

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 22, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1027

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

REGINALD D. PHILLIPS,

Petitioner-Appellant,

v.

DEPARTMENT OF PUBLIC INSTRUCTION,

Respondent-Respondent.

APPEAL from a judgment of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. Reginald D. Phillips's teaching licenses were revoked by the State Superintendent of Public Instruction (SPI). Phillips appeals from a trial court judgment denying his motion to remand the case for further administrative proceedings, and affirming the license revocations. Phillips argues that the trial court erred in ruling that no material error in procedure occurred during the administrative proceeding, that the admission of

"highly unreliable and prejudicial evidence" impaired the administrative hearing, and that the court erred in failing to view a videotape generated during the hearing which, Phillips alleges, demonstrates that the hearing examiner distorted the evidence of witness Jeanne Yunowich. For the reasons set forth below, we affirm.

In December 1990, school authorities in Niagara began to investigate whether Phillips had sexual contact with his female students. In March 1991, Phillips was suspended. In January 1992, SPI filed a Notice of Probable Cause and Intent to Revoke License. SPI alleged Phillips violated § 115.31, STATS.,¹ and WIS. ADM. CODE § PI 3.04² in seventeen counts of immoral conduct by inappropriately touching female students. As the result of a five-day administrative hearing conducted in April 1992, the hearing examiner proposed that SPI revoke Phillips's licenses to teach. SPI affirmed and made the decision final, effective July 17, 1992. Phillips filed a ch. 227, STATS., appeal to the trial court.

STANDARD OF REVIEW

Under § 227.57(6), STATS., if the agency's action depends on any fact found by the agency in a contested case hearing, a reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed fact. However, the reviewing court shall set aside the agency's action, or remand the case to the agency if the court finds that the agency's

¹ Section 115.31(2), STATS., reads in relevant portion as follows: "[A]fter written notice of the charges and of an opportunity for defense, any license granted by the state superintendent may be revoked by the state superintendent for incompetency or immoral conduct on the part of the licensee."

"Immoral conduct' means conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil." Section 115.31(1)(c), STATS.

² WIS. ADM. CODE § PI 3.04(1)(a) reads as follows: "Immoral conduct' means conduct or behavior which is contrary to commonly accepted moral or ethical standards." WIS. ADM. CODE § PI 3.04(2) reads in part as follows: "[T]he state superintendent may revoke any license issued by the department for incompetency or immoral conduct on the part of the holder."

action depends on a finding of fact not supported by substantial evidence in the record. *Id.* WIS. ADM. CODE § Pt 3.04(2)(a) provides for revocation on immoral conduct grounds if there is clear and convincing evidence that the person whose license is sought to be revoked engaged in immoral conduct and there is a nexus between the immoral conduct and the health, welfare, safety or education of any student.

ANALYSIS

Phillips attacks certain portions of the evidence as unfairly prejudicial. He argues that the hearing examiner distorted Yunowich's testimony, that the examiner granted improper weight to SPI's psychological expert's testimony, and that the testimony of Christine Cazzola was improper because it was too remote in time as the incident upon which the testimony was based occurred approximately twenty years before this case.

However, Phillips does not attack other findings of fact which, standing alone, are sufficient to support the license revocations. For example, there was uncontradicted evidence that Phillips touched the breast or brassiere strap of Melissa Johnson, Jessica Smith, Angela Morrison, Elissa Van Pembroke and Jennifer Champeau.

Phillips argues that some or all of this touching was inadvertent or incidental to teaching driving or industrial arts classes. However, as set forth in the standard of review above, the hearing examiner determines the weight to give contested testimony, and we may not substitute our judgment unless there is no substantial evidence to support the findings. Here, there was substantial evidence by the other students as to the duration of the touches (some as long as thirty seconds) and the fact that Phillips maintained the touch when the students tried to withdraw.

Because this evidence of sexual contact with five students, all under the age of seventeen, is sufficient to sustain the revocations,³ we need not

³ As the hearing examiner noted, Phillips's behavior with each individual student was part of a "mosaic" of behavior, and the "numbers of ... intentional contacts with the

consider whether the hearing examiner gave improper weight to SPI's expert witness,⁴ whether the testimony of Cazzola was too remote to be accepted,⁵ or whether the hearing examiner distorted testimony by Yunowich. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (this court need not address other issues when one is dispositive of the appeal).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)

intimate parts of female students" was the actual basis for revoking the licenses. Under this analysis, the undisputed evidence by the students is a sufficient basis for the exercise of the agency's discretion. *Cf.* § 227.57(8), STATS. (reviewing court is not to substitute its discretion for that of the agency's).

⁴ The hearing examiner specifically noted he was *not* relying upon the psychological evaluation.

⁵ We further note that the hearing examiner admitted Cazzola's testimony only for the very limited purpose of showing a pattern of behavior. Given all the other testimony establishing a pattern, Cazzola's testimony for this purpose, if erroneous, was harmless.