[Cite as *Deem v. Fairview Park*, 2009-Ohio-6314.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93135

RICHARD M. DEEM

PLAINTIFF-APPELLANT

vs.

CITY OF FAIRVIEW PARK

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-654357

BEFORE: McMonagle, P.J., Blackmon, J., and Sweeney, J.

RELEASED: December 3, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Daniel J. Ryan
2000 Standard Building
1370 Ontario Street
Cleveland, OH 44113

ATTORNEY FOR APPELLEE

Sara J. Fagnilli
Director of Law
City of Fairview Park
20777 Lorain Road
Fairview Park, OH 44126

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).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, Richard M. Deem, appeals the trial court's March 19, 2009 judgment affirming the Fairview Park Civil Service Commission's decision. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

{¶ 2} For several years prior to April 2006, Deem was a captain in the Fairview Park Police Department. A March 29, 2006 letter addressed to Deem at the police station from the Mayor of Fairview Park stated that, effective April 17, 2006, Deem was being reassigned to the position of police lieutenant. The letter explained that because of a decrease in revenue and increase in expenditures, the city had to reduce costs and the cost-reducing efforts included eliminating the police captain position.[1]

{¶ 3} In April and July 2007 letters to the city's law director and the city council, respectively, Deem's attorney noted that two other police officers who were demoted at the same time as Deem as part of the city's cost-saving efforts had been restored to their previous ranks and paid back wages for the period of their demotions; counsel sought back pay for Deem as well.

{¶ 4} On December 5, 2007, Deem filed an appeal to the city's Civil Service Commission. Deem noted the other demoted officers were later

[1]Fairview Park Codified Ordinances 06-13, passed on April 17, 2006, eliminated the position.

restored to their previous ranks and compensated back wages; the ground for his appeal was the city's failure to do the same for him.

{¶ 5} In February 2008, the Commission denied Deem's appeal as being untimely under R.C. 124.34(B). In March 2008, Deem appealed to the common pleas court under R.C. 2506.01 and 2506.03. The city filed the record in April 2008. In September 2008, Deem filed two motions for a hearing; one of the motions was supported by his affidavit. In his affidavit, Deem averred that he never received the March 29, 2006 letter reassigning him.

{¶ 6} On March 19, 2009, the trial court found that Deem had "failed to timely file an appeal at the administrative level and failed to raise the issue of insufficient notice at the administrative level." The court therefore affirmed the decision of the Fairview Park Civil Service Commission. Deem now appeals, raising two assignments of error for our review.

LAW AND ANALYSIS

1. Standard of Review

{¶ 7} In *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 2000-Ohio-493, 735 N.E.2d 433, the Ohio Supreme Court distinguished the standard of review to be applied by common pleas courts and appellate courts in R.C. Chapter 2506 administrative appeals. The Court stated:

{¶ 8} "The common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. * * * The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is 'more limited in scope.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 465 N.E.2d 848, 852. 'This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.' Id. at fn. 4. 'It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264, 267." *Henley* at 147.

{¶ 9} Thus, this court will review the judgment of the trial court to determine if the lower court abused its discretion in making a judgment that

the preponderance of reliable, probative and substantial evidence supported the administrative decision. See *Wolstein v. Pepper Pike City Council*, 156 Ohio App.3d 20, 2004-Ohio-361, 804 N.E.2d 75, ¶21.

2. Analysis

{¶ 10} Deem contends in his first assignment of error that he did not receive the March 29, 2006 letter, and, thus, "could not determine when his right of appeal would commence." In his second assignment of error, he contends that the record filed by the city was incomplete because the Commission did not grant him a hearing on his appeal.

{¶ 11} R.C. 124.34(B) governs "reductions" of a city's civil service employees and provides in relevant part as follows:

{¶ 12} "(B) In case of a reduction, * * * the appointing authority shall serve the employee with a copy of the order of reduction, * * * which order shall state the reasons for the action.

{¶ 13} "Within ten days following the date on which the order is served * * * the employee * * * may file an appeal of the order in writing with the state personnel board of review or the commission. For purposes of this section, *the date on which an order is served is the date of hand delivery of the order or the date of delivery of the order by certified United States mail*, whichever occurs first. If an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, the

appeal within thirty days from and after its filing with the board or commission. The board, commission, or trial board may affirm, disaffirm, or modify the judgment of the appointing authority." (Emphasis added.)

{¶ 14} The trial court abused its discretion by not finding as a matter of law that Deem's due process rights were violated. The March 29 letter was addressed to Deem at the police station, but no evidence exists that it was served on him either by hand delivery or certified mail as required under R.C. 124.34(B). Deem contends he did not receive it as required by the statute, and the city did not demonstrate that he did. Thus, Deem's procedural due process right to notice was violated and the trial court abused its discretion in finding that the Civil Service Commission's order was supported by reliable, probative, and substantial evidence. The first assignment of error is sustained.

{¶ 15} In light of the above, Deem's argument in his second assignment of error that the Commission should have granted him a hearing has merit and, therefore, the second assignment of error is also sustained.

Judgment reversed; case remanded for further proceedings consistent with this opinion.

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

The 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.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR