[Cite as *Bryant v. Hamilton Civ. Serv. Comm.*, 2009-Ohio-3676.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MICHAEL BRYANT,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-10-243
	:	O P I N I O N
- vs -		7/27/2009
	:	
CIVIL SERVICE COMMISSION, HAMILTON, OHIO, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV07-06-2347

Fred S. Miller, Baden & Jones Building, 246 High Street, Hamilton, Ohio 45011, for plaintiff-appellant

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HENDRICKSON, J.

{¶1} Plaintiff-appellant, Michael Bryant, appeals from a judgment of the Butler County Court of Common Pleas which affirmed a decision of the city of Hamilton Civil Service Commission terminating his employment. For the reasons outlined below, we reverse and remand.

{¶2} Bryant was employed as a police officer for the city of Hamilton Police

Department (HPD) from June 1998 to May 2007. In October 2006, Bryant was disciplined for unbecoming conduct, truthfulness, and failure to obey a direct order. He was suspended for three days and prohibited from working any extra duty assignments for five months. The internal affairs investigation which led to this sanction was conducted by Captain Joseph Murray, Lieutenant Scott Scrimizzi, and Sergeant Michael Waldeck.

{¶3} In early 2007, Captain Murray received an unsolicited subscription to Cosmopolitan Magazine along with a bill for $54.00. The bill indicated that subscriptions had also been sent to Lieutenant Scrimizzi and Sergeant Waldeck. This prompted an internal affairs investigation. Bryant eventually admitted to forging the subscriptions as a "stupid joke," but denied doing so in retaliation for his previous suspension.

{¶4} As a result of the investigation, Bryant was discharged from his employment with the HPD for violating several departmental rules of conduct. These included unbecoming conduct, respect required to superiors, relationships with others, and conformance to laws. On appeal, the termination was first upheld by the Hamilton Civil Service Commission (the commission), and then by the common pleas court. Bryant timely appeals, raising two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT APPLIED AN IMPROPER STANDARD OF REVIEW OF THE CIVIL SERVICE COMMISSION DECISION AND RECOMMENDATION."

{¶7} Bryant argues that reversal is required because the common pleas court improperly reviewed the commission's decision for an abuse of discretion rather than conducting a de novo review. We agree that Bryant was entitled to a trial de novo,

which is not exactly the same as a de novo review.[1]

{¶8} The suspension, demotion, or removal of civil servants is governed by R.C. 124.34. The version of the statute in effect at the time Bryant was terminated[2] states, in pertinent part:

{¶9} "The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No such officer or employee shall be * * * removed, except * * * for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony." R.C. 124.34(A).

{¶10} The statute goes on to specify the termination and appeals processes when a civil servant is found to have violated one or more of the above-quoted prohibitions. R.C. 124.34(B) is implicated for the majority of civil service employees, while R.C. 124.34(C) is implicated when the employee is a member of the police or fire departments of a city or civil service township. This is an important distinction, as the method of review employed by the common pleas court varies depending upon which subsection applies.

{¶11} Both subsections (B) and (C) require the appointing authority to provide

1. A de novo review involves "an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." Black's Law Dictionary (7th Ed.2001) 94. In comparison, a trial de novo involves "[a] new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance." Id. at 1512.

the employee with a copy of the order of removal which states the reasons for the removal. Both subsections also permit the employee to appeal the removal, first to the state personnel board of review or municipal civil service commission, and then to the common pleas court. However, it is here that the key distinction between the two subsections lies.

{¶12} Subsection (B), which applies to most civil service employees, explains the discretionary right of appeal to the common pleas court under that subsection as follows:

{¶13} "In cases of removal * * *, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides *in accordance with the procedure provided by section 119.12 of the Revised Code*." (Emphasis added.)

{¶14} R.C. 119.12, the statute governing administrative appeals, specifies that the court of common pleas may affirm the agency's decision if the court finds "that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." This is the standard of review that was employed by the common pleas court in the case at bar.

{¶15} Referring back to R.C. 124.34(C), however, one finds that a different standard is applicable when the employee is a member of the police or fire departments. The discretionary right of appeal to the common pleas court under subsection (C) is delineated as follows:

{¶16} "An appeal *on questions of law and fact* may be had from the decision of

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2. Not long after Bryant's termination, R.C. 124.34 was amended by 2006 H 187, effective July 1, 2007. The statute was further amended by 2009 H 16, effective June 1, 2009.

the municipal or civil service township civil service commission to the court of common pleas in the county in which such city or civil service township is situated." (Emphasis added.)

{¶17} The Ohio Supreme Court held that a police officer's appeal on questions of law and fact contemplates a trial de novo. *Cupps v. Toledo* (1961), 172 Ohio St. 536, paragraph two of the syllabus (construing R.C. 143.27, the predecessor to R.C. 124.34). See, also, R.C. 2505.01(A)(3) (defining the phrase "appeal on questions of law and fact" to mean "a rehearing and retrial of a cause upon the law and the facts"). Thus, when the removal involves a member of the police or fire departments, subsection (C) controls and provides for a trial de novo on appeal from the commission's decision to the common pleas court.

{¶18} Turning to the present matter, the commission argues that the review conducted by the common pleas court was sufficient to constitute a de novo review. However, it is evident from the language in the court's decision that the court mistakenly employed the wrong standard in reviewing the commission's decision. As a member of the police department, Bryant's case fell within R.C. 124.34(C). Bryant was therefore entitled to a trial de novo in his appeal before the common pleas court. *Cupps* at paragraph two of the syllabus.

{¶19} The scope of review contemplated by a trial de novo is governed by the provisions of R.C. Chapter 2505, to the extent that they are applicable. *Chupka v. Saunders* (1986), 28 Ohio St.3d 325, 327. In a trial de novo, the common pleas court independently examines the record as it appeared before the commission. Id. The court has the discretion to permit a party to supplement the record with additional evidence if it so chooses. Id. at 328. Unlike some other administrative appeals, the common pleas court is empowered to substitute its own judgment for that of the

commission. Id. at 327. The court may "dispose of all issues of law and of fact as though no proceeding had been held before the commission." *Newsome v. Columbus Civ. Serv. Comm.* (1984), 20 Ohio App.3d 327, 329. The burden of proof during such a trial is placed on the appointing authority, which must prove the truth of the charges against the terminated employee by a preponderance of the evidence. *Cupps* at 538-39.

{¶20} We observe that our ruling in the present matter conflicts with a decision rendered by this court just over two decades ago. In *Holtzberger v. Civ. Serv. Comm.* (Apr. 13, 1987), Butler App. No. CA86-06-094, 1987 WL 9753, we addressed an appeal involving a Hamilton police officer who was suspended for three days as the result of a verbal altercation between him and another officer. The suspension was upheld by the commission and by the common pleas court. On appeal to this court, Holzberger argued that the common pleas court applied the wrong standard of review when it concluded that the commission's decision was supported by reliable and probative evidence. We agreed that Holzberger was entitled to a trial de novo, but held that the lower court's failure to perform such a review constituted harmless error on three fronts.

{¶21} First, there was no conflicting testimony regarding whether Holzberger violated departmental rules. Holzberger admitted to using foul and threatening language towards the other officer. Because there were no factual disputes, the common pleas court did not have to independently resolve any questions of fact. We concluded that although the common pleas court should have independently stated its findings of fact, this omission amounted to harmless error due to the absence of any factual issues.

{¶22} Second, the common pleas court failed to resolve a legal question regarding whether the officer with whom Holzberger had the argument was his

"supervisor," so that Holzberger was actually threatening or abusing a supervisor. While we agreed that the common pleas court should have independently addressed and resolved this legal dispute, we found that the omission amounted to harmless error in light of the fact that we resolved the issue later in our opinion.

{¶23} Third, the common pleas court failed to make any independent findings regarding the appropriate sanction for Holzberger's infraction. Again, we concluded that this was harmless error in view of the common pleas court's conclusion that the commission's decision was supported by the evidence.

{¶24} In the present matter, the commission maintains that Bryant's case is indistinguishable from *Holzberger* because there were no factual disputes for the common pleas court to resolve. Particularly, there were no factual disputes regarding the central issue, that is, whether Bryant was responsible for sending in the magazine subscriptions for the three officers. To the extent that the common pleas court failed to express that its conclusions were based upon an independent review of the record, the commission asserts, this amounted to harmless error.

{¶25} We must now determine whether *Holzberger* should be applied to the present matter as controlling precedent. We begin by noting that the doctrine of stare decisis is a revered means for ensuring continuity and predictability in our justice system. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶43. Even so, a steadfast adherence to this doctrine is not warranted when a reviewing court discovers that one of its prior decisions was erroneous. Id. Only when there is a "special justification" shall a reviewing court depart from the doctrine of stare decisis. Id. at ¶44. The Ohio Supreme Court has developed a three-part test for determining whether to overrule a prior decision, stating:

{¶26} "Thus, in Ohio, a prior decision of the Supreme Court may be overruled

where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." Id. at ¶48.

{¶27} Although the high court set forth this test in the context of determining whether to overrule one of its own decisions, it stands to reason that a state court of appeals may appropriately apply the same factors in deciding whether to overrule one of its prior decisions. Consequently, these factors guide our scrutiny of *Holzberger*.

{¶28} As stated, the lower court in *Holzberger* applied the wrong standard in reviewing the commission's decision. The plain language of R.C. 124.34(C) and high court case law addressing the issue clearly indicate that a police officer appealing his termination to the common pleas court is entitled to a trial de novo on appeal from the commission's decision. A trial de novo is very different from applying the "reliable, probative, and substantial evidence" standard of review. The common pleas court is not encumbered by the commission's decision and has the discretion to admit new evidence. A common pleas court could feasibly find itself confronted with a different record and reach a different result than the commission under such circumstances. Consequently, although the application of the harmless error standard was perhaps a technically viable method for disposing of the appeal, the *Holzberger* court should have sent the case back in order for the common pleas court to conduct a trial de novo. We therefore conclude that *Holzberger* was wrongly decided.

{¶29} In order to preserve the correct standard of review in cases involving R.C. 124.34(C), reviewing courts should be consistent in addressing appeals under this subsection. In view of our decision in the present matter, *Holzberger* has lost its practical workability. In addition, it is doubtful that undue hardship would result if we

were to overrule *Holzberger*. The case is just over two decades old, and has not been cited extensively. Thus, it is clear that the case has not "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶58, quoting *Robinson v. Detroit* (2000), 462 Mich. 439, 466.

{¶30} We hold that a trial de novo is mandatory in cases where the administrative appeal is governed by R.C. 124.34(C). *Holzberger v. Civ. Serv. Comm.* is hereby overruled. Because the common pleas court did not conduct a trial de novo on Bryant's appeal from the commission's decision upholding his termination, Bryant's first assignment of error is sustained.

{¶31} Assignment of Error No. 2:

{¶32} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT DETERMINED THAT TERMINATION OF EMPLOYMENT WAS THE PROPER REMEDY FOR BRYANT'S MISCONDUCT."

{¶33} Although Bryant concedes that some form of punishment was warranted by his foolish conduct, he maintains that termination was too severe in light of his favorable record of service with the HPD. However, Bryant's second assignment of error has been rendered moot by our disposition of his first assignment of error. Consequently, we need not address it. See App.R. 12(A)(1)(c).

{¶34} Due to the common pleas court's failure to conduct a trial de novo, the decision of the common pleas court is reversed and this matter is remanded for proceedings consistent with this opinion.

{¶35} Reversed and remanded.

{¶36} POWELL, P.J., and YOUNG, J., concur.