[Cite as *Judd v. Bergant*, 2012-Ohio-979.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

DARLENE JUDD, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF P.J. AND P.J., MINORS,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2011-G-3020**
- vs -	:	
JOSEPH BERGANT, II, et al.,	:	
Appellees.	:	

Administrative Appeal from the Geauga County Court of Common Pleas, Case No. 10A000395.

Judgment: Affirmed.

David H. Davies, Law Firm of David H. Davies, 38108 Third Street, P.O. Box 1264, Willoughby, OH 44096 (For Appellant).

Susan R. Hartung, Susan Keating Anderson, and *Eric J. Johnson*, Walter & Haverfield, LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 3500, Cleveland, OH 44114 (For Appellees).

DIANE V. GRENDELL, J.

{¶1} Appellant, Darlene Judd, appeals from the judgment of the Geauga County Court of Common Pleas, affirming the Chardon Board of Education's affirmation of the expulsion imposed on Judd's children, P.J. and P.J., by their superintendent. The issues to be determined in this case are whether the expulsion was supported by a preponderance of the evidence and whether a violation of school rules must take place

on school property in order for an expulsion to be allowed. For the following reasons, we affirm the decision of the court below.

{¶2} On February 18, 2010, a Discipline Report was issued by Chardon High School Assistant Principal Scott May, regarding P.J. and P.J., two students at Chardon. The report stated that the students violated four rules of the Chardon Local School District Code of Student Conduct. The report stated that "tobacco products" were observed being taken from P.J. and P.J.'s vehicle. It further noted that "narcotic products" were also taken from the vehicle and that the items included "several amounts of bags with a substance that appeared to be marijuana," an electronic scale, a "pipe that appeared to have marijuana residue," and "several plastic bottles with dryer sheets [inside]." The report also stated that two unidentified Chardon High School students "verified that advertisement and or meetings were set up during the school day for the purchase of illegal substances" from P.J. and P.J.

{¶3} On the same date, Principal Andrew Fetchik issued a recommendation to Superintendent Joseph Bergant that both children be expelled from school for the maximum number of days allowed by law. In the recommendation, he noted that four violations occurred, including possession of a disruptive item, possession of a tobacco product, and possession of drugs and drug-related paraphernalia.

{¶4} On February 22, 2010, Judd sent Superintendent Bergant a letter notifying him that she had received a Notice of Intended Suspension for 10 days and would be appealing the suspension since the "offenses occurred on property owned by the City of Chardon and did not occur during school hours."

{¶5} Also on February 22, Superintendent Bergant sent a letter to Judd informing her of his intention to expel P.J. and P.J for eighty days, in addition to the 10-day suspension, due to the violation of the Student Code Rules. He noted that they would be expelled through September 21, 2010.

{¶6} In a March 3, 2010 letter written to Superintendent Bergant, Judd's counsel noted that P.J. and P.J. were in a "city parking area" when items were recovered from their car and that the events took place "off of school property." In the letter, Judd also requested a hearing before the school board regarding the expulsion.

{¶7} On March 8, 2010, a hearing was held before the Chardon Board of Education regarding the students' expulsion. A transcript of this hearing was subsequently prepared, but contained multiple portions that are marked "unintelligible." The portions that were transcribed included discussions of the various board members regarding the repercussions of P.J. and P.J.'s actions. The transcript does not contain a transcription of testimony regarding the facts of the incident that led to the students' expulsion.

{¶8} The minutes of the Chardon Board of Education's March 8, 2010 meeting state that the Board voted on the expulsion, found that the students violated the four aforementioned rules of Student Conduct, and the Order of Expulsion issued by Superintendent Bergant was affirmed. The Board further noted that it "shall hold in abeyance any expulsion" carrying over into the 2010-2011 school year, provided that the students complete a substance abuse program. Following this decision, a letter was sent to Judd from Superintendent Bergant, confirming the Board's ruling.

{¶9} Judd filed a notice of appeal from the Board's decision to the Geauga County Court of Common Pleas on April 6, 2010.

{¶10} On April 21, 2011, the trial court issued a Judgment Entry, stating that the Board of Education's decision was "supported by a preponderance of the evidence in the record of the proceedings," and affirmed its decision.

{¶11} Judd timely appeals and raises the following assignments of error:

{¶12} "[1.] The trial [court] erred and abused its discretion in holding that the decision of the Board of Education to accept the recommendation of the superintendent and expel the students was supported by the law and a preponderance of the evidence when the suspension was unconstitutional, illegal, arbitrary, capricious, unreasonable and unsupported by the evidence.

{¶13} "[2.] The trial court erred in its interpretation of the authority of the school board to enforce conduct of pupils when such conduct does not occur at a time or place that is under the authority or protection of the board."

{¶14} Appeals taken from a school board or board of education's decision are governed by Ohio Revised Code Section 2506. *Kiel v. Green Local School Dist. Bd. of Edn.*, 69 Ohio St.3d 149, 152, 630 N.E.2d 716 (1994). R.C. 2506.01(A) provides, in part, 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."

{¶15} "Pursuant to R.C. 2506.04, the trial court must weigh the evidence in the record and whatever additional evidence is admitted to determine if an administrative agency's decision is supported by a preponderance of reliable, probative and

substantial evidence. * * * The court must give deference to the agency's resolution of any evidentiary conflicts and, especially in areas of administrative expertise, may not blatantly substitute its judgment for the agency's. * * * In turn, this court's determination is limited to the question whether, as a matter of law, a preponderance of reliable, probative and substantial evidence exists to support the board's decision." (Citation omitted.) *Mayeux v. Bd. of Edn. of the Painesville Twp. School Dist.*, 11th Dist. No. 2007-L-099, 2008-Ohio-1335, ¶ 16.

{¶16} An appellate court must apply an abuse of discretion standard in such appeals. *Winfield v. Painesville*, 11th Dist. No. 2003-L-117, 2004-Ohio-5626, ¶ 8; *Mayeux* at ¶ 17.

{¶17} Judd argues that the evidence in the record does not support a finding that P.J. and P.J.'s actions violated any of the four rules of the Code of Student Conduct, such that expulsion would be proper.

{¶18} We initially note that Judd asserts that the transcript of the hearing before the Board appears to be missing portions of testimony due to such testimony being "unintelligible." While this may be true, pursuant to R.C. 2506.03, Judd could have filed an affidavit with the trial court asserting that the transcript was incomplete, but failed to do so, thereby waiving the argument that additional testimony should have been presented before the trial court to rectify the problem. *Malone v. Bd. of Zoning Appeals of Xenia Twp.*, 2nd Dist. No. 06-CA-62, 2007-Ohio-3812, ¶ 33; *Lyons v. Dir., Ohio Job & Family Servs.*, 8th Dist. No. 90334, 2008-Ohio-3547, ¶ 24 (where portions of the transcript were inaudible but the party claiming deficiency failed to file an affidavit of

deficiency or show deficiencies on the face of the transcript, the appellate court could not have made a finding that the record was deficient as a matter of law).

{¶19} It is noteworthy that in the proceedings below, there does not appear to have been a dispute as to the factual scenario but instead as to whether the property where P.J. and P.J. were located at the time of the incident belonged to the school district and whether the conduct actually violated the rules contained in the Student Code of Conduct. Therefore, we will now consider whether the trial court's finding that the preponderance of the evidence supported the Board's ruling was an abuse of discretion.

{¶20} Regarding Rule 1, Judd asserts that there was no evidence that the students' conduct disrupted any function of the school. Rule 1, in pertinent part, states that a student shall not "by use of violence, force, noise, coercion, threat, harassment, intimidation, fear, passive resistance or any other conduct, cause, attempt, or threaten to cause the disruption or obstruction of any lawful mission, process, activity, or function of the school, nor encourage others to do so." As noted in the Discipline Report, the statements of two Chardon High School students established that P.J. and P.J. had attempted to sell some type of drugs during the school day, thereby causing a disruption of the function of the school. This is further supported by the Report's statement that an electronic scale was found in their car, along with other drug related items.

{¶21} Concerning Rule 4, it states that students shall not "use, possess, handle, transmit, sell or conceal any object that can be classified as a weapon or dangerous instrument * * * or instruments that may be disruptive to education." Although this rule does refer to weapons, it was not improper or unsupported by evidence for the Board

and the trial court to find that instruments related to drug use and distribution are "instruments disruptive to education," especially when considered in light of the assertions that such instruments were used to help offer drugs for sale at the school.

{¶22} Finally, regarding Rules 6 and 10, Judd states that there was no evidence that P.J. and P.J. were in possession of a prohibited drug or tobacco item. Rule 6 states that students "shall not possess * * * offer to sell, or conceal any drug of abuse, instrument or paraphernalia," while Rule 10 states that students shall not possess "tobacco or tobacco containers." The Discipline Report prepared by Assistant Principal May indicated that both a pipe containing what appeared to be marijuana residue, as well as cigarettes, were removed from the car, violating the foregoing rules. This supports a finding that P.J. and P.J were in possession of both drug paraphernalia and tobacco. *See Mayeux*, 2008-Ohio-1335, at ¶ 34 (where cigarettes were found in a student's car and the student possessed the car, the cigarettes were in his possession for the purposes of the school's rule against possession of tobacco), citing Black's Law Dictionary (4 Ed. 1957) 1325 ("[t]he term 'possession' ordinarily implies control or custody of something for one's use and enjoyment as owner").

{¶23} Although the testimony presented is limited, based on all of the evidence present in the record, we cannot find that the trial court abused its discretion in finding that the preponderance of reliable, probative, and substantial evidence supported the Board's finding that the foregoing rules were broken.

{¶24} The first assignment of error is without merit.

{¶25} In her second assignment of error, Judd argues that the conduct of P.J. and P.J. did not occur on school property and, therefore, could not provide the basis for their expulsion.

{¶26} Appellees argue that the foregoing rules were applicable because the conduct took place on a school conveyance, a parking lot in which Chardon High School students parked, property to which the school had an easement from the City of Chardon.

{¶27} The Code of Student Conduct states that "[u]nless otherwise noted in the individual section, this code shall be applicable on school grounds at all times or off school grounds during a school-sponsored activity, on any school conveyance and at any other time when the student is subject to the authority of the school." This provision is applicable to all four rules discussed above, as they do not contain any notations indicating otherwise.

{¶28} Although it is not immediately clear from the transcript, both parties asserted throughout the proceedings below that P.J. and P.J. were in a parking lot across from the school when the items were removed from their car. In a letter from Judd's counsel, it was noted that the offenses occurred on property owned by the City of Chardon.

{¶29} Presented as part of the transcript of proceedings was a document granting an easement on a certain piece of property from the City of Chardon to the Chardon Local School District. The document states that the City "does hereby give, grant, bargain and convey" such easement to the Chardon Local School District. Appellees have contended throughout the proceedings that this easement applied to the

property on which P.J. and P.J. were located at the time the items were retrieved from their car. Although the record does not clearly show whether the easement was over the exact portion of the property where the car was located, due to the inaudible or unintelligible portions of the transcript, we must give deference to the agency's resolution of any evidentiary conflicts. *Lawson v. Foster*, 76 Ohio App.3d 784, 788, 603 N.E.2d 370 (2nd Dist.1992). The existence of this easement, and the language conveying the easement to the school district, supports the contention that the land was a "school conveyance." *See Christiansen v. Schuhart*, 193 Ohio App.3d 89, 2011-Ohio-1199, 951 N.E.2d 107, ¶ 36 (5th Dist.) (an easement is an interest in land that can be created by a conveyance). Therefore, we cannot find that the trial court abused its discretion by finding that the conduct violated the school rules by taking place on "any school conveyance," as required by the Code of Student Conduct.

{¶30} The second assignment of error is without merit.

{¶31} Based on the foregoing, the judgment of the Geauga County Court of Common Pleas, affirming the Chardon Board of Education's affirmation of the expulsion imposed on P.J. and P.J., is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.