

[Cite as *Roberts v. Wellston*, 2004-Ohio-606.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

Roy Roberts,	:	
	:	
Plaintiff-Appellant,	:	
	:	Case No. 03CA14
v.	:	
	:	<u>DECISION AND</u>
City of Wellston, Ohio, et al.,	:	<u>JUDGMENT ENTRY</u>
	:	
Defendants-Appellees.	:	FILE-STAMPED DATE: 2-04-04
	:	

APPEARANCES:

Daniel H. Klos, Columbus, Ohio, for appellant.

Joseph D. Kirby, Jackson, Ohio, for appellee.

Kline, P.J.:

{¶1} Roy Roberts (“Roberts”) appeals the decision of the Jackson County Court of Common Pleas, finding that he was a probationary employee at the time the City of Wellston terminated his employment as a full-time patrolman, upholding both his removal by the hiring authority of the City of Wellston, and the decision of the Wellston Civil Service Commission denying his request for a

hearing. Because we find that the City failed to carry its burden of proving that Roberts was a probationary employee at the time of his dismissal, we reverse the decision of the trial court and remand this cause for further proceedings consistent with this opinion.

I.

{¶2} On September 4, 1998, the City appointed Roberts as a part-time patrolman for the Wellston Police Department (“Police Department”). Pursuant to his letter of appointment, he was to work no more than 31 scheduled hours in any workweek, and was to be compensated at a rate of \$6.25 per hour. The letter of appointment did not specify that Roberts would be subject to any probationary period, although Roberts acknowledged in his testimony that he was to serve a one-year probationary period after this appointment.

{¶3} The record reflects that Roberts had back surgery in December 1998. As a result, in March or April of 1999, Roberts assumed dispatching duties for the Police Department. The parties dispute whether Roberts continued to serve as a part-time patrolman after he assumed dispatching duties and before his appointment as a full-time patrolman on October 14, 2001. Roberts contends that in addition to his duties as a dispatcher/communications officer, he continued to serve as a part-time police officer. The City contends that Roberts ceased to be a

patrolman when he assumed the duties of a dispatcher/communications officer, and therefore, Roberts failed to satisfactorily complete his one-year probationary period as a part-time patrolman. Consequently, the City claims that Roberts commenced a new one-year probationary period upon his appointment as a full-time patrolman. The parties do not dispute that Roberts worked continuously for the Police Department from September 4, 1998 until his removal on August 19, 2002.

{¶4} On August 19, 2002, the City informed Roberts of his dismissal from his position as a full-time patrolman both orally, and in writing. In its dismissal letter, the City informed Roberts that he was subject to a one-year probationary period pursuant to R.C. 124.27, and that the City was dismissing him due to: 1) his failure to secure and/or observe a detainee, that resulted in the detainee's escape; and, 2) his improper handling of a police investigation, including his failure to properly classify the offense as a burglary, his failure to follow proper procedures in the course of the investigation, and his failure to collect evidence at the scene of the offense.

{¶5} On August 26, 2002, Roberts appealed his dismissal to the City of Wellston Civil Service Commission ("Civil Service Commission"). The Civil

Service Commission met on September 13, 2002, denied his request for a hearing, and upheld his dismissal.

{¶6} Roberts filed a timely notice appealing the Civil Service Commission's denial of hearing in the Jackson County Court of Common Pleas. The trial court conducted a hearing on the matter on January 30, 2003. On April 30, 2003, the trial court issued a decision and order, wherein it found, in relevant part, that:

1) Roberts was originally hired by the City on September 4, 1998; 2) Roberts had back surgery in December 1998 and was unable to perform the duties of a part-time police officer during his one-year probationary period; 3) During his one-year probationary period, Roberts began serving as a dispatcher and continued in that capacity until his appointment as a full-time police officer on October 14, 2001; 4) Roberts did continue limited police officer duties until February 14, 2000, but after that date, there was no evidence that Roberts performed any police officer duties until his appointment as a full-time police officer on October 14, 2001; and 5) at the time of his full-time appointment, Roberts was placed on a one-year probationary period as a full-time police officer. Accordingly, the trial court concluded that Roberts was a probationary employee at the time of his termination, and therefore, was not entitled to a hearing before his termination.

{¶7} Roberts timely appealed the trial court's decision, arguing that: he completed his probationary period before August 19, 2002; he was entitled to a hearing as a non-probationary employee before his termination on August 19, 2002; and, the trial court's decision was against the manifest weight of the evidence, arbitrary and capricious, and the court failed to consider evidence in his favor.¹ For purposes of our review, we shall treat Roberts' arguments as two assignments of error, as follows: I. The trial court's determination that Roberts was a probationary employee at the time of his dismissal and, therefore, was not entitled to a hearing prior to such dismissal was against the manifest weight of the evidence, arbitrary and capricious, contrary to law; and, II. The trial court abused its discretion by failing to consider evidence in favor of Roberts.

II.

{¶8} Here, the sole issue before the trial court was whether Roberts was a probationary employee at the time of his dismissal such that he does not have a right to appeal his removal. The courts of Ohio have long held that a probationary employee has no property interest in continued employment sufficient to warrant procedural due process protection because his appointment is not final until he

¹ Roberts failed to state his assignments of error in his brief, contrary to the requirements of App.R. 16(A)(3). However, his assignment of error is discernable from his arguments. Therefore, in the interest of justice, we consider his arguments.

satisfactorily completes his probationary period. *State ex rel. Rose v. Ohio Dept. of Rehab. & Corr.* (2001), 91 Ohio St.3d 453, 458, citing *Walton v. Montgomery Cty. Welfare Dept.* (1982), 69 Ohio St.2d 58, 64; *Jacomin v. Cleveland* (1990), 70 Ohio App.3d 163, 168; *Taylor v. Middletown* (1989), 58 Ohio App.3d 88, 91-92; R.C. 124.27. Thus, a determination of Roberts' status as either a probationary or non-probationary employee is dispositive of Roberts' right to appeal his removal from his position as a Wellston police officer.

{¶9} O.R.C. 124.27(C) provides in relevant part: “* * * original appointments to a police department as a police officer * * * shall be for a probationary period of one year, and 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's decision is to remove the appointee, the appointing authority's communication to the director shall indicate 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.”

{¶10} Roberts argues that his “original appointment” as a police officer occurred on September 4, 1998, when the City appointed him as a part-time patrolman. He argues that he continuously served the City as a police officer from the date of his original appointment until his removal on August 19, 2002. Roberts also claims that his duties as a dispatcher or communications officer from April 1999 to October 13, 2001 were in addition to his duties as a part-time police officer. In contrast, the City argues that Roberts ceased to serve as a part-time police officer in April 1999, when he assumed the duties of a dispatcher or communications officer. Therefore, the City argues that Roberts “original appointment” as a police officer occurred on October 14, 2001, when he was appointed as a full-time police officer. We find that Roberts status as either a probationary or non-probationary employee depends upon the definition of “original appointment” as the term is used in R.C. 124.27, and whether Roberts satisfactorily served the probationary period following his original appointment.

{¶11} We interpret statutes and their application de novo, without deference to the trial court's determination. *State v. Hiatt* (1997), 120 Ohio App.3d 247, 254, citing *State v. Sufronko* (1995), 105 Ohio App.3d 504; *State v. Boso* (Sept. 11, 1996), Washington App. No. 95 CA 10. However, our review of the trial court’s factual determinations is more limited in scope, in that we review the decision of

the trial court to determine whether it is against the manifest weight of the evidence. *Beyersdoerfer v. Shocket* (1994), 93 Ohio App.3d 647, 650. We will not reverse a judgment supported by some competent, credible evidence going to all the essential elements of the case as being against the manifest weight of the evidence. *C. E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶12} R.C. Chapter 124 does not define the term “original appointment.” The term also appears in R.C. Chapter 4112, but again, the term is undefined. Additionally, we note that neither party has introduced any evidence of any Wellston Civil Service Commission rules, personnel manual, the contract between the City and the Fraternal Order of Police, or any other source that could potentially contain a definition of “original appointment” applicable to the present circumstances. Nor did the City present any evidence tending to demonstrate that it placed Roberts on a one-year probationary period at the time it appointed him as a full-time police officer.² Therefore, we give the term its usual and ordinary

² The City did introduce Roberts’ Police and Firemen’s Disability and Pension Fund (“Pension Fund”) personal history record into evidence. In that document the City Auditor, Penny Green, certified that “[Roberts] received an original appointment as a full-time regular police officer in a police department from a duly established civil service eligible list.” R.C. 742.01(A)(2)(a) defines a “[m]ember of a police department” to include, in relevant part, “[a]ny person who receives an *original appointment as a full-time regular police officer* in a police department from a duly established civil service eligible list.” (Emphasis added.) Before one is entitled to contribute to or receive benefits from the Pension Fund, it is clear that one must be a full-time police officer. *Northern Ohio Patrolmen’s Benevolent Assn. v. Police and Firemen’s Disability and Pension Bd. of Ohio* (Jun. 3, 1982), Cuyahoga App. No. 43924. (Citation omitted.) Thus, for purposes of the Pension Fund, the phrase “original appointment as a full-time regular

meaning. *Banjoff v. Twp. of Carlisle* (April 14, 1999), Lorain App. No. 98CA007079, citing *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, 173; R.C. 1.42.

{¶13} The word “original” means “first in order.” See Black’s Law Dictionary 1099 (6th ed. 1990). An “appointment” is “the designation of a person, by the person or persons having authority therefore, to discharge the duties of some office or trust.” Black’s Law Dictionary 99, (6th ed. 1990). Accordingly, we find that, in the context of this case, an “original appointment” pursuant to R.C. 124.27(C) refers to Roberts’ first appointment as a police officer for the City, which occurred on September 4, 1998. This is not to say that a city can never treat the hiring of a previously part-time officer to a full-time position as an original appointment. However, here, the City has failed to introduce any evidence tending to demonstrate that it had a policy of treating such appointments as original appointments, subject to a new one-year probationary period. Instead, the City relied solely upon the probationary period prescribed in R.C. 124.27(C), which we interpret to apply only to an individual’s first appointment as a police officer by the appointing authority.

police officer” refers to the first full-time position that makes the employee eligible to participate in the pension fund.

{¶14} Having found that Roberts’ “original appointment” pursuant to R.C. 124.27(C) refers to his first appointment as a police officer for the City; we must now determine whether Roberts satisfactorily served the one-year probationary period following his part-time appointment. Roberts argues that he satisfactorily completed this probationary period in that he continuously served as a City police officer from the time of his original appointment in September 1998 until his removal in August 2001. The City contends that Roberts did not satisfactorily serve his probationary period as a part-time police officer in that the City demoted him to the position of dispatcher/communications officer in April 1999, and he ceased to serve in the capacity of a part-time police officer. However, we note that despite the City’s argument, the trial court found, based upon the 2000 arrest log admitted into evidence by the City that Roberts did continue to perform “limited Police Officer duties” until February 14, 2000.

{¶15} It is a fundamental concept of administrative law that the party asserting the affirmative bears the burden of proof. 2 Ohio Jur.3d Administrative Law §92. See also, *Goodyear Synthetic Rubber Corp. v. Dept. of Indus. Relations* (C.P. Franklin Co. 1954), 76 Ohio Law Abst. 146, 122 N.E.2d 503. Thus, in the appeal of a discharged police officer, the burden of proof is upon the appointing authority to show that the discharge was proper and valid under law. *Turner v.*

Krob (May 23, 1985), Cuyahoga App. No. 49162, citing *Chiero v. Bureau of Motor Vehicles* (1977), 55 Ohio Misc. 22. Here, we find that the City bears the burden of proving Roberts was a probationary employee at the time of his dismissal.

{¶16} The record reflects that in December 1998, during the probationary period following his September 1998 appointment, Roberts underwent back surgery. As a result, Roberts was unable to perform the duties of a part-time police officer for some period, although the exact duration of his disability is not apparent from the record. Roberts testified that he was on light duty for some period following the surgery, and, during that time, he handled station traffic. The parties agree that in April 1999, Roberts assumed dispatcher/communications officer duties for the police department. However, they disagree as to the significance of these new duties.

{¶17} Roberts claims that he assumed the dispatcher duties in addition to his duties as a part-time police officer, and that he continued to serve as a part-time police officer until his full-time appointment in October 2001. In contrast, the City argues that Roberts ceased to perform as a part-time police officer when he assumed the duties of a dispatcher, and that the City essentially demoted him to the

position of dispatcher/communications officer. Thus, the City argues that Roberts failed to serve out his probationary period as a part-time police officer.

{¶18} Pursuant to R.C. 124.27(C), the City had a right to “remove or reduce” Roberts during his probationary period for unsatisfactory performance. R.C. 124.27(C) further provides that: “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.” While Roberts did not have the right to appeal a removal or reduction during his probationary period pursuant to R.C. 124.34, he was entitled to the other protections afforded by that section. Specifically, R.C. 124.34(C) provides: “In the case of the suspension for any period of time, or a fine, demotion, or removal of * * * *any member* of the police or fire department of a city or civil service township, the appointing authority shall furnish such * * * member of a department with a copy of the order of suspension, fine, demotion, or removal, which order shall state the reasons for the action.” (Emphasis added.)

{¶19} The provision of R.C. 124.34(C) regarding police officers and firefighters is in direct contrast to the provisions of R.C. 124.34(B) regarding the reduction, suspension, or removal of general civil servants. That provision provides that: “In case of a reduction, suspension of more than three working

days, fine in excess of three days' pay, or removal, *except for the reduction or removal of a probationary employee*, the appointing authority shall serve the employee with a copy of the order of reduction, fine, suspension, or removal, which order shall state the reasons for the action." (Emphasis added.)

{¶20} The distinction between these two similar provisions demonstrates a legislative intent to afford greater protection to members of the police and fire services than is afforded to other types of civil servants. Thus, if the City intended Roberts' assumption of dispatcher/communications officer duties to be a demotion or removal from his position as a part-time police officer, the City had a duty to provide Roberts with a copy of the order of demotion that stated the reasons for the action. The City presented no evidence tending to demonstrate that it informed Roberts, either orally or in writing, that it was demoting him from his position as a part-time police officer when he assumed the duties of a dispatcher/communications officer. The only testimony offered by the city was that of the current Mayor and Auditor, neither of which held their elected offices at the time of the alleged demotion. Additionally, the City acknowledged in its post hearing brief that it could not locate any termination letter. Accordingly, we find that the City did not duly demote or reduce Roberts in accordance with R.C. 124.34(C) during his probationary period as a part-time police officer. Therefore,

despite the City's argument to the contrary, Roberts continued to serve as a part-time police officer until his appointment as a full-time officer on October 14, 2001.

{¶21} Having determined that Roberts continued to serve the City as a part-time police officer, in that the City never duly demoted or reduced him, we must determine whether Roberts satisfactorily served his one-year probationary period following his appointment as a part-time police officer. “Where, following an appointment, the appointee serves for more than the probationary period and the appointing power fails to make any report to the proper civil service official indicating that the appointee's services are unsatisfactory, it is presumed that his services are satisfactory and the appointment becomes permanent.” *Dillon v. City of Macedonia* (1988), 43 Ohio App.3d 17, 19, citing *State, ex rel. Kelley v. Hill* (1950), 88 Ohio App. 219. The record reflects that the City appointed Roberts as a part-time police officer on September 4, 1998.

{¶22} As we found above, pursuant to R.C. 124.27(C) and 124.34(C), Roberts continued to serve as a part-time police officer until the City appointed him to a position as a full-time police officer on October 14, 2001. Thus, Roberts served as a part-time police officer for more than three years – substantially more than the statutorily mandated one-year probationary period, even if his probationary period was extended to reflect the time he was unable to work

following his December 1998 back surgery. The record contains no evidence that the City ever provided Roberts with a copy of an order of suspension, fine, demotion, or removal during his probationary period as required by R.C. 124.34(C). Therefore, we presume that Roberts satisfactorily completed his probationary period following his appointment as a part-time police officer, and was not subject to the probation provision of R.C. 124.27(C) at the time the City appointed him as a full-time police officer. Accordingly, we sustain Roberts' first assignment of error.

III.

{¶23} In his second assignment of error, Roberts argues that the trial court abused its discretion by failing to consider evidence in his favor. Specifically, Roberts argues that the trial court erred in failing to reopen the record so that he could supplement it with the testimony of Mark Jacobs ("Jacobs"), former Wellston Chief of Police. The disposition of Roberts' first assignment of error renders the arguments raised in this assignment of error moot. Accordingly, we decline to address the issues raised in this assignment of error.

IV.

{¶24} In sum, we find that the term "original appointment" as it is used in R.C. 124.27(C), and as applicable to this case refers to Roberts' first appointment

as a police officer for the City on September 4, 1998. We find that, as the party seeking to prove the affirmative in an administrative proceeding, the City bore the burden of proving that Roberts failed to satisfactorily serve his probationary period following his appointment as a part-time police officer. We also find that the city failed to prove that it demoted Roberts to the position of dispatcher/communications officer in April 1999, in that the city presented no evidence tending to demonstrate that it complied with the requirements of R.C. 124.34(C). Further, we find that the City failed to demonstrate that it imposed a second probationary period upon Roberts' October 14, 2001 appointment as a full-time police officer.

{¶25} Accordingly, we find that the trial court's decision is against the manifest weight of the evidence and contrary to law. Therefore, we sustain Robert's first assignment of error, reverse the judgment of the trial court, and remand this cause for further proceedings consistent with this decision. Because our resolution of Roberts' first assignment of error renders his second assignment of error moot, we decline to address it.

JUDGMENT REVERSED
AND REMANDED.

Harsha, J., dissenting:

{¶26} I agree that the main issue is whether Roberts was a probationary employee when Wellston terminated him on August 19, 2002. Wellston initially hired Roberts as a part-time police officer on September 4, 1998. During his probationary period, he underwent back surgery, which limited his ability to function as a police officer. Thus, Wellston had him serving as a dispatcher/communications officer. On October 14, 2001, Wellston appointed him to the position of full-time police officer.

{¶27} Thus, the question becomes whether the October 14, 2001, appointment to full-time police officer constituted an "original appointment." Under OAC 124-1-02(E), an "appointment" means "placement of an employee in a position." Wellston originally placed Roberts in a position on September 4, 1998, and one can logically argue that his original appointment that invoked the probationary period occurred September 4, 1998. Wellston also placed Roberts in a position on October 14, 2001, and one can also logically argue that the appointment to the full-time police officer position constituted an "original appointment" to that position. Thus, we must decide whether "original" refers to the initial placing within the police department or the initial placement in a particular position?

{¶28} Neither the statutes, relevant administrative code sections, nor case law help clarify the meaning of "original" appointment. However, common sense leads me to believe that anytime someone is placed in a new position that carries different duties, a probationary period should be in effect. Thus, I believe the October 14, 2001, appointment was an "original appointment" that created a new probation period. As a probationary employee, appellant was not entitled to a hearing prior to dismissal.

Harsha, J.: Dissents with Dissenting Opinion.

Evans, J.: Concur in Judgment Only.

For the Court

BY: _____
Roger L. Kline, Presiding Judge