

[Cite as *Ramsey v. Cleveland*, 2009-Ohio-2387.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91940

JOHN RAMSEY

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-642811

BEFORE: Blackmon, P.J., Stewart, J., and Jones, J.

RELEASED: May 21, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert J. Triozzi
Director of Law

L. Stewart Hastings
Chief Assistant Director of Law
Kevin J. Gibbons
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077

ATTORNEYS FOR APPELLEE

Joseph W. Diemert, Jr.
Thomas M. Hanculak
Joseph W. Diemert, Jr. & Associates Co.
1360 S.O.M. Center Road
Mayfield Heights, Ohio 44124-2189

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶1} Appellant, the City of Cleveland (“the City”), appeals the trial court’s judgment reversing the decision of the Civil Service Commission that terminated Appellee John Ramsey’s position with the Cleveland Fire Department. The City assigns the following error for our review:

“I. Trial court erred in holding that the Civil Service Commission decision was not supported by reliable, probative and substantial evidence.”

{¶2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶3} The record before us demonstrates that Ramsey began his employment with the City as a firefighter in 1994. At the time of his hire, Ramsey resided in a multi unit house located at Silsby Road on Cleveland’s west side. Shortly after Ramsey was hired, he married and started a family.

{¶4} As the family grew, Ramsey and his wife purchased a larger home located at Ernadale Avenue, also on Cleveland’s west side. The family lived at this home for approximately ten years. During this period, Ramsey and his wife chose to enroll their children in private schools; they considered the Cleveland Public Schools to be inadequate for their children.

{¶5} In 2005, the Ramseys sold their home on Ernadale Avenue and purchased a home in Avon, Ohio. Ramsey’s wife, Barbara, and their children moved to the home in Avon. Ramsey subsequently rented a unit within the City’s limits, which was at his previous residence on Silsby Road.

{¶16} After the Ramseys purchased the house in Avon, the City received an anonymous tip that Ramsey was residing at the Avon house and not within the city of Cleveland, as required by Section 74 of the Cleveland Charter. Pursuant to the tip, the City began an investigation into Ramsey's residency. The investigation, which spanned nine months, consisted of video surveillance of the Avon and Silsby addresses.

{¶17} On August 29, 2005, the City notified Ramsey that his residency was in question. The notice was hand-delivered to Ramsey at the Silsby Road address by a member of the City's fire department. The notice required Ramsey to submit documented proof in compliance with the civil service rules that he was a bona fide resident within the City.

{¶18} Ramsey submitted proof in the form of a one-year lease agreement for the Silsby Road address, signed July 18, 2005, and commencing August 15, 2005; a negotiated check for the first month's rent reflecting the Silsby Road address; a copy of his driver's license reflecting the Silsby Road address; a copy of the renter's insurance policy; a postal change of address confirmation form indicating a change in address from the Ernadale house to the Silsby house; a telephone bill in Ramsey's name for the Silsby Road address; a voter registration card showing his residence on Silsby Road; and an active electric bill for the address. Thereafter, the City scheduled a civil service hearing, and selected a referee to hear the evidence and make a recommendation.

{¶9} At the hearing, Ramsey resubmitted the same documents, in addition to a voter registration card reflecting the Silsby Road address, and an electric bill reflecting active service at the Silsby Road address. Ramsey also testified that his true and fixed residence was the Silsby Road address. Ramsey testified that based on the academic and safe well-being of their children, he and his wife decided that it was in the family's best interest for his wife and children to live in Avon, while he lived in the City of Cleveland to comply with his employment residency requirement. Ramsey testified that he and his wife hoped that the separation would be temporary.

{¶10} In addition, Ramsey introduced a video of the Silsby Road address showing a fully furnished apartment, with food in the refrigerator, clothes in the closets, and toiletries in the bathroom. The video also showed a rear parking lot, which was not viewable from the street, where one of Ramsey's vehicles was parked.

{¶11} At the hearing, Ramsey's wife, Barbara, also testified that the Silsby Road address was Ramsey's fixed address. Barbara corroborated Ramsey's testimony regarding their decision that she and the children would live in Avon, while Ramsey lived in Cleveland.

{¶12} At the hearing, the City introduced documented evidence that Ramsey's name was on the mortgage to the house in Avon and that his children were enrolled in the Avon School District. The City also introduced evidence that Ramsey also receives some mail at the Avon address.

{¶13} In addition, the City presented the testimony of Civil Service Investigator, John Fryer, who testified that he conducted video surveillance of both the Avon and Silsby Road addresses. Fryer testified that video surveillance was compiled over 43 days spanning approximately nine months. The videotape was shown at the hearing, and Fryer testified regarding his surveillance. In the video, Ramsey was observed on four separate occasions at the Avon address, and one of Ramsey's trucks was routinely observed at that address.

{¶14} The referee recommended Ramsey's termination. The appointing authority, Cleveland Safety Director Martin Flask, concurred and immediately terminated Ramsey. Ramsey appealed his termination to the civil service commission. A hearing was held by the commission, and thereafter, it upheld the decision to terminate Ramsey.

{¶15} Ramsey appealed the civil service commission's decision to the common pleas court, which set a briefing schedule for consideration of the appeal. After the parties' briefs had been filed, the court issued a judgment reversing the civil service commission's decision to terminate Ramsey, and reinstating him to his position. The City requested Findings of Fact and Conclusions of Law, which the trial court issued.

Residency Appeal

{¶16} In its sole assigned error, the City argues the trial court erred when it determined that the Civil Service Commission's decision was not supported by reliable, probative, and substantial evidence. We disagree.

{¶17} First, we must point out that we are limiting our review to whether the trial court abused its discretion in reversing the decision of the Civil Service Commission, which terminated Ramsey’s employment for allegedly violating the residency requirement of Cleveland, Ohio, Charter §74. The constitutionality of the residency requirement has been decided in the affirmative by this court in the *City of Cleveland v. State of Ohio*.¹ This matter is currently pending before the Ohio Supreme Court.

{¶18} A city employee who has been discharged for violating a city’s residency requirement may appeal from a decision of the municipal civil service commission to the common pleas court pursuant to R.C. 124.34 and R.C. 119.12, or under R.C. Chapter 2506.² Here, Ramsey elected to prosecute his appeal pursuant to R.C. 124.34 and R.C. 119.12.

{¶19} It is well established that administrative appeals brought pursuant to R.C. 124.34 and R.C. 119.12 are subject to trial de novo.³ The common pleas court may substitute its own judgment on the facts for that of the commission, based upon the court's independent examination and determination of conflicting issues of fact.⁴ A trial court must not simply determine if the ruling of the commission was arbitrary

¹Cuyahoga App. Nos. 89486 and 89565, 2008-Ohio-2655.

²See, e.g., *Ward v. Cleveland*, Cuyahoga App. No. 79946, 2002-Ohio-482; *Maple Heights v. Karley* (Nov. 23, 1977), Cuyahoga App. No. 36564.

³*Wolf v. Cleveland*, Cuyahoga App. No. 82135, 2003-Ohio-3261, at ¶8.

⁴*Id.*, citing *Newsome v. Columbus Civ. Serv. Comm.* (1984), 20 Ohio App.3d 327.

or capricious, the standard for appeals brought pursuant to R.C. Chapter 2506, but must evaluate the evidence anew.

{¶20} The initial burden of furnishing proof of his Cleveland residency in accordance with the civil service rules was upon Ramsey.⁵ If his documented evidence satisfied the civil service rules regarding proof of residency, the court of common pleas was obligated to then place the burden upon the City to demonstrate by a preponderance of the evidence that Ramsey's proofs were a sham and his bona fide residence was located outside of the City.⁶

{¶21} In reviewing the common pleas court's decision on an administrative appeal pursuant to R.C. 124.34 and R.C. 119.12, the appellate court's review is limited to a determination of whether the common pleas court's decision is supported by reliable, probative, and substantial evidence and is in accordance with the law.⁷ This court's review, therefore, is limited to a determination of whether the court of common pleas abused its discretion.⁸

{¶22} Abuse of discretion suggests more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.⁹

⁵ *Ward*, supra, at ¶10.

⁶ *Id.*, *Cupps v. Toledo* (1961), 172 Ohio St. 536, 539.

⁷ *Wolf*, supra at ¶10, citing R.C. 119.12; *Arlen v. State* (1980), 61 Ohio St.2d 168; *Ohio State Bd. of Pharmacy v. Poppe* (1988), 48 Ohio App.3d 222.

⁸ *Id.*, citing *In re Barnes* (1986), 31 Ohio App.3d 201, 208.

⁹ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶23} The term “discretion” itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.¹⁰

{¶24} Upon review, we do not find that the trial court’s decision was “so palpably and grossly violative of fact and logic” that it demonstrates perversity of will, defiance of judgment, or bias. The City requested documented evidence of Ramsey’s bona fide residency and he provided satisfactory proof in the form of a written lease, cancelled rent check, renter’s insurance policy, utility bills, driver’s license and voter’s registration card, all of which reflected the Silsby Road address. In addition, Ramsey produced video graphic evidence of the Silsby Road address with all the indicia of a “lived in” dwelling, such as food, clothing and toiletries.

{¶25} We find that the City has failed to satisfy the burden of showing by a preponderance of the evidence that Ramsey’s documented evidence was a sham and his bona fide residence was located outside Cleveland. The record indicates that during the City’s nine-month video surveillance of the Avon address, the investigator was able to videotape Ramsey’s presence a total of only four times. On

¹⁰*In re Barnick*, Cuyahoga App. No. 88334, 2007-Ohio-1720, at ¶9, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222.

those four occasions, the surveillance was between the hours of 4:30 p.m. and 6:30 p.m. One of those occasions shows Ramsey preparing to go “trick-or-treating” with his four school-aged children.

{¶26} The City's evidence, consisting of four sightings, does not establish by a preponderance of the evidence that Ramsey was living at the Avon address and not just visiting as Ramsey has maintained. In its judgment reversing the commission, the trial court stated, in relevant part, the following:

“In a case involving similar facts in that a police officer’s wife lived in Brunswick and his children attended Brunswick schools, the Eighth Appellate District Court held that the police officer’s ‘presence at the Brunswick home does not establish proof that he lived there or that he made that home his residence.’ *Wolf v. City of Cleveland* (Ohio App. 8th Dist.), Cuyahoga App. No. 82135, 2003 Ohio 3261.”¹¹

{¶27} Consequently, the trial court’s decision was supported by reliable, probative, and substantial evidence and is in accordance with law. Accordingly, we overrule the City’s sole assigned error.

Judgment affirmed.

It is ordered that appellee recover from appellant his costs herein taxed.

This court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

¹¹ Finding of Facts and Conclusion of Law at 7.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

LARRY A. JONES, J., CONCUR;
MELODY J. STEWART, J., CONCURS
WITH SEPARATE CONCURRING OPINION

MELODY J. STEWART, J., CONCURRING:

{¶28} I agree with the majority decision to affirm the judgment in this case. The trial court found that the results of the video surveillance, coupled with other evidence submitted by the City, did not satisfactorily rebut the proof of residency offered by Ramsey. We do not find that the trial court's decision was an abuse of discretion, and we cannot evaluate the evidence anew and substitute our judgment for that of the trial court. However, I think the findings in this case call into question how much evidence it takes to satisfy the City's burden of proving a sham and at what cost to the City. The findings also demonstrate the inequality of burdens placed upon the alleged employee-violator and the City.

{¶29} In this case, four sightings of Ramsey at his Avon property over 43 days of surveillance that spanned nine months was insufficient to prove a sham. In *Missig v. Cleveland Civ. Serv. Comm.*, Cuyahoga App. No. 91699, 2009-Ohio-966, the City offered into evidence a compilation of video surveillance spanning a two-year period as proof that a terminated employee's proof of residency was a sham. What is clear

is this: if a City employee is willing to expend the energy and resources to set up a scenario that creates the appearance of residency (paper residency), it would be relatively easy according to the civil service rules, to satisfy the initial requirements of showing bona fide residency. The burden then shifts to the City to show that this residential set up creates the appearance of residency, but in reality is not where the employee actually resides. Needless to say, the City may need to expend considerable resources on investigative measures in order to satisfy this burden. Additionally, these investigative measures naturally entail intruding into the private lives of the City employees and their families. In all respects, this entire process is distasteful and unfortunate.