

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Evette Fields,	:	
Appellant-Appellant,	:	No. 09AP-208
v.	:	(C.P.C. No. 08CVF-8802)
Fairfield County Board of MR/DD,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on August 27, 2009

McNees Wallace & Nurick LLC, and Samuel N. Lillard, for appellant.

Bricker & Eckler LLP, and Susan L. Oppenheimer, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Appellant, Evette Fields, appeals from the judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR") which dismissed, for lack of subject-matter jurisdiction, her administrative appeal of the non-renewal of her employment contract with appellee, Fairfield County Board of MR/DD ("Board"). The SPBR order, in summary, determined appellant was a member of the unclassified civil service and was therefore not entitled to a hearing before

SBPR. Because the common pleas court did not err as a matter of law in its statutory interpretation, and did not abuse its discretion in determining the SPBR order was supported by reliable, probative, and substantial evidence, we affirm.

{¶2} On March 18, 2003, appellant began her employment with the Board as a substitute secretary. Effective April 1, 2003, appellant accepted the position of administrative assistant to Board superintendent John Pekar. Appellant's initial position description identified the position as being in the classified civil service and indicated she was subject to a 120-day probationary period. Both appellant and Pekar signed the position description. Appellant successfully completed the probationary period.

{¶3} In mid-2006, the Board reviewed five positions, including appellant's, to determine whether those positions should be considered unclassified management positions. Upon advice of legal counsel, the Board concluded four of the five positions, including appellant's, met the statutory definition for management positions and, as such, the employees holding those positions should be on management contracts.

{¶4} On June 20, 2006, the Board approved the issuance of management contracts to the employees in the four positions, including appellant. Thereafter, the Board prepared a written limited contract of employment reflecting the terms of appellant's employment as a management employee. By its terms, the contract was to commence on July 1, 2006, and end on June 30, 2007, and was renewable at the discretion of the superintendent. Appellant refused to sign the contract; however, she continued to work as an administrative assistant and accept the salary and benefits provided thereunder. By letter dated March 21, 2007, Pekar notified appellant, pursuant

to R.C. 5126.21(A)(1), that he did not intend to renew the contract following its expiration on June 30, 2007.

{¶5} Thereafter, on March 29, 2007, appellant filed an appeal with SPBR, claiming she was a classified employee entitled to civil service protection. The Board filed a motion to dismiss the appeal for lack of subject-matter jurisdiction. SPBR held the motion in abeyance pending a hearing. Following a hearing and the filing of briefs, an Administrative Law Judge ("ALJ") issued a report and recommendation dismissing appellant's appeal for lack of subject-matter jurisdiction. The ALJ concluded appellant was a confidential employee as defined in R.C. 4117.01(K) and, therefore, a management employee under R.C. 5126.20(C) and 5126.22(A); accordingly, she was an unclassified employee pursuant to R.C. 124.11(A)(19). Appellant filed objections to the report and recommendation. SPBR subsequently adopted the ALJ's report and recommendation without substantive comment.

{¶6} On June 18, 2008, appellant filed an appeal with the Franklin County Court of Common Pleas. On February 10, 2009, the common pleas court issued a decision affirming SPBR's order. The court specifically found SPBR's conclusion that appellant was in the unclassified civil service and that it therefore did not have jurisdiction over appellant's appeal was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶7} On February 27, 2009, appellant filed a notice of appeal in this court, advancing the following three assignments of error:

[I.] THE LOWER COURT ERRED IN CONCLUDING THAT MS. FIELDS, IN HER POSITION AS ADMINISTRATIVE ASSISTANT TO THE SUPERINTENDANT [sic] OF

FAIRFIELD COUNTY BOARD OF MR/DD, MET THE STATUTORY DEFINITION OF "CONFIDENTIAL EMPLOYEE" UNDER R.C. §4117.01(K), THEREBY MAKING HER AN UNCLASSIFIED EMPLOYEE UNDER R.C. §124.11(A)(19).

[II.] THE LOWER COURT ERRED IN FINDING THAT THE TERMINATION OF MS. FIELDS DID NOT VIOLATE THE PLAIN LANGUAGE OF R.C. §5126.22(F).

[III.] THE LOWER COURT ERRED IN FAILING TO FIND THAT MS. FIELDS WAS STRIPPED OF HER CLASSIFIED CIVIL SERVICE STATUS WITHOUT DUE PROCESS OF LAW.

{¶8} Appellant's first assignment of error contends the common pleas court abused its discretion in finding that her position as administrative assistant to the Board superintendent met the statutory definition of "confidential employee" under R.C. 4117.01(K), thereby making her an unclassified employee under R.C. 124.11(A)(19).

{¶9} In an administrative appeal, pursuant to R.C. 119.12, the common pleas court reviews an agency's order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Klaiman v. Ohio State Univ.*, 10th Dist. No. 03AP-683, 2004-Ohio-1137, ¶7. In performing this review, the court may, to a limited extent, consider the credibility of the witnesses as well as the weight and probative character of the evidence. *Id.* This standard of review permits the common pleas court to substitute its judgment for that of the administrative agency; however, the court must give due deference to the administrative resolution of evidentiary conflicts. *Id.*, citing *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108.

{¶10} An appellate court's review is more limited than that of the common pleas court. *Klaiman* at ¶8. Unlike the common pleas court, an appellate court does not weigh

the evidence. *Id.* Rather, review by the court of appeals is limited to a determination of whether or not the common pleas court abused its discretion in determining that the agency's order is supported by reliable, probative, and substantial evidence. *Id.*, citing *Hartzog v. Ohio State Univ.* (1985), 27 Ohio App.3d 214. An abuse of discretion implies that a decision is both without a reasonable basis and is clearly wrong. *Id.*, citing *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159. Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the administrative agency or the common pleas court. *Provisions Plus, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-670, 2004-Ohio-592, ¶8, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 1993-Ohio-122. However, on questions of law, the common pleas court does not exercise discretion and the court of appeals' review is plenary. *Klaiman* at ¶8, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339.

{¶11} R.C. 124.11 sets forth the general statutory distinction between classified and unclassified civil services. *Id.* at ¶9. This section also sets forth which positions are to be considered classified and which are to be considered unclassified. *Id.*, citing *Suso v. Ohio Dept. of Dev.* (1993), 93 Ohio App.3d 493. SPBR's jurisdiction derives from R.C. 124.03, which provides SPBR authority to hear appeals of employees in the classified civil service. As such, SPBR does not have jurisdiction to hear appeals of employees in the unclassified civil service.

{¶12} SPBR and the common pleas court found that appellant was a member of the unclassified civil service, pursuant to R.C. 124.11(A)(19), which provides, in pertinent part, as follows:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

* * *

(19) Superintendents, and management employees as defined in section 5126.20 of the Revised Code, of county boards of mental retardation and developmental disabilities[.]

{¶13} R.C. 5126.20(C) defines "management employee" as "a person employed by a board in a position having supervisory or managerial responsibilities and duties, and includes employees in the positions listed in division (A) of section 5126.22 of the Revised Code." R.C. 5126.22(A) provides that "[e]mployees who hold the following positions in a county board of mental retardation and developmental disabilities are management employees." The positions listed in R.C. 5126.22(A) include "confidential employees as defined in section 4117.01 of the Revised Code." R.C. 4117.01(K) defines "[c]onfidential employee" as "any employee who works in the personnel offices of a public employer and deals with information to be used by the public employer in collective bargaining; or any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer."

{¶14} The common pleas court determined appellant was a "confidential employee" as defined in R.C. 4117.01(K), thus, a management employee pursuant to R.C. 5126.20(C) and 5126.22(A) in the unclassified civil service pursuant to R.C. 124.11(A)(19). In so concluding, the court, applying the second half of the definition of "confidential employee," found that Pekar "undisputedly directly participated in collective bargaining efforts on behalf of [the Board]." Further, following consideration of appellant's

duties with regard to her professional relationship with Pekar, the court concluded that appellant worked in a "close continuing relationship" with Pekar. Appellant contends the court erred both as a matter of law in interpreting R.C. 4117.01(K) and abused its discretion in finding that she worked in a "close continuing relationship" with Pekar. We disagree with both contentions.

{¶15} Initially, we note that statutory construction presents a legal issue which we review de novo. *State v. Wemer* (1996), 112 Ohio App.3d 100, 103. The first rule of statutory construction is that a statute which is unambiguous and definite on its face is to be applied as written and not construed. *Id.*, citing *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584. Courts must give effect to the words expressly used in a statute rather than deleting words used, or inserting words not used, in order to interpret an unambiguous statute. *Id.*, citing *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 1995-Ohio-163.

{¶16} R.C. 4117.01(K) provides two alternative definitions of "confidential employee." The first addresses employees who work in the personnel office of the public employer and deal with information to be used by the public employer in collective bargaining. The second, relied upon by SPBR and the common pleas court, speaks to employees who work in a "close continuing relationship" with a public officer or representative who directly participates in collective bargaining on behalf of the employer.

{¶17} Under the first alternative, the "confidential employee" herself must deal with collective bargaining information. Under the second alternative, whether or not the employee herself participates in collective bargaining or is directly responsible for collective bargaining information is immaterial. The phrase "directly participating in

collective bargaining" modifies "public officers or representatives," not "employee." The pertinent fact is whether the employee works in a "close continuing relationship" with a public officer or representative who, in turn, directly participates in collective bargaining on behalf of the public employer.

{¶18} Appellant contends she was not a "confidential employee" as defined in R.C. 4117.01(K) because she was not personally involved in collective bargaining negotiations or with union matters. Appellant argues that R.C. 4117.01(K) should be read as if the phrase "directly participating in collective bargaining" modifies "employee," that is, as if the General Assembly intended to define "confidential employee" to mean an individual who participates directly in collective bargaining and also works in a close continuing relationship with a public officer or representative. Here, if the employee participates directly in collective bargaining, the first alternative of R.C. 4117.01(K) applies and it is immaterial whether the employee also works in a close continuing relationship with another public officer or representative. The common pleas court implicitly rejected appellant's strained interpretation of R.C. 4117.01(K) in favor of the more reasonable interpretation, that is, that a "confidential employee" is either an individual who participates directly in collective bargaining or works in a close continuing relationship with a public officer or representative that participates in collective bargaining on behalf of the public employer. Accordingly, the common pleas court did not err as a matter of law in interpreting R.C. 4117.01(K).

{¶19} The common pleas court also properly found that the question of whether appellant was a "confidential employee" under the second alternative definition provided in R.C. 4117.01(K) is a factual one. As such, our review is limited to whether the common

pleas court abused its discretion in finding appellant to be a "confidential employee," that is, whether appellant worked in a "close continuing relationship" with a public officer or representative who directly participated in collective bargaining on behalf of the Board.

{¶20} Appellant does not dispute that, throughout her employment with the Board, she was the administrative assistant to Pekar, the Board's superintendent. She also does not dispute that Pekar directly participated in collective bargaining negotiations on behalf of the Board. Appellant takes issue with the common pleas court's determination that she worked in a "close continuing relationship" with Pekar. In so finding, the common pleas court stated:

When considering the identified issue, the factual evidence before the administrative hearing officer included the fact that appellant's supervisor, Pekar, undisputedly directly participated in collective bargaining efforts on behalf of appellee. Thus, appellant's professional relationship with Pekar becomes of paramount import.

On that issue, the evidence before the hearing officer included the circumstance that appellant was Pekar's administrative assistant (appellant was requested to "take control" of Pekar's professional life) and as such, worked together with Pekar on a daily basis. Furthermore, appellant opened Pekar's mail, appellant had her work station in the outer office of Pekar and obviously could observe the coming and going of visitors to Pekar (this was described as the "access point" to Pekar's office), appellant received and routed most of Pekar's incoming telephone calls, appellant prepared agendas and minutes of board meetings, appellant was to organize and categorized [sic] all the information that Pekar had in his office and scheduled most of Pekar's business appointments, appellant was a member of the management leadership team with Pekar which considered, inter alia, collective bargaining negotiations and, among other things, appellant was to maintain all confidential information that came through Pekar's office.

{¶21} Contrary to appellant's assertion, the common pleas court did not rely solely on evidence of "close spatial proximity" to Pekar's office in concluding that appellant worked in a "close continuing relationship" with Pekar. Rather, the court also considered the duties assigned to and performed by appellant. See *Kohls v. Perry Cty. Bd. of Mental Retardation & Developmental Disabilities* (Sept. 29, 1994), 10th Dist. No. 94APE01-122. ("The true test [in determining whether an employee is a member of the unclassified service pursuant to R.C. 124.11] is the actual duties assigned to and performed by the employee.") As noted, the common pleas court considered the duties appellant performed on a daily basis, including handling Pekar's incoming and outgoing mail, typing his correspondence, answering his telephone calls, and scheduling his business appointments, as well as the fact that she was a member of the management leadership team which considered issues related to collective bargaining.

{¶22} Review of the evidence offered at the administrative hearing substantiates the common pleas court's factual findings. During his testimony, Pekar referred to appellant's office as the "access point" to the superintendent's office and stated that appellant acted as his "chief of staff" and organized his professional life. (Tr. 37-38.) According to Pekar, appellant was responsible for managing all the business functions of the superintendent's office, providing assistance in the business functions of the personnel office, maintaining employee records, typing and handling the superintendent's incoming and outgoing correspondence on a daily basis, maintaining confidential information, and providing secretarial and administrative support to the superintendent. Appellant scheduled Board meetings and was advised of the topic to convey to Board members when necessary or relevant, took Board meeting minutes, and compiled Board

meeting agendas and information packets. Appellant was authorized to open envelopes addressed to Pekar marked "confidential." She had access to confidential electronic faxes addressed to the superintendent from legal counsel and to the superintendent's calendar, desk, and file cabinets, including collective bargaining related materials contained therein. She served on the management leadership team, which, among other things, discussed issues in preparation for entering into collective bargaining negotiations.

{¶23} Appellant specifically challenges the common pleas court's findings that she opened Pekar's confidential mail and was permitted access to confidential information. Appellant claims she offered "unrebutted" testimony refuting those findings. To be sure, appellant testified that a receptionist opened Pekar's mail and routed all confidential mail to Cynthia Hillberry, the agency's Director of Human Resources, and that she (appellant) was never allowed access to confidential information regarding the collective bargaining process. However, appellant's testimony was not "unrebutted," as Pekar offered testimony to the contrary.

{¶24} As noted previously, this court may not weigh the evidence. Rather, our review is limited to determining whether the common pleas court abused its discretion. The common pleas court's review permits limited consideration of witness credibility as well as the weight and probative character of the evidence. In ruling as it did, the common pleas court clearly afforded due deference to SPBR's resolution of evidentiary conflicts. Indeed, the common pleas court expressly noted that the evidence in support of SPBR's determination was "sufficient * * * in terms of nature, quality and effect."

{¶25} For the foregoing reasons, we conclude that the common pleas court did not err as a matter of law in interpreting the definition of "confidential employee" set forth

in R.C. 4117.01(K) and did not abuse its discretion in finding appellant to be a "confidential employee" as defined in that statute. The first assignment of error is overruled.

{¶26} Appellant's second assignment of error contends the common pleas court erred in finding that appellant's "termination" did not violate the plain language of R.C. 5126.22(F). We disagree.

{¶27} R.C. 5126.22(F) provides:

A county board shall not terminate its employment of any management, professional, or service employee solely because a position is added to or eliminated from those positions listed in this section or because a position is designated or no longer designated by the director or a county board.

{¶28} Appellant contends the Board "redesignated" her a management employee and then terminated her in contravention of R.C. 5126.22(F). We disagree. The term "designated," as utilized in R.C. 5126.22(F), appears to be a term of art particular to R.C. 5126.22, and which must be understood in the context of the other provisions in that section. R.C. 5126.22(A) includes in the list of management employees "positions designated by the county board in accordance with division (D) of this section." R.C. 5126.22(A) thus enables a county board to deem a particular position a management employee that is not otherwise delineated in the statute. Here, the Board did not need to "designate" the position of administrative assistant to the superintendent as a management employee because the position was already included on the list of management employees under R.C. 5126.22(A) as a confidential employee as defined in R.C. 4117.01(K). As R.C. 5126.22(F) applies only to employees who are "designated" by

a county board as management, pursuant to R.C. 5126.22(A), because they are not otherwise included in R.C. 5126.22(A), it is not applicable here, and the trial court did not abuse its discretion in so concluding. The second assignment of error is overruled.

{¶29} Appellant's third assignment of error contends the common pleas court erred in failing to find that she was "stripped" of her classified civil service status without due process of law. Again, we disagree.

{¶30} Appellant's argument is premised on her erroneous belief that her position was ever in the classified civil service. Pekar testified that appellant's initial position description mistakenly listed the position as one in the classified civil service. The misidentification of appellant's civil service status on her initial position description does not legally place her in the classified civil service. As noted, the duties and responsibilities performed by the employee determine whether that employee is a member of the classified or unclassified service. *Kohls*. As set forth above, reliable, probative, and substantial evidence supports the factual determination that appellant was a "confidential employee" and, thus, a management employee in the unclassified civil service, pursuant to R.C. 124.11(A)(19), throughout her employment with the Board.

{¶31} As properly noted by the common pleas court, no due process violation could have occurred unless appellant "acquired a property right in the classified characterization of her service." Any property interest in public employment derives from the statutory protections and benefits of R.C. Chapter 124. *Lawrence v. Edwin Shaw Hosp.* (1986), 34 Ohio App.3d 137, 140. Such property interest exists only if an employee is included under the classified civil service. *Id.* As the common pleas court found, appellant had no such property right because, as a management employee of the

Board, "her employment rights were legislatively restricted by R.C. 5126.21 and were not expanded" by an error in her initial position description making it appear that she was a classified employee. As an unclassified management employee holding a one-year limited contract of employment, the only requirement for the non-renewal of her contract was that she was entitled to receive notice of the superintendent's intention not to rehire her at least 90 days prior to the expiration of the contract. R.C. 5126.21(A). The Board, through Pekar, complied with this requirement.

{¶32} Having found that appellant was a management employee and, thus, an unclassified civil servant throughout her employment with the Board, appellant's due process claim accordingly fails. The third assignment of error is overruled.

{¶33} Having overruled appellant's first, second, and third assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.
