[Cite as *Bradley v. Ohio State Dept. of Job & Family Servs.*, 2011-Ohio-1388.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Shelba Bradley,	:	
Appellant-Appellant,	:	
		No. 10AP-567
v.	:	(C.P.C. No. 09CVF09-14588)
Ohio State Department of Job and Family Services,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on March 24, 2011

Buckley King LPA, and *James E. Melle,* for appellant.

Michael DeWine, Attorney General, *Nicole S. Moss* and *Mahjabeen Qadir,* for appellee.

APPEAL from the Franklin County Common Pleas Court.

BRYANT, P.J.

{¶1} Appellant-appellant, Shelba Bradley, appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR") that dismissed as moot appellant's appeal of a temporary change in her duties as an employee of appellee-appellee, Ohio State Department of Job and Family Services ("ODJFS"). Because the common pleas court properly affirmed the SPBR's order finding the matter moot, we affirm.

I. Facts and Procedural History

{¶2} Appellant began her employment with the state in 1985 and transferred to ODJFS in 1998. In the 12 months prior to February 2009, appellant worked as an EEO Regional Administrator at ODJFS where she was primarily responsible for investigating claims of discrimination filed by ODJFS employees or customers of the federal entitlement programs ODJFS administered. Prior to February 4, 2009, appellant sent an email to another ODJFS employee, the contents of which caused appellant's supervisor, EEO Manager Shanna Bagner, to question the neutrality with which appellant was performing her duties.

{¶3} To address the concerns, appellant's supervisor and the labor relations chief on February 5, 2009 ordered appellant to cease working on discrimination investigations until ODJFS completed its own investigation of "her 'advising activities.' " (Bagner Aff. ¶8.) As a result of its investigation, ODJFS ultimately removed appellant for cause from her position as EEO Regional Administrator on April 21, 2009. Appellant appealed her removal to the SPBR, a matter addressed in a separate action.

{¶4} From February 5, 2009 to April 21, 2009, during the two and a half months of the ODJFS investigation, appellant performed the work of a receptionist or clerk but continued to be classified as an EEO Regional Administrator and to be paid at her regular pay rate. On February 19, 2009, appellant appealed the change in her job duties to the SPBR. As part of her appeal, appellant filed a Motion to Disaffirm, pointing out that ODJFS, in violation of Ohio Adm.Code 124-3-01(A), failed to serve her with an R.C. 124.34 reduction order. Appellant argued that, as a result, SPBR should disaffirm the

reduction in her duties and return her to her former assignment as EEO Regional Administrator.

{¶5} ODJFS responded, citing Ohio Department of Administrative Services Directive No. 08-08, issued March 2008. ODJFS asserted the temporary change in appellant's duties during the investigation was not a disciplinary reduction, but a permissible temporary modification of duties pending the investigation of appellant's job performance. ODJFS further asserted appellant's appeal was moot because ODJFS no longer employed appellant.

{¶6} Following appellant's response, the Administrative Law Judge ("ALJ") filed a Report and Recommendation with the SPBR on July 30, 2009. The ALJ stated ODJFS acted appropriately under Directive 08-08 because ODJFS reduced only appellant's duties during the ongoing investigation, so appellant suffered no monetary loss. The ALJ also concluded that, even had appellant demonstrated ODJFS acted contrary to law, appellant's only remedy would be an order restoring her to her duties as EEO Regional Administrator. Because, subsequent to the temporary reassignment, ODJFS removed appellant for cause from that position, the ALJ concluded she could not be returned to it, leaving SPBR no remedy it could offer appellant. Finally, the ALJ noted appellant separately appealed the removal order and, if appellant were successful in that appeal, she would be restored to her former position as EEO Regional Administrator, rendering the appeal at issue before the SPBR without effect. With those premises, the ALJ recommended the SPBR overrule appellant's motion to disaffirm or dismiss the appeal as moot. (R&R, 6.) The SPBR adopted the ALJ's recommendation and ordered the appeal dismissed as moot.

{¶7} On September 29, 2009 appellant appealed the SPBR's decision to the Franklin County Court of Common Pleas. Appellant's brief supporting her appeal argued (1) R.C. 124.03(A)(1) required SPBR to disaffirm appellant's reduction because she was not served with a R.C. 124.34(B) order of reduction, and (2) the appeal was not moot because a favorable ruling would lead to a favorable result in appellant's separate appeal of the removal order. Following ODJFS' response, the common pleas court issued its decision on May 20, 2010 concluding ODJFS' actions were proper. The court initially stated "the change of duties was not intended to be disciplinary" so that "a reduction order as contemplated under R.C. 124.34 was not mandated." (Decision, 5.) The court added that even if such an order were "necessary, the relief that would be accorded appellant, restoration of the proper duties, is no longer available, thus making moot the appeal." (Decision, 6.) The common pleas court thus affirmed the board's order. Appellant appeals.

II. Assignments of Error

{¶8} Appellant assigns the following errors:

> 1. The Common Pleas Court erred in its interpretation of R.C. 124.34(B) by (i) making a distinction between reductions in position for disciplinary and non-disciplinary reasons and (ii) finding that R.C. 124.34(B) does not require service of a §124.34 order when the employee is reduced in position for non-disciplinary reasons.
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> 2. The Common Pleas Court erred in failing to reverse the SPBR's Order because R.C. 124.03(A)(1) requires that the SPBR must disaffirm a reduction in position where an employer fails to comply with its obligations in R.C. 124.34(B).
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> 3. The Common Pleas Court erred in ruling that the appeal was moot.

> 4. The Common Pleas Court erred in ruling that DAS Directive 08-08 was not void.

{¶9} Appellant's third assignment of error challenges the common pleas court's conclusion that appellant's appeal is moot. Because resolution of the issue disposes of appellant's appeal, we first address it.

III. Mootness

{¶10} Under R.C. 119.12, the standard of review for an appellate court reviewing an administrative appeal is more limited than that of the court of common pleas. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. We review factual issues to determine if the court of common pleas abused its discretion in assessing whether reliable, probative, and substantial evidence supports the administrative action. *Alternative Residences, Two, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 04AP-306, 2004-Ohio-6444, ¶17. We, however, independently determine questions of law. Id., citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, paragraph one of the syllabus. Because appellant's appeal concerns questions of law, our review is plenary. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶5.

{¶11} "The doctrine of mootness is rooted in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint." *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791. "While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question." Id.

"It is not the duty of the court to answer moot questions," so if during the course of a proceeding "an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief," the court will refuse to rule on the moot question. *Miner v. Witt* (1910), 82 Ohio St. 237, syllabus. See also *Tschantz v. Ferguson* (1991), 57 Ohio St.3d 131, 133 (stating "[n]o actual controversy exists where a case has been rendered moot by an outside event"). *Lingo v. Ohio Cent. R.R., Inc.*, 10th Dist. No. 05AP-206, 2006-Ohio-2268, ¶20, quoting *Grove City v. Clark*, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶11 (concluding an action is moot when it does not involve an " 'actual genuine, live controversy, the decision of which can definitely affect existing legal relations' ").

{¶12} The mootness doctrine has limited exceptions. One exception concerns "cases which present a debatable constitutional question or a matter of great public or general interest." *Tschantz* at 133, citing *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 31. Another exception allows for judicial review of moot questions when the issue is " 'capable of repetition, yet evading review.' " *Nextel West Corp. v. Franklin Cty. Bd. of Zoning Appeals*, 10th Dist. No. 03AP-625, 2004-Ohio-2943, ¶14, citing *State ex rel. Plain Dealer Pub. Co. v. Barnes* (1988), 38 Ohio St.3d 165, paragraph one of the syllabus. Appellant has not alleged either exception applies to her.

{¶13} Rather, appellant claims R.C. 124.34 and 124.03(A)(1) required the SPBR to disaffirm the temporary reduction in her duties. See R.C. 124.34(A) (providing "[n]o officer or employee shall be reduced in pay or position * * * except as provided in section 124.32 of the Revised Code"); R.C. 124.34(B) (providing "[i]n case of a reduction * * * the appointing authority shall serve the employee with a copy of the order of reduction * * * which order shall state the reasons for the action"); *Veney v. Massilon Psychiatric Ctr.*

(June 7, 1994), 10th Dist. No. 93APE12-1684 (explaining that, where no order of reduction has been filed with SPBR, Ohio Adm.Code 124-5-02 allows "employees an opportunity to prove * * * that formal action was, in fact, taken to effectuate a reduction in position"). See also Ohio Adm.Code 124-1-02(Z) (providing a reduction in position "means an action which diminishes an employee's duties or responsi-bilities [sic] to the extent an audit of the employee's position would result in a reclassification to a classification assigned a lower pay range").

{¶14} Because ODJFS no longer employs appellant, appellant's argument fails to advance the ultimate result she seeks. Regardless of the results of an audit, or even a conclusion that appellant was wrongly reassigned job duties during the investigation, the remedy appellant seeks is an order disaffirming her change in duties and restoring her to her former position. As a result of subsequent ODJFS action, disaffirming the change in her responsibilities does not aid appellant, as she has no position to which she may return. No meaningful relief can be afforded appellant through her appeal of SPBR's order. Instead, her remedy lies in a successful appeal of ODJFS' decision to terminate her employment.

