

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JESSICA HARTING, ET AL.

Plaintiffs-Appellants

-VS-

MASSILLON CIVIL SERVICE
COMMISSION, ET AL.

Defendants-Appellees

: JUDGES:

: Hon. Sheila G. Farmer, P.J.
: Hon. Patricia A. Delaney, J.
: Hon. Craig R. Baldwin, J.

: Case No. 2014CA00114

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No.
2013CV01968

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

February 23, 2015

APPEARANCES:

For Plaintiffs-Appellants:

TIMOTHY R. PIATT
MACALA & PIATT LLC
601 South Main
North Canton, OH 44720

For Defendants-Appellees:

PERICLES G. STERGIOS
MASSILLON CITY LAW DIRECTOR
ROBERT ZEDELL
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Delaney, J.

{¶1} Plaintiffs-Appellants Jessica Harting et al. (“appellants”) appeal from the May 30, 2014 Judgment Entry of the Stark County Court of Common Pleas affirming the layoff decision of Defendant-Appellee City of Massillon (“City”) as approved by Defendant-Appellee Massillon Civil Service Commission (“Commission”).

FACTS AND PROCEDURAL HISTORY

{¶2} Appellants are police officers and civil service employees of the City. The City is therefore the relevant appointing authority. On May 1, 2012, the City notified appellants they would be laid off effective May 20, 2012.

{¶3} On May 1, 2012, the City filed a Statement of Rationale with the Commission asserting that the City was in the midst of “a projected deficiency of funding to maintain the current levels of staffing and operations for the City departments affected by layoffs;” further, “appropriations of resources are not sufficient to support the current levels of staffing in the departments affected by layoffs.”

{¶4} On May 7, 2012, appellants appealed the layoffs to the Commission. A hearing was held on May 31, 2012 and the appeals were overruled on June 26, 2012.

The First Administrative Appeal: Remand to Commission regarding Bad Faith

{¶5} Appellants appealed the Commission’s decision to the Stark County Court of Common Pleas in case number 2012CV02397. The court found “there was a preponderance of substantial, reliable and probative evidence to support [the Commission’s] decision that ‘the city of Massillon had established a deficiency of funding to maintain current levels of staffing and operations to warrant layoffs in the

Massillon Police Department effective May 20, 2012 in the manner set forth in ORC 124.321.”

{¶6} The matter was ultimately remanded to the Commission, though, for resolution of incomplete findings: “However, because [the Commission] has failed to make a decision about whether [the City] acted in bad faith pursuant to OAC 124-07-01, this Court cannot determine whether [the Commission’s] decision should be affirmed, reversed, vacated, or modified in regards to that issue. Therefore, this Court finds pursuant to R.C. 2506.04 that the present action should be remanded back to [the Commission] for a decision to be rendered regarding whether [the City] acted in bad faith pursuant to OAC 124-07-01.”

{¶7} No appeal was taken from the decision of the Court of Common Pleas.

{¶8} On May 29, 2013, the Commission found appellants failed to demonstrate bad faith by the City by a preponderance of the evidence; the City did establish, by a preponderance of the evidence, “a lack of funds at the time of the layoff precipitated the layoffs. And the layoff was expected to last less than one year pursuant to OAC 124-7-01(A)(2).”

The Second Administrative Appeal

{¶9} Appellants appealed the Commission’s decision to the Stark County Court of Common Pleas in case number 2013CV01968. The court found no evidence of bad faith “and that the lack of funds at the time of the layoff was expected to last less than one year pursuant to OAC 124-7-01(A)(2) is supported by the preponderance of substantial, reliable, and probative evidence.”

{¶10} Appellants now appeal from the May 30, 2014 Judgment Entry of the Stark County Court of Common Pleas.

{¶11} Appellants raise one assignment of error:

ASSIGNMENT OF ERROR

{¶12} “I. THE COURT OF COMMON PLEAS ERRED IN AFFIRMING APPELLEE MCSC’S DECISION THAT APPELLANTS’ LAYOFFS WERE NOT IN BAD FAITH AND THAT APPELLEE CITY’S DECISION TO LAY OFF APPELLANTS WAS SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE, AS THE LAYOFFS WERE IN BAD FAITH BECAUSE THE CITY FAILED TO PRODUCE ANY EVIDENCE THAT IT EXPECTED THE LACK OF FUNDS AND RESULTANT LAYOFFS TO LAST LESS THAN ONE YEAR AND, THEREFORE, FAILED TO SUBSTANTIALLY COMPLY WITH STATUTORY AND REGULATORY PROCEDURAL REQUIREMENTS IN LAYING OFF APPELLANTS.”

ANALYSIS

{¶13} Appellant argues the Stark County Court of Common Pleas erred in upholding the decision of the Massillon Civil Service Commission because the City did not comply with statutory and regulatory procedural requirements and demonstrated bad faith. We disagree.

Standard of Review

{¶14} R.C. 2506.04 sets forth the applicable standard of review for a court of common pleas to review an administrative appeal:

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 in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code.

{¶15} In *Henley v. Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000), the Ohio Supreme Court stated: “[W]e have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. The common pleas court considers the ‘whole record,’ including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence (citation omitted).” *Pataskala Banking Co. v. Etna Tp. Bd. of Zoning Appeals*, 5th Dist. Licking Nos. 07–CA–116, 07–CA–117, 07–CA–118, 2008–Ohio–2770, ¶ 13.

{¶16} This court's standard of review of a R.C. 2506.04 appeal is “more limited in scope.” *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). “This statute grants a more limited power to the court of appeals to review the judgment of the

common pleas court 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. Within the ambit of ‘questions of law’ for appellate court review would be abuse of discretion by the common pleas court.” *Id.* at fn. 4. “It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals * * * might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.” *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261, 533 N.E.2d 264 (1988). We must affirm the trial court's decision if such evidence exists in the record. *Kisil*, *supra*, 12 Ohio St.3d at 34.

{¶17} Thus, we review the trial court's judgment to determine if the lower court abused its discretion in deciding that a preponderance of reliable, probative, and substantial evidence supported the administrative decision. *Deem v. Fairview Park*, 8th Dist. Cuyahoga No. 96843, 2011-Ohio-5836, ¶ 10.

Ohio Adm. Code 124-7-01: Bad Faith & Duration of Lack of Funds

{¶18} Appellants argue the City was required to prove it expected the lack of funds precipitating the layoffs of police officers to last less than one year and the City's failure to do so means it failed to prove it substantially complied with statutory and procedural requirements.

{¶19} Layoffs are governed by statute and by administrative regulation. Pursuant to R.C. 124.06, “[n]o person shall be * * * laid off * * * as an officer or

employee in the civil service, in any manner or by any means other than those prescribed in this chapter, and the rules of the director of administrative services for positions in the service of the state or the municipal or civil service township civil service commission within their respective jurisdictions.”

{¶20} R.C. 124.321 states in pertinent part:

(A) Whenever it becomes necessary for an appointing authority to reduce its work force, the appointing authority shall lay off employees or abolish their positions in accordance with sections 124.321 to 124.327 of the Revised Code. If the affected work force is in the service of the state, the reduction shall also be in compliance with the rules of the director of administrative services.

(B)(1) Employees may be laid off as a result of a lack of funds within an appointing authority. For appointing authorities that employ persons whose salary or wage is paid by warrant of the director of budget and management, the director of budget and management shall be responsible for determining, consistent with the rules adopted under division (B)(3) of this section, whether a lack of funds exists. For appointing authorities that employ persons whose salary or wage is paid other than by warrant of the director of budget and management, the appointing authority itself shall determine whether a lack of funds exists.

(2) As used in this division, a “lack of funds” means an appointing authority has a current or projected deficiency of funding to

maintain current, or to sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset a deficiency or projected deficiency of funding for programs funded by the federal government, special revenue accounts, or proprietary accounts. Whenever a program receives funding through a grant or similar mechanism, a lack of funds shall be presumed for the positions assigned to and the employees who work under the grant or similar mechanism if, for any reason, the funding is reduced or withdrawn.

* * * *

{¶21} As an initial matter, the portion of the trial court's decision finding the City complied with R.C. 124.321, that "there was a preponderance of substantial, reliable and probative evidence to support [the Commission's] decision that 'the city of Massillon had established a deficiency of funding to maintain current levels of staffing and operations to warrant layoffs in the Massillon Police Department effective May 20, 2012'" is unchallenged and is therefore res judicata.

{¶22} We proceed therefore on the premise a lack of funds existed. One issue in this appeal is whether the parties met their respective burdens pursuant to the applicable administrative regulation. Ohio Adm.Code 124-7-01(A)(2) states in pertinent part:

(A) Job abolishments and layoffs shall be disaffirmed if the action was taken in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence.

* * * *

(2) The appointing authority shall demonstrate by a preponderance of the evidence that a layoff was undertaken due to a temporary lack of work or lack of funds expected to last less than one year.

(3) Layoffs * * * may only be affirmed if the appointing authority has substantially complied with procedural requirements set forth in sections 124.321 to 124.394 of the Revised Code and the administrative rules promulgated pursuant to these statutes.

{¶23} Ohio Adm.Code 124-1-02(K) defines “layoff” as “a suspension of employment, expected to last less than twelve months, due to either a lack of work or a lack of funds.”

“Lack of Funds Expected to Last Less than One Year”

{¶24} Our first task is to determine whether the lower court abused its discretion in deciding that a preponderance of reliable, probative, and substantial evidence supported the Commission’s finding that the City demonstrated by a preponderance of the evidence the layoffs were undertaken due to a temporary lack of work or lack of funds expected to last less than one year. Again, it is not our role to weigh the evidence or to substitute our judgment for that of the court below.

{¶25} Turning to the record, we find the City’s fiscal crisis was acute in the first three months of the year but showed indications of improving. The City’s budget concerns were described by the mayor as a “moving target.” The City’s projections when the layoffs were implemented indicated a net deficit of \$215,000 per month for the first three months of the year only. Precipitating the lack of funds, at least in part, was

the City's obligation to pay debts from the previous year; the budget director indicated those bills were being paid "this month," or May 2012. The budget director testified as follows:

[Commissioner:] Just briefly, if I can. How do you get obligated to pay bills that were encumbered in the previous year?

[Budget Director:] We are the City of Massillon.

[Commissioner:] Isn't there a budget?

[Budget Director:] There was a budget, and then there was a lack of controls on the spending. Council was made aware of the shortfall of money in the summertime. They were assuming the managers of the departments and the mayor would be putting controls on spending and that did not happen.

[Commissioner:] So these figures, the two counsel just mentioned, the 1.2 million and eight hundred and some thousand were not budgeted.

[Budget Director:] Right. They were not budgeted last year. They were put on the city's tab with different vendors there and obligated the city to, but there was no funding for it. And that's why I'm—I was saying before we're running out of cash. We have a liquidity crisis even if we do get the 17 million, or an increase on what was last year, we still already spent the money, you know, the 885 and the 1.6 million on last year's bills so that brings that down, that 17 down that much money.

* * * *

{¶26} The City's statement of rationale was premised upon initial 2012 General Fund appropriations of \$14,874,135.46 (abbreviated throughout the hearing as "\$15 million"). Appellants made the point the City was on target to reach "\$17 million" in part due to revenue increases in April and May. The budget director did not yet have the figures for April and the first few months of May although the income tax department had acknowledged an increase of roughly 20 to 23 percent in the April 2012 collections over the April 2011 collections. The budget director further testified as follows:

[City Counsel:] Okay. Is it fair to say I guess only time will tell how much of that [increase] carries through the year?

[Budget Director:] When we get to the end of June there we should be able to average the months to see if there is any significant increase in, you know, what we call the core tax base.

{¶27} The record also reflects Moody's Investors Service downgraded the City's bond rating in March, 2012 due to the City's depleted General Fund reserves after five consecutive years of operating deficits. Moody's indicated that the City may implement expenditure reductions and revenue enhancements to return to a balanced operation in the future. The current Mayor of Massillon, Kathy Catazaro-Perry, testified as to specific efforts by herself and city council to achieve a balanced budget in 2012 and thereafter. Although she testified that it is possible the layoffs could continue beyond one year (until May, 2013), the record reflects numerous efforts were being considered by the City to improve the budget in 2012 including an income tax increase by the voters and associated reduction of the resident income tax credit.

{¶28} “Preponderance of the evidence” means the greater weight of the evidence. The trial court found the greater weight of the evidence supported the City’s lack of funds was expected to last less than one year, a conclusion which may be extrapolated from the record including the evidence cited above. As the City points out, no evidence exists the lack of funds would continue for longer than one year. In light of our review of the record, we find the trial court’s decision is supported by the greater weight of reliable, probative, and substantial evidence.

Bad Faith Not Demonstrated by a Preponderance of the Evidence

{¶29} Our second task, then, is to review the trial court’s judgment to determine if the lower court abused its discretion in deciding that the preponderance of reliable, probative, and substantial evidence supports the Commission’s conclusion appellants failed by a preponderance of the evidence to establish the City acted in bad faith. It is not our role to weigh the evidence.

{¶30} “Bad faith” is not mere procedural irregularity; the term implies dishonesty of belief or purpose. See, Black’s Law Dictionary (9th ed. 2009). Bad faith may be established by evidence or reasonable inferences from the evidence that layoffs were used as a subterfuge to subvert the civil service system. See, *Henschen v. Ohio Dept. of Taxation*, 10th Dist. Franklin No. 06AP-341, 2007-Ohio-2528. Bad faith need not be predicated on political or personal motivation. See, *Blinn v. Ohio Bureau of Employment Services*, 29 Ohio App.3d 77 (10th Dist.1985).

{¶31} The record in this case is devoid of any evidentiary demonstration of bad faith. Instead, appellants argue bad faith may be inferred from the City’s alleged failure to demonstrate a lack of funds expected to last less than one year. As we discuss *infra*,

the City did not fail to establish the lack of funds was expected to last less than one year, but more importantly, appellants have ignored their own affirmative burden of demonstrating bad faith by a preponderance of the evidence.

{¶32} The evidence at the hearing established only that the layoffs were motivated by budgetary considerations. Parsing the record, we note appellants argued at the hearing that alternatives to layoffs may have existed, although some of these alternatives were implemented too late to avoid layoffs altogether. The City administration indicated it was working on revenue-increasing measures continually but those measures take time. The existence of a choice between alternatives does not demonstrate bad faith. “The election between available alternatives rests solely with officials of the municipality in the exercise of their sound discretion, and is not one which should be made, or secondguessed (*sic*), by the courts.” *Civil Service Personnel Association, Inc. v. City of Akron*, 9th Dist. Summit No. 11509, unreported, 1984 WL 4809 (March 28, 1984).

{¶33} Appellants did not meet their burden of production under the administrative regulation. We find the court below did not abuse its discretion in affirming the Commission’s finding that appellants failed to demonstrate the City acted in bad faith.

CONCLUSION

{¶34} The evidence in the record supports the decision of the Commission and the trial court's affirmance thereof. Appellant's sole assignment of error is therefore overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Baldwin, J., concur.