

ANTOINETTE MURPHY,

Appellant

v.

PRINCE GEORGE'S COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-19

OPINION

INTRODUCTION

Antoinette Murphy (Appellant) appeals the decision of the Prince George's County Board of Education (local board) terminating her as a 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 was a bus driver for Prince George's County Public Schools (PGCPS). On November 8, 2012, her supervisor presented her with a letter indicating she had been chosen for a random drug test. Per local board policy, she had two hours in which to report for testing. She signed the form at 9:15 a.m. It is unclear from the record at what time Appellant actually arrived at the testing center. A center employee signed a form at approximately 11:24 a.m. indicating Appellant had presented her with a sample for testing. The test was ultimately negative. The school system concluded, however, based on the time on the form that Appellant arrived late for the test. (Motion, Exs. M-11, M-12, A1).

On November 29, 2012, while on personal leave, Appellant arrived at the bus lot. According to Appellant, she was there in her role as a union steward because she understood that her supervisor, Everett Edmond, was meeting with an employee about a potential disciplinary issue. Mr. Edmond told Appellant she was not supposed to be on the lot on her day off and asked her to leave. He informed the employee that they would reschedule the disciplinary meeting for the following week with another union representative. Appellant complained that the other union representative was not a good representative for the employee and she declined to leave. The bus lot foreman also asked Appellant to leave the lot. (Motion, Exs. M-11, A2).

On November 30, 2012, Mr. Edmond came to the bus lot to meet with Appellant after she had finished a bus run. He asked her to come to his office because he had a letter for her from the Director of Transportation, Thomas Bishop. Appellant told him she was off the clock and declined to meet with him, telling him she would see him on Monday. The following Monday, December 3, 2012, Mr. Edmond met Appellant in the morning before she had begun her morning bus route. He again told her to come to his office to receive a letter from Mr. Bishop. She again declined. As a result, Mr. Edmond told Appellant to report to Mr. Bishop's office at the Facilities Administration Building. According to Appellant, she remained in the lounge while waiting for a ride from her husband to the administration building. Mr. Edmond found that she

caused a disruption among the other employees who were in the lounge at the time. Appellant also never reported to Mr. Bishop's office but instead attempted to meet with the school system's acting CEO. (Motion, Ex. M-11, A2).

On December 13, 2012, Mr. Bishop sent Appellant a letter indicating that he was recommending her termination as a bus driver based on the failure to report to the drug test within the required time period and the allegations of insubordination. (Motion, A3).

A pre-termination hearing occurred on January 10, 2013. During the hearing, Appellant presented her version of events. She acknowledged that she declined to meet with Mr. Edmond on November 30 or December 3, 2012. (Motion, Ex. M11).

On February 22, 2013, Douglas Anthony, the acting chief human resources officer, terminated Appellant. The letter of termination referred to an earlier disciplinary letter that Appellant received on April 1, 2011 from the director of employee and labor relations. The 2011 letter summarized a list of prior reprimands dating back to 2008, including nine reprimands for showing disrespect towards others, eight reprimands for refusing to follow a supervisor's directive, and four reprimands for dangerous behavior while driving.¹ The letter also contained the following language:

PGCPS will not tolerate a single additional instance of the types of behaviors for which you have previously been disciplined and about which you have repeatedly been warned. Any further occurrence of conduct in any way similar to that addressed in the previous disciplinary letters that have been issued to you will result in your termination from employment by PGCPS.

(Motion, A4).

Mr. Anthony stated that in light of "the entirety of your disciplinary record with PGCPS and in view of the similarity of your recent behavior to the prior conduct which you were warned not to repeat, I have determined that the appropriate sanction for your conduct as described above is that you be terminated as a bus driver with PGCPS." (Motion, Ex. M-11).

Appellant appealed her termination to the CEO. The matter was referred to a hearing officer and he conducted a hearing beginning on November 21, 2013. The hearing ended early that day because Appellant experienced a medical issue and the matter was rescheduled for January 16, 2014. The hearing was continued again after Appellant decided she wanted to be represented by private counsel rather than the union. The remainder of the hearing took place on April 8, 2014 and May 1, 2014.

On June 4, 2014, the hearing officer issued findings of fact, conclusions of law, and a recommended decision. The hearing officer concluded that Appellant's testimony "was incredible due to her actual bias, her demonstrated hostility during the procedures, and basic inconsistency with the uncontroverted evidence." (Hearing Officer Recommendation, at 6). By contrast, the hearing officer found the school system's witnesses to be credible.

¹ During the hearing, Appellant argued that she had been "exonerated" of all prior disciplinary incidents and that there should be no reprimands on her record. She was unable to provide any evidence to support her claim that the incidents had been purged from her record.

(Recommendation, at 3).

The hearing officer concluded that Appellant violated the school system's drug testing policies by not reporting to a testing center within two hours of receiving the notice. The hearing officer also concluded that Appellant was insubordinate because she failed "to follow direct instructions from a supervisory employee" and took steps "to undermine the authority of a supervisory employee." (Recommendation, at 8). The hearing officer found the directives issued to the Appellant by her supervisor, such as leaving the bus lot and reporting to his office to accept a letter, were reasonable and given to her while she was on-duty. (Recommendation, at 8-9). He also found that the Appellant received the required due process hearing that occurred on January 10, 2013 prior to her termination. (Recommendation, at 9).

The CEO adopted the decision the same day and Appellant appealed to the local board. Oral arguments took place before the local board on October 22, 2015 and the local board issued its decision on November 16, 2015. As a preliminary matter, the local board determined that Appellant did bear the burden of proof while appealing her termination to the CEO. The local board cited to the State Board's decision in *Eichelberger v. Baltimore County Bd. of Educ.*, MSBE Op. No. 15-03 (2015) in which this Board stated that an Appellant has the burden to show a decision was arbitrary or unreasonable.²

On the issue of drug testing, the local board found that the record did not contain clear evidence to show when Appellant actually arrived at the reporting location. As a result, the local board rejected this as a ground to support Appellant's termination. The local board concluded, however, that Appellant failed to show her termination for insubordination was arbitrary, unreasonable, or illegal. The local board explained that Appellant received a warning letter on April 1, 2011, informing her that one more instance of unacceptable conduct could lead to her termination. The local board found that Appellant's prior conduct, summarized in the 2011 letter, was similar to insubordinate conduct in November and December 2012. Accordingly, the local board upheld the CEO's termination.³

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 Brown v. Queen Anne's County Bd. of Educ.*, MSBE Op. No. 13-37 (2013). 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.

² We find that the local board's reliance on our decision in *Eichelberger*, as well as its reference to our appeal regulations, is misplaced. *Eichelberger* and our appeal regulations discuss who has the burden of proof on appeal to the State Board, not who bears the burden of proof before the CEO and local board.

³ In oral argument before the local board, Appellant argued that she was the victim of retaliation for filing harassment claims against a supervisor. The local board declined to consider this argument because evidence of such a claim was not presented to the hearing officer.

LEGAL ANALYSIS

Appellant raises several arguments against her termination, which we shall address in turn.

Lack of due process

Appellant contends that she was not permitted to present information in her defense during her pre-termination hearing. Contrary to Appellant's representation on appeal, she previously testified that she was allowed to present her version of events during that conference. (T. 113). She was not allowed, however, to present information that went beyond the scope of the incidents for which she was terminated, but neither was the school system. (T. 113-14). 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 *Mobley v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-09 (2015); *Mayberry v. Board of Educ. of Anne Arundel County*, 131 Md. App. 686, 690-691 (2000).

Federal claims

Appellant argues that she has a claim for violation of due process under 42 U.S.C. §1983. That is a federal civil rights claim. This administrative appeal is not the proper avenue to bring such a claim. Appellant also argues that her termination violates the National Labor Relations Act because she was involved in union activities at the time. That Act does not apply to county boards of education. See 29 U.S.C. 152(2) (defining employer as excluding State government and its political subdivisions).

Weight of the evidence

Appellant argues that she should not have been disciplined for the three incidents of insubordination in November and December 2012. She further maintains that it was improper for the local board to have considered the April 2011 letter in which she was warned that she could be terminated for future instances of misconduct.⁴

During the hearing, there were conflicting accounts given of Appellant's behavior. Regarding the incident of November 29, 2012, Appellant argues that she was off-duty and conducting union business at the time she was asked to leave the bus lot. She cites to the negotiated agreement, which allows union representatives "to transact official business on school property at reasonable times provided that this shall not interfere with or interrupt the normal work schedule of the employee or prevent the person from satisfactorily performing his or her responsibilities." The language of the agreement is clear that it allows Appellant to conduct union business, but does not permit her to disrupt the work of other employees. The record contains statements from Appellant's supervisor that she was creating a disturbance and refused to leave the lot.

Appellant also challenges her discipline related to the November 30, 2012 incident. She

⁴ Appellant also disputes the allegation that she reported late for a drug test. Because the local board declined to consider this as a ground for upholding the termination, we shall not consider it as part of this appeal.

argues that after she finished her shift, her supervisor was prohibited from asking her to come to his office. "Appellant did not have to meet with Mr. Edmond when she was off duty and was not obligated to be nice about it," she states in her appeal. During the hearing, Mr. Edmond stated that he had to talk to Appellant after she completed her bus run because he could not speak to her while she was actually driving the bus.

On December 3, 2012, Mr. Edmond again requested that Appellant come to his office to receive a personnel-related letter. Appellant argues that she was permitted to refuse the request because the matter could have been related to a disciplinary action which would permit her to have union representation. Although in her appeal she claims that she stated she would not meet with him without a union representative present, that information was not a part of the record before the local board. In addition, the negotiated agreement states that employees are to be advised in advance of a scheduled meeting if the purpose is "to specifically investigate a situation that may result in disciplinary action being taken against such an employee." Negotiated Agreement Article 7, Section 1. The record contained no evidence that Appellant was being asked to meet with a supervisor to investigate an incident.

The hearing officer found Appellant's testimony to be "incredible" and described her as an inconsistent witness with obvious bias and hostility towards the school system. The hearing officer found the school system witnesses, by contrast, to be credible. "It is the Hearing Examiner's duty to weigh all of the evidence and issue a decision based upon the evidence the Hearing Examiner finds to be credible and relevant." *Komolafe v. Board of Educ. of Prince George's County*, MSBE Op. No. 14-47 (2014). The hearing officer's decision to credit testimony from some witnesses and not others alone does not make the local board's decision arbitrary, unreasonable, or illegal. In our view, there was sufficient evidence in the record to support the termination of Appellant.

Finally, Appellant argues that it was improper for the local board to consider the April 2011 letter in which she warned that one more incident of misconduct would lead to her termination. She maintains that she was "exonerated" of all previous reprimands. Although the hearing officer did not permit the local board or Appellant to provide evidence regarding these past incidents, he did consider the warning letter itself in reaching his recommendation. He also permitted Appellant to provide evidence that these incidents had been stripped from her record, but she was unable to do so. In our view, the hearing officer and local board did not err in considering the April 2011 letter as part of Appellant's termination.

Retaliation claims

Appellant contends that she was terminated in retaliation for filing a charge of sexual harassment against another PGCPs supervisor who was not involved in her termination. She did not present this information during her case-in-chief before the hearing officer. Instead, after Appellant dismissed the union as her representatives and hired private counsel, her attorney sought to introduce this information through cross-examination of the school system's witnesses. The hearing officer declined to admit that evidence, concluding that Appellant had been given an opportunity to raise this issue as part of her case but had failed to do so. In reviewing the record, we find that Appellant was provided sufficient opportunity to raise this issue as part of her case.

Her decision to change her representatives mid-way through the hearing and alter her appeal strategy does not entitle her to a “do-over” on the hearing itself.

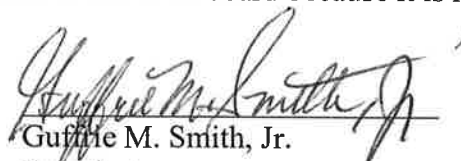
Burden of proof

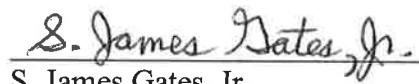
Appellant argues that the burden of proof was improperly placed on her, rather than the school system, during her post-termination hearing. During the hearing, the hearing officer allowed Appellant’s counsel the opportunity to file a memorandum explaining her position and providing case law to support it. She failed to submit anything to the hearing officer. (Hearing Officer Recommendation, at 3). In our view, Appellant waived this argument by failing to pursue it during the hearing itself. *See Cone v. Carroll County Bd. of Educ.*, MSBE Op. No. 99-31 (1999) (dismissing an argument concerning the burden of proof because it was not raised before the local board).

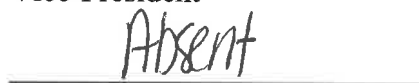
Our decision should not be read, however, as an affirmative statement that an employee bears the burden of proof in such a situation. The burden of proof in a hearing before the CEO and on appeal to the local board depends on a variety of factors, including whether the burden of proof has been set as part of a negotiated agreement.

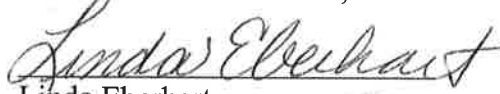
CONCLUSION

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


Guffie M. Smith, Jr.
President

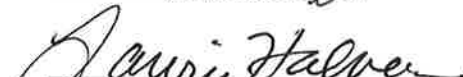

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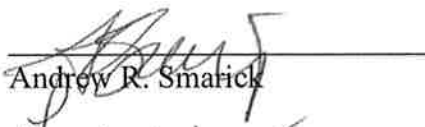

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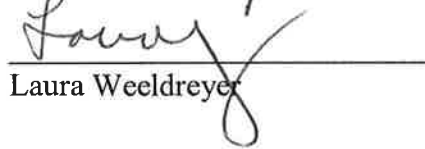
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May 24, 2016