[Cite as *Shadd v. Cleveland Civ. Serv. Comm.*, 2019-Ohio-1996.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JEREMY SHADD,	:	
Appellant,	:	No. 107603
v.	:	
CLEVELAND CIVIL SERVICE COMMISSION, ET AL.,	:	
Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 23, 2019

Administrative Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-889571

Appearances:

Climaco, Wilcox, Peca, Tarantino & Garofoli, and Stewart D. Roll, *for appellant*.

Mark V. Webber, Cleveland Chief Assistant Director of Law, and Amanda Boutton, Assistant Director of Law, *for appellee*s.

MARY J. BOYLE, P.J.:

{¶ 1} Appellant, Jeremy Shadd, appeals from a judgment of the Cuyahoga County Court of Common Pleas Court affirming a decision of the Cleveland Civil Service Commission ("the commission") terminating Shadd's employment as a construction equipment operator with the city of Cleveland. Shadd raises three assignments of error for our review:

> 1. The trial court's February 19, 2018 Journal Entry evinces that it erred by denying Appellant Jeremy Shadd's motion for judgment pursuant to R.C. 119.12(I)'s mandate. That mandate requires judgment for Appellant upon his January 4, 2018 motion for that judgment, upon proof of Appellees the City of Cleveland, Ohio and [the commission's] failure to timely file its administrative record and Appellee's failure to claim or prove excusable neglect as required by Civ.R. 6(B)(2) to allow its tardy filing of the administrative record. The docket and Appellant's January 4, 2018 motion provide that proof, and the trial court's failure to render judgment for Appellant. [The commission's] failure to timely file the record adversely affected Appellant by continuing to frustrate his desire for reinstatement.
>
> 2. The trial court erred by finding in its August 2, 2018 Judgment that [the commission's] decision to affirm Cleveland's decision to terminate Mr. Shadd's employment with Cleveland by: (1) ignoring Cleveland's failure to prove that its termination of Mr. Shadd's employment was supported by the charges contained in Cleveland's notice of the termination of Mr. Shadd's employment, and (2) finding that [the commission's] decision was supported by reliable, probative, and substantial evidence and was in accordance with law. The trial court erred by finding that Cleveland proved that Mr. Shadd caused or was involved in any incident which warranted his termination.
>
> 3. The Referee Thomas Skulina and [the commission] erred when they affirmed Cleveland's termination of Appellant Shadd's employment without stating any conclusions of law as is respectively required by R.C. 119.09 and its rules.

{¶ 2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶ 3} Shadd was terminated from his employment with the city of Cleveland after an incident that occurred on January 14, 2015. Pursuant to a February 6, 2015 termination letter, Sharon Dumas, Interim Director of the Department of Public Utilities, notified Shadd that he was being terminated as of March 6, 2015. Dumas informed Shadd that he was being terminated for violating several of the city's workplace policies as well as six violations of Civ.Serv.R. 9.10, including (1) neglect of duty, (2) incompetence or inefficient performance of duties, (3) conduct unbecoming an employee in public service, (4) insubordination, (5) offensive conduct or language toward a fellow employee, (6) for other failure of good behavior that was detrimental to the service, and (7) "for any other act of misfeasance, malfeasance, or nonfeasance in office." Dumas further informed Shadd:

> "Your behavior clearly substantiates the charges of neglect of duty and insubordination. Your negligence in performing your duties as required caused the division wasted performance hours, and created a safety hazard. Be advised that you put your safety as well as your coworker's safety at risk, which is unacceptable.

{¶ 4} Shadd appealed his termination to the commission. A commission referee heard the matter in November 2015. In his "report and recommendation," the referee found that the city had sufficient reasons to terminate Shadd. The referee found that Shadd did not have the authority to order another employee off of a front-end loader. He further found that Shadd approaching "this large piece of equipment, while its motor was running, was extremely unsafe." The referee explained that "there was a safety issue of the three workmen should the driver get

confused and move the machine." He also found that "[t]here was insubordination" when Shadd drove to the back and continued loading trucks, instead of parking the front-end loader. The referee concluded that Shadd's actions "created a serious safety hazard by getting on the front-end loader while it was running." The referee stated, "In view of the serious safety issue and [Shadd's] approach to the operating loader, the usurpation of authority and the failure to park when ordered, there were sufficient reasons to issue the discipline chosen" by the city.

{¶ 5} Shadd appealed the referee's recommendation to the commission, which heard the appeal in late October 2017. The commission denied Shadd's appeal on November 10, 2017, adopting the referee's decision and upholding the city's termination of Shadd's employment.

{¶ 6} On November 28, 2017, Shadd appealed the commission's decision to the common pleas court. He alleged that the commission's decision was not supported by reliable, probative, and substantial evidence because he was not involved in any incident that warranted his termination. Specifically, Shadd alleged that the commission failed to consider and apply the city's progressive disciplinary policy in making its decision and failed to consider the fact that the referee's report was based in large part on his past "alleged misbehavior," which was "supposed to have been dismissed and removed" from his record according to a September 25, 2017 settlement agreement that he entered into with the city.

{¶ 7} The trial court upheld the commission's decision. It is from this judgment that Shadd now appeals.

II. Transmission of the Record

{¶ 8} In his first assignment of error, Shadd argues that the trial court erred when it denied his motion requesting judgment against the commission pursuant to R.C. 119.12(I) after the commission failed to timely file the record with the common pleas court. He further argues that the trial court erred when it permitted the commission to file the record untimely because it never requested leave to do so.

{¶ 9} Shadd claims that he filed his notice of appeal with the common pleas court "pursuant to R.C. 119.12 and R.C. 124.34." But he actually filed his notice of appeal to the common pleas court "pursuant to R.C. 119.12 and R.C. 124.34 and, alternatively, R.C. 2506.01." The record establishes that the commission received notice of Shadd's appeal on November 30, 2017, two days after he filed it.

{¶ 10} On January 4, 2018, Shadd filed a motion pursuant to R.C. 119.12(I), arguing that because the commission did not prepare and certify the record to the common pleas court within 30 days of receiving his notice of appeal, he was entitled to judgment, including immediate reinstatement, back pay, and restoration of benefits. According to Shadd, the certified record was due on January 2, 2018. Shadd further requested attorney fees and costs pursuant to R.C. 119.12(M).

{¶ 11} On January 5, 2018, the commission filed the certified record along with a brief in opposition to Shadd's R.C. 119.12 motion, arguing that it did not file the record late because Shadd also brought his complaint under R.C. 2506.02. The commission maintained that under R.C. 2506.02, it had 40 days from the notice of

appeal — until January 8, 2018 — to certify and transmit the record to the common pleas court.

{¶ 12} The trial court denied Shadd's motion for judgment, concluding that the question of whether Shadd could proceed under R.C. 119.12 at all or whether he had to proceed under R.C. Chapter 2506 was unclear at that point. The trial court instructed the parties to fully brief the issue. The trial court also construed commission's brief in opposition as a motion for leave to file the administrative record beyond 30 days assuming that R.C. 119.12 applied and granted the commission leave to file the certified record.

{¶ 13} Where a municipality removes a classified employee from his employment for disciplinary reasons, a decision by the municipality's civil service commission may be appealed to the court of common pleas pursuant to R.C. 124.34, in accordance with the procedures set forth in R.C. 119.12, or pursuant to R.C. 2506.01 in accordance with the general appellate procedures set forth in R.C. Chapter 2505. *Walker v. Eastlake*, 61 Ohio St.2d 273, 274-275, 400 N.E.2d 908 (1980); *Sutherland-Wagner v. Brook Park Civ. Serv. Comm.*, 32 Ohio St.3d 323, 324-326, 512 N.E.2d 1170 (1987); *Wolf v. Cleveland*, 8th Dist. Cuyahoga No. 82135, 2003-Ohio-3261, ¶ 7; *Slusser v. Celina*, 3d Dist. Mercer No. 10-15-09, 2015-Ohio-3721, ¶ 24; *Beare v. Eaton*, 9 Ohio App.3d 142, 144, 458 N.E.2d 895 (12th Dist.1983).

{¶ 14} R.C. Chapter 124 was enacted to effectuate the civil service system. *Chubb v. Ohio Bur. of Worker's Comp.*, 81 Ohio St. 3d 275, 277, 690 N.E.2d 1267 (1998). R.C. Chapter 124 provides different statutory protections for employees

depending on an employee's classification. R.C. 124.34(A) provides in pertinent part:

> No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony while employed in the civil service.

{¶ 15} The term "commission" as used in Section 124.34 is defined in R.C. 124.01 as "the municipal civil service commission of any city." Thus, R.C. 124.34 clearly creates a statutory right of appeal to the common pleas court from an order of a municipal civil service commission dismissing a classified employee for disciplinary reasons. Because Shadd was in the classified service of the city of Cleveland and was dismissed for disciplinary reasons, he could appeal that dismissal pursuant to R.C. 124.34.

{¶ 16} R.C. 124.34(B) provides:

> In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission, and any such appeal shall be to the court of common pleas of the county in which the appointing authority is located, or to the court of common pleas of Franklin county, *as provided by section 119.12 of the Revised Code.*

(Emphasis added.)

{¶ 17} Pursuant to R.C. 124.34(B), the procedures governing an appeal under R.C. Chapter 124 are set forth in R.C. 119.12. R.C. 119.12(I) provides:

> Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal.

{¶ 18} Thus, under R.C. 119.12(I), if the agency does not certify the record within 30 days of receiving the employee's notice of appeal, the trial court must enter a finding in favor of the employee. But this provision also gives the trial court the option of granting an agency an additional 30 days if the agency shows that it made a substantial effort to comply.

{¶ 19} When a municipality removes a classified employee from his or her position for disciplinary reasons, the employee may also appeal the decision of the municipality's civil service commission to the common pleas court under the provisions of R.C. Chapter 2506 and the general appellate procedures under R.C. Chapter 2505.

{¶ 20} R.C. 2506.01(A) provides in pertinent part:

> [E]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code.

{¶ 21} The remedy set forth in R.C. 2506.01 is "in addition to any other remedy of appeal provided by law." *Id*.

{¶ 22} Pursuant to R.C. 2506.02:

> Within forty days after filing a notice of appeal in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the officer or body from which the appeal is taken, upon the filing of a praecipe by the appellant, shall prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision. The costs of the transcript shall be taxed as a part of the costs of the appeal.

{¶ 23} After reviewing each statutory avenue of appeal, it is clear that they differ significantly regarding the amount of time the agency has to transmit the record — 30 days under R.C. 119.12(I) versus 40 days under R.C. 2506.02. As this court stated in *Ferguson v. Cleveland*, 8th Dist. Cuyahoga No. 42987, 1981 Ohio App. LEXIS 14094 (July 30, 1981), "[w]hen an agency fails to timely prepare and certify a transcript to the Court of Common Pleas, the resulting consequences differ significantly depending upon whether a party is appealing pursuant to R.C. 119.12 or whether the party is appealing pursuant to R.C. [Chapter] 2506." *Id*. at 8. Unlike R.C. 119.12(I), R.C. 2506.02 contains no penalty — let alone one as harsh as granting judgment to the adverse party. Instead, when an agency fails to file the certified record under R.C. 2506.02, "a court may have to invoke its contempt powers." *Id.*, quoting *Stephan v. State Veterinary Med. Bd.*, 113 Ohio App. 538, 173 N.E.2d 389 (1st Dist.1960).

{¶ 24} In this case, although Shadd indicated in his complaint that he was seeking relief pursuant to "R.C. 2506.01 alternatively," Shadd still invoked both statutory avenues when filing his notice of appeal from the commission's final order upholding his termination. Thus, it is understandable why the commission believed it had 40 days to transmit the certified record. Although Shadd further indicated in his notice of appeal that he was seeking a hearing as provided in R.C. 119.12, he also included a praecipe with his notice of appeal requesting that the agency prepare and certify the entire record to the common pleas court. A praecipe is required for appeals filed pursuant to R.C. 2506.02. Those appealing under R.C. 119.12, however, are not required to file a praecipe with their notice of appeal. *Martin v. Bexley Civ. Serv. Comm.*, 10th Dist. Franklin No. 83AP-1067, 1984 Ohio App. LEXIS 10605, 2 (Aug. 9, 1984). Thus, the fact that Shadd filed a praecipe was even more support for the commission's uncertainty regarding which statutory avenue Shadd was proceeding and how long it had to transfer the record.

{¶ 25} Faced with a very similar set of facts in *Ferguson*, this court explained:

> Given that appellant did not indicate that he was proceeding pursuant to R.C. 119.12 until he moved for a default judgment on May 27, 1980, we cannot assume that the Cleveland Civil Service Commission was aware that it risked a punitive judgment against it for failing to timely certify a transcript of the proceedings. While the Cleveland Civil Service Commission's delay in filing a transcript was unfortunate, we are unwilling to say that the harsh remedy of a punitive judgment against the Commission was appropriate, given the ambiguity of appellant's procedural activity. The agency may well have thought that it was only risking contempt proceedings for failure to comply, pursuant to R.C. 2506.02.

Id. at 9-10. We agree with *Ferguson's* sound reasoning and apply it here. Without knowing the statutory avenue on which Shadd wished to proceed, we do not find fault with the commission in not filing the record within 30 days or the trial court in granting the commission's motion for leave to file the record untimely.

{¶ 26} Moreover, R.C. 119.12(I) gave the trial court the discretion to extend the agency's time for filing the transcript by 30 days if the agency showed that it made a substantial effort to comply. Although Shadd claims that the trial court failed to make the finding that the commission "made a substantial effort to comply," the statute does not require the trial court to make explicit findings. The commission explained in its brief in opposition to Shadd's motion that it believed it had 40 days to transmit the record. After review, we cannot say that the trial court abused its discretion in construing the agency's brief in opposition as motion for leave to file an untimely record and subsequently granting it. "'Fairness and justice are best served when a court disposes of a case on the merits.'" *Goehringer v. Cuyahoga Cty. Welfare Dept.*, 8th Dist. Cuyahoga No. 46700, 1983 Ohio App. LEXIS 14463, 4 (Nov. 17, 1983), quoting *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 431 N.E.2d 644 (1982).

{¶ 27} Finally, we note that Shadd raised an issue in his reply brief and at oral argument that he did not assert in his appellate brief. He asserted that the commission failed to transmit the complete record to the common pleas court because it failed to include a "revised letter" of termination. Shadd attached this

"revised letter" for the first time to his reply brief to this court.[1] Most notably, however, Shadd failed to raise this issue with the trial court in his R.C. 119.12(I) motion, or in any other pleading. Appellants cannot raise an issue for the first time on appeal that they did not raise to the trial court. *Gardi v. Bd. of Edn.*, 8th Dist. Cuyahoga No. 99414, 2013-Ohio-3436, ¶ 27, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 679 N.E.2d 706 (1997).

{¶ 28} Shadd's first assignment of error is overruled.

III. Just Cause

{¶ 29} In his second assignment of error, Shadd contends that the city failed to prove by reliable, probative, and substantial evidence its reasons for terminating him under Civil Service Rule 9.10, which the city set forth in the February 6, 2015 termination letter. He therefore argues that the trial court abused its discretion in finding that the city did prove its reasons by reliable, probative, and substantial evidence.

{¶ 30} The trial court ultimately determined that Shadd could proceed pursuant to R.C. 119.12. Under R.C. 119.12(M),

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

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[1] The revised letter is dated February 24, 2015. The only difference between the revised letter and the original termination letter dated February 6, 2015, is that the revised letter changes Shadd's termination date from March 6, 2015 to March 9, 2015.

{¶ 31} The standard of review to be applied by the court of appeals in an administrative appeal brought under either R.C. 119.12 or 2506.04 is more limited than that employed by the common pleas court (which can consider the whole record, including any new or additional evidence admitted). *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000), quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 465 N.E.2d 848 (1984); *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 260-261, 533 N.E.2d 264 (1988).

{¶ 32} The appellate review standard is whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence. *Jones v. Cleveland Civ. Serv. Comm.*, 8th Dist. Cuyahoga No. 103143, 2016-Ohio-3169, ¶ 20. "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *In re C.K.*, 2d Dist. Montgomery No. 25728, 2013-Ohio-4513, ¶ 13, citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985). A decision is unreasonable if there is no sound reasoning process that would support that decision. *Id.*, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 553 N.E.2d 597 (1990).

{¶ 33} When applying the abuse of discretion standard, a reviewing court may not simply substitute its own judgment for that of the trial court. *Adams v. Adams*, 3d Dist. Union No. 14-13-01, 2013-Ohio-2947, ¶ 15, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *see also Lorain City Bd. of Edn.* at 260-261 (The fact that the court of appeals might have reached 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 a lawful basis).

{¶ 34} After considering the evidentiary record and the parties' briefs, the trial court found that the commission's decision was supported by reliable, probative, and substantial evidence.

{¶ 35} In this case, the city informed Shadd in his termination letter that it was terminating him for seven violations of Civil Service Rule 9.10, including (1) neglect of duty, (2) incompetence or inefficient performance of duties, (3) conduct unbecoming an employee in public service, (4) insubordination, (5) offensive conduct or language toward a fellow employee, (6) for other failure of good behavior that was detrimental to the service, and (7) "for any other act of misfeasance, malfeasance, or nonfeasance in office." The city further told Shadd that he put his and his coworkers' safety at risk, which was unacceptable.

{¶ 36} The following evidence was presented to the referee. Ernest Gardner testified that he works for the city of Cleveland's Division of Water Pollution Control. He was classified as a "sewer serviceman," but was temporarily assigned as a construction equipment operator to operate heavy equipment. In this temporary assignment, Gardner stated that he does "whatever the supervisor has available at the moment," including operating a front-end loader to load trucks "in the yard" with material that foremen need "to complete [their] job of that day." The materials that operators load include gravel, sand, pipes, or whatever foremen might need.

{¶ 37} On the morning of January 14, 2015, Edwin Rivera was Gardner's supervisor. Rivera instructed Gardner to "do the yard." Gardner said that he got a "front-end loader" to "start doing the yard." After Gardner loaded a truck up with sand and was "backing up to let another truck through," the door on his front-end loader "flew open." He looked at the door, but did not see anyone at first, so he continued backing up. Then, however, Shadd "jumped up on the truck," reached across Gardner, grabbed the gear, and put the front-end loader in neutral.

{¶ 38} Gardner asked Shadd, "What the f#ck are you doing?" Gardner explained that he was in motion and had to "slam on [his] brakes because [he] had a crew right behind [him], about three feet behind [him]" picking up pipes. Shadd told Gardner, "You know, you can get the f#ck off the machine" because he was going to run it that day. According to Gardner, Shadd reached over to grab the key. Gardner tried to stop him, but Shadd told him, "No, I'm assigned to do this today."

{¶ 39} At this point, Gardner stated that "all of a sudden, the people in the yard kind of stopped and looked because [Shadd was] on the machine and [was] causing a commotion." Gardner testified:

> I still had the machine in drive. I still had the bucke[t] up in the air with material on it. I slammed on [my] brakes and then finally after we were going back and forth, he was telling me to get the hell off, I just proceeded to say, "look just get the fuck down and you can have it." So he stopped. I looked. He climbed down. It was already in park and then I just got off of it. I put the bucket down on the ground and I just got off and I walked away, and then he got up on the machine.

{¶ 40} Gardner stated he was startled when Shadd jumped on the machine because "it's only a one man crew" and "you don't expect [someone] to jump up on

the machine while it's in motion or nothing like that." Gardner explained that what Shadd did was "a safety risk" because he had a truck under him with his "bucket in the air" and "guys standing on the ground" within about three feet of the front-end loader. Gardner stated that when one turns the wheel of a front-end loader, the "back end of it will whip." When Shadd jumped on his machine, Gardner did not know what to do. He explained, "I don't know, should I cut the machine off, let the bucket down, turn the steering wheel, what to do, address him, make sure he doesn't fall of the machine because it's backing up. I don't know what to do at the time." Despite not knowing what to do, Gardner had to make a "snap decision." He just "slammed on the brakes" and "didn't do nothing." Gardner stated "whatever was going to happen, it was because of what [Shadd] was doing."

{¶ 41} After what seemed like "four or five minutes" of Shadd and Gardner exchanging words, Gardner told Shadd to get down so that Gardner could get off the machine and give it to Shadd. Gardner stated that Shadd got down, but held onto the machine so that Gardner "couldn't take off or nothing."

{¶ 42} After Gardner got off of the machine, he proceeded back toward the garage. He saw Rivera, who asked him what he was doing. Gardner told Rivera that he was "just waiting." Rivera asked him why because he had "told [him] to go do the yard." Gardner informed Rivera that Shadd made him get off of the front-end loader. Rivera told Gardner to wait where he was while Rivera went to talk to Shadd. Rivera left, and when he came back, he told Gardner that Shadd was going to do the job that Rivera assigned to him (which was report to another job site) and that

Gardner should go back to the yard to complete what he had been doing in the yard. Gardner went back to the yard to get the front-end loader, but Shadd was still operating it and still loading trucks. Gardner went back to Rivera to tell him that Shadd was still operating the front-end loader. Rivera stated, "I just told his mother f#cking ass * * * to go do his job assignment." Rivera went back to talk to Shadd. When Rivera was done talking to Shadd, he told Gardner to "do the job that he asked [him] to do." Gardner got on the front-end loader and completed loading the trucks. Gardner wrote an incident report about what occurred.

{¶ 43} Gardner agreed on cross-examination that this incident was not the first time that he reported an "altercation" with Shadd. Gardner stated on his written incident report, "This recent altercation with Jeremy Shadd was, at the least, a severe safety hazard and is one of a few documented incidents involving Jeremy Shadd's aggression towards me while I was performing my assigned duties." Gardner also recalled that Shadd had filed a complaint against him as well.

{¶ 44} Rivera testified next. Rivera was responsible for assigning all of the construction crews in the water pollution control division. Rivera testified that on the morning of January 14, 2015, he assigned Shadd to "to go dig for one of [his] foremen" at a location on the west side and he assigned Gardner "to do the yard work." Rivera later ran into Gardner in the garage and asked him why he was not in the yard. Gardner told him that Shadd "had pulled him off the front loader." Rivera said that he "went out and asked [Shadd] to park the front loader by the back of the building and to proceed to his job site." Rivera said that Shadd pulled to the back,

but then began loading another truck. Rivera went back to talk to Shadd and told him to "jump" on his equipment and go to his job site. Rivera stated that Shadd had created a major safety hazard because one "should never jump on a truck while it's running, especially not heavy equipment."

{¶ 45} Rivera identified an email that he had sent to his supervisor, Dan Tomko, to tell him what happened that day. He also included "everybody in charge" on the email list. Rivera stated that he was aware that there had been prior incidents between Shadd and Gardner, but he did not know that either of them had filed written complaints against the other. Rivera wanted to do "an employee consultation" with Shadd, but Tomko told him that he would handle it. Rivera stated that he was not involved in any way with Shadd's termination.

{¶ 46} Tomko testified that he was superintendent of sewer maintenance. After Rivera had notified him about what had occurred, Tomko asked Gardner to give him a written statement about the incident. Tomko explained why Shadd's actions were so dangerous. He stated:

> The front-end loader is articulated steering. It steers on hydraulics. It has in between the two tires, right in the center of the tractor, is a hinge and it steers by actually articulating the whole machine. So in other words, it doesn't steer like a car where your tires turn, but the machine pivots. Also, you have the large wheel right there by the ladder. I have personally seen somebody get smashed in between that when it was turning, by doing the almost identical climbing up on the machine trying to yell at the operator, telling him what they were doing or weren't doing wrong. That is the biggest no-no with that machine and one of the most hazardous safety conditions you can even create.

{¶ 47} Tomko testified that he recommended terminating Shadd, but Tomko was not the ultimate decision-maker. Tomko recommended termination to the commissioner and to the "Human Resources person that holds the hearings." Tomko said that he recommended termination "first and foremost" due to safety reasons and secondly due to "numerous" other "write-ups" on Shadd.

{¶ 48} Shadd testified that he was a construction equipment operator for the city. He maintained and operated construction equipment. Shadd testified that on January 12, 2015, which was a Monday, he was assigned to work in the yard for that week. He explained that "operators switch off weeks" and that they usually "just rotate themselves."

{¶ 49} On that Wednesday, January 14, 2015, Rivera told Shadd to go to a west side job site. Shadd said that he asked Rivera if it was okay if he "had somebody else do the yard" that morning and was "going to get loaded in the yard." Rivera told him that was fine. On the way out, Shadd saw the foreman from the west side job, who told Shadd that he did not have to be there for two to three hours. Shadd explained that because it was his week "to do the yard," he "took it upon [himself] to complete [his] week of doing that duty."

{¶ 50} Shadd stated that he saw Gardner sitting in the front-end loader, which was stationary at that time with "the bucket" on the ground. He said that he walked up to the loader and said, "Hey, I got this." Shadd stated that Gardner jumped out of the loader, and Shadd climbed in it. Shadd stated that there were no words exchanged and there was "no confrontation, no nothing." According to

Shadd, Gardner just went inside the building. Shadd said that he completed the work in the yard. When he was done, he saw Rivera, who told him to take the loader around back. When he got "around back," he saw a dump truck waiting to be loaded, so he started loading it until Rivera came out and told him to "stop and go to [his] job site."

{¶ 51} Shadd explained that there have been prior incidents with Gardner where Gardner acted "hostile" and "aggressive" towards him. Shadd filed a written complaint against Gardner. He was not aware if Gardner was ever disciplined for it. Shadd stated that he did not know if Gardner had filed a complaint against him.

{¶ 52} Based on our limited scope of review, the record before us demonstrates that the trial court did not abuse its discretion in affirming the commission's decision to uphold the city's termination of Shadd. The city established by reliable, probative, and substantial evidence that Shadd created a major safety hazard when he jumped on the front-end loader while it was running, with several people standing near it. Shadd also failed to follow his supervisor's instructions by (1) not reporting to his job site, (2) working in the yard and taking over Gardner's job, and (3) continuing to load trucks after Rivera told him to stop.

{¶ 53} Shadd further argues that his termination was not supported by reliable, probative, and substantial evidence because the commission should not have considered his past disciplinary acts after he entered into a settlement agreement with the city in September 2017 regarding those past acts. He maintains that because the city agreed to "remove or reduce" his past acts of discipline, that

the incident on January 14, 2015, essentially became his first workplace violation that required discipline and, thus, the city should have imposed another disciplinary action besides termination. We disagree.

{¶ 54} Under the city's progressive discipline policy, the city is permitted to "skip steps depending upon the circumstances of each situation and the nature of the offense" and terminate employees "without prior disciplinary action." Types of conduct that may warrant immediate termination include disregarding safety rules that would likely result in serious physical harm to someone. In her letter notifying Shadd that he was being terminated, Dumas stated that Shadd put himself as well as his coworkers in danger. Thus, even without considering Shadd's prior disciplinary history, the trial court did not abuse its discretion in finding that there was reliable, probative, and substantial evidence supporting Shadd's termination.

{¶ 55} Accordingly, Shadd's second assignment of error is overruled.

IV. Referee's Report

{¶ 56} In his third assignment of error, Shadd argues that his termination should be reversed because the referee did not include conclusions of law in his report and recommendation as required by R.C. 119.09 and that the commission's decision did not contain conclusions of law in violation of its own rule. Assuming for the sake of argument that there were violations of these rules, we disagree that they warrant reversal.

{¶ 57} R.C. 119.09 states, "The referee or examiner shall submit to the agency a written report setting forth the referee's or examiner's findings of fact and conclusions of law and a recommendation of the action to be taken by the agency."

{¶ 58} Rule 9.70 of the rules of the Civil Service Commission provides that "the decision of the commission shall be final upon its enactment of written findings of fact and conclusions of law, which shall be voted upon and enacted by the majority of the commission that had voted to sustain the prevailing party's position."

{¶ 59} The trial court addressed this argument, finding that the referee's report and the commission's decision contained implicit findings, stating:

> The record evidence shows that the referee did make conclusions of law, even if they were not designated as such. In the section of his report labeled "Discussion and Recommendation," the referee makes several factual findings that Shadd had no authority to order Gardner out of the front-end loader; that Shadd's conduct was extremely unsafe; that his actions presented risk of injury to the nearby workers; and that he committed insubordination and then concludes that [i]n view of the serious safety issue and his approach to the operating loader, the usurpation of authority and the failure to park when ordered, there were sufficient reasons to issue the discipline chosen by the Appellant supervisor. The commission then adopted the referee findings and affirmed that the seriousness of the offense warrants the discipline imposed.
>
> Implicit in the language used by the referee and the commission is [the] conclusion that the facts of the incident, as found by the referee, fit the work rules justifying discipline. I don't read R.C. 119.09 to obligate the referee to say that the facts show that Shadd created safety hazard, thus he violated the rule against creating safety hazard. It is enough to find that his conduct created safety hazard because the factual finding dictates the conclusion of law, which is apparent without additional verbiage.

{¶ 60} We agree. The purpose of setting forth findings of fact and conclusions of law is to permit a reviewing court to assess the validity of a lower

court's decision. A decision that recites various facts and legal conclusions is sufficient when, considered with the rest of the record, it forms an adequate basis to decide the issues on appeal. *Ferrari v. Ohio Dept. of Mental Health & Mental Retardation*, 69 Ohio App.3d 541, 545, 591 N.E.2d 284 (10th Dist.1990). Although *Ferrari* was addressing a trial court's findings under the Rules of Civil Procedure, its reasoning is instructive here. Based upon the referee's report and the commission's decision, which relied on that report, the court of common pleas was able to assess the validity of both the report and the decision based upon the facts presented to the referee and entire record on appeal.

{¶ 61} Accordingly, we find no prejudice to Shadd for any failure to include explicit conclusions of law. Shadd's third assignment of error is overruled.

{¶ 62} Judgment affirmed.

It is ordered that appellees 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.

MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR