[Cite as *Sandusky v. Nuesse*, 2011-Ohio-6497.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

City of Sandusky — Court of Appeals No. E-10-039

Appellee/Cross-Appellant — Trial Court No. 09 CV 0859

v.

Kimberly Nuesse, et al. — **DECISION AND JUDGMENT**

Appellant/Cross-Appellee — Decided: December 16, 2011

* * * * *

Margaret Anne Cannon and Susan Porter, for appellee.

K. Ronald Bailey, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas overturning the decision of the Sandusky Civil Service Commission and upholding the termination of former Sandusky Police Chief Kimberly Nuesse. For the reasons that follow, we affirm.

{¶ 2} In August 2006, the city of Sandusky ("the City") hired Nuesse to be its chief of police. Less than two years later, on March 10, 2008, the city manager, Matthew Kline, suspended Nuesse with pay pending the outcome of an external investigation conducted by Michael Murman. The investigation resulted in the "Murman Report," an eight-page document with an over 200-page supplement, featuring signed statements and interview summaries from many of the people who interacted with Nuesse. A copy of this report and supplement were provided to Nuesse's attorney. Relying on the Murman Report, on June 3, 2008, Kline notified Nuesse of a pre-disciplinary meeting to provide her an opportunity to respond to alleged violations of "the laws of the State of Ohio and the City Police Department" including, inter alia: failure to uphold standards of honesty and failure to display absolute honesty, falsification of reports, using public office for private gain, and failure to cooperate and coordinate with other law enforcement organizations and government agencies. The notice also stated,

{¶ 3} "[T]he City plans to use any information contained in the Murman report to support its position. In particular, the City believes that the report confirms that while you were the Chief of Police for the City you were dishonest, falsified Federal government funding documents, allowed a parking ticket issued against you to be dismissed, and created an uncomfortable work environment for employees of the Police Department, the City and Erie County, all of which violate one or more of the above laws, rules and regulations. Examples of your dishonesty include informing your superior and members of City Commission that the City's dispatch system was on the

verge of collapse which would impact public safety, submitting false information to the Federal government regarding grants, creating a situation allowing an employee to receive paid administrative leave for attending a court ordered Driving Under the Influence class, giving your assistant inaccurate information regarding City job assignments, and manipulating Police Department expenses so that City officials would not be aware of money spent on such items as coffee and water."

{¶ 4} Nuesse chose to forego the pre-disciplinary meeting and instead sent a written response ("Nuesse Response") to the allegations on June 10, 2008. Subsequently, on June 17, 2008, Kline issued a disciplinary decision notifying Nuesse that she was being terminated as Chief of the Sandusky Police Department. In the disciplinary decision, Kline stated,

{¶ 5} "Based on the initial investigation and the Nuesse Response, I have focused my decision on violations of the Sandusky Police Department's Rules and Regulations involving falsification of reports, honesty, cooperation with other organizations and agencies, and use of official position for personal gain. However, it is my further decision that other disciplinary violations also occurred as set forth in the original Notice."

{¶ 6} The disciplinary decision continued by identifying examples of Nuesse's dishonesty relating to grant documents and the capabilities and need to replace the current dispatch system, Nuesse's failure to cooperate with the Erie County Sheriff and

Prosecutor, and Nuesse's use of her office for personal gain by allowing a parking ticket she received to be voided. The disciplinary decision concluded,

{¶ 7} "There are additional disciplinary violations set forth in the Notice. However, in reviewing the Sandusky Police Department's Rules and Regulations 1-7, Employee Discipline, I find your actions and violations as set forth above to fall under Category III offenses. Being such offenses, I have decided the appropriate cause of action to be dismissal."

{¶ 8} Nuesse appealed the termination order to Sandusky's Municipal Civil Service Commission ("the Commission"). The Commission scheduled a hearing on the matter and hired former judge, Joseph E. Cirigliano, to serve as the fact finder. The parties stipulated that the hearing would be limited to resolving four issues:

{¶ 9} "1. The giving of false statements by Ms. Nuesse regarding certain grant applications,

{¶ 10} "2. Failure of Ms. Nuesse to display absolute honesty, including using the influence of her position to mislead city officials regarding the dispatch system, in addition to the falsification of the grant application,

{¶ 11} "3. Failure of Ms. Nuesse to cooperate and coordinate efforts with other employees and law enforcement organizations and agencies, such as the County Sheriff and County Prosecutor, and

{¶ 12} "4. Use of Ms. Nuesse's public office for private gain, specifically regarding a parking ticket."

{¶ 13} The hearing commenced on October 13, 2008, and spanned 22 days over a period of six months, included over 60 witnesses and 280 exhibits, and generated over 3,600 pages of transcript. Afterwards, Hearing Officer Cirigliano issued his report recommending to the Civil Service Commission that Kline's decision to discharge Nuesse be sustained.

{¶ 14} In his report, the hearing officer initially identified the state and local laws that authorized the city to discharge Nuesse. Specifically, R.C. 124.34(A) provides that a classified civil service employee may be discharged from his or her position for, inter alia, dishonesty or violating any "policy or work rule of the officer's or employee's appointing authority." Notably, the Sandusky Police Department's Rules and Regulations governing "Employee Discipline" divide unacceptable conduct into three categories according to the severity of misbehavior. Category III offenses, which include, but are not limited to, "[e]ngaging in dishonest or immoral conduct that undermines the effectiveness of the agency's activities or employee performance, whether on or off the job," are the most severe. The rules deem the commission of a Category III offense so serious as to warrant suspension or dismissal upon a single occurrence.

{¶ 15} The hearing officer then found that the City proved the allegations in the disciplinary decision by a preponderance of the evidence. First, he found that Nuesse committed a Category III offense by using her office for personal gain regarding an incident where she did not pay a $15 parking ticket, and an incident where she asked for and accepted tickets for her family to Soak City—the water park attached to the Cedar

Point amusement park. Second, the hearing officer found that Nuesse committed a Category III offense by failing to work cooperatively with other law enforcement agencies, a finding that stemmed from her personal conflicts with the Erie County Sheriff and Prosecutor. This included a failure to notify them of a fugitive roundup she was coordinating with the U.S. Marshall's office, even though the sheriff's office would be required to house those arrested and the prosecutor's office would be required to process them. Third, the hearing officer found that Nuesse committed Category III offenses when she engaged in dishonest and fraudulent conduct on three separate occasions by: (1) providing false information with regard to the federal Edward Byrne Justice Assistance Grants Program, (2) knowingly giving false information to other city representatives regarding the capabilities of the dispatch system that were to be included in a Weed and Seed grant application, and (3) misleading Kline and the city commissioners into believing that the City's emergency dispatch system was on the verge of collapse when it was not, and that the City's only viable option was to immediately merge its system with Perkins Township. Finally, the hearing officer commented on several instances where Nuesse testified untruthfully at the hearing. Although these instances were "wholly unrelated to the issues that led to her termination," he found they nonetheless reinforced the conclusion that the decision to remove Nuesse as the chief of police was correct. The incidents consisted of "Nuesse's assertion that laptop computers were never removed from the patrol vehicles during her tenure, that Assistant Chief Sams left work early on February 28, 2008, [that] she spoke personally with Judge O'Brien

about her unpaid parking ticket * * * [and] that Chief Majoy offered her tickets to Soak City—she never asked for them." (Emphasis sic.)

{¶ 16} On October 7, 2009, the Commission was scheduled to meet to review the hearing officer's report. Two days prior to that, the City filed a motion to have Chairperson Janice Warner recuse herself because her brother testified on behalf of Nuesse at the hearing. Chairperson Warner denied the motion, stating that she would be impartial. At the October 7, 2009 meeting, Commissioner Rhodes made a motion to "modify the ruling of [Hearing Officer] Cirigliano and reinstate Kim Nuesse to her job as chief of police with no back pay effective Wednesday, October 7, 2009." Chairperson Warner seconded the motion. Roll was taken and Chairperson Warner and Commissioner Rhodes affirmed and Commissioner May dissented.

{¶ 17} Immediately thereafter, pursuant to R.C. 124.34(C), the City appealed the Commission's decision to the Erie County Court of Common Pleas, and simultaneously filed a motion to stay the reinstatement of Nuesse, which the trial court ultimately granted. On October 14, 2009, Nuesse filed a cross-appeal in the trial court, contesting the Commission's denial of back pay, and seeking to have the hearing officer's report vacated. Subsequently, the parties agreed that the trial court would conduct a trial de novo on the same four issues submitted to Hearing Officer Cirigliano, with the trial to consist of the court reading the transcript, examining the exhibits, and allowing the parties to submit additional evidence. See *Cupps v. City of Toledo* (1961), 172 Ohio St. 536, paragraph two of the syllabus (trial de novo is the appropriate procedure for an

appeal from the decision of a civil service commission on questions of law and fact taken pursuant to R.C. 124.34).

{¶ 18} On August 10, 2010, the trial court issued its judgment entry upholding the June 17, 2008 termination of Nuesse, and overturning the October 7, 2009 decision of the Commission.

{¶ 19} Although it reached the same ultimate result as the hearing officer, the trial court's conclusions on most of the issues differed. First, the court found that the City failed to prove by a preponderance of the evidence that Nuesse used her public office for private gain regarding both the parking ticket and Soak City incidents. Next, the court found that the City failed to prove the allegation that Nuesse did not work cooperatively with other law enforcement agencies, characterizing most of the incidents as "legitimate disagreements among elected officials." Third, the court found that the City failed to meet its burden regarding the allegations of false statements pertaining to the "Edward Byrne" and "Weed and Seed" grants. However, the court did find that the City successfully established by a preponderance of the evidence that Nuesse failed to "display absolute honesty, including using the influence of her position to mislead city officials regarding the dispatch system," and thus upheld the termination.

{¶ 20} In reaching its conclusion on this issue, the trial court, unlike the hearing officer, found that the City did not prove that Nuesse misled city officials into believing that the dispatch system was near collapse. Similarly, the court found that the City did not prove that Nuesse *intentionally* misled city officials regarding the capabilities of the

existing dispatch system; instead, any lack of understanding was attributed to Nuesse's ignorance of the system. Nevertheless, the court identified three other specific incidents of dishonesty, each of which it deemed sufficient to justify Nuesse's termination. In order to put these incidents into context, a brief summary of the background facts is necessary.

