

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

MUNICIPAL CONSTRUCTION :
EQUIPMENT OPERATORS' LABOR :
COUNCIL, ET AL., :
 :
Plaintiffs-Appellants, :
 :
v. :
 :
 :
 :
CLEVELAND OHIO AND ITS CIVIL :
SERVICE COMMISSION, :
 :
Defendant-Appellee. :

No. 110659

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 30, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-905689

Appearances:

Gertsburg Licata Co., LPA, and Stewart D. Roll, *for appellants.*

Mark Griffin, Cleveland Director of Law, Mark V. Webber, Chief Assistant Director of Law, and Tiffany Fischbach, Assistant Director of Law, *for appellee.*

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Plaintiffs-appellants, Municipal Construction Equipment Operators’ Labor Council (“the Union”), John Boehnlein (“Boehnlein”) and David Mangano (“Mangano”) (collectively “appellants”), appeal the trial court’s decision denying their motion for summary judgment and granting summary judgment in favor of defendants-appellees, the city of Cleveland (“the city”) and its Civil Service Commission (“the Commission”) (collectively “appellees”). For the reasons that follow, we affirm.

I. Procedural History

{¶ 2} In October 2018, appellants filed a complaint against appellees seeking injunctive relief and a declaratory judgment that the city and the Commission’s actions violated the city’s charter in the selection of a Construction Equipment Operator — Group A (hereinafter “CEO”) from an eligibility list certified by the Commission to the appointing authority. From that list, the appointing authority selected Rashon Bings (“Bings”) to fill the open position. In doing so, it did not select appellants Boehnlein or Mangano, who are members of the Union. In their prayer for relief, appellants sought an order enjoining the appellees from employing Bings and applicants Mark Grubiss (“Grubiss”) and Michael Hanson (“Hanson”), who were both ranked higher on the eligibility list than Boehnlein and Mangano in the CEO position.

{¶ 3} Following various procedural maneuvers and hurdles, including a prior appeal, the parties engaged in lengthy discovery practice, and each moved for

summary judgment on the complaint. Appellants requested that the court grant summary judgment in its favor and declare that the Commission’s certification of the eligibility list for CEO position violated the city’s charter. Appellees requested summary judgment and for the court to declare that their certification process did not violate the charter. In June 2021, the trial court granted summary judgment in favor of the appellees, declaring that “there is no evidence that [the city], and [its Commission] violated the city of Cleveland charter.”

{¶ 4} Appellants now appeal, raising two assignments of error. In their first assignment of error, appellants contend that the trial court erred in granting summary judgment in favor of appellees. Appellants’ second assignment of error asserts that the trial court erred by not entering summary judgment in their favor.

II. Standard of Review

{¶ 5} An action for declaratory judgment “enables a court to declare the rights, status, and other legal relations of the parties.” *Priore v. State Farm Fire & Cas. Co.*, 8th Dist. Cuyahoga No. 99692, 2014-Ohio-696, ¶ 14; Civ.R. 57; R.C. 2721.02(A). It provides a means by which parties can eliminate uncertainty regarding their legal rights and obligations. *Travelers Indemn. Co. v. Cochrane*, 155 Ohio St. 305, 98 N.E.2d 840 (1951).

{¶ 6} A party to a declaratory judgment action may request, with or without supporting affidavits, summary judgment in their favor as to all or any part of the declaratory judgment action. Civ.R. 56(A). We review a trial court’s decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d

102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶ 7} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

III. Relevant Charter Provisions

{¶ 8} The city's charter and the Commission's Civil Service Rules ("the Rules") set forth the rules and procedures for establishing a Civil Service Eligibility List ("eligibility list"). Chapter 27, Section 131 of the city's charter governs the creation of eligibility lists. It provides, in relevant part,

When any position in the classified service, except the general labor class, is to be filled, the appointing authority shall notify the Commission of the fact and the Commission shall certify to the authority the names and addresses of the ten candidates standing

highest on the eligibility list for the class or grade to which that position belongs. The appointing authority shall appoint to that position one of the ten persons whose names are certified.

{¶ 9} The Commission bears the responsibility of certifying the eligibility list. The Rules delineate how applicants apply and become qualified for inclusion on the eligibility list and how the lists are prepared for certification by the Commission. Specifically, Rules 3.10, 3.30, 3.40, and 3.42 govern a candidate's application and the Commission's responsibility of processing of those applications and making a determination regarding minimum qualifications.

