

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



DIVISION ONE  
FILED: 05/26/09  
PHILIP G. URRY, CLERK  
BY: DN

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

THOMAS HETHERINGTON, ) 1 CA-CV 08-0447  
)  
Plaintiff/Appellant, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
PARADISE VALLEY UNIFIED SCHOOL ) Rule 28, Arizona Rules  
DISTRICT NO. 69, a political ) of Civil Appellate  
subdivision of the State of ) Procedure)  
Arizona, )  
)  
Defendant/Appellee. )  
)

---

Appeal from the Superior Court in Maricopa County

Cause No. LC2007-000608-001 DT

The Honorable Margaret H. Downie, Judge

**AFFIRMED**

---

Skarecky & Holder, P.A. Phoenix  
by William W. Holder  
Attorneys for Plaintiff/Appellant

Jones, Skelton & Hochuli, P.L.C. Phoenix  
by Gordon Lewis  
Barry H. Uhrman  
Attorneys for Defendant/Appellee

---

**I R V I N E**, Judge

¶1 Thomas Hetherington ("Hetherington" or "TH") appeals the superior court's affirmation of the Paradise Valley Unified

School District's ("District") decision to dismiss him as a teacher. Hetherington argues the District board ("Board") did not have substantial evidence to support its decision, that the District's representative violated his privilege against self-incrimination, and that the District's rejection of the hearing officer's recommendation was arbitrary and capricious. For the following reasons, we affirm the superior court's decision.

#### FACTS AND PROCEDURAL HISTORY

¶2 Hetherington taught physics and chemistry in the District since 1985. Throughout his tenure as a teacher within the District, Hetherington consistently received satisfactory or above satisfactory evaluations, and had no history of disciplinary actions against him. In 2005, Hetherington and his then-spouse Theresa were going through a contentious divorce, and Theresa petitioned for an order of protection against him.

¶3 At the hearing for the order of protection, Hetherington sat as a witness. While he was testifying, the following exchange took place between Bastian, Theresa's counsel, and Gillespie, Hetherington's counsel:

Bastian [to Hetherington]: And did you videotape your 13-year-old babysitter changing her clothes in your bathroom?

. . . .

Gillespie: Your honor, we will stipulate that this occurred, and my client went to

counseling, and there's never been a reoccurrence.

. . . .

Gillespie: My client acknowledges that he did that, and he went to counseling and there has never been a reoccurrence.

Throughout this exchange, Hetherington never spoke, and he did not object or correct his counsel regarding the stipulation. After this hearing, the District received two anonymous letters from "a concerned" and "shocked citizen and parent" that alluded to the videotaping incident. Because of these letters, the District commenced an investigation.

¶4 Dr. John Weimer ("Weimer" or "JW"), the Assistant Superintendent for the District, and Mitch von Gnechten, Shadow Mountain High School's principal, met with Hetherington to discuss the allegations. At the outset, Weimer told Hetherington that "[w]hile these allegations don't pertain to your work, they are allegations that might affect your work." Weimer then read each of the allegations to Hetherington and Hetherington answered:

[JW] Allegation: Tom admitted under oath he had video taped a 13-year old baby sitter changing into her swim suit? Did you do this?

[TH] NO. I don't even know how to respond to this. . . . I don't know where this stuff is coming from.

[JW] Where does the "under oath" part come from?

[TH] I don't know where she gets this stuff. I don't know where it's coming from. All I can tell you is that my wife is throwing these allegations out. It's a bunch of lies, all of it a bunch of lies.

JW: So you're denying videotaping a 13 year old.

TH: Yes. This issue was brought up in the hearing and our two attorneys discussed it privately but I haven't had a chance to talk to him (attorney) to find out about this or where it's coming from.

After an investigation by the District, it initiated charges in June 2007 and served Hetherington with a copy. In its notice and statement of charges against Hetherington, the District stated, "any one or any combination of the following charges provides good and sufficient cause to dismiss Thomas Hetherington . . . (1) Unprofessional Conduct[;] (2) Insubordination[;] (3) Conduct in Violation of District Policy and Procedures."

¶15 The District supported each charge with an allegation. For the charge of unprofessional conduct, the District alleged Hetherington engaged in "secretly filming a minor female while she was undressing in his home." Further, the District added, "Hetherington engaged in unprofessional conduct and insubordination by lying to the district officials regarding the allegations against him." Finally, the District alleged

"Hetherington's conduct violated district policy and procedures," specifically District Policies 3.3.7<sup>1</sup> and 8.2.2.<sup>2</sup>

¶6 Hetherington timely requested a hearing, and attorney Gary Lassen acted as the agreed-upon hearing officer. At the hearing, Hetherington called Dr. Mayer, his psychotherapist. Hetherington's counsel questioned Dr. Mayer about the videotaping incident:

Q: Have you been able to form a professional opinion on the question whether he is any more dangerous to children, particularly teenagers, than other teachers or the average teacher?

A: I feel strongly about this. I think this was a one-time incident, and in the - 10 years ago, strictly one time. I think he has been an exemplary teacher without any difficulty.

¶7 Ten days after the hearing, Lassen issued his factual findings, conclusions of law, and recommendations to the District board. He found insufficient evidence to terminate Hetherington, but found sufficient evidence for the District to

---

<sup>1</sup> District Policy 3.3.7 relates to employee professionalism, and states in relevant part: "[D]istrict personnel must conduct themselves in a courteous and professional manner in all interactions with co-workers, students, parents, vendors, and others with whom employees interact in furtherance of the District's mission."

<sup>2</sup> District Policy 8.2.2 contains miscellaneous rules, requiring "faculty, staff, and employees of the district . . . to conduct themselves in such a manner as to promote effective and orderly education and to protect the students and the district property."

have brought the charges, and recommended suspending Hetherington for one day without pay. Although Lassen failed to conclude whether the stipulation was binding on the administrative proceeding, he did find that "[i]f the event did in fact occur, it provides sufficient cause, despite its remoteness in time and lack of connection to school, for the Paradise Valley School District Administration to take employment action against Mr. Hetherington." A few weeks later, the District board accepted Lassen's factual findings, but rejected his recommended one-day suspension and unanimously voted to dismiss Hetherington.

¶18 Hetherington appealed the District's decision to the superior court. The court engaged in a detailed analysis of the District's decision. It found the District's decision to terminate Hetherington was not arbitrary and capricious under the statute and affirmed the board's final decision. He then timely appealed the superior court's decision. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 41-785(G) (Supp. 2008).

#### **DISCUSSION**

¶19 Hetherington's arguments on appeal relate to alleged failures by the District board regarding its review of his case. The Board made an administrative decision to terminate Hetherington. Therefore, the superior court's scope of review

was limited to determining "only whether the administrative action was supported by substantial evidence, and was not illegal, arbitrary, capricious, or an abuse of discretion." *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 176, ¶ 10, 83 P.3d 1114, 1117 (App. 2004). We limit our review to whether the evidence in the record supports the superior court's judgment. *Id.*

¶10 As the court noted, it does not operate as a "tie-breaker" when more than one conclusion can be reached on a given set of facts. See *Fulton v. Dysart Unified Sch. Dist. No. 89*, 133 Ariz. 314, 319, 651 P.2d 369, 374 (App. 1982) ("Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." (citing *Tucson Pub. Sch., Dist. No. 1 v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972))). It "may not substitute its determination of good cause for that of the board and is limited to a determination of whether reasonable evidence supports the board's finding, and if so, whether the determination that good cause exists is arbitrary, capricious or an abuse of discretion." *Bd. of Educ. v. Lammle*, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979).

## I. Substantial Evidence

¶11 Under A.R.S. § 12-910(E) (2003), the superior court must "affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." Substantial evidence is "[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla," even if "two inconsistent factual conclusions are supported by the record." *Black's Law Dictionary* 599 (8th ed. 2004); *Williams v. Tucson Unified Sch. Dist. No. 1*, 158 Ariz. 32, 35, 760 P.2d 1081, 1084 (App. 1987).

¶12 During an order of protection hearing, Hetherington's attorney stipulated that his client videotaped a 13-year-old changing her clothes in his bathroom. Contrary to Hetherington's argument, Rule 80(d) of the Arizona Rules of Civil Procedure<sup>3</sup> does not preclude the District from considering the stipulation. "The parties are bound by their stipulations, unless relieved therefrom by the trial court." *Rutledge v. Ariz. Bd. of Regents*, 147 Ariz. 534, 549, 711 P.2d 1207, 1222 (App. 1985). Here,

---

<sup>3</sup> "No agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes."

counsel did not request relief from the stipulation at the order of protection hearing or at the District hearing. The record reflects the fact that the District had a transcript of the hearing, which was also recorded. Moreover, at the administrative hearing, Hetherington's psychotherapist testified that Hetherington engaged in a "voyeuristic" act, although she asserted, "he was not aware that" the 13-year-old "was that young." Based upon the record, the District had substantial evidence of Hetherington's conduct.

¶13 Hetherington also asserts that the District lacked substantial evidence to find a nexus between his conduct and any predictable harm to the school or community. In *Winters*, the court found that "the off-campus acts for which a teacher is being disciplined need not be limited to teacher-student interactions, but must relate to his/her fitness as a teacher and must have an adverse effect on or within the school community." 207 Ariz. at 178, ¶ 16, 83 P.3d at 1119. *Winters*, a high school teacher, was involved in five physical or verbal altercations with his neighbors. *Id.* at 175-76, ¶¶ 2-7, 83 P.3d at 1116-17. Although some of the charges against *Winters* were dismissed, he stipulated to the facts relating to each incident. *Id.* at 178-79, ¶ 18, 83 P.3d at 1119-20. In affirming the lower judgments against *Winters*, the court found a nexus existed because, despite the fact that the incidents occurred away from

campus, “[t]wo incidents involved young adults about the age of high school seniors,” giving the school board “reasonable cause for concern and a basis to act ‘to prevent or control predictable future harm.’” *Id.* at 179, ¶ 19, 83 P.3d at 1120 (quoting *Welch v. Bd. of Educ.*, 136 Ariz. 552, 555, 667 P.2d 746, 749 (App. 1983)).

¶14 Similarly, a school board and a reasonable person could regard a teacher surreptitiously recording a young teenager as a reasonable cause for concern. As Lassen indicated in his factual findings, “[t]he liability that could ensue should Mr. Hetherington engage in inappropriate sexual behavior with a minor based upon the information the District had been given, could enhance the District’s liability exposure.”

## **II. Self-Incrimination**

¶15 Hetherington asserts that Weimer’s questions to him violated his Fifth Amendment privilege against self-incrimination. We review constitutional questions *de novo*. *Carlson v. Ariz. State Personnel Bd.*, 214 Ariz. 426, 430, ¶ 12, 153 P.3d 1055, 1059 (App. 2007). The privilege against self-incrimination is self-executing only “in cases where ‘the individual is deprived of his ‘free choice to admit, to deny, or refuse to answer.’” *Minh T. v. Ariz. Dep’t of Econ. Sec.*, 202 Ariz. 76, 79, ¶ 13, 41 P.3d 614, 617 (App. 2001) (quoting *In re*

*Amanda W.*, 705 N.E. 724, 726 (1997) and *Mace v. Amestoy*, 765 F.Supp. 847, 850 (D.Vt. 1991)).

¶16 Weimer did not deprive Hetherington of that choice. Weimer met with Hetherington during the initial phase of the District's investigation. Whether Hetherington felt compelled to answer Weimer's questions is immaterial; he answered the questions and never invoked the Fifth Amendment privilege. Hetherington points to *Lefkowitz v. Turley*, which ordered the government refrain from "insist[ing] that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them." 414 U.S. at 84-85. It specifically held "that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence." 414 U.S. 70, 85 (1973). In this situation, however, no school official threatened Hetherington with punitive action, including the termination of his job, as a consequence of refusing to answer Weimer's questions, and Hetherington did not invoke his Fifth Amendment privilege at any time during questioning. Furthermore, he was not then, and apparently is not now, the target of a criminal investigation. Therefore, Hetherington was not deprived of his free choice to admit, deny, or refuse to answer Weimer's questions.

### III. Dismissal Decision

¶17 Finally, Hetherington argues the District's rejection of Lassen's recommendation for suspension in favor of an outright dismissal was arbitrary and capricious. He argues the District acted arbitrarily when it accepted all of Lassen's factual findings, but rejected his recommendation. Under A.R.S. § 41-785(F)(5) (Supp. 2008), a school board's decision is appealable if its decision was arbitrary or capricious. We will find the superior court abused its discretion in affirming the District's decision if the record does not "provide substantial support for its decision or the court commits an error of law in reaching the decision." See *State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) (quoting *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001)).

¶18 The record before the hearing officer, before the superior court, and before us provides substantial support in favor of dismissing Hetherington. At the evidentiary hearing, Dr. Gasket, the District's assistant superintendent for human resources, testified that the District has

two main obligations in a district. One is to educate students and one is to maintain the safety and well-being of our students. And if a teacher is surreptitiously videotaping a minor, that speaks to someone who is using, at the very least, poor judgment and certainly is exploiting children sexually. And if that's the case, it would be a huge risk to keep someone like

that in our district. We just couldn't do that.

¶19 Moreover, the District is not bound by a hearing commissioner's recommendations. A district board "is vested with the exclusive power to terminate a continuing teacher's employment. Therefore, the commission's recommendation that the teacher should be dismissed or that the teacher should not be dismissed is not binding on the board." *Fulton*, 133 Ariz. at 317-18, 651 P.2d at 372-73. The District's action is justified so long as it is supported by good cause. Good cause "means a cause which bears a reasonable relationship to a teacher's unfitness to discharge the duties assigned or is in a reasonable sense detrimental to the students being taught." *Lammle*, 122 Ariz. at 526, 596 P.2d at 52.

¶20 The District had substantial evidence in the record for it to make a reasoned decision. First, the record included Hetherington stipulating through his attorney that he videotaped a 13-year-old girl changing in his home. Second, Hetherington's psychotherapist admitted to the hearing officer that he engaged in this act. Third, Weimer corroborated the hand-transcribed account of his meeting with Hetherington, whose answers Lassen described as "vague and non-responsive." The record also included the District's policies regarding safety and

professionalism. We find that the record supports the superior court's decision.

**CONCLUSION**

¶21 For the foregoing reasons, we affirm.

---

PATRICK IRVINE, Judge

CONCURRING:

---

PATRICIA A. OROZCO, Presiding Judge

---

PETER B. SWANN, Judge