

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Marti Mackey

Appellant

v.

Buckeye Local School District Board of Education

Appellee

Case Nos. 2020-MIS-11-0182
2020-ABL-11-0183
2020-WHB-11-0184
2020-OSH-11-0185
2021-WHB-01-0005

ORDER

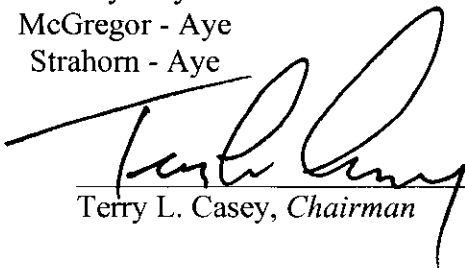
These matters came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeals.

After a thorough examination of the entirety of the records, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

It is particularly important that school administrators are cognizant of the contributions that field staff can make regarding ensuring proper protocols are followed. Indeed, paying appropriate attention to legitimate concerns raised by field staff helps to protect the health and safety of both students and staff.

Wherefore, it is hereby **ORDERED** that that the instant consolidated appeals are **GRANTED** in part and **DENIED** in part so that relief is appropriate, and reasonably calculated to restrain the proven violation in conformance with R.C. 4167.13 as set forth in the instant Report and Recommendation. Appellant Mackey is a prevailing party.

Casey - Aye
McGregor - Aye
Strahorn - Aye



Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, March 04, 2022.



Clerk

NOTE: Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. After the board has received the deposit, the transcript and copies of the file will be prepared and the cost of those items will be calculated. If the deposit exceeds the costs of these items, then a refund of the excess will be issued; if the deposit does not cover the full amount, then the appealing party will be billed for the outstanding balance. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system. The State Employment Relations Board Fiscal Office will initiate the ISTV after receipt of the Notice of Appeal. The Fiscal Office can be contacted at (614) 466-1128.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE March 11, 2022. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2020-MIS-11-0182, et seq

Transcript Costs: \$1260.00 Administrative Costs: \$25.00

Total Deposit Required: * \$1285.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: March 21, 2022

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Marti Mackey

Case Nos. 2020-OSH-11-0185 *et al.*

Appellant

v.

November 16, 2021

Buckeye Local School
District Board of Education

Appellee

Raymond M. Geis
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came to hearing on October 20 and 21, 2021. Appellant alleges that she was reprimanded, reduced in hours worked and then terminated from her substitute school bus driver position in retaliation for her reporting of safety issues to Appellee and to the Public Employee Risk Reduction Program ("PERRP"), in violation of R.C. 4167.13 *Prohibiting Retaliation by Employer*. The subject matter of this report comprises Case Nos. 2020-OSH-11-0185 (alleging retaliatory reprimand and reduction of hours) and 2021-WHB-01-0005 (alleging retaliatory termination) the latter of which is consolidated with the former, and is redesignated as an "OSH" appeal, hereby.

Appellant filed several companion appeals arising from events related to the instant appeal. Case No. 2020-INV-12-0227 was previously dismissed by this Board for lack of jurisdiction. Case Nos. 2020-MIS-11-0182, 2020-ABL-11-0183, and 2020-WHB-11-0184 are recommended for dismissal for the reasons set forth in this Board's January 26, 2021, Procedural Order which is fully incorporated herein by reference as if fully rewritten herein.

Appellant Marti Mackey ("Mackey") appeared and was represented by Attorney Benjamin Riek, III. Appellee, Buckeye Local School District Board of Education ("Board of Education", "BOE", or "the District"), appeared through its designee, Superintendent Jeffrey Harrison ("Supt. Harrison"), and was represented by Attorney Max Rieker.

Witnesses testifying at the hearing were: Board of Education President Denise Piovarchy ("Piovarchy"); President of the Ohio Association of Public School Employees Local # 216 ("OAPSE") Joannie Howells ("Howells"), representing permanent bus drivers

within the District; Supt. Harrison; District bus driver Steven Temple ("Temple"); former District bus driver Aaron Gaebelein ("Gaebelein"); and Appellant Mackey.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Mackey was hired as a substitute school bus driver for the District on or about November 2019. Mackey testified that the prior superintendent promised to hire her as a permanent bus driver after she had served as a substitute driver for an indefinite period. There is no writing to support a finding for a contract for permanent employment between Mackey and the Board of Education. Supt. Harrison was hired by the District on or about August 2020. Mackey contacted Supt. Harrison and insisted he hire her permanently, based on her recollection of the oral promise made by the prior superintendent. Supt. Harrison refused, as there was no evidence of a binding agreement between Mackey and the Board of Education for permanent employment, however he did indicate that he would consider Mackey for prospective permanent positions.

During this period, Mackey was driving the same route every day. She hoped her schedule would become permanent. Mackey paid extraordinary attention to all the rules and regulations governing the driving of school buses and became far more knowledgeable about them than the average employee.

Mackey notified the District's transportation supervisor that first aid kits aboard her bus were missing necessary bandages, the disinfectants used on the buses were not labeled, and there were no safety data sheets regarding the use of disinfectants or what to do in case of accidental exposure. The transportation supervisor rebuffed Mackey, who felt dismissed by the encounter between them.

Mackey next expressed her concerns to the Board of Education via email. One member, Mr. Ken Barco, took interest in Mackey's allegations. His response incensed Board President Piovarchy, who insisted that the chain of command be followed, and that Mackey was wrong for attempting to communicate with the Board of Education at all. Piovarchy reprimanded Mackey in a two-page letter for, *inter alia*, reporting perceived safety hazards directly to the Board of Education.

Undeterred, Mackey sought a meeting with Supt. Harrison, who met with her and fellow bus driver Temple on October 5, 2020. The meeting was heated. Both Mackey and Supt. Harrison raised their voices to each other, and Temple testified that he was very "uncomfortable." Around the time of this meeting, Mackey filed a complaint with PERRP alleging the same or similar violations of hazardous communications (safety sheets and labeling) standards that she had brought to the attention of the transportation supervisor and the Board of Education.

PERRP investigated the matter and, as a result of its investigation, cited the District eight times, including for the issues raised by Mackey. As part of the investigation,

PERRP sent a notice of complaint to the District containing the factual allegations, which mirrored the allegations Mackey previously made to the Board of Education and Supt. Harrison. Thus, there was every reason for the Board of Education to suspect Mackey was the individual who had filed the PERRP complaint.

During this time, OAPSE and Supt. Harrison held midterm talks concerning the reorganization of bus routes. OAPSE complained that sporadic in-person student attendance caused by the COVID-19 protocols left bus drivers with less paid driving time. Supt. Harrison responded by consolidating routes to make them longer. OAPSE approved of this change because its drivers now worked longer, earned more, and received greater Board of Education contributions to their benefits premiums. However, it also meant less work for Mackey, who lost her route because of the consolidations. The newly consolidated permanent routes were rebid amongst the bargaining unit in accordance with the collective bargaining agreement. There was one route left over, which was posted outside the bargaining unit.

Before Mackey could apply for this externally posted route, the District investigated her and Gaebelein for misconduct. The District's investigation concluded that Mackey was visiting Gaebelein in the junior high school parking lot during his morning layover between routes. Mackey was dropping off her child, who was a student at the junior high school, and was off duty during these visits. Gaebelein was supposed to sanitize his bus during the layover. The District investigator retrieved the standard bus surveillance video and audio of Mackey and Gaebelein meeting together. During their conversations, Mackey spoke of how she had complained to the Ohio Department of Education about Supt. Harrison, and they discussed the District's delay in fixing the hazardous communication and labeling problems about which Mackey complained. Gaebelein was worried about being seen with Mackey because he felt the District was targeting her and did not want to suffer retaliation because of their association. Mackey often crouched in the doorway steps of the bus when cars came by, to avoid detection by others.

Following its investigation, the District suspended Gaebelein for one day for failing to sanitize his bus on a few occasions during his layovers. He admitted Mackey distracted him from his duties and that he felt cornered by her, but not harassed or intimidated; Mackey stated that she considered Gaebelein her friend. The District fired Mackey for being on Gaebelein's bus, bringing food onto Gaebelein's bus, and for making comments about her ability to stick the District for her children's inter-district transportation costs; Mackey lived in temporary housing outside the District at that time and her children were legally homeless. The District's homeless coordinator did in fact arrange for free transportation of Mackey's children later.

The District did not demonstrate any policy prohibiting fraternization between employees, nor any prohibition on bus drivers eating on the bus when no children were present. Nevertheless, the District viewed Mackey's actions as unnecessary, detrimental to Gaebelein's performance, and, therefore, unauthorized.

CONCLUSIONS OF LAW

R.C. 4167.13 (A) states:

No public employer shall discharge or in any manner discriminate against any public employee because the public employee, in good faith, files any complaint or institutes any proceeding under or related to this chapter, or testifies or is about to testify in any proceeding, or because of the exercise by the public employee, on his own behalf or on the behalf of others, of any right afforded under this chapter.

1. Mackey complained in good faith

The Board of Education claims that Mackey filed her complaint with PERRP because she was upset that she had not been hired as a permanent bus driver. This argument is wholly without merit. The fact that PERRP took Mackey's allegations seriously and cited the District proves, albeit after the fact, that her allegations were not only legitimate but in the public interest. Mackey filed her PERRP complaint and complained to the Board of Education and the superintendent in good faith. She had an honest belief that the District violated PERRP rules. This is all that good faith requires -- an honest assertion of a legal right. Any additional motive(s) or ill feelings Mackey may have had are irrelevant and do not cancel her right to report. Nor do they excuse the District's violations.

2. Board President Piovarchy and the Board of Education, by extension, discriminated against Mackey by admonishing her for communicating directly with the Board of Education about safety hazards.

R.C. 4167.13 guarantees an employee's freedom from retaliation for any rights conferred under R.C. Chapter 4167, including for instituting "any" proceeding related to R.C. 4167. Board President Piovarchy's admonishment is reasonably read to deter Mackey from contacting the Board of Education and to shame her for, among other things, reporting health and safety violations.

To the extent that Mackey's complaints were about workplace hazards, Piovarchy's strict rejection of an open-door policy cannot be tolerated under R.C. 4167.13. Mackey had already reported the same conditions to her supervisor and been rebuffed. The District's chain of command policy, as applied by Piovarchy in the form of a reprimand, acted to discriminate against Mackey. This holds true even if Piovarchy did not necessarily intend to punish Mackey for bringing up health and safety issues *per se*.

3. Mackey's firing was substantially motivated by her PERRP complaint and her other complaints about safety and health to the Board of Education.

The District argues that because Mackey was a casual (i.e., part-time) employee without any property interest in her employment, there is a low bar for a lawful disciplinary termination. The District submits that Mackey distracted Gaebelein without privilege, which contributed to his failure to sanitize the bus on two occasions. The District stresses that Mackey spoke of wanting to get Supt. Harrison fired and that Mackey intentionally caused the District to incur extra transportation costs out of spite and not out of need. Finally, the District notes that Mackey brought food on the school bus. The District submits that Mackey's attitude displayed disloyalty, and her actions constituted subterfuge.

Mackey's protected activity is inexorably intertwined with her conversations with Gaebelein about efforts to bring about District compliance with PERRP standards. The two employees discussed the perceived slow pace of compliance and what to do to change that. Gaebelein knew of another employee who had complained previously about some of the same issues. The District was not a model employer when it came to hazardous communication and chemical labeling and these two employees knew it. Both tried to do something about it through their mutual efforts, including their discussion on Gaebelein's bus.

The District did not show that Mackey was prohibited from fraternizing with Gaebelein. Most likely, Supt. Harrison was not overly upset about Mackey bringing a biscuit onto Gaebelein's bus or that Gaebelein sanitized the bus three times instead of four because he was distracted. The District did prove that Mackey contributed to Gaebelein's neglect of duty, which was a ground for discipline. Testimony at hearing, however, made clear that the working relationship between Mackey and Supt. Harrison was strained. Mackey relentlessly pursued her complaints, even against Supt. Harrison in a personal capacity. She invited and accompanied an Ohio Department of Agriculture inspector into the bus garage, without notice to the District and on her day off, to check sanitizer storage (which is a regulated pesticide). It is apparent that District officials were losing patience with Mackey and things were reaching a tipping point.

Rightly or wrongly, Mackey's style of interaction with the District angered, offended, and annoyed Supt. Harrison and Board of Education President Piovarchy, even though they each deny it. However, Mackey's perceived lack of etiquette cannot be separated from her protected conduct. There is no way to demonstrate that it was her purported lack of customary courtesies toward District officials, and not the subject matter itself, which caused the District to fire Mackey. The law cannot tolerate illegal discrimination, and Mackey is entitled to be free of it because she was cloaked in protected activity.

4. Mackey did not prove retaliation by way of reduction of hours or certainty of economic damages after mitigation.

Mackey claims she lost \$20,000 because of the District's actions, although documentation shows that she earned less than \$8,000 while on the District's payroll. The higher dollar amount is based on her perceived entitlement to a permanent position.

Mackey's employment was casual, and she did not prove a right to a particular number of hours. The District articulated a legitimate reason for consolidating routes due to OAPSE's lobbying. When routes were rebid within the bargaining unit after consolidation, only one route remained, which was not the route Mackey was driving.

Mackey did not show that she would have been hired permanently but for her protected activity. The two other substitute drivers hired permanently were previously employed as regular drivers for the District and each opted to be rehired as permanent drivers. Their acceptances of new offers of permanent employment from the District overcomes testimony from Mackey and Gaebelein that these employees did not want to drive or wanted to drive less.

During this time, Mackey also drove bus for a neighboring school district. This also fulfilled her duty to mitigate damages. However, Mackey claims that her routes were shorter, and the pay was about three dollars less per hour even while she drove nearly every day for them. There is simply not enough data in the record to show that Mackey earned less overall at her other bus driver job than what she would have been entitled to earn if employed by Appellee.

Alternatively, this Board should withhold any backpay to Mackey because of her comparative fault in misconduct by contributing to Gaebelein's neglect of duty. She occupied him with her prerogative in a way which prevented him from completing necessary work. All the other misconduct allegations against Mackey are either unproven or too specious.

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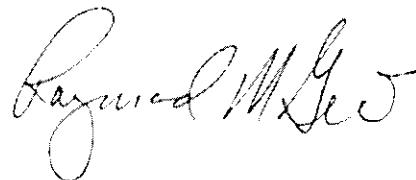
Pursuant to R.C. 4167.13, this Board may order all relief it finds appropriate to restrain the District from discriminating or retaliating against Mackey. It is therefore recommended that this Board order the following:

1. Reinstate Mackey to the position of "substitute" bus driver.
2. Place Mackey on first call status, meaning Mackey shall be called to substitute first before any other substitute driver for a period of 187 days (equivalent to one full school year) that school is in session, from the date of this Board's final order.
3. Consider Mackey for the next available externally posted bus driver position. Her application will be deemed active and continuous. Consideration shall continue for a period of 187 days that school is in session from the date of this Board's final order until Mackey accepts or refuses an offer of permanent employment as a bargaining unit bus driver, or this period expires. If another person is selected for an externally posted position during this period, the selectee shall be demonstrably superior to Mackey in qualification, training or experience directly related to the job.

4. Cease and desist from discriminating against Mackey and all other employees for complaining about safety hazards and/or filing a complaint including to the PERRP and/or the Buckeye Local Schools Board of Education.
5. Rescind or revise the Board Policy prohibiting direct communication by employees to the Board of Education so employees are not in violation of school policy for reporting their health or safety hazards directly to the Board of Education.
6. Remove all derogatory information from Mackey's personnel file arising from her PERRP report and related complaints including but not limited to Piovarchy's letter of reprimand, Supt. Harrison's letter of removal with the no rehire provision, and the third party human resources consulting company "HR On-Call's" investigation report purchased by the District in an attempt to plausibly deny Mackey's allegations.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the instant consolidated appeal be **GRANTED** in part and **DENIED** in part so that relief is appropriate, and reasonably calculated to restrain the proven violation in conformance with R.C. 4167.13. Appellant Mackey is a prevailing party.



Raymond M. Geis
Administrative Law Judge