[Cite as *State ex rel. Rader v. Pataskala*, 2016-Ohio-1215.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, EX REL. JERRY L. RADER,	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Relator-Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 15-CA-40
	:	
CITY OF PATASKALA, ET AL.	:	
	:	
	:	
Respondents-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 14 CV 00080

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: March 18, 2016

APPEARANCES:

For Relator-Appellant:

WESLEY T. FORTUNE
FORTUNE LAW LIMITED
4417 Carroll Southern Rd.
Carroll, OH 43112

For Defendants-Appellees:

MICHAEL J. VALENTINE
MELVIN J. DAVIS
REMINGER CO., L.P.A.
65 East State St., 4th Floor
Columbus, OH 43215

Delaney, J.

{¶1} Appellant Jerry L. Rader appeals from the May 8, 2015 Judgment Entry of the Licking County Court of Common Pleas granting the motion for summary judgment of appellees City of Pataskala ("City"), Benjamin King ("King") and Timothy Boland ("Boland").

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant worked for the City in the position of Public Service Supervisor/Street Supervisor/Street Superintendent.[1] Beginning in 2007, appellant reported directly to King, the City's former Director of Public Services. King in turn reported to Boland, the City's former City Administrator.

{¶3} On August 22, 2011, the City sent appellant a memorandum about his "unacceptable work performance" as documented by King. Evaluation of appellant's performance as Street Supervisor indicated his leadership needed improvement and in some areas his performance had diminished significantly. Appellant responded in writing to the work performance evaluation.

{¶4} On June 7, 2012, due to additional poor reviews of appellant's work performance, King recommended demotion of appellant to equipment operator via a memorandum to Boland and Law Director Rufus Hurst dated.

[1] Witnesses stated in deposition these titles were used interchangeably but all meant the same thing. Appellant's original position with the City will henceforth be referred to throughout this opinion as "Street Supervisor."

{¶5} On July 15, 2012, appellant addressed a memorandum to Boland and Hurst reporting an "age discrimination situation" between King and himself, asking the City to initiate an "administrative investigation."

{¶6} On July 17, 2012, the City served appellant with a Notice of Pre-Disciplinary Meeting to be held on July 19, 2012. The hearing was continued to August 9, 2012, and then to August 16, 2012.

{¶7} The "pre-disciplinary summary and recommendation" is dated August 21, 2012 and memorializes events, noting appellant's counsel requested more time to review the information provided and the hearing was continued to August 9, 2012. The following paragraph describes the events of August 9, 2012:

> * * * *.
>
> On August 9, 2012, the pre-disciplinary meeting reconvened with [King], [Hurst], and [appellant's counsel] in attendance. At that time, [appellant's counsel] was advised that he had until August 16, 2012 to submit a written response [to] the allegations set forth against [appellant] if he wished to exercise that right. The City has not, at this point in time, received response from [appellant's counsel] to the allegations. [Appellant's counsel] did respond to Mr. Hurst via e-mail to inform that City that [appellant] was contemplating retirement and he was interested in negotiating a severance package. Additionally, [appellant's counsel] requested confirmation that, since [appellant] was considering retirement, the discipline allegations and actions would be dropped.

* * * *.

{¶8} The recommendation further states appellant's potential retirement was a separate matter; the persons involved in the disciplinary action did not have authority to drop the disciplinary procedures without the approval of the City Administrator; and if appellant intended to retire, he should communicate with the Administrator as soon as possible. As of the date of the recommendation, appellant had not responded, so King recommended that the City proceed with the disciplinary process, i.e. demote appellant from Street Supervisor to Equipment Operator. The memo notes appellant has appeal rights to the Personnel Board of Review.

{¶9} In an email dated August 31, 2012, City Law Director Rufus Hurst advised appellant's counsel the disciplinary proceedings would go forward and the parties needed to "define both direction and a timetable." If appellant wanted to accept a demotion and continue his employment, Hurst would prepare a Memorandum of Understanding; if appellant chose to retire, he should advise the City as soon as possible; or finally, the disciplinary process would continue and appellant could "proceed consistent with his rights."

{¶10} On September 13, 2012, with an effective date of September 14, 2012, the City served appellant with an Order of Removal, Reduction, Suspension, Fine, Involuntary Disability Separation noting his demotion from the position of Street Supervisor to the position of Equipment Operator IV. The Order advised appellant of his appeal rights to the City of Pataskala Personnel Board of Review. Appellant filed a written request for appeal to the Personnel Board of Review on September 19, 2012.

{¶11} The parties were communicating and attempting to schedule the hearing before the Personnel Board of Review when appellant submitted a two-week notice of retirement on December 17, 2012.

{¶12} Appellant's Exhibit 24, attached to his Complaint, is email correspondence. On December 17, 2012, Hurst emailed appellant's counsel and stated he was surprised and confused to learn appellant submitted his resignation effective December 31. Appellant's counsel responded he had recently learned appellant submitted his resignation "after discussing matters with his family over the weekend" and appellant was not amenable to a settlement offer the City had made.

{¶13} On December 26, 2012, the City sent appellant a letter stating the human resources department was in receipt of his "unanticipated" resignation letter dated December 17, 2012 and the City accepted the resignation. Further, pursuant to appellant's letter, his employment with the City would end on December 31, 2012 and his exit interview was scheduled for that day. The letter also states in pertinent part:

> * * * *.
>
> Please be advised that I have received an inquiry from the Ohio Public Employees Retirement System (OPERS) requesting confirmation of your status relative to your determination to retire, and we have provided the information they requested. City Law Director Rufus Hurst has requested that I advise you that he will notify the City Personnel Board of Review of your decision to retire from the City. We will provide separate communication from them

> regarding what will presumably be the dismissal of your appeal as your retirement from the City renders the appeal meaningless.
>
> * * * *.

{¶14} The email correspondence attached to appellant's Complaint demonstrates that from this point forward, the City concluded appellant's notice of intent to retire abandoned his attempt to appeal the demotion. Appellant, though, referred to his separation from employment as an unintended result forced upon him by the City. (Complaint Exhibit 25).

{¶15} Appellant claimed he did not intend to retire, only to stay in the City's "good graces." Appellant made the following statements in deposition:

> * * * *.
>
> [COUNSEL:] * * *[I]t's my understanding that in December of 2012 your employment relationship with [the City] ends, correct?
>
> [APPELLANT:] They retire me, yes.
>
> [COUNSEL:] Tell me what you mean by they retired me.
>
> [APPELLANT:] I submitted a note to them to attempt to stay—to abide by their rules in the handbook so I could get re-employment really, you know what I mean, because you have to leave in good standing.
>
> [COUNSEL:] You said you submitted a note. To whom did you submit a note?
>
> [APPELLANT:] The receptionist.
>
> * * * *.

[COUNSEL:] Okay. Was the note addressed to the receptionist or was it addressed to someone else?

[APPELLANT:] No, it wasn't addressed to nobody.

[COUNSEL:] Okay. What did that note say?

[APPELLANT:] I give you two-week notice like it says in the handbook.

[COUNSEL:] Two-week notice of what?

[APPELLANT:] That's all it said, I give you two-week notice.

[COUNSEL:] That was it?

[APPELLANT:] Yes.

[COUNSEL:] You didn't tell them what you were giving them two-weeks' notice of?

[APPELLANT:] No, because it says in the handbook you have to give them a two-week notice to stay in good graces with them. I was hoping they wouldn't accept it, do you know what I mean, and then I would get my old job back.

* * * *.

T. 60-61.

{¶16} And further,

[COUNSEL:] I think your testimony was when you submitted this note you gave it to the receptionist hoping that the city would not accept it?

* * * *.

[APPELLANT:] I just wanted my old job back.

[COUNSEL:] Okay. Okay.

[APPELLANT:] And that's the only way I knew to be in good graces.

[COUNSEL:] Instead your understanding is the city accepted the note and treated it as a retirement?

[APPELLANT:] Yes.

[COUNSEL:] Okay. So at that point in December of 2012 you're then retired from the city or you're advised that you've retired from the city, correct?

[APPELLANT:] Yes.

[COUNSEL:] And you're telling today that wasn't your intention?

[APPELLANT:] No.

* * * *.

T. 64-65.

{¶17} On January 27, 2014, appellant filed a Complaint for Declaratory and Injunctive Relief and Original Action in Mandamus. Appellees answered. On March 19, 2015, appellees filed a Motion for Summary Judgment. Appellant responded with a motion in opposition and appellees replied.

{¶18} On May 8, 2015, the trial court granted appellees' motion for summary judgment.

{¶19} Appellant now appeals from the May 8, 2015 Judgment Entry of the Licking County Court of Common Pleas.

{¶20} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶21} "I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT APPELLANT VOLUNTARILY RETIRED FROM EMPLOYMENT WITH APPELLEES."

{¶22} "II. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEES' SUMMARY JUDGMENT ON APPELLANT'S CAUSE OF ACTION FOR DECLARATORY RELIEF."

{¶23} "III. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEES' SUMMARY JUDGMENT ON APPELLANT'S CAUSES OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF BECAUSE THE APPELLEES NEVER ADDRESSED THE DECLARATORY OR INJUNCTIVE RELIEF ACTIONS IN THEIR MOTION FOR SUMMARY JUDGMENT."

{¶24} "IV. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO APPELLEES ON APPELLANT'S REQUEST FOR A WRIT OF MANDAMUS BECAUSE THE APPELLANT HAS NOT (*sic*) ADEQUATE REMEDY AT LAW."

ANALYSIS

{¶25} Appellant's four assignments of error are related and will be considered together. Appellant argues the trial court erred in granting appellees' motion for summary judgment. We disagree.

Standard of Review

{¶26} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides in pertinent part:

> * * * *. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * *. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * *.

{¶27} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *McPherson v.*

Total Car Express, Inc., 5th Dist. Stark No. 2015CA00081, 2015-Ohio-5251, __N.E.3d__, ¶ 16, citing *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶28} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher,* supra, 75 Ohio St.3d 280.

{¶29} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Cabot 570 Polaris Parkway, L.L.C. v. Carlile, Patchen & Murphy L.L.P.*, 5th Dist. Delaware No. 15 CAE 02 0012, 2015-Ohio-5110, ¶ 13, citing *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987). We review cases involving a grant of summary judgment using a de novo standard of review. *Esber Beverage Co. v. Labatt USA Operating Co.*, 138 Ohio St.3d 71, 2013-Ohio-4544, 3 N.E.3d 1173, ¶ 9, citing *Bonacorsi v. Wheeling & Lake Erie Ry. Co.,* 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶ 24.

Appellant Waived his Appeal to the Personnel Board of Review

{¶30} The issue presented by this case is whether appellant's submission of his notice of retirement on December 17, 2012 waived his opportunity to challenge his demotion by appeal to the Personnel Board of Review.

{¶31} Rule XV of the Rules and Regulations of the Personnel Board of Review of the City of Pataskala, Ohio states in subsection E, "Resignation Before Final Action:"

> The acceptance by an appointing authority of the resignation of a person discharged, before the final action by the Board, will be considered a withdrawal of the appeal. Notice of such resignation

> shall be submitted immediately to the Board. The separation of the employee thus resigning shall be entered upon the records of the Board and the proceedings dismissed without judgment.

{¶32} Appellees raised waiver as an affirmative defense in their answer to appellant's complaint. Waiver is a voluntary relinquishment of a known right. *State ex rel. Wallace v. State Med. Bd. of Ohio*, 89 Ohio St.3d 431, 435, 732 N.E.2d 960 (2000). Waiver is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional. *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist. Bd. of Directors*, 75 Ohio St.3d 611, 616, 665 N.E.2d 202 (1996). The burden is on the public employer to prove that waiver applies, and it may be enforced if the employer had a duty to perform and changed its position as a result of the waiver. *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 279, 690 N.E.2d 1267 (1998).

{¶33} Waiver assumes one has an opportunity to choose between either relinquishing or enforcing of the right. *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 279, 1998-Ohio-628, 690 N.E.2d 1267 (1998). A waiver may be enforced by the person who had a duty to perform and who changed his or her position as a result of the waiver. Id*.,* citing *Andrews v. State Teachers Retirement Sys. Bd.*, 62 Ohio St.2d 202, 205, 404 N.E.2d 747 (1980).

{¶34} Appellant's voluntary retirement operated as a waiver of his right to challenge the disciplinary process, seek declaratory relief, and to seek reinstatement via mandamus. The City offered appellant the position of Equipment Operator but appellant retired instead of accepting the position. The City changed its position by halting

disciplinary proceedings against appellant when his appeal to the Personnel Board of Review became moot. In this case, the voluminous attachments to appellant's complaint contain the written and emailed discussions of the parties about appellant's pending appeal to the Personnel Board of Review and fully support the trial court's conclusions of law, including appellant's voluntary abandonment of his appeal.

{¶35} In *Phillips v. W. Holmes Local School Dist. Bd. of Educ.*, we found a school district employee waived his right to reinstatement and/or back pay by voluntarily retiring when he had the opportunity to remain employed with the District. 5th Dist. Holmes No. CA-407, 1990 WL 41584, *3 (Mar. 20, 1990), appeal not allowed, 54 Ohio St.3d 709, 561 N.E.2d 944. The employee "was not put in that position of having to choose retirement, and his voluntary choice of early retirement operates as a waiver of [his] rights to seek reinstatement and/or back pay * * *." Id.

{¶36} Appellant argues his retirement was involuntary on the basis of *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, but that case is inapposite. 97 Ohio St.3d 269, 2002-Ohio-6322, 779 N.E.2d 216. In that case, the Ohio Supreme Court found the relator had not waived his rights because he was forced to retire. We find the instant case has more in common with *Phillips*, supra, than *Stacy*. The Court in fact distinguished *Stacy* from *Phillips* because the employee's position was illegally abolished and he did not have the option of remaining employed. Id. at ¶ 29.

{¶37} In the instant case, it is not true appellant's only alternative was a reduction in work; appellant had the alternatives of retiring, continuing to work as an Equipment Operator, or following the disciplinary process through to its conclusion. As appellant's own exhibits demonstrate, in the midst of the conversations about scheduling the appeal

and possible settlement, appellant submitted his notice of retirement to the surprise of his own counsel.

{¶38} In his complaint, appellant sought declarations that appellees failed to comply with his state and federal constitutional rights generally, and failed to comply with the terms of their own rules and regulations for disciplinary proceedings specifically. Appellant sought a declaration that his retirement was not voluntary. Appellant also sought unspecified injunctive relief ordering appellees to comply with the law and a writ of mandamus to reinstate appellant. On appeal, appellant argues the trial court erred in granting summary judgment because appellees did not specifically request summary judgment as to the claims for declaratory and injunctive relief. It is evident to us, however, that in asserting the affirmative defense of waiver, appellees asserted a complete defense and the trial court agreed. The trial court's failure to specify that appellant's claims for declaratory and injunctive relief did not survive summary judgment is implicit in its finding that appellant voluntarily retired.

{¶39} In order to be entitled to a writ of mandamus, a relator has the burden of establishing that he has a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law. *State ex rel. Halleck v. Delaware Cty. Commrs.*, 5th Dist. Delaware No. 96CA-E-04-021, 1996 WL 753127, *2 (Dec. 13, 1996), citing *State ex rel. Fain v. Summit Cty. Adult Probation Dept.*, 71 Ohio St.3d 658 (1995) and *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587 (1994). In light of our conclusion that appellees' affirmative defense of waiver applies, we find appellant failed to establish he has a clear legal right to the relief requested. As a matter of law, appellant has no constitutionally protected right to

public employment. *Halleck,* supra, 1996 WL 753127 at *3, citing *Walton v. Montgomery Cty. Welfare Dept.*, 69 Ohio St.2d 58, 64 (1982) and *State ex rel. Gibbons v. City of Cleveland*, 9 Ohio St.3d 216 (1984).

{¶40} Dismissal of a complaint is warranted if a party's mandamus claims are obviously without merit. *State ex rel. Mackey v. Blackwell*, 106 Ohio St.3d 261, 2005-Ohio-4789, 834 N.E.2d 346, ¶ 11. Dismissal is appropriate if it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in favor of the relators, that they are not entitled to the requested extraordinary relief. *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 632, 1999-Ohio-130, 716 N.E.2d 704, citing *State ex rel. Dist. 1199, Health Care & Social Serv. Union, SEIU, AFL–CIO v. Lawrence Cty. Gen. Hosp.*, 83 Ohio St.3d 351, 352, 699 N.E.2d 1281 (1998).

{¶41} Appellant failed to establish he has a clear legal right to the reinstatement and that the City has a clear legal duty to perform the requested act because appellant never fully litigated the disciplinary proceedings via the City's Personnel Board of Review.

{¶42} Appellant's arguments as to the injustice of his demotion are moot because appellant did not see the disciplinary process through to its conclusion; therefore, there is no determination that appellant's demotion was justified or unjustified. In his complaint and subsequent filings, including the instant appeal, appellant recites in detail the City's disciplinary policies and procedures but makes no substantiated allegation that the City violated any of them. He claims he suffered an involuntary and illegal demotion, but the Civ.R. 56 evidence in the record establishes appellant abandoned his appeal to the Personnel Board of Review by choosing to retire.

{¶43} With respect to summary judgment, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264 (1996). Appellant's summary allegations that the City failed to comply with its own disciplinary rules and regulations are belied by the record. Appellant's argument implies his retirement was inevitable because appellees gave him no option but to retire in hopes of salvaging a chance of keeping his job. His own exhibits, though, document exhaustive ongoing discussions terminated suddenly by appellant's notice of his intent to retire.

{¶44} While it is evident appellant wants to characterize his two-week notice as anything other than what it is, appellant retired before final action of the Personnel Board of Review and appellees cannot be faulted for accepting the notice for what it was. Appellees have amply demonstrated reasonable minds can come to but one conclusion and that conclusion is adverse to appellant, even when the evidence is construed most strongly in appellant's favor. In turn, appellant has not set forth specific facts showing that there is a genuine issue for trial.

{¶45} We conclude the trial court did not err in granting summary judgment on appellees' behalf. Appellant's four assignments of error are overruled.

CONCLUSION

{¶46} Appellant's four assignments of error are overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J. and

Hoffman, P.J.

Baldwin, J., concur.