[Cite as *Sutton v. Ohio Dept. of Edn.*, 2017-Ohio-105.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104476

JOHN R. SUTTON

PLAINTIFF-APPELLANT

vs.

OHIO DEPARTMENT OF EDUCATION

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-847919

BEFORE: Jones, P.J., Boyle, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 12, 2017

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LARRY A. JONES, SR., P.J.:

{¶1} Plaintiff-appellant, John Sutton, appeals the trial court's decision to uphold the resolution of defendant-appellee Ohio Department of Education ("ODE") suspending his professional teaching license for four months. We affirm.

I. Facts

{¶2} Sutton held a five-year professional high school teaching license and was a teacher at the Cleveland Public Schools when he was convicted of persistent disorderly conduct and attempted violation of a temporary protection order. The two misdemeanor convictions involved unsolicited communications he sent or delivered to "M.F.," a women he dated some forty years prior.

{¶3} The Ohio State Board of Education ("Board") sent Sutton a Notice of Opportunity for Hearing, informing him that his convictions constituted a violation of R.C. 3319.31(B)(1) and that he was entitled to a hearing because the ODE intended to determine whether his teaching license should be limited, suspended, revoked, or permanently revoked. Sutton retained counsel and requested a hearing. The hearing took place in January 2015. The following pertinent evidence was adduced at the hearing.

{¶4} Sutton and M.F. dated in the 1970s when M.F. was 19 years old and in high school and Sutton was 20 years old. They lost contact after breaking up but Sutton occasionally tried to contact M.F. throughout the years. He stopped when M.F.'s husband and brother asked him to cease contact.

{¶5} In 2012, M.F. went to the Avon Police Department and complained that Sutton was "stalking" her and knew where she lived because he had put a card in her mailbox. She told the police she did not want to press charges but wanted the police to talk to him and ask him to stay away from her. Officer Kevin O'Neill of the Avon Police testified that he contacted Sutton and explained to him that M.F. did not want any contact with him, and if Sutton did not comply, M.F. would seek a restraining order.

{¶6} Approximately one year later, in September 2013, M.F. went to the Avon police, claiming that Sutton had again contacted her. Officer O'Neill arrested Sutton in the parking lot of his church, which was approximately 100 yards from M.F.'s home. After his arrest, M.F. received a protection order against Sutton, which covered her and members of her immediate family. Subsequent to that, Sutton wrote a long letter to M.F.'s brother, who was employed as an assistant Cuyahoga County prosecutor, asking the brother to get his sister to drop the charges against him.

{¶7} Sutton testified that, in 2011, he saw M.F. at a department store and assumed she was not married because she was not wearing a wedding ring. Sutton wrote a letter to M.F.'s brother and enclosed a letter to M.F., hoping her brother would pass the letter along to her. The letter to M.F., Sutton conceded, discussed their past and how nice it would be to reconnect. Sutton recalled receiving a call from the Avon Police that included a warning not to contact her again, but insisted he did not remember the police telling him he would be "prosecuted" if he communicated with M.F.

{¶8} About a year later, according to Sutton, he was working on his doctorate

degree, felt overwhelmed, and so he put a prayer card with M.F.'s name on it in her mailbox. Sutton testified he was surprised to be arrested at church and went to court unrepresented by counsel. He contended that he did not know that the restraining order covered members of M.F.'s family so he wrote a letter to her brother asking that they drop the charges against him.

{¶9} Sutton testified that he was ashamed and upset and would have never tried to contact M.F. if he had known she was married. He claimed to be in counseling and submitted letters of reference from colleagues; though he admitted that none of his colleagues knew about his convictions or disciplinary proceedings.

{¶10} According to the ODE's attorney, M.F. was subpoenaed to testify but did not appear because she was afraid to be in the same room as Sutton. The hearing was continued for the parties to determine whether she would testify, but it does not appear M.F. ever testified.

{¶11} The ODE requested a license suspension of at least three years and asked that Sutton be required to take a "fitness to teach" evaluation prior to reinstatement. The hearing officer recommended that the Board suspend Sutton's five-year professional teaching license for four months and order that he submit to and pass a "fitness to teach" evaluation at his own cost and by a Board-approved evaluator, prior to his license being reinstated and again during the 2016-2017 school year. The Board adopted the hearing officer's recommendation and suspended Sutton's license from June 9 through October 9, 2015, with the conditions that the hearing officer recommended.

{¶12} Pursuant to R.C. 119.12, Sutton appealed the Board's decision to the Cuyahoga County Court of Common Pleas. The trial court found that the Board's resolution adopting the report and recommendation of the hearing officer was supported by reliable, probative, and substantial evidence and was in accordance with the law. Sutton filed a timely notice of appeal and raises five assignments of error for our review.

II. Assignments of Error

> I. The trial court's affirmance of ODE's resolution 11's suspension of Mr. Sutton's teaching license for four months and the condition that he, at his own expense, complete a fitness to teach evaluation by a licensed psychiatrist or psychologist, preapproved by the Ohio Department of Education, before returning to teaching and again before the 2016-2017 academic year was an abuse of discretion and not in accordance with law, because the hearing officer and ODE did not apply the nexus test to whether Mr. Sutton's conduct and resultant misdemeanor convictions constituted "unbecoming" conduct under R.C. 3319.31(B)(1).
>
> II. The trial court's affirmance of the hearing officer's finding that ODE proved its case against Mr. Sutton by a preponderance of the evidence was an abuse of discretion and not in accordance with law, because the hearing officer and ODE did not apply the nexus test to whether Mr. Sutton's conduct and resultant misdemeanor convictions constituted unbecoming conduct under R.C. 3319.31(B)(1).
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> III. The trial court's affirmance of ODE's resolution 11's suspension of Mr. Sutton's teaching license for four months and the condition that he, at his own expense, complete a fitness to teach evaluation by a licensed psychiatrist or psychologist, preapproved by the Ohio Department of Education, before returning to teaching and again before the 2016-2017 academic year without considering all eight factors in OAC 3301-73-21(A) was an abuse of discretion and not in accordance with law.
>
> IV. The trial court's affirmance of ODE's resolution 11's suspension of Mr. Sutton's teaching license for four months and the condition that he, at his own expense, complete a fitness to teach evaluation by a licensed psychiatrist or psychologist, preapproved by the Ohio Department of Education, before returning to teaching and again before the 2016-2017 academic year without considering any expert testimony about Mr. Sutton

was an abuse of discretion and not in accordance with law.

V. The trial court's affirmance of ODE's 4 month suspension of appellant was an abuse of discretion and not in accordance with law as being excessive.

III. Law and Analysis

A. Standard of Review

{¶13} R.C. 119.12 permits the appeal of an agency's decision to the court of common pleas and provides, in relevant part:

> The [trial] court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

See also Tsiperson v. Ohio Dept. of Commerce Div. of Fin. Inst., 8th Dist. Cuyahoga No. 96917, 2012-Ohio-1048, ¶ 22.

{¶14} A trial court examines the record in its entirety, including any evidence it elects to admit, but its inquiry is limited to whether the administrative agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Tsiperson* at *id.* As an appellate court, our review is even more constrained. Our review is to determine whether the trial court abused its discretion. *Id.* at ¶ 23, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993); *Bellante v. Ohio Dept. of Commerce Dept. of Fin. Inst.*, 8th Dist. Cuyahoga No. 86712, 2006-Ohio-2472, ¶ 24.

{¶15} The exception to the abuse of discretion standard is where the issue posed on appeal involves a question of law:

> R.C. 2505.01(A)(2) defines an appeal on questions of law as a review of a cause upon questions of law, including the weight and sufficiency of the evidence. Thus, although the appeal to the appellate court is as to questions of law, it will necessarily involve a review of the evidence to determine whether the common pleas court applied the correct standard of review.

Zingale v. Ohio Casino Control Comm., 8th Dist. Cuyahoga No. 101381, 2014-Ohio-4937, ¶ 25.

B. Nexus Test

{¶16} We combine the first and second assignments of error for review because Sutton makes the same arguments in both assigned errors. Sutton argues that the trial court erred when it affirmed the Board's decision to suspend his teaching license because the hearing officer failed to apply the "nexus test" to determine whether Sutton's conduct and misdemeanor convictions constituted "conduct unbecoming" under R.C. 3319.31(B)(1).

{¶17} In deciding to suspend Sutton's teaching license, the hearing officer determined that his behavior constituted conduct unbecoming his position as a teacher based on R.C. 3319.31 and Ohio Adm.Code 3301-73-21. R.C. 3319.31(B)(1) provides:

> 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:

> (1) Engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position.

{¶18} The factors set forth in Ohio Adm.Code 3301-73-21 (A) supplement the statutory standard and guide assessments of what conduct is "unbecoming." *Haynam v. Ohio State Bd. of Edn.*, 6th Dist. Lucas No. L-11-1100, 2011-Ohio-6499, ¶ 32, citing *Poignon v. Ohio Bd. of Pharmacy*, 10th Dist. Franklin No. 03-AP-178, 2004-Ohio-2709. The hearing officer found that Ohio Adm.Code 3301-73-21(A)(6) and (8) were applicable to Sutton. Those subsections provide:

> (A) The state board of education shall consider, but not be limited to, the following factors when evaluating conduct unbecoming under division (B)(1) of section 3319.31 of the Revised Code:
>
> (6) A plea of guilty to, or finding of guilt, of a conviction, granting of treatment in lieu of conviction, or a pre-trial diversion program to any offense in violation of federal, state, or local laws and/or statutes regarding criminal activity;
>
> * * *
>
> (8) Any other crimes or misconduct that negatively reflect upon the teaching profession, including sanctions and/or disciplinary action by another state educational entity or another professional licensing board or entity.

Id.

{¶19} Sutton argues that there was no "nexus" or relationship between the crimes for which he was convicted and his profession as a teacher. The ODE argues that there

was a nexus between Sutton's conduct and an educator's obligation to be a positive role model and for supervising the well being of students in his or her care. To support his position, Sutton distinguishes his case from this court's decision in *Hoffman v. State Bd. of Edn.*, 145 Ohio App.3d 392, 763 N.E.2d 210 (8th Dist.2001). In *Hoffman*, this court affirmed the revocation of a teacher's license based on his engaging in public indecency at an adult book store. This court concluded that even though the teacher's conduct did not occur on school grounds or during school hours, there was a nexus between the teacher's conduct and his teaching duties because he solicited students to write letters on his behalf. *Id.* at 396.

{¶20} Neither the plain language of R.C. 3319.32, applicable portions of the Ohio Administrative Code, or the Ohio Supreme Court have expressly required a nexus between an educator's conduct and the ability to teach or administrate in order for the Board to act on an educator's license. Some appellate districts, however, have adopted a nexus test. *See Robinson v. Ohio Dept of Edn.*, 2012-Ohio-1982, 971 N.E.2d 977, ¶ 35 (2d Dist.).

{¶21} We note that cases the parties cited from our district that discussed a nexus between a teacher's conduct and his or her teaching duties predated the 2007 amendment to R.C. 3319.31. In 2007, R.C. 3319.31 was amended by 2007 HB 190, which added requirements that led to the creation of a code of conduct for educators. *See Robinson* at ¶ 17. In March 1998, the Board adopted the Licensure Code of Professional Conduct for Ohio Educators. The Licensure Code serves "as the basis for decisions on issues pertaining to licensure that are consistent with applicable law, and provides a guide for

conduct in situations that have professional implications for all individuals licensed by the State Board of Education[.]" Licensure Code, p. 1.; *Robinson* at ¶ 18. The Licensure Code includes eight principles that define the "fundamental beliefs" required for Ohio educators and to a greater extent explains what constitutes "conduct unbecoming." Licensure Code at *id.* Thus, as it serves our purposes, the Licensure Code further supplements the statutory and administrative standards and guides our assessment of "conduct unbecoming." Educators in the state are likewise bound by the principles found in the Licensure Code.

{¶22} Although the hearing officer did not cite the Licensure Code as a basis for finding "conduct unbecoming" in this case, we note that two of the code's principles of behaviors apply: Principle 1 — Professional Behavior and Principle 4 — Criminal Acts.

> **1. Professional Behavior**
>
> **Educators shall behave as professionals realizing that their actions reflect directly on the status and substance of the education profession.**
>
> An educator serves as a positive role model to both students and adults and is responsible for preserving the dignity and integrity of the teaching profession and for practicing the profession according to the highest ethical standards. Conduct unbecoming to the profession includes, but is not limited to, the following actions:
>
> * * *
>
> (b) Committing any violation of state or federal laws, statutes, or rules, although the conduct may not have resulted in a criminal charge, indictment, prosecution, or conviction.
>
> * * *
>
> **4. Criminal Acts**

> **Educators shall adhere to federal, state and local laws and statutes.**
>
> An educator shall not engage in criminal activity as evidenced by a criminal conviction, guilty plea, [or] finding of guilt[.]
>
> **Conduct unbecoming** includes, but is not limited to, the following actions:
>
> * * *
>
> (e) A criminal offense that is not identified as an absolute bar offense or offense requiring rehabilitation pursuant to Ohio Administrative Code Rule 3301-20-01, and the offense does not involve a student, a minor, a school district or school personnel. (This does not include traffic violations.)

(Emphasis sic.)

{¶23} The presumptive range of disciplinary action for a violation of Principle 1 includes a "[l]etter of admonishment up to revocation/denial of a license for other acts unbecoming to the professional conduct of educators." The presumptive range of disciplinary action for a violation of Principle 4 includes a "[l]etter of admonishment up to revocation/denial of a license for all other misdemeanor criminal acts."

{¶24} In this case, the hearing officer found that

> while there was no direct nexus established between [Sutton's] conduct toward [M.F.] and her brother and [Sutton's] teaching career, the nature and persistence of Mr. Sutton's letters and attempts to contact M.F. is concerning.

The hearing officer noted that Sutton was reported in 2009 for "similar and persistent behavior" toward a fellow female teacher, had exhibited "obsessive and impulsive" behavior during the incidents that led to his two misdemeanor convictions, and exhibited concerning behavior during his own January 2015 disciplinary hearing. That behavior

included trouble focusing on the hearing, and texting on his phone, walking around, rambling, and praying during the hearing. Thus, contrary to Sutton's claim, the hearing officer expressly considered the nexus between Sutton's conduct and his profession.

{¶25} We find that although the Board did not find an express nexus between Sutton's conduct and his profession as an educator, the trial court did not err in affirming the ODE's decision. The first and second assignments of error are overruled.

C. "Conduct Unbecoming" Factors

{¶26} In the third assignment of error, Sutton claims that the trial court erred in suspending him without considering all eight factors as set forth in Ohio Adm. Code 3301-73-21.

{¶27} As mentioned, the Ohio Administrative Code provides a list of factors which the "state board of education shall consider, but not be limited to * * * when evaluating conduct unbecoming" under R.C. 3319.31(B)(1). Ohio Adm.Code 3301-73-21(A). Those factors include: (1) crimes or misconduct involving minors, (2) school children, or (3) academic fraud; (4) making any false or misleading statement, or providing false, inaccurate, or incomplete information about criminal history or prior disciplinary actions by the state board; (5) crimes or misconduct involving the school community, school funds, or school equipment/property, (6) a plea of guilty to, or finding of guilt, of a conviction, to any offense in violation of federal, state, or local laws and/or statutes regarding criminal activity; (7) a violation of the terms and conditions of a consent agreement; or (8) any other crimes or misconduct that negatively reflect upon the teaching

profession, including sanctions and/or disciplinary action.

{¶28} According to Sutton, the trial court erred when it failed to consider the factors in Ohio Adm.Code 3301-73-21 that he did *not* violate. However, there is no evidence that the hearing officer failed to consider all of the factors and, in fact, found that two of the factors applied: Ohio Adm.Code 3301-73-21(6) and (8).

{¶29} In finding that Sutton had committed conduct unbecoming to his profession, the hearing officer found that Sutton previously pleaded no contest and was convicted of disorderly conduct and attempted violation of a temporary protection order (Ohio Adm.Code 3301-73-21(6)). He also wrote letters to the victim of his crimes and her brother, which were "unsolicited and rambling in nature." The hearing officer further found that the writings were unfocused and based on feelings from 40 years ago. The hearing officer opined that Sutton had an obsession with M.F., despite the consequences to himself, and his actions and behavior were "reflective of conduct unbecoming of an educator." (Ohio Adm. Code 3301-73-21(8)).

{¶30} As a general rule,

> "courts * * * must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command."

Orth v. State, 10th Dist. Franklin No. 14AP-19, 2014-Ohio-5353, ¶ 16, quoting *Bernard v. Unemp. Comp. Rev. Comm.*, 136 Ohio St.3d 264, 2013-Ohio-3121, 994 N.E.2d 437, ¶ 12.

{¶31} We find that it was reasonable for the hearing officer to determine whether Sutton's conduct was unbecoming with reference to the Ohio Administrative Code and

Revised Code; the hearing officer's determination that the ODE proved by a preponderance of the evidence that Sutton engage in conduct unbecoming an educator was decided through a reasonable interpretation of the discretionary authority the General Assembly granted the Board in R.C. 3319.31(B). As the hearing officer's interpretation of "conduct unbecoming" was reasonable under the circumstances, we must accord it due deference. *See Frisch's Restaurants, Inc. v. Conrad*, 170 Ohio App.3d 578, 2007-Ohio-545, 868 N.E.2d 689, ¶ 21 (10th Dist.) (the reviewing court must apply the principle of administrative deference and consider only the reasonableness of the agency's interpretation regardless of whether alternative interpretations are more satisfactory to a party).

{¶32} In light of the above, the third assignment of error is overruled.

D. Expert Testimony

{¶33} In the fourth assignment of error, Sutton argues that the trial court erred in upholding the ODE's resolution requiring him to undergo a fitness evaluation prior to license reactivation.

{¶34} Sutton argues that the hearing officer was an attorney, not a licensed health-care professional, and therefore had no authority to decide that he needed to undergo a fitness to teach evaluation prior to license reinstatement. He further argues that the Board introduced no evidence or testimony from a licensed social worker or mental health professional to support its recommendation that he submit to and pass a fitness-to-teach evaluation prior to license reactivation.

{¶35} Sutton, however, cites no authority to support his claims. If evidence, authority, and arguments exist that can support an assignment of error, it is not the duty of the appellate court to root it out. *See* App.R. 12(A)(2); App.R. 16(A)(7); *Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.*, 8th Dist. Cuyahoga No. 84748, 2005-Ohio-1017, ¶ 10.

{¶36} The hearing officer noted the concerns that M.F., the police, and she herself had with regards to Sutton's behavior both in the events leading up to the hearing and during the hearing itself. Absent authority to the contrary, we find no error in the Board's decision to adopt that portion of the hearing officer's report and recommendation that required Sutton undergo and pass a fitness-to- teach evaluation prior to returning to teaching.

{¶37} The fourth assignment of error is overruled.

E. Excessive Suspension

{¶38} In the fifth assignment of error, Sutton argues that the length of his suspension was excessive. To support his position, Sutton cites the name and teaching license numbers of four individuals who apparently committed crimes similar to his but received lesser sanctions.

{¶39} Ohio Adm.Code 3301-73-21(B) contains an additional 14 "mitigating and aggravating factors" for the Board to consider "in determining a final action under division (B)(1) of section 3319.31 of the Revised Code." In addition to the factors under Ohio Adm.Code 3301-73-21 (A)(6) and (8), the hearing officer further considered the following

aggravating and mitigating factors pursuant to Ohio Adm.Code 3301-73-21(B): Sutton's behavior resulted in two misdemeanor convictions; his conduct bordered on obsessive and seemed to be part of his personality, which was concerning given his relation to his students; Sutton had a previous incident in which he was given a letter of warning after harassing a female teacher; he had not disclosed his convictions to his employer or fellow teachers; he had not previously been convicted of any crimes and had since been law-abiding; he appeared truly remorseful for his actions; he was 60 years of age; he had not been previously disciplined by another licensing agency or the Board; and it did not appear as though his actions had negatively impacted his students or the school community.

{¶40} We are reminded that

> [t]he Board of Education is ultimately charged with the administrative responsibility for monitoring and, as necessary, disciplining educators for behavior that reflects adversely on their moral fitness to continue in the school environment.

Haynam, 6th Dist. Lucas No. L-11-1100, 2011-Ohio-6499, at ¶ 88. Educators are role-models for students. The nature and duration of a sanction against an educator who has committed conduct unbecoming of his or her profession under R.C. 3319.31(B) and Ohio Adm.Code 3301-73-21 is for the Board to determine. This court's role is strictly limited to determining whether the trial court abused its discretion in finding that the Board's order was supported by reliable, probative, and substantial evidence.

{¶41} The ODE requested a three-year suspension. The hearing officer saw fit to give Sutton a four-month suspension conditioned on passing a fitness to teach evaluation.

The Board adopted the hearing officer's recommendation and the trial court found that it was supported by substantial, reliable, and probative evidence. Given the nature of our review, we cannot say that the trial court abused its discretion in this case.

{¶42} Therefore, the fifth assignment of error is overruled.

{¶43} Judgment affirmed.

It is ordered that appellee recover appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY J. BOYLE, J., and
ANITA LASTER MAYS, J., CONCUR