[Cite as *O'Neill v. Tremont,* 2009-Ohio-3768.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

JAMES O'NEILL	:	
	:	Appellate Case No. 08-CA-66
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-CV-1496
v.	:	
	:	(Civil Appeal from
VILLAGE OF TREMONT	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 31st day of July, 2009.

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FAIN, J.

{¶ 1} In this administrative appeal, defendant-appellant Village of Tremont (Tremont) appeals from a trial court decision rendering judgment on the pleadings in favor of plaintiff-appellee James O'Neill. Tremont contends that the trial court erred in substituting its judgment for that of the Tremont Village Council. Tremont also contends that the trial court erred in concluding that the council members could not be neutral and detached fact-finders concerning the charge that O'Neill abused the Ohio Law

Enforcement Gateway (OHLEG).

{¶ 2} We conclude that the trial court did not improperly substitute its judgment for that of the council. The trial court did not abuse its discretion in concluding that Tremont's decision to terminate O'Neil was unreasonable or unsupported by substantial, reliable, and probative evidence. In view of this holding, the assignment of error relating to the alleged lack of neutrality of council members is moot. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} James O'Neill was hired as a captain in the Tremont Village Police Department in August 2002. O'Neill was subsequently promoted to Chief of Police in June 2004, and served in that capacity until notified in October 2007, of his suspension, pending removal. On November 5, 2007, Tremont held a public hearing, which was attended by Mayor Jeff Clippenger and the six village council members. These council members were Robert Evans, Tony Flood, Paula Johnson, Jane Athey, Doug Pendleton, and Mark Hunger. Also present at the hearing were O'Neill, and attorneys representing O'Neill and Tremont.

{¶ 4} Clippenger had earlier presented O'Neill with nine written charges, including: (1) incompeteny [sic]; (2) inefficiency; (3) dishonesty; (4) insubordination; (5) discourteous treatment to the public; (6) neglect of duty; (7) misfeasance; (8) malfeasance; and (9) nonfeasance. The first charge was based on a few police reports that contained missing or incorrect information.[1] The second charge and fourth charges

[1]There was no evidence offered at the hearing to indicate that Chief O'Neill filled

were both based on O'Neill's decision not to cite a minor on a third charge of violating curfew; instead, O'Neill escorted the minor back to his parents' home.

{¶ 5} The third and fifth charges were both based on O'Neill's use of OHLEG to check the criminal records of two council members, Tony Flood and Mark Evans. Flood alleged at the hearing, but offered no proof, that the Chief had conducted the searches because he was upset with Council for its having entered into a mutual aid agreement with German Township. O'Neill indicated at the hearing that he checked OHLEG because he had received a complaint that Flood had been convicted of domestic violence. O'Neill learned that Flood had been charged but not convicted, and did not pursue the matter further. O'Neill also indicated that he had checked Evans's record due to some irregularities, and had learned that Evans had a number of criminal convictions, including felony theft and forgery. O'Neill alerted the Mayor about this issue, but did not disseminate the information to anyone else at that time.

{¶ 6} The sixth charge was based on O'Neill's alleged failure to timely process a juvenile assault charge. The charge, which involved a fractured toe, was received by the police on September 25, 2007, and charges were filed around October 2, 2007, seven days later.

{¶ 7} At the end of the hearing, the Mayor stated that he had nothing to offer on the remaining three counts. Thus, the actual charges involved four matters. Prior to the executive session, Flood moved to vote on all charges collectively, instead of considering them separately, and this motion was seconded. Following an executive session, O'Neill was removed from office. However, Tremont has never given O'Neill a

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out these reports or was involved with the reports.

written notice of removal. Following council's decision, O'Neil filed an appeal with the Clark County Common Pleas Court.

{¶ 8} After the transcript of the public hearing was filed, O'Neill filed a motion for judgment on the pleadings, or in the alternative for summary judgment. The trial court then rendered judgment on the pleadings in favor of O'Neill. The court concluded that council members Flood and Evans could not have been detached and neutral fact-finders, because they were the target of the alleged unauthorized searches. Consequently, the court concluded that the two council members' inherent partiality tainted the entire vote, since the record indicated that council voted on the pending charges collectively, rather than separately. The trial court also found that the isolated instances in the record did not justify O'Neill's removal.

{¶ 9} From the judgment of the trial court, Tremont appeals.

II

{¶ 10} Tremont's First Assignment of Error is as follows:

{¶ 11} "THE REVIEWING COURT ERRED WHEN IT SUBSTITUTED ITS JUDGMENT FOR THAT OF THE VILLAGE COUNCIL."

{¶ 12} Under this assignment of error, Tremont argues that the trial court improperly substituted its judgment for that of the Village Council. We disagree.

{¶ 13} O'Neill's appeal of his removal was brought pursuant to R.C. 737.171, which provides removal procedures for marshals, and pursuant to R.C. 2506.01(A), which authorizes appeals from administrative decisions of political subdivisions. R.C. 737.171 provides, in pertinent part, that:

{¶ 14} "[I]f the mayor of a village has reason to believe that a duly appointed marshal of the village has been guilty of incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other acts of misfeasance, malfeasance, or nonfeasance in the performance of the marshal's official duty, the mayor shall file with the legislative authority of the village written charges against that person setting forth in detail the reason for the charges and immediately shall serve a true copy of the charges upon the person against whom they are made.

{¶ 15} "Charges filed under this section shall be heard at the next regular meeting of the legislative authority occurring not less than five days after the date those charges have been served on the person against whom they are made. The person against whom those charges are filed may appear in person and by counsel at the hearing, examine all witnesses, and answer all charges against that person.

{¶ 16} "At the conclusion of the hearing, the legislative authority may dismiss the charges, suspend the accused from office for not more than sixty days, or remove the accused from office.

{¶ 17} "Action of the legislative authority removing or suspending the accused from office requires the affirmative vote of two-thirds of all members elected to it.

{¶ 18} "In the case of removal from office, the person so removed may appeal on questions of law and fact the decision of the legislative authority to the court of common pleas of the county in which the village is situated. The person shall take the appeal within ten days from the date of the finding of the legislative authority."

{¶ 19} R.C. 2506.01(A) also allows aggrieved parties to appeal administrative

decisions of political subdivisions. This remedy is in addition to other remedies provided by law. R.C. 2501.06(B). The scope of review of administrative orders is provided for in R.C. 2506.04, as follows:

{¶ 20} "The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided by the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

{¶ 21} In appeals brought under R.C. Chapter 2506, the common pleas court "must weigh the evidence in the record and may consider new or additional evidence." *Smith v. Granville Twp. Board of Trustees,* 81 Ohio St.3d 608, 612,1998-Ohio-340. However, review of the trial court's decision by a court of appeals is " ' more limited in scope.' " *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 147, 2000-Ohio-493 (citation omitted). Common pleas court judgments may be reviewed " 'only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." * * * Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' " Id. (citations omitted). "Within the ambit of 'questions of law' for appellate court review

would be abuse of discretion by the common pleas court." *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34, n. 4. Accord *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 147, 2000-Ohio-493.

{¶ 22} In contending that the common pleas court improperly weighed the facts, Tremont relies on *In re Walker* (1961), 171 Ohio St. 177, which held that "the removal by the legislative authority, if regular in procedure, should not be reversed if the charges were related to and affected the administration of the office and there was credible evidence in support of any one or more of the charges on which the legislative authority caused such removal." Id. at paragraph two of the syllabus. Tremont contends that the trial court erred in reversing O'Neill's removal because there is credible evidence to support each charge against O'Neill.

{¶ 23} The relevant statutes in *In re Walker*, supra, were R.C. 733.36, which provided that the action of the legislative authority in removing the officer "shall be final," subject to the provision in R.C. 737.15 that "[i]n the case of the removal of a marshal or chief of police of a village, an appeal may be had from the decision of the legislative authority to the Court of Common Pleas *to determine the sufficiency of the cause of removal*`." (Emphasis supplied by the Supreme Court of Ohio in *In re Walker*, supra, at 182. The Ohio Supreme Court made it clear that it was limited to the facts as found by the legislative authority in reviewing the sufficiency of those facts as a cause for removal.

{¶ 24} The statute that the parties agree controls this case, R.C. 737.171, provides that: "In the case of removal from office, the person so removed may appeal on questions of law and fact the decision of the legislative authority to the court of

common pleas of the county in which the village is situated." The ability to appeal on questions of fact, as well as on questions of law clearly permits the common pleas court to weigh the evidence, without being limited by the findings of fact made by the legislative authority of the municipality.

{¶ 25} As a further matter, we note that Tremont has not raised the issue of whether the trial court erred procedurally in granting judgment on the pleadings rather than rendering summary judgment. A review of the record indicates that the trial court did consider matters outside the pleadings – namely, the transcript of the public hearing.

{¶ 26} Under Civ. R. 12(C), any party may move for judgment on the pleadings after the pleadings are closed. "The trial court's inquiry is restricted to the material allegations in the pleadings and any attachments thereto. * * * Furthermore, the trial court must accept material allegations in the pleadings and all reasonable inferences as true." *Business Data Sys., Inc. v. Figetakis*, Summit App. No. 22783, 2006-Ohio-1036, at ¶7. In *Business Data Sys*., the court of appeals held that the trial court's error in considering materials outside the pleadings was not harmless, because Civ. R. 12(C) does not provide a mechanism for converting motions for judgment on the pleadings into summary judgment motions. Id. at ¶9.

{¶ 27} The present case is distinguishable, because O'Neill alternatively moved for summary judgment, meaning that Tremont had notice of the summary judgment motion and also had an opportunity to object or respond. Any error was, therefore, waived. See, *e.g.*, *Shariff v. Rahman*, 152 Ohio App.3d 210, 215, 2003-Ohio-1336, at ¶ 9 (holding that error in considering matters outside the pleadings is waived where the opposing party fails to object to consideration of a summary judgment motion and fails to

submit materials). Accord *McCory v. Clements*, Montgomery App. No. 19043, 2002-Ohio-2060 (concluding that procedural error is waived where a party fails to object either in trial court or on appeal).

{¶ 28} Tremont did not object in the trial court to consideration of the summary judgment motion, nor did it submit any factual materials, other than the transcript of the council hearing, which was filed with the court before O'Neill moved for judgment on the pleadings, or alternatively for summary judgment. As was noted, Tremont also has not raised this point on appeal.

{¶ 29} Tremont does argue that the trial court improperly substituted its judgment for the council, because the evidence before the council was conflicting. In this regard, Tremont points to the testimony of an individual who complained about a delay in filing charges against a juvenile who had assaulted her son. The trial court did not resolve conflicts in testimony; instead, it concluded that a delay of seven to nine days in filing charges was not an undue delay.

{¶ 30} Tremont also failed to offer any evidence at the council hearing to show that O'Neill's use of OHLEG was improper. O'Neill's explanation indicates that his use of the system was appropriate, and no proof was offered to rebut his statement or to show that the system was improperly used. The remaining charges were rejected by the trial court as isolated instances that do not "rise to the level of inefficiency, insubordination, neglect of duty, misfeasance, malfeasance, or nonfeasance." August 5, 2008 Entry, p. 1. The trial court concluded, in essence, that Tremont's decision was "unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04.

{¶ 31} We review the trial court's decision for abuse of discretion. *Kisil*, 12 Ohio St.3d 30, 34, n. 4; *Henley,* 90 Ohio St.3d 142, 147. An 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 (citation omitted). After reviewing the trial court's decision and the record, we cannot conclude that the court's decision was unreasonable, arbitrary, or unconscionable. The trial court confined itself to the review permitted in administrative appeals, and concluded that the decision was not properly supported by the evidence. This was not an unreasonable, arbitrary, or unconscionable decision.

{¶ 32} Tremont's First Assignment of Error is overruled.

III

{¶ 33} Tremont's Second Assignment of Error is as follows:

{¶ 34} "THE REVIEWING COURT ERRED WHEN IT STATED THAT COUNCIL MEMBERS FLOOD AND EVANS COULD NOT BE NEUTRAL AND DETACHED FACT FINDERS REGARDING THE ISSUE OF THE CHARGE THAT JAMES O'NEILL ABUSED THE ATTORNEY GENERAL'S DATA BASE, OHLEG."

{¶ 35} The trial court also concluded that the participation and inherent partiality of two council members who were the subject of the alleged improper OHLEG searches tainted the entire outcome of the proceeding. Tremont contends under the Second Assignment of Error that O'Neill waived arguments about the partiality of the council members by failing to object at the public hearing. Tremont also contends that the trial court failed to consider R.C. 737.171, which requires the affirmative vote of two-thirds of

the elected members of a legislative authority before an accused may be removed or suspended from office. Tremont points out that if a six-member council exists, four would have to concur in the action. Therefore, if a police chief improperly investigates three council members by using OHLEG, the issue could not be brought before council.

{¶ 36} We need not consider these arguments, based on our resolution of the First Assignment of Error. Because the trial court properly exercised its discretion, we must affirm the decision, and the court's additional reasons for its decision are irrelevant.

{¶ 37} Tremont's Second Assignment of Error is overruled as moot.

IV

{¶ 38} Tremont's First Assignment of Error having been overruled, and the Second Assignment of Error having been overruled as moot, the judgment of the trial court is Affirmed.

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BROGAN and FRENCH, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

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