

[Cite as *Fritzgerald v. Cleveland Civ. Serv. Comm.*, 2015-Ohio-609.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101586

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**DIANTE FRITZGERALD**

PLAINTIFF-APPELLANT

vs.

**CITY OF CLEVELAND CIVIL SERVICE COMMISSION, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
REVERSED AND REMANDED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-11-768125

**BEFORE:** Keough, J., Celebrezze, A.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** February 19, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Appellant, Diante Fitzgerald, appeals the trial court's judgment upholding the order of the Cleveland Civil Service Commission terminating his discharge from employment with the city of Cleveland. Finding merit to the appeal, we reverse and remand.

### I. Background

{¶2} Fitzgerald was employed by the city of Cleveland as an assistant commissioner in the division of printing and reproduction. He began his 30-year career with the city in the entry level position of machine operator and was promoted steadily until he reached the position of assistant commissioner.

{¶3} On December 18, 2009, the city issued Fitzgerald a letter informing him that a predisciplinary conference had been scheduled to discuss his alleged violation of Cleveland Civil Service Rules 9.10.05; 07, 08, 09, 10, and 18: (1) conduct unbecoming an employee in the public service; (2) disorderly, immoral or unethical conduct while on duty; (3) insubordination; (4) offensive conduct or language toward fellow employees, superiors, or the public in the course of employment; (5) willful violation of provision of law governing the civil service of the city or of the rules or regulations of the commission; and (6) other failure of good behavior detrimental to the service, or other acts of misfeasance, malfeasance or nonfeasance in office.

{¶4} The letter stated that the charges were related to "the following reported incidents":

1. On 11/25/09, you met alone with a vendor during a bid violating a direct order and specific instructions by your commissioner.
2. On 11/25/09, you were told to take no further action regarding an alleged policy violation by a division employee while your commissioner investigated the incident. You disregarded this instruction and wrote up the employee in disregard of a specific directive.

3. On 12/9/09, you made threatening remarks to your commissioner by saying “I’m not a vindictive or malicious person. I don’t like hurting people but I will do whatever it takes to set things right.” This is in direct violation of the city’s Workplace Violence policy.

{¶5} The letter further stated that Fritzgerald would be afforded an opportunity at the predisciplinary conference to offer an explanation of the alleged conduct.

{¶6} The predisciplinary hearing proceeded on January 7, 2010. Thereafter, on February 16, 2010, the city issued a letter to Fritzgerald advising him that he was terminated from his employment with the city. The termination letter stated that the predisciplinary letter had identified violations of various civil service rules. The letter further stated that “the violations of the civil service rules arose from several incidents and confrontations with commissioner Hewitt,” and it then reiterated the three incidents outlined in the predisciplinary letter. Continuing, the letter stated:

I have reviewed the policy and rule violations alleged and your responses to each of the incidents described and find that you violated Rules 9.10.05, 9.10.08, 9.10.09, and 9.10.18. You offered no explanation to mitigate or explain your negative actions. *You have a history of being argumentative, irrational and abusive* which for an assistant commissioner is counterproductive and demoralizing for the entire operation. *You have been disciplined for similar insubordinate behavior, dating back to 2006.* This behavior can no longer be tolerated by the Department of Finance, Division of Printing and Reproduction.

*\* \* \* You have engaged in a continuing pattern of unacceptable and obstreperous behavior that negatively affected the work environment in the Division.* (Emphasis added.)

{¶7} Pursuant to Civil Service Rule 9.22, Fritzgerald requested a hearing before a referee.

At the hearing, counsel for the city gave an opening statement in which he reviewed the three incidents outlined in the predisciplinary letter to Fritzgerald. He then informed the referee that there had been other instances and threats of violence “in the past” that had reflected poorly on Fritzgerald’s management skills “such to the point where the only appropriate remedy was

termination.” Counsel for the city then reviewed an incident in August 2009, where Fritzgerald allegedly failed to properly supervise a painting project; an incident in April 2009, where PC technician Lisa Hart complained that Fritzgerald had been treating her unfairly; and an incident in January 2009, where Fritzgerald allegedly left the workplace to complain to someone at City Hall about the lack of heat in his office, despite an order from his boss, commissioner Michael Hewitt, not to do so.

{¶8} Hewitt testified for the city at the hearing. In addition to describing the three events charged in the predisciplinary letter, Hewitt testified over Fritzgerald’s counsel’s objection about the painting project, the alleged City Hall incident, and other incidents involving Fritzgerald that Hewitt said demonstrated that Fritzgerald was a threat to employees. Hewitt’s testimony included his description of an incident that occurred in January 2007 where Fritzgerald allegedly called another employee a “hateful bitch” and said “[o]ne day I’m going to f— that bitch up.”

{¶9} Likewise, Lisa Hart testified over counsel’s objection about an alleged incident between her and Fritzgerald in April 2009 where she felt intimidated by Fritzgerald, and she identified a memo she wrote about the incident in which she described Fritzgerald’s treatment of her as “horrible.” The memo was subsequently admitted as an exhibit. James Hardy, commissioner of purchases and supplies in the department of finance, also testified over counsel’s objection about the painting project that Fritzgerald allegedly failed to properly supervise.

{¶10} Following the hearing (held on May 5, June 1, and June 15, 2010), the referee issued a report and recommendation finding that Fritzgerald’s termination was for just cause because “threats and failure to follow directions cannot be tolerated in the workplace.” The referee noted in his report that “there were a series of events that led to the decision to discharge

[Fritzgerald]” that “evinced a pattern which was probably considered by the appointing authority.” The referee listed those events in his report, including the three events charged in the predisciplinary letter, but also including the painting project, the City Hall incident about the heating, the incident involving Lisa Hart, and the incident where Fritzgerald called another employee a “hateful bitch.” The referee recommended that in light of the incidents, Fritzgerald’s discharge should be sustained.

{¶11} After the referee issued his report, Fritzgerald filed an appeal with the Civil Service Commission and then moved under Civil Service R. 9.60 to introduce additional evidence. The referee held another hearing to consider the additional evidence. Subsequently, the referee issued a report stating that after reviewing the documents and hearing Fritzgerald’s additional testimony, he did not find any facts or explanations that altered his earlier recommendation that the discharge be sustained. The Civil Service Commission subsequently affirmed the city’s decision to terminate Fritzgerald’s employment.

{¶12} Fritzgerald then appealed the commission’s decision to the common pleas court, which affirmed the commission’s decision upholding Fritzgerald’s discharge. This appeal followed.

## II. Analysis

{¶13} The common pleas court and the court of appeals apply different standards of review for administrative appeals. R.C. 2506.04. The common pleas court considers the whole record, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Id.*; *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). The standard of review for the appeals court is limited to review on

questions of law. *Id.* Within the ambit of questions of law for appellate review is whether the common pleas court abused its discretion in affirming the administrative decision. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848, (1984) fn. 4.

{¶14} In his first assignment of error, Fitzgerald contends that the trial court erred in affirming the Commission's decision upholding his termination because the city violated his due process rights. As a public employee, Fitzgerald had a property right in continued employment, a right protected by the due process clause of the Fourteenth Amendment. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 538-539, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Fitzgerald contends that he was not afforded adequate due process because the predisciplinary letter did not notify him of all the charges against him. Specifically, he argues that the only incidents he was notified about were the three incidents set forth in the predisciplinary letter. He was not notified prior to the disciplinary hearing that he was also charged with negligent supervision regarding the painting project, treating Lisa Hart unfairly, leaving the workplace without authorization to do so, or calling another employee a "hateful bitch," and that these events would be considered by the city in determining its discipline of Fitzgerald.<sup>1</sup>

{¶15} In *Loudermill*, 470 U.S. at 545, the United States Supreme Court set forth the procedural requirements for the pretermination hearing of a public employee as follows:

The essential requirements of due process \* \* \* are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. \* \* \* The 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.

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<sup>1</sup>Fitzgerald received a one-day suspension in January 2009, for leaving the workplace without authorization; he was not disciplined for the other incidents.

{¶16} In this case, the city's predisciplinary notice informed Fritzgerald of the civil service infractions with which he was being charged. The city also provided Fritzgerald with an opportunity to respond to the charges. However, the city did not adequately provide Fritzgerald with an explanation of the evidence against him. Specifically, Fritzgerald was not informed in the predisciplinary letter or during the predisciplinary hearing that other incidents of misbehavior were being considered as a basis for his termination. The predisciplinary letter makes no mention of any incidents other than the incidents that occurred on November 25, 2009, and December 9, 2009, and Hewitt's memo to Jim Gentile, assistant finance director, following the predisciplinary conference details Fritzgerald's explanations in response to the three charged incidents, but does not include any discussion relating to the other incidents, an obvious indication that they were not discussed during the predisciplinary conference.

{¶17} The city failed to inform Fritzgerald until after the predisciplinary conference that other incidents were being considered against him, in violation of his procedural due process rights. As this court stated in *Jones v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 49226, 1985 Ohio App. LEXIS 8025 (June 13, 1985), "the due process requirement for opportunity to be heard at a meaningful time and in a meaningful manner, as applied in employment-related cases, demands at least written notice of the charges and of the evidence upon which they are based, so that the charged individual can prepare a defense or explanation."

{¶18} The city argues that there was no due process violation because the evidence not set forth in the predisciplinary letter or the termination letter did not form the basis of the city's decision to terminate Fritzgerald. Accordingly, the city contends that the referee did not err in considering this additional evidence in the *postdetermination* hearings. Further, the city contends that any due process violation was remedied when the referee allowed Fritzgerald to



introduce additional evidence at an additional hearing. The trial court likewise concluded that any due process violation was cured when the referee held the additional hearing.

{¶19} However, as *Loudermill* made clear, a due process violation occurs when a tenured public employee is not given *predetermination* notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. 470 U.S. at 544. Because the city did not give Fritzgerald notice of the additional evidence against him nor an opportunity to respond to the additional evidence at the predisciplinary hearing, it violated his due process rights.

{¶20} Furthermore, it is apparent that the city relied on these additional incidents in its decision to terminate Fritzgerald's employment. The termination letter informed Fritzgerald that he had "a history of being argumentative, irrational and abusive" and that he had "engaged in a continuing pattern of unacceptable and obstreperous behavior," including an incident for which he had been disciplined in 2006. Furthermore, at the hearing before the referee, Hewitt testified that Fritzgerald was terminated not only for the three incidents, but also for a "continuing pattern of behavior" that was disruptive to the department.

{¶21} This case is similar to *Clipps v. Cleveland*, 8th Dist. Cuyahoga No. 86887, 2006-Ohio-3154. In *Clipps*, this court held that a due process violation had occurred when, as in this case, the city failed to inform the employee until after the predisciplinary hearing that, in addition to the incidents of which she had been advised, other incidents of misbehavior were being considered as a basis for her demotion. *Id.* at ¶ 17. This court found that although the employee had subsequently been provided with procedures for additional hearings and evidence to be presented, by failing to inform the employee *prior to* the disciplinary hearing of all the city's evidence against her, the city violated the employee's procedural due process right. *Id.* at

¶ 18-19. *See also Lane v. Pickerington*, 6th Cir. No. 14a0862n.06, 2014 U.S. App. LEXIS 21894, \*18 (Nov. 14, 2004) (adequate post-termination hearing does not vitiate pre-termination deprivation of due process).

{¶22} We hold that the trial court erred in affirming the decision of the civil service commission upholding Fritzgerald's termination. The first assignment of error is sustained; the second assignment of error is therefore moot and we need not consider it. App.R. 12(A)(c).

{¶23} In *Clipps*, this court found that instead of reinstatement, the proper remedy for such a violation is to remand the matter to the trial court for a determination of whether the employee would have been disciplined even if procedural due process had been afforded. *Id.* at ¶ 19-22. Accordingly, we reverse and remand this matter to the trial court. On remand, the trial court must conduct an evidentiary hearing to determine whether Fritzgerald would have been terminated even if his procedural due process rights had been observed. If so, Fritzgerald would not be entitled to reinstatement or compensatory damages, but he may be entitled to an award of nominal damages for the deprivation of his due process rights. *Id.* at ¶ 22, citing *Emanuel v. Columbus Recreation & Parks Dept.*, 115 Ohio App.3d 592, 601, 685 N.E.2d 1272 (10th Dist. 1996). If the trial court finds that Fritzgerald would not have been terminated if afforded his due process rights, then the court should make a determination as to the reinstatement, back pay, and benefits requested by him.

{¶24} Reversed and remanded.

It is ordered that appellant recover from appellees 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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and  
MARY EILEEN KILBANE, J., CONCUR