

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DONALD R. CONTINI

Plaintiff-Appellant

-VS-

OHIO STATE BOARD OF EDUCATION

Defendant-Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2007CA0136

O P I N I O N

CHARACTER OF PROCEEDING:

On Appeal from the Licking County Court of
Common Pleas, Case No. 07 CV 0502

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

November 4, 2008

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Delaney, J.

{¶1} Plaintiff-Appellant, Donald R. Contini, appeals the October 9, 2007 judgment of the Licking County Court of Common Pleas which affirmed the decision of Defendant-Appellee, Ohio State Board of Education, to revoke Appellant's teaching license.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant was employed as a high school science teacher for the Whitehall City School District in Columbus, Ohio for the school year of 2004-2005. On May 2, 2006, the Office of Professional Conduct notified Appellant that Appellee intended to determine whether to limit, suspend or revoke Appellant's permanent high school teaching certificate issued to him in 2001 pursuant to R.C. 3319.31(B)(1) and (B)(2)(c).

{¶3} Appellee sent Appellant an amended notice on July 28, 2006, advising him of the reasons for the proposed action. According to the Ohio Department of Education, on May 6, 2005, Appellant attended a high school dance smelling of alcohol and engaged in inappropriate physical contact with a female student. The female student testified that Appellant commented that she looked nice in her dress. (T. 75-77). He then came up behind her and told her that her ass looked good in her dress. Id. He rubbed his hand across her buttocks. Id. Further, the Ohio Department of Education noted Appellant had prior convictions in the Licking County Municipal Court for one count of a misdemeanor violation of a civil protection order on July 14, 2003 and one count of misdemeanor assault on June 28, 2004.

{¶4} Appellant requested a hearing before the Ohio State Board of Education and was represented by counsel at the hearing on November 27 and 28, 2006. Thirteen witnesses and forty-one exhibits were admitted into the record.

{¶5} On January 5, 2007, the hearing officer issued his Report and Recommendation, finding that sufficient evidence was presented to conclude that Appellant's convictions, his behaviors underlying those convictions and the incident at the high school dance were in violation of R.C. 3319.31(B)(1) and (B)(2)(c). The hearing officer recommended that Appellant's permanent high school teaching license be revoked, but Appellant should be eligible to reapply for a new license after a two-year period if he could present suitable evidence to Appellee that he was no longer under the influence of alcohol and had received mental health counseling.

{¶6} Appellee considered the hearing officer's Report and Recommendation, as well as objections filed by Appellant. Appellee approved a Resolution adopting the Report and Recommendation of the hearing officer. On March 20, 2007, Appellee sent Appellant a copy of the Resolution and an explanation of the appeals process pursuant to R.C. 119.12.

{¶7} Appellant timely appealed the Resolution to the Licking County Court of Common Pleas. On October 9, 2007, the trial court affirmed Appellee's decision to revoke Appellant's teaching license. Appellant now appeals.

{¶8} Appellant raises seven Assignments of Error:

{¶9} "I. THE 2003 CPO VIOLATION CANNOT, AS A MATTER OF LAW, BE A BASIS FOR REMOVING A TEACHER'S LICENSE BECAUSE THERE WAS NO EVIDENCE THAT THE CPO VIOLATION INVOLVED AN 'OFFENSE OF VIOLENCE'

UNDER R.C. 3319(B)(2)(c), AND NO NEXUS BETWEEN THE CPO VIOLATION AND BEING A GOOD TEACHER WAS EXPLAINED IN THE FINDINGS.

{¶10} “II. THE COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT FAILED TO OVERTURN THE HEARING OFFICER’S REFUSAL TO ADMIT MR. CONTINI’S MITIGATING EVIDENCE REGARDING THE ASSAULT - *I.E.*, PAUL IKEHORN’S VOICE MAIL MESSAGES - TO SUPPORT APPELLANT’S STATEMENTS THAT IKEHORN WAS A VIOLENT MAN WHO INITIATED THE CONFRONTATION THAT LED TO THE ASSAULT CHARGE.

{¶11} “III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RULE THAT PAUL IKEHORN’S TROUBLED PAST BE INCLUDED IN THE FINDINGS PRESENTED TO THE EIGHTEEN-MEMBER BOARD. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED A FINDING THAT THE SENTENCING COURT FOUND IKEHORN TO BE A GOOD PERSON, NOTWITHSTANDING A TOTAL LACK OF RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE IN THIS REGARD.

{¶12} “IV. THE COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT FAILED TO ORDER THE BOARD TO RECOGNIZE THAT APPELLANT ALREADY HAS COMPLETED TREATMENT FOR HIS MENTAL CONDITION THAT CONTRIBUTED TO THE ASSAULT CHARGE.

{¶13} “V. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO FIND THERE WAS NO RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE TO SUPPORT THE HEARING EXAMINER’S FINDINGS (1) THAT MR. CONTINI WAS IMPAIRED AT THE SCHOOL PROM, (2) THAT HE DID NOT EVEN KNOW WHAT HE DID ON PROM NIGHT, (3) THAT HE SAID HE USED MOUTHWASH ON PROM

NIGHT, AND (4) THAT STUDENT JANELLE COUSINS REFUSED TO DANCE WITH HIM.

{¶14} “VI. THE COURT OF COMMON PLEAS ABUSED ITS DISCRETION IN FAILING TO OVERTURN THE FINDING THAT ELAINA NORRIS WAS A CREDIBLE WITNESS, BECAUSE HER TESTIMONY WAS DIRECTLY CONTRADICTED BY ANOTHER ODE WITNESSES, BECAUSE ELAINA NORRIS LIED UNDER OATH, AND BECAUSE THE ALLEGED LOCATION OF THE INAPPROPRIATE CONTACT MAKES ELAINA NORRIS’ STORY UNBELIEVABLE.

{¶15} “VII. THE COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW BY AFFIRMING THE HEARING OFFICER’S FAILURE TO ORDER THE DISCLOSURE OF THE INVESTIGATIVE FILE SO AS TO PROVIDE APPELLANT WITH EXCULPATORY EVIDENCE.”

STANDARD OF REVIEW

{¶16} For the purposes of simplicity, we will first discuss our standard of review regarding Appellant’s arguments before this Court. In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. Reliable, probative and substantial evidence has been defined as: (1) “Reliable” evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) “Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) “Substantial” evidence is evidence with some weight; it must

have importance and value.” *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.

{¶17} In determining evidentiary conflicts, the Ohio Supreme Court in *University of Cincinnati v. Conrad* (1980), 63 Ohio State 2d 108, 407 N.E.2d 1265, directed courts of common pleas to give deference to the administrative resolution of such conflicts. The Supreme Court noted when the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265.

{¶18} On appeal to this Court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. In reviewing the trial court's determination that Appellee's order was supported by reliable, probative and substantial evidence, this Court's role is limited to determining whether the trial court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680, 610 N.E.2d 562. The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

I.

{¶19} Appellant argues in his first Assignment of Error it was error for Appellee to revoke Appellant's teaching license pursuant to R.C. 3319.31(B) based upon

Appellant's misdemeanor conviction for violation of a civil protection order. On July 14, 2003, Appellant was convicted by the Licking County Municipal Court for violating a civil protection order issued by the Licking County Court of Common Pleas, Domestic Relations Division. Appellant's wife filed a civil protection petition against Appellant because Appellant made threats to his wife during their divorce. (Tr. 35). Appellant was ordered to refrain from entering, approaching or contacting his wife. Id. Appellant entered the residence of Paul Ikehorn, where he knew his former wife was located. Id. Appellant argues this conviction is insufficient to support Appellee's decision to revoke his teaching license.

{¶20} R.C. 3319.31(B) states in pertinent part:

{¶21} "(B) 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:

{¶22} "(1) Engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position;

{¶23} "(2) A plea of guilty to, a finding of guilt by a jury or court of, or a conviction of any of the following:

{¶24} "* * *

{¶25} "(c) An offense of violence;

{¶26} "* * *"

{¶27} Appellant argues that because his conviction for violation of the civil protection order was not based upon a violent act, Appellee must have relied upon R.C. 3319.31(B)(1) to revoke his teaching license. It has been held that if the state board revokes a license for conduct unbecoming to the teacher's position, the board must show some "nexus" between the conduct the individual is accused of and the individual's performance as a teacher. *Freisthler v. State Bd. of Educ.*, 3rd Dist. No. 1-02-36, 2002-Ohio-4941, ¶ 20.

