

[Cite as *Card v. Cleveland Civ. Serv. Comm.*, 2010-Ohio-3200.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93991

LINDA CARD

PLAINTIFF-APPELLANT

vs.

**CITY OF CLEVELAND
CIVIL SERVICE COMMISSION**

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-675442

BEFORE: Celebrezze, J., Rocco, P.J., and Sweeney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Linda Card, appeals from the trial court's affirmance of the decision of the City of Cleveland Civil Service Commission (the "Commission") to affirm the termination of her employment with appellee, the city of Cleveland's Department of Parks, Recreation, and Properties (the "City"). After a thorough review of the record, and for the following reasons, we reverse and remand.

{¶ 2} Appellant had been in the employ of the City for eight years when, on July 31, 2008, she slipped and fell down a set of recently-waxed marble steps at Cleveland City Hall on her way to her work station. She sought treatment for her injuries, and the treating emergency room physician provided documentation that she should not return to work until August 4, 2008. Appellant sought follow-up care on August 12, 2008 with her primary care physician, who advised her she could return to restricted duty on August 25, 2008. Appellant applied for and received workers compensation payments for time off work due to her workplace injuries.

{¶ 3} On August 11, 2008, after appellant failed to return on the original date she was cleared to work, the City sent her a letter advising that her continued absence without explanation would be deemed an "away without leave resignation" ("AWOL resignation"), pursuant to Cleveland Civil Service Rule 8.45 ("Rule 8.45"). The letter requested that appellant respond

with an explanation of her continued absence. The City then received the August 12th notice from appellant's physician advising a return to restricted duty on August 25, 2008. Upon receiving this notice, the City sent appellant a letter dated August 19, 2008 advising her to return for duty on August 25, 2008 in compliance with her physician's restrictions. Appellant did not return to work on that day, and she continued to call in her absences to the City's hotline.

{¶ 4} On September 19, 2008, appellant obtained an updated recommendation from her physician advising that she should not return to work until October 10, 2008. However, by this time the City had already initiated action to terminate her employment based on her continued absence from work. On September 12, 2008, the City sent appellant a notice advising that, because she had failed to satisfactorily explain her continued absence, her absence was deemed an AWOL resignation pursuant to Rule 8.45.

{¶ 5} Appellant sought review of her termination by the Commission. A hearing was held on October 10, 2008. The Commission heard arguments and unsworn testimony before reaching its decision to deny appellant's appeal request.

{¶ 6} Appellant then sought review of the Commission's decision in the common pleas court, adding allegations of violations of the Family and Medical Leave Act ("FMLA") and Ohio Worker's Compensation Act ("WCA").

Appellant requested an evidentiary hearing to augment the record because the Commission failed to file its conclusions and because the testimony heard before the Commission was not taken under oath. The City filed a motion to dismiss as well as a motion to deny appellant's request for an evidentiary hearing.

{¶ 7} On May 1, 2009, the trial court partially granted the City's motion, dismissing appellant's FMLA and WCA claims without prejudice because the trial court was limited in its review to the record before the Commission. After accepting briefs on the matter, the trial court ruled on August 28, 2009 that the Commission did not abuse its discretion, and it affirmed the Commission's decision. The trial court also denied appellant's motion for an evidentiary hearing. Appellant then timely filed a notice of appeal to this court citing four assignments of error for our review.

Law and Analysis

{¶ 8} "In reviewing an administrative appeal under R.C. Chapter 2506, a trial 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." *Manlou v. City of Cleveland Civ. Serv. Comm.*, Cuyahoga App. No. 83214, 2004-Ohio-1112, ¶6. Our review is more narrow

in scope. See *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264. We must determine if the trial court abused its discretion in its review of the Commission's decision.

Id. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

Failure to Hold an Evidentiary Hearing

{¶ 9} Appellant first argues that “[t]he trial court erred in denying appellant’s motion for evidentiary hearing and in refusing to hold an evidentiary hearing since the record did not include the findings of fact relied upon by the Cleveland Civil Service Commission and the testimony adduced at the commission was not taken under oath.”

{¶ 10} Review by the trial court was instituted pursuant to R.C. 2506.01, which states that “every final order, adjudication, or decision of any * * * 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.”

{¶ 11} Such review is limited in scope to the administrative record except in certain enumerated circumstances. R.C. 2506.03(A). In this case, the City attached a transcript of the Commission hearing to a renewed

motion to dismiss. This is not sufficient to comply with the dictates of R.C. 2506.02, which states that “[w]ithin forty days after filing a notice of appeal in relation to a final order, adjudication, or decision * * * 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.” That was never done here. According to the trial court docket, these items were never filed, and a file-stamped copy of the transcript and evidence adduced at the administrative hearing is not contained in the record.

{¶ 12} In *Reilly v. Sylvania Twp. Bd. of Trustees* (1990), 66 Ohio App.3d 324, 326, 584 N.E.2d 30, a somewhat similar case, a review of the record “indicate[d] that the transcript was never filed with the Lucas County Court of Common Pleas[,] * * * [t]he copy of the transcript presented to this court was never file-stamped and was never entered as filed on the docket sheet of the Lucas County Court of Common Pleas[.]” and the Sixth District Court of Appeals held that “[t]he Lucas County Court of Common Pleas therefore acted beyond its jurisdiction when it considered th[e] case[.]” *Id.* See, also, *Grant v. Washington Twp.* (1963), 1 Ohio App.2d 84, 203 N.E.2d 859.

{¶ 13} Even if this requirement had been complied with, the Commission failed to file conclusions of fact to support its determination. The City claims that conclusions of fact were filed and cites the transcript of the proceedings and the October 24, 2008 letter sent to appellant by the Commission. These are not sufficient given the mandate in R.C. 2506.03(B) to hold an evidentiary hearing should “[t]he officer or body fail[] to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.” R.C. 2506.03(A)(5).

{¶ 14} Here, the transcript of the Commission hearing was not properly submitted to the trial court for review even though appellant submitted the requisite praecipe. No conclusions of fact were filed in support of the Commission’s decision. The letter the City claims contains these findings states, “[t]he appeal hearing regarding Linda Card’s termination by AWOL resignation from the classification of Chief Clerk with Division of Recreation, Department of Park, Recreation & Properties, was denied and the termination was upheld by the Civil Service Commission at its’ [sic] hearing on October 10, 2008.” Nowhere does this letter state the basis for the determination. There were no findings of fact or conclusions of law submitted in this case.

{¶ 15} In such a situation, this court must remand the case “to the trial court to reconsider its decision and decide the cause on the entire record”

because “the commission should not be able to avoid a review of its decision by the appropriate forum as a result of that failure.” *Chupka v. Saunders* (1986), 28 Ohio St.3d 325, 328, 504 N.E.2d 9. It is incumbent upon the trial court to hold an evidentiary hearing in this case. *Manlou* at ¶13.¹

{¶ 16} Because the trial court, in dismissing appellant’s FMLA and WCA claims, found they were not within its purview because they were not raised before the Commission and review was limited to the administrative record, that decision can now be revisited because the trial court’s review is no longer limited to the administrative record pursuant to R.C. 2506.03.

{¶ 17} Our resolution of appellant’s first assignment of error renders her remaining errors moot;² therefore, they will not be addressed. App.R. 12(A)(1)(c).

¹Appellant also argues that because the testimony adduced at the hearing before the Commission was unsworn, an evidentiary hearing was required. Because this case can be disposed of on the above grounds, whether a failure to object to unsworn testimony at an administrative hearing waives the opportunity to supplement the record on those grounds, as some cases have held, will not be addressed. See *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, 876 N.E.2d 972, ¶16; *Zurow v. Cleveland* (1978), 61 Ohio App.2d 14, 24, 399 N.E.2d 92. But, see, *Brown v Germantown* (Sept. 23, 1988), Montgomery App. No. 10984.

²Appellant also claimed the following errors:

II. “The trial court erred, as a matter of law, in upholding the discharge of Ms. Card since the discharge was accomplished in violation of written city policies that constitute legally binding work rules between the City and its employees.”

III. “Appellant’s termination of employment was in violation of her rights to procedural due process as guaranteed classified civil service employees of the City of Cleveland.”

IV. “Appellant’s termination is illegal since the termination violates the Ohio Worker’s Compensation Act and the Family and Medical Leave Act.”

Conclusion

{¶ 18} The trial court was denied meaningful review by the Commission's failure to properly file the administrative record, findings, and conclusions. The trial court compounded this problem by refusing to grant appellant an evidentiary hearing. That decision must be reversed.

{¶ 19} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out 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.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR