[Cite as *State ex rel. Worsham v. Cincinnati*, 2010-Ohio-2765.]

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

STATE OF OHIO ex rel. PHILIP A. WORSHAM,	:	APPEAL NO. C-090328 TRIAL NO. A-0711177
JAMES W. KETTLER,	:	*D E C I S I O N.*
JAY B. BOSSE,	:	
GREGORY M. PHELIA, JR.,	:	
KENNETH D. LEMASTER,	:	
and	:	
PAUL D. KREKELER,	:	
Relators-Appellees,	:	
vs.	:	
CITY OF CINCINNATI	:	
and	:	
CIVIL SERVICE COMMISSION,	:	
Respondants-Appellants.		

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Writ Vacated

Date of Judgment Entry on Appeal: June 18, 2010

William Gustavson, for Relators-Appellees,

Augustino Giglio, Assistant City Solicitor, for Respondents-Appellants.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} The city of Cincinnati and the Cincinnati Civil Service Commission (collectively "the city") appeal from the judgment of the Hamilton County Court of Common Pleas that granted a writ of mandamus requested by six Cincinnati firefighters who sought an award of back pay and retroactive benefits on the ground that their promotions had been wrongfully delayed. We hold that the city did not wrongfully delay the promotions where the promotions were enjoined and, therefore, that the issuance of the writ was in error.

{¶2} The relators, Philip A. Worsham,[1] James W. Kettler, Jay B. Bosse, Gregory M. Phelia, Jr., Kenneth D. LeMaster, and Paul D. Krekeler, who were employed in the classified service of the Cincinnati Fire Department as firefighters, took a promotional exam for the rank of fire lieutenant on November 22, 2005. Two weeks later, the Cincinnati Civil Service Commission approved and posted promotion-eligible list 05-35 ("the promotion list") based on the exam.

{¶3} James Inman, another firefighter in the Cincinnati Fire Department who had taken the exam, filed an "appeal" related to the exam in the Hamilton County Court of Common Pleas. The trial court ordered that the city promote Inman to the next available vacancy in the rank of fire lieutenant. After granting the city an automatic stay pending an appeal, the trial court then enjoined the city from certifying or promoting to the rank of lieutenant any persons on the promotion list pending appeal, and it also extended the effective period for the promotion list. This court overruled the city's motion for a stay of that injunction.

[1] Worsham's first name was misspelled "Phillip" in the notice of appeal.

{¶4} After vacancies occurred in the rank of fire lieutenant, the relators filed this mandamus action seeking promotion to the rank of fire lieutenant with back pay and retroactive benefits including seniority and time in grade ("retroactive benefits"). The city moved to dismiss the action until the resolution of the *Inman* appeal and claimed that if the trial court were to grant the relators' writ of mandamus, the city would be forced "to make the unenviable choice of facing contempt orders" for violating the *Inman* injunction or for violating the writ of mandamus. In response to the city's motion to dismiss, the relators moved the trial court to stay all further proceedings in the action until the resolution of the *Inman* appeal. The relators took the position that they "were not asking [the] court to overturn the injunction[,] but to defer further proceedings on this complaint, until the Court of Appeals renders a decision on the *Inman* case, including the injunction * * * [that] is effective 'pending appeal.' "

{¶5} On June 6, 2008, this court issued its decision in *Inman*. We held that the trial court had lacked subject-matter jurisdiction to review the merits of Inman's claim because Inman had appealed the outcome of an administrative investigation and not a final order or adjudication as required by R.C. 2506.01(A).[2] We reversed the trial court's decision and remanded the case to the trial court.[3] Upon remand, the trial court dismissed the appeal for lack of jurisdiction and dissolved its order enjoining the city from promoting from the promotion list.[4]

{¶6} Thereafter, the city promoted the relators to vacancies in the rank of fire lieutenant, with the promotions effective on the date of our *Inman* decision. The city refused the relators' request for back pay and retroactive benefits. The relators

[2] *Inman v. Civil Serv. Comm.*, 1st Dist. Nos. C-070316 and C-070434, 2008-Ohio-2707, ¶7.
[3] Id. at ¶8.
[4] Hamilton Cty. C.P. No. A-0603309 (order entered June 23, 2008).

then moved for summary judgment in this mandamus action and supported their motion with affidavits. The city also moved for summary judgment.

{¶7} The trial court summarily granted the relators' motion, denied the city's motion, and issued a writ ordering the city to provide the relators with back pay, seniority, and time in grade retroactive to various dates. Upon the city's motion the trial court stayed its decision pending this appeal.

{¶8} In its sole assignment of error, the city now contends that the trial court erred by granting the relators' motion for summary judgment, by denying the city's motion for summary judgment, and by issuing the writ of mandamus.

{¶9} To succeed on their mandamus claims, the relators had to show "(1) that they ha[d] a clear legal right to the relief prayed for, (2) that the [city was] under a clear duty to perform the acts, and (3) that [they] ha[d] no plain and adequate remedy in the ordinary course of the law."[5] In addition, Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined (1) that no genuine issue as to any material fact remains to be litigated, (2) that the moving party is entitled to judgment as a matter of law, and (3) that it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. We review de novo the grant or denial of summary judgment, applying the standards set forth in Civ.R. 56.

The Relief Request

{¶10} Although the relators initially sought a writ of mandamus to compel both their promotion to lieutenant and an award of back pay and retroactive benefits,

[5] *State ex rel. Natl. City Bank v. Bd. of Edn. of the Cleveland City School Dist.* (1977), 52 Ohio St.2d 81, 84, 369 N.E.2d 1200.

the city promoted them before the trial court ruled on the mandamus claim. Thus, the issue before the court was limited to whether the relators were entitled to a writ compelling the payment of back pay and retroactive benefits.

{¶11} The relators contended that they were entitled to back pay and retroactive benefits because the order enjoining their promotions was held to be void. According to the relators, the injunction never existed, and the city had failed to promote them within ten days after the date of the vacancies to which they were entitled, as required by R.C. 124.46.

{¶12} The city presented alternative arguments in opposition to the relators' motion for summary judgment and in support of its own motion for summary judgment. The city argued (1) that back pay and retroactive benefits could not be awarded without a showing of "bad faith" by the city in denying or delaying the promotions, (2) that the promotions had not been unlawfully delayed because a court order had enjoined them, or (3) that if the injunction had been void ab initio as the relators argued, then the relators could not demonstrate a legal right to relief because the promotion list would have expired on December 7, 2007, without the injunction. The city presents these same arguments on appeal in support of its sole assignment of error challenging the trial court's issuance of the writ.

Bad-Faith Test Rejected

{¶13} The Ohio Supreme Court in *State ex rel. Bednar v. North Canton*[6] set forth a new test to determine eligibility for back pay in a case alleging the wrongful denial or delay of a civil-service promotion. The court adopted the test used when a public employee makes a claim for back pay after reinstatement following a wrongful

[6] 69 Ohio St.3d 278, 1994-Ohio-89, 631 N.E.2d 621.

dismissal: back pay is allowed " 'provided the amount recoverable is established with certainty.' "[7]

{¶14} Thus, in a mandamus action for back pay, "the relator must first establish that the dismissal or denial of promotion was wrongful. In wrongful-failure-to-promote cases, this proof may be in the mandamus action itself. Then, the relator must prove a clear right to relief by establishing the amount due with certainty. If certainty is established, then prejudgment interest is allowed as a matter of law."[8]

{¶15} By adopting this test, the Ohio Supreme Court clarified that a civil service employee seeking back pay for a wrongfully delayed or denied promotion is not required to establish bad faith by the city.[9] Because bad faith is not a requirement for an award of back pay, we reject the city's argument that the trial court erred by issuing the writ without a finding of bad faith.

Wrongful Denial or Delay of a Promotion

{¶16} To ascertain whether the relators are entitled to an award of back pay and concomitant retroactive benefits under the test set forth in *Bednar*, we must determine whether the relators established that the city had wrongfully denied or delayed their promotions. Certainly a city is not free to ignore the applicable civil-service laws in denying a promotion.[10] But in this case, it is undisputed that the city delayed the promotions because of the injunction.

{¶17} The relators maintain that because the trial court in *Inman* lacked subject-matter jurisdiction to entertain Inman's appeal, the injunction issued by the

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[7] *Bednar* at 282, quoting *State ex rel. Martin v. Columbus* (1979), 58 Ohio St.2d 261, 389 N.E.2d 1123, paragraph one of the syllabus.
[8] Id. at 283.
[9] Id. at 284.
[10] See id. at 281; *Brickweg v. St. Bernard* (1999), 133 Ohio App.3d 189, 194, 727 N.E.2d 164.

court as a result of that appeal was void, and " ' it [wa]s as though such proceedings had never occurred; the judgment [wa]s a mere nullity and the parties [we]re in the same position as if there had been no judgment.' "[11] It is their position, therefore, that in retrospect the city wrongfully failed to promote at the time of the vacancies.

{¶18} The relators' retrospective focus ignores what we regard as the fundamental issue in this case: whether the city had a duty to promote at a time when it was enjoined by a court from doing so.

{¶19} A city cannot ignore a court order enjoining a promotion. While the injunction existed, the city was forbidden by law from doing the act enjoined—promoting the relators.[12] Thus, the city had no duty to promote the relators on the date of the vacancies because of the injunction.

{¶20} Importantly, the relators would not have been entitled to a writ of mandamus compelling the promotions at a time before the dissolution of the injunction, even though they were not parties to the injunction decree.[13] The relators recognized this in the proceedings below, as evidenced by their motion to stay the proceedings until after the resolution of the pending appeal in *Inman*.

Conclusion

{¶21} On these facts, where the city was prohibited by a court order from promoting the relators, we hold that the city did not wrongfully delay the relators' promotions to the rank of Cincinnati fire lieutenant. For this reason, we hold that the trial court erred by granting summary judgment in favor of the relators, by issuing a writ of mandamus awarding back pay and retroactive benefits, and by

[11] Appellees' Brief at 5, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶19.
[12] See *Ohio and Indiana Railroad Co. v. Commissioners of Wyandot Cty*. (1857), 7 Ohio St. 278, 280.
[13] See *State v. ex rel. Kurtz v. Bliss* (1946), 147 Ohio St. 211, 214, 70 N.E.2d 653; *Ohio and Indiana Railroad Co.*, supra, at syllabus.

denying summary judgment to the city. Accordingly, we sustain the assignment of error.

{¶22} Because we find merit in the city's second argument in support of the assignment of error, we decline to address the final alternative ground for relief.

Judgment reversed and writ vacated.

CUNNINGHAM, P.J., DINKELACKER AND MALLORY, JJ.

The court has recorded its own entry on the date of the release of this decision.