{¶28} Upon our review of the record in this matter, we find the revocation of Appellant's teaching license was not solely based upon Appellant's conviction for violation of a civil protection order. Appellee also based its decision to revoke Appellant's license upon Appellant's undisputed conviction for assault and the incident with a student at the high school dance. Pursuant to R.C. 3319.31(B)(2)(c), the state board may revoke Appellant's license for a conviction of an offense of violence. And as we will discuss in further detail when addressing Appellant's remaining Assignments of Error, we find it was not an abuse of discretion for the trial court to find Appellee properly revoked Appellant's teaching license on the authority of R.C. 3319.31(B)(1) based upon the acts that occurred at the high school dance.

{¶29} Appellant's first Assignment of Error is overruled.

II., III.

{¶30} Appellant argues in his second and third Assignments of Error that the trial court abused its discretion in relation to evidentiary issues concerning Paul Ikehorn. Paul Ikehorn is the paramour of Appellant's former wife. (T. 220). On June 28, 2004, Appellant was convicted by the Licking County Municipal Court on one count of assault

against Paul Ikehorn. Appellant was fined \$250 plus court costs and was sentenced to ninety-days in jail, with thirty-days suspended. In addition, the municipal court ordered Appellant to make restitution to Ikehorn for lost wages.

{¶31} Appellant raises the issue of Ikehorn in relation to Appellant's conviction for assault. Appellant's conviction for assault was one of the reasons for Appellee's decision to revoke Appellant's teaching license pursuant to R.C. 3319.31(B). Appellant argues in his second Assignment of Error that he should have been permitted to introduce evidence before the Hearing Officer of Ikehorn's bullying voice mail messages to Appellant as means of explaining the reason for Appellant's conviction for assault.

{¶32} Upon review of the record before the Hearing Officer, we find the record to be replete with evidence of Appellant's confrontational relationship with Ikehorn. Further, R.C. 3319.31(B)(2)(c) states that the state board of education may revoke a license issued to any person if that person has been convicted of an offense of violence. It is undisputed that on June 28, 2004, the Licking County Municipal Court convicted Appellant of assault, in violation of R.C. 2903.13. R.C. 2903.13 states in pertinent part, "[n]o person shall knowingly cause or attempt to cause physical harm to another ***."

{¶33} Appellant continues to argue in his third Assignment of Error that the Hearing Officer failed to include evidence of Ikehorn's bad character in the Hearing Officer's decision to recommend that Appellant's teaching license be revoked. The judgment of the trial court to affirm Appellee's order, Appellant argues, was therefore an abuse of discretion because Appellee's order was not based upon reliable, probative and substantial evidence.

{¶34} We find again that it is undisputed that Appellant was convicted of assault, an offense of violence pursuant to R.C. 3319.31(B)(2)(c). The trial court did not abuse its discretion in affirming the decision of Appellee on this basis.

{¶35} Appellant's second and third Assignments of Error are overruled.

IV.

{¶36} In Appellant's fourth Assignment of Error, he argues the trial court abused its discretion when it did not reverse and remand the decision of Appellee to revoke Appellant's teaching license for Appellee's failure to consider Appellant's prior mental health treatment. Appellee stated in its Resolution revoking Appellant's teaching license that Appellant may reapply for his license after a period of two years "provided that he can present suitable evidence to the State Board that he is no longer under the influence of alcohol and has received appropriate counseling for his mental health problems." (Resolution to Accept the Report and Recommendation of the Hearing Officer to Revoke the Permanent High School Teaching License of Donald R. Contini). Appellant argues that evidence was presented at the hearing that Appellant has already received professional treatment, but it was not included in the Hearing Officer's recommendation. Therefore, the matter should be sent back to the state board of education so that they may consider that in determining when Appellant can reapply for his license.

{¶37} Ohio Adm.Code 3301-73-22(A) states, in relevant part, that:

{¶38} "(2) Revocation of a license is a permanent action. After revoking a license, the state board shall impose one of the following conditions:

{¶39} “(a) The state board may establish a minimum period of time before an applicant can apply for a new license. At the conclusion of the specified period, and upon demonstration of compliance with any educational requirements, the terms of the state board's order, and the criteria set forth in rule 3301-73-24 of the Administrative Code, the state board may issue a new license to the applicant.”

{¶40} A review of the transcript shows a great deal of the testimony related to Appellant's struggles with alcoholism, depression and bipolar disorder. There was testimony from Appellant and Appellant's sister that Appellant had participated in treatment for his alcoholism and was taking medication for his mental health issues. (T. 180-181; 337). This evidence was before the Hearing Officer and he recommended that Appellant's teaching license be revoked and that Appellant may reapply for his license after two years with the submission of evidence that he is no longer under the influence of alcohol and has received mental health counseling. As stated above, the trial court is to defer to the administrative body in the determination of evidentiary issues. *Conrad*, supra. We cannot find an abuse of discretion for the trial court to affirm the administrative decision based upon this determination.

{¶41} Appellant's fourth Assignment of Error is overruled.

V., VI.

{¶42} Appellant's fifth and sixth Assignments of Error argue the trial court abused its discretion in finding the administrative decision regarding the incident at the high school dance was supported by reliable, probative and substantial evidence. On May 6, 2005, Appellant attended a school dance at Whitehall-Yearling High School. He was not a chaperone for the dance, but several of his students had invited him to the

event. A sixteen-year-old junior at the time of the dance testified at the hearing that she spoke with Appellant at the dance. While they were speaking, the student testified that she smelled alcohol on Appellant's breath. She testified that Appellant told her that she looked nice in her dress and then Appellant came up behind her and told her that her ass looked good in her dress. He rubbed his hand across her buttocks. (T. 75-77). After the interaction, the student reported the incident to a teacher chaperone at the dance. The teacher reported the incident to the school principal, who confronted Appellant at the dance. Appellant became angry and left the dance. (T. 126-129). At the hearing, three individuals testified that they smelled alcohol on Appellant's breath. (Id., T. 126-129, 99, 58-61).

{¶43} Appellant objects to five evidentiary findings made by the Hearing Officer: (1) that Appellant was impaired at the school dance; (2) that Appellant did not know what he did at the dance; (3) that Appellant said the witnesses smelled mouthwash on his breath; (4) that one student testified that she refused to dance with him; and (5) that the student involved in the incident was a credible witness. In reviewing an administrative decision, the trial court reviews the order to determine whether the order was supported by reliable, probative and substantial evidence and in accordance with the law. In determining evidentiary conflicts, the trial court is to give deference to the administrative resolution of such conflicts. *Conrad*, supra. When the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265.

{¶44} When the matter reaches the appellate level, we review the trial court decision through a smaller window, whether the trial court's judgment is an abuse of discretion. Upon our review of the record before us and with the understanding that the trial court must defer the resolution of evidentiary conflicts to the Hearing Officer who had opportunity to determine the witnesses' credibility and weigh the evidence, we cannot find the trial court abused its discretion in affirming the administrative order and its resolution of those evidentiary conflicts. Appellant's fifth and sixth Assignments of Error are overruled.

VII.

{¶45} Appellant argues in his final Assignment of Error that he should have had access to the Ohio Department of Education's investigative file so that he could have determined that Appellee's witnesses to the incident at the high school dance had made inconsistent statements. Appellant requested the file at the administrative level, which was denied. Appellant filed a motion with the trial court to request the file through discovery. The trial court did not rule on the motion before issuing its judgment on October 9, 2007. It has been held that a trial court's failure to rule on a motion is normally deemed to be a denial of that motion for purposes of appellate review. *State v. Olah* (2001), 146 Ohio App.3d 586, 767 N.E.2d 755, fn. 2.

{¶46} A decision regarding the disposition of discovery issues is reviewed under an abuse of discretion standard. *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198. We find the trial court did not abuse its discretion in denying Appellant's motion for the investigative file. Further, Appellant had the

opportunity to confront the witnesses to the incident at the administrative hearing and did cross examine those witnesses as to their recollection of the incident.

{¶47} As such, Appellant's seventh Assignment of Error is overruled.

{¶48} The judgment of the Licking County Court of Common Pleas is affirmed.

By Delaney, J.

Farmer, J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

HON. JOHN W. WISE