

[Cite as *Seman v. Lakewood Civ. Serv. Comm.*, 2015-Ohio-680.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101277

DAVID M. SEMAN

PLAINTIFF-APPELLANT

vs.

LAKEWOOD CIVIL SERVICE COMMISSION

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-807414

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

RELEASED AND JOURNALIZED: February 26, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Appellant David M. Seman (“Seman”) appeals from the trial court’s judgment affirming the decision of the Lakewood Civil Service Commission (the “Commission”) that upheld Seman’s layoff from his position as manager of parks and public property for the city of Lakewood. Finding no merit to the appeal, we affirm.

I. Background

{¶2} Seman began his employment with the city of Lakewood in 1998 as a groundskeeper. He was a classified civil service employee. In 2006, he was promoted to manager of the division of parks and public property within the department of public works. He was laid off in September 2012, when his position was eliminated.

{¶3} Seman appealed his layoff to the Commission. After a hearing, the Commission issued findings of fact and upheld Seman’s layoff. The Commission found that Michael Summers, the mayor of Lakewood, as the proper appointing authority, made the decision to eliminate Seman’s position for economic reasons. The Commission further found that the abolishment of Seman’s position was not motivated by any personal animosity of the mayor toward Seman, as argued by Seman. The Commission stated:

Based on the evidence presented * * *, the Commission finds that Mr. Seman’s termination was for reasons of economy, which outweighs Mr. Seman’s evidence and arguments that the city’s layoff was made in bad faith or as a subterfuge in order to circumvent the civil service system.

[T]he city has met its burden to demonstrate by a preponderance of the evidence that the layoff by abolishment of Mr. Seman’s position was due to a lack of continuing need for the position based on a reorganization for the efficient operation of the city and for reasons of economy; and not as a subterfuge in order to circumvent the civil service system.

{¶4} Seman appealed the Commission’s decision to the court of common pleas pursuant to R.C. Chapter 2506. The trial court upheld the decision of the Commission, finding that the

mayor had the authority to eliminate Seman's position, there was no evidence the mayor was exacting revenge by targeting Seman for layoff, and the elimination of Seman's position was for economic reasons. The court stated:

The record stands on its own: Mr. Seman was the junior-most manager within Lakewood's public works department, and as the manager with the least seniority, under Lakewood's civil service rules, his was the position eligible for elimination.

In abolishing his position, Lakewood's mayor followed the civil service rules on the order of layoffs. There was no design to circumvent civil service protections against undue discipline. The mayor had no intent to discipline Mr. Seman or terminate him for cause; this was, in the end, simply a layoff. As the chief executive of the city, the mayor was gravely concerned about state budget cuts and their impact on the city's service to residents, and he made the calculated decision to eliminate or leave unfilled several middle-management positions, Mr. Seman's among them, in order to achieve cost reductions.

II. Standard of Review

{¶5} The applicable standards of review for trial and appellate courts in R.C. Chapter 2506 administrative appeals are different. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433. The common pleas court is to consider the "whole record," including any new or additional evidence admitted under R.C. 2506.03, and determine whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Id.* R.C. 2506.04 gives an appellate court a more limited power to review the judgment of the common pleas court only on questions of law, and does not include the same extensive power to weigh the evidence as is given to the common pleas court. Our more limited review requires us to affirm the common pleas court unless we find that the trial court abused its discretion in concluding that the administrative decision is supported by a preponderance of reliable, probative, and substantial evidence. *Henley* at 147, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984); *Deem v. Fairview Park*, 8th Dist.

Cuyahoga No. 93135, 2009-Ohio-6314, ¶ 9. Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

III. Law and Analysis

A. The Proper Appointing Authority

{¶6} The city of Lakewood has adopted a charter form of government pursuant to the home-rule amendments of the Ohio Constitution. Lakewood’s charter establishes various departments, including the department of public works, in which Seman worked as division manager. The charter provides that “the head of each department shall be a director, appointed by the Mayor, and shall serve at the Mayor’s pleasure * * *.” The charter further provides that “[e]ach director shall, subject to applicable civil service regulations, appoint, promote, transfer, reduce or remove heads of divisions and officers and employees within such director’s department.” Lakewood Charter, Art. IV, § 2.

{¶7} The charter also provides for a three-member Civil Service Commission. The Commission is empowered to “make, promulgate, prescribe and enforce rules for the appointment, promotion, transfer, lay-off, reinstatement, suspension and removal of employees in the classified service * * *.” Lakewood Charter, Art. XI, § 4.

{¶8} The Commission’s rules provide that “no employee * * * shall be * * * suspended or removed, except as provided in the section entitled lay-off * * * and the applicable conditions of appointment and continued employment established by any provision of the Charter * * *.” Commission’s Rules, Art. 9.

{¶9} “Appointing authority” is defined in the Commission’s rules as “[t]he Director, Board * * * or Commission having the power of appointment to, or removal from, the position in

any office or department as described in the City Charter.” Commission’s Rules, Art. 21.

{¶10} The Commission found that the mayor was the proper appointing authority responsible for Seman’s layoff due to the elimination of his position. The Commission stated that it interpreted its rules to find that “Mayor Summers was the appointing authority ultimately responsible for Mr. Seman’s layoff” because the mayor “by city charter supervises the administration of the affairs of the city, approves of all hires and promotions, and removes appointees as authorized by law.”

{¶11} Seman contends in his first assignment of error, however, that his layoff due to the elimination of his position was invalid because the decision to eliminate his position was not made by the proper “appointing authority.” Specifically, Seman contends that in light of the city charter and the Commission’s rules, his boss, Joseph Beno, as director of the public works department, was the “appointing authority” with respect to his position and, accordingly, the only individual who could decide to eliminate his position. Seman argues that because it is undisputed that the mayor, rather than Beno, made the decision to eliminate his position, the decision was not made by the proper “appointing authority” and, accordingly, the trial court erred in affirming the Commission’s decision.

{¶12} We are not persuaded. Lakewood’s charter gives the mayor broad authority over the affairs of the city as the city’s chief executive:

The Mayor shall be the chief conservator of the peace within the City; shall supervise the administration of the affairs of the City; shall see that all ordinances of the City are enforced; shall recommend to the Council for adoption such measure as they may deem necessary or expedient; shall keep Council advised of the financial condition and future needs of the City; shall prepare and submit to Council such reports as may be required by the body; *and shall exercise such powers and perform such duties as are conferred or required by this Charter, by ordinance or resolution of Council, or by general law.*

(Emphasis added.) Art.I, Sec. 6.

{¶13} As Seman points out in his brief on appeal, the charter limits the Mayor's appointment powers to department heads, except as "otherwise provided for by general law or ordinance." Art. I, Sec.4. The charter defines the term "general law" to include state statutes, as well as the state constitution and any rules and regulations promulgated pursuant to the constitution and statutes. Art. I., Sec. 3.

{¶14} R.C. 733.03 defines the general powers of mayors in cities as follows:

The mayor shall be the chief conservator of peace within the city. *He may appoint and remove* the director of public service, the director of public safety, and *the heads of the subdepartments of public service* and public safety, and shall have such other powers and perform such other duties as are conferred and required by law.

(Emphasis added.)

{¶15} The Ohio Supreme Court has held that "municipal charters must be construed to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible." *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 127, 698 N.E.2d 987 (1998). Additionally, language used in a municipal charter should be construed according to its ordinary and common usage. *Id.*

{¶16} Applying these rules of construction, we find that under the Lakewood charter, Mayor Summers and his directors have concurrent authority to appoint division heads such as Seman. The applicable charter provisions give the mayor the authority to appoint directors and to exercise other powers as conferred by "general law." R.C. 733.03, as general law, gives mayors of municipalities the authority to appoint "the heads of the subdepartment of public service and public safety." Seman, as manager of the division of parks and public property

within the department of public works, was clearly the head of a subdepartment within the department of public service. Accordingly, the mayor had the authority to appoint him to his position, even though the charter also provides that the directors of each department also have the authority to appoint heads of divisions.

{¶17} The power to appoint also implies the power to terminate. *Minor v. Eschen*, 74 Ohio St.3d 134, 139, 656 N.E.2d 940 (1995). Accordingly, because Mayor Summers had the authority to appoint Seman to his position, he also had the authority to lay him off because his position was eliminated.

{¶18} The record reflects that the mayor directed all directors, including Beno, to cut \$100,000 from their departmental budgets. Beno's proposed cuts fell short of the \$100,000 goal, however, and, although Beno disagreed that a layoff was the best cost-cutting measure, the mayor determined that elimination of the public works division manager position was necessary to reach the goal. Although the mayor could have ordered Beno to terminate Seman, the mayor took it upon himself to advise Seman that his position was being eliminated.

{¶19} Because Mayor Summers was a proper "appointing authority," the trial court did not err in affirming the Commission's decision that Summers had the authority to terminate Seman's position. The first assignment of error is therefore overruled.

B. Economic Justification for Elimination of Seman's Position

{¶20} In his second assignment of error, Seman contends that the trial court abused its discretion by affirming the Lakewood Civil Service Commission's decision that upheld the elimination of his position. Seman contends that the Commission's decision was illegal, arbitrary, capricious, unreasonable, and not supported by a preponderance of substantial, reliable, and probative evidence. Specifically, he argues that there was no evidence to support the city's

contention that his position was eliminated “for reasons of economy” or due to a reorganization of the public works department for operational efficiency. *See* R.C. 124.321(D)(2)(a).

{¶21} Lakewood’s charter established a civil service system for the merit-based protection of municipal employees and authorizes the Commission to make and enforce rules for, among other things, layoffs of employees. The Commission’s rules are silent as to what constitutes “reasons of economy,” but under the Ohio Revised Code, reasons of economy relating to a job abolishment may be based on “the estimated amount of savings with respect to salary, benefits, and other matters associated with the abolishment of the position,” when the employer’s funds have been “reduced by an executive or legislative action, or the appointing authority has a current or projected deficiency in funding to maintain current or projected levels of staffing and operations.” R.C. 124.321(D)(2)(a).

{¶22} The Commission’s rules are likewise silent as to the burden of proof when a layoff is created by the abolishment of a position, but the city accepted the burden found in state administrative law that the appointing authority must demonstrate by a preponderance of the evidence that the job abolishment was due to a lack of continuing need for the position based on, among other things, reasons of economy. Ohio Adm.Code 124-7-01(A)(1).

{¶23} “‘The critical guideline in the abolition of a civil service position is that it must be done in good faith and not as a subterfuge.’” *Penrod v. Ohio Dept. of Adm. Serv.*, 113 Ohio St.3d 239, 2007-Ohio-1688, 864 N.E.2d 79, ¶ 17, quoting *Weston v. Ferguson*, 8 Ohio St.3d 52, 54, 457 N.E.2d 818 (1983). “If an appointing authority uses a job abolishment as a pretense to target a specific employee for termination, the abolishment should not withstand scrutiny.” *Id.* It is the employee’s burden to demonstrate the appointing authority’s bad faith by a preponderance of the evidence. Ohio Adm.Code 124-7-01(A).

{¶24} In nearly seven hours of testimony before the Commission that produced a 548-page record, the Commission heard evidence and reviewed documents that demonstrated that through 2012, Lakewood had experienced a significant loss of revenue due to a combination of the economic downturn, reduction in state funding, and reduced property tax revenues. There was also evidence that the city would continue to experience a reduction in revenues in 2013. The Commission found that the city's evidence regarding its financial position in 2012 and 2013 was "compelling and unrebutted."

{¶25} The mayor testified that the city evaluated its organizational structure in the public works department to prepare for the impending decline in revenues. Prior to Seman's termination, the mayor decided that a fleet division manager who retired would not be immediately replaced, and a retiring manager in engineering was to be replaced with someone who could take on a broader role, thus limiting the number of managers in the public works department. The mayor testified that although the city had lost many employees due to pension-reform-related retirements in 2012, fewer managers than service-level employees had left. Thus, in the fall of 2012, he decided to abolish another division manager position in the public works department due to the expected shortfalls in revenue. Because Seman had the least seniority among his class of managers in the public works department, his position was eliminated and he was laid off.

{¶26} Seman attempted to show that the city had adequate resources to keep his position, and that the reorganization of the public works department had not been designed to result in cost savings. Specifically, Seman pointed to two job postings for "group leaders" within his division, and argued that these were two "new" positions and thus, there could be no economic justification for abolishing his position. The city's evidence demonstrated that the group leader

positions were not new positions, however, as argued by Seman, but had existed during Seman's employment with the city, and the duties and compensation associated with those positions had rotated among the employees. The city's evidence further established that the group leader positions would not be filled by new hires, but that the city was reorganizing the division for operational efficiency to have group leader duties permanently designated to specific current employees, rather than having the duties rotated. The evidence demonstrated that while this change would result in a marginal pay increase to the two employees, the overall effect would be cost-neutral for the city.

{¶27} In light of this evidence, the Commission found that the city had met its burden of demonstrating that Seman's position was abolished for financial reasons and a reorganization designed to enhance the efficient operation of the city. Our review of the record demonstrates that the trial court did not abuse its discretion in finding that the Commission's decision was supported by a preponderance of reliable, probative, and substantial evidence.

{¶28} Seman argues on appeal, however, as he did before the trial court, that even if the city were justified in laying off employees or abolishing certain jobs based on reasons of economy, his job was improperly targeted because a number of other employees, including part-time employees, should have been laid off before him. As support for his argument, Seman cited Commission Rule Art. 12, § 1201 regarding the "Order of Lay-off", which states:

The appointing authority shall determine the number of employees *within each class* to be laid off. All lay-offs within each class must proceed in the following order:

- A. Employees serving temporary or emergency appointments;
- B. Seasonal employees;
- C. Part-time employees;

- D. Provisional appointees who have not completed their probationary period;
- E. Provisional appointees who have completed their probationary period;
- F. Employees certified from eligible list who have not completed their probationary period;
- G. Full-time permanent employees certified from eligible list who have the least amount of seniority.

{¶29} Seman's layoff was in accord with the rule. The record reflects that his position was in the class called division manager within the public works department, and he was the least senior division manager within the department. There were no part-time employees, seasonal division managers, provisional employees, or employees who had not completed their probation in Seman's class. Accordingly, in the class of division manager within the department of public works, Seman was the first person eligible to be laid off.

{¶30} The second assignment of error is therefore overruled.

C. A Good Faith Termination

{¶31} In his third assignment of error, Seman contends that the trial court erred in affirming the Commission decision upholding his termination because his position was not terminated in good faith. Specifically, Seman contends that the purported economic justification for the elimination of his position was a hoax, and that the mayor targeted him for termination because of a personal animus toward him.

{¶32} Seman testified before the Commission about a situation where he disagreed with the mayor as to who would be hired for a maintenance position in his division. He also testified about an incident where he was investigated for alleged improprieties in completing time cards. But the evidence demonstrated that Seman was never disciplined for the time card incident, the

mayor was not involved in the time card investigation, and Seman was found both by the city and the Commission not to have committed any wrongdoing at all. Nor was there any evidence in the record that the mayor's initial disagreement with Seman over the promotion of an internal parks employee to the maintenance position led to Seman's termination.

{¶33} Furthermore, as the Commission found, even if the mayor had some personal animosity toward Seman (a claim the Commission rejected), there was no evidence that such alleged animosity was in any way connected to Seman's termination. Rather, the evidence established that Seman was the junior-most division manager within the public works department and, thus, that the mayor followed the Commission's rules on the order of layoff when making his decision. Further, the mayor testified that the seasonal nature of work within the city's parks made his decision to eliminate the position of division manager in the parks and public property division less impactful on city operations as winter approached.

{¶34} Seman asserts that the mayor's bad faith is apparent because he was the "only" person laid off. This argument is without merit. The record shows that the city laid off more than 200 employees between 2008 and Seman's termination. The record also reflects that the city put on a hiring freeze in 2011 and lost 21 jobs by attrition in 2011 and 2012. Furthermore, the mayor testified that not long before Seman's position was abolished, he laid off a cabinet-level director in the housing division, and then consolidated that director position with another director position. Contrary to his assertion, Seman certainly was not alone in losing his job.

{¶35} On this record, there is no evidence whatsoever to support Seman's assertion that the mayor's stated financial reasons for the abolishment of Seman's position were merely a subterfuge to terminate Seman out of personal animosity. Accordingly, the trial court did not

abuse its discretion in affirming the Commission's decision, and the third assignment of error is overruled.

{¶36} Judgment affirmed.

It is ordered that appellee recover from appellant 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

LARRY A. JONES, SR., P.J., and
MELODY J. STEWART, J., CONCUR