[Cite as *Saeed v. Cincinnati*, 2004-Ohio-3747.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

SOHAIL SAEED,	:	APPEAL NO. C-030854 TRIAL NO. A-0302360
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
CITY OF CINCINNATI	:	
and	:	
CIVIL SERVICE COMMISSION OF THE CITY OF CINCINNATI, OHIO,	:	
	:	
Defendants-Appellants.		

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 16, 2004

William M. Gustavson, for Plaintiff-Appellee,

J. Rita McNeil, City Solicitor, and *Augustine Giglio*, Assistant City Solicitor, for Defendants-Appellants.

We have sua sponte removed this cause from the accelerated calendar.

GORMAN, Judge.

{¶1} The appellants, the city of Cincinnati and its civil service commission, appeal the judgment of the court of common pleas reversing the decision of the civil service commission and holding, pursuant to R.C. Chapter 2506, that the order denying appellee, Sohail Saeed, promotion to the position of Senior Engineer in the Metropolitan Sewer District ("MSD") was not supported by the preponderance of substantial, reliable, and probative evidence. The court ordered Saeed promoted to Senior Engineer in the classified civil service and awarded back pay from the date he received his Professional Engineer ("P.E.") license. In their two assignments of error, the city and the civil service commission contend that the court erred by (1) admitting additional evidence; and (2) holding that the decision of the civil service commission was not supported by substantial, reliable, and probative evidence. We affirm.

{¶2} On January 27, 2003, Saeed, a Senior Engineering Technician in the Design/Consulting Services Unit of MSD's Wastewater Engineering Section, requested promotion to the vacant position of Senior Engineer in the System Wide Model Project because he had obtained his P.E. license in December 2002. He had undergraduate and graduate degrees in electrical engineering from Texas A & M University, and in 1999 he earned an MBA degree from Xavier University. He was initially employed by MSD as an Engineer-in-Training and Engineer Intern from September 1989 until August 24, 2000. On August 24, 2000, his title was changed to Senior Engineering Technician, a

comparable classification, because, as set forth in the civil service commission's class specification, he had not obtained his P.E. license within ten years.

{¶3} After a hearing on his promotion request, the civil service commission, on February 26, 2003, denied the promotion, stating its decision "was based on the fact that there is no current vacant Senior Engineer position in the Electrical area." It stated that Saeed "should get the next vacancy in his area of expertise." After receiving the decision, Saeed's counsel wrote to the commission on March 5, 2003, stating that it had never before denied promotion to a Senior Engineer employed by MSD on grounds that a vacancy did not match a P.E.-licensed engineer's undergraduate engineering degree. Counsel cited the promotion to Senior Engineer of four specific individuals whose undergraduate and graduate degrees did not match the subject area of the vacant position, but who were, nevertheless, promoted to the position of Senior Engineer and were currently working in a position that differed from their undergraduate degree. Noting that the vacancy was in the same unit that Saeed had been working in for several years, counsel requested the opportunity to present additional information to the commission. The civil service commission agreed to hear "both sides of the issue."

{¶4} Before the civil service commission issued its second decision on March 10, 2003, and in response to the request by Saeed's counsel to present additional evidence, Robert Campbell, MSD's Deputy Director, wrote an ex parte letter to the civil service commission, mistakenly dated March 5, 2002, rather than 2003, in which he stated that the four engineers Saeed's counsel had cited in his letter qualified for promotion because of their experience in specific areas outside of their undergraduate

degree. Campbell stated that Saeed lacked the necessary training or experience outside his undergraduate degree in electrical engineering for the vacancy.

{¶5} On March 10, 2003, the commission, acknowledging that it had never considered this issue before, observed that MSD "did not want to promote someone from an Engineer Intern to a Senior Engineer based on not having a certain engineering discipline." In again denying Saeed's request for promotion, the commission stated that it "has always relied on the recommendation from the Department."

{¶6} In their first assignment of error, the city and the civil service commission contend that the common pleas court wrongly admitted two letters offered by Saeed that were not included in the record of the February 28, 2003, hearing before the commission. These letters, dated November 22, 1994, and May 24, 1995, were written by MSD's Superintendent of Wastewater Administration to the Immigration and Naturalization Service and requested permission to employ Saeed temporarily and then permanently in the position of Engineer-in-Training. The city and the civil service commission argue that because the decision of the civil service commission was entered on February 28, 2003, and because the letters offered as additional evidence related to an issue that Saeed had an opportunity to refute at the hearing, the court was not entitled to consider them.

{¶7} In an appeal to the common pleas court from the administrative agency's decision or order, R.C. 2506.03 provides the following:

{¶8} "(A) The hearing of such appeal shall proceed as in the trial of a civil action, but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies. * * * (2) The appellant

was not permitted to appear and be heard in person or by his attorney, in opposition to the final order, adjudication or decision appealed from, and to do any of the following: * * * (d) Offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions."

{¶9} The claim of the city and the civil service commission—that the commission's letter decision of February 28, 2003, was the final decision—is at odds with the record. In his letter of March 5, 2003, to the civil service commission, Saeed's attorney stated that it "had never before required the Engineering specialty as a prerequisite for promotion to Senior Engineer." He listed by name four engineers in MSD who were promoted to the position of Senior Engineer upon eventually obtaining their P.E. license, even though their degrees did not match the subject area of the vacancy. The commission stated in its decision of March 10, 2003, that it "has not had this issue come before [it] previously." Saeed had asked for time to present additional information, and the commission said that it "agreed and heard both sides of the issue."

{¶10} Saeed also argued in the common pleas court that he was not given a copy of Campbell's letter of rebuttal, dated March 5, [2003]. Saeed had no knowledge of its existence until the record of the appeal was filed on April 28, 2003, in the common pleas court. In that letter, Campbell said, "Mr. Saeed does not currently have the necessary training or experience to move into the current position vacancies. As we testified on February 27, the majority of Mr. Saeed's experience is in electrical design."

{¶11} At the hearing, Campbell had testified that because of "managed competition fear" MSD was in the "process of doing ongoing study to look at our work processes and efficiencies." He talked about "putting a hold on hiring and filling those

positions until this study is done." His stated criticism of Saeed's experience was that "he has not taken courses in hydraulics or hydrology. Electrical engineers don't * * *. His work experience in MSD has been primarily, in electrical systems designs." In both his February 26, 2003, letter and at the hearing, Campbell stated that the position required three to four years of sewer-modeling software use and that Saeed only had 190 hours rather than the 6200 hours needed.

{¶12} The city and the commission argue that this deficiency was what disqualified Saeed despite the vacant position in his work unit. But the qualifications listed for the position as advertised on the Cincinnati.Com and Career Builder site said, "The successful candidate must be proficient in the following areas: hydraulics, hydrology, computer programming, sewer systems, advanced mathematics and SWMM modeling software, and will have knowledge of wastewater collection and treatment operations and maintenance; * * * Each applicant must have a Bachelor's Degree in Civil Engineering from an accredited college or university. *Ideal candidate* would have 3 to 4 years experience with SWMM modeling software." (Emphasis added.)

{¶13} At the hearing, Campbell's reason for denying the promotion to Saeed was that an engineer who had been reclassified for failing to obtain a P.E. license within ten years was not entitled to automatic promotion after obtaining a P.E. license. He said in his letter of February 26, 2003, "Each position that is filled must be evaluated based on the needs of MSD as compared to the skill set each candidate brings to the interview. * * * My degrees are in Civil Engineering, whereas Mr. Saeed's are in Electrical Engineering. This is as different as comparing two doctors, one that does surgery on your brain, and one that does surgery on your feet, both competent in their field, but not

interchangeable." In his memorandum in support of his motion to add additional evidence to the record, Saeed argued that had he known of the existence of Campbell's position at the time of the hearing, he would have produced evidence "that would have shown that the attempted justification for denying Saeed's promotion was a sham."

{¶14} The Campbell letter, mistakenly dated March 5, 2002, and received by the civil service commission after the hearing, was a refutation of the post-hearing letter of Saeed's counsel. It arguably changed the reason originally given for MSD's failure to promote Saeed and focused on his lack of experience in wastewater management rather than on his failure to have an engineering degree that matched the senior engineer vacancy. Saeed's contention seems confirmed by the civil service commission's February 28, 2003, decision, which states, "The Civil Service Commission does believe that Mr. Saeed should get the next vacancy in his area of expertise."

{¶15} The letter of November 22, 1994, from the MSD Superintendent of Wastewater Management, received as additional evidence in the trial court, summarized Saeed's responsibilities, which included compliance with environmental regulations, on-plant effluent discharges and air emissions, plant-process control, system administration, equipment maintenance, and efficiency of plant operations. It outlined his project duties, which included engineering work on specifications and purchasing, plant-process control and instrumentation, electronics hardware and software plant-effluent chlorination and dechlorination systems, collection of air emissions data, filing of air emissions permits with the Ohio Environmental Protection Agency, and measurement and process control of sewage sludge dewatering at the Mill Creek wastewater treatment plant.

{¶16} The superintendent of MSD's wastewater administration observed, "The engineering work which Mr. Saeed performs is unique and of an extraordinary nature. His work requires research work and the application of ideas which result in the efficient operation of our wastewater treatment plants to meet stringent state and federal environmental regulations. He significantly assists in enabling us to meet our goals and objectives to protect and improve water and air quality in our service area and to furnish clean water and air quality in our service area and to furnish clean water to downstream users. Exhibit 23 is a recent performance report in which one of our Senior Engineers stated, 'His work is critical to our mission of the organization-working on items related to our permits, process controls and plant performance measures.' He was given a 'Superior' rating in all categories."

{¶17} The second eleven-page letter of May 24, 1995, admitted by the court, like the superintendent's earlier letter, summarized Saeed's duties and responsibilities in the wastewater treatment division. It stated, "For division-wide projects, Mr. Saeed is our only employee who is an instrumentation and control engineer. His work is critical in many aspects of wastewater treatment design and operation. Our inability to continue to employ Mr. Saeed would reduce our ability to monitor, control and reduce the adverse water and pollution impacts of sewage and industrial wastes generated in Hamilton County."

{¶18} Although it is evident why the city and the civil service commission did not want these letters considered, the common pleas court did not abuse its discretion by allowing introduction of the additional evidence at the court hearing. R.C. 2506.03 contains a liberal provision for the common pleas court to permit the introduction of

additional evidence under the statutory criteria listed. See *Cincinnati Bell, Inc. v. Glendale* (1975), 42 Ohio St.2d 368, 370, 328 N.E.2d 808. The common pleas court could have reasonably concluded, as Saeed argued, that, unknown to Saeed, Campbell's letter of March 5, [2003,] to the civil service commission, sent after the hearing closed, was a change in MSD's position for denying Saeed's promotion to Senior Engineer: from that the vacancy did not match Saeed's undergraduate degree in electrical engineering to his lack of experience outside electrical engineering. The two letters written by the superintendent of the wastewater treatment division tended to refute Campbell's comments. The record on this issue does not suggest that the common pleas court's attitude was unreasonable, arbitrary and unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Therefore, the assignment of error is overruled.

{¶19} In their second assignment of error, the city and the civil service commission challenge the decision of the common pleas court reversing the commission and finding that its decision was not supported by the preponderance of substantial, reliable and probative evidence. A strategy of exclusion of the additional evidence pursued by the city and the civil service commission in their first assignment of error would seem to be a judicial confession that both letters had substantial probative value regarding Saeed's experience.

{¶20} As discussed by the supreme court in *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433, common pleas courts and the courts of appeals review administrative appeals under differing standards of review. See, also, R.C. 2506.04. The common pleas court is required to determine from

the record, and any additional evidence that may be admitted pursuant to R.C. 2506.03, if the order or decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." Only when the record lacks reliable, probative, and substantial evidence to support the agency's decision can the common pleas court reverse, vacate, modify, or remand. See *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113.

{¶21} The standard of review provided in R.C. 2506.04 for courts of appeals, however, is limited to questions of law and "does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence' as is granted to the common pleas court." *Henley*, 90 Ohio St.3d at 147, 2000-Ohio-493, 735 N.E.2d 433, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848, fn. 4; see *Kenkel v. Hamilton Cty. Bd. of Cty. Commrs.*, 1st Dist. No. C-010347, 2001-Ohio-3917. An appellate court cannot substitute its judgment for that of the common pleas court except within its limited statutory scope of review. See id. The appellate court is to determine only if the common pleas court abused its discretion. See *Henley*, 90 Ohio St.3d at 148, 2000-Ohio-493, 735 N.E.2d 433.

{¶22} The city and the civil service commission correctly argue that the commission and the common pleas court must defer to the expertise of the administrative agency. See *Burket v. Civil Service Trial Bd.* (Dec. 28, 1994), 1st Dist. No. C-930810. In reviewing the commission's decision, the common pleas court was bound by the nature of administrative proceedings to presume that its decision was reasonable and valid. See *Community Concerned Citizens Inc. v. Union Twp. Bd. of Zoning Appeals*, 66

Ohio St.3d 452, 456, 1993-Ohio-115, 613 N.E.2d 580. However, we have stated that it is the function of the common pleas court to weigh the evidence in the record, and any additional evidence admitted under R.C. 2506.03, to determine if there exists a preponderance of reliable, probative and substantial evidence to support the agency decision, even though it cannot blatantly substitute its judgment for that of the agency. See *Burket.*

{¶23} The civil service commission stated in its March 10, 2003, decision, that it had not considered this issue before, because it had "always relied on the recommendation from the Department." Such a statement standing alone, even if unintended, was facially arbitrary and unreasonable, as it showed that the commission had delegated to MSD its own responsibility for weighing the evidence[1]. If the civil service commission simply relied on MSD's recommendation, any hearing for Saeed became a meaningless charade. The commission's statement that Saeed should be promoted to "the next Senior Engineer position for which you qualify" provided him no solace or relief.

{¶24} We hold that there was in the record before the common pleas court an appropriate basis to allow the court to conclude that the commission's decision was not supported by a preponderance of substantial, reliable and probative evidence. The uncontradicted evidence was that no other engineer who had earned a P.E. license after ten years of employment with MSD was ever denied promotion to a Senior Engineer position because his undergraduate engineering degree did not match the vacant position. The city and the civil service commission relied only on Campbell's testimony that Saeed

lacked the experience for this position because "190 hours in a modeling office does not equate to 6200 hours of minimum need." No document in the record established such a requirement. By contrast, R. Carlton, the supervising engineer in Saeed's work unit, on January 17, 2003, wrote to the Chief Sewers Engineer, with a copy sent to Campbell, and said, "I would urge, again, that Sohail should now be promoted to the position of Senior Engineer. Failure to proceed with a timely promotion and pay retroactive to the date when he received notification of having passed the PE test sends a very negative message to other staff members currently pursuing education & training toward improving their professional circumstances. * * * Additionally, once Sohail receives the promotion we can then utilize him more effectively – as a Project Manager."

{¶25} There was more than ample evidence in the record from which the common pleas court could find that the civil service commission's decision denying Saeed's promotion was not supported by the preponderance of reliable, probative and substantial evidence, and that MSD's action was arbitrary and unreasonable. The assignment of error is overruled.

{¶26} Therefore, the judgment of the common pleas court is affirmed.

Judgment affirmed.

WINKLER, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

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[1]The commission, however, in the spirit of a fair hearing allowed Saeed to present evidence of his

The court has placed of record its own entry in this case on the date of the release of this Opinion.

experience in response to Campbell's letter, which had been unknown to Saeed and his counsel.