IN THE SUPREME COURT OF OHIO

SHAWN JONES, Plaintiff-Appellee, v. KENT CITY SCHOOL DISTRICT BOARD OF EDUCATION, Defendant-Appellant.	)	Case No. 2023-0376 On Appeal from the Eleventh Appellate District, Portage County, Ohio Court of Appeals Case No. 2021-P-0094

MERIT BRIEF OF PLAINTIFF-APPELLEE SHAWN JONES

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I. INTRODUCTION

"The purpose of evaluations is to assist teachers in getting better."

Snyder v. Mendon-Union Local School Dist. Bd. of Edn., 75 Ohio St. 3d 69, 661 N.E.2d 717 (1996).

It is unfortunate that Defendant-Appellant Kent City Schools Board of Education (the "Board") has chosen to come before the Ohio Supreme Court and smear the reputation and character of Appellee Shawn Jones ("Mr. Jones"), who has loyally educated the students of its district for twenty years. What's more unfortunate is that the Board has chosen to suggest, without evidence, that Mr. Jones' absence from the Kent City School District's (the "District") flawed try at a third formal observation, which Mr. Jones missed because of medical reasons, was somehow sinister. The Board attempts, for the very first time in more than three years of litigation, to raise the issue of whether Mr. Jones' medical leave from May 11, 2020, to June 1, 2020, was proper. The Board further attempts to use this argument to try to factually distinguish this case from *Skilton v. Perry Local Sch. Dist. Bd. Of Edn.*, 102 Ohio St.3d 173, 2004-Ohio-2239, 807 N.E.2d 919, syllabus where this Court held that "[a] teacher's medical leave of absence does not excuse a school board from complying with R.C. 3319.111."

"A party who fails to raise an argument in the court below waives his or her right to raise it here." *State ex rel. Zollner v. Industrial Comm'n of Ohio*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1988), citing *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 530 N.E.2d 916 (1988). *See also Estlock v. Bd. of Zoning & Bldg. Appeals*, 9th Dist. Summit No. 21409, 2003-Ohio-4634, ¶ 8 ("A failure to raise an issue during an administrative appeal before the common pleas court operates as a waiver of the party's right to assert the issue for the first time to an appellate court").

The Board not only failed to question Mr. Jones' medical leave below, but it conceded at all stages below that Mr. Jones was on a medical leave of absence from May 11, 2020, to June 1,

2020. *See* Bd.'s Br. in Opp'n to Pl.'s Statutory Appeal, 6 ("Appellant went on a medical leave from May 11, 2020 to June 1, 2020."); Bd.'s Appeal Br., 5 ("Appellant took a medical leave from May 11, 2020 to June 1, 2020."). The Board represented to both the Common Pleas Court and the Eleventh District Court of Appeals that Mr. Jones was on medical leave from May 11, 2020, to June 1, 2020; the Eleventh District found that Mr. Jones was on medical leave; and now the Board argues that "the Eleventh District erroneously concluded that Jones was on medical leave." (Appellant's Merit Br., p. 7.) The Board's argument is without merit.

The administrative hearing transcript also reveals that Mr. Jones' medical leave was never in question:

> MR. MALARCIK [counsel for Mr. Jones]: All right. Mr. Larkin, you're aware that Mr. Jones was on a medical leave per his doctor's orders and had a medically excused absence from teaching from May 11th through June 1st, 2020?
>
> MR. LARKIN [assistant superintendent and director of personnel for Kent City Schools]: Correct.

(Tr. of Bd. of Educ. Meeting, 06/30/2020, 27.)[1] Any argument as to whether Mr. Jones' medical leave was proper has been waived, conceded, and is simply not before this Court.

The remainder of the Board's brief is rooted in calamitous, hyperbolic language, warning against an imaginary "constitutional crisis" unless this Court gives the Board what it wants. In reality, however, the Board simply disagrees with the sound logic of the Eleventh District Court of Appeals, which found that a "formal observation" of a teacher cannot occur if the teacher is not present to be observed.

As set forth herein, the Eleventh District's opinion should be affirmed, and the Board's propositions of law are without merit because: (1) R.C. 3319.111 mandated that Mr. Jones receive

[1] The transcript was filed in the Portage County Common Pleas Court on October 30, 2020 (Docket No. 6), and the record was supplemented with the hearing exhibits on June 16, 2021 (Docket No. 17).

three "formal observations" before the Board was permitted to not renew his limited teaching contract, a requirement that could not be altered by a collective bargaining agreement; (2) Mr. Jones did not receive three formal observations, which invalidates the nonrenewal of his contract; and (3) the Ohio Teacher Evaluation System Model, which sets forth a guide for school districts on teacher evaluation procedures and is implemented in R.C. 3319.111 and 3319.112, includes mandatory requirements, which have been violated.

II. STATEMENT OF FACTS

Because of the factual mischaracterizations contained in the Board's brief, it is necessary to provide this Court with a complete and accurate background before addressing the Board's propositions of law.

A. During the 2019-2020 school year, the District complained about the conduct of Mr. Jones, an educator of twenty years.

Plaintiff-Appellee Shawn Jones ("Mr. Jones") holds a certificate from the Ohio Department of Education to teach grades one through eight and had taught at Kent City Schools for twenty years. (Tr. at 52.) For the 2019 – 2020 school year, Mr. Jones' was on a one-year limited contract to teach Technology at Stanton Middle School. (*Id*. at 8.)

During the 2019-2020 school year, Mr. Jones received complaints from the District for two different reasons. First, it was alleged that Mr. Jones "was found leaving the building before the end of the school day on October 3rd, October 4th, October 7th, October 10th, October 11th, and October 14th, and left the building before the end of the school day without notifying the administration or asking permission from the administration." (*Id*. at 8-9.) It was also alleged that Mr. Jones failed to fulfill duties assigned to him on October 10, 2019, an early release day, and October 11, 2019, a teacher in-service day. (*Id*. at 9.) As a result, Mr. Jones was placed on a three-day suspension without pay in late October 2019. (*Id*. at 9-10.)

Mr. Jones responded to the allegations during the school board hearing on his contract non-renewal. There, he testified that, in most cases, he had a planned period at the end of the school day and did not have a scheduled class or students. (*Id*. at 53.) Mr. Jones explained that students are permitted to leave the building at 2:40 p.m. and the contractual time at which teachers may leave is 2:45 p.m. (*Id*. at 54.) On certain occasions, however, Mr. Jones admitted that he left the building, along with several other teachers, about five minutes early, at the same time as the students. (*Id*. at 54.) As to the early release and teacher in-service days, Mr. Jones admitted to leaving the building early along with other teachers; however, Mr. Jones had completed his job duties before leaving, just as he always had in his twenty years of teaching at Kent. (*Id*. at 54-55.) At his nonrenewal hearing, Mr. Jones testified:

> Ms. Ferguson: Mr. Jones, so are you stating that your work responsibilities were completed?
>
> Mr. Jones: Yes, ma'am, I am. I have never not done my work, whether it be lesson planning, whether it be my responsibilities on workdays. When we have our workdays, I do my work. I love my job.

(*Id*. at 55-56.)

Next, the District took issue with an accident that occurred on Monday, January 6, 2020, where Mr. Jones missed work and failed to secure a substitute teacher. Mr. Jones explained that he inadvertently called off on the following Monday, January 13, 2020, instead of January 6, 2020. (*Id*. at 12-13.) Mr. Jones testified:

> I did go into the system on the afternoon of Sunday, January 5th, and put in for a substitute teacher for the following day.
>
> I was very ill. I could not hear out of my right ear at all. I had woken up that morning with blood all over my face and bedding. I was also shaking and feeling sick. I thought that part was due to a recent diagnosis of diabetes.

> I checked the system. I checked the system later that afternoon to make sure I had a sub. Because if I did not have one, I would have called administration to see what I should do, as I always do. When I checked, I saw that Bradley Sisak had picked up my request."
>
> […]
>
> I was made aware of the situation when I was called into Mr. Horton's office on Thursday, the 9th, with Mrs. Scott and Mr. Larkin. As you know, I was in shock that I was not in the system. When we got into the system, it became clear that I did make a mistake. When I put in for a sub, I accidentally hit the following Monday's date instead, the 13th instead of the 6th. As I stated, it was a mistake and one made by me and a completely honest one.
>
> I have never once in my 20 plus years of teaching at Kent not just shown up for work without documentation.

(*Id*. at 41-42.)

B. Mr. Jones was placed on a "full cycle OTES evaluation."

As a result of the January 6, 2020, incident, Assistant Superintendent Thomas Larkin informed Mr. Jones that he would be placed on a "full cycle OTES evaluation" beginning January 14, 2020. (Tr. Ex. D, 11.) OTES stands for the "Ohio Teacher Evaluation System," and it sets forth "[t]he evaluation of teachers as required in Ohio Revised Code 3319.111 and 3319.112." (Tr. Ex. E, 2.) Mr. Larkin testified that, "procedurally, it was our responsibility from that January date and moving forward to complete three observations in the OTES evaluation model." (Tr. at 16.) R.C. 3319.111(E) requires *at least* three "formal observations" of a teacher who is under consideration for nonrenewal of a limited contract. The procedure for a "formal observation" of a teacher is described in the OTES Model Guide authored by the Ohio Department of Education. That guide states:

> The Formal Observation Process
>
> Observations of teaching provide important evidence when assessing a teacher's performance and effectiveness. *As an evaluator observes a teacher engaging students in learning*, valuable evidence may be collected on multiple levels. As part of the formal observation process, on-going communication and collaboration between evaluator and teacher help foster a productive professional relationship that is supportive and leads to a teacher's professional growth and development. Based upon researched best practices, the formal observation process consists of a pre-conference, classroom observation (and walkthroughs), and a post-conference. (Emphasis added.)

(Tr. Ex. E at 15.)

C. Mr. Jones did not receive three formal observations and, therefore, the Board was prohibited from non-renewing his contract.

Despite the requirement of R.C. 3319.111(E), the OTES Model Guide, and the Board's own admissions that Mr. Jones was required to undergo (at least) three formal observations, the Board failed to formally observe Mr. Jones three times. Instead, the Board observed him just twice.

The first formal observation of Mr. Jones occurred during an in-class session on January 29, 2020. The evaluator observed Mr. Jones' 6th Grade Communication Technology class. (Tr. Ex. I, at 1.)

On May 1, 2020, Mr. Jones received his second formal observation. With the adoption of remote learning due to the pandemic, Mr. Jones recorded a lesson which he shared with his students and the evaluator. (Tr. at 44-45; Ex. J.) Mr. Jones was also afforded a pre-conference and post-conference meeting with the evaluator. (Tr. at 44-45; Ex. J.) During the post-conference meeting, Mr. Jones invited the evaluator to observe his office hours on May 5 or May 6, 2020. (Tr. at 46.) The evaluator indicated she would try to attend one of those sessions for Mr. Jones' third formal observation, but ultimately, she failed to attend either session. (*Id*. at 46-47.) Instead, the evaluator planned to conduct Mr. Jones' third formal observation on May 11, 2020. (*Id*.)

Unfortunately, Mr. Jones became hospitalized on May 11, 2020. (*Id*. at 47.)

Mr. Jones testified he "woke up at like 4 a.m. with serious heart pains and everything. My wife said, let's get you to the hospital. So, I was laying in the hospital all day on the 11th." (*Id*.) Following his hospitalization, Mr. Jones' doctor advised him to take three weeks away from work for health reasons. (*Id*. at 47-48.) Mr. Jones was provided with a note which excused him from work from May 11, 2020, to June 1, 2020. At Mr. Jones' nonrenewal hearing, the assistant superintendent, Mr. Larkin, acknowledged that Mr. Jones was on medical leave from May 11, 2020, to June 1, 2020. (*Id*. at 27.)

With deadlines for teacher evaluations approaching, the District decided to attempt to conduct the third formal observation of Mr. Jones *without Mr. Jones*. Instead, "[o]n May 15, an observation was conducted of a Google Meets session where the students 'shar[ed] progress on their google sheets assignment.'" *Jones v. Kent City School District Board of Education*, 11th Dist. Portage No. 2021-P-0094, 2023-Ohio-265, ¶ 5. "Jones was not present during this session, as he was on a medical leave, and the evaluation consisted of observing the students working on a project Jones had designed." *Id*. "An invitation for a post-conference meeting on May 28th was sent to Jones, who did not attend." *Id*. Mr. Jones did not miss the post-conference meeting by choice, however, explaining: "it was not me refusing. I've never refused an administrator of anything. It was me following my doctor's orders." (Tr. at 48-49.)

At Mr. Jones' nonrenewal hearing, Assistant Superintendent Larkin implicitly recognized the District's shortcoming. Mr. Larkin testified: "I have an inclination that Mr. Jones is going to be disappointed with the May 15th observation, because Mr. Jones was not present during his - - the virtual class that day. However, again, we were up against deadlines and protocols." (*Id*. at 21.) Mr. Larkin went on to testify that the attempt to observe Mr. Jones without Mr. Jones present

"wasn't an ideal situation." (*Id*. at 22.) "It's not the preferred. But again, we needed to complete this observation to meet the timelines of the state. And that's why we completed that observation on the 15th." (*Id*. at 22.)

Mr. Larkin was not aware of any occasions in the entire district where an evaluator did a walkthrough or a teacher observation when the teacher was not present. (*Id*. at 37.)

Despite its best creative efforts, the District was still unable to meet the deadlines for timely evaluations. According to the face of the document, the final report, which needed to be completed by May 22, 2020, was not completed until May 28, 2020. (Tr. Ex. M.) That report indicated that based upon the observation that had been completed, Mr. Jones received a "Final Summative (Overall) Rating" of "Accomplished," which is the highest rating possible. (Tr. at 27; Exhibit M.)

D. Despite Mr. Jones' consistent high ratings and the Board's noncompliance with R.C. 3319.111, the Board voted not to renew Mr. Jones' contract, and Mr. Jones exercised his statutory right to appeal.

On May 19, 2020, the Board voted not to renew Mr. Jones' limited teaching contract. (Tr. Ex. O, 6.) On May 20, 2020, the Board notified Mr. Jones of his contract non-renewal via correspondence stating, "This notification of the Board of Education's action not to re-employ you is given in compliance with § 3319.11 of the Ohio Revised Code." (Tr. Ex. P.) On May 21, 2020, Mr. Jones made a written demand for the circumstances related to his nonrenewal. (Tr. Ex. Q.) On May 26, 2020, the Board returned the following justification for non-renewal:

> 1. Mr. Jones left Stanton Middle School before the end of the scheduled workday and without informing an administrator at Stanton Middle School on the following dates: * 10/3/19, 10/4/19, 10/7/19, 10/10/19, 10/11/19, and 10/14/19. Furthermore, you did not fulfill your assigned duties on early release day 10/10/19 and teacher work day 10/11/19. You were suspended without pay on 10/22/19, 10/23/19, and 10/25/19.
>
> 2. Mr. Jones was absent from work on January 6, 2020 without appropriately documenting the absence in absence management or

> by notifying administration. As a result of your actions, students were left unsupervised.

(Tr. Ex. R.)

On May 29, 2020, Mr. Jones, through counsel, made a written demand to the Board for an administrative hearing pursuant to R.C. 3319.11(G)(4) through (G)(6). (Tr. Ex. S.) The hearing occurred on the morning of June 30, 2020. At the beginning of that hearing, the Board's president stated on record that the hearing was being held in accordance with "section 3319.11, paragraph G of the Ohio Revised Code." (Tr.at 4.) "Pursuant to the Ohio Revised Code," the hearing would proceed in executive session. (*Id*.)

At the conclusion of the hearing, the Board went into executive session and voted to affirm the decision not to renew Mr. Jones' teaching contract.

On July 16, 2020, Mr. Jones filed a notice of appeal of the Board's decision to the Portage County Court of Common Pleas. The appeal was taken pursuant to R.C. 3319.11(G)(7).

The parties fully briefed the administrative appeal and on August 18, 2021, the Portage County Court of Common Pleas entered a one-paragraph judgment entry affirming the Board's non-renewal of Mr. Jones' contract. The court offered no analysis for its decision.

On August 26, 2021, Mr. Jones moved the court for findings of fact and conclusions of law, which the court promptly denied. Mr. Jones timely appealed to the Eleventh District Court of Appeals, which reversed the trial court's decision, ordered Mr. Jones to be reinstated, and remanded the case on the issue of back-pay owed to Mr. Jones. This Court accepted the Board's jurisdictional appeal and, for the reasons stated below, it should affirm the Eleventh District's opinion.

III. ARGUMENT

The Board begins its legal argument by questioning the legitimacy of Mr. Jones' medical absence from May 1, 2020, to June 1, 2020. As explained above, that issue is not before this Court and no further analysis is warranted.

Standard of Review

"A court of common pleas' scope of review is more limited under Chapter 3319 appeals than in standard administrative appeals." *Skilton*, *supra*, ¶ 16. "R.C. 3319.11(G)(7) allows an appeal to the court of common pleas on the grounds that a board of education has not complied with R.C. 3319.11 or R.C. 3319.111." *Id*. "An appellate court's review is more restricted than that of a court of common pleas reviewing the same order." *Id*. at ¶ 19. "An appellate court may only determine if the court of common pleas abused its discretion." *Id*., citing *Layman v. Perry Local School Dist. Bd. of Edn.*, 11th Dist. No. 2000- L-005, 2001 Ohio App. LEXIS 3635 (Aug. 17, 2001). Here, the Eleventh District properly determined that the Portage County Court of Common Pleas abused its discretion in finding that the Board complied with R.C. 3319.11 and 3319.111.

As explained herein, while the Revised Code controls this matter, and the abuse of discretion standard is proper. Even under the inapplicable, alternative standard of review presented by the Board, the Eleventh District's opinion should still be upheld. The Court of Common Pleas' decision that the Board complied with the requirements of R.C. 3319.111 was, as a matter of law, not supported by reliable, probative, and substantial evidence.

> **Response to Proposition of Law No. 1:** Teachers are afforded statutory protections under R.C. 3319.11 and 3319.111 that may not be superseded by any collective bargaining agreement, one of which is receiving three formal observations when their limited contract is under consideration for nonrenewal. The Eleventh District's decision upholds these statutory protections afforded to teachers as the General Assembly intended.

It is undisputed that the Board was required to follow the procedures set forth in R.C. 3319.11 and R.C. 3319.111. The dispute, however, is whether the teacher evaluation procedure requires statutory application or was derived from the Collective Bargaining Agreement ("CBA") or Memorandum of Understanding ("MOU") between the Board and teachers' union. "To determine jurisdiction over a claim asserted by a party to the CBA, the court must determine whether the party's claims 'arise from or depend on the collective bargaining rights.'" *Jones v. Kent City School District Board of Education*, 11th Dist. Portage No. 2021-P-0094, 2023-Ohio-265, ¶ 20; *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 572 N.E.2d 87 (1991). The Eleventh District correctly determined that the statutory procedures set forth in R.C. 3319.111 cannot be superseded by a collective bargaining agreement, and thus the application of the law is not dependent upon a collective bargaining agreement. *Jones* at ¶ 21.

A. The Ohio Revised Code governed the teacher evaluation procedure.

"The General Assembly enacted in the State Teacher Tenure Act, R.C. Chapter 3319, procedural mechanisms to advantage public school teachers in relations with their employers." *Skilton*, *supra*, at ¶ 17. It is not this Court's role to "pass upon the fairness of the chapter." *Id*. "Absent a constitutional deficiency, courts are, and must be, limited to interpreting and applying a statute as written." *Id*. For decades, this Court has held firm to "the simple, specific dictates the General Assembly enacted regarding the evaluation of teachers. *Snyder*, 75 Ohio St.3d at 73.

To that end, R.C. 3319.11, R.C. 3319.111, and R.C. 3319.112 govern the evaluation of teachers, like Mr. Jones, who are under limited teaching contracts. "R.C. 3319.11(E) provides that a teacher under a limited contract *shall be considered reemployed* at the expiration of the contract *'unless evaluation procedures have been complied with pursuant to [R.C. 3319.111]* and the employing board' gives the teacher notice of its intention not to reemploy the teacher." (Emphasis added.) *Jones v. Kent City School District Board of Education*, 11th Dist. Portage No. 2021-P-0094, 2023-Ohio-265, ¶ 28, quoting R.C. 3319.11(E).

R.C. 3319.111(E) requires "at least three formal observations of each teacher who is under consideration for nonrenewal…" R.C. 3319.111(H) states: "Notwithstanding any provision to the contrary in Chapter 4117 of the Revised Code, the requirements of this section prevail over any conflicting provisions of a collective bargaining agreement entered into on or after September 24, 2012."[2]

"R.C. 3319.11 and 3319.111 are remedial statutes that must be liberally construed in favor of teachers." *Naylor v. Cardinal Local School Dist. Bd. of Edn.*, 69 Ohio St.3d 162, 630 N.E.2d 725 (1994), paragraph one of the syllabus. "Strict compliance with procedures, not just substantial compliance is required." *Springer v. Board of Ed. Cleveland Heights-Univ. Heights Sch*., 8th Dist. Cuyahoga No. 75939, 2000 Ohio App. LEXIS 920, *5 (March 9, 2000), citing *Snyder v. Mendon-Union Local School Dist. Bd. of Edn.*, 75 Ohio St.3d 69, 661 N.E.2d 717 (1996).

[2] While the provision was since amended on November 2, 2018, and October 3, 2023, this was the language in place at the time the CBA here was made effective. The current version of R.C. 3319.111(H) states: "Notwithstanding any provision to the contrary in Chapter 4117. of the Revised Code, the requirements of this section prevail over any conflicting provisions of a collective bargaining agreement entered into on or after November 2, 2018."

B. Mr. Jones' claim does not arise from or depend on collective bargaining rights.

As the Board suggests, there was a CBA in place between the Board and teachers' union. Only a small portion of that CBA is in the record as Exhibit F to the nonrenewal hearing transcript. From that portion, it appears the CBA was effective July 1, 2017, through June 30, 2020. The relevant part of that document, Article V, Section H states that the "teacher observation and evaluation procedures" under the section "*exclusively govern* the observation and evaluations" of teachers and "shall *supersede* the observation and evaluation procedures contained in and referenced in Ohio Revised Code Sections 3319.11, 3319.111, and 3319.16." (Emphasis added.) (Tr. Ex. F, 42.)

