

FILED
LORAIN COUNTY

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COURT OF COMMON PLEAS
TOM ORLANDO



To the Clerk: **THIS IS A FINAL APPEALABLE ORDER.**
Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date May 11, 2018

Case No. 16CV190175

BARBARA BARR
Plaintiff

Brent English
Plaintiff's Attorney

VS

LORAIN COUNTY DEPT. OF JOB
AND FAMILY SERVICES
Defendant

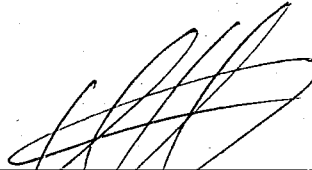
Eugene Nevada
Defendant's Attorney

This matter is before the Court on Plaintiff/Appellant, Barbara Barr's, Appeal From A Final Order of the State Personnel Board of Review, filed August 4, 2016.

THE COURT RULES THAT: The Order of the State of Ohio Personnel Board of Review dated July 20, 2016 that prospectively restored Plaintiff/Appellant to her former position or a comparably-ranked position/pay and designated the sum of money representing the difference between her current pay and her back pay arising from restoration to her former classification as a fine is hereby **AFFIRMED** as the Order is supported by reliable, probative, and substantial evidence, is in accordance with law, and is not subject to review by this Court.

See Judgment Entry. No Record.

IT IS SO ORDERED.



JUDGE D. Chris Cook

cc: English, Esq.
Nevada, Esq.



LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date May 11, 2018

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BARBARA BARR

Plaintiff/Appellant

Brent English

Plaintiff's Attorney

VS

LORAIN COUNTY DEPT. OF JOB
AND FAMILY SERVICES

Defendant/Appellee

Eugene Nevada

Defendant's Attorney

INTRODUCTION

This matter is before the Court on Plaintiff/Appellant, Barbara Barr's, Appeal From A Final Order of the State Personnel Board of Review, filed August 4, 2016, the Certified Record, and the parties Motions and Briefs.

Oral hearing had May 9, 2018.

PROCEDURAL HISTORY

On March 18-19, 2015, in response to Plaintiff/Appellant, Barbara Barr's ("Barr"), appealed demotion to the State of Ohio State Personnel Board of Review ("The Board"), an evidentiary hearing ("The Hearing") was conducted before Administrative Law Judge, Marcie M. Scholl ("Judge Scholl").

On December 7, 2015, Judge Scholl issued a Report And Recommendation that Barr's reduction in position/pay with Defendant/Appellee, Lorain County Dept. of Job and Family Services ("DJFS") be affirmed.

On February 1, 2016, Barr filed an Objection To The Administrative Law Judge's Report And Recommendation; on February 26, 2016, DJFS filed its Response To Appellant's Objections.

On July 20, 2016, The Board issued its Order modifying Barr's reduction in position/pay and restored her to her pre-disciplinary position/pay. In addition, The Board ordered a



'fine' "... equivalent to the sum owed to her representing the difference between her current pay and her back pay arising from restoration to her former classification ..."

This appeal timely followed and has been thoroughly briefed and argued by the parties.

STATEMENT OF PERTINENT FACTS

Barr is a 20-year management employee of Lorain County DJFS. On April 1, 2014, she was removed from her position as the front desk supervisor and reassigned to the records room. This adverse job action constituted both a demotion in position and a reduction in pay.

This demotion became permanent on August 11, 2014. As a result of her demotion, Bar lost \$26,232.32 in salary plus the State's share of contributions to her PERS account.¹

DJFS based Bar's demotion on three main reasons: 1) Failure of good behavior and misfeasance for a pattern of involving an intern in Barr's family's personal, non-job related activities; 2) Failure of good behavior for involving the intern in a "drug related situation;" and, 3) Failure of good behavior and misfeasance and violation of the employer's work rules, policies, and regulations for misusing agency time, resources, and equipment.

Two additional violations were advanced for her demotion including 4) Failure of good behavior and misfeasance for showing the intern a list of phone numbers of drug dealers that included the intern's child's father and instructing the intern to keep this man away from Barr's own son, a heroin addict; and, 5) Making false or misleading statements in response to questions at a pre-disciplinary hearing.

At The Hearing, DJFS called seven (7) witnesses to support its decision to demote Barr. These witnesses, in order, were "Kiely," "Barrios," "Curry," "Barr" on cross, "Johnson," "Beaty," and "Esposito." In addition, DJFS introduced, over objection, the tape-recorded, unsworn testimony² of Pansie Raymore ("Raymore"), an intern who worked for DJFS and reported to Barr who testified at the pre-disciplinary hearing.

In her case in chief at The Hearing, Barr testified on her own behalf, called her husband, Timothy Barr ("Timothy"), "McClendon," and re-called Kiely.

¹ This Court acknowledges DJFS' argument in its Motion To Strike (that was denied) that the actual figure of economic loss ("draconian" according to Barr) is not part of the record. This is of no matter as Barr clearly suffered *some* economic loss as a result of her demotion and The Board designated this loss, in whatever amount it may be, as a "fine" for her misconduct.

² At the pre-disciplinary hearing, Raymore was subject to cross examination by Barr's counsel.



STANDARD OF REVIEW

RC 119.12(M) embodies the statutory standard for review to be applied by a court of common pleas when reviewing an administrative appeal:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

In addition, the Ninth District Court of Appeals has enunciated the standard of review in a recent decision, *Eckert v. Summit County Public Health*, 9th Dist. Summit No.27844, 2016-Ohio-7076. The Court stated,

Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the "entire record" to determine whether "reliable, probative, and substantial evidence" supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110, 407 N.E.2d 1265 (1980). *Eckert*, at ¶ 11.

The common pleas court's review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court "must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence[,] and the weight [to be given it]." *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280, 131 N.E.2d 390 (1955). The common pleas court must give "due deference to the administrative [agency's] resolution of evidentiary conflicts," and "when the evidence before the court consists of conflicting testimony of approximately equal weight the court should defer to the determination of the administrative body * * *." *Conrad* at 111, 407 N.E.2d 1265. "However, the findings of the agency are by no means conclusive." *Id.* Thus, it is clear that although a court of common pleas may not blatantly substitute its judgment for that of the administrative agency, the court must weigh evidence of record, including the credibility of witnesses. *Id.* at 110, 407 N.E.2d 1265; see *Smith v. Richfield Twp. Bd. of Zoning Appeals*, 9th Dist. Summit No. 25575, 2012-Ohio-1175, ¶ 33 (considering an administrative appeal under R.C. 2506). *Eckert*, at ¶ 12.



A court of common pleas may "reverse, vacate, or modify the administrative order" when "the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination * * *." *Conrad* at 111, 407 N.E.2d 1265. "Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight." *Id.* Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order." *Id.* at 111-112, 407 N.E.2d 1265. *Eckert*, at ¶ 13. An "appellate court's review is even more limited than that of the trial court." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). Unlike the court of common pleas, this Court is not permitted to weigh the evidence. *Id.* We may not reconsider the credibility of witnesses. *See Id.* "While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court." *Id.* On appeal, this Court determines only if the court of common pleas abused its discretion in determining whether reliable, probative, and substantial evidence supports the agency's order. *Id.* An appellate court will not substitute its judgment for that of the court of common pleas unless the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Absent an abuse of discretion, we must affirm the trial court's judgment, even if we would not reach the same conclusion. *Pons* at 621, 614 N.E.2d 748. *Eckert*, at ¶ 14.

ANALYSIS

In support of her appeal, Barr advances two (2) propositions of law, to wit: 1) The Board's finding that Barr "misused her position for personal reasons" is not supported by the evidence; and 2) even if DJFS proved a *de minimus* violation of one or more of its rules, the sanction was [excessive]. Barr, of course, does not challenge her reinstatement, but urges that she should have been awarded back-pay.

DJFS posits four (4) responses in support of The Board's decision to reinstate Barr but fine her for her misconduct, or, put another way, in support of The Board's decision not to award back-pay, to wit: 1) this Court lacks subject matter jurisdiction to consider this appeal because there is no evidence in the record of loss of pay; 2) The Board's order is supported by reliable, probative, and substantial evidence; 3) the tape-recorded testimony of Pansie Raymore, offered by DJFS at The Hearing was properly admitted over Barr's objection; and 4) the imposition of a fine, which is a penalty, is not subject to appeal.



In resolving this matter, the Court is persuaded by DJFS's fourth proposition of law and finds it determinative. Accordingly, this Court will re-order DJFS's arguments and addresses the argument that Barr is trying to "... appeal a 'penalty' ..."

MAY BARR APPEAL THE BOARD'S DECISION TO IMPOSE AS A FINE THE EQUIVALENCE OF HER BACK-PAY

Reduced to its most basic iteration, The Board agreed with Judge Scholl that Barr committed professional misconduct in multiple instances regarding her interactions with Raymore and Barr's use of her county computer to "investigate" McDaniel. When weighing Barr's misconduct against her "... many years of satisfactory service ... and the rather unique and difficult personal circumstances that unquestionably impacted on her behavior ... which seems unlikely to be repeated ...," The Board modified her demotion and restored her to her previous position and pay.

Nevertheless, acknowledging that Barr did commit multiple instances of serious misconduct regarding the Raymore situation and Barr's improper use of her computer, The Board determined that while Barr should be restored to her previous position, she should not be awarded back-pay. The Board designated its decision not to award back-pay as a "fine."

Barr goes to great lengths to argue that the imposition of a fine is "arbitrary," fails to "make her whole," is statutorily inapposite, and is subject to review by this Court.

All of these arguments fail.

First, the decision by The Board to restore Barr to her previous position without back-pay was hardly arbitrary. Quite the opposite. The decision was thoughtful, reasonable, and well-measured. The Board correctly concluded that while a permanent demotion was an excessive sanction for her misconduct, and that she should be restored to her previous position, that restoration should be without back-pay.

Second, Barr is completely correct that the decision by The Board fails to "make her whole." That is the point! Barr should not be made whole. The decision to restore her to her previous position was made "prospectively." It takes into account that the adverse job action of a permanent demotion was too severe while acknowledging that she committed misconduct related to her position and should suffer a sanction.

Third, Barr's assertion that RC 124.34 does not provide for "... or even suggest ..." that a fine would be legal misconstrues the statute. That statute states, in pertinent part,



No officer or employee shall be reduced in pay or position, **fin**ed, suspended . . . except as provided in section 124.32 . . . and for . . . violation of any policy or work rule of the officer's or employee's appointing authority . . ." (Emphasis added.)

Accordingly, and clearly based upon a plain reading of the statute, an employee properly found to violate any policy or work rule of [her employer] may be fined.

A ROSE BY ANY OTHER WORD WOULD SMELL AS SWEET³

In reaching its conclusion that Barr's reinstatement without back-pay was apposite based upon the entire record, the evidence adduced at The Hearing, and the testimony of the witnesses, including Raymore, this Court finds it appropriate to glean The Board's objective from its decision. While it is somewhat linguistically enigmatic to deem the failure to award back-pay as a fine, the point is quite clear. As noted, *supra*, The Board determined that Barr should be reinstated to her original position prospectively without back-pay in recognition of her misconduct.

Clearly, it would have been less obtuse had The Board simply said as much. Regardless, the manner in which The Board articulated its final decision is a difference without a distinction. Had The Board simply reinstated Barr "without back-pay," designated the failure to award back-pay as a castigation, censure, correction, discipline, penalty, punishment, rebuke, recrimination, reprimand, reprisal, or sanction, is of no accord. That The Board designated the decision not to award back-pay as a fine does not alter the essence of what it sought to accomplish, to wit: restore Barr to her prior position going forward but sanction her for her misconduct by not awarding back-pay.

THE BOARD'S DECISION NOT TO AWARD BACK-PAY, WHETHER DESIGNATED AS A FINE, SANCTION, PUNISHMENT, OR OTHERWISE CANNOT BE CHALLENGED ON APPEAL

As noted *supra*, this appeal can be resolved on the final proposition of law urged by DJFS, to wit: Barr cannot appeal a punishment or, put another way, a common pleas court has no authority to disturb a sanction imposed by an administrative agency.

Unfortunately, this Court is well-acquainted with *Henry's Café, Inc.*⁴ and its progeny. This counter-intuitive case has wreaked-havoc on and emasculated the common pleas

³ *Romeo and Juliet*, Act II, Scene II, William Shakespeare

⁴ See: *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233.



Courts authority to review, and when necessary, correct the decisions of Ohio administrative agencies as to punishments.⁵

Henry's Café, a three-page Ohio Supreme Court decision somewhat lacking in thoughtful legal analysis has been challenged in many appellate districts and numerous common pleas courts in this state since its inception some 58 years ago. The decision stands for the proposition that a common pleas court has the authority to affirm, reverse, vacate, or modify an order of an administrative board but if the court affirms the order, it may not modify an attendant punishment. Of course, there is no cogent reason or legal rationale as to why the term "modify" is limited to modify only the decision of an agency board, but not a sanction.

Put another way, how can a common pleas court be vested with the awesome authority to completely vacate an administrative agency's order but not invoke a lesser power to uphold the order but modify the punishment?

Someday, the General Assembly will revisit this issue and broaden the power of the common pleas courts to uphold an administrative agency's findings but modify an unjust sanction, or, the Ohio Supreme Court will judicially rectify this anomaly.

But I digress.

Henry's Café is the law in Ohio and this Court is compelled to follow it. Absent legislative correction or Supreme Court intervention, this Court will not create interstitial law where it lacks the authority to do so.

That said, I agree with The Board's determination that the evidence, testimony, and exhibits that make up the record demonstrate that Barr committed multiple instances of misconduct but that she nevertheless should be prospectively restored to her prior position without back-pay. As such, based on my determination that she cannot appeal a sanction to this Court, her appeal must be denied.

Simply put, *Henry's Café* and its progeny prohibit this Court from reviewing the propriety of the decision by The Board to restore Barr to her prior position without back-pay. That decision was borne of a desire to harmonize her long years of unblemished service against her poor judgment and misconduct developed herein, supported by the evidence and testimony contained in the 440 pages of hearing transcript.

⁵ See: *Ohio Dept. of Insurance v. Horn*, 9th Dist. Lorain, No.15CA010892, 2017-Ohio-231; *Dept. of Youth Serv. v. Grimsley*, 10th Dist. Franklin, No. 16AP-682, 2018-Ohio-1530.



Regardless, by restoring Barr to her previous position without back-pay, The Board struck a fair, reasonable, and measured balance based upon all of the testimony and evidence, much which is not contested.⁶ Because this Court finds the decision to be supported by

reliable, probative, and substantial evidence, and what Barr complains of is in reality, a punishment, this Court cannot review The Board's action on appeal. Moreover, even if it could, I would affirm the decision by The Board *in toto*.

CONCLUSION

After review of the pleadings and extensive briefing, as well as the Certified Record, relevant case law supplied by the parties and Court, and the oral arguments of counsel, the Court rules that:

The Order of the State of Ohio Personnel Board of Review dated July 20, 2016 that prospectively restored Appellant to her former position or a comparably-ranked position/pay and designated the sum of money representing the difference between her current pay and her back pay arising from restoration to her former classification as a fine is hereby AFFIRMED as the Order is supported by reliable, probative, and substantial evidence, is in accordance with law, and is not subject to review by this Court.

Case Dismissed. Costs to Plaintiff/Appellant.

IT IS SO ORDERED. No Record.



JUDGE D. Chris Cook

TO THE CLERK: PURSUANT TO CIV.R. 58(B), THIS IS A FINAL APPEALABLE ORDER. PLEASE SERVE UPON ALL PARTIES, NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

⁶ Barr's arguments, in general, go more to the weight of the evidence and admission of Raymore's testimony than actually contesting the facts and Barr's conduct, many, the record shows, she admitted.