[Cite as *Lane v. E. Cleveland Civ. Serv. Comm.*, 2010-Ohio-2352.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93530

PATRICIA LANE

PLAINTIFF-APPELLANT

vs.

THE CITY OF EAST CLEVELAND CIVIL SERVICE COMMISSION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the

Cuyahoga County Court of Common Pleas
Case No. CV-646193

BEFORE: Dyke, J., Kilbane, P.J., and Stewart, J.

RELEASED: May 27, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Plaintiff Patricia Lane appeals from the trial court's affirmance of the civil service order that upheld her discharge as Chief of Police of the City of East Cleveland. For the reasons set forth below, we affirm.

{¶ 2} Plaintiff became a member of the East Cleveland Police in 1985. In 1999, she was appointed Chief of Police. On January 1, 2006, Eric Brewer became Mayor of East Cleveland. On August 27, 2007, Mayor Brewer sent a letter to plaintiff that charged her with the following violations of her management duties: 1) failure to maintain good behavior and good order within the police department by failing to address a grievance regarding dust collecting in air ducts; 2) failure to enforce the East Cleveland Charter, Administrative Code and departmental rules in disciplinary actions involving Officer Shawna Glaspy, Officer Tiffiney Cleveland, and Officer Michael Cook; 3) violation of East Cleveland Charter by failing to seek agreements with vendors; 4) failure to enforce the collective bargaining agreement by extending additional benefits by using the Law Enforcement Trust Fund to purchase baseball tickets and awarding them to select police officers as a non-contractual incentive; 5) insubordination for failing to ensure that an assistant to the mayor received copies of photographs of charged suspects for distribution to the public access channel; 6) failure to provide the mayor with an external communication from the LEADS and CRIS data systems[1]

[1] LEADS is an acronym for the Ohio Law Enforcement Automated Data System. The

regarding a request for an investigation of improper use by Officer Tiffiney Cleveland.[2]

{¶ 3} The matter proceeded to hearing on August 28, 2007. At this time, Mayor Brewer questioned plaintiff, Officer Tiffiney Cleveland, Officer Gerhart, Det. James Ruth, Administrative Assistant William Fambrough, and an unidentified male witness. Plaintiff was also given an opportunity to question the witnesses. The hearing was then continued until September 10, 2007, in order for plaintiff to obtain counsel. As the hearing resumed, Mayor Brewer and plaintiff's counsel questioned Sgt. Paula Robinson, Lt. Daniel Haywell, plaintiff, Service Director Maxwell Lockhart, Sgt. James Naylor, Sgt. James Ruth, Deputy Safety Director Kenneth Adams, and Acting Chief of Police Ralph Spotts.

{¶ 4} Following the hearing, Mayor Brewer terminated plaintiff. Plaintiff appealed the decision to the Civil Service Commission. The matter then proceeded to a hearing before the Civil Service Commission on November 21, 2007. The witnesses included Sgt. Paula Robinson, Finance Director Ronald Brooks, Sgt. James Ruth, Mayor Eric Brewer, Regional Information Services Manager Robert Cermak, Fraternal Order of Police Labor Council Representative Otto Holm, Ret. Judge Una Kennon, and plaintiff.

LEADS database system is accessed through the County Regional Information System, aka CRIS. See *Scarso v. Village of Mayfield* (Nov. 18, 1999), Cuyahoga App. No. 75269.

[2] This charge was substituted after the original sixth charge, concerning certain communications, was dismissed.

{¶ 5} The Civil Service Commission affirmed the decision to terminate plaintiff and she then appealed to the court of common pleas, pursuant to R.C. Chapter 2506. The trial court held a supplemental hearing pursuant to R.C. 2506.03(A)(5) since the Civil Service Commission did not file findings of fact and conclusions of law to support its decision. The witnesses at this hearing were plaintiff, Sgt. Naylor, Chief Spotts, and Mayor Brewer.

{¶ 6} Plaintiff assigned the following errors for the trial court's consideration:

{¶ 7} "The Civil Service erred in affirming the findings of Mayor Brewer on the charges tendered, and in affirming the termination of Chief Lane."

