

[Cite as *Mun. Constr. Equip. Operators' Labor Council v. Cleveland Civ. Serv. Council*, 2010-Ohio-5849.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94605

MUNICIPAL CONSTRUCTION EQUIPMENT OPERATORS' LABOR COUNCIL

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND CIVIL SERVICE COMMISSION, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-631240

BEFORE: McMonagle, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: December 2, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, the city of Cleveland (the “City”), appeals from the trial court’s judgment denying its motion for summary judgment and granting the motion for summary judgment of plaintiff-appellee, the Municipal Construction Equipment Operators’ Labor Council (the “Union”), which represents construction equipment operators employed by the City.

For the reasons that follow, we reverse and remand with instructions to the trial court to grant the City's motion for summary judgment.

I. Background

{¶ 2} Section 127 of the Cleveland City Charter gives the Civil Service Commission (the "Commission") the authority to "make, promulgate, and when necessary * * * amend, rules for the appointment, promotion, transfer, layoff, reinstatement, suspension and removal of City officials and employees in the classified service." Section 128 of the Charter requires that the Commission provide rules for the classification of jobs, and stipulates that "[s]uch classification into groups and subdivisions shall be based upon and graded according to duties and responsibilities * * *."

{¶ 3} In accordance with the Charter, the Civil Service Commission has promulgated rules concerning job classifications. Rule 2.20 of the Civil Service Rules provides that, "[w]henever a new position is established or the duties of a position are so changed that the statement of duties and typical tasks of the classification to which it was originally allocated no longer apply, the appointing authority shall report such fact to the Commission and transmit a full statement of the circumstances and description of the duties. The Commission shall thereupon after investigation, determine the proper classification of such position. * * *."

{¶ 4} Under Rule 2.30 of the Civil Service Rules, the “statement[s] of duties and typical tasks of classifications * * * are descriptive only and not restrictive.” The rule further provides that the duties statement is “a general description of the kind of work involved in all positions that properly fall within a classification” and does not “in any sense” prescribe what the duties of a position shall be, nor limit the Commission’s right to “prescribe or alter the duties of any position.”

{¶ 5} Rule 2.40 of the Civil Service Rules gives the Commission wide latitude in amending job descriptions. It provides that “[t]he Commission reserves the right to amend the statement of duties and typical tasks for any classification and to abolish, merge or divide existing classifications.”

{¶ 6} On April 22 and June 22, 2007, the Commission adopted amended job descriptions for Group A and Group B construction equipment operators. The original job descriptions described the construction equipment operators’ duties in terms of the equipment they typically used in their jobs as follows:

{¶ 7} For Group A operators: “Under supervision, operates, maintains or repairs, erects or dismantles, and performs other related duties as required in the operation of A-frames, Compressor Operators, Boom Trucks, Cranes, Derricks, Draglines, Dredges, Elevating Grader of Euclid Loaders, Gradalls,

Hoes (all types), Hoisting Engines, Pile Drivers, Power Shovels, Side Booms, Trench Machines (over 24" wide), and related duties as required.

{¶ 8} "Minimum Qualifications: A High School Diploma or GED is required. Five years of full time paid experience maintaining, operating, and repairing heavy equipment vehicles is required. Must have own tools. A valid State of Ohio Commercial Driver's License Class 'A' with air brake and trailer endorsement is required."

{¶ 9} For Group B operators: "Under supervision, operates, maintains or repairs, erects or dismantles, or performs other related duties as required in the operation of bulldozers, Endloaders, Kholman Type Loaders, Power Graders, Power Scoops, Power Scrapers, Push Cats, and related duties as required.

{¶ 10} "Minimum Qualifications: A High School Diploma or GED is required. Five years of full time paid experience in maintaining, operating, and repairing construction equipment is required. Must own or have access to a set of tools. A valid State of Ohio Commercial Driver's License is required."

{¶ 11} The amended job descriptions explained the type of work that A and B construction equipment operators were expected to perform, instead of listing the type of equipment the operators used, as follows:

{¶ 12} For Group A operators: “Under general supervision, performs excavation and grading work to repair and maintain: channels to accommodate vehicular and pedestrian traffic such as, but not limited to, roads, streets, expressways, bridges, parking lots, alleys, and sidewalks (excludes building); City serviced and provided projects such as, but not limited to, drainage, water supply, and water development; Structures for utilities provided and serviced by the City such as, but not limited to, storm and sanitary sewers, drainage structures, waterlines, transmission lines, storage tanks, underground electrical lines, or fences. Directs, instructs, and assists workers in the installation and maintenance work of the water distribution system. Transports equipment to and from job site. Loads debris from streets, structure demolitions, and from City emergency projects for removal. Participates in loading, crushing, or processing of snow season materials. Maintains and repairs equipment. Participates in the skilled operation of heavy equipment. Serves as a member of a crew where specialized knowledge and skills are required. Performs other job-related duties as required where qualified.” The minimum qualifications for the job did not change.

{¶ 13} For Group B operators: “Under general supervision, performs excavation and grading work to repair and maintain: channels to accommodate vehicular and pedestrian traffic such as, but not limited to,

roads, streets, expressways, bridges, drainage structures, grade separations, parking lots, alleys, fences, and sidewalks (excludes buildings). Directs, instructs, and assists workers in the installation and maintenance work of the water distribution system. Transports equipment to and from job site. Loads refuse, debris from streets, structure demolitions, and from City emergency projects for removal. Participates in loading, crushing, or processing of snow season materials. Maintains and repairs equipment. Participates in the skilled operation of heavy equipment. Serves as a member of a crew where specialized knowledge and skills are required. Performs other job-related duties as required where qualified.” The minimum qualifications for the job did not change.

{¶ 14} On July 30, 2007, the Union filed a declaratory judgment action seeking an order declaring that the new job descriptions had not been implemented in accord with Civil Service Commission Rule 2.20 and were therefore void, and ordering the Commission to reinstate the former job descriptions.

{¶ 15} Both the Union and the City subsequently filed motions for summary judgment. In its motion, the City argued that Rules 2.30 and 2.40 of the Civil Service Commission Rules, which reserve to the Commission the right to amend the statement of duties and typical tasks for any job classification, applied to the amended job descriptions and, therefore, the

amended job descriptions had been properly implemented. The Union, on the other hand, argued that the amended job descriptions had actually created new job classifications and, therefore, Rule 2.20 of the Civil Service Commission Rules, which requires that the City perform an investigation to determine the proper classification before adopting a new job classification, applied. The Union contended that because no investigation regarding the job classifications had been done, the amended job descriptions were invalid.

{¶ 16} More than a year later, the trial court heard oral argument on the motions. The trial court subsequently granted the Union's motion and denied the City's motion. In its judgment entry, the trial court concluded that the amended job descriptions established new job classifications and, therefore, Rule 2.20 of the Civil Service Commission Rules applied. The trial court found that the amended job descriptions were invalid because the City had not conducted the required investigation and it ordered the City to reinstate the former job descriptions. The City appeals from this judgment.

II. Standard of Review

{¶ 17} Civ.R. 56(C) provides that summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party.

Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. We review the trial court's judgment de novo using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 201, 205, 671 N.E.2d 241.

III. Discussion

A. Summary Judgment

{¶ 18} In its first assignment of error, the City contends that the trial court “failed to apply the correct legal standard” in evaluating the Union’s motion for summary judgment. Specifically, the City contends that the trial court should have deferred to the Commission’s conclusion that Rules 2.30 and 2.40 applied, instead of adopting the Union’s argument that Rule 2.20 applied. The City argues that an agency’s interpretation of its own rules is entitled to deference. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 1994-Ohio-486, 627 N.E.2d 538 (“[C]onsiderable deference should be accorded to an agency’s interpretation of rules the agency is required to administer.”), citing *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 155, 438 N.E.2d 120. See, also, *Cuyahoga Cty. Bd. of Commrs. v. Ford* (1987), 35 Ohio App.3d 88, 92, 520 N.E.2d 1. Hence, the City contends, the trial court should have deferred to the Commission’s authority to conclude that Rule 2.20 did not apply to the facts of this case, but

that Rules 2.30 and 2.40 applied because the job description change involved the amendment of existing job descriptions, rather than the creation of a new job classification.

{¶ 19} The Union concedes that a reviewing court should defer to an administrative agency's interpretation of matters uniquely within the expertise of that agency, where such interpretation is consistent with the statutory law and the plain language of the rules. *Penix v. Ohio Real Estate Appraiser Bd.*, 5th Dist. No. 09-CA-14, 2009-Ohio-6439, ¶30. It contends that this principle is not applicable to this case, however, because the Commission did not follow its own rule setting forth the procedural requirements for creating a new job classification, i.e., Rule 2.20.

{¶ 20} We need not resolve this issue because our de novo review of the record demonstrates that the Commission did not act improperly in amending the job descriptions for Class A and B construction equipment operators in accord with Rules 2.30 and 2.40.

{¶ 21} Despite the Union's assertions and the trial court's findings that the City had nefarious motives for making the changes, the evidence in the record supports the City's position that the Commission amended the job descriptions to better describe the type of work the Groups A and B construction equipment operators perform. Trudy Hutchinson, Director of Personnel for the city of Cleveland, testified in deposition that the City "had

been concerned about the wording of the job description and wanted to have it more reasonably fit the duties.” She stated that “[t]he directors * * * in whose departments the CEO [“construction equipment operators”] work basically were concerned about that job description not reflecting the work that was being performed.”

{¶ 22} A collection of emails attached to the City’s motion for summary judgment indicated that various City departments were involved in formulating new job description language that more accurately described the construction equipment operators’ job functions. The emails indicate that discussions took place from November 2006 until the amended job descriptions were first submitted to the Commission on April 22, 2007.

{¶ 23} The record is also clear that the amendments did not create new job classifications. Various construction equipment operators were deposed for purposes of this litigation approximately one year after the amended job descriptions were adopted. None of the operators testified that their job duties had been altered by the amended job descriptions. In fact, they *all* testified that neither their job duties nor hours had been affected in any way by the changes made in the job descriptions. They also testified that they had continued operating the same type of equipment that they had used before the job description change. In short, the terms and conditions of

employment for construction equipment operators were not changed at all by the amended job descriptions.

{¶ 24} This evidence was un rebutted by the Union. Instead, the Union asked the trial court to speculate that the City's alleged motivation for making the change was to circumvent craft jurisdictional language of a collective bargaining agreement between the parties and a previous order from another common pleas court judge that found the City in contempt for assigning construction equipment operators' Union work to non-Union employees. The trial court agreed with the Union's speculation that the City's intent in amending the job descriptions was to eliminate the construction equipment operators' jobs.

{¶ 25} But the trial court's conclusion is not supported by the record. The contempt order, issued while the collective bargaining agreement was in effect, clearly recognized that it had no prospective application after March 31, 2007, when the collective bargaining agreement expired. Moreover, even assuming that the terms of the collective bargaining agreement were still in effect,¹ the unrefuted evidence was that more than a year after the job descriptions had been amended, none of the construction equipment

¹When a collective bargaining agreement expires, an employer has a continuing duty to bargain in good faith and maintain the status quo as to conditions of employment in the expired agreement. *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 113 Ohio St.3d 480, 2007-Ohio-2452, 866 N.E.2d 1065, ¶22.

operators' job duties or responsibilities had changed in any way — obvious confirmation that the new job descriptions had not created a new job classification.

{¶ 26} The Union contends that the construction equipment operators' job duties had not changed prior to the amendment of their job descriptions and, therefore, the City was required to apply Rule 2.20 before making any job description change. But we interpret Rule 2.40 as applicable in this instance precisely because the construction equipment operators' job duties had not changed.

{¶ 27} Under the plain language of Rule 2.20, the City must conduct an investigation and issue a report determining the appropriate job classification when “the duties of a position are so changed” that those duties might no longer appropriately fall within the classification to which that job was originally assigned. But here, the record is clear that there was no change in the construction equipment operators' duties, either prior to or after the job description change. The only change was the amendment to the job descriptions themselves, as allowed by Rules 2.30 and 2.40.

{¶ 28} Hence, the Union's argument that it was entitled to summary judgment because “the undisputed facts show the Civil Service Commission did not comply with its Rule 2.20 is meaningless.” The Commission was not required to comply with Rule 2.20 because under Rules 2.30 and 2.40, the

Commission may amend job descriptions, even where job duties have not changed, so long as the amendments do not create new job classifications. The “undisputed facts” of this case are that the construction equipment operators’ jobs did not change in any way after the amended job descriptions were approved by the Commission.

{¶ 29} In sum, we find no evidence in this record that amending the construction equipment operators’ job descriptions from one describing the type of equipment they typically use to one describing their duties and responsibilities using that equipment created new job classifications. Rule 2.40 specifically reserves to the Commission the exclusive authority “to amend the statement of duties and typical tasks for any classification,” which is what happened here. Because the amendment to the job descriptions did not change or create a new job classification, Rule 2.20 was inapplicable, and the Commission was not required to follow it. Accordingly, the trial court erred in granting the Union’s motion for summary judgment and denying the City’s motion.

{¶ 30} Appellant’s first assignment of error is sustained.

B. Exhaustion of Administrative Remedies

{¶ 31} In its second assignment of error, the City argues that the trial court erred in granting the Union’s motion for summary judgment because the Union failed to exhaust its administrative remedies before filing its action

for declaratory judgment. Specifically, the City contends that the Union failed to appear before the Civil Service Commission at either the April or June 2007 Civil Service Commission meetings when the proposed job description amendments were on the Commission's agenda. It further contends that even after the Commission had voted, the Union could have appealed the Commission's decision to the Board of Zoning Appeals. The City argues that because the Union did not do so, it failed to exhaust its administrative remedies. We are not persuaded by either argument.

{¶ 32} First, our review of the City's motion for summary judgment indicates that although the City argued that the Union had notice of the April and June 2007 Commission meetings, the City produced no evidence demonstrating such notice. Although we reject the Union's assertion that the evidence supports an inference that the City "had no intention" of informing the Union of the changes in the job descriptions until after the changes had been made,² the City failed to demonstrate there was no genuine issue of material fact regarding whether the Union had notice of the Commission meetings.

²An email from Trudy Hutchinson to Tony Washington dated September 20, 2006 with a subject line "MCEO job description" states "[d]o we yet know when the classification changes will go before the C.S. Commission? As soon as we know it is scheduled we can plan to put the union on notice immediately thereafter." We construe this email as indicating the City would advise the Union of the meeting once it knew when it was scheduled, and not, as the Union contends, that the City would advise the Union of the changes after the meeting.

{¶ 33} Second, the Cleveland City Charter does not provide for appeals from decisions of the Civil Service Commission to the Board of Zoning Appeals. Even a perfunctory review of Chapter 11 of the Charter demonstrates that §76-6(b), which the City contends authorizes such appeals, provides for appeals to the Board of Zoning Appeals from orders or decisions of administrative officers *related to zoning*. We cannot agree with the City's tortured interpretation of §76-6(b) that it provides for appeals to the Board of Zoning Appeals from the orders and regulations of all City administrative officers and agencies.

{¶ 34} Appellant's second assignment of error is overruled.

Reversed and remanded with instructions for the trial court to grant the City's motion for summary judgment.

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

MELODY J. STEWART, J., and

COLLEEN CONWAY COONEY, J., CONCUR