[Cite as *Phillips v. Ohio Univ.*, 2010-Ohio-2584.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

JOHN R. PHILLIPS,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA17
	:	
vs.	:	**Released: June 3, 2010**
	:	
OHIO UNIVERSITY,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Richard Cordray, Ohio Attorney General, and Drew C. Piersall and Joseph N. Rosenthal, Assistant Ohio Attorneys General, Columbus, Ohio, for Defendant-Appellant.

John R. Phillips, Athens, Ohio, pro se Plaintiff-Appellee.[1]

McFarland, P.J.:

{¶1} Defendant-Appellant, Ohio University ("OU"), appeals the decision of the Athens County Court of Common Pleas in favor of Plaintiff-Appellee, John R. Phillips. After the State Personnel Board of Review ("the Board") dismissed Phillips' appeal for his failure to appear at a hearing, the trial court reversed that decision, finding that it was not supported by reliable, probative, and substantial evidence. OU now argues that the trial court lacked subject-matter jurisdiction to hear the case. It also argues that

[1] Phillips did not file an appellate brief in the instant matter.

even if the court had jurisdiction to hear the case, it was error to reverse the Board's decision.

{¶2} Because we find that Phillips met the procedural requirements of R.C. 119.12 in filing the appeal in the trial court, we reject OU's subject-matter jurisdiction argument. Further, because we find the trial court did not abuse its discretion in determining that the Board lacked reliable, probative, and substantial evidence in dismissing Phillips' appeal, we overrule OU's assignment of error and affirm the decision of the court below.

I. Facts

{¶3} OU removed John R. Phillips from his position as an administrative assistant in December 2006. Phillips appealed that decision to the Board. After two continuances, one granted to Phillips and one granted to OU, a hearing was finally scheduled for May 2008. Phillips failed to appear at the hearing and OU moved to dismiss the appeal. The presiding administrative law judge issued a report recommending that OU's motion be granted. The Board adopted the judge's report and issued a final order dismissing the appeal. Phillips then appealed the Board's decision to the Athens County Court of Common Pleas.

{¶4} Stating that Phillips did not properly perfect his appeal in the Common Pleas Court, OU moved for dismissal. OU claimed that, because

R.C. 119.12 requires an appellant to file a time-stamped copy of the administrative agency's decision with the trial court, and because Phillips failed to include such a copy, the trial court lacked subject-matter jurisdiction to hear the appeal. The trial court denied OU's motion to dismiss, finding that R.C. 119.12 had been satisfied.

{¶5} The trial court then found that the Board's dismissal of Phillips' appeal was not supported by substantial evidence and was not in accordance with the law. As such, the court reversed the Board's decision and remanded the matter for a hearing on the merits. OU appeals that decision in the current appeal.

II. Assignment of Error

> THE COMMON PLEAS COURT ERRED WHEN IT REVERSED THE STATE PERSONNEL BOARD OF REVIEW'S DISMISSAL OF PLAINTIFF-APPELLEE'S APPEAL FOR FAILURE TO APPEAR AT THE RECORD HEARING IN THIS MATTER AND REMANDED THIS CASE TO THE STATE PERSONNEL BOARD OF REVIEW TO ADDRESS THE MERITS OF APPELLANT'S APPEAL.

III. Legal Analysis

{¶6} Under its sole assignment of error, OU presents two distinct arguments for our review. First, it asserts that the trial court's legal conclusions were mistaken and that there was reliable, probative, and substantial evidence to support the Board's decision. OU also argues that because Phillips did not comply with the procedural requirements of R.C.

119.12, the trial court lacked subject-matter jurisdiction to hear his case. We first address the jurisdictional argument.

A. Subject-Matter Jurisdiction

{¶7} "A determination of whether a court has subject-matter jurisdiction involves a question of law that we review de novo." *Parsons v. Dept. of Youth Servs*., 4th Dist. No. 09CA3302, 2010-Ohio-284, at ¶6, citing *Roll v. Edwards*, 156 Ohio App.3d 227, 2004-Ohio-767, 805 N.E.2d 162, at ¶15.

{¶8} OU asserts that the trial court lacked subject-matter jurisdiction to hear the case because Phillips failed to comply with the strict requirements of R.C. 119.12. That code section mandates the procedure that must be followed when an appeal is sought from an Ohio administrative agency:

{¶9} "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal. A copy of the notice of appeal shall also be filed by the appellant with the court. Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section." R.C. 119.12.

{¶10} In the case sub judice, the State Personnel Board of Review dismissed Phillips' case because he failed to appear at his hearing. OU does not dispute that Phillips filed a notice of appeal of that decision with both the trial court and the Board. Rather, OU's argument is that because the notice of appeal filed with the trial court was not a copy bearing the time-stamp of the Board, Phillips did not strictly comply with R.C. 119.12. OU states that, under Ohio case law, R.C. 119.12 clearly requires such a time-stamped copy.

{¶11} To support it's argument, OU cites The Supreme Court of Ohio decision in *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, 868 N.E.2d 246. In *Hughes*, the appellant filed her original notice of appeal with the trial court and then filed a copy of that notice with the agency in question. The Court held that, to satisfy R.C. 119.12, a party must file the original notice of appeal with the administrative agency and a copy with the trial court, not vice-versa. Id. at paragraph two of the syllabus. But the decision does not state that the copy must include the time-stamp of the agency where the original was filed. Nor does it even address the issue.

{¶12} OU also argues that the decision in *Blasko v. Ohio State Bd. of Pharmacy*, 143 Ohio App.3d 191, 2001-Ohio-3270, 757 N.E.2d 846,

supports its argument. But, again, OU's reliance is misplaced. The issue in *Blasko* dealt only with the timeliness of filing. The decision does address the necessity of time-stamped filings within the context of R.C. 119.12, but only for purposes of determining *when* a notice of appeal was filed. Like *Hughes*, *Blasko* does not address the issue of whether, under R.C. 119.12, a copy has to bear the time-stamp of the agency that received the original.

{¶13} OU also cites *Baltodano-Werle v. Ohio State Dental Bd.*, 2nd Dist. No. CA22396, 2008-Ohio-5766. Unlike the previous cases cited by OU, *Baltoano-Werle* directly addresses the issue at hand. In that case, our colleagues in the Second District did find that R.C. 119.12 requires such a time-stamped copy. "Only when the copy of the notice of appeal filed with the agency and bearing the time-stamp of the agency is filed in the common pleas court is the common pleas court vested with subject-matter jurisdiction." Id. at ¶14. But unlike the Second District, we do not believe the plain meaning of R.C. 119.12 imposes such a requirement. As such, we decline to follow *Baltodano-Werle*. Instead, we agree with the rationale expressed by the Tenth District in *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073.

{¶14} In *Helms*, the appellant appealed from an order of the Environmental Review Appeals Commission. The appeal was brought

pursuant to R.C. 3745.06. Containing language very similar to R.C. 119.12, that section states:

{¶15} "Any party desiring to so appeal shall file with the commission a notice of appeal designating the order appealed. A copy of the notice also shall be filed by the appellant with the court * * *. Such notices shall be filed and mailed within thirty days after the date upon which the appellant received notice from the commission by certified mail of the making of the order appealed."

{¶16} In *Helms*, the Tenth District declined to interpret R.C. 3745.06 as requiring that before a copy of the appeal could be filed with the trial court, it must first bear a time-stamp of the administrative agency. "That interpretation would require an appellant either to file the notice personally at [the agency] and then at the court-a significant burden for appellants outside Franklin County-or to mail the original notice to [the agency], wait for the returned time-stamped copies, file one of the time-stamped copies with the court * * * all within the 30-day deadline. We find nothing in the statute or in prior court opinions to impose such a burden upon an appellant."

{¶17} Though *Helms* dealt with R.C. 3745.06, and the relevant statute in the case sub judice is R.C. 119.12, we find the *Helms* court's

rationale to be equally applicable here. In fact, because R.C. 119.12 allows only fifteen days to file the appeals, not the thirty days allowed by R.C. 3745.06, the burden would seem to be even more onerous.

{¶18} OU does not allege that Phillips failed to file the original notice of appeal with the Board and a copy of the notice with the trial court. Instead, OU's argument is simply that because the notice filed with the trial court does contain the time-stamp of the Board, it is not a valid copy. We decline to find that the plain meaning of the word "copy," as contained in R.C. 119.12, should be read as "copy bearing the time-stamp of the agency in which the original was filed." Accordingly, we find that OU's argument concerning subject-matter jurisdiction is unwarranted. We now turn to the substantive merits of OU's appeal.

B. Standard of Review

{¶19} In an administrative appeal under R.C. 119.12, appeal, the trial court must affirm the agency's decision if it is supported by "reliable, probative, and substantial evidence and is in accordance with law." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748; *In re Williams* (1991), 60 Ohio St.3d 85, 86, 573 N.E.2d 638. " 'Reliable' evidence is dependable or trustworthy; 'probative' evidence tends to prove the issue in question and is relevant to the issue presented; and

'substantial' evidence carries some weight or value." *Ohio Civ. Rights Comm. v. Case W. Res. Univ*., 76 Ohio St.3d 168, 178, 1996-Ohio-53, 666 N.E.2d 1376, citing *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.

{¶20} Thus, when a trial court reviews the agency's decision, it must examine all the evidence "as to credibility of witnesses, the probative character of the evidence and the weight to be given it, and, if from such a consideration it finds that the * * * (administrative) order is not supported by reliable, probative and substantial evidence and is not in accordance with law, the court is authorized to reverse, vacate, or modify the order * * *." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110, 407 N.E.2d 1265, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 131 N.E.2d 390, paragraph one of the syllabus. "[W]hether an agency order is supported by reliable, probative and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence. Although this in essence is a legal question, inevitably it involves a consideration of the evidence, and to a limited extent would permit a substitution of judgment by the reviewing Common Pleas Court." Id. at 111. Further, while the trial court must give due deference to the administrative agency in the resolution of evidentiary conflicts, that

deference "does not contemplate uncritical acquiescence to administrative findings." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 200, 421 N.E.2d 128.

{¶21} In contrast to the trial court's standard of review, an appellate court's review of an administrative agency's order is more limited. *Lorain City Bd. of Edn. v. State Emp. Relations Bd*. (1988), 40 Ohio St.3d 257, 260-261, 533 N.E.2d 264. Though it is incumbent upon the trial court in such instances to examine the evidence, that is not the role of the appellate court. Id. Instead, the appellate court is limited to determining whether the trial court has abused its discretion. Id. Thus, absent an abuse of discretion, the appellate court must affirm the trial court's decision. Id.

{¶22} "An abuse of discretion 'implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.' " *Bartchy v. State Bd. of Edn*., 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, at ¶41, quoting *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191, 193, 489 N.E.2d 288. Accordingly, the fact that an appellate court might arrive at a different conclusion under a less deferential standard of review is immaterial. Absent an abuse of discretion, the appellate court must not

substitute its judgment for that of the administrative agency or the trial court. *Pons* at 621.

C. Reliable, Probative, And Substantial Evidence

{¶23} In its brief, OU argues the Board's decision to dismiss Philips' appeal was supported by reliable, probative and substantial evidence. The trial court disagreed and cited a number of factors in support of its decision. The court first noted that the Board dismissed Phillips' appeal solely because he failed to appear for one scheduled administrative hearing. The court determined that Phillips should not be penalized for "what was, at most, an inadvertent mistake."

{¶24} The court acknowledged that Ohio Admin. Code 124-11-19(A) states the Board may dismiss an appellants' appeal for failure to appear. The court stated that administrative code section has been interpreted as authorizing a dismissal when the employee neither attends the hearing nor offers an excuse for his failure to appear. But the court noted that Phillips did offer an excuse for his absence. Soon after he received the administrative law judge's recommendation, Phillips contacted the Board in writing, alleging that he never received notice of the hearing.

{¶25} The administrative law judge found that Phillips had been properly served by regular mail and, accordingly, that he did not have good

cause for failing to appear. The trial court noted that for there to be a rebuttable presumption of receipt, there must be evidence of actual mailing, not merely evidence that the notice was created. Though the trial court noted that Phillips' hearing notice contains the statement "Date Mailed: February 5, 2008," the court questioned whether that alone was sufficient to show actual mailing.

{¶26} Phillips gave an uncontradicted statement that he failed to receive notice. The court further noted that the Board, in its final decision dismissing Philips' appeal, did not address the merits of his lack of notice claim. The court found that, based on the above, there was no legal presumption that Phillips received notice and, as such, there was cause to reverse the Board's decision due to lack of substantial supporting evidence.

{¶27} The court also stated the Board lacked support for the severe sanction of dismissal due to the fact that Phillips had otherwise vigorously pursued his appeal, both before and after the missed hearing. The court found that Phillips' single mistake, failing to appear at a hearing which had been twice continued, once at the State's request, was not made in bad faith and did not constitute purposeful delay. The trial court found that, at most, Phillips' failure to appear amounted to "inadvertent error." "Dismissing

Philips' case for single, apparently inadvertent, procedural error would clearly frustrate the prevailing policy of deciding such cases on the merits."

{¶28} After reviewing the record below, and bearing in mind that we must review the trial court's decision under an abuse of discretion standard, we cannot say the trial court erred in determining that the Board lacked reliable, probative, and substantial evidence to dismiss Philips' appeal. Under an abuse of discretion standard of review, we may not simply substitute our judgment for that of the trial court. And the trial court's decision does not rise to the level of "perversity of will, passion, prejudice, partiality, or moral delinquency" which would require our reversal. Accordingly, we affirm the decision of the court below.

IV. Conclusion

{¶29} For the foregoing reasons, we find that OU's assignment of error is unwarranted. Because an appeal perfected under R.C. 119.12 does not require that the copy filed with the trial court bear the administrative agency's time-stamp, the trial court had subject-matter jurisdiction to hear the case. Further, we cannot say the trial court abused its discretion in determining the Board lacked reliable, probative, and substantial evidence in dismissing the appeal. As such, we affirm the trial court's decision.

JUDGMENT AFFIRMED.

Kline, J., concurring.

{¶30} I concur in judgment and opinion. In addition to the reasons stated in the opinion, I would also reject OU's jurisdictional argument based on our analysis of R.C. 119.12 in *Morrison v. Dept. of Ins.*, Gallia App. No. 01CA13, 2002-Ohio-5986, at ¶18.

Harsha, J., concurring in part and dissenting in part:

{¶31} I agree with the principal opinion that the appellant properly invoked the jurisdiction of the common pleas court in this appeal. However, I cannot join the majority in concluding that court correctly reversed the agency's order of dismissal. Because dismissal was available as a sanction for failure to appear, it was not contrary to law. And based upon the facts in the record, it was not an abuse of discretion. Therefore, I dissent from the principal opinion's conclusion to the contrary.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant 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 Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, J.: Concurs in Judgment and Opinion with Opinion.
Harsha, J.: Concurs in Part and Dissents in Part with Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.