IN THE LICKING COUNTY COMMON PLEAS COURT

Jane Pfautsch,

Appellant,

vs. : Case No. 11 CV 01671

The Ohio Department of Education, : Judge W. David Branstool

Appellee. :

DECISION AND ENTRY AFFIRMING STATE BOARD OF EDUCATION'S SUSPENSION OF APPELLANT'S TEACHING LICENSE

This case is an administrative appeal from a decision of the Ohio State Board of Education (hereafter "Board"). Appellant, Jane Pfautsch, (hereafter "Pfautsch"), is appealing the Board's decision to suspend her teaching license for one year as a result of the Board's finding that she violated R.C. 3319.151 and OAC 3301-7-01. Pfautsch's appeal is brought pursuant to R.C. 119.12. For the reasons set forth below, the Board's decision is affirmed.

I. Standard of Review

As an initial matter, it is important to recognize the standard of review a common pleas court must utilize when considering an appeal of an administrative decision. Revised Code 119.12, in pertinent part, establishes this standard. It reads as follows:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate or modify the order, or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with the law.

In essence, when a trial court reviews an order of an administrative agency under R.C. 119.12, it must consider the entire record to determine whether the agency's

order is supported by reliable, probative, and substantial evidence, and is in accordance with the law. The Ohio Supreme Court has considered this standard in a number of cases. For instance, in *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992), the Court stated:

> [t]he evidence required by R.C. 119.12 can be defined as follows: (1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value.

Likewise, in *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980), the Court held that:

> [D]etermining whether an agency order is supported by reliable, probative and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence. Although this in essence is a legal question, inevitably it involves a consideration of the evidence, and to a limited extent would permit a substitution of judgment by the reviewing Common Pleas Court.
>
> In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts.

It is against this backdrop, that the Court must consider Appellant's arguments of appeal.

II. Background

Appellant, Ms. Pfautsch, holds a permanent elementary teaching certificate, and has been employed by the Granville School District since 1984. Ms. Pfautsch has been an English language learner (ELL) specialist at the middle and high school levels. During the 2009-2010 school year one of Ms. Pfautsch's duties was to administer the Ohio Test of English Language Acquisition (OTELA).

The test is administered to students who are "limited English proficient" as the term is defined in 20 U.SC. 7801 and Ohio Adm.Code 3301-13-11. R.C. 3301.0711(C)(3). A student's score on OTELA is used to determine whether the student continues to be identified as a "limited English proficient student." Ohio Adm.Code 3301-13-11(A)(3). If a student achieves a sufficient score he no longer is considered "limited English proficient" and may be exited from the school district's limited English proficient program. *Id.* (Tr. 17-18).

OTELA has four sections—reading, writing, listening, and speaking. It is divided into grade bands, grades K-2, 3-5, 6-8, and 9-12. *Id.* at 19. The speaking portion of the test is administered by playing a CD. *Id.* at 21. The student gives oral responses to prompts played from the CD. *Id.* The test administrator scores the student's responses on the student's answer document as the student answers the prompts. *Id.*

During the 2010 testing period, officials at the Granville School District reported testing irregularities to the Department of Education concerning the test administered by Ms. Pfautsch, and an investigation was initiated. On May 17, 2010, the Board issued notice to Ms. Pfautsch of its intention to determine whether to suspend her teaching certificate. A hearing was held on the matter at Department of Education on April 11-12, 2011, and the Hearing Officer issued her report and recommendation October 5, 2011. The Board alleged Ms. Pfautsch failed to administer the speaking section of OTELA to five students, and, instead, filled in perfect scores for each of them on their test answer sheets. (The students are referred to by number for the purpose of confidentiality. State's Ex. 1A). Ms. Pfautsch admitted she did not administer the test to Students 1-4 but asserted that she administered the test to student 5. The Hearing

Officer held that Ms. Pfautsch had violated R.C. 3319.151 and Ohio Adm.Code 3301-7-01 and recommended a one-year suspension of Ms. Pfautsch's teaching license. The Board adopted the recommendation of the Hearing Officer by resolution on November, 15, 2011.

Appellant has raised seven assignments of error and has offered additional evidence in Exhibits 3 – 6 with her brief. These issues will be addressed in the order that they have been raised.

III. Issues on Appeal

A. *Assignments of Error 1: Ohio Adm.Code 3301-7-01*

Ms. Pfautsch's first assignment of error asserts that Ohio Adm.Code 3301-7-01 does not apply to teachers and, as a result, cannot be used to sanction teachers. Appellant is correct that there is no sanction provision in the regulation, and the parties have cited no authority addressing whether a teacher may be sanctioned for violating Ohio Adm.Code 3301-7-01.

However, this point is of little importance given that the Hearing Officer's Report and the Board's resolution concluded that Pfautsch's conduct violated R.C.3319.151, as well. Because OAC 3301-7-01 is part of the Department's regulatory scheme, it must be read *in pari materia* with R.C. 3319.151, which allows the Board to suspend a teacher's license when the teacher has been found to have assisted a student in cheating on an assessment test. And, in the Court's view, R.C. 3319.151's prohibition is broad enough to include violating OAC 3301-7-01. Violating OAC 3301-7-01 is not an additional penalty.

B. *Assignments of Error 2 and 6*

Appellant alleges there was not sufficient reliable, probative, and substantial evidence concerning Students 1-4, and that the Board erred in finding she violated R.C. 3319.151. The Court disagrees.

R.C. 3319.151 states:

> (A) No person shall reveal to any student any specific question that the person knows is part of an assessment to be administered under section 3301.0711 of the Revised Code or in any other way assist a pupil to cheat on such an assessment.
>
> (B) On a finding by the state board of education, after investigation, that a school employee who holds a license issued under sections 3319.22 to 3319.31 of the Revised Code has violated division (A) of this section, the license of such teacher shall be suspended for one year. Prior to commencing an investigation, the board shall give the teacher notice of the allegation and an opportunity to respond and present a defense.

The Board found that Ms. Pfautsch assisted five students in cheating on the speaking section of OTELA.

Ms. Pfautsch asserts that her actions did not constitute assisting a pupil to cheat. She testified that it was her understanding that if the student was proficient the year before there was no point in retesting because speaking is not a skill in which students regress. (Tr. 59). She argues that she did not cheat because "those students could have whizzed through that." *Id.* She further stated, "There is no way those students wouldn't have gotten a 2." *Id.* at 60. The scoring options on a speaking exam question is 0, 1, or 2, with 2 being the highest score. *Id.*

Ms. Pfautsch argues that she was unaware that the students were required to take the speaking section even if they had passed before. She stated she believed it was like another test, the OGT, in this respect. *Id.* at 59. She alleges the school district

did not properly train her so that she would have been aware of this. Thus, she argues she did not believe she was cheating and did not have the requisite intent to cheat. She offers a definition of cheat in her brief from the *Merriam-Webster Dictionary*: "(1) to deprive something valuable by the use of deceit or fraud; (2) to influence of lead by deceit, trick, or artifice; or (3) to elude or thwart by or as if by outwitting." (Appellant's Brief at 26).

Ms. Pfautsch argues that she did not cheat because the students were clearly proficient, and therefore, filling in perfect scores for their answers was not deceitful. While the term cheat is not defined in the statute, "when interpreting legislation, words used in statutes must be given their plain and ordinary meaning, unless legislative intent indicates otherwise." *Union Rural Elec. Co-op., Inc. v. Public Utilities Com'n of Ohio*, 52 Ohio St.3d 78, 80 (1990).

The Hearing Officer also listed the dictionary definitions of cheat including "to mislead." American Heritage Dictionary of the English Language 229 (1976); Webster's II New Riverside University Dictionary 251 (1984). She also stated "perhaps the most pertinent definition" is "'to take an examination in a dishonest way, as by having improper access to answers.'" (Report and Recommendation at 14, citing Webster's College Dictionary 225 (2nd ed.2001)).

The Hearing Officer concluded that "it is dishonest to receive a perfect score on a test without even taking the test. Therefore, Ms. Pfautsch assisted the students in taking the OTELA in a dishonest way." *Id.* at 15. The Hearing Officer also discounted Ms. Pfautsch's argument that she lacked motive or intent to cheat. As the Hearing Officer stated, the statute does not require intent on the part of the person assisting a

student to cheat. Nonetheless, the Hearing Officer found that even if specific intent is required, Ms. Pfautsch knowingly chose not to give the test, and knowingly filled in the test scores. *Id.*

It is important to note that this finding was predicated on the following facts. First, Ms. Pfautsch admitted that she did not administer the test to students 1-4 and that she filled in perfect scores for those students. (Tr. 59). Second, prior to the 2009-10 school year, Ms. Pfautsch took a test on the Ohio Ethical Use of Tests and received a perfect score. *Id.* at 49-51. Third, Ms. Pfautsch received a copy of the rules for administering the OTELA prior to administering the test. *Id.* at 53-54. The directions for the speaking portion of the test state "[Test Administrators] MUST SCORE and RECORED RESPONSES IN STUDENT ANSWER DOCUMENTS. Failure to do so will result in a score of Did Not Attempt (DNA)." (State's Ex. 11 at 56). If a student has a DNA on a section of the exam, they do not get a composite score for the whole exam which determines their level of proficiency. (Tr. 42-43).

Moreover, even if Ms. Pfautsch knew students 2, 3, and 4 were proficient in 2009, she nevertheless administered the writing, reading, and listening sections to them. (Tr. 233-236). Her justification for this was her belief that students do not deteriorate in speaking skills. She cites no rule and regulation for OTELA as the basis of her decision not to administer the test. Further, the five students were eventually administered the speaking portion of the test. (Tr. 164). Only one student received a perfect score on all 16 questions. (State's Ex. 21). One student receive one score of 1, two students received two scores of 1, and one student received one 0 and three scores of 1. (State's Ex. 22-25).

In light of the foregoing evidence, much of it based on Ms. Pfautsch's own statements, the Court finds that there was substantial, reliable, and probative evidence to support the Board's decision.

C. *Assignment of Error 3: Student 5*

Appellant asserts the Hearing Officer ignored evidence that Pfautsch administered the speaking exam to Student 5. The Hearing Officer's Report and the record demonstrate that the Hearing Officer considered and weighed all the evidence admitted.

Ms. Pfautsch maintains that she administered the speaking test to student 5, a sixth grade student. One witness, Ms. Locke, stated she witnessed Ms. Pfautsch administer the test to student 5. The Hearing Officer concluded she had not. The strongest evidence that Ms. Pfautsch had not administered the test was the fact that the testing materials, five compact discs, used to administer the test were still in the shrink-wrap packaging after Ms. Pfautsch had finished testing her students. (Tr. at 132-133). The speaking test could not have been administered without using a speaking prompt CD.

Ms. Pfautsch alleges that there could have been a missing CD or perhaps the wrong CD was used. However, there is no extra CD accounted for in any of the testing material inventories. (State's Ex. 42). Ms. Pfautsch's speculation as to the possible missing CD and the motives of her superiors was not supported by any substantial evidence. Mr. Emery, who initiated the investigation for the district, contacted the testing company, American Institutes for Research, for confirmation that only five CDs were sent to the school, and that the same CDs that were returned by the school. (Tr.

at 133-134). The company sent him a letter confirming this. (State's Ex. 42). The packaging materials and inventory sheets sent to the school with the testing materials also only accounted for five 6-8 grade band speaking CDs. *Id.* The shipment included four expected 6-8 grade kits and one overage. *Id.* Thus, the Court finds that there was substantial, reliable, and probative evidence to support the Hearing Officer's Recommendation and the Board's decision.

D. *Assignments of Error 4 and 5*

Appellant alleges the Hearing Officer ignored evidence that the District provided false information to the Department of Education in retaliation for Pfautsch speaking up for the legal rights of her students.

The Hearing Officer's Report and the record demonstrate that the Hearing Officer considered and weighed all the evidence admitted and there is nothing in the record to suggest she ignored anything, including Ms. Pfautsch's argument that she was retaliated against. In light of the fact that the Court is required to give due deference to evidentiary conflicts resolved by the Hearing Officer, the Court finds that there was substantial, reliable, and probative evidence to support the Hearing Officer's Recommendation and the Board's decision on this point.

E. *Additional Evidence*

Ms. Pfautsch has submitted new exhibits 3-6 for this Court to review on appeal. Revised Code 119.12 states as follows:

> Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

"'Newly discovered' evidence under R.C. 119.12 pertains to evidence that existed at the time of the administrative hearing; the term does not refer to newly created evidence, such as evidence created after the hearing." *Beach v. Ohio Bd. of Nursing*, 10th Dist. No. 10AP–940, 2011-Ohio-3451, ¶16. "The decision to admit additional evidence lies within the discretion of the court of common pleas, but only after the court has determined that the evidence is newly discovered and that it could not with reasonable diligence have been ascertained prior to the agency hearing." *Cincinnati City School Dist. v. State Bd. of Edn.*, 113 Ohio App.3d 305, 317 (10 Dist.1996).

With this standard in mind, the Court finds that the exhibits Ms. Pfautsch has submitted are not newly discovered evidence. Exhibit 3 is an affidavit from appellant's attorney, which is not newly discovered evidence, nor does it purport to demonstrate that the other exhibits could not with reasonable diligence have been obtained prior to the hearing.

Exhibit 4 is an undated letter to an unnamed recipient from Student 6's mother urging the recipient to disregard her daughter's testimony. The Court cannot ascertain if the letter is newly discovered evidence, and there is no representation that if it existed prior to the hearing, it could not have been obtained with reasonable diligence. Pfautsch was not accused of any violation concerning Student 6, and the letter does not contain any relevant or probative evidence concerning Pfautsch's accusation of retaliation as she suggests.

Exhibit 5 is a letter from Student 5's father. This letter was in existence at the time of the hearing, but again there is no representation that the letter could not have

been obtained with reasonable diligence. Similarly, this letter contains very little evidentiary significance.

Finally, Exhibit 6 contains materials concerning the investigation of another Granville teacher involving a testing incident in 2007. This evidence was in existence at the time of the hearing, but appellant has not explained why it could not have been obtained prior to the hearing. Further, the document is not relevant to or probative of the issues in Ms. Pfautsch's case.

As stated earlier, Appellant has not demonstrated that the exhibits are newly discovered or that they could not have been obtained with reasonable diligence prior to the administrative hearing. Further, even considering the exhibits, they do not demonstrate that the Hearing Officer erred or that her decision was not supported by reliable, probative, and substantial evidence.

F. *Assignment of Error 7*

In Appellant's final assignment of error, she asserts that the Department of Education failed to provide evidence that students 1-5 were required to take the test. Pfautsch argues that the State did not meet its burden of production as to this issue. She cites an unrelated federal court case for this proposition. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir.2000). *Cline*, concerns the burden of production required by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), in an employment discrimination case. Appellant cites no authority for the contention the Hearing Officer cannot consider all the evidence presented at the hearing.

The statute does state that it applies to assessments "administered under section 3301.0711 of the Revised Code." OTELA is administered pursuant to

R.C. 3301.0711, and it was administered to Students 1-5. The fact that Students 1-5 were required to take the test was not in dispute at the hearing.

Nonetheless, Ms. Pfautsch, when called to testify during the Department's case-in-chief, stated that the students were "limited English proficient" and were required to take OTELA. (Tr. 92-93). In fact, Ms. Pfautsch was the second witness called by the Department of Education in the case. Ms. Mahaley testified that OTELA is for students who are "limited English proficient." (Tr. 17-18). Ms. Pfautsch administered three sections of the test to the students, and they took the speaking section once the district determined Ms. Pfautsch had not administered that section of the exam. Ms. Pfautsch did not contend at the hearing that the students were not "limited English proficient" or that they were not required to take the test.

Appellant cites no authority for the contention that the state must prove the student is required to take an assessment as an element of a violation of R.C. 3319.151. Regardless, there was reliable, probative, and substantial evidence at the hearing for the Hearing Officer to find the students were required to take the test, and in fact the issue was not in dispute.

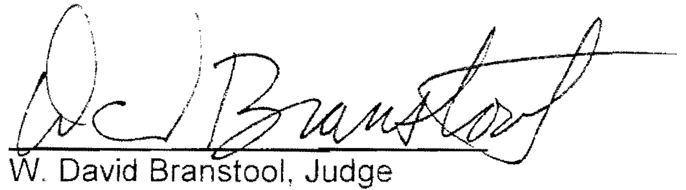
III. Conclusion

For the reasons set forth above, the decision of the Board is AFFIRMED. Costs to Appellant.

It is so ORDERED.

There is no just cause for delay. This is a final appealable order.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



W. David Branstool, Judge

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