[Cite as *Haynam v. Ohio State Bd. of Edn.*, 2011-Ohio-6499.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Benjamin J. Haynam	Court of Appeals No. L-11-1100
Appellant	Trial Court No. CI 201007536
v.	
Ohio State Board of Education, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: December 16, 2011

* * * * *

Douglas G. Haynam, for appellant.

Mike DeWine, Attorney General of Ohio, Amy Nash Golian
and Jennifer Bondurant, Assistant Attorneys General, for appellees.

* * * * *

YARBROUGH, J.

{¶ 1} Plaintiff-appellant, Benjamin J. Haynam, appeals a judgment entered by the Lucas County Court of Common Pleas affirming a decision of appellee Ohio State Board of Education ("Board"), which, among other aspects, ordered that he "be permanently ineligible to apply for any license issued by the State Board of Education."

{¶ 2} The core facts are not in dispute. Haynam began classes at Kent State University ("KSU") in 2003 but withdrew in 2006 with only 40 credit hours and a 1.91 grade point average. Even before withdrawing, he concealed his academic struggles from his parents. This continued for two years until 2008, when he finally told family and friends he was graduating "cum laude" with a Bachelor's Degree in Integrated Science Education. He then orchestrated events to induce belief in that falsehood by renting a cap and gown, participating in KSU's graduation exercises, and sending his parents an email from a fictitious KSU official apologizing for omitting Haynam's name from the official list of graduates.

{¶ 3} The record is unclear whether this academic episode served to fuel further mendacity or whether Haynam simply felt trapped within the accumulated deceit. Regardless, in late 2008, and with support from his parents, Haynam obtained a substitute teaching position with Sylvania City Schools ("Sylvania"). This employment was gained largely on the strength of a resume detailing sham credentials and accomplishments at KSU, and falsely claiming he had taught for five months at Kent High School. Although Sylvania initially requested copies of Haynam's academic degree and state teaching license, he ignored the request and the school's personnel official did not pursue it. From 2008 to 2009, Haynam continued to substitute teach. He also assisted with various extracurricular events. He apparently did well enough in these roles to earn positive evaluations from otherwise unsuspecting Sylvania administrators, teachers, parents and students.

{¶ 4} In June 2009, Haynam interviewed for a full-time position and was selected. It was during an examination of his personnel file that a Sylvania official noticed the absence of a KSU degree, college transcripts and the teaching license. Haynam was asked to provide these items. From his computer he created a bogus license and gave it to Sylvania's personnel officer. He then applied to the Ohio Department of Education ("ODE") for a provisional Ohio teaching license. On the application he falsified various items of academic and background information, and then signed the name of a KSU official. While this application was pending, Sylvania officials had become suspicious about the appearance of the license. They contacted the ODE and it was confirmed to be a forgery. Then, from KSU, they promptly learned Haynam had never graduated and their academic official's signature was also a forgery.

{¶ 5} Amid the unraveling deceit, Haynam claimed "it was all a mistake" when Sylvania personnel confronted him with the inconsistent facts and the failure to submit the requested documents. Official frustration with this response soon became an investigative matter for the Sylvania Police Department. In July 2009, Haynam was indicted on three counts of forgery and three counts of tampering with records, all felonies, in connection with the fraudulent teaching license and the forged documents. In November 2009, he pled guilty to one count each of the forgery and tampering offenses. Hayman was sentenced to four years of community control and ordered to pay restitution to Sylvania in the amount of $21,837.34.

{¶ 6} In a letter to Haynam dated May 11, 2010, the Board indicated its intent to decide whether to deny his application for a two-year provisional teaching license and whether to "limit, suspend, or revoke" his three-year pupil-activity supervisor permit that had been issued in 2008. The Board listed as reasons for this potential action Haynam's felony convictions and five instances of "conduct unbecoming a licensed educator" consisting of deceptive and fraudulent acts between 2007 and 2009. Haynam requested a hearing pursuant to R.C. Chapter 119, and one was held before a state hearing officer in August 2010. Following this five-day hearing, the officer issued a report and recommendation. The report, in part, noted that "[Haynam] does not dispute many of the allegations of misconduct. The primary issue [is] whether or not the denial * * * should be permanent [or whether] licensure at some time in the future should remain a potential option."

{¶ 7} After reviewing the facts, the hearing officer found sufficient evidence from which to conclude that Haynam's convictions, and the underlying fraudulent and deceptive acts which precipitated them, violated the standards for licensure established in R.C. 3319.31(B)(1), B(2)(a) and (B)(2)(c). He recommended that the Board: (1) permanently deny Haynam's application for the two-year provisional license teaching license; (2) permanently revoke his three-year supervisor permit; and (3) declare him "permanently ineligible to apply for a permit or licensure in Ohio in the future."[1]

[1]While acknowledging the positive evaluations Haynam received for his substitute teaching, the hearing officer concluded: "The issue [is] whether [Haynam's] deceit and

{¶ 8} Haynam filed objections to the report. On October 12, 2010, after considering the report and the objections, the Board, by resolution, adopted the substance of the three recommendations. Haynam then appealed to the Lucas County Court of Common Pleas, which affirmed the Board's decision. This appeal followed.

{¶ 9} R.C. 119.12 establishes a hybrid standard for appellate review of a common pleas court's decision affirming the order of a state administrative agency. *Moczniansk*i *v. Ohio Dept. of Jobs & Family Servs.*, 6th Dist., No. L-10-1367, 2011-Ohio-4685, ¶ 20-21; *Washington Cty. Home v. Ohio Dept. of Health* (2008), 178 Ohio App.3d 78, 2008-Ohio- 4342, ¶ 24-25. One part of the standard pertains to factual or evidentiary issues, the other to questions of law. In reviewing the lower court's decision as to the evidentiary basis for the agency's order, this court is limited to the abuse-of-discretion standard. Id. at ¶ 24; *Shelton v. Gallia Cty. Veterans Serv. Comm.*, 4th Dist. No. 10-CA-14, 2011-Ohio-1906, ¶ 9. However, in appeals challenging the court's construction, interpretation or application of a constitutional provision, statute or case, we exercise de novo review. *Washington*, supra, at ¶ 25 (on purely legal questions, the appellate court "exercises

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dishonest conduct should permanently prevent him from being entrusted with young children as a teacher and role model. * * * This is not a single incident of poor judgment. This was a continuing course of multiple dishonest acts and misrepresentations over an extended period of time. [Haynam] deceived family, friends, colleagues, employers, and public officials. * * * These misrepresentations were made again and again over many years. [Haynam] had multiple opportunities to 'come clean' and tell the truth, and his failure to do so excludes him from being a proper role model for young students."

independent judgment"); *Carter v. Ohio State Bd. of Edn.*,10th Dist. 10-AP-116, 2011-Ohio-2945, ¶ 9 ("plenary review" of legal questions.)

{¶ 10} Haynam has assigned three errors for our review. There is no dispute about the underlying material facts which led to the hearing officer's recommendation or the Board's decision to adopt it, and this appeal involves none. The first and third assignments seek to reverse the trial court's decision holding that the Board had statutory authority under R.C. 3319.31 to declare Haynam permanently ineligible to apply for a teaching license. These raise questions of law, and Haynam argues the Board has no such authority under the statute. We will address them separately.

{¶ 11} The first assigned error states:

{¶ 12} "1. The Lucas County Common Pleas Court erred in affirming the decision of the Ohio State Board of Education ('SBOE') declaring Benjamin J. Haynam permanently ineligible to apply for an educator's license in that the SBOE lacks authority under the Revised Code to declare an individual subject to discretionary discipline permanently ineligible to apply for a license."

{¶ 13} R.C. 3319.31 is entitled "Refusal, limitation, suspension, or revocation of license." In relevant part, subsections (B) and (C) state:

{¶ 14} "(B) 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:

{¶ 15} "(1) Engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position;

{¶ 16} "(2) A plea of guilty to, a finding of guilt by a jury or court of, or a conviction of any of the following:

{¶ 17} "(a) A felony other than a felony listed in division (C) of this section;

{¶ 18} "(b) An offense of violence other than an offense of violence listed in division (C) of this section;

{¶ 19} "(c) A theft offense, as defined in section 2913.01 of the Revised Code, other than a theft offense listed in division (C) of this section;

{¶ 20} "* * *

{¶ 21} "* * *

{¶ 22} "(C) Upon learning of a plea of guilty to, a finding of guilt by a jury or court of, or a conviction of any of the offenses listed in this division by a person who holds a current or expired license or is an applicant for a license or renewal of a license, the state board or the superintendent of public instruction, if the state board has delegated the duty pursuant to division (D) of this section, *shall* by a written order revoke the person's license or deny issuance or renewal of the license to the person. The state board or the superintendent *shall* revoke a license that has been issued to a person to whom this division applies and has expired in the same manner as a license that has not expired.

{¶ 23} "Revocation of a license or denial of issuance or renewal of a license under this division is effective immediately at the time and date that the board or superintendent issues the written order and is not subject to appeal in accordance with Chapter 119 of the Revised Code. Revocation of a license or denial of issuance or renewal of license under this division remains in force during the pendency of an appeal by the person of the plea of guilty, finding of guilt, or conviction that is the basis of the action taken under this division." (Emphasis added.)

{¶ 24} R.C. 3319.31(C) goes on to list eighty offenses that prevent an educator or applicant from being eligible to retain or acquire a teaching license. Both parties agree that subsection (C) gives no discretion to the Board in regard to the action it will take. The two felonies to which Hayman pled guilty do not fall within subsection (C), but are within the purview of subsection (B)(2)(a) and (c). Subsection (B) confers on the Board discretionary authority to determine sanctions for those offenses, and similarly for the conduct described in subsection (B)(1).

{¶ 25} Haynam maintains that the discretion given in R.C.3319.31(B) does not include action that is permanent in nature, because the statute creates a "dichotomy in its treatment of felony convictions" as they impact a person's potential to be a licensed educator. The felonies in subsection (C) create a permanent bar to licensure and the actions required of the Board there are mandatory, whereas the felonies and the conduct specified under subsection (B) *may* create a bar, but if so, it is not a permanent one. Thus, he argues, the Board cannot use its discretionary authority to impose a permanent

sanction.[2] The Attorney General responds that the mandatory language regarding the felonies listed in subsection (C) implies nothing about the scope of the discretionary authority the Board is granted in subsection (B). Although giving the Board discretion to act in ways that are less than permanent, nothing in the language of subsection (B) *limits* its ability to impose a permanent sanction if the severity of the misconduct or the offense would warrant it.

{¶ 26} In support of their respective positions on whether any sense of permanency is implied by the sanctions listed in R.C. 3319.31(B), both parties refer us to the cases involving the State Medical Board and the revocation of medical licenses under R.C. 4731.22. Haynam cites *Richter v. State Medical Bd.*, 161 Ohio App.3d 606, 2005-Ohio-2995, while the Attorney General relies on *Roy v. Ohio State Med. Bd.* (1995), 101 Ohio App.3d 352. These cases address the meaning and scope of the term "revoke," one of the sanctions available in R.C. 4731.22(B).

{¶ 27} In *Roy,* the physician's license had been permanently revoked based on two felony theft convictions. On appeal, he argued that R.C. 4731.22(B) limited the board to nonpermanent revocations. The *Roy* court rejected this, holding that the term "revocation," standing alone, included the possibility of permanent revocation: "[T]he authority granted the board under R.C. 4731.22(B) to revoke a physician's license to

[2]By long-standing construction, the term "may" in a statute is deemed permissive, while the term "shall" is mandatory. See, generally, *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102. But for this argument, Haynam further equates the use of "may" with a nonpermanent result and the use of "shall" with a permanent one.

practice medicine includes the authority to revoke it permanently." Id. at 355. *Roy* also recognized that under some circumstances the revocation of a license could be less than permanent, citing *State v. White* (1987), 29 Ohio St.3d 39. In *White*, the issue involved the suspension of a driver's license under R.C. 4507.16(A). The Ohio Supreme Court analyzed how the words "suspend" and "revoke" were used in R.C. Chapter 4507 and concluded that, although not defined in the Revised Code, their use indicated the terms were not intended to be synonymous. Giving them "their common, everyday meaning," the court stated that "'suspend' ordinarily contemplates the temporary taking away of something," while "revocation * * * is a permanent taking without the expectation of reinstatement." Id. at 40. The Supreme Court conceded that under some circumstances not all revocations prevent relicensure. Id. at 41. Thus, revocation generally means a permanent taking, but not always.

{¶ 28} In *Richter*, the medical board permanently revoked the physician's license for various violations of R.C. 4731.22(B), including criminal offenses. The board also imposed a lifetime ban on him from practicing medicine. When he sought a new license, the board refused to provide, accept or process his application. Challenging this refusal, Richter sought to overturn the permanent revocation and the ban. Id. at ¶ 6-8. The Tenth Appellate District reviewed a line of cases involving the revocation of medical licenses, including *Roy*, and held, consistent with *Roy* and *White*, that R.C. 4731.22(B) conveys the authority to revoke a license permanently, even though that section did not modify "revoke" with the word "permanently." Id. at ¶ 14. The court noted, however, that in

applying for a *new* license Richter "was not seeking reinstatement" of the revoked license. Id. at ¶ 8. Thus, because "some revocations are subject to reinstatement, and under some circumstances, a new license may be obtained following revocation," Richter was at least "entitled to *apply* for a new medical license." Id. at ¶ 14. (Emphasis added.)

{¶ 29} *Roy* and *Richter,* however, were decided under R.C. 4731.22 (B). That subsection employs the mandatory term "shall" regarding the board's authority to impose one of the several sanctions against medical licensure listed there. Neither party has cited *Guanzon v. State Med. Bd.* (1997), 123 Ohio App.3d 489, in which the board, under R.C. 4731.22(A), permanently revoked the medical license of a physician who had used deception in the course of applying for it. That subsection conveys on the medical board the *discretionary* authority to take adverse actions, such as revocation. Like R.C. 3319.31(B) here, R.C. 4731.22(A) signals that discretion by using the term "may." Its sanctions pertain specifically to a medical licensee or applicant who "commit[s] fraud, misrepresentation, or deception in applying for or securing any license * * * issued by the board." For this conduct, subsection (A) states that the board "*may* revoke or *may* refuse to grant" a certificate or license. (Emphasis added.)

{¶ 30} In his application, Guanzon had failed to disclose the fact that disciplinary proceedings had been initiated against him in another state, resulting in the surrender of his medical license there. Finding that *Roy* "appli[ed] with equal weight" because both subsections of R.C. 4731.22 used the "same operative language," the *Guanzon* court upheld the permanent revocation. The court concluded without difficulty that the

statute's discretionary language gave the medical board the "authority to permanently revoke a physician's license for a violation of R.C. 4731.22(A)." Id. at 497.

{¶ 31} *Roy* and *Richter* thus dispose of Haynam's claim that unless a particular sanction, such as "revoke," is modified by the adjective "permanently," the Board is necessarily without authority to make it permanent. Plainly it has that authority. *Guanzon*, as a matter of construction, indicates that where a statute grants the board *discretion* to impose a sanction against a licensee or applicant, that discretion can encompass imposing the sanction in its *permanent* form. That does not end the analysis, however, for the medical board cases take us only so far.

{¶ 32} Notably relevant here is *Poignon v. Ohio Bd. of Pharmacy*, 10th Dist. No. 03-AP-178, 2004-Ohio-2709. The issue in *Poignon* was whether the pharmacy board can forever bar an applicant. Poignon, who had been a licensed pharmacist, had his license permanently revoked both for stealing controlled substances, primarily narcotics and stimulants, and for the ensuing felony convictions. Through a mandamus action, he asked the appeals court to order the pharmacy board to process his application for a new license and either grant it or give him a hearing.

{¶ 33} The pharmacy board had revoked Poignon's license under its discretionary authority in R.C. 4729.16(A) ("may revoke"), and then denied his new application on the same basis. Poignon claimed that because the term "revoke" was susceptible of different meanings as to degree, it was ambiguous. Citing several medical board cases, including *Roy*, he argued that "since a physician whose medical license has been 'revoked' * * *

may seek its reinstatement, he, as a pharmacist, may seek reinstatement of his permanently revoked pharmacy license." Id. at ¶ 3. The court rejected Poignon's attempt to apply the medical cases "generally to *any* license issued by a state agency." Id. at ¶ 5. Distinguishing those cases, the court cited the significance of Ohio Adm.Code 4729-9-01(E), which takes the statutory term "revoke" and defines it as an "action [taken] against a license *rendering such license void* and *such license may not be reissued*. 'Revoke' is an action that is *permanent against the license and licensee*." (Emphasis added.) Id. at ¶ 7.

{¶ 34} The *Poignon* court noted that this administrative code section was adopted pursuant to R.C. 4729.26, in which the General Assembly granted rule-making authority to the pharmacy board. Id. In relevant part, R.C. 4729.26 states:

{¶ 35} "The state board of pharmacy *may adopt rules* in accordance with Chapter 119. of the Revised Code, not inconsistent with the law, *as may be necessary to carry out the purposes of and to enforce the provisions of this chapter*.* * *" (Emphasis added.)

{¶ 36} Therefore, because R.C. 4729.16(A) gave the board the discretionary authority to revoke a license, and because Ohio Adm.Code Section 4729-9-01(E) defined both the scope *and effect* of what "revoke" means, the *Poignon* court held:

{¶ 37} "[T]he pharmacy board does not need to specify in its order [under R.C. 4729.16(A)] that its revocation of a pharmacy license is permanent, *as Ohio Adm.Code 4729-9-01(E) has already done so*. In the absence of any evidence that the legislature did not mean what it clearly said, we decline [Poignon's] invitation to 'interpret' a definition

that is not ambiguous. The pharmacy board is under no legal duty to either grant [his] application or provide him with a hearing on his attempt to regain his license, as he does not have a legal right to regain it." Id. at ¶ 7. (Emphasis added.)

{¶ 38} In sum, *Poignon* indicates that where the enabling statute gives the board the discretionary authority to sanction licensees and applicants, and also gives it the rule-making authority "to carry out" those sanctions, the board may, by administrative rule, define both the meaning and scope (or effect) of a particular sanction, unless the legislature has otherwise done so or has restricted that authority.

{¶ 39} This brings us to the scope of the Board of Education's disciplinary authority under R.C. 3319.31(B) as applied to Haynam. That section employs as terms of sanction: "refuse," "limit," suspend" and "revoke." "Limit" and "suspend" would certainly denote less than a permanent taking or denial of a license (see *State v. White*), while "refuse" and "revoke" could entail permanency. In this case, it is important to be clear about which of these terms actually applies to Haynam. He was not a licensed educator to whom the term "revoke" would normally apply. Subsection (B) applies that term to existing licenses or expired licenses. Here, the only act of revocation pertained to his three year "pupil activity supervisory permit," which was not a license to teach. See R.C. 3319.303(A). Indeed, Haynam never had a teaching license. The permit, issued in 2008, merely covered activities other than teaching, and he is not challenging its revocation. The forgery-tainted application he sent to the Board, however, was for a two-year license. If it had issued, it would have been classified as a "provisional

adolescent-to-young adult teaching license." Although the hearing officer recommended that this application be "permanently denied," the text of the Board's resolution merely "denied" the application. But Haynam is not challenging its denial. However, as a further step in denying the application, the Board's resolution ordered that he "be permanently ineligible to apply" for a future license—in effect, imposing a lifetime ban. Haynam *is* challenging this order.

