

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Martin D. Carter,	:	
	:	
Defendant-Appellee,	:	
	:	
v.	:	No. 10AP-1116
	:	(C.P.C. No. 10CVF-05-7304)
Ohio State Board of Education,	:	
	:	(ACCELERATED CALENDAR)
Plaintiff-Appellant.	:	

D E C I S I O N

Rendered on June 16, 2010

William C. Martin, for appellee.

Michael DeWine, Attorney General, *Mia Meucci Yaniko* and *Jennifer Bondurant*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Appellant, Ohio State Board of Education ("Board"), appeals the Franklin County Court of Common Pleas' order reversing the Board's decision to permanently revoke appellee's teaching license and remanding the matter to the Board for further proceedings. For the reasons that follow, we affirm the common pleas court's order.

{¶2} Appellee, Martin D. Carter, was a licensed teacher in Jackson County working as a music teacher and band director. In December 2006, a student,

(hereinafter "Student 1"), reported to his mother that Carter had touched his genitals during private after school music lessons conducted in the school band room. After an investigation by Jackson County Children Services, the school superintendant and county prosecutor were informed of the suspected abuse. Carter was charged criminally and a 2007 trial ended without a verdict due to a hung jury. The charges were dismissed and the record sealed in February 2009. The Board issued a notice to Carter on May 11, 2009 that it intended to suspend or revoke his teaching license.

{¶3} Carter requested a hearing, which was held before a hearing officer on January 13 and 14, 2010. Testimony and exhibits were entered into evidence including testimony from Student 1's mother, father, and psychologist, Dr. Ed Black. Carter testified that nothing inappropriate happened during the music lessons. Student 1, who was 12 in December 2006 and 15 at the time of the hearing did not testify. The hearing officer issued a report and recommendation that Carter's license be revoked which was adopted by the Board on April 14, 2010.

{¶4} Carter appealed the Board's decision to the Franklin County Court of Common Pleas. On September 9, 2010, the common pleas court issued an order reversing and remanding the Board's decision.

{¶5} The Board timely filed a notice of appeal and assigns the following errors for our consideration:

I. The Trial Court erred in its interpretation of R.C. Chapter 119, R.C. 3319.31 and O.A.C. Chapter 3301-73, et seq. with respect to how the agency is to conduct administrative hearings concerning educator licensure.

II. The Trial Court erred by substituting its judgment for that of the Ohio State Board of Education.

{¶6} In an administrative appeal, pursuant to R.C. 119.12, when a trial court reviews an order of an administrative agency, it must consider the entire record to determine whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570. To be "reliable," evidence must be dependable and true within a reasonable probability. To be "probative," evidence must be relevant, or, in other words, tend to prove the issue in question. To be "substantial," evidence must have importance and value. *Id.* If reliable, probative, and substantial evidence exists, the common pleas court must affirm the administrative agency's decision. *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207.

{¶7} The common pleas court's review of the administrative record is neither a trial de novo nor an appeal on questions of law only but a hybrid review in which the court " 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. The determination of whether reliable, probative, and substantial evidence supports the board's decision is primarily a question of the absence or presence of the requisite quantum of evidence. *Pope v. Ohio State Dept. of Rehab. & Corr.*, 179 Ohio App.3d 377, 382, 2008-Ohio-5063, citing *Andrews*.

{¶8} In this hybrid form of review, due deference must be given to the administrative resolution of evidentiary conflicts. For example, when there is conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact finder, had the opportunity to observe the

demeanor of the witness and weigh their credibility. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. However, the findings of the agency are, by no means, conclusive. *Id.*

{¶9} An appellate court's review of the evidence is more limited than a trial court's. Instead of appraising the weight of the evidence, an appellate court determines whether the trial court abused its discretion in its examination of the record for reliable, probative, and substantial evidence. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. However, on questions of law, an appellate court's review is plenary. *Franklin Cty. Sheriff v. Frazier*, 174 Ohio App.3d 202, 2007-Ohio-7001.

{¶10} In the first assignment of error, the Board argues that the trial court failed to adhere to the standard of review set forth within R.C. 119.12 and other chapters of the Ohio Revised Code when it concluded that the Board's order was not supported by reliable, probative, and substantial evidence when the Board relied on hearsay evidence.

{¶11} Hearsay may be considered by an administrative agency and the rules of hearsay exclusion are not strictly applied in administrative hearings. *Felice's Main St. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1405, 2002-Ohio-5962. However, an administrative agency should not act upon evidence which is not admissible, competent, or probative of the facts which it is to determine. The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner. *Hong Kong Trading Ctr., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 09AP-293, 2010-Ohio-913, ¶41.

{¶12} The trial court in its hybrid review of the Board's order must apprise all the evidence as to the credibility of the witness and the probative character of the evidence. The court must also examine the weight of the evidence. If there is conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which had the opportunity to observe the demeanor of the witness and weigh their credibility. *Conrad* at 111.

{¶13} The central question in this case is whether the alleged inappropriate conduct occurred. Student 1 did not testify at the hearing and evidence of the alleged incident came through the testimony of Student 1's mother, father, and his psychologist. Carter did testify at the hearing and adamantly denies that he had any inappropriate contact with Student 1. The trial court, in weighing the evidence, found that the direct evidence presented by Carter made the hearsay testimony less than reliable, substantial, and probative.

{¶14} The trial court did not abuse its discretion in coming to the conclusion that the Board lacks a preponderance of reliable, probative, and substantial evidence to support its order. The due deference normally afforded an administrative agency is partially based on the fact that they had an opportunity to observe the demeanor of the witness. This advantage of observing a witness is nullified when evaluating hearsay testimony. Further, this due deference is given when evaluating approximately equal weights of conflicting testimony. While there is direct evidence that Student 1 was upset and told his mother, father, and psychologist about the alleged conduct, there is no direct evidence of the conduct itself.

{¶15} The Board argues that the trial court erred by requiring testimony from Student 1. The trial court does not require the testimony of Student 1, but was very concerned about the lack of the ability to cross-examine Student 1 who was 12 at the time of the incident and at least 15 at the time of hearing. The trial court is not only saying that there is lack of the necessary quantum of evidence, but also what evidence would be most helpful in overcoming that deficiency. The trial court is not importing a Sixth Amendment Confrontation Clause requirement or enforcing the confrontation provision of the Ohio Constitution.

{¶16} The Board also further argues that it was improper for the trial court to conclude that the hearing officer was required to conduct an in-camera review to determine the scope of the testimony to be offered by Student 1's psychologist, Dr. Black.

{¶17} The trial court only suggests that an in-camera review would be proper. What the trial court is mandating, is that the hearing officer be required to make a determination as to what testimony is proper. The trial court could not require the hearing officer to conduct an in-camera review in this administrative proceeding.

{¶18} What the trial court is concerned with is evaluating the reliability of Dr. Black's testimony that Student 1 was telling the truth. The trial court found that, if Dr. Black's testimony had more weight, then it would have affirmed the agency's decision. In the trial court's judgment, the limited cross-examination of Dr. Black was a factor that lightened the weight of the evidence that Dr. Black presented.

{¶19} What the trial court has done is not only indicating why it did not give Dr. Black's testimony more weight, but also how the hearing officer can cure it in future proceedings.

{¶20} The trial court did not abuse its discretion in its examination of the record for reliable, probative, and substantial evidence. The trial court weighed the evidence and found that the hearsay testimony was not reliable enough given the direct testimony of Carter to support the Board's decision.

{¶21} The first assignment of error is overruled.

{¶22} The Board's second assignment of error is that the trial court substituted its judgment for that of the Board.

{¶23} The determination whether an agency order is supported by reliable, probative, and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence. "Although this in essence is a legal question, inevitably it involves a consideration of the evidence, and to a limited extent would permit a substitution of judgment by the reviewing Common Pleas Court." *Univ. of Cincinnati* at 111.

{¶24} In this case, the trial court evaluated the evidence on record and determined that there was not the requisite quantum to show Carter had committed any improper conduct. The trial court said that while the hearsay may have some indicia of reliability, it is not a substitute for direct evidence. This is a limited substitution of judgment in which the trial court did not abuse its discretion in making.

{¶25} The second assignment of error is overruled.

{¶26} The trial court did not abuse its discretion when evaluating whether the agency's order was supported by reliable, probative, and substantial evidence finding that the order lacked the requisite quantum of evidence. Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs.
BRYANT, P.J., concurs separately.

BRYANT, P.J., concurring separately.

{¶27} I agree with the majority's opinion that the judgment of the common pleas court be affirmed, but because I do so for somewhat different reasons, I write separately.

{¶28} The common pleas court faults the hearing process because the evidence supporting the Board's decision is largely hearsay, Student 1 having not testified at the hearing. In administrative hearings, the rules of evidence are relaxed, and an administrative agency has "substantial leeway in evaluating the evidence before it and drawing inferences from it." *State ex rel. Donohoe v. Indus. Comm.*, 10th Dist. No. 08AP-201, 2010-Ohio-1317, ¶14, quoting *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, ¶28. Even if, however, we apply the rules of evidence, much of the psychologist's testimony regarding what Student 1 told him arguably falls under the exception to the hearsay rule for statements made for purposes of medical diagnosis and treatment. Evid.R. 803(4).

{¶29} Moreover, the common pleas court's decision seems to suggest Student 1 must testify, either at the hearing or by deposition. The Supreme Court "has never

required direct evidence" to prove a claim during an administrative proceeding; instead the hearing officer "may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence." *Donohoe* at ¶14, quoting *Shelly* at ¶29, citing *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69. Indeed, even in the criminal context, the victim does not necessarily need to testify for the state to obtain a conviction. See, e.g., *State v. Williams*, 6th Dist. No. L-08-1371, 2009-Ohio-6967 (affirming defendant's domestic violence conviction where the victim did not testify at trial but the responding officer testified as to the victim's statements at the scene of the crime); *State v. Williams*, 5th Dist. No. 2007-CA-00267, 2008-Ohio-3652 (affirming defendant's domestic violence conviction where victim did not testify at trial but responding officers and the victim's treating physician testified as to the victim's statements made at the time of her injuries). Prevailing case law would prohibit applying a stricter standard for an administrative proceeding, where the rules of evidence are relaxed, than for a criminal trial. See generally *Kelly v. Ohio Dept. of Admin. Servs.*, 10th Dist. No. 04AP-119, 2004-Ohio-6732, ¶17 (noting that many procedural requirements, such as the right to cross-examine a witness, are "not required for due process in administrative actions to the same extent as in criminal court actions"); *Ohio State Bar Assn. v. Illman* (1976), 45 Ohio St.2d 159, 162 (noting "[t]he standards of due process in [administrative] proceedings are not those in a criminal proceeding").

{¶30} Despite my concerns regarding the common pleas court's decision, the record presents two issues that lead me to conclude the common pleas court did not abuse its discretion in reversing and remanding the Board's decision. First, Student 1's mother, school principal, and psychologist all testified Student 1 was a truthful person and

they believed he was telling the truth. (Tr. 77-78, 95, 199.) In general, one witness' opinion as to the credibility of another's statement or testimony is impermissible, at least in criminal proceedings. See *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, ¶33, citing *State v. Boston* (1989), 46 Ohio St.3d 108. Not to apply a criminal standard to this administrative proceeding, and acknowledging the rules applied to an administrative hearing are more relaxed than those pertinent to a criminal proceeding, I note here that the hearing officer explicitly relied on both the mother's and the psychologist's testimony stating they believed Student 1 was telling the truth.

{¶31} Student 1's credibility was at the heart of the Board's decision. The hearing officer did not have the opportunity to independently evaluate Student 1's credibility. The hearing officer nonetheless allowed the other witnesses to vouch for Student 1's credibility and then explicitly relied on their opinions of Student 1's truthfulness, a process that is troublesome. See generally *Glass City Academy, Inc. v. Toledo*, 179 Ohio App.3d 796, 2008-Ohio-6391 (discussing the general caution required in an administrative hearing in accepting lay opinion testimony). Allowing hearsay evidence in an administrative proceeding is different than allowing the witnesses testifying at an administrative hearing to attest to the veracity of the hearsay evidence, as testing the veracity of the declarant is one of the inherent problems in relying on hearsay evidence. See Ohio Adm.Code 5101:6-7-01(C)(1)(b) (stating "[h]earsay evidence may be considered by the hearing officer in arriving at the findings of fact" but "such evidence must be critically evaluated, since it is not given under oath and cannot be cross-examined to test the perception, memory, and veracity of the declarant").

{¶32} Secondly, the hearing officer instructed the psychologist that he could "be the judge of what [his] release allows [him] to talk about." (Tr. 207.) As the common pleas court notes, matters of privilege are sensitive, and when the parties dispute the scope of the release, the tribunal should determine what evidence falls within its ambit. *Neftzer v. Neftzer* (2000), 140 Ohio App.3d 618, 622 (holding a trial court errs in ordering a hospital to disclose medical records without first conducting an in camera inspection of the records to determine which records are "causally or historically related to physical or mental injuries that are relevant to the issues"). In an administrative hearing, even if in camera inspection is not required, it is certainly permissible and often preferable. See *Child Care Provider Certification Dept. v. Harris*, 8th Dist. No. 80669, 2002-Ohio-3795, ¶25 (concluding that, in an administrative hearing, "an in camera inspection of such [confidential] records is not only permitted, but is preferred"). In any event, the hearing officer should not allow the witness alone to determine the scope of the release.

{¶33} Although the hearing officer admitted into evidence the signed release, nothing suggests the hearing officer independently considered the scope of the release. Because the psychologist's testimony was pivotal to the Board's case, the hearing officer's allowing the psychologist to determine the scope of his own release is problematic.

{¶34} For these reasons, I concur in the majority's conclusion that the common pleas court did not abuse its discretion in reversing the Board's decision and remanding for further proceedings.