{¶ 8} "Chief Lane should be reinstated because no one charge leveled against her warrants dismissal, even if proven."

{¶ 9} The trial court subsequently determined that there was insufficient evidence to support Charge No. 1 as the evidence did not establish that it was within plaintiff's responsibilities to correct structural and building maintenance issues.

{¶ 10} The trial court also concluded that there was insufficient evidence to establish Charge No. 3, because there was no evidence that plaintiff was required to obtain approval from the mayor before spending Law Enforcement Trust Fund monies.

{¶ 11} The trial court next concluded that Charge No. 4 was not established as there was no evidence to demonstrate that plaintiff's purchase and distribution of baseball tickets violated the collective bargaining agreement.

{¶ 12} With regard to Charge No. 5, the trial court found that plaintiff failed to provide the photographs of suspects due to the city's failure to purchase a necessary software package, and not due to insubordination.

{¶ 13} Finally, the trial court determined, with regard to Charge No. 2 and Charge No. 6, that there was no evidence that plaintiff failed to properly discipline Officer Shawna Glaspy and Officer Michael Cook. The trial court concluded, however, that:

{¶ 14} "[T]he evidence demonstrates that Chief Lane learned of Officer's [sic] Cleveland's involvement in the unauthorized use of the LEADS/CRIS system from agents of the FBI and asked for her resignation. * * * However, * * * Chief Lane did not personally investigate the allegations against Officer Cleveland, accepted without question her response to the inquiry concerning her use of the LEADS system, failed to inform him of [CRIS manager] Mr. Cermak's letter [seeking information on the possible misuse of the LEADS/CRIS system] and misrepresented the extent of the disciplinary actions taken against Officer Cleveland.

{¶ 15} "* * *

{¶ 16} "The Court finds that sufficient reliable, probative and substantial evidence was presented to support the Commission's decision to affirm the Mayor's decision to terminate based on these charges."

{¶ 17} Plaintiff now appeals and assigns two related errors for our review.

{¶ 18} For her first assignment of error, plaintiff asserts that the trial court erred in finding that there was a preponderance of substantial, reliable, and probative evidence in the record to support the Civil Service Commission's decision that found Charge No. 2 to be established as a basis for termination.

{¶ 19} For her second assignment of error, plaintiff asserts that the trial court erred in finding that there was a preponderance of substantial, reliable, and probative evidence in the record to support the Civil Service Commission's decision that found Charge No. 6 to be established as a basis for termination.

{¶ 20} In *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 2000-Ohio-493, 735 N.E.2d 433, the Ohio Supreme Court set forth the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals as follows:

{¶ 21} "The common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. See *Smith v. Granville Twp. Bd. of Trustees* (1998), 81 Ohio St.3d 608, 612, 693 N.E.2d 219, 223, citing *Dudukovich v. Lorain Metro. Hous.*

Auth. (1979), 58 Ohio St.2d 202, 206-207, 12 O.O.3d 198, 201-202, 389 N.E.2d 1113, 1116-1117.

{¶ 22} "The standard of review to be applied by the court of appeals in an R.C. 2506.04 appeal is 'more limited in scope.' (Emphasis added.) *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 30, 465 N.E.2d 848, 852. 'This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.' Id. at fn. 4. 'It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court.'"

{¶ 23} The court of appeals, in contrast, should not weigh evidence but should determine whether there existed a preponderance of reliable, probative, and substantial evidence to support the administrative board's decision. *Buckosh v. Westlake City Schools,* Cuyahoga App. No. 91714, 2009-Ohio-1093, citing *Dawson v. Richmond Hts. Local School Dist.* (May 16, 1996), Cuyahoga App. No. 69577. In short, an appellate court's review examines whether the trial court abused its discretion. *Henley v. Youngstown Bd. of Zoning Appeals,* supra.

{¶ 24} The appellate court may not substitute its judgment for the judgment of the administrative agency or trial court and it is immaterial whether an appellate court could have reached a different conclusion than the administrative agency. Id.

{¶ 25} In this matter, we cannot conclude that the trial court abused its discretion in affirming the Civil Service decision upholding plaintiff's termination, as there was in fact a preponderance of reliable, probative, and substantial evidence to support the administrative board's decision.

{¶ 26} Within Charge No. 2, the mayor, who is also the city's safety director, asserted that plaintiff had engaged in disparate treatment of three officers, Shawna Glaspy, Michael Cook, and Tiffiney Cleveland. Glaspy was accused of filing a false workers' compensation claim and allowing a prisoner to escape from jail. Cook was accused of waiving traffic camera citations to police officers, city workers, and relatives. Under plaintiff's leadership, these matters were investigated by the detective bureau and the internal affairs department, thus leading to Glaspy's prosecution and Cook's resignation. Officer Cleveland, a friend of plaintiff, was accused of accessing the LEADS and CRIS law enforcement data systems to help her husband, a suspect in a drug investigation. This matter was not investigated and, although plaintiff followed the mayor's instruction to remove Cleveland from the detective bureau, Cleveland first began leave under the Family Medical Leave Act ("FMLA"), and plaintiff did not make the discipline effective until Cleveland completed this leave. However, an employee who requests FMLA leave would have no greater protection against discipline for reasons unrelated to the FMLA leave than he or she did before submitting the FMLA request. *Throneberry v. McGehee Desha Cty. Hosp.* (8th Cir., 2005), 403 F.3d 972, 977 (employer will not be liable for interfering with FMLA leave if the

employer can prove it would have made the same decision had the employee not exercised the employee's FMLA rights).

{¶ 27} Plaintiff stated that she asked Cleveland to resign but she refused to do so. Plaintiff obtained a letter from Cleveland about the matter in which Cleveland indicated that she could not remember the query, which had been made two years earlier. Plaintiff forwarded this letter in response to the LEADS /CRIS inquiry and also submitted her own letter in which she asked that the complainant be identified. Plaintiff further stated that Cleveland had been "cleared of all allegations" in connection with "a previous allegation," and also stated that Cleveland had been "internally disciplined."

{¶ 28} Plaintiff removed Cleveland from the detective bureau and revoked her LEADS and CRIS access. Plaintiff then recused herself from the matter, but the recusal occurred after plaintiff determined the punishment and imposed it. Plaintiff admitted that she did not order the detective bureau or the internal affairs department to investigate the matter, explaining that she did not want to interfere with investigations undertaken by the F.B.I., LEADS, and CRIS. She assigned Sgt. Naylor to communicate with the F.B.I. about the matter.

{¶ 29} On this record, the trial court properly found a preponderance of substantial, reliable, and probative evidence that plaintiff engaged in the disparate treatment of Officers Glaspy and Cook, and Officer Cleveland. The trial court did not abuse its discretion in concluding that Charge No. 2 was supported by sufficient evidence.

{¶ 30} Plaintiff insists that the charge is not established because the city did not identify the precise section of the Charter, Ordinances, Administrative Code, or departmental rules that were disparately applied. This contention lacks merit as there is a preponderance of substantial, reliable and probative evidence that it was plaintiff's responsibility to discipline officers and the city's discipline and termination policy clearly contemplates "fact-finding efforts" and "a fair and objective investigation to determine the facts." Preferential treatment of one employee and the disparate treatment of similarly situated employees clearly contravenes these duties. The trial court did not abuse its discretion in concluding that plaintiff undertook disparate treatment with regard to Officer Cleveland and Officers Glaspy and Cook.

{¶ 31} Plaintiff also insists that she did all that could be done to discipline Officer Cleveland. The record indicates, however, that plaintiff did not launch a formal investigation, and did not direct an investigation to be undertaken. Although she removed Cleveland from the detective bureau, she did not do so in a prompt fashion and imposed a lesser sanction than was ultimately ordered, and then recused herself after imposing this discipline.

