[Cite as *Barnes v. Columbus Civ. Serv. Comm.*, 2011-Ohio-2808.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jimmie D. Barnes et al.,	:	
Plaintiffs-Appellants,	:	
		No. 10AP-637
v.	:	(C.P.C. No. 09CVH 05-8080)
Columbus, Ohio Civil Service Commission, et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 9, 2011

The Gittes Law Group, *Frederick M. Gittes*, and *Jeffrey P. Vardaro*, for appellants.

Glenn B. Redick, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiffs-appellants, Jimmie D. Barnes, Joseph E. Horton, Scott R. Hyland, and Steven A. Wilkinson (collectively, "appellants"), appeal the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendants-appellees, the city of Columbus (the "City") and the Columbus Civil Service Commission ("CSC")

(collectively, "appellees"), on appellants' claims under R.C. 149.351(B). For the following reasons, we affirm.

{¶2} In May and June 2008, appellants, all of whom were employed by the City of Columbus, Division of Police, took promotional examinations administered by the CSC, a commission appointed by the City to administer the City's classified civil service. The promotional examinations contained both written and oral components, but we are concerned only with the oral phase. During the oral phase of the examinations, each candidate made oral presentations to a panel of three assessors in response to two scenarios. Each assessor assigned the candidate a score on each presentation, based on four scoring criteria. Each presentation was also videotaped, and another panel of three assessors assigned scores based on the videotape. In all, each candidate received 12 scores on the oral phase of the examination.

{¶3} The CSC provides its assessors written instructions and live training regarding testing procedures and scoring criteria. The CSC encourages assessors to take notes during candidates' presentations to minimize rating errors and makes available to the assessors pre-printed note taking forms, divided into quadrants that correspond to the four scoring criteria. After a presentation, each assessor assigns the candidate a score, based upon the assessor's notes and the relevant rating scales. After each assessor assigns an initial score, the panel discusses the candidate's presentation, after which the assessors may revise their initial scores. Once the assessors assign final scores for each scenario, a CSC test monitor collects the

assessors' score sheets and notes. The monitor forwards the notes to CSC clerical staff for shredding, usually the same day.

{¶4} Unsatisfied with the results of their examinations, appellants filed public record requests for materials associated with the 2008 promotional examinations. The CSC provided some materials, but informed appellants that the notes taken by assessors during the oral phase of the examinations had been destroyed following administration of the examinations.

{¶5} Appellants filed this action on May 29, 2009 against the CSC and filed an amended complaint, adding the City as a defendant, on July 14, 2009. Appellants alleged that the destruction of the assessors' written notes violated R.C. 149.351. They requested the statutory forfeiture of $1,000 for each record destroyed and a permanent injunction prohibiting appellees from further unlawful destruction of existing and future records of civil service examinations. After engaging in discovery, the parties filed cross-motions for summary judgment. On June 8, 2010, the trial court issued a decision and entry granting appellees' motion for summary judgment and denying appellants' motion for summary judgment. The trial court concluded that appellants' claims failed as a matter of law, based solely on its determination that the assessors' personal notes were not public records.

{¶6} In their timely appeal, appellants raise the following single assignment of error:

> THE TRIAL COURT ERRED IN HOLDING THAT THE NOTES THE [CSC] SPECIFICALLY INSTRUCTED ITS EXAMINATION ASSESSORS TO CREATE AND USE IN

GRADING POLICE PROMOTIONAL EXAMINATIONS COULD BE DESTROYED WITHOUT REFERENCE TO A RETENTION SCHEDULE.

{¶7} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown*, at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should

award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶9} R.C. Chapter 149 includes provisions creating a state records program and provisions detailing the availability of public records. For purposes of R.C. Chapter 149, "record" is broadly defined as "any document, device, or item * * * created or received by or coming under the jurisdiction of any public office * * *, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). The Supreme Court of Ohio has explained the breadth of that definition as follows:

> Unless otherwise exempted or excepted, almost all documents memorializing the activities of a public office can satisfy the definition of "record." * * * Indeed, any record that a government actor uses to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office can be classified reasonably as a record. * * * The document need not be in final form to meet the statutory definition of "record."

Kish v. Akron, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶20. (Internal citations omitted.)

{¶10} R.C. 149.351, upon which appellants base their claims, provides, in substantial part, as follows:

> (A) All records are the property of the public office concerned and shall not be * * * destroyed * * * or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions

> provided for under sections 149.38 to 149.42 of the Revised Code * * *.[1]
>
> (B) Any person who is aggrieved by the * * * destruction * * * or by other damage to or disposition of a record in violation of division (A) of this section * * * may commence either or both of the following * * *:
>
> (1) A civil action for injunctive relief to compel compliance with division (A) of this section * * *;
>
> (2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation * * *.

Appellants seek relief under both R.C. 149.351(B)(1) and (2).

{¶11} In their motion for summary judgment, appellees stated that the determinative issue in this case is whether the assessors' notes qualify as "public records" and argued that they were entitled to judgment as a matter of law because the notes were not "public records." The trial court accepted appellees' argument in its entirety, stating that the assessors' personal notes "are not public records and, therefore, the [appellants'] claims * * * fail as a matter of law."

{¶12} R.C. 149.43 addresses the availability of "public records" and permits individuals aggrieved by the denial of a public record request to maintain a mandamus action to compel production of the requested public record. " 'Public record' means records kept by any public office" other than those categories of documents specifically excluded or exempted. The exemptions include medical records, probation and parole records, adoption records, and trial preparation records. R.C. 149.43(A)(1).

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[1] R.C. 149.39 creates in each municipal corporation of the state a municipal records commission to create, and submit for approval, rules for records retention and a records retention schedule.

{¶13} The term "public record" is notably absent from R.C. 149.351, which refers only to "records," as defined in R.C. 149.011(G). This court has expressly recognized the distinction between a "record," as defined by R.C. 149.011(G), and a "public record," as defined by R.C. 149.43(A)(1). See *Walker v. Ohio State Univ. Bd. of Trustees*, 10th Dist. No. 09AP-748, 2010-Ohio-373. "If a document is a record, it becomes a 'public record' under R.C. 149.43(A)(1) if it is * * * '[K]ept by any public office' " and is not statutorily excluded or exempted from the general definition of "public record." *State ex rel. Dist. 1199, Health Care & Social Serv. Union, SEIU, AFL-CIO v. Gulyassy* (1995), 107 Ohio App.3d 729, 734.

{¶14} To maintain a successful mandamus action under R.C. 149.43, the petitioner must establish that the requested document satisfies the Revised Code definitions of both "record" and "public record." See *Dist. 1199, Health Care & Social Serv. Union* at 733-34. In contrast, a records destruction claim under R.C. 149.351(B) may lie whenever a public office improperly destroys "records," regardless of whether those records qualify as "public records" subject to disclosure under R.C. 149.43. See *Walker* at ¶24. ("R.C. 149.351(A) prohibits the destruction of 'records' as defined in R.C. 149.011(G).") Defendants' assertion that only "public records" are subject to record retention rules under R.C. 149.351 not only ignores the plain language of the statute but, also, would inexplicably exclude from record retention requirements those documents, such as medical, probation, and adoption records, that are statutorily excluded from the definition of "public records."

{¶15} Whether the assessors' notes were subject to records retention requirements, therefore, depends not upon whether the notes were "public records," but on whether they were "records," as broadly defined in R.C. 149.011(G). Not all documents received by a public office constitute "records," despite the breadth of the R.C. 149.011(G) definition. See *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St.3d 61, 1998-Ohio-180 (letters received by a trial judge and placed into her files were not "records" because they did not document her sentencing decision or any other official activity); *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680.

{¶16} We conclude, however, that we need not reach the question whether the assessors' notes qualify as "records" under R.C. 149.011(G). Rather, even assuming that they so qualify and even assuming that appellees violated R.C. 149.351(A) by destroying the notes without reference to a records retention schedule, we conclude that appellees were entitled to summary judgment on appellants' claims.

{¶17} Only persons "aggrieved by" a violation of R.C. 149.351 may sue to enforce that statute. *Walker* at ¶24. While appellees argued, in their memorandum in opposition to appellants' motion for summary judgment, that appellants were not aggrieved, the trial court did not address that issue. A person is aggrieved by a violation of R.C. 149.351 "when (1) the person has a legal right to disclosure of a record of a public office, and (2) the * * * destruction * * * of the record, not permitted by law, allegedly infringes the right." *Walker* at ¶26.

{¶18} Thus, a person is aggrieved when his or her legal right to disclosure of a public record is infringed by the impermissible destruction of the public record. That is not to say, however, that a person could not otherwise establish a legal right to disclosure of a document that is not a public record and, thus, still demonstrate that he or she is an aggrieved party. In *Walker*, this court agreed with the trial court (1) that completed questionnaires, gathered as part of a state university academic study, were not public records subject to disclosure under R.C. 149.43, and (2) that the plaintiff was not aggrieved by their destruction because she was not entitled to view the records. At ¶27, we stated, "plaintiff never had a legal right to disclosure of the records in question because they were * * * not 'public records,' and were not subject to disclosure under R.C. 149.43(A)." We concluded that the destruction of the questionnaires did not infringe her legal rights and that she was, therefore, not an "aggrieved person." Id.

{¶19} Appellees rely on a number of cases in which courts, including the Supreme Court of Ohio, have considered whether personal notes by public officials or employees constitute public records. First, in *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 1993-Ohio-32, the Supreme Court held that a judge's notes, handwritten during trial, were not public records, and affirmed the dismissal of a mandamus action for disclosure of those notes. The court recognized that R.C. 149.43(A)(1) "does not define a 'public record' as any piece of paper on which a public officer writes something." Steffen at 440. The court noted the absence of any assertion that other court officials had access to or used the judge's notes or that the clerk of courts had custody of the notes as official records. Ultimately, the court concluded that the notes

were "simply personal papers kept for the judge's own convenience and not official records." Relying on *Steffen*, the Eighth District Court of Appeals subsequently dismissed a mandamus action for a judge's personal notes despite the additional fact that the notes had been placed in the court's file maintained by the clerk of courts. See *State ex rel. Pauer v. Ertel*, 149 Ohio App.3d 287, 2002-Ohio-4592. Like the Supreme Court, the Eighth District noted the absence of any averment that the judge's notes were delivered to the clerk to be filed with and preserved by the court. Id. at ¶9.

{¶20} The Supreme Court of Ohio examined a similar issue in *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, in which the petitioner sought a writ of mandamus to compel the city of Cleveland to produce notes taken by the City Planning Commission Director during a predisciplinary conference with the petitioner. The director read from and relied on his notes during a hearing on the petitioner's appeal from his subsequent discharge. The court again held that the notes were not public records subject to disclosure under R.C. 149.43. Relying on *Steffen*, the court stated that the director's notes "were kept for his own convenience to recall events and were not kept as part of the city's or the planning commission's official records." Id. at ¶18.

{¶21} More recently, the Supreme Court of Ohio decided *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, which involved facts that closely parallel those in this case. In *Carr*, firefighters/medics who took promotional examinations filed an action for a writ of mandamus to compel the city to permit access to records relating to the examinations, including the assessors' notes. Although much of the court's

analysis in *Carr* is inapposite here, the Supreme Court specifically held that "the assessors' personal notes are not public records." [2] Id. at ¶56, citing *Cranford* at ¶21-22.

{¶22} The Second District Court of Appeals recently relied on this line of cases in *Silberstein v. Montgomery Cty. Community College Dist.*, 2d Dist. No. 23439, 2009-Ohio-6138, in which the plaintiff alleged that the defendant violated R.C. 149.351 by destroying interview question forms on which members of the defendant's employee search committee took notes during interviews of employment candidates. *Silberstein*, unlike *Steffen* and *Cranford*, involved a claim pursuant to R.C. 149.351, but the court nevertheless relied on those cases to conclude that the interview forms were not public records. The court rejected the plaintiff's argument that *Steffen* and *Cranford* were no longer controlling because they predated *Kish*, which broadly defined the scope of "records" under R.C. 149.011(G). The court stated that *Kish* indicated no intention to depart from previously-announced cases regarding personal notes and found that the Supreme Court's more recent, post-*Kish*, rejection of an attempt to obtain personal notes in *Carr* defeated the plaintiff's argument. The Second District held: "Like the individuals in *Cranford* and *Steffen*, the * * * committee members took personal notes for their own convenience, and their notes were not used by others. The notes, therefore, are not public records for purposes of R.C. 149.43, and [the defendant] did not violate R.C. 149.351 by disposing of the notes." Id. at ¶67. See also *State ex rel.*

[2] The Supreme Court also concluded that one of the petitioners never requested the subject records from the city; the federal Freedom of Information Act did not apply to the city; and the remaining records either had been provided, did not exist or were excepted from disclosure under Ohio's Public Records Act.

Murray v. Netting (Sept. 18, 1998), 5th Dist. No. 97-CA-24 (holding that interviewers' notes, used to complete evaluation forms of employment candidates, were not public records even though some ended up in the respondent's custody).

{¶23} Appellants attempt to distinguish the assessors' notes here from the personal notes in the foregoing cases. They maintain that the assessors' notes were not taken for the assessors' own convenience because the CSC strongly and repeatedly encouraged note taking to minimize error in the scoring process. They also assert that the notes were not personal because assessors shared their notes with each other and turned them into the CSC after the examination. Despite appellants' arguments, we discern no basis for the distinctions appellants urge this court to make.

{¶24} Although the CSC undisputedly encouraged assessors to use their notes, instead of relying exclusively on their memories, to aid in assigning scores, neither CSC's encouragement of note taking nor its provision of note taking forms suggests that the assessors' notes were not for their own convenience, even if the result was to minimize rating errors. In the prior personal note cases, like here, the notes at issue related to a matter upon which the note taker was charged with making a decision or aiding in the decision-making process. Especially similar to this case is *Murray*, in which interviewers took notes while interviewing employment candidates and used their notes to complete evaluation forms for the candidates. Also, in *Cranford*, the Supreme Court rejected the contention that notes kept "to recall events" were public records. Here, the CSC encouraged note taking as an alternative to assessors' reliance exclusively on their memory. Thus, the assessors used their notes to recall relevant

factors observed during a candidate's presentation and to assist them in completing the score sheets. That the CSC encouraged the assessors to take notes and instructed them to refer to their notes in assigning scores does not alter the fact that the notes were for the assessors' convenience.

{¶25} Next, contrary to appellants' assertion, there is no evidence that the assessors shared their notes with each other or with others. Laura Hausman, a CSC personnel analyst, testified in her deposition that, after the assessors assign their initial, independent scores, they compare scores, and if the scores differ by more than two points, they discuss the candidate's performance to determine the reason for the differential. She testified that, during such a discussion, assessors typically look at their notes to voice their rationale or reasoning for their initial rating. Although the assessors were free to rely on their notes in discussing a candidate's performance, the record contains no evidence that the assessors had access to each other's notes.

{¶26} Finally, while the test monitor collected the assessors' notes, there is no evidence that the CSC collected the notes to preserve them as official records. Indeed, the undisputed evidence is that the CSC immediately had its clerical staff shred the notes for test security reasons. Thus, while the notes were briefly in the CSC's possession, CSC did not keep them as official records. See *Ertel* at ¶9; see also *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260 (hiring materials submitted by finalists for position of school district superintendent during interviews, but returned to

candidates at the close of interviews, were not "public records" because they were not kept by a public office).

{¶27} For these reasons, we discern no basis for differentiating the assessors' notes here from the personal notes in *Steffen*, *Cranford*, *Carr*, and the other foregoing cases. In accord with those cases, the assessors' notes did not qualify as "public records," subject to disclosure to a member of the public, pursuant to R.C. 149.43. Therefore, appellants did not have a legal right to obtain the notes, and they were not aggrieved by their destruction. See *Walker*.

{¶28} Appellants offer other, alternative reasons for why they were aggrieved, even if the assessors' notes were not "public records." For example, appellants, who are union members, contend that they had a contractual right, via their collective bargaining agreement, to access the information in the assessors' notes through review by a union-appointed testing expert. Appellants also state that they "intended to, and did, take subsequent promotional exams, which could and should have been improved using an analysis of the notes by such an expert (or by the [CSC] itself, which destroyed the notes without conducting any analysis)." Lastly, appellants argue that they are considering a legal challenge to the examinations and that access to the notes would have been beneficial to their claims. None of these arguments persuades the court that appellants are aggrieved under R.C. 149.351.

{¶29} The Fraternal Order of Police, Capital City Lodge No. 9 ("FOP"), is the exclusive bargaining representative of all full-time, sworn police officers and police supervisors below the rank of Deputy Chief, who are employed by the City Division of

Police. The FOP and the City are parties to a Collective Bargaining Agreement ("CBA") that governs the wages, hours, and terms and conditions of employment for union members. Article 15 of the CBA affords the FOP the right to utilize a testing expert to consult with the CSC regarding the development, implementation, and administration of promotional examinations. Section 15.3 requires the CSC to provide the FOP's testing expert access to a broad range of testing materials. With respect to post-testing materials, Section 15.3(D)(6) provides that "[t]he [CSC] shall provide, for continued test assessment and improvement, access to data files from which the [FOP's] testing consultant(s) can perform statistical analyses of test results." Even were we to conclude that the CBA entitled the FOP's testing consultant to review assessors' notes following the administration of a promotional examination, that contractual right would extend only to the FOP, and not to individual union members like appellants, who admit that the CBA did not give them the right to review the notes personally. Accordingly, we conclude that the CBA does not confer a legal right upon appellants to access the assessors' notes.

{¶30} We similarly reject appellants' argument that they are aggrieved because they took subsequent promotional examinations that "should have been improved using an analysis of the notes" and because they have considered bringing a legal challenge to the subject examinations. The fact that appellants took subsequent examinations does not alter the fact that they had no legal right to view the assessors' notes, which were not public records. Had appellants filed an action to challenge the examinations, requested the assessors' notes in discovery, and established that appellees wrongfully

destroyed the notes in violation of R.C. 149.351, they may have been able to demonstrate that they were aggrieved. Presently, however, appellants have not legally challenged the examinations and any finding that they are aggrieved by their inability to access the notes as part of the discovery process is premature and speculative.

{¶31} In conclusion, we agree with the trial court that the assessors' notes at issue in this case did not constitute "public records," as defined by R.C. 149.43(A)(1). We disagree, however, with the trial court's holding that R.C. 149.351 applies only to "public records." To the extent the trial court held that only "public records," as defined by R.C. 149.43(A)(1), are subject to the requirements of record retention set forth in R.C. 149.351, we sustain appellants' assignment of error. We have not considered whether the assessors' notes are "records" under R.C. 149.011(G). Rather, we affirm the trial court's judgment on a different basis—namely, that appellants are not aggrieved persons under R.C. 149.351. Because the assessors' notes did not qualify as "public records" and because the destruction of the assessors' notes did not otherwise infringe a legal right of appellants to disclosure of the notes, appellants are not aggrieved persons entitled to maintain an action under R.C. 149.351(B). Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and CONNOR, J., concur.