

IN THE COURT OF COMMON PLEAS  
GENERAL DIVISION  
BUTLER COUNTY, OHIO

KHORI T. VONDENBENKEN, Case No.: CV 2017 03 0604

Plaintiff/Appellant

Judge Charles L. Pater

vs.

OHIO BOARD OF EDUCATION,

ORDER SUSTAINING THE  
DECISION OF THE STATE  
BOARD OF EDUCATION

Defendants/Appellee

(FINAL APPEALABLE ORDER)

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This matter is before the court on appeal filed by the appellant, Kohri T. Vondenbenken, (Vondenbenken/Appellant), of a decision terminating his license to teach made by the Ohio Board of Education, (BOE/Appellee). Upon consideration of the appeal, the briefings, the record, and for the reasons that follow, the decision is sustained.

**PROCEDURAL POSTURE**

This case is before the court pursuant to the provisions of R.C. §119.12 following a decision by the BOE denying Vondenbenken's pending license applications and permanently declaring him ineligible to apply for any license issued by the BOE. The parties did not challenge due process in this matter, and the court will accordingly find all procedural requirements were complied with in the administrative process.

Appellant was notified by letter in February 2016 he had been charged with two counts of conduct unbecoming to the teaching profession in violation of R.C. §3319.3(B)(1). The first count charged Vondenbenken with falsifying several

students', Student Learning Objective, (SLOs), test scores to a higher level during their post assessments in the 2013-2014 school year.

SLOs are used by the Monroe Local School District where Vondenbenken was employed, to evaluate student and teacher performance. The initial test, (pre-test), is given early in the school year and sets a base line of performance and understanding of the material. A post assessment, typically administered in the late spring, measures the student's absorption of the material taught. Monroe Schools first used the SLOs in the 2013-2014 school year, and the pre-test were not administered until November.

The second count also charged appellant with conduct unbecoming a member of the teaching profession for asking another teacher to simply assign pre-test SLO scores to two students who were absent on the test date, rather than Vondenbenken conducting a separate assessment. Appellant eventually withdrew the request and administered the assessment to the students.

At a hearing before an administrative hearing officer on July 21, 2016, several witnesses gave similar testimony. Melissa Wolf, (Wolf) a science teacher and the chair of the science department at Monroe Junior and Senior High School, testified that on September 19, 2014, the science teachers at Monroe, including Wolf, Dave McNally, (McNally), Emily Hendrickson, (Hendrickson), appellant, and others, were taking part in a teacher development day. The colleagues were discussing the SLOs and expressing frustration with the process. At that meeting, appellant stated that the scores did not really mean anything, and that he had "fudged" his data and no one knew.

Upon learning that appellant had altered his SLO results, Wolf became upset. Vondenbenken eventually told Wolf that his rationale for changing the students' scores was that he felt the students would be hurt if they found out that they had not met their growth targets, even though there was no policy that students were to be informed of the test results.

Later that same day, appellant and Wolf had another conversation, this time pertaining to the current year's SLOs. The pre-tests had been given and Wolf was tallying up the numbers for all of the students when she realized that two of the students were missing a score. Appellant told Wolf that those were his students whose scores were missing, and that the students had been absent on the day that the pre-test had been administered. Wolf informed Vondenbenken that he needed to administer make-up tests to these students, but he told her he would not and she should just assign the students a growth target.

At the end of the school day, Wolf spoke with Dr. Brian Powderly, (Powderly), the school principal, who instructed her to write a statement summarizing the events of the day. Wolf, later that same day, again spoke with Vondenbenken, who told her that if it would make her feel better, he would give the two students their make-up tests, but that he felt like he had done the right thing. Wolf testified that evening, she completed a statement summarizing her interactions with appellant and wrote that, "I told him that he needed to correctly report his scores this year. He told me he would do what he felt like in his heart he needed to do. I told him we were going to have to agree to disagree. He commented to me that he learned his lesson in that, for the future, he would keep his mouth shut."

Wolf also testified that the 2013-2014 school year was the first year that the district was required to administer SLO tests. As a result, many staff members had given their pre-tests in late October or early November. In spite of this fact, to Wolf's knowledge, Vondenbenken was the only teacher who changed scores on students' post-assessments.

Wolf also testified that, although appellant does a good job in the classroom with students, she feels that she will need to work with him a few more years to keep "double checking" him. She analogized her concerns to a student that she caught cheating and said, ". . . there will always be a doubt in the back of my mind."

McNally testified that he was present at the September 19, 2014 meeting and he heard Vondenbenken state that he had "fudged" his SLO results. He testified that he was "surprised" and "stunned" at appellant's statement. McNally also testified that, even though he had given his pre-test later in the year than it should have been given, it did not occur to him to change his post-test results and he believes that it would have been unethical to do so.

Hendrickson testified that she teaches 7<sup>th</sup> and 8<sup>th</sup> grade science at Monroe Middle School and that she was present during the science teachers' meeting where she also heard Vondenbenken say not to worry about the SLOs because "you can just fudge it." She stated that in a situation where a pre-test has been given later than it should have been, resulting in the student already knowing some of the content, the correct procedure is to alter the student's target.

