

DANIEL M. HERRIGAN

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IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY CLERK OF COURTS COUNTY OF SUMMIT

VIRGIL WALKER	)	CASE NO.CV 2012 11 6268
	)	
Appellant	)	JUDGE PARKER
	)	
-vs-	)	
	)	
OHIO DEPARTMENT	)	<b><u>ORDER</u></b>
EDUCATION	)	
Appellee	)	
	)	

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This matter is before the court upon the Administrative Appeal filed in this action on November 13, 2012. In relation to his appeal, Appellant Virgil Walker (“Walker”) files an Assignment of Errors and Brief. Appellee Ohio Department of Education (“Board”) also files a brief. Walker files a reply brief. A Record of Administrative Proceedings has also been filed. The court deems all matters submitted and now proceeds to make the following disposition of the instant appeal.

*Background*

On May 15 and 16, 2012, this matter came on for a hearing before Hearing Officer Howard D. Silver in relation to consideration of the permanent high school teaching certificate held by Walker for purported misconduct as stated by the hearing officer in his Post-Hearing Entry and Amended Report and Recommendation (“Report”), dated August 8, 2012: “[B]rought a loaded handgun onto school property by forgetting the handgun was in the glove box of Mr. Walker’s automobile.”

The hearing officer heard testimony from several witnesses, considered the parties' arguments, and rendered Findings of Facts and Conclusions of Law. In summary, the hearing officer found that Walker had held a State of Ohio teaching license since 1978. (Report, pg. 57, Findings of Fact 2). From 1997 until Walker's retirement at the end of the 2010-2011 school year, Walker worked as a teacher and football coach within the Warrensville Heights City School District. (Report, pg. 57, Findings of Fact 5). Walker owned a Charter Arms .38 caliber revolver ("revolver" or "handgun"). (Report, pg. 57, Findings of Fact 6). On November 2, 2010, Walker discovered that he was unable to locate his revolver and commenced a search for it. (Report, pg. 57, Findings of Fact 7). On November 2, 2010, Walker reported to his school building principal that he was unable to locate his handgun, (Report, pg. 57, Findings of Fact 11). Walker recalls transporting the handgun to a shooting range where he shot the gun, seven to ten days before November 2, 2010. (Report, pg. 57, Findings of Fact 10).

The hearing officer found that the hearing record contains a preponderance of evidence proving that Walker's loaded handgun was stolen from the glove compartment in Walker's 1997 Lexus while the vehicle was parked next to Warrensville Heights High School, and the theft of this loaded handgun was facilitated by Walker's vehicle being unlocked. (Report, pg. 58, Findings of Fact 19). The handgun was stolen by a Warrensville High School student shortly before November 2, 2010 and recovered on November 10, 2010 by a security official of the Warrensville Heights School District. (Report, pg. 58, Findings of Fact 17).

The hearing officer determined that bringing a loaded handgun onto school property and leaving it unattended in an unlocked vehicle from which the handgun was stolen by a fourteen-year old high school student is conduct unbecoming to a teaching position filled by Walker, a circumstance empowering the Ohio State Board of Education to take action on Walker's teaching license pursuant to R.C. 3319.31(B). (Report, pg. 59, Findings of Fact 22). The hearing officer further found that such conduct comprised a single instance of misconduct. (Report, pg. 59, Findings of Fact 23).

In his Conclusions of Law, the hearing officer concluded that the misconduct of Walker was serious; the misconduct was singular; there was no other misconduct described in the hearing record involving Walker; the conduct and work activity of Walker, with the exception of the events involving Walker's handgun were exemplary and presented substantial mitigating factors. (Report pg. 62, Conclusions of Law, No. 7). The hearing officer further concluded that such mitigating factors militated against the suspension or revocation of Walker's State of Ohio teaching license. (Report pg. 62, Conclusions of Law, No 8). Therefore, the hearing officer recommended that a letter of admonishment be issued to Walker for transporting a handgun onto school property. Report pg. 62, Conclusions of Law, No. 10).

On October 9, 2012, the Board passed a resolution respecting the report of Hearing Officer Silver. In its resolution, the Board adopted the report in part, and rejected the report in part. Specifically, the Board rejected Finding of Fact 23 and Conclusions of Law Nos. 7, 8 and 10. The Board found that Walker's conduct was not a singular event, but rather his acts, conduct and omissions over a ten day period, culminated in his handgun being stolen from his unlocked car while on school property,

a student subsequently taking the gun into the high school, and Walker's failing to know where his gun was for a period of time, and failing to report the theft of the gun to police from at least November 2, 2010 to November 10, 2012. The Board also rejected the proposed recommendation for admonishment and instead modified the sanction to a one-year suspension of Walker's license, which may be stayed upon Walker's taking twelve hours of gun training.

Walker raises Four Assignments of Error:

First Assignment of Error: The State Board of Education Waived Their Right to Modify The Hearing Officer's Report and Recommendation When It Failed to File Objections.

Second Assignment of Error: Appellee Board's Rejection of Hearing Officer Silver's Finding of Fact No. 23 and Conclusions of Law Nos. 7 and 10 Were Not Supported By Reliable, Probative, And Substantial Evidence and Were Not In Accordance With the Law.

Third Assignment of Error: Appellee Board's Rejection of Hearing Officer Silver's Conclusion of Law No. 8 was not supported by Reliable, Probative and Substantial Evidence and Was not in Accordance With the Law.

Fourth Assignment of Error: Appellee Board's Rejection of Hearing Officer Silver's Recommendation to Admonish Appellant Walker Was Not Supported by Reliable, Probative, and Substantial Evidence and Was Not in Accordance with the Law.

As to the first Assignment of Error, Walker argues that the Board failed to exhaust its administrative remedies. Walker cites O.A.C. §3301.73-20(D) in support. Walker argues that the Board's failure to file objections to the hearing officer's report deprived him the ability to respond to any issues raised by those objections. The Board argues that the language of R.C. 119.09 provides for permissive, and not mandatory, filing of objections and offers no provision for responses to objections, if objections were filed. The Board also argues that Walker's due process arguments also fail as he

was given the opportunity to be heard at the hearing before the hearing officer and has the opportunity to appeal, which is the instant action.

Upon review, the court finds that Hearing Officer Silver's August 9, 2012 report states on the first page:

"You are advised that Section 119.09 of the Ohio Revised Code provides you may within ten (10) days of receipt of this report, file written objections to the Report and Recommendation with the Board of Education. Such objections will be considered by the State Board of Education before approving, modifying, or disapproving the recommendations of the Hearing Officer...."

The court finds that such language permissively allows the filing of objections. The School Board is permitted to consider the hearing officer's report in consideration of any objections at the next scheduled meeting after the time for objections has passed. *See*, O.A.C. 3301-73-20(F). Thus, after the time has passed for filing objections, if any, the Board is permitted to consider the hearing officer's report. The court does not find that failure of any party to file objections to be prejudicial nor deprive any party of due process rights. Thus, Walker's First Assignment of Error is overruled.

The court will next address the Second Assignment of Error which raises the issue of whether the Board's Rejection of the Hearing Officer's Findings of Fact, No. 23 and Conclusions of Law Nos. 7 and 10 were supported by Reliable, Probative, and Substantial Evidence.

In reviewing an administrative decision, the court reviews the order to determine whether the order was supported by reliable, probative and substantial evidence and in accordance with the law. In determining evidentiary conflicts, the trial court is to give deference to the administrative resolution of such conflicts. *University of Cincinnati v. Conrad* (1980), 63 Ohio State 2d 108, 407 N.E.2d 1265. When the evidence before the court consists of conflicting testimony of approximately equal weight, the common

pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265. *Contini v. Ohio State Bd. of Educ.*, 2008 Ohio 5710.

Walker argues that the Board's rejection of the hearing officer's Findings of Fact wherein the hearing officer found that Walker's conduct comprised a singular incident was not supported by reliable, probative, and substantial evidence and was not in accordance with the law. Walker argues that the Seventh Appellate District found that "unless a finding of fact by such referee is manifestly against the weight of the evidence, the board of education must sustain such finding of fact." *Winters v. State Bd. of Edn.*, 1995 WL 9261 (Ohio App.7<sup>th</sup> Dist.), \*3.

The Board replies that the court must give deference to the Board's findings unless such findings are internally inconsistent, rest on improper inferences, or are otherwise insupportable. (citing, *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81, 697 N.E. 2d 655 (1998)). The Board also states that it is not bound by the recommendation of the hearing officer; rather, it need only articulate its reason for rejecting a recommendation (citing R.C. 119.09; *Graziano v. Bd. of Edn.*, 32 Ohio St.3d 289, 293, 513 N.E.2d 282 (1987)). In relying on such deference, the Board states that the specific facts it based its decision upon all derive either directly from the hearing officer's findings of fact or from the uncontroverted testimony at the hearing. The Board acknowledges in its brief (p. 15) that the conduct at issue derives from one instance of Walker bringing the gun onto school property, but it was Walker's conduct during the several days of conduct, and after it was recovered that formed the basis of the action against his license.

Walker acknowledges the Board's authority to reject the hearing officer's findings, but argues in this case, the Board's rejection of the hearing officer's findings that the incident comprised more than one incident is not in accordance of the law and inconsistent with the hearing officer's other findings of fact. The court agrees.

The court does not take issue with the Board's authority to accept or reject the hearing officer's recommendations, but finds that the Board's rejection of the hearing officer's finding that Walker's bringing the gun in his vehicle on school property comprised more than one incident to be inconsistent with the hearing officer's findings of fact and the record and is not supported by the record. The court finds that the record supports the hearing officer's finding that Walker's act was singular as the evidence reflected that the resulting acts and omissions were precipitated by the theft of the gun from Walker's vehicle. As such, the court finds Walker's Second Assignment of Error to be well-taken and finds that the Board erred in finding that Walker's misconduct was not a singular event.

In the same assignment of error, Walker challenges the Board's decision for failing to articulate any reasons for rejecting the hearing officer's finding that other than the single incident, Walker's conduct and work activity over a period of thirty years was exemplary and presented mitigating factors. The issue of mitigating factors is also raised in Walker's third and fourth assignments of error, in which Walker argues that the Board's Conclusion of Law No.8 (Third Assignment of Error) and Rejection of Hearing Officer's Recommendation as to Admonishment (Fourth Assignment of Error) is not supported by Reliable, Probative, and Substantial Evidence.

The Board replies that the Board did not reject any of the mitigation, but rejected the improper weight afforded the mitigation by the hearing officer in Conclusion of Law 8. The Board states that it found that the mitigating factors did not outweigh the aggravating factors of the misconduct: 1) the nature and seriousness of the offense; 2) negative effect on the teaching profession; 3) efforts to ensure school zones are free from weapons; and 4) health, safety and welfare of students. The Board argues that the Board is not bound by the recommended sanction of the hearing officer- a letter of admonishment- and the Board only need to articulate its reasons for rejecting the recommendation.

In this matter, there can be no dispute that the record evidence demonstrated that Walker had an exemplary career as an educator and coach during his thirty year career. However, the court cannot find that the Board's decision to modify the hearing officer's recommendation for sanctions to be erroneous in light of the seriousness that the Board ascribed to the incident, even if it occurred inadvertently and was the responsibility of someone who had had a laudable career. The court must find that that Board's modification of the sanction imposed by the hearing officer was both articulated in its decision and supported by reliable, probative, and substantial evidence in the record.

#### *Conclusion*

In conclusion, the court finds that the Board's Rejection of Hearing Officer Silver's Findings of Fact No. 23 and Conclusions of Law Nos. 7 and 10 as to the fact that the events arose out of a single event was not supported by reliable, probative, and substantial evidence and was not in accordance with the law. However, the court finds that the sanction imposed by the Board was supported by reliable, probative, and substantial evidence and was in accordance with the law.



As such, the court hereby modifies the Board's October 9, 2012 Decision and finds that the events arose out of a single event, but affirms the Board's October 9, 2012 Decision sanctioning Walker with a one-year suspension of his teaching license, which may be stayed upon Walker's taking of twelve hours of gun training.

This is a final, appealable order. Costs to be split by the parties.

IT IS SO ORDERED.

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JUDGE TOM PARKER

cc: Attorney Kathleen D. McKinley/Rachel M. Reight  
Attorney Holly E. Leclair Welch/Lindsay M. Sestile

CR:lcb  
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