

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

ROBERT L MILLER JR,

CASE NO.: 2016 CV 01738

Plaintiff(s),

JUDGE GREGORY F. SINGER

-vs-

OHIO DEPARTMENT OF EDUCATION,

Defendant(s).

**DECISION, ORDER, AND ENTRY
AFFIRMING THE DETERMINATION OF
THE OHIO DEPARTMENT OF
EDUCATION**

I. INTRODUCTION

This matter is before the Court upon Appellant, Robert L. Miller's, administrative appeal from the decision of Appellee, Ohio Department of Education (hereinafter "ODE" or "Board"), permanently denying Appellant's application for the issuance of a three-year pupil activity permit to work with students at Wayne High School on an unpaid basis. Based upon the following, the decision of the ODE is **AFFIRMED**.

II. SUMMARY OF FACTS

On April 1, 2016, Appellant filed a Notice of Administration appeal against Ohio Department of Education. Appellant was permanently denied an issuance of a three-year pupil activity permit to work with students at Wayne High School on an unpaid basis. Appellant provided multiple arguments as to why the ODE's decision should be reversed. First is Miller's Military experience. The Appellant argues the sole reason advanced by the ODE to permanently deny the application for a three-year pupil activity permit is that in March 1999, Miller plead guilty to various charges arising out of a general court martial at Wright Patterson Air Force Base. (Brief in Support, p. 2.) Appellant claims he stepped forward and plead guilty to all charges, to save his mother from certain prosecution and potentially his wife Sonya Miller from a similar

fate. (*Id.* at 3.) The charges arose out of incidents involving larceny, however, the Appellant claims there is zero evidence that Miller ever received or converted military funds to his personal use. (*Id.*) Appellant argues his mother was a drug addict who exercised poor choices and his mother and several servicemen in the Air Force were actually involved in these larcenies. (*Id.*) Appellant argues he stepped up and took responsibility. (*Id.*) Appellant argues he was imprisoned for three days and then was forced to continue serving the U.S. military without pay and without the ability to see his wife or family for five years (1999-2004). (*Id.*) The appellant argues he did everything demanded of him without any further involvement in improper actions and the government even trusted Appellant with supervisory positions and financial matters during this time. (*Id.*)

Next, Appellant argues upon release from military service he began giving back to his community through church and school involvements culminating in his support of Dr. Judy Hennessy's Dayton Early College and assisting his wife in coaching the Wayne High School Girls Varsity Basketball Team. (*Id.* at 3.) Additionally, Appellant argues he took many students who were not able to be financially supported by their families or who no longer qualified for foster care, into their homes and gave them food, support, and encouragement for no financial gain. (*Id.* at 4.) Appellant also argues he helped many student athletes obtain athletic scholarships, even if that took driving hundreds of miles to talk to the college coach in person. (*Id.*)

Then, Appellant argues the decision of Hearing Officer Lisa Finnegan (hereinafter "Finnegan" or "HO Finnegan") was in his favor. Appellant argues on December 14, 2015, Finnegan issued a thirty-three page report (hereinafter "R&R") recommending that Miller's three-year pupil activity permit be issued subject to Miller providing the ODE with written confirmation of his efforts at rehabilitation in accordance with the requirements of Ohio Administrative Code 3301-20-01(E)(3)(d)(R-000080-00013). (*Id.*) Appellant argues Finnegan's Report and Recommendation was an extensive, exhaustive and critical review of the sworn testimony of the parties and witnesses, the exhibits offered and the applicable law. (*Id.* at 4-5). In the R&R, the findings of facts included that on March 18-19, 1999, Miller was found guilty of the specifications in the court martial proceedings; that he was sentenced to a dishonorable discharge, confinement for twelve years, forfeiture of all pay and allowances, and a reduction in rank; that his sentence did not include a requirement of restitution; that Miller served five years of confinement; that his convictions for activity at Castle Air Force Base involved his mother who was a substance abuser and at that time Miller's dependent,

and her activities with Miller's supervisor and possibly other subordinates of that supervisor; that Miller did not take any money, that no government checks were issued in his name and that he did not direct any checks to his mother; that his convictions at WPAFB involved alleged misappropriation of funds by failing to pay vendors interest on overdue payments, but that he received no kickbacks or monetary gain by failing to pay the interest; and further the non-payment of interest was requested by the vendors to expedite payment of the actual invoice. (*Id.* at 5.)

In the R&R, the conclusions of law included that Miller's court martial convictions were substantially similar to felony and theft offenses in Ohio, which is a basis upon which the Board, pursuant to R.C. 3319.31(B)(2)(a)(B)(2) and (F), could refuse to issue a license or limit a license to an applicant. (*Id.* at 6.) Hearing Officer Finnegan also found these court martial convictions also support a finding of "conduct unbecoming" pursuant to OAC 3301-73-21(A)(6). (*Id.*)

Appellant then states Finnegan went on to determine whether any aggravating or mitigating factors existed. (*Id.*) Finnegan did find aggravating factors existed, such as the nature and seriousness of the offense; the extent of the past criminal history; and the failure of Appellant to disclose his court martial convictions on his application for a three-year pupil permit. (*Id.* at 7.) Also, Finnegan found mitigating factors existed, such as the amount of time that had passed since the commission of Miller's last criminal activity (1997); Miller's total lack of involvement or trouble with the law since his court martial (1999); and the evidence of his rehabilitation. (*Id.*) Hearing Officer Finnegan found that these mitigating factors exceeded any aggravating factors, particularly due to the amount of time that had passed and his excellent reputation and work in the community. (*Id.*) Hearing Officer Finnegan found that a license, under applicable Ohio law, can still issue even after it is established that an applicant has been convicted/found guilty of certain criminal offenses and since Miller's convictions did not involve students or minors, the criminal convictions did not constitute an absolute bar to the issuance of a license in accordance with Ohio Administrative Code 3301-20-01(E)(1) and (2). (*Id.*) Finnegan's ultimate recommendation to the BOE was to issue Miller the three-year pupil activity permit, assuming he provided written confirmation of his rehabilitation efforts as required by Ohio Administrative Code 3301-20-01. (*Id.* at 8.) Hearing Officer Finnegan included a five-page explanation to the DOE on the basis of her recommendation. (*Id.*) Appellant argues it is clear front Hearing Officer Finnegan's R&R that notwithstanding Miller's convictions, that based on the passage of time and Miller's

life and activities following his discharge from the military that a reasonable person would conclude that the issuance of a three-year pupil activity permit would not jeopardize the health, safety, or welfare of the persons served by the district. (*Id.* at 9.)

Finally, Appellant argues the ODE misstated the record and made a rash judgment when they amended the resolution by substitution and permanently denied Miller's application for a three-year pupil activity permit. (*Id.* at 10.) Appellant argues the Board minutes reflect alleged misstatements of fact by the Hearing Officer, as well as allegations that Miller lied on his application, however, there is no substantial support for any alleged substantive misstatements of fact by the Hearing Officer. (*Id.*) Deficiencies with the Substituted Resolution include: ODE argues that the Hearing Officer erred in finding that Appellant had been gainfully employed for 12 years, when it was slightly less than 12 years; ODE argues that the Hearing Officer should not have considered the five years after his guilty plea at the court martial as time he stayed out of trouble because he was in military confinement, even though he only spent only three days in prison and was then selected to work at an Army base in Kansas; ODE argues that Miller involved subordinates in his alleged conspiracy to commit larceny, but it was his supervisor who stole the funds; and ODE argues Miller failed to disclose the existence of the court martials on his application, however, the ODE attorney admitted at the hearing that Miller wasn't being charged with this failure. (*Id.* at 14-16). Appellant argues none of the alleged misstatements of facts were substantive and cannot serve as the basis to overturn Hearing Officer Finnegan's recommendation. (*Id.* at 12.) Appellant argues although appeals brought pursuant to R.C. 119.12 are generally difficult to establish, in this case the R&R written by Hearing Officer Finnegan and the misstatements of the ODE are enough to warrant a reversal of the decision. (*Id.* at 13.) Thus, Appellant argues this Court should vacate the ODE's Order permanently denying Appellant's application for a three-year pupil activity permit and Order that he be issued the permit in accordance with the Hearing Officer's R&R.

In response, Appellee states the facts did not evolve as the Appellant argues. At the October 6, 2015 hearing, the Department presented certified records of Miller's convictions which showed Miller did not plead guilty to every offense, but he plead not guilty and was found guilty. (Answer Brief, p. 2-3.) In addition to the certified records of his conviction, the Department also introduced records from Air Force Office of Special Investigation, which detailed Miller's scheme. (*Id.* at 3.) Miller's scheme involved creating

false invoices and syphon off interest payments owed to the military, into checks directed for himself. (*Id.*) He enlisted younger accomplices in this scheme. (*Id.*) Miller would destroy documents and evidence. (*Id.*) Miller's time in military prison was reduced from twelve years to nine-and-a-half years because he had information regarding a murder that involved associates of his mother. (*Id.*) Appellee argues the Hearing Officer, in her R&R, found that Miller claimed his convictions were the result of his mother's actions, that he did not receive any money; however, she did not find this was actually what happened. (*Id.* at 4.) Finally, on February 9, 2016, the ODE considered Miller's case at its monthly meeting. (*Id.*) As a matter of policy for educator misconduct hearings, the State Board does not allow the Department or the Respondent to directly address the Board at their meetings and advocate. (*Id.*) The Board only considers the record created at the Chapter 119 hearing. (*Id.*) Here, Appellee argues, the Board reviewed the record, and came to a different conclusion than the hearing officer. (*Id.*) The hearing officer only makes a recommendation to the Board. (*Id.*) By statute, the Board makes the final decision on the weighing of aggravating and mitigating factors, and here the Board found that Miller's substantial criminal activity was best addressed with a permanent denial of his license. (*Id.*)

Appellee cites three arguments as to why the ODE correctly denied Miller's application for a three-year pupil activity permit. First, Appellee was convicted of several felonies because he personally stole from the Air Force and was sent to prison for several years. (*Id.* at 7.) Appellee argues Miller disputes the facts underlying his conviction, however this is misleading for two reasons: (1) Miller did engage in the crimes he was convicted of; and (2) the Board is not required to re-litigate Miller's convictions. (*Id.*) The Board charged Miller with having convictions, and only needed to prove Miller was convicted, which it did. (*Id.*) Appellee claims Miller's version of the events is nothing more than a falsehood from an individual convicted of crimes of dishonesty, who successfully stole from the Air Force for years and tricked others into aiding his scheme. (*Id.* at 8.) Since Miller has already been convicted of offenses substantially comparable to theft and felonies under Ohio law, and because Miller has engaged in conduct unbecoming a licensed educator, Appellee argues the resolution declaring Miller permanently ineligible should be upheld. (*Id.* at 10.)

Second, Appellee argues Miller's involvement with students and high school athletics should raise red flags for two reasons: (1) Miller has already been very involved in coaching basketball and the students' lives for years, despite not having a license; and (2) Miller fails to understand the role of a volunteer

basketball coach. (*Id.* at 11.) Appellee argues Miller testified at length about several female students coming to live with him and his family and while Miller appears to have good intentions, he is not a licensed social worker, a counselor, or a foster parent. (*Id.*) Appellee argues even licensed social workers and counselors do not invite their clients to live with them and must maintain strict professional boundaries to prevent any conflict of interest. (*Id.*)

Finally, Appellee states Miller argues that the Board did not state the record accurately, and did not give him the opportunity to address the board. (*Id.* at 12.) Appellee argues these claims are misleading. (*Id.*) First, as a matter of policy, the Board does not allow Respondents in Chapter 119 hearings to address them directly at their meetings and the Board only allows Respondents to speak to the Board through the record of their Chapter 119 hearing. (*Id.* 12-13.) Appellee argues had Miller been present, he could not have done anything except watch silently. (*Id.* at 13.) Further, Appellee argues the hearing officer's report and recommendation is not at issue in this appeal and Miller's extensive discussion about the hearing officer's report and recommendation is not relevant. (*Id.*) The Board members are experts and they are entitled to weigh the facts and come to their own conclusions. *Arlen v. State*, 61 Ohio St.2d 168, 173 (1980). Appellee argues the Board thoroughly reviewed the record, discussed this matter, weighed the mitigating and aggravating factors, and memorialized it in their resolution. (Answer Brief, p. 13.) Appellee argues the Board relied upon probative and substantial information from the certified records of Miller's convictions and Miller's admission that he was convicted of the crimes in these certified records, to find he did engage in the misconduct alleged in the notice of opportunity for hearing. (*Id.* at 17.) Thus, the ODE requests the Board's resolution be upheld.

III. LAW AND ANALYSIS

a. Standard of Review.

The procedure and standard of review of administrative appeals of agency orders is governed by R.C. 119.12, which states 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 law.

R.C. 119.12(M).

An appeal from decision of a board of education is governed by R.C. 2506. R.C. 2506.01 provides that “every final order, adjudication, or decision of any *** board*** of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located***.” *Kiel v. Green Local Sch. Dist. Bd. Of Educ.*, 69 Ohio St.3d 149, 152, quoting R.C. 2506.01. R.C. 2305.03 confines a reviewing court to the transcript of the administrative proceeding unless the transcript is incomplete for lack of conclusions of fact supporting the agency’s final decision. *See* R.C. 2305.03(A)(1)–(5).

The Court of Common Pleas must weigh the evidence in the record, and whatever additional evidence may be admitted pursuant to R.C. 2506.03, to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision.” *Arnett v. Franklin Monroe Local Bd. of Educ.*, 2d Dist. Darke No. 1567, 2002-Ohio-3559 (July 12, 2002), quoting *Dudukovich v. Lorain Met. Housing Auth.*, 58 Ohio St.2d 202, 389 N.E.2d 1113, 1117 (1979). The Ohio Supreme Court has defined what constitutes reliable, probative, and substantial evidence:

- (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.

Bartchy v. State Bd. of Educ., 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E. 2d 1096, ¶ 39. If such evidence exists, the court must affirm the board’s decision. *Id.*

A court of common pleas “must give due deference to the administrative resolution of evidentiary conflicts.” *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). The agency’s findings, however, are not conclusive. *Id.* Where the court determines the agency relied upon improper evidence or inferences drawn from such evidence, the court may reverse the agency’s decision. *Id.*

b. The Appellant’s Request for a Hearing is Denied, Because The Court Finds the Briefs Are Sufficient.

There is no requirement that a common pleas court, sitting as an appellate court in an administrative appeal, must hold an oral hearing. *Trout v. Ohio Dep’t of Educ.*, 2003-Ohio-987 (10th Dist. 2003). The Ohio Supreme Court has stated “R.C. 119.12 requires only a hearing. The hearing may be limited to a review of

the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs, oral argument and/or newly discovered evidence." *Ohio Motor Vehicle Dealers Bd. V. Central Cadillac Co*, 14 Ohio St.3d 64, 67 (1984). The appellate review mandated by R.C. 119.12 involves reviewing the Ohio Department of Education's findings and legal conclusions and determining they were supported by reliable, probative, and substantial evidence. The Court finds that the briefs submitted in this case were more than adequate to give the Court a complete understanding of the case.

c. The Ohio Department of Education's Order was Supported by Reliable, Probative, and Substantial Evidence and Is Therefore Upheld.

Despite coming to a different conclusion than Hearing Officer Finnegan, the Ohio Department of Education Board had reliable, probative, and substantial evidence to make their decision. The power delegated to the Board includes the authority to rely on its own knowledge when making a decision. *Walker v. State Med. Bd. Of Ohio*, 10th Dist. No. 01AP-791, 2002-Ohio-682. Accordingly, the court may not substitute its judgment for that of the agency – regardless of whether it may have come to a different conclusion. *In Re Application of Watkins*, 2nd Dist. Montgomery No. 17723, 2000 WL 192430 (Feb. 18, 2000). In fact, the common pleas court has no authority to modify a penalty that the agency was authorized to and did impose on the grounds that the agency abused its discretion. *Henry's Café v. Bd. Of Liquor Control*, 170 Ohio St. 233, 236, 163 N.E.2d 678, at paragraph 3 of the syllabus (1959).

Here, the Board found the seriousness of Miller's court martial convictions outweighed the mitigating circumstances since his release. The Board admitted into evidence certified copies of Miller's convictions and investigation records. Both the Hearing Officer and the Board found the crimes committed by Miller to be substantially similar to theft and felony offenses in Ohio. The Board is authorized to refuse to issue a license whenever the applicant is convicted of a felony. R.C. 3310.31(B)(2)(a). The Board is also authorized to refuse to issue a license when an applicant is convicted of theft. R.C. 3319.31(B)(2)(b). These need not be convictions in Ohio, they need only be convictions substantially comparable to Ohio law. R.C. 3319.31(F). The Board can also deny an application for conduct unbecoming of a licensed educator. R.C. 3310.31(B)(1). In this case, Miller's court martial convictions fit in each of these categories.

The Board gave careful consideration to this matter. The Board thoroughly reviewed the record from the Chapter 119 hearing, discussed the matter, weighed the mitigating and aggravating factors, reviewed the

R&R, and memorialized it in their resolution. It was not in error that the Board did not believe Miller's story about what happened. The Board relied upon reliable, probative, and substantial information when it relied on certified records of Miller's convictions and Miller's admission that he was convicted of the crimes in these certified records. The Board alone is entitled to weigh aggravating and mitigating circumstances and make its decision. Therefore, based upon the foregoing, the Court finds the Board relied upon reliable, probative and substantial information when it made its decision to permanently deny Miller's application for a three-year pupil activity permit. The Order of the Ohio Department of Education is **AFFIRMED**.

IV. CONCLUSION

Based upon the foregoing, the decision of the Ohio Department of Education is hereby **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST REASON FOR DELAY FOR PURPOSES OF OHIO RULE OF CIVIL PROCEDURE 54. PURSUANT TO OHIO APPELLATE RULE 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE GREGORY F. SINGER

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

DAVID M DUWEL
(937) 297-1154
Attorney for Plaintiff, Robert L Miller, Jr

ADAM P BESSLER
(614) 644-7250
Attorney for Defendant, Ohio Department Of Education

HEIDI ADAMS, Bailiff (937) 225-4376 ADAMSH@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Order:
Case Number: 2016 CV 01738
Case Title: ROBERT L MILLER vs OHIO DEPARTMENT OF EDUCATION

So Ordered

A handwritten signature in black ink, appearing to read "G. Singer".