{¶15} Appellant nonetheless claims that because ODJFS was at fault when it failed to serve appellant with a R.C. 124.34 order, ODJFS cannot claim her appeal is moot. Appellant is correct in asserting a question is moot when "an event occurs *without the fault of either party*, which renders it impossible for the court to grant any relief." (Emphasis added.) *Miner* at syllabus. A party thus may not assert a case is moot when the party is at fault in causing the occurrence which led to mootness. See *Roberts v. Put-in-Bay Planning Comm.* (July 15, 1994), 6th Dist. No. 93 OT040.

{¶16} ODJFS' not filing or serving a R.C. 124.34 order of reduction did not cause the case before us to become moot. Appellant's permanent removal from her position caused the mootness, and the propriety of that action will be determined in a separate action. If appellant were to prevail in that action, she would receive as a remedy all she seeks here; if she does not prevail in the separate appeal, nothing decided here can effectuate the remedy she seeks. See *Miner* at 238-39 (instructing that the duty of this court is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions * * * or to declare principles or rules of law which cannot affect the matter in issue in the case before it").

{¶17} Appellant next argues application of the "merger and bar rule" prevents her appeal from being moot. Although appellant's "merger and bar" argument acknowledges relief is not possible in this appeal, she nonetheless asserts a decision here would be useful in her separate appeal of her termination from ODJFS. Appellant's argument is not persuasive.

{¶18} The merger and bar defense provides that "[a]ll incidents which occurred prior to the incident for which a non-oral disciplinary action is being imposed, of which an appointing authority has knowledge and for which an employee could be disciplined, are merged into the non-oral discipline imposed by the appointing authority." Ohio Adm.Code 124-3-05(A). "[O]nce discipline is imposed for a particular incident, that incident shall not be used as the basis for subsequent discipline." Ohio Adm.Code 124-3-05(B). "Non-oral discipline" is "written reprimands and suspension orders." Ohio Adm.Code 124-3-05(A)(2).

{¶19} Appellant's supervisor and the labor relations chief gave appellant written orders in February 2009 instructing her to cease working on investigations, refrain from being on ODJFS premises after working hours, and to otherwise comply with the commands of her supervisor. Under Ohio Adm.Code 124-3-05, appellant would be required to prove the written order was a non-oral disciplinary action, all of the incidents used to support the temporary change in her duties were used to support her removal, and ODJFS, at the time of the temporary reassignment, knew all the bases for discipline it later used as a basis for the order of removal. Nothing prevents appellant from arguing the "merger and bar rule" in her separate appeal of her termination from employment with ODJFS, regardless of the outcome of her appeal here. Her ability to do so, however, does not prevent this action from being moot.

{¶20} In a last effort to avoid mootness, appellant analogizes her situation to *Joys v. Univ. of Toledo* (Apr. 29, 1997), 10th Dist. No. 96APE08-1040. In *Joys*, an employer abolished an employee's position, the employee retired, and we agreed with the trial court the case was not moot. We concluded effective relief was possible, because the SPBR could order the employee reinstated despite her retirement. Id. *Joys* is distinguishable because, under the Public Employees Retirement System statutes and R.C. 145.38, a retired employee was permitted to return to work for a public employer. Id. "Because reemployment with the University [was] clearly possible under PERS statutes, Joys' decision to retire no more moot[ed] her appeal on the propriety of her job abolishment than would her alternative choice of collecting unemployment benefits subsequent to such an abolishment." Id.

{¶21} By contrast, appellant points to no statute that allows an employee removed for cause to return to their former position. As a result, a favorable ruling on appellant's appeal of her reassignment to temporary duties would not provide appellant with a choice of returning to her former position, as appellant has no position at ODJFS to which she may return. See *Ridgeway v. State Med. Bd. of Ohio*, 10th Dist. No. 06AP-1197, 2007-Ohio-5657, ¶12 (concluding that because the medical board issued a final adjudicative order, the doctor's "license [was] no longer under summary suspension and his attempts to contest the summary suspension [were] moot"). As in *Ridgeway*, appellant's complaints about the temporary change in her duties became moot with her subsequent removal from her position at ODJFS.

{¶22} Based on the foregoing, we overrule appellant's third assignment of error, rendering moot her first, second, and fourth assignments of error. We thus affirm the judgment of the common pleas court affirming SPBR's order that dismissed appellant's appeal as moot.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.

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