[Cite as *Sellars v. Dublin City School Dist. Bd. of Edn.*, 2013-Ohio-3367.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Danielle Sellars,	:	
Appellant-Appellee,	:	
v.	:	No. 12AP-1007 (C.P.C. No. 12CV-05-6368)
Dublin City School District Board of Education,	:	(REGULAR CALENDAR)
Appellee-Appellant.	:	

D E C I S I O N

Rendered on August 1, 2013

Johrendt & Holford, and *Andrew Mills Holford*, for appellee.

Britton, Smith, Peters & Kalail Co., L.P.A., Scott C. Peters, and *Giselle S. Spencer*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Dublin City School District Board of Education ("the Board"), appeals from the judgment of the Franklin County Court of Common Pleas reversing appellant's order that expelled appellee, Danielle Sellars, from school for the remainder of the 2011-2012 school year. For the reasons that follow, we reverse the judgment of the trial court and remand this matter for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} During the 2011-2012 school year, appellee attended Davis Middle School as a seventh grade student. On February 7, 2012, Assistant Principal Mark Mousa received a report from the school resource officer, Dublin Police Officer Jeff Hall, about drug activity

at the school and the possibility of appellee being involved. Mousa and Officer Hall searched appellee's locker but found nothing. The following day, Mousa was informed that a parent had called the school to report that her daughter received marijuana at school from appellee. The parent did not want the marijuana in her house and, therefore, brought it to Officer Hall. Based on these events, Mousa began questioning the students said to be involved. When Mousa questioned appellee, the school's guidance counselor, Suzanne Hicks, was the only other person present. At the beginning of the meeting, Mousa gave appellee written notice of the school's intention to suspend her for violation of Rules 1 and 26 of the Middle School Handbook ("handbook"), which provide:

> **RULE 1. Narcotics, alcoholic beverages, drugs, drug paraphernalia, counterfeit controlled substances, or mood altering chemicals of any kind:** A student shall not knowingly buy, sell, supply, apply, possess, use, transmit, conceal, be under the influence of the aforementioned items, assist and/or facilitate in the sale of the aforementioned items.
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> * * *
>
> **RULE 26. General Misconduct:** The General Misconduct shall apply to conduct not specifically set forth herein which substantially and materially disrupts or interferes with the good order, discipline, operation, academic or educational process taking place in the school, or which substantially and materially is or poses a threat to persons or property.

(Handbook, 23, 26.)

{¶ 3} When asked if she knew anything about the marijuana, appellee admitted that at school she received marijuana from a student and then split that amount of marijuana between herself and another student who was to give appellee money for it the following day. Appellee also provided a written statement describing her involvement in the incident. Thereafter, Holly Collins, appellee's mother, was notified of appellee's ten-day suspension from school and her right to appeal the suspension to the Board. The notice to Collins also notified her that appellee would be recommended for expulsion due to the distribution of marijuana while at school. Appellee's suspension was appealed and

upheld by the Board's designee. Though being advised of the right to further appeal the suspension to the Franklin County Court of Common Pleas, no appeal was taken.

{¶ 4} On February 13, 2012, Superintendent David Axner sent Collins notice of the recommended expulsion and notice that a hearing on the issue was scheduled for February 21, 2012. After the hearing, Collins and appellee were notified that appellee was expelled for 55 days, the remainder of the 2011-2012 school year. The decision to expel appellee was appealed to the Board, which issued findings of fact and conclusions of law affirming the expulsion decision. Thereafter, appellee filed an appeal in the trial court pursuant to R.C. Chapter 2506. In the trial court, appellee asserted three errors, namely that appellee's due process rights were violated, that the expulsion decision was not supported by substantial, reliable, and probative evidence, and that the expulsion decision constituted an abuse of discretion.

{¶ 5} With respect to her claim that her due process rights were violated, appellant asserted she was denied her right to have a representative present during her questioning as required by page 31 of the handbook, which provides:

> When a student is questioned by school officials or staff members as part of a police investigation, whether relative to his/her conduct or in an attempt to gather information, the student shall have the right to be accompanied by a teacher, counselor, or parent/custodian during the questioning.

{¶ 6} Appellee argued that, during the February 8, 2012 "interrogation," Mousa was aware that a companion police investigation was occurring contemporaneously; therefore, she was denied due process because she was not informed of her right to be accompanied by one of the persons enumerated in the handbook. The trial court agreed with appellee that her due process rights were violated because she was not afforded her right to be accompanied by a teacher, counselor or parent/custodian. Accordingly, the trial court reversed the decision of the Board expelling appellee without addressing appellee's other arguments.

II. ASSIGNMENT OF ERROR

{¶ 7} This appeal followed, and the Board brings the following assignment of error for our review:

> THE TRIAL COURT ERRED IN DETERMINING THE DUBLIN CITY SCHOOL DISTRICT BOARD OF EDUCATION'S DECISION TO EXPEL PLAINTIFF DANIELLE SELLARS WAS AN UNCONSTITUTIONAL VIOLATION OF THE STUDENT'S DUE PROCESS RIGHTS.

III. DISCUSSION

A. Standard of Review

{¶ 8} Prior to reviewing appellant's assignment of error, we recall the applicable standard of review for both the trial court and this court from an administrative appeal brought pursuant to R.C. Chapter 2506. In an appeal pursuant to R.C. Chapter 2506, the court of common pleas may find that the order, adjudication or decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. Consistent with its findings, the court of common pleas may "affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court." R.C. 2506.04. In conducting its review, the common pleas court is to give due deference to the agency's resolution of evidentiary conflicts and not "blatantly substitute its judgment for that of the agency." *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202, 207 (1979). As such, the common pleas court is required to affirm the agency's decision if it is supported by a preponderance of reliable, probative, and substantial evidence. *Id*.

{¶ 9} The standard of review to be applied by the court of appeals is more limited in scope. *Barristers, Inc. v. Westerville City Council*, 10th Dist. No. 03AP-1073, 2004-Ohio-2533, ¶ 11, citing *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147 (2000). Our review is limited to the issue of whether the trial court abused its discretion in finding that a preponderance of reliable, probative, and substantial evidence exists to support the decision of the agency. *Id*. at ¶ 13, citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). *See also Gasper v. Washington Twp.*, 10th Dist. No. 02AP-1192, 2003-Ohio-3750, appeal not allowed, 100 Ohio St.3d 1507, 2003-Ohio-6161, citing *Elbert v. Bexley Planning Comm.*, 108 Ohio App.3d 59, 66 (10th Dist.1995), appeal not allowed, 75 Ohio St. 3d 1477.

B. Assigned Error

{¶ 10} In its sole assignment of error, the Board argues the trial court abused its discretion in determining that the Board's decision to expel appellee was unconstitutional based on a violation of appellee's due process rights.

{¶ 11} In the trial court, appellee argued the Board's order of expulsion could not be upheld because the evidentiary support for the order was based entirely on appellee's admissions made in violation of her due process rights. Specifically, appellee asserted her admission on February 8, 2012 was taken in violation of the handbook which requires that she be accompanied by a teacher, counselor, parent or guardian during questioning.

{¶ 12} The Board asserts that, because appellee is challenging the use of statements made on February 8 during the initial suspension hearing without having appealed the suspension order itself, appellee is barred from challenging any of the procedures leading up to the order of suspension. We disagree.

{¶ 13} We recognize that appellee did not challenge the order of suspension in court and that she does not do so now. Rather, appellee challenges the expulsion order and the use of evidence at the expulsion hearing – evidence she contends was taken in violation of her due process rights at the initial suspension hearing on February 8, 2012. Hence, appellee is challenging evidence used to support the expulsion. Though this evidence also supported the suspension, the board does not direct us to any requirement that appellee had to challenge this evidence via appeals from the suspension order or be otherwise barred from doing so. Because appellee is challenging the expulsion order and the evidence to support the same, to determine whether the expulsion order was properly supported, we must look to whether there is support for appellant's argument that her statements made on February 8 were taken in violation of her due process rights. However, since the order of suspension is not before us, our findings have no affect on the same and affect solely the order of expulsion from which appellee has filed an appeal.

{¶ 14} Appellee challenged the evidence obtained at her initial suspension hearing; therefore, we must determine whether appellee was afforded due process at the initial suspension hearing held on February 8. The Supreme Court of Ohio has directly addressed the process due a student who is suspended from school for ten days or less. In *Goss v. Lopez*, 419 U.S. 565, 581 (1975), the court found that "in connection with a

suspension of 10 days or less, * * * the student [should] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."

{¶ 15} In addition, the Ohio legislature has established specific procedures that schools must follow before suspending a student from school. *See* R.C. 3313.66(A). As is relevant here, the law provides that no student shall be suspended unless, prior to the suspension, such superintendent or principal does both of the following: (1) gives the pupil written notice of the intention to suspend the pupil and the reasons for the intended suspension, and (2) provides the pupil an opportunity to appear at an informal hearing before the principal, assistant principal, superintendent or superintendent's designee and challenge the reason for the intended suspension or otherwise to explain the pupil's actions. R.C. 3313.66(A)(1) and (2); *Buckosh v. Westlake City Schools*, 8th Dist. No. 91714, 2009-Ohio-1093.

{¶ 16} Furthermore, R.C. 3313.66 provides:

> (D) The superintendent or principal, within one school day after the time of a pupil's expulsion or suspension, shall notify in writing the parent, guardian, or custodian of the pupil and the treasurer of the board of education of the expulsion or suspension. The notice shall include the reasons for the expulsion or suspension, notification of the right of the pupil or the pupil's parent, guardian, or custodian to appeal the expulsion or suspension to the board of education or to its designee, to be represented in all appeal proceedings, to be granted a hearing before the board or its designee in order to be heard against the suspension or expulsion, and to request that the hearing be held in executive session.
>
> * * *
>
> (E) A pupil or the pupil's parent, guardian, or custodian may appeal the pupil's expulsion by a superintendent or suspension by a superintendent, principal, assistant principal, or other administrator to the board of education or to its designee.

{¶ 17} Additionally, regarding suspensions, the handbook provides:

> A. Suspension
>
> 1. The Superintendent, Principal, or Assistant Principal may suspend a student for not more than ten (10) school days. * * * The Superintendent, Principal or Assistant Principal shall give the student written notice of the intent to suspend, and the reasons for the intended suspension.
>
> 2. The student shall have an opportunity to appear in an informal hearing before the Principal, Assistant Principal, or Superintendent or Superintendent's designee and shall have the right to challenge the reasons for the intended suspension or otherwise explain his/her actions. This hearing may take place immediately.
>
> 3. Within one (1) school day of the suspension, the parent, guardian, and/or custodian (hereafter referred to as "Parent") of the student and the Treasurer of the Board will be notified in writing of Principal, or Assistant Principal. The notice shall include the reasons for the suspension, the right of the parent or student to appeal the suspension to the Board of Education or its designee, and the right to be represented by legal counsel at the appeal. A parent conference may be arranged to discuss the action being taken by the school.

(Handbook, 29.)

{¶ 18} The record reflects that, on February 8, 2012, appellee was given notice of the school's intent to suspend her for ten days and the notice documented the reasons therefore. Additionally, appellee met with Mousa and was provided the opportunity to challenge the reasons for the intended suspension or otherwise explain her actions. At the meeting, appellee told Mousa she received marijuana at school from a fellow student and that she in turn gave half of the marijuana to another student that was to give money to appellee the following day. Collins was timely notified of the suspension and the right to appeal the suspension, which was appealed to and affirmed by the superintendent's designee. From this evidence, it is clear the officials of Davis Middle School met the requirements established by *Goss*, R.C. 3313.66 as it pertains to suspensions and mirrors *Goss*, and the handbook as it pertains to suspensions. *Turner v. South-Western City School Dist.*, 82 F.Supp.2d 757, 762 (S.D.Ohio 1999). *See also Rutherford v. Gahanna-Jefferson City School Dist. Bd. of Edn.*, 10th Dist. No. 97APE02-162 (Sept. 16, 1997)

(student's due process rights for school suspension entails the right to notice of the charges and an opportunity to present his side of the story).

{¶ 19} Regardless, the trial court concluded appellee's due process rights were violated because she was questioned in violation of the process set forth on page 31 of the handbook. We disagree as we conclude there was no violation of said handbook provision.

{¶ 20} The entire text of subsection (H) contained on page 31 of the handbook provides as follows:

> H. Interrogation and/or removal from school by law enforcement officials shall occur as follows
>
> 1. A student in school may not be interrogated by law enforcement officials or any person not affiliated with the school without the knowledge of school officials.
>
> 2. Any interrogation must be done in private with an official school representative present.
>
> 3. A student may not be released to the custody of persons other than his/her parent(s) or custodian(s), unless placed under arrest by a legal authority.
>
> 4. If a student is removed from the school by a law enforcement official the parent(s) or custodian(s) shall be notified by school officials of this action as soon as possible.
>
> 5. When a student in questioned by school officials or staff members as part of a police investigation, whether relative to his/her conduct or in an attempt to gather information, the student shall have the right to be accompanied by a teacher, counselor, or parent/custodian during the questioning.

{¶ 21} We note first that subsection (H) applies to interrogations and removals from school conducted by law enforcement officials. Thus, when read in context, paragraph 5 of subsection (H) appears to refer to questioning by school officials *on behalf of* or *for* law enforcement officials "as part of a police investigation." This record lacks evidence to support the trial court's conclusion that the questioning of appellee on February 8, 2012 was done "as part of a police investigation" to make subsection (H)(5) applicable.

{¶ 22} According to the record, Officer Hall, the school resource officer, received information about drug activity at the school, and Officer Hall reported that information to Mousa. A search of appellee's locker by Officer Hall and Mousa produced nothing. The following day, the school's principal informed Mousa that he received a report of drug activity at the school from a parent who turned some marijuana into Officer Hall because she did not want it at her home. According to that parent, her child received the marijuana from appellee. When asked during the expulsion hearing if there was any police involvement at the time of appellee's suspension, Mousa stated, "[b]eyond reporting it, Officer Hall made a mention of it as part of the case record because he did receive marijuana from the other parent who brought it in. I think he ended up turning that over, because our jurisdiction is actually Columbus." (Tr. 14.) Upon additional questioning, Mousa stated, "[s]o the marijuana was actually turned in the next day to a Columbus detective, and Officer Hall made note of all that in his report." (Tr. 15.) Thereafter, Collins stated appellee has a court date "for possession" in Franklin County Juvenile Court. (Tr. 15.)

{¶ 23} When asked again about Officer Hall's involvement, Mousa stated:

> He had given us advice about what to do, and we are required by law to notify an officer of the law anytime drugs are involved in the school.
>
> Officer Hall at this point did not question any of the students. The students were only questioned by myself and Mr. Nosker and Ms. Hicks, and Ms. Hicks really didn't question. She was just kind of there as an observer.
>
> But, yes, you're right, we do go to Officer Hall and get guidance as to, you know, we are dealing with drugs, we are dealing with something that is not only a school violation but is also – can be a criminal violation should the law officer decide to go that direction.
>
> But during this questioning with Danielle, Officer Hall was not involved.

(Tr. 38.)

{¶ 24} Thus, the record establishes the school resource officer was involved in reporting information about drug activity on school grounds to Mousa, and the school

resource officer turned marijuana over to a Columbus detective – marijuana he received from a parent who did not want the marijuana at her home. These facts, without more, do not turn Mousa's initial questioning of appellee on February 8, 2012 ipso facto into an interrogation done on behalf of law enforcement "as part of a police investigation," as is required for subsection (H)(5) to be applicable. In other words, though information obtained from the school's investigation may have been used by police in subsequent police investigations, such does not automatically result in a finding that the school's initial investigation was done "as a part" thereof as referenced in subsection (H)(5) of the handbook.

{¶ 25} As indicated above in our discussion of *Goss* and R.C. 3313.66, the school officials involved in this matter provided appellee with the due process required for the imposition of the ten-day suspension. Accordingly, we conclude appellee's admissions made on February 8, 2012 were not made in violation of her due process rights, and we sustain the Board's single assignment of error.

IV. CONCLUSION

{¶ 26} For the foregoing reasons, the Board's single assignment of error is sustained, and the judgment of the Franklin County Court of Common Pleas is hereby reversed. This matter is remanded to that court for further proceedings consistent with law and this decision.

Judgment reversed;
cause remanded.

BROWN and DORRIAN, JJ., concur.