In April 2020, KEA and the Board entered a Memorandum of Understanding ("MOU") pursuant to H.B. 197, which was enacted in response to the COVID-19 public health emergency. The MOU stated, in part:

> [I]f all required observations were not completed by March 16, 2020, needed observations will be completed virtually through distance learning means in a manner agreed upon by the Assistant Superintendent and the Association President… the credentialed evaluator shall complete the evaluation report by May 22, 2020, and provide the written evaluation report for the 2019-2020 school year to the individual teacher by May 29, 2020.

(Tr. Ex. G at ¶ 2.) Further, "Based upon the full completion of the procedures provided above, all teachers subject to evaluation for the 2019-2020 school year shall be deemed to have evaluations complied with for purposes of R.C. 3319.11." (Tr. Ex. G at ¶ 5.)

H.B. 197 permitted "some degree of bargaining about the completion/timing of evaluations." *Jones* at ¶ 24. H.B. 197 allowed districts to completely opt out of completing teacher evaluations for the 2019 – 2020 school year if the district board determined that it would be impossible or impracticable to do so, without penalty to the employee for purposes of

reemployment. Philip A. Cummins, et al., *H.B. 197 Fiscal Note & Local Impact Statement*, Ohio Legislative Service Commission, 14. Additionally, the Superintendent of Public Instruction, under H.B. 197, extended the statutory evaluation deadlines from May 1st to May 22nd and the written report of the results from the statutory evaluation deadline from May 10th to May 29th. Kenna S. Haycox & Van D. Keating, *House Bill 197's impact on personnel issues,* PDQ May 2020, available at the Ohio School Boards Association, https://www.ohioschoolboards.org/pdq-may-2020 (accessed September 28, 2023). "However, districts must closely review local collective bargaining agreements that have the statutory May 1 and May 10 deadline within them and consult with legal counsel regarding whether they have the ability to take advantage of the extended deadlines to complete evaluations or if evaluations must still be completed by May 1, with the report provided by May 10 to deem the evaluation as complete in accordance with law." *Id.*

Notably, H.B. 197 did not "provide authority for changing the specific terms of the statutory evaluation procedure, such as the number of observations to be conducted or otherwise prohibit application of R.C. 3319.111(H)." *Jones* at ¶ 24. Those statutory procedures were mandatory and required strict compliance. A teacher for whom an evaluation was not completed during the 2019-2020 school year was afforded rights established under Ohio Revised Code Section 3319.11." Ohio Department of Education, *COVID-19 Education Information: Educator Evaluation Systems FAQs,*https://education.ohio.gov/getattachment/Topics/Teaching/Educator-Evaluation-System/District-Educator-Evaluation-Systems/Reset-and-Restart-Full-FAQs-7-20-20_Final.pdf.aspx?lang=en-US (accessed September 28, 2023). This was expressly recognized by the MOU, which, at paragraph 5, stated:

> 5. Based upon the full completion of the procedures provided above, all teachers subject to evaluation for the 2019-2020 school year shall be deemed to have evaluations complied with *for purposes of RC. 3319.11*. (Emphasis added.)

Moreover, the MOU concluded by stating that it contained the entire agreement between the parties as to its subject matter and that it superseded any prior agreements or understandings regarding those issues. (Tr. Ex. G, 2.)

Despite the Board's suggestion that Mr. Jones' formal observations were subject to the CBA and the MOU, the Eleventh District recognized that it was unnecessary for it to resolve the issue of whether the MOU "require[d] application of the statutory teacher evaluation procedures under R.C. 3319.111 or whether the MOU is an addendum to the CBA which supersedes the statute, because the evaluation procedures were required by statute, could not be altered, and application of the law 'is not dependent upon a collective bargaining agreement.'" *Jones* at ¶ 20, citing R.C. 3319.111(H). This case inherently turns on an interpretation of the Ohio Revised Code as opposed to some contractual right, and the parties, at all times, were following the strict mandates of the Ohio Revised Code.

C. *Flower v. Brunswick* is not applicable.

The Board cites to *Flower v. Brunswick City Sch. Dist. Bd. of Edn.,* 2015-Ohio-2620, 34 N.E.3d 973, ¶ 31 (9th Dist.) in a feeble attempt to draw a parallel between R.C. 3319.16 and R.C. 3319.111. Appellant's Merit Br., 10. *Flower* involved a teacher under a *continuing* teaching contract who was terminated under the teacher termination provisions of a collective bargaining agreement between the teachers' union and board of education. *Flower* at ¶ 3. The CBA stated that no disciplinary action could be taken against a teacher without just cause. *Id.* at ¶ 5. The teacher argued that the CBA impermissibly altered the statutory grounds for terminating a teacher with a continuing contract under R.C. 3319.61, which required "good and just cause." *Id.* at ¶ 19. The Ninth District held that the CBA was consistent with the Revised Code. *Id.* at ¶ 31.

Here, Mr. Jones was statutorily afforded, among other things, at least three formal observations by statute before his contract could be nonrenewed. No CBA or MOU could affect that right. Mr. Jones did not receive those three formal observations and, therefore, the non-renewal of his contract was against R.C. 3913.111. The trial court abused its discretion to find otherwise.

> **Response to Proposition of Law No. 2:** The issue in this case does not arise from a negotiated procedure laid out in a collective bargaining agreement. Rather, the issue is that Mr. Jones was not afforded the statutory protections to which he was entitled, those of which could not be conflicted with or superseded by a collective bargaining agreement. The Eleventh District's decision aligns with Ohio law.

There is no evidence in this record of some unique teacher evaluation procedure established through a collective bargaining agreement. Nor was the Board permitted to do anything that conflicted with the strict requirements of R.C. 3319.111 per R.C. 3319.111(H). The claim here, rather, is that the mandatory evaluation procedures set forth in the Revised Code, namely those set forth in R.C. 3319.111(E), were not adhered to. This creates an issue of statutory interpretation, which the Eleventh District correctly performed.

A. R.C. 3319.111(E) requires three formal observations, which were not afforded to Mr. Jones.

R.C. 3319.111(E) states, in pertinent part: "[T]he board shall require *at least three formal observations of each teacher* who is under consideration for nonrenewal and with whom the board has entered into a limited contract or an extended limited contract under section 3319.11 of the Revised Code." (Emphasis added). R.C. 3319.111(E). "R.C. 3319.11 and 3319.111 contemplate that the formal observations will result in evaluations, the results of which will be contained in a written report provided to the teacher." *Gucciardo v. Springfield Local Sch. Dist. Bd. of Educ*., 6th Dist. Lucas No. L-19-1276, 2020-Ohio-5038, ¶ 21. "R.C. 3319.112 identifies components of the

teacher's performance to be evaluated and requires ratings of 'accomplished,' 'skilled,' 'developing,' and 'ineffective' to be assigned in assessing the teacher's performance." *Id*.

The District attempted to complete the required minimum third observation *of* Mr. Jones entirely *without* Mr. Jones. An unprecedented move, which the District's own assistant superintendent confessed he had never seen before. (Tr. at 37.)

B. The Eleventh District correctly held that Mr. Jones could not be "formally evaluated" if he was not present.

"Section 3319 does not define 'formal observation' nor is there case law interpreting this term." *Jones* at ¶ 30. Before the Eleventh District's opinion, it had not previously been interpreted by a court of appeals. "Where statutory terms are undefined, generally '[courts] afford the terms their plain, everyday meanings, looking to how such words are ordinarily used.'" *Jones* at ¶ 30, quoting *State ex rel. More Bratenahl v. Bratenahl*, 157 Ohio St.3d 309, 2019-Ohio-3233, 136 N.E.3d 447, ¶ 12. R.C. 1.42 instructs: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." In deciding the terms meaning, the Eleventh District referred to "the procedures utilized within the state of Ohio for evaluating teachers." *Jones* at ¶ 31-32. That led the Eleventh District to the Ohio Teacher Evaluation System ("OTES").

The Ohio Department of Education created the OTES as a model for district teacher evaluation systems pursuant to R.C. 3319.112. *Jones* at ¶ 22, 25; *Routson-Gim-Belluardo v. Ohio Dept. of Edn.*, 2d Dist. Montgomery No. 27148, 2017-Ohio-2611, ¶ 4. The OTES sets forth the "evaluation of teachers as required in Ohio Revised Code 3319.111 and 3319.112." (Tr. Ex. E, 2.)

According to the OTES, "Teachers who are being considered for non-renewal and have a limited or extended limited contract will participate in a minimum of three formal observations. A

formal observation consists of a visitation of a class period or the viewing of a class lesson. The observation should be conducted for an entire class period, lesson, or a minimum of 30 minutes. During the classroom observation, the evaluator documents specific information related to teaching and learning. Each formal observation will be analyzed by the evaluator using the Teacher Performance Evaluation Rubric." Ohio Department of Education, *Ohio Teacher Evaluation System Model,* 2015, 16. "That rubric includes, inter alia, factors observed such as the teacher's demonstration of familiarity with the students' background knowledge, the teacher's ability to explain topics to ensure understanding, the quality of the teacher's instructional materials, the strategies used by the teacher, the teacher's rapport and communication with the students, feedback to students, and the monitoring of student behavior." *Jones* at ¶ 31-32. Further, the OTES explains that "[c]lassroom walkthroughs are informal observations less than 30 minutes. These may occur frequently and may be unannounced." *Id.*

With this background, the Court of Appeals correctly concluded that: "While observing the students performing work without teacher supervision may be part of an evaluation, the teacher's absence prevents a complete evaluation of the teacher's abilities and may inhibit the purposes of the requirement to conduct a formal observation." *Jones* at ¶ 34, citing, *Snyder*, 75 Ohio St.3d at 73 ("The purpose of evaluations is to assist teachers in getting better"). The relevant statutes *do not* contemplate observation of solely the students. *Jones* at ¶ 34. There was no teaching conducted during the observed Google Meet period. While the Board suggests observations are often conducted when lessons are more "student-centered rather than teacher-centered," as the Eleventh District astutely recognized, that "differs from the teacher being entirely absent." *Jones* at ¶ 34.

"A board's decision to nonrenew is not valid if the board does not follow the dictates of R.C. 3319.111 in properly evaluating the teacher." *Snyder* 75 Ohio St.3d at 72. The Court of Appeals correctly concluded:

> In reviewing the entirety of the circumstances, the factors to be evaluated in the teacher observations, and the purposes of such evaluations, and taking into consideration the mandate that these statutes must be construed liberally in favor of teachers, we find that the Board was not in compliance with the procedure for completing the third portion of the formal observation process and did not satisfy the requirements for non-renewal of Jones' contract. By misapplying the law and failing to enforce the requirements for a formal observation, the trial court abused its discretion.

Jones at ¶ 37.

"If a court determines that a board of education has failed to comply with the evaluation procedures required by [R.C. 3319.111], the teacher whose contract was not properly nonrenewed is entitled to back pay." *Farmer v. Kelleys Island Bd. of Educ.*, 69 Ohio St. 3d 156, 630 N.E.2d 721 (1994), paragraph four of the syllabus. "This back pay begins to accumulate when the board improperly chose not to renew the teacher's contract." *Id*. The Eleventh District's opinion was sound and should not be disturbed.

> **Response to Proposition of Law No. 3:** The OTES framework was created to guide school districts in complying with Ohio law. The provisions of OTES derived from the Ohio Revised Code are mandatory.

As described above, the Eleventh District correctly looked to OTES for guidance in interpreting the term "formal observation" as used in R.C. 3319.111(E). But it was the Board itself that admitted the OTES controlled. During the administrative hearing, the District, through Assistant Superintendent Larkin, testified that the terms set forth in the OTES Model, developed by the Ohio Department of Education pursuant to R.C. 3319.112(E), were controlling. (Tr. at 15-16; Ex. E). That OTES Model was introduced at the hearing as an exhibit in its entirety. Many of

the OTES provisions are directly derived from R.C. 3319.111 and R.C. 3319.112 and are required by Ohio law. The OTES Model "is designed to provide support for the implementation of the State Board of Education approved framework." (Tr. Ex. E at 4.) For instance, while school boards and teachers' unions may negotiate certain non-material terms of the OTES, such as whether to follow an original framework or alternative framework for teacher ratings, and whether notice would be required for a classroom walkthrough, the material terms of formal teacher observations under R.C. 3319.111(E) are mandatory. *See generally*, Tr. Ex. E and derived from the Ohio Revised Code.

IV. CONCLUSION

The Eleventh District concluded correctly that Mr. Jones was entitled to three formal observations under R.C. 3319.111(E) before his contract could be non-renewed. Strict compliance was required by the Ohio Revised Code. The Eleventh District properly concluded that the third attempted observation, for which Mr. Jones was not present, did not count. The fact that it was challenging to formally observe Mr. Jones for a third time did not excuse the Board from following R.C. 3319.111(E). *Skilton*, 102 Ohio St.3d 173, 2004-Ohio-2239, 807 N.E.2d 919. The Board, through collective bargaining or a memorandum of understanding, did not and could not have altered the requirement for those formal observations.

As this Court stated previously, if the Board finds the strict requirements of R.C. 3919.11 and R.C. 3913.111 not to its liking, it "may seek recourse at the General Assembly." *Skilton* at ¶ 17.

WHEREFORE, Appellee Shawn Jones requests that this Court (1) reject the propositions of law presented by the Board, (2) affirm the opinion of the Eleventh District Court of Appeals, which reversed and remanded the Portage County Court of Common Pleas' affirmation of the

Board's action not to renew Mr. Jones' contract, and (3) remand the matter to determine the amount of backpay to which Mr. Jones is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 12, 2023, a true and accurate copy of the foregoing was electronically filed with the Supreme Court of Ohio. Notice of this filing will be delivered to Counsel for Defendant-Appellant, Patrick O. Peters and Jackson E. Biesecker, by email to: Patrick.Peters@jacksonlewis.com and Jackson.Biesecker@jacksonlewis.com.

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