[Cite as *Pawloski v. Ohio Dept. of Transp.*, 2012-Ohio-4907.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Karen A. Pawloski,	:	
Appellant-Appellant,	:	No. 12AP-161 (C.P.C. No. 11CVF-10-12801)
v.	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on October 23, 2012

Moses Law Offices, L.L.C., and *Michael A. Moses*, for appellant.

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

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Appellant, Karen A. Pawloski, appeals from the judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"), in which the SPBR overruled appellant's objections to the report and recommendation of the administrative law judge ("ALJ"). In the report and recommendation, the ALJ recommended that the SPBR grant the motion to dismiss filed by the Ohio Department of Transportation ("ODOT") because appellant had no right to appeal her termination from employment with ODOT.

{¶ 2} Appellant worked for ODOT from April 20, 1987 to August 16, 1991, holding the classified positions of Assistant Liaison Officer 1, 2, 3, and 4, and Public Information Specialist 4 and 5. ODOT does not dispute that appellant served probationary terms from 1987 and 1991 in association with these classified positions. On March 19, 2007, appellant

was hired by ODOT in the unclassified position of Deputy Director 5. On June 6, 2010, appellant was promoted to the unclassified position of Deputy Director 6.

{¶ 3} On November 7, 2010, appellant accepted a voluntary demotion to the classified position of Management Analyst Supervisor 2. On January 28, 2011, ODOT informed appellant that she would serve a probationary period of 180 days, effective November 7, 2010. Also on January 28, 2011, ODOT terminated appellant's employment due to unsatisfactory performance.

{¶ 4} Appellant appealed her termination to the SPBR. On May 20, 2011, ODOT filed a motion to dismiss appellant's appeal. On August 23, 2011, the ALJ issued a report and recommendation, recommending that the SPBR grant ODOT's motion to dismiss. The ALJ found that, because appellant's assumption of the Management Analyst Supervisor 2 position was an "original appointment" under R.C. 124.27(C), she was subject to a probationary period, and the SPBR has no jurisdiction over employees terminated during their probationary period. Appellant filed objections to the ALJ's report and recommendation. On September 28, 2011, the SPBR overruled appellant's objections and adopted the ALJ's report and recommendation.

{¶ 5} Appellant appealed the SPBR's decision to the Franklin County Court of Common Pleas. On January 26, 2012, the court issued a judgment, in which the court affirmed the SPBR's order. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE DECISION OF THE LOWER COURT WAS ERRONEOUS INSOFAR AS IT AFFIRMED THE ORDER OF THE STATE PERSONNEL BOARD OF REVIEW DISMISSING AN EMPLOYEE'S APPEAL FROM THE APPELLEE'S REMOVAL PURSUANT TO R.C. SEC. 124.27 BECAUSE IT WAS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND WAS NOT IN ACCORDANCE WITH LAW.

{¶ 6} Appellant argues in her assignment of error that the common pleas court abused its discretion when it affirmed the SPBR's dismissal of her appeal. 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*, 63 Ohio St.2d 108 (1980).

{¶ 7} 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.*, 27 Ohio App.3d 214 (10th Dist.1985). 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.*, 11 Ohio App.3d 159 (10th Dist.1983). 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). 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.*, 63 Ohio St.3d 339 (1992).

{¶ 8} R.C. 124.27(C), the nearly identical provisions to which are now located in R.C. 124.27(B), provided during the pertinent time:

> All original and promotional appointments * * * but not intermittent appointments, shall be for a probationary period, not less than sixty days nor more than one year, to be fixed by the rules of the director * * *. No appointment or promotion is final until the appointee has satisfactorily served the probationary period. If the service of the probationary employee is unsatisfactory, the employee may be removed or reduced at any time during the probationary period. If the appointing authority decides to remove a probationary employee in the service of the state, the appointing authority shall communicate to the director the reason for that decision. A probationary employee duly removed or reduced in position

> for unsatisfactory service does not have the right to appeal the removal or reduction under section 124.34 of the Revised Code.

Thus, pursuant to R.C. 124.27(C), a probationary employee that is removed or reduced in position does not have a right to appeal the removal or reduction, as afforded in R.C. 124.34.

{¶ 9} Appellant argues that R.C. 124.27(C) applies only to original and promotional appointments and does not encompass voluntary demotions, such as the one she undertook here. Because the parties agree that appellant's appointment to the classified position was not "promotional," the sole issue before us is whether appellant's appointment to the classified position was an "original" appointment, as used in R.C. 124.27(C), so that the probationary period delineated in that section applied to her. The parties also agree that R.C. Chapter 124 does not define the term "original appointment."

{¶ 10} The ALJ determined in her report that Ohio law did not provide clear direction on the issue. However, this court has very recently issued decisions in two cases that address the major issue before us in the present case. In *Rayl v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-303, 2012-Ohio-4379, and *Fletcher v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-46, 2012-Ohio-3920, the employees began working for ODOT in unclassified service and then were voluntarily demoted to classified service. In both cases, ODOT informed the employees that, because their new positions were their first classified service positions with ODOT, they were required to serve a probationary period. Subsequently, ODOT terminated the employees by probationary removal due to unsatisfactory service. The SPBR in both cases dismissed the employees' appeals for lack of jurisdiction, and the trial court affirmed the SPBR's decisions. On appeal, this court found in *Fletcher*, which we subsequently relied upon in *Rayl*, that an original appointment occurs the first time an appointing authority places an employee into a position of classified service. *Fletcher* at ¶ 15; *Rayl* at ¶11. Thus, an employee in unclassified service who is placed into classified service for the first time by an appointing authority must serve a probationary period under R.C. 124.27(C).

{¶ 11} The facts in *Fletcher* and *Rayl* are congruous with those in the present case. In all three cases, the employees began working for ODOT in unclassified service and then

were demoted to classified service. Applying the precedent established in *Fletcher* and *Rayl* to the present case, appellant was required to serve a probationary term, pursuant to R.C. 124.27(C), when she was voluntarily demoted from the unclassified position of Deputy Director 6 to the classified position of Management Analyst Supervisor 2, and the SPBR lacked jurisdiction to address her subsequent termination.

{¶ 12} However, appellant's case differs in one aspect from *Fletcher* and *Rayl*, and appellant claims this distinction prevents her demotion to classified service from being an original appointment pursuant to R.C. 124.27(C). In the present case, unlike the employees in *Fletcher* and *Rayl*, appellant had previously worked for the same agency, ODOT, holding classified positions for which she served probationary terms. The ALJ in the present case found that distinction was irrelevant, as appellant had a 17-year break in service before being hired again by ODOT in 2007 as a new hire. The ALJ found that appellant could not argue that, by serving a probationary period during her first service with ODOT in 1987, she should not have to serve another probationary period as a new hire 17 years later because any tenured rights she would have earned during her first period of service would have been lost during the 17-year break in service. On this issue, the common pleas court also found that appellant failed to show that the classified positions she had held during her previous employment with ODOT from 1987 to 1991 were comparable to the job duties assigned to her in her latest classified position, and that the purpose of a probationary period is to demonstrate proficiency in a particular position and not just the initial position assigned upon service.

{¶ 13} We agree with the ALJ that appellant's prior classified service with ODOT was irrelevant to the issues in the present case because of her 17-year break in service. The court's determination in *Lucas Cty. Welfare Dept. v. Hebert*, 6th Dist. No. L-79-239 (Mar. 28, 1980), supports this conclusion. In that case, the employee was hired by the county in the position of Custodial Worker I, and he served a probationary term. He was then promoted to the position of Custodial Worker II. He was then promoted to the position of Painter and successfully completed a probationary period in that position. He was then laid off, and nine months later, the county abolished the position of Painter. Three days after abolishing the position of Painter, the county hired the employee to fill the position of Custodial Worker I, which was the same position the employee had

previously held. Several months later, while serving the new probationary period, the employee was terminated, and he filed an appeal with the SPBR. The SPBR found the second appointment as custodial worker was not an original appointment under R.C. 124.27, because the word "original" suggests a primary or first appointment to a position, which was not what had occurred in that case. The common pleas court reversed the SPBR's decision, finding the appointment was an original appointment subject to a probationary period. Upon further appeal, the court of appeals in *Hebert* also found that the employment was an original appointment subject to the probationary period in R.C. 124.27.

{¶ 14} *Hebert* is clearly contrary to appellant's argument that her prior employment as either a classified or unclassified employee, or her serving previous probationary periods during her prior employment, precluded her later appointment to a classified position after a break in service from being an original appointment. The court in *Hebert* found that the appointment of the employee in that case was an original appointment, despite that the employee had been previously employed by the county, previously held the exact same job, and served a previous probationary period for the same position and a previous probationary period for another position. In other words, a break in service with the same employer requires the employee to serve another probationary period under R.C. 124.27 upon her return to classified service, even if the employee had been in classified service and served a probationary period with the same employer prior to the break in service. *See Hebert*.

{¶ 15} Applying the holding in *Hebert* to the present case, appellant's break in service with ODOT required her to serve another probationary term when she was subsequently demoted to classified service by ODOT, even though she had been in classified service and served probationary periods with ODOT prior to the break in service. Appellant's completion of a probationary period at ODOT prior to a break in service did not exempt her from all future probationary periods required by ODOT after the break in service. Therefore, appellant's voluntary demotion was an original appointment to classified service, and she was a probationary employee when she was terminated. Pursuant to former R.C. 124.27(C), appellant did not have the right to appeal ODOT's decision to remove her for unsatisfactory service during her probationary period;

thus, SPBR lacked jurisdiction to hold a hearing. The trial court properly affirmed SPBR's order because the order was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶ 16} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 17} I respectfully dissent for two separate reasons. First, I do not see Karen Pawloski's move to an unclassified position as making her service an "original appointment" after she had already served the State of Ohio for years and after she had already served two probationary periods.

{¶ 18} Second, R.C. 124.27(C) allows an employee to be fired if their service during the probationary period is "unsatisfactory." There is nothing in the record before us to show that her service was actually unsatisfactory. Instead, the appearances in this case are that she was fired by the new Republican administration shortly after it came into office because she was an active Democrat. She was told she was serving a probationary period and was fired on the very same day. She had no time to perform in an unsatisfactory manner.

{¶ 19} The statute says a state employee can be removed without a right to appeal to the State Personnel Board of Review ("SPBR") when the removal is for unsatisfactory service. The employee does not lose the right to appeal when the claim of unsatisfactory service is clearly a sham. The SPBR should be required to conduct proceedings at least on the issue of whether Karen Pawloski did in fact render unsatisfactory service during the few hours, or possibly the few minutes or seconds, between when she was told she was on a probationary period and when she was fired. Classified employees for the State of Ohio, even those serving probationary periods, should not be fired for no reason whatsoever—let alone for what appears to be purely political reasons.

{¶ 20} I would reverse the judgment of the common pleas court and send this case back to the SPBR for it to determine if Karen Pawloski's service in a classified service position was actually unsatisfactory.

{¶ 21} If her service was not unsatisfactory, then she has a right for a full hearing on all pertinent issues before the SPBR.

{¶ 22} Again, I respectfully dissent.