{¶ 40} Given this, among the discretionary adverse actions available to the Board in R.C. 3319.31(B), the only one applicable to Haynam's situation would be the "refus[al] to issue a license to the applicant." As with the act of revoking a license, the refusal to issue one can entail different levels of severity, depending on the circumstances. The question here, therefore, is whether the Board had the authority under R.C. 3319.31(B) to impose "permanent ineligibility" to apply for a license as the *severest* form of the refusal sanction.

{¶ 41} R.C. 3319.31(G) states:

{¶ 42} "(G) *The state board may adopt rules* in accordance with Chapter 119 of the Revised Code *to carry out this section* and section 3319.311 of the Revised Code." (Emphasis added.)[3]

[3]The reference to R.C. 3319.311 pertains to the Board's authority to conduct investigations and hold hearings in regard to conduct arising under R.C. 3319.31.

{¶ 43} Pursuant to this section, the Board adopted Ohio Adm.Code 3301-73-22, entitled "Suspension, revocation, permanent revocation and admonishment." This section states, in pertinent part:

{¶ 44} "(A) The state board, in accordance with Chapter 119. and section 3319.311 of the Revised Code, may suspend, revoke or deny a license as specified in paragraph (A) of this rule.

{¶ 45} "* * *

{¶ 46} "(2) *Revocation of a license is a final action*. After revoking a license, the state board shall impose one of the conditions described in paragraphs (A)(2)(a) and (A)(2)(b) of this rule.

{¶ 47} "(a) The state board may establish a minimum period of time before an applicant can apply for a new license. At the conclusion of the specified period, and upon demonstration of compliance with any educational requirements, the terms of the state board's order, and the criteria set forth in rule 3301-73-24 of the Administrative Code, the state board may issue a new license to the applicant.

{¶ 48} "(b) *The state board may order that the respondent whose license has been revoked shall be permanently ineligible to apply for any license issued by the state board* and that the respondent shall no longer be permitted to hold any position in any school district in the state that requires a license issued by the state board.

{¶ 49} "(3) *Denial of an application for a license is a final action.* After denying an application, the state board shall impose one of the conditions described in paragraphs (A)(3)(a) and (A)(3)(b) of this rule.

{¶ 50} "(a) The state board may establish a minimum period of time before an applicant can apply for a license. At the conclusion of the specified period, and upon demonstration of compliance with any educational requirements, the state board's order, and the criteria set forth in rule 3301-73-24 of the Administrative Code, the state board may issue a license to the applicant.

{¶ 51} "(b) *The state board may order that the respondent whose license has been denied shall be permanently ineligible to apply for any license issued by the state board* and that the respondent shall not be permitted to hold any position in any school district in the state that requires a license issued by the state board." (Emphasis added.)

{¶ 52} R.C. 3319.31(G) unambiguously delegates broad rule-making authority to the Board over sanctions.[4] The reference to adopting rules "*to carry out this section*"

[4]That the General Assembly intended such rule-making is further supported by the language in subsection (D)(2) of R.C. 3319.31, the pertinent portion stating: "The decision of the board [to continue revocation or denial of a license or reinstate it] shall be based *on grounds for revoking, denying, suspending, or limiting a license adopted by rule under division (G) of this section* and in accordance with the evidentiary standards the board employs for all other licensure hearings." Support is also found in R.C. 3319.313(A)(1), entitled "Unprofessional Conduct." Subsection (A)(1) states: "'Conduct unbecoming to the teaching profession' *shall be as described in rules adopted by* the state board of education." Finally, R.C. 3301.07(N) generally infuses broad rule-making authority in the Board, stating: "The State Board may adopt rules necessary for carrying out *any function imposed on it by law*[.]" (All emphasis added.)

indicates a legislative anticipation that the Board would create rules in furtherance of the very subject-matter covered by subsection (B), i.e., punitive action that refuses, limits, suspends, or revokes a teaching license based upon specified misconduct, conviction of certain offenses, or both. Ohio Adm.Code 3301-73-22 distributes in measured degrees the sanctions for which punitive authority is explicitly provided in R.C. 3319.31(B). It tailors those sanctions from less severe to most severe: from denying, suspending or revoking a license for a temporary period, with conditions before reapplication, to revoking or denying a license permanently. Ohio Adm.Code 3301-73-22 merely takes the statutory sanctions "may refuse" and "may revoke" and defines their scope for the Board's use on a case-by-case basis, as befits the exercise of discretion. *Poignon*, supra. Here Ohio Adm.Code 3301-73-22 (A)(2)(b) allows the Board to impose permanent ineligibility after revoking an existing teaching license, while Ohio Adm.Code 3301-73-22 (A)(3)(b) allows it to order permanent ineligibility after denying an application for one. This latter outcome applies to Haynam.[5]

{¶ 53} Haynam nevertheless maintains that the Board "[lacks] a clear grant of authority to use its discretionary powers under R.C. 3319.31(B) to render an individual permanently ineligible to secure an educator's license." Although the trial court found R.C. 3319.31(G) dispositive in rejecting the same argument, Haynam simply dismisses

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[5]Although R.C. 3319.31(B) does not use the terms "denial" or "deny," we construe the statutory phrase "may *refuse* to issue a license to an applicant" to be substantially equivalent to "may deny" a license to an applicant.

this section. He initially argues that Adm.Code 3301-73-22 is invalid because the word "permanent" does not modify any of the sanctions in R.C. 3319.31(B). Thus, the General Assembly did not intend for an "order of permanent ineligibility" to be within the Board's discretionary authority, and Adm.Code 3301-73-22 improperly expands on that authority. As indicated by *Roy*, *Richter*, *Guanzon* and *Poignon*, however, that assertion is little more than an untenable semantic gambit. The degree of a statutorily-authorized sanction is not restricted by the lack of a modifying adjective if its ordinary meaning could allow for it, whether as a matter of construction or as defined by an administrative rule.

{¶ 54} Haynam next argues that Ohio Adm.Code 3301-73-22 is an invalid extension of administrative power contrary to *D.A.B.E., Inc. v. Toledo Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172. Based on that case, he contends that administrative agencies are prohibited from stepping beyond the regulatory power explicitly delegated them in an enabling statute. He then urges that Adm.Code 3301-73-22 improperly enlarges on the Board's rule-making authority under R.C. 3319.31(G). We do not agree. A careful reading of *D.A.B.E.* suffices to distinguish what the health board attempted there under its rule-making authority from the Board's adoption of Adm.Code 3301-73-22 here.

{¶ 55} In *D.A.B.E.*, the Supreme Court held that the General Assembly had not expressly delegated to local health boards the authority under R.C. 3709.21 to ban smoking in all enclosed or indoor public areas, such as bars, restaurants and bowling alleys. Id at ¶ 41. Only the first sentence of that statute was in dispute and the relevant

portion stated: "[T]he board of health * * * may make such orders and regulations as are necessary * * * for the public health [.]" Id. at ¶ 18. The health board claimed this language gave it unrestricted "plenary power" to adopt regulations covering any public health matter, a claim the Supreme Court rejected for two reasons.

{¶ 56} The court first reviewed the entirety of R.C. Chapter 3709 and found the General Assembly had enacted no less than seven other sections that "explicitly and in great detail identified specific areas where local [health] boards * * * have substantive regulatory power" over public-health issues. Id. at ¶ 23. Reasoning by implication, the court concluded that the legislature could not have intended the language in R.C. 3709.21 to allow regulation-making so broad as to permit a county-wide ban on smoking in public, for otherwise that power would render these additional provisions "superfluous." Id. at ¶ 25. Instead, the court held that R.C. 3709.21 was a "*rules-enabling* statute," not "a provision granting substantive regulatory authority." Id. at ¶ 45. (Emphasis added.) The purpose of the rule-making grant was to effectuate the board's "authority to issue orders and adopt regulations relating to the numerous areas of public health where the power to act has been delegated" in specific sections of R.C. Title 37. Id. at ¶ 45. It conferred authority that was "administrative and procedural," but none that would permit broad public-policy initiatives. Id. Such initiatives "are legislative in nature" and, under the Ohio Constitution, are within the exclusive domain of "power delegated to the General Assembly." Id. at ¶ 41.

{¶ 57} An administrative agency "exceeds its grant of authority when it creates rules that reflect a public policy not expressed in the governing statute." *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, ¶ 25. In adopting Ohio Adm.Code 3301-73-22, we fail to discern how the Board engaged in a "plenary" initiative that exceeded the scope of the disciplinary sanctions already authorized in R.C. 3319.31(B). And certainly, as suggested by *D.A.B.E.*'s analysis of R.C. Chapter 3709, we see no other provision in R.C. Chapter 3319 that expressly or impliedly prohibits this administrative rule. See id. at ¶ 23-25.

{¶ 58} Secondarily, the *D.A.B.E.* court found "no express grant of power" in the language of R.C. 3709.21 that would allow a health board the "unfettered authority to promulgate any health regulation deemed necessary," and specifically one that banned smoking in public places. Id. at ¶ 41. The court described the nature of grants of authority by the General Assembly to administrative agencies, quoting from *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47:

{¶ 59} "*Such grant of power*, by virtue of a statute, *may be either express or implied*, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, *the implied power is only incidental or ancillary to an express power*, and, *if there be no express grant*, if follows, as a matter of course, that there can be no implied grant." (Emphasis added.) *D.A.B.E.* at ¶ 39.

{¶ 60} Seizing on this quote, Haynam again maintains that R.C. 3319.31 does not expressly grant the Board rule-making authority to permanently ban licensure in subsection (B), because "permanent ineligibility" is not specified there, whereas in subsection (C) he asserts it is.[6] The semantic ploy aside, the quoted passage from *Pierce* merely begs the question. That passage is a general statement on the distinction between the express and implied delegations of regulatory power to administrative agencies (and the limitation on the implied power) which is not in dispute. *D.A.B.E.* is inapposite here, for in R.C. 3319.31(B) "an express power" *is* conferred on the Board to impose, within its discretion, one of several sanctions on teaching licenses. Then, in R.C. 3319.31(G), rule-making authority is *expressly granted* to the Board "to carry out" that power. The import of this express authority is to implement a statute that speaks in direct punitive terms of

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[6]On this point, Haynam simply claims more for the interplay between R.C. 3319.31(B) and (C) than is entailed by their language. First, in subsection (C), neither "permanent" nor "permanent ineligibility" is used in regard to the sanctions listed there. Haynam merely *infers* such permanency from the mandatory word "shall," notwithstanding that subsection (B) uses the same terms whose scope he disputes (e.g., "revoke"). But even assuming the sanctions in subsection (C) are permanent in nature, it does not follow that prohibiting the Board discretion there indicates a legislative intent to *restrict* its explicit discretion in subsection (B) to nonpermanent revocations or refusals. That construction would add words of limitation the General Assembly did not. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶ 12 ("[A] court looks to the language of the statute, giving effect to the words used. * * * A court is neither to insert words that were not used by the legislature nor to delete words that were used.") Next, such a cramped view of R.C. 3319.31(B) would defeat the purpose of giving the Board discretion in the first place. Such discretion would necessarily include the flexibility to determine a penalty from within a range of severity for conduct "unbecoming" in subsection (B)(1) or for conviction of any of the offenses in subsections (B)(2)(a) through (e).

sanctions against licensure. A power is impliedly vested in an administrative agency if it is "incidental" to the express power. *Pierce* at 47. The permanent ineligibility components of Ohio Adm.Code 3301-73-22(A)(2)(b) and (A)(3)(b) are merely incidental to the express authority already conferred in R.C. 3319.31(B) to refuse or revoke teaching licenses.

{¶ 61} Having been adopted pursuant to R.C. 3319.31(G), Ohio Adm.Code 3301-73-22 is thus a valid administrative rule. It is not inconsistent with *D.A.B.E.*'s preclusion of legislative-style initiatives by administrative agencies. The Supreme Court, moreover, has generally treated the grant of rule-making authority to local boards of education quite broadly. See *Ohio Assn. of Pub. School Emp. v. Stark Cty. Bd. of Edn.* (1992), 63 Ohio St.3d 300, 304; *Princeton City School Dist. Bd. of Edn. v. Ohio State Bd. of Edn.* (1994), 96 Ohio App.3d 558, 564. We find no convincing reason to believe that the State Board's rule-making authority under R.C. 3319.31(G) is somehow more constrained.

{¶ 62} Accordingly, the first assignment of error is not well-taken.

{¶ 63} The third assigned error states:

{¶ 64} "3. The Lucas County Common Pleas Court erred in affirming the decision of the SBOE declaring Benjamin Haynam permanently ineligible to apply for an educator's license in that its decision was *ad hoc*, arbitrary, declared without reference to any standard, and unreasonable."

{¶ 65} In support of this assignment, Haynam makes two arguments. He first maintains that even assuming the Board had authority under R.C. 3319.31(B) to declare a

person permanently ineligible for a license, its decision here was "ad hoc, arbitrary and standardless," because no criteria exist for determining whether a person's behavior should result in a sanction that is permanent or temporary. Therefore, he insists, this results in "arbitrary" outcomes: in some cases lifetime bans, in others licensure is barred for a specified time. Haynam then argues, somewhat repetitively, that the Board's decision was also unreasonable because its statutory authority was implemented without "guidelines or standards in place for exercising that authority."

{¶ 66} We will first address the litany of "ad hoc, arbitrary and standardless." For this trio, Haynam relies on language from the Supreme Court's decision in *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad,* 92 Ohio St.3d 282. He maintains that even if an agency has the statutory authority to act, but the statute leaves the details of carrying out the legislative program to the agency, *Conrad* requires both a reasonable interpretation of that mandate and reasonableness in performing the act. As a casual summary unattached to any facts, that is accurate; yet, a closer reading reveals that *Conrad* plainly supports the Board's position.

{¶ 67} *Conrad* involved the issue whether, absent express legislative direction, the Bureau of Workers' Compensation could withdraw proceeds from the state insurance fund ("SIF") needed to pay the required administrative and performance-incentive fees to certified managed-care organizations ("MCOs") under the Health Partnership Program ("HPP"). The HPP was created by R.C. 4121.44 and 4121.441 and added to the workers' compensation scheme. Id. at 282-283. *Conrad* held that when the legislature mandates

that an agency administer a program, but leaves "gaps" in the statute regarding the details of administering it, the agency may make rules in order to fill in those gaps. Id. at 289. This, of course, assumes there is a separate statutory section that plainly gives rule-making authority to the agency, and the *Conrad* court easily identified several sections in R.C. Chapter 4121 where the General Assembly had delegated "broad rule-making authority" to the bureau's administrator. Id. at 286-287.

{¶ 68} Like Haynam's narrow reading of R.C. 3319.31(B) and (G) here, the Tenth Appellate District had held that because R.C. 4121.441(A)(4) did not specifically mention using the SIF monies to pay MCOs under HPP, that use was not legislatively authorized. The Supreme Court reversed, finding that the General Assembly had vested express rule-making power in the administrator, "tailored to the specific goals of that comprehensive [HPP] program," citing R.C. 4121.441 as that authority. Id. at 287. The court rejected the Tenth District's construction and ruled that the Bureau acted within its authority in fashioning rules for the day-to-day workings of the mandated HPP program, particularly Ohio Adm.Code 4123-6-13(B). ("[I]t represents exactly the sort of rule-making contemplated by the enabling language in R.C. 4121.441." Id. at 287.) Although neither the statute nor Ohio Adm.Code 4123-6-13 identified the SIF proceeds as permissible source funds, the court found the bureau had reasonably interpreted the statute in deciding to use those proceeds for HPP-related payments. Id. at 287-289.

{¶ 69} *Conrad* and later cases have only accentuated the need for reviewing courts to weigh the administrative agency's view of the legislative mandate and to "give due

deference to the agency's reasonable interpretation of the legislative scheme." Id. at 287. In *Maitland v. Ford Motor Co.*,103 Ohio St.3d 463, 2004-Ohio-5717, the court further developed this point on rule-making authority, stating:

{¶ 70} "[C]ourts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, *and to which the legislature has delegated the responsibility of implementing the legislative command.* Therefore, *under these circumstances, where the legislature has granted the authority to the Attorney General to adopt rules* governing the informal dispute-resolution mechanisms, we defer to the Attorney General's policy on mileage setoffs." (Emphasis added.) Id. at ¶ 26.[7]

{¶ 71} We have already concluded that under R.C. 3319.31(B) the Board's discretionary authority extends to determinations of permanent ineligibility for a teaching license. Applying *Conrad* here, we also conclude that the Board reasonably interpreted the scope of its statutory prerogative by means of Ohio Adm.Code Section 3301-73-22. However, Haynam's further claim that the Board failed to establish any "guidelines or standards" for making such determinations flies in the face of Ohio Adm.Code

[7]The Supreme Court has continued to hold that an agency's interpretation of an enabling statute is to be reviewed under a deferential standard. See *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, ¶ 34. ("When interpreting statutes, courts must give due deference to those interpretations by 'an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility.'" (Citations omitted.))

3301-73-21. His appellate brief ignores this section, insisting instead that the Board "has promulgated no standard whatsoever and appl[ied] no discernible standard."

{¶ 72} Ohio Adm.Code 3301-73-21, entitled "Factors for the state board to consider under division (B)(1) of section 3319.31," provides eight non-exhaustive factors for evaluating alleged instances of "conduct unbecoming." The Attorney General suggests that Haynam's acts implicated seven of them. This section states:

{¶ 73} "(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:

{¶ 74} "(1) Crimes or misconduct involving minors;

{¶ 75} "(2) Crimes or misconduct involving school children;

{¶ 76} "(3) Crimes or misconduct involving academic fraud;

{¶ 77} "(4) Making, 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;

{¶ 78} "(5) Crimes or misconduct involving the school community, school funds, or school equipment/property;

{¶ 79} "(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;

{¶ 80} "(7) A violation of the terms and conditions of a consent agreement; and

{¶ 81} "(8) Any other crimes or misconduct that negatively reflect upon the teaching profession."

{¶ 82} Given the foregoing, the "ad hoc, arbitrary and standardless" mantra is unconvincing. In some sense *all* punitive actions by the Board, whether permanent or temporary, are ad hoc in nature. The "ad hoc" characterization thus adds nothing to the analysis. In R.C. 3319.31(B) the General Assembly expressly granted the Board the discretionary authority to refuse, limit, suspend or revoke teaching licenses under certain circumstances. R.C. 3319.31(B)(1) then identifies in general descriptive terms the type of conduct (or misconduct) which may prompt such punitive action: "engaging in an immoral act, incompetence, negligence, or conduct unbecoming to the applicant's or person's position." The express authority to refuse or revoke a teaching license necessarily includes the power to determine what acts constitute "incompetence," "negligence," "an immoral act," or "conduct unbecoming." *Pierce,* 96 Ohio St. at 47. Indeed, that power would be both ineffectual and its exercise subject to challenge if the Board did not have the power to decide what standards govern its assessment of behavior that allegedly violates R.C. 3319.31(B)(1). The authority to adjudicate whether an educator or applicant has engaged in "conduct unbecoming" implies the incidental power to establish the standards by which it evaluates that question. Id.

{¶ 83} The factors set forth in Ohio Adm.Code 3301-73-21(A) supplement the statutory standard and guide assessments of what conduct is "unbecoming." *Poignon*, supra. Subsection (B) thereof 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." Therefore, in exercising its statutory discretion to declare Haynam permanently ineligible for a teaching license, the Board did not act in an "arbitrary and standardless" manner. As it is for Ohio Adm.Code 3301-73-22, R.C. 3319.31(G) is the source for Ohio Adm.Code 3301-73-21. Both are reasonable interpretations of the discretionary authority the General Assembly gave the Board in R.C. 3319.31(B). *Conrad*.

{¶ 84} Haynam also claims that the same exercise of discretion was "per se unreasonable." In substance, this claim is little more than conclusory and duplicates his arbitrariness contention. He identifies no specific aspect of the hearing or decision process as unreasonable, other than to complain that the Board lacks "a set of precedent-establishing cases relating to its exercise of its authority" and "there are no readily available prior decisions of [the Board] regarding its exercise of [the] power to declare an individual permanently ineligible to apply" for a license. However, if these are indeed legal predicates before an agency's decision on licensure can be deemed reasonable, Haynam has failed to cite any case, statute or administrative code section that requires them.

{¶ 85} In part, Haynam's unreasonableness objection resembles a *proportionality* challenge to the decision to bar him permanently. Although postured as if his case were the first instance of permanent ineligibility, we note that in *State ex rel. Kleja v. State Teachers Retirement Bd.*, 10th Dist. No 08-AP-326, 2009-Ohio-2047, the teacher's

"certificate was permanently revoked and she was made *permanently ineligible to apply for any license [from the Board]* * * * based on her conviction for impaired driving." Id. at ¶ 40. (Emphasis added.) In *Kellough v. Ohio State Bd. of Edn.* 10th Dist. No. 10-AP-419, 2011-Ohio-431, the Tenth Appellate District upheld the Board's decision to permanently revoke a teacher's license "and *render [him] permanently ineligible to apply for any license issued by the Board*." Id. at ¶ 27-28. (Emphasis added.) Kellough's unbecoming behavior included inadequately supervising an after-school event during which one student was injured and nearly died, and then lying to investigators afterward to cover up or minimize his role.[8]

{¶ 86} In rejecting the physician's proportionality argument in *Guanzon*, the Tenth Appellate District expressed its disapprobation for his deceit, stating:

{¶ 87} "[T]he nature of the violation in this case justifies, in our view, a severe sanction. Indeed, the violation involves *deception, fraud, and dishonesty* by [Guanzon] in his dealings with the state licensing authority. *Acts of deception by an applicant in securing a medical license put the public at a substantial risk of harm.* Under the circumstances, we cannot say that the penalty imposed [permanent revocation] was so severe as to be out of all proportion to the wrong." (Emphasis added.) Id. at 497.

[8]Kellough challenged the permanent revocation of his license, but the Tenth District noted that an appellate court is prohibited from modifying a disciplinary sanction the Board had statutory authority to impose where reliable, probative and substantial evidence supports it. Id. at ¶ 57. *Henry's Café, Inc. v. Bd. of Liquor Control Comm.* (1959), 170 Ohio St. 233, paragraphs two and three of the syllabus.

{¶ 88} The 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. For good reason, the high standards of conduct expected of licensed teachers apply equally to those seeking admission to the field. That educators are role-models for students is beyond question. Hence, discernible traits of character matter—probity, for example. Public policy thus requires that the Board be afforded wide latitude in evaluating who is fit to enter the profession. Past misconduct *may* be prologue. But whether its nature or duration is sufficiently egregious to warrant a greater or lesser degree of sanction under R.C. 3319.31(B) is for the Board to determine.[9]

{¶ 89} In this case the record indicates that the hearing officer had serious reservations about ever allowing Haynam to return to a setting in which parents and

[9]In *Harris v. State* (Apr. 20, 2000), 8th Dist. No. 76154, the Eighth Appellate District made this same point: "[T]he State Board is under no obligation to treat all individuals the same. The facts and circumstances of each case must be considered individually. In each case, the credibility of each applicant must be independently weighed, integrity determined and rehabilitation judged. *In one case, a hearing officer may decide that a person is capable of rehabilitation based upon the evidence presented and in another instance, the very same officer, upon similar facts, may conclude that the credibility of an applicant is such that a [teaching] certificate should not be given or should be revoked.*" (Emphasis added.) See, also, *Crumpler v. State Bd. of Edn.* (1991), 71 Ohio App.3d 526, 529 (held: though no conviction resulted, the underlying act was sufficiently severe to justify revoking teaching certificate, "as it involved intemperate and immoral conduct unbecoming to [the teacher's] position."); *Stelzer*, supra (held: revocation of license justified by unbecoming conduct consisting of teacher's fraudulently obtaining welfare benefits for five years and her related conviction for receiving stolen property.)

administrators should be able to place their unqualified trust. The Board agreed with that assessment. Haynam contends nonetheless that because a successor board might someday find he is both sufficiently rehabilitated and academically qualified to become licensed, it serves no interest of the state "to foreclose that future opportunity to a future board." He points to the hearing officer's positive remarks about his ability as a substitute teacher and his commendable interaction with students and faculty. He suggests this "demonstrate[s] an aptitude and capacity for teaching," and his misconduct should not forever bar pursuing it. It is true the record reflects such favorable evidence. The officer's report acknowledged it in mitigation. However, nothing in R.C. 3319.31 requires that behavior flagrant enough to result in felony convictions first be shown to affect teaching ability or classroom performance before it can be sanctioned. *Stelzer v. State Bd. of Edn*. (1991), 72 Ohio App.3d 529, 532-533. More fundamentally, this suggestion invites us to second-guess the merits of the decision. Having found nothing arbitrary or standardless in how it was reached, we are prohibited from substituting our judgment for that of the Board's. *Kellough*, supra, at ¶ 57.

{¶ 90} Accordingly, the third assignment of error is not well-taken.

{¶ 91} The second assignment of error states:

{¶ 92} "2. The Lucas County Common Pleas Court erred in affirming the decision of the SBOE declaring Benjamin Haynam permanently ineligible to apply for an educator's license in that the SBOE lacks authority under the Ohio Constitution to limit the exercise of discretionary authority by future State Boards of Education."

{¶ 93} Under this assignment, Haynam discounts the Board's ability to impose permanent ineligibility based on a general constitutional theory usually applied to a legislature's passage of a statute that purports, in some substantive respect, to "bind" future members of that body. Haynam insists this doctrine also applies to the Board, for it is but "a creature of the General Assembly" and has only "such power as the legislature itself has." He points to no specific provision of the Ohio Constitution and offers no Ohio cases to support the doctrine's use here, framing the matter as one of first impression.[10] The trial court rejected this argument by adopting the distinction urged by the Attorney General that the Board is "an administrative agency, not a legislature." Although that is technically accurate, the more fundamental response is that the "binding" concept is contextually disanalogous to what administrative agencies do.

{¶ 94} As argued in this assignment, the concept is ripped from its unique mooring in cases that address the tension between the legislature's plenary power to legislate on

[10]He also suggests that because Board members are "term-limited," this signals a legislative intent that the current Board, in taking discretionary action against teaching licenses under R.C. 3319.31(B), cannot "tie the hands of a future Board" by imposing penalties that are permanent. Despite its members being subject to term-limits, we see no significance in this fact on the Board's licensure decisions. Haynam does not suggest the converse is true: i.e., that because of term-limits the Board has no statutory authority *to issue* a permanent teaching license that remains valid throughout an educator's career, despite changes in its composition over that same time. In other words, a particular license issued by one Board is not adversely affected by later changes in membership. It is thus difficult to understand how the Board's authority to deny or revoke a license permanently is legislatively intended to be affected by such changes, whether caused by term-limits or through normal attrition (e.g., death or disability).

any matter which the constitution does not preclude and the prohibition against destroying vested rights or impairing the obligation of contracts. Indeed, in the lead case Haynam cites, *United States v. Winstar* (1996), 518 U.S. 839, the binding concept is identified in its historic context as an integral tenet of the "unmistakability doctrine," a traditional defense employed by the government in public contract suits. See id. at 858-860. Both developed out of early contract clause cases challenging legislation that purported to alter the government's obligation in such contracts. The binding concept is inextricably linked to the "unmistakability" defense as a rule of contract construction which disfavors alleged surrenders of sovereign authority. Id. at 859-860.

{¶ 95} Haynam also cites *State ex rel. Stenberg v. Moore* (1996), 249 Neb. 589. There, the Nebraska Supreme Court addressed an attempt to "bind a successor legislature" by means of a statute that required any subsequent legislation likely to increase the state's prison population to include operating-cost estimates and to make appropriations to cover those costs. To enforce this, the legislature inserted a provision declaring "null and void" *any* prison legislation passed after 1993 without the cost estimates and separate appropriations. The *Stenberg* court struck down the statute on the ground that the "null and void" provision was an attempt at "irrepealable legislation," thereby violating the general rule against impeding the constitutional discretion of a later legislature to revise or repeal a law passed by an earlier body. Id. at 595.

{¶ 96} The proffered analogy to the legislative cases might perhaps be more accurate if the Board had actually attempted something like the Nebraska legislature in

Stenberg. Had the Board here issued some extreme edict purporting to divest future boards of education of authority over educator licenses under R.C. 3319.22 et seq., then a *Stenberg* analogy might have persuasive traction. In that instance the Board would be striking at its essential *institutional* authority over licensure for which it was established.

{¶ 97} Though not cited by either party, the Ohio Supreme Court has spoken on the binding concept before in *Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207. *Boyce* involved a declaratory judgment action challenging a 2008 statute that allegedly destroyed an irrevocable trust and the contractual obligations arising from it. A statute passed in 2000 had established, in part, a $235 million trust fund containing monies paid from a settlement agreement with tobacco manufacturers. Under this statute a state foundation was created as the trustee of the fund. Various anti-tobacco plaintiffs sued after the 2008 statute abolished the foundation. The *Boyce* court rejected both the trust and contract claims, finding that the fund was not a trust and no contract had been formed when the foundation and the fund were created. Id. at ¶ 25-29. In discussing the 2008 statute and the General Assembly's power to legislate, the court stated:

{¶ 98} "Although the General Assembly's plenary legislative power is expansive, it is not all-inclusive. It does not include the ability to bind future General Assemblies. 'No general assembly can guarantee the continuity of its legislation or tie the hands of its successors.' * * * '[N]o General Assembly has power to render its enactment irrevocable and unrepealable by a future General Assembly. No General Assembly can guarantee the

span of life of its legislation beyond the period of its biennium. The power and responsibility of legislation is always upon the existing General Assembly. One General Assembly may not lay its mandate upon a future one. Only the Constitution can do that. The power of a subsequent General Assembly either to acquiesce or to repeal is always existent.'" (Citations omitted.) Id. at ¶ 16.

{¶ 99} *Winstar, Stenberg* and *Boyce* only underscore the fact that the restriction against "binding" future assemblies draws its sole relevance from the inherent institutional power to make, change or repeal statutes—typically as exercised in the face of alleged commitments in public contracts. *Winstar*; *Boyce*. That power is both plenary and sui generis to the legislature. The binding restriction exists to protect the continuity of the power to legislate from self-disablement, despite periodic rotations in legislative office. *Boyce* at ¶ 10-11. Beyond that constitutional context it has no application and cannot be forcibly transmuted into the decisions of administrative agencies acting in matters of occupational licensure.

{¶ 100} The Board does not have plenary law-making power and was not undertaking a legislative function when it ordered Haynam to be permanently ineligible for a license. What power it has is *regulatory* and delegated by statute. The Board's authority over educational licensure is exercised interstitially, and the process of sanctioning educators and applicants is individuated. Certainly nothing in the decision here forecloses a future Board from adopting a new or amended rule that allows for

reapplication under certain conditions in previous cases where permanent revocation or permanent ineligibility was ordered.

{¶ 101} Accordingly, the second assignment of error is not well-taken.

{¶ 102} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE