IN THE SUPREME COURT OF OHIO

John D. Freshwater Appellant, v. MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al: Appellee.	:	CASE NO. 12-0613 On Appeal from the Fifth District Court of Appeals Case No. 2011-CA-000023

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHN D. FRESHWATER

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TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS.....2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....5

I. Proposition of Law No. I: The termination of a public school teacher's employment contract based on the teacher's use of academic freedom where the school board has not provided any clear indication as to the kinds of materials or teaching methods which are unacceptable cannot be legally justified, as it constitutes an impermissible violation of the rights of the teacher and his students to free speech and academic freedom under the First Amendment to the United States Constitution and a manifestation of hostility toward religion in violation of the First Amendment's Establishment Clause.....5

II. Proposition of Law No. II: The termination of a public school teacher's employment contract based on the mere presence of religious texts from the school's library and/or the display of a patriotic poster cannot be legally justified, as it constitutes an impermissible violation of the rights of a teacher and his students to free speech and academic freedom under the First Amendment to the United States Constitution and a manifestation of hostility toward religion in violation of the First Amendment's Establishment Clause.....8

III. Proposition of Law No. III: Where the "investigation" and subsequent termination of a public school teacher by his employer are demonstrably motivated by the teacher's public expressions of his personal religious beliefs, said investigation and termination violate the teacher's First Amendment right to free speech and Fourteenth Amendment right to equal protection under the law.....9

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

CASES

Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868 (1982)...1, 2, 6, 7, 9

Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985).....8

Epperson v. Arkansas, 393 U.S. 97, 106-107 (1968).....7, 8

Keyishian v. Board of Regents, 385 U.S. 589 (1967).....1, 6, 7, 9

Lynch v. Donnelly, 465 U.S. 668, 673 (1984).....9

McCollum v. Board of Ed., 333 U.S. 203, 211 (1948).....9

Tinker v. Des Moines School Dist., 393 U.S. 507, 511 (1969).....2

United States v. Associated Press, D.C., 52 F.Supp. 362, 372 (1943).....7

Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 871 (Mo. Ct. App. 2009).....9

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This is a case of first impression in Ohio involving venerated principles of academic freedom and freedom from religious hostility. Its outcome holds significant implications for teachers' rights of free speech, free exercise, and equal protection under the First and Fourteenth Amendments to the United States Constitution. If the decisions below are left standing, local school boards will henceforth be empowered to terminate the employment of public school teachers who proficiently teach all required curriculum merely because they include additional, age-appropriate information to broaden their students' understanding of the curriculum.

This Court must intervene if students and teachers in America's public schools are to remain free to engage in open, respectful dialogue about competing academic theories and their respective merits.[1] Nowhere is such freedom more crucial than in a science classroom, where the asking and answering of questions is the very basis of the universally acknowledged "scientific method."

As the United States Supreme Court has instructed, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Board of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 868 (1982) (*quoting Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

> In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.

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[1] The Supreme Court of the United States has recently recognized a dearth of jurisprudence regarding the academic freedom issues at the very heart of this case and has acknowledged the need for development of parameters for academic freedom in the classroom context. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (recognizing the issue but finding it unnecessary to rule on it in that case).

Id. Here, the Board has ignored these essential principles and attempted to transform students into "closed-circuit recipients of only that which the State chooses to communicate." *See Tinker v. Des Moines School Dist.*, 393 U.S. 507, 511 (1969). The Board's action in this regard is at once a matter of highest public concern and a grave violation of core First Amendment values.

Moreover, the academic freedom concern presented here is of heightened importance because it involves the banishment of academic theories from the classroom based solely on the fact that they are consistent with certain religious traditions. Thus, this case presents a situation in which the threat to academic freedom also implicates the First Amendment command of official neutrality toward religion.

Finally, if the decision below is left standing, public school teachers will henceforth be subject to a significant chilling effect on the public exercise or proclamation of their religious faith. This is so because local school boards will be permitted to impose a distinct, more intense form of scrutiny on the performance of religious teachers in the classroom than that imposed upon other faculty members. School authorities will be free to cite any outward indication of an employee's religious faith as grounds for termination. The existence of such a double standard is, at once, a matter of great public concern and an issue of hostility toward religion and religious individuals that implicates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE AND FACTS

Despite objective evidence demonstrating Freshwater's consistent excellence as an eighth-grade science teacher for over 20 years, and despite his immaculate employment record, Freshwater came under intense scrutiny following a 2008 incident in which a common classroom

science experiment with a Tesla coil used safely by other teachers for over 20 years allegedly produced a cross-shaped mark on one student's arm.

While the Referee who investigated this incident ultimately determined that "speculation and imagination had pushed reality aside," (Referee's Report, p. 2), community hysteria resulting from rumors about Freshwater and the incident prompted the Board to launch a full-scale inquisition into Freshwater's teaching methods and performance. This sweeping critique focused entirely on trace evidence of Freshwater's religious faith which allegedly appeared in the classroom. On January 10, 2011, the Board adopted a Resolution terminating Freshwater's employment contract based upon a recommendation issued by Referee R. Lee Shepherd, Esq. on January 7, 2011 that Freshwater be terminated for "good and just cause."

The Board accepted the Referee's recommendation to terminate Freshwater on only two of the specified grounds:

1. Specified Ground No. 2 (a)-(g) (Failure to Adhere to Established Curriculum)

Referee Shepherd and the Board based their conclusion that Freshwater's teaching failed to adhere to established curriculum on the facts that: (1) he allowed his students to examine evidence both for and against evolution, (2) he developed a method of allowing students to point out passages in printed materials that could be questioned or debated by saying "here," and (3) some of the evidence against evolution was based upon the principles of Creationism and Intelligent Design (Report, p. 4). However, it is undisputed that Freshwater adjusted his teaching methods to the specific requests made known to him (i.e., by ceasing the use of certain handouts) each time he was asked to do so (Transcript, pp. 920, 983, 1287, 2244, 2281, 3730 and 3816).

Finally, Shepherd and the Board found that Freshwater had failed to adhere to the established curriculum by telling his students that "the Bible states that homosexuality is a sin, so

anyone who chooses to be a homosexual is a sinner." (Report, pp. 6-7). Freshwater denies ever making this or any similar statement, and evidence conclusively demonstrates that the single witness who allegedly heard Freshwater make this statement, Jim Stockdale, was not, in fact, even present in Freshwater's class on the day in question (See School Substitute Teacher Attendance Records, attached hereto as Exhibit A).

2. Specified Ground No. 4 (Disobedience of Orders).

As part of a course of "corrective action," administrators demanded that Freshwater remove a number of items from his classroom (Report, p.8). Middle School Principal William White testified that when he returned to Freshwater's classroom thereafter, "Almost everything had been removed, but there was still the Colin Powell poster . . . out of the school library he had checked out the Bible and had a book called *Jesus of Nazareth.*" (Id., citing Transcript at 513-14). Freshwater testified that he did not recall being told to remove the patriotic poster of Colin Powell (Report, p. 10, citing Transcript, at 444). Freshwater and other teachers testified that they received the poster from school's office (Freshwater, Transcript, p. 4656; Teacher Lori Miller, Transcript, p. 2396; and Teacher Dino Deottore, Transcript, p. 1784). Moreover, testimony revealed that the Board had opened classroom walls to the non-disruptive expression of its teachers, and Board policies 2270 and 3218 confirm this (Transcript, pp. 300, 525, 1786, 2024, 2142, 2147, 2366 and 2828). In fact, it is undisputed that identical posters of Colin Powell were hanging in other classrooms and offices within the school district (Transcript, pp. 539, 2082, 2094, 2125 and 3601). Nonetheless, Referee Shepherd and the Board concluded that Freshwater's display of the same patriotic poster of Colin Powell displayed by others, and the presence in the classroom of materials checked out from the school library constituted "defiance." (Report, p. 9).

On these two grounds alone, the Board thus terminated Freshwater's employment. By Journal Entry on October 5, 2011, the Knox County Court of Common Pleas affirmed the Board's decision to terminate Freshwater without further hearing or analysis. On March 5, 2012, the Court of Appeals for the Fifth District affirmed this judgment, again without any analysis of the significant First Amendment and Fourteenth Amendment Equal Protection issues raised by John Freshwater.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The termination of a public school teacher's employment contract based on the teacher's use of academic freedom where the school board has not provided any clear indication as to the kinds of materials or teaching methods which are unacceptable cannot be legally justified, as it constitutes an impermissible violation of the rights of the teacher and his students to free speech and academic freedom under the First Amendment to the United States Constitution and a manifestation of hostility toward religion in violation of the First Amendment's Establishment Clause.

As an eighth-grade science teacher, Freshwater sought to encourage his students to differentiate between facts and theories, and to identify and discuss instances where textbook statements were subject to intellectual and scientific debate. Any reasonable person in a free society would identify this methodology, particularly in the context of a science classroom, as good teaching practice. In fact, Ohio's Academic Content Standards (Board Exhibit 37, pp. 215-216) and board policy 2240 titled *Controversial Issues* (Employee Exhibit 81) emphasized teaching and discussion in this regard. The fact that one competing theory on the formation of the universe and the beginning of life is consistent with the teachings of multiple major world religions simply does not justify interference with students' and teachers' academic freedom.

It was Freshwater's encouragement of students to open-mindedly consider competing theories—his very neutrality toward religion—that has led to the termination of his employment

contract. This raises significant First Amendment concerns that were completely ignored by the courts below. The Board's action in this regard is in violation of the First Amendment guarantee of free speech—and the subsidiary right of academic freedom—with respect to both Freshwater and his students. Additionally, the Board's action manifests a clear and distinct hostility toward the major world religions whose teachings are consistent with the alternative theories discussed in Freshwater's classes. Indeed, the *only* cited reason why the discussion of alternative theories was improper was the fact that these theories were consistent with certain religious views. This reasoning runs directly afoul of the First Amendment's Establishment Clause, which forbids government to manifest hostility toward religion just as surely as it forbids government to favor a particular religion.

It is well-established that the broad discretion of school boards to manage school affairs "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982). The First Amendment's guarantees are essential not only for fostering individual expression, but also for affording access to discussion, debate, and a diversity of ideas. *Id.* at 866 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). In furtherance of these principles, the United States Supreme Court has affirmatively held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* (*quoting Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

While these concepts have been expounded in a variety of factual contexts, the High Court has extrapolated from them a specific, First Amendment-based right to academic freedom that applies in the public school context. *See, e.g., Pico, supra* (school board may not remove books from library based on disagreeable content); *Keyishian v. Board of Regents*, 385 U.S. 589

(1967) (state regulations prohibiting employment of subversive teachers violated First Amendment). The Court has explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

Keyishian, supra, at 603 (*quoting Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *United States v. Associated Press, D.C.*, 52 F.Supp. 362, 372 (1943)). And in *Pico, supra*, the Court stated simply and plainly, "Our Constitution does not permit the official suppression of *ideas*." 457 U.S. at 871 (emphasis in original).

The official suppression of ideas is precisely what the Board has undertaken in this case, and its action is thus utterly repugnant to the First Amendment and the Board's own policies. Freshwater's teaching method represents the very best of the profession: the encouragement of students to engage their own minds, to consider the merits of a variety of competing ideas, and to evaluate the information they receive. The Board's actions in stifling the vitality of this inquisitive learning environment must be reversed.

The Board's ostensible reliance upon the First Amendment's Establishment Clause to justify its action is similarly misguided and demands immediate and unequivocal correction. In *Epperson v. Arkansas*, where the United States Supreme Court struck down a state law forbidding the teaching of evolution, the Court explained:

> While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This

> prohibition is absolute. It forbids the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.
>
> ***
>
> The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

393 U.S. 97, 106-107 (1968) (internal citation omitted).

The Board's hostile reaction to the purely academic consideration of popularly held positions among the students and community which differ from that presented in the students' textbook constitutes an outright hostility to religion that departs from the requirement of religious neutrality and, by so doing, violates the Establishment Clause. *See also Epperson, supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion).

> **Proposition of Law No. II: The termination of a public school teacher's employment contract based on the mere presence of religious texts from the school's library and/or the display of a patriotic poster cannot be legally justified, as it constitutes an impermissible violation of the rights of a teacher and his students to free speech and academic freedom under the First Amendment to the United States Constitution and a manifestation of hostility toward religion in violation of the First Amendment's Establishment Clause.**

In ordering Freshwater to remove all religious books and a patriotic poster from his classroom despite the existence of policies allowing teachers to maintain non-disruptive classroom displays, school officials again interfered with core First Amendment values. Even in "non-public forums" such as a public school classroom, school officials may not constitutionally engage in viewpoint-based discrimination. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Moreover, as outlined above, the Establishment Clause has been interpreted to preclude official orders or actions that manifest hostility toward religion. *See, e.g.*,

Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (The Constitution mandates accommodation of all religions and forbids hostility toward any) (*citing Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952); *McCollum v. Board of Ed.*, 333 U.S. 203, 211 (1948)).

Officials' orders for Freshwater to remove the Bible (also an object kept by other teachers in other classrooms) and religious school library books such as *Jesus of Nazareth* are constitutionally problematic for the same reasons set forth above. In particular, the order to remove works of literature from a public school classroom casts an unconstitutional "pall of orthodoxy" upon the very halls of learning where future citizens are engaged in the pursuit of knowledge and diverse ideas. *See Pico, supra*, at 870 (*quoting Keyishian, supra*, at 603).

Proposition of Law No. III: Where the "investigation" and subsequent termination of a public school teacher by his employer are demonstrably motivated by the teacher's public expressions of his personal religious beliefs, said investigation and termination violate the teacher's First Amendment right to free speech and Fourteenth Amendment right to equal protection under the law.

The circumstances under which the investigation of Freshwater was initiated, as well as the facts upon which Referee Shepherd and the Board based his termination, suggest that a discriminatory animus was a substantial motivation for the investigation and ultimate firing. Indeed, each and every cited basis for the decision was connected to the religious faith for which Freshwater had become infamous as a result of the rumors and speculation that stemmed from the sensationalized Tesla coil incident.

In cases such as this, where a number of essentially groundless charges are raised as a justification for terminating a person's employment after he or she exercises protected civil liberties, it is appropriate for courts to infer that the disciplinary action was improperly motivated. *See, e.g. Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 871 (Mo. Ct. App.

2009) (where flight attendant was terminated shortly after filing harassment complaint, jury could properly conclude that sudden proliferation of criticisms about job performance after employee lodged harassment complaint were pretexts for animus). Here, in light of Freshwater's illustrious reputation among his peers, exemplary student testing results, and immaculate employment record, it is difficult to conceive of any reason for the events that have transpired over the past three years apart from the presence of a discriminatory animus. Thus, Freshwater submits that his termination is in direct contravention of his rights under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The Board's actions constitute a violation of the First Amendment academic freedom rights of both Freshwater and his students, of the First Amendment's Establishment Clause, and of Freshwater's right to Equal Protection under the Fourteenth Amendment. Because of its significant implications for academic freedom in public schools and the continued vitality of teachers' First Amendment right to openly practice and discuss their religious faith, the case is one of monumental public concern. As no reviewing court has yet examined these critical civil liberty components of this case, Freshwater prays that this Court will grant his petition and undertake that essential analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2012, a copy of the foregoing brief was mailed by first-class mail, postage prepaid, to

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COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN FRESHWATER

Plaintiff-Appellant

-vs-

MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 2011-CA-000023

OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Knox County Court of Common Pleas, Case No. 11AP02-0090

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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{1} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

(E) Determination and judgment on appeal.

The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

The decision may be by judgment entry in which case it will not be published in any form.

{2} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655(10th Dist. 1983). This appeal shall be considered in accordance with the aforementioned rule.

{3} This case arises out of the Mount Vernon City School District Board of Education ("Board of Education"), decision to terminate appellant John Freshwater's ("Freshwater") employment pursuant to the R.C. 3319.16 after he failed to adhere to the established curriculum under the Academic Content Standards for eighth grade as adopted by the Board of Education by teaching creationism and intelligent design in his eighth grade science classes.

{4} Freshwater was hired by the Board of Education in 1987 and was employed by them as an eighth grade science teacher until the incidents pertaining to this lawsuit occurred. For 16 of the 20 years that Freshwater taught, he was the faculty appointed facilitator, monitor, and supervisor of the eighth grade group called the Fellowship of Christian Athletes. For his entire teaching career, Freshwater kept a Bible on his desk. Several other teachers employed by the Board of Education also kept Bibles on their desks. Freshwater has been engaged as a private citizen in promoting certain religious activities and liberties in the Mount Vernon, Ohio community.

{5} Throughout Freshwater's employment, he was given performance evaluations on at least twenty occasions, each of which was positive. Freshwater had never been disciplined before the events relevant to the instant action.

{6} In January 2008, the parents of one of Freshwater's students complained to the president of the Board of Education, Defendant Ian Watson, about an incident in which Freshwater used a device called a Tesla Coil to make a mark that lasted a week and one-half to two weeks on the student's arm. Defendants characterize the mark as the religious symbol of a Christian cross. Freshwater claims that, although he had used a Tesla Coil before, he did not expect it to leave a mark on the student nor did he believe that was even a possibility.

{7} Because of this complaint, the Board of Education retained counsel and requested an investigation of the charges made against Freshwater. The contract between the Board of Education and the Mount Vernon Education Association provided the authority for such an investigation. A report on the investigation was provided to the Board of Education. The report indicated that it had interviewed Weston and that "Dr.

Weston stated that she has had to deal with internal and external complaints about his (Plaintiff Freshwater) failure to follow the curriculum for much of her 11 years at Mount Vernon." *Id.* at ¶ 114.

{8} An administrative hearing regarding the charges brought against Freshwater was conducted. "Short, Weston and White testified in the hearing they had personal knowledge of or a perceived belief concerning Plaintiff Freshwater's personal religious activities as a result of actions taken by Freshwater during Freshwater's time outside of school duties." *Id.* at ¶ 113. At the hearing, Weston testified that the statement in the report that she had received internal and external complaints for much of her eleven years of employment with the Board of Education was "inaccurate." *Id.* at ¶ 115.

{9} On June 20, 2008, the Board of Education passed by vote a resolution titled *"Intent to Consider the Termination of the Teaching Contract of John Freshwater"* ("Resolution"), which stated that Freshwater "consistently failed to adhere to the established curriculum under the American Content Standards for eighth grade as adopted by ... the Mount Vernon City School Board." *Id.* 4 ¶¶ 23, 24. On July 7, 2008, the Board of Education amended the resolution to correctly identify the curriculum standards as the "Academic Content Standards." *Id.* ¶ 25. The resolution stated that Freshwater taught creationism and intelligent design in his eighth grade science classes, which is not allowed by the Academic Content Standards.

{10} Freshwater contends that he was the target of intentional religious discrimination and harassment, being treated differently than his similarly situated coworkers, and that he was deprived of his constitutional rights to free speech and

association, equal protection, and due process. See, *Freshwater, et al. v. Mt. Vernon School District, et al.*, S.D.Ohio No. 2:09-CV-464, 2009 WL 4730597 (Dec 8, 2009); *Doe v. Mt. Vernon School District, et al.*, S.D.Ohio No. 2:08-CV-575, 2010 WL 1433301(Apr 6, 2010).

{11} Freshwater requested a hearing pursuant to R.C. 3319.16. A public hearing was held before a referee. The referee presided over 38 days of witness testimony from over 80 witnesses that generated over 6,000 pages of transcript. The referee also admitted approximately 350 exhibits into evidence. The hearing process took nearly two years to complete. The referee issued his report on January 7, 2011, recommending the Board terminate Freshwater's employment contract(s) for good and just cause.

{12} On January 10, 2011, the Board adopted the referee's report and resolved to terminate Freshwater's employment for two main reasons. First, Freshwater injected his personal religious beliefs into his plan and pattern of instructing his students that also included a religious display in his classroom, and second, insubordination.

{13} On February 8, 2011, Freshwater appealed the Board's decision to the Knox County Court of Common Pleas pursuant to R.C. 3319.16. On October 5, 2011, the trial court entered a Journal Entry affirming the Board's decision to terminate Freshwater, finding in the record "clear and convincing evidence" of good and just cause. The Court further found Freshwater's request for it to conduct additional hearings not well taken, based on the depth and breadth of witnesses and exhibits presented at the referee's hearing.

{14} This case is before this Court on appeal from the October 5, 2011 decision of the Knox County Court of Common Pleas that affirmed the appellee's January 10, 2011 resolution to terminate appellant's employment. Freshwater raises one assignment of error,

{15} "I. THE COURT BELOW ABUSED ITS DISCRETION IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE BOARD OF EDUCATION'S TERMINATION OF FRESHWATER'S EMPLOYMENT CONTRACT(S) FOR GOOD AND JUST CAUSE, IN AFFIRMING THE BOARD'S TERMINATION OF FRESHWATER'S EMPLOYMENT CONTRACT(S), AND IN ORDERING FRESHWATER TO PAY THE COSTS OF THE APPEAL."

I.

{16} R.C. 3319.16 provides that a tenured teacher can be terminated "for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause." These constitute three separate, independent bases, each of which is sufficient to terminate a tenured teacher. *Hale v. Lancaster Bd. of Edn.*, 13 Ohio St. 2d 92, 234 N.E. 2d 583(1968).

{17} The process to be employed in such a matter, after the decision to discharge is made, begins with a referee. He is required to hold an evidentiary hearing from which he presents his report to the school board. The board may then elect to accept or reject his recommendation.

> The decision to terminate a teacher's contract is comprised of two parts: (1) the factual basis for the allegations giving rise to the termination; and (2) the judgment as to whether the facts, as found, constitute gross

> inefficiency, immorality, or good cause as defined by statute. The distinction between these two is important in understanding the respective roles of the school board and of the statutory referee in the termination process. * * * The referee's primary duty is to ascertain facts. The board's primary duty is to interpret the significance of the facts.

Aldridge v. Huntington School Dist., 38 Ohio St.3d 154, 157-158, 527 N.E.2d 291, 294(1988).

{18} The *Aldridge* court, therefore, held in the syllabus:

> In teacher contract termination disputes arising under R.C. 3319.16:
>
> 1. The referee's findings of fact must be accepted unless such findings are against the greater weight, or preponderance, of the evidence;
>
> 2. A school board has the discretion to accept or reject the recommendation of the referee unless such acceptance or rejection is contrary to law.

{19} From there, the decision of the school board may be appealed to the court of common pleas. The court then engages in a hybrid exercise, encompassing "characteristics both of an original action with evidence presented and a review of an administrative agency's decision based upon a submitted record." *Douglas v. Cincinnati Bd. of Edn.*, 80 Ohio App.3d 173, 177, 608 N.E.2d 1128, 1131(1st Dist.1992). Based upon this review, "[t]he Common Pleas Court may reverse an order of termination of a teacher's contract, made by a Board of Education, where it finds that such order is not

211
214

supported by or is against the weight of the evidence. (Section 3319. 16, Revised Code, construed and applied.)" *Hale,* 13 Ohio St. 2d 92, 234 N.E. 2d 583, paragraph one of the syllabus.

{20} The Supreme Court of Ohio has delineated the standard of review and the role of a court of appeals:

> If the judgment of the court of common pleas is then appealed to the court of appeals, review in the appellate court is strictly limited to a determination of whether the common pleas court abused its discretion. This scope of review is, of course, extremely narrow. The term 'abuse of discretion' has been defined as implying '"not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency."' (Citations omitted.)

Graziano v. Amherst Exempted Village Bd. of Edn., 32 Ohio St.3d 289, 295, 513 N.E.2d 282(1987). (Douglas, J., concurring).

{21} Thus, unless this court determines that the trial court abused its discretion, we are compelled to affirm its decision as "the court of appeals may not engage in what amounts to a substitution of judgment of the trial court in an R.C. 3319.16 proceeding." *Id.* at 294, 513 N.E.2d at 286.

> "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. * * * It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

> A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601(1990).

{22} In the matter *sub judice*, we do not perceive an "unreasonable, arbitrary or unconscionable attitude," nor one that is "not merely error of judgment, but [one of] perversity of will, passion, prejudice, partiality, or moral delinquency." To the contrary, the referee's memorandum provides a well-reasoned and articulated basis for affirming the decision of the Board and for the trial court to accept the recommendation of the referee.

{23} In *Graziano* the Supreme Court said that the "report *and recommendation* undertaken by the referee pursuant to R.C. 3319.16 must be considered and weighed by the board of education. [Emphasis added.] * * * [D]ue deference must be accorded to the findings and recommendations of the referee * * * who is best able to observe the demeanor of the witnesses and weigh their credibility." 32 Ohio St.3d at 293, 513 N.E.2d at 285. *Graziano* noted that the board is not bound by the recommendations rendered by the referee, but that the board "should, in the spirit of due process, articulate its reasons therefore" if it rejects the recommendations. *Id.*; *Aldridge v. Huntington School Dist.*, 38 Ohio St.3d at 157, 527 N.E.2d 291.

{24} In the case at bar, this court rejects appellant's contentions as to issues involving the sufficiency of the evidence and the credibility of certain witnesses. There was sufficient evidence to support both the referee and appellee's findings, and we do not determine issues involving credibility.

{25} Next, we find it is within the trial court's discretion to determine whether additional hearings should be conducted. Although the common pleas court's review of a board's decision is not *de novo*, R.C. 3319.16 does empower the court to weigh the evidence, hold additional hearings if necessary, and render factual determinations. *Graziano*, 32 Ohio St.3d at 293, 513 N.E.2d at 285. However, nothing in the statute absolutely requires the reviewing court to do so. See R.C. 3319.16 (stating that the court "shall hold such additional hearings *as it considers advisable*, at which it *may* consider other evidence in addition to the transcript and record.") (Emphasis added.) If there exists "substantial and credible evidence" in support of the charges of the Board, and "a fair administrative hearing is had, the [common pleas court] cannot substitute its judgment for the judgment of the administrative authorities." *Bertolini v. Whitehall City Sch. Dist. Bd. of Edn.*, 139 Ohio App.3d 595, 604, 744 N.E.2d 1245(10th Dist. 2000), quoting *Strohm v. Reynoldsburg City School Dist. Bd. of Edn.*, 10th Dist. No. 97APE07-972, 1998 WL 151082 (Mar. 31, 1998). *Accord Elsass v. St. Mary's City School Dist. Bd. Of Edn.*, 3d Dist. No. 2-10-30, 2011-Ohio-1870, ¶ 43.

{26} Appellant's main contention in the case sub judice is that the conduct found did not rise to the level of good and just cause sufficient to terminate his contract. [Appellant's Brief at 7].

{27} The Supreme Court has defined "good and just cause" as a "fairly serious matter." *Hale* at 98–99, 234 N.E.2d 583. The referee in the case at bar found appellant's conduct to constitute a "fairly serious matter,"

> Without question, the repeated violation of the Constitution of the United States is a "fairly serious matter" and is therefore, a valid basis for termination of John Freshwaters contract(s). Further, he repeatedly acted in defiance of direct instructions and orders of the administrators - his superiors. These defiant acts are also a "fairly serious matter" and, therefore, a valid basis for termination of John Freshwater's contract.

Referee's Report at 13.

{28} The referee did not use the Tesla Coil incident as a reason to terminate appellant's contract. The referee found that incident had been dealt with by the administration and that case was closed.

{29} The referee further found that "the multiple incidents which gave rise to the numerous and various bases/grounds more than suffice in support of termination." Referee's Report at 12. The referee found that appellant had repeatedly violated the U.S. Constitution; acted in defiance of direct instructions and orders of his superiors, and refused and/or failed to employ objectivity in his instruction of a variety of science subjects. Id.

{30} The common pleas court found that appellee's order was not against the manifest weight of the evidence and that appellant's conduct constituted good and just cause to terminate appellant. Therefore, it affirmed appellant's termination.

{31} A review of the record shows that a hearing spanning nearly two years was conducted, testimony from over 80 witnesses was received, a transcript of over 6,000 pages was produced, and approximately 350 exhibits were admitted into evidence.

{32} During the proceedings appellant was represented by a competent attorney, he was permitted to fully explain his actions, he presented witnesses on his behalf, and he had a full opportunity to challenge the Board's key witnesses. R.C. 3319.16 does not contain any requirement that a teacher be afforded an opportunity to refute the contents of a referee's report in the period between the filing of the report and its acceptance or rejection by the board of education, nor does it provide for an additional hearing before the board if the teacher does not like the results of the hearing before the referee. *Elsass v. St. Mary's City School Dist. Bd. Of Edn.*, 2011-Ohio-1870, ¶ 60.

{33} Appellant has failed to demonstrate any due process violation. The trial court did not abuse its discretion by overruled his request to conduct additional hearings.

{34} We further find that appellee's determination as to the significance of appellant's conduct—that such constituted a fairly serious matter—is explicable and reasonable. Further, the common pleas court's affirmance of that determination was not an abuse of discretion and, therefore, will not be disturbed by this court.

{35} In *Oleske v. Hilliard City School Dist. Bd. Of Edn.*, the Court observed,

> It is not within the province of this court to second-guess appellee's determination of the significance of appellant's conduct. We do not sit as a

super-school board. Given the circumstances presented herein, we simply cannot find an abuse of discretion on the part of the common pleas court in affirming appellee's order. To do so would simply be to substitute our judgment for that of the common pleas court and/or appellee, and this is not our role.

146 Ohio App.3d 57, 65, 764 N.E.2d 1110 (10th Dist. 2001).

{36} Accordingly, appellant's sole Assignment of Error is overruled in its entirety.

{37} The judgment of the Court of Common Pleas, Knox County, Ohio is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

WSG:clw 0222

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JOHN FRESHWATER

Plaintiff-Appellant

-vs-

MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2011-CA-000023

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Knox County, Ohio is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

211
221