[Cite as *Orth v. Ohio Dept. of Edn.*, 2012-Ohio-4512.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sherry L. Orth,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-155 (C.P.C. No. 11CVF-05-5897)
State of Ohio Department of Education, Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 28, 2012

Farlow & Associates, LLC, and *Beverly J. Farlow*, for appellant.

Michael DeWine, Attorney General, *Holly E. LeClair* and *Mia Meucci Yaniko*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Sherry l. Orth is appealing from the permanent revocation of her teaching license by the Ohio Department of Education ("ODE"). She assigns nine errors for our consideration:

> FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE ADMINISTRATIVE DECISION REGARDING APPELLANT'S ALLEGED FAILURE TO ADMINISTER FIRST AID WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT NO EVIDENCE WAS PROFFERED, NOR WAS ANY ARGUMENT PROVIDED, THAT CAST ANY DOUBT ON THE CREDIBILITY OF THE WITNESSES.

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE HEARING OFFICER'S MISUSE OF THE WORD "PRONE" DID NOT HAVE "ANY DIRECT BEARING ON THE HOLDINGS OF THE HEARING OFFICER."

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THERE IS A NEXUS BETWEEN APPELLANT'S ALLEGED VIOLATION OF R.C. § 3319.31(B)(1) AND HER ABILITY TO TEACH.

FIFTH ASSIGNMENT OF ERROR: THE TRIAL COURT'S FINDING THAT THERE IS A NEXUS BETWEEN APPELLANT'S ALLEGED VIOLATION OF R.C. § 3319.31(B)(1) AND HER ABILITY TO TEACH IS NOT IN ACCORDANCE WITH LAW.

SIXTH ASSIGNMENT OF ERROR**:** THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT THE HEARING OFFICER'S FINDING THAT APPELLANT ASKED OTHERS TO LIE WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTA[N]TIAL EVIDENCE.

SEVENTH ASSIGNMENT OF ERROR**:** THE TRIAL COURT ABUSED ITS DISCRETION BY UPHOLDING AN EXCESSIVE PENALTY FOR THE ALLEGED VIOLATION OF R.C. 3319.31(B)(1).

EIGHTH ASSIGNMENT OF ERROR**:** THE TRIAL COURT'S DECISION TO UPHOLD APPELLEE'S PERMANENT REVOCATION OF APPELLANT'S TEACHING LICENSE IS A VIOLATION OF DUE PROCESS, AND IS, THEREFORE, NOT IN ACCORDANCE WITH LAW.

NINTH ASSIGNMENT OF ERROR**:** THE TRIAL COURT DEPRIVED APPELLANT OF A MEANINGFUL APPEAL UNDER R.C. § 119.12 BY GIVING UNDUE DEFERENCE TO APPELLEE.

{¶ 2} Several facts are not in serious dispute. Orth served as a teacher in the Columbus Public Schools for 25 years with no history of misconduct or disciplinary actions. For the last 10 years of that time, she worked with students who were not yet in kindergarten at Valley Forge Elementary School.

{¶ 3} On October 22, 2009, she restrained a student who was out of control. As a result of the restraint, the student ended up with scratches and red marks on his lower back and buttocks. She did not have first aid administered immediately, but allowed the child to proceed home on a school bus. Once home, the child's mother gave him a bath and applied Neosporin.

{¶ 4} Orth did not immediately fill out the paperwork reporting her encounter with the student and his minor injuries. She began a report, but interrupted its preparation to teach her afternoon students. She did not finish the report after her last students left for the day. The paperwork was intended for the school principal, but the principal was out of the building the next day, which was a Friday. As a result, the report was not submitted to the principal until the next Monday.

{¶ 5} Based upon these facts, charges were filed with ODE, alleging that Orth should lose her teaching license for violating R.C. 3319.31(B)(1), which reads:

> For any of the following reasons, the state board of education, in accordance with Chapter 119. and section 3319.311 of the Revised Code, may refuse to issue a license to an applicant; may limit a license it issues to an applicant; may suspend, revoke, or limit a license that has been issued to any person; or may revoke a license that has been issued to any person and has expired:
>
> (1) Engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position[.]

{¶ 6} Orth was not alleged to have engaged in an immoral act. She was not alleged to be incompetent. She was not alleged to have been negligent. She was alleged to have engaged in conduct that is or was "unbecoming" to her teaching position.

{¶ 7} "Conduct unbecoming" a classroom teacher is not clearly defined by statute in Ohio. The phrase is also not defined by Ohio case law. One recent case in the Second Appellate District in which this phrase in R.C. 3319.31(B)(1)(c) was used as the basis for discipline is *Robinson v. Ohio Dept. of Edn.*, 2d Dist. No. 24808, 2012-Ohio-1982. Robinson viewed images of a young woman exposing her breasts and pubic region on a school computer. He sent one or more of the images to a fellow teacher as an e-mail attachment, allegedly as a joke. His conduct was viewed as conduct unbecoming a classroom teacher. His teaching license was suspended for one year, with all but 60 days suspended.

{¶ 8} A prior appellate case involving "conduct unbecoming" is *Friesthler v. State Bd. of Edn.*, 3d Dist. No. 1-02-36, 2002-Ohio-4941 from the Third Appellate District. In that case, the State Board of Education refused to renew a teaching license for a man who had pled guilty to persistent disorderly conduct as a part of a plea bargain. He had originally been charged with sexual imposition based upon an allegation that he had engaged in a suggestive conversation with an undercover police officer and had touched the undercover officer in the groin area.

{¶ 9} The Allen County Court of Common Pleas vacated the suspension of Friesthler's teaching license and the Third District Court of Appeals upheld the reversal of State Board of Education's actions.

{¶ 10} The phrase "conduct unbecoming an officer" has been a part of the Uniform Code of Military Justice for many years. The phrase has never been applied to situations as minimal as failing to immediately render first aid to a military person with minor scratches on his or her lower back area. The phrase also has never been applied to a situation where an officer fails to file a report the same day as the injury.

{¶ 11} In the military context, the phrase implies misconduct so seriously against law, justice, morality, or decorum so as to expose the offender to disgrace and or so as to dishonor the military profession.

{¶ 12} The first assignment of error raises the question of whether Orth engaged in conduct unbecoming of a teacher by allowing the student to get on a school bus immediately after the scratches were discovered. Instead of taking the child off the bus, having the child miss the bus and putting an antibiotic cream on the child's scratches,

Orth allowed the child to stay on the bus and directed the bus driver to have the child's mother call Orth. This call did occur and the child's mother was able to bathe the child before administering an antibiotic cream. Such bathing could not have occurred at the school and resulted in a more complete treatment of the scratches.

{¶ 13} We note that the fit thrown by the child before the child left the classroom was the result of the child being asked to go get on the school bus with his classmates. The fit was so strong and long that another member of the school's staff had to take the other children to the bus while Orth tried to get the student under control. Taking the student off the bus and having to put him on another bus later or to arrange other transportation later risked another uncontrollable fit. Orth made a reasonable professional judgment that resulted in better treatment for the scratches and removed the risk of another uncontrollable fit, which would have been the child's third such fit for the morning.

{¶ 14} We cannot interpret R.C. 3319.31(B)(1) in such a way as to make Orth's handling of the first aid treatment for the scratches as being conduct unbecoming a classroom teacher. Teachers are called upon to make professional judgments every day and the reasonable exercise of such professional judgment cannot constitute a violation of R.C. 3319.31(B) as conduct unbecoming a classroom teacher.

{¶ 15} The first assignment of error is sustained.

{¶ 16} Because the permanent revocation of Orth's license was based, at least in part, upon Orth's failure to administer first aid herself or have other school personnel administer first aid immediately after removing the child from the bus, the case must be remanded to the Ohio Department of Education for further proceedings. Since the penalty must be vacated due to the failure of proof of an underlying violation, the assignments of error regarding the excessiveness of the penalty are rendered moot. The seventh and eighth assignments of error are therefore rendered moot.

{¶ 17} The fourth and fifth assignments of error question the nexus between the violations alleged and Orth's ability to teach. For better or worse, classroom teachers have a duty to maintain order in their classrooms, even in the most trying of circumstances. Causing harm to a student is not consistent with maintaining reasonable order in the classroom, although harm can be risked when a student is out of control. That student is

a risk to himself or herself and to the others in the classroom, including the teacher. We find, that as a matter of statutory interpretation, violations of R.C. 3319.31(B)(1) can have a nexus with the ability to teach if they involve unreasonable physical restraint of a student. However, we do not find that failure to file a report within two business days of an incident constitutes conduct so egregious as to constitute conduct unbecoming a classroom teacher. This is again a matter of our interpretation of R.C. 3319.31(B), based at least in part on the longtime use of the "conduct unbecoming" phrase in the military justice context.

{¶ 18} The fourth and fifth assignments of error are overruled in part and sustained in part.

{¶ 19} The case law regarding R.C. 119.12 appeals requires giving a certain amount of deference to the agencies. We cannot say that the trial court judge who addressed this case below failed to follow the pertinent case law requiring deference. We, therefore, find no reversible error under the ninth assignment of error.

{¶ 20} The ninth assignment of error is therefore overruled.

{¶ 21} The second and sixth assignments of error allege error regarding the credibility of witnesses and regarding the credibility of Orth herself when she testified. We, as a court of appeals, are not in a position to weigh the credibility of the witnesses generally. The credibility of witnesses generally is not subject to the "reliable, probative and substantial standard," but the establishment or non-establishment of the underlying violations is subject to such a standard. Different events which occurred in October 2009 were subject to different recollections by persons affiliated with Valley Forge Elementary School, so credibility had to be assessed at least to some degree by the common pleas court. We cannot say that no issues of credibility were present, but cannot find the trial court's assessment to be an abuse of discretion as to any witnesses.

{¶ 22} The second and sixth assignments of error are overruled.

{¶ 23} As to the third assignment of error, neither Orth nor the student she was trying to control were standing upright when Orth attempted to drag him back to her and gain control of him. Although "prone" may not be the ideal description of the position of the student or of Orth, its use cannot be said to have affected the hearing officer's report or the decision of ODE.

{¶ 24} The third assignment of error is overruled.

{¶ 25} We note that counsel for ODE asserts the position of ODE that the scratches were not deliberately inflicted.

{¶ 26} Therefore, upon remand to ODE, the issue resolves to whether a classroom teacher who accidentally inflicts scratches on an out-of-control preschool student deserves disciplinary action from ODE. If disciplinary action is warranted, what discipline is appropriate?

{¶ 27} On review, we sustain the first assignment of error in toto and the fourth and fifth assignments of error in part. We overrule the second, third, sixth and ninth assignments of error. We overrule the fourth and fifth assignments of error in part and the seventh and eighth assignments of error are rendered moot.

{¶ 28} The judgment of the Franklin County Court of Common Pleas is vacated and the case is remanded to Ohio Department of Education for further appropriate proceedings.

Judgment vacated; case remanded
for further proceedings.

CONNOR, J., concurs.
BRYANT, J., concurs in part and dissents in part.

Bryant, J., concurring in part and dissenting in part.

{¶29} Unable to agree fully with the majority decision, I respectfully concur in part and dissent in part from its disposition of the assigned errors and dissent from the majority's decision to reverse the judgment of the common pleas court.

{¶30} Appellant, Sherry L. Orth, was charged with violating R.C. 3319.31(B)(1), which provides that the state board of education, in accordance with R.C. Chapter 119 and R.C. 3319.311, "may suspend, revoke, or limit a license that has been issued to any person" if that person engaged "in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position." Appellee, State of Ohio Department of Education ("ODE"), held a hearing to determine whether to suspend appellant's five-year professional pre-kindergarten teaching license for conduct unbecoming a teacher.

{¶31} Appellee adopted the Licensure Code of Professional Conduct for Ohio teachers in 2008. Under Principle #2, conduct unbecoming a teacher includes "committing an act of cruelty to children or an act of child endangerment (e.g., physical abuse, mental injury, or emotional abuse)." *Id.* at 2(b). Similarly, Ohio Adm.Code 3301-73-21 provides factors to be considered in evaluating whether a teacher has engaged in conduct unbecoming a teacher, and they include misconduct that involves minors and school children. Ohio Adm.Code 3301-73-21(A)(1) and (2) (noting crimes and misconduct involving minors or students); *see also* Ohio Adm.Code 3301-73-21(A)(4) (prohibiting "[m]aking, or causing to make, any false or misleading statement"). The rule further provides mitigating factors that may be, but are not required to be, considered, such as appellant's lack of prior discipline.

{¶32} Appellant was charged with violating the applicable law and rules by:

- Engaging in conduct that resulted in physical injuries to Student 1
- Failing to properly report the incident with Student 1
- Failing to arrange for or administer first aid to Student 1

{¶33} According to the hearing officer's findings of fact, appellant was a special needs teacher in the Columbus Public Schools during the 2009-2010 school year, and Student 1, then four years old, was enrolled in appellant's classroom. Appellant admits that on October 22, 2009, she caused Student 1 physical injury. Franklin County Children Services ("FCCS") "substantiated" the student's injuries as "child abuse." (Finding of Fact 7.)

{¶34} The details of how Student 1 incurred the injury are contested. Student 1 reported that appellant "dragged him outside over the grass and sidewalk on the playground toward the bus." (Finding of Fact 10.) Student 1 so demonstrated "by dragging his teddy bear by the arm." (Finding of Fact 10.) Pictures Student 1's mother took reveal "scrapes and/or scratches" on Student 1's back and buttocks when he arrived home from school. (Finding of Fact 11.) She further said Student 1 had dry blood and dirt on his bottom.

{¶35} By contrast, appellant stated the students never left the building that day; rather Student 1's injuries occurred in the classroom. Appellant said Student 1 refused to get on the bus to go home at the end of the half-day of school and began to assault her. To restrain him, appellant put him in a Crisis Prevention Institute ("CPI") hold, a method taught at CPI but to be used as a last resort. Student 1 pushed appellant to the floor, where she continued to try to restrain him in what the hearing officer referred to as a prone restraint. When Student 1 was contained, she and the student then left the building through the front door to the bus. Appellant admitted that her dragging Student 1 on the classroom rug caused his injuries. Appellant did not administer first aid but instead told the bus driver to have Student 1's mother call her because there was a problem.

{¶36} The hearing officer noted that if appellant's testimony were true about the incident just before the end of the school day, then the CPI hold would have been the second appellant administered to Student 1 the same day. Appellant had difficulty controlling Student 1 when he came to school in the morning, and she asked for help. Leah Valentine, another teacher at the school, reported that when she went to assist appellant, appellant had Student 1 in a prone CPI hold on the floor; Valentine commented that they were "not supposed to have the child on the floor." (Finding of Fact 15.) Prone restraints are prohibited, as they are deemed dangerous for children. If a child drops to the floor, the teacher is to leave the child there and use verbal direction to guide the child. Because appellant received CPI training, "[s]he would have been aware of the prohibition." (Finding of Fact 19.)

{¶37} After the morning incident, Valentine took Student 1 to the PEAK room where she stroked his back and noticed he had no scratches at that time. Although appellant denied placing the child in a CPI hold when he first arrived at school, the hearing officer specifically found appellant's testimony not to be credible and Valentine's testimony to be credible.

{¶38} The hearing officer further found Diane Honeycutt's account of the events to be credible and to provide corroboration for Student 1's version of the late morning incident. Honeycutt, a teacher's assistant, said that about ten minutes before the class was to be dismissed, she and appellant took the class to the playground for a leaf walk. Since Student 1 did not want to participate in a leaf walk, he stayed on a bench with Valentine,

whose class also was outside. When the students were to leave for home after their half-day of schooling, Student 1 refused to go to the bus. Appellant asked Honeycutt to take the rest of the students to the bus, and Valentine took her class inside for lunch. Valentine corroborated that appellant had her class outside for a leaf walk that day and recalled sitting with Student 1 on the bench.

{¶39} Honeycutt saw appellant on the bench with Student 1 when Honeycutt went around the corner to take the students to the bus. When appellant "approached the bus with Student 1," Honeycutt "saw bloody scratches on his backside." (Finding of Fact 24.) The hearing officer found persuasive the bus driver's statement that appellant and Student 1 did not come out of the front door but from around the corner of the building, "consistent" with Honeycutt's testimony. (Finding of Fact 25.) Both Valentine and Honeycutt said appellant asked them to state that appellant's class had not been outside that day.

{¶40} Columbus Public Schools investigated the matter and concluded appellant caused Student 1's injuries, failed to give him medical attention, failed to report the incident, and attempted to convince two of her co-workers to not say anything about being outside with Student 1. The CPS examiner recommended appellant's employment be terminated, but appellant resigned, later rescinding her letter of resignation. Columbus police investigated the matter and determined the child was dragged outside on the concrete, as the injuries did not appear to be the result of a carpet burn. The hearing officer noted that however the injuries occurred, appellant admitted she caused them, did not report them timely, and did not follow first aid procedure.

{¶41} With those findings, I disagree with the majority's conclusion under appellant's first assignment of error that the common pleas court abused its discretion in determining substantial, reliable and probative evidence supports appellee's decision. Whether the facts be as Student 1 posited, or those appellant testified to, the undisputed facts demonstrate appellant in three separate ways failed to comply with requirements of the school that employed her: she caused injury to Student 1, did not administer first aid or take him to a nurse for first aid treatment, and did not report the injury until Student 1's mother contacted the school.

{¶42} Nothing in the evidence suggests compliance was discretionary or left to the reasonable judgment of the teacher. Rather, the requirements operate as an accountability tool that enables school administration to know what occurred at various school locations. Indeed, this case demonstrates why the requirements are not discretionary: whether the administration would have known appellant violated any requirement, much less three, is questionable had Student 1's mother not contacted the school.

{¶43} The majority seems to conclude Student 1's injuries nonetheless were too negligible to warrant a finding of misconduct regarding the application of first aid. The requirement for first aid treatment, however, presumably is designed to ensure every student receives needed treatment even if the teacher deems it unnecessary, and the evidence undisputedly demonstrates appellant failed to comply with the requirement that Student 1 receive such treatment. The common pleas court aptly noted that appellant's thought processes for why she failed to procure first aid are more pertinent to mitigating factors than to whether misconduct occurred. The common pleas court had ample evidence that appellant violated the requirement, and I cannot say the common pleas court abused its discretion in so concluding.

{¶44} The other two violations are the same. Although the hearing officer seemed inclined to believe appellant dragged Student 1 over the concrete to the bus, appellant's misconduct is evident even under her own version of the facts. She conducted a CPI floor hold, contrary to training. When Student 1 allegedly took her to the floor, appellant, instead of using verbal direction to guide Student 1, stayed on the ground with him and continued to use the prohibited CPI that resulted in Student 1's injuries. Indeed, FCCS determined she abused Student 1. Similarly, she did not comply with the requirement that she report the incident that day. Again, she posited an explanation, but the requirement to report does not allow her that discretion, and evidence indicated she was noncompliant in the past. Unlike the majority, I would overrule appellant's first assignment of error, as well as her fourth and fifth assignments of error, adopting, however, the majority's conclusion that if a nexus is necessary, the evidence here supports it.

{¶45} In the end, the majority's decision suggests dissatisfaction with the penalty imposed in light of what it deems appellant's reasonable conduct regarding first aid

treatment for Student 1. Even if I were to agree, the penalty is not an issue we may address. *See Henry's Café, Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233 (1959). Accordingly, I would overrule appellant's seventh and eighth assignments of error, and I agree with the majority's conclusion that the remaining assignments of error be overruled.

{¶46} Because I would overrule all the assigned errors, I would affirm the judgment of the common pleas court. The majority does not, and so I dissent from its decision to reverse the judgment.