

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

KEVIN JOHNSON,	:	
	:	CASE NO. CA2008-09-215
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- vs -	:	8/3/2009
	:	
EDGEWOOD CITY SCHOOL DISTRICT	:	
BOARD OF EDUCATION,	:	
	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2006-12-4523

J.C. Shew, 16 North Main Street, Middletown, Ohio 45042 and Fred S. Miller, 246 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

Frost Brown Todd LLC, Thomas B. Allen, Joseph W. Scholler, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Edgewood City School District Board of Education (Board), appeals from the August 13, 2008 decision of the Butler County Court of Common Pleas reversing the decision of the Board to terminate plaintiff-appellee, Kevin Johnson. For the reasons outlined below, we affirm the decision of the common pleas court.

{¶2} Appellee was a teacher at Edgewood High School from November 25, 1991

until his termination on November 15, 2006. Appellee's termination stemmed from a project assigned to his 2006 senior sociology class known as the "20-Year Reunion" project, where students would make predictions about their fellow classmates' future lives. The predictions were to be read aloud in class by appellee, after being "screened" for appropriateness. Based upon student complaints that some predictions were embarrassing or upsetting, the Board suspended appellee, without pay, pending termination.

{¶3} The Board decided to terminate appellee, but appellee elected to have a hearing before an appointed referee pursuant to R.C. 3319.16. The hearing was conducted on September 18-19, 2006, after which the referee issued a determination of the facts and decision recommending that appellee be reprimanded but not terminated. Choosing to reject the recommendation, the Board reverted back to its initial decision to terminate appellee and, consequently, issued a Resolution and Order of Termination. The Order detailed the facts before the referee and the referee's conclusions the Board accepted and rejected.

{¶4} Upon termination, appellee initiated an administrative appeal of the Board's decision to the Butler County Court of Common Pleas. The common pleas court reversed the decision of the Board stating that appellee's termination was against the greater weight of the evidence. Appellant then filed this timely appeal, raising the following assignments of error:

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE BOARD."

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION BY REVERSING THE TERMINATION DECISION OF THE BOARD OF EDUCATION."

{¶7} In both assignments of error appellant argues that the common pleas court abused its discretion in not following the Board's decision to terminate appellee for immorality

or other good and just cause pursuant to R.C. 3319.16.¹ As such, the assignments of error will be addressed simultaneously.

{¶8} A thorough review of the appropriate standards of review for both the common pleas court and the appellate court is necessary. "Although the common pleas court's review of a board's decision is not de novo, R.C. 3319.16 empowers the court to weigh the evidence, hold additional hearings, if necessary, and to render factual determinations." *Katz v. Maple Heights City Sch. Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 256, 260; see, also, *Oleske v. Hilliard City Sch. Dist. Bd. of Edn.* (2001), 146 Ohio App.3d 57, 62. A common pleas court may reverse a Board's decision to terminate "only where it finds that the order is not supported by or is against the weight of the evidence." *Kitchen v. Bd. of Edn. of Fairfield City Sch. Dist.*, Butler App. No. CA2006-09-234, 2007-Ohio-2846, ¶17, citing *Katz* at 260. Furthermore, if there exists "substantial and credible evidence" in support of the charges of the Board, and "a fair administrative hearing is had, the [common pleas court] cannot substitute its judgment for the judgment of the administrative authorities." *Id.*, citing *Bertolini v. Whitehall City Sch. Dist. Bd. of Edn.* (2000), 139 Ohio App.3d 595, 604; *Strohm v. Reynoldsburg City Sch. Dist. Bd. of Edn.* (Mar. 31, 1998), Franklin App. No. 97APE07-972.

{¶9} Comparatively, the scope of review by an appellate court is "extremely narrow" and "strictly limited to a determination of whether the common pleas court abused its discretion." *James v. Trumbull Cty. Bd. of Edn.* (1995), 105 Ohio App.3d 392, 396. "Absent an abuse of discretion, an appellate court may not engage in what amounts to a substitution of the judgment of the common pleas court." *Id.* An abuse of discretion is "more than an error of law or judgment" but a "perversity of will, passion, prejudice, partiality, or moral

1. R.C. 3319.16 provides: "The contract of any teacher employed by the board of education of any city, exempted village, local, county, or joint vocational school district may not be terminated except for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause."

delinquency." *Oleske* at 62. An abuse of discretion implies "that the court's attitude is unreasonable, arbitrary or unconscionable." *Katz* at 261. Therefore, appellate courts must take great care in applying the abuse of discretion standard, making sure that a reversal occurs only where the trial court truly acted unreasonably or unconscionably.

{¶10} In this case, the common pleas court found that the Board's decision was not supported by the weight of the evidence and reversed its decision to terminate appellee. The common pleas court relied on the evidence presented to the referee that appellee had a strong employment record, was praised as being an "outstanding teacher" by the Board just prior to this incident, had been assigning this project for 12 years without previous issue, had no malicious intent to harass the students, and was not provided with unambiguous instructions regarding the assignment.² The common pleas court weighed the evidence, rendered factual determinations, and reversed the board's termination of appellee as being against the weight of the evidence. We cannot say that the common pleas court abused its discretion in making this determination.

{¶11} Most instances of abuse of discretion result from decisions which are "simply unreasonable," having "no sound reasoning process that would support [the] decision." *James* at 396. Reversal is inappropriate if the sole reason for it is that the reviewing court is not persuaded by the reasoning process of the lower court. *Id.*, citing *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161. A reviewing court must not substitute its own judgment for the judgment of the lower court but, rather, determine whether, through the evidence presented, the lower court acted without reason.

{¶12} In *Graziano v. Board of Education of Amherst Exempted Village School District*

2. In 14 years of teaching, appellee had been reprimanded only once, for sending inappropriate emails on a school computer. This occurred a few months before appellee was praised as being an outstanding teacher.

(1987), 32 Ohio St.3d 289, 293, the Ohio Supreme Court determined that the common pleas court did not abuse its discretion when it determined that the school board's termination of a teacher was not supported by the "preponderance of the evidence." The Court held that "given the precise language of R.C. 3319.16, along with [the Supreme Court's] pronouncement in *Hale*...the court of common pleas acted well within the scope of its powers in reversing the board of education's decision" and, therefore, the common pleas court "did not abuse its discretion." *Id.* at 293-4.

{¶13} In *Oleske v. Hilliard City Schools*, the Tenth Appellate District upheld the common pleas court's ruling that the school board's termination of a teacher who told students "dirty" jokes and used derogatory terms to describe another teacher was not against the weight of the evidence. *Oleske* at 65. The appellate court stated that it "simply [could not] find an abuse of discretion on the part of the common pleas court in affirming [the school board]'s order." *Id.*

{¶14} In *James v. Trumbull County*, the Eleventh Appellate District upheld the common pleas court's reversal of the school board's termination of a teacher who used controversial treatments for students with severe handicaps. *James* at 399. In determining whether the common pleas court's decision was unreasonable, arbitrary or unconscionable the appellate court concluded that the common pleas court's opinion was a "well-reasoned and articulated basis" for reversal. *Id.* at 396. The court concluded that it was "unable to deduce that the trial court abused its discretion by reversing the decision of [the school board]." *Id.* at 399.

{¶15} In *Katz v. Maple Heights*, the Eighth Appellate District reversed the judgment of the common pleas court upholding the school board's termination of a teacher for the falsification of a sick leave statement. *Katz* at 264. The common pleas court affirmed the school board's decision to terminate the teacher even though he was considered "an

effective and competent teacher" and had no prior disciplinary infractions on his record. *Id.* at 262. The appellate court determined that where there is "a range of possible sanctions for a particular offense," the school board "must consider a teacher's employment record prior to imposing a particular sanction." *Id.* at 263. Because the common pleas court affirmed the decision of the school board to impose "the most severe sanction" of termination upon the teacher without first "consider[ing the] teacher's employment record," the common pleas court abused its discretion. *Id.*

{¶16} Finally, in *Kitchen v. Board of Education*, this court held that the common pleas court did not abuse its discretion in upholding the school board's decision to terminate the assistant superintendent after appearing at a school football game while intoxicated and, subsequently, being arrested for operating a vehicle while under the influence. *Kitchen*, 2007-Ohio-2846 at ¶1-2. The referee, school board, and common pleas court determined that there was significant evidence of the assistant superintendent's inappropriate conduct. Though the referee suggested punishment other than termination, the school board disagreed and terminated the assistant superintendent. Upon review of the facts of the case, the common pleas court determined that it was not against the weight of the evidence for the school board to terminate the assistant superintendent, relying on evidence that the conduct of the assistant superintendent was a "public, serious and hostile matter" which would prevent the assistant superintendent from performing "her many leadership responsibilities" including "her involvement in programs such as drug and alcohol education for the district." *Id.* at ¶34. Based upon these facts, this court held that the common pleas court's decision was not "unreasonable, arbitrary, or unconscionable" and, therefore, "no abuse of discretion" existed. *Id.*

{¶17} In this case, the trial court did not abuse its discretion in determining the grounds for appellee's termination were not established by the evidence.

{¶18} The Board accepted the referee's findings that appellee had been implementing this specific assignment for 12 previous years without incident and that at least the Department Chairman knew of the assignment, although the Board claims no administrator nor many of the students' parents knew of the assignment. Furthermore, the Board accepted the referee's findings that appellee was "a good teacher in his early years and an outstanding teacher in his later years," despite the reprimand appellee received for sending inappropriate emails on a school computer. According to *Katz*, a good employment record, such as appellee's, "must [be] consider[ed]" by a school board "prior to imposing a particular sanction." *Katz* at 263. There is no indication in the Board's Order of Termination that appellee's employment record was considered by the Board before termination, only that the Board acknowledged its existence. It is undisputed that appellee had a good employment record.

{¶19} Though accepting appellee's history of strong employment, the Board rejected other factual determinations made by the referee, even though the referee is an impartial party "best able to observe the demeanor of the witnesses and weigh their credibility." *Graziano* at 293. The Board rejected the referee's findings that one of the student-witnesses was not credible. Even though the student made a statement which differed from the recollections of the other students who testified—a statement the referee felt reflected poorly on the credibility of the student—the Board determined that the statement was "irrelevant" to the student's credibility.

{¶20} Instead, the Board relied heavily on testimony of the school district's Superintendent. The Superintendent testified about the importance of teachers not ridiculing students and provided reasons why it was possible many of the students in appellee's sociology class would not want to complain about being embarrassed by the comments read

in class or get involved in the hearing.³ The Board claimed the referee "failed to consider" and "ignored" the testimony.

{¶21} In its review of the referee's findings and the Board's decision, the trial court first stated that appellee's termination must be rationally based on conduct that the Board "perceived to be immoral or conduct that constituted a good and just cause for termination" pursuant to R.C. 3319.16. After the review of several cases involving termination due to immorality or other good and just cause, the trial court determined that appellee's actions were not repetitive in nature, nor did they have a distinct level of severity of conduct which was typical in cases where termination was upheld.⁴ Although the Board argued that appellee's indiscretions were related to his professional judgment, status as a role model, and responsibilities as a teacher, the trial court pointed to the referee's findings that only this instance concerned appellee's poor judgment in regard to students and this incident resulted only in minor embarrassment to students rather than more severe conduct. Thus, the trial court concluded that the relevant Ohio cases involving terminations of teachers due to repetitive acts and/or severe conduct are distinguishable from the case at hand.

{¶22} Upon conclusion of its careful review of the relevant case law, the briefs, the referee's decision and the Board's Order of Termination, the trial court determined that: "the weight of the evidence indicates that the Referee's Decision should have been given the appropriate level of deference. The Referee, an impartial party charged with reviewing all evidence and testimony, issued a fair and rational decision, indicating that termination of a

3. There is no evidence in the record that any students, other than the four involved here, were embarrassed by the "20 Year Reunion" project.

4. See *Ricchetti v. Cleveland City Sch. Dist. Bd. of Edn.* (Mar. 3, 1994), Cuyahoga App. No. 64833, 1994 WL 66227 (school psychologist charged with kidnapping and illegal restraint of a minor for the purposes of engaging in sexual activity; convicted of illegal restraint misdemeanor); *Oleske v. Hilliard City Sch. Dist. Bd. of Edn.* (2001), 146 Ohio App.3d 57, (teacher engaged in several instances of telling dirty jokes to students and referring to another teacher by a derogatory name); and *Kitchen v. Bd. of Edn. of Fairfield City Sch. Dist.*, Butler App. No.

teacher with a strong employment record is an excessive measure when reprimand and unambiguous instructions regarding the assignment would have been more appropriate. *** This Court finds that the Board's decision to terminate the [appellee] is against the greater weight of evidence and hereby rules in favor of the [appellee] on the merits of this case."

{¶23} Through its very language, the trial court followed the guidelines of R.C. 3319.16, as well as Ohio case law, in determining that the Board's decision to terminate appellee was against the greater weight of the evidence.

{¶24} Although it is the province of the Board to determine the significance of the facts and make a determination accordingly, it is also the province of the common pleas court to determine when the decision to terminate is not supported by the weight of the evidence. See *Kitchen* at ¶39. Because there is evidence in the referee's Findings and Recommendation as well as the Board's Resolution and Order of Termination to support the common pleas court's decision, it cannot be said that the common pleas court acted unreasonably, arbitrarily, or unconscionably. Therefore, we find no abuse of discretion in this case.

{¶25} Because we find that the common pleas court did not abuse its discretion in determining that the Board's decision was not supported by and consistent with the weight of the evidence, appellant's two assignments of errors are overruled.

{¶26} Judgment affirmed.

YOUNG, J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶27} Because I am bound to review the trial court's decision under an abuse of discretion standard, I concur with the judgment of this court. However, I cannot say that the school board's decision to terminate appellee was incorrect. Ohio legislators place great responsibility on boards of education to govern school districts throughout Ohio. Specifically, R.C. 3319.07 charges school boards with employing teachers, and R.C. 3319.16 sets forth the extensive process a school board must implement before terminating a teacher's contract.

{¶28} Given the facts, it is obvious that the school board adopted a remedy based on the authority conferred by statute. Though this remedy differed from the trial court's, I maintain that an appellate court and trial court should grant deference to a school board's decision. It is impossible to ignore the reality that a school board's decisions are subject to review as much, if not more so, by its constituents than a reviewing court. Because of that realization, a trial court's remedy should be tempered by the responsibility a school board has to its students, community, and legislative duties. As such, the trial court should be limited in its review and should not disturb a school board's decision unless that decision is arbitrary, unreasonable, or unconscionable. Therefore, and until the Ohio Supreme Court broadens our scope of review (if ever) when considering a trial court's review of a school board's decision, I will concur in judgment only.

[Cite as *Johnson v. Edgewood City School Dist. Bd. of Edn.*, 2009-Ohio-3827.]