{¶ 10} Pursuant to Rule 3.10,

No person shall be permitted to enter an examination for a position in the competitive or non-competitive classes unless he/she have (1) filed written application on the forms prescribed by the Commission, (2) qualified in accordance with the minimum entrance qualifications for the examination, and (3) had his/her application approved in accordance with the rules of the Commission.

{¶ 11} Rule 3.30 sets for the procedure of processing the applications. It provides, in relevant part,

Prior to the administration date of each examination the examining staff shall review all applications filed for entrance thereto. Whenever the examining staff finds that an application lacks any of the established minimum entrance qualifications pertaining to age, education, experience, license, citizenship, or residence such applicant shall be notified by the examining staff that his/her application has been rejected and the reason or reasons thereto. The Commission may give the examining staff the right to refuse applications which do not meet the minimum qualifications.

{¶ 12} Rule 3.40 governs an applicant's minimum qualifications. It provides:

Prior to the announcement of each competitive or non-competitive examination, the Commission shall determine the minimum qualifications to be established for entrance into such examination. The minimum entrance qualifications shall be made part of the examination announcement and published as required in these rules. Following the publication of an examination announcement, no deviation from or modification in the minimum entrance qualifications shall be permitted for individual applicants except by action of the Commission whereupon a new publication of the examination announcement shall be provided. The minimum entrance qualifications shall include, where appropriate, the requirements set forth in Rules 3.41 through 3.45 inclusive.

{¶ 13} Finally, Rule 3.42 governs an applicant's experience and education.

It provides:

Whenever, in the judgment of the Commission, requirements as to experience or education or both are factors in determining the merit and fitness of applicants, the Commission shall prescribe minimum experience or educational requirements or both for entrance to examinations. Provided however that no person shall be permitted to take an examination who is unable to produce a certificate attesting to his or her having graduated from a standard, four[-]year high school, except that applicants achieving a certification of satisfactory completion of the General Education Development Test (GED) may be permitted to take an examination without regard to the certificate of graduation from a standard four-year high school.

IV. Relevant Facts

{¶ 14} In January 2018, the Commission announced an examination for the creation of an eligibility list (effective from July 27, 2018, until July 27, 2020) for a CEO position. The job announcement included the examination information, examples of job duties, minimum qualifications, and notice that a veteran's preference would be awarded, if applicable. The minimum qualifications included a high school diploma or GED and a valid commercial driver's license ("CDL"), Class "A," with air brake and trailer endorsements. Additionally, the position required

“[f]ive years of full time recent and relevant paid experience operating excavating equipment.” The announcement further provided that education and experience would count for 50 percent of the applicant’s score and a field skills test operating equipment would count for the other 50 percent. Bings, Grubiss, Hanson, Boehnlein, and Mangano, along with other applicants, applied for the position.

{¶ 15} Pursuant to Bing’s application and resume, he possessed a high school diploma, a Class “A” CDL with air brake and trailer endorsements, and a certification following graduation in 1995 from Pavement Construction and Heavy Equipment Operation School at Sheppard Air Force Base in Texas. In his resume, Bings specified that while enlisted in the United States Air Force from 1994 to 1999, he was a pavement and construction equipment journeyman, where his duties included, but were not limited to, “constructs and maintains concrete and asphalt runways, aircraft parking aprons, and roads. Operates and maintains heavy construction equipment, such as loaders, graders, dozers, backhoes, and dump trucks.”

{¶ 16} Under “work experience” on his employment application, Bings noted that he was employed from “October 2015 to the present” as an “Airport Maintenance Unit Leader” with the city of Cleveland at the Department of Port Control. Under “duties,” Bings stated, in relevant part, “[c]oncrete and asphalt construction and maintenance, landscape technology, snow removal operations and heavy construction equipment operation.” Bings noted that prior to his current position, he was employed from November 1999 until June 2015, as an “Airport

Maintenance Man” with the city of Cleveland at the Department of Port Control. Under duties, Bings stated, in relevant part, “perform the maintenance and repair work of the airport facilities, runways, taxiways and air carrier ramps in both summer and winter seasons. Concrete and asphalt construction and maintenance, landscape technology, snow removal operations and heavy construction equipment operation[s]. Was also responsible for refuse disposal.” Under “Other skills” on his application, Bings further specified, “Heavy Construction Equipment Operator — Expert 23 years.”

{¶ 17} Darryl Eatman, a Commission examiner, was assigned to review the applications for the CEO position, compile the final civil service scores of eligible applicants, and create the eligibility list as required under the city’s charter and in accordance with the Rules.

{¶ 18} Eatman testified at deposition that he scored Bings a grade of 91.450 on the Commission’s “Experience and/or Academic Training Evaluation.” This score included 70 points for satisfying the minimum qualifications of the job, 0.025 points for “Certificated Schooling/Courses” indirectly related to field, and 5 points for military veteran preference. Eatman testified that based on Bings’s experience as a heavy equipment operator since 1999, and with his prior experience in the military, he determined that Bings had 18 years and three months of experience operating excavating equipment. This work experience, when calculated under the formula adopted by the Commission, yielded 16.425 points under the category, “Directly related experience pertaining to field.” Bings’s performance on his field

skills test yielded a score of 91 points. Accordingly, Bings's final score, when averaged as the job posting noted, was 91.225 — the top-ranked score of the applicants.

{¶ 19} Grubiss and Hanson both received top scores to place them in the top ten on the list of eligible of candidates for consideration — Grubiss was ranked second and Hanson third. Appellees Boehnlein and Mangano both received scores to place them in the top ten on the eligibility list — fifth and sixth, respectively. In accordance with the city's charter and Rules, the Commission certified the list to the appointing authority for the next phase of the hiring process.

{¶ 20} Ramona Lowery, deputy commissioner of the city's department of public utilities ("DPU"), division of water pollution control ("WPC"), attested in her affidavit that she participated in the interviews of Bings, Grubiss, Hanson, Boehnlein, and Mangano. She averred that neither the DPU nor the WPC rely on the civil services scores alone when deciding who to recommend to hire to DPU's director, i.e., appointing authority. According to Michael Spreng, secretary of the Commission, hiring departments are free to consider any legal factors beyond the examination score and eligible list rank when selecting who to hire for the vacant position.

{¶ 21} Following the interview process, Bings was hired for the CEO position.

V. Motions for Summary Judgment

{¶ 22} Appellants moved for summary judgment requesting that the court declare that appellees “failed to comply with their Cleveland Charter obligations by certifying to an appointing authority, in violation of Charter Section 131, the names of persons whose standing was not within the ten highest to which that position belongs.” Appellants contend that the appellees did not comply with their own minimum qualification requirements for the CEO position because the position required “five years of full time recent and relevant paid experience operating excavating equipment.”

{¶ 23} Succinctly, appellants contend that Bings should not have been hired because he should not have been included on the certified eligibility list in the first place because he did not have “five years of *recent* and relevant experience *operating excavating equipment*.” (Emphasis created by appellants). Appellants further contend that Grubiss and Hanson were also ineligible for consideration based on the same reasoning. As such, appellants allege that the appellees’ preparation and certification of the eligibility list were performed in a manner that violated Section 131 of the city’s charter.

{¶ 24} Appellants supported their motion with (1) a copy of the January 19, 2018 job announcement; (2) Spreng’s deposition dated January 31, 2020, and exhibits; (3) Eatman’s deposition dated March 16, 2020, and exhibits; and (4) documents that were attached to a filing in *State ex rel. Mun. Constr. Equip.*

Operators' Labor Council v. Cleveland, 8th Dist. Cuyahoga No. 107585, 2019-Ohio-1889.¹

{¶ 25} Appellees filed a cross-motion for summary judgment, incorporating by reference the entirety of their statements and arguments made in their brief in opposition to appellants' motion for summary judgment. Appellees contended that (1) they did not violate the city charter because the challenged applicants were properly included on the eligibility list because they each met the minimum qualifications; and (2) appellants have no legal right to the relief requested because they do not have a real controversy that is justiciable in character, such that the conflict between the parties is only merely possible or remote; and (3) the individual members, and thus the Union, do not have standing to bring this claim because the members do not have an actual injury based on the speculative nature of whether they would have been awarded the position.

{¶ 26} Appellees supported their motions and arguments with (1) an affidavit from Spreng, with incorporated exhibits including the Rules of the Commission, the eligible list for the position of CEO, and applications/examinations of Bings, Grubiss, and Hanson; and (2) an affidavit from Lowery, with incorporated exhibits including her interview notes of the applicants from the eligible list.

¹ No objection was raised regarding whether appellants' supporting documentation was proper under Civ.R. 56.

VI. Analysis

{¶ 27} We find that irrespective of any alleged deficiencies in appellants' request for declaratory relief as raised by the appellees in their motion for summary judgment and again on appeal as alternative means for affirming the trial court's judgment,² the trial court did not err in granting appellees' motion for summary judgment because no genuine issue of material fact exists demonstrating that appellees violated the city's charter.

{¶ 28} At issue in this case is the interpretation of the minimum qualifications announced for the CEO position and its application to the candidates on the eligibility list. According to appellants, Bings was ineligible to be hired because he did not have "recent and relevant experience operating excavation equipment"; thus, his name should not have been included on the eligibility list. Appellants allege that Eatman admitted in his deposition that he disregarded the term "recent" in determining whether Bings had the requisite minimum experience qualifications when certifying the eligibility list. They further allege that Eatman admitted that Bings's work history and reported job duties did not include the words "operate" and "excavating equipment." These admissions, according to appellants,

² Pursuant to App.R. 3(C), appellees raise alternative grounds to affirm the trial court's decision. Appellees contend that declaratory relief is not proper because (1) appellants do not present a real controversy that is justiciable in character, such that the conflict between the parties is only merely possible or remote; (2) the issue is moot because the eligibility list expired in June 2020; (3) the Boehnlein and Mangano do not have standing; thus the Union also lacks standing, because no actual injury exists; (4) Boehnlein and Mangano lack taxpayer standing; and (5) there is no evidence of application fraud by Bings, Grubiss, or Hanson.

demonstrate that Bings did not meet the minimum qualifications and thus, appellants violated the city's charter and the Rules by certifying an eligibility list containing Bings and other applicants whose experience did not meet the minimum qualifications set forth in the job announcement. Appellees contend that Bings, Grubiss, and Hanson undoubtedly met the minimum qualifications; thus, no violation of the charter occurred.

{¶ 29} Based on our de novo review, this court finds that the trial court properly granted summary judgment in favor of appellees because appellees did not violate the city's charter when certifying the eligibility list for the CEO position. Based on the arguments raised and the documents in support, we find that no genuine issue of material fact exists demonstrating that Bings, or any other challenged candidate, did not meet the minimum requirements set forth in the job announcement.³ The documentation clearly provides that Bings had "five years recent and relevant paid experience operating excavating equipment." Although Eatman testified at his deposition that he did not focus on the terms "recent" and "operating excavating equipment" in his review of Bings's work history, our review of Bings's application and resume, when viewed together, clearly demonstrate that he satisfied the minimum qualifications for the CEO position and thus, appellees graded his qualifications and work experience in accordance with the city's charter.

³ In their complaint, appellants also challenge the inclusion of Grubiss and Hanson on the eligibility list. In their motion for summary judgment, appellants only focus on Bings, and on appeal, appellants have not raised any argument regarding Grubiss or Hanson. Accordingly, the focus of our analysis will be on Bings's qualifications.

{¶ 30} Bings had been employed with the city of Cleveland, Department of Port Control, since 1999. Spreng testified at his deposition that he interpreted the term “recent” to mean “within five years.” Accordingly, looking at the five years prior to the CEO job announcement, Bings worked at the airport in two different capacities — as an airport maintenance unit leader and maintenance man. According to Bings’s application and resume, his duties as a unit leader included “[c]oncrete and asphalt construction and maintenance, landscape technology, snow removal operations and heavy construction equipment operation.” And his duties as a maintenance man included performing

the maintenance and repair work of the airport facilities, runways, taxiways and air carrier ramps in both summer and winter seasons. Concrete and asphalt construction and maintenance, landscape technology, snow removal operations and heavy construction equipment operation[s]. Was also responsible for refuse disposal.

{¶ 31} Although Bings used the generic term “heavy construction equipment operation” on his application, the overall content of his formal application reveals that he indeed possessed the minimum qualifications and work experience because the duties listed also encompass operating excavating equipment. As such, assessing Bings the full point value of the minimum qualifications, grading his related work history, and awarding the veteran credit was in accordance with the Rules and the city’s charter.

{¶ 32} Appellants point to no evidence creating a *genuine* issue of *material fact* that appellees failed to follow the city charter or the Rules in the generation and certification of the eligibility list, and the city appointing authority’s selection of

Bings to the CEO position. Even construing the evidence in favor of appellants, this court finds that reasonable minds can only conclude that the city complied with Chapter 27, Section 131 of the charter regarding the certification of ten applicants from which the appointing authority selected one person. The Commission complied with Rule 3.30 in processing all applications under the standards provided for in Rules 3.10 and 3.42 regarding minimum qualifications and experience. Accordingly, the trial court's decision declaring that appellees did not violate the charter was proper.

VII. Conclusion

{¶ 33} Accordingly, we affirm the trial court's judgment granting summary judgment to appellees and denying appellants' motion for summary judgment. Both assignments of error are overruled.

{¶ 34} Judgment affirmed.

It is ordered that appellees recover from appellants 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, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR

