[Cite as *Baron v. Hubbard*, 2010-Ohio-1165.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ROBERT BARON,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2009-T-0106**
- vs -	:	
CITY OF HUBBARD, OHIO, et al.,	:	
Appellees.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 2008 CV 3231.

Judgment: Affirmed.

Jason P. Matthews, Jeffrey M. Silverstein and Associates, 627 South Edwin C. Moses Boulevard, #2-C, Dayton, OH 45417 (For Appellant).

Jeffrey D. Adler, City of Hubbard Law Director, 220 West Liberty Street, P.O. Box 307, Hubbard, OH 44425 (For Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Robert Baron, appeals from the September 18, 2009 judgment entry of the Trumbull County Court of Common Pleas, affirming the decision of appellee, city of Hubbard Civil Service Commission ("Service Commission"), to terminate his employment, and dismissing his administrative appeal.

{¶2} Appellant was employed as a part-time police patrolman for appellee, city of Hubbard, Ohio ("city of Hubbard"). On April 7, 2006, James R. Taafe ("Chief Taafe"), Police Chief with appellee, city of Hubbard Police Department ("Hubbard Police

Department"), issued a letter to appellant informing him that he would be subjected to a pre-disciplinary hearing on April 14, 2006, due to a failure to report to duty and for showing up late for work.

{¶3} At that hearing, Chief Taafe indicated that beginning on February 11, 2002, appellant was issued a one-day suspension for being absent without leave. Appellant was told that any similar, future events would lead to his dismissal. In 2004, a meeting was held between Chief Taafe and appellant because Hubbard Police Department was having difficulties contacting appellant on his phone and there were numerous scheduling difficulties due to his frequent absences. According to Chief Taafe, appellant had been called to report for duty thirty-three times, and that at least twenty-two of those times, he failed to answer the phone, resulting in his absence in 9-1-1 emergency situations. Also, it was established that appellant was unable to work the required hours of a part-time patrolman.

{¶4} On March 24, 2006, Chief Taafe indicated that appellant called to say he would be late for work because he was falling asleep and would have to pull off to the side of the road. On March 25, 2006, appellant was recorded as being an hour and a half late to work. Chief Taafe informed appellant that he violated city of Hubbard policies, specifically No. 40804, being absent without leave, and No. 40800, failing to report for duty.

{¶5} In addition, it was established that appellant resided in Dayton, Ohio, a city over four hours and two hundred and fifty miles away from Hubbard. Appellant indicated he was employed by the city of Dayton Fire Department at the same time he was employed by the city of Hubbard as a part-time patrolman.

{¶6} After that hearing, Chief Taafe prepared a letter to Arthur Magee ("Mayor Magee"), Mayor of the city of Hubbard, providing grounds for appellant's termination as a patrolman. Chief Taafe then suspended appellant indefinitely. In September of 2006, Mayor Magee terminated appellant's employment with the city of Hubbard.

{¶7} A hearing before the Service Commission was held on October 6, 2008. On November 10, 2008, the Service Commission affirmed the dismissal of appellant.

{¶8} On November 19, 2008, appellant filed an administrative appeal with the Trumbull County Court of Common Pleas pursuant to R.C. Chapters 2505 and 2506. Appellant filed a brief in support of his administrative appeal on January 20, 2009, and a revised brief on July 27, 2009. On August 28, 2009, the city of Hubbard, the Hubbard Police Department, and the Service Commission, filed a brief in opposition to appellant's administrative appeal.

{¶9} Pursuant to its September 18, 2009 judgment entry, the trial court dismissed appellant's administrative appeal, finding that the decisions of the city of Hubbard were based on reliable, probative, and substantial evidence and were in accordance with the law. It is from that judgment that appellant filed a timely notice of appeal with this court, asserting the following assignments of error for our review:

{¶10} "[1.] The trial court committed prejudicial error in affirming the Appellee, City of Hubbard Civil Service Commission's, Decision to uphold the suspension and removal of Appellant, Robert Baron, from his position as a part-time patrolman because Appellees, City of Hubbard and the City of Hubbard Police Department, failed to comply with the mandates of R.C. 124.34, in that they did not provide a written order to Appellant setting forth the reasons for the suspension and removal.

{¶11} "[2.] The trial court committed prejudicial error in determining that Appellant was suspended and terminated for reasons set forth in O.R.C. 124.34.

{¶12} "[3.] The trial court committed prejudicial error in determining that Appellant was given a pre-deprivation due process hearing prior to his removal."

{¶13} Preliminarily, we note that this court stated the following in *Kramer v. Niles Hous. Maintenance Bd.*, 11th Dist. No. 2008-T-0004, 2008-Ohio-4978, at ¶12-14:

{¶14} "Judicial review of decisions by the [Service Commission] is authorized by R.C. 2506.01(A): 'every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, 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.'

{¶15} "When an appeal is taken pursuant to R.C. 2506.01, 'the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court.' R.C. 2506.04.

{¶16} "Appellate review of the trial court's decision is provided for in R.C. 2506.04: '(t)he judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with

those rules, Chapter 2505. of the Revised Code.' 'An appeal to the court of appeals, pursuant to R.C. 2506.04, is more limited in scope and requires that court to affirm the common pleas court, unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative and substantial evidence.' *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34 ***. 'While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law.' *Carrolls Corp. v. Bd. of Zoning Appeals,* 11th Dist. No. 2005-L-110, 2006 Ohio 3411, at ¶10 (citations omitted)." (Parallel citation omitted.)

{¶17} In his first assignment of error, appellant argues that the trial court erred in affirming the Service Commission's decision to uphold his suspension and removal from his position as a part-time patrolman because the city of Hubbard and the Hubbard Police Department failed to comply with the mandates of R.C. 124.34 in that they did not provide a written order to him setting forth the reasons for the suspension and removal. Appellant maintains that his due process rights were violated and that the trial court misapplied the requirements set forth in *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532.

{¶18} R.C. 124.34(C) provides in part: "[i]n the case of the suspension for any period of time, or a fine, demotion, or removal, of a chief of police, a chief of a fire department, or any member of the police or fire department of a city or civil service township, who is in the classified civil service, the appointing authority shall furnish the chief or member with a copy of the order of suspension, fine, demotion, or removal, which order shall state the reasons for the action. ***"

{¶19} This court stated in *Swigart v. Kent State Univ.*, 11th Dist. No. 2004-P-0037, 2005-Ohio-2258, at ¶45:

{¶20} "'The essential requirements of due process (***) are notice and an opportunity to respond. (***) To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.' *Kennedy*[*v. Marion Correctional Institution*, 69 Ohio St.3d 20,] at 23, citing *Loudermill*[, supra, at] 546. 'A classified civil servant employee of the state of Ohio must be afforded a pretermination disciplinary hearing; however, such hearing need not be elaborate, but must afford the employee notice and the opportunity to have an explanation of the employer's charges and evidence against him, and an opportunity to present his side of the story.' *Local 4501, Communications Workers of America v. Ohio State University* (1990), 49 Ohio St.3d 1, 6 ***." (Parallel citations omitted.)

{¶21} The Supreme Court of Ohio in *Kennedy*, supra, at 23, quoting *Loudermill*, supra, at 546, also stated that "'[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

{¶22} In the case at bar, appellant was a classified civil service employee, and therefore, comes within the purview of R.C. 124.34(C). The record before us establishes that appellant received adequate oral and written notice of the reasons surrounding his suspension and subsequent removal. Again, on April 7, 2006, appellant received a letter from Chief Taafe informing him that he would be subjected to a pre-disciplinary hearing on April 14, 2006, due to a failure to report to duty and for showing

up late for work, incidents which occurred in March of 2006. A pre-disciplinary hearing was held on the scheduled date of April 14, 2006. At that hearing, appellant was again orally informed of the charges against him and Chief Taafe gave him the opportunity to respond. At the end of the hearing, appellant was informed that he was suspended and that termination proceedings would be initiated if he did not submit a letter of resignation.

{¶23} The foregoing procedure comported with the requirements pursuant to *Kennedy* and *Loudermill*, supra. As such, appellant's due process rights were not violated. Also, appellant was able to use the charges and evidence presented when he later went before the Service Commission on October 6, 2008. Since there is no due process violation as appellant was legitimately terminated according to R.C. 124.34, he is precluded from reinstatement and/or from recovering back pay. See *Emanuel v. Columbus Recreation & Parks Dept.* (1996), 115 Ohio App.3d 592, 600-601.

{¶24} Appellant's first assignment of error is without merit.

{¶25} In his second assignment of error, appellant contends that the trial court erred in determining that he was suspended and terminated for reasons set forth under R.C. 124.34(A). Also, appellant reiterates that appellees failed to provide him with the reasons for his suspension and removal in writing as required by R.C. 124.34(C).

{¶26} Pursuant to R.C. 124.34(A), appellant, as a classified civil service employee, could not be suspended or removed, except for: "*** incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, *neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority*, violation of this chapter or the rules of the

director of administrative services or the commission, any other *failure of good behavior*, any other acts of *misfeasance*, malfeasance, or nonfeasance in office, or conviction of a felony." (Emphasis added.)

{¶27} In the instant matter, again, at the pre-disciplinary hearing, Chief Taafe indicated to appellant that he was in direct violation of two policies, namely No. 40804, being absent without leave, and No. 40800, failure to report for duty. Appellant was given the opportunity to respond. At the end of the hearing, appellant was informed that he was suspended and that he would likely be terminated.

{¶28} The foregoing establishes that appellant was subject to termination pursuant to R.C. 124.34(A), due to his "neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, *** failure of good behavior *** [and/or] *** misfeasance[.]" Also, as previously addressed, appellant's due process rights were not violated since he had notice of and an opportunity to respond to evidence regarding the incidents at issue.

{¶29} Appellant's second assignment of error is without merit.

{¶30} In his third assignment of error, appellant maintains that he had a property interest in his position as a part-time patrolman. He alleges that the trial court erred in determining that he was given a pre-deprivation due process hearing prior to his removal. He stresses that he was entitled to a pre-termination hearing.

{¶31} Appellant correctly notes, and the city of Hubbard acknowledges, that he had a property interest in his position as a part-time patrolman pursuant to R.C. 124.34, which creates a property interest for certain public employees in their employment during good behavior.

{¶32} The April 14, 2006 "pre-disciplinary hearing" sufficed as a pre-disciplinary or pre-termination hearing required by R.C. 124.34 and pursuant to *Loudermill*, as the terms are virtually interchangeable. Again, appellant was given notice and an opportunity to hear evidence supporting the charges against him as well as an opportunity to tell his side of the story at the pre-disciplinary hearing. *Loudermill*, supra, at 546. At the conclusion of that hearing, Chief Taafe explicitly warned appellant that another member of his staff would request Mayor Magee to draw up the necessary paperwork and initiate termination proceedings if he did not submit his letter of resignation. In addition, appellant was offered a more formal post-termination hearing with the Service Commission on October 6, 2008.

{¶33} The record before us establishes that the city of Hubbard had sufficient evidence to support appellant's termination pursuant to the disciplinary provisions of R.C. 124.34.

{¶34} Appellant's third assignment of error is without merit.

{¶35} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.