

MICHAEL WINTER,

Appellant

v.

ALLEGANY COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-06

### OPINION

This is an appeal of the local board's ruling that upheld the Superintendent's interpretation of a head custodian's duties. The local board filed a Motion for Summary Affirmance maintaining that its ruling is not arbitrary, unreasonable or illegal. Appellant has filed a reply in opposition to the local board's motion.

### FACTUAL BACKGROUND

Mr. Winter, the Appellant, was the head custodian at Cash Valley Elementary School. He has been an employee of the Allegany County Public Schools ("ACPS") for 37 years and a Head Custodian II for 16 years. For the past 16 years, Appellant has transported in his personal car small amounts of gasoline to use in the school's lawn mowers and snowblowers. In late July of 2004, Appellant wrote the director of personnel of ACPS inquiring whether he could be promoted to Head Custodian I. By letter dated August 30, 2004, William AuMiller, Superintendent of Schools, indicated that Appellant's current position as Head Custodian II was appropriate given the number of other custodians he supervised, the number and types of boilers in the school, the number of nightly events, the number of air conditioning and the like. He commended Appellant on his years of excellent evaluations and work and suggested that Appellant apply for openings at larger schools as they occur. (Tr. 53-54).

On September 3, 2004, Appellant thanked Dr. AuMiller for his swift reply and stated that he would try to work like a Number I custodian but that he did not know if he could "work that slow". (Tr. 54).

That same day Appellant requisitioned some gasoline, noting that he would need someone to pick up the gasoline and take away waste oil. He noted in the requisition slip that was "too hazardous" to transport in his personal vehicle. (Requisition slip, 9/3/04). A school system official told Appellant that gasoline could not be delivered. Appellant refused to pick up the gasoline in his personal car. (Requisition slip, 10/5/04).

On November 3, 2004, Mr. Wayne Belloff, Appellant's supervisor directed him to pick up the gasoline, noting that Appellant had been doing so for the past sixteen years and that every head custodian in the school system was required to do so. On November 5, 2004, Appellant

signed a statement that he was refusing to transport gasoline in his personal vehicle, citing “liability issues”. In a memorandum dated November 19, 2004, Appellant further cited the high price of gasoline and of car services and repairs as additional reasons not to transport the gasoline. He further detailed that his car insurance agent informed him that he might need a commercial insurance policy to cover his car at a higher premium and that, if he did not get commercial insurance and had an accident, his insurance would be dropped. He provided a letter from his insurance company to that effect. Appellant noted that effective January 1, 2005, he would no longer perform the “free” service of transporting the gasoline.

On January 31, 2005, James Bestpitch with the American Federation of State, County and Municipal Employees, wrote Dr. AuMiller, asking that Dr. AuMiller decide the “controversy and dispute concerning the voluntary use of an employee’s vehicle to perform board business”. Mr. Bestpitch noted that “the job description for head custodian and custodian does not require any employee to possess, own or obtain a private vehicle to accomplish any job duties as outlined in their job description.”

On February 15, 2005, Dr. AuMiller replied stating:

the performance of this particular responsibility, acquiring gasoline for his mowers, snowblowers, etc. is well founded in past practice, as well as the “other duties as assigned” heading in his job description.

He also stated that “no employee has the right to arbitrarily decide not to perform a job function that he was been doing for years, as a routine part of his assignment.”

Appellant continued to refuse to acquire and transport the gasoline. Accordingly, on February 17, 2005, Dr. AuMiller reassigned Appellant as a regular custodian at Fort Hill High School, effective February 28, 2005, a position in which he would not have to acquire and transport gasoline.

Appellant appealed Superintendent’s decision concerning his job duties to the local board. Appellant contended that (1) the transportation of the gasoline may be unsafe; (2) transporting the gasoline may cause an increase in his insurance rates; (3) he should be reimbursed for the use of his vehicle; and (4) the transportation of gasoline is not listed in his job description.

With respect to safety, the local board found that there were no reported incidents or accidents regarding the transportation of the gasoline. It also found that all the containers provided to the custodians comply with all safety regulations.<sup>1</sup>

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<sup>1</sup>Mr. Bestpitch also filed a complaint concerning the gas containers with the Maryland Occupational Safety and Health Administration (“MOSHA”). An inspection found no violations of any MOSHA regulations. (Tr. 71-72).

With respect to the insurance rates, the local board found the evidence was at best ambiguous as to whether his rates would rise and that the superintendent provided testimony to the contrary. Therefore, the local board found Appellant did not meet his burden of proof on the insurance issue.

The local board found that Appellant and all other head custodians should be reimbursed for their mileage like all board employees.<sup>2</sup>

Finally, the local board found that acquiring and transporting gasoline fell within the category of “other duties as assigned” on Appellant’s job description. The local board noted that Appellant had admitted that he knew that head custodian performed these duties when he applied for the job and had performed these duties without incident or complaint for many years. Further, Appellant knew that all other head custodians also performed these duties. The local board affirmed the Superintendent’s decision.

This appeal followed.

#### STANDARD OF REVIEW

The standard of review that the State Board applies in reviewing the decision of a local board concerning a local policy is that the local board decision shall be considered *prima facie* correct, and the State Board will not substitute its judgment for that of the local board unless the decision is shown to be arbitrary, unreasonable, or illegal. *See, e.g., Breads v. Board of Education of Montgomery County*, 7 Op. MSBE 507 (1997). A decision may be arbitrary or unreasonable if it is contrary to sound educational policy or a reasoning mind could not have reasonably reached the conclusion the county board reached. COMAR 13A.01.01.03E(1)(b).

#### ANALYSIS

The sole issue for this appeal is whether it was reasonable for the local board to direct the use of the Appellant’s personal vehicle to transport gas because the task is covered by the “other duties as assigned” in the Appellant’s job description.<sup>3</sup>

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<sup>2</sup>Appellant was being reimbursed for mileage up until the time he refused to transport the gasoline. (Tr. 27-28).

<sup>3</sup>Although the letter of appeal to the State Board requests a reversal of any adverse personnel action, Appellant’s reassignment as a regular custodian at Fort Hill High School was not part of the proceedings before the local board. (Tr. 12). The State Board has consistently declined to address issues that have not been reviewed initially by the local board. *See Craven v. Board of Education of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Hart v. Board of Education of St. Mary’s County*, 7 Op. MSBE 740 (1997) (failure to raise issue of age discrimination below constituted waiver on appeal). *McDaniel v. Montgomery County Board of Education*, MSBE Op. No 03-22 (June 27, 2003)(complaints from public not raised before local board deemed waived).

The “other duties as assigned” category in the job description is essentially a boundless one. Just about anything could be put into that category. To avoid arbitrariness however, the duties assigned must be reasonable ones. It is the opinion of this Board that requiring a custodial employee to transport gasoline in his car is not a reasonable job requirement. Despite the fact that containers pass safety regulations and that there have been no accidents, accidents do happen and transporting gasoline has an element of danger to it. Moreover, as the Appellant’s counsel pointed out to the local board, the job description for head custodian does not require the employee to own a car in order to accomplish any job duty. If ownership of a car is not a stated job requirement, it does not appear to this Board that requiring the transport of gasoline in the head custodian’s car as an “other duty as assigned” is a reasonable job requirement. We understand that the Appellant has been transporting gas in his car for the school system for many years and that he did not challenge that practice until now. We do not view the Appellant’s acquiescence as transforming that task into a job requirement. We view the Appellant’s actions as voluntary ones. For years, he voluntarily transported gasoline. The local board cannot create a job requirement out of a voluntary act, however.

### CONCLUSION

Accordingly, for all these reasons we reverse the decision of the local board.

Edward L. Root  
President

Dunbar Brooks  
Vice President

Lelia T. Allen

JoAnn T. Bell

J. Henry Butta

Beverly A. Cooper

**ABSENT**

Calvin D. Disney

Richard L. Goodall

Karabelle Pizzigati

Maria C. Torres-Queral

David F. Tufaro

March 1, 2006