

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

CRAIG A. McGLINCH	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 13
v.	:	T.C. NO. 09 CV 65239
GREENVILLE CITY SCHOOL DISTRICT	:	(Civil appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 25th day of June, 2010.

CRAIG A. McGLINCH, 109 Wellsley Court, Greenville, Ohio 45331
Plaintiff-Appellee

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Attorney for Plaintiff-Appellee at Oral Argument

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FROELICH, J.

{¶ 1} The Greenville City School District Board of Education (“the Board”) appeals from a judgment of the Darke County Court of Common Pleas, which affirmed a decision of the Greenville Civil Service Commission to reduce Craig McGlinch’s punishment for

insubordination from a termination to a six-month suspension and which awarded him back pay in the amount of \$16,895.

{¶ 2} For the reasons that follow, the judgment of the trial court will be affirmed in part, reversed in part, and remanded for further proceedings.

I

{¶ 3} McGlinch worked as a custodian for the school district for eight years. On June 5, 2008, McGlinch reported to work at the intermediate school although he had been instructed by the superintendent the previous day to report to the high school for the summer. McGlinch allegedly refused to report to the high school as his summer assignment. He was found by the Board to be insubordinate, and his employment was terminated. McGlinch appealed to the Greenville Civil Service Commission.

{¶ 4} The dates and events pertinent to McGlinch's appeal are as follows:

June 6, 2008 McGlinch was terminated by the Board. He filed a timely appeal with the Greenville Civil Service Commission.

Aug. 7, 2008 McGlinch filed a pre-hearing brief in which he asked that the Commission's decision be reversed or modified; he also requested back pay in the event the decision was reversed.

Aug. 20, 27, 2008 A hearing was held before a hearing officer of the Civil Service Commission; no evidence was presented concerning back pay.

Oct. 17, 2009 McGlinch filed a post-hearing brief, which again requested back pay.

Dec. 16, 2008 The hearing officer filed a report recommending that McGlinch's termination be modified to a six-month unpaid suspension. The hearing officer's decision did not address the issue of back pay.

Dec. 29, 2008 The Board filed objections to the report modifying the termination to a suspension. McGlinch did not file objections.

January 23, 2009 The Civil Service Commission issued a Final Order adopting the

hearing officer's recommendation; the Commission designated the six-month suspension dates as June 6, 2008-December 6, 2008. The Commission did not address the issue of back pay.

February 6, 2009 The Board appealed the Commission's order to the court of common pleas.

February 26, 2009 The Board sought to stay enforcement of the Commission's order.

March 4, 2009 McGlinch opposed the stay and sought back pay and benefits to December 6, 2008. In the alternative, he sought a "compromise" that he be reinstated during the appeal without back pay.

March 10, 2009 The trial court granted a stay.

April 24, 2009 The trial court held a hearing on the Board's appeal; McGlinch again sought back pay and benefits.

April 27, 2009 The trial court "sustained" the Commission's order and reinstated McGlinch to his position effective December 6, 2008. The court retained jurisdiction over damages.

June 1, 2009 McGlinch returned to work. (The reason for the delay between the judgment of April 27 and McGlinch's return to work on June 1 is unclear from the record.)

Sept. 28, 2009 The trial court conducted a hearing on damages, over the objection of the Board.

Oct. 2, 2009 The trial court awarded "economic damages" of \$16,895, which represented back pay for 155 days.

{¶ 5} The Board raises two assignments of error on appeal.

II

{¶ 6} The first assignment of error states:

{¶ 7} "THE TRIAL COURT ERRED WHEN IT ORDERED THE GREENVILLE CITY SCHOOL DISTRICT BOARD OF EDUCATION TO PAY MR. MCGLINCH 'ECONOMIC DAMAGES.' "

{¶ 8} The Board contends that the trial court was not authorized to hear McGlinch's claim for back pay because he did not seek back pay in the administrative proceedings.

{¶ 9} R.C. Chapter 2506 deals with appeals taken from orders of administrative officers and agencies. R.C. 2506.01 provides, in part, that "every final order, adjudication, or decision of any *** board *** 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 ***." Referring to this statute, the supreme court has observed that "[a] school board certainly fits the definition of a 'board,' and the word 'any' certainly means that it is included within the purview of R.C. Chapter 2506." *Kiel v. Green Local School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 149, 152 (Citations omitted.).

{¶ 10} When considering an administrative appeal pursuant to Chapter R.C. 2506, a court of common pleas must weigh the evidence in the record to ascertain whether there exists a preponderance of reliable, probative, and substantial evidence to support the administrative agency's decision. R.C. 2506.04; *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207; *State ex rel. Pilarczyk v. Riverside*, Montgomery App. No. 20706, 2005-Ohio-3755, at ¶10. Consistent with its findings, the court may affirm, reverse, vacate, or modify the decision or remand the matter to the body appealed from with instructions to enter a decision consistent with the findings or opinion of the court. R.C. 2506.04.

{¶ 11} R.C. 2506.02 requires the filing of a transcript by the officer or body from which the appeal is taken. With certain delineated exceptions, the trial court's review is generally confined to the original papers, the testimony, and the evidence that was

offered, heard, and taken into consideration by the administrative body in rendering its final order or decision. R.C. 2506.03(A); *Borgerding v. Dayton* (1993), 91 Ohio App.3d 96, 99. Neither party in this case contends that any of the exceptions apply.

{¶ 12} Similarly, it is well-settled that, in order for an appellate court to consider an issue, it must have been raised and preserved in the trial court; otherwise, the issue is waived. See *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 123; *Holman v. Grandview Hosp. & Med. Ctr.* (1987), 37 Ohio App.3d 151, 157; *Stainfield v. Jefferson Emergency Rescue Dist.*, Ashtabula App. No. 2009-A-0044, 2010-Ohio-2282, ¶22. The doctrine of waiver has also been applied to administrative appeals. *Loyal Order of Moose Lodge No. 1473 v. Ohio Liquor Control Comm.* (1994), 95 Ohio App.3d 109, 114; *Flaherty v. Barberton City School Dist. Bd. of Educ.* (1997), Summit App. No. 18320, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629.

{¶ 13} The Board contends that McGlinch was not permitted to raise a “new issue of ‘economic damages’ as an appellee, after the fact, in an administrative appeal.” As such, it argues that the trial court was not authorized to “retain jurisdiction” to hear the damages claim raised by McGlinch after it affirmed the decision of the Commission.

{¶ 14} As a preliminary matter, we believe that the back pay awarded by the trial court must be divided into two categories: 1) the pay that accrued from the date the six-month suspension ended, as determined by the Commission, through the date that the stay requested by the Board was granted (December 6, 2008 - March 10, 2009); and 2) the pay attributable to the stay itself (accruing after March 10, 2009). We will begin by addressing the latter category.

{¶ 15} By seeking to stay McGlinch's reinstatement while it pursued its administrative appeal in the trial court, the Board kept McGlinch out of his employment well beyond the suspension period. In support of its request for a stay, the Board claimed that McGlinch's reinstatement was "improper and unworkable;" it did not present compelling reasons why he could not be allowed to return to work while the appeal was pending. Although the Board clearly hoped to have the termination reinstated, it surely recognized that McGlinch would be entitled to compensation for the additional period of unemployment if the Commission's decision were affirmed. The back pay that accrued during the stay was a risk that the Board assumed when it prevented McGlinch from returning to work, by means of a stay, while the appeal proceeded. McGlinch was entitled to back pay from the time the stay was granted (March 10, 2009) through his return to work on June 1, 2009.

{¶ 16} Whether McGlinch was entitled to back pay for the period preceding the grant of the stay is a more difficult question. Contrary to the Board's assertions in its brief, McGlinch did request back pay in his pre- and post-hearing briefs filed with the Commission. However, he did not object to the hearing officer's failure to award back pay, and he did not present evidence during the administrative proceedings about his rate of pay. Because none of the exceptions set forth in R.C. 2506.03 applied, the trial court lacked authority to take additional evidence on this issue. Accordingly, the trial court should not have awarded back pay for the period from the end of the suspension December 6, 2008, until the beginning of the stay (March 10, 2009) because no evidence was presented in the administrative proceedings about McGlinch's rate of pay.

{¶ 17} In our view, however, there is no question that McGlinch is entitled to back

pay beginning on December 6, 2008. The Commission determined his suspension ended that day – thus, he returned to his pre-suspension employment status – and this was affirmed by the trial court. McGlinch’s failure to present evidence about his wages at the administrative level precluded the trial court from awarding back wages in this action, but he may pursue them in an independent proceeding, such as an action for breach of contract or a writ of mandamus. See, e.g., *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, ¶24 (“It is axiomatic that ‘[a] wrongfully excluded public employee may obtain back pay and related benefits in a mandamus action following reinstatement *** .’” (Citations omitted.)) Thus, we strongly encourage the parties to resolve this issue as expeditiously as possible.

{¶ 18} The first assignment of error is sustained in part and overruled in part.

III

{¶ 19} The Board’s second assignment of error states:

{¶ 20} “EVEN ASSUMING, ARGUENDO, THE ISSUE OF ‘ECONOMIC DAMAGES’ WAS PROPERLY BEFORE THE TRIAL COURT, AND THE TRIAL COURT HAD AUTHORITY TO ORDER THE GREENVILLE CITY SCHOOL DISTRICT BOARD OF EDUCATION TO PAY ANYTHING, THE TRIAL COURT ERRED IN THE AMOUNT OF DAMAGES IT AWARDED.”

{¶ 21} The Board contends that, because the parties stipulated that, at most, McGlinch missed 125 days of work between the end of his suspension and his return to work, the trial court erred in calculating his damages based on 155 days of work. This argument is well taken, and McGlinch concedes that the number of days for which he

was entitled to compensation did not exceed 125. The number used by the trial court apparently included weekends.

{¶ 22} The Board also contends that it should not have been held responsible for back pay that accrued before the Commission's decision was rendered (from December 6, 2008 - January 23, 2009) or during the stay. If these days had been excluded, the Board would have paid back wages for only 55 days. These arguments were not advanced in the trial court, and the trial court implicitly rejected any reduction of the number of days when it awarded back pay for 155 days.

{¶ 23} We have already discussed the Board's responsibility for unpaid wages that accrued during the stay.

{¶ 24} As we stated under the first assignment of error, the issue of back pay predating the stay was not properly before the trial court. However, if presented with this issue in an independent claim for back pay, we would conclude that trial court acted within its discretion in ordering back pay from the date that the suspension imposed by the Commission ended, even though that date preceded the date on which the Commission's decision was rendered by approximately six weeks.

{¶ 25} Finally, the trial court noted in its decision on damages that McGlinch was required to "reduce the award [ordered by the court] by the amount of other earnings/wages received, including compensation for substitute teaching. While the amount of earnings/wages is not a part of the record, the parties can nonetheless make this adjustment – or petition the Court to do so on their behalf." Because we will remand this matter for recalculation of the back pay that accrued during the stay (and because of the possibility that this issue will be raised in an independent claim), the trial

court may revisit the issue of whether an offset is required and, if so, in what amount.

{¶ 26} The second assignment of error is sustained to the extent that we have found – and the parties acknowledge – that McGlinch was not entitled to back pay for 155 days. A recalculation of back pay will be required on remand.

IV

{¶ 27} The judgment of the trial court will be affirmed in part and reversed in part. This matter will be remanded for recalculation of back pay consistent with this opinion.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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Hon. Jonathan P. Hein