{¶ 21} During Nuesse's tenure, the City was contemplating an agreement with Perkins Township that would result in a single facility to house their respective police departments and the court systems. Eventually, those discussions became limited to simply joining the two entities' dispatch systems. Simultaneously, the City was also discussing the merger of its dispatch system with Erie County. The impetus of these discussions was the Sandusky Commissioners' understanding that the City's dispatch system was inadequate and needed to be replaced. This understanding was based on the commissioners' belief from conversations with Nuesse that the dispatch system could fail at any point, and statements from Nuesse that the current dispatch system could not generate the necessary reports to secure grant funding. As to the former point, there is conflicting testimony regarding whether Nuesse actually told the commissioners that the situation regarding the dispatch system was dire and that collapse was imminent. Regardless of the basis for their understanding, the commissioners were faced with three options: (1) upgrade the City's current dispatch system at a significant cost, (2) merge the City's dispatch system with the system in Perkins Township, or (3) merge the City's dispatch system with Erie County's system. Nuesse was in favor of the merger with

Perkins Township, and strongly against the merger with Erie County. However, on February 26, 2008, it became clear that Perkins Township would not approve combining its dispatch system with the City.

{¶ 22} On that day, a meeting was held at 2:00 p.m. between Sandusky officials Mayor Murray, Commissioners Stahl and Crandall, Law Director Don Icsman, and Fire Chief Meinzer so that Meinzer could inform the commissioners of what he thought were false statements made by Nuesse the night before, regarding the viability of the current dispatch system. Kline participated in the meeting via telephone. Nuesse was also summoned to this meeting, but was told that it began at 3:00 p.m. Believing that the meeting was to work on the merger proposal with Perkins Township, Nuesse asked Assistant Chief Sams to accompany her. When the two arrived a few minutes early to the meeting, they were told to wait outside, an order that they perceived to be ominous. Upon being allowed into the meeting, Commissioner Stahl and Mayor Murray informed Nuesse that she had misled them regarding the dispatch system. In addition, Mayor Murray revealed to Nuesse that Perkins Township would not approve the merger, and thus the commissioners were exploring a merger with Erie County.

{¶ 23} As it relates to the first incident of dishonesty relied on by the trial court, several witnesses testified that Nuesse's behavior following the February 26, 2008 meeting was emotional, erratic, unraveled, and hostile in nature. The trial court found that sometime shortly after the meeting, Nuesse told the city dispatchers they were going to be county employees within the next two weeks, even though no timetable for

implementing a merger was given at the meeting, and it was clearly agreed that the merger would be of equipment and facilities only; the dispatchers would remain city employees. When Kline had to assure the union leader that city employees would remain so, he confronted Nuesse about what she said. Nuesse claimed that the dispatchers simply misunderstood her. However, the trial court found that the evidence was otherwise, and concluded that this incident of dishonesty, by itself, was sufficient to support the termination.

{¶ 24} The second incident related to an occurrence on February 28, 2008 when Kline called a meeting to discuss the dispatch system and the potential merger with Erie County. Kline ordered Nuesse to attend, but Nuesse refused, saying that she had talked to a lawyer and was too concerned about losing her job. Nuesse also refused to send Assistant Chief Sams, claiming that he was unavailable and also was concerned about losing his job. However, the testimony revealed that Sams was in fact not concerned. In addition, the trial court found that Nuesse later claimed at the hearing that Sams had gone home that day and would not have been able to attend the meeting, but this was refuted by Sams' time card and the testimony of other officers. The trial court found that this incident of dishonesty, by itself, was sufficient to support the termination.

{¶ 25} As to the third incident, on February 29, 2008, Kline arrived at work to see newspaper headlines that Nuesse was in jeopardy of losing her job, despite Kline making statements to the contrary to a reporter the night before. When Kline confronted Nuesse

about the headlines and to see if she had spoken to the reporter, he found her already visibly upset. Kline sent her home that day, which was a Friday, with Nuesse scheduled to be on vacation the following week. While Nuesse was on vacation, she contacted Sams, and told him that Kline could not be trusted and that Sams should secretly tape record any conversation with Kline. This order was in contravention of her previous directive prohibiting secret tape recordings. Sams reminded her of this directive, but Nuesse replied that it only applied to the officers, not to her and Sams. When Nuesse returned from vacation, Kline informed her that she was suspended with pay pending the outcome of an external investigation. At the hearing, Nuesse testified that she did not order any secret tape recordings. The trial court found this denial to be a falsehood as it was contradicted by both Sams and Lt. Chris Hofacker. The court then found that this incident of dishonesty, by itself, was sufficient to support the termination.

{¶ 26} In addition to identifying these three incidents, the trial court also engaged in a discussion in its judgment entry under the heading "A pattern of dishonest conduct permeating the entire case." In reviewing the entire record, the court concluded that,

{¶ 27} "Chief's Nuesse [sic] management style was, in large part, simply based upon the telling of partial truths and outright lies to suit her own purposes. * * * The Court specifically concludes that Chief Nuesse's failure to display honesty undermined the effectiveness of the Sandusky Police Department and her own performance as Chief by repeatedly violating Category III prohibitions."

{¶ 28} The trial court then listed eight falsehoods that it found proven by a preponderance of the evidence, giving the caveat that "some of these untruths were related to certain allegations in this case, which this Court concluded were not proven by a preponderance of the evidence. Nevertheless, these incidences of not being truthful certainly are relevant to issue [sic] of Ms. Nuesse's 'failure to display absolute honesty.' Some of these matters are relatively minor in nature, while others are serious."

{¶ 29} The court itemized the falsehoods as:

{¶ 30} "1) Chief Nuesse insisted, under oath, that the Cedar Point and Sandusky Police Departments were co-equals (Cedar Point is a private police force, deriving its power from the City of Sandusky).

{¶ 31} "2) There were serious problems with search warrants coming out of the police department. Nuesse claimed she corrected the problem by placing Assistant Chief Sams in charge of reviewing all warrants and making him available 24/7. (Sams under oath called this a lie, as he was not in charge of reviewing warrants.)

{¶ 32} "3) Chief Nuesse insisted that lap top computers were not removed from the patrol vehicles while she was chief. (Evidence was overwhelming that she knew they were out of the vehicles and were removed while she was chief.)

{¶ 33} "4) Chief Nuesse insisted she did not ask Cedar Point Chief Majoy about Soak City Tickets. (Chief Majoy said she did and is very credible on this issue, as he had no authority to offer her those tickets in the first place and had to call to obtain them.)

{¶ 34} "5) Chief Nuesse insisted she talked to Judge O'Brien about the parking ticket matter. (Judge O'Brien testified that he talked to Captain Frankowski about the matter, but has no recollection of talking to Ms. Nuesse.)

{¶ 35} "6) Chief Nuesse claimed she toured the County's dispatch system when it was fully functional. (Credible evidence showed that it was not fully functional when she toured the center following a meeting.)

{¶ 36} "7) Chief Nuesse denied any knowledge of a new police website that was being prepared by Assistant Chief Sams. (Nuesse later admitted to the City Manager that she knew Sams was preparing the site and had actually seen it.)

{¶ 37} "Finally, and perhaps most illustrative of how dishonesty can undermine the effectiveness of a police department was the testimony of Lt. Chris Hofacker, who was full of praise for Chief Nuesse and her family for helping him out of a very tough personal situation. Nevertheless, upon questioning, Officer Hofacker related an incident when Chief Nuesse asked that patrol officers no longer park in the circle in front of the police station, but rather in the back. Officer Hofacker sent out a directive to other officers, informing them of the change. Officer Hofacker also testified that he forwarded a copy of the directive to Chief Nuesse.

{¶ 38} "Officer Hofacker further testified that he never heard anything back from Chief Nuesse on the order he copied her, but he did hear some complaining from officers. One day, he was standing with one of the loudest complainers when Chief Nuesse approached. Chief Nuesse told the complaining officer that the parking order was a

misunderstanding; it only related to certain times that they could not park there. Hofacker then testified that the other officer 'looked at me like, boy, how do you know—you're telling us this stuff and how much of it is really a fact and how much of it are you just making up kind of thing, and I lost some credibility with him a little bit.'"

{¶ 39} Upon resolving the four stipulated issues by finding that the City proved by a preponderance of the evidence that Nuesse failed to display absolute honesty, the trial court then addressed the City's other legal arguments. The court found that the City was not denied due process when Chairperson Janice Warner refused to disqualify herself from reviewing the hearing officer's report because of a potential conflict of interest. The court also declined to examine how much time individual commission members spent on their decision to modify the hearing officer's recommendation.

{¶ 40} Nuesse now appeals from the judgment of the trial court, setting forth the following two assignments of error:

{¶ 41} "I. THE REVIEWING COURT ERRED BY ABUSING ITS DISCRETION IN DENYING APPELLANT HER RIGHT TO DUE PROCESS SECURED TO HER UNDER THE OHIO AND UNITED STATES CONSTITUTION.

{¶ 42} "II. THE REVIEWING COURT ERRED IN FAILING TO AWARD APPELLANT FULL BACK PAY AND CONDUCTING A HEARING ON THE CORRECT AMOUNT."

{¶ 43} In addition, the City cross-appeals, raising the following three assignments of error:

{¶ 44} "1. Did the Erie County Court of Common Pleas commit reversible error by rejecting the City's argument that it was denied due process after Chairperson Janice Warner refused to disqualify herself from voting on whether to adopt, modify or reject Hearing Officer Cirigliano's August 13, 2009 Report and Recommendation where the uncontroverted evidence showed that she could not be a fair and impartial decision-maker because her brother was one of Ms. Nuesse's material witnesses; she was a participant in the Perkins Township and City of Sandusky Police Participation Committee that backed Appellant Nuesse's unsuccessful proposal to merge the City's emergency dispatch system with Perkins Township; and her former sister-in-law—a Sandusky Police Department Dispatcher—was laid off just prior to the October 7, 2009 Commission meeting?

{¶ 45} "2. Did the Erie County Court of Common Pleas commit reversible error by failing to consider any of the evidence supporting the City's argument that it was denied due process after Chairperson Janice Warner and Commissioner Vincent Rhodes voted to modify Hearing Officer Cirigliano's Report and Recommendation and to order Nuesse's immediate reinstatement without meaningfully reviewing the 3,647 transcript [sic] and 281 exhibits from the 22-day hearing?

{¶ 46} "3. Did the Erie County Court of Common Pleas commit reversible error when it found that Appellant [sic] The City of Sandusky ("the City") failed to establish by a preponderance of the evidence that Nuesse was properly terminated under Ohio Law and the Sandusky Police Department's Rules and Regulations for engaging in misconduct, including using her public office for private gain by failing to pay a parking

ticket and accepting Cedar Point and Soak City tickets; failing to cooperate and coordinate efforts with other employees and law enforcement organizations and agencies, such as the Erie County Sheriff and Prosecutor; and falsifying grant reports?"

{¶ 47} We begin our analysis by noting that we review the trial court's judgment on the R.C. 124.34(C) appeal from the decision of the civil service commission under an abuse of discretion standard. *Raizk v. Brewer*, 12th Dist. Nos. CA2002-05-021, CA2002-05-023, 2003-Ohio-1266, ¶ 10; *Ward v. City of Cleveland*, 8th Dist. No. 79946, 2002-Ohio-482. The term abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying this standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 48} Under her first assignment of error, Nuesse argues that the trial court abused its discretion in that it violated her right to due process by considering incidents of dishonesty that were outside the scope of the stipulated issues. Specifically, Nuesse argues that the court abused its discretion by upholding the termination based on incidents of dishonesty that were not related to the grant applications or the dispatch system, and by upholding the termination based on incidents of dishonesty that occurred at the hearing, after she was already terminated. The City, on the other hand, argues that one of the stipulated issues was failure "to display absolute honesty," and that this issue encompasses all incidents of dishonesty, not just those relating to the grants or the dispatch system. Moreover, the City argues that the trial court was entitled to consider

incidents of dishonesty that occurred at the hearing, because not allowing the court to do so could lead to a "bizarre and nonsensical result" in that "the City would have to re-hire [Nuesse], and then re-fire her, on the clearly legitimate grounds that she lied under oath at the [civil service] hearing."

{¶ 49} This case presents the unusual situation in which the trial court found that the City did not prove by a preponderance of the evidence its main reasons for terminating Nuesse's employment. Instead, the court found alternative reasons to justify upholding Nuesse's termination that, while beyond those specifically stated by the City, were within what it interpreted to be the scope of the larger stipulated issue of "failure to display absolute honesty." Because we conclude that one of these incidents of dishonesty was sufficiently identified in the disciplinary decision and the Murman Report such that it is appropriately included in the stipulated issue, and because that incident constitutes a Category III offense for which termination is warranted upon a single occurrence, we affirm the trial court's decision.

{¶ 50} Contrary to the City's argument, we think it is axiomatic that a court cannot base its finding that a termination was justified on acts that occurred *after* the employee was terminated. It is the duty of the court to determine whether the City's proffered reasons for termination were proven, not to seek "ad hoc" reasons to support terminating the employee. The City cites to several cases that it argues support its position that a court can consider post-termination events. However, we find the City's reliance on those cases to be misplaced.

{¶ 51} The first is *Athens Cty. Commrs. v. Ohio Patrolmen's Benevolent Assn.*, 4th Dist. No. 06CA49, 2007-Ohio-6895. In that case, an arbitrator determined the county had just cause to terminate an employee. Notwithstanding that, the arbitrator used evidence of the employee's medical condition, discovered post-termination, to mitigate the punishment of the employee from discharge to reinstatement with a requirement that every six months he prove his ability to perform his job. The City argues that the same logic applies here, such that the trial court is permitted to rely upon evidence which was not available to the City at the time of its termination decision—Nuesse's falsehoods at the hearing—to determine whether the City had just cause for termination. We disagree.

{¶ 52} *Athens* cited to *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1998), 81 Ohio St.3d 269, 271-272, in which the Ohio Supreme Court framed the issues that an arbitrator must consider in determining whether "just cause" exists to discharge an employee as: "(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances." Although not controlling because the present situation does not involve arbitration, we think this framework is helpful in illustrating the flaw in the City's argument. In *Athens Cty. Commrs.*, the employee did not dispute that a cause for discipline existed. Thus, the issue before the arbitrator was whether the amount of discipline was appropriate. In deciding that issue, the arbitrator was empowered by the collective bargaining agreement to modify the amount of discipline based on the circumstances, and was not limited by the collective bargaining agreement to considering only facts known at the time of the

decision to discipline. *Athens Cty. Commrs.* at ¶ 40. It is in that context that the Fourth District discussed whether consideration of post-termination evidence was appropriate; reaching the conclusion that such consideration was in the discretion of the arbitrator. Id. at ¶ 41. Here, in contrast, the issue before the trial court was whether a cause for discipline existed in the first instance, not whether the amount of discipline was appropriate. Therefore, the holding in *Athens Cty. Commrs.* is inapposite.

{¶ 53} For the same reasons, the City's argument that the present situation is analogous to the "after-acquired evidence doctrine" as articulated by the United States Supreme Court in *McKennon v. Nashville Banner Publishing Co.* (1995), 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852, is untenable. In *McKennon*, the employee was allegedly discharged as part of a work force reduction plan. However, the employee filed suit in federal court, contending that age was the motivating factor in the decision to discharge her, and thus her employer violated the Age Discrimination in Employment Act of 1967 ("ADEA"). During discovery, the employee admitted to having copied several confidential documents relating to the company's financial situation while still employed. Upon learning this, the employer sent a letter informing the employee that this conduct was a separate and sufficient ground for termination. The employer argued that this after-acquired evidence barred any recovery by the employee for any violation of the ADEA. In its reasoning, the Supreme Court stated,

{¶ 54} "[T]he case comes to us on the express assumption that an unlawful motive was the sole basis for the firing. [The employee's] misconduct was not discovered until

after she had been fired. *The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason*. Mixed motive cases are inapposite here, except to the important extent they underscore the necessity of determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law." (Emphasis added.) *McKennon* at 360.

