in the transcript of the dismissal hearing before the original finder of fact, the Hearing Examiner, where the testimonies of the witnesses for BCPSS (the BCPSS' School Safety Officer and the principals of SEMS and FHHS), were erroneous, inconsistent, and impeached. (Exhibit 21). Also, the petitioner's Brief cites the pages in the transcript where the School Safety Officer of the BCPSS was coerced to admit that he had erroneously stated the facts in that there were still lead-based paint hazards at FHHS after December of 1996, that there was never any "clearance testing" document issued to the BCPSS officials indicating that the lead-based paint hazards at FHHS were abated and that FHHS was ready for re-occupancy. Furthermore, the Safety Officer for BCPSS was forced to admit that SEMS was one of thirty-two schools in BCPSS that had lead in the drinking water since 1991, and that there were lead-based paint hazards at FHHS when the petitioner publicly stated that these hazards existed. However, in her Recommended Decision and Order, the ALJ cited that after December of 1996 there were no lead-based paint hazards at FHHS, that the BCPSS officials had received a

"clearance testing" document that indicated that the lead-based paint hazards had been abated at FHHS and that FHHS was ready for re-occupancy. But, the evidence in the record reveals a March 17, 1997 video taping of lead-based paint hazards in the interior of FHHS. Moreover, in the petitioner's Brief, the definition of a lead-based paint hazard as defined by COMAR and what conditions constitute lead-based hazards are thoroughly detailed. Although the substantial evidence in the record is contrary, the ALJ found that there was no lead-based paint hazards or lead-contaminated drinking water at FHHS and SEMS when the petitioner sent her communications to the parents about these specific health and safety dangers. As noted in the Certificate of Service, the petitioner sent her Brief to the ARB within the time limit specified by the Federal rules. However, the ARB exceedingly past its ninety-day time limit to issue its written Final Decision and Order. The ARB allowed over two years to lapse prior to issuing a 3-page Final Decision and Order that had the ALJ's Recommended Decision and Order attached. The ARB issued the Final Decision and Order along with the ALJ's Recommended Decision and Order on May 30, 2003. (Exhibit 22). The Code of Federal Regulation, namely, 29C.F.R. 24-6(b) gives a time limit of ninety days for the ARB to issue the Final Decision and Order. On September 1, 2000, the petitioner filed a complaint of discrimination with OSHA against MOSH, known as the Complaint Against State Plan Administration (hereinafter "CASPA complaint"), relevant to various issues, including the way MOSH's handled her discrimination complaint against BCPSS. OSHA merited the petitioner's CASPA complaint against MOSH. Although the petitioner didn't receive the report until July 11, 2002, the federal Regional Investigator completed the 7-page final investigative report

On October 19, 2001, (Exhibit 23) The Regional Investigator spent over a year investigating the appellant's CASPA complaint. Under the "Analysis and Conclusion" section of his 7-page investigative report, the Regional Investigator did not agree with MOSH's decision to close the petitioner's complaint of discrimination against BCPSS, made numerous other recommendations to MOSH, and cited the following:

....."Absent the above listed additional investigation activities, the undersigned cannot agree with the recommendation of the MOSH investigation to close the case without further action. The Complainant has the burden of proof in a discrimination complaint filing and limiting the investigation to an interview of only one potential Complainant witness does not give the appearance of an unbiased investigation unless that is the only witness identified by the complainant. Without additional investigative activity to conduct additional interviews and records review a recommendation of dismissal should not have been made." .....

On July 10, 2002, the Regional Administrator for OSHA forwarded the petitioner a copy of his findings and recommendations regarding her CASPA complaint against MOSH. (Exhibit 24). In his two-page letter, the Regional Administrator for OSHA had similar findings and recommendations to MOSH as the Regional Investigator. The Regional Administrator cited the appearances of a bias investigation relevant to the way MOSH handled the petitioner's complaint of discrimination against BCPSS. Also, the Regional Administrator recommended that MOSH coerce the BCPSS to give the appellant back pay.

**ARGUMENT IN SUPPORT OF PETITION**

This case presents a fundamental question of personal liberty for 96,000 students and personal liberty for thousands of Baltimore City Public School Teachers, and employees of any private or other public entity. This Honorable United States Court of Appeals' determination of the rights of these students, the petitioner, and other employees will have significant impact upon the children's lives and upon future public disclosure of information by employees regarding specific dangers to public health and safety, such as lead poisoning and asbestos hazards.

This case presents the audacity of BCPSS to violate the Federal Lead-Contamination Act of 1988 by allowing staff, the public, but more significantly, 96,000 children to drink lead-tainted water on a daily basis for over a decade. Also, this case presents the boldness of BCPSS to intentionally and willingly violate the right of children to have a quality education as stated in the Maryland State Constitution by exposing students to lead-contaminated drinking water. Further, this case presents the liability of BCPSS for its role in potentially contributing to thousands of children having brain damage, decreased I.Q., having attention deficit disorder and other learning disabilities associated with lead poisoning, and placed in special education classes as a result of being exposed to lead poisoning for over ten years. Still too, this case presents gall of BCPSS to violate the

fundamental Constitutional rights of the petitioner, namely, the 1st and 14th Amendment rights, which guarantee freedom of speech and the right of any citizen of the U.S. the right to the pursuit of liberty through the due process rights of the law. This case presents the lack of respect for the federal and state statutes and laws by BCPSS in violating OSHA's whistleblower

discrimination statutes, the MOSH Act of 1973, and Maryland's disclosure laws that protect employees from being discriminated against because they report specific dangers in the workplace. Further, this case represents the condoning of the BCPSS' violation of the federal and state statutes and laws, the petitioner's 1st and 14th Constitutional rights, and the School Board policies and procedures for suspension and termination of professional employees by the ALJ and the ARB. Both of these agencies failed to thoroughly review the massive evidence in the record that substantiated the BCPSS' consistent violations and discriminatory practices against the petitioner. Thus, the evidence support the fact that the ALJ and the ARB erred and misrepresented the facts and applied the law and conclusions of the law to allegations that were erroneous and unsubstantiated. Also, these two federal agencies erred in premising the issues of the petitioner's suspension without pay and dismissal on allegations that were not stated in the original statement of charges document, but were illegally amended to after the original Finder of Fact had ruled in favor of the petitioner. Thus, the BCPSS amended the original statement of charges document on a case that was on appeal, which is illegal. Moreover, this case represents how one Federal agency's approximately two-year investigation, massive documentation, and final reports was totally ignored by the ARB, but, on the other hand, the ALJ's two and one-half day hearing, with the petitioner being represented Pro Se, was completely relied upon without question or consideration of the Federal OSHA's Regional Supervisor and Investigator.

As re-affirmed through the testimony of witnesses at the hearing on lead in the drinking water sponsored by the Baltimore City Council, the BCPSS has been knowingly, willingly, and intentionally exposing staff, students, and

more significantly, children under six years of age and pregnant females to lead-contaminated drinking water for well over ten years. SEMS was one of thirty-two schools in BCPSS that had staff and students drinking lead-tainted water for over a decade. Therefore, the petitioner's communications to the parents and the public was correct in stating that there was lead-contaminated drinking water at SEMS. Furthermore, public disclosure of health and safety issues in the schools by an employee or any citizen is protected under the 1st Amendment of the Constitution of the United States.

According to the Federal Statute, Title X, COMAR, MDE regulations, and the Housing and Urban Development guidelines, a lead-based paint hazard is defined as chipping, peeling, flaking lead-based paint or lead dust above a certain standard, and that properties built before 1950 are presumed to have lead-based paint. Since 1996, the petitioner has documented lead-based paint and/or asbestos hazards at FHHS, JMES, and HMS. Included in the over 5,000 pages of exhibits in the record before the Lower Court is a March 17, 1997 video taping of the chipping, peeling, flaking lead-based paint at FHHS which was built before 1950. Therefore, the Federal ALJ erred in her recommended decision in stating that FHHS didn't have lead-based paint hazards after December 1996. JMES is presently closed because of lead-based paint hazards, even though MOSH issued a citation to BCPSS to abate the lead-based paint hazards in 1998.

As substantiated in the voluminous record, along with defaming the petitioner and causing her to undergo "major depression", the BCPSS knowingly, willingly, and intentionally misled and deceived the parents, students, staff and the public for over a decade about the lead-tainted drinking water in BCPSS and/or the lead-based paint hazards in the schools. Thus, the



ALJ and the ARB erred in finding that there were no lead-contaminated drinking water at SEMS and/or lead based-paint hazards at FHHS and JMES when the petitioner issued her communications to the public relevant to these specific health hazards at the schools.

BCPSS violated the Federal Lead Contamination Act of 1988 by knowingly, willingly, and intentionally allowing staff and approximately 96,000 students to drink poisonous water from fountains that contain more than 20 ppb of lead for over ten years. Still too, BCPSS violated the Maryland State Constitution knowingly, willingly, and intentionally by allowing for over ten years approximately 96,000 children a year to be deprived of a quality education by allowing them to ingest and drink the poison, lead. The Health Commissioner and others testified that there are studies that show a direct relationship between lead poisoned children and special education, lead-poisoned children and the drop-out rate, lead-poisoned children and juvenile delinquency, and lead-poisoned children and crime. Thus, BCPSS has committed criminal activity by knowingly, intentionally, and deliberately allowing our children to be exposed to lead-contaminated drinking water for over ten years and for being in violation of the Federal Lead-Contamination Act of 1988 and the Maryland State Constitution.

An employee's freedom of speech is protected under the 1st Amendment of the Constitution. Consequently, the petitioner has a right to publicly express his/her concerns about specific health and safety issues without being terminated by his/her employer for doing so.

Throughout the Administrative proceedings, other litigations, as well as in the appeal before the ALJ, the CEO of BCPSS and the Local School Board

has taken advantage of the fact that the petitioner is being represented Pro Se and, thus, lacked the knowledge of the laws, regulations, and board policies protecting her due process rights granted in the 14th Amendment of the Constitution. The CEO of BCPSS and the Local Board denied the petitioner of her due process rights granted in the 14th Amendment, which included denying the petitioner her due process right to be placed on suspension with pay until the Local School Board made the decision to place the petitioner on suspension without pay, denying the petitioner her due process right of being heard before the Local School Board prior to placing her suspension without pay, denying the petitioner her due process right to be heard before the Local School Board prior to deciding to reject the 11-page H.E. Report, denying the petitioner her due process right of receiving a written explanation by the Local School Board of why they decided to reject the Hearing Examiner's findings of fact, conclusions, and recommendations, denying the petitioner her due process right of receiving a sign and dated Order of her dismissal by the Local School Board within a reasonable time period, along with a written explanation of the Local School Board's reasons for her dismissal, and denying the petitioner her due process right to receive a signed and dated Order in a timely fashion, rather than almost nine months after the Local School Board rejected the recommendation of the H.E.. Also, the petitioner has never heard before the Local School Board prior to her suspension without pay and termination from BCPSS and that her due process rights were violated throughout the Administrative Hearings and thereafter. The petitioner has never granted her due process right of the law in being heard before the Local School Board.

Before suspending without pay and terminating the petitioner, the CEO of

BCPSS knew that the petitioner was not erroneously stating that there was lead-tainted drinking water and/or lead-based paint hazards at SEMS, FHHS, and JMS. Such allegations were a pretext in order to conceal the true reason for getting rid of the petitioner, that is, because the petitioner was a whistleblowing trouble-maker who was in the process of revealing BCPSS' horrible secret of knowingly, willingly, and intentionally lead-poisoning staff and students for over a decade.

After the H.E. denied the CEO of BCPSS' recommendation to dismiss the petitioner based on the allegations in the original statement of charges

document, the CEO of BCPSS knew that he had to come up with a new allegation in order to have a leg to stand on in the appeal. Therefore, the CEO of BCPSS, who is also a member of the Local School Board, cleverly and illegally amended the original statement of charges on the appeal to the Local School Board. The fact that the petitioner was being represented Pro Se was, also, advantageous to the CEO of BCPSS being able to illegally

amend the original statement of charges on an appeal in such a way that the shift of the focus of the issue would be on the amended allegation, and that a lay person in the law would not be able to readily recognize the illegal

amending of the original statement of charges. Thus, the ALJ and ARB erred in not premising the case of dismissal of the petitioner on the original

statement of charges. Also, the petitioner didn't illegally accessed and

obtained confidential student information, but a copy of the student directory, the ALPHA Listing, was voluntarily given to the petitioner by a clerical staff.

Further, the petitioner only used the ALPHA listing to educate and inform

parents of students at SEMS about the lead-tainted drinking water after the

principal of SEMS ignored the issue. Moreover, although petitioner has been

out of work for over two years, has had to deplete her annuity in order to provide for her family, and has only received 6 months worth of unemployment benefits, she has only used her expertise in lead hazard reduction, assessment, and evaluation in order to inform and educate the parents and the public about lead poisoning. The petitioner has never requested or received a penny from giving her assessment, evaluation, and recommendation as a recognized lead expert to parents, schools, churches, and the public at large. Consequently, the ALJ and the ARB erred in finding that the petitioner illegally accessed and obtained the ALPHA listing for personal gain.

According to the federal statutes cited by OSHA, the petitioner was discriminated against by the BCPSS for participating in whistleblowing activities that are considered as "protected activity" under the federal statutes. The federal statutes prohibit an employer from terminating an employee for participating in these protected activity. Therefore, OSHA merited the petitioner's federal discrimination complaint against BCPSS because BCPSS violated federal statutes in terminating the petitioner in retaliation of her involvement in whistleblowing activities that are protected under the federal Acts. The petitioner provided evidence to support the fact that the MOSH Act and regulations, also, protect her from being discriminated against by her employer as a whistleblower.

Therefore, the ALJ and the ARB erred in not finding that, based upon the substantial evidence in the record, which includes over two thousand pages of document, the 11-page findings of the original finder of fact, and the federal OSHA findings, and the documents included in this informal brief, the BCPSS

discriminated against the petitioner in suspending her without pay and dismissing her because of her participation in protected activity as covered under the Acts.

## DOCUMENTS

Exhibit 1: Video taping (2 tapes) of the March 26, 2003 City Council Hearing on Lead in BCPS

Exhibit 2: Petitioner's accreditations by MDE

Exhibit 3 COMAR 26.01.18 (B) "Recognized Lead Expert"

Exhibit 4 JAMA article entitled "Bone Lead Levels" by Dr. Needleman

Exhibit 5 Letter of Suspension without pay by CEO of BCPSS

Exhibit 6 Local Board Policy 201.07(B)(5) - (10)

Exhibit 7 Statement of Charges document by CEO of BCPSS

Exhibit 8 11-page findings, conclusions, and recommendation by Hearing Examiner

Exhibit 9 Letter from Local Board dated December 8, 1999

Exhibit 10 Maryland Annotated Code & 10-220 for Proposed Decisions and Orders

Exhibit 11 Local School Board's unsigned and undated Order

Exhibit 12 A copy of the envelope dated August 16, 2000

Exhibit 13 Maryland Annotated Code & 10-221 "Final Decision and Order"

Exhibit 14 Petitioner's 9-page final argument before MSBE

Exhibit 15 ALPHA Listing

Exhibit 16 Transcript of Lower Court

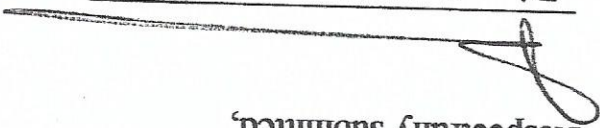
Exhibit 17 Letter dated 6-21-2000 from OSHA's Regional Supervisor with enclosure of OSHA Investigator's 12-page report of Petitioner's

complaint of discrimination against BCPSS, dated 2-29-2000  
Exhibit 18 Letter dated June 12, 2000 from OSHA Regional Supervisor  
Exhibit 19 OSHA Regional Supervisor's 4-page report  
Exhibit 20 Petitioner's 52-page Brief

Exhibit 21 Transcript of the dismissal hearing of the petitioner before the  
original finder of fact, the Hearing Examiner  
Exhibit 22 ARB Final Decision and Order along with the attached ALJ's  
Recommended Decision and Order  
Exhibit 23 OSHA Administrator's letter dated July 11, 2002 and enclosure of  
OSHA Investigator's 7page CASPA report, dated October 19,  
2001

Exhibit 24 OSHA Regional Administrator's 2-page findings and  
recommendations from the CASPA complaint, dated 7-10-2003

Respectfully submitted,

  
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