[Cite as *Saxe v. Ohio Dept. of Mental Retardation & Dev. Disabilities,* 2010-Ohio-4377.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Helen L. Saxe,	:	
Appellant-Appellant,	:	No. 09AP-1022
v.	:	(C.P.C. No. 09CVF-05-7403)
The Ohio Department of Mental Retardation and Developmental Disabilities,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on September 16, 2010

McNees Wallace & Nurick LLC, Samuel N. Lillard, Brett E. Younkin and *Anthony Dick*, for appellant.

Richard Cordray, Attorney General, *Nicole S. Moss* and *Mahjabeen F. Qadir*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant, Helen L. Saxe, appeals from the judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("the Board").

{¶2} The underlying facts are not in dispute as the parties have stipulated to the following. Appellant was hired by appellee, Ohio Department of Mental Retardation and Developmental Disabilities ("MRDD"), effective July 30, 1979, and held the classified

position of Mental Health Administrator ("MHA") 5. In 1991, the position was designated as unclassified MHA5, but the position held essentially the same job duties. In January 2005, the Department of Administrative Services ("DAS"), renumbered the MHA positions causing each position to increase by one number, i.e., MHA5 became MHA6.

{¶3} On November 4, 2005, while appellant was an unclassified MHA6, MRDD sent DAS a reorganization plan, which included a rationale for a reduction of its workforce and a layoff rationale for the MHA6 classified position. On November 20, 2005, appellant's MHA6 unclassified position was revoked, and she was placed as a classified MHA6 pursuant to her fallback rights. On December 12, 2005, DAS sent a letter to MRDD authorizing it to begin its reorganization, including the abolishment of the MHA6 position. Days later, appellant was informed of her bumping rights. On February 18, 2006, the reorganization went into effect, appellant's classified MHA6 position was abolished, and appellant bumped into a classified MHA4 position. Five months later, appellant took advantage of the Early Retirement Incentive Program ("ERIP"), and retired effective July 31, 2006.

{¶4} Appellant appealed the abolishment of the MHA6 position to the Board. Appellant argued that MRDD created the classified MHA6 position and placed her there in an effort to deny appellant her fallback rights; therefore, appellant argued that she was entitled to fallback into her previous classified position of MHA6 and a finding that her reorganization into the MHA4 position was a legal nullity. To the contrary, MRDD argued that, pursuant to R.C. 5123.08, appellant was given her fallback rights because she was placed in an MHA6 classified position after her unclassified MHA6 appointment was revoked. An administrative law judge ("ALJ"), issued a report and recommendation

holding that the Board did not have jurisdiction to consider the issue of fallback rights, and, therefore, the ALJ made no findings regarding whether or not appellant was properly allowed to exercise the same. Additionally, the ALJ found that appellee complied with the procedural requirements in effectuating the abolishment of appellant's classified MHA6 position and her subsequent displacement to the classified MHA4 position she held at the time of her retirement.

{¶5} Appellant filed objections to the report and recommendation, and after review, the Board adopted the ALJ's report and recommendation. Appellant appealed to the Franklin County Court of Common Pleas, which affirmed the Board's decision. Specifically, the trial court found that the Board's finding that it lacked jurisdiction as to appellant's claims relating to her fallback rights was not arbitrary, capricious, or otherwise contrary to law, and did not constitute an abuse of discretion. Further, the trial court found the Board's order concerning the abolishment of appellant's position was supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶6} This appeal followed and appellant brings the following two assignments of error for our review:

> 1. THE LOWER COURT ERRED IN CONCLUDING THAT IT LACKED JURISDICTION TO DETERMINE WHETHER MS. SAXE'S CLASSIFIED POSITION WAS PROPERLY ABOLISHED UNDER O.A.C. 123:1-41-08(F) WHEN MS. SAXE WAS TRANSFERRED INTO A CLASSIFIED POSITION AFTER IT HAD ALREADY BEEN SLATED FOR ABOLISHMENT.
>
> 2. THE LOWER COURT ERRED IN FINDING THAT APPELLEE PROPERLY ABOLISHED MS. SAXE'S CLASSIFIED POSITION AND THAT APPELLEE'S ACTIONS DID NOT CONSTITUTE BAD FAITH WHEN THERE WAS AMPLE EVIDENCE THAT APPELLEE ACTED TO ABOLISH

> A PERSON AND NOT A POSITION IN VIOLATION OF O.A.C. § 124-7-01.

{¶7} Our standard of review in this matter is well-established. In an administrative appeal pursuant to R.C. 119.12, the court of common pleas reviews a Board's order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶8} On further appeal to this court, our standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Bd. of Edn. of Rossford Exempted Village School Dist. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. Our role is limited to a determination of whether the court of common pleas abused its discretion in finding that the Board's order was or was not supported by reliable, probative, and substantial evidence. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the Board's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶9} Reliable, probative, and substantial evidence has been defined as follows:

> * * * "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. * * * "Probative" evidence is evidence that tends to prove the issue

> in question; it must be relevant in determining the issue. * * * "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 63 Ohio St.3d 570, 571 (footnotes omitted).

{¶10} In her first assignment of error, appellant contends the trial court erred in affirming the Board's finding that it lacked jurisdiction over a portion of appellant's claims. According to appellant, the Board does have jurisdiction because she is not contesting her fallback rights as much as she is contesting her "transfer" to a classified position that was slated for abolishment. We disagree.

{¶11} Appellant's classified status was revoked, and as required by R.C. 5123.08, MRDD had to allow appellant to fallback into her last classified position, which was the MHA5, later renumbered as MHA6. This position from 1991, however, no longer existed, so MRDD created a classified position effective November 20, 2005, which corresponded with the revocation of appellant's unclassified status. As the trial court noted, however, at the time appellant exercised her fallback rights into the classified MHA6 position, there was only an *expectancy* that the position would be abolished, as DAS did not give acceptance of MRDD's rationale for the reorganization until December 12, 2005. As stated by the trial court, if DAS did not accept appellee's justification, "the classified MHA6 position would have continued unabated." (Decision at 8.)

{¶12} The parties agree that, pursuant to R.C. 5123.08, an employee retains the right to resume the position and status held by him in the classified service immediately prior to his appointment. Such right is honored by reinstating the employee to his last held classified position. R.C. 5123.08. Appellant argued to the Board that appellee's

actions in this case were taken in an attempt to deny appellant her fallback rights. As conceded by the parties, issues concerning fallback rights pursuant to R.C. 5123.08 are beyond the jurisdiction of the Board. It appears what appellant attempts to do at this juncture, as it did before the trial court, is manipulate the terminology in an effort to try and provide the Board with jurisdiction. We, like the trial court, however, find that the Board was correct in its decision that it lacked jurisdiction because the issue raised by appellant concerns the revocation of an unclassified appointment and appellant's request to exercise her fallback rights after the revocation, both of which are actions taken pursuant to R.C. 5123.08 and, therefore, beyond the Board's jurisdiction.

{¶13} Accordingly, we overrule appellant's first assignment of error.

{¶14} In her second assignment of error, appellant contends the trial court erred in upholding the Board's decision that appellee properly abolished appellant's position and that appellant's actions did not constitute bad faith. According to appellant, this was clearly in error because the evidence demonstrates appellee acted to abolish a person and not a position in violation of Ohio Adm.Code 124-7-01, which provides in relevant part:

> (A) Job abolishments and layoffs shall be disaffirmed if the action was taken in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence.
>
> (1) The appointing authority shall demonstrate by a preponderance of the evidence that a job abolishment was undertaken due to a lack of a continuing need for the position based on: a reorganization for the efficient operation of the appointing authority; reasons of economy; or a lack of work expected to last one year or longer.

{¶15} There are two pieces of evidence to which appellant directs us in support of her position. The first is a statement taken from appellee's abolishment rationale, which is as follows:

> This position has been created in order to provide the required back up position under MRDD's revocation rule 5123.08. The employee who was revoked has a back up right to this, her former classified position of MHA6.

{¶16} The second piece of evidence is the following testimony of Brenda Gerhardstein, MRDD's Manager of Labor Relations:

> Q. So it's – there's no dispute that the whole rationale that was submitted to D.A.S. was intended to abolish Ms. Saxe's fallback position. In fact, you requested that her fallback position be abolished before you even put her in it?
>
> A. Correct.

(Tr.104.)

{¶17} As argued by appellee, this evidence is taken out of context and renders no support for appellant's position. When read fully, the layoff rationale states:

> State the specific reason(s) why this position is no longer needed:
>
> This position has been created in order to provide the required back up position under MRDD's revocation rule 5123.08. The employee who was revoked has a back up right to this, her former classified position of MHA6. This position has not been utilized for several years. The department no longer has an external audits section. Since that time, the Deputy Director 4 who reports to the Deputy Director of Audits, along with many other duties, has performed the duties. There is no need for an external audits section of this small division. There are only thirteen total employees in the Division of Audits.

{¶18} Additionally, Ms. Gerhardstein's testimony, including the portion cited by appellant, does not state that the rationale for abolishment was employee specific. Instead, the testimony acknowledges the fact the classified MHA6 was sought to be abolished, and it was done so even before appellant occupied the position. This statement does nothing to contradict Ms. Gerhardstein's testimony that "there was a redundancy in the position and it was a layer of supervision that wasn't necessary." (Tr. 21.) Ms. Gerhardstein explained in detail that the job duties simply no longer existed because the Division of Audits no longer performed external audits.

{¶19} As the trial court stated, it was appellant's burden to establish the requested changes were merely a subterfuge for appellee's desire to terminate appellant. Appellant, however, has not done so. A review of the evidence plainly reveals no support for appellant's bad-faith claim, nor does it demonstrate that the rationale for appellee's action was personal to appellant. Accordingly, we overrule appellant's second assignment of error.

{¶20} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.

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