IN THE LICKING COUNTY COMMON PLEAS COURT

Mary Ellen Locke,		
Appellant,	:	
vs.	:	Case No. 11 CV 01672
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, Mary Ellen Locke, (hereafter "Locke"), 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. Locke'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.
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> 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

The Board adopted a resolution on November 15, 2011, suspending Appellant's teaching license for one year. The Board found that Ms. Locke failed to administer the speaking portion of Ohio Test of English Acquisition (OTELA) to Student 1.[1] The Board determined that despite having not administered the test, Ms. Locke entered a false

[1] Students are referred to by number for the purpose of confidentiality. State's Ex. 1A.

perfect score on the student's answer sheet. The Board also determined that Ms. Locke did not assist another teacher, Jane Pfautsch, in administering the same section of the test to Student 2. Similarly, it is alleged, Ms. Pfautsch entered a false perfect score for Student 2. The Board found these actions violated R.C. 3319.151 and OAC 3301-7-01.

Ms. Locke holds a five-year early childhood teaching license that was issued in 2007 and held a five-year long-term adolescence to young adult substitute teaching license issued in 2005 which has expired. She has worked in the Granville Exempted Village School District since 2000. At the time of the investigation by the State, Ms. Locke was an English Language Learner (ELL) specialist at the school. Among her duties as an ELL teacher was the administration of OTELA. The exam is administered to students who are "limited English proficient" (LEP) 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. (Tr. 42). During the 2009-2010 school year Ms. Locke and Ms. Pfautsch were responsible for administering the exam.

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 33. The speaking portion of the test is administered by following scripted directions. (State's Ex. 12). The student gives oral responses to speaking prompts played from a CD. (Tr. at 38-39). 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 exams administered by Ms. Locke and Ms. Pfautsch, and an investigation was initiated. *Id.* at 184. After the testing, the school testing coordinator, Samantha McMasters, observed that none of the five 6-8 grade speaking prompt CDs had been removed from their shrink-wrapped packaging. *Id.* at 132-133, 191-193, 195, 197. However, completed answer sheets had been returned for four students that were in the 6th and 7th grades. *Id.* at 186-187. This included the answer sheets for Students 1 and 2 who were sixth grade students. *Id.* at 187-191. McMasters enquired of Ms. Pfautsch concerning the unopened CDs. Ms. Pfautsch stated she did not test four of the students because she believed they were proficient. Ms. Pfautsch, however, stated she did test Student 2 with the assistance of Ms. Locke. Ms. Locke stated she tested Student 1 and observed Ms. Pfautsch administer the test to Student 2. Both students received perfect scores on the speaking portion of the exam. *Id.* at 174-175, 211. The students were later tested on the speaking portion and did not receive perfect scores. (State's Ex. 22, 23). Both students were found to be proficient, however. (Tr. 149-150).

On June 22, 2010, the Department of Education notified Ms. Locke that the Board intended to determine whether to suspend her teaching license. A hearing was held March 21 and May 10, 2011, before the Hearing Officer. The Hearing Officer issued a Report and Recommendation September 1, 2011, recommending that Ms.

Locke's license be suspended for one year. This Report was adopted by the Board's resolution of November 15, 2011.

Appellant submits eight assignments of error and has offered additional evidence in Exhibits 4-7 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 and 2: Ohio Adm.Code 3301-7-01*

Ms. Locke's first assignment of error asserts the Hearing Officer made no findings that Locke violated Ohio Adm.Code 3301-7-01. While the Hearing Officer did not make a specific finding that Ms. Locke violated Ohio Adm.Code 3301-7-01, he discussed the regulation's applicability at length. (Report and Recommendation at 57-60). Ultimately, however, the Hearing Officer determined appellant violated R.C. 3319.151, and recommended the sanction provided in the statute.

Ms. Locke's second assignment of error asserts that Ohio Adm.Code 3301-7-01, 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 value given that the Hearing Officer's Report and the Board's resolution concluded that Locke's conduct violate 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. *Assignment of Error 3*

Ms. Locke's third assignment of error asserts that the evidence proves Ms. Locke and Ms. Pfautsch did administer the test to Students 1 and 2. Here, Appellant objects to the weight and credibility the Hearing Officer gave the evidence. However, based on the Court's review of the entire record, and giving due deference to the administrative resolution of evidentiary conflicts, the Court concludes, that there was reliable, probative, and substantial evidence to support the findings.

The most crucial, disputed evidentiary issue concerned the fact that the 6-8 grade speaking prompt CDs were unopened, yet Ms. Locke and Ms. Pfautsch gave perfect scores to both Students 1 and 2 on the speaking portion of the test. The test could not have been administered without using a speaking prompt CD.

Ms. Locke contends that there was a missing, opened CD that went unaccounted for. Her only evidence for this contention is her testimony and the testimony of Ms. Pfautsch. Ms. Locke asserts school officials including McMasters, the Superintendent, and Mr. Emery used the incident as an opportunity to retaliate against her for her participation in a lawsuit against the district on behalf of her students. She alternatively implies that McMasters, or someone, purposely disposed of the missing CD or that the CD was missing due to McMasters's failure to securely store the testing materials.

The testimony of Emery and McMasters as well as the documentary evidence contradicted these theories. McMasters testified that she accounted for five 6-8 grade

speaking CDs and that they were unopened after Locke and Pfautsch had completed the testing. (Tr. at 132-133). Emery testified that he conducted an investigation into the matter. He also witnessed the five unopened CDs and documented this with a video recording. *Id.* at 191-193, 195, 197. He further investigated whether the students could have been administered the test from the wrong grade band CD. He could not find a way they could have received a perfect score if the wrong CD had been used. *Id.* at 191. Mr. Emery also 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. *Id.* 192-193. The company sent him a letter confirming this. (State's Ex. 37). 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.*

What is more, Locke's and Pfautsch's testimony were contradictory about which of them opened the alleged missing CD. Both stated that they had removed the shrink wrap from the CD to administer the test to Student 2. (Tr. at 116, 324, 327). Locke stated that she must have used the same opened CD to test Student 1 at a later date. *Id.* at 328, 343-344. McMasters stated she enquired with Pfautsch about the unopened CDs, and Pfautsch replied only that she had not tested four students. She did not say anything about the fact the CDs had not been opened or about Students 1 and 2. *Id.* at 134. However, Pfautsch denied she was made aware of the unopened CDs at the time McMasters first questioned her. *Id.* at 119.

The testimony of Emery and McMasters was corroborated by the documentary evidence. Thus, there was relevant, probative, and substantial evidence to support the

Hearing Officer's conclusion that Ms. Locke and Ms. Pfautsch did not administer the test to Students 1 and 2.

Appellant has not demonstrated that the Hearing Officer erred in the weight and credibility he gave to the evidence. He could reasonably reach the conclusion, as he did, that Ms. Locke's assertions were implausible in light of the evidence. (Report and Recommendation at 68-71).

C. *Assignment of Error 4: Exclusion of Evidence*

Ms. Locke asserts that the Hearing Officer erred by refusing to admit the results of her polygraph examination and the affidavit of Kathleen Binau into evidence.

The Board notes that appellant failed to proffer both exhibits at the hearing, and they are not part of the record and that a reviewing court is limited to the record certified by the agency. Evidence excluded by an agency must be made part of the agency record of proceedings before error may be predicated on the agency's ruling." *Sicking v. State Medical Bd.*, 62 Ohio App.3d 387, 393 (10th Dist.1991).

Revised Code 119.09 states,

> The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

Appellant did not proffer this evidence for the record at the hearing, and it is not before the Court. (Appellant did submit a letter concerning the polygraph as Exhibit 3 to her brief on appeal). However, even had the evidence been proffered, the Hearing Officer did not err by refusing to consider the evidence.

The Binau affidavit purportedly would contain testimony that Ms. Binau received inaccurate packing lists of testing materials at another school district. The Hearing Officer determined the testimony was not relevant. While the purported testimony, which could have been procured by a proper subpoena, supports appellant's contention that mistakes are made in packing and shipping testing materials, the State did not contend that mistakes could not happen. The testimony is not probative of what happened at Granville during the 2010 testing. Thus, even if the Hearing Officer considered the evidence, it was not substantial and would have carried very little weight. He did not err in excluding the affidavit.

The Officer's exclusion of Ms. Locke's polygraph examination was also within his discretion. Polygraph results are inadmissible unless the parties stipulate to the submission of the test results, including the graphs and opinions of the polygraph examiner. *E.g. City of Zanesville v. Sheets*, 38 Ohio App.3d 24 (5th Dist.1987); *St. Elizabeth's Employee Federal Credit Union v. Jarman*, 1st Dist. No. C-971039, 1999 WL 162138 (March 26, 1999); *In re Bailey*, 1st Dist. No. C-990528, 2001 WL 477069 (May 2, 2001). The parties did not stipulate to the admission of the polygraph results.

D. *Additional evidence*

Appellant has submitted several exhibits with its brief to be considered 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 submitted exhibits are not admissible as newly discovered evidence. Exhibit 4 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 5 is an undated letter to an unnamed recipient from Student 1'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. Further, Student 1 did not testify, nor were any hearsay statements of Student 1 offered by the State. Ms. Locke, however, did testify as to Student 1's statements during her case. Even if the Court were to consider the evidence, it has very little value other than confirming that Student 1 was in fact an ELL student.

Exhibit 6 is a letter from Student 2'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 7 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. Locke's case.

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 his decision was not supported by reliable, probative, and substantial evidence.

E. *Assignments of Error 5 and 6*

Appellant alleges that the Hearing Officer ignored relevant and probative evidence that Ms. Locke and Ms. Pfautsch administered the speaking test to Students 1 and 2, and that Locke's supervisors provided false information to the Department of Education in retaliation for Locke speaking up for her ELL students' legal rights.

The Hearing Officer's Report and the record demonstrate that the Hearing Officer considered and weighed all the evidence admitted. There is nothing in the record to suggest he ignored anything. 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.

F. *Assignment of Error 7: R.C. 3319.151*

Assignment of error seven asserts that the Board wrongly determined that appellant violated R.C. 3319.151. Locke asserts that her alleged conduct, even if true, did not constitute cheating for the purposes of R.C. 3319.151.

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 Locke assisted a pupil to cheat by failing to administer the test to Student 1 and recording a perfect score. Further, it found Locke did not assist Pfautsch in administering the test to Student 2 who also received a perfect score.

Locke insists this conduct does not constitute cheating or assisting in cheating. 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 29).

Even using Locke's proffered definition, though, her conduct could reasonably be considered a violation of R.C. 3319.151. The Hearing Officer and Board found that

Locke did not administer the test and, instead, filled in perfect scores for Student 1. Giving a perfect score to a student who had not been tested could only convey the impression that the student achieved a score she did not earn. As to Student 2, the Board found Locke to be complicit in cheating by stating she had assisted Pfautsch in administering the test. The Hearing Officer found that Pfautsch had not administered the test to Student 2 and gave her a perfect score. Thus, the conclusion the Board made was that Locke had been dishonest about Student 2.

As stated above, there was reliable, probative, and substantial evidence to support the Hearing Officer's findings and the Board's decision.

G. *Assignment of Error 8*

Locke's final assignment of error asserts that she could not be found in violation of R.C. 3319.151 because the State did not prove that Students 1 and 2 were required to take OTELA, in other words that they were LEP students as defined in state and federal law.

Locke 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 and 2. Ms. Locke and Ms.

Pfautsch administered the other three sections of the test to them. The fact that Students 1 and 2 were required to take the test was not in dispute at the hearing. Nonetheless, Students 1 and 2 were ELL (ESL) students of Ms. Locke and Ms. Pfautsch. All ELL students are required to take OTELA. (Tr. at 124). Students 1 and 2 had previously taken OTELA in 2009. (State's Ex. 39, 40). Student 1 had not tested fully English proficient in 2009. (State's Ex. 39). Finally, Ms. Locke testified that Student 1 was internationally adopted and that English was not Student 2's first language. (Tr. at 347, 356-357). As appellant points out these are two of the definitions of "Limited English proficient." 20 U.S.C. 7801(25); R.C. 3301.0711(C)(3).

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 sufficient 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.

Appellant's first and second assignments of error are well taken. Assignments of error 3-8 are overruled. Accordingly, the Court finds the decision of the Board is supported by reliable, probative, and substantial evidence. Appellant's license was properly suspended pursuant to R.C. 3319.151.

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

Copies to:

Eric Rosenberg, Esq., Attorney for Appellant
395 North Pearl Street, Granville, OH 43023

Reid Caryer, Esq., Attorney for Appellee
Assistant Attorney General, 30 East Broad Street, 16th Floor, Columbus, OH 43215