[Cite as *Kellough v. Ohio State Bd. of Edn.*, 2011-Ohio-431.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Martin L. Kellough,	:	
Appellant-Appellant,	:	
		No. 10AP-419
v.	:	(C.P.C. No. 09CVF11-16938)
Ohio State Board of Education,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on February 1, 2011

Kingsley Law Office, *James R. Kingsley* and *Nickolas D. Owen*, for appellant.

Michael DeWine, Attorney General, *Mia Meucci* and *Todd R. Marti*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Appellant, Martin L. Kellough, appeals from a judgment of the Franklin County Court of Common Pleas affirming the decision of appellee, the Ohio State Board of Education ("Board"), to revoke Kellough's five-year professional career technical teaching license. For the following reasons, we affirm.

{¶2} From approximately 1997 until 2008, Kellough was a teacher at Pike County Career Technology Center ("Career Technology Center"), a vocational and technical high school located in Piketon, Ohio. Kellough was assigned to teach electricity

to junior-level students during the 2007-2008 school year. Kellough worked closely with Timothy Cox, a first-year teacher who instructed senior-level students in electricity.

{¶3} Throughout the 2007-2008 school year, the Career Technology Center was undergoing renovations, so classes convened at three separate locations in and around Piketon. Kellough and Cox taught their electricity classes at a temporary laboratory set up at the Pike County Fairgrounds. The morning of December 20, 2007, Kellough and Cox asked the school principal, Kevin Smith, if they could hold a Christmas party for their students at the fairgrounds. Smith denied their request because he had to supervise classes at two other locations—the Old Piketon High School and the 2J Supply Building—and he did not want to also supervise classes at a third location. Smith told Kellough and Cox to hold their Christmas party in an empty classroom at the Old Piketon High School. Smith then went to the 2J Supply Building, located about three miles from the Old Piketon High School.

{¶4} At approximately 10:45 a.m., Smith received a telephone call from Lorna Music, the school guidance counselor. Music told Smith that an accident had occurred in the auditorium of the Old Piketon High School, a student was unconscious, and a school official had called for emergency medical assistance. Smith immediately returned to the Old Piketon High School.

{¶5} When Smith arrived, he discovered that Kellough and Cox had held their Christmas party in the combination auditorium and gymnasium, not an empty classroom. The auditorium/gymnasium at the Old Piketon High School consists of three sections. In the first section, rows of seats face a stage that is approximately four feet above the auditorium floor. The stage section is bracketed by curtains, which were partially drawn

across the stage during the Christmas party. Finally, immediately past the stage lies the gymnasium section, which includes a basketball court and bleachers.

{¶6} When Smith entered the auditorium, he found the unconscious student, Student 1, lying on the floor of the auditorium next to the stage.[1] Wendy Harper, a registered nurse and allied health careers instructor at the Career Technology Center, was attending to Student 1. Harper had responded to the auditorium after another teacher had come into her classroom seeking medical help for Student 1. Upon arriving at the auditorium, Harper had asked Kellough what had happened, and Kellough had responded that, "[t]he kid fell off the stage." (Tr. 130.) Harper then asked what Student 1 had been doing when he fell, and Kellough said, "I'm not sure. He just fell." (Tr. 130.)

{¶7} Harper assessed Student 1 and determined that he had sustained a serious head injury. Although Student 1 would periodically rouse from unconsciousness for seconds, he could not regain sustained consciousness. Paramedics rushed Student 1 to the local hospital and later transported him to Grant Medical Center in Columbus, Ohio, for further treatment.

{¶8} Smith, meanwhile, quizzed Kellough about what had happened. Kellough told Smith that he had not seen Student 1's accident, but he understood from the other students that Student 1 had fallen from the stage. Smith instructed Kellough and Cox to question the students about what had occurred and report back to him.

{¶9} At approximately 1:00 p.m., Smith received a telephone call from Kellough. According to Kellough, the students had admitted that Student 1 and Student 2 had been

[1] To protect the privacy of the students involved, the Board assigned a pseudonym to each student. We will refer to each student by his pseudonym.

boxing on the stage. Student 1 had fallen off the stage after Student 2 had hit him. Kellough stated that he did not know that Student 1 and Student 2 were boxing because he was standing near the bleachers in the gymnasium, and the stage curtains blocked his view of the portion of the stage where the boxing had occurred.

{¶10} Smith reported the incident to Stephen E. Martin, the superintendent of the Career Technology Center,[2] who told Smith to speak with everyone involved to determine exactly what happened. Upon the students' return from winter break, Smith interviewed the students who had attended the Christmas party. Given his head injury, Student 1 did not have much memory of the events of December 20, and he could not recall boxing or falling from the stage. Most of the other students were similarly unhelpful to Smith because they were either playing basketball in the gymnasium or the video game "Guitar Hero" on a large screen set up in the seating section of the auditorium. With their attention focused elsewhere, the majority of the students claimed that they did not see Student 1 get injured. Three students, however, gave Smith more information about the boxing match and Student 1's fall.

{¶11} Student 4 told Smith that he had brought his boxing gloves to school on the day of the party because he was scheduled to box after school. During the party, Student 2 approached Student 4 while Student 4 was playing "Guitar Hero." Student 2 asked to borrow Student 4's boxing gloves, and Student 4 consented. Student 4 then returned to the video game. Because Student 4 was concentrating on the game, he did not see Student 1's fall. Student 4 also stated that Cox was watching the students playing "Guitar Hero" and did not see the boxing match.

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[2] The Career Technology Center is classified as a joint vocational school district.

{¶12} Student 3 confirmed that Student 1 and Student 2 had boxed on the stage between the curtains. He said that the students chose that location so the teachers would not see the boxing match. As Student 3 watched, Student 2 struck Student 1 on the neck and jaw, causing Student 1 to fall from the stage. When interviewed by Smith, Student 2's version of events matched Student 3's recounting.

{¶13} After Smith had completed his investigation, he received a telephone call from Mrs. Fout, the school's apprenticeship coordinator, who asked him to come to the fairgrounds to talk with Cox. When Smith arrived at the fairgrounds, he found Cox pacing, wringing his hands, and about to cry. Cox told Smith that everything he had heard from Cox, Kellough, and the students was a lie. Cox said that he wanted to confess the truth because his wife was urging him to do so and he was unable to sleep. According to Cox, both he and Kellough knew that Student 1 and Student 2 were boxing during the Christmas party. Cox stated that the boxing match occurred on the floor of the auditorium, not the stage. While Cox was focused on the students playing "Guitar Hero," Kellough was part of the crowd watching the boxers. Cox heard Kellough say, "hey, Tim, check this out." (Tr. 73.) Cox turned and saw Student 1 go limp and fall to the floor.

{¶14} Given the extent of Student 1's injuries, Cox and Kellough knew that they could face discipline, and they decided to concoct a more palatable story to explain what had happened. Cox and Kellough gathered the students who had been involved with the boxing match. Kellough told the students that they all needed to say that Student 1 and Student 2 had been boxing on the stage, Student 1 fell from the stage after Student 2 punched him, and neither Cox nor Kellough knew about the boxing. Afterward, Cox felt extremely guilty, particularly when he discovered that Student 1 had nearly died. He

talked with Kellough about confessing the truth, but Kellough said that "he had taken care of it and to just let it go." (Exhibit J, at 5.)

{¶15} After meeting with Cox, Smith re-interviewed all of the students. When interviewing Student 2 for the second time, Smith told Student 2 that he could tell Smith anything and that he would not be in trouble. Smith then said, "I already know the truth. You just need to tell it to me now." (Tr. 80.) Student 2 responded that he was glad that someone had finally admitted the truth. Student 2's subsequent explanation of the events leading up to Student 1's injuries corroborated Cox's confession. Importantly, Student 2 confirmed that Kellough was among the crowd of 15 to 20 people who watched the boxing match. He also substantiated Cox's explanation of the attempted cover up, stating that Cox and Kellough had told the students to say that he and Student 1 boxed on the stage and that the boxing match occurred without the teachers' knowledge.

{¶16} Having received corroboration of Cox's story, Smith confronted Kellough. When Smith asked Kellough to tell him what really happened, Kellough responded that everything he had previously told Smith was accurate.

{¶17} On January 18, 2008, Smith prepared a report of his findings and submitted the report to Martin. Martin then held a meeting with Smith, Cox, and Kellough. At the meeting, Kellough again denied Cox's version of events and reiterated that his recounting of the incident was truthful. Martin suspended both teachers for three days, and he told them that he would be taking the matter before the board of the joint vocational school district. Both Cox and Kellough resigned their positions before that board took any further disciplinary action against them.

{¶18} In addition to reporting Kellough's misconduct to the board of the joint vocational school district, Martin also informed the Ohio Department of Education ("Department") that Kellough had failed to appropriately supervise his students during the Christmas party and that Kellough had been dishonest during the school's investigation into the incident. The Department assigned Kelly Beall, an investigator in the Department's Office of Professional Conduct, to investigate the matter. As a result of Beall's investigation, the Board issued Kellough a notice of its intent to determine whether to limit, suspend, or revoke his teaching license.

{¶19} The Board sent Kellough the October 6, 2008 notice of intent by certified mail. A notation at the conclusion of the notice of intent states, "cc: * * * James R. Kingsley, Attorney for Respondent." In accordance with this notation, Beall mailed a copy of the notice of intent to Kingsley by regular mail.

{¶20} Pursuant to R.C. 119.07, the Board must hold a hearing if a party requests it within 30 days of the mailing of a notice of intent. The notice of intent informed Kellough of his right to request a hearing, and it warned Kellough that if he did not exercise this right, the Board could suspend, limit, or revoke his teaching license in his absence. Although Kellough timely received the notice of intent, he did not request a hearing within the 30-day period. The Board, nevertheless, scheduled a hearing for February 25, 2009. Apparently, the Board believed that *Goldman v. State Med. Bd. of Ohio* (1996), 110 Ohio App.3d 124, required a hearing so that the Board could conduct "some sort of reliable evidentiary review, including [consideration of] the sworn testimony of the investigator." Id. at 129 ("*Goldman I*"). The Board informed Kellough of the February 25, 2009 hearing via a letter dated January 21, 2009.

{¶21} On February 18, 2009, Kellough moved for a continuance of the hearing. In an attached letter, Kellough's attorney explained that he had a scheduling conflict and that he needed to obtain a sworn statement from a dispositive witness who he had yet to locate. The hearing examiner granted Kellough a continuance, and the Board rescheduled the hearing for April 22, 2009.

{¶22} Before the hearing commenced, Kellough filed a motion for leave to request a hearing. Kellough recognized that he had waived his right to present evidence, cross-examine witnesses, and make opening and closing statements when he failed to timely request a hearing. *Goldman v. State Med. Bd. of Ohio* (Oct. 20, 1998), 10th Dist. No. 98AP-238 ("*Goldman II*"). Kellough argued, however, that *Goldman II* did not preclude the hearing examiner from exercising his discretion to accept a late-filed request for a hearing and to allow Kellough to fully participate in that hearing. Moreover, Kellough asserted that his attorney had never received a copy of the October 6, 2008 notice of intent, so good cause existed to allow Kellough to belatedly file a request for a hearing.

{¶23} On March 20, 2009, the hearing examiner held a hearing on Kellough's motion for leave to request a hearing. Through his attorney, Kellough admitted that he received the notice of intent. Kellough claimed that he did not request a hearing because he assumed that his attorney had received the same notice, and he relied on his attorney to file the request for him. Kellough's attorney asserted that he did not know to request a hearing because he did not receive a copy of the notice of intent. In response, the Board contended that it had sent a copy of the notice of intent to Kellough's attorney through regular mail.

{¶24} In his March 31, 2009 decision, the hearing examiner determined that the Board had complied with R.C. 119.07 when sending the notice of intent to Kellough and Kellough's attorney. Thus, the hearing examiner denied Kellough's motion and indicated that he would conduct the scheduled hearing in accordance with the parameters set forth in *Goldman I* and *II*.[3]

{¶25} At the April 22, 2009 hearing, Martin, Smith, Harper, and Beall testified as to the facts recounted above. Additionally, the Board introduced into evidence a copy of Smith's January 18, 2008 report.

{¶26} The hearing examiner issued his report and recommendation on July 17, 2009. The hearing examiner acknowledged that Cox and Kellough gave contradictory explanations of how Student 1 was injured. Even assuming that Kellough's explanation was true, the hearing examiner concluded that Kellough had failed to adequately supervise the students at the Christmas party. Due to the size and configuration of the auditorium/gymnasium, Kellough and Cox could not sufficiently manage and ensure the safety of the approximately 40 students who were engaging in multiple physical activities in every section of the large space. The fact that two students could hold a boxing match—whether or not the teachers knew about it—established that Kellough and Cox were not adequately supervising their students. The hearing examiner determined that this inadequate supervision amounted to conduct unbecoming to Kellough's position, which is a ground for discipline under R.C. 3319.31(B)(1).

[3] Although the hearing examiner largely precluded Kellough from participating during the hearing, he did permit Kellough to make a proffer of evidence at the conclusion of the Board's case. Because the hearing examiner did not consider the proffer, it did not influence his findings of fact or recommended sanction.

{¶27} Additionally, the hearing examiner found Cox's version of events more credible than Kellough's version, and that Kellough and Cox disregarded Smith's instruction to hold the Christmas party in an empty classroom. Given all of his findings, the hearing examiner concluded that Kellough engaged in conduct unbecoming a teacher, and thus, the Board had grounds to sanction Kellough under R.C. 3319.31(B)(1) and Ohio Adm.Code 3301-73-22. The hearing examiner recommended that the Board permanently revoke Kellough's teaching license and render Kellough permanently ineligible to apply for any license issued by the Board.

{¶28} On October 13, 2009, the Board resolved to adopt the hearing examiner's report and recommendation. The Board revoked Kellough's teaching license and barred him from applying for any teaching license issued by the Board. Kellough appealed the Board's order to the trial court. After considering Kellough's arguments, the trial court affirmed the Board's order. Kellough now appeals to this court, and he assigns the following errors:[4]

> [1.] Did the Court of Common Pleas abuse its discretion when it found that the notice-of-hearing was received by counsel?
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> [2.] Did the Court of Common Pleas abuse its discretion when it found that the Board lacked jurisdiction to permit Mr. Kellough to participate?
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> [3.] Did the Court of Common Pleas abuse its discretion when it found that the Board's decision to permanently revoke Mr. Kellough's teaching license was supported by reliable, substantial, and probative evidence on the record as a whole?

[4] None of Kellough's assignments of error actually asserts any error in the trial court's decision. Instead, the assignments of error merely raise issues for this court's consideration. Nevertheless, we will treat each assignment of error as an assertion that the trial court erred in resolving the issue raised.

> [4.] Did the Court of Common Pleas abuse its discretion when it affirmed the Board's decision not to bifurcate the issue of appropriate punishment?
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> [5.] Did the Court of Common Pleas abuse its discretion when it failed to review the appropriateness of the punishment?

{¶29} Pursuant to R.C. 119.12, when a common pleas court reviews an order of an administrative agency, the court must consider the entire record to determine if the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. To be "reliable," evidence must be dependable and true within a reasonable probability. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571. To be "probative," evidence must be relevant, or, in other words, tend to prove the issue in question. Id. To be "substantial," evidence must have some weight; it must have importance and value. Id.

{¶30} In reviewing the record for reliable, probative, and substantial evidence, the trial court " 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *AmCare, Inc. v. Ohio Dept. of Job & Family Servs.*, 161 Ohio App.3d 350, 2005-Ohio-2714, ¶9 (quoting *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207). In doing so, the trial court must give due deference to the administrative resolution of evidentiary conflicts because the agency, as the fact finder, is in the best position to observe the manner and demeanor of the witnesses. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶31} Unlike a trial court, an appellate court may not review the evidence. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. An appellate court is limited to determining whether the trial court abused its discretion. Id. Absent such an

abuse of discretion, an appellate court must affirm the trial court's judgment, even if the appellate court would have arrived at a different conclusion than the trial court. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261. When reviewing the trial court's judgment as to whether an agency's decision is in accordance with law, an appellate court's review is plenary. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶14.

{¶32} By his first assignment of error, Kellough argues that the trial court abused its discretion when it found that reliable, probative, and substantial evidence proved that Kingsley, Kellough's attorney, received the October 6, 2008 notice of intent. This argument misconstrues the trial court's holding. The trial court, in fact, found that the record contained reliable, probative, and substantial evidence that the Board "complied with R.C. 119.07." (Decision and Entry, at 13.)

{¶33} In relevant part, R.C. 119.07 provides that:

> [I]n all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing the party of the party's right to a hearing. Notice shall be given by registered mail, return receipt requested * * *. * * * A copy of the notice shall be mailed to attorneys or other representatives of record representing the party.

R.C. 119.07 only requires that an agency mail the notice of intent to a party's attorney; it does not require that the agency ensure that the attorney receives the notice. Thus, in ruling that the Board complied with R.C. 119.07, the trial court found that the Board had mailed the notice of intent to Kingsley, not that Kingsley had received the notice.

{¶34} In arguing to the contrary, Kellough asserts that by mandating that a notice of intent be "mailed to attorneys," the General Assembly intended that agencies assure

actual delivery of the notice to the attorneys of record. Kellough cites multiple rules of statutory interpretation to support his argument. Because the import of R.C. 119.07 is clear, we reject Kellough's argument. When statutory language is plain and unambiguous and conveys a clear and definite meaning, courts need not resort to rules of statutory interpretation to determine the meaning of the statute. *Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St.3d 138, 2010-Ohio-3264, ¶15; *State v. McConville*, 124 Ohio St.3d 556, 2010-Ohio-958, ¶8. "To interpret what is already plain 'is not interpretation but legislation, which is not the function of the courts.' " *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶31 (quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.* (1951), 155 Ohio St. 287, 290). Rather than interpret the provisions of an unambiguous statute, a court must simply apply those provisions to the case at hand. McConville at ¶8; *Hin, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, ¶15.

{¶35} In the case at bar, the plain language of R.C. 119.07 requires that agencies "mail[ ]" a copy of the notice of intent to any attorneys of record. Nothing in R.C. 119.07 imposes on agencies an additional duty to ensure that the mail reaches its intended recipient. Courts may not modify an unambiguous statute by inserting words not used. *State v. Bess*, 126 Ohio St.3d 350, 2010-Ohio-3292, ¶18; *Estate of Heintzelman* at ¶15. Consequently, we will not infer a duty of actual delivery when the General Assembly only requires mailing.

{¶36} Moreover, we do not accept Kellough's contention that due process commands that his attorney receive a copy of the notice of intent before the Board may take action against his teaching license. Both the Fourteenth Amendment of the United

States Constitution and Section 16, Article I, of the Ohio Constitution require that administrative proceedings comport with due process. *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893 (considering whether a federal agency accorded an individual due process before depriving him of a private interest); *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46 (considering whether a state agency complied with due process requirements).[5] To comply with the requirements of procedural due process, administrative agencies must, at a minimum, provide notice and an opportunity for a hearing before depriving individuals of their protected liberty or property interests. *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 542, 105 S.Ct. 1487, 1493; *Boddie v. Conn.* (1971), 401 U.S. 371, 377-78, 91 S.Ct. 780, 786; *Ohio Assn. of Public School Employees, AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.*, 68 Ohio St.3d 175, 176, 1994-Ohio-354. R.C. 119.07 satisfies these procedural due process requirements because it sets forth a process reasonably calculated to apprise the party of the charges against him and the opportunity to request a hearing. *C & H Investors, Inc. v. Ohio Liquor Control Comm.* (Dec. 9, 1999), 10th Dist. No. 98AP-1519; *Tripodi v. Liquor Control Comm.* (1970), 21 Ohio App.3d 110, 111-12. In light of this process to ensure that the *party* receives notice, the additional notice to the party's *attorney* is merely a courtesy, not a constitutional prerequisite.[6] Moreover, even if due process also requires notice to the party's attorney, notice sent by ordinary mail to an address of record is

[5] The "due course of law" aspect of Section 16, Article I, Ohio Constitution, is the equivalent of the Due Process Clause of the United States Constitution. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶53.

[6] In so concluding, we do not imply that agencies have the discretion to disregard R.C. 119.07's requirement that they mail a copy of a notice of intent to a party's attorney. That step is not constitutionally required, but it is statutorily required.

sufficient to comply with due process. *Holmes v. Union Gospel Press* (1980), 64 Ohio 2d 187, 189 (notice sent by ordinary mail, even though the appellant did not receive it, accorded the appellant the necessary procedural due process safeguards); *In re Foreclosure of Liens for Delinquent Taxes* (1980), 62 Ohio St.2d 333, 336 (holding that "notification by 'ordinary mail to the record addresses' would comport with due process").[7] Therefore, Kingsley's failure to receive the notice did not deny Kellough his due process rights or preclude the Board from disciplining Kellough. Cf. *Leonard v. Delphia Consulting, LLC*, 10th Dist. No. 06AP-874, 2007-Ohio-1846, ¶19 (holding that mailing a notice of a final judgment to a party's attorney and recording the mailing on the docket satisfies due process, even if the attorney does not receive the notice).

{¶37} Here, Kellough does not dispute that the Board mailed his attorney a copy of the notice of intent.[8] Investigator Beall testified that he sent Kingsley a letter that enclosed a copy of the notice of intent. Accordingly, we conclude that the trial court did not abuse its discretion in determining that reliable, probative, and substantial evidence established that the Board complied with R.C. 119.07 when it mailed a copy of the notice of intent to Kellough's attorney. We thus overrule Kellough's first assignment of error.

{¶38} By his second assignment of error, Kellough argues that the trial court erred in concluding that the Board lacked the discretion to allow him to participate in the hearing. Pursuant to R.C. 119.07, a party is entitled to a hearing if the party requests it

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[7] This is the case particularly where, as here, the United States Postal Service does not return the mail to the sender. Additionally, we note that the record contains evidence that the Board mailed the notice of intent to the attorney's correct address. The letter sent with the notice of intent displays the same address that the attorney supplied to the Board approximately four months prior to the issuance of the notice of intent.

[8] In appellant's brief filed before this court, Kellough states that he "is not arguing that the Board did not send notice to his counsel. He could never make this argument. He is merely arguing that his counsel did not receive it." (Appellant's brief, at 4.)

within 30 days of the time of the mailing of the notice of intent. Kellough failed to timely request a hearing, and thus, he waived his right to present evidence, cross-examine witnesses, and make opening and closing statements. *Goldman II*. Nevertheless, Kellough contends that the Board had the discretion to disregard his waiver and grant him the right to participate in the hearing. Kellough asserts that the trial court erred by finding that the Board did not have the "jurisdiction" to allow Kellough the full panoply of rights accorded to a party who, unlike Kellough, timely requests a hearing.

{¶39} To address this argument, we must review the legal precedent that caused the Board to decide to hold a hearing, but to preclude Kellough from any meaningful participation in that hearing. In *Goldman I*, the State Medical Board permanently revoked the appellant's license to practice cosmetic therapy by roll-call vote after the appellant failed to request a hearing. On appeal to this court, we considered whether an agency may proceed in such a summary manner when a party fails to request or appear for a hearing. To resolve this issue, we looked to R.C. 4731.22(B), which allowed the State Medical Board to take disciplinary action against a licensed limited practitioner "pursuant to an adjudicatory hearing under Chapter 119. of the Revised Code." The State Medical Board argued that it had fulfilled its obligations under R.C. Chapter 119 by giving the appellant an *opportunity* for hearing, and thus, it could revoke the appellant's license in a summary fashion. We disagreed, stating:

> The fact that [R.C. 4731.22(B)] provides that such a hearing shall proceed under R.C. Chapter 119 does not permit the board to dilute the requirement for a hearing set forth in R.C. 4731.22 to the level of a simple opportunity for a hearing which may be omitted entirely if the affected practitioner waives his right to appear.

Id. at 128-29. We then concluded that due process required the State Medical Board to afford the appellant a hearing. While due process did not call for a "full adversarial and evidentiary proceeding," the State Medical Board had to conduct "some sort of reliable evidentiary review, including [consideration of] the sworn testimony of the investigator, as well as a more considered review of the circumstances of the case" before disciplining the appellant. Id. at 129.

{¶40} The question then arose: to what extent could the party participate in the hearing? In *Goldman I*, we concluded that because the appellant had not timely requested a hearing, he had "waived his right to appear at further hearings * * * and the board may proceed with further adjudication in his absence, so long as it more substantially complies with the procedural safeguards implicit and explicit in R.C. Chapter 119." Id. at 129. We expanded upon this conclusion in *Goldman II*.

{¶41} Upon remand to the State Medical Board in accordance with our instruction in *Goldman I*, a hearing examiner held an evidentiary hearing at which a board investigator testified. Although the appellant and his attorney were present at the hearing, the hearing examiner did not allow them to present evidence, cross-examine the board investigator, or make an opening statement or closing argument. After considering the evidence introduced at the hearing, the hearing examiner recommended that the State Medical Board indefinitely suspend the appellant's license to practice cosmetic therapy. The State Medical Board approved and adopted the hearing examiner's report and recommendation. The appellant again appealed and, in relevant part, argued that the Board erred in refusing to allow him to participate in the hearing. This time, we disagreed with the appellant's argument, holding that:

> The fundamental requirement of procedural due process is notice and the *opportunity* to be heard. Such opportunity is subject to waiver. This is precisely what occurred here.
>
> Appellant was given notice and the opportunity to be heard. Appellant waived the right to appear at the hearing, including the right to present evidence, cross-examine and make opening and closing statements.

Goldman II (emphasis sic and citations omitted). Thus, because a party waives his opportunity to be heard by not requesting a hearing, due process does not require an agency to allow that party to participate in a *Goldman* hearing. Id. See also *Black v. Ohio State Bd. of Psychology*, 160 Ohio App.3d 91, 2005-Ohio-1449, ¶9; *Flowers v. Ohio State Dental Bd.* (July 21, 1998), 10th Dist. No. 97APE12-1632; *Davidson v. State Med. Bd. of Ohio* (May 7, 1998), 10th Dist. No. 97APE08-1036.

{¶42} Kellough acknowledges that an agency does not err if it disallows a party from participating in a *Goldman* hearing. However, he contends that agencies have the discretion to decline to hold a *Goldman* hearing, and instead proceed with a full hearing, giving the party all the rights of participation that he would have had if he had timely requested an R.C. Chapter 119 hearing.

{¶43} The resolution of Kellough's second assignment of error turns upon the Board's lack of statutory authority to allow Kellough to participate in the hearing. "An administrative agency has no authority beyond the authority conferred by statute and it may exercise only those powers that are expressly granted by the General Assembly." *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 171, 2000-Ohio-282. See also *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, ¶32 (holding that a state agency "has only those powers explicitly delegated by statute and must operate within whatever limitations

are contained within its enabling statutes"). Thus, the Board's ability to permit Kellough's participation in the hearing depends on it receiving a grant of authority to do so under either the statutes that establish and empower the Board or R.C. Chapter 119.

{¶44} Here, because Kellough failed to request a hearing within 30 days of the mailing of the notice of intent, nothing in the Board's enabling statutes or R.C. Chapter 119 sanctions Kellough's participation in the hearing that preceded the imposition of discipline. Therefore, the Board lacked any statutory authority to permit Kellough's participation. Accordingly, we overrule Kellough's second assignment of error.

{¶45} By Kellough's third assignment of error, he argues that the trial court abused its discretion in finding that reliable, probative, and substantial evidence supported the Board's decision to permanently revoke his teaching license. Kellough contends that the Board disciplined him solely on the strength of hearsay testimony, and he asserts that this testimony does not amount to reliable, probative, and substantial evidence. We disagree.

{¶46} Generally, hearsay is inadmissible in Ohio courts. Evid.R. 802; *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶23. Under Evid.R. 801(C), " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." As used in Evid.R. 801(C), a "statement" is "an oral or written assertion" or the "nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A).

{¶47} The rules of evidence do not bind administrative agencies. *Bd. of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 415, 417. In hearings before the Board, as before other administrative agencies, the rules of

evidence guide—but do not control—the admission of evidence. Id.; Ohio Adm.Code 3301-73-18(A) ("The Ohio rules of evidence may be taken into consideration by the hearing officer in determining the admissibility of evidence, but shall not be controlling."). Consequently, hearsay is admissible in administrative hearings, and it can constitute reliable, probative, and substantial evidence. *Westlake v. Ohio Dept. of Agriculture*, 10th Dist. No. 08AP-71, 2008-Ohio-4422, ¶19; *Felice's Main St., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1405, 2002-Ohio-5962, ¶17-20. However, while hearsay is permissible, the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner. *Holtzhauser v. State Med. Bd. of Ohio*, 10th Dist. No. 06AP-1031, 2007-Ohio-5003, ¶19; *Althof v. Ohio State Bd. of Psychology*, 10th Dist. No. 05AP-1169, 2007-Ohio-1010, ¶74. Adjudicators of administrative proceedings must exclude hearsay statements that are inherently unreliable. *1609 Gilsey Investments, Inc. v. Liquor Control Comm.*, 10th Dist. No. 07AP-1069, 2008-Ohio-2795, ¶13; *Reynolds v. Ohio State Bd. of Examiners of Nursing Home Administrators*, 10th Dist. No. 03AP-127, 2003-Ohio-4958, ¶19.

{¶48} Pursuant to R.C. 3319.31(B)(1), the Board may revoke a teaching license if a teacher has engaged in "conduct that is unbecoming to the * * * person's position." Here, the Board found Kellough's conduct unbecoming to his teaching position because: (1) he failed to adequately supervise the students during the Christmas party, (2) he disobeyed Smith's order that he and Cox hold the Christmas party in an empty classroom, and (3) he was dishonest during the investigation into what had occurred during the Christmas party.

{¶49} With regard to the first reason given for Kellough's discipline, the hearing examiner accepted as true Kellough's account of what happened during the Christmas party. The hearing examiner then considered testimony about the number of students who had attended the Christmas party and the size and configuration of the auditorium/gymnasium. Finally, the hearing examiner took into account Smith's opinion testimony that:

> [The auditorium/gymnasium is] a big space, it's large. There's two teachers and all this space to cover. There's two of them. I mean, I know that there wasn't any way for them to cover all of it[.]

(Tr. 61.)

{¶50} Of this evidence, only Kellough's version of events was introduced into evidence through out-of-court statements. However, Kellough's statements do not constitute hearsay because they qualify as the admissions of a party-opponent. Under Evid.R. 801(D)(1), out-of-court statements are not hearsay if they are a party's own statements and they are offered against the party. *In re Coy*, 67 Ohio St.3d 215, 218, 1993-Ohio-202; *State v. Jackson*, 10th Dist. No. 02AP-867, 2003-Ohio-6183, ¶79. Since the statements at issue satisfy both criteria, they are not hearsay. Thus, contrary to Kellough's argument, the Board did not rely on any hearsay evidence to find that Kellough inadequately supervised his students.

{¶51} With regard to the second reason given for Kellough's discipline, the hearing examiner credited Smith's statement that he told Kellough and Cox to hold the Christmas party in an empty classroom. The hearing examiner also accepted the testimony of both Smith and Harper, both of whom observed the aftermath of the Christmas party, that the party occurred in the auditorium/gymnasium.

{¶52} Smith's recounting on the stand of his instructions to Kellough and Cox is an out-of-court statement. However, that statement does not qualify as hearsay because it is not an assertion. For hearsay purposes, to make an assertion " 'simply means *to say that something is so, e.g.*, that an event happened or that a condition existed.' " *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶97 (emphasis in sic) (quoting *State v. Carter*, 72 Ohio St.3d 545, 549, 1995-Ohio-104). Because an instruction cannot be proved true or false, it is not an assertion, and thus, it is not hearsay. *State v. West*, 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶9; *State v. Young* (Apr. 12, 2001), 8th Dist. No. 78058. Again, contrary to Kellough's argument, the Board did not rely on any hearsay evidence to find that Kellough defied Smith's order.

{¶53} With regard to the third reason given for Kellough's discipline, the hearing examiner considered and found credible Smith's testimony regarding Cox's and Student 2's revised recounting of what happened during the Christmas party. Unlike the other out-of-court statements at issue, this testimony constituted hearsay. However, as we stated above, hearsay is admissible in an administrative hearing, as long as it is not inherently unreliable. We find that the hearing examiner did not act arbitrarily in considering this hearsay evidence because the circumstances under which both statements were elicited established the statements' reliability. First, Cox acted against his own interest in admitting to Smith that he knew about the boxing match and that he and Kellough lied in an attempt to hide their knowledge. By his obvious distress and his own admission, Cox demonstrated that he understood that he would face adverse consequences, but his conscience demanded that he confess. Moreover, when Smith confronted Student 2 after Cox's recantation, Student 2 corroborated Cox without any

prompting by Smith. Smith had assured Student 2 that he would not face any repercussions for telling the truth, so Student 2 had no incentive to lie. In fact, Student 2's desire to protect Kellough, a popular teacher, would have induced him to deny Cox's version of events, not substantiate it. Given these circumstances, we conclude that the hearing examiner did not arbitrarily admit the hearsay into evidence. Moreover, we conclude that Cox's and Student 2's statements are reliable, probative, and substantial evidence that proves that Kellough was dishonest about what occurred during the Christmas party.

{¶54} Finally, Kellough argues that the Board erred when it did not, on its own initiative, subpoena Cox and Student 2 to obtain their testimony. This argument does not correspond with the third assignment of error. While the assignment of error challenges the quality of the evidence, this argument asserts that the Board must, as a matter of law, obtain for itself relevant testimony. As a general matter, this court rules on assignments of error, not mere arguments. *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶70. See also *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶5-6 (refusing to address any "contentions in the argument section of the brief that do not plainly fall under one of the listed assignments of error"). Because the argument at issue does not relate to the assignment of error, we decline to address it.

{¶55} In sum, we conclude that the trial court did not abuse its discretion in finding that reliable, probative, and substantial evidence supported the Board's decision to permanently revoke Kellough's teaching license. Accordingly, we overrule Kellough's third assignment of error.

{¶56} By Kellough's fourth assignment of error, he argues that the trial court erred in determining that the Board did not need to bifurcate the hearing so that Kellough could present mitigating evidence in a separate proceeding. Nothing in the Board's enabling statutes or R.C. Chapter 119 provides authority for the Board to conduct a bifurcated hearing. Moreover, contrary to Kellough's assertion, procedural due process does not compel an agency to allow a person to offer evidence in mitigation after that person waives his opportunity for a hearing. Accordingly, we overrule Kellough's fourth assignment of error.

{¶57} By Kellough's fifth assignment of error, he argues that the trial court erred in refusing to review the appropriateness of the sanction that the Board imposed on him. In so arguing, Kellough acknowledges that Supreme Court of Ohio precedent prohibits a reviewing court from modifying a sanction that an agency has statutory authority to impose if reliable, probative, and substantial evidence supports the agency's order. See *Henry's Café, Inc. v. Bd. of Liquor Control Comm.* (1959), 170 Ohio St. 233, paragraphs two and three of the syllabus. Kellough also concedes that R.C. 3319.31(B) permits the Board to discipline him by permanently revoking his teaching license. However, Kellough urges this court to depart from controlling precedent because he contends that it violates due process.

{¶58} As a court inferior to the Supreme Court of Ohio, we are bound by and must follow the decisions of that court. *State ex rel. Abrusci v. Indus. Comm.*, 10th Dist. No. 08AP-756, 2009-Ohio-4381, ¶5; *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, ¶21; *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-2216, ¶10. Ohio appellate courts have no authority to declare unconstitutional a decision of the Supreme

Court of Ohio. *State v. Howard*, 7th Dist. No. 08-MA-121, 2009-Ohio-6398, ¶49. Consequently, this court has repeatedly rejected appellants' requests that we modify or overrule *Henry's Café*. *Auchi v. Liquor Control Comm.*, 10th Dist. No. 06AP-493, 2006-Ohio-6003, ¶8, fn. 3; *Gehad & Mandi, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 05AP-1181, 2006-Ohio-3081, ¶7; *Goldfinger Enterprises, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1172, 2002-Ohio-2770, ¶22; *Lindner v. Ohio Liquor Control Comm.* (May 31, 2001), 10th Dist. No. 00AP-1430. We do so again in this case. Accordingly, we overrule Kellough's fifth assignment of error.

{¶59} For the foregoing reasons, we overrule all of Kellough's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.