STATE OF MICHIGAN

COURT OF APPEALS

SHARON BETH KIRSCH, Petitioner-Appellee,	UNPUBLISHED November 19, 2013
v SUPERINTENDENT OF PUBLIC INSTRUCTION and MICHIGAN DEPARTMENT OF EDUCATION, Respondents-Appellants.	No. 311121 Oakland Circuit Court LC No. 2011-121734-AA

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Respondents appeal by leave granted a circuit court order reversing the Final Decision and Order of the Superintendent of Public Instruction (Superintendent) and the Michigan Department of Education (MDE), which revoked petitioner's provisional teaching certificate. The circuit court also directed the MDE to process petitioner's provisional teaching certification renewal application. We reverse the circuit court's order and reinstate the July 28, 2011 Final Decision and Order of the Superintendent and the MDE.

Respondents first argue that the circuit court grossly misapplied the substantial evidence test when it held that the record failed to contain even a scintilla of evidence to support the Superintendent's decision. We agree. This Court's review is "limited to determining whether the circuit court 'misapprehended or grossly misapplied'" the substantial evidence test when reviewing an agency's factual findings. *Romulus v Mich Dep't of Envtl Quality*, 260 Mich App 54, 62; 678 NW2d 444 (2003). A "circuit court's review of [an agency's] factual findings is limited to determining whether the decision was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, or was clearly an abuse of discretion." *Id*. at 62-63.

"'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion." *Dowerk Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). "While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Id.* "Under the substantial evidence test, the circuit court's review is not de novo and the court is not permitted to draw its own conclusions from the evidence presented to the administrative body." *Edw C Levy Co v Marine City Zoning Bd of Appeals*, 293 Mich App

333, 341; 810 NW2d 621 (2011). "Reviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency's choice between two reasonably differing views of the evidence." *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 553; 581 NW2d 707 (1998) (original citation omitted).

Respondents argue that the circuit court misapplied the substantial evidence test by ignoring the significant circumstantial evidence that petitioner knowingly submitted an altered or fraudulent test score report to Wayne State University (WSU) to obtain her provisional teaching certificate. Respondents assert that the circuit court's use of a lack of actual evidence standard grossly misapplied the applicable substantial evidence test because it ignores the circumstantial evidence presented. The circuit court correctly stated the substantial evidence standard under which it should review the agency's decision and also accepted the agency's findings of credibility. However, even after acknowledging that petitioner's testimony was not credible, the court found no evidence of forgery or fraud. Although the circuit court agreed that the evidence showed that the test score report submitted to WSU was altered, it found that there was no evidence regarding who did the alteration. It appears by its ruling that the circuit court did not consider the ample circumstantial evidence provided at the hearing that petitioner was responsible for the alteration and required that proof of the alleged fraud be established by direct evidence. An administrative agency may make factual findings based upon circumstantial evidence. *Dillon v Lapeer State Home & Training School,* 364 Mich 1, 8; 110 NW2d 588 (1961). Further, it is well established that fraud and misrepresentation may be proven circumstantially. *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 458; 559 NW2d 379 (1996).

Here, ample circumstantial evidence exists to support the Superintendent's finding that that petitioner knowingly provided WSU with an altered test score report for the July 12, 2003 history test in support of her application for an initial provisional teacher certification. The MDE produced an exact copy of the test score report sent to petitioner from the Evaluation Systems Group of Pearson Education, Inc.'s archived data. That archived report, along with the MDE's ASCII report, and the duplicate report printed in 2009 were compared to the test score report that petitioner originally provided to WSU. All of the reports had identical data except the report submitted by petitioner, which contained several differences from the other reports. The archived copy of the report, the ASCII report, and the report printed in 2009 all indicated that petitioner scored a 218 and indicated a status of "Did Not Pass" or "F"; only the report submitted by petitioner indicated that she scored 228 and passed the test. Further, petitioner's copy of the report contained different scoring in the subareas than the other reports. Evidence was also presented at the hearing that the 228 score on petitioner's copy of the test was not a possible score for the test.

Additional evidence was presented that refuted petitioner's allegation that the differences in the test score reports were due to computer error. The hearing testimony established that there were no other known instances where a single individual examinee's test report from Pearson did not accurately reflect their actual performance. If an error had occurred during processing, then the archived and other generated reports would also contain the same error. A computer error affecting only one report and not repeated elsewhere was virtually impossible. Further, it is worth noting that even though WSU twice asked petitioner to supply it with a duplicate score report from the testing company and provided her with information on how to do so, petitioner merely supplied a copy of the altered report she had originally submitted. Such a failure to

comply with WSU's requests can create an inference that petitioner knew the report that she would receive from Pearson would be different from the report she originally submitted to WSU. Finally, the Superintendent found that there was credible evidence that petitioner told a WSU official in 2009 that information provided by the testing company in 2009 would be inaccurate.

Evidence regarding petitioner's possible motivation to submit an altered report was also presented. Petitioner had failed the history test on three occasions before July 2003 and a passing score on the history test was required before petitioner could do her student teaching. Petitioner had submitted the July 2003 score report at issue in response to an August 12, 2003 notice from WSU that she was in jeopardy of having her name removed from the student teaching roster for fall 2003 because she had not passed the history and social studies tests. Although petitioner stated she could take the test as often as she needed to and that retaking the test was of no import to her, evidence was presented that, without student teaching, petitioner would have been unable to graduate.

Based upon the foregoing, it is clear that the circuit court misapplied the substantial evidence test. The reports produced by the MDE, along with testimony regarding the unlikelihood of computer error and petitioner's possible motivation to submit an altered report, provide more than a scintilla of evidence to establish that petitioner submitted an altered or fraudulent test report to WSU. The only reasonable explanation is that the test score report submitted by petitioner was somehow altered to misrepresent her actual score. Therefore, we find that the circuit court erred in reversing the Superintendent's decision to revoke petitioner's teaching certificate.

Respondents also argue on appeal that the circuit court clearly lacked the authority to order the processing of petitioner's renewal application without the required teacher preparation institution recommendation and that such an order essentially amounts to improper mandamus relief. We agree. This Court reviews issues involving statutory interpretation de novo. *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 223; 771 NW2d 423 (2009).

Under the MDE's rules, to obtain an initial secondary provisional teaching certificate, an applicant must have completed an approved general or liberal arts program, 2006 AACS, R 390.1122(1), obtained a bachelor's degree, and "shall be recommended" by a State Board of Education approved Michigan college or university, Rule 390.1125(1); Rule 390.1125(2); Rule 390.1129a. Michigan law further requires that an applicant must have passed the applicable tests to obtain a secondary provisional certificate. MCL 380.1531(2). Further, to renew a provisional certificate, an applicant must have a recommendation from a teacher preparation institution. Rule 390.1129a(2).[1]

[1] Although petitioner asserts that not everyone seeking certification in Michigan is required to obtain a recommendation from a teacher preparation institution, this assertion is limited to out-of-state applicants only, Rule 390.1154, and thus is inapplicable under these circumstances.

WSU withdrew its original recommendation for petitioner's teaching certificate application after it determined that petitioner had provided it with an altered test report in 2003. As a result, the MDE revoked petitioner's Initial Secondary Provisional Certificate since she lacked the requisite recommendation. Further, without WSU's recommendation, petitioner has not submitted a proper renewal application.

Despite the foregoing, the circuit court ordered what is essentially mandamus relief by ordering the Superintendent and the MDE to process petitioner's renewal application.[2] It is well established that a circuit court may not grant relief on appeal from an administrative decision that is "in the nature of mandamus." *Vanzandt v State Employees Retirement Sys*, 266 Mich App 579, 586 n 3; 701 NW2d 214 (2005). In *Vanzandt*, this Court found that the circuit court was without authority when it directed the agency to make particular factual findings. *Id.*

Even if mandamus were an option, "[a]n order of mandamus will only be issued if a plaintiff proves it has a clear legal right to performance of the specific duty sought to be compelled and that the defendant has a clear legal duty to perform such an act." *Baraga Co v State Tax Comm*, 466 Mich 264, 268-269; 645 NW2d 13 (2002) (internal quotations and citations omitted). Here, there is no legal right or duty to process a renewal application without the required recommendation.

Finally, mandamus is "an inappropriate tool to control a public official's . . . exercise of discretion." *Lansing Sch Ed Ass'n v Lansing Sch Dist Bd of Ed (On Remand)*, 293 Mich App 506, 520; 810 NW2d 95 (2011) (citation omitted). "[M]andamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Teasel v Dep't of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984) (footnote omitted). Here, the circuit court lacked the authority to direct the Superintendent and the MDE to process petitioner's renewal application when she did not have the requisite recommendation from a teacher preparation institute.[3] Accordingly, we hold that the circuit court erred when it ordered the MDE to process petitioner's renewal application without the required recommendation.

The circuit court's order is reversed. The Superintendent's Final Decision and Order is reinstated. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

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[2] Petitioner's Initial Provisional Secondary Teaching Certificate was due to expire. Petitioner sent a renewal application to the MDE, which returned it since there was no accompanying recommendation from a teacher preparation institution. Without such a recommendation, a proper renewal application is not before the MDE.

[3] Petitioner also makes the argument that the "recommendation" required can be negative or positive, but such an argument is both nonsensical and lacks merit.