

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Department of Youth Services, Central Office, | : | |
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| Appellant-Appellant, | : | |
| | : | No. 09AP-109 |
| v. | : | (C.P.C. No. 08CVF-06-8097) |
| | : | |
| John Terry, | : | (ACCELERATED CALENDAR) |
| | : | |
| Appellee-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on September 10, 2009

Richard Cordray, Attorney General, *Megan H. Bolarsky* and *Drew C. Piersall*, for appellant.

McGuire & Schneider, and *John H. Hix*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant, Department of Youth Services ("DYS"), appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"), which modified appellee, John Terry's ("Terry"), removal from DYS to a 90-day suspension and step reduction.

{¶2} Underlying the matter before us is an incident that occurred on April 6, 2006, involving a youth being housed at the DYS Ohio River Valley facility where Terry was employed. Terry began employment at this facility on January 23, 2005, as an

Operations Manager, and at the time of the incident was supervising approximately 40 Juvenile Corrections Officers ("JCO's"), on second shift. Prior to working at DYS, Terry had been employed by the Ohio Department of Rehabilitation and Corrections ("ODRC") for 12 years.

{¶3} On April 6, 2006, Terry was in his office and received a call to come to the McKinley Unit where the youth at issue was housed. Earlier this day, there had been an episode with this youth, and Terry had spoken to the youth at that time in an effort to calm him. When Terry received the phone call requesting his presence in the McKinley Unit, Terry was informed the youth was hurting himself. Therefore, Terry took the video camera and proceeded to the area to assess the situation.

{¶4} When Terry arrived, the youth was banging on the door, shouting, and attempting to hit himself. Terry's attempts at talking to the youth were unsuccessful, and the youth began to slam his head against the wall. Terry gave the video camera to JCO Yates and then Terry and JCO McQuithy decided to enter the room and restrain the youth to prevent him from hurting himself. In their attempt to restrain the youth and transfer him to a rubber isolation room, Terry and the others learned the youth had covered himself in hair grease. According to the testimony, the youth had grease on his arms and chest as well as on the floor.

{¶5} The youth resisted being handcuffed so Terry and JCO McQuithy attempted to turn the youth to cuff him in the back. In the process, the youth bit JCO McQuithy's arm. Terry did a "leg sweep" on the youth, and the pair fell to the floor. Being unable to handcuff the youth in the back, Terry handcuffed the youth in the front. The youth began kicking and spitting on JCO McQuithy. In response, JCO McQuithy kicked the youth, and

Terry instructed JCO McQuithy not to do that. The youth then wrapped his legs around Terry's leg and was exerting pressure on Terry's ankle. Terry asked the youth three times to release his leg, but the youth only squeezed harder. At this time, Terry struck the youth in the face with an open hand causing the youth's nose to bleed. Terry then instructed JCO Yates to get additional JCOs for help and the youth was then transferred to a rubber isolation room without further incident.

{¶6} As a result of this April 6, 2006 occurrence, Terry was charged with multiple work rule violations, and on July 11, 2006, Terry was given an order of removal. Terry appealed to SPBR. After a hearing, an Administrative Law Judge ("ALJ"), issued a report and recommendation ("R&R") on January 2, 2008. The ALJ recommended Terry's removal be modified to a 30-day suspension and a step decrease. DYS filed objections to the R&R, and SPBR reviewed the matter. Finding some of DYS's objections to be well-taken, SPBR modified the ALJ's R&R to a 90-day suspension and a step reduction. On June 4, 2008, DYS appealed to the common pleas court in accordance with R.C. 119.12. On December 22, 2008, the trial court affirmed SPBR's order of a 90-day suspension and step reduction. The trial court concluded SPBR's order was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶7} This appeal followed, and DYS brings a single assignment of error for our review:

The common pleas court erred when it upheld the decision of the State Personnel Board of Review disaffirming John Terry's removal from the Ohio Department of Youth Services.

{¶8} Though Terry was initially charged with six work rule violations, on appeal to this court, DYS addresses only one. Therefore, as set forth in DYS's brief, the focus here

is whether Terry's actions on April 6, 2006, constituted abuse of a youth in violation of DYS work rule 6.1.

{¶9} In an administrative appeal, pursuant to R.C. 119.12, the common pleas court considers the entire record and determines whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570-71.

{¶10} 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. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Though the findings of the agency are not conclusive, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts. *Maurer v. Franklin Cty. Treasurer*, 10th Dist. No. 07AP-1027, 2008-Ohio-3468, ¶15, citing *Univ. of Cincinnati*, at 111; see also *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St.3d 40, 43, quoting *Graziano v. Amherst Exempted Village Bd. of Edn.*

(1987), 32 Ohio St.3d 289, 293 (stating " 'due deference must be accorded to the findings and recommendation of the [ALJ] * * * because it is the [ALJ] who is best able to observe the demeanor of the witnesses and weigh their credibility' ").

{¶11} On appeal to this court, the standard of review is more limited. Unlike the common pleas court, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the common pleas court's determination that the agency's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the common pleas court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the agency's order was in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶12} DYS first argues under its assigned error that SPBR omitted key exhibits when it transmitted the certified record to the trial court and that DYS was materially prejudiced by this omission. Specifically, DYS asserts the record was incomplete because it did not contain Exhibit 15, which was the videotape/DVD ("video") that was viewed by the ALJ and SPBR and captured the incident in question. According to DYS, it was unaware that the video had not been included in the certified record to the trial court until after the trial court rendered its decision. Because the certified record to this court likewise does not contain the video, DYS contends our record is equally defective.

{¶13} As provided in R.C. 119.12, within 30 days after receipt of a notice of appeal, "the agency shall prepare and certify to the court a complete record of the proceedings." Failure of the agency to comply within 30 days, "upon motion, shall cause the court to enter a finding in favor of the party adversely affected." *Id.* However, " '[a]n agency's omission of items from the certified record of an appealed administrative proceeding does not require a finding for the appellant, pursuant to R.C. 119.12, when the omissions in no way prejudice him in the presentation of his appeal.' " *McGhee v. Ohio State Bd. of Psychology* (1993), 82 Ohio App.3d 301, 306, quoting *Lorms v. State* (1976), 48 Ohio St.2d 153, syllabus.

{¶14} Here, DYS does not specifically set forth how it is prejudiced by the omission of the video but, rather, argues in a conclusory fashion that it is prejudiced because without the video, it is prevented from "fully presenting its case to this court." (Appellant's brief at 9.) To highlight the necessity of the video, DYS contends SPBR's order even states, "the video of the incident goes directly to the heart of this case." (Appellant's brief at 9.) After review, however, we do not find DYS has established it was prejudiced by this omission.

{¶15} First we note that SPBR's order states that each board member examined the entire record, "including the [R&R] of the [ALJ], any objections and responses to objections to that report which have been timely and properly filed, and a DVD formatted capturing of the incident that lies at the heart of this matter." (Order at 1.) Thus, when referring to what lies at the heart of this matter, it appears SPBR's order was referring to the incident—not the video itself.

{¶16} Secondly, it is undisputed that the youth was engaging in combative resistance and that Terry slapped the youth with an open hand while the two were on the floor after the youth bit JCO McQuithy. Additionally, the certified record transmitted to the trial court contains a transcription of what was said on the video; thus, the trial court had before it the verbal content of the video, including Terry's statements to the youth during the incident.

{¶17} Thirdly, the testimony of those at the hearing describes the contents of the video, including Terry's actions and Terry's statements made to the youth. As the trial court's decision sets forth, "the record demonstrates that it is inconclusive from the videotape whether appellee's legs were free at the time that [Terry] slapped the youth since the view is obstructed." (Decision at 7.)

{¶18} There is nothing before us to suggest the video would have provided any additional insight regarding the incident in question, and DYS does not allege otherwise. DYS does not allege that the trial court was in any way inhibited from rendering a decision given the omission of the video, nor does DYS allege that the outcome would have been any different had the trial court actually viewed the video. Given the evidence in the record, including that which is largely undisputed, i.e., that Terry slapped the youth with an open hand during this incident in which the youth was engaged in combative resistance, and including the testimony of those involved in the incident as well as those who reviewed the video and depicted its contents, we do not find DYS was prejudiced by SPBR's failure to include the video in the certified record.

{¶19} Next under this assigned error, DYS contends striking the youth in the face is not a pain compliance technique taught by DYS, and the situation did not warrant an

emergency defense response; therefore, Terry's actions had to constitute abuse of a youth in violation of DYS work rule 6.1. Indeed, the ALJ expressly found an emergency defense response was not warranted here. Similarly, the ALJ found, in accordance with the testimony of Charles D. Bird, an employee at the DYS Training Academy, that an open-handed slap is not a pain compliance technique taught by DYS. Because the open-handed slap does not fall under either of these categories, DYS contends it can only constitute abuse, and it is a legal impossibility for the ALJ, SPBR, and trial court to have made a contrary finding. We disagree.

{¶20} The ALJ found that while Terry used "inappropriate force," his actions were "neither excessive nor punitive." (R&R at 14.) Specifically, the ALJ stated, "the level of [Terry's] response was proper, but the specific technique utilized was not" such that his conduct was sufficient to constitute a violation of DYS work rule 4.12, inappropriate use of force, but not sufficient to constitute a violation of DYS work rule 6.1, abuse of a youth. In agreeing with the ALJ as to this issue, SPBR's order stated:

The record supports a finding that [Terry] utilized inappropriate, but not excessive or abusive force in restraining the youth in question. We must also keep in mind that the youth in question was harming himself, was resisting all reasonable attempts to restrain him, had also bitten one of [Terry's] team members, and that [Terry's] restraint team was essentially short-staffed during the majority of this encounter.

(Order at 1.)

{¶21} Contrary to DYS's assertion, there is nothing in the record suggesting that Terry's actions in the given circumstance had to fall in one of three categories, i.e., abuse, an emergency defense response, or a pain compliance technique taught by DYS. Further, the record demonstrates, and DYS seemingly concedes, a Level 3 physical

response was appropriate in this circumstance, wherein Terry and JCO McQuithy were presented with a youth covered in grease, trying to harm himself, and demonstrating combative resistance. Additionally, verbal commands had failed, the youth had spat on, kicked, and bitten JCO McQuithy and refused to comply with additional requests to be restrained. Given the foregoing, we do not agree with DYS that the finding of the ALJ, SPBR, and trial court, that Terry's actions could be inappropriate yet non-abusive, constitutes a legal impossibility. A Level 3 physical response was appropriate here, but because an open-handed slap is not a pain compliance technique taught by DYS, both the ALJ and SPBR found the open-handed slap to be inappropriate. However, because the open-handed slap in the given situation was neither excessive nor punitive, the ALJ and SPBR did not find the open-handed slap constituted abuse. This does not present a legal impossibility, and the record supports the findings of the ALJ and SPBR.

{¶22} Because the common pleas court did not abuse its discretion in concluding substantial, reliable, and probative evidence supports SPBR's decision modifying Terry's removal from DYS to a 90-day suspension and step reduction, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and SADLER, J., concur.
