

SAMUEL LOWE,

Appellant

v.

WICOMICO COUNTY BOARD  
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 10-38

## OPINION

### INTRODUCTION

Samuel Lowe, a bus driver for Wicomico County Public School System (WCPS), appealed the decision of the Wicomico County Board of Education (local board) decertifying him as a bus driver. The local board filed a Response to the appeal. Thereafter, Mr. Lowe, through counsel, filed a Memorandum in Support of the Appeal. The local board filed a Response to the Memorandum.

### PRELIMINARY LEGAL ISSUE: Lack of Transcript

During the course of the briefing in this matter, the parties discovered that, due to a malfunction in the local board's recording system, almost the entire evidentiary hearing on the decertification issue conducted by the local board was not taped. Therefore, a transcript of the hearing is not available on appeal.

On November 19, 2009, we notified the parties that the State Board would proceed with the appeal without a transcript, "unless the Appellant can show that the missing portions of the transcript are relevant to consideration of a specific allegation of error in the appeal and that no sufficient substitute for the missing transcript can be reconstructed." We cited to *Bradley v. Hayard Technology Co., Inc.*, 340 Md. 202 (1995). (November 19, 2009, Memo from La Fiandra to Jeffers, McDonald, and Lowe).

In that case, Hayard Technology appealed to the circuit court to overturn an unfavorable district court judgment. A transcript of the district court trial was unavailable because of a failure of the court's recording equipment. Hayard Technology asked the circuit court to remand the case for a new trial and the circuit court agreed. Ms. Bradley appealed that ruling. *Id.* at 204-207.

On appeal, the Court of Appeals ruled that the lack of a transcript did not by itself warrant a remand for a new trial and that the burden was on the Appellant to show that the "omissions . . . are in some manner relevant on appeal." *Id.* at 208-209. The Court fashioned a rule to apply

when a full transcript is unavailable:

We hold that the circuit court should first require an appellant to assert specifically what errors occurred at the district court trial as required by Md. Rule 7-113(d)(2). If all or part of the trial transcript is missing, an appellant should be required to demonstrate to the circuit court that the missing portion is relevant to the appellate issues raised in the appeal memorandum. If the circuit court determines that the lost portion of the record is material to the appellate issues, the appellant must make diligent efforts to reconstruct the missing portions of the record through the use of affidavits and stipulations with the opposing party. If the circuit court finds that a record sufficient for a fair consideration of the appellate issues can be reconstructed, the appeal should proceed on that record.

*Id.* at 211.

We expected that the Appellant would follow the rule the Court of Appeals established, and explain to us which omissions in the transcript were material to the appeal and explain the efforts made to reconstruct the transcript is cooperation with counsel to the local board.

Instead, on December 23, 2009, the Appellant filed a Memorandum in Support of the Appeal in which he argued that there was no evidence in the record that he had notice of “unacceptable behavior” for bus drivers; no sufficient evidence that “this was the second incident in which [he] had inappropriately, struck a student; and no evidence that he failed to “secure” the bus when he got off to talk to a parent. (Memorandum at 2-3).

In the Memorandum, the Appellant made no reference to any effort to reconstruct the missing portions of the transcript through affidavits or stipulations.

We have considered whether a meaningful appellate review is possible absent the transcript (or reconstructed transcript) of the hearing. For the following reasons we believe there is a sufficient record to review. First, the local board had before it numerous documents related to the information Mr. Lowe had been given about inappropriate bus drivers conduct. Second, the local board viewed a videotape of Mr. Lowe’s actions on the bus on the day in question. That tape is in the record. Therefore, we will proceed with the appellate review.

#### FACTUAL BACKGROUND

The local board found as a fact that on January 10, 2008, while transporting students to school, Mr. Lowe threw a backpack into a student; hit two students with a rolled up paper; put his face within inches of a student’s face and yelled at the student; exited the bus twice leaving the bus running and not properly secured. (Appeal, Ex. 1, Opinion at 2). The videotape of the events on the bus on January 10, 2008 shows the bus students who appear to be 3<sup>rd</sup> or 4<sup>th</sup> graders.

They entered the bus relatively quietly, but within minutes the students and Mr. Lowe appeared out of control. Mr. Lowe stopped the bus twice in 10 minutes to scream at the students to "sit down." They did not pay attention to him. He threw a backpack into a seated student. He hit some students with a rolled-up paper. He appears to push a student back into a seat.

The local board also found as a fact that, in 2006 after an incident of striking a student, Mr. Lowe had been counseled about appropriate conduct when disciplining students. *Id.* at 3.

Mr. David Reeve, Supervisor of Transportation, wrote in his September 2, 2008 letter decertifying Mr. Lowe:

Unfortunately, this is not your first incident involving your failure to follow student discipline policies or procedures. On January 12, 2006, you were accused of striking a student. You admitted to striking the student to get his attention. Your certification to operate a school bus under contract with Wicomico County Board of Education was suspended. During the months of April and May of 2006, you came into the Transportation Office and spoke to me on three different occasions concerning your recertification to operate a school bus. During these meetings we discussed child abuse/sexual assault laws and acceptable behaviors for school bus drivers when disciplining students. On June 29, 2006, I wrote a memo to the Assistant Superintendent of Student Services recommending your driver certification to be reinstated. In the memo I made the following statements:

- "Mr. Lowe has been counseled as to appropriate driver interactions with student passengers."
- "My opinion is that Mr. Lowe has demonstrated a full understanding of his responsibilities as a school bus contractor and driver and that appropriate behavior management strategies will be implemented to provide a safe environment for students."
- "It is my recommendation that Samuel Lowe continues as a school bus contractor and certified driver for Wicomico County Board of Education."

(Local Board Response to Appeal, Ex. S-1, p.3).

That recommendation was approved and Mr. Lowe's certification to operate a school bus under contract with Wicomico County Board of Education was reinstated in August of 2007.

In November of 2007, Mr. Lowe attended the school bus driver inservice program. During this inservice, the topics of Child Abuse/Neglect and proper driver behaviors were

addressed. The procedures and expectations for school bus drivers to address student discipline were reviewed. Also, a school bus drivers' code of conduct titled "School Bus Driver Unacceptable Behaviors/Consequences" was presented. Touching a student in a disciplinary manner was listed as an unacceptable driver behavior with the first offense consequence being a five day suspension and permanent decertification for a second offense. (Local Board Response to Appeal, Ex. S-1, p.3).

The record, also, contains agendas of school bus driver training sessions at which appropriate student discipline procedures were discussed and Mr. Lowe's attendance sign-in for each. (See Local Board's Response to Appeal, Ex. S-1, pp. 6-13; 31-35; 38-41).

After the local board issued its decision to decertify Mr. Lowe, this appeal ensued.

### STANDARD OF REVIEW

This case concerns a local board decision involving a dispute regarding the rules and regulations of the local board. The decision is considered *prima facie* correct unless the Appellant shows that it is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05(A).

### LEGAL ANALYSIS

The Appellant first argues that "he was not afforded a reasonable opportunity to know what kind of conduct was prohibited in disciplining students in order to govern his behavior accordingly." Memorandum at 2. Thus, he asserts he was deprived of his due process rights. As set forth in the factual background, the record is replete with documents demonstrating that Mr. Lowe attended training on the proper discipline of students. It is our view that Mr. Lowe had plenty of notice of what constituted unacceptable behavior.

The Appellant next challenges the discipline he received arguing that local board rules call for decertification of a school bus driver after the second incident of inappropriate discipline of a student. The Appellant asserts that there was no credible evidence in the record about a first incident of inappropriate discipline. The evidence in the record consists of an April 12, 2006 letter to Mr. Lowe from the Assistant Superintendent stating that Mr. Lowe had been found guilty of second degree assault for hitting a twelve year old student on the back of the head for not sitting down. (*Id.* Ex. S-1, p. 24). The record contains the court docket setting forth the district court conviction. Mr. Lowe appealed that conviction to the circuit court. (*Id.* Ex. S-1, pp. 15-21). The circuit court jury found Mr. Lowe not guilty. The school system ultimately reinstated Mr. Lowe. (*Id.*, Ex. S-1, p. 14).

Mr. Lowe believes that the not guilty verdict erases all traces of the first incident. But, as the local board argues, it is not "bound by criminal outcomes, which have a beyond the reasonable doubt standard." (Local Board's Response to Memorandum at 2). Indeed, the prosecution's failure to prove second degree assault occurred does not establish that Mr. Lowe never hit the student. Apparently, Mr. Lowe admitted hitting the child. (*Id.* Ex. S-1, p. 2A).

It is our view that the record is sufficient to support a finding that the incident here was the second time Mr. Lowe discipline students in an inappropriate way.

Upon reviewing the record before us, we believe there were sufficient grounds to decertify Mr. Lowe. As Superintendent Fredrickson said in his decision to decertify Mr. Lowe:

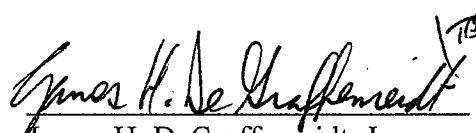
Our school system is entrusted with thousands of children each school day, and we have an obligation to keep them safe. Bus drivers, who are the first school representatives to see the children at the start of the day and the last to see them at the end of the day, are expected to follow the procedures for addressing discipline problems on the bus and to refrain from any physical contact with the children. As an experienced bus driver, Mr. Lowe knew or should have known that his actions on January 11, 2008 were contrary to the clear guidelines for bus drivers.

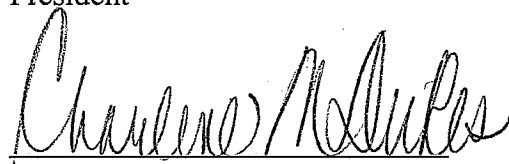
(*Id.*, Ex. S-1, p. 2A).

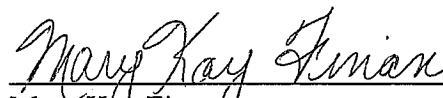
We certainly agree.

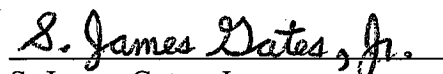
#### CONCLUSION

For all the reasons stated, we affirm the decision of the local board.

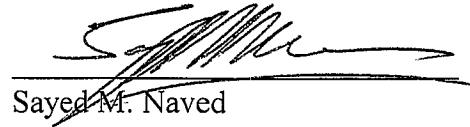
  
James H. DeGraffenreidt, Jr.  
President

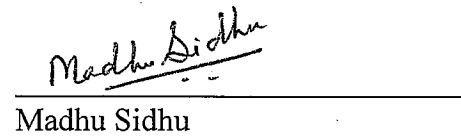
  
Charlene M. Dukes  
Vice President

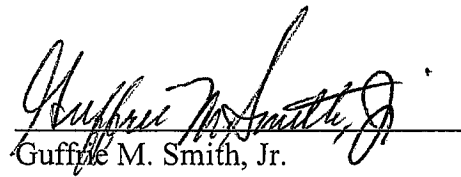
  
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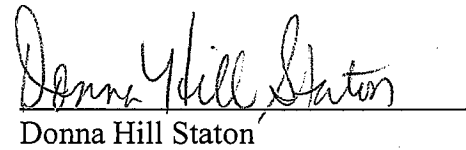
  
S. James Gates, Jr.

  
Luisa Montero Diaz

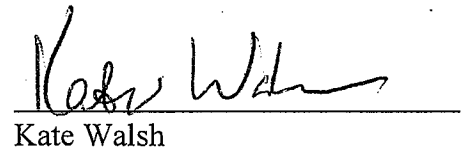
  
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September 21, 2010