[Cite as *Velazquez v. Bratenahl*, 2003-Ohio-878.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81592

LOUIS VELAZQUEZ Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	and
VILLAGE OF BRATENAHL Defendant-Appellee	:	OPINION

DATE OF ANNOUNCEMENT OF DECISION: February 27, 2003

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court Case No. CV-413534

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

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COLLEEN CONWAY COONEY, J.:

{¶1} Plaintiff-appellant Louis Velazquez ("Velazquez") appeals the judgment of the court of common pleas affirming the Village Council's decision to terminate his employment with the Village of Bratenahl Police Department. We find no merit to the appeal and affirm.

{¶2} Velazquez joined the Village of Bratenahl Police Department in November 1999. He had an antagonistic relationship with the Bratenahl Police Chief, Paul E. Falzone ("Falzone"), who was also his father-in-law.

{¶3} Due to his hostile relationship with Chief Falzone, Velazquez met with the mayor, Richard D. McKeon, in April 2000 to discuss resigning as a police officer. Although Velazquez expressed his intention to resign, he did not submit a letter of resignation nor did he give a firm date for his resignation. It is undisputed that Velazquez informed the mayor and his supervisors in April 2000, that he was planning to resign because he was

pursuing a position with the Cuyahoga Metropolitan Housing Authority ("CMHA") police department and because of his hostile relationship with Chief Falzone.

{¶4} On Monday, May 1, 2000, Velazquez's lawyer, Michael R. Piotrowski ("Piotrowski"), telephoned Bratenahl's prosecutor, Sylvester Summers, Jr. ("Summers"), to formalize Velazquez's resignation. Summers advised Piotrowski that the Village wished to terminate Velazquez's employment with the police department. Accordingly, the lawyers negotiated an agreement (the "Agreement") setting forth the terms by which Velazquez's tenure as a police officer would end.

{¶5} Under the terms of the Agreement, Velazquez was to provide a formal letter of resignation and return all police property to Bratenahl by May 2, 2000. Velazquez was also required to release Bratenahl and its officials from all claims arising out of his employment and his separation from the department. In exchange, Bratenahl was to pay Velazquez for all remaining vacation and sick time along with an additional sixteen (16) days of approved administrative sick leave. The negotiated administrative leave was conditioned upon Velazquez's performance of his obligations under the Agreement.

{¶6} Although the parties had not yet signed the Agreement, on May 2, 2000, Velazquez voluntarily turned in his police badge, weapon, identification, and other police property to Sgt. Terry DeCrescenzo, at the Bratenahl Police Department. Because Velazquez's accrued vacation and sick time would expire on May 15, 2000, Bratenahl anticipated Velazquez would execute and return the Agreement no later than May 15, 2000. However, on May 30, 2000, when the Agreement was still not signed, Chief Falzone sent a letter to Velazquez informing him that he had been terminated as of May 15, 2000. The letter advised Velazquez that his employment was being formally terminated and

requested he promptly return any additional Bratenahl property he may have had in his possession.

{¶7} Velazquez responded to the Chief's letter on May 31, 2000 by sending a package to his supervisor, Lt. Kevin Gaul, containing a few items of Bratenahl property and a handwritten note. The note read: "Lt. Here is the clip your buddy wants back. Please make sure Joe gets the ticket book. See you in court."

{¶8} Velazquez appealed the chief's decision to the mayor. Because the chief of a village police force is not empowered to terminate an officer, Bratenahl reinitiated the termination process. On June 9, 2000, Chief Falzone submitted formal disciplinary charges against Velazquez to Mayor McKeon. Chief Falzone brought the charges pursuant to R.C. 737.19 and indicated that Velazquez had violated Sections 4 and 13 of the Bratenahl Uniform Standards of Conduct as a result of his unauthorized and unapproved absence from work and his failure to report for work in May and June 2000.

{¶9} Mayor McKeon investigated the formal disciplinary charges filed against Velazquez and on June 13, 2000, decided to affirm, with modification, Chief Falzone's recommendation that Velazquez be terminated.

{¶10} On June 16, 2000, pursuant to R.C. 737.19, Velazquez timely appealed the Mayor's decision to the Village Council. On July 13, 2000, a hearing was conducted before the Village Council. Velazquez and his counsel were present but Velazquez declined to give any sworn testimony, or to present any testimony in his defense to the Bratenahl Village Council. After hearing the sworn testimony of Mayor McKeon, Lt. Gaul, and Chief Falzone, the Bratenahl Village Council unanimously voted to affirm Mayor McKeon's decision to terminate Velazquez.

{¶11} Velazquez filed a timely appeal of the Village Council's decision to the Cuyahoga County Court of Common Pleas. After a de novo review, the trial court affirmed the Village Council's decision. Velazquez now appeals to this court, raising two assignments of error for our review. Because this appeal is governed by R.C. 2506.04, we review the trial court's decision under an abuse of discretion standard. *Summers v. Village of Highland Hills* (July 29, 1999), Cuyahoga App. No. 74437, citing *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12; *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30.

{¶12} In his first assignment of error, Velazquez argues the Village of Bratenahl violated his constitutional rights when it terminated his employment without first providing him a pre-termination hearing. Specifically, Velazquez argues that under *Loudermill v. Cleveland Bd. of Edn*. (1985), 470 U.S. 532, he could not be terminated without notice and a pre-termination hearing because, as a public employee, he had a constitutionally protected property interest in his continued employment. In *Loudermill*, the United States Supreme Court held that Due Process "requires 'some kind of hearing' prior to discharge of an employee who has a constitutionally protected property interest in his employment." Id. at 542.

{¶13} A public employee has a property interest in his public employment if state law gives him a right to continued employment. See *Deoma v. City of Shaker Heights* (1990), 68 Ohio App.3d 72, 80-81, and *Jackson v. Kurtz* (1979), 65 Ohio App.2d 152, 157-158, (both cases held that R.C. 124.34 gives classified public employees the right to continued employment except as provided therein). In Ohio, the termination of village police officers is governed by R.C. 737.19, which provides that village police officers may only be terminated for " * * * incompetence, gross neglect of duty, gross immorality,

habitual drunkenness, failure to obey orders given them by proper authority, or for any other reasonable or just cause."

{¶14} Courts have analogized the language in R.C. 737.19 governing the termination of village police officers to R.C. 124.34 which governs the tenure, reduction, suspension, removal, and demotion of classified civil servants. *See Shaffer v. Village of West Farmington* (1992), 82 Ohio App.3d 579; *Stephen v. Village of Barnesville*, 7th Dist. No. 97 BA 12, 1999 Ohio App. Lexis 3922. In *Loudermill*, the United States Supreme Court held that R.C. 124.34 creates a property interest in continued employment for classified civil servants because such employees can only be terminated for cause. *Loudermill,* supra at 542. Similarly, because R.C. 737.19 allows the termination of village police officers only for just or reasonable cause, R.C. 737.19 confers a property interest in continued employment to the employee.

{¶15} Bratenahl argues Velazquez was not entitled to a pre-termination hearing because he voluntarily resigned his position as a village police officer. In *Sanitary Commercial Services v. Shank* (1991), 57 Ohio St.3d 178, 181, the Ohio Supreme Court held that "the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided the waiver does not violate public policy." Similarly, in *Nichols v. Cuyahoga County Bd. of Mental Retardation and Dev. Disabilities* (Nov. 12, 1992), Cuyahoga App. No. 61111, this court held that an employee may waive his or her right to a *Loudermill* pre-termination hearing. Thus, it follows that if an employee voluntarily resigns, thereby removing the need for a pre-termination hearing, he waives his right to a *Loudermill* pre-termination hearing.

{¶16} An employee's words and actions may be construed as an effective resignation when they demonstrate the employee's intent to resign. In *Hammon v. DHL Airways, Inc*. (6th Cir. 1999), 165 F.3d 441, the United States Sixth Circuit Court of Appeals stated that in determining whether an employee "effectively resigned," courts examine "whether the employee expressed an intention to end his employment, and whether the employee took action to relinquish his position." Id. at 448.

{¶17} Here, the undisputed evidence indicates Velazquez verbally expressed his "intention to resign" to Mayor McKeon and Lt. Gaul. Velazquez's counsel also relayed his intention to resign to the Village. Although he never signed the proposed Agreement setting forth the terms of his separation, he substantially complied with the terms when he turned in his badge and his gun. Presumably, he also accepted payment for his accumulated sick leave and vacation time.

{¶18} It is also undisputed that Velazquez never returned to work or sought permission to return to work. Although Velazquez claims he did not return to work because he was reviewing the terms of the Agreement, there is no evidence that he proposed any sort of counteroffer or indicated to Bratenahl that he needed extra time to review the agreement even though he was purportedly reviewing the Agreement with counsel during the entire month of May. All of Velazquez's actions demonstrated his intent to resign. Therefore, his actions, coupled with his expressed intention to resign, constitute an effective resignation.

{¶19} Having voluntarily resigned from his position as a police officer, Velazquez waived his right to a *Loudermill* pre-termination hearing. Accordingly, Velazquez's first assignment of error is overruled.

{¶20} In his second assignment of error, Velazquez argues the trial court erred when it found it was reasonable for Bratenahl to terminate Velazquez. Velazquez asserts it was unreasonable for Bratenahl to terminate him because he was absent with Bratenahl's knowledge and consent. During the month of May 2000, his supervisors recorded his absence as "administrative sick leave." However, when he failed to execute the parties' Agreement and failed to report for work for over a month, Chief Falzone revised the schedule so that Velazquez was recorded as AWOL (absent without leave). Velazquez asserts that the subsequent revision of the schedule together with his termination were unreasonable.

{¶21} However, the undisputed evidence in the record demonstrates Velazquez expressed his intention to resign to the mayor and Lt. Gaul, stating he was pursuing other employment with CMHA. The undisputed evidence also indicates Velazquez carried out his intention to resign by returning his badge and gun to the department, voluntarily negotiating a separation agreement, and failing to express any desire to return to work for over a month even though he had not signed the Agreement. Moreover, Velazquez had the opportunity to explain his reasons for his extended absence and for refusing to sign the agreement at the hearing before the Village Council but failed to offer any explanation. Faced with the undisputed facts regarding Velazquez's voluntary resignation and his failure to report for duty for over a month, the trial court could only conclude that the termination was reasonable. Accordingly, Velazquez's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, P.J. and

JOSEPH J. NAHRA, J.* CONCUR

JUDGE

COLLEEN CONWAY COONEY

*Sitting by assignment, Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).