

OPINIONS OF THE SUPREME COURT OF OHIO

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The State ex rel. Baran, Appellee, v. Fuerst, Cuyahoga County Clerk of Common Pleas Court, Appellant.

[Cite as State ex rel. Baran v. Fuerst (1992), Ohio St.3d .]

Civil service -- Classified civil service employee -- Posting clerk in common pleas court -- Mandamus proper remedy for reinstatement and back pay, when.

(No. 91-1597 -- Submitted September 22, 1992 -- Decided December 14, 1992.)

Appeal from the Court of Appeals for Cuyahoga County, No. 56679.

Appellee, William E. Baran ("Baran"), petitioned the court of appeals for a writ of mandamus directing appellant, Gerald E. Fuerst ("Fuerst"), to restore Baran to his former position and compensate him for back pay, insurance premiums, accrued vacation and sick leave.

The facts in this case are stipulated. Fuerst is the Clerk of the Cuyahoga County Court of Common Pleas. Baran was employed by Fuerst as a classified civil service employee in the position of posting clerk from January 6, 1986 until December 23, 1987.

On December 16, 1987, Baran was indicted on the charge of unlawfully, purposely and knowingly obtaining, possessing or using cocaine. On December 23, 1987, Fuerst filed an order with the State Personnel Board of Review ("board") suspending Baran from his position indefinitely, "pending favorable outcome of trial." The order alleged Baran was incompetent to perform his duties due to the nature of the indictment.

Baran appealed the order to the board, which continued the appeal upon Fuerst's request. On March 31, 1988, Fuerst filed a second order with the board providing that, effective April 4, 1988, Baran was permanently removed from the position of posting clerk. This order modified the original allegation of the indictment by alleging several instances of criminal activity on the part of Baran. Baran was later convicted of drug trafficking committed on November 5, 1987, which was one of the allegations in Fuerst's second order, but the charge constituting the basis for Fuerst's original order of

suspension was dropped pursuant to a plea agreement.

On April 28, 1988, Fuerst filed a motion with the board to withdraw the December 23, 1987 order of indefinite suspension. The motion was granted by the board. Attached to the withdrawal order was Baran's brief requesting that the board's order be conditioned on granting Baran restoration of his position, with back pay, for the period of suspension.

After an evidentiary hearing, the board affirmed Baran's removal pursuant to Fuerst's March 31, 1988 order, but also found that his employment was not terminated until April 4, 1988.

Baran's complaint for a writ of mandamus requested that Fuerst be directed to restore him to his former employment for the period of December 23, 1987 through April 4, 1988, the period covered by the withdrawn order of indefinite suspension. Upon motion by Fuerst, the court of appeals dismissed the complaint. This court reversed the court of appeals and remanded for consideration on the merits. *State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 563 N.E.2d 713. On remand, the court of appeals issued a writ of mandamus directing Fuerst to reinstate Baran for the period from December 23, 1987 to April 4, 1988, pay back wages of \$2,436.24 plus interest, and reimburse Baran for the cost of maintaining hospitalization coverage.

The cause is now before this court upon an appeal as of right.

Stephanie Tubbs Jones, Prosecuting Attorney, Patrick J. Murphy and Michael P. Butler, Assistant Prosecuting Attorneys, for appellant.

Paul Mancino, Jr. and Edward J. Galaska, for appellee.

Moyer, C.J. The issue presented by this appeal is whether Baran was removed from his position contrary to law and therefore entitled to reinstatement by mandamus.

It is established law in Ohio that a member of the classified civil service has the right to reinstatement and back pay by way of mandamus when his or her removal is contrary to the provisions of what is now R.C. 124.34. See *State ex rel. Bay v. Witter* (1924), 110 Ohio St. 216, 143 N.E. 556; and *State ex rel. Brittain v. Ohio Bd. of Agriculture* (1917), 95 Ohio St. 276, 116 N.E. 459.

Fuerst alleges that mandamus relief is not available here because Baran should have appealed the board's affirmance of the March 31, 1988 order of removal. However, because Fuerst withdrew the December 23, 1987 order of indefinite suspension, appeal of that order was not an option. As discussed *infra*, the March 31, 1988 order cannot be the foundation for the indefinite suspension, but can only govern Baran's permanent removal. Lacking a decision from which to appeal the indefinite suspension, Baran had no adequate remedy at law, and his mandamus action is therefore appropriate. *State ex rel. Carter v. Cleveland Bd. of Edn.* (1985), 17 Ohio St.3d 105, 17 OBR 224, 477 N.E.2d 1134.

The remaining issues are whether Baran was wrongfully excluded from employment during the period of indefinite suspension and, if so, whether he is entitled to back pay for

that period.

Pursuant to R.C. 124.34, the Ohio Administrative Code imposes procedural requirements governing suspensions or removals of civil service employees. The court of appeals below correctly found that the indefinite suspension order issued by Fuerst was contrary to Ohio Adm. Code 124-1-02(Y), which defines "suspension" as the termination of an employee's employment and compensation for a fixed period of time, and Ohio Adm.Code 124-9-08(D), which provides that "[i]ndictment or citation for a criminal offense does not establish a statutory basis for discipline under section 124.34 of the Revised Code." Fuerst therefore had no authority to issue the order of indefinite suspension.

Fuerst asserts, however, that Baran was rightfully excluded from employment from December 23, 1987 to April 4, 1988, arguing that the permanent removal order, which was affirmed by the board, relates back to the date of the criminal offense, November 5, 1987. Fuerst is arguing, in essence, that the March 31, 1988 removal order amends, supplants, or otherwise cures the defective suspension order issued December 23, 1987. That is not the case. Ohio Adm.Code 124-3-03(B) prohibits amending an order with new material once it has been furnished to the affected employee, and Ohio Adm.Code 124-3-03(B)(1) provides that, if new material is to be added, a new order must be filed. Further, under Ohio Adm.Code 124-3-01(A)(2), an order must be furnished to the employee prior to or on the effective date of the order. Accordingly, the March 31, 1988 removal order can be effective only prospectively.

The second issue is whether Baran is entitled to back pay for the period of his indefinite suspension.

It is well settled that back pay may be awarded in a mandamus action, provided the amount recoverable is established with certainty. State ex rel. Hamlin v. Collins (1981), 65 Ohio St.2d 63, 19 O.O.3d 259, 418 N.E.2d 398; State ex rel. Colangelo v. McFaul (1980), 62 Ohio St.2d 200, 16 O.O.3d 239, 404 N.E.2d 745; State ex rel. Martin v. Columbus (1979), 58 Ohio St.2d 261, 12 O.O.3d 268, 389 N.E.2d 1123. Fuerst claims the amount recoverable cannot be ascertained with certainty because from the date of Baran's suspension until March 18, 1988, when he secured other employment, he did not exercise due diligence in pursuing other employment opportunities.

The stipulations do not address the issue of Baran's diligence in seeking other employment, and Fuerst did not request a hearing on this issue. Rather, Fuerst attempted to submit this evidence in his merit brief filed in the court of appeals on April 29, 1991, which he denominated a merit brief and motion for summary judgment. Attached to Fuerst's brief was Baran's unsigned deposition in which he states that from December 23, 1987 to March 18, 1988 he did not seek employment upon the advice of an individual in the clerk's office. The court of appeals' March 1, 1991 order required the parties to file stipulations or request a hearing on the evidence no later than March 18, 1991.

Baran moved the court of appeals to strike the deposition on the basis that it was not properly filed and did not constitute evidence upon which a determination could be made.

The court of appeals denied the motion for summary judgment, stating only: "Motion by respondent for summary judgment is denied." Contemporaneously, the court issued its merit decision in which it awarded Baran back pay, without addressing the motion for summary judgment or the deposition, relying instead only on the stipulated evidence. On appeal to this court, Fuerst claims the court of appeals erred by not granting summary judgment on this issue.

The burden of proof is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157, 553 N.E.2d 597, paragraph two of the syllabus; Civ.R. 56(C). In this proceeding, Fuerst attempts to carry his burden only on the basis of the untimely filed deposition.

Civ.R. 56(C) states that summary judgment shall be rendered if documentary evidence "timely filed in the action" shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, the untimely filed deposition attached to Fuerst's motion for summary judgment need not have been considered by the court of appeals. That being the only evidence offered to support the motion, Fuerst has failed to carry his burden, and the court of appeals' denial of the motion was proper.

For the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

Sweeney, Douglas, Wright and H. Brown, JJ., concur.
Holmes and Resnick, JJ., dissent.