

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

J. Michael Byrd,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-560
Auditor of State,	:	(C.P.C. No. 09CVF-10-14851)
Appellee-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 30, 2011

John J. Alastra, for appellant.

Michael DeWine, Attorney General, and *Joseph N. Rosenthal*,
for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, J. Michael Byrd ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"), in which SPBR affirmed appellant's removal from his position with appellee, the Ohio Auditor of State ("the Auditor"). For the following reasons, we affirm.

{¶2} Appellant began employment with the Auditor in December 1996. From June 2001 until his termination in May 2005, appellant was classified as a "Personal Computer Administrator 2" and was employed as a help desk technician in the

information technology division of the Auditor's office. As a help desk technician, appellant's primary function was to provide prompt and effective front-line support for employees of the Auditor's office who were experiencing problems with their personal computers or laptops. The vast majority of those employees were auditors working in the field or on a job site in assigned regions around the state of Ohio.

{¶3} Kathy Smith, a personal computer administrator 2, directly supervised the help desk staff, which consisted of three individuals, including appellant. Ms. Smith was appellant's direct supervisor. Kevin Colwell was the personal computer manager who managed the help desk staff, as well as several field technicians. Mr. Colwell served as Ms. Smith's immediate supervisor. Mr. Colwell, in turn, was supervised by Ron Rollo, deputy chief information officer.

{¶4} The help desk technicians received updates and training with respect to handling calls from users. Between 2001 and 2004, appellant received 207 hours of training and continuing professional education related to a variety of topics such as customer service as a help desk technician, troubleshooting, hardware repair, software repair, and networking. Appellant attended a Help Desk Technician training, Network + Certification, as well as A+ OS and A+ CORE training, and various Microsoft trainings, among others.

{¶5} Prior to his removal in May 2005, appellant received counseling as well as several disciplinary actions. He was disciplined in 2002 with three and five day suspensions. In November 2004, appellant received a three day suspension as a result of complaints from various users. In December 2004, appellant was placed on a performance action plan ("PAP") which identified appellant's job responsibilities and set

specific goals for him to achieve. In February 2005, appellant received a five day suspension as a result of continued failure to meet the PAP expectations. In March 2005, appellant received a ten day suspension based upon failure to meet the expectations set forth in the PAP.

{¶6} On April 12, 2005, appellant received a call at the help desk regarding a user from the Cincinnati regional office who was concerned about having access to files that had previously not been available to her. Appellant opened a help desk ticket at approximately 12:07 p.m. He then closed the ticket at approximately 2:19 p.m. Shortly thereafter, the user complained that she was never updated about the problem and still had questions. Thus, the ticket should not have been closed. When Mr. Colwell sent an e-mail to appellant asking how it may have happened that the ticket was closed when the user still had questions and had not been updated, appellant sent a response acknowledging that he prematurely closed the ticket, but indicating he had "more questions than answers." Mr. Colwell believed appellant's response reflected a failure to take responsibility for his actions and was an attempt to put the blame on his co-workers. As a result, Mr. Colwell sent a memorandum to Mr. Rollo requesting that appellant be terminated, based upon appellant's continuing performance issues.

{¶7} Appellant was issued an order of removal dated May 2, 2005. The order stated:

The reason for this action is that you have been guilty of neglect of duty, misfeasance and/or insubordination in the performance of your duties[.] Specifically: you have failed to demonstrate the necessary improvement in meeting the expectations of performance detailed in your performance action plan (which is fully incorporated by reference). Despite numerous counseling sessions, meetings and memos, despite training, and despite a five and ten-day suspension for

recurring performance issues, you did not significantly improve during this period. It is the considered judgment of your superiors that you do not perform at a level expected of an employee with your training, tenure, and experience.

{¶8} Appellant appealed his removal to the SPBR. A hearing was held before an administrative law judge ("ALJ") on August 26, 2008. On July 2, 2009, the ALJ issued a report and recommendation finding that the Auditor had proved the allegations in the removal order and recommending that appellant's removal be affirmed. Appellant filed objections to the report and recommendation. On September 18, 2009, the SPBR adopted the recommendation of the ALJ. On October 5, 2009, appellant filed a notice of appeal and appealed the SPBR's decision to the Franklin County Court of Common Pleas. On March 30, 2010, the common pleas court issued a decision affirming the SPBR's decision. A final judgment entry journalizing this decision was filed on May 19, 2010. Appellant now appeals to this court and asserts the following assignment of error for our review:

[I.] THE COMMON PLEAS COURT ABUSED ITS DISCRETION AS ITS DECISION WAS UNREASONABLE AND MORALLY DELINQUENT AS EVIDENCE SUPPORTING THE APPELLANT WAS IGNORED AND OTHER EVIDENCE NOTED IN ITS DECISION IS NOT SUPPORTED BY THE RECORD.

{¶9} This matter is an administrative appeal filed pursuant to R.C. 124.34 and 119.12. Appellant has appealed from a final order of the SPBR which affirmed appellant's removal. "[A] party adversely affected by the SPBR's decision may appeal that decision to the common pleas court." *Ressler v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-338, 2009-Ohio-5857, ¶11.

{¶10} In an administrative appeal under R.C. 119.12, the common pleas court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows:

* * * (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571.

(Footnotes omitted.)

{¶11} The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. "However, the findings of the agency are by no means conclusive." *Id.* On questions of law, the common pleas court conducts a de novo review in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182.

{¶12} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence.

Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn. (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the board's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. Absent an abuse of discretion on the part of the trial court, a court of appeals cannot substitute its judgment for that of the board or the trial court. *Pons v. Ohio State Medical Bd.*, 66 Ohio St. 3d 619, 621, 1993-Ohio-122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. However, on the question of whether the board's order was in accordance with the law, this court's review is plenary. *McGee v. Ohio State Bd. of Psychology* (1993), 82 Ohio App. 3d 301, 305, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶13} Ohio Adm.Code 124-3-06 requires an appointing authority, such as the Auditor, to "prove, by a preponderance of the evidence, the factual allegations in a disciplinary order. Failure to prove all of the allegations contained in an order does not, as a matter of law, require disaffirmance of an order."

{¶14} In his sole assignment of error, appellant contends the common pleas court committed error and abused its discretion in affirming the SPBR's order by relying upon evidence which is not supported by the record, and by failing to consider certain evidence that is in the record and is favorable to appellant. Specifically, appellant takes issue with the following three statements set forth in the common pleas court's decision: (1)

"Appellant did not adequately explain why the ticket was closed other than it was his unsupported belief that a coworker was to handle it"; (2) "According to appellant's supervisors, the ticket is to remain open until the problem is rectified"; and (3) "The issue of whether other employees had committed the same type of error lacks probative evidence in support." (R. 47 at 4-5.)

{¶15} First, appellant disputes the determination that he failed to adequately explain why the help desk ticket was closed. Appellant submits the common pleas court failed to consider appellant's testimony and evidence establishing a good faith belief that a co-worker, Tom Rieman, was going to take over the April 12, 2005 ticket and that as a result, appellant had no duty to contact the actual user, Debra Maloney. Appellant further argues the common pleas court failed to consider evidence that he did attempt to contact the regional field technician, Ron Kendrick, and because Mr. Kendrick was the point of contact, it was Mr. Kendrick's responsibility to contact the user.

{¶16} The common pleas court described appellant's explanation for why the help desk ticket was closed before the problem was resolved as "not adequate." This characterization is not error and is supported by the report and recommendation adopted by the SPBR and by the record. Mr. Colwell testified that appellant's response to his e-mail inquiry about why the ticket had been closed when the issue had not been resolved was "not acceptable." (Tr. 112.) Mr. Colwell went on to state that appellant's explanation for the premature closure of the ticket did not take ownership of the problem. Instead, appellant blamed his co-workers and the purported flaws with the system. Mr. Colwell testified appellant's response was not representative of an employee wanting to be a team player or wanting to provide good customer service.

{¶17} As a result, the ALJ found that appellant's response to Mr. Colwell's inquiry failed to assume responsibility for the problem and that appellant had failed to solve the user's problem. As the testimony established, one of the goals contained in the PAP was for appellant to solve the needs of users in an efficient and effective way and to be a team player. Appellant's response was one more demonstration of how appellant failed to meet the expectations of the PAP.

{¶18} Furthermore, other than appellant's own self-serving testimony that he believed a co-worker, Mr. Rieman, was going to handle the ticket, there was no other evidence to support this assertion. In fact, as noted by the ALJ in her report and recommendation, Mr. Rieman testified that he did not recall telling appellant that he would assume responsibility for the help desk ticket. Therefore, the common pleas court's characterization of appellant's explanation as inadequate is supported by the record. Moreover, the ALJ's reference to this testimony constitutes reliable, substantial, and probative evidence upon which the SPBR clearly relied in reaching its determination.

{¶19} Next, appellant argues the common pleas court abused its discretion in affirming the SPBR's order because there is no evidence in the record which supports the finding that appellant's supervisors indicated that a help desk ticket was to remain open until the problem was resolved. However, we find this argument to be without merit.

{¶20} In her report and recommendation, the ALJ sets forth numerous findings of fact. Finding of fact No. 8 states: "When a user calls the help desk with a problem, the technician opens a ticket and when the problem is resolved, the technician closes the ticket." (July 2, 2009 Report and Recommendation, at 8.) This finding of fact is supported by testimony provided at the hearing by Mr. Colwell, who testified: "When a person calls

you open a ticket and when all their needs are met you close the ticket." (Tr. 100.) Furthermore, Mr. Colwell acknowledged that when a problem was fixed or a resolution was reached, it was the policy of the Auditor to let the user know of that finding or resolution, in order to confirm that the user agreed that the problem had indeed been resolved. (Tr. 108.) The SPBR obviously found this evidence to be credible and probative, and thus worthy of significant weight, and the common pleas court, in appraising this evidence, agreed it constituted reliable, probative, and substantial evidence. This was not an abuse of discretion.

{¶21} Finally, appellant argues the common pleas court erred in affirming the SPBR's order because it failed to consider appellant's exhibit A, a report showing there were 330 help desk tickets which were closed and re-opened during a two-year time period between April 2003 and April 2005. Appellant claims this report demonstrates there were numerous tickets which were closed and re-opened by other employees and that this practice, of which the Auditor was aware, was not prohibited. He further submits that this evidence shows some of these tickets *may* have been closed prematurely and re-opened, and thus the record contains evidence to support his assertion that other employees had committed similar errors in closing tickets prematurely, yet were not removed from their positions.

{¶22} We find that the common pleas court did not err in determining that the record does not contain probative evidence to support this assertion. At the record hearing, appellant introduced a report showing there were 330 help desk tickets which were closed and re-opened during a two-year time period. However, appellant did not demonstrate that those tickets were in fact re-opened *because they had been closed*

prematurely, as is claimed in this case, since it was established that tickets could be re-opened for other reasons. Instead, appellant merely speculated that some of them *may* have been closed prematurely. Although the ALJ overruled the Auditor's objection to the exhibit on that basis and admitted the report into evidence, she indicated she would give it the weight she felt it was due. It is apparent that the ALJ considered the evidence, but in considering its probative value, awarded it little weight, which, as the trier of fact, is a finding within the ALJ's province. See *Long v. Ohio Dept. of Job & Family Servs.*, 180 Ohio App.3d 772, 2009-Ohio-643, ¶48. The common pleas court simply agreed that the SPBR's assessment of the evidence was supported by the record. This is not an abuse of discretion.

{¶23} Additionally, as the common pleas court noted in its decision, even if the report were given some weight, there was no evidence introduced to show that the other employees who may have prematurely closed those help desk tickets also had the long history of workplace issues that appellant has demonstrated. As indicated by both the ALJ and the common pleas court, it is that long history which accounts for appellant's removal, not just the premature closing of a single help desk ticket.

{¶24} In conclusion, the testimony and documentary evidence introduced at the hearing and cited by the ALJ established that appellant is guilty of neglect of duty and misfeasance with respect to the performance of his job duties, as alleged in the removal order. Numerous complaints were received regarding appellant's job performance. Appellant was counseled as to the deficiencies in his job performance but failed to make progress on achieving the goals listed in his PAP and continually failed to meet the expectations set forth in the PAP. Appellant was disciplined several times in the course

of a one-year period, including twice while the PAP was in effect. His supervisor did not see improvement or a desire to change during that time period. Appellant's premature closing of the help desk ticket on April 12, 2005 was described as "the last straw * * * that broke the camel's back." (Tr. 125.) On that date, appellant opened a help desk ticket for a user with a problem but closed the ticket without resolving the problem and without updating the user. This was not a demonstration of good customer service. When questioned about it, appellant provided an unacceptable response and failed to take responsibility for the problem. The culmination of all of these events resulted in appellant's removal.

{¶25} Despite appellant's assertion that he did nothing improper and neither committed misfeasance nor acted negligently in performing his duties, and based upon our analysis as set forth above, we find the common pleas court did not abuse its discretion in determining the SPBR's order affirming appellant's removal was based upon reliable, probative, and substantial evidence and in accordance with law.

{¶26} Accordingly, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