{¶ 32} With regard to Charge No. 6, the charge that plaintiff did not provide Mayor Brewer with a communication from CRIS and LEADS regarding a request for an investigation of improper use by Officer Cleveland, plaintiff asserts that this charge was not included within the original August 27, 2007 letter, and was improperly included at the September 10, 2007 hearing.

{¶ 33} In *Emmons v. City of Miamisburg* (March 27, 1989), Montgomery App. No. 11197, the court considered whether the city impermissibly added new charges when it first detailed Emmons' alleged infractions on December 15, 1986, then set forth new allegations on February 5, 1987, prior to demoting him. The court determined that the city had not impermissibly added new charges as all of the charges focused on three areas: 1) threatening employees who cooperated with the investigation; (2) interference with an investigation; and (3) improper conduct as a supervisor.

{¶ 34} Similarly, in this matter, the record reflects that Charge No. 6, regarding the failure to notify the mayor of the LEADS/CRIS request for an investigation into Officer Cleveland's LEADS inquiry was essentially of the same nature and arose from the same circumstances as the disparate treatment allegation of Charge No. 2 contained within the August 27, 2007 letter. That is, the August 27, 2007 letter provided in relevant part as follows:

{¶ 35} "2) You have failed to properly and evenly enforce the Charter, the Ordinances, the Administrative Code and Departmental Rules as demonstrated by your handling of disciplinary actions involving the following employees: former Patrol Officer Shawna Glaspy, Patrol Officer Tiffiney Cleveland and Patrol Officer Michael Cook."

{¶ 36} The essence of this charge was that plaintiff's friendship with Cleveland shielded Cleveland from a thorough investigation into whether she had used the LEADS and CRIS law enforcement data system to run the license plate of

an undercover vehicle during the FBI's investigation of Cleveland's husband, a suspect in a drug trafficking investigation. The mayor also charged that Cleveland was not appropriately disciplined.

{¶ 37} The charge added on September 10, 2007, is as follows:

{¶ 38} "You failed to provide the Mayor with an external communication from CRIS and LEADS regarding a request for an investigation of improper use by Officer Tiffiney Cleveland."

{¶ 39} This matter likewise stems from plaintiff's actions in investigating and disciplining Officer Cleveland, and references her failure to apprise the Mayor of Cermak's June 2007 letter requesting plaintiff investigate Officer Cleveland's use of the LEADS and CRIS systems. We therefore agree with the trial court's determinations that "the issues raised in [Charge No. 2] involve facts pertinent to the issues raised in Charge Six" and "arise from the same factual basis." Plaintiff was therefore on notice of the substance of Charge No. 6 within the August 27, 2007 letter.

{¶ 40} We further conclude that the trial court properly found a preponderance of substantial, reliable, and probative evidence that plaintiff failed to notify the Mayor of Cermak's June 2007 request for an investigation into whether Officer Cleveland improperly accessed the LEADS and CRIS systems. The record indicates that the Mayor testified that he instructed plaintiff on June 15, 2007, to report "external communications" to him, and she failed to notify him of Cermak's letter requesting an investigation into Officer Cleveland's use of the

LEADS and CRIS systems. Plaintiff asserted that this failure was simply an oversight. She also neglected to mention this letter to the Mayor during her weekly reports to him and did not inform the Mayor that she sent correspondence to LEADS/CRIS which stated that Cleveland had been "cleared" in a previous matter and had been "internally disciplined." The serious nature of the matter, in relation to the FBI investigation of Cleveland's husband, demonstrates, however, that plaintiff did not give due concern to the Mayor's request for information and withheld this important information from him for a period of weeks. The trial court did not abuse its discretion in concluding that Charge No. 6 was supported by sufficient evidence.

{¶ 41} Moreover, the trial court properly determined that "there was a preponderance of substantial, reliable and probative evidence on the whole record to support the Mayor's decision to terminate plaintiff based on Charge Numbers Two and Six" based upon the extremely serious nature of these charges that affect the integrity of the entire department. The trial court did not abuse its discretion in upholding the termination order.

{¶ 42} Plaintiff's assignments of error are without merit.

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.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR