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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-002234-MR  
&  
NO. 2008-CA-002293-MR

SHARON MACY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 05-CI-00059

KENTUCKY EDUCATION  
PROFESSIONAL STANDARDS  
BOARD

APPELLEE/CROSS-APPELLANT

### OPINION AFFIRMING

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BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Sharon Macy appeals, and the Kentucky Education Professional Standards Board cross-appeals, from an Opinion and Order of the Franklin Circuit Court affirming in part and reversing in part a Final Order of the

Kentucky Education Professional Standards Board (“the Board”). The Board revoked Macy’s Teaching Certificate for a period of ten years upon determining that Macy committed multiple statutory and regulatory professional conduct violations. On review, the circuit court reversed in part after concluding that some of the Board’s findings were not supported by substantial evidence. The court sustained, however, the Board’s finding that Macy had engaged in criminal conduct involving the terroristic threatening of students during school hours and on school property, and that this finding alone supported the Board’s revocation of Macy’s Teaching Certificate. Macy appeals from this determination and the Board cross-appeals from the circuit court’s reversal of several of the Board’s findings. We are persuaded that the Board properly determined that Macy’s criminal conduct supported the revocation of her Teaching Certificate for a period of ten years, and accordingly affirm the Opinion and Order on appeal.

Macy began her employment as a school teacher with the Hopkins County School System in approximately 1981. In 1987, she suffered a severe head injury while bicycling on a public roadway. The injury required her to relearn how to write her name and perform everyday tasks. She suffered the lingering effects of headaches, lack of concentration, irritability and anger. Macy continued to work as a school teacher, and was able to manage her headaches via the use of occipital nerve blocks.

In 1995, Macy was involved in a motor vehicle accident which caused the headaches to return. She continued treatment with a neurologist and therapist.

That same year, Assistant Superintendent for Instruction at the Hopkins County Board of Education, Linda Zellich, was approached by a school psychologist who suggested implementing a “504 plan” to assist Macy in her employment. 504 plans had already been developed to accommodate students with disabilities as provided for under the Federal Rehabilitation Act. Though not intended for teachers, Zellich sought to develop a similar plan to help Macy. Such a plan was developed and implemented, which provided a cot for Macy to rest on when she developed severe headaches and a plan for an assistant to supervise her classroom in Macy’s absence. Informational documents were produced to inform other teachers of Macy’s condition, and in order to reduce noise, students were requested not to walk through the gym where Macy taught. The plan was revised in 1997 and 1999.

In 1999 and 2000, some teachers began to become concerned that Macy was becoming increasingly anxious, frustrated and subject to outbursts. An ongoing conflict developed between Macy and Principal Darryl Herring. The first notable incident involving Macy occurred on November 24, 1998, when Macy became angry during a gym class and pushed a chair off of a stage where she was standing. A student complained to his father that the chair landed where the student had just been standing, and after the father met with Principal Herring a letter was placed in Macy’s file indicating that the behavior was not appropriate.

Several other incidents occurred, which are set out in the record and do not need to be fully recited herein. Macy was given a written reprimand for an

outburst involving another teacher, a parent, and a student, which occurred on November 5, 1999; the next month, Macy created fake detention slips for the purpose of seeing whether male and female members of the school's basketball teams were treated differently; and, Macy became involved with an informal school organization called the Loser's Club, which may have been intended to mock the school's Pride Club which promoted good behavior and good grades.

On November 7, 2000, a parent filed a complaint against Macy in Hopkins County District Court alleging that Macy had repeatedly threatened to kill members of the boys' basketball team after she learned that they were teasing a group of girls. A sheriff's department investigation ensued, after which a criminal complaint against Macy was filed setting out nine counts of terroristic threatening.

Macy's employment was terminated by way of letter dated November 30, 2000. While the primary basis for the termination was the November 1, 2000 terroristic threatening incident, 31 additional offenses were charged in the letter. A teacher tribunal affirmed the termination in late January, 2001.

On March 29, 2001, trial was conducted in Hopkins District Court on the nine counts of terroristic threatening. Macy was found guilty, and ordered to pay a fine of \$500.00 per count for a total of \$4,500.00. The fine was discharged on the condition that Macy has no abusive contact with the victims for two years and commits no other criminal offenses during that period. The Hopkins Circuit Court affirmed the conviction on December 7, 2001.

A number of additional incidents occurred which are worth noting. It was later alleged before the Board that Macy threw a plastic water bottle at administrator Zellich's car in the parking lot; that Macy positioned her vehicle to block in Zellich's vehicle at a gas pump while Macy was crying and berating Zellich; that Macy confronted Zellich in the school parking lot and positioned her car to block Zellich's car; that Macy made harassing phone calls to Zellich's home and left a voice mail stating that Macy's termination from employment was going to result in Macy's death.

In November, 2000, the Board filed 18 administrative charges against Macy alleging that she violated several statutory and regulatory provisions governing her conduct as a Kentucky school teacher. The incident which formed the basis for the terroristic threatening conviction was among the charges, but a number of other incidents were included in the Board's allegations. Five additional charges were added in April, 2004.

The matter proceeded before a Hearing Officer who upon taking proof dismissed several of the charges because they lacked a sufficient nexus to Macy's employment as a school teacher to warrant disciplinary action. Other charges were dismissed as having no legal basis. The Hearing Officer rendered recommended Findings and Order in which the officer concluded that only the incidents involving the threatening of students rose to the level sufficient to warrant discipline. The officer recommended that Macy's Teaching Certificate be suspended until January 1, 2005.

The Board's legal counsel filed exceptions to the recommended Findings and Order. Thereafter, the Board rejected the Hearing Officer's recommendation to dismiss most of the charges as not supported by the law or lacking a sufficient nexus to Macy's employment, and it determined that her Teaching Certificate should be suspended for a period of ten years ending in 2015. This determination was memorialized in a Final Order rendered in September, 2004.

Macy then prosecuted an appeal to the Franklin Circuit Court. On October 22, 2008, the court rendered an Opinion and Order affirming in part and reversing in part the Board's Final Order revoking Macy's Teaching Certificate for 10 years. The court determined that a number of the allegations set out in the Board's action did not support a finding that Macy violated the applicable professional standards statutes and regulations. For example, the court found no substantial evidence to support the conclusion that Macy's act of pushing the chair off the stage, or another incident where she kicked a trashcan across the room in the presence of students violated the applicable statutes or regulation sufficient to support revocation. Similarly, the court found that Macy's participation in – or support of – the so-called Loser's Club did not put in jeopardy the "health, safety and emotional well-being of students" as required by one regulation cited, nor that it subjected students to "embarrassment or disparagement" as required by another regulation. Furthermore, the circuit court determined that Macy's issuance of fake detention slips for the purpose of investigating whether male and female students

were treated differently by the administration did not meet the statutory requirement set out in KRS Chapter 161 of “incompetence or neglect of duty.”

As to Macy’s criminal conviction for terroristic threatening, the circuit court found that “these charges, standing alone, are adequate to justify the severe penalty imposed” by the Board. It found substantial evidence in the record to support the Board’s contention that Macy was convicted of nine counts of terroristic threatening, and that the acts underlying the conviction supported the Board’s conclusion that Macy violated the statutes and regulations governing professional conduct. The circuit court determined that because of the nature of the terroristic threatening incident – which included Macy’s repeated threats to kill nine students - those facts taken alone supported the revocation of Macy’s Teaching Certificate. This appeal followed.

Macy now argues *pro se* that the Board acted arbitrarily and contrary to the weight of the evidence when it found violation of counts 1-14, 17-19 and 23, and in rejecting the Hearing Officer’s Recommended Order by imposing a 10-year revocation. In support of this argument, Macy maintains that the record in this matter is so large that the Board’s adoption of its attorney’s exceptions, coupled with the large volume of other cases that it was reviewing, demonstrates that the Board’s decision was arbitrary. Macy also argues that the Board’s Findings of Fact and Conclusions of Law are contrary to the evidence; that counts 1-11 and 17-19 were not serious matters meriting revocation of her Teaching Certificate; and, that other teachers in the Hopkins County School System have committed similar

or greater offenses but have not been terminated from employment. In sum, she contends that the circuit court erred in affirming the Board's action because professional violations with which she was charged either were not serious enough to merit the revocation of her Teaching Certificate, or was not otherwise supported by substantial evidence.<sup>1</sup>

In response, the Board characterizes as misplaced Macy's argument that the Board was somehow required to accept the Hearing Officer's Recommendations, and her contention that the revocation of her Teaching Certificate is arbitrary because the Board imposed less severe penalties in other cases. It also maintains that the regulatory and statutory violations supporting the revocation were supported by substantial evidence of record. In its cross-appeal, the Board argues that the circuit court erred in reversing the Board as to counts 1-2, 4-6, 9-11, 17 and 19 because the allegations set out in those counts were supported by substantial evidence.

We have closely examined the record and the law, and find no basis for reversing the Opinion and Order on appeal. On review, the Franklin Circuit Court was charged with the duty to determine whether the Board's action 1) violated the constitutional or statutory law, 2) was in excess of its statutory

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<sup>1</sup> Macy also filed 1) a complaint with the Kentucky Commission on Human Rights alleging violations of the Kentucky Civil Rights Act, and 2) a complaint in United States District Court for the Western District of Kentucky alleging wrongful termination in violation of Americans with Disabilities Act (ADA) and Kentucky Civil Rights Act (KCRA), and retaliatory discharge. The EEOC complaint was dismissed for lack of probable cause. The federal action resulted in an Order granting Summary Judgment in favor of the school district after the court determined that Macy failed to rebut the school district's proffered legitimate, nondiscriminatory reason for terminating her employment.



authority, 3) was not supported by substantial evidence, 4) was arbitrary or capricious, 5) was based on *ex parte* communications, or 6) was otherwise contrary to the law. See generally, KRS 13B.150; *Southern Bluegrass Racing, LLC v. Kentucky Horse Racing Authority*, 136 S.W.3d 49 (Ky. App. 2004). Arbitrariness is found where an agency exceeds its statutory powers, does not afford the parties procedural due process, or takes action unsupported by substantial evidence. *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641 (Ky. App. 1994). And finally, substantial evidence is some evidence of substance or relevant consequence having fitness to induce conviction in the minds of reasonable people. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

In the matter at bar, the Franklin Circuit Court undertook an analysis of each count of the 23 count charge. While addressing each count, it concluded “that the criminal conduct involving the threatening of students during school hours and on school property, which resulted in a conviction on multiple counts of terroristic threatening, by itself provides a sufficient basis to support the severe penalty imposed by the Board, regardless of whether any of the other administrative charges against Ms. Macy can be sustained.” That charge, set out as count 23 in the complaint, alleged that Macy lacked the physical or mental capacity to perform her duty as required by KRS 161.120(1)(e). That provision states that,

. . . the Education Professional Standards Board may revoke, suspend, or refuse to issue or renew; impose probationary or supervisory conditions upon; issue a

written reprimand or admonishment; or any combination of those actions regarding any certificate issued under KRS 161.010 to 161.100, or any certificate or license issued under any previous law to superintendents, principals, teachers, substitute teachers, interns, supervisors, directors of pupil personnel, or other administrative, supervisory, or instructional employees for the following reasons: . . . Physical or mental incapacity that prevents the certificate holder from performing duties with reasonable skill, competence, or safety . . . .

The Board answered in the affirmative the question of whether Macy lacked the physical or mental capacity to perform her duties with reasonable skill, competence, and safety. The question then becomes whether this determination was arbitrary, unsupported by substantial evidence or otherwise ran afoul of KRS 13B.150 or *Southern Bluegrass Racing, supra*. The Franklin Circuit Court concluded that it was not, and we find no error in that determination.

It is uncontroverted that Macy was convicted on nine counts of terroristic threatening arising from her repeated threat to kill nine students. While Macy continues to deny that she made the threats, the Board properly relied on the conviction as substantial evidence of record supporting its conclusion that Macy has a physical or mental incapacity that prevents her from performing her duties with reasonable skill, competence, and safety. It cannot reasonably be argued that the Board's reliance on this conviction in support of its action was arbitrary or otherwise outside the scope of its statutory authority. The question is not whether Macy was convicted on nine counts of terroristic threatening, because that issue has reached judicial resolution. Rather, the issue is whether the conviction

supports the Board's action. We must conclude that it does. KRS 161.120(1)(e) expressly permits the Board to revoke a Teaching Certificate under circumstances where a teacher is physically or mentally unable to ensure student safety, and the record supports the Board's action in this regard. The circuit court acknowledged that Macy's head injuries, which were beyond her control, were contributing factors to the conduct resulting in her criminal conviction and termination from employment. It also properly noted, however, that the Board is charged by statute with the vitally important public trust of administering a system of professional standards that will ensure that Kentucky school children receive a quality education from well qualified professionals. KRS 161.028. Ultimately, the Legislature has determined that student safety is paramount, and Macy's conviction on nine counts of terroristic threatening constitutes substantial evidence in support of the Board's Order revoking her Teaching Certificate for 10 years. Because the Franklin Circuit Court properly determined that Macy's conviction, taken alone, was sufficient to support the revocation, the parties' ancillary arguments are moot.

For the foregoing reasons, we affirm the Opinion and Order affirming in part and reversing in part the Kentucky Education Professional Standards Board's Findings of Fact, Conclusions of Law and Final Order revoking Macy's Teaching Certificate for a period of 10 years.

DIXON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN PART, DISSENTS IN PART,

AND FILES SEPARATE OPINION:

MOORE, JUDGE: I concur with the majority's well-reasoned opinion affirming the circuit court on the issues raised in the direct appeal. I, however, would reverse the circuit court on the issues raised in the cross-appeal with the exception of the decision regarding Count 17; therefore, I respectfully dissent in part as to the cross-appeal.

In the Board's cross-appeal, it argues that the circuit court erred in reversing the Board's decision on Counts 1-2, 4-6, 9-11, 17 and 19. Relevant to the cross-appeal, KRS 161.120 grants the Board authority to revoke or suspend a teaching certificate for a variety of reasons including "[d]emonstrating willful or careless disregard for the health, welfare, or safety of others;" "[i]ncompetency or neglect of duty;" and "[v]iolating the professional code of ethics for Kentucky school certified personnel established by the Education Professional Standards Board through the promulgation of administrative regulation[.]"

Counts 1 and 2 involved Macy's kicking a chair so that it fell off a stage while she was teaching. Counts 4 and 5 included Macy's sponsorship of the "Loser's Club," which was a club started by students who did not qualify for the school's Pride Club. Macy was warned not to sponsor the club but choose to do so. Count 6 was based on Macy's getting upset with students and responding by angrily kicking a trash can in the presence of the students. Counts 9 and 10 concern Macy's writing a fake detention slip for a female student to test the school

administration regarding whether it would give a harsher penalty for a female student than a male student. Count 11 charged that Macy, in violation of the disciplinary policy, transferred several students to another classroom as punishment. Count 19 included that Macy believed Linda Zellich, Assistant Superintendent for Hopkins County Schools, was instrumental in the disciplinary actions being taken against Macy. Macy blamed Zellich for ruining her life and betraying her. As a result, Macy (1) blocked Zellich and her son at a gas station pump by pulling her car in front of Zellich's while Macy verbally berated her; (2) again using her car, blocked Zellich and her son in their car at the parking lot of the central office and ranted about how Zellich had lied about her; and (3) made harassing telephone calls to Zellich's home and office telephone, including a voice message that Macy's termination was going to result in Macy's death.

In my opinion the Board correctly decided that the conduct for which these counts were brought against Macy fell into the parameters of KRS 161.120. Thus, I would reverse on the cross-appeal all issues raised with the exception of Count 17, on which I would affirm.

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