[Cite as *Holmes v. Cleveland Civ. Serv. Comm.*, 2010-Ohio-76.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93191

ANGELA HOLMES

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND CIVIL SERVICE COMMISSION

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-674301

BEFORE: Blackmon, J., Cooney, P.J., and McMonagle, J.

RELEASED: January 14, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Kevin P. Prendergast
27999 Clemens Road
Suite One
Westlake, Ohio 44145

Drue Marie Skaryd
Ritzler, Coughlin & Swasinger, Ltd.
1360 East Ninth Street
1000 IMG Center
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

Robert Triozzi
Director of Law

Theodora M. Monegan
Chief Assistant Director of Law
Jose M. Gonzalez
Assistant Director of Law
City Hall, Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114-1077

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), is filed within ten (10) 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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Angela Holmes appeals the trial court's judgment affirming the decision of the Civil Service Commission ("Commission") terminating her employment with the appellee city of Cleveland ("City"). She assigns the following errors for our review:

> **"I. The trial court erred in denying appellant's motion for [an] 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."**
>
> **"II. The trial court erred, as a matter of law, in finding that the decision of the Cleveland Civil Service Commission, in terminating the employment of the appellant, was supported by the preponderance of substantial reliable and probative evidence and that the decision was not illegal, arbitrary, capricious, unreasonable or unconstitutional."**
>
> **"III. Plaintiff-appellant's termination of employment was in violation of her rights to procedural due process as [sic] guaranteed [to] classified Civil Service employees of the City of Cleveland."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

Facts

{¶ 3} The city of Cleveland hired Angela Holmes in May 2000 as an Accountant II in the Department of Finance, Division of Financial Reporting and Control. She received several promotions over the years and obtained the title

of Accountant IV. In September 2006, she was laterally transferred to the Division of Public Utilities Fiscal Control.

{¶ 4} At the conclusion of the workday on November 8, 2007, Holmes sent an email to her superiors resigning from her position effective that day. Holmes had given no other indication that she was resigning prior to that day. In fact, just prior to her resignation, she had been involved in discussions with the City for a lateral transfer to the Department of Finance.

{¶ 5} The day after Holmes resigned, the City Controller contacted her to discuss the position at the Department of Finance. Holmes agreed to take the position; she rescinded her resignation and agreed to return to her prior position until the proper paperwork was completed for her transfer. She returned to work on November 13, 2007. It is undisputed that because of her resignation, she did not work for the City on Friday, November 9, 2007 and Monday, November 12, 2007. Upon returning to work, she met with the Commissioner of the Division of Utilities and Fiscal Control, Dennis Nichols, who decided no discipline was warranted for her prior resignation without notice.

{¶ 6} On or about November 28, 2007, Holmes received her paycheck for the prior two weeks. She was not paid the two days she did not work. On November 29, 2007, Holmes sent an email to Commissioner Nichols (and copied division director, Barry Withers) complaining about the shortage in her paycheck. In the email, she directly threatened Monique Reed-Hendricks, her direct

supervisor, and Renee Carter, the General Manager of Administrative Services in the Division of Utilities Fiscal Control. She blamed both women for the paycheck shortage, although they had no control over her paycheck. Commissioner Nichols was in charge of determining paycheck amounts, and he made the decision not to pay Holmes for the two days. Holmes's email stated in pertinent part:

> **"I went to payroll personnel and before asking any questions, I was informed, again by payroll personnel, that it was advised to inform me that my pay would not be as it should be. Moreover payroll personnel were also told by Renee Carter and Monique Reed-Hendricks not to mention anything to me."**

{¶ 7} She then proceeded to state in the email:

> **"Should my pay not being correct result in the Successtech [sic] incident? Is this what Renee Carter and Monique Reed-Hendricks is [sic] searching for?"**

{¶ 8} Several weeks prior to the email, a student at SuccessTech Academy shot four people and then mortally shot himself. SuccessTech is located on East 13th Street and Lakeside Avenue across the street from the Division of Utilities Fiscal Control on East 12th Street and Lakeside Avenue.

{¶ 9} As a result of the email, Holmes was placed on administrative leave with pay. Holmes was provided written notice that a pre-disciplinary hearing would be conducted regarding the incident and that she would be afforded an opportunity to explain her behavior; she was also told that she was entitled to

representation. After the hearing, Commissioner Nichols decided Holmes's actions warranted termination. On December 13, 2007, he sent her a termination letter explaining the reasons for her discharge.

{¶ 10} Holmes appealed her termination to Barry Withers, the Director of the Department of Public Utilities Fiscal Control. The Civil Service Commission appointed a referee to hear the matter and make recommendations to the director. At the hearing, Holmes, Commissioner Nichols, and Renee Carter testified. Holmes was permitted to cross-examine the witnesses and to offer evidence. The referee issued a report recommending that Commissioner Nichols's decision to terminate Holmes be upheld. Thereafter, Withers issued a letter agreeing with the referee and upheld the termination.

{¶ 11} Holmes appealed Withers's decision to the Civil Service Commission, which held a hearing. Holmes was again permitted to testify and explain her behavior. The Commission denied her appeal and upheld her termination. Holmes appealed the Commission's decision to the Court of Common Pleas pursuant to R.C. Chapter 2506. The trial court upheld the decision of the Commission, stating:

> **"Upon consideration of the transcript and such additional evidence as the court has allowed to be introduced, the court affirms the order of [the] Civil Service Commission, finding the order is not unconstitutional, illegal, arbitrary, capricious,**

unreasonable, nor unsupported by a preponderance of substantial, reliable, and probative evidence on the whole record."

Standard of Review

{¶ 12} Holmes brought her appeal pursuant to R.C. Chapter 2506. In *Henley v. Bd. of Zoning Appeals*,[1] the Ohio Supreme Court explained the applicable standard of review as follows:

> **"[W]e have distinguished the standard of review to be applied by common pleas courts and courts of appeals in R.C. Chapter 2506 administrative appeals. 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, citing *Dudukovich v. Lorain Metro. Hous. Auth*. (1979), 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113, * * *.**
>
> **"The standard of review to be applied 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, 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.* * * The fact that the court of appeals * * * might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264, 267"[2]**

{¶ 13} Thus, our review requires that we affirm the trial court unless we find as a matter of law that the court abused its discretion.

Evidentiary Hearing and Findings of Fact

{¶ 14} In her first assigned error, Holmes argues that the trial court erred in not granting her an evidentiary hearing and that, absent findings of fact and conclusions of law, a hearing is required. We disagree.

---

[1]90 Ohio St.3d 142, 147, 2000-Ohio-493.

[2]Id. at 147.

{¶ 15} Relying on this court's decision in *Manlou v. Cleveland Civil Service Commission*,[3] Holmes argues that because the Commission failed to file findings of fact and conclusions of law, the trial court was deprived of evidence to determine whether the Commission's decision was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.

{¶ 16} Prior to Holmes's termination, a pre-disciplinary hearing was conducted where Holmes was permitted to explain her behavior. After the hearing, Commissioner Nichols found grounds to terminate Holmes. Holmes appealed the decision and a full evidentiary hearing was conducted before a referee appointed by the Civil Service Commission. The complete transcript of the hearing was included as part of the record before the trial court; the trial court referenced a transcript in its order. At the hearing, Holmes testified under oath, presented evidence, and was able to view the evidence in support of the City's decision to terminate her, and also was permitted to cross-examine the witnesses. Following the hearing, and after receipt of post-hearing briefs, the referee issued findings of fact and conclusions of law recommending the Holmes's termination be upheld. These findings were also included in the record.

---

[3]Cuyahoga App. No. 83214, 2004-Ohio-1112.

{¶ 17} Thereafter, Barry Withers, the Director of the Department of Public Utilities, adopted the referee's decision and issued a letter in which he notified Holmes of the referee's recommendation to uphold Nichols's decision to terminate her and that he agreed with the recommendation. Holmes appealed Withers's decision to the Civil Service Commission. A transcript of the hearing before the Commission was included as part of the record. At this hearing, Holmes was permitted to introduce additional testimony. The Commission denied Holmes's appeal and upheld her termination. Therefore, along with the referee's findings of fact and conclusions of law, the record contained two transcripts of two different hearings. The record provided sufficient evidence to enable the trial court to review the Commission's decision under the appropriate standard of review.

{¶ 18} In the *Manlou* case, the Commission did not appoint a referee to conduct an evidentiary hearing. In fact, the transcript, unlike the instant case, lacked any conclusions of fact by the Commission or anyone appointed by the Commission.

{¶ 19} R.C. 2506.03(A)(5) requires the officer or public body whose decision is appealed to file with the transcript, "the conclusions of fact supporting the final order, adjudication, or decision appealed from." Additionally, Civ. Serv. Rule 9.70 requires the Commission to enact findings of fact and conclusions of law. We conclude under the facts of the instant case, the Commission complied

with these requirements by submitting to the trial court the findings of fact and conclusions of law made by the referee it appointed to investigate Holmes's termination.

{¶ 20} It is well established that the court can consider only the evidence presented in the transcript of the administrative hearing unless an appellant shows that the transcript is deficient in one or more of the ways enumerated in R.C. 2506.03(A). The transcripts in the instant case are not deficient. Therefore, there was no reason for the trial court to conduct an evidentiary hearing. Accordingly, Holmes's first assigned error is overruled.

Civil Service Commission's Decision

{¶ 21} In her second assigned error, Holmes argues the trial court erred by concluding the Civil Service Commission's decision was supported by the preponderance of substantial, reliable, and probative evidence, and that the Commission's decision was not illegal, arbitrary, capricious, unreasonable, or unconstitutional. She argues that the manner in which she was terminated violated the City's Workplace Violence Policy ("WVP") and its Progressive Discipline Policy. We disagree.

{¶ 22} Holmes argues that once a disciplinary charge is determined to fall under the WVP, the policy requires the matter be reported to the City's Department of Personnel and Human Resources to conduct an investigation. Holmes contends that the matter was never referred to the personnel department

because the department did not conduct interviews of the parties involved and there is no documentation from that department. Instead, the Department of Utilities Fiscal Control performed its own investigation.

{¶ 23} We conclude that Holmes's termination was not compromised by the failure of the Commissioner to refer the case to the Department of Personnel for an investigation. Commissioner Nichols informed the department director, Barry Withers, about Holmes's email. Nichols also recalled that he saw several emails that were exchanged between the director and the personnel department regarding Holmes's email. He also stated that Gina Routen, who works for Director Withers, is also the department's liaison with the personnel department, and she was advised of the situation. Therefore, the personnel department was provided notice of the situation.

{¶ 24} The failure of the personnel department to conduct an investigation was not prejudicial under the facts of the instant case. The facts surrounding the email were not contested. Holmes admitted she sent the email. Therefore, an investigation would not have added anything that could aid in the decision regarding Holmes's disciplinary sanction.

{¶ 25} We also conclude the City did not violate its Progressive Discipline Policy by terminating Holmes. Holmes argues her discharge was excessive punishment given her exemplary work history. According to the City's assistant law director, the policy referenced by Holmes was outdated and was never

integrated into the City's Personnel Policies and Procedures Manual adopted in 1997. (Regardless, even if the policy was integrated, it was not violated by the City.)

{¶ 26} Pursuant to the Progressive Discipline Policy, threatening a co-employee is considered a Group II offense, which allows after a first offense, suspension pending discharge. Holmes's email was a threat designed to intimidate her superiors into paying her for the two days she did not work. The threat was especially egregious given that it was issued shortly after the SuccessTech incident occurred not far from the department's building on East 12th Street and Lakeside Avenue. Therefore, the City's decision to terminate her did not violate this policy.

{¶ 27} Moreover, the City should be allowed to dismiss an employee who makes a serious threat of harm to two named co-employees. Although Holmes claims she did not intend the threat and that her email was misinterpreted, it was proper for the City to find the email threatening. The City is obligated to maintain a safe working environment for its employees; consequently, when such a violent threat is made to specifically named employees, termination is reasonable.

{¶ 28} Holmes also argues that the City's failure to file criminal charges against her indicated that the threat was not considered serious. However, whether to prosecute someone and whether to terminate someone are completely different standards. The commissioner and director of the department

were in the best position to determine the impact the threat had on the other employees and the workplace. Moreover, Commissioner Nichols stated at the pre-disciplinary hearing that Holmes's contention that the SuccessTech shooter was a victim, was a cause for concern and led him to believe termination was necessary because Holmes perceived herself as a victim. Although Holmes sent a short email to both the director and commissioner apologizing for her actions, at the hearing she merely stated that she apologized that her email was misinterpreted. Accordingly, Holmes's second assigned error is overruled.

Procedural Due Process Violated

{¶ 29} In her third assigned error, Holmes argues her due process rights were violated because she was not provided adequate pre-termination notice of the charge and the disciplinary action being considered. We disagree.

{¶ 30} As explained in *Emanuel v. Columbus Recreation & Parks Dept.,*[4] because classified civil servants can be removed only for cause, they possess a property interest in continued employment, which right is protected by the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court in *Cleveland Bd. of Edn. v. Loudermill*[5] held that to comply with such due process requirements, "an appointing authority is required to afford an employee certain protections before terminating employment, including oral or written notice

[4](1996), 115 Ohio App.3d 592.

[5](1985), 470 U.S. 532, 546-48, 105 S.Ct. 1487, 1495-97.

of the charges against the employee, an explanation of the employer's evidence, and an opportunity to be heard before being terminated."

{¶ 31} Commissioner Nichols advised Holmes in writing that a pre-disciplinary hearing was scheduled and that it concerned the incident on November 29, 2007. Although the notice did not detail that the incident concerned the email, nothing else of significance to his case occurred on November 29. Also, Holmes has never complained that she did not know what the hearing concerned.

{¶ 32} The record reflects that a pre-disciplinary hearing was conducted where Holmes was provided with notice of the charge and the evidence underlying the violation. Holmes was given an opportunity to explain her actions prior to the decision to terminate her employment was made. Thus, the requirements of *Loudermill* have been met. Prior to her termination, she was provided with notice of the charge, an explanation of the employer's evidence in support of the charge, and she was given an opportunity to explain her actions.

{¶ 33} Citing to this court's opinion in *Cleveland v. AFSCME, Local 100*,[6] Holmes contends that Civ. Serv. R. 9.20 provides more due process than that required by *Loudermill.* Civ. Serv. R. 9.20 provides:

> **"When any disciplinary action is contemplated as to an officer or employee in the classified service, the appointing authority**

[6](Aug. 5, 1999), Cuyahoga App. No. 74467.

> **or the secretary of a board or commission in the City service, shall give such officer or employee oral or written notice of the action contemplated and an opportunity to respond."**

{¶ 34} According to Holmes, Civ. Serv. R. 9.20 requires the City provide the employee with notice of the disciplinary action contemplated and an opportunity to respond at the pre-termination hearing. Although *AFSCME* does state this, the holding in *AFSCME* is dicta because we were reviewing an arbitration decision, which involves a very limited review.

{¶ 35} *AFSCME* also involved an employee who was a member of a union that had a collective bargaining agreement. In the bargaining agreement, the parties agreed to a "due process procedure that the City must follow prior to initiating discipline." Therefore, there had to be strict adherence to those procedures. As we held in *AFSCME*,

> **"The parties' CBA limited [the] arbitrator's authority in ¶161 so that he or she cannot add, subtract or modify language in the CBA, pass upon issues governed by law, or make an award in conflict with law. Before the trial court, the City argued that the arbitrator violated these limitations when he found the pre-disciplinary notice insufficient. * * * On the contrary, the arbitrator interpreted and applied the parties' agreed-upon due process procedure as found in the CBA and the City's Civil Service Rules, which provided more due process than that articulated in the *Loudermill* decision by the U.S. Supreme Court."**

{¶ 36} Holmes is not a union employee. Moreover, the arbitrator found the notice deficient for several reasons. The notice "'made no reference to the

disciplinary action contemplated, did not describe the incident in question, and listed the wrong date,' which meant that the grievant 'didn't know what was coming up' because she 'worked all day on August 8'"[7] and the discipline was for August 9. In the instant case, Holmes was not confused as to the subject matter of the hearing and the correct date was noted. Finally, the arbitrator in *AFSCME* also found the evidence against the employee unconvincing. In the instant case, there is no dispute that Holmes committed the serious act.

{¶ 37} Finally, even if a violation of Holmes's due process occurred, the remedy for a procedural due process violation is not reinstatement unless but for the lack of notice, Holmes would not have been terminated.[8] As we explained in *Clipps*,

> **"The rationale for this is that the wrong suffered by the employee was the deprivation of due process, not the dismissal. *Emanual*, 115 Ohio App.3d at 601, 685 N.E.2d 1272. As stated in *Green*, supra: 'to hold that a discharge is invalid because of**

[7] *AFSCME*, supra.

[8] *Clipps v. Cleveland*, Cuyahoga App. No. 86887, 2006-Ohio-3154, citing *Emanuel v. Columbus Recreation & Parks Dept.* (1996), 115 Ohio App.3d 592, 600-601 and *Green v. Village of Buckeye Lake*, 5th Dist. No. 01CA106, 2002-Ohio-2543.

procedural difficulties emphasizes form over substance, and reinstatement is not an appropriate remedy for a due process violation prior to termination.'"

{¶ 38} Holmes also argues that the Cleveland Charter Section 128(m) provides that a discharge is not effective until after a person has been given written notice of the discharge and an opportunity to be heard. The City followed the charter in discharging Holmes. She was placed on administrative leave with pay on November 30, 2007. She was officially discharged in a written letter on December 13, 2007, which also advised her of her right to appeal the decision.

{¶ 39} Finally, "[O]nly the barest of a pre-termination procedure [is required], especially when an elaborate post-termination procedure is in place."[9] Holmes was given a full opportunity to present evidence and challenge the decision to terminate her before the director of her division, the Commission, and the common pleas court. Based on the foregoing, we are unable to conclude Holmes was not afforded the requisite due process prior to her termination. Accordingly, we overrule Holmes's third assigned error.

Judgment affirmed.

---

[9]*Clipps*, Cuyahoga App. No. 86887.

It is ordered that appellee recover from appellant its 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.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR