[Cite as *Hall v. Rocky River*, 2019-Ohio-1997.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DANIEL HALL, :

Plaintiff-Appellant, :

No. 107624

v. :

CITY OF ROCKY RIVER, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 23, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-881701

Appearances:

Jeffrey H. Weir, *for appellant*.

Andrew D. Bemer, Law Director, City of Rocky River, *for appellees*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} Plaintiff-appellant, Daniel Hall ("Hall"), appeals from the trial court's order granting summary judgment to defendants-appellees, the city of Rocky River, et al. ("the City"). For the reasons set forth below, we affirm.

{¶ 2} In February 2015, Hall was promoted to an electrician at the Rocky River Wastewater Treatment Plant ("RRWWTP"). He was previously employed as an Operator Class III, a position he held since August 2014. As an employee of RRWWTP, Hall was subject to the rules and procedures outlined in the RRWWTP Employees Association ("Association") and the City Contract for 2014-2016 ("the Contract").

{¶ 3} On June 14, 2016, Hall was advised by Carrie Anne Rosemark ("Rosemark"), the RRWWTP Superintendent, to attend a meeting with her and City officials about his continuing employment. At this meeting, Hall was advised that Rosemark recommended his termination because of several factors including making a number of serious errors and his lack of understanding and knowledge of troubleshooting, repairs, and resolution of electrical problems. Hall was also advised that Rosemark recommended his termination because she believed Hall was unqualified to perform the essential functions of his job duties as a plant electrician.

{¶ 4} In a letter dated June 20, 2016, Mary Kay Costello ("Costello"), the City's Director of Public Safety-Service, advised Hall that he had been terminated. Costello also summarized the reasons for Hall's termination. In addition, Costello advised Hall that he had a right to appeal his termination to the Mayor of Rocky River, Pamela Bobst ("Mayor Bobst").

{¶ 5} Hall appealed his termination. On July 6, 2016, Mayor Bobst held a hearing on Hall's appeal. In a letter dated August 1, 2016, Mayor Bobst notified Hall that she concurred with the findings and conclusions of the Director of Public Safety-

Service as stated in Costello's letter dated June 20, 2016. Mayor Bobst notified Hall that she had rejected his appeal and affirmed the decision to terminate his employment.

{¶ 6} On June 13, 2017, Hall filed a complaint in the common pleas court asserting claims of wrongful termination and breach of contract against the City. Hall also asserted claims against Rosemark for tortious interference with contract and defamation of character.

{¶ 7} On June 19, 2017, the City and Rosemark filed a motion to dismiss the complaint for lack of subject matter jurisdiction, based upon Hall's failure to exhaust his administrative remedies under a collective bargaining agreement ("CBA"). The CBA covers Hall's employment with the City, and Articles 8 and 9 contain a five-step grievance procedure. The City primarily argued that Hall pursued the grievance procedure through Step 3, the appeal to Mayor Bobst, but failed to pursue Step 4, which was arbitration. The City contended Hall's failure to pursue Step 4 of the grievance procedure caused his claims to fail.

{¶ 8} In August 2017, Hall filed his motion in opposition to the City's motion to dismiss. Hall argued that the grievance procedure did not cover discharges, only disciplinary actions. Hall specifically argued that Step 4 of the grievance procedure did not require final and binding arbitration. Instead, it provided that the parties "may" engage in arbitration by mutual assent.

{¶ 9} In January 2018, the trial court denied the City's and Rosemark's motion to dismiss Hall's complaint. Subsequently, the City and Rosemark filed a

joint motion for summary judgment, which Hall opposed. The trial court granted the City's motion for summary judgment, finding that:

> [Hall] and [the City] are parties to a collective bargaining agreement. The collective bargaining agreement contained a grievance procedure which allowed the parties to submit grievance to arbitration. Specifically, Step 4 of the grievance procedure states in relevant part: "[i]f within thirty (30) calendar days of the completion of Step 3, the grievance is not satisfactorily settled, the parties may, by mutual agreement, submit the grievance to arbitration. The decision of the arbitrator shall be final and binding upon the employer, the association, and the grievant(s). Further, Step 5 of the grievance procedure states as follows: "[i]n the event that the parties cannot agree to submit to binding arbitration, the affected parties shall have as a final remedy, the appropriate courts of the state of Ohio." On its face, the parties' agreement makes the participation in arbitration voluntary.
>
> However, O.R.C. 4117.10 governs the wages, hours and terms and condition of public employment covered by the agreement, and O.R.C. 4117.10(A) provides that where an agreement provides for final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. [The City] argues, citing long-standing case law, that * * * because [Hall] has failed to exhaust his administrative remedies and thus this Court lacks jurisdiction to hear [Hall's] claims. This Court agrees.

{¶ 10} It is from this order that Hall now appeals, assigning the following three errors for review:

Assignment of Error One

> The trial court erred by granting summary judgment in favor of [the City] based on [Hall's] failure to exhaust administrative remedies, as summary judgment on this basis was not supported by legitimate summary judgment evidence and was contrary to applicable law.

Assignment of Error Two

> The trial court erred by granting summary judgment in favor of [the City] based on the application of Revised Code Section 4117.10(A), O.R.C. 4117.10(A), as summary judgment on this basis was not supported by legitimate summary judgment evidence and was contrary to applicable law.

Assignment of Error Three

> The trial court erred by denying [Hall's] motion to strike the affidavits of Darryl Radeff, Brian Mullen, Michael Yammine, and Mark Bloch, Esq., as this determination was contrary to Ohio R. Evid. 701 and/or 702.

{¶ 11} We will address the first and second assignments of error collectively. Hall argues the trial court erred in granting summary judgment to the City on the basis that he had failed to exhaust his administrative remedies. Hall also argues the trial court erred by applying R.C. 4117.10(A).

{¶ 12} We review a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In conducting a de novo review, "we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Kestranek v. Crosby*, 8th Dist. Cuyahoga No. 93163, 2010-Ohio-1208, ¶ 14.

{¶ 13} Under Civ.R. 56(C), summary judgment is properly granted when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most

strongly in his or her favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1976).

{¶ 14} If the moving party fails to satisfy this initial burden, the summary judgment motion must be denied. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). If the moving party satisfies its burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id., quoting Civ.R. 56(E).

{¶ 15} In the trial court's well-reasoned decision, the court found it lacked subject matter jurisdiction to review Hall's claims because Hall failed to exhaust his administrative remedies.

{¶ 16} In *Loper v. Help Me Grow of Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 106152, 2018-Ohio-2401, we addressed an appellant's failure to exhaust administrative remedies and stated:

> In *Schneider v. Cuyahoga Cty. Bd. of Cty. Commrs.*, 2017-Ohio-1278, 88 N.E.3d 567 (8th Dist.), this court explained: It is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938). Thus, a "party must exhaust the available avenues of administrative relief through administrative appeal" before seeking separate judicial intervention. *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29, 406 N.E.2d 1095 (1980). "Exhaustion is generally required as a matter of preventing

> premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

Id. at ¶ 20.

{¶ 17} As we stated in *Loper*, it is well-settled that a party must exhaust the available avenues of administrative relief through an administrative appeal before seeking separate judicial intervention. Here, the record demonstrates that Hall failed to exhaust the available avenues of administrative relief prior to filing his complaint.

{¶ 18} There is no dispute that the City and Hall were parties to a CBA. There is also no dispute that the CBA contained a five-step grievance procedure. In addition, there is no dispute that Hall appealed his termination to Mayor Brobst, which represents the third step in the grievance procedure, before he filed suit.

{¶ 19} Further, Hall does not dispute that he did not proceed to Step 4 of the grievance procedure. Instead, Hall argues it was voluntary, because Step 4 states "the parties may, by mutual agreement, submit the grievance to arbitration." We disagree.

{¶ 20} Step 5 of the grievance procedure states: "[i]n the event that the parties cannot agree to submit to binding arbitration, the affected parties shall have a final remedy, the appropriate Courts of the State of Ohio." On its face, the plain language and existence of Step 5, contemplate that the parties would proceed to Step

4 before court intervention. However, Hall bypassed Step 4 and proceeded directly to Step 5.

{¶ 21} The exhaustion of administrative remedies doctrine requires that where an administrative remedy is available, relief must be sought by exhausting the remedy before a court will act. *Rokakis v. W. Res. Leasing Co.*, 8th Dist. Cuyahoga No. 95058, 2011-Ohio-1926, citing *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St. 3d 109, 564 N.E.2d 477 (1990), syllabus.

{¶ 22} If interested parties are not required to exhaust available administrative remedies, "there is the possibility that frequent and deliberate flouting of administrative processes could weaken the effectiveness of any agency by encouraging people to ignore its procedures." *Anderson v. Interface Elec., Inc.*, 10th Dist. Franklin No. 03AP-354, 2003-Ohio-7031, quoting *Hawkes v. United Parcel Serv., Inc.*, 10th Dist. Franklin No. 89AP-1475, 1990 Ohio App. LEXIS 2065 (May 24, 1990).

{¶ 23} Because Hall did not avail himself of the total administrative process, before seeking court intervention, the trial court lacked subject matter jurisdiction. As a result, the trial court was without power to grant the requested relief and thus, the trial court did not err when it granted summary judgment to the City.

{¶ 24} Hall also argues that the trial court should not have applied R.C. 4117.10(A). We disagree.

{¶ 25} R.C. 4117.10(A) provides, in pertinent part:

> (A)n agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure [.]

{¶ 26} R.C. Chapter 4117 contains a comprehensive framework for the resolution of public sector labor disputes, and does not allow for a private right of action in the common pleas court. *Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 8th Dist. Cuyahoga No. 104114, 2016-Ohio-5934, ¶ 11, citing *Carter v. Trotwood-Madison City Bd. of Edn.*, 181 Ohio App. 3d 764, 2009-Ohio-1769, 910 N.E.2d 1088, ¶ 51 (2d Dist.), citing *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 169-170, 572 N.E.2d 87 (1991).

{¶ 27} Because the instant case involves a public sector labor dispute, R.C. 4117.10(A) was the proper framework to resolve the dispute. Therefore, the trial court did not err in applying R.C. 4117.10(A).

{¶ 28} Accordingly, assignment of errors one and two are overruled.

{¶ 29} In the third assignment of error, Hall argues the trial court erred by denying his motion to strike the affidavits of Darryl Radeff, Brian Mullen, Michael Yammine, and Mark Bloch, Esq.

{¶ 30} Our standard of review for a motion to strike is an abuse of discretion by the trial court. *Abernethy v. Abernethy*, 8th Dist. Cuyahoga No. 81675, 2003-Ohio-1528, ¶ 7. An abuse of discretion is more than an error of law or judgment; it

implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 31} Hall argues the affidavits of Radeff, Mullen, and Yammine contained opinion testimony and lacked the qualification of expert witnesses. We have reviewed all three affidavits and find no abuse of discretion in the trial court's decision to deny Hall's motion to strike.

{¶ 32} Our review of the record reveals that Radeff, the first affiant, retired after working 30 years with RRWWTP. For 22 of those years, Radeff served as the foreman of Maintenance Mechanic Department, where he directed the plant's maintenance needs, along with the repair of mechanical and electro-mechanical machinery and equipment. Radeff averred that during his tenure, he had direct involvement with Hall, whom he believed was not competent to be the plant's electrician. In support of this belief, Radeff detailed several examples of improper or incorrect electrical procedures that Hall performed.

{¶ 33} Mullen, the second affiant, was employed with RRWWTP for 22 years and served as its maintenance mechanic for 17 years. Mullen also averred that he had direct involvement with Hall, whom he believed did not have a basic understanding of electronic circuitry or the sophisticated equipment necessary for the proper functioning of the plant. In support of this belief, Mullen detailed several examples of Hall's deficient electrical background.

{¶ 34} Yammine, the third affiant, was the president of a firm, which provided electrical and electronic troubleshooting for industrial automatic control

systems and instrumentation for process control in various industrial settings. Yammine averred that he provided this service to RRWWTP during Hall's tenure as the electrician. Yammine detailed examples during Hall's tenure, which demonstrated that Hall lacked the basic skills and understanding required to troubleshoot the instrumentation and electrical equipment used within the facility.

{¶ 35} Based on our review of the affidavits, all three affiants provided opinions that were rationally based on their perception of Hall through the lens of their respective experience in the line of work directly or cross impacting the job Hall was hired to perform. Thus, to the extent that the trial court relied on these affidavits, we find no abuse of discretion.

{¶ 36} We have also reviewed the affidavit of Bloch, a practicing attorney for more than four decades, with a focus on private and public sector law. We find no abuse of discretion in the trial court's decision to deny Hall's motion to strike the affidavit. Bloch opined that Hall was obligated to exhaust the administrative remedies contained in the CBA's grievance procedure before seeking court intervention. As discussed previously, we have found the same.

{¶ 37} Accordingly, we overrule the third assignment of error.

{¶ 38} Based on the foregoing, we find that the trial court did not err when it granted summary judgment to the City.

{¶ 39} 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 issue of this court directing the common pleas 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 EILEEN KILBANE, ADMINISTRATIVE JUDGE

LARRY A. JONES, SR., J., and
ANITA LASTER MAYS, J., CONCUR