HOWARD ROBINSON,	BEFORE THE
Appellants	MARYLAND
v.	STATE BOARD
CHARLES COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 11-21

OPINION

In this appeal, the Appellant challenges the decision of the Charles County Board of Education ("local board") upholding his termination as a painter due to misconduct in office, neglect of duty and insubordination. The local board has submitted a Motion for Summary Affirmance arguing that its decision was not arbitrary, unreasonable or illegal and should be upheld. The Appellant filed a Response, to which the local board filed a Reply.

FACTUAL BACKGROUND

In 2004, the Appellant was hired as a painter for the school system. To perform his duties at various school building sites around the county, the Appellant was assigned a school system vehicle to use during the workday. At the beginning of the Appellant's shift, he would drive to the maintenance shop in La Plata, pick up his assigned school system vehicle, and drive to a designated site. The Appellant had a 30 minute lunch break, during which time he was permitted to drive his assigned vehicle to get food or make other minor stops associated with the lunch break. At the end of his shift, the Appellant returned the school system vehicle to the maintenance shop. (Local Bd. Decision at 3.)

In April 2005, the school system was issued a traffic citation after the Appellant ran through a red traffic light. The Appellant was not authorized to be in the area where he was ticketed. (Local Bd. Decision at 2.) The Appellant paid the citation and was advised by Jerome Butkiewicz, Supervisor of Maintenance, that he was expected to use the school system vehicle only for his assigned duties, not unauthorized uses. (Local Bd. Memo at 2-3.)

In November 2009, Mr. Butkiewicz purchased portable GPS equipment to monitor proper use of school system vehicles. Mr. Butkiewicz did so in part because he previously received complaints that the Appellant left work sites during his shift without authorization. (Local Bd. Memo at 3.) The GPS equipment tracked the date, time, location, distance traveled and speed of the vehicle. Mr. Butkiewicz met with employees, including Appellant, and informed them of the school system's ability to track the location of its vehicles. On November 13, 2009, Mr.

Butkiewicz installed a GPS on the Appellant's work vehicle without the Appellant's knowledge. (Local Bd. Decision at 2.)

During this time, the Appellant was assigned to paint at Matthew Henson Middle School in Indian Head. The school was approximately 25 miles and a 50 minute round trip from the maintenance shop in La Plata. Mr. Butkiewicz reviewed information from GPS on Appellant's vehicle between November 13 – November 23, 2009. The GPS data provided the following:

- November 13 – Appellant drove 33.5 miles and over 75 minutes
- November 16 – Appellant drove 79.6 miles and over three hours
- November 17 – Appellant drove 34.4 miles and approximately 75 minutes
- November 18 – Appellant drove 50.4 miles and almost two hours
- November 19 – Appellant drove 38.7 miles and more than 100 minutes
- November 20 – Appellant drove 54.2 miles and more than 100 minutes
- November 23 – Appellant drove 40.3 miles and almost 95 minutes

(Local Bd. Decision at 2-3.) After reviewing the GPS data, Mr. Butkiewicz concluded that the Appellant took several unauthorized trips during the workday to other locations around the county, driving almost twice the amount of miles in seven days that he would normally drive from the maintenance shop to the school. In addition, the GPS data showed that the Appellant exceeded the posted speed limit of 55 miles per hour on each day. (*Id.*)

Further, Mr. Butkiewicz, and two human resources personnel followed the Appellant in his school system vehicle another day and found he drove to an area of the county where he was not authorized to be. (Local Bd. Memo at 4.)

Mr. Butkiewicz and Jeremy Campbell, Human Resources Personnel Specialist, met with the Appellant on two occasions regarding the data they collected and their concerns regarding his improper use of the school vehicle. The Appellant did not provide a satisfactory explanation for his conduct and he allegedly responded, "If I had known you were tracking my vehicle, I would have done the right thing." (Local Bd. Memo at 5; Tr. 108:6.)

Consequently, Mr. Butkiewicz recommended the Appellant's immediate termination. Mr. Campbell and Keith Hettel, Assistant Superintendent for Human Resources and the local superintendent's designee, met with Appellant to give him opportunity to respond to the charges. The Appellant admitted wrongdoing. (Local Bd. Memo at 5; Tr. 170:10-18.) Mr. Hettel subsequently agreed with the recommendation and terminated the Appellant, effective November 30, 2009, for misconduct in office, willful neglect of duty, and insubordination. (Local Bd. Memo at 5.)

The Appellant appealed the termination to the local board, which transferred the case for a full evidentiary hearing before an assigned hearing examiner. At the hearing, the Appellant was represented by legal counsel. (Local Bd. Memo at 5.) The hearing examiner concluded that the decision of the superintendent's designee to terminate the Appellant was supported by

credible documentary and testimonial evidence. As a result, the hearing examiner recommended that the Appellant's termination be upheld. (Local Bd. Decision at 5.)

Following the hearing examiner's recommendation, the parties presented oral argument before the local board. After considering the record and oral argument presented, the local board issued its decision on June 1, 2010. The board found that the Hearing Officer's Recommendation to uphold the Appellant's termination was fully supported by the record and affirmed the superintendent designee's decision.

STANDARD OF REVIEW

In *Livers v. Charles County Board of Education*, 6 Op.MSBE 407 (1992), *aff'd* 101 Md.App. 160, *cert. denied*, 336 Md. 594 (1993), the State Board held that a non-certificated support employee is entitled to administrative review of a termination pursuant to §4-205(c)(4) of the Education Article. The standard of review that the State Board applies to such a termination is that the local board's decision is prima facie correct and the State Board will 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

The Appellant argues that the local board's decision was arbitrary, unreasonable or illegal on several grounds, which we outline below.

Request for De Novo Hearing

As an initial matter, the Appellant states he is a certificated employee, and as a result, he is entitled to a de novo review of this appeal before an administrative law judge. He did not provide a copy of any Maryland or other state certification in the record. The local board correctly states that there is no State certification for the position of painter in public schools.

In our view, the Appellant is not entitled to a de novo review of his appeal. The State Board has held that there is no right to an evidentiary hearing when there is no constitutional or statutory basis to provide one. *See Roger B. v. St. Mary's County Bd. of Educ.*, MSBE Op. No. 08-53 (2008); *Teegardin v. Carroll County Bd. of Educ.*, MSBE Op. No. 02-52 (2002). Under State Board regulations, certificated personnel dismissed pursuant to Education Article section 6-202 are provided a de novo review. COMAR 13A.01.05.05F. Here, however, the Appellant was dismissed as a noncertificated employee under Education Article section 4-205(c). Therefore, the Appellant is entitled to an administrative review on the record of his appeal, not a de novo hearing. COMAR 13A.01.05.06.

In addition, the Appellant does not allege any genuine disputes of material facts that would require an evidentiary hearing before an administrative law judge. It is well settled that due process does not require a hearing on issues that do not involve a genuine dispute of material fact. *See Hethman v. Prince George's County Bd. of Educ.*, 6 Op. MSBE 646, 648-649 (1993).

Sufficiency of GPS Data

The Appellant challenges the reliability of the GPS data that led to his termination. He asserts that a proper foundation was not laid during the hearing, because no testimony was provided regarding accuracy of the tracking program, nor did Mr. Butkiewicz demonstrate sufficient training or familiarity with the program. The Appellant also notes that, despite the GPS data, he was never issued a speeding ticket or citation by law enforcement officials.

In response, the local board argues that the Appellant was represented by counsel at the hearing and presented no objection to the local superintendent's 14 exhibits offered into evidence with the GPS data. (*See* Local Bd. Reply at 5.) The local board argues that because the Appellant failed to challenge any lack of foundation at the hearing or before the local board, that issue is now waived before the State Board.

In addition, the local board contends that while the Appellant generally challenges the accuracy of the GPS data, he did not deny the accuracy of the underlying allegations. Instead, the Appellant admitted to driving miles out of the way during work hours. (Local Bd. Motion at 7; Tr. 240:4 - 241:12.) Human resources personnel also observed the Appellant making unauthorized stops.

In our view, the Appellant has waived any challenges regarding lack of proper foundation or sufficiency of the GPS data because he failed to raise them at the evidentiary hearing or before the local board. The State Board has consistently declined to address issues that were not initially reviewed by the local board. *See Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003) (failure to raise untimely notice of probationary contract non-renewal decision constituted waiver); *Craven v. Bd. of Educ. of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Hart v. Bd. of Educ. of St. Mary's County*, 7 Op. MSBE 740 (1997) (failure to raise issue of age discrimination below constituted waiver).

Arrival Time

The Appellant next argues that one of his supervisors, Greg Thompson, was aware that he would be late to his assignments and did not object. The local board disagrees and notes that Mr. Butkiewicz testified in detail that the Appellant was expected to arrive to work on time and perform his assigned duties. Neither party called Mr. Thompson to testify at the hearing.

In our view, this issue comes down to a credibility determination made by the hearing examiner, who heard the Appellant's testimony regarding Mr. Thompson's implicit approval to arrive late for his work assignments. The hearing examiner was not persuaded by the Appellant's testimony. It is well established that determinations concerning witness credibility are within the province of the local board as trier of fact. *See, e.g.*, *Bd. 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."); *see also Board of Education 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."). We do not find any basis to overturn the credibility decision made by the hearing examiner or affirmed by the local board.

Travel/Distance Time

The Appellant next argues that because he was not given a particular route to and from the school that he had to travel, he should not be penalized by choosing alternate, better routes that resulted in his driving some miles out of the way to and from his assignment. The local board responds that regardless of which route the Appellant chose, he was expected to use reasonable judgment in the distance he traveled, which he failed to do.

We agree with the local board. The GPS data taken from the Appellant's work vehicle captured him driving between eight and 54.6 miles more per day than would be required to drive to and from his school assignment. The Appellant has not presented evidence of any alternate route that would reasonably account for such a large discrepancy in miles driven.

Unauthorized Detours

Next, the Appellant contends that he had permission to make some detours because he advised Mr. Thompson that he needed to go home, which was nearby, and attend to the family dog while his wife visited an ill family member. The Appellant states that Mr. Thompson did not object to him making the detour. The local board responds that Mr. Butkiewicz testified that the Appellant was allowed to make reasonable personal stops or detours during his 30 minute lunch break, but not hours long stops or miles out of the way.

From our review of the record, the Appellant's contention lacks merit. Even if the Appellant received permission from Mr. Thompson to go home on one occasion, he still was not authorized to make the numerous other stops, driving significantly more miles and minutes on other days captured by the GPS data.

Right to Representation

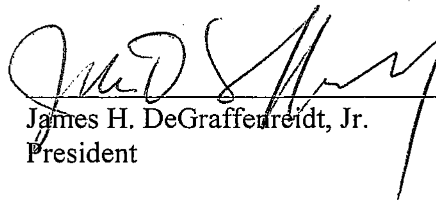
Last, the Appellant argues that his termination was illegal because it followed the "fact gathering meeting" with the superintendent's designee and others, at which the Appellant was not advised of his right for union representation. The local board asserts that even if that were true, the violation was cured by the hearings subsequently provided to the Appellant, including the hearing before the superintendent's designee and the full, evidentiary hearing at the local board level. The Appellant was represented by counsel at those levels of appeal.

The Appellant's argument rests on the assumption that due process required school officials to notify him of his right to union representation at the pre-termination meeting. As the U.S. Supreme Court held in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the core requirement of due process is that an individual is given notice of the intended action and an opportunity to be heard prior to being deprived of any significant property interest.

Here, the Appellant was given multiple opportunities to hear school officials' concerns and to respond to them. The Appellant was afforded a full evidentiary hearing, at which he was represented by counsel and had the opportunity to present evidence, argument and cross examine witnesses. Following the hearing examiner's decision, the Appellant presented oral argument before the local board rendered its decision. The Appellant does not cite any law, ruling, policy or contract provision that requires him to have received more than this level of due process. Thus, in our view, the *Loudermill* standard was met in this case and the Appellant was afforded adequate due process.

CONCLUSION

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



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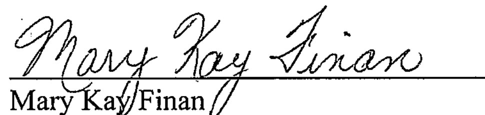
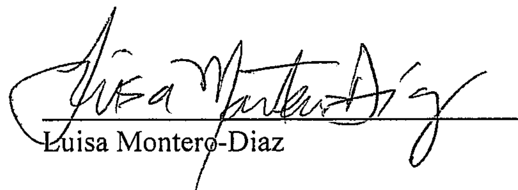


Mary Kay Finan

S. James Gates, Jr.



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April 26, 2011