{¶ 55} The Supreme Court then went on to "consider how the after-acquired evidence of the employee's wrongdoing bears on the specific remedy to be ordered." Id. Under that analysis, the Supreme Court held that in the case before it, and as a general rule in cases involving after-acquired evidence sufficient to support termination, "neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." Id. at 361-362. However, the court concluded that an absolute rule barring any recovery would undermine the ADEA's objectives of forcing employers to examine their motivations, and penalizing employers for decisions that spring from age discrimination. Instead, the beginning point in formulating a remedy "should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered * * * [and] taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." Id. at 362.

{¶ 56} Similar to *Athens* and *Bd. of Trustees of Miami Twp.*, the Supreme Court separated the issues of the motivation behind the termination decision from the proper remedy for the unlawful discharge. Moreover, the court allowed after-acquired evidence when considering the latter, but not the former. Here, the issue before the trial court was whether the City proved its grounds for termination by a preponderance of the evidence, which is akin to finding whether cause existed to discipline Nuesse, as in *Athens* or *Bd. of Trustees of Miami Twp.*, or determining the City's motivation to terminate Nuesse, as in *McKennon*. As such, we find instructive the Supreme Court's statement that "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the [after-acquired] reason." *McKennon* at 360. Therefore, we reject the City's argument that the trial court was entitled to consider evidence of Nuesse's post-termination dishonesty when determining whether the City proved its grounds for termination.

{¶ 57} Applying this conclusion to the three separate incidents the trial court relied upon to support its judgment that Nuesse failed to display absolute honesty, we find that the third incident and part of the second incident—Nuesse's denial that she ordered secret recordings of conversations with Kline, and her statement that Sams was unavailable on February 28, 2008, respectively—are falsehoods that occurred at the hearing, and thus could not be considered by the trial court in determining whether cause existed to terminate Nuesse at the time the decision was made. Likewise, the first six of the eight

additional falsehoods mentioned by the trial court should not have been considered as they also relate to statements Nuesse made at the hearing.

{¶ 58} In fact, of the incidents of dishonesty referenced by the trial court, only four occurred prior to Nuesse's termination, and, therefore, were available to support the court's decision to uphold the termination. They are: (1) Nuesse's denial to Kline that she made statements to the dispatchers that they would be county employees within two weeks ("dispatcher incident"), (2) Nuesse's statement to Kline that Sams could not attend the February 28, 2008 meeting because he was unavailable and/or afraid of losing his job ("Sams incident"), (3) Nuesse's denial to then City Manager Miears that she had any knowledge of a new police website being created by Sams ("website incident"), and (4) Nuesse's claim that the parking directive issued by Hofacker was a misunderstanding ("parking incident").[1]

{¶ 59} We must now decide whether these four remaining incidents are sufficiently within the scope of the issues presented to the trial court as grounds for Nuesse's termination. Specifically, the stipulated issue of "Failure of Ms. Nuesse to display absolute honesty, including using the influence of her position to mislead city officials regarding the dispatch system, in addition to the falsification of the grant application." Nuesse argues that this issue is limited to incidents of dishonesty relating only to the dispatch system or the grant applications. The City, on the other hand, argues

[1]The first two are the first and second separate incidents of dishonesty found by the trial court, while the last two are the seventh and eighth additional falsehoods mentioned by the court.

that the plain language of this issue is broad enough to encompass any incident of dishonesty. We reject both arguments.

{¶ 60} Initially, we find Nuesse's argument meritless because a simple reading of the stipulated issue reveals that "failure of Ms. Nuesse to display absolute honesty" is modified by the next phrase "*including* using the influence of her position * * *." (Emphasis added.) The word "including" does not in any way limit the incidents of dishonesty to be considered, but rather emphasizes the importance of the two incidents that are specifically mentioned. Therefore, we disagree with Nuesse's narrow interpretation that only incidents of dishonesty relating to the dispatch system or to the grant applications should be considered.

{¶ 61} However, we also cannot adopt the City's broad construction. By adopting the City's view, we would be sanctioning a scenario in which a city police chief could be notified of the grounds for her termination, contest the termination on those grounds, and then have the termination upheld on entirely different grounds of which she was unaware and had no opportunity to contest. This result contravenes the concept of procedural due process, which requires, at a minimum, an opportunity to be heard at a meaningful time and in a meaningful manner "when the state seeks to infringe a protected liberty or property right."[2] *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, ¶ 8 (citing

[2]The parties do not dispute that Nuesse has a protected property right in continued employment as the City of Sandusky Chief of Police. See *Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494.

Boddie v. Connecticut (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 and *Mathews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18).

{¶ 62} In employment termination cases, procedural due process claims typically arise in the context of the sufficiency of the pre-termination notice. In that context, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill* (1985), 470 U.S. 523, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494. We think these same due process considerations also apply post-termination to prevent a trial court from upholding the termination order where the employee had no notification that the relied upon incidents were at issue. Therefore, in order to define the scope of the incidents included in "failure * * * to display absolute honesty," we look to the disciplinary decision, which notified Nuesse of the reasons for her termination.

{¶ 63} We note initially that while the disciplinary decision sets forth the allegations of dishonesty relating to the dispatch system and the grant applications, it does not specifically mention any of the four remaining incidents relied upon by the trial court. However, in the disciplinary decision, Kline incorporates the pre-termination notice and the Murman Report by stating, "it is my further decision that other disciplinary violations also occurred as set forth in the original Notice," "[t]he Murman Report gives examples of your lack of honesty," and "[t]here are additional disciplinary violations set forth in the Notice." In addition, we note that the pre-termination notice also does not

specifically address any of the four remaining incidents, but does advise Nuesse that "the City plans to use any information contained in the Murman [R]eport to support its position." Thus, we turn to the Murman Report to determine if the four remaining incidents were included in it.

{¶ 64} Of those four incidents, the main body of the Murman Report does not notify Nuesse, in any way, about three of them—the Sams incident, the website incident, and the parking incident. In fact, the Sams incident is not even mentioned in the 200-page supplement to the Murman Report, the website incident only appears once in the supplement, in the signed statement of Mark Volz, and the parking incident only appears in the supplement in two places, the signed statements of Sams and Hofacker. Therefore, because Nuesse was not notified of these three incidents of dishonesty, they cannot be used to uphold the decision to terminate her.[3] See *Clipps v. City of Cleveland*, 8th Dist. No. 86887, 2006-Ohio-3154, ¶ 18 (employee's due process rights were violated where the city did not inform the employee that other sexual harassment incidents were being considered against her); *Arnett v. Franklin Monroe Local Bd. of Educ.*, 2d Dist. No. 1567, 2002-Ohio-3559 (school bus driver's due process rights were violated where he was not told that an alleged conversation regarding a complaint that he almost struck a

[3]This is not to say, however, that the City is required to ignore the excluded incidents of dishonesty. See *Brown v. Ohio Bur. of Emp. Servs.* (1996), 114 Ohio App.3d 85, 92 ("[*McKennon*] held that the court cannot force an employer to ignore improper behavior that it learns about during the proceeding.") Indeed, had we reversed the judgment of the trial court, these incidents would be relevant in constructing an appropriate remedy for the wrongful discharge under the reasoning in *McKennon*, supra, at 360-362.

student with his bus, and during which he stated that he was not trying to hit the student, but merely was trying to scare him, would be used to evaluate whether he should be terminated).

{¶ 65} In contrast, the dispatcher incident is included in the main body of the Murman Report. The report states:

{¶ 66} "Deceit to advance her personal agenda has been policy for chief Nuesse * * * * In an apparent fit of spitefulness, after her recommendation to merge with Perkins Township's dispatch was rebuffed, she announced to the Sandusky dispatchers that they would all be working at the county in two weeks."

{¶ 67} In addition, mention of this incident was also found in the supplement to the report in the signed statement of Meinzer, and in the summary of the interviews of union representative Tony Vaccaro, Mayor Murray, Commissioner Crandall, and dispatcher Amy Theriault. Moreover, the supplement contained the signed statement of dispatcher Felicia Jones who claimed that Nuesse told her they would be at the county in two weeks. Finally, the supplement included the interview summary of Chief Nuesse, in which she discussed what she said to the dispatchers.

{¶ 68} Therefore, because the dispatcher incident was specifically mentioned in the main body of the Murman Report, and was referenced by seven different people in the supplement to the report, including Nuesse herself, and because the Murman report was incorporated into both the pre-termination notice and the disciplinary decision, we hold that Nuesse was sufficiently apprised that this incident of dishonesty would be at

issue, and thus it fell within the scope of the stipulated issue of "failure of Ms. Nuesse to display absolute honesty." See *Washington v. Cleveland Civ. Serv. Comm.*, 8th Dist. No. 94596, 2010-Ohio-5608, ¶ 31 (letters sufficient to notify employee of charges against him where they adequately explained the evidence against him, employee had opportunity to respond, and he was given a full post-termination hearing). Furthermore, because this incident of dishonesty fell within the scope of the stipulated issue, the trial court was entitled to rely upon it to uphold the termination.

{¶ 69} Having held that the incident regarding Nuesse's statements to the dispatchers fell within the scope of the stipulated issue of failing to display absolute honesty, we now turn to whether the trial court abused its discretion in finding that the City proved this allegation by a preponderance of the evidence, and in finding that this incident alone was sufficient to uphold Nuesse's termination.

{¶ 70} Nuesse contends that there is no support for the idea that she told the dispatchers they were going to be county employees. Further, Nuesse contends that the trial court violated due process by "alleging" that she was dishonest where her testimony was supported by the testimony of others. However, "[o]n the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 71} At the hearing, Murman, Kline, Hofacker, and Nuesse all testified regarding this incident.

{¶ 72} Murman stated, "She walked into the dispatch area after a Council meeting, or Commission meeting, in which things had not gone her way, and began speaking directly to the - - to the dispatchers. And whatever she actually said we'll probably never know for sure, but certainly some of the dispatchers came away with the impression that she told them that their jobs were - - with the city were toast, that they'd be over at the - - they'd be working over at the county, and for the county, within a couple of weeks."

{¶ 73} Kline testified, "[I got] a call that our dispatch employees are all upset, in arms because the night before after the meeting, after the meeting that afternoon, Kim had gone back and went straight to the dispatchers that were working and said * * * 'You're going to become County employees in the next two weeks.'" Kline learned this from Warrenette Parthemore who told him that Troy Vaccaro was inquiring why they were taking away the union's employees. Kline stated that from his meeting with Vaccaro, "[t]he clear impression [was] that the dispatchers were told that they were going to become county employees in the next two weeks, or within two weeks." Kline further testified that Nuesse said, "Well, that's not what I said. They misunderstood me." Kline also recalled that at the February 26, 2008 meeting, Mayor Murray clearly said that the merger would be of facilities only; dispatchers would not become county employees.

{¶ 74} Hofacker testified that dispatcher Felicia Jones "yelled out one of the questions to the Chief and the Chief looked in the office and told [Jones] that, and, again,

I'm not going to speculate or tell you something I can't remember exactly. I don't remember what time frame she said, but the Chief made some comment to her about the dispatch was going to be moved in X number of days and I don't remember how many days. And if she had a problem with that, she had to take it up with her Union."

{¶ 75} Nuesse, for her part, testified that "one of the dispatchers became upset and asked me if their job was in jeopardy, and I reassured her that, no, it was not. She kept asking me questions I couldn't answer. And I explained to her that I didn't have any answers for her at the time, that everything was very preliminary, I had just learned about it an hour or so before. * * * And that as more details became available, I would make them aware of it. And then she asked if she could contact her union. And I said, 'Well, that's up to you. But, you know, but I'm sure that they are going to be kept in the loop same as when we were working on the joint Sandusky/Perkins effort.'"

{¶ 76} In addition, the Murman Report, which was entered into evidence, contained the signed statement of dispatcher Felicia Jones, and the interview summary of dispatcher Amy Theriault.[4] In her signed statement, Jones stated,

{¶ 77} "The very next day around 4:30 PM, the Chief with [Assistant Chief] Sams accompanying her once again came to the dispatch area after she had been to a meeting with the City Commissioners. It was the day the Commissioners had been to a meeting in Perkins Township. While in the Dispatch room Chief Nuesse said 'They had a meeting and it is out of my hands, in two weeks they want you at the County.'

[4]Neither Jones nor Theriault testified at the hearing.

{¶ 78} "I asked the Chief questions about how would the work with the courts, warrants, and other matters be handled, if the Dispatch Center was moved to the County. The Chief gave no answers and said, 'It is out of my hands.' The Chief then told me 'Contact your union representatives.' It was obvious to me that the Chief was visibly upset.

{¶ 79} "Subsequent to this discussion with Chief Nuesse, that night, I called Union President Todd Gibson, but he was ill so I talked to Union Vice President Troy Vaccaro, who told me he would check into it, the possible move in two weeks, but advised me no jobs would be lost."

{¶ 80} The summary of the interview with Amy Theriault recounted that, "[Theriault] stated that after the article appeared in the local newspaper, regarding the Department's dispatch system, Chief Nuesse did come in and tell the unit that no one would lose their job and it was just in the planning stage. However, on another occasion, after the County Commissioners had indicated that the Sandusky Police Department Dispatch might move to the Erie County Dispatch Center, Chief Nuesse came into the unit and said it was out of her hands at that point. Tim Mead may have been present when she made the announcement. According to Theriault, Chief Nuesse appeared to be visibly upset and indicated our questions about the move would be answered eventually and she did not have the answers at that time.

{¶ 81} "Ms. Theriault stated that very night she got a call from another police dispatcher, Felicia Jones, who told her that Chief Nuesse told Jones, 'we were moving to

the County in two weeks.' Ms. Theriault stated the next morning both she and Tim Mead were on duty and Chief Nuesse did not mention to them they were moving in two weeks. She stated if she had, we definitely would have discussed it. Ms. Theriault stated it is hard to keep it all straight, with so many people talking about these matters for the last several weeks."

{¶ 82} Based on the above evidence, specifically the statements of Kline, Hofacker, and Felicia Jones, we cannot conclude that the trial court abused its discretion in finding that Nuesse committed a falsehood when she denied to Kline that she had told the dispatchers they would be county employees within two weeks, claiming that they misunderstood what she had said.

{¶ 83} Nor can we conclude that the trial court abused its discretion in finding that "this incident of dishonesty, by itself, is sufficient in the Court's view to terminate Chief Nuesse." The Sandusky Police Department's Rules and Regulations governing "Employee Discipline" define Category III offenses as including, "[e]ngaging in dishonest or immoral conduct that undermines the effectiveness of the agency's activities or employee performance, whether on or off the job." In addition, the rules deem the commission of a Category III offense so serious as to warrant suspension or dismissal upon a single occurrence. Here, Nuesse engaged in dishonesty that caused city dispatchers to become needlessly concerned for their jobs. Because the rules provide that the commission of a single Category III offense can lead to termination, we hold that the

trial court did not abuse its discretion in upholding Nuesse's termination on this incident alone.

{¶ 84} Accordingly, Nuesse's argument that the trial court violated her due process rights is without merit, and her first assignment of error is not well-taken. Further, our resolution of Nuesse's first assignment of error renders her second assignment of error moot. See App.R. 12(A)(1)(c). Similarly, because we have upheld Nuesse's termination, the City's cross-appeal is also moot, and will not be considered. See id.

{¶ 85} Based on the foregoing, the judgment of the Erie County Court of Common Pleas is affirmed. Nuesse is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE