[Cite as *Fristzgerald v. Cleveland Civ. Serv. Comm.*, 2017-Ohio-7086.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104492

DIANTE FRITZGERALD

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND CIVIL SERVICE COMMISSION, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-768125

BEFORE: Laster Mays, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 3, 2017

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ANITA LASTER MAYS, J.:

{¶1} Defendants-appellants city of Cleveland and the city of Cleveland Civil Service Commission (jointly "appellants") appeal the trial court's determination that plaintiff-appellee Diante Fritzgerald's ("Fritzgerald") termination of employment was not supported by reliable, substantial, and probative evidence, and entering judgment in Fritzgerald's behalf. After a review of the record, we affirm.

I. Background and Facts

A. *Fritzgerald I*

{¶2} We initially entertained this case in *Fritzgerald v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 101586, 2015-Ohio-609 ("*Fritzgerald I*"). We lay the foundation for the current appeal by summarizing *Fritzgerald I*, which we reversed and remanded with instructions to the trial court.

{¶3} Fritzgerald worked his way up the proverbial ladder from machine operator to assistant commissioner, spanning a term of over 30 years. *Id*. at ¶ 2. Fritzgerald reported to Commissioner Michael Hewitt ("Hewitt").

{¶4} On December 18, 2009, the city issued a December 18, 2009 letter to Fritzgerald scheduling a predisciplinary proceeding for a violation of certain Cleveland civil service rules:

> Rules 9.10.05, 07, 08, 09, 10, and 18: (1) conduct unbecoming an employee in the public service; (2) disorderly, immoral or unethical conduct while on duty; (3) insubordination; (4) offensive conduct or language toward fellow employees, superiors, or the public in the course of employment; (5) willful violation of provision of law governing the civil service of the city or of the rules or regulations of the commission; and (6) other failure of good behavior detrimental to the service, or other acts of misfeasance, malfeasance or nonfeasance in office.

Id. at ¶ 3.

{¶5} Fritzgerald was afforded a predisciplinary hearing on January 7, 2010, to explain the three incidents listed in the notice:

> 1. On 11/25/09, you met alone with a vendor during a bid violating a direct order and specific instructions by your commissioner.
>
> 2. On 11/25/09, you were told to take no further action regarding an alleged policy violation by a division employee while your commissioner investigated the incident. You disregarded this instruction and wrote up the employee in disregard of a specific directive.
>
> 3. On 12/9/09, you made threatening remarks to your commissioner by saying "I'm not a vindictive or malicious person. I don't like hurting people but I will do whatever it takes to set things right." This is in direct violation of the city's workplace violence policy.

Id. at ¶ 6.

{¶6} Fritzgerald received a letter of termination on February 16, 2010. The letter listed the cited three incidents and stated "the violations of the civil service rules arose from several incidents and confrontations with commissioner Hewitt." *Id.* at ¶ 6. The letter also provided that Fritzgerald:

> "[O]ffered no explanation to mitigate or explain your negative actions. *You have a history of being argumentative, irrational and abusive* which for an assistant commissioner is counterproductive and demoralizing for the entire operation. *You have been disciplined for similar insubordinate behavior, dating back to 2006.* This behavior can no longer be tolerated by the Department of Finance, Division of Printing and Reproduction.
>
> * * * *You have engaged in a continuing pattern of unacceptable and obstreperous behavior that negatively affected the work environment in the Division*."

(Emphasis added.) *Id.*

{¶7} Fritzgerald requested a hearing before a referee pursuant to Civil Service Rule 9.22. At that hearing, city's counsel not only addressed the issues contained in the notice, but effectively blindsided Fritzgerald by describing a series of allegedly egregious acts that were not cited in the notice, such as leaving the workplace to complain about the lack of heat in his office in spite of Hewitt's directive not to do so. *Id.* at ¶ 7.

{¶8} A female employee testified that she felt "intimidated" by Fritzgerald's "horrible" behavior during an encounter in 2009, and submitted a memorandum about the incident that was entered into evidence. The commissioner of purchases and supplies in the city's finance department testified that Fritzgerald failed to properly supervise a painting project. Hewitt shared several incidents that he felt "demonstrated that Fritzgerald was a threat to employees," such as a 2007 incident alleging that Fritzgerald called another employee a "'hateful bitch' and said '[o]ne day I'm going to f— that bitch up.'" *Id*. at ¶ 8.

{¶9} The referee upheld the prior just cause decision, not only on the three cited incidents, but on the previously undisclosed claims introduced at the hearing. Fritzgerald was allowed to introduce additional evidence at the Civ.R. 9.60 hearing, but the referee's decision was affirmed.

{¶10} The common pleas court entertained the appeal of the referee's decision pursuant to R.C. 2506.04 governing termination of a public employee. The court also affirmed the referee's decision.

{¶11} This court determined that the city's failure to fully advise Fritzgerald of all of the charges against him in the initial predisciplinary notice violated his due process

rights in violation of *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 538-539, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985):

> "The essential requirements of due process * * * are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. * * * The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

Fritzgerald I at ¶ 15, quoting *Loudermill* at 545.

{¶12} We reversed the judgment and remanded the case to the trial court with the following instructions:

> In *Clipps* [*v. Cleveland*, 8th Dist. Cuyahoga No. 86887, 2006-Ohio-3154], this court found that instead of reinstatement, the proper remedy for such a violation is to remand the matter to the trial court for a determination of whether the employee would have been disciplined even if procedural due process had been afforded. *Id*. at ¶ 19-22. Accordingly, we reversed and remanded this matter to the trial court. On remand, the trial court must conduct an evidentiary hearing to determine whether Fritzgerald would have been terminated even if his procedural due process rights had been observed. If so, Fritzgerald would not be entitled to reinstatement or compensatory damages, but he may be entitled to an award of nominal damages for the deprivation of his due process rights. *Id*. at ¶ 22, citing *Emanuel v. Columbus Recreation & Parks Dept.*, 115 Ohio App.3d 592, 601, 685 N.E.2d 1272 (10th Dist.1996). If the trial court finds that Fritzgerald would not have been terminated if afforded his due process rights, then the court should make a determination as to the reinstatement, back pay, and benefits requested by him.

Fritzgerald I at ¶ 23.

B. Proceedings Upon Remand

{¶13} Fritzgerald maintains that he was harassed by his supervisor in spite of his outstanding employment history and years of service. He offers that the harassment,

disciplinary action, and termination was a pretext designed to allow another individual to be placed in his position.

{¶14} The trial court conducted a two-day evidentiary hearing on remand, and accepted post-hearing proposed findings of fact and conclusions of law. The trial court issued findings of fact and conclusions of law determining that "Fritzgerald's termination was unsupported by reliable, substantial, and probative evidence and enters judgment in favor of the Plaintiff." The court awarded "back pay offset by any interim earnings, and his lost benefits * * * [and he] shall be restored to his former position with the [c]ity."

{¶15} The instant appeal ensued, presenting the three assignments of error addressed below. We first advise that we do not address the arguments first raised in appellants' reply brief. "Reply briefs are to be used only to rebut arguments raised in an appellee's brief, and an appellant may not use a reply brief to raise new issues or assignments of error." *Capital One Bank (USA), N.A. v. Gordon*, 8th Dist. Cuyahoga No. 98953, 2013-Ohio-2095, ¶ 9, citing *Midwest Curtainwalls, Inc. v. Pinnacle, 701, L.L.C.*, 8th Dist. Cuyahoga No. 92269, 2009-Ohio-3740, ¶ 77, citing App.R. 16(C).

II. Law and Analysis

A. Fritzgerald's Termination Process did not Violate his Right to Procedural Due Process

{¶16} We determined in *Fritzgerald I* that "[b]ecause the city did not give Fritzgerald notice of the additional evidence against him nor an opportunity to respond to the additional evidence at the predisciplinary hearing, it violated his due process rights." *Id*. at ¶ 19. Appellants request that we revisit that decision; however, as Fritzgerald

correctly asserts, the error is addressed in short order as we are precluded from considering this argument due to the law of the case doctrine.

{¶17} The law of the case doctrine "is rooted in principles of res judicata and issue preclusion." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 35. The "'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co.*, 81 Ohio St.3d 214, 218, 1998-Ohio-465, 690 N.E.2d 515, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

{¶18} "The law of the case is applicable to subsequent proceedings in the reviewing court as well as the trial court." *Nolan* at ¶ 4. "[T]he decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court. [Citations omitted.]" *Id*. Where a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), citing 1B J. Moore & T. Currier, Moore's *Federal Practice* (1982). *Kolosai v. Azem*, 8th Dist. Cuyahoga No. 102920, 2016-Ohio-5831, ¶ 28.

{¶19} We proceed to the remaining assignment of errors.

B. Upon Remand, the Trial Court Erroneously Conducted a De Novo Review, gave no Deference to the Referee's Resolution of Evidentiary Conflicts, and Blatantly Substituted its Judgment for that of the Commission.

C. The Trial Court Failed to Comply with this Court's Remand Order and Executed its Scope.

{¶20} We combine the interrelated second and third errors for analysis. The assigned errors challenge the scope and conduct of the trial court's proceedings upon remand. Appellants cite our decision *in Mallett v. Cleveland Civ. Serv. Comm.*, 2015-Ohio-5140, 53 N.E.3d 975 (8th Dist.), to support their argument that the trial court exceeded its scope of review, asserting that the trial court's evidentiary hearing constitutes a de novo review.

{¶21} A classified municipal employee who is removed from employment for disciplinary reasons may appeal the decision of the civil service commission to the court of common pleas "pursuant to R.C. 124.34, in accordance with the procedure set forth in R.C. 119.12, or pursuant to R.C. 2506.01 through 2506.04." (Citations omitted.) *Knight v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 103104, 2016-Ohio-5133, ¶ 5. The employee in *Mallett* elected to proceed under R.C. 119.12 while Fritzgerald's pursuit of justice is grounded on R.C. 2506.04.

{¶22} Under R.C. 2506.04,

> The common pleas court considers the whole record, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Id.*; *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433.

Fritzgerald I at ¶ 13. "'It is incumbent on the trial court to examine the evidence.'" *6957 Ridge Rd., L.L.C. v. Parma*, 8th Dist. Cuyahoga No. 99006, 2013-Ohio-4028, ¶ 10, quoting *Henley v. Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433.

{¶23} We instructed the trial court in *Fritzgerald I* to consider the evidence supporting the charges set forth in the original notice as appellants concede in their appellate brief. Appellants argue that the extraneous evidence that we ruled in *Fritzgerald I* violated Fritzgerald's due process rights should

have been admitted at the evidentiary hearing, asserting that Fritzgerald's due process rights had not been violated. However, that ship has already sailed as we explained in our analysis of appellants' first assigned error.

{¶24} We also advise that the scope of the trial court's review upon remand is further bounded by the mandate rule. The mandate rule pertains "only to the relationship between appellate and inferior courts, [and] is a jurisdictional bar on the inferior court's authority to reconsider issues that were expressly or impliedly decided in a previous appeal." *Phillips v. Houk*, 587 Fed.App. 868, 871, 2014 U.S. App. LEXIS 19856 (6th Cir.).

{¶25} As this court has explained:

> An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court's judgment. Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Natl. Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *see also, State ex rel. Cordray v. Marshall, 123* Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶ 32 ("We have expressly held that the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals."). *The lower court may, however, rule on issues left open by the mandate. Id.* But when the mandate leaves nothing left to decide, the lower court is bound to execute it. *Id.* We have stated that the mandate rule "provides that a lower court on remand must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90, at ¶ 31.

(Emphasis added.) *State v. Carlisle*, 8th Dist. Cuyahoga No. 93266, 2010-Ohio-3407, ¶ 16.

{¶26} Our mandate to the trial court in *Fritzgerald I* was to "conduct an evidentiary hearing to determine whether Fritzgerald would have been terminated even if his

procedural due process rights had been observed." *Id*. at ¶ 23. If the trial court determined that Fritzgerald "would not have been terminated if afforded his due process rights, then the court should make a determination as to the reinstatement, back pay, and benefits requested by him." *Id.*

{¶27} We stated that "[b]ecause the city did not give Fritzgerald notice of the additional evidence against him nor an opportunity to respond to the additional evidence at the predisciplinary hearing, it violated his due process rights." *Fritzgerald I* at ¶ 20. We were guided by our prior decision in *Clipps v. Cleveland*, 8th Dist. Cuyahoga No. 86887, 2006-Ohio-3154,[1] where we identified a due process violation under similar facts:

> In *Clipps*, this court held that a due process violation had occurred when, as in this case, the city failed to inform the employee until after the predisciplinary hearing [for violating the company's sexual harassment policy] that, in addition to the incidents of which she had been advised, other incidents of misbehavior were being considered as a basis for her demotion. *Id*. at ¶ 17. This court found that although the employee had subsequently been provided with procedures for additional hearings and evidence to be presented, by failing to inform the employee *prior* to the disciplinary hearing of all the city's evidence against her, the city violated the employee's procedural due process right. *Id.* at ¶ 18-19. *See also Lane v. Pickerington*, 588 Fed. App. 456, 2014 U.S. App. LEXIS 21894, *18 (6th Cir.) (adequate post-termination hearing does not vitiate pre-termination deprivation of due process).

(Emphasis sic.) *Fritzgerald I* at ¶ 21.

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[1] At the evidentiary hearing upon remand on the sexual harassment complaint, Clipps testified to being a "touchy-feely" person with the complainant and other subordinates as she did not think it was inappropriate, demonstrating poor judgment as a leader and undermining her authority as a manager. Clipps had admitted to inappropriate touching of other employees the day she received the predisciplinary notice at issue. Clipps appealed the trial court's finding that Clipps would have been demoted even if her due process rights had not been violated. *Clipps v. Cleveland*, 187 Ohio App.3d 577, 2010-Ohio-2343, 932 N.E.2d 980, ¶ 8 (8th Dist.). We affirmed. *Id.* at ¶ 16.

{¶28} We find that the trial court on remand properly discerned the parameters of our mandate. It was impossible to cure the due process violation by expanding the scope of the post-termination appeal hearing as such would not "vitiate [the] pre-termination deprivation of due process." *Id*. The trial court properly limited the scope to the incidents cited in the disciplinary notice.

{¶29} As charged by R.C. 2506.04, it is wholly within the purview of the trial court to consider the evidence and determine "whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Fritzgerald I* at ¶ 13, citing *Henley*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433.

{¶30} The trial court crafted thorough and detailed findings of fact and conclusions of law in rendering an opinion. For each charge, the trial court found that the appellants failed to meet their evidentiary burden, and cited the evidence upon which it relied. Summarizing the trial court's findings:

> Charge One — 11/25/09: Meeting alone with a vendor in violation of a direct order and specific instructions by the Commissioner.
>
> Finding: The vendor involved was not a current bidder, the bidding for the items sold by the vendor was closed; division employees (including Fritzgerald and the two witnesses against him in the administrative proceedings) often met alone with vendors and sales representatives; and there was no formal written policy forbidding the meeting.
>
> Charge Two — 11/25/09: Fritzgerald violated the Commissioner's directive to take no further action regarding an alleged policy violation by a division employee while the Commissioner investigated the incident.

> Finding: The charge is undermined by the documentary evidence. Appellants claim Fritzgerald pursued the investigation after instruction from the Commissioner not to do so on 11/25/09. Fritzgerald sent an email on November 27, 2009 to the alleged violator with a copy to the Commissioner, so the violation could not have occurred on 11/25/09. Fritzgerald continued to send emails to the Commissioner requesting information and guidance until December 11, 2009. "The fact that the Commissioner did not respond to Mr. Fritzgerald's emails bolsters the conclusion that the Commissioner did not intend to give Mr. Fritzgerald any directive prior to December 11, 2009." "It is inconceivable that [Fritzgerald] would send such correspondence to the Commissioner if he had in fact been told not to investigate. What stands out is that the Commissioner never responded in writing to Mr. Fritzgerald, but instead sent detailed emails to his superior."
>
> Charge Three — 12/9/09: Workplace Violence, stated to the Commissioner "I'm not a vindictive or malicious person. I don't like hurting people but I will do whatever it takes to set things right."
>
> Finding: Mr. Fritzgerald never threatened the Commissioner, his words were taken out of context and intended to convey that it was the administrator's job to discipline employees. The Commissioner was not afraid of Fritzgerald, There was no investigation as required by the workplace violence policy. The charge was not supported by reliable, substantial, and probative evidence. "Finding otherwise under these circumstances would raise the frightening possibility that an employee could be accused of the serious crime of workplace violence anytime he or she spoke his or her mind to a supervisor in a forceful manner."

{¶31} We do not find that the trial court abused its discretion. As the trial court stated, the decision was "supported by a preponderance of reliable, probative, and substantial evidence." *See Kisil v. City of Sandusky*, 12 Ohio St.3d 30, 465 N.E.2d 848, fn. 4.

{¶32} The second and third assigned errors are without merit. The trial court's findings are affirmed.

III. Conclusion

{¶33} For the foregoing reasons we overrule appellants' assignments of error and

we affirm the trial court's final judgment.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR