

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. 11 CA 000023

JOHN FRESHWATER,

Appellant,

v.

MOUNT VERNON CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Appellee.

APPELLANT'S BRIEF

R. Kelly Hamilton
Ohio State Bar No. 0066403
The Law Office of R. Kelly Hamilton
P.O. Box 824, Grove City, OH 43123
(614) 875-4174

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ASSIGNMENTS OF ERROR

- 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 (Journal Entry, p. 2, Attached as Exhibit A).

ISSUES FOR REVIEW

- I. Does a public school teacher's facilitation of classroom discussion concerning popular alternative theories to the Big Bang theory, and the encouragement of students to distinguish scientific theories and hypotheses from fact as directed and permitted by school policy and Ohio's Academic Content Standards, create "good and just cause" for termination of the teacher's employment contract, or does the termination of the teacher on this basis constitute 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 (Journal Entry, p. 2)?
- II. Does the presence of religious texts from the school's library in a teacher's classroom, or the display of a patriotic poster depicting the nation's highest executive leaders praying, as permitted by O.R.C. §3313.601, constitute "good and just cause" for termination of the teacher's employment contract, or does the termination of a teacher on this basis constitute 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 (Journal Entry, p. 2)?
- III. Was the Mount Vernon City School District Board of Education's termination of Freshwater's employment contract improperly based upon an unconstitutional animus toward a perception of Freshwater's religious faith, thus belying the lower court's finding that there was "good and just cause" for said termination and, in fact, violating Freshwater's First Amendment right to free speech and Fourteenth Amendment right to equal protection (Journal Entry, p. 2)?

STATEMENT OF THE CASE

This is an appeal of a summary decision by the Court of Common Pleas of Knox County, made without the benefit of a hearing or upon any specific legal analysis. The Court upheld the 2011 Resolution of the Mount Vernon City School District Board of Education (hereinafter “Board”) to terminate John Freshwater’s employment contract. 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, performed safely by Freshwater and other teachers for over 20 years, allegedly produced a 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.”

STATEMENT OF FACTS RELEVANT TO THE ASSIGNMENTS OF ERROR

The Board hired John Freshwater as an eighth-grade science teacher in 1987. All available evidence demonstrates that Freshwater's teaching career was conspicuously marked by excellence (Report, p. 2). This point is not disputed, nor could it be. On average, Freshwater's students performed at or above the state requirements, and their test scores often exceeded the state test scores of other eighth-grade science students (Id.). Freshwater was recognized by his peers on multiple occasions for his outstanding teaching skills (Id.). Throughout Freshwater's employment, he was given at least 20 performance evaluations, each of which was positive. Freshwater had never been disciplined before the events giving rise to the instant case.

During his teaching tenure, Freshwater frequently availed himself of his First Amendment rights to freely exercise his religion as a private citizen in the community. He kept a Bible on his desk, as did other teachers employed by the Board. He also served as the faculty-appointed facilitator, monitor, and supervisor of the eighth-grade Fellowship of Christian Athletes student group for over 15 years (hereinafter "FCA").

In January, 2008, the parents of one of Freshwater's students complained to the school board president about an incident in which an experiment with a Tesla coil in Freshwater's classroom allegedly left marks on the student's arm. The alleged mark was presented in the shape of an "x," or, depending upon one's perspective, a cross. Importantly, no one but the reporting family observed the alleged mark, as the family took a picture of the student's arm instead of taking the child to a physician or showing the arm to any other potentially interested adult. Unfortunately, the complaint became the subject of rumors and speculations that spread

quickly throughout the community¹, thus prompting the Board to begin an investigation of unprecedented proportion into Freshwater's entire teaching career. Ultimately, Referee Shepherd concluded:

[I]t became obvious that speculation and imagination had pushed reality aside. There was a plausible explanation for how and why the Tesla Coil had been used by John Freshwater. Further, and more crucial to a review of the Amended Resolution, the use of the Tesla Coil by John Freshwater did not seem to be a proper subject for the Amended Resolution. ... The issue and incident was dealt with by the administration. That case was closed.

(Report, p. 2).

However, based upon various statements that were made concerning Freshwater during the course of the investigation of that incident, including some that were later admitted to have been fabricated,² the Board passed a resolution on June 20, 2008, entitled "Intent to Consider the Termination of the Teaching Contract of John Freshwater." This resolution was based primarily upon complaints that Freshwater "consistently failed to adhere to the established curriculum..." Specifically, the Resolution alleged that Freshwater taught creationism and intelligent design in his science classes along with the required curriculum on evolution.

At Freshwater's request, a public hearing pursuant to O.R.C. § 3319.16 was held before Referee Shepherd (Journal Entry, p.1). The Referee received testimony from over 80 witnesses and admitted approximately 350 exhibits into evidence (Id.). On January 7, 2011, the Referee issued a Report recommending that the Board terminate Freshwater's contract for "good and just cause." (Id.; Report, p. 11-12).

¹ See Report, p. 2 ("Due to the sensational and provocative nature of this specified ground, it and the facts and circumstances surrounding it became the focus of the curious, including those in the video, audio, and print media.").

² See reference to initial administrative hearing in *Freshwater v. Mount Vernon City Sch. Dist. Board of Educ.*, 2009 U.S. Dist. LEXIS 114346, *6 (S.D. Ohio 2009). ("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.'").

On January 10, 2011, the Board accepted the Referee's recommendation to terminate Freshwater on two of the specified grounds:

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

Referee Shepherd concluded that the evidence did not establish that Freshwater had failed to adequately teach the mandatory subject areas for his classes (Report, p. 3). In fact, Shepherd pointed out that Freshwater's students "learned and tested well with regards to the mandatory subject areas." (Id.). However, Shepherd found fault with his perception that Freshwater "was determined to inject his personal religious beliefs into his plan and pattern of instruction of his students," thereby violating various Board policies (Id.). However, the relevant policies recommend that "Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets." (Id.).

The facts upon which Shepherd and the Board based their conclusion that Freshwater's teaching violated this policy were: (1) that he allowed his students to examine evidence both for and against evolution, (2) that 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) that 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 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 recently obtained proves conclusively 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). In light of the facts that Freshwater has consistently and vehemently denied making the statement, and that the only witness who alleges to have heard the statement has been discredited, it is unreasonable, unconscionable, and an abuse of discretion for this allegation to be accepted as true.

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

According to Shepherd's Report, school administrators "began implementing a plan of corrective action in hopes of forestalling legal action against the Mount Vernon Schools." (Report, p. 8). As part of this "corrective action," administrators demanded that Freshwater remove a number of items from his classroom (Id.).

Middle School Principal William White testified that following the communication of these instructions, when he returned to Freshwater's classroom, "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 D'Ettore, 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, *Religion in Curriculum* (Employee Exhibit 9), and 3218, *Academic Freedom of Teachers* (Employee Exhibit 84), confirm this (Transcript, pp. 300, 525,

1786, 2024, 2142, 2147, 2366 and 2828). Nonetheless, Referee Shepherd and the Board concluded that this failure to remove the patriotic poster of Colin Powell, and the presence in the classroom of materials checked out from the school library constituted “defiance.” (Report, p. 9). 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). The school board president testified that he did not consider the poster, in and of itself, to be religious in nature (Transcript, p. 5529 and 5537). Other witnesses agreed with the board president in determining the poster was not religious in nature (Expert Finn Laursen, Transcript, p. 3911, and former Mount Vernon Middle School Principal Jeff Kuntz, Transcript, p. 3822).

Based on the foregoing analysis of these issues, Referee Shepherd concluded that under either a clear and convincing evidence standard or a preponderance of the evidence standard, Freshwater’s conduct represented a “fairly serious matter,” and was a valid basis for his termination based upon “good and just cause.” (Report, p. 10). Referee Shepherd specifically noted that he had not determined whether any one of the grounds would be sufficient in and of itself for termination (Id.). Shepherd also concluded that Freshwater had “repeatedly violated the Establishment Clause.” (Id., at 11).

In its Resolution of January 10, 2011, the Board adopted the Referee’s Report, finding good and just cause to terminate Freshwater’s employment on the basis of the aforementioned grounds.

ARGUMENT

I. SUMMARY

In short, the cited grounds do not constitute “good and just cause” for Freshwater’s termination, and the summary affirmance of the Board’s decision by the court below, without any hearing or analysis of Freshwater’s legal arguments, constitutes an abuse of discretion. Because the court held no hearing, it was unable to consider the highly relevant exonerating information (records demonstrating that the only alleged witness to Freshwater’s statement about homosexuality was never, in fact, in Freshwater’s classroom) that became available following the Board’s adoption of its Resolution . While it is tempting to deduce — from the sheer number of alleged incidents raised by the Board in justifying their actions against Freshwater—that Freshwater was a problematic employee who repeatedly violated rules, policies, and direct orders, the evidence shows that this is not the case. It is critical to bear in mind that throughout his 20-year teaching career, *Freshwater never received a single negative performance evaluation*. His students excelled. He was recognized by his peers as an exemplary teacher.

It is likely that if any 20-year teaching career were subjected to the intense critique of over 80 witnesses, offering testimony over 38 days, and the examination of 350 exhibits, a board of education that was predisposed to do so would find some plausible ground for establishing “good and just cause” for termination. But in Freshwater’s case, even this exacting scrutiny failed to reveal any credible basis for determining that he had committed any “fairly serious” misconduct that would justify termination.

Rather, when viewed in the proper context from an objective viewpoint, it becomes obvious that Freshwater’s termination was prompted by something other than poor job performance, violation of policies, or refusal to comply with directives. Freshwater submits that the true basis for his termination was a combination of religious animus, an unfounded fear of

lawsuits, and a desire to appease members of the community who were prejudiced by the sensationalized Tesla coil incident that was ultimately found to be insignificant.

Upon careful examination and analysis of the relevant facts, each of the cited grounds for Freshwater's termination is demonstrated to be insufficient to constitute "good and just cause" for one or more of the following reasons:

1. The incident(s) described did not, in fact, occur;
2. The incident was a single, isolated occurrence and not serious enough to constitute "good and just cause" under Ohio law;
3. The issue complained of was actually consistent with good teaching practices, Board policies, and/or First Amendment principles; and/or
4. The matter was resolved by Freshwater upon request by school officials.

Freshwater respectfully submits that this Court must not be swayed by the number of charges levied against him in an effort to justify his termination. The Court must instead carefully consider each alleged basis to determine whether the incident(s) occurred and, if so, whether or not it was significant enough either on its own, or in concert with any other actual occurrences, to constitute the level of misconduct that would justify the termination of Freshwater's employment. Moreover, the Court must seek to discern whether all or any part of the Board's motivation for this action against Freshwater was based on an unlawful desire to remove all vestiges of "religion" from the school system. And finally, the Court must reverse Board actions that conflict with the First Amendment rights of students and teachers and the requirements of the Establishment Clause.

II. LEGAL STANDARD

Under Ohio law, a public school teacher's contract may be terminated "for good and just

cause.” O.R.C. § 3316.19. However, the Ohio Supreme Court has clarified that any alleged teacher misconduct must constitute a “fairly serious matter” to justify termination. *Hale v. Board of Educ.*, 13 Ohio St. 2d 92, 98-99 (1968). Among the factors courts examine to determine whether alleged misconduct rises to this level are the teacher’s previous job performance, the number of instances of misconduct involved, and the seriousness of the behavior at issue. *Id.* Where a teacher is effective and competent and has not been subject to prior disciplinary actions, his or her termination for isolated incidents of misconduct is improper. *See Katz v. Maple Heights City Sch. Dist. Bd. of Educ.*, 87 Ohio App. 3d 256, 622 N.E.2d 1 (Cuyahoga 1993).

This Court must reverse the decision below if it is found to have been an abuse of discretion. *Id.* Where it appears that the trial court has acted arbitrarily, unreasonably or unconscionably, an abuse of discretion will be found. *Id.* Freshwater submits that the summary affirmance of the Board’s Resolution, without the examination of any factual issues disputed by Appellant or any analysis of his First and Fourteenth Amendment claims, constitutes an abuse of discretion.

III. INSUFFICIENCY AND ILLEGALITY OF PURPORTED GROUNDS FOR TERMINATION

A. Freshwater’s Teaching Methods

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. Moreover, Ohio’s Academic Content Standards (Board Exhibit 37, p. 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 transform good teaching practice into a violation of the First Amendment's Establishment Clause.

While the District Bylaw/Policy that Freshwater's teaching methods allegedly violated states, "Instructional activities shall not be permitted to advance or inhibit any particular religion," (Report, p. 4; Employee Exhibit #9), Freshwater has now been terminated precisely because he followed this policy by simply informing students of various alternative theories without regard to those theories' religious or anti-religious implications. In short, it is 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.

As Referee Shepherd noted, District Bylaws/Policies also specify that "Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets." (Report, p. 3; Employee Exhibit 9). This is exactly what Freshwater did. Referee Shepherd correctly noted Freshwater had "instruct[ed] his eighth grade students in such a way that they were examining evidence both for and against evolution." (Report, p. 4). However, from that fact Shepherd wrongly concluded that Freshwater improperly "injected his beliefs as associated with his own religious tenets into his science instruction," (Id.) Freshwater submits that his encouraging students to think critically about scientific theories, as directed by Ohio's Academic Content Standards (Board Exhibit 37, p. 215-216) and board policy 2240 titled *Controversial Issues* (Employee Exhibit 81), cannot be rendered illegal based solely on the presumption that Freshwater's personal beliefs happen to align with one of the competing theories considered.

While Referee Shepherd and the Board also took issue with Freshwater's provision of handouts to supplement his use of the textbook, evidence demonstrated that teachers were given wide latitude to use outside materials in conjunction with the curriculum, and had been encouraged to do so (Transcript, p. 1502, Teacher Adkins, p. 1815, Teacher Spitzer, p. 1934, 1946, Teacher Strouse, p. 2018, Teacher Cook, p. 2108, Teacher Farmer, p. 2425, Teacher Miller, p. 2597, Teacher Weston, p. 2855, Teacher Elifritz, p. 2917, Teacher Thompson, and p. 3979, Teacher Button). No pre-authorization was ever necessary, nor was there a protocol in place to obtain such authorization (Transcript, p. 2265, Superintendent Maley, p. 1501, Teacher Adkins, and p. 2058, Teacher Malone). Moreover, on the two occasions when school officials raised objections to materials being used by Freshwater, he immediately ceased using them (Transcript, p. 920, Teacher Cunningham, p. 983, Teacher Beach, p. 1287, Investigator Herlevi, p. 2244, 2281, Superintendent Maley, p. 3730, Teacher Mahan, and p. 3816, Principal Keib). Freshwater never received any adverse notations in his personnel file to warn him that there was any problem with his teaching methodology in this regard or any other.

Referee Shepherd and the Board also found fault with Freshwater's development of means by which students could independently call attention to instances in the textbook where scientific theories appeared to the students to be portrayed as indisputable facts (Report, p. 4). Freshwater encouraged students to say the word, "here," aloud as a way of briefly communicating their identification of one of these instances. This methodology was an extension of and in compliance with District Bylaws/Policies stating students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets." (Report, p. 3; Employee Exhibit 9).

The Board’s termination of Freshwater’s employment on this basis raises significant First Amendment concerns that were completely ignored by the court 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, 863-64 (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, including Policy 2270, *Religion in Curriculum* (Employee Exhibit 9) and Policy 2240, *Controversial Issues*, (Employee Exhibit 81), which provide the only official guidance from the Board to Freshwater. 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 effort to stifle the vitality of this inquisitive learning environment is an affront to the First Amendment rights of student and teacher alike and contrary to Board policies.

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. The record of this case is utterly devoid of any evidence that Freshwater's acknowledgment and

discussions of students' questions about alternative origins of life theories were used in any way to advance the creed of any religion. Rather, the theories in question were uniformly evaluated for their scientific and logical merits (Transcript pp. 3625-3629, 3767). Nonetheless, because widely-accepted theories on the origins of life are consistent with the views of multiple major world religions, Referee Shepherd and the Board concluded that classroom discussion of these alternative theories constitutes a violation of the First Amendment's Establishment Clause (Report, p. 4, 11). This conclusion demonstrates a fundamental misunderstanding of the First Amendment that, in fact, turns this foundational freedom on its head. It also contradicts the Board's own policies, as identified herein.

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). This language is instructive for the instant case in two regards. First, it stands as a reminder that study of religions and of the Bible is not off-limits in the public school system where they form part of a secular program of education as opposed to the inculcation of a religious creed. Second, it emphasizes that the Establishment Clause cuts two ways, forbidding alike state actions that aid or oppose any religion.

Applying these principles to the instant case, it becomes absolutely clear that while Freshwater's teaching methods were a permissible and valuable pedagogical exercise, 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).

Finally, with regard to the final issue raised in this section of the Referee's Report, the alleged comment Freshwater made to students about homosexuality, Freshwater disputes ever making any such statement (Transcript, pp. 478, 1173, 1201, 4653, and 4673). Evidence acquired only after the close of the administrative hearings conclusively demonstrates that the sole purported witness to this incident *was not, in fact, in Freshwater's classroom on the day in question* (See Exhibit A). Stockdale alleged that on the day in question, in the fall of 2006, he was substituting for Kerri Mahan, the inclusion teacher for Freshwater's eighth-grade science class (Report, p. 6). But recently-obtained school records conclusively demonstrate that Stockdale did not, in fact, substitute for Mahan or any other inclusion teacher who could have been in Freshwater's class at any time during the fall of 2006, and thus would have had no occasion to witness the statement he has accused Freshwater of making (See Exhibit A). Like the dramatized Tesla coil matter, actual evidence completely debunks any notion that Freshwater ever made the offending statement. It is therefore an improper basis for the termination of his employment contract. In light of the facts that Freshwater has consistently and vehemently denied making the statement, and that the only witness who alleges to have heard the statement

has been discredited, it is unreasonable, unconscionable, and an abuse of discretion for this allegation to be accepted as true.

B. Alleged Insubordination

Far from providing justification for Freshwater’s termination, a review of Freshwater’s responses to orders of his superiors demonstrates the impropriety of the Board’s actions. Where lawful instructions were clearly communicated to Freshwater, the record shows that he complied with them in good faith. Thus, the appropriate response to any perceived shortcomings in Freshwater’s performance of his job duties is a matter of simple communication rather than the conclusory termination of his employment.

While Referee Shepherd’s Report asserts that Freshwater defied instructions to alter the decoration of his classroom, this contention is belied by Principal White’s own testimony quoted in the Report, which established that “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.” (Report, p. 9).

With regard to the patriotic Colin Powell poster, Freshwater testified that he did not recall being told to remove it. (Report, p. 10; Transcript, p. 444). Contemporaneous documentation of the order for Freshwater to remove specified objects from his classroom supports Freshwater’s claim, as it makes no reference to the items that Freshwater did not recall being asked to remove (i.e., the poster, Bible, and Jesus of Nazareth book) (Employee Exhibits 145 and 146). In fact, an order for Freshwater to remove this particular patriotic poster would have been inconsistent with school officials’ actions in allowing the display of the exact same poster in other rooms (Transcript, p. 539, Principal White, p. 2082, Teacher Gustin, p. 2094, Teacher Sanders, p. 2125, Teacher Carter, and p.3602, Principal Keib).

O.R.C. §3313.601 provides in pertinent part:

No board of education shall prohibit a classroom teacher from providing in the teacher's classroom reasonable periods of time for activities of a moral, philosophical, or patriotic theme.

State law thus goes beyond allowing the mere *display* of patriotic pictures (which is all Freshwater has been accused of doing); it allows teachers to actually use instructional time to conduct *activities* to emphasize moral, philosophical, or patriotic themes. Freshwater and multiple other Board employees chose to hang this particular poster because of its patriotic value. The Board is out of sync with the moral fiber of our nation, generally, and in violation of Ohio State law, specifically, in using the mere presence of this benign poster as an excuse for terminating Freshwater's employment.

Moreover, the purported orders for Freshwater to remove the Bible (also an object kept by other teachers in other classrooms) and *Jesus of Nazareth* is constitutionally problematic for the reasons set forth *supra*. It is nonsensical for the Board to terminate a teacher's employment based on the presence of school library books in his classroom. Worse, 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). Even if defiance of the order might otherwise constitute good and just cause for terminating his employment (which Freshwater disputes), the unconstitutionality of the order by virtue of Supreme Court precedent invalidates the Board's reliance on this basis to support its action.

IV. DISCRIMINATORY ANIMUS MOTIVATED THE BOARD'S DISCIPLINARY ACTION

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 State 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 court below abused its discretion in summarily upholding Freshwater's termination, because the Board's action is utterly unjustified on the face of the record and is based upon patently unconstitutional premises. Where lawful and reasonable instructions were given to Freshwater, he routinely complied with them. Nonetheless, despite the existence of significant constitutional claims, the court simply affirmed the Board's decision without conducting its own hearings or offering any explanatory analysis. This manifests an attitude that is unreasonable,

arbitrary, and unconscionable, and therefore constitutes an abuse of discretion. *See Graziano v. Amherst Exempted Village Bd. of Educ.*, 32 Ohio St. 3d 289, 513 N.E.2d 282 (1987).

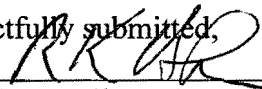
The Board's actions constitute a violation of the First Amendment academic freedom rights of both Freshwater and his students and of the First Amendment's Establishment Clause. As the United States Supreme Court has instructed, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Pico*, at 868 (*quoting Keyishian*, at 603).

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.

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). By virtue of the First Amendment, this is not permitted.

Freshwater prays that this Court reverse the decision of the court below upholding the Board's Resolution; award him monetary damages in an amount to be determined as a result of his wrongful termination and the interference with his rights under the First and Fourteenth Amendments to the United States Constitution; order that the Board reinstate him to his teaching position; and order such other relief as the Court may deem appropriate.

Respectfully submitted,




R. Kelly Hamilton (0066403)
Counsel for Appellant
The Law Office of R. Kelly Hamilton, LLC
P.O. Box 824, Grove City, OH 43123
(614) 875-4174
Participating Attorney with
THE RUTHERFORD INSTITUTE

CERTIFICATE OF SERVICE

I hereby certify that on this 06th day of December, 2011, a copy of the foregoing brief was mailed by first-class mail, postage prepaid, to

David Kane Smith
BRITTON SMITH PETERS & KALAIL CO., L.P.A.
3 Summit Park Drive, Suite 400, Cleveland, OH 44131



R. Kelly Hamilton
Counsel for Appellant

Exhibit A

Journal Entry

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

IN THE COURT OF COMMON PLEAS, KNOX COUNTY OHIO

FILED
KNOX COUNTY
COURT OF COMMON PLEAS

JOHN FRESHWATER,

2011 OCT -5 AM 9:40

Plaintiff,

MARY JO H. LINDSAY
CLERK OF COURTS

CASE NO. 11AP02-0090

vs.

:

JUDGE OTHO EYSTER

MOUNT VERNON CITY SCHOOL DISTRICT :
BOARD OF EDUCATION

JOURNAL ENTRY

:

Defendant.

:

This matter came before the Court as an original action filed by Plaintiff ("Freshwater") pursuant to Ohio Revised Code §3319.19.16. Freshwater is appealing the Defendant's ("Board of Education") January 10, 2011, Resolution terminating Freshwater's employment contract.

At Freshwater's request and pursuant to the provisions of O.R.C. §3319.16, a public hearing was held before Referee R. Lee Shepard, Esq. The Referee presided over thirty-eight (38) days of witness testimony from over eighty (80) witnesses generating six thousand three hundred forty four (6,344) pages of transcript. The Referee also admitted approximately three hundred fifty (350) exhibits into evidence. The Referee issued a Report on January 7, 2011, recommending the Board of Education terminate Freshwater's contract(s) for "good and just cause."

Based on the number of witnesses and exhibits presented at the Referee's hearing held over a period of over twenty-one (21) months, the Court finds Freshwater's request that the Court conduct additional hearings is not well taken.

The Court, having reviewed the certified transcript of the testimony and the evidence admitted at the hearing before the Referee, the transcript of original papers filed with the

203
527

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

Board of Education, a certified copy of the minutes of the Board of Education meetings, the Board of Education Resolutions, and having considered the applicable law, finds there is clear and convincing evidence to support the Board of Education's termination of Freshwater's contract(s) for good and just cause, and

IT IS ORDERED, ADJUDGED, AND DECREED that Freshwater's request that the Court conduct additional hearings is denied, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the Complaint filed in this matter is denied and the Resolution of the Board of Education dated January 10, 2011, terminating any and all contracts with Freshwater is affirmed, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED Freshwater is to pay the costs of this proceeding within 30 days of receipt of the cost bill.

IT IS SO ORDERED.



JUDGE OTHO EYSTER

Close Code: 18

cc:
John Freshwater, Plaintiff
David Kane Smith, Esq.
Krista Keim, Esq.
Paul Deegan, Esq.

Exhibit B

School Substitute Teacher Attendance Records

DATE: 04/08/11
 TIME: 3:48 pm

MT. VERNON CITY SCHOOLS

PAGE:
 (ABS101)

Staff Attendance Report
 Selected Employees, All Appt. Types From 07/01/06 thru 06/30/07 for AB

ID	Bld/Dept	Employee Name	Date	Job	Rec No.	Wk Day	Length	Unit Code	Category	Sub Cat.	Defc
009002	MAHAN, KERRI L.		09/27/06	00	1	WE	1.0000	D - Days	SI - Sick		
			10/04/06	00	1	WE	1.0000	D - Days	PR - Professional		
			10/13/06	00	1	FR	1.0000	D - Days	SI - Sick		
			10/27/06	00	1	FR	.5000	D - Days	PR - Professional		
			11/02/06	00	1	TH	1.0000	D - Days	PL - Personal		
			11/07/06	00	1	TU	.5000	D - Days	PR - Professional		
			11/13/06	00	1	MO	1.0000	D - Days	SI - Sick		
			12/04/06	00	1	MO	.5000	D - Days	SI - Sick		
			12/18/06	00	1	MO	1.0000	D - Days	SI - Sick		
			01/10/07	00	1	WE	.5000	D - Days	PR - Professional		
			01/19/07	00	1	FR	.5000	D - Days	SI - Sick		
			01/22/07	00	1	MO	.5000	D - Days	PR - Professional		
			02/16/07	00	1	FR	1.0000	D - Days	PR - Professional		
			02/21/07	00	1	WE	1.0000	D - Days	PR - Professional		
			02/27/07	00	1	TU	1.0000	D - Days	PR - Professional		
			02/28/07	00	1	WE	1.0000	D - Days	PR - Professional		
			03/01/07	00	2	TH	1.0000	D - Days	PR - Professional		
			03/05/07	00	1	MO	1.0000	D - Days	PR - Professional		
			03/06/07	00	1	TU	1.0000	D - Days	PR - Professional		
			03/09/07	00	1	FR	.5000	D - Days	PR - Professional		
			03/12/07	00	1	MO	1.0000	D - Days	SI - Sick		
			03/13/07	00	1	TU	1.0000	D - Days	SI - Sick		
			04/03/07	00	1	TU	1.0000	D - Days	PL - Personal		
			04/04/07	00	1	WE	1.0000	D - Days	PL - Personal		
			04/23/07	00	1	MO	.5000	D - Days	SI - Sick		
			04/24/07	00	1	TU	1.0000	D - Days	SI - Sick		
			04/25/07	00	1	WE	1.0000	D - Days	SI - Sick		
			04/26/07	00	1	TH	.5000	D - Days	SI - Sick		
			05/15/07	00	1	TU	1.0000	D - Days	PR - Professional		
			06/01/07	00	2	FR	.5000	D - Days	SI - Sick		
			Category	Records	Days	Hours	Weeks	Balance			
			SI Sick	13	10.5000	.0000		-1.0000			
			PL Personal	3	3.0000	.0000		3.0000			
			PR Professional	14	11.5000	.0000					
Totals for MAHAN KERRI L				30	25.0000	.0000	.0000				

* - Multiple transactions for same date combined

DATE: 04/11/11
 TIME: 8:02 am

MT. VERNON CITY SCHOOLS

PAGE:
 (ABS101)

Staff Attendance Report
 Selected Employees, All Appt. Types From 07/01/05 thru 06/30/06 for AT

ID	Bld/Dept	Employee Name	Date	Job	Rec No.	Wk Day	Length	Unit Code	Category	Sub Cat.	Defe
	009002	STOCKDALE, JAMES L.	07/01/05	00	2	FR	1.0000	D - Days	AT - Attendance		
			07/05/05	00	1	TU	1.0000	D - Days	AT - Attendance		
			07/06/05	00	1	WE	1.0000	D - Days	AT - Attendance		
			07/07/05	00	1	TH	1.0000	D - Days	AT - Attendance		
			07/08/05	00	2	FR	1.0000	D - Days	AT - Attendance		
			07/11/05	00	1	MO	1.0000	D - Days	AT - Attendance		
	115000		11/04/05	50	1	FR	1.0000	D - Days	SB - Substituting		
			**** Substituted For: MARTH, JAMES K.								
			11/17/05	50	1	TH	1.0000	D - Days	SB - Substituting		
			**** Substituted For: JONES, MINDY J.								
			11/22/05	50	1	TU	1.0000	D - Days	SB - Substituting		
			**** Substituted For: MARTH, JAMES K.								
			11/23/05	50	1	WE	1.0000	D - Days	SB - Substituting		
			**** Substituted For: MARTH, JAMES K.								
			12/02/05	50	1	FR	1.0000	D - Days	SB - Substituting		
			**** Substituted For: JONES, MINDY J.								
			12/07/05	50	1	WE	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			12/08/05	50	1	TH	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			02/02/06	50	1	TH	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			02/07/06	50	1	TU	1.0000	D - Days	AT - Attendance		
			03/06/06	50	1	MO	1.0000	D - Days	SB - Substituting		
			03/07/06	50	1	TU	.5000	D - Days	SB - Substituting		
			03/08/06	50	1	WE	.5000	D - Days	SB - Substituting		
			03/09/06	50	1	TH	.5000	D - Days	SB - Substituting		
			03/10/06	50	1	FR	.5000	D - Days	SB - Substituting		
			03/10/06	50	2	FR	.5000	D - Days	SB - Substituting		
			**** Substituted For: WHITE, SUSAN R.								
			03/13/06	50	1	MO	1.0000	D - Days	SB - Substituting		
			03/17/06	50	1	FR	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			03/22/06	50	1	WE	1.0000	D - Days	SB - Substituting		
			**** Substituted For: MARTH, JAMES K.								
			03/31/06	50	1	FR	1.0000	D - Days	AT - Attendance		
			04/03/06	50	1	MO	1.0000	D - Days	AT - Attendance		
			04/05/06	50	1	WE	1.0000	D - Days	AT - Attendance		
			04/06/06	50	1	TH	1.0000	D - Days	AT - Attendance		
			04/27/06	50	1	TH	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			04/28/06	50	1	FR	1.0000	D - Days	AT - Attendance		
			05/01/06	50	1	MO	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			05/08/06	50	1	MO	1.0000	D - Days	AT - Attendance		
			05/10/06	50	1	WE	1.0000	D - Days	AT - Attendance		
			05/14/06	50	1	SU	1.0000	D - Days	AT - Attendance		
			05/15/06	50	1	MO	1.0000	D - Days	SB - Substituting		
			**** Substituted For: FIREBAUGH, COREY S.								
			05/19/06	50	1	FR	1.0000	D - Days	AT - Attendance		
			05/25/06	50	1	TH	1.0000	D - Days	AT - Attendance		

* - Multiple transactions for same date combined

DATE: 04/11/11
TIME: 8:02 am

MT. VERNON CITY SCHOOLS

PAGE:
(ABS101)

Staff Attendance Report
Selected Employees, All Appt. Types From 07/01/05 thru 06/30/06 for AT

Category	Records	Days	Hours	Weeks
AT Attendance	17	17.0000	.0000	
SB Substitutions	20	17.5000	.0000	
Totals for STOCKDALE JAMES L	37	34.5000	.0000	.0000

* - Multiple transactions for same date combined

DATE: 04/11/11
 TIME: 8:01 am

MT. VERNON CITY SCHOOLS

PAGE:
 (ABS101)

Staff Attendance Report
 Selected Employees, All Appt. Types From 07/01/06 thru 06/30/07 for AT

ID	Bld/Dept	Employee Name	Date	Job No.	Rec Wk Day	Length	Unit Code	Category	Sub Cat. Defe
115000	STOCKDALE,	JAMES L.	09/13/06	50	1 WE	1.0000	D - Days	SB - Substituting	
			****					Substituted For: FIREBAUGH, COREY S.	
			09/14/06	50	1 TH	1.0000	D - Days	SB - Substituting	
			****					Substituted For: FIREBAUGH, COREY S.	
			09/21/06	50	1 TH	1.0000	D - Days	SB - Substituting	
			****					Substituted For: JONES, MINDY J.	
			09/22/06	50	1 FR	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARTH, JAMES K.	
			09/25/06	50	1 MO	1.0000	D - Days	SB - Substituting	
			****					Substituted For: JONES, MINDY J.	
			09/26/06	50	1 TU	1.0000	D - Days	SB - Substituting	
			****					Substituted For: JONES, MINDY J.	
			09/27/06	50	1 WE	1.0000	D - Days	SB - Substituting	
			****					Substituted For: BARONE, PAULA S.	
			09/29/06	50	1 FR	1.0000	D - Days	SB - Substituting	
			****					Substituted For: LEWIS, NANCY P.	
			10/03/06	50	1 TU	1.0000	D - Days	SB - Substituting	
			****					Substituted For: KUHLMAN, JANE E.	
			10/04/06	50	1 WE	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARN, DONALD F.	
			10/05/06	50	1 TH	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARN, DONALD F.	
			10/06/06	50	1 FR	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARN, DONALD F.	
			10/09/06	50	1 MO	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MILLER, LORI A.	
			10/10/06	50	1 TU	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARTH, JAMES K.	
			10/11/06	50	1 WE	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MILLER, LORI A.	
			10/13/06	50	1 FR	1.0000	D - Days	SB - Substituting	
			****					Substituted For: FIREBAUGH, COREY S.	
			10/16/06	50	1 MO	1.0000	D - Days	SB - Substituting	
			****					Substituted For: JONES, MINDY J.	
			10/19/06	50	1 TH	1.0000	D - Days	SB - Substituting	
			****					Substituted For: OXENFORD, WILLIAM L.	
			10/20/06	50	1 FR	1.0000	D - Days	SB - Substituting	
			****					Substituted For: OXENFORD, WILLIAM L.	
			10/27/06	50	1 FR	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARTH, JAMES K.	
			10/30/06	50	1 MO	1.0000	D - Days	SB - Substituting	
			****					Substituted For: OXENFORD, WILLIAM L.	
			12/05/06	50	1 TU	1.0000	D - Days	SB - Substituting	
			****					Substituted For: FIREBAUGH, COREY S.	
			12/18/06	50	1 MO	1.0000	D - Days	SB - Substituting	
			****					Substituted For: MARTH, JAMES K.	

* - Multiple transactions for same date combined

DATE: 04/11/11
TIME: 8:01 am

MT. VERNON CITY SCHOOLS

PAGE:
(ABS101)

Staff Attendance Report
Selected Employees, All Appt. Types From 07/01/06 thru 06/30/07 for AT

Category	Records	Days	Hours	Weeks
SB Substitutions	23	23.0000	.0000	
Totals for STOCKDALE JAMES L	23	23.0000	.0000	.0000

* - Multiple transactions for same date combined