

TORRAINE STUBBS,

Appellant

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-40

OPINION

INTRODUCTION

Torraine Stubbs (Appellant) appeals the decision of the Anne Arundel County Board of Education (local board) affirming her dismissal as a school bus driver. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

Appellant began working as a school bus driver for Anne Arundel County Public Schools (AACPS) in April 2010. Before that, she drove school buses for several years on a contract basis for private companies that provide bus services to the school system. She had no prior disciplinary actions against her and her evaluations were positive. (Motion, Ex. 1, Hearing Examiner Report; Oct. 22, 2015 T. 17, 19, 41, 95).

In mid-October 2014, Appellant approached Sharon Swanegan, the dispatch manager for the transportation department, about switching buses. According to Appellant, she wanted to switch buses because the bus aide assigned to work with Appellant was dating her brother. During the conversation, Appellant hinted that her bus aide was sleeping on the bus and texting and talking on a cell phone throughout the day. Appellant suggested to Ms. Swanegan that she “might want to check” the tapes from Appellant’s bus. All AACPS buses are equipped with three video cameras that automatically record footage onto a single tape as soon as the driver starts the engine. The cameras continue to record until five minutes after the engine has been turned off. AACPS staff review the video footage if an incident arises and they also periodically review footage from the buses to monitor employee performance. (Motion, Ex. 1, Hearing Examiner Report; Oct. 22, 2015 T. 48, 87, 91, 95-96, 98).

Around the end of October, Ms. Swanegan pulled tapes from Appellant’s bus in order to verify the allegations about Appellant’s bus aide. The footage was recorded on October 28, October 30, and October 31, 2014. While reviewing the tape, Ms. Swanegan saw footage in which Appellant reached into her purse while driving and pulled out a cell phone. Ms. Swanegan reviewed several days’ worth of footage and found multiple instances in which Appellant used her cell phone while operating the bus with students on board. AACPS prohibits drivers from using a cell phone, including through Bluetooth or other hands-free means, “while the bus is in motion, employed by, or in service” of the school system. Drivers receive seven hours of training each year, which includes discussion of the cell phone policy. (Motion, Ex. 1,

Hearing Examiner Report; Oct. 22, 2015 T. 99-101).

Ms. Swanegan reported what she found to Ron Despenza, the supervisor of transportation. In response, Mr. Despenza stated that he wanted Appellant taken off of the bus route “immediately.” Ms. Swanegan contacted Appellant, told her that video footage showed her using a cell phone, and explained that the school system was initiating disciplinary action. (Motion, Ex. 1, Hearing Examiner Report; Oct. 22, 2015 T. 101-103).

On November 11, 2014, Appellant attended a pre-disciplinary conference with her union president. Ms. Swanegan and her immediate supervisor, Alex Baker, were also present. During the conference, portions of the videos were viewed by the group. According to Ms. Swanegan, Appellant admitted to using her cell phone, but declined to say anything else until she could speak with her attorney. (Motion, Ex. 1, Hearing Examiner Report; Oct. 22, 2015 T. 103-105).

On November 12, 2014, Mr. Baker sent Appellant a letter informing her that she was terminated based on her “gross negligence” for using her cell phone while operating a school bus with students on board. The letter stated the following: “Specifically, you mentioned someone had texted you, you put your purse in your lap to look for your cell phone. Once the cell phone was found, you read the text and responded to it. In addition, on several occasions you were viewed texting while students were on board.” (Motion, Ex. 4).

Appellant appealed her termination to the superintendent. On March 24, 2015, the superintendent’s designee conducted a hearing, during which Appellant was represented by counsel. During the hearing, Appellant’s counsel argued that the videotapes should not be admitted into evidence because the school system recorded audio without Appellant’s consent in violation of Maryland’s wiretapping laws. Although the superintendent’s designee concluded that Appellant was aware of the video cameras and had no reasonable expectation of privacy on the bus, the designee agreed to view the tapes with the sound muted. (Motion, Ex. 5).

On May 14, 2015, the superintendent’s designee issued a decision upholding Appellant’s termination based solely on her use of a cell phone while operating an AACPS bus. The designee reviewed the tapes and described the following incidents:

- October 28, 2014 – Appellant reached for her purse and placed it in her lap while driving the bus. At one point, she did not have either hand on the steering wheel while the bus was in motion. While continuing to drive the bus, Appellant removed her cell phone from her purse. Appellant admitted taking out her cell phone in order to check the time.
- October 28, 2014 – Another video clip shows Appellant removed her cell phone from her purse while the bus was parked but with students onboard. Appellant looked at the phone for several minutes and used her thumb to touch the screen. She then showed the phone to her bus aide.
- October 31, 2014 – Appellant used her cell phone three times during one portion of the video. At one point, she can be seen driving the bus with students on board while scrolling through her cell phone using her thumb and finger.

(Motion, Ex. 5; 872-1028clip1(2).WMV; 872-1028clip4(2).WMV; 872-1031clip1.WMV.).

The superintendent's designee concluded that AACPS had clear policies against cell phone use, that Appellant was aware of those policies, and that the evidence showed Appellant had used her cell phone while operating her bus on several occasions. Accordingly, the designee upheld Appellant's termination. (Motion, Ex. 5).

Appellant appealed to the local board, which referred the matter to a hearing examiner. A hearing was held on October 22, 2015 and December 4, 2015, during which Appellant was represented by counsel, testified on her own behalf, and presented witnesses.

On February 29, 2016, the Hearing Examiner issued her decision recommending that the local board uphold Appellant's termination. The Hearing Examiner concluded that the video clips of Appellant using her cell phone provided "ample evidence" that she violated AACPS policies.¹ (Motion, Ex. 1).

On May 4, 2016, the local board adopted the Hearing Examiner's decision and affirmed Appellant's termination. In reaching its decision, the board highlighted the following conclusions of the Hearing Examiner: (1) students were present on the bus on three of the clips; (2) the bus was in motion in two of the clips and on its way to a destination, but stopped at a stop light, in one of the clips; (3) the bus was stopped on the side of the road with the engine running in one of the clips; (4) Appellant used her cell phone six different times on the video; and (5) the longest Appellant held the phone in one or both hands was four minutes and twenty-five seconds; the shortest time period was seven seconds. (Motion, Ex. 1).

This appeal followed.

STANDARD OF REVIEW

A non-certificated employee is entitled to administrative review of a termination pursuant to Md. Code, Educ. §4-205. *See Murphy v. Prince George's County Bd. of Educ.*, MSBE Op. No. 16-19 (2016). Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Appellant raises several issues on appeal, which we shall address in turn.²

¹ The video clips also showed Appellant driving while using a Zonar, an electronic wand that is used by drivers as part of their daily bus inspections. Because Appellant was not terminated for her use of the Zonar, the hearing examiner did not consider those portions of the clips in reaching her conclusion.

² These issues are drawn entirely from the written closing argument offered by Appellant's counsel during the local board hearing, per Appellant's counsel's request. One of Appellant's arguments – that Appellant's termination was based on factors other than those raised at the pre-termination hearing – is meritless. None of the examples raised by Appellant were a part of the local board's decision, which focused solely on her cell phone use.

Violation of Maryland's wiretapping statute

Video footage showing Appellant using her cell phone was played without sound during two separate post-termination hearings in this case. Appellant argues that, because the videos were originally recorded with sound, that they were inadmissible under Md. Code, Courts & Judicial Proceedings §10-405. Section 10-405 concerns the admissibility of “wiretapped communications” in legal proceedings. The pertinent part of the statute is:

[W]hensoever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle.

Although the law covers audio communications, it does not extend to video surveillance. *See Ricks v. State*, 312 Md. 11, 20 (1998) (concluding that nothing in the wiretapping act prohibits or regulates video surveillance). Video recordings can, therefore, be admitted into evidence in administrative proceedings. We are unpersuaded by Appellant’s argument that video recordings originally recorded with sound, but played without sound, somehow violate the wiretapping statute. The statute concerns intercepted communications. The videos were played without sound during the two hearings and no “communications” were put into evidence against Appellant. Accordingly, we conclude that there was no violation of §10-405.

Lack of notice of charges

Appellant argues that she did not have sufficient notice of the charges at her pre-disciplinary hearing. The record shows, however, that Appellant was informed by Ms. Swanegan that she had been seen using her cell phone on the bus and that AACPS was investigating. (Oct. 22, 2015 T. 103). This provided Appellant with clear notice of what she could expect to encounter at a pre-disciplinary hearing. Even if there had been a lack of due process in the earlier proceeding, and we are not presuming that there was, it was cured by the full evidentiary hearing that occurred post-termination. *See Murphy v. Prince George’s County Bd. of Educ.*, MSBE Op. No. 16-19 (2016).

Additionally, Appellant argues that her termination letter stated she was specifically fired for texting and that any other allegation of cell phone use is a violation of her due process rights. Contrary to Appellant’s assertion, her November 12, 2014 termination letter stated she was terminated “as a result of using your cell phone while operating a school bus with students on board.” Her termination letter provided her with a clear description of AACPS’s rationale for terminating her which was not limited to “texting.”

Disagreement with hearing examiner conclusions

Appellant maintains that she did not text while driving and argues that the tapes back up her account of events. Moreover, Appellant contends that there was no evidence of where her

eyes were when she had a device in her hand nor was there evidence that the bus was not under her complete control.

A hearing examiner weighs the evidence before him or her and issues decisions based on the evidence found to be credible and relevant. *See Beverly Byrd v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 16-34 (2016). A hearing examiner is not required to give equal weight to all of the evidence and a failure to agree with Appellant's view of the evidence does not mean the hearing examiner's decision is arbitrary, unreasonable, or illegal. *Id.*

The hearing examiner's conclusion that Appellant improperly used her cell phone had support in the record. The local board was not required to show that Appellant's eyes were off the road or that she lost control of the school bus in order to demonstrate that Appellant violated school policies. Although Appellant claimed to only use her cell phone to check the time and to use the GPS service on her phone, the Hearing Examiner did not have to credit Appellant's testimony on these points and could draw her own conclusions about Appellant's actions based on other evidence.

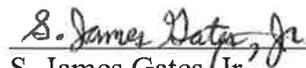
In addition, Appellant argues that Mr. Baker, a supervisor in the transportation department, was unreliable as a witness because he did not bring his notes with him to the local board hearing. It is unclear what the link is between Mr. Baker's reliability as a witness and his failure to bring his notes to the hearing. Regardless, Appellant had a full opportunity to cross-examine Mr. Baker and argue against his credibility to the Hearing Examiner.

CONCLUSION

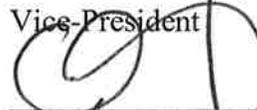
For all of the foregoing reasons, we affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.



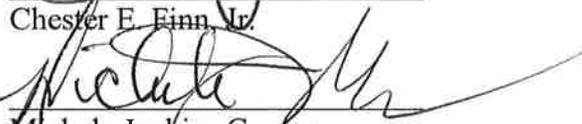
Andrew R. Smarick
President



S. James Gates, Jr.
Vice-President



Chester E. Finn, Jr.



Michele Jenkins Guyton



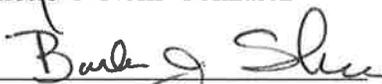
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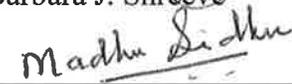
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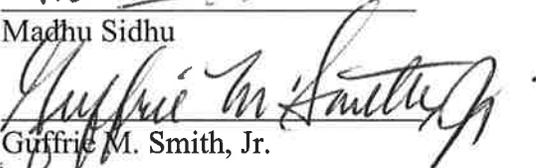
Jannette O'Neill-González



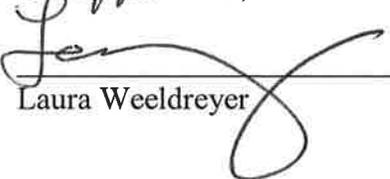
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September 27, 2016