

LINDA L. KEMP,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 02-34

OPINION

Linda L. Kemp appeals the local board determination that her bus accident was her second preventable accident in 24 months which resulted in her decertification as a bus driver for Montgomery County Public Schools (“MCPS”). The local board has filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant has submitted a response in opposition to the local board’s motion.

BACKGROUND

Linda L. Kemp was certified as a bus operator since 1998 and had been employed by the MCPS since that time. On May 22, 2000, Appellant was backing a school bus into her assigned parking space at the West Farm Bus Depot in Silver Spring, Maryland, when she struck a stationary parked car. The car was improperly parked and was partially located in Appellant’s parking space. At the time of the accident, there was heavy rain and fog. The collision made a dent in the car approximately 6 inches long and about an inch deep. MCPS paid \$1,749.41 to repair the damages caused by the collision. The MCPS-DOT classified the incident as a preventable accident.¹ After the MCPS-DOT determination, Ms. Kemp was decertified as a bus operator and was demoted to a bus attendant.

Pursuant to MCPS administrative regulation EBI-RA, “Review of Preventable Accidents and Bus Accidents Review Board (“BARB”),” section III.E.1, Ms. Kemp appealed the preventable accident finding to the BARB. On September 26, 2000, the BARB upheld the determination that the accident was preventable. Ms. Kemp next appealed the BARB determination to the Accident Review Board (“ARB”), pursuant to EBI-RA, section III.E.2. Ms. Kemp appeared before the ARB on December 19, 2000, and presented arguments about why the incident should not be treated as a preventable accident. On December 20, 2000, the ARB concluded that Ms. Kemp “contributed to the accident by failing to verify a clear path for backing the bus, and by not practicing defensive driving, regardless of weather conditions.” The ARB upheld the determination that her accident was preventable. The December 20, 2000 letter from ARB advised Ms. Kemp to contact the Safety/Training Unit Supervisor by January 4, 2001,

¹This was Ms. Kemp’s second accident that was deemed “preventable.” The previous “preventable” accident occurred February 10, 2000.

if she wanted to appeal further.

In early January 2001, Ms. Kemp asked the supervisor of the Training and Safety Unit to submit her appeal to the Safety Council of Maryland. On February 1, 2001, Joseph Schwartz, Director of Traffic Services for the Safety Council sent a letter to the MCPS Transportation Training and Safety Supervisor stating agreement with the ARB's findings that the May 22nd accident was preventable. The letter states, in pertinent part:

While I cannot condone illegal/improper (sideways) parking, the burden of safe movement is always upon the driver of the vehicle that is underway (bus). It is important to remember that there is a distinct line between "legal" responsibility issue (sic) and "preventability." In this case, the driver underway must ensure clearance in all directions, including to the rear when backing. Doing any less will certainly mean a preventable crash.

The heavy rain, if anything, requires greater attention than in normal situations, since visibility is reduced. While bad whether (sic) and illegal parking are factors in this crash, neither absolves Ms. Kemp of her responsibility to be sure that the way is clear before backing. (Emphasis in the original).

Meanwhile, on January 19, 2001, Appellant appealed the case directly to the State Board. The State Board deemed the appeal premature based on Appellant's failure to pursue her administrative remedies before the local superintendent and local board. *See Linda Kemp v. Montgomery County Board of Education*, MSBE Opinion No. 01-14 (April 24, 2001). The matter was remanded to the local board for appropriate handling and review.

On remand to the local school system, Appellant's appeal was referred to Dr. Wayne T. Fleeger, the superintendent's designee, who concluded that the May 22, 2000 accident was "preventable." On further appeal, the local board referred the matter to a hearing examiner, William J. Roberts, Esquire, who conducted a full evidentiary hearing at which Appellant was represented by counsel. At the hearing, counsel for Appellant presented testimony and other evidence and cross-examined witnesses. Hearing Examiner Roberts issued a report of Findings of Facts and Conclusions of Law recommending that the local board affirm the decision of the superintendent's designee.

Thereafter, the local board heard oral argument. In a decision issued February 12, 2002, the local board unanimously upheld the decision that Appellant's May 22, 2000 bus accident was preventable and that her decertification as a bus operator was proper.

ANALYSIS

Additional Evidence

As a preliminary matter, Appellant requests that the State Board consider evidence that

was not originally part of the record below. Appellant attempted to introduce these materials at oral argument before the local board over the objection of opposing counsel that the items should not be considered because they were not part of the administrative record compiled by the hearing officer. The local board did not address this issue at oral argument or in its decision; therefore we assume that the materials were not considered by the local board or added to the administrative record.

The first document consists of a January 24, 2002 e-mail from the Montgomery County Police Department dealing generally with the exchange of information at the scene of an accident. This e-mail is wholly irrelevant to the issues in this case given that Appellant hit a parked vehicle in which no driver or passengers were present. The other document is a January 19, 2002 letter from Mr. John P. Malloy. Mr. Malloy had the opportunity to present the information contained in his letter when he testified as a witness on Appellant's behalf at the hearing where Appellant was represented by legal counsel. Accordingly, we do not find it appropriate to consider these two documents.

Standard of Review

Because this case involves a local policy or dispute regarding the rules and regulations of a local school system, the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.01.03E(1)(a).

Procedural Issues

Appellant has raised a myriad of procedural issues. First, Appellant asserts that the accident was not thoroughly investigated because the initial MCPS employee, Ms. Jacqueline Jackson, who filed the supervisor's accident report, did not have sufficient information and did not "investigate" the occurrence. In support of this claim, Appellant argued below that Ms. Jackson could not have completed the accident report in the time frame shown on the report because at the time that she filed the report, she was not aware of the identity of the owner of the private vehicle that had been hit by Appellant's bus.

The local hearing officer found that the issue of the name of the owner of the private vehicle was wholly irrelevant to the issue of whether the accident was preventable. He also found that whether Ms. Jackson personally "investigated" the occurrence was irrelevant. Ms. Jackson's role was in an administrative capacity only, *i.e.*, she collected information about the accident, took pictures of the vehicles involved, and forwarded that information to her superiors. (Tr. 161-175, hearing). Additionally, Chris Fain of the Safety and Training Unit, conferred with Appellant and collected information concerning the accident. (Tr. 185-86, hearing). The hearing officer noted that none of the information transmitted by Ms. Jackson contradicted information provided by the Appellant immediately after the accident. Based upon our review of the record, we concur with the hearing officer and find no support for Appellant's argument on this ground.

Appellant also asserts that the membership of the BARB and ARB was not properly composed during the review of her case because there was no representative present from the Montgomery County Police Department or from the Department of Materials Management, respectively. While local board Policy EBI-RA dictates the composition of the BARB and ARB, it also provides that only a quorum of three members need be present to convene either board. Thus, the absence of a particular representative from either the BARB or ARB does not prove that the board was improperly comprised.

Additionally, Appellant maintains that extenuating circumstances such as weather and visibility were not considered by the local board. To the contrary, it is quite clear that such circumstances were considered by the board hearing officer, Mr. Roberts, who did not assign the same significance to these conditions as did Appellant.² Mr. Roberts believed that Appellant failed to take these factors into consideration and that she did not act reasonably in light of them. The same holds true for Appellant's allegation that no consideration was given to testimony that the car was illegally parked in her assigned space. Again, this information was considered but found irrelevant given that Appellant acted unreasonably in failing to observe the parking space before backing into the space.

Appellant further disputes the amount of property damage to the car that she struck. She claims that the damage to the car as shown in the pictures that were admitted during the hearing was more extensive than any damage that she may have caused. Although Appellant claims that she did not damage the car in excess of \$500, Mr. Roberts found that the damage exceeded \$1,700. Even Appellant's own witness, John Malloy, was unable to state that the damage as depicted in the photographs was more extensive than that which he saw on the day of the incident. (Tr. 134-135, hearing). In any event, this matter is an issue of witness credibility. Determinations concerning witness credibility are within the province of the local board as trier of fact. *See, e.g., Board of Trustees v. Novik*, 87 Md. App. 308, 312 (1991), *aff'd*, 326 Md. 450 (1992) ("It is within the Examiner's province to resolve conflicting evidence. Where conflicting inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences."); *Board of Educ. v. Paynter*, 303 Md. 22, 36 (1985) ("[N]ot only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.").

Appellant also takes issue with regard to information concerning a third incident in which she was involved. That incident was not classified as a preventable accident, but only deemed an incident because it was a collision involving \$500 or less of damage. Information concerning this incident was elicited during oral argument by a local board member from Dr. Stephen Raucher, Director of the Department of Transportation, to explain why a letter was not placed in Appellant's file excusing the second preventable accident as permitted by COMAR 13A.06.07.05(3)(D). (Tr. 23-24, oral argument). Counsel for Appellant did not object to Dr.

²The local board adopted the findings and recommendations of Mr. Roberts.

Raucher's statements at oral argument.³

Merits

COMAR 13A.06.07.05C(3)(d) provides:

A driver who has two preventable accidents involving appreciable damage⁴ or personal injury in any 24-month period may not be permitted to continue operating a school vehicle unless the Supervisor of Transportation places a letter in the driver's personnel file documenting good and sufficient reasons for continued employment. If the individual's employment as a driver is not continued, the individual may not be re-employed to operate a school vehicle for a period of five years.

COMAR 13A.06.07.01B defines a "preventable accident" as "an accident in which the driver failed to do everything the driver reasonably could have done to prevent it, according to accepted standards of the National Safety Council."

The Maryland State Department of Education Guidelines entitled "Determining Preventability of School Bus Accidents, May 1987," indicate that "practically all backing accidents are preventable." Among other reasons, such accidents are preventable if the school bus driver failed to get out of the vehicle and check the proposed path of backward travel; depended solely on mirrors when it was practicable to look back; and failed to get out of the vehicle periodically and recheck conditions when backing a long distance. *See* Guidelines at 7.

Appellant disagrees with the designation that the May 22, 2000 accident was "preventable" and the determination that she failed to do everything reasonable to prevent the accident. This matter has been through numerous levels of review including the BARB, the ARB, the superintendent's designee, the local board hearing examiner and the local board. At each level the accident has been found to be preventable. Moreover, local school transportation officials have deemed the accident "preventable," as well as the Director of Traffic Services of the Safety Council of Maryland who concluded that a professional school bus driver should have taken reasonable steps to ensure all clearances prior to beginning the backing maneuver, particularly in inclement weather.

³A reference to a third preventable accident in the superintendent's August 3, 2001 memorandum to the local board appears to be an error. It is clear from the local board's decision that it understood that the third event was not a preventable accident.

⁴At the time of the accident "appreciable damage" was defined as "property damage in excess of \$500." Effective October 1, 2001, the regulation was amended to read "property damage in excess of \$1,500." *See* COMAR 13A.06.07.01B(2).

A review of the evidence in this case overwhelmingly supports the local board's decision. Simply put, Appellant did not look where she was going before conducting the backing maneuver. As stated by Hearing Examiner Roberts:

Even giving the Appellant the benefit of the doubt with regard to much of the evidence and testimony produced in this case and viewing much of it in her favor, including, for example, the location of the private vehicle struck by the bus operated by the Appellant, the limited visibility of the Appellant in operating the bus, and the fact (wholly irrelevant) that her supervisor may not have "investigated" the occurrence, the undersigned must conclude that the occurrence was a "preventable accident" involving "appreciable damage". . . .

The Appellant herself testified that, when pulling abreast of the parking space into which she intended to back, she did not take the time to do what common sense would dictate; that is, look into the parking space to determine whether or not there was any vehicle or other obstruction which she might collide with when backing the bus.

In addition, even if one assumes that the visibility of the Appellant in the mirrors of the bus was restricted solely to the area extending to the rear of the bus, or even if she could not see into the entirety of the parking space had she looked when pulling abreast of that parking space due to fog and rain, that simply does not excuse the Appellant from the obvious and egregious error of assuming that there would be nothing in the bus parking space which she might back into. (Emphasis in the original).

Hearing Examiner Decision at 19-20. We concur. Appellant failed to do all that she reasonably could have done to prevent the accident by not taking the steps necessary to ensure that her assigned parking space was free from obstructions. *See, e.g., Sheila Grauel v. Montgomery County Board of Education*, MSBE Opinion No. 00-16 (March 22, 2000) (upholding permanent decertification of bus driver for having more than two preventable accidents in a 24-month period).

CONCLUSION

For these reasons, we affirm the decision of the Board of Education of Montgomery County.

Marilyn D. Maultsby
President

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Reginald L. Dunn

Clarence A. Hawkins

Walter S. Levin, Esquire

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John L. Wisthoff

July 23, 2002