

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Thomas W. Berning,	:	
Appellant-Appellee,	:	
v.	:	No. 11AP-837 (C.P.C. No. 11CVF-2398)
Ohio Department of Transportation,	:	(ACCELERATED CALENDAR)
Appellee-Appellant.	:	

D E C I S I O N

Rendered on June 29, 2012

*Thomas W. Berning, pro se; Maguire and Schneider, LLP,
and John H. Hix, for appellee.*

*Michael DeWine, Attorney General, Drew C. Piersall and
Matthew J. Karam, for appellant.*

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Appellee-appellant, the Ohio Department of Transportation ("ODOT"), appeals from judgments of the Franklin County Court of Common Pleas reversing orders of the State Personnel Board of Review ("the Board") and denying ODOT's motion to reconsider. Because we conclude that the Board did not properly consider the correct statutory framework in reviewing Berning's appeal, we affirm the lower court's judgment.

{¶ 2} Appellant-appellee, Thomas W. Berning ("Berning"), was employed by ODOT beginning in 1995. In May 2003, Berning was promoted to the position of Transportation Administrator for the Hardin County Garage. As Transportation Administrator, Berning directly supervised other ODOT employees who worked at the garage. In April 2009, Berning requested the installation of surveillance equipment in the

garage facility to address employee misconduct. As a result of this request, cameras were placed in the garage and video was recorded; however, Berning was not notified that the cameras had been installed. The video recording on the surveillance cameras revealed that certain employees were not working for extended periods of time and that the timekeeping and pay records these employees submitted were incorrect. Following an administrative investigation, ODOT concluded that Berning failed to effectively manage the garage, resulting in consistent misuse of state resources and inaccurate documentation. On December 18, 2009, ODOT removed Berning from employment.

{¶ 3} Pursuant to R.C. 124.34, Berning appealed his removal to the Board. An administrative law judge conducted a hearing and issued a report and recommendation that Berning's removal be modified to a 10-day suspension and that he be reinstated as Transportation Administrator. After reviewing the report and recommendation, the Board ordered that Berning's removal be modified to a reduction in classification to Highway Technician and that he be reinstated to a position within that classification.

{¶ 4} ODOT then appealed the Board's order to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12 and 124.34. The common pleas court concluded that Berning was classified as a "career professional service" employee under R.C. 5501.20 and, therefore, was subject to specific disciplinary procedures pursuant to that statute. The court found that ODOT did not follow the statutory procedures before removing Berning from employment. The court further held that the Board's order constituted an error of law and that the Board should have disaffirmed the removal and instructed ODOT to follow the requirements of R.C. 5501.20. The common pleas court reversed the Board's order and remanded the matter to the Board for further proceedings. ODOT moved for reconsideration and the court denied the motion, concluding that it had no jurisdiction to reconsider the matter because it had entered a final judgment.

{¶ 5} ODOT appeals from the common pleas court's judgments, assigning the following error for this court's review:

The common pleas court erred and abused its discretion in reversing the decision of the State Personnel Board of Review disaffirming Thomas W. Berning's reduction in position at the Ohio Department of Transportation.

Within the context of its single assignment of error, ODOT presents two issues for this court's review:

1. The trial court abused its discretion by finding that Thomas W. Berning, as a career professional employee, was entitled to a written corrective action plan and six months to improve his unsatisfactory performance pursuant to R.C. § 5501.20. Berning's performance was not unsatisfactory; rather he was disciplined by the Ohio Department of Transportation for "neglect of duty."
2. The trial court abused its discretion by finding that Thomas W. Berning has not waived his ability to raise his status as a career professional employee, despite the undisputed fact that he failed to do so before the State Personnel Board of Review.

{¶ 6} We begin by considering ODOT's second issue, which asserts that Berning waived the argument that he was entitled to the disciplinary procedures under R.C. 5501.20 by failing to raise this argument at the administrative level, and that the lower court erred by not finding that this argument was waived. This presents a threshold issue because, if the argument was waived, then the trial court erred by remanding the case to the Board.

{¶ 7} In an administrative appeal under R.C. 119.12, a common pleas court reviews the entire record and determines whether an agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170 (10th Dist.), ¶ 43, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-11 (1980). On appeal from a determination by the common pleas court that an agency's order was supported by reliable, probative, and substantial evidence, this court reviews the lower court's decision for abuse of discretion. *Id.* at ¶ 44. "However, on the question of whether the agency's order was in accordance with law, this court's review is plenary." *Id.*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992). In this case, the common pleas court concluded that the Board erred as matter of law by not reversing the removal and ordering ODOT to follow the requirements of R.C. 5501.20; therefore, we exercise plenary review.

{¶ 8} R.C. 5501.20 provides that ODOT must establish a business plan, including designation of certain employees as "career professional service" employees. R.C. 5501.20(A)(1) defines the positions that fall within the career professional service classification. R.C. 5501.20(C) provides, in relevant part, that ODOT must give a career professional service employee whose performance is unsatisfactory an opportunity to improve, through a written corrective action plan, for a period of at least six months prior to taking any disciplinary action under R.C. 124.34 or 5501.20. The common pleas court found that Berning's position was classified as a career professional service position by ODOT. The court also found that there was no evidence that ODOT followed the requirements of R.C. 5501.20 in disciplining Berning.

{¶ 9} ODOT does not dispute that Berning was classified as a career professional service employee. Likewise, ODOT admits that Berning was not given a six-month period to improve his performance under R.C. 5501.20(C). However, ODOT argues that the common pleas court erred by reversing the Board on this basis, asserting that Berning waived this issue by failing to raise it during the administrative proceedings. In his brief, Berning concedes that he raised this issue for the first time in his appeal to the common pleas court.

{¶ 10} Courts generally hold that a party waives the right to appeal an issue that could have been but was not raised in earlier proceedings. *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304 (10th Dist.), ¶ 19; *Leslie* at ¶ 47. This principle has also been applied in appeals from administrative proceedings. See *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81-83 (1997); *Trish's Café* at ¶ 19; *Leslie* at ¶ 47. Thus, we have previously held that "[i]ssues not raised at the administrative level are waived." *Golden Christian Academy v. Zelman*, 144 Ohio App.3d 513, 516-17 (10th Dist.2001).

{¶ 11} The Supreme Court of Ohio explained the rationale for holding that errors or issues that were not previously raised are treated as waived in the *Quarto Mining* decision:

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause.

Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

Id. at 81. Furthermore, the court opined that failing to treat the argument as waived "would also open the door to forcing an already overworked [administrative agency] to comb the files of every * * * case [before it] in search of issues that could potentially be raised by both sides at the hearing table." *Id.* at 82-83.

{¶ 12} As noted above, Berning admits that he first raised the issue of his status as a career professional service employee and ODOT's failure to comply with R.C. 5501.20(C) in his appeal to the common pleas court. He did not raise this issue before the administrative law judge or in his objections to the administrative law judge's report and recommendation. However, despite Berning's failure to raise the issue at the administrative level, we find that the purposes underlying the waiver doctrine do not apply to this case.

{¶ 13} The Board is a specialized administrative agency with expertise in employment issues. *See Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 260 (1988). As the lower court noted, the Board must utilize this knowledge and apply the correct statutory mandates in considering appeals filed before it. The record presented to the Board's hearing examiner included a position description, which clearly indicated that ODOT classified Berning as a career professional service employee. Further, Ohio Adm.Code 5501-2-03 specifies that the position of Transportation Administrator is designated as a career professional service position. Finally, ODOT admits that Berning held a career professional service position, although, as discussed below, it argues that he was not entitled to a six-month corrective period. Thus, despite Berning's failure to raise this classification before the Board, it is clear that R.C. 5501.20 was part of the statutory framework that the Board should have applied in considering Berning's appeal. It was not necessary in this case for the Board to "comb the files" to be alerted to Berning's classification. Rather, consideration of his classification

would have been square one of the Board's analysis. Certainly, the Board considered Berning's position as Transportation Administrator and his classification when it decided that he should be reduced in classification to the position of Highway Technician.

{¶ 14} Given the unique circumstances presented in this case, we cannot say that the lower court erred in not applying the general rule that an argument not raised at the administrative level will be considered to have been waived. Therefore, the lower court did not err by failing to find that Berning waived the ability to raise his status as a career professional service employee by failing to assert this argument before the Board.

{¶ 15} Accordingly, we reject ODOT's argument on the second issue that it presents for this court's review.

{¶ 16} In the first issue that ODOT presents for this court's review, it asserts that the common pleas court erred in holding that Berning was entitled to a written corrective action plan under R.C. 5501.20 because Berning was disciplined for neglect of duty, rather than unsatisfactory performance.

{¶ 17} R.C. 5501.20(C) states that, after being appointed to a career professional service position, an employee will be given a written performance action plan describing ODOT's expectations for the employee in "fulfill[ing] the mission, business objectives, and strategies" in ODOT's business plan. The statute further provides that for employees in career professional service positions, "[ODOT] shall give an employee whose performance is unsatisfactory an opportunity to improve performance for a period of at least six months, by means of a written corrective action plan, before [ODOT] takes any disciplinary action under this section or section 124.34 of the Revised Code."

{¶ 18} However, ODOT argues that Berning was not entitled to a six-month corrective period under R.C. 5501.20(C) because he was dismissed for neglect of duty, rather than poor performance. ODOT argues that R.C. 5501.20(C) and the six-month performance improvement period only applies to performance that hinders or restricts the fulfillment of ODOT's business plan. In support of this argument, ODOT cites to R.C. 5501.20(D), which provides that "[a]n employee in the career professional service may be suspended, demoted, or removed because of performance that hinders or restricts the fulfillment of [ODOT's] business plan or for disciplinary reasons under section 124.34 or 124.57 of the Revised Code." ODOT further notes that, under R.C. 124.34(A), an employee

may be disciplined for "neglect of duty" or other specified reasons. Based on these statutory provisions, ODOT argues that an employee in a career professional service position may be terminated immediately for neglect of duty.

{¶ 19} We reject ODOT's argument because it is contrary to the plain language of the statute. The statute explicitly provides that ODOT shall give an employee whose performance is unsatisfactory a written corrective action plan and six-month period for improvement "before [ODOT] takes *any* disciplinary action under this section *or section 124.34* of the Revised Code." (Emphasis added.) R.C. 5501.20(C). Thus, assuming that ODOT sought to remove Berning from employment for neglect of duty pursuant to R.C. 124.34, R.C. 5501.20(C) required that ODOT give Berning a written corrective action plan and an opportunity to improve his performance before it could take *any* disciplinary action. This language does not support any distinction between disciplinary action pursuant to R.C. 124.34 under R.C. 5501.20(C) and disciplinary action under R.C. 5501.20(D), contrary to ODOT's argument.

{¶ 20} Accordingly, we reject ODOT's argument on the first issue that it presents for this court's review.

{¶ 21} For the foregoing reasons, ODOT's assignment of error is overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

BROWN, P.J., and BRYANT, J., concur.