Powderly testified that he served as principal of Monroe Junior/Senior High School for three years and that he conducted a pre-disciplinary hearing with

Vondenbenken on September 22, 2014. The following day the principal drafted a memorandum summarizing the meeting where he recorded that appellant admitted to him that he had “fudged” his SLO post-test results for approximately 5-8 students.

Powderly further testified he believed that appellant’s conduct, “speaks to ethics and it’s a slippery slope of changing data to reflect what you want it to reflect.”

Dr. Philip Cagwin, (Cagwin), superintendent of Monroe Local Schools, testified that as a result of the information he had received from Powderly, he held a disciplinary hearing regarding Vondenbenken and eventually suspended appellant without pay for three days. He testified that he made the decision to require Vondenbenken serve a suspension because he, “. . . wanted to give some type of a message about this is serious and that it shouldn’t be something that we just disregard.”

Carolyn Everidge-Frey, (Everidge-Frey), testified that she has been employed by ODE, first as Director of Educator Equity and Talent, and currently as Director of the Office of Educator Effectiveness. She explained the Ohio Teacher Evaluation System (“OTES”) as being comprised of 50% observation, and 50% student growth. Everidge-Frey testified that if a school district is using SLOs as part of its evaluation system that the pre-test should ideally be given before the teacher starts to instruct the new content for the students.

Everidge-Frey addressed the issue of a pre-test given later than is optimal, and stated that the proper procedure would be for the teacher to communicate with their evaluator and to adjust the growth target so that the student is not

expected to demonstrate as much growth. She testified that it would be considered falsifying data to change the result of the post-assessment.

Vondenbenken admitted in his testimony that he altered the post-test scores of 5-8 students to higher scores. He also testified that he did this because he felt the results were inaccurate due to the timing of the pre-test. Appellant admitted that he never approached anyone with his concerns about the pre-test and also admitted that he told Wolf to assign scores to two of his students, who had been absent during the pre-test.

Following the closing of the administrative record, both parties submitted closing briefs and on October 13, 2016, the hearing officer issued a report finding that the BOE had proven that appellant engaged in conduct unbecoming to the teaching profession.

The hearing officer determined that, “. . . the falsification of student test data by Mr. Vondenbenken was a serious ethical breach and comprises misconduct that negatively impacted students.” Despite the findings, the hearing officer recommended Vondenbenken’s pending applications be approved, the recommended suspension of the teaching licenses be stayed, unless Vondenbenken again engages in conduct unbecoming, and ordered him to complete eight hours of professional boundaries and ethics training.

The BOE filed objections to the decision and issued a resolution overruling the decision, claiming the hearing officer did not give the facts and aggravating factors the weight they deserved when he made his recommendation. BOE found that issuing a stayed suspension to Vondenbenken would demean the nature and seriousness of his conduct, rejected in part the findings of fact and conclusions of

law of the hearing officer, and denied appellant's pending license applications. Finally BOE ordered appellant be permanently ineligible to apply for any license issued by the State Board of Education.

Vondenbenken appealed that decision claiming the BOE ruling was arbitrary, capricious and an abuse of discretion not supported by the manifest weight of the evidence. He also claims BOE failed to render deference to the Hearing Officer's recommendations and failed to apply the appropriate aggravating and mitigating standards in reaching its decision.

BOE responded that its decision that Vondenbenken had engaged in conduct unbecoming an educator was supported by the evidence and the sanctions imposed were supported by the Ohio Administrative Code. The court agrees.

### **DECISION**

R.C. §119.12 provides the standard for the common pleas court to apply in reviewing an administrative decision, and mandates the court determine whether the decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

"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." *Rhodes v. Ohio Counselor, Social Worker, and Marriage and Family Therapist Board*, (1992) Ohio 5<sup>th</sup> App., No. CT2009-0011, 2009-Ohio-5666, par. 33, citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, (1992), 63 Ohio.St.3d 570, 571, 589 N.E.2d 1303 .

“Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.*

“Substantial” evidence is evidence with some weight; it must have importance and value. *Id.*

The court must conduct, “. . . two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry. As to the first inquiry, ‘the common pleas court must give deference to the agency’s resolution of evidentiary conflicts, but the findings of the agency are by no means conclusive.’ \* \* \* ‘Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate, or modify the administrative order.’” *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-471, 613 N.E.2d 591, quoting *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 17 O.O.3d 65, 407 N.E.2d 1265. A reviewing court must presume the agency’s findings of fact are correct and must defer to them unless it finds that the agency’s findings are inconsistent, impeached by evidence of a prior inconsistent statement, or unsupportable. *Id.*, 471

“Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. “[W]hen reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct.” (Internal quotations and citation omitted.) *Clucas v. RT 80 Express, Inc.*, Ohio

App. 9<sup>th</sup>, No. 11CA009989, 2012-Ohio-1259, par.9. “[t]he common pleas court must defer to the determination of the administrative body,” *Langdon v. Ohio Department of Education*, (2017) Ohio App. 12<sup>th</sup>, 2017-Ohio-8356, CA2017-02-025 ¶75 quoting *Ohio Historical Soc. v. State Emp. Relations Bd.*, (1993), 66 Ohio St.3d 466.

Appellant initially argues BOE’s decision is in error as there is no “nexus” between the allegations and Vondenbenken’s fitness to teach and relies heavily upon the holding in *Freisthler v. State Bd. Of Ed.*, (2002) Ohio App. 3<sup>rd</sup>, No. 10236, 02-LW-3066, 2002-Ohio-4941. The *Freisthler* factors, however, are misapplied here. BOE’s decision to terminate the license is for conduct “unbecoming” and requires no nexus finding. See generally, *Langdon v. Ohio Department of Education*, (2017) Ohio App. 12<sup>th</sup>, 2017-Ohio-8356, CA2017-02-025.

The Ohio Administrative Code §3301-73-21(A) sets forth the factors to be considered when determining conduct unbecoming to include, “: [C]rimes or *misconduct involving academic fraud*; [M]aking, or causing to make, *any false or misleading statement*, or concealing a material fact *in a matter pertaining to facts concerning qualifications for professional practice and other educational matters*, or providing false, inaccurate, or incomplete information about criminal history or prior disciplinary actions by the state board or another professional licensing board or entity; [A]ny other crimes or *misconduct that negatively reflect upon the teaching profession.*” *Emphasis added*

Once the BOE determines a person has violated section A, it *may* review the aggravating and mitigating factors and take them into consideration when deciding its decision.

The relevant provisions of R.C. §3319.31(B)(1) considered in this matter included: “(1) [T]he nature and seriousness of the crime or misconduct; (9) [W]hether the person fully disclosed the crime or misconduct to the state board or the employing school district; (10) [W]hether licensure will negatively impact the health, safety, or welfare of the school community and/or statewide education community; and (14) [A]ny other relevant factor.”

Here BOE specifically found appellant “arbitrarily, unilaterally and knowingly falsifying (sic) student data,” kept the fact hidden and was fully aware of his misconduct. Additionally, BOE found the hearing officer inappropriately applied a personal belief in a, “higher interest,” than the state’s interests in arriving at his decision.

Appellant next argues BOE’s decision is not supported by reliable, probative and substantial evidence. The argument presented, though, centers on applying mitigating factors, specifically the testimony by other teachers and supervisory personnel who believed Vondenbenken learned his lesson. BOE cited, though, Wolf’s and McNally’s testimony about their doubts that future results reported by appellant can be trusted and his failure to acknowledge the “inappropriateness” of his conduct. Regardless of the proffered testimony in support of appellant being permitted to continue teaching, Vondenbenken’s admission to the charge of conduct unbecoming is sufficient evidence to support the BOE’s finding.

Appellant also argues his “request” to arbitrarily assign test scores to the students who missed the pre-test” is “protected speech” and he ultimately conducted the tests thereby excusing his conduct. Again, though, Vondenbenken specifically admitted the comments, that constitute a, “. . . false or misleading statement.” Further, Vondenbenken admitted he learned, “. . . for the future he would keep his mouth shut.”

BOE found appellant’s testimony to be reliable, i.e., a reasonable probability that the evidence is true; probative, in that it tends to prove the issue in question; and substantial in that it had importance and value. *Rhodes v. Ohio Counselor, Social Worker, and Marriage and Family Therapist Bd.*, (1992) Ohio 5<sup>th</sup> App., No. CT2009-0011, 2009-Ohio-5666, par. 33, citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, (1992), 63 Ohio.St.3d 570, 571, 589 N.E.2d 1303 .

The court giving deference to the hearing officer’s and agency’s review of the evidence cannot find as against the manifest weight of the evidence, “. . . that there exist a legally significant reason . . . .” to “. . . reverse, vacate, or modify the administrative order,” . *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-471, 613 N.E.2d 591, quoting *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 17 O.O.3d 65, 407 N.E.2d 1265.

After a full review of the record, the court finds appellant admitted to engaging in conduct unbecoming a member of the education profession, that BOE completely proved the charges against Vondenbenken and its decision was not arbitrary, capricious or against the manifest weight of the evidence.

Judge  
Charles L. Pater  
Common Pleas Court  
Butler County, Ohio

**IT IS THEREFORE ORDERED, ADJUGED AND DECREED** the decision of the Ohio State Board of Education to permanently deny appellant a teaching license is **SUSTAINED** .

**SO ORDERED,**

ENTER,

*Charles L Pater*

/s/ Electronically

Charles L. Pater, Judge

CC: Susan D. Jansen, Esq.  
Mary L. Hollern, Esq.

Judge  
Charles L. Pater  
Common Pleas Court  
Butler County